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MEMORANDUM

TO: Dane County Zoning & Land Regulation Committee
Rutland Town Board
Town of Rutland Planning Commission

FROM: William F. White, Esq. 
Michael P. Screnock, Esq. 

DATE: May 22, 2014

SUBJECT: Petition Nos. Rezone 10672/CUP 2270 – Stoughton Farms Inc.
Wis. Stat. § 66.0406 re Radio Broadcast Service Facilities

Various questions arose during the April 29, 2014 public hearing conducted by the Dane County Zoning & Land Regulation (“ZLR”) Committee on Stoughton Farms Inc.’s pending rezoning and CUP requests regarding the impact of the recently adopted legislation that specifically addresses a municipality’s authority to regulate radio broadcast service facilities. There appears to be some confusion as to the proper application of the new legislation to Magnum Communications’ proposed tower, and we offer the following explanation to help clarify the issue. As we explained at the April 29 public hearing, under the new legislation Magnum Communications is not required to obtain rezoning approval prior to constructing its tower, because the legislation provides that Dane County’s current zoning ordinance does not apply and may not be enforced to the extent it conflicts with the new law. Nevertheless, Magnum Communications has voluntarily petitioned for a rezoning and a CUP because it recognizes that the public will benefit from the rezoning process and from ZLR’s opportunity to craft reasonable approval conditions in the context of the CUP process.

Magnum Communications has not waived its rights under the new legislation, and fully expects that Dane County and Town of Rutland officials will keep that legislation in mind as they process the pending petitions.

During the last legislative session, the Wisconsin legislature created section 66.0406 of the Wisconsin Statutes as an express legislative limitation on local regulation of radio towers. This new statute is not the much-discussed legislation pertaining to cell tower siting. Rather, it addresses the very narrow subset of communications towers and related facilities that are used to provide radio broadcast services, defined as a “commercial or noncommercial service involving the transmission, emission, or reception of radio waves for the transmission of sound or images in which the transmissions are intended for direct reception by the general public.” Wis. Stat. § 66.0406(1)(b). The operative language that specifically limits local authority is in section 66.0406(2), which states:

Beginning on May 1, 2013, ***if a political subdivision enacts an ordinance, adopts a resolution, or takes any other action*** that affects the placement, construction, or modification of radio broadcast service facilities, the ordinance, resolution, or other action ***may not take effect unless all of the following apply.***

- (a) The ordinance, resolution, or other action ***has a reasonable and clearly defined public health or safety objective, and reflects the minimum practical regulation that is necessary to accomplish that objective.***
- (b) The ordinance, resolution, or other action ***reasonably accommodates radio broadcast services and does not prohibit, or have the effect of prohibiting, the provision of such services in the political subdivision.***

With the new legislation, the Wisconsin legislature also severely restricted a political subdivision's ability to deny a request "to place, construct, or modify radio broadcast facilities" through sec. 66.0406(4), which states:

"...the denial may be based only on the political subdivision's public health or safety concerns."

Finally, the Wisconsin legislature foreclosed local governments' ability to rely on existing ordinances to prohibit or limit the placement or construction of a radio broadcast service facility through sec. 66.04046 (3), which commands:

If a political subdivision has in effect on May 1, 2013, an ordinance or resolution that is inconsistent with the requirements that are specified in sub. (2) for an ordinance, resolution, or other action to take effect, the existing ordinance or resolution ***does not apply, and may not be enforced, to the extent that it is inconsistent with the requirements that are specified in sub. (2).***

Accordingly, to the extent a town, village, city, or county has in effect any existing ordinances or resolutions that are inconsistent with the limited grant of local authority set forth in section 66.0406(2), the Wisconsin legislature commands that they may not be applied to a proposed radio broadcast service facility. The Dane County Planning and Zoning staff interpret the Dane County Zoning Ordinance to summarily preclude the construction of a radio broadcast service facility on any property currently zoned A-1 Exclusive Agriculture. To the extent that zoning ordinance is inconsistent with the standards established in sec. 66.0406(2), it does not apply and may not be enforced. That is, to the extent the A-1 Exclusive Agriculture zoning regulations do not reflect the minimum practical regulation that is necessary to accomplish a reasonable and clearly defined public health or safety objective, they do not apply to Magnum Communications' proposed facility and they may not be enforced against Magnum Communications. The same is true of the Town of Rutland's Ordinance No. 12.5 pertaining to the construction and operation of communication towers.

The argument has been made that because the site of Magnum Communications' proposed facility is zoned under the State's farmland preservation zoning scheme, Dane County, and the Town of Rutland, may ignore the new statute. We understand that some people have suggested that somehow section 91.48 of the Wisconsin Statutes, which addresses rezoning of exclusive agriculture land, trumps the clear legislative restriction on municipal authority to "enact an ordinance, adopt a resolution, or take any other action" involving an application for radio broadcast service facilities. To begin with, section 66.0406 provides that the existing zoning ordinance does not apply and may not be enforced, even if the subject property is never rezoned. But even in the context of Stoughton Farms' pending rezoning petition, there is no conflict between section 66.0406 and the provisions of chapter 91, the farmland preservation statute.

Importantly, the statutory provisions establishing farmland preservation zoning districts (secs. 91.42(2) and 91.46(4), Stats.) expressly recognize that “transportation, communications, pipeline, electric transmission, utility, or drainage use” are permissible conditional uses in an exclusive agriculture zoning district. By expressly identifying “communications” as a permissible conditional use, the Wisconsin legislature has made the policy determination that a communication use, such as a radio broadcast service facility, is an appropriate use in a farmland preservation zoning district. Thus, there is no conflict between section 66.0406, which severely limits local authority to condition or deny a radio broadcast service facility, and chapter 91, which seeks to preserve farmland.

Moreover, the argument that chapter 91 trumps section 66.0406 runs afoul of the basic rules governing statutory construction under Wisconsin law. Under Wisconsin law, municipal bodies have only such powers as are expressly conferred upon them by the legislature or are necessarily implied from the powers conferred. *First Wis. Nat'l Bank of Milwaukee v. Town of Catawba*, 183 Wis. 220, 224, 197 N.W. 1013 (1924). A municipality may not pass ordinances or take action that infringes upon the spirit of a state law or are repugnant to the general policy of the state. *County of Dane v. Norman*, 174 Wis. 2d 683, 689, 497 N.W.2d 714 (1993). In addition, when the state has manifested an intent to regulate a specific field or subject, conflicting municipal ordinances on the same subject are invalid to the extent of the conflict. *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 651, 547 N.W.2d 770 (1996).

By enacting section 66.0406, the Wisconsin legislature has severely restricted local authority in the specific area of radio broadcast service facilities. The new legislation contains specific and express limitations on what a town or county may do and consider when presented with an application. When presented with an application pertaining to a radio broadcast service facility, local authority is limited to that authorized by section 66.0406. To the extent other legislation or local ordinances conflict, the Wisconsin legislature was plain and clear – section 66.0406 controls. Accordingly, to the extent that any Dane County or Town of Rutland ordinances may conflict with section 66.0406, they “may not be enforced.”

Statutory interpretation also “begins with the language of the statute. If the meaning of the statute is plain, [the courts] stop the inquiry.” *Seider v. O’Connell*, 2000 WI 76, 236 Wis. 2d 211, 232, 612 N.W.2d 659. Statutory language is given its common, ordinary, and accepted meaning. *Bruno v. Milwaukee County*, 2003 WI 28, 260 Wis. 2d 633, 660 N.W. 656. It is also a basic tenet of Wisconsin statutory construction that when a general statute and a specific statute are compared, the specific statute takes precedence. *Milwaukee v. Kilgore*, 193 Wis. 2d 168, 185, 532 N.W.2d 690 (1995). Here, the Wisconsin legislature has enacted an expressly specified statute and that statute controls. Indeed, section 66.0406 relates specifically to radio broadcast service facilities, which is a subset of the “communications” uses authorized as conditional uses under sections 91.42 and 91.46(4) of the farmland preservation statute, so there can be no doubt that section 66.0406 is the more specific statute.

The language of section 66.0406 is clear and unambiguous. If the legislature had intended to carve out farmland or farmland preservation ordinances from the application of section 66.0406, it could have done so. It did not. The legislature could have easily qualified the language of section 66.0406 by exempting out farmland or farmland preservation ordinances adopted pursuant to chapter 91. It is clear that the legislature knew how to accomplish its objectives by the language used in the statute. The rules governing statutory construction also recognize that when the Wisconsin legislature enacts a statute, it is presumed to act with full knowledge of existing statutes. *Mark v. Joint School District No. 3*, 92 Wis. 2d 476, 489, 285 N.W.2d 604 (1979). When the legislature enacted sec. 66.0406, it did so with the full knowledge of chapter

91, including sections 91.42, 91.46 and 91.48, and in so enacting section 66.0406 expressly commanded that “if a political subdivision has in effect on May 1, 2013, an ordinance or resolution that is inconsistent with the requirements that are specified in sub. (2) ... [it] may not be enforced...” Any municipal ordinances based upon sections 91.42, 91.46 and 91.48 may not be enforced if they conflict with the Wisconsin legislature’s newly enacted statute governing radio broadcast service facilities.

With the enactment of section 66.0406, the legislature expressly specified the limitation placed on political subdivisions when presented with a request relating to radio broadcast service facilities. Deference is afforded to the policy choices enacted by the legislature and such deference requires that statutory interpretation focus primarily on the language of the statute. It is the enacted law that is binding on the public, including municipalities.

As explained above, in response to questioning during the ZLR public hearing on Magnum Communications’ pending zoning and CUP petitions, counsel for Magnum Communications stated that it is not necessary for Magnum Communications to pursue its rezoning request under current law. Nevertheless, Magnum Communications recognizes the public value in going through the rezoning and CUP process and to allow the ZLR Committee to craft reasonable conditions of approval. Magnum Communications retains its position that under section 66.0406, Dane County and the Town of Rutland are without authority to enforce existing zoning and communication tower regulations, to the extent they conflict with section 66.0406(2). Magnum Communications is exploring its options to enforce its rights under section 66.0406 in the event either the Town or the County expresses an intent to ignore the clear directives of section 66.0406 in the context of processing Stoughton Farms’ pending rezoning and CUP petitions. Magnum Communications remains hopeful that such action will not be necessary, and that the Town of Rutland and Dane County will act in accordance with section 66.0406 and the best interest of the public with respect to those petitions.