



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

991006025

JAMES E. DOYLE
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114 East, State Capitol
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January 28, 2000

OAG - 1 - 00

Mr. J. Denis Moran
Director of State Courts
Supreme Court of Wisconsin
119 Martin Luther King Jr. Blvd., Room LL2
Madison, WI 53703

Dear Mr. Moran:

You ask my opinion concerning whether circuit courts may, by blanket order, allow motion costs under Wis. Stat. § 814.07 on all motions brought to open a judgment entered on a forfeiture action under Wis. Stat. § 345.37.

A COURT MAY NOT BY BLANKET ORDER IMPOSE WIS. STAT.
§ 814.07 COSTS ON ALL WIS. STAT. § 345.37(1)(b) MOTIONS.

Wisconsin Stat. § 814.07 costs may be allowed on a motion "in the discretion of the court or judge." Discretion "contemplates a process of reasoning." *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). Wisconsin Stat. § 345.37(1)(b) specifies criteria a court must evaluate when considering a motion to open the judgment. The court must determine whether the failure to appear was due to mistake, inadvertence, surprise or excusable neglect. The process of discretion depends "on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards." *McCleary*, 49 Wis. 2d at 277.

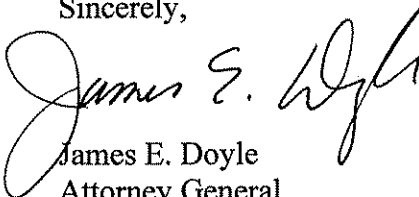
State v. Smith, 203 Wis. 2d 288, 299, 553 N.W.2d 824 (Ct. App. 1996) is instructive. It involved a trial court's blanket ruling rejecting prior conviction evidence for impeachment purposes under Wis. Stat. § (Rule) 906.09. The trial court did not individualize to each witness its analysis of the factors to be weighed in the balancing test under Wis. Stat. § (Rule) 906.09(2) to determine whether the probative value of the prior conviction evidence was substantially outweighed by the danger of unfair prejudice. The *Smith* court found that a "blanket ruling, while expedient and consistent, fails to show a consideration of the proper factors with respect to each witness, and thus, is an erroneous exercise of discretion." *Smith*, 203 Wis. 2d at 299, citing *McCleary*, 49 Wis. 2d at 277-78. See also *State v. Martin*, 100 Wis. 2d 326, 302 N.W.2d 58 (Ct. App. 1981).

Mr. J. Denis Moran
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Imposing costs by blanket order without an inquiry into the facts of each case as applied to the criteria of Wis. Stat. § 345.37(1)(b), would therefore be a failure to exercise the discretion called for in Wis. Stat. § 814.07.

In sum, Wis. Stat. § 814.07 costs may not be imposed by blanket order.

Sincerely,



James E. Doyle
Attorney General

JED:SJN:ajl

CAPTION: Wisconsin Stat. § 814.07 motion costs on motions brought to open a judgment entered on a forfeiture action under Wis. Stat. § 345.37 may not be imposed by blanket order.



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

991028044

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June 7, 2000

OAG - 2 - 00

Mr. Benjamin Southwick
Corporation Counsel
Richland County
181 Seminary Street
Richland Center, WI 53581

Dear Mr. Southwick:

You have requested my opinion on the following question: "Do counties in Wisconsin have legal authority to require the removal of junked, unused, unlicensed or abandoned motor vehicles which are being stored on private property in the unincorporated areas of the county?" The answer to your question is yes. Counties have authority to prohibit or regulate the storage of junked, unused, unlicensed or abandoned vehicles through the exercise of their zoning power, subject to applicable statutory and constitutional restrictions. Counties also have separate statutory authority to enact ordinances governing the removal and disposal of abandoned vehicles.

You have stated that, in your opinion, counties in Wisconsin do not have the authority to require the clean-up of junked vehicles stored on private property for non-business purposes because you can find no statute that specifically gives them that authority. You note that Wis. Stat. § 175.25 gives cities, villages and towns the power to regulate the storage of junked automobiles within their corporate limits, and that Wis. Stat. § 84.31 authorizes the Wisconsin Department of Transportation to require the clean-up of junkyards located within 1,000 feet of an interstate or federal-aid primary highway, but that neither of these statutes gives such power to counties. You further observe that Wis. Stat. § 59.55(5) gives counties the power to license and regulate "the conduct of motor vehicle junking," but that statute, in your opinion, applies only to the regulation of the junked vehicle *business* and does not give counties the authority to regulate the storage of junked vehicles on private property for a personal or non-business purpose, which apparently is the type of use of most concern to you.

While it may be true that no statute expressly gives counties the specific power that you seek, it is my opinion that counties in Wisconsin nonetheless have authority to prohibit or regulate the storage of junked, unused, unlicensed or abandoned vehicles through the exercise of their zoning power under Wis. Stat. § 59.69. Under that statute, county boards may establish and regulate zoning districts in unincorporated areas of the county for the purpose of promoting the public health, safety and general welfare. See Wis. Stat. § 59.69(4). A zoning ordinance enacted pursuant to this statute may regulate, among other things, the use of land for agricultural, business, industrial, residential or recreational purposes and may designate certain areas and uses

subject to special regulation. *See* Wis. Stat. § 59.64(4)(a), (b) and (e). The county board may enforce such zoning ordinances either by appropriate forfeitures, according to administrative procedures prescribed by the board, or by bringing suit and asking a court to enjoin a violation of the ordinance. *See* Wis. Stat. § 59.69(11).

It is my opinion that a county's power, under Wis. Stat. § 59.69(4), to promote the public health, safety and general welfare by designating particular land uses subject to special regulation and by restricting and regulating the areas in which agricultural, business, industrial, residential, and recreational uses may occur, is broad enough to encompass regulation of the storage of junked, unused, unlicensed or abandoned motor vehicles on private property. The concept of the public welfare, as used with respect to the zoning power, "is broad and inclusive and embraces in comprehensive zoning the orderliness of community growth, land value, and aesthetic objectives." *State ex rel. American Oil Co. v. Bessent*, 27 Wis. 2d 537, 545, 135 N.W.2d 317 (1965). It has been established since the earliest days of modern zoning that if zoning regulations "stabilize the value of property, promote the permanency of desirable home surroundings, and if they add to the happiness and comfort of the citizens, they thereby promote the general welfare." *State ex rel. Carter v. Harper*, 182 Wis. 148, 158, 196 N.W. 451 (1923). I conclude from this that the storage of junked vehicles on private property may be regulated by zoning, if that use injures other persons in their use and enjoyment of neighboring lands or if it is inconsistent with an orderly plan of land development. *See Harper*, 182 Wis. at 156; *Bessent*, 27 Wis. 2d at 544.

Although there are no published court decisions specifically holding that counties may regulate the storage of junked vehicles through the exercise of their zoning power under Wis. Stat. § 59.69, the Wisconsin Supreme Court has applied county zoning ordinances that purported to regulate automobile wrecking yards and the storage of junk without questioning the statutory validity of such enactments. *See Sohns v. Jensen*, 11 Wis. 2d 449, 105 N.W.2d 818 (1960); *Racine County v. Plourde*, 38 Wis. 2d 403, 157 N.W.2d 591 (1968); *Judicial Disc. Proc. Against Staeger*, 165 Wis. 2d 21, 23, 476 N.W.2d 876 (1991). The court has likewise applied, without questioning their validity, city zoning ordinances, authorized by the very similar statutory language of Wis. Stat. § 62.23(7)(a), that purported to regulate junk or salvage yards. *See Franklin v. Gerovac*, 55 Wis. 2d 51, 197 N.W.2d 772 (1972); *New Berlin v. Stein*, 58 Wis. 2d 417, 206 N.W.2d 207 (1973). Previous Attorney General opinions, as well, have taken the position that Wisconsin counties may use their zoning power to regulate such uses as the erection and location of billboards and the placement of trailers and mobile homes on agricultural land. *See* 46 Op. Att'y Gen. 148 (1957); 62 Op. Att'y Gen. 292 (1973). While those uses are not identical with the storage of junked vehicles, many of the problems they create are similar and, if the zoning power extends to the former, it should also reach the latter. Other jurisdictions have also held that the regulation of junkyards is within the scope of the zoning power. *See* 2 Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning* § 14.02(3) n.65, § 14.02(4) n.81, § 14.04(3) nn.27-28 (1999) (citing many cases). These considerations reinforce my conclusion

that counties in Wisconsin may regulate the storage of junked vehicles on private property in the exercise of their zoning power.

The power to regulate the use of land through zoning must, of course, be exercised within the applicable statutory and constitutional limits. Procedurally, a county zoning ordinance, or any amendment thereto, must be formed according to the procedures set out in subsections (2), (3), and (5) of Wis. Stat. § 59.69. In addition, a county zoning ordinance “shall not be effective in any town until it has been approved by the town board.” Wis. Stat. § 59.69(5)(c).

Substantively, a county’s zoning power is subject to the basic constitutional limitation that the classification of uses permitted in a given district must have a rational basis:

[U]nreasonable classifications in zoning ordinances, whether comprehensive or not, and restrictions which are not reasonably germane to legitimate objectives or which prohibit a particular use of land ignoring its natural characteristics for such use or which are arbitrary have been held to be unconstitutional on the facts presented.

Bessent, 27 Wis. 2d at 545.

In applying this test, our supreme court has found particular zoning classifications to be unreasonable for not being germane to the legislative purpose and for failing to make substantial distinctions or provide a basis for differential treatment. *See Caledonia v. Racine Limestone Co.*, 266 Wis. 475, 63 N.W.2d 697 (1954); *Boerschinger v. Elkay Enterprises, Inc.*, 32 Wis. 2d 168, 145 N.W.2d 108 (1966). Of particular interest here, the court has also found that a town zoning ordinance that classified the entire town as residential and then purported to prohibit junkyards within the residential district was invalid because it “completely ignore[d] the apparent natural differences existing in the area of the town.” *Hobart v. Collier*, 3 Wis. 2d 182, 189, 87 N.W.2d 868 (1958). The problem, the court noted, was not that the town lacked the power to prohibit a junkyard, but rather that it was unreasonable and arbitrary to zone the entire town as residential with the aim of prohibiting a particular use, while paying no attention to the suitability of specific areas within the town for that use. *Id.* at 189-90. Clearly, then, any county zoning ordinance purporting to prohibit the storage of junked vehicles on private property would have to give due weight to the possible suitability of such storage in particular areas and could not impose a blanket prohibition without regard to the actual characteristics of the regulated properties and their surroundings.

The rational basis test is not the only limitation on the zoning power. County zoning ordinances also “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.” Wis. Stat. § 59.69(10)(a). Under this provision, if any of the properties that you would like to clean up is currently being lawfully used to store junked, unused,

unlicensed or abandoned vehicles as part of a “trade or industry,” then your county board may not use its zoning power to prohibit the continuation of such storage.

The protection afforded to established nonconforming uses by this statute, however, extends only to uses that are sufficiently substantial. Under long-standing case law, an existing nonconforming use may be prohibited, in spite of the language of Wis. Stat. § 59.69(10), if the use in question is “casual and occasional” or if it is “merely accessory or incidental to the principal use” of the property. *Walworth County v. Hartwell*, 62 Wis. 2d 57, 61, 214 N.W.2d 288 (1974). It follows that a county can prohibit the continuation of the nonconforming use of private property for the storage of junked, unused, unlicensed or abandoned vehicles if that use is accessory or incidental to the property’s principal use – e.g., if the property in question is primarily used for residential or agricultural purposes.

In addition, as previously noted, it appears from your letter⁶ that you are primarily concerned with the storage of junked vehicles for *non-business* purposes, rather than as part of a “trade or industry.” Because the plain language of Wis. Stat. § 59.69(10) only protects established uses “for any trade or industry,” it appears that a county zoning ordinance could prohibit a *non-commercial* nonconforming use without violating that statute. It is important to note, however, that the protection of nonconforming uses has a constitutional, as well as a statutory, dimension. The retroactive application of a zoning ordinance to destroy a substantial, existing property use – whether commercial or non-commercial – could constitute an unconstitutional taking of private property without just compensation, if the prohibited use were the principal use of the property. See 2 Edward H. Ziegler, Jr., *Rathkopf’s The Law of Zoning and Planning* § 51.01(2)(b).

Even where an existing property use is protected by Wis. Stat. § 59.69(10), moreover, the scope of that protection is limited. First, under the plain language of the statute, such protection applies only to an existing use and not to any new use of the property. Second, if a protected nonconforming use is discontinued for a period of twelve months, resumption of that use may be prohibited. Wis. Stat. § 59.69(10)(a). Third, the statute says that lawful nonconforming uses may not be *prohibited*, but it does not say that such uses may not be *regulated*. In accordance with these principles, our courts have held that enlargements and extensions of a nonconforming use may be prohibited if the expansion amounts to a change in the nature of the use and may be regulated even if the expansion is merely an increase in the historically allowed use. See *Waukesha County v. Pewaukee Marina, Inc.*, 187 Wis. 2d 18, 24-27, 522 N.W.2d 536 (Ct. App. 1994). It follows that, even where the storage of junked vehicles constitutes the principal use of a property, a county board may regulate that use and any expansion thereof, and may restrict or even prohibit such expansion if it amounts to the creation of a new use.

Finally, in addition to their zoning power, counties also have separate statutory authority to “enact ordinances governing the removal and disposal of abandoned vehicles.” Wis. Stat. § 342.40(3). Under this statute, a county official may order the removal of a vehicle located on

private property if the vehicle has been left unattended without the permission of the property owner for a period of time designated by an applicable local ordinance. *See* Wis. Stat. § 342.40(1m). In addition, under a second provision, a county official may order the removal of a vehicle that has been left unattended “for such time and under such circumstances as to cause the vehicle to reasonably appear to have been abandoned.” Wis. Stat. § 342.40(1m). The word “abandoned” is a term of legal art that refers to property of which the owner has relinquished possession and control with the intention of never again reclaiming it. *See* Black’s Law Dictionary 1, 1233 (7th ed. 1999). A county official acting under this second provision, therefore, may order the removal of a vehicle located on private property if the vehicle has been left unattended under circumstances that make it reasonably appear that the owner has permanently relinquished possession and control of the vehicle. Since it would be difficult to demonstrate such intent where a person has stored a vehicle on his or her own property, however, it seems likely that this second provision of Wis. Stat. § 342.40(1m), like the first, will apply only if the vehicle has been left on the property without the permission of the property owner. Where that condition is satisfied, however, the statute gives counties independent statutory authority to order the removal of abandoned vehicles from private property.

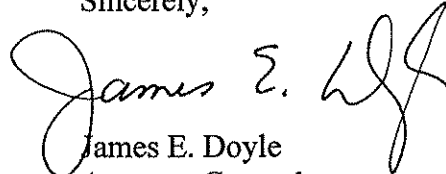
To summarize, a county acting under its zoning power may regulate the storage of junked, unused, unlicensed or abandoned motor vehicles on private property in unincorporated areas in the following ways:

- (1) A county may prospectively prohibit the storage of junked, unlicensed, unused or abandoned vehicles on properties where such storage is not already taking place;
- (2) A county may retrospectively prohibit such storage on properties where it is already taking place, if the storage is merely accessory or incidental to the property’s principal use; and
- (3) A county may place regulatory restrictions short of outright prohibition on such storage, even where it is already occurring and constitutes the principal use of the property in question.

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In addition, a county acting under Wis. Stat. § 342.40 may enact ordinances governing the removal and disposal of abandoned vehicles left unattended on private property, but this statute is not likely to apply in situations where the vehicle is being stored with the permission of the property owner.

Sincerely,


James E. Doyle
Attorney General

JED:TCB:mmp

CAPTION: Counties have the authority to prohibit or regulate the storage of junked, unused, unlicensed or abandoned vehicles on private property under a valid and applicable zoning ordinance. Counties also have separate statutory authority to enact ordinances governing the removal and disposal of abandoned vehicles left unattended on private property.

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STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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ATTORNEY GENERAL

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Burncatta L. Bridge
Deputy Attorney General

OAG-3-00

July 31, 2000

Mr. George E. Meyer, Secretary
Department of Natural Resources
101 South Webster Street
Madison, WI 53707-7921

Dear Mr. Meyer:

You have asked for a formal opinion on whether the Wisconsin endangered and threatened species statute, Wis. Stat. § 29.604, applies to protect state-listed endangered and threatened plants growing on public property. In my opinion, by its plain language, Wis. Stat. § 29.604 applies to state-listed endangered and threatened plants growing on public property.

Under Wis. Stat. § 29.604(3)(a), the Department of Natural Resources (DNR) must establish a list of endangered and threatened plants. DNR has established such a state list. It is found in Wis. Admin. Code ch. NR 27. You ask whether that list applies to protect listed plants growing on public lands. In answering your question, I first note that the introductory subsection of Wis. Stat. § 29.604, which states the purpose of the statute, includes the legislative finding that activities both of individual persons *and* of "governmental agencies" are affecting the "few remaining whole plant-animal communities in the state." Wis. Stat. § 29.604(1). This legislative finding is consistent with interpreting Wis. Stat. § 29.604 to apply to listed plants growing on public property.

The central provision of the Wisconsin endangered and threatened species act is Wis. Stat. § 29.604(4). In most pertinent part, concerning your inquiry, it reads as follows:

Except as provided in sub. (6r) or as permitted by departmental rule or permit:

....

(c) No person may do any of the following to any wild plant of an endangered or threatened species that is on public property or on property that he or she does not own or lease, except in the course of forestry or agricultural practices or in the construction, operation or maintenance of a utility facility:

1. Remove, transport or carry away the wild plant from the place where it is growing.

2. Cut, root up, sever, injure or destroy the wild plant.

Wisconsin Stat. § 29.604(4)(intro.) and (c). Interpreting this provision requires an understanding of, first, its general applicability to protect listed plants and, second, the limited exceptions to that general applicability.

In interpreting Wis. Stat. § 29.604(4) to determine its general applicability, one looks first at its plain language. *See Voss v. City of Middleton*, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991). Interpreting its plain language, two questions arise. First, because sub. (4)(c) applies to “persons,” are state agencies, counties, towns, and municipalities “persons” under the statute? Second, the words in sub. (4)(c) “on public property or on property that he or she does not own or lease” are disjunctive, so that if either of those circumstances exist, that is if a plant is either on public property or on property not owned or leased by the person in question, its removal or destruction is prohibited. Thus, in interpreting sub. (4) for purposes of answering your inquiry, the second question is whether property owned by the state, a county, a town, or another municipality is “public property.”

First, who is a “person” under Wis. Stat. § 29.604(4)? Neither the state nor its agencies are a “person” as that term is defined for general use in the statutes by Wis. Stat. § 990.01(26). *See State ex rel. Dept. of Pub. Instruction v. ILHR*, 68 Wis. 2d 677, 683, 229 N.W.2d 591 (1975). That general statutory definition of “person” does not apply, however, if “such construction would produce a result inconsistent with the manifest intent of the legislature.” Wis. Stat. § 990.01(intro.). An entire statute must be given effect, so that no portion of it is surplusage. *See Lake City Corp. v. City of Mequon*, 207 Wis. 2d 155, 162, 558 N.W.2d 100 (1997). Section 29.604(4), which by its terms in pars. (a), (b), and (c) applies to “persons,” contains in its introduction an express exception that reads “[e]xcept as provided in sub. (6r).” That exception in sub. (6r) applies only to “state agencies.” Under sub. (6r), DNR may allow “state agencies,” as broadly defined in Wis. Stat. § 29.604(2)(am), to affect listed plants if certain stated conditions are met. If state agencies were not included within “person” in sub. (4), there would, of course, be no need to exclude them at all, as is done in sub. (4)(intro.), by referring to sub. (6r). The stated exception in sub. (4)(intro.) would be surplusage. Under the rules of statutory construction, an interpretation that renders a portion of the statute superfluous is to be avoided. *See Lake City Corp.*, 207 Wis. 2d at 162. Applying the rules of statutory construction, therefore, “state agencies” are “persons” under sub. (4)(c).

In addition, Wis. Stat. § 990.01(26) supports interpreting “person” to include other public entities. “Person” is defined in relevant part to include all “bodies politic or corporate.” Wis. Stat. § 990.01(26). Counties, towns, cities, and villages are “‘bodies politic or corporate’ within the meaning of § 990.01(26)” and, thus, they are “persons.” *See Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 371, 243 N.W.2d 422 (1976) (cities and counties are “persons”); *Blooming Grove v. Madison*, 275 Wis. 328, 333, 335, 81 N.W.2d 713 (1957) (towns are “persons”). Thus, applying the rules of statutory construction and using the statutory definition of “person,” which

includes “bod[ies] politic or corporate,” it is my opinion that not only state agencies but also counties, towns, cities, and villages are each included within the meaning of “person” as used in Wis. Stat. § 29.604(4).

Second, is property owned by the state, a county, a town, or another municipality, “public property” under the act? “Public property” is not defined by Wisconsin statute, case law, or administrative rule. The term “public property” appears, however, more than 20 times in the Wisconsin statutes. Although it is not defined, in each instance where it is used, “public property” simply distinguishes governmentally owned property from non-governmentally owned property. *See, e.g.,* Wis. Stat. §§ 66.073(16)(b) (municipal electric company property), 66.39(9) (veterans housing property), and 66.40(22) (housing authority property). *See also* Wis. Stat. § 66.527(3)(a) (recreational activities on public property or private property).

“Public property” is a nontechnical term. It is, therefore, construed according to its common and approved usage. *See* Wis. Stat. § 990.01(1). Its common and approved usage can be established by referring to a recognized dictionary. *See Hayne v. Progressive N. Ins. Co.*, 115 Wis. 2d 68, 73, 339 N.W.2d 588 (1983); *Ahlgren v. Pierce County*, 198 Wis. 2d 576, 580, 543 N.W.2d 812 (Ct. App. 1995). *Black’s Law Dictionary* 1217 (6th ed. 1990) defines “public property” as follows:

Public property. This term is commonly used as a designation of those things which are *publici juris (q.v.)*, and therefore considered as being owned by “the public,” the entire state or community, and not restricted to the dominion of a private person. It may also apply to any subject of property owned by a state, nation, or municipal corporation as such.

Another similar generally-accepted definition for the term “public property” is as follows:

Property may be classified as either public or private. Public property is that owned by the public as such in some governmental capacity. Private property is that which is owned by an individual or some other private owner, and ordinarily devoted to the private uses of that private owner

63C Am. Jur. 2d *Property*, § 10 (1997) (footnote omitted). Under these definitions, property owned by the state, a state agency, a county, a town, a city, or a village is “public property” and subject to Wis. Stat. § 29.604.

For some purposes, earlier Wisconsin case law distinguishes between a governmental unit’s “governmental” activities and its “private or proprietary” activities. *See, e.g., Milwaukee E. R. & L. Co. v. Milwaukee*, 209 Wis. 656, 667, 245 N.W. 856 (1932); *State Journal Printing Co. v. Madison*, 148 Wis. 396, 403, 134 N.W. 909 (1912). Although some may argue for a narrow definition of “public property,” which distinguishes between property held for

governmental purposes and property held for private or proprietary purposes, nothing supports applying that narrow definition here. No authority supports defining “public property” as used here in ch. 29 to include less than all governmentally owned property. *Cf.* Wis. Stat. § 24.01 (6) (“Public lands’ embraces all lands . . . owned by the state either as proprietor or as trustee . . .”).

After having determined, as explained above, that Wis. Stat. § 29.604(4) applies to all governmental units, one must then consider the several exceptions to its prohibitions. Two exceptions are stated in sub. (4). First, as already noted above, there is an exception “as provided in sub. (6r) or as permitted by departmental rule or permit.” Wis. Stat. § 29.604(4)(intro.). Second, there is an exception for actions taken “in the course of forestry or agricultural practices or in the construction, operation or maintenance of a utility facility.” Wis. Stat. § 29.604(4)(c).

First, there is the sub. (6r) and DNR rule or permit exception. The language as quoted above from Wis. Stat. § 29.604(4)(intro.) includes the following introductory exception: “Except as provided in sub. (6r) or as permitted by departmental rule or permit.” Wis. Stat. § 29.604(4)(intro.). This language presents two questions: What is provided under sub. (6r)? What may DNR authorize by rule or permit?

Regarding the exception provided in sub. (6r), that subsection sets forth procedures for a state agency to follow when it conducts, approves, or funds an activity that may affect an endangered or threatened species. Taking a plant may be allowed by DNR under sub. (6r), but only if the conditions of that subsection are met. *See* Wis. Stat. § 29.604(6r). Thus, sub. (6r) does not exempt state agencies from the statute. Rather, it provides an alternative procedure that state agencies may be able to follow when their actions directly or indirectly affect listed plants. Responding here to your specific question, Wis. Stat. § 29.604 applies to state-listed endangered and threatened plants growing on public property. If a state agency is involved, the application of Wis. Stat. § 29.604 may be under sub. (6r), rather than under sub. (4) directly.

Regarding the exception stated in sub. (4)(intro.) for what is “permitted by departmental rule or permit,” subs. (6) and (6m) give DNR authority to issue permits allowing listed plants to be adversely affected under certain specified circumstances. In my opinion, however, DNR may not by rule or permit allow what sub. (4) prohibits unless DNR is expressly authorized to do so under sub. (6) or (6m). Again, responding to your specific question, Wis. Stat. § 29.604 applies to state-listed endangered and threatened plants growing on public property. If a rule or permit is authorized under sub. (6) or (6m), the application of Wis. Stat. § 29.604 may be under sub. (6) or (6m), rather than under sub. (4) directly.

Wisconsin Statute § 29.604(6)(a) gives DNR authority to adopt rules setting the terms and conditions under which it may issue a permit authorizing the “taking, exportation, transportation or possession of any . . . wild plant on the list of endangered and threatened species for zoological, educational or scientific purposes, [or] for propagation . . . in captivity for

Mr. George E. Meyer, Secretary
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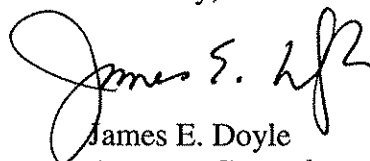
preservation purposes.” Beyond the rulemaking authority delegated to it, DNR lacks general rulemaking authority enabling it to carve out other exceptions to sub. (4). Subsection (4)(intro.) may not be read more broadly to delegate to DNR rulemaking or permit issuing authority without any accompanying standards governing its exercise. See *Niagara of Wis. Paper Corp. v. DNR*, 84 Wis. 2d 32, 48, 268 N.W.2d 153 (1978) (“agency charged with administering a law may not substitute its own policy for that of the legislature”); *Schmidt v. Local Affairs & Development Dept.*, 39 Wis. 2d 46, 59, 158 N.W.2d 306 (1968) (“power . . . to fix the limits within which the law shall operate—is a power which is vested by our constitutions in the legislature and may not be delegated”); *Clintonville Transfer Line v. Public Service Comm.*, 248 Wis. 59, 68-69, 21 N.W.2d 5 (1945).

Second, there is the “in the course of forestry or agricultural practices or in the construction, operation or maintenance of a utility facility” exception provided in Wis. Stat. § 29.604(4)(c). The forestry and agricultural practices exceptions appear clear. Listed plants may be affected by forestry or agriculture. The “utility facility” exception may be less clear. “Utility facility” is not defined in Wis. Stat. § 29.604, but it is defined in two other sections of the Wisconsin statutes. In Wis. Stat. §§ 30.40(19) and 84.063(1)(b), “utility facility” is defined to mean a structure used for the transmission, distribution, or delivery of electrical power or light, heat, water, gas, sewer, telegraph, or telecommunications services. Thus, consistent with the use of the term “utility facility” elsewhere in the statutes, only property used for these activities is exempt from sub. (4). Most governmentally owned lands and most governmental activities do not fall within the forestry, agricultural, or utility facility exceptions stated in the final portion of sub. (4)(c)(intro.).

Finally, Wis. Stat. § 29.604 is not ambiguous, and so a review of its legislative history is unnecessary. See *State v. Badzmirowski*, 171 Wis. 2d 260, 263, 490 N.W.2d 784 (Ct. App. 1992). However, a review of that legislative history further supports a broad reading of the prohibitions in sub. (4)(c) and a narrow reading of the exceptions to those prohibitions.

For these reasons, I conclude that Wis. Stat. § 29.604, which is the Wisconsin endangered and threatened species statute, applies to protect state-listed endangered and threatened plants growing on public property.

Sincerely,


James E. Doyle
Attorney General

JED:PP:tw

Mr. George E. Meyer, Secretary
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CAPTION:

Wisconsin Stat. § 29.604, which is the Wisconsin endangered and threatened species statute, applies to protect state-listed endangered and threatened plants growing on public property.



STATE OF WISCONSIN
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Deputy Attorney General

October 4, 2000

OAG - 4 - 00

The Honorable Chuck Chvala
Senate Majority Leader
211 South, State Capitol
Madison, WI 53702

Dear Senator Chvala:

The Senate Committee on Organization asks whether municipal courts have authority to order the parents of a juvenile to pay a forfeiture imposed on their child for violating a non-traffic municipal ordinance. I have concluded that they do.

In addition to the inherent powers possessed by all courts to enable them to perform their judicial functions, municipal courts have other powers conferred by statute. *See City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 747-48, 595 N.W.2d 635 (1999); *State ex rel. Lang v. Municipal Justice Court*, 50 Wis. 2d 21, 25, 183 N.W.2d 43 (1971). These additional powers need not be conferred expressly, directly and unequivocally, but may be derived from a reasonable construction of the statutes. *Cf. Milwaukee v. Kilgore*, 193 Wis. 2d 168, 183-87, 190-91, 532 N.W.2d 690 (1995) (construing ambiguous statutes to confer on municipal courts power to suspend driver's license for failure to pay forfeiture imposed for violation of non-traffic municipal ordinance).

Although no single provision directly authorizes municipal courts to order parents to pay their children's forfeitures, this power may be found in the statutes by following a marked trail through a series of sections beginning with the one which makes parents liable for the forfeitures.

The Juvenile Justice Code, Wis. Stat. § 938.45(1r)(b), provides that "[i]n a proceeding in which the court has determined under s. . . . 938.343(2)" to impose a forfeiture on a juvenile, "the court may order a parent who has custody . . . of the juvenile to pay the forfeiture."

The Juvenile Justice Code defines a "court" as the juvenile court, or in the case of a juvenile who is subject to Wis. Stat. § 938.17(2), a municipal court. *See* Wis. Stat. § 938.02(2m). Wisconsin Stat. § 938.17(2) gives municipal courts concurrent jurisdiction with juvenile courts in cases involving non-traffic municipal ordinance violations, including jurisdiction to enter any of the dispositional orders permitted under Wis. Stat. § 938.343. *See* Wis. Stat. § 938.17(2)(d). Wisconsin Stat. § 938.343(2) permits a court to impose a forfeiture on a juvenile for violating a non-traffic municipal ordinance.

The Honorable Chuck Chvala
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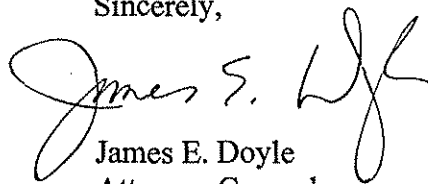
Thus, a municipal court is a court which can determine to impose a forfeiture on a juvenile in a proceeding under Wis. Stat. § 938.343(2). And because the municipal court can impose a forfeiture on a juvenile under this section, it is a court which may order the parents of the juvenile offender to pay the forfeiture under Wis. Stat. § 938.45(1r)(b).

This conclusion is confirmed by Wis. Stat. § 895.035 which is titled "Parental liability for acts of minor child." Wisconsin Stat. § 895.035(2m)(b) provides that if either a juvenile or the juvenile's parent fails to pay a forfeiture ordered by either a juvenile court or a municipal court, the amount of the forfeiture may be docketed as a judgment against both the juvenile and the parent. This section obviously assumes that a municipal court can order a parent to pay a forfeiture assessed against the parent's child.

Moreover, any other conclusion would result in an unreasonable dichotomy, something to be scrupulously avoided in interpreting statutes. *See generally State v. Timm*, 163 Wis. 2d 894, 899, 472 N.W.2d 593 (Ct. App. 1991). There is no question that under Wis. Stat. § 938.45(1r)(b) a juvenile court can order the parents of a juvenile to pay a forfeiture imposed on their child for violating a non-traffic municipal ordinance. There is no logical reason why parents should be required to pay a forfeiture imposed on their child by a juvenile court, but not be required to pay a forfeiture imposed for the same act violating the same ordinance simply because the forfeiture was imposed by a municipal court having concurrent jurisdiction to impose the forfeiture on their child. *Cf. Trewhella v. Fiedler*, 185 Wis. 2d 499, 525, 517 N.W.2d 689 (Ct. App. 1994), *aff'd sub nom. Kilgore*, 193 Wis. 2d 168 (respondents do not explain how municipal courts could have been given authority to order forfeitures but not given power to enforce their orders in the manner the Legislature explicitly established).

Municipal courts have statutory authority to order the parents of a juvenile to pay a forfeiture imposed on their child for violating a non-traffic municipal ordinance.

Sincerely,



James E. Doyle
Attorney General

JED:TJB:klp

CAPTION:

Municipal courts have statutory authority to order the parents of a juvenile to pay a forfeiture imposed on their child for violating a non-traffic municipal ordinance.