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DEPARTMENT OF JUSTICE

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OAG—3—10

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

Dear Mr. Desmond:

¶ 1. You advise that Oneida County has contracted with the North Central Wisconsin Regional Plan Commission to assist in developing a comprehensive plan for the county. You state that the county board has adopted a resolution that requires the county's comprehensive plan to adopt and incorporate the comprehensive plans that have been adopted by the towns within the county.

BACKGROUND

¶ 2. You indicate that instead of adopting a comprehensive plan, three towns have sent a document entitled "Notice of Coordination" to the county. Each notice states that the town "has invoked its authority to coordinate with federal, state, and local governments, and agencies regarding planning to benefit the citizens within its jurisdiction." A resolution adopted by each town cites various federal and state statutes, including Wis. Stat. §§ 1.13, 16.023(1)(c), 16.965, 16.967, and 560.04, as well as other legal authority. Each resolution then states that the town is "invok[ing] . . . [its] legal standing and authority to coordinate with, and insist on coordination by, all State and federal agencies and units of government claiming jurisdiction over lands and/or resources located within the jurisdiction of the [t]own . . . pursuant to the federal and state acts recited above[.]" Each resolution concludes that "the land use plan adopted pursuant to this Resolution shall be a dynamic, continuously evolving plan requiring periodic review, assessment, and amendment in coordination with all agencies and units of federal and State government in relation to which the Town invokes coordination pursuant to this Resolution . . . and the federal and state statutes recited herein."

¶ 3. The resolutions adopted by these towns were apparently the product or result of a February 2, 2009, written solicitation, which states in part as follows:

> You have indicated interest in the coordination method of land use planning as an alternative to creating a "comprehensive" plan as outlined in Wisconsin statute 66.1001.

After extensive study of the issues it has been determined that a coordination plan can be created that offers compliance with the goals of that statute with strong emphasis on intergovernmental relations while maintaining local control.

A major component in adopting coordination is the ability to engage and control the creation, adoption, and implementation of your planning process. Under the existing federal and state statutes, after proper adoption, your municipality will have the on going [sic] authority to;

1. Require early notification (prior to public notice) to the local government of all actions or plans of the federal or state agencies that will affect local units of government, its [sic] economy, or environment.

2. Grant an opportunity for *meaningful* input by the local government, which means input that has substance and given [sic] weight and meaning by the agency.

3. Require agencies of all levels of government to be apprised of any local government policy or plan.

4. Those agencies/governments are required to consider the local government policy or plan when working on a municipal county, state, or federal policy or plan or management action.

5. And, most importantly, the agency or level of government is required to make all practicable effort to make their [sic] policy, plan, or action *consistent* with your local policy or plan.[1]

It is the "consistency" requirement that gives teeth to coordination. Other levels of government and their agencies cannot listen and then ignore the position of the local government. It [sic] must make every practicable effort to make its action, policy, or plan "consistent" with that of local government.

. . . .

We will be using the consulting services of . . . [a] legal consultant to local governments which have adopted the process which he researched and developed [sic] the strategy.

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[1]When this opinion describes a power of "coordination" or obligations imposed by "coordination," I am referring to the assertion of these five powers described in this solicitation.

In order for us to consult in guiding you through the first three steps of the adoption and implementation of your resolution process the costs are a fee of $1500 plus mileage at the current government rate and any out of pocket expense. If you wish for us to consult on the additional steps, four through eight, we will be happy to provide service for any or all those steps at a rate of $50.00 per hour plus mileage and out of pocket expenses.

If you wish to proceed we have provided an Indemnification and Hold Harmless Agreement.

QUESTIONS PRESENTED AND BRIEF ANSWERS

¶ 4. You ask two questions with subparts, which I have renumbered and reworded as follows:

> 1. Does the use of the word "coordination" in various Wisconsin statutes dealing with municipal planning by itself impose affirmative duties upon certain municipalities that are in addition to any other affirmative obligations that are imposed under those statutes?

¶ 5. In my opinion, the answer is no. Towns have only those powers delegated by statute, and the Wisconsin municipal planning statutes do not contain a "coordination" power that would allow a town to ignore its own statutory obligations or impose non-statutory obligations on other municipalities or units of government. Other statutes cited in the coordination resolutions described in your correspondence do not give rise to a "coordination" power.

> 1(a). If the use of the word "coordination" in various municipal planning statutes can by itself result in the imposition of additional affirmative duties upon certain municipalities, does a town need to take some form of action in order to compel other municipalities to perform those additional duties, what are those additional duties, and are those additional duties similar to the duties imposed upon the Secretary of the Interior by the Federal Land Policy and Management Act of 1976 § 202, 43 U.S.C. § 1712(c)(9) (2006)?

¶ 6. Because of my answer to your first question, it is unnecessary for me to directly address this question.

> 1(b). If the use of the word "coordination" in municipal planning statutes can by itself result in the imposition of additional affirmative duties upon certain municipalities, which municipal duties must be coordinated with a town that has invoked its authority to compel other municipalities to perform such additional duties?

¶ 7. Because of my answer to your first question, it is unnecessary for me to address this question.

> 2. If "coordination" is a power that can be invoked by a municipality, can that power be used to create a "coordination plan" instead of a comprehensive plan for that town as specified in Wis. Stat. § 66.1001? If a "coordination" plan can be adopted, does a town lose or gain any particular privileges with a "coordination" plan?

¶ 8. Because "coordination" is not a power that can be invoked by a municipality, it is unnecessary to address this question.

ANALYSIS

¶ 9. While you ask multiple questions in your correspondence, all are contingent upon answering the specific concern you articulate in the introduction to your letter, which I have rephrased as follows:

> 1. Is "coordination" a legal doctrine that can be invoked by towns to impose on other governmental units additional obligations that are not required by the municipal planning statutes?

¶ 10. In my opinion, the answer is no.

¶ 11. "[T]owns have no home rule powers but only those powers specifically delegated to them by the legislature or necessarily implied therefrom[.]" *Danielson v. City of Sun Prairie*, 2000 WI App 227, ¶ 13, 239 Wis. 2d 178, 619 N.W.2d 108. It follows that for a town to invoke a "coordination" power, it must either appear in the statutes or be necessarily implied from the statutes.

¶ 12. The powers granted by the Legislature to towns are enumerated primarily in Wis. Stat. ch. 60. The word "coordination" does not appear in Wis. Stat. ch. 60.[2] Moreover, Wisconsin's municipal planning statutes do not use other terminology to require "coordination" as described in your correspondence.

¶ 13. The resolutions that the towns were persuaded to adopt make no reference to Wis. Stat. ch. 60. Those resolutions do cite the following state statutes relating to municipal planning that contain the word "coordination": Wis. Stat. §§ 1.13, 16.023(1)(c), 16.965, 16.967,

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[2]Wisconsin Stat. 60.23(4)(c) does authorize a town industrial development agency, which is a nonprofit corporation, to "[c]oordinate its activities with the county planning commission, the department of commerce and private credit development organizations."

and 560.04. An examination of these statutes, however, does not indicate a generally applicable "coordination" power that could be invoked by towns in the municipal planning context.

¶ 14. Wisconsin Stat. § 1.13 provides in part:

> (2) Each state agency, where applicable and consistent with other laws, is encouraged to design its programs, policies, infrastructure and investments of the agency to reflect a balance between the mission of the agency and following local, comprehensive planning goals:
>
> . . . .
>
> (g) Encouragement of coordination and cooperation among nearby units of government.
>
> . . . .
>
> (3) Consistently with other laws, each state agency, whenever it administers a law under which a local governmental unit prepares a plan, is encouraged to design its planning requirements in a manner that makes it practical for local governmental units to incorporate these plans into local comprehensive plans prepared under s. 66.1001.

Wisconsin Stat. § 1.13(2) and (3), which apply to state agencies and not to local units of government, use the words "encouraged" and "encouragement." The statutory term "encourage" does not have a technical meaning. *State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 190, 277 N.W. 278, 280 N.W. 698 (1938). The word "encourage" means "**1** . . . **b :** to attempt to persuade : URGE <they *encouraged* him to go back to school>." *http://www.merriam-webster.com/dictionary/encourage*. This is far different from the meaning of "coordination" as described in your correspondence or the common definition of the term. The transitive verb "coordinate" means "**2 :** to bring into a common action, movement, or condition : HARMONIZE <we need to coordinate our schedules>." *http://www.merriam-webster.com/dictionary/coordinate*. The intransitive verb "coordinate" means "**1 :** to be or become coordinate especially so as to act together in a smooth concerted way." *http://www.merriam-webster.com/dictionary/coordinate*.

¶ 15. "If the statute is merely a guide for the conduct of business and for orderly procedure rather than a limitation of power, it will be construed as directory." 1A Singer, *Sutherland Statutory Construction* § 25:3 (6th ed. 2002) (footnote omitted). By their very nature, words such as "encouraged" and "encouragement" are directory. *See Cross v. Soderbeck*, 94 Wis. 2d 331, 340-41, 288 N.W.2d 779 (1980); *Manninen v. Liss*, 265 Wis. 355, 357, 61 N.W.2d 336 (1953). *See also Mews v. Department of Commerce*, 2004 WI App 24, ¶¶ 17-24, 269 Wis. 2d 641,

676 N.W.2d 160 (Even though Wis. Stat. § 101.143(2m), entitled "INTERDEPARTMENTAL COORDINATION," stated that an interdepartmental meeting was to occur under specified circumstances, that portion of the statute was directory). Because Wis. Stat. § 1.13(2) and (3) are directory provisions, they accord no substantive rights to towns.

¶ 16. Wisconsin Stat. § 16.023(1)(c) provides that the Wisconsin Land Council ("Council") shall "[s]tudy areas of cooperation and coordination in the state's land use statutes and recommend to the governor legislation to harmonize these statutes to further the state's land use goals." The Council is a state agency. Wis. Stat. § 15.107(16). Wisconsin Stat. § 16.023(1)(c) directs the Council to study certain items so that it can recommend legislation. Any "areas of cooperation and coordination" studied or identified by the Council pursuant to Wis. Stat. § 16.023(1)(c) must subsequently be adopted as legislation in order to be accorded the force of law. Wisconsin Stat. § 16.023(1)(c) accords no rights to towns or other local units of government.

¶ 17. Wisconsin Stat. § 16.965(4) provides in part:

> In determining whether to approve a proposed grant, preference shall be accorded [by the department of administration] to applications of local governmental units that contain all of the following elements:
>
> . . . .
>
> (b) Planning efforts that contain a specific description of the means by which all of the following local, comprehensive planning goals will be achieved:
>
> . . . .
>
> 7. Encouragement of coordination and cooperation among nearby units of government.

Wisconsin Stat. § 16.965(4) contains certain criteria to be applied by the Department of Administration ("DOA") in awarding grants to local units of government. Wisconsin Stat. § 16.965(4) has no application to towns or other local units of government in any area other than the award of certain grants by DOA.

¶ 18. Wisconsin Stat. § 16.967 provides in part:

> (3) DUTIES OF DEPARTMENT. The department [of administration] shall direct and supervise the land information program and serve as the state clearinghouse for access to land information. . . .

. . . .

> (8) ADVICE; COOPERATION. In carrying out its duties under this section, the department may seek advice and assistance from the board of regents of the University of Wisconsin System and other agencies, local governmental units, and other experts involved in collecting and managing land information. Agencies shall cooperate with the department in the coordination of land information collection.

The first sentence of Wis. Stat. § 16.967(8) authorizes DOA to "seek advice and assistance from . . . agencies, [or] local governmental units" if DOA chooses to do so. The second sentence of Wis. Stat. § 16.967(8) requires "[a]gencies . . ." to "cooperate" with DOA "in the coordination of land information collection." The "[a]gencies . . ." referred to in the second sentence of Wis. Stat. § 16.967(8) are state agencies. *See* Wis. Stat. § 16.967(1)(a), which cross references the definition of "agency" contained in Wis. Stat. § 16.70(1)(e). Although the first sentence of Wis. Stat. § 16.967(8) does permit DOA to seek advice and assistance from town governments, there is no language in Wis. Stat. § 16.967(8) that accords any rights or authority to towns or other local units of government.

¶ 19. Wisconsin Stat. § 560.04 provides in part:

> Community development. (1) PURPOSE. The legislature determines that a pattern of state-local relations shall be established that will facilitate closer coordination and cooperation between state and local governments. The department [of commerce] shall recommend methods for achieving such closer coordination and cooperation in order to meet citizen needs, provide a balanced economy and facilitate economic and community development.

Wisconsin Stat. § 560.04(1) is a statement of legislative purpose. The first sentence of Wis. Stat. § 560.04(1) explains that the Legislature's goal is to establish "a pattern of state-local relations . . . that will facilitate closer coordination and cooperation between state and local governments." The second sentence of Wis. Stat. § 560.04(1) describes the first step in achieving that goal: the issuance of recommendations by the Department of Commerce ("Commerce"). The only obligation imposed upon Commerce by the second sentence of Wis. Stat. § 560.04(1) is to make recommendations that do not have the force of law. The obligation to make those recommendations falls solely upon Commerce. The statement of legislative purpose in Wis. Stat. § 560.04(1) therefore accords no legal rights to towns or other local units of government.

¶ 20. Statutory interpretation "'begins with the language of the statute.'" *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). Statutory language must be construed in the context in which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes.

Kalal, 271 Wis. 2d 633, ¶ 46. The extent to which the word "coordination" imposes an affirmative obligation upon a particular unit of government can only be determined by examining the specific language contained in the statute involved. As I have explained, municipal planning statutes such as Wis. Stat. §§ 1.13, 16.023(1)(c), 16.965, 16.967, and 560.04 do not accord any local municipalities any right to compel other units of government to act in a particular way.

¶ 21. Nor is the power of "coordination" necessarily implied from any of the statutes governing municipal planning. With respect to comprehensive planning, which appears to be the primary area of concern motivating the adoption of these resolutions, municipalities may develop and adopt comprehensive plans required by law by simply following the statutory requirements of Wis. Stat. § 66.1001. Exercise of a "coordination" power is not necessary for covered governmental units to accomplish the statute's directives.

¶ 22. In sum, Wisconsin statutes do not grant towns a "coordination" power that would compel other municipalities (much less the state or its agencies or officers) to coordinate their municipal planning activities with the municipal planning activities of towns.

¶ 23. This is not to say that towns are without a role to play in comprehensive planning or with the more specific elements of zoning. For example, with respect to comprehensive planning, public notice and participation provisions are specifically addressed in statute. Wis. Stat. § 66.1001(4). A town must follow those provisions and follow public participation procedures when adopting or amending a town's comprehensive plan and presumably may participate in another governmental unit's public participation proceedings when the other governmental unit is adopting or amending its plan. Towns located within another governmental body's boundaries (for example, a county) are to be provided a copy with the other governmental body's comprehensive plan. Wis. Stat. § 66.1001(4)(b)1. Towns may have a role to play with respect to the creation of regional planning commissions. Wis. Stat. § 66.0309(2). With respect to zoning ordinances, county ordinances are not effective in a town until the town board approves the ordinance. Wis. Stat. § 59.69(4). More generally with respect to coordinating governmental activities, towns may "cooperate" with other municipalities by entering into *voluntary* intergovernmental agreements to furnish or receive services, or jointly exercise any power or duty required or authorized by law, subject to specific statutory exceptions or limitations. Wis. Stat. § 60.23(1).

¶ 24. But these statutory duties and rights, which relate to governments working together or having overlapping responsibilities, are far different in nature than the "coordination" power described in your correspondence. They have one other critical difference: they are contained in Wisconsin statutes.

CONCLUSION

¶ 25. I therefore conclude that the use of the word "coordination" in various Wisconsin statutes dealing with municipal planning does not by itself authorize towns to invoke a power of "coordination" that would impose affirmative duties upon certain municipalities that are in addition to any other obligations that are imposed under those statutes. With respect to the development of and amendment of comprehensive plans, Wis. Stat. § 66.1001 is to be followed by the local governmental units and political subdivisions identified in that section.

Sincerely,

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Attorney General

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