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April 11, 2017

Mr Brad D Schimel  
Wisconsin Attorney General  
PO Box 7857  
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Dear Mr Schimel:

I am writing to you pursuant to Wis Stat sec 59.42(1c) to request a legal opinion relating to the ability of the County to impose general zoning provisions in the shoreland area in zoning in towns in Wisconsin that have not adopted comprehensive zoning. This opinion has been requested by the Oneida County Planning & Development Committee.

In 1967 Oneida County enacted its original shoreland zoning ordinance. At that time all lands in the shoreland area were placed in the district 5, general use, zoning district. Our research has indicated that the use of the general use zoning district, from the general zoning ordinance for Oneida County enacted pursuant to Wis Stat sec 59.69, has been in place in the shoreland areas in towns that have not adopted comprehensive zoning since the enactment of the shoreland zoning ordinance. In 1987 the shoreland area around Sugar Camp lake, in the Town of Sugar Camp, which has not adopted comprehensive zoning, was changed by the County Board from the general use district to single family zoning district. The land owners on the neighboring lake, Indian Lake, in the Town of Sugar Camp petitioned the County for a change from general use to single family zoning in 1991. The single family zoning district has continued in the shoreland area around those two lakes in the Town of Sugar Camp ever since those re-zone petitions were granted.

Oneida County has had language in their zoning ordinance that allows for the application of the general zoning provisions in the shoreland areas. Specifically, the Oneida County code in section 9.90(c) states:

The general provisions of this ordinance consisting of articles 1, 2, 3, 4, 5, 6, 7, 8 and 10 are expressly incorporated by reference into the shoreland protection provisions (article 9 of this ordinance) and shall apply on the shorelands through the County, to the extent applicable. In the event of a conflict between the general zoning provisions and the shoreland protection provisions, the more restrictive provisions shall apply.

This language has been used in order to apply the general zoning provisions in all the shoreland areas in towns that have not adopted comprehensive zoning in Oneida County.

With the changes brought about by Act 55, Oneida County has been reviewing and revising their general zoning ordinance and shoreland protection ordinance in order to be in compliance with the changes in State law. As part of that review, the question was brought up with regards to Oneida County's authority to impose the general zoning provisions in the shoreland zone. As stated below, the changes necessitated by Act 55 may complicate Oneida County's practice of imposing general zoning standards in the shoreland protection area.

Currently, the Town of Sugar Camp which has not enacted comprehensive zoning and is seeking to maintain the single family zoning district from the general zoning ordinance around Indian and Sugar Camp lakes that was approved by the County Board in 1987 and 1991, respectively, and have the entirety of the remaining town not subject to any zoning provisions except for article 9, the zoning shoreland provisions of the County zoning ordinance would be applicable in the shoreland areas.

Based upon the history as presented, the Oneida County Planning & Development Committee has been reviewing the legal authority that underpins the manner in which Oneida County has been proceeding with zoning matters in the shoreland protection area, necessitating answers to the questions posed below:

**1. May a county impose general zoning ordinance provisions, enacted pursuant to Wis Stat sec 59.69(5), in the shoreland areas (as defined in sec 59.69(2)(1)(b)) of towns that have not adopted comprehensive zoning under Wis Stat sec 59.69(5c)?**

My review of the state statutes and the case law that surrounds this issue indicates that there is no explicit authority contained in the statutes or case law that would allow for Oneida County to enforce general zoning in the shoreland zones. This would mean that there is no explicit authority for the County to enact and enforce general zoning in the shoreland zone around only two lakes in the Town of Sugar Camp. This opinion has been relayed to the Committee on a number of occasions.

Oneida County is granted the authority to zone lands within the County by Wisconsin State sec 59.69 entitled, Planning and Zoning Authority. More specifically, sec 59.69(5) entitled, Formation of a zoning ordinance; procedure, lays out the procedure by which the County may enact a general zoning ordinance and the procedure in which towns can adopt that ordinance and have it be effective within that particular town. With regards to towns enacting the County zoning ordinance, Wis Stat sec 59.69(5)(c) reads: "A county ordinance enacted under this section shall not be effective in any town until it has been approved by the town board." This language indicates that for general zoning to be effective in any town within Oneida County, the town board needs to adopt general zoning in its entirety by means of town board approval. That approval is provided to Oneida County by a "certified copy of the approving resolution" attached to one of the copies of such ordinance submitted to the town board and shall be promptly filed with the county clerk by the town." *Id.* The language of the statute indicates that a town either adopts zoning in its entirety for their town or the town is known as unzoned. Unzoned towns have no zoning except for zoning in the shoreland areas. It should be noted that the current language in the proposed rewrite of the shoreland protection ordinance is written to explicitly state that the general zoning provisions are only effective in those towns that have adopted general zoning from the County.

Prior to the rewrite of the shoreland protection ordinance, Oneida County had language in the shoreland provisions of the ordinance which allowed for the general zoning ordinance to be applicable in the shoreland zone. Again, I would state that there is no express language in the statute that allows for this arrangement. I would also note that with the changes that came from Act 55, applying general zoning in the shoreland zone could be complicated. Wisconsin stat sec 59.69(2)(1d) states: "An ordinance enacted under this section may not regulate a matter more restrictively than the matter is regulated by a shoreland zoning standard." Wisconsin stat sec 59.69(5) states: "An ordinance enacted under this section supercedes all provisions of an ordinance enacted under sec 59.69 that relate to shorelands." As such, applying the general zoning to the shoreland zones could be extremely difficult in trying to ascertain what portions of the general zoning ordinance may regulate a matter more restrictive than a shoreland zoning standard or it could be difficult to determine which sections of the general zoning ordinance are superceded by the shoreland zoning ordinance.

**2. If you have answered question #1 finding that there is legal authority to impose general zoning provisions in the shoreland areas of towns that have not adopted comprehensive zoning under Wis Stat sec 59.69(5)(c), may the County impose the general zoning ordinance around only two lakes in a particular town and enforce only the shoreland zoning ordinance with regards to the remaining lakes in that town?**

As stated above, whatever decision Oneida County makes with regards to how to proceed with this matter, the County needs to be cognizant of possible violations of

the equal protection clause of the 14<sup>th</sup> amendment of the United States Constitution. It has been stated that “the equal protection clause ensures that people will not be discriminated against with regard to statutory classifications in other governmental activity.” *Thorp v Town of Lebanon*, 235 Wis2d 610, para 37 (2000). There are similar protections in the Wisconsin Constitution Article 1, sec 1. When reviewing zoning ordinances with regards to equal protection, it should be noted that the zoning ordinance must “provide those in similar circumstances among whom no reasonable basis for distinction exists with equal protection of the law is constitutional required of all ordinances as well as statutes.” *Browndale Int'l Ltd v Board of Adjustment for County of Dane*, 60 Wis2d 182, 205 (1973). That case went on further to state that “A classification to be valid must always rest on a difference which bears a fair, substantial, natural, reasonable and just relation to the object, act or persons in respect to which it is proposed.” *Id* (internal citation omitted). Also, *Browndale* stated “Classifications of persons or property must be based upon reasonable differences or distinctions which distinguishes the members of one class from those of another in respect germane to some general and public purpose or object of a particular legislation.” *Id* (internal citation omitted). When reviewing an equal protection claim, it has been held that zoning does not involve fundamental rights. *Thorp*, 235 Wis2d 610, para 39 (2000). As such, the level of scrutiny “involves a rational basis test wherein classifications are upheld if they are in any way rationally related to the asserted purpose of the legislation.” *Id*. Whether or not a rational basis is able to be proffered in relation to a challenge to a county zoning ordinance or decision relies on the nature of the situation that is being presented.

With the proposal from the Town of Sugar Camp, at this time I cannot authoritatively say that there would be a rational basis for the County to make a determination that the town can have zoning around only two lakes and not the others. With the many different facets of zoning it is hard to contemplate each and every possible form in which a challenge on equal protection grounds may be presented to the County (i.e., such as the denial of a permit, the necessity of a permit, etc). Again, I cannot authoritatively state that a rational basis exists for all types of decisions that may be made, should the request of Sugar Camp be granted.

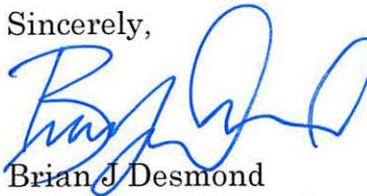
In summary, Oneida County wishes to enact an ordinance that is in conformity with the statutes as currently written. It is our request that you provide us with an

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opinion with regards to the questions that have been posed above. If you have any further questions or concerns, please feel free to contact me. Thank you.

Sincerely,



Brian J Desmond  
Corporation Counsel  
State Bar No 1047048

BJD/sg

cc: Mr Karl Jennrich  
Oneida County Planning & Development Committee