

**CORPORATION COUNSEL
ONEIDA COUNTY**

Courthouse Building

P.O. Box 400

Rhineland, Wisconsin 54501-0400

Telephone (715) 369-6155

Fax (715) 369-6284

September 27, 2007

Mr. J. B. Van Hollen
Wisconsin Attorney General
PO Box 7857
Madison, WI 53707-7857

Dear Attorney General Van Hollen:

We are writing to you pursuant to Wis. Stat. sec. 59.42(1c) to request an informal legal opinion relating to the ability of the County to regulate the transportation of aquatic vegetation.

Oneida County is currently taking efforts to prevent the spread of aquatic invasive species to lakes and streams within, or partially within the County. In that regard, the County has discussed the enacting of an ordinance which would prevent persons from transporting aquatic invasive species on any public roads within the County. Included within the ordinance would be a prohibition on the transportation of aquatic invasive species on boats, boat trailers and boating equipment. We are requesting an informal opinion as to whether the County has the authority to enact such an ordinance.

The Wisconsin statutes currently prohibit the placement of boats, boating equipment or boat trailers in navigable water if the operator has reason to believe that any aquatic plants are attached. See Wis. Stat. sec. 30.715 (2005-06). That statute section does not prohibit all transportation of aquatic plants or aquatic invasive plants.

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Additionally, the legislature has delegated authority to the Department of Natural Resources (WDNR) to control the spread of invasive species. Wis. Stat. sec. 23.22 (2005-06). The WDNR has enacted the following:

1. Wis. Admin. Code ch. NR 192 entitled Lake Monitoring Contracts
2. Wis. Admin. Code ch. NR 198 entitled Invasive Species Control Grants
3. Wis. Admin. Code ch. NR 120 entitled Priority Watershed and Priority Lake Program

Although all three of those chapters relate to the protection of navigable waters, none of them contain rules of the type being considered by our County.

We have reviewed the statutes and case law in an effort to determine whether authority exists for a county to enact an ordinance of the type being considered. The Wisconsin legislature, in what is commonly known as the "home rule statute" has granted general powers to counties. Wis. Stat. sec. 59.03(3) (2005-06). That statute reads in part as follows:

Except as elsewhere specifically provided in these statutes, the board of any county is vested with all powers of a local, legislative and administrative character including without limitation because of enumeration...". Wis. Stat. sec. 59.03(2) (2005-06).

The legislature has also stated that "To give counties the largest measure of self government under the administrative home rule authority granted to counties in sec. 59.03(1), this chapter shall be liberally construed in favor of the rights, powers and privileges of counties to exercise any organizational or administrative power." Wis. Stat. sec. 59.04 (2005-06). Absent from this section of the statutes is the word "legislative".

The courts of Wisconsin have stated that a county is a creature of the legislature and, as such, has only those powers that the legislature, by statute, has given to the county. Jackson v State of Wisconsin Department of Natural Resources, 2006 WI 96, para. 16, 717 N.W.2d 713, 720, 293 Wis. 2d 497, 510.

Additionally, the Wisconsin Supreme Court has stated that "it has consequently become well recognized that 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 County, 102 Wis 2d 686, 689, 307 NW 2d 227, 228 (1981).

Thus, the issues are as follows:

1. Is the type of ordinance proposed by the County of a "local nature" to the extent that the County has power to enact it under the home rule statute?
2. Has the legislature expressly conferred upon counties the power to enact such a statute?
3. Can the power to enact such a statute be necessarily implied from powers expressly given or from the nature of grants or power to counties?

A. Home Rule Authority

There are no Wisconsin cases which are determinative as to whether such an ordinance is appropriate under the "home rule statute". While the introduction of

invasive species is of great concern to Oneida County, it is, obviously, also of state wide concern. This is particularly true as some of the navigable waters of Oneida County border on, or flow into or from other counties.

The Supreme Court of the State of Wisconsin has indicated that when counties act under the home rule statute and make decisions relating to local affairs, they must do so in a manner that does not conflict with the State's interest in uniformly treating questions that arise in many counties across the State. Jackson County v. State Department of Natural Resources, 206 WI 96, para.19, 717 N.W.2d 713, 721, 293 Wis. 2d 497, 512 (2006).

In some instances, the courts have held that counties have authority to act in a regulatory capacity regarding issues that are of State wide concern. For instance, the Court of Appeals has held that even though controlled access highways are a matter of state wide concern, and statutes exist governing such highways, counties under the home rule statute could regulate and restrict driveway access to highways. Mommsen v Schueller, 599 N.W.2d 21, 228 Wis. 2d 627 (App. 1999). Additionally, your office has issued an opinion relating to the ability of Milwaukee County to regulate firearm use within that county. 32 Wis. Op. Atty's Gen. 370 (1943). In that instance, your office opined that Milwaukee County could adopt ordinances relating to firearms even though the exclusive authority to regulate hunting for the entire state was vested in the Conservation Commission (n/k/a Department of Natural Resources). Of course, it is recognized that one of the statutes cited in that opinion was former Wis. Stat. sec. 59.083, a home rule statute which at the time related only to counties with a population of 250,000 persons or more.

We have also reviewed the statutes to determine whether there has been a specific grant of authority by the legislature to counties to enact an ordinance of the type we are considering. We have located no explicit grant of power to a county to enact an ordinance such as the one contemplated.

Therefore, the remaining question is whether the power to enact such a statute can be necessarily implied from powers expressly given or the nature of grants of power expressly made by the legislature. In that regard, we have reviewed the statutes cited below.

B. Related Statutes and Administrative Rules

As mentioned above, the legislature has enacted a statute relating to the control of invasive species. Wis. Stat. sec. 23.22 (2005-06) entitled Invasive Species. This section allows the WDNR to establish a state-wide program to control invasive species and directs the department to establish a procedure to award cost sharing grants to public and private entities. Wis. Stat. sec. 23.22(2)(c) (2005-06)). A portion of sec. 23.22 of the statutes states that the DNR shall, as part of its establishment of a state program to control invasive species in this state, "encourage cooperation among state agencies and other entities to control invasive species in this state. It is unclear as to

whether a grant of power to enact an ordinance of the type we are considering would stem from this language.

The legislature has also enacted a section of the statutes which relates to the control of nuisance weeds. Wis. Stat. sec. 23.235 (2005-06). For the purpose of that section of the statute, nuisance weeds are defined to mean purple loosestrife or hybrids thereof and multi-flora rose. That section of the statutes generally relates to education, research and control efforts by the Department. A grant of legislative power to counties of the type contemplated by our County would not seem to stem from this section of the statutes.

The legislature has also enacted a statute relating generally to aquatic plants. Wis. Stat. sec. 23.24 (2005-06). That section of the statute generally grants to the WDNR the ability to regulate and permit the introduction and control of aquatic plants. That section of the statute exempts local governmental units from permitting requirements and allows certain use of chemical treatments by local governmental bodies. It would seem that there is not an implied grant of legislative power of the sort contemplated by our County from this section of the statutes.

As noted above, the WDNR has enacted Wis. Admin. Code ch. NR 192 entitled Lake Monitoring Contracts and Citizen Lake Monitoring Networks. That chapter of the Code generally speaking, relates to the monitoring of lakes rather than action to be taken as the result of monitoring. One section of that chapter, however, reads in part as follows: "The state-wide lake monitoring network provides quality, cost effective lake data useful to federal, state and local lake management efforts on the use of lakes and the understanding of the natural eco-system of lakes and the water quality of lakes." Wis. Admin. Code sec. NR 192.01. This section of the Code implies an ability on the part of local government to be involved in "management efforts" regarding lakes. It is not clear whether such efforts could include an ordinance of the type our County is considering.

The WDNR has promulgated Wis. Admin. Code ch. NR 120 entitled Priority Watershed and Priority Lake Program. This chapter of the statutes relates generally to the control and remediation of non-point pollution sources, rather than the control of invasive aquatic vegetation. Therefore, it would seem that the authority to enact an ordinance of the type our County is considering would not stem from that section of the statutes.

Wis. Stat. ch. 33 is entitled Public Inland Waters. This chapter of the statutes generally relates to the creation of lake districts. The chapter allows for the creation of lake districts by county boards. Wis. Stat. sec. 33.24 (2005-06). The chapter also allows lake districts "do any other acts necessary to carry out a program of lake protection and rehabilitation". Wis. Stat. sec. 33.22(1) (2005-06). That chapter also grants commissioners of districts the same authority as sanitary commissioners under Wis. Stat. sec. 60.77. Wis. Stat. sec. 33.22(3) (2005-06). The powers of a sanitary district under Wis. Stat. sec. 60.77 include power to "issue rules or orders...". Wis. Stat. sec. 60.77(5)(c) (2005-06). It is unclear whether a county, by creating a lake district, or the lake districts themselves could enact rules prohibiting the transport of aquatic vegetation.

Chapter 30 of the statutes relates to navigable waters, harbors and navigations. Wis. Stat. sec. 30.77 (2005-06) allows for the enactment of ordinances by towns, villages, cities, public inland lake protection and rehabilitation districts, town sanitary districts and counties. The enactment of counties would appear to be limited to ordinance relating to rivers and streams. Wis. Stat. sec. 30.77(3)(b) (2005-06). Such ordinances must be reviewed by the WDNR. Wis. Stat. sec. 30.77(3)(d) (2005-06).

The statute states:

The types of ordinances that may be enacted under para. a., am. or b. include the following:

1. Restrictions on speed.
2. Restrictions on certain types of boating activities on all or on specified parts of the lake, river or stream.
3. Restrictions on certain types of boating activities during specified hours of the day or specified days of the week.

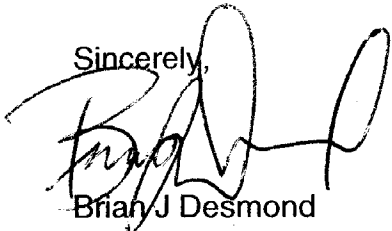
Wis. Stat. sec. 30.77(3)(cr) (2005-06).

It would appear that this chapter does not grant the authority to enact an ordinance of the type being considered by our County.

Wis. Stat. sec. 59.692 (2005-06) relates to the zoning of shorelands on navigable waters. Shoreland zoning ordinance relates generally to construction and development of shorelands. For that reason, it is believed that the authority to enact an ordinance prohibiting the transportation of aquatic invasive species would not stem from the legislature's enactment of Wis. Stat. sec. 59.692.

In summary, Oneida County wishes to enact an ordinance which prohibits the transport of aquatic vegetation. It is our request that you provide us with an opinion as to whether such an ordinance is within the authority of a county. Thank you.

Sincerely,



Brian J Desmond
Corporation Counsel
State Bar No. 1047048



Thomas D Wiensch
Assistant Corporation Counsel
State Bar No. 1018958

TDW/sg

cc: Mr Radley Watkins
Land & Water Conservation Committee