

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857

June 8, 2007

OAG – 2 – 07

Mr. Richard J. Summerfield
Corporation Counsel
Rusk County
311 East Miner Avenue, Suite L361
Ladysmith, WI 54848

Dear Mr. Summerfield:

In your letter dated March 8, 2007, you ask whether a county can exercise its home rule authority in such a way as to appoint one regular member and one alternate member who reside in the same town to a county board of adjustment.

In my opinion, the answer is no.

Wisconsin Stat. § 59.03 provides in part as follows:

(1) ADMINISTRATIVE HOME RULE. Every county may exercise any organizational or administrative power, subject only to the constitution and to any enactment of the legislature which is of statewide concern and which uniformly affects every county.

Wisconsin Stat. § 59.04 provides as follows:

Construction of powers. To give counties the largest measure of self-government under the administrative home rule authority granted to counties in s. 59.03(1), this chapter shall be liberally construed in favor of the rights, powers and privileges of counties to exercise any organizational or administrative power.

Wisconsin Stat. § 59.51(1) provides as follows:

Board powers. (1) ORGANIZATIONAL OR ADMINISTRATIVE POWERS. The board of each county shall have the authority to exercise any organizational or administrative power, subject only to the constitution and any enactment of the legislature which grants the organizational or administrative power to a county executive or county administrator or to a person supervised by a county executive or county administrator or any enactment which is of statewide concern and which uniformly affects every county. Any organizational or

administrative power conferred under this subchapter shall be in addition to all other grants. A county board may exercise any organizational or administrative power under this subchapter without limitation because of enumeration, and these powers shall be broadly and liberally construed and limited only by express language.

Wisconsin Stat. § 59.694(2) provides in part:

(am) The chairperson of the county board to which par. (a) applies shall appoint, for staggered 3-year terms, 2 alternate members of the board of adjustment, who are subject to the approval of the county board. Annually, the chairperson of the county board shall designate one of the alternate members as the first alternate and the other as 2nd alternate. The first alternate shall act, with full power, only when a member of the board of adjustment refuses to vote because of a conflict of interest or when a member is absent. The 2nd alternate shall act only when the first alternate refuses to vote because of a conflict of interest or is absent, or if more than one member of the board of adjustment refuses to vote because of a conflict of interest or is absent.

....

(c) The members of the board of adjustment, including alternate members, shall all reside within the county and outside of the limits of incorporated cities and villages; **provided however, that no 2 members shall reside in the same town.**

In *Jackson County v. State*, 2006 WI 96, ¶¶ 19-20, 293 Wis. 2d 497, 717 N.W.2d 713, the court described the home rule authority of counties:

The County correctly asserts that Wis. Stat. § 59.03 is a broad grant of power to counties. . . . When exercising home rule power, a county must be cognizant of the limitation imposed if the matter has been addressed in a statute that uniformly affects every county as such legislation shows the matter is of statewide concern. *Mommsen v. Schueller*, 228 Wis. 2d 627, 635, 599 N.W.2d 21 (Ct. App. 1999). Wisconsin courts have previously recognized that while some subjects are exclusively a statewide concern, others may be entirely a local concern and some subjects are not exclusively within the purview of either the state or of a county. *Id.* at 636. For those subjects where both the state and a county may act, the county's actions must "complement rather than conflict with the state legislation." *State ex rel. Ziervogel v. Washington County Bd. of Adjustment*, 2004 WI 23, ¶ 37, 269 Wis. 2d 549, 676 N.W.2d 401.

Four factors assist us in determining how a county's action is to be analyzed:

(1) whether the legislature has expressly withdrawn the power of municipalities to act;

(2) whether the ordinance logically conflicts with the state legislation;

(3) whether the ordinance defeats the purpose of the state legislation;
or

(4) whether the ordinance goes against the spirit of the state legislation.

Mommsen, 228 Wis. 2d at 636-37 (citing *Anchor Sav. & Loan Ass'n v. EOC*, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984); *U.S. Oil, Inc. v. City of Fond Du Lac*, 199 Wis. 2d 333, 345, 544 N.W.2d 589 (Ct. App. 1996)). If any one of the four factors set out in *Mommsen* is met by a county's action, that action is without legal effect. *Ziervogel*, 269 Wis. 2d 549, ¶ 38 (citation omitted).

Wisconsin Stat. § 59.51(1) requires that a county's home rule authority be exercised by the county board. The materials you have provided contain no indication that the county board has enacted an ordinance providing that one regular member and one alternate member of a county board of adjustment can reside in the same town.

The residency requirement in Wis. Stat. § 59.694(2)(c) also uniformly applies to every county with a population of under 500,000, thus indicating that it involves a matter of statewide concern. *Jackson County*, 293 Wis. 2d 497, ¶ 19. To the extent that the residency requirement provisions in Wis. Stat. § 59.694(2) are "an[] enactment of the legislature which is of statewide concern and which uniformly affects every county" within the meaning of Wis. Stat. §§ 59.03(1) and 59.51(1), counties may not utilize their home rule powers to appoint two members from the same town to the county board of adjustment.

Whether the enactment of an ordinance permitting two members of a board of adjustment to be from the same town logically conflicts with, defeats the purpose of, or is contrary to the spirit of state legislation depends upon the meaning of the residency language in Wis. Stat. § 59.694(2)(c). Statutory language is construed according to its plain meaning. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Wisconsin Stat. § 59.694(2)(c) unambiguously provides that "no 2 members [of the board of adjustment] shall reside in the same town." The "structure of the statute in which the operative language appears" is also important in ascertaining its meaning. *Kalal*, 271 Wis. 2d 633, ¶ 46. Wisconsin Stat. § 59.694(2)(am) provides that the county board chair shall appoint "2 alternate members of the

board of adjustment[.]” Wisconsin Stat. § 59.694(2)(c) refers to the “[t]he members of the board of adjustment, including alternate members” Both provisions indicate that the two alternates are members of the board.

Prior versions of a statute may be consulted in order to ascertain its meaning. *Kalal*, 271 Wis. 2d 633, ¶¶ 48-49 and n.8. The statutory provision requiring the appointment of two alternate members to the board of adjustment in what is now Wis. Stat. § 59.694(2)(am) was enacted in 1993 Wisconsin Act 177, sec. 1. Wisconsin Stat. § 59.694(2)(am) provides that “[t]he first alternate shall act, with full power, only when a member of the board of adjustment refuses to vote because of a conflict of interest or when a member is absent.” Wisconsin Stat. § 59.694(2)(am) similarly provides that “[t]he 2nd alternate shall act only when the first alternate refuses to vote because of a conflict of interest or is absent, or if more than one member of the board of adjustment refuses to vote because of a conflict of interest or is absent.” These provisions grant an alternate member the power to act regardless of whether a regular member of the board is from the same town as that alternate. In addition, 1993 Wisconsin Act 177, sec. 2, simply inserted the phrase “including alternate members” into the first sentence of what is now Wis. Stat. § 59.694(2)(c) without changing the basic requirement that no two members of the board of adjustment can reside in the same town. If the Legislature had intended to permit alternate members and regular members of the board of adjustment to reside in the same town, it would have been a simple matter to include a provision permitting them to do so when 1993 Wisconsin Act 71 was enacted.

The question that must be resolved is not whether the variation by your county from the residency requirement provisions in Wis. Stat. § 59.694(2) is minimal. The question is whether, in enacting the residency requirement provisions in Wis. Stat. § 59.694(2), the Legislature intended to allow counties with populations under 500,000 to deviate from those provisions at all. *See* 81 Op. Att’y Gen. 145, 150 (1994). If counties with populations under 500,000 are not bound by the residency requirement provisions contained in Wis. Stat. § 59.694(2), then they may deviate from those provisions in any way they choose and an individual county could conceivably go so far as to appoint all members who are residents of the same town to the board of adjustment. I am not persuaded that the Legislature intended to relinquish to counties with populations under 500,000 the power to elect against the residency requirement provisions in Wis. Stat. § 59.694(2) by selecting any number of residents they might choose from the same town. Granting counties the authority to do so would logically conflict with, defeat the purpose of and be contrary to the spirit of the state legislation by granting potentially disproportionate influence over decisions of the board of adjustment to the viewpoint of residents of a particular town.

Mr. Richard J. Summerfield
Page 5

I therefore conclude that a county cannot exercise its home rule authority in such a way as to appoint one regular member and one alternate member who reside in the same town to a county board of adjustment.

Sincerely,

J.B. Van Hollen
Attorney General

JBVH:FTC:cla

Mr. Richard J. Summerfield
Page 6

x:\public\van hollen\summerfield 5-31-2007.doc