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**SUPREME COURT**

STATE OF WISCONSIN  
IN SUPREME COURT

\_\_\_\_\_  
No. 2021AP1589

\_\_\_\_\_  
SOJENHOMER LLC,

Plaintiff-Appellant,

v.

VILLAGE OF EGG HARBOR,

Defendant-Respondent-Petitioner.

\_\_\_\_\_  
ON REVIEW OF A DECISION BY DISTRICT III  
OF THE WISCONSIN COURT OF APPEALS  
OF AN APPEAL OF A FINAL ORDER OF THE  
DOOR COUNTY CIRCUIT COURT,  
THE HONORABLE DAVID L. WEBER, PRESIDING

\_\_\_\_\_  
**NONPARTY BRIEF OF THE**  
**WISCONSIN DEPARTMENT OF TRANSPORTATION**

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## INTRODUCTION

Eminent-domain statutes limit condemnors' power to acquire property for a "pedestrian way." This case asks whether that exception also applies to "sidewalks," even though a "sidewalk" and a "pedestrian way" are defined differently and treated separately in the statutes.

The circuit court below properly concluded the terms have different meanings, but the court of appeals reversed, erroneously concluding they are synonymous. This Court should correct that misconception and hold that the Village of Egg Harbor (the "Village") was not forbidden from acquiring property to develop a project that includes a sidewalk.

## ISSUE PRESENTED

Wisconsin Stat. § 32.015 requires that "[p]roperty may not be acquired by condemnation to establish . . . a pedestrian way, as defined in s. 346.02(8)(a)." Wisconsin Stat. § 61.34(3)(b) similarly requires that a village board may not condemn property to establish a pedestrian way. "A pedestrian way means a walk designated for the use of pedestrian travel." Wis. Stat. § 346.02(8)(a).

The Village sought to acquire property that Sojenhomer LLC owns to establish a sidewalk. The circuit court held that Wis. Stat. §§ 32.015 and 61.34(3)(b) do not forbid it. The court of appeals reversed and held, as a matter of first impression, that a sidewalk is the same as a pedestrian way, so the Village may not acquire the property.

Is a sidewalk the same as a "pedestrian way" as that term is used in Wis. Stat. §§ 32.015, 61.34(3)(b), 346.02(8)(a), and related statutes?

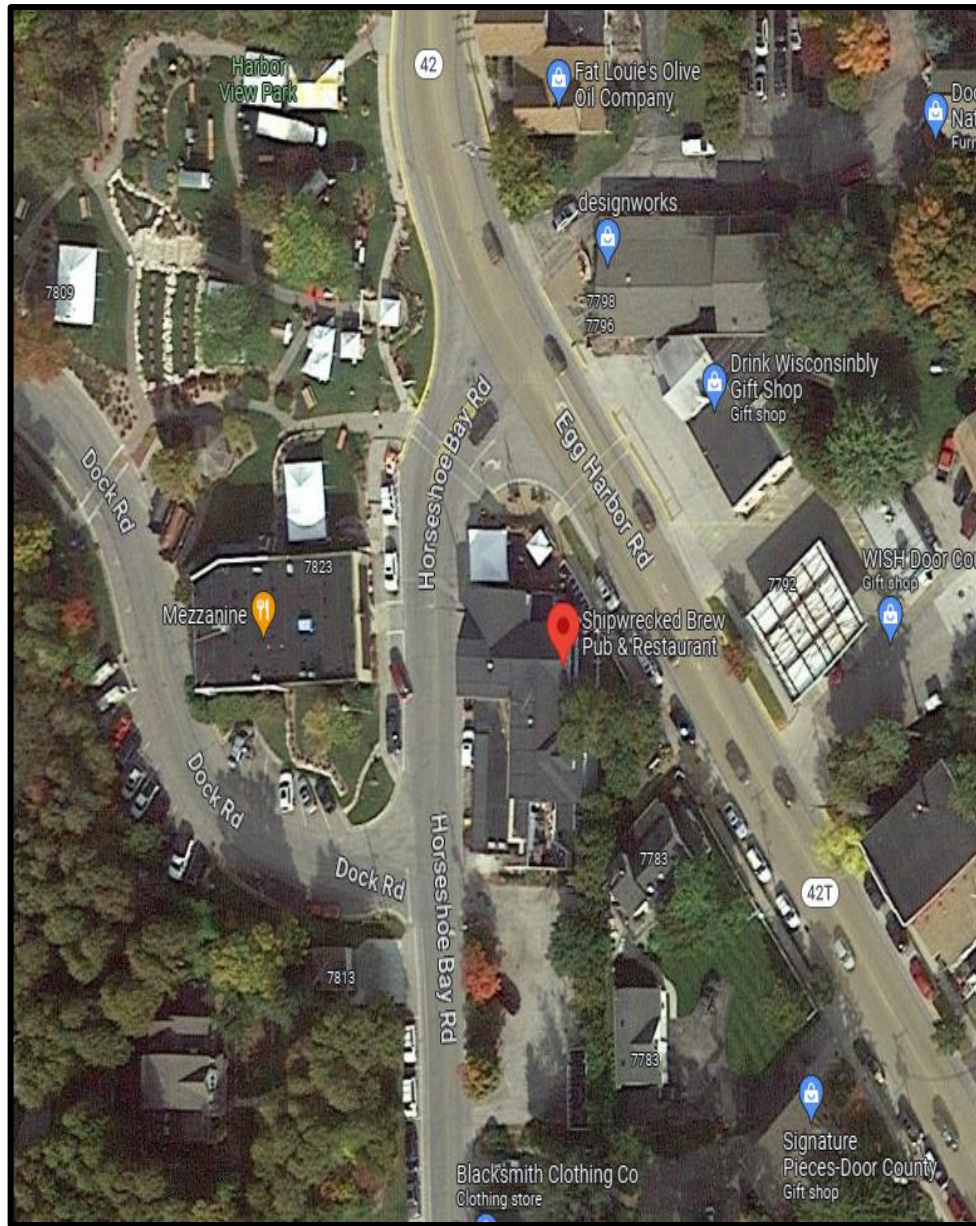
The Wisconsin Department of Transportation (DOT) believes that this Court should answer "no."

## ARGUMENT

The immediate question before the Court is whether the Village may lawfully acquire a sliver of Sojenhomer LLC's property near a well-travelled Door County intersection. But the ramifications of this Court's decision are much bigger. If this Court does not correct the court of appeals's erroneous conflation of pedestrian ways and sidewalks, this Court's decision would impact almost all governmental authority statewide to acquire property for sidewalks.

This brief will first address DOT's interests, including why interpreting the relevant statutes impacts DOT's statewide condemnation authority. The brief will then explain why the decision below should be reversed.

This case is about a property acquisition, so it can be helpful to see the location. The following (non-record) image shows where Horseshoe Bay Road (Highway G) intersects Egg Harbor Road (Highway 42) near Shipwrecked Brew Pub and Restaurant, which the Sojenhomer LLC owns.



Google Maps, *Shipwrecked Brew Pub & Restaurant*, <http://maps.google.com> (satellite image) (last accessed Oct. 20, 2023); (see also Village App. 124 (depicting the location)).



**I. This Court’s decision will impact DOT’s statewide condemnation authority under Wis. Stat. chs. 32 and 85.**

This Court’s decision will have statewide impact; therefore, DOT’s interest in the Court’s making a correct statutory interpretation is vital.

DOT’s eminent-domain authority under Wis. Stat. ch. 32 is impacted by the court of appeals’s incorrect interpretation of Wis. Stat. §§ 32.015 and 346.02(8). Wisconsin Stat. § 85.09(2)(a), addressing DOT’s authority to acquire abandoned rail property, is also affected because it mirrors the language of Wis. Stat. § 32.015.

Wisconsin Stat. ch. 32 governs eminent domain generally. It establishes who may condemn property and how it is done, including DOT’s authority to acquire property to establish facilities such as sidewalks and pedestrian ways. *See* Wis. Stat. §§ 32.02–32.09. Importantly, Wis. Stat. § 32.015—the main statute at issue in this appeal—applies to DOT’s condemnation authority. How that statute is interpreted is crucial to DOT’s work when a sidewalk or pedestrian way is part of a highway project. This Court’s decision will therefore directly impact DOT’s ability to condemn property for construction projects throughout the state, impacting millions of dollars of projects.

Wisconsin Stat. ch. 85 governs the acquisition of abandoned rail property and also excepts a “pedestrian way” from DOT’s condemnation authority. Wisconsin Stat. § 85.09(2)(a) states that DOT “shall have the first right to acquire, for present or future transportation or recreational purposes, any property used in operating a railroad or railway, including land and rails, ties, switches, trestles, bridges, and the like located on that property, that has been abandoned.” “Acquisition by [DOT] may be by . . . condemnation in accordance with the procedure under

s. 32.05, except that the power of condemnation may not be used to acquire property for the purpose of establishing . . . a pedestrian way, as defined in s. 346.02(8)(a).” *Id.* Because the statute contains a similar exception for “pedestrian way[s]” as Wis. Stat. § 32.015, and cross-references the definition of “pedestrian way” in Wis. Stat. § 346.02(8)(a), this section will also be affected by this Court’s ruling.

**II. The decision below erroneously interpreted the relevant statutes by equating sidewalks with pedestrian ways.**

The decision below was incorrect, as the Village’s brief persuasively argues. (Village Br. 8–9, 17–25.) The decision misconstrued Wis. Stat. §§ 32.015, 61.34(3)(b), 346.02(8), and related statutes and erroneously equated a sidewalk with a pedestrian way when these terms have different meanings.

**A. The definitions of “sidewalk” and “pedestrian way” are materially distinct.**

The statutes define the terms at issue. “Sidewalk” means “that portion of a highway between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, constructed for use of pedestrians.” Wis. Stat. § 340.01(58). “[P]edestrian way,” in contrast, means “a walk designated for the use of pedestrian travel.” Wis. Stat. § 346.02(8)(a).

Some important distinctions can be read in the plain language of these definitions. Notably, a pedestrian way is not defined as being *part of* a highway or roadway, whereas a sidewalk is a “portion of a highway” “between the curb lines” or a “portion of a highway” “between . . . the lateral lines of a roadway.” Wis. Stat. § 340.01(58). “Highway” and “roadway” are also defined terms, meaning “all public ways and thoroughfares and bridges on the same” and “that portion of



a highway between the regularly established curb lines or that portion which is improved, designed or ordinarily used for vehicular travel, excluding the berm or shoulder,” respectively. Wis. Stat. § 340.01(22), (54). The fact that a sidewalk is *part of* a highway or roadway, and that a pedestrian way need not be, shows that these terms have different characteristics and distinct meanings.

Sidewalks and pedestrian ways are also created differently in the statutes.

A pedestrian way is a “walk” that has been “designated” for pedestrians to use for travel. Because it is not part of the highway right-of-way itself—like a sidewalk is—it may have been pre-existing and only later identified as a pedestrian way. Wis. Stat. § 346.02(8)(a).

A sidewalk, in contrast, is a facility “constructed” for pedestrian use within the highway right-of-way. It may have been constructed with the original highway or added later, but it is always part of the highway. Wis. Stat. § 340.01(58). Because it must be *part of* the highway, a sidewalk cannot be “designated” as a pedestrian way.

The decision below erroneously concluded that a sidewalk is merely something that runs adjacent to a highway, when a sidewalk is *part of* a highway under the statutes. Specifically, Wis. Stat. § 340.01(58) defines “[s]idewalk” as “that *portion of a highway* between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, constructed for use of pedestrians.” This definition applies to Wis. Stat. ch. 346 “unless a different meaning is expressly provided or the context clearly indicates a different meaning.” Wis. Stat. § 340.01(1).

The decision also stated that “the term pedestrian way includes . . . (1) *sidewalks—i.e., walks adjacent to a roadway for the use of pedestrian travel, see WIS. STAT. § 340.01(58).*” *Sojenhomer LLC v. Vill. of Egg Harbor*, 2023 WI App 20, ¶ 29, 407 Wis. 2d 587, 990 N.W.2d 267 (emphasis added). This is inconsistent with the defined term “sidewalk,” and no other definition is expressly provided for or demanded by the context.

**B. The statutes treat sidewalks and pedestrian ways as different things.**

Subsections (8)(a) and (b) of Wis. Stat. § 346.02 treat a sidewalk and a pedestrian way as different things. The court of appeals erred in failing to recognize these statutory distinctions.

“Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.” *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. When a statute “use[s] two different words, we generally consider each separately and presume that different words have different meanings.” *See United Am., LLC v. DOT*, 2021 WI 44, ¶ 13, 397 Wis. 2d 42, 959 N.W.2d 317 (citation omitted); *cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretations of Legal Texts* 170 (2012) (“A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.”).

Here, Wis. Stat. § 346.02(8)(a) defines “pedestrian way” as “a walk designated for the use of pedestrian travel.” The same provision also states that “[a]ll of the applicable provisions of this chapter pertaining to highways, streets, alleys, roadways and *sidewalks* also apply to *pedestrian ways*.” *Id.* By distinguishing “sidewalks” and “pedestrian ways” in the same sentence, the statute specifies they are different.

Similarly, Wis. Stat. § 346.02(8)(b) states that “[p]ublic utilities may be installed either above or below a pedestrian way, and assessments may be made therefor *as if such pedestrian way were a* highway, street, alley, roadway or sidewalk.” That sentence explicitly recognizes that a pedestrian way is, in fact, not the same as a sidewalk or other items in the list.

The decision below did not explain how Wis. Stat. § 346.02(8)(a) and (b) can be squared with equating a pedestrian way with a sidewalk, specifically when this statutory provision treats the terms as different things.

**C. Wisconsin Stat. § 32.015, which describes pedestrian ways, should not be expanded to include sidewalks.**

The decision below also erroneously found the Legislature “had no need to include the term sidewalk in § 32.015 because the inclusion of the term pedestrian way already made § 32.015 applicable to sidewalks.” *Sojenhomer LLC*, 407 Wis. 2d 587, ¶ 33; (see *Village Br. 20*).

“‘[W]hat a text chooses *not* to do’ is as significant ‘as its affirmative dispositions.’” *Wis. Prop. Taxpayers, Inc. v. Town of Buchanan*, 2023 WI 58, ¶ 20, 408 Wis. 2d 287, 992 N.W.2d 100 (alteration in original) (quoting Scalia & Garner, *supra*, at 57). “For this reason, ‘[w]e do not read words into a statute . . . rather, we interpret the words the legislature actually enacted into law.’” *Id.* (alteration in original) (quoting *State v. Hinkle*, 2019 WI 96, ¶ 24, 389 Wis. 2d 1, 935 N.W.2d 271). Here, the decision below read the word “sidewalk” into the statute when it is simply not there.

The decision below also engaged in unsound circular reasoning based upon the misapplication of the avoid-surplusage canon of statutory interpretation.

Specifically, the decision below erroneously reasoned that “[a]lthough, in certain circumstances, the use of two similar terms in the same sentence might suggest the terms have wholly distinct meanings, we conclude that these provisions contain no surplusage *if* the term pedestrian way is interpreted to include sidewalks.” *Sojenhomer LLC*, 407 Wis. 2d 587, ¶ 28 (emphasis added).

The “if” in the decision’s analysis is key. Its premise should not be accepted. The logic is unsound and assumes the conclusion: it relies on the assumption that a sidewalk *is* a pedestrian way when these terms (1) have distinct, defined meanings, and (2) are used separately, not interchangeably.

Similarly, and as the Village correctly argues, the reasoning as to the Legislature’s not needing to include “sidewalk” in Wis. Stat. § 32.015 disobeys the omitted-case canon of statutory interpretation, whereby “[n]othing is to be added to what the text states or reasonably implies.” (Village Br. 21 (alteration in original) (quoting *State ex rel. Lopez-Quintero v. Dittman*, 2019 WI 58, ¶ 18, 387 Wis. 2d 50, 928 N.W.2d 480).) The decision below effectively read the word “sidewalk” into Wis. Stat. § 32.015, which is incorrect.

This Court should reject the court of appeals’s statutory interpretation, reverse its decision, and hold that the Village of Egg Harbor had the authority to acquire the property in question for a sidewalk.

## CONCLUSION

This Court should reverse the court of appeals's decision.

Dated this 20th day of October 2023.

Respectfully submitted,

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### **FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2056 words.

Dated this 20th day of October 2023.

Electronically signed by:

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CLAYTON P. KAWSKI  
Assistant Attorney General

### **CERTIFICATE OF EFILE/SERVICE**

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 20th day of October 2023.

Electronically signed by:

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