



FAUERBACH & MARTELL, S.C.

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July 10, 2009

Ms. Patty Hobin  
Town Clerk  
P.O. Box 270  
LaPointe, WI 54850

fax to 747-6654 & first class

**Re: Proper procedure related to significant changes in zoning ordinance**

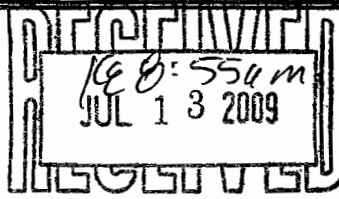
Dear Ms. Hobin:

I am writing in response to your fax regarding the proper procedure to be followed for significant changes to the zoning ordinance. I have reviewed the June 23, 2009 fax and attachments that you sent. Because the attachments included a memo from Zoning Administrator Jen Croonborg that referred to a good deal of other information I asked that Jen provide that information to me, and I have likewise reviewed it. I will state the issue as best I am able to frame it, review some of the legal concepts that are applicable, and then discuss how I think this matter might be best approached.

ISSUE

What is the proper procedure to be followed when the town is involved in a significant modification of their zoning ordinance?

Short answer: The proper procedure to be followed is contained in §62.23(7)(d)2 (copy attached). That statute says the Town Board may adopt amendments to an existing zoning ordinance after first submitting the proposed amendment to the Town Plan Commission for recommendation and report after first providing for a public hearing preceded by a Class 2 notice. If the proposed amendment had the effect of changing the allowable use of any property within the town, the notice shall include either a map showing the property affected by the amendments or a description of the property affected by the amendments and a statement that a map may be obtained from the Town Board. (The language in this statute refers to "council" rather than "Town Board" because §62.23(7) is ordinarily applied to cities but also applies to towns exercising village powers).



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LAW

§62.23(7)(d)3 provides that,

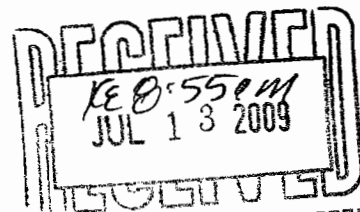
“The council may repeal or repeal and reenact the entire district plan and all zoning regulations in accordance with subd. 1. The council may repeal or repeal and reenact a part or parts of the district plan and regulations in accordance with subds. 2. and 2m.”

When I have seen some of the correspondence that has been circulating within the town hall it appears to me that people were focusing on whether or not this was a text change or a major rewrite of the ordinance. Based upon the above language I don't think that is the issue. I think the issue is whether it is a complete repeal and reenactment of the ordinance or a partial repeal and reenactment. I will discuss below the extent of the changes in the ordinance but I think it is apparent that while the changes are substantial they are not a complete repeal and reenactment of the ordinance.

§62.23(7)(d)2 is, therefore, applicable and provides that the Town Board may adopt amendments to the existing zoning ordinance after submitting those proposed amendments to the Town Plan Commission. The public hearing is before the Town Plan Commission but it is not necessarily the job of the Town Plan Commission to make the decision on what the ordinance should be; that job belongs to the Town Board. The job of the Town Plan Commission is to make a “recommendation”. §62:23(7)(d)2. The Town Board may then accept or reject the recommendation.

If you carefully follow the language in the above statute you will note that the Town Board may adopt the amendment after first “submitting the proposed amendments to the Town Plan Commission”. That presupposes that there is an ordinance change in existence to present to the Town Plan Commission. I understand that the recent and not so recent history of zoning in the Town of LaPointe is that the Town Plan Commission is involved in the drafting of the ordinance. I don't think there is anything illegal about that, but I do think a proposed ordinance has to be in existence before the Town Plan Commission considers it for a recommendation and before there is any notice of a public hearing. Notice of a public hearing, therefore, needs to be delayed until there is a specific ordinance change to be considered.

I want to emphasize that this does not in any way preclude additional public hearings or open meetings at which public comment and input on the proposed change can be obtained. I would certainly recommend that. However, I am not saying that there is necessarily more than one public hearing required. As a practical matter, if the Town Plan Commission is going to put these



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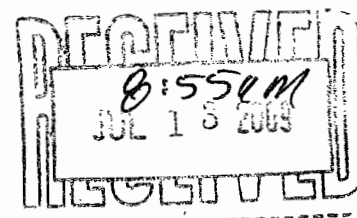
ordinances together they need to have meetings and those meetings are subject to all the rules of the open meetings and open records law. If the town does not follow them it will be sued, the lawsuits will likely be successful and there is a significant probability that the town would even have to pay the other side's attorney fees.

Jen Croonborg has provided me a number of additional items from the *Guide to Community Planning in Wisconsin* by Brian W. Ohm. I suspect that Mr. Ohm knows significantly more about this subject than I do, but the things he put together in this guide are his interpretation of the law and he is applying it to at least three different situations: county zoning; town zoning; and town with village powers zoning. Some of the things he puts forth in this publication are, in my opinion, not clearly legally required for a town exercising village powers. I will focus on what is minimally legally required in the "discussion" section below, but first I think there needs to be statements of some additional facts related to what has already happened related to ordinance changes.

## FACTS AND DISCUSSION

The recent history of the town's effort to modify its zoning ordinance has apparently occurred over a significant period of time and certain changes have already been passed. Those changes include the following:

1. The addition of a new Sec. 4.3.3 regarding nonconforming grandfathered lots, including decreased setbacks up to 50% for lots of prior record.
2. The addition of a new Sec. 4.4.4 regarding camping on private lands. No permit or permanent sanitary area is required for a camping unit.
3. The repeal and rewrite of Sec. 8.42 regarding conditional use permits (CUPs) instituting an entirely new procedure for CUPs.
4. The deletion of Sec. 15 regarding the complaint process related to CUPs.
5. The repeal and rewrite of the definition of "guest house".



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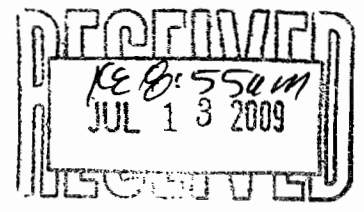
6. The addition of a new Sec. 6.10 related to the use of residential dwellings and property for occupational or business use.

In addition to these changes there are other very significant changes that are apparently under consideration or at some point in the process but not yet passed:

1. Proposed change to Sec. 3 regarding zoning districts.
2. Proposed changes to the "definitions" section, including the definition of "mixed use district" and a "functional family".
3. Proposed changes to the zoning schedules, including dimensional tables and decreased measurements and how to take those measurements.
4. A number of issues raised by the General Code company and their January 2007 editorial analysis.
5. A new section for non-conforming lots, also from General Code.

My comments will first focus on the changes that have not yet been completed. Those changes definitely come under the procedure in Sec. 62.23(7)(d)2. A Town Board may adopt the amendments after first submitting the proposed amendment to the Town Plan Commission and getting their report. The Town Plan Commission has to have a public hearing following a Class 2 notice procedure. If the proposed amendment has the effect of changing the allowable use of any property within the city the notice shall include either a map showing the property affected or a description of the property affected by the amendments and a statement that a map may be obtained from the Town Board. If for some reason the Town Board does not receive recommendations and a report from the Town Plan Commission within 60 days of submitting the proposed amendment the Town Board may, but is not required to, hold hearings without first receiving the recommendations and report.

At the risk of appearing redundant, I want to again point out that before there is any kind of public hearing notice, which obviously has to come before the public hearing, there has to be specific proposed ordinance provisions to be considered and commented on at the public hearing. If you



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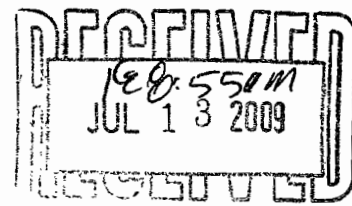
don't have that the public hearing with a Class 2 notice is premature. The *Guide to Community Planning in Wisconsin* by Brian W. Ohm certainly suggests a more protracted procedure. Given the extent of the rewrite in this case, that might very well be a good idea, but I can't see that it is legally required.

However, I do want to suggest consideration, or perhaps reconsideration, of some ordinance provisions that have already been passed because of legal issues that could create problems for the town if they are not considered.

When I first started to review these materials I took the approach of only looking forward and not looking backward at items that had already been passed. However, while I was working on this I was also working on an opinion that I recently provided to you regarding the open records requirement related to information on Town Board members' computers and Mr. Allen's open records and open meetings complaint. I am not representing the town related to the actual complaint. That is Matt Anich's job to deal with District Attorney Sean Duffy. However, it is difficult for me to do this opinion letter and ignore the information that I came across in doing the last opinion letter. I express no opinion on whether or not there were violations of the open meetings or open records law regarding the prior process. I was not involved in that process and I understand that the documentation that is available may be incomplete and somewhat unclear. Nonetheless, I understand that there is a pending complaint on this issue and that there is some public opinion to the effect that prior amendments to the ordinance could have been done in a more open fashion. In doing my work for the town I try to completely ignore public sentiment whenever possible and just try to give as neutral and unbiased of an opinion on the law as I can. The problem is that I also have to be concerned about things that could happen and cause lawsuits for the town. I make every effort to see that they can be avoided and if there is a significant chance that the town is going to be sued for something I can't very well ignore that. If all the existing recent changes were reconsidered in clear compliance with the open meetings law that would make a successful open meetings prosecution more difficult and unlikely.

I have also reviewed some of the changes to the ordinance that have already been made, at least through early June 2009. I haven't studied all the various sections and compared one to another because nobody asked me to. However, I do note the following things that I think are worthy of consideration or reconsideration:

1. There seems to be a number of conflicts between Sec. 7.1 of the ordinance and 8.4.2 regarding CUPs. There is still a procedure for revocation of a CUP, but it is unclear whether there is a right to any hearing.



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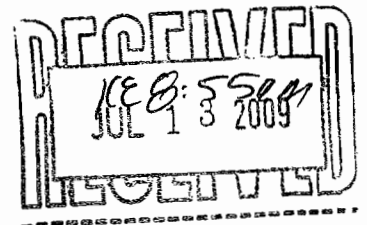
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2. Sec. 4.3.3 regarding reduced setbacks for nonconforming lots is very confusing and possibly illegal, based upon how it is interpreted. It looks like an "aggrieved" owner of a nonconforming grandfathered lot can apply to the Board of Adjustment for reduced setback. However, there are other parts of the ordinance that make it sound like the reduced setbacks are simply automatic. If the Board of Adjustment is going to consider these situations what legal standard do they apply? The proper legal standard under the Wisconsin case law for the granting of a variance is "unnecessary hardship" but parts of the ordinance make it sound as though the relief comes automatically and that is not the same as unnecessary hardship, by a long shot. If you want to give a more automatic or easier to obtain relief to the owners of nonconforming grandfathered lots you can certainly do that but it ought to be by some sort of special permit or special exception process that could be issued by the Town Plan Commission and not by the Board of Adjustment. It could also be issued by the Board of Adjustment but I don't think you would want to call it a variance.
3. Section 15, as I understand it, has been revoked yet it is referred to in other sections of the ordinance.

## CONCLUSION

I do not believe that there is a separate procedure for major ordinance revisions versus text changes. Under §62.23(7)(d)3 the choices are between total repeal and reenactment of the ordinance and a partial repeal and reenactment of the ordinance. What the town is in the process of doing is making a substantial change in the ordinance but it is still partial and not total. The proper procedure for that is included in §62.23(7)(d)2 as set forth above. I think that contains the legal requirements and other requirements in the *Guide to Community Planning in Wisconsin* by Brian W. Ohm may be advisable and good public policy but are not necessarily legally required. Nonetheless, I do believe that a specific ordinance draft is required prior to the public hearing.

I have some significant misgivings about both the process and the end product of zoning ordinance changes that have already been completed. While it may not technically be legally required, I suggest that the Town Plan Commission be requested to put together one set of changes that would include everything now under consideration plus changes to some fairly obvious problems that have already been put into the ordinance related to CUPs and reduced setbacks for nonconforming lots. I really think these sections need to be cleaned up. Until they are cleaned up I would suggest a brief



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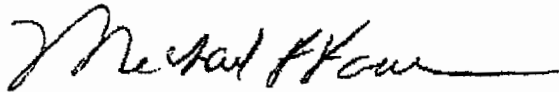
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moratorium on CUPs and reduced setbacks for nonconforming lots. Before any more new ordinance changes are noticed for public hearing I suggest that those proposed ordinances be submitted to someone with legal training.

Should you need anything else on this please feel free to contact me.

Sincerely,

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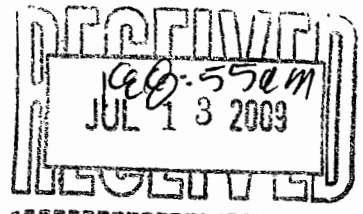


Michael F. Fauerbach

MFF:da

encl

cc: Greg Nelson w/encl  
Ted Pallas w/encl  
Jen Croonborg w/encl



protection of groundwater resources; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; and to preserve burial sites, as defined in s. 157.70 (1) (b). Such regulations shall be made with reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city.

(d) *Method of procedure.* 1. a. Upon the request of the city council, the city plan commission, the board of public land commissioners, or if the city has neither, the city plan committee of the city council shall prepare and recommend a district plan and regulations for the city. Following the formulation of tentative recommendations a public hearing shall be held by, at the council's option, the council, the plan commission, the board of public land commissioners or the plan committee. The entity holding the hearing shall consider any comments made, or submitted, by the commanding officer, or the officer's designee, of a military base or installation, with at least 200 assigned military personnel or that contains at least 2,000 acres, that is located in or near the city. At least 10 days' prior written notice of any such hearings shall be given to the clerk of any municipality whose boundaries are within 1,000 feet of any lands included in the proposed plan and regulations, and to the commanding officer, or the officer's designee, of any military base or installation, with at least 200 assigned military personnel or that contains at least 2,000 acres, that is located in or near the city, but failure to give such notice shall not invalidate such district plan or regulations. Publication of a class 2 notice, under ch. 985, of the tentative recommendations and hearings thereon must be made once during each of the 2 weeks prior to such hearing. If the proposed district plan and regulations have the effect of changing the allowable use of any property within the city, the notice shall include either a map showing the property affected by the plan and regulations or a description of the property affected by the plan and regulations and a statement that a map may be obtained from the city council.

b. The council may make changes in the tentative recommendations after first submitting the proposed changes to the plan commission, board of public land commissioners or plan committee for recommendation and report and after publishing a class 2 notice, under ch. 985, of the proposed changes and hearings thereon as well as the notice to the clerk of any contiguous municipality and to the commanding officer, or the officer's designee, of any military base or installation, with at least 200 assigned military personnel or that contains at least 2,000 acres, that is located in or near the city, as required in subd. 1. a. Hearings on the proposed changes may be held by, at the council's option, the council, the plan commission, the board of public land commissioners or the plan committee. The entity holding the hearing shall consider any comments made, or submitted, by the commanding officer, or the officer's designee, of a military base or installation, with at least 200 assigned military personnel or that contains at least 2,000 acres, that is located in or near the city. If the proposed changes to the proposed district plan and regulations have the effect of changing the allowable use of any property within the city, the notice shall include either a map showing the property affected by the changes or a description of the property affected by the changes and a statement that a map may be obtained from the city council.

2. The council may adopt amendments to an existing zoning ordinance after first submitting the proposed amendments to the city plan commission, board of public land commissioners or plan committee for recommendation and report and after providing the notices as required in subd. 1. b. of the proposed amendments and hearings thereon. In any city which is not located in whole or in part in a county with a population of 500,000 or more, if the proposed amendments would make any change in an airport affected area, as defined in sub. (5) (am) 1. b., the council shall mail a copy

of such notice to the owner or operator of the airport bordered by the airport affected area. A hearing shall be held on the proposed amendments by, at the council's option, the council, the plan commission, the board of public land commissioners or the plan committee. The entity holding the hearing shall consider any comments made, or submitted, by the commanding officer, or the officer's designee, of a military base or installation, with at least 200 assigned military personnel or that contains at least 2,000 acres, that is located in or near the city. If the proposed amendments have the effect of changing the allowable use of any property within the city, the notice shall include either a map showing the property affected by the amendments or a description of the property affected by the amendments and a statement that a map may be obtained from the city council. If the council does not receive recommendations and a report from the plan commission, board of public land commissioners or plan committee within 60 days of submitting the proposed amendments, the council may hold hearings without first receiving the recommendations and report.

2m. a. In case of a protest against an amendment proposed under subd. 2., duly signed and acknowledged by the owners of 20% or more either of the areas of the land included in such proposed amendment, or by the owners of 20% or more of the area of the land immediately adjacent extending 100 feet therefrom, or by the owners of 20% or more of the land directly opposite thereto extending 100 feet from the street frontage of such opposite land, such amendment shall not become effective except by the favorable vote of three-fourths of the members of the council voting on the proposed change.

b. In any city which is not located in whole or in part in a county with a population of 500,000 or more, if a proposed amendment under subd. 2. would make any change in an airport affected area, as defined under sub. (5) (am) 1. b. and the owner or operator of the airport bordered by the airport affected area protests against the amendment, the amendment shall not become effective except by the favorable vote of two-thirds of the members of the council voting on the proposed change.

3. The council may repeal or repeal and reenact the entire district plan and all zoning regulations in accordance with subd. 1. The council may repeal or repeal and reenact a part or parts of the district plan and regulations in accordance with subds. 2. and 2m.

4. The city council shall maintain a list of persons who submit a written request to receive notice of any proposed zoning action that may be taken under subd. 1. a. or b. or 2. that affects the allowable use of the person's property. If the plan commission, the board of public land commissioners, or city plan committee of the city council completes action on any tentative recommendations that are noticed under subd. 1. a., proposed changes to a proposed district plan and regulations that are submitted under subd. 1. b., or proposed amendments that are submitted under subd. 2., and the city council is prepared to vote on the tentative recommendations, proposed changes to a proposed district plan, and regulations or proposed amendments, the city council shall send a notice, which contains a copy of the tentative recommendations, proposed changes to a proposed district plan, and regulations or proposed amendments, to each person on the list whose property, the allowable use of which, may be affected by the tentative recommendations or proposed changes or amendments. The notice shall be by mail or in any reasonable form that is agreed to by the person and the city council. The city council may charge each person on the list who receives a notice a fee that does not exceed the approximate cost of providing the notice to the person. An ordinance or amendment that is subject to this subdivision may take effect even if the city council fails to send the notice that is required by this subdivision.

(da) *Interim zoning.* The common council of any city which has not adopted a zoning ordinance may, without referring the matter to the plan commission, enact an interim zoning ordinance to preserve existing uses while the comprehensive zoning plan is

