



AXLEY BRYNELSON, LLP

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February 12, 2010

VIA E-MAIL AND U.S. MAIL

Madison Area Builders Association
Attn: Mr. Kent Disch
5936 Seminole Centre Court
Madison, WI 53711

RE: Validity of CARPC's FUDA Requirements
Our File: [TBD]

Dear Mr. Disch:

We have been asked by the Madison Area Builders Association, Inc. ("MABA") to review the legal basis for the Capital Area Regional Planning Commission's ("CARPC") Future Urban Development Area ("FUDA") requirements.

A. REGIONAL PLANNING COMMISSIONS

Regional planning commissions are authorized by Wis. Stat. § 66.0309. They are agencies of the State of Wisconsin.¹ Administrative agencies have only those powers that are expressly conferred or necessarily implied from the statutory provisions under which they operate.² Regional planning commissions are created by the Governor, or other executive branch official designated by the Governor, pursuant to a petition of one or more local governments requesting the formation of a regional planning commission for a designated region. Wis. Stat. § 66.0309 defines the powers and functions of a regional planning commission; and with limited exceptions, these powers are limited to planning, research, analysis, and advisory functions. A regional planning commission may have certain of the powers of a state agency delegated to it with respect to the plat review process under Wis. Stat. § 236.12(2)(a), provided that both the state agency and the relevant regional planning commission consent to such delegation. Beyond this delegated power, regional planning commissions are entirely advisory bodies. This has been recognized in several decisions by Wisconsin courts.³

¹ Kegonsa Joint Sanitary Dist. v. City of Stoughton, 87 Wis.2d 131, 153, 274 N.W.2d 598, 608 (Wis. 1979).

² Albrechtsen v. Wisconsin Dept. of Workforce Development, 288 Wis.2d 144, 708 N.W.2d 1, 2005 WI App 241, ¶22.

³ City of Stoughton, at 154 and Tanek v. Dane County Regional Planning Commission, 81 Wis.2d 76, 260 N.W.2d 18, 23 (Wis. 1977).

B. MUNICIPAL PLANNING POWERS

A municipality, whether a Village, City, Town, or County, is a creature of the state and does not have independent sovereignty. It is an entity created solely by the exercise of legislative power. “The creation of municipal corporations is peculiarly within the province of the legislature. A unit of local government is a creature of the legislature. It owes its existence to legislative fiat and its life may be snuffed out by appropriate legislative action.”⁴

Cities and other units of local government have only such powers as are expressly granted to them and such others as are necessary to implement the powers expressly granted.⁵ Ordinances of local government units which fail to comply with empowering statutes are invalid.⁶

The Wisconsin Statutes grant certain land use planning powers to certain local government units (subject to certain exclusions and restrictions) including the power to enact zoning ordinances.⁷ Other powers related to creation and extension of infrastructure are also granted to local government units.

C. CAPITAL AREA REGIONAL PLANNING COMMISSION

CARPC was created by Executive Order No. 197 (the “**Order**”) issued by Governor Doyle pursuant to the petitioning resolutions made by local government units within Dane County, which resolutions petitioned for the creation of the CARPC (collectively, the “**Resolutions**”). The **Order** lists the local government entities which fall within the region covered by the CARPC and describes the region covered by the CARPC. This region covers all of Dane County, including all the local government units contained therein (the “**Region**”).

The **Resolutions** requested the Governor to create CARPC by executive order and proposed a number of things, such as a “membership plan” and a proposal that CARPC “. . . shall work with the communities to update the Dane County Water Quality Plan.” The **Order**, as issued, created CARPC “. . . consistent with Wis. Stat. § 66.0309(2) . . .” and directed that “. . . the membership of (CARPC) shall be in accordance with the resolutions approved by the governing bodies . . . as it is proposed within the referenced resolutions . . .”. The **Order** did not incorporate the provisions relating to updating the water quality plan, nor the “future urban development area” planning proposal.

⁴ Scharping v. Johnson, 32 Wis.2d 383, 145 N.W.2d 691 (Wis. 1966).

⁵ Schroeder v. City of Clintonville, 90 Wis.2d 457, 280 N.W.2d 166 (Wis. 1979); Haug v. Wallace Lake Sanitary Dist., 130 Wis.2d 347, 387 N.W.2d 133 (Wis. 1986).

⁶ Laskaris v. City of Wisconsin Dells, 131 Wis.2d 525, 389 N.W.2d 67

⁷ See for example Wis. Stat. § 62.23; § 62.231; § 61.35; § 61.351; §§60.61-60.66; §§ 59.69-59.78.

Section 7 of the **Resolutions** provides that the **CARPC** shall work with communities to update the Dane County Water Quality Plan (“**Updated Plan**”) to incorporate the elements of Wis. Admin. Code Ch. NR 121, to provide areas to be protected from development in order to protect water quality, and to define areas that can be developed with measures to protect, restore or minimize degradation of water quality. The **Updated Plan** is also to define a 25-year Future Urban Development Area (“**FUDA**”) with 5-year updates. As part of the **FUDA** planning process, local units of government within the **Region** are required to submit their proposed **FUDA** plans to **CARPC** within 24 months of the date after they receive certain data from **CARPC**. If a local unit of government does not meet this timeline, **CARPC** will not act on any individual urban service area (“**USA**”) expansion requests until the proposed plan is submitted (the “**Sanction**”). (As a side observation, the **Resolutions** indicate that once a **FUDA** plan has been prepared and submitted to **CARPC**, then **CARPC** “. . . shall act on the proposed . . .” **FUDA** plan within a year after its submittal. Nowhere is there any explanation of the word “act.” Does it mean “approve” or “disapprove?” Does it mean **CARPC** has the authority to make unilateral alterations or modifications to the **FUDA** plan and require compliance? Nowhere is the concept of “action” explained. Such ambiguity may be fatal to enforcement of the process.)

In creating **CARPC**, the **Order** did not incorporate the **Sanction** provisions. Indeed, the **Order** is very specific in that **CARPC** is to operate “consistent” with Wis. Stat. § 66.0309(2), and that only the membership plan was being incorporated from the **Resolutions** into the **Order**. The **FUDA** provisions were omitted. It should also be noted that in any event, the **Sanction** is not authorized by Wis. Stat. § 66.0309 (the regional planning commission authorizing statute) nor is it authorized under Wis. Admin. Code Ch. NR 121. Rather, it is entirely a concept, invented by the drafters of the **Resolutions**, a concept not reflected in the **Order**. Clearly, the **Order** is not the source of such authority.

D. AUTHORITY MATTERS

Against this background certain fundamental principles must be applied to determine whether or not the **FUDA** concept is binding upon the communities included within the **Region** and whether or not the **Sanction** can be imposed if a community does not satisfy the **FUDA** requirements.

Wis. Stat. § 66.0301(2) provides that local governmental units and state agencies may contract for the cooperative provision of services or the joint exercise of any power or duty; provided however, that “each may act under under the contract to the extent of its lawful powers and duties.” This raises the issue of whether or not the **Resolutions** of the communities create a “contract” that provides a basis for imposing the **FUDA** requirements and the imposition of the **Sanction**.

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An administrative agency has only those powers given to it by statute; an agency may not promulgate a rule that conflicts with a statute; and if a rule is not authorized by statute it must be invalidated.⁸ We can find no Wisconsin Statute or administrative rule that confers upon Cities, Villages or Towns, the ability to implement the **FUDA** concept in the manner suggested or to impose the **Sanction**. (Indeed, the discussion set forth in Section F below suggests the contrary.) If the petitioning communities lack this authority, no contract can confer the authority on any resulting commission or body. Even assuming the petitioning communities did have such authority, local government units may not surrender or contract away their governmental powers.⁹ Local governmental units are wholly creatures of legislatively delegated power, and therefore cannot by ordinance or contract bargain away that portion of the state's sovereignty which has been conferred upon them.¹⁰ One aspect of this principle is that a municipality may not make contracts that will control them in the performance of their legislative functions in the future, and that includes zoning.¹¹

It is well established that a municipality is free to deny the validity of a contract that was beyond the municipality's power to make and that such contracts are ultra vires and void.¹²

E. STATUS OF CARPC SANCTION

Since the **CARPC Sanction** is not authorized by either Wis. Stat. § 66.0309 or Wis. Admin. Code Ch. NR 121, it is our view that the **Sanction** is in excess of any authority granted to the **CARPC**, an agency of State of Wisconsin. Moreover, it does not appear that the petitioning communities have such authority, and therefore cannot confer it upon **CARPC**. Even if they did, any powers delegated to the **CARPC** by the member local government units constitutes a delegation of their governing authority and powers which delegation is not permitted by any statute.

As has been discussed above, both local government units and state agencies are creatures which exist solely by virtue of legislative action and must act strictly within their authorizing legislative action.

⁸ Wisconsin Builders Ass'n v. State Dept. of Commerce, 316 Wis.2d 301, 762 N.W.2d 845, 2009 WI App 20, ¶8.

⁹ Town of Brockway v. City of Black River Falls, 285 Wis.2d 708, 702 N.W.2d 418, 2005 WI App 174, ¶21 (citing Wausau Joint Venture v. Redevelopment Auth., 118 Wis.2d 50, 59, 347 N.W.2d 604 (1984)).

¹⁰ Town of Brokway, ¶27 (citing State ex rel. Hammermill Paper Co. v. La Plante, 58 Wis.2d 32, 80, 205 N.W.2d 784 (Wis. 1973) and Adamczyk v. Caledonia, 52 Wis.2d 270, 275, 190 N.W.2d 137 (Wis. 1971)).

¹¹ Town of Brokway, ¶27.

¹² Wisconsin Elec. Power Co. v. Outagamie County, 2008 WI App 75, ¶ 12, 311 Wis.2d 746, 752 N.W.2d 388 (citing Village of McFarland v. Town of Dunn, 82 Wis.2d 469, 474, 263 N.W.2d 167 (1978)).

Where they act outside such authority, whether by the creation of rules such as the **Sanction** or by the impermissible delegation of powers as contemplated by the **Resolutions**, their actions are null and void. Moreover, the **Order** by its terms does not confer the authority. For these reasons, we believe the **Sanction** is invalid and unenforceable, if **CARPC** sought to impose it.

F. INTERACTION OF FUDA PLANS AND SMART GROWTH PLANS

A related issue is whether or not the **FUDA** plans must be consistent with the local government unit comprehensive plans mandated by Wis. Stat. § 66.1001 (“**Smart Growth**”). Virtually all local government land use planning activities after January 1, 2010 must comply with the approved applicable comprehensive plan of such local government entity under Wis. Stat. § 66.1001(3). **Smart Growth** also requires a regional plan commission to modify, prepare or amend its master plan adopted under Wis. Stat. § 66.0309(8), (9) or (10), to conform to the requirement of Wis. Stat. § 66.1001. See Wis. Stat. § 66.1001(1). This suggests that any **FUDA** plan adopted or approved by **CARPC** must also conform to **Smart Growth**; and that any **FUDA** plan conflict with a **Smart Growth** plan, must give way to the latter. The intent of the legislature in enacting such a **Smart Growth** requirement cannot be construed to permit any other key planning activity to deviate from such comprehensive planning mandated by that statute.¹³ Moreover, the role of a regional planning commission in relationship to a community’s comprehensive planning process is set forth in Wis. Stat. § 66.1001(5):

“(5) APPLICABILITY OF A REGIONAL PLANNING COMMISSION’S PLAN. A regional planning commission’s comprehensive plan is only advisory in its applicability to a political subdivision and a political subdivision’s comprehensive plan.” (Emphasis Added.)

It should be noted that a regional plan commission’s comprehensive plan is “. . . only advisory . . .” to a community and its comprehensive plan. **CARPC** cannot make compliance with its comprehensive plan “mandatory” by imposing the **Sanction**. Correspondingly, **CARPC** cannot make any **FUDA** plan “mandatory” by imposing a **Sanction**. To do so elevates the role of **CARPC** above that as expressly authorized by **Smart Growth** and other applicable law. In sum, no matter what the **CARPC FUDA** plan provides, **CARPC** cannot impose a mandatory future urban development area plan on one or more communities and then issue a **Sanction** if not presented. For it to do so would be a usurpation of a community’s authority, and any alleged authority of **CARPC** would be non-existent for the reasons described above. For this reason, local government **Smart Growth** plans will govern to the extent they conflict with a **CARPC FUDA**.

¹³ In re Village of Powers Lake, Kenosha County, 171 Wis.2d 659, 492 N.W.2d 342 (Ct. App. 1992).

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If you have any questions, please advise.

Sincerely,

AXLEY BRYNELSON, LLP

A handwritten signature in black ink, appearing to read 'Timothy D. Fenner', with a long horizontal line extending to the right.

Timothy D. Fenner
EJL:hgg

cc: Charles V. Sweeney
Robert C. Procter
Edward J. Lawton