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43



State of Wisconsin \ DEPARTMENT OF NATURAL RESOURCES

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March 31, 2006

Daniel Ebert
Town Chairperson
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Subject: Town Ordinance restricting water supply wells in water supply protection area

Dear Mr. Ebert:

The Department of Natural Resources ("DNR") recently learned that the Town of Ripon, Fond du Lac County, enacted a Town Ordinance restricting the construction of water supply wells in a described water supply protection area, Ordinance 4.16.02, Section 4.16.05, effective May 9, 2005. Under s. 280.11(1), Wis. Stats., the Department of Natural Resources ("DNR") has general supervision and control of all methods of obtaining groundwater for human consumption, including the construction or reconstruction of wells, and shall do any act necessary for the safeguarding of public health. The Wisconsin Supreme Court has ruled that issues involving water supply and the promotion and protection of public health are matters of statewide concern. City of Fond du Lac v. Empire, 273 Wis. 333 (1956) and State ex rel Martin v. Juneau, 238 Wis. 564 (1941). In the Empire case, an ordinance passed by the town board of the town of Empire, which regulated the drilling of wells in the town, was held to be invalid because the Supreme Court said the town had no authority to adopt the ordinance.

Case law and statutory law in Wisconsin establish that local units of government (such as counties and municipalities) may not adopt or enforce regulations regarding water supply issues except as specifically authorized by the Legislature (by statute) or DNR (by regulation). Under s. 280.21(1), Stats., DNR may authorize counties to adopt ordinances under s. 59.70(6)(b) and (c), relating to certain water supply issues. The only subject areas in which counties or municipalities have been authorized to enact ordinances are:

1. Well construction or pump installation requirements for private wells (s. 59.70(6), Stats., and ch. NR 845, Wis. Adm. Code).
2. Prohibition on cross-connections and requirement for well abandonment of wells located on premises served by municipal water systems (ss. NR 811.09 and 811.10, Wis. Adm. Code).

Under s. NR 845.03, Wis. Adm. Code, no entity, other than a county authorized under ch. NR 845 or a municipality with well abandonment and cross-connection ordinances approved by DNR under ch. NR 811, may adopt or enforce an ordinance regulating matters covered by ch. 280, Stats., or DNR rules adopted under ch. 280, Stats.

DNR has adopted multiple regulations governing well construction, under ch. NR 812, Wis. Adm. Code. If authorized by DNR under s. 280.21(1), Wis. Stats., a county may enact and enforce a well construction ordinance; however, provisions of the ordinance must be in strict conformity with ch. 280, Wis. Stats.,



and DNR rules promulgated under that statute (s. 59.70(6)(b), Wis. Stats.). Municipalities, including towns, are specifically prohibited from enacting or enforcing an ordinance regulating matters covered by ch. 280 and related DNR rules (s. 59.70(6)(e), Wis. Stats.).

Section 4.16.05.1 (Findings), paragraph J, of the Ordinance states that it is "in the public interest to prohibit in the Water Supply Protection Area the construction of new water supply wells or increased pumping by existing wells when the latter occurs to supply new construction, and for any building or other construction." Section 4.16.05.2 (Restrictions), paragraphs B and C, of the Ordinance state that no person may construct or arrange for the construction of a new water supply well to serve any new structure in the Water Supply Protection Area and no person may connect an existing water supply well to any new structure in the Water Supply Protection Area for any purpose. These restrictions go beyond the Town's authority to restrict water supply wells. They also go beyond the restrictions already in place by DNR, which established a "Special Well Casing Pipe Depth Area" for this area because of contamination from the Ripon FF/NN Landfill Site. DNR sent letters to Wisconsin licensed wells drillers on July 15, 2004, stating that the requirements for special well casing pipe depth would be effective August 15, 2004.

Thus, the Town of Ripon had no authority to enact Ordinance 4.16.02, Section 4.16.05, and has no authority to enforce it. Even if Fond du Lac County had enacted an ordinance in this case, instead of the Town of Ripon, the ordinance would be invalid because its terms are not in strict conformity with ch. 280, Wis. Stats. Thus, it is clear that the Town of Ripon Ordinance regulating the construction of wells is not allowed under state law. DNR strongly recommends that the Town Board repeal Town Ordinance 4.16.02, Section 4.16.05, as soon as possible.

Department staff is willing to work with the Town of Ripon to address any water supply issues the Town is concerned about. Please contact, Mark Putra, at (608)267-7649 or Bob Barnum, at (920)492-5888, if you would like to discuss this.

Sincerely,

Judy Mills Ohm
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c: Mark Putra—DG/2
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