



COUNTY OF KENOSHA

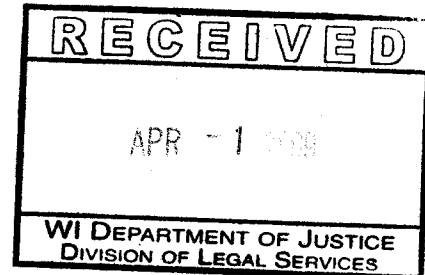
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March 25, 2009

Mr. J.B. Van Holland
Wisconsin Attorney General
114 East, State Capital
Madison, WI 53702



RE: Opinion Request Regarding Authority by
County Board or County Executive to Appoint
Member to Lake District Protection Board

Dear Attorney General Van Holland:

Our Office has been asked whether a County Executive or County Board makes the appointment of a commissioner member to serve as a county representative on a public inland lake district board under section 33.28 of the Wisconsin Statutes. Please see attached opinion from our Office 2009-4 dated March 19, 2009. Our County Board Chairman has requested a review of this opinion by your Office, and therefore we ask that you provide us with your opinion on this matter.

Your anticipated assistance in this regard is most appreciated.

Sincerely,

Frank V. Volpintesta

Cc:
Mr. Joseph D. Clark
Chair of Kenosha County Board of Supervisors

Mr. Jim Kreuser
Kenosha County Executive

DEPT. JUSTICE-

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March 19, 2009

Mr. Jim Kreuser
Kenosha County Executive

RE: County Executive or County Board Authority to Appoint Lake Protection District
Board Member per Sec. 33.28, Statutes
Opinion 2009-4.

Dear Mr. Kreuser:

Opinion Request

Thank you for the letter of March 10, 2009 inquiring on whether a county executive or a county board makes the appointment of a commissioner member to serve as a county representative on a public inland lake district board under section 33.28 of the Wisconsin Statutes. The position in question is for a person to serve on the Board of Commissioners for the District of Powers Lake. Also, thank you for the materials submitted with your question, consisting of statutory references, general information on operation of lake districts, a prior appointment resolution of the Kenosha County Board of Supervisors and approval thereof by the County Executive.

Discussion

BACKGROUND

In the 1990's, an inland lake district was created by the Kenosha County Board of Supervisors to help manage Powers Lake. Most of Powers Lake lies in Kenosha County, and some of it is located in Walworth County. A lake district board shall meet at least quarterly. It has authority and duties as set forth in Chapter 33, Public Inland Waters, Subsections III & IV on Lake Protection and Rehabilitation Projects, and Districts, in the Wisconsin Statutes. It is quite independent, and may sue or be sued, in its own name. Overall, the goal of such district is to improve or protect the quality of an inland lake. See sec. 33.11.

Of the 5-member board which governs such a district, a county gets to appoint one commissioner. (s. 33.28). For the past appointments of this county representative, the Kenosha County Board of Supervisors has, by adopted resolution, appointed a person nominated by the Kenosha County Land Conservation Committee, and the County

Executive has approved such resolution. Our Office has not been previously requested to provide an opinion on this subject, probably because of the unique & specific appointment language in the statute describing how such person is nominated and appointed in s. 33.28.

APPLICABLE LAW

There are two state statutes that are directly relevant to the appointment process to fill this lake district commissioner position. They are somewhat at odds with each other. The first is the specific procedure for appointment of the county representative on the lake district board found in section 33.28(2), which reads as follows:

"33.28. District board of commissioners.

(1) Management of the affairs of the district shall be delegated to a board of commissioners.

(2) The board of commissioners shall consist of:

(a) **One person appointed by the county board who is a member of the county land conservation committee or is nominated by the county land conservation committee and appointed by the county board;**

(b) One member of the governing body of the town, village or city within which the largest portion by valuation of the district lies, appointed by the governing body and owning property within the district if possible; and

(c) Three electors or owners of property within the district elected by secret ballot by the qualified electors and property owners within the district, for staggered 3-year terms. At least one of the elected commissioners shall be a resident of the district. . . ." (Emphasis added.)

The second statute involved is section 59.17, which describes the powers and duties of a county executive. This might be referred to as the "general rule" when considering appointments to boards or commissions under a county executive form of government. The relevant portion is contained in the portion quoted below:

"59.17 County Executive. . . .

(2) DUTIES AND POWERS . . .

(c) Appoint the members of all boards and commissions where appointments are required and where the statutes provide that the appointments are made by the county board or by the chairperson of the county board. All appointments to boards and commissions by the county executive are subject to confirmation by the county board. . . ."

There are no cases directly on point. There are opinions from the Wisconsin Attorney General that fall on either side of the question. One Attorney General opinion that is most relevant is attached for your convenience, OAG 41-87 dated July 13, 1987, written to the Corporation Counsel of Fond du Lac County concerning appointment to a county land conservation committee.

In opinion 41-87 the Attorney General notes that the land conservation committee was (and in 2009 still is) composed of both county board supervisors and citizens at large. See s. 92.06(1). This statute provides that the county board makes the appointment of both the seats held by county board members, and held by citizens at large. While the Attorney General agreed that, in most cases, the county executive appointment statute (now s. 59.17) trumps other statutes which indicate that the county board makes an appointment, he pointed out that this is not always true.

The Attorney General's opinion cites to other opinions which observed an exception for appointments to "committees," because the word "committees" was not included in the county executive statute, even if those committees are created by statutes outside of Chapter 59 on counties, citing 61 OAG 119-120. More significantly, the Attorney General reasoned that the purpose and the legislative history of the "Soil and Water Conservation Laws, as codified in Chapter 92 of the statutes, supported the concept that the land conservation committees are subject to the approval of the county board. The Legislature's enacted public purpose of protection against soil erosion and water pollution must be given effect. The Attorney General concluded that all appointments made to the land conservation committee were to be made by the county board, not the county executive.

Since section 33.28 provides a connection between the county land conservation committee and the special lake district board, we feel the Attorney General's Opinion 41-87 carries persuasive weight in our analysis. However, there are distinctions in the two statutory appointments. Further, we see something of a trend in more recent times to strengthen the powers of a county executive in appointments. See Hart v. Ament, 176 Wis. 2d 694, 500 N.W.2d 312 (1993). See also 70 OAG 181, where the county executive appoints "trustees" even though the word "trustees" is not found in s. 59.17.

It is the task of courts, and of our Office when asked, to harmonize the statutes whenever possible. This rule of statutory construction is described as follows:

"[T]his court has held that "[i]f the potential for conflict between the statutes is present, we will read the statutes to avoid such a conflict if a reasonable construction exists." Kolupar v. Wilde Pontiac Cadillac, Inc., 303 Wis. 2d 258, 735 N.W.2d 93; see also Gerczak v. Estate of Gerczak, 2005 WI App 168, P10, 285 Wis. 2d 397, 702 N.W.2d 72 ("Conflicts between statutes are disfavored and will be held not to exist if the statutes may be otherwise construed."). Not only must we attempt to harmonize statutes if they are seemingly in conflict, we must do so "if it is possible, in a way which will give each full force and effect." City of Milwaukee v. Kilgore, 193 Wis. 2d 168, 184, 532 N.W.2d 690 (1995).

Thus, we look at these statutes to see if they may be harmonized, and we find that there is an interpretation which advances both statutes. Obviously, the Legislature has crafted an appointment statute in section 33.28 which relies upon some measure of dedication, and familiarity for proper lake management, of the county land conservation committee for either a nomination or for one of its members to serve on the lake district board. However, the countervailing county executive statute, section 59.17 does not need to ignore this part of the lake district laws to fulfill its terms of making appointments. If section 33.28 is read to substitute the "county executive" for the "county board," both statutes are given effect.

For purposes of interpretation and application of both statutes, we advise to read section 33.28(2)(a) as follows, for a county which has a county executive form of government:


(2) The board of commissioners shall consist of:

(a) One person appointed by the county executive who is a member of the county land conservation committee or is nominated by the county land conservation committee and appointed by the county executive;

Conclusion

We therefore advise that the County Executive has the authority to appoint a commissioner of the Powers Lake District Board of Commissioners, from the name or names of a person nominated to the County Executive by the Land Conservation Committee, or from the membership of the Land Conservation Committee. Since a county executive does not have to accept the first person nominated by such committee, it follows that a flow of communication and conversation will need to exist between the Committee and the County Executive on who will serve this important role.

Sincerely,



Bernard R. Wash

Cc:

Mr. Joseph D. Clark, County Board Chair

Ms. Kimberly Breunig, Chair of Extension Education and Conservation Committee

Mr. George Melcher, Director of Planning & Development

Ms. Jennie Tunkieicz, Assistant to County Executive