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January 21, 2009

Ms. Jennifer Croonborg
 LaPointe Town Hall
 PO Box 270
 LaPointe, Wisconsin 54850

FAX to 747-6654 & first class

Re: Questions related to Ryder zoning change request

Dear Ms. Croonborg:

This is in response to your letter of 1/13/09. I will first go through the relevant facts as I understand them, state the issues with conclusions, and then provide a discussion.

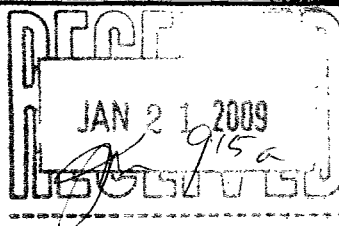
FACTS

Mr. and Mrs. Ryder applied to the Town Plan Commission (later the Town Board) for approval of a CSM to reconfigure their lots to solve certain setback violations on their property. On 10/28/08 the Town Board denied approval of the CSM.

On 11/25/08 Mr. and Mrs. Ryder applied for a zoning map change to make some of their land Shoreland Protection District (S-1). It is presently zoned Wilderness Preservation District 1 (W-1).

When this was originally noticed for hearing before the Town Plan Commission it was referred to as a zoning change and request for approval of a CSM. That apparently was in error, but I assume that even if the rezoning was approved a new CSM would have to be approved in a later step. The matter is now set for public hearing before the Town Plan Commission on Wednesday, 1/21/09.

There have been letters for and against from adjoining property owners. One of the letters against is dated 12/8/08 from the sanitary district. They object to the map change due to a concern about spot zoning and due to a 750 ft. setback requirement from what I assume is a wastewater treatment pond. There is also a reference in that letter to the fact that two lots had previously been combined by the Ryders.



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3. Issue: Can the town enforce Mr. Ryder's 1998 and 1999 representation to require the Ryders to follow through and join the two easterly parcels as a solution to the setback encroachments?

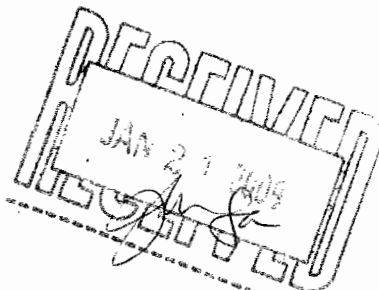
Short Answer: I am not aware of any legal authority that would allow the town or any of its officers or boards to force a joinder of these two parcels under a single ownership. However, the fact that the ownership of the parcels was apparently misrepresented on two prior occasions in the zoning and building process is certainly something that any town board or decision maker could justifiably consider in terms of this request for a zoning change.

DISCUSSION

I do not think Mike Starck has a conflict of interest unless there are other facts that I am not aware of. The statute on conflict of interest, §19.59(1)(a) provides, in pertinent part, as follows:

"No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated."

I am not aware of any facts to suggest that Mike Starck or a member of his immediate family has anything to gain from the rezoning. However, the fact that Mr. Starck has stated his support for this proposal before it is voted on does put him, and potentially the town, in a difficult position. If there is a lawsuit over this there will undoubtedly be a claim that Mr. Starck had already made up his mind and was not a neutral and detached decision maker. In at least one case Wisconsin appellate courts have required a rehearing of a decision of a zoning authority where it appeared that the decision makers had a prejudice one way or another and were not impartial. *City of Marris v. City of Cederberg*, 176 Wis.2d 14 (1973). See also, *Keen v. Dane County Bd.*, 2004 WI App 26 and *State v. Gudgeon*, 2006 WI App 143. The facts in the *Marris* case were more egregious than what we have here but, in my opinion, it would keep things a lot cleaner and simpler and avoid this issue entirely if Mike Starck did not vote on this issue. In the future I would also recommend that the people on either the Town Plan Commission or the Town Board who are going to vote on issues that affect people's rights not take written or public positions on the question before the vote occurs, if at all possible.



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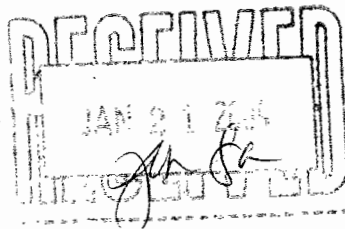
¶ 13. The standard to determine whether spot zoning is legal is as follows: Spot zoning to be accomplished through rezoning should only be indulged in where it is in the public interest and not solely for the benefit of the property owner who requests rezoning, absent any showing that a refusal to rezone will in effect confiscate his property by depriving him of all beneficial use thereof. . . .

Rodgers, 55 Wis. 2d at 573 (citation omitted). The determination of whether spot zoning is in fact legal is a case by case inquiry that must be determined on the facts. *Step Now*, 264 Wis. 2d 662, ¶ 30. Those factors which we have pointed to in the past as relevant to this inquiry are as follows:

whether the rezoning is consistent with long-range planning and based upon considerations which affect the whole community. The nature and character of the parcel, the use of the surrounding land and the overall scheme or zoning plan are also relevant. Finally, the interests of public health, morals and safety must also be considered, as well as the promotion of public welfare, convenience and general prosperity. *Id.* (citations omitted)". *Whitbeck v. Barron*, 2007 WI App 162 ¶11.

To summarize the above for purposes of this case as follows:

1. A party challenging a rezoning must overcome a heavy presumption that the zoning change is legally valid.
2. This is certainly spot zoning in that it affects only one parcel. However, spot zoning is not illegal if it is consistent with the purposes of zoning.
3. Spot zoning should only be indulged in when it is in the public interest and not solely for the benefit of the individual landowner. (I want to point out here that it is not the town's attorney's job to decide what is in the public interest. That is the job of the elected and appointed zoning officials of the Town of LaPointe. Admittedly, it appears in this case that this change is primarily, if not exclusively, for the benefit of the Ryders but I may not have all the facts on that issue).



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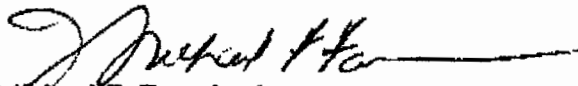
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If the zoning change request is denied I suppose they still have an opportunity to request a variance, but if they request a variance the same issue comes up in a different legal context: why is this not a self-created hardship? Put another way, it is the job of the elected and appointed officials of the town to determine what is in the public interest. If a zoning change is not in the public interest then other consequences would logically appear to follow.

There is no legal authority for forcing the lots to be fused by the town but there is also no legal authority saying that the Ryders are required to have some special way out of the position they put themselves in such as a change in the zoning map. That is a decision left to the discretion of the town zoning authorities in charge of map/zoning district changes.

Sincerely,

FAUERBACH & MARTELL, S.C.



Michael F. Fauerbach
MFF:da
cc: Greg Nelson

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