



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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June 12, 2012

OAG—01—12

Mr. Scott M. Corbett  
Corporation Counsel  
Marathon County  
500 Forest Street, Rm. B134  
Wausau, WI 54403-5568

Dear Mr. Corbett:

¶ 1. You indicate that your county has established a solid waste management department and that the solid waste management director is the head of that department. You ask whether the county administrator or the county solid waste management board possesses statutory authority to appoint the director of the county solid waste management department and whether the director or the board supervises the operation of the department.

¶ 2. In my opinion, the county administrator possesses statutory authority to appoint and supervise the solid waste management director. The director supervises the operation of the department. The board is purely an advisory and policy-making body.

ANALYSIS

¶ 3. The county board “may create a solid waste management board to operate the [solid waste management] system . . . composed of not less than 9 nor more than 15 persons of recognized ability and demonstrated interest in the problems of solid waste management, but not more than 5 of the board members may be appointed from the county board of supervisors.” Wis. Stat. § 59.70(2). The solid waste management board has broad statutory authority over all aspects of solid waste operations, including but not limited to the authority to acquire real property and equipment, to enact solid waste ordinances, and to impose or charge fees. See Wis. Stat. § 59.70(2)(a)-(p). The Legislature did not designate the solid waste management board to be a county department head.

¶ 4. Wisconsin Stat. § 59.70(2) provides that the solid waste management board “may employ a manager for the system.” The materials that you have submitted suggest that in your county the solid waste management director is the head of the solid waste management department and is also the “system manager” within the meaning of Wis. Stat. § 59.70(2).

¶ 5. Wisconsin Stat. § 59.18(2)(a) provides that the county administrator “[c]oordinate[s] and direct[s] all administrative and management functions of the county government **not otherwise vested by law in boards or commissions**, or in other elected officers.”<sup>1</sup> The next subsection of the county administrator statute, Wis. Stat. § 59.18(2)(b), provides that the administrator “shall . . . appoint and supervise all department heads where the law provides that the appointment shall be made by a board or commission[.]” The solid waste management board is a “board” within the meaning of Wis. Stat. § 59.18(2)(b). *See* 76 Op. Att’y Gen. 173, 175 (1987) (citing 61 Op. Att’y Gen. 116, 119-20 (1972), for the proposition “that the Legislature used the words ‘boards and commissions’ advisedly to the exclusion of ‘[county board] committees[.]’”). If I am correct that the system manager in your county is also the department head, then your county administrator appoints and supervises him.<sup>2</sup>

¶ 6. With respect to the functions that the board can perform in a county with a county administrator, Wis. Stat. § 59.18(2)(b) provides: “Notwithstanding any statutory provision that a board or commission supervise the administration of a department, the department head shall supervise the administration of the department and the board or commission shall perform any advisory or policy-making function authorized by statute.” Wisconsin Stat. § 59.18(2)(b) transfers the authority to supervise the administration of county departments from boards and commissions to department heads appointed by the county administrator. Wisconsin Stat. § 59.18(2) therefore entirely negates Wis. Stat. § 59.70(2) insofar as it provides that the board may “employ” a system manager. In a county with a county administrator, the solid waste management board is purely an advisory body to the county administrator and to the county board and a policy-making body for the solid waste management department as a whole.

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<sup>1</sup>You note that the language in Wis. Stat. § 59.18(2)(a) contrasts with the first sentence of Wis. Stat. § 59.17(2)(a), which provides that a county executive in a county with a population of under 500,000 “coordinate[s] and direct[s] all administrative and management functions of the county government not otherwise vested by law in other elected officers,” without any exception for boards or commissions. The language concerning boards and commissions was deleted from the county executive statute in 1985 Wisconsin Act 29. *See* 77 Op. Att’y Gen. 98 (1988) (concluding that in a county with a county executive, the solid waste management board is purely an advisory or policy-making body). In those rare instances in which the Legislature designates a board itself or a commission itself as a county department head, supervisory and management authority is not transferred from the board or commission to a county administrator under Wis. Stat. § 59.18(2)(a).

<sup>2</sup>Even if your county has both a solid waste management director who is a department head and a system manager who is not, it is doubtful that the appointment of a system manager constitutes an advisory or policy-making function that the board is authorized to perform. *See* Wis. Stat. § 59.18(2)(b); *cf.* OAG-01-10 (January 28, 2010), ¶ 7 (“Selecting or appointing an individual to perform a particular task or function in this context is an organizational or administrative power.”).

**CONCLUSION**

¶ 7. I therefore conclude that in a county that has a county administrator, the administrator possesses statutory authority to appoint the director or system manager of a county solid waste management department as department head and to supervise that department head. The person who is appointed department head supervises the operation of the department. The county solid waste management board is purely an advisory and policy-making body that cannot exercise administrative or managerial authority over the solid waste management department.

Sincerely,



J.B. VAN HOLLEN  
Attorney General

JBVH:FTC:cla



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October 4, 2012

OAG—02—12

Mr. Mark Gottlieb  
Secretary  
Wisconsin Department of Transportation  
4802 Sheboygan Avenue, Rm. 120B  
Madison, WI 53705

Dear Mr. Gottlieb:

¶ 1. You have asked for advice concerning the applicability of a new federal policy, the U.S. Department of Homeland Security's "Deferred Action for Childhood Arrivals" ("DACA"), to the issuance of an operator's license under Wisconsin law. I conclude that an applicant for a standard driver's license may prove legal presence in the United States by providing evidence of approved deferred action status under the new policy. The license expires two years from the date when deferred action status was granted.

¶ 2. The immigration laws have long given the U.S. Attorney General discretion to permit certain otherwise-removable aliens to remain in the United States. *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2015 (2012). Deferred action represents an exercise of prosecutorial discretion to defer removal action against an individual who is unlawfully present in the United States:

[T]he INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation. This commendable exercise in administrative discretion, developed without express statutory authorization, originally was known as nonpriority and is now designated as deferred action. A case may be selected for deferred action treatment at any stage of the administrative process. Approval of deferred action status means that . . . no action will thereafter be taken to proceed against an apparently deportable alien, even on grounds normally regarded as aggravated.

*Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (quotes and citation omitted).

¶ 3. On June 15, 2012, Secretary of U.S. Homeland Security Janet Napolitano issued a new policy making certain illegal immigrants eligible for "Deferred Action Status."

Secretary Napolitano detailed this policy in a memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” issued to U.S. Customs and Border Protection, U.S. Citizenship and Immigration Services, and U.S. Immigration and Customs Enforcement. The memorandum sets forth a specific list of criteria for deferred action, including (1) arrival in the U.S. before the age of sixteen; (2) continuous residence in the U.S. for at least five years prior to the date of the memorandum; (3) current student, high school graduate, recipient of a general education development certificate, or honorably discharged veteran; (4) not convicted of a felony, significant misdemeanor, multiple misdemeanors, or otherwise a threat to national security or public safety; and (5) not above the age of 30. *See* Secretary Napolitano Memo (June 15, 2012), available at [www.uscis.gov/childhoodarrivals](http://www.uscis.gov/childhoodarrivals) (last visited Sept. 12, 2012).

¶ 4. On August 15, 2012, the Department of Homeland Security began accepting applications for deferred action status under the new criteria. A successful applicant will receive a notice of decision from Homeland Security reflecting that the individual has approved deferred action status. An applicant’s status under the program expires two years from the date of the decision. *See* DHS Secretary Napolitano’s Memo at 2-3.

¶ 5. Wisconsin law requires an applicant for a driver’s license to prove citizenship or legal presence in the United States. Wisconsin Stat. § 343.14(2)(er)1. provides that an application must include “[d]ocumentary proof that the individual is a citizen of the United States or documentary proof that the individual is legally present in the United States.” One of the ways an applicant may prove legal presence is by providing documentary proof of “approved deferred action status.” Wis. Stat. § 343.14(2)(er)2.

¶ 6. I conclude that a notice of approved deferred action status issued pursuant to the Deferred Action for Childhood Arrivals program constitutes satisfactory proof of legal presence under Wis. Stat. § 343.14(2)(er)2. A successful applicant under the federal program will have proof of deferred action status, which tracks the deferred action status permitted to serve as proof of legal residence under Wis. Stat. § 343.14(2)(er)2.

¶ 7. I also conclude that a license issued by the Department of Transportation based on such notice will expire two years from the date when the notice was issued. Wisconsin Stat. § 343.20(1m) provides that any person who provided documentary proof under Wis. Stat. § 343.14(2)(er)2., such as proof of approved deferred action status, must be issued a license that expires on “the date that the person’s legal presence in the United States is no longer

Mr. Mark Gottlieb  
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authorized[.]” If an applicant relies on approved deferred action status to prove legal presence, the license must expire two years from the date when that status was approved.

Sincerely,

A handwritten signature in blue ink that reads "J.B. Van Hollen". The signature is fluid and cursive, with a long horizontal stroke at the end.

J.B. VAN HOLLEN  
Attorney General

JBVH:DL:CG:cla



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October 11, 2012

OAG-03-12

Mr. Robert D. Zapf  
District Attorney  
Kenosha County  
912 56th Street  
Kenosha, WI 53140

Dear Mr. Zapf:

¶ 1. You indicate that your office would like to prosecute certain worthless check offenses as civil county ordinance violations rather than as criminal cases if restitution can be obtained. Wisconsin Stat. § 59.54(22) authorizes county boards to enact ordinances imposing civil forfeitures for conduct that is the same or similar to that prohibited by Wis. Stat. chs. 941 to 948. Pursuant to Wis. Stat. § 59.54(22), your county has enacted an ordinance that is in conformity with Wis. Stat. § 943.24(5)(b), the criminal statute prohibiting the issuance of worthless checks. Wisconsin Stat. § 59.54(22) is silent on whether circuit courts may award restitution for violations of county ordinances enacted under that statute.

#### QUESTION PRESENTED AND BRIEF ANSWER

¶ 2. You ask whether a circuit court can award restitution in a civil forfeiture proceeding if the court determines that the defendant violated a county ordinance that is in conformity with Wis. Stat. § 943.24(5)(b).

¶ 3. In my opinion, a circuit court can award restitution of up to \$10,000 in such a proceeding.

#### ANALYSIS

¶ 4. Wisconsin Stat. § 943.24(5)(b) provides in part: "In actions concerning violations of ordinances in conformity with this section, a judge may order a violator to make restitution under s. 800.093." You express two concerns about the applicability of Wis. Stat. § 943.24(5)(b) to civil prosecutions for violation of your county's worthless check ordinance. First, you note that Wis. Stat. § 800.93(1) refers only to municipal court, while county ordinance violation cases are heard in circuit court. Second, you are concerned that the victim in a worthless check case may not incur "damage to the property" within the meaning of Wis. Stat. § 800.093(1)(b).

¶ 5. Your first concern is that a circuit court is not a “municipal court” within the meaning of Wis. Stat. § 800.093(1). Wisconsin Stat. § 943.24 provides the statutory authority for a circuit court judge to order restitution in cases concerning violations of ordinances in conformity with that provision. That statute authorizes any “judge” to award restitution, using the *procedure* set forth in Wis. Stat. § 800.093. The statute does not define “judge,” but the general statutory definition of “judge” includes a circuit judge. Wis. Stat. § 990.01(17m). Thus, although Wis. Stat. § 943.24 references the procedures spelled out in Wis. Stat. § 800.093, which discusses municipal courts, the authority it confers on any “judge” continues to apply. A circuit court judge may impose restitution under Wis. Stat. § 943.24, utilizing the procedures provided for by Wis. Stat. § 800.093.

¶ 6. Wisconsin Stat. § 66.0114(1)(c) supports this conclusion. Wisconsin Stat. § 66.0114(1) authorizes a court to impose restitution under Wis. Stat. § 800.093 in a forfeiture action based on a violation of an ordinance. While the provision does not explicitly state that it includes actions based on a violation of a county ordinance, Wis. Stat. § 799.01(1)(b) provides that any “different procedure” prescribed in Wis. Stat. ch. 66 “shall apply equally to the state, a county or a municipality regardless of any limitation contained therein.” The restitution procedures set forth in Wis. Stat. ch. 66 therefore apply to forfeiture actions based on a violation of a county ordinance. *See* 77 Op. Att’y Gen. 270, 271 (1988).

¶ 7. Your second concern is that Wis. Stat. § 800.093(1)(b) uses the phrase “damage to the property of . . . a person other than the defendant,” which might not include loss of property like that incurred by the victim of a worthless check. While Wis. Stat. § 800.093(1)(b) does not use the term “loss,” subsections (3) and (5) of Wis. Stat. § 800.093 do. Wisconsin Stat. § 800.093(3) provides for specific forms of restitution “[i]f the violation resulted in damage to or loss . . . of property[.]” Wisconsin Stat. § 800.093(3)(a) permits the court to require the defendant to “[r]eturn the property to the owner or the owner’s designee.” Wisconsin Stat. § 800.093(5)(a) permits the court to award special damages, including “the money equivalent of loss resulting from property taken[.]” These provisions spell out the calculation of the restitution and nature of the remedy for property loss. If property loss were not among the types of damage compensable through restitution under Wis. Stat. § 800.093, there would be no need for these specific provisions. By providing criteria and procedures for compensating property loss, subsections (3) and (5) give meaning to “damage to property” in Wis. Stat. § 800.093(1)(b).

¶ 8. In addition, much of the language in Wis. Stat. § 800.093 mirrors language in Wis. Stat. § 973.20, the criminal restitution statute. The criminal restitution statute allows compensation for property loss. Wisconsin Stat. § 973.20(2), which provides that restitution is available “[i]f a crime considered at sentencing resulted in damage to or loss or destruction of property . . .,” is identical to language in Wis. Stat. § 800.093(3). Both Wis. Stat. § 800.093(5)(a) and Wis. Stat. § 973.20(5)(a) permit a court to award restitution in the form of “special damages.” The scope of restitution available under Wis. Stat. § 800.093 thus is the

same as the scope of restitution available under parallel restitution provisions for criminal cases under Wis. Stat. § 973.20.

¶ 9. Under the criminal restitution statute, “special damages” represent the victim’s readily ascertainable pecuniary losses that could be recovered in a civil action against the person that committed the crime. *See State v. Johnson*, 2005 WI App 201, ¶ 12, 287 Wis. 2d 381, 704 N.W.2d 625. The purpose of the criminal restitution statute is to return the crime victim to the position that he was in before the defendant caused the injury. *Johnson*, 287 Wis. 2d 381, ¶ 14. The phrase “special damages” in the criminal restitution statute is broadly and liberally construed to allow the victim to recover the losses caused by the criminal conduct. *Johnson*, 287 Wis. 2d 381, ¶ 14. The phrase “special damages” in Wis. Stat. § 800.093(5)(a) must similarly be liberally construed to permit the court to return the victim to the position that he was in before the ordinance violation occurred.

¶ 10. Wisconsin Stat. § 800.093 provides for restitution for the loss of property. A circuit court therefore can award restitution for the loss of property in a worthless check case in civil forfeiture cases in which the defendant violated a county ordinance in conformity with Wis. Stat. § 943.24(5)(b).

¶ 11. Finally, the Legislature has capped the amount of restitution that can be awarded in municipal ordinance forfeiture proceedings. Wisconsin Stat. § 800.093(2) provides in part: “A court may not order a defendant to pay more than the amount specified in s. 799.01(1)(d) in restitution under this section.” *See also* Wis. Stat. § 800.093(4)(intro.) and (5)(intro.). The dollar limit contained in Wis. Stat. § 799.01(1)(d), as amended by 2011 Wisconsin Act 32, sec. 3484n, is \$10,000. A circuit court therefore can award restitution of up to \$10,000 in a civil forfeiture action.

### CONCLUSION

¶ 12. I conclude that a circuit court can award restitution of up to \$10,000 in a civil forfeiture proceeding if the court determines that the defendant violated a county ordinance that is in conformity with Wis. Stat. § 943.24(5)(b).

Sincerely,



J.B. VAN HOLLEN  
Attorney General



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December 11, 2012

OAG—04—12

Mr. Grant P. Thomas  
Corporation Counsel  
Door County  
421 Nebraska Street  
Sturgeon Bay, WI 54235

Dear Mr. Thomas:

¶ 1. You have asked for advice concerning the duty of a register of deeds to accept self-created “land patents” and “updates of land patents.” For a number of years, some individuals have attempted to record or file a “land patent,” “update of land patent,” or other similarly-titled instrument with registers of deeds, often in an apparent attempt to defeat a foreclosure action or eliminate a mortgage debt. I conclude that a register of deeds has no duty to record such documents.

¶ 2. Wisconsin Stat. § 59.43(1) specifies the duties of the register of deeds. Regarding recording, it provides:

The register of deeds shall:

(a) Record or cause to be recorded in suitable books to be kept in his or her office, correctly and legibly all deeds, mortgages, instruments and writings authorized by law to be recorded in his or her office and left with him or her for that purpose . . . .

The statute requires the recording only of documents that are “authorized by law to be recorded.”

¶ 3. The recording statute, Wis. Stat. § 706.05(1), governs which documents relating to real property are authorized by law to be recorded. It provides that “every conveyance, and every other instrument which affects title to land in this state, shall be entitled to record in the office of the register of deeds[.]” “Conveyance” is a written instrument evidencing a transaction governed by Wis. Stat. ch. 706, which governs transactions by which an interest in land is created, aliened, mortgaged, assigned, or otherwise affected. Wis. Stat. §§ 706.01(4), 706.001(1). Thus, whether the document would be classified as a conveyance or other

instrument, the question is whether self-created land patents and similarly-titled documents “affect an interest in land.”<sup>1</sup>

¶ 4. They do not. A land patent is the instrument by which the government conveys title to portions of the public domain to private individuals. *United States v. Shumway*, 199 F.3d 1093, 1096 (9th Cir. 1999); BLACK’S LAW DICTIONARY 1234 (9th ed. 2009). A land patent conveys fee simple ownership from the government to the patentee in previously public land. *In re Johnson*, 61 B.R. 858, 863 (Bankr. D. S.D. 1986); *Murphy v. Burch*, 205 P.3d 289, 292 (Cal. 2009). Once a land patent has been issued and title conveyed, there is no provision, or need for, any “update” to the patent. *United States v. Manke*, 2012 WL 1898757 (W.D. Mo. 2012), at \*6.

¶ 5. “Land patents,” “updates of land patent” and other, similarly-titled documents filed by private individuals are not true land patents. They are not grants of public land from the government to private individuals. They purport to be grants of private land from private individuals to themselves or other private individuals. Numerous courts have concluded that a “land patent” self-created by an individual is a legal nullity. The court in *Hilgefurd v. Peoples Bank*, 607 F. Supp. 536, 538 (N.D. Ind. 1985) (emphasis in original), described this invalidity:

[T]he “land patent” attached to plaintiffs’ various filings is a grant of a land patent from the plaintiffs to the plaintiffs. It is, quite simply, an attempt to improve title by saying it is better. The court cannot conceive of a potentially more disruptive force in the world of property law than the ability of a person to get “superior” title to land by simply filling out a document granting himself a “land patent” and then filing it with the recorder of deeds. Such self-serving, gratuitous activity *does not, cannot and will not* be sufficient by itself to create good title.

Citing *Hilgefurd*, the Seventh Circuit has also concluded that such filings are legally invalid. *State of Wisconsin v Glick*, 782 F.2d 670, 672 (7th Cir. 1986); *see also Manke*, 2012 WL 1898757 at \*6; *Hamilton v. Noble Energy, Inc.*, 220 P.3d 1010, 1013-14 (Colo. App. 2009) (a self-created “land patent” fails to acquire or otherwise transfer any interest in the property); *Britt v. Fed. Land Bank Ass’n of St. Louis*, 505 N.E.2d 387, 391 (Ill. App. 1987) (collecting cases and finding individual’s claim frivolous); *Fed. Land Bank of Jackson v. Kennedy*, 662 F. Supp. 787, 792 (N.D. Miss. 1987) (individual’s self-created “declaration of land patent” void); *Nixon v. Phillipoff*, 615 F. Supp. 890, 894 (N.D. Ind. 1985) (“This court has considered Nixon’s land patent and found it to be a frivolous legal nullity that did not and could not affect the title to the mortgaged land at issue . . .”).

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<sup>1</sup>In using the term “self-created land patent,” this opinion refers to a document not executed by an authorized government representative and which does not relate to a transfer of an interest by a governmental agency.

¶ 6. A legally invalid document affects no interest in land. Only instruments that affect an interest in land are entitled to be recorded under Wis. Stat. § 706.05(1). Since self-created land patents affect no interest in land, they are not entitled to recording under Wis. Stat. § 706.05(1).

¶ 7. Without authorization to be recorded, self-created land patents are not among the documents that the register of deeds is required to record under Wis. Stat. § 59.43(1). Where the face of an instrument indicates that it is not among the documents authorized by law to be filed, a register of deeds has no obligation to record it. *Appliance Buyers Credit Corp. v. Crivello*, 43 Wis. 2d 241, 251, 168 N.W.2d 892 (1969) (holding that the Milwaukee register of deeds had no obligation to record a document purporting to affect only property that was not entitled by law to be recorded). A prior Attorney General opinion has also concluded that, where the face of an instrument evidences its invalidity, a register of deeds has no obligation to record the document and should refuse to do so. 69 Op. Att'y Gen. 58, 63 (1980).

¶ 8. I conclude that, because self-created land patents and updates to land patents are invalid on their face, they are not instruments entitled to recording under Wis. Stat. § 706.05(1). Because they are not authorized by law to be recorded, they are not among the instruments or writings that a register of deeds must record under Wis. Stat. § 59.43(1). A register of deeds has no duty to record these documents.

Sincerely,



J.B. VAN HOLLEN  
Attorney General