

[=OAG 2-00, 1]

June 7, 2000

OAG 2-00

Mr. Benjamin Southwick
Corporation Counsel
Richland County
181 Seminary Street
Richland Center, WI 53581

Dear Mr. Southwick:

You have requested my opinion on the following question: “Do counties in Wisconsin have legal authority to require the removal of junked, unused, unlicensed or abandoned motor vehicles which are being stored on private property in the unincorporated areas of the county?” The answer to your question is yes. Counties have authority to prohibit or regulate the storage of junked, unused, unlicensed or abandoned vehicles through the exercise of their zoning power, subject to applicable statutory and constitutional restrictions. Counties also have separate statutory authority to enact ordinances governing the removal and disposal of abandoned vehicles.

You have stated that, in your opinion, counties in Wisconsin do not have the authority to require the clean-up of junked vehicles stored on private property for non-business purposes because you can find no statute that specifically gives them that authority. You note that Wis. Stat. § 175.25 gives cities, villages and towns the power to regulate the storage of junked automobiles within their corporate limits, and that Wis. Stat. § 84.31 authorizes the Wisconsin Department of Transportation to require the clean-up of junkyards located within 1,000 feet of an interstate or federal-aid primary highway, but that neither of these statutes gives such power to counties. You further observe that Wis. Stat. § 59.55(5) gives counties the power to license and regulate “the conduct of motor vehicle junking,” but that statute, in your opinion, applies only to the regulation of the junked vehicle *business* and does not give counties the authority to regulate the storage of junked vehicles on private property for a personal or non-business purpose, which apparently is the type of use of most concern to you.

[=OAG 2-00, 1-2] While it may be true that no statute expressly gives counties the specific power that you seek, it is my opinion that counties in Wisconsin nonetheless have authority to prohibit or regulate the storage of junked, unused, unlicensed or abandoned vehicles through the exercise of their zoning power under Wis. Stat. § 59.69. Under that statute, county boards may establish and regulate zoning districts in unincorporated areas of the county for the purpose of promoting the public health, safety and general welfare. *See* Wis. Stat. § 59.69(4). A zoning ordinance enacted pursuant to this statute may regulate, among other things, the use of land for agricultural, business, industrial, residential or recreational purposes and may designate certain

areas and uses subject to special regulation. *See* Wis. Stat. § 59.64(4)(a), (b) and (e). The county board may enforce such zoning ordinances either by appropriate forfeitures, according to administrative procedures prescribed by the board, or by bringing suit and asking a court to enjoin a violation of the ordinance. *See* Wis. Stat. § 59.69(11).

It is my opinion that a county's power, under Wis. Stat. § 59.69(4), to promote the public health, safety and general welfare by designating particular land uses subject to special regulation and by restricting and regulating the areas in which agricultural, business, industrial, residential, and recreational uses may occur, is broad enough to encompass regulation of the storage of junked, unused, unlicensed or abandoned motor vehicles on private property. The concept of the public welfare, as used with respect to the zoning power, "is broad and inclusive and embraces in comprehensive zoning the orderliness of community growth, land value, and aesthetic objectives." *State ex rel. American Oil Co. v. Bessent*, 27 Wis. 2d 537, 545, 135 N.W.2d 317 (1965). It has been established since the earliest days of modern zoning that if zoning regulations "stabilize the value of property, promote the permanency of desirable home surroundings, and if they add to the happiness and comfort of the citizens, they thereby promote the general welfare." *State ex rel. Carter v. Harper*, 182 Wis. 148, 158, 196 N.W. 451 (1923). I conclude from this that the storage of junked vehicles on private property may be regulated by zoning, if that use injures other persons in their use and enjoyment of neighboring lands or if it is inconsistent with an orderly plan of land development. *See Harper*, 182 Wis. at 156; *Bessent*, 27 Wis. 2d at 544.

[=OAG 2-00, 2-3] Although there are no published court decisions specifically holding that counties may regulate the storage of junked vehicles through the exercise of their zoning power under Wis. Stat. § 59.69, the Wisconsin Supreme Court has applied county zoning ordinances that purported to regulate automobile wrecking yards and the storage of junk without questioning the statutory validity of such enactments. *See Sohns v. Jensen*, 11 Wis. 2d 449, 105 N.W.2d 818 (1960); *Racine County v. Plourde*, 38 Wis. 2d 403, 157 N.W.2d 591 (1968); *Judicial Disc. Proc. Against Staeger*, 165 Wis. 2d 21, 23, 476 N.W.2d 876 (1991). The court has likewise applied, without questioning their validity, city zoning ordinances, authorized by the very similar statutory language of Wis. Stat. § 62.23(7)(a), that purported to regulate junk or salvage yards. *See Franklin v. Gerovac*, 55 Wis. 2d 51, 197 N.W.2d 772 (1972); *New Berlin v. Stein*, 58 Wis. 2d 417, 206 N.W.2d 207 (1973). Previous Attorney General opinions, as well, have taken the position that Wisconsin counties may use their zoning power to regulate such uses as the erection and location of billboards and the placement of trailers and mobile homes on agricultural land. *See* 46 Op. Att'y Gen. 148 (1957); 62 Op. Att'y Gen. 292 (1973). While those uses are not identical with the storage of junked vehicles, many of the problems they create are similar and, if the zoning power extends to the former, it should also reach the latter. Other jurisdictions have also held that the regulation of junkyards is within the scope of the zoning power. *See* 2 Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning* § 14.02(3) n.65, § 14.02(4) n.81, § 14.04(3) nn.27-28 (1999) (citing many cases). These considerations reinforce my conclusion

that counties in Wisconsin may regulate the storage of junked vehicles on private property in the exercise of their zoning power.

The power to regulate the use of land through zoning must, of course, be exercised within the applicable statutory and constitutional limits. Procedurally, a county zoning ordinance, or any amendment thereto, must be formed according to the procedures set out in subsections (2), (3), and (5) of Wis. Stat. § 59.69. In addition, a county zoning ordinance “shall not be effective in any town until it has been approved by the town board.” Wis. Stat. § 59.69(5)(c).

Substantively, a county’s zoning power is subject to the basic constitutional limitation that the classification of uses permitted in a given district must have a rational basis:

[U]nreasonable classifications in zoning ordinances, whether comprehensive or not, and restrictions which are not reasonably germane to legitimate objectives or which prohibit a particular use of land ignoring its natural characteristics for such use or which are arbitrary have been held to be unconstitutional on the facts presented.

Bessent, 27 Wis. 2d at 545.

In applying this test, our supreme court has found particular zoning classifications to be unreasonable for not being germane to the legislative purpose and for failing to make substantial distinctions or provide a basis for differential treatment. See *Caledonia v. Racine Limestone Co.*, 266 Wis. 475, 63 N.W.2d 697 (1954); *Boerschinger v. Elkay Enterprises, Inc.*, 32 Wis. 2d 168, 145 N.W.2d 108 (1966). Of particular interest here, the court has also found that a town zoning ordinance that classified the entire town as residential and then purported to prohibit junkyards within the residential district was invalid because it “completely ignore[d] the apparent natural differences existing in the area of the town.” *Hobart v. Collier*, 3 Wis. 2d 182, 189, 87 N.W.2d 868 (1958). The problem, the court noted, was not that the town lacked the power to prohibit a junkyard, but rather that it was unreasonable and arbitrary to zone the entire town as residential with the aim of prohibiting a particular use, while paying no attention to the suitability of specific areas within the town for that use. *Id.* at 189-90. Clearly, then, any county zoning ordinance purporting to prohibit the storage of junked vehicles on private property would have to give due weight to the possible suitability of such storage in particular areas and could not impose a blanket prohibition without regard to the actual characteristics of the regulated properties and their surroundings.

[=OAG 2-00, 3-4] The rational basis test is not the only limitation on the zoning power. County zoning ordinances also “may not prohibit the continuance of the lawful use of any building or premises for any trade or industry for which such building or premises is used at the time that the ordinances take effect.” Wis. Stat. § 59.69(10)(a). Under this provision, if any of the properties that you would like to clean up is currently being lawfully used to store junked,

unused, unlicensed or abandoned vehicles as part of a “trade or industry,” then your county board may not use its zoning power to prohibit the continuation of such storage.

The protection afforded to established nonconforming uses by this statute, however, extends only to uses that are sufficiently substantial. Under long-standing case law, an existing nonconforming use may be prohibited, in spite of the language of Wis. Stat. § 59.69(10), if the use in question is “casual and occasional” or if it is “merely accessory or incidental to the principal use” of the property. *Walworth County v. Hartwell*, 62 Wis. 2d 57, 61, 214 N.W.2d 288 (1974). It follows that a county can prohibit the continuation of the nonconforming use of private property for the storage of junked, unused, unlicensed or abandoned vehicles if that use is accessory or incidental to the property’s principal use – e.g., if the property in question is primarily used for residential or agricultural purposes.

In addition, as previously noted, it appears from your letter that you are primarily concerned with the storage of junked vehicles for *non-business* purposes, rather than as part of a “trade or industry.” Because the plain language of Wis. Stat. § 59.69(10) only protects established uses “for any trade or industry,” it appears that a county zoning ordinance could prohibit a *non-commercial* nonconforming use without violating that statute. It is important to note, however, that the protection of nonconforming uses has a constitutional, as well as a statutory, dimension. The retroactive application of a zoning ordinance to destroy a substantial, existing property use – whether commercial or non-commercial – could constitute an unconstitutional taking of private property without just compensation, if the prohibited use were the principal use of the property. See 2 Edward H. Ziegler, Jr., *Rathkopf’s The Law of Zoning and Planning* § 51.01(2)(b).

Even where an existing property use is protected by Wis. Stat. § 59.69(10), moreover, the scope of that protection is limited. First, under the plain language of the statute, such protection applies only to an existing use and not to any new use of the property. Second, if a protected nonconforming use is discontinued for a period of twelve months, resumption of that use may be prohibited. Wis. Stat. § 59.69(10)(a). Third, the statute says that lawful nonconforming uses may not be *prohibited*, but it does not say that such uses may not be *regulated*. In accordance with these principles, our courts have held that enlargements and extensions of a nonconforming use may be prohibited if the expansion amounts to a change in the nature of the use and may be regulated even if the expansion is merely an increase in the historically allowed use. See *Waukesha County v. Pewaukee Marina, Inc.*, 187 Wis. 2d 18, 24-27, 522 N.W.2d 536 (Ct. App. 1994). It follows that, even where the storage of junked vehicles constitutes the principal use of a property, a county board may regulate that use and any expansion thereof, and may restrict or even prohibit such expansion if it amounts to the creation of a new use.

[=OAG 2-00, 4-5] Finally, in addition to their zoning power, counties also have separate statutory authority to “enact ordinances governing the removal and disposal of abandoned vehicles.” Wis. Stat. § 342.40(3). Under this statute, a county official may order the removal of

a vehicle located on private property if the vehicle has been left unattended without the permission of the property owner for a period of time designated by an applicable local ordinance. *See* Wis. Stat. § 342.40(1m). In addition, under a second provision, a county official may order the removal of a vehicle that has been left unattended “for such time and under such circumstances as to cause the vehicle to reasonably appear to have been abandoned.” Wis. Stat. § 342.40(1m). The word “abandoned” is a term of legal art that refers to property of which the owner has relinquished possession and control with the intention of never again reclaiming it. *See* Black’s Law Dictionary 1, 1233 (7th ed. 1999). A county official acting under this second provision, therefore, may order the removal of a vehicle located on private property if the vehicle has been left unattended under circumstances that make it reasonably appear that the owner has permanently relinquished possession and control of the vehicle. Since it would be difficult to demonstrate such intent where a person has stored a vehicle on his or her own property, however, it seems likely that this second provision of Wis. Stat. § 342.40(1m), like the first, will apply only if the vehicle has been left on the property without the permission of the property owner. Where that condition is satisfied, however, the statute gives counties independent statutory authority to order the removal of abandoned vehicles from private property.

To summarize, a county acting under its zoning power may regulate the storage of junked, unused, unlicensed or abandoned motor vehicles on private property in unincorporated areas in the following ways:

- (1) A county may prospectively prohibit the storage of junked, unlicensed, unused or abandoned vehicles on properties where such storage is not already taking place;
- (2) A county may retrospectively prohibit such storage on properties where it is already taking place, if the storage is merely accessory or incidental to the property’s principal use; and
- (3) A county may place regulatory restrictions short of outright prohibition on such storage, even where it is already occurring and constitutes the principal use of the property in question.

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[=OAG 2-00, 6] In addition, a county acting under Wis. Stat. § 342.40 may enact ordinances governing the removal and disposal of abandoned vehicles left unattended on private property, but this statute is not likely to apply in situations where the vehicle is being stored with the permission of the property owner.

Sincerely,

James E. Doyle
Attorney General

JED:TCB:mmp

CAPTION: Counties have the authority to prohibit or regulate the storage of junked, unused, unlicensed or abandoned vehicles on private property under a valid and applicable zoning ordinance. Counties also have separate statutory authority to enact ordinances governing the removal and disposal of abandoned vehicles left unattended on private property.