

## **Extraterritorial Zoning vs. Extraterritorial Plat Approval Authority**

### **Q. What is extraterritorial zoning?**

A. Those towns that live near cities and villages may have heard of such municipalities possessing some sort of "extraterritorial" power. There are two types of extraterritorial powers that may be exercised: extraterritorial zoning and extraterritorial plat review. First, let's review extraterritorial zoning jurisdiction under s. 62.23(7a), Wis. Stat. Any city or village that has a plan commission and has adopted a zoning ordinance may attempt to exercise extraterritorial zoning jurisdiction. First, second, and third class cities may exercise extraterritorial zoning within 3 miles of their corporate limits. Fourth class cities and villages may exercise extraterritorial zoning within 1 1/2 miles beyond their corporate limits.

Three major steps are involved in the adoption of an extra territorial zoning ordinance. First the governing body of the city or village adopts and publicizes a resolution which establishes its intent to exercise its zoning authority within all or part of its extraterritorial jurisdiction. Next, the city or village directs its plan commission to formulate tentative recommendations for the extraterritorial district plan and regulations. The hearings, recommendations, and decisions regarding the final zoning plan are made and conducted by a joint extraterritorial zoning committee. The joint committee is composed of three city or village representatives and three members from each of the towns included within the area proposed to be zoned. Once tentative recommendations for the district plan and regulations are formulated, there must be a properly noticed public hearing. However, the city or village may not adopt the proposed plan and regulations, or amendments thereto, unless they receive a favorable vote of a majority of the six members of the joint committee. If the extraterritorial zoning committee gives its approval, the city or village may adopt the regulations as received or request that the joint committee approve changes (and have another properly noticed hearing, etc.) before the final plan and regulations may be adopted. If the joint committee fails to approve the proposed plan and regulations, the city or village's attempt to exercise extraterritorial zoning fails, for the time being.

A city or village that adopts a resolution to exercise extraterritorial zoning may adopt an interim extraterritorial zoning ordinance. The interim ordinance freezes existing zoning or uses in the area during the period in which the extraterritorial ordinance is being prepared. An interim zoning ordinance is valid for two years after its enactment and be extended for another year if the joint committee so recommends. No other interim zoning ordinance may be enacted affecting the same area or part thereof until two years after the date of the expiration of the interim zoning ordinance.

### **Q. How does a city exercise extraterritorial plat approval jurisdiction?**

A. In addition to extraterritorial zoning, cities and villages may also exercise extraterritorial plat approval jurisdiction. The geographical limits for extraterritorial plat review are the same as for extraterritorial zoning jurisdiction. However, there are key differences in the process for

exercising extraterritorial plat review. Extraterritorial plat approval jurisdiction applies automatically if the city or village adopts a subdivision ordinance or official map. The town does not have any input in the matter and is not required to approve the city or village's subdivision ordinance. A city or village may waive its authority to approve plats within its extraterritorial plat approval jurisdiction by adopting a resolution to that effect and filing it with the register of deeds. See s. 236.10(5), Wis. Stat. If a city or village is exercising its extraterritorial plat approval jurisdiction, the city or village must approve of the final plat before it can be recorded, s. 236.10(1)(b), Wis. Stat. Since the town and county might also have subdivision ordinances in place, if there is a conflict between the requirements, the proposed subdivision must comply with the most restrictive requirements, s. 236.13(4), Wis. Stat.

**Q. Can a city or village use its extraterritorial plat approval authority to control the use of land in its extraterritorial area?**

A. A municipality may not deny approval of a plat on the basis of the proposed use of land within the extraterritorial plat jurisdiction. See s. 235.45(3)(b), Wis. Stat. Those towns that have been following this issue know that this general rule was initially created by a court of appeals case, *Gordie Boucher Lincoln-Mercury Madison, Inc. v. City of Madison Plan Commission*, 178 Wis. 2d 74, 503 N.W.2d 265 (Ct. App. 1993). Ten years later, the Wisconsin Supreme Court overruled *Gordie Boucher* when it issued a decision finding the opposite in *Wood v. City of Madison*, 2003 WI 24, 260 Wis. 2d 71, 659 N.W.2d 31. The *Wood* decision prompted the Wisconsin Towns Association Urban Towns Committee to lobby for legislative change. Our lobbying efforts resulted in 2009 Act 399 which created s. 236.45(3)(b), a statute which definitively states that a municipality cannot deny extraterritorial plat approval based on land use. Thus, the current law is that a city or village may not use its extraterritorial plat approval authority to impose land use regulations. Land use regulations must be done in conjunction with the neighboring town(s) through extraterritorial *zoning*.

Section 236.24(3)(b), Wis. Stat. was recently put to the test in *Lake Delavan Property Co., LLC v. City of Delavan*, 2013 AP1202, which was decided on February 12, 2014. In that case, the city amended its subdivision ordinance to restrict land division within its extraterritorial jurisdiction to a density of no more than one lot per thirty-five acres of land and a minimum lot size of one acre. When challenged, the city argued it was simply applying its density restrictions when it failed to approve a proposed plat in its extraterritorial area. But, the property owner maintained that the city wanted to keep a ring of land adjacent to its borders agricultural in nature and the thirty-five acre density restriction was designed to do just that. The court of appeals agreed with the property owner and found that the city's density restriction was an attempt to use its extraterritorial plat approval authority to supercede the residential county zoning that was already in place. The court noted that ch. 236 does not permit a city or village to enact density restrictions that are so extreme as to effectively veto the zoned residential use of land. This decision is an important one for towns as it helps clarify the limits associated with extraterritorial plat approval authority.