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DEPARTMENT OF JUSTICE

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January 2, 2019

OAG–01–19

Mr. Brian J. Desmond
Corporation Counsel
Oneida County Courthouse
Post Office Box 400
Rhinelander, WI 54501-0400

Dear Mr. Desmond:

¶ 1. You have requested an opinion on whether a county can impose a single-family zoning provision from its general zoning ordinance, enacted under Wis. Stat. § 59.69(5), in its shoreland zoning ordinance, enacted under Wis. Stat. § 59.692(1c), in a town that has not adopted the county's general zoning ordinance under Wis. Stat. § 59.69(5)(c). Specifically, Oneida County's Zoning and Shoreland Protection Ordinance provides that the provisions of its general zoning ordinance "shall apply in the shorelands through the County, to the extent applicable." Oneida County, Wis., *Gen. Code* art. 9.90C. Oneida County zoned the shorelands surrounding two lakes for single-family housing, a zoning use in its general zoning ordinance, based on petitions filed by landowners under Wis. Stat. § 59.69(5)(e). The two lakes are in towns that have not adopted the county's general zoning ordinance.

¶ 2. I conclude that Oneida County has the authority to zone these shorelands for single-family housing because such zoning is consistent with the express powers granted to counties and does not violate any of the specific restrictions on shoreland zoning in Wis. Stat. § 59.692. Further, a county's authority to zone the shorelands is not limited by a town's failure to adopt the county's general zoning ordinance because Wis. Stat. § 59.692(2) grants counties the authority to zone shorelands to the exclusion of towns.

¶ 3. You also request an opinion on whether Oneida County is violating the equal protection clause by zoning only two lakes in the county for single-family housing. I decline to offer an opinion on this question because it would involve offering an opinion on the legislative judgment of the Oneida County Board. In addition, any

opinion on a potential equal protection claim would be entirely speculative. This legal issue is fact-specific because the county board exercises its legislative judgment on zoning on a case-by-case basis depending on the specific facts of each zoning decision. I would not be able to offer an opinion in the absence of specific facts.

LEGAL AND FACTUAL BACKGROUND

¶ 4. Under Wisconsin law, "a county board has only such powers as are expressly conferred upon it or necessarily implied from the powers expressly given or from the nature of the grant of power." *Town of Vernon v. Waukesha Cty.*, 102 Wis. 2d 686, 689, 307 N.W.2d 227 (1981). The Legislature granted counties general zoning powers in Wis. Stat § 59.69 and shoreland zoning powers in Wis. Stat. § 59.692. As the Wisconsin Supreme Court requires, I begin with the plain language of these statutes. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110.

¶ 5. Counties have general zoning authority under Wis. Stat. § 59.69(5), which grants counties the power to adopt a general zoning ordinance. The general zoning ordinance, however, "shall not be effective in any town until it has been approved by the town board." Wis. Stat. § 59.69(5)(c).

¶ 6. Counties also have separate statutory authority over zoning in shoreland areas within the county. Wisconsin Stat. § 59.692(1c) provides that "[t]o effect the purposes of s. 281.31 and to promote the public health, safety and general welfare, each county shall zone by ordinance all shorelands in its unincorporated area." The purposes of Wis. Stat. § 281.31 include "to further the maintenance of safe and healthful conditions; prevent and control water pollution; protect spawning grounds, fish and aquatic life; control building sites, placement of structure and land uses and reserve shore cover and natural beauty." Wis. Stat. § 281.31(1). "Shorelands" are defined as one thousand feet from the high-water mark of lakes, ponds, or flowages, and three hundred feet from the high-water mark of a river or stream. Wis. Stat. § 59.692(1)(b)1.–2. The shoreland zoning ordinance "may be enacted separately from ordinances enacted under s. 59.69." Wis. Stat. § 59.692(1c). Unlike a general zoning ordinance, a shoreland zoning ordinance "shall not require approval or be subject to disapproval by any town or town board." Wis. Stat. § 59.692(2)(a). The other provisions of Wis. Stat. § 59.69 governing general zoning ordinances apply to the shoreland zoning ordinances and amendments, unless otherwise specified. Wis. Stat. § 59.692(2)(a).

¶ 7. The Legislature has restricted counties' authority over shoreland zoning in several ways, perhaps most importantly in providing that a county shoreland zoning ordinance "may not regulate a matter more restrictively than the matter is regulated by a shoreland zoning standard" issued by the Department of Natural Resources. Wis. Stat. § 59.692(1d)(a). Shoreland zoning standards are codified at Wis. Admin. Code § NR 115.05. The shoreland zoning statute contains several other specific limitations on counties' shoreland zoning power. *E.g.*, Wis. Stat. § 59.692(1f), (1k)(am), (1k)(b), (1n)(am), (1n)(d).

¶ 8. The county board may amend a zoning ordinance upon a petition "made by a property owner in the area to be affected by the amendment, by the town board of any town in which the ordinance is in effect; by any member of the board or by the agency designated by the board to consider county zoning matters." Wis. Stat. § 59.69(5)(e)1. After following the procedures for a public hearing and town approval in Wis. Stat. § 59.69(5)(e)2.–3m., the county zoning agency approves, modifies or disapproves the petition, Wis. Stat. § 59.69(5)(e)4., after which the county board can enact the zoning agency's report, enact it with amendment, deny it, or refer it back to the zoning agency. Wis. Stat. § 59.69(5)(e)5.

¶ 9. According to your letter, Oneida County has enacted a Zoning and Shoreland Protection Ordinance that includes both general zoning provisions, enacted pursuant to Wis. Stat. § 59.69(5), and a shoreland zoning provision, enacted pursuant to Wis. Stat. § 59.692(1c). *See* Oneida County, Wis., *Gen. Code* art. 9. The shoreland zoning article of the ordinance provides that its general zoning ordinance "shall apply in the shorelands through the County . . . . In the event of a conflict between the general zoning provisions and the Shoreland Protection Provisions, the more restrictive provisions shall apply." Oneida County, Wis., *Gen. Code* art. 9.90E.

¶ 10. In 1987 and 1991, the Oneida County Board granted petitions under Wis. Stat. § 59.69(5)(e) filed by landowners on two lakes to zone the lakes for single-family housing, a zoning use from the county's general zoning ordinance. *See* Oneida County, Wis., *Gen. Code* art. 9.22. Both lakes are in a town that has not adopted the county's general zoning ordinance under Wis. Stat. § 59.69(5)(c).

DISCUSSION

¶ 11. I conclude that a county may impose a single-family zoning provision from its general zoning ordinances in the shorelands of the county. In Wis. Stat. § 59.692(1c), the Legislature gave counties the authority to "zone by ordinance all shorelands in its unincorporated area[s]." The Wisconsin Court of Appeals has held "the legislature has not only conferred broad legislative power upon counties in the area of shoreland zoning, it appears to require such zoning." *State v. Land Concepts, Ltd.*, 177 Wis. 2d 24, 29, 501 N.W.2d 817 (Ct. App. 1993). The court further ruled that counties can exercise the power so long as there is no "express language elsewhere in the statutes restricting, revoking or withdrawing the power" or the power was otherwise preempted due to incompatibility with state law. *Id.*

¶ 12. Given this authority, a county has broad power to zone the shorelands so long as it is consistent with the limitations imposed in Wis. Stat. § 59.692 and the shoreland zoning standards in Wis. Admin. Code § NR 115.05. As a general matter, nothing in Wis. Stat. §§ 59.69 or 59.692 prohibits a county from incorporating elements from its general zoning ordinance into its shorelands ordinance. In fact, the Legislature suggested the opposite when it mandated that a shoreland zoning ordinance "shall accord and be consistent with any comprehensive zoning plan or general zoning ordinance applicable to the enacting counties, so far as practicable." Wis. Stat. § 59.692(2)(c). The shoreland zoning standards in Wis. Admin. Code § NR 115.05 do not preclude single-family zoning in general. To the extent an individual provision in Oneida County's code regulates a matter more restrictively than a shorelands zoning standard, however, such provision would be preempted by Wis. Stat. § 59.692(1d)(a). While individual provisions in a county's zoning ordinance could be preempted, this does not affect the county's power, as a general matter, to impose single-family zoning in its shorelands.

¶ 13. As it specifically relates to zoning the shorelands surrounding lakes for single-family housing, this type of zoning is consistent with state policy, which provides that "[d]omestic uses shall be generally preferred" in municipal regulation of shorelands. Wis. Stat. § 281.31(5)(a)1. Further, the Oneida County ordinance is consistent with the purposes of Wis. Stat. §§ 59.692(1c) and 281.31 in providing that "the more restrictive provisions shall apply" in the event of a conflict between the shoreland provision and provisions from the general zoning ordinance. Oneida County, Wis., *Gen. Code* art. 9.90C.

¶ 14. A county is not prohibited from imposing elements of its general zoning ordinance in the shorelands because a town has not adopted the county's general zoning ordinance under Wis. Stat. § 59.69(5)(c). Unlike the general zoning ordinance, the shoreland "ordinances and amendments shall not require approval or be subject to disapproval by any town or town board." Wis. Stat. § 59.692(2)(a). This provision "specifically prohibit[s] towns from having authority to approve or disapprove of county shoreland ordinances operating within the town." *Hegwood v. Town of Eagle Zoning Bd. of Appeals*, 2013 WI App 118, ¶ 12, 351 Wis. 2d 196, 839 N.W.2d 111. In fact, "[t]he plain language of the statutory scheme evinces that by enactment of Wis. Stat. §§ 281.31 and 59.692, the legislature intended that towns would not have authority to regulate shorelands," except in circumstances not applicable here. *Id.* ¶ 16. Simply put, the "legislature has given shoreland zoning authority to counties," not towns. *Herman v. Cty. of Walworth*, 2005 WI App 185, ¶ 18, 286 Wis. 2d 449, 703 N.W.2d 720.

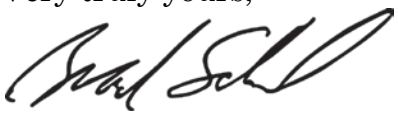
¶ 15. In addition, the county had the authority to amend its shoreland ordinance by petition, the method by which the two lakes were zoned for single-family housing. The shorelands zoning statue provides that "[e]xcept as otherwise specified, all provisions of s. 59.69 apply to ordinances and their amendments enacted under this section whether or not enacted separately from ordinances enacted under s. 59.69." Wis. Stat. § 59.692(2)(a). Thus, the petition process in Wis. Stat. § 59.69(5) applies with equal force to a shorelands ordinance enacted under Wis. Stat. § 59.692 as it does to the general zoning ordinance enacted under Wis. Stat. § 59.69(5).

¶ 16. Because county boards have the authority to zone in the shorelands irrespective of whether a town has adopted the county's general zoning ordinance, a county can incorporate aspects of its general zoning provisions in the shorelands so long as these provisions are consistent with Wis. Stat. § 59.692. Single-family zoning is consistent with the powers granted in Wis. Stat. § 59.692 and does not violate any of the specific limitations on counties' shoreland zoning powers.

¶ 17. I am not offering an opinion on whether the county's zoning of two lakes for single-family housing, while not imposing single-family zoning on other lakes, would violate the equal protection clause. The Wisconsin Supreme Court has held that "[z]oning is legislative action and rezoning by amending the ordinance is equally legislative." *Quinn v. Town of Dodgeville*, 122 Wis. 2d 570, 584, 364 N.W.2d 149 (1985). The Attorney General does not provide opinions on "matters involving the exercise of legislative or executive judgment or the exercise of discretion by public officers." 77 Op. Att'y Gen. Preface (1988). Further, any opinion on this

subject would be speculative because the propriety of the County Board's discretion on zoning depends on the specific facts of each zoning decision. This legal issue is fact-specific, and I would not be able to offer an opinion in the absence of specific facts. It would be inappropriate to offer an opinion on how the Oneida County Board should rule on any future petitions under Wis. Stat. § 59.69(5)(c) landowners may file to change their zoning to single-family housing.

Very truly yours,



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January 2, 2019

OAG–02–19

Mr. Daniel M. Olson
Corporation Counsel
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Baraboo, WI 53913

Dear Mr. Olson:

¶ 1. You ask whether staff at a county jail who are trained to provide some basic emergency care prior to the arrival of medical professionals, but who are not certified by the Department of Health Services (DHS) as emergency medical responders, must comply with a "do–not–resuscitate order" issued to an inmate of a county jail. You ask this question at this time because provisions of the applicable administrative rule, Wis. Admin. Code ch. DHS 125, appear to conflict with the controlling statute, Wis. Stat. § 154.19. The statute was recently amended, see 2017 Wis. Act 12 ("Act 12"), but the rule has not been updated to reflect the statutory changes. I conclude that the statute overrides any conflicting provisions contained in the rule. Specifically, the statute does not require jail staff who are not emergency medical responders to follow a do–not–resuscitate order. The language in the rule that imposes that obligation on "first responders" is therefore unenforceable.[1]

[1] An earlier informal opinion of the Attorney General addressing similar questions to those raised here was based on earlier versions of the applicable statute and rule. I–05–08 (Sept. 4, 2008). That opinion is superseded by this opinion and is hereby withdrawn.

¶ 2. A do–not–resuscitate order is a written order issued by an attending physician to a qualified patient[2] directing "emergency medical services practitioners, emergency medical responders, and emergency health care facilities personnel not to attempt cardiopulmonary resuscitation on a person for whom the order is issued if that person suffers cardiac or respiratory arrest." Wis. Stat. § 154.17(2), *as amended by Act 12*. A person who has been issued a do–not–resuscitate order may wear a do–not–resuscitate order bracelet to convey the fact that he or she has such an order. Wis. Stat. § 154.27(1).

¶ 3. The statutory obligation to follow a do–not–resuscitate order is limited to the three occupations specifically named in the statute: "emergency medical services practitioners, as defined in s. 256.01(5), emergency medical responders, as defined in s. 256.01(4p), and emergency health care facilities personnel." Wis. Stat. § 154.19(3)(a), *as amended by Act 12*. These three occupations are defined. An emergency medical services practitioner is "an emergency medical technician, an advanced emergency medical technician, an emergency medical technician — intermediate, or a paramedic." Wis. Stat. § 256.01(5), *as amended by Act 12*. An emergency medical responder is "a person who is certified by [DHS] as an emergency medical responder," and "who, as a condition of employment or as a member of an organization that provides emergency medical care before hospitalization, provides emergency medical care to a sick, disabled, or injured individual." Wis. Stat. § 256.01(4p), *as amended by Act 12*. Emergency health care facilities personnel include "staff of a hospital emergency room or an urgent care clinic whose duties are to render emergency medical care to sick, disabled or injured persons conveyed to the facility." Wis. Admin. Code § DHS 125.03(5).

[2] A "[q]ualified patient" is a person 18 or older who has any of the following conditions: a terminal condition; "a medical condition such that, were the person to suffer cardiac or pulmonary failure, resuscitation would be unsuccessful in restoring cardiac or respiratory function or the person would experience repeated cardiac or pulmonary failure within a short period before death occurs"; or "a medical condition such that, were the person to suffer cardiac or pulmonary failure, resuscitation of that person would cause significant physical pain or harm that would outweigh the possibility that resuscitation would successfully restore cardiac or respiratory function for an indefinite period of time." Wis. Stat. § 154.17(4).

¶ 4. Under the plain language of the statutes, a do–not–resuscitate order does not bind county jail personnel unless they come within those three occupational definitions. For example, a staff member who is a trained and licensed paramedic will be required to follow the do–not–resuscitate order. *See* Wis. Stat. §§ 154.19(3)(a), 256.01(5), *as amended by Act 12*. However, a staff member who does not come within one of the three statutory categories is not required to follow a do–not–resuscitate order.

¶ 5. You ask whether DHS's administrative rules impose different obligations. To the extent their requirements are inconsistent with the new statutory language, they are without force. Those rules track statutory language that Act 12 superseded.

¶ 6. Prior to the enactment of Act 12, "first responders" were statutorily required to follow do–not–resuscitate order orders. *See* Wis. Stat. § 154.19(3)(a) (2015–16). The term "first responder" was defined by Wis. Stat. §§ 154.17(3m) and 256.01(9) (2015–16). Act 12 eliminated "first responder" from these statutory provisions. The phrase was deleted from section 154.19(3)(a), the provision listing the occupations required to follow do–not–resuscitate order orders. Sections 154.17(3m) and 256.01(9), the provisions that defined "first responder," were deleted from the statutes entirely.

¶ 7. The administrative rules tracked the pre-Act 12 statute by including a definition of "first responder," and directing first responders to follow do–not–resuscitate order orders. *See* Wis. Admin. Code §§ DHS 125.03(7), 125.05(1). Under section DHS 125.03(7), a first responder is "a person who provides emergency medical care to a sick, disabled or injured individual prior to the arrival of an ambulance as a condition of employment or as a member of a first responder service, and who may or may not be certified by [DHS] under [Wis. Admin. Code] ch. DHS 110 to perform defibrillation." The administrative rules have not been revised to conform to the statutory changes in Act 12. Thus, despite the fact that Act 12 removed the "first responder" category from the statutes, the rules maintain the category and require persons coming within the first-responder definition to follow do–not–resuscitate order orders.

¶ 8. The administrative rules exceed DHS's statutory authority because they are more restrictive than the statute. The DHS rules state that chapter DHS 125 is "promulgated under the authority of ss. 154.19(3)(a) and 154.27, Stats." Wis. Admin. Code § DHS 125.01. Section 154.19(3)(a) permits DHS to promulgate only rules governing the "procedures used" by the occupational categories covered by

the statute. It does not authorize DHS to impose the statutory requirement on additional occupational categories. But, whereas the statute requires only three occupational categories to follow do–not–resuscitate order orders, the rules purport to extend that obligation to an additional category—first responders. Significantly, Act 12 did not simply leave first responders off the list of persons obliged to follow these orders; it affirmatively removed them from that list. Before Act 12, first responders were specifically included; after Act 12, they were excluded. To the extent the rules purport to include first responders even though the statutes do not, the statute controls and the rules are unenforceable.

¶ 9. This is the case even though the inconsistent rules were valid when first promulgated. According to Wis. Stat. §§ 227.10 and 227.11, which govern administrative rulemaking, an existing rule that exceeds an agency's authority under a later-enacted or amended statute is no longer enforceable once the statutory change goes into effect. *See* OAG–04–17 (Dec. 8, 2017).

¶ 10. Agency rulemaking authority is subject to specific limits set out in chapter 227. Most generally, "[n]o agency may promulgate a rule which conflicts with state law." Wis. Stat. § 227.10(2). Thus, "[e]ach agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation." Wis. Stat. § 227.11(2)(a). And, pertinent here, "[a] statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision." Wis. Stat. § 227.11(2)(a)3; *see generally* OAG–04–17 (Dec. 8, 2017).

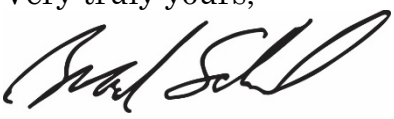
¶ 11. I have applied a three-step analysis to determine whether the first-responder provisions of Wis. Admin. Code ch. DHS 125 impose "a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision." Wis. Stat. § 227.11(2)(a)3. First, I conclude that the statute and rule contain a requirement governing the same subject matter, i.e., the occupations that must follow a do–not–resuscitate order. Second, I conclude that the rule is more restrictive than the statute because it imposes the requirement on a category of professionals not statutorily required to follow do–not–resuscitate order orders. Finally, including first responders among the persons required to follow do–not–resuscitate order orders is not "explicitly required or

explicitly permitted by statute or by a rule that has been promulgated in accordance with" sections 227.10–.30. Wis. Stat. § 227.10(2m). There is no governing statute or rule explicitly requiring or permitting the addition of first responders to the class of occupations that must follow do–not–resuscitate order orders. Thus, I conclude that the chapter DHS 125 requirements regarding first responders are "more restrictive" than those found in the Wisconsin Statutes.

¶ 12. Because the chapter DHS 125 requirements are "more restrictive" than those found in section 154.19, the first-responder provisions of chapter DHS 125 may no longer be enforced or administered. *See* Wis. Stat. § 227.11(2)(a)3. While including first responders in the classes of occupations required to follow do–not–resuscitate order orders was valid when the governing statute included first responders, DHS cannot impose that requirement since Act 12 removed first responders from section 154.19. Because such a rule could not be lawfully "promulgate[d]" today, it can no longer be "enforce[d]" or "administer[ed]" pursuant to section 227.11(2)(a)3.

¶ 13. In summary, county jail staff are not required to follow do–not–resuscitate order orders unless they fall into one of the three occupational categories named in Wis. Stat. § 154.19(3)(a), *as amended by Act 12*.

Very truly yours,



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