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CLEARINGHOUSE RULE 01-007

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

1. Statutory Authority

a. Section 30.77 (3) (a), Stats., provides that a town, village or city may, in the interest of public health, safety or welfare enact ordinances applicable to waters within its jurisdiction “if the ordinances are not contrary to or inconsistent with [ch. 30, Stats.] and if the ordinances relate to the equipment, use or operation of boats or to any activity regulated by ss. 30.60 to 30.71.” Section 30.77 (3) (b), Stats., includes a similar provision for counties with regard to rivers and streams within a county’s jurisdiction. In contrast, s. 30.77 (2), Stats., provides that any municipality (defined in s. 30.01 (4), Stats., for this purpose as a city, village, town or county) may enact ordinances that are in strict conformity with ss. 30.50 to 30.71, Stats.

In *Menzer v. Village of Elkhart Lake*, 51 Wis. 2d 70, 186 N.W.2d 290 (1971), the Wisconsin Supreme Court attempted to reconcile the “strict conformity” language with the “not contrary to or inconsistent with” language in an earlier version of the statutes. The court did not require “strict conformity” with respect to all local regulations but permitted a town, village or city to enact a local regulation that was not contrary to or inconsistent with ch. 30, Stats., and that was in the interest of public health or safety. (Since that case, in the interest of public welfare has been added to the statutes.)

Based on this court decision, it appears that a town, village or city (or county with respect to a river or stream) may, under certain circumstances, enact ordinances relating to “the equipment, use or operation of boats or to any activity regulated by ss. 30.60 to 30.71” that are not in “strict conformity” with the statutes. Thus, it could be argued that, under certain

circumstances, local ordinances may be “more restrictive than state law” as indicated by s. NR 5.15 (1) (a). (Under this line of reasoning, it would be more appropriate to refer to “more restrictive than state statutes” inasmuch as the Wisconsin Administrative Code and court decisions also constitute “state law.”)

Given the *Menzer* decision and the specific references in s. 30.77 (3) (a) and (b), Stats., to “ss. 30.60 to 30.71,” it is unclear that there is statutory authority to specify in s. NR 5.15 (1) (b) that certain statutes in this range (namely, ss. NR 30.60, 30.61, 30.62, 30.63, 30.64, 30.65, 30.67, 30.675, 30.68 (3) (b) and 30.71, Stats.) may not be changed by local ordinance, especially if the statute involves an “activity.” What is the basis for limiting local authority with respect to these statutes?

If the response is that s. 30.77 (3) (cr), Stats., does not include these statutes as examples of what may be included in ordinances, then it would be unclear why other statutes in the ss. 30.60 to 30.71 range, for example, s. 30.625, the remainder of s. 30.68 and all of s. 30.681, Stats., were also not included on the list of statutes that may not be changed by local ordinance.

b. Given the court’s reasoning in *Menzer*, it is unclear that there is authority for s. NR 5.15 (1) (d), Stats., which specifies that local ordinances may not regulate boating activities based “solely” on boat size or horsepower.

Moreover, even if this were a permissible limitation on the authority of local units of government, it appears that questions could be raised as to what could be combined with boat size or horsepower to create an appropriate regulation. For example, could a time of day provision coupled with a horsepower provision (for example, no boats with more than 10 horsepower between the hours of 6:00 a.m. and 6:00 p.m.) be appropriate if all other conditions were met?

2. Form, Style and Placement in Administrative Code

a. The three definitions added to s. NR 5.001 are unusual in that all indicate that the terms are defined for the purpose of a specific statute. One of the three definitions (“water skis, aquaplane or similar device” in s. NR 5.001 (16m)) goes further to explain that that term is being defined not only for the purpose of a particular statute but also for the purpose of ch. NR 5.

Typically, introductory language in a definitions section specifies that terms are being defined for a specified portion of the Wisconsin Administrative Code, for example, by using a phrase such as: “In this chapter:”, “In this subchapter:” or “In this section:”. Current s. NR 5.001 does not include such introductory language. This means that there is some ambiguity as to the exact purpose for which a term is being defined. For example, when “public access” is specified in s. NR 5.001 (11m) as being defined for the purpose of s. 30.635, Stats., does that mean it is not being defined in the same way whenever the term is used in ch. NR 5, for example, in s. NR 5.20? This question is especially pertinent when that definition is contrasted with the definition of “water skis, aquaplane or similar device” in s. NR 5.001 (16m). The latter definition indicates that the term is being defined for the purpose of s. 30.69, Stats., and also for the purpose of ch. NR 5.

In contrast to these two approaches, some of the existing definitions in s. NR 5.001 do not specify the purpose for which they are being defined. They are presumably being defined for purposes of ch. NR 5, but this is not specified. These varying approaches lead to ambiguity. Section NR 5.001 should be revisited to clarify this matter.

b. Section NR 5.001 (1m) defines “boat” for the purpose of s. 30.51, Stats.; that is, for the purpose of certificate of number and registration. According to s. 30.50 (2), Stats., the term “boat” does not include fishing rafts for the purpose of regulation of boating under ss. 30.50 to 30.80, Stats. Nevertheless, s. 30.505, Stats., provides that for purposes of certificate of number systems, Wisconsin law must be in conformity with the federal system of identification number of boats. Thus, it appears that it is appropriate to define “boat” in this more expansive manner for very limited purposes in ch. NR 5, for example, for ss. NR 5.01 to 5.07.

The rule should more clearly explain which sections of ch. NR 5 the definition of “boat” in s. NR 5.001 (1m) applies to. Otherwise, it could be implied that every reference to “boat” in ch. NR 5 includes motorized fishing rafts, which would be contrary to s. 30.50 (2), Stats.

c. SECTION 3 renumbered s. NR 5.15 to s. NR 5.15 (2). Was it the intention to delete the title? If so, this should be indicated. If not, a title should be added to s. NR 5.15 (1). [See s. 1.05 (1), Manual.]

d. In the first sentence of s. NR 5.15 (1) (a), “entity will provide” should be changed to “entity shall provide.” [See s. 1.01 (2), Manual.]

4. Adequacy of References to Related Statutes, Rules and Forms

The rule does not explain what use the Department of Natural Resources will make of the condition report required under s. NR 5.15 (1) (a).

Further, it is not clear when a condition report must be submitted, for example, before or after an ordinance becomes effective. Section NR 5.15 (1) (a) (intro.) suggests that the report is to be submitted after enactment. Is that the intention? The rule should be clarified as to the timing of the submission of the report.

Also, how does the timing of the submission of this condition report interface with the pre-enactment submission of proposed ordinances that must occur with respect to inland lakes under s. 30.77 (3) (d), Stats.?

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In s. NR 5.001 (16m), the phrase “or an inflatable device and barefoot or skiless skiing” is unclear. Was this intended to mean “or an inflatable device used with barefoot or skiless skiing”?

b. In s. NR 5.15 (1) (a) 3., the requirement that there be “[a] statement concerning the impact the regulation will have on public health, safety or welfare if the regulation is not

adopted” should be changed to “[a] statement concerning the impact on public health, safety or welfare if the regulation is not adopted.”

c. In s. NR 5.15 (1) (c), the phrase “such as slow-no-wake areas” should be set off by commas.

d. In s. NR 5.15 (1) (e), a period should be inserted at the end of the paragraph.