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STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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OAG 1-97

January 14, 1997

Mr. William R. Glaves
Corporation Counsel
Vilas County Courthouse
Post Office Box 369
Eagle River, WI 54521

Dear Mr. Glaves:

You have asked whether a joint tenant's vendee's interest in a land contract may be terminated pursuant to the procedure set forth in section 867.045, Stats. In my opinion, regardless of the fact that the statute does not expressly refer to a vendee's interest in a land contract, a vendee under a standard land contract who is a joint tenant may use the procedure in section 867.045, to perfect the record as to the termination of a deceased joint vendee's interest.

Section 867.045 provides in relevant part,

> Administrative joint tenancy or life estate termination for certain property. (1) Upon the death of any person having an interest as a joint tenant or life tenant in any real property or in the vendor's interest in a land contract or a mortgagee's interest in a mortgage, the surviving joint tenant or remainderman may obtain evidence of the termination of that interest of the decedent by providing to the register of deeds of the county in which such property is located a certified copy of the death certificate for the decedent and by providing, on applications supplied by the register of deeds for that purpose, the name and address of the decedent and of the surviving joint tenant or remainderman and the date of the decedent's death.

A land contract vendee who is a joint tenant possesses "an interest as a joint tenant or life tenant in . . . real property" within the scope of section 867.045. In Wisconsin, under the doctrine of equitable conversion, a land contract vendee is "the beneficial owner of the property since the execution of the land contract, and as such he enjoys the rights and sustains the burdens of ownership." City of Milwaukee v. Greenberg, 163 Wis. 2d 28, 44, 471 N.W.2d 33 (1991). The court in Greenberg made clear that to the extent property is conveyed under a standard land contract, the

vendor does not "retain any ownership 'sticks or rights' other than the bare legal title," because the bundle is basically transferred to the vendee. Greenberg, 163 Wis. 2d at 39. A land contract vendee thus possesses the sole beneficial ownership interest in the property to which the contract refers.

The law governing Wisconsin real estate transfer fees also reflects the principle that a land contract vendee has an interest in real property. Specifically, section 77.21, acknowledges the fact that a land contract vendee possesses an assignable ownership interest in real estate. That section states in relevant part: "(1) 'Conveyance' includes deeds and other instruments for the passage of ownership interests in real estate, including contracts and assignments of a vendee's interest therein. . . ." Sec. 77.21, Stats. The reference in section 77.21(1) to "instruments for the passage of ownership interests in real estate" expressly includes those instruments which assign a vendee's interest in a contract. By contrast, the assignment of a vendor's interest under a land contract is not subject to the real estate transfer fee precisely and expressly because such an assignment "'does not provide for the passage of ownership interest in real estate.'" Greenberg, 163 Wis. 2d at 44 n.11 (citing Wis. Admin. Code § Tax 15.04(4)).

Thus, a vendee under a land contract unquestionably possesses an ownership interest in real property. Hence, a land contract vendee who is a joint tenant constitutes a "person having an interest as a joint tenant . . . in . . . real property," within the scope of section 867.045. Such a vendee who survives the death of his or her joint tenant may avail him or herself of the procedures in section 867.045, for obtaining evidence of the termination of the deceased joint tenant's vendee's interest.

Termination of the interest of a deceased joint tenant occurs upon his or her death, by operation of law. Section 700.17(2)(a), Stats., as amended by 1995 Wisconsin Act 360, states:

> (2) CHARACTERISTICS OF JOINT TENANCY. (a) Each of 2 or more joint tenants has an equal interest in the whole property for the duration of the tenancy, irrespective of unequal contributions at its creation. On the death of one of 2 joint tenants, the survivor becomes the sole owner; on the death of one of 3 or more joint tenants, the survivors are joint tenants of the entire interest, except that if a survivor disclaims under s. 701.27(2)(b)1., the joint tenancy is severed as of the date of death with respect to the disclaimed interest.

A certificate of termination of joint tenancy is most reasonably understood as effecting the perfection of the record of transfer of title from joint to sole ownership, whereas the title itself has

already been transferred by the death. See Will of Barnes, 4 Wis. 2d 22, 27, 89 N.W.2d 807 (1958) (discussing sec. 230.48(2), Stats., now renumbered as sec. 867.04, Stats).

It follows that the interest of a land contract vendee who is a joint tenant also terminates as a matter of law upon his or her death. Should there be only one surviving joint tenant, and assuming the survivor has not disclaimed, the survivor would then become the sole beneficial owner of the property. Should there be several surviving joint tenants, and assuming none of them has disclaimed, each would then become a joint tenant with the other surviving vendees of the entire vendees' interest. In either case, a vendee under a standard land contract who is a joint tenant may use the procedure in section 867.045(1), upon the death of another joint tenant, to perfect the record of transfer of title to the surviving vendee or vendees.

Sincerely,

James E. Doyle
Attorney General

JED:KMP:dah

CAPTION:

The termination of a joint tenant's vendee's interest in a standard land contract can be perfected under the provisions of section 867.045, Stats.

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STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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OAG 2-97

December 8, 1997

Mr. Lawrence R. Heath
Corporation Counsel
Oneida County
Court House Building
Post Office Box 400
Rhinelander, WI 54501-0400

Dear Mr. Heath:

You ask several questions about Wisconsin's shoreland zoning statutes and administrative rules. Your request is prompted by Oneida County's comprehensive review of its zoning and shoreland protection ordinance.

Specifically, you request an attorney general's opinion on the following: (1) May a county enact a shoreland zoning ordinance that does not expressly regulate legal nonconforming uses, structures, and properties? (2) May a county enact a shoreland zoning ordinance that does not include the "50% rule" for altering, adding to, or repairing nonconforming structures? If so, what, if anything, would then restrict the county's authority to regulate or not regulate alterations, additions, or repairs to legal nonconforming structures? (3) Under Wisconsin zoning law, "[d]oes an isolated lot, on which there is a pre-existing dwelling or principal structure between 40 feet and 75 feet of the [Ordinary High Water Mark] of a navigable water, constitute an 'existing development pattern'?"

First, in my opinion, a county may not enact a shoreland zoning ordinance that fails to require legal nonconforming uses discontinued for 12 months or longer to conform to the zoning ordinance. Second, a county may enact a shoreland zoning ordinance with no "50% rule" but should, and has broad authority to, restrict nonconforming uses or structures in some manner to bring them ultimately into compliance with the ordinance. Indeed, not somehow restricting a nonconforming use or structure would render its status as nonconforming meaningless. Third, an isolated lot having a principal structure within 75 feet of the ordinary high water mark ("OHWM") is not an "existing development pattern."

For clarification, "nonconforming use or structure" in this opinion refers both to legal nonconforming land uses contrary to a zoning ordinance and to legal nonconforming structures with a conforming use but not conforming to the dimensional standards of an ordinance. Although statutes, administrative rules, zoning ordinances, or caselaw sometimes use "nonconforming use" to refer to both those circumstances, using "nonconforming use or structure" here may avoid some ambiguity.

Your three questions are more fully discussed here in the order in which you have asked those questions.

(1)

May a county enact a shoreland zoning ordinance that does not expressly regulate legal nonconforming uses, structures, and properties?

You quote section 59.69(10)(a), Stats. Although section 59.692 applies more specifically to county shoreland zoning, section 59.69(10) applies as well. "Except as otherwise specified, all provisions of s. 59.69 apply to ordinances . . . enacted under [sec. 59.692] . . . ." Sec. 59.692(2)(a), Stats.

Section 59.69(10)(a) sets forth a county's statutory obligations regarding an ordinance on nonconforming uses:

> An ordinance enacted under this section 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, but the alteration of, or addition to, or repair in excess of 50% of its assessed value of any existing building or structure for the purpose of carrying on any prohibited trade or new industry within the district where such buildings or structures are located, may be prohibited. The continuance of the nonconforming use of a temporary structure may be prohibited. If the nonconforming use is discontinued for a period of 12 months, any future use of the building and premises shall conform to the ordinance.

On the one hand, section 59.69(10)(a), as quoted here, is expressly mandatory in two respects about county nonconforming use ordinances: (1) lawful continuation of a legal nonconforming trade or industrial use or structure may not be prohibited, and (2) if a legal nonconforming use or structure is discontinued for 12 months or longer, future use must conform to the ordinance. On the other hand, section 59.69(10)(a) is expressly permissive in two respects: (1) a county may choose either to enact or not to enact the "50%

rule," and (2) a county may choose either to prohibit or not to prohibit the legal nonconforming use of a temporary structure.

Wisconsin Administrative Code § NR 115.05(3)(e), as applied to shoreland zoning ordinances, is on these points similar to section 59.69(10)(a), except that it goes beyond trade and industrial uses to encompass all nonconforming uses or structures. This broader application of Wisconsin Administrative Code § NR 115.05(3)(e) is authorized by the expansive DNR authority in sections 59.692 and 281.31 to establish county shoreland zoning standards by administrative rule. See, e.g., secs. 59.692(1)(c) and 281.31(1), Stats. This more expansive authority derives in turn from the extra protections required for shorelands pursuant to the state's "active public trust duty . . . in respect to navigable waters." Just v. Marinette County, 56 Wis. 2d 7, 18-19, 201 N.W.2d 761 (1972). Compare also section 62.23(7)(h), which on relevant points is more restrictive for cities.

It follows, therefore, from section 59.69(10)(a), Stats., and Wisconsin Administrative Code § NR 115.05(3)(e) that a county may choose to enact a zoning ordinance not regulating nonconforming uses, structures, or properties, except that its ordinance must regulate the reuse of nonconforming uses or structures discontinued for 12 months or longer. When read together, sections 59.69(10)(a) and 59.692(1m), and Wisconsin Administrative Code § NR 115.05(3)(e) are mandatory in requiring that a shoreland zoning ordinance be enacted that does not prohibit the lawful continuation of nonconforming uses or structures, but those provisions are not similarly mandatory in requiring that a shoreland zoning ordinance shall regulate nonconforming uses or structures, except for the need to regulate nonconforming uses or structures discontinued for 12 months or longer.

This interpretation of what is required by section 59.692(1m), which requires counties to enact a shoreland zoning ordinance, and of what is and is not required by section 59.69(10)(a), and Wisconsin Administrative Code § NR 115.05(3)(e) follows the "general rule of express mention and implied exclusion" under which the "express mention of one matter excludes other similar matters not mentioned." Teamsters Union Local 695 v. Waukesha County, 57 Wis. 2d 62, 67 n.6, 203 N.W.2d 707 (1973) ("expressio unius est exclusio alterius"). Rules of statutory construction apply similarly to administrative rules. Basinas v. State, 104 Wis. 2d 539, 546, 312 N.W.2d 483 (1981).

(2)

May a county enact a shoreland zoning ordinance that does not include the "50% rule" for altering, adding to, or repairing nonconforming uses or structures? If so, what, if anything, would then restrict the county's authority to regulate or not regulate alterations, additions, or repairs to nonconforming uses or structures?

Under section 59.692, the Department of Natural Resources ("DNR") has promulgated administrative rules governing county shoreland zoning ordinances. For DNR's specific authority on shoreland zoning, see, in particular, section 59.692(1)(c), (1m), (6), and (7)(ar) and (c). See also sec. 59.692(1s), as created by 1997 Wisconsin Act 27, § 2174 and sec. 283.31, Stats. (1995-96).

Wisconsin's shoreland management rules are found in Wisconsin Administrative Code ch. NR 115. The "50% rule" limiting the extent of alterations, additions, or repairs that may be made to nonconforming uses or structures in shoreland areas is referenced in that rule as follows:

> Under s. 59.97(10), Stats., the continuation of the lawful use of a building, structure or property, existing at the time an ordinance . . . takes effect . . . shall not be prohibited, but the alteration of, addition to, or repair, over the life of the building or structure, in excess of 50% of the equalized assessed value . . . may be prohibited.

Wisconsin Administrative Code § NR 115.05(3)(e) (emphasis added) (sec. 59.97, Stats. (1993-94), referenced therein, was renumbered sec. 59.69, Stats., by 1995 Wis. Act 201, § 475). Section 59.69(10)(a), which on the points relevant here, including reference to the 50% rule, is similar to Wisconsin Administrative Code § NR 115.05(3)(e), except that § NR 115.05(3)(e) goes beyond trade or industrial uses or structures to encompass all nonconforming uses or structures. Specifically, Wisconsin Administrative Code § NR 115.05(3)(e) allows the 50% rule for all structures, so long as lawful uses may continue. Accordingly, the rule allows for more expansive regulation by counties of nonconforming buildings than the statute.

Wisconsin Administrative Code § NR 115.05(3)(e), on its face, plainly allows a county to choose not to enact the "50% rule" for nonconforming uses or structures that are altered, added to, or repaired. That is so because the rule says alterations, additions, or repairs in excess of 50% "may be prohibited." See also sec. 59.69(10)(a), Stats. (alterations, additions, or repairs in excess

of 50% "may be prohibited"). Under the rules of statutory construction, "may" is generally construed as permissive. State v. Camara, 28 Wis. 2d 365, 371, 137 N.W.2d 1 (1965). That is particularly so if, as in Wisconsin Administrative Code § NR 115.05(3)(e), "may" appears near "shall." Scanlon v. Menasha, 16 Wis. 2d 437, 443, 114 N.W.2d 791 (1962). Thus, a county need not enact the 50% rule.

Furthermore, for certain damaged or destroyed nonconforming structures, a county not only need not, but indeed may not, enact a 50% rule to limit the costs incurred in restoring the damaged or destroyed structure. Section 59.692(1s), created by 1997 Wisconsin Act 27, § 2174pm, reads as follows:

> (a) Restrictions that are applicable to damaged or destroyed nonconforming structures and that are contained in an ordinance enacted under this section may not prohibit the restoration of a nonconforming structure if the structure will be restored to the size, subject to par. (b), location and use that it had immediately before the damage or destruction occurred or impose any limits on the costs of the repair, reconstruction or improvement if all of the following apply:
>
> 1. The nonconforming structure was damaged or destroyed after the effective date of this subdivision [October 14, 1997].
>
> 2. The damage or destruction was caused by violent wind, vandalism, fire or a flood.
>
> (b) An ordinance enacted under this section to which par. (a) applies shall allow for the size of a structure to be larger than the size it was immediately before the damage or destruction if necessary for the structure to comply with applicable state or federal requirements.

This recently enacted subsection, therefore, covers nonconforming structures damaged or destroyed after October 14, 1997, by "violent wind, vandalism, fire or a flood." Under it, a county must allow those structures to be restored to the same size, at the same location, and for the same use as they had before the damage or destruction and must allow restoration to an even larger size, but only if required by state or federal law. The repair, reconstruction, or improvement costs for those damaged or destroyed structures may not be limited. As a result, a county ordinance may have no 50% rule for restoring those damaged or destroyed nonconforming structures.

However, counties retain broad authority to regulate nonconforming uses or structures outside of section 59.692(1s). This leads to the second half of your question, which is what, if anything, restricts a county's authority to regulate or not regulate alterations, additions, or repairs to nonconforming uses or structures if there is no 50% rule in its county shoreland zoning ordinance? If a county's zoning ordinance has no "50% rule," the county may still, nonetheless, otherwise regulate nonconforming uses by ordinance so long as its ordinance is consistent with the law as described above. See Waukesha County v. Pewaukee Marina, Inc., 187 Wis. 2d 18, 22-24, 522 N.W.2d 536 (Ct. App. 1994) ("Seitz II").

In addition, the common law may limit the extension of legal nonconforming uses or structures if the extension is contrary to the spirit of zoning. Wis. Const. art. XIV, § 13 (common law continues unless varied by legislature); In re Custody of D.M.M., 137 Wis. 2d 375, 390, 404 N.W.2d 530 (1987) (no change in common law unless clearly indicated); Aaby v. Citizens Nat. Bank, 197 Wis. 56, 57, 221 N.W. 417 (1928) ("common law prevails in Wisconsin until changed by statute"). See also 2B Norman J. Singer, Sutherland Statutory Construction § 50.01, at 90 (5th ed. 1992) (repeal revives the common law). In fact, the absence of any restrictions on nonconforming uses or structures is contrary to the common law reasons for having nonconforming uses at all. If there were no restrictions, that would mean classifying a structure or use as nonconforming would have no significance.

Under the common law, some extensions of nonconforming uses or structures are prohibited even if no specific zoning ordinance provision is violated. Seitz II, 187 Wis. 2d at 26-27. In Seitz II, Seitz argued that to prohibit change in a nonconforming use, a specific ordinance provision must be violated. Id. at 25. The court rejected the argument. Change in a nonconforming use may be prohibited without reliance on a specific ordinance provision. Id. at 26. This is "part of the general practice of zoning." Id. at 24.

Reliance on common law is also the practice under caselaw elsewhere as well.

> The right to continue a nonconforming use does not include a right to extend or enlarge it. This appears to be the rule whether or not the municipal corporation has adopted an ordinance which specifically limits the right of a nonconforming user to enlarge or extend his use, since, without reference to express language, the courts

> have held that expansion of a nonconforming use offends the spirit of zoning regulation.

1 Kenneth H. Young, Anderson's American Law of Zoning (4th ed. 1996) § 6.45 at 623-624 (citations omitted). Although some courts have allowed alterations, other "courts, relying upon the basic policy which dictates early termination of nonconforming uses, have disapproved structural alterations without the aid of a restrictive ordinance." Anderson § 6.56 at 658.

The presumption under Wisconsin caselaw is that "[n]on-conforming uses are . . . not to be enlarged in derogation of the general scheme of the ordinance for the use of property." Yorkville v. Fonk, 3 Wis. 2d 371, 378, 88 N.W.2d 319 (1958) (citations omitted). "[T]he spirit of zoning is to restrict a nonconforming use and to eliminate such uses as quickly as possible." Waukesha County v. Seitz, 140 Wis. 2d 111, 116, 409 N.W.2d 403 (Ct. App. 1987) ("Seitz I").

Your letter in passing also touches on whether a county remains subject to other minimum shoreland zoning requirements if it repeals its 50% rule. Even so, a county must still comply with all minimum requirements of section 59.692 and Wisconsin Administrative Code § NR 115.05. A county must enact a county shoreland zoning ordinance. Sec. 59.692(1m), Stats. A county shoreland zoning ordinance may not be less restrictive than state law allows. Sec. 59.692(7)(ar), Stats. Thus, the minimum lot size and setback requirements of Wisconsin Administrative Code § NR 115.05(3)(a) and (b) still apply. Unlike the 50% rule, those lot size and setback requirements are not permissive. They are mandatory.

To summarize, a county may enact a shoreland zoning ordinance without a "50% rule," but a county may, consistent with the law, also regulate the expansion, alteration, or repair of nonconforming structures by other means. The common law may also limit the extension of nonconforming uses or structures. All minimum shoreland zoning law requirements still apply.

(3)

> **Under Wisconsin zoning law, "[d]oes an isolated lot, on which there is a pre-existing dwelling or principal structure between 40 feet and 75 feet of the OHWM of a navigable water, constitute an 'existing development pattern'?"**

Wisconsin by administrative rule sets the relevant, minimum setback requirement for all county shoreland zoning ordinances:

> Unless an existing development pattern exists, a setback of 75 feet from the ordinary high-water mark of an adjacent body of water to the nearest part of a building or structure, shall be required for all buildings and structures, except piers, boat hoists and boathouses.

Wis. Admin. Code § NR 115.05(3)(b)1. (emphasis added). This rule has the force and effect of law. State ex rel. Staples v. DHSS, 115 Wis. 2d 363, 367, 340 N. W.2d 194 (1983). You ask about the meaning of the term "existing development pattern" as used in this quoted rule provision. It is not defined in Wisconsin Administrative Code ch. NR 115.

When not defined, nontechnical words in a statute or rule are given their relevant, ordinary and accepted meaning, which may be found in a dictionary. State ex rel. First Nat. Bank & Trust v. Skow, 91 Wis. 2d 773, 781, 284 N.W.2d 74 (1979). See also sec. 990.01(1), Stats. ("words and phrases shall be construed according to common and approved usage"). As noted above, the rules of statutory construction also apply to administrative rules. Basinas, 104 Wis. 2d at 546.

The most relevant, ordinary and accepted dictionary definition of "pattern" is "a representative instance: a typical example." Webster's Third New International Dictionary 1657 (1986). An "isolated lot" is by definition not "a representative instance: a typical example" of "existing development." Instead, "isolated" is defined as "occurring alone or once: unique." Webster's Third New International Dictionary 1199 (1986). What is "occurring alone or once: unique" cannot also be a "typical example." Thus, an "isolated lot, on which there is a pre-existing dwelling or principal structure between 40 feet and 75 feet of the OHWM of a navigable water" is not an "existing development pattern" under Wisconsin Administrative Code § NR 115.05(3)(b)1.

"[T]he spirit of zoning is to restrict a nonconforming use and to eliminate such uses as quickly as possible." Seitz I, 140 Wis. 2d at 116. "Non-conforming uses are . . . not to be enlarged in derogation of the general scheme of the ordinance for the use of property." Yorkville, 3 Wis. 2d at 378. In contrast to that fundamental purpose behind the law of legal nonconforming uses, if isolated nonconforming uses were deemed an "existing development pattern," that could in some instances nullify the 75-foot setback restriction in Wis. Admin. Code § NR 115.05(3)(b)1. That would be contrary to the fundamental policy in the law of zoning not to extend but rather to restrict legal nonconforming uses.

That is not a sound interpretation of the words "existing development pattern." A sound interpretation would not render the

rule void or meaningless. Associated Hospital Service v. Milwaukee, 13 Wis. 2d. 447, 463, 109 N.W.2d 271 (1961). Rather it would further the policy of the rule. State v. Clausen, 105 Wis. 2d 231, 244, 313 N.W.2d 819 (1982).

Summary

In summary, a county may not enact a shoreland zoning ordinance that does not regulate nonconforming uses or structures whose use has been discontinued for 12 months or longer. A county may have a shoreland zoning ordinance without a "50% rule," but may regulate nonconforming structures by other means. Without a 50% rule, the common law limits the extension of nonconforming uses or structures. Finally, under state law, an "isolated lot" is not an "existing development pattern."

Sincerely,

James E. Doyle
Attorney General

JED:PP

CAPTION:

A county may not enact a shoreland zoning ordinance without a provision in it regulating nonconforming uses or structures whose use has been discontinued for 12 months or longer. A county may enact a shoreland zoning ordinance without the "50% rule." That is allowed under section 59.69(10)(a), Stats., and Wisconsin Administrative Code § NR 115.05(3)(e). If an ordinance has no "50% rule," common law controls.

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OAG 3-97

December 30, 1997

The Honorable Scott Jensen
Chairman
Assembly Committee on Organization
211 West, State Capitol
Madison, WI 53702

Dear Representative Jensen:

The Assembly Committee on Organization has requested my opinion regarding the appropriate person or entity that must consent under the federal Medicaid program, to the community placement of an individual who currently resides in a center for the developmentally disabled.

The committee states:

> Under 42 U.S.C. s. 1396n(c)(2)(C), an individual likely to require the level of care provided in an intermediate care facility for the mentally retarded may receive MA when placed in an alternative home or community-based setting, when the individual chooses the alternative setting. The federal statute has been interpreted in 42 C.F.R. s. 441.302(d) to mean that MA will be provided to a recipient in an alternative when the recipient, or his or her legal representative is, among other things, given the choice of either institutional or home and community-based services. With respect to a person who has been placed in a center for the developmentally disabled under s. 55.06, Stats., the Department of Health and Family Services has interpreted the term "legal representative," as used in the federal regulation, to mean the circuit court that has the authority to terminate the protective placement. The Federal Health Care Financing Administration in the Department of Health and Human Services has accepted this interpretation. Representatives of individuals placed in centers for the developmentally disabled contest this interpretation and contend that only a parent or a legal guardian has the authority to give consent to an alternative placement for purposes of the MA program.

Specifically, you ask the following question:

Under 42 U.S.C. s. 1396n(c), 42 C.F.R. s. 441.302(d) and ss. 46.275 and 55.06, Stats., which person or entity is required to consent to an alternative to placement in a center for the developmentally disabled for purposes of the MA program?

Title 42 U.S.C. § 1396n(c) provides, in relevant part:

(1) The Secretary may by waiver provide that a State plan . . . may include as "medical assistance" . . . payment for part or all of the cost of home or community-based services . . . which are provided . . . to individuals with respect to whom there has been a determination that but for the provision of such services the individuals would require the level of care provided in a[n] . . . intermediate care facility for the mentally retarded . . . .

(2) A waiver shall not be granted under this subsection unless the State provides assurances satisfactory to the Secretary that--

. . . .

(C) such individuals who are determined to be likely to require the level of care provided in a[n] . . . intermediate care facility for the mentally retarded are informed of the feasible alternatives, if available under the waiver, at the choice of such individuals, to the provision of . . . services in an intermediate care facility for the mentally retarded[.]

Title 42 C.F.R. § 441.302 provides, in relevant part:

Unless the Medicaid agency provides the following satisfactory assurances to HCFA, HCFA will not grant a waiver under this subpart and may terminate a waiver already granted:

. . . .

(d) Alternatives--Assurance that when a recipient is determined to be likely to require the level of care provided in an . . . ICF/MR, the recipient or his or her legal representative will be--

> (1) Informed of any feasible alternatives available under the waiver; and
>
> (2) Given the choice of either institutional or home and community-based services.

As initially drafted, 42 C.F.R. § 441.302(d) required states seeking the waiver described above to provide assurance that the recipient or "his or her representative" would be given the choice of institutional or community-based services. 46 Fed. Reg. 48,532, 48,541 (1981). In the final rule, however, HCFA added the modifier "legal" to "representative," noting in commentary that the modifier was "intended to imply that . . . the representative must be designated in accordance with the laws of the State." 50 Fed. Reg. 10,013, 10,019 (1985).

The federal regulation, therefore, does not require that any particular individual or class of individuals, such as attorneys, parents, or guardians, be empowered to exercise choice on behalf of a recipient. The federal regulation looks to state law to determine the identity of the person or entity having legal authority to choose between institutional or community-based services. Under Wisconsin law, the circuit court has the legal authority and the duty to choose between institutional and community-based services for persons who have been protectively placed to centers for the developmentally disabled.

It is the policy of the State of Wisconsin to place the least possible restriction on the personal liberties and constitutional rights of developmentally disabled persons, consistent with due process and protection from abuse, exploitation and neglect. Sec. 55.001, Stats. To that end, Wisconsin's system of protective services for individuals with developmental and other disabilities is designed to encourage independent living and to avoid protective placement whenever possible. Sec. 55.02, Stats.

Guardians may consent to the admission of their wards to certain small, community-based facilities, section 55.05(5)(b)1., Stats., and guardians are among those who may petition a circuit court for protective placement. Sec. 55.06(2), Stats. No guardian, however, may permanently place a ward in a state center for the developmentally disabled or in another intermediate care facility for the mentally retarded without a circuit court order for protective placement. Sec. 55.06(1)(d), Stats. A circuit court may order placement in such facilities as nursing homes, public medical institutions, centers for the developmentally disabled, foster care services and other home placements, or other appropriate facilities. Sec. 55.06(9)(a), Stats. The individual

must be placed in the least restrictive environment consistent with his or her needs. Sec. 55.06(9)(a), Stats.

Once an individual is protectively placed, the department or other agency responsible for the placement is required to review the status of the person placed at least once every twelve months. Sec. 55.06(10)(a), Stats. Where appropriate, the review shall include recommendations for placement in services which place fewer restrictions on personal freedom. Id. A copy of the review must be furnished to the court that ordered the placement and to the person's guardian. Id. A guardian may also at any time petition the court for a modification of a protective placement. Sec. 55.06(10)(b), Stats. As described above, although a guardian participates in the protective placement process, the circuit court determines the nature of the placement, based on the restrictiveness needed by the individual and the available resources.

Consistent with the general principles of the protective services program, it is Wisconsin's policy to relocate persons from the state centers for the developmentally disabled into appropriate community settings. Sec. 46.275(1), Stats. Any medical assistance recipient living in a state center, or any individual acting on behalf of such a recipient, may apply to participate in this community integration program. Sec. 46.275(4)(a), Stats. Participation in the program is voluntary, although certain criteria must be met. Section 46.275(4)(b) provides, in relevant part:

> No person may participate in the program unless all of the following occur:
>
> 1. Consent for participation is given either by the person's parent, guardian or legal custodian, if the person is under age 18, or by the person or the person's guardian, if the person is age 18 or over, except that this subdivision does not limit the authority of the circuit court to . . . order a [protective] placement under s. 55.06.

Thus, in answer to the question the committee poses, under Wisconsin law a parent's or guardian's objection to his or her child's or ward's participation in the community integration program does not determine whether the child or ward will remain institutionalized, although such parent's or guardian's consent to participation in the community integration program is valid without the approval of the court. If the parent or guardian declines to consent to the community placement, the ultimate authority to choose whether a child or ward should be discharged from a center for the developmentally disabled to a community-supported living

arrangement rests with the circuit court. If a circuit court determines that a community placement supported by community-based services to the individual is the least restrictive environment consistent with the individual's needs and the available resources, the court has the duty to order such a placement, even over the objections of the parent or guardian.

Wisconsin explained its position that the circuit court has ultimate authority to determine whether an individual receives community or institutional placement in its assurances to the Health Care Financing Administration, as required by 42 C.F.R. § 441.302(d). HCFA accepted Wisconsin's assurance on freedom of choice. On November 7, 1996, the Co-Director of the Office of Long Term Care Services of the Medicaid Bureau at HCFA wrote the president of Wisconsin Parents Coalition for the Retarded, Inc., in relevant part as follows:

> Federal regulations at 42 CFR 441.302 require States to assure the Health Care Financing Administration that an individual or his or her legal representative are given the choice of either institutional or community-based services. This regulatory requirement governing freedom of choice, however, allows States to designate, in accordance with State law, the entity with the ultimate legal authority to choose between institutional and community-based care on behalf of an individual who is not competent to make that decision.

Thus, the federal agency responsible for administering the waiver program under 42 U.S.C. § 1396n(c) considers Wisconsin's assignment of ultimate authority for placement decisions to the courts to be in compliance with federal law and regulations. I conclude that under federal and state law, the circuit court which protectively placed an incompetent person to a center for the developmentally disabled has the ultimate authority to determine whether the person should continue to remain institutionalized or should receive home and community-based services.

Sincerely,

James E. Doyle
Attorney General

JED:BAO:djm

CAPTION:

The circuit court which protectively placed an incompetent person to a center for the developmentally disabled has the ultimate authority under state and federal law to determine whether the person should continue to remain institutionalized or should receive home and community-based services.