STATE OF WISCONSIN
SUPREME COURT

State of Wisconsin ex rel. Kristle Majchrzak and Robert Glau d/b/a Kristle KLR,

Petitioners-Plaintiffs,

v.

APPEAL NO. 2022AP001241

Bayfield County and Bayfield County Board of Adjustment,

Respondents-Defendants.

Appeal from the June 11, 2024 affirmance by the Court of Appeals
of the October 4, 2022 Order of the Circuit Court
for Bayfield County (Cir. Ct. No. 2021CV88)

RESPONDENTS-DEFENDANTS' BRIEF IN RESPONSE TO PETITIONERS-PLAINTIFFS' PETITION FOR REVIEW

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STATEMENT OF THE ISSUES

ISSUE NO. 1: Whether this Court should eliminate municipal deference from Wisconsin Jurisprudence and bar municipalities from interpreting its own ordinance in litigation which the municipality is a party.

Circuit Court holding: Not discussed or ruled on by the Circuit Court.

Appellate Court holding: The Court of Appeals deferred to the municipality's interpretation of its ordinance.

ISSUE NO. 2: If municipal deference is not eliminated by this Court, whether this Court needs to clarify the scope of the deference required under *Ottman.*

Circuit Court holding: Not discussed or ruled on by the Circuit Court.

Appellate Court holding: The Board's interpretations of the ordinances are entitled to deference under *Ottman* because the ordinances are unique to Bayfield County.

ISSUE NO. 3: Whether the county's ordinances are ambiguous, and thus should be construed in favor of the free use of private property, in conjunction with *Cohen.*

Circuit Court holding: The ordinance unambiguously denied application of concurrent jurisdiction and a permissible land use under the zoning ordinance.

DISPOSITION BELOW: The Court of Appeals found the ordinance unambiguous and construed it in favor of restricting land use.

STATEMENT ON CRITERIA FOR REVIEW

Supreme Court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented. Wis. Stat. § 809.62(1r). The following, while neither controlling nor fully measuring the court's discretion, indicate criteria that will be considered:

> (a) A real and significant question of federal or state constitutional law is presented.
> (b) The petition for review demonstrates a need for the supreme court to consider establishing, implementing or changing a policy within its authority.
> (c) A decision by the supreme court will help develop, clarify or harmonize the law, and
> 1. The case calls for the application of a new doctrine rather than merely the application of well-settled principles to the factual situation; or
> 2. The question presented is a novel one, the resolution of which will have statewide impact; or
> 3. The question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court.
> (d) The court of appeals' decision is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions.

Wis. Stat. § 809.62(1r)(a)-(d). No genuine issue warrants review in this case.

Petitioner here relies on all subsections above to argue that Supreme Court review is warranted here. (Brief for Petitioner at 9). Petitioner also fails to describe in detail how jurisdictional review is warranted. The only reference to the criteria for review is within their statement of criteria (Brief for Petitioner at 9). But, Petitioners do not provide a concise statement of criteria and compelling reasons for

review, pursuant to Wis. Stat. § 809.62(2)(c). Even if Petitioners did provide a detailed statement of criteria, their argument fails.

First, there is no significant question of federal or state constitutional law presented. The Court of Appeals properly relied on Supreme Court decisions to determine that the Board's determination was entitled to deference under *Ottman* because the ordinances at issue are unique to Bayfield County. Therefore, the lower courts' decisions are consistent with state law and should not be abandoned.

Petitioner also argues that this Court needs to consider establishing, implementing or changing a policy within its authority. (Brief for Petitioner at 9). Specifically, Petitioner is requesting this Court eliminate municipal deference from Wisconsin jurisprudence. Further, Petitioner argues that the Court of Appeals' decision is in direct conflict of well-settled law. Municipal deference is well settled law in the State of Wisconsin. Municipal deference only concerns laws unique to the municipality and does not concern Wisconsin statutes. Thus, municipal deference is distinct from pre-*Tetra* administrative deference, and no change in municipal deference is warranted.

Lastly, this case will not assist this Court in developing or harmonizing established law, pursuant to Wis. Stat. § 809.62(1r)(c). Petitioner relies on the *Ottman* decision to reach this conclusion. *See Ottman v. Town of Primrose,* 2011 WI 18, ¶59, 332 Wis. 2d 3, 796 N.W.2d 411 (2011). *Ottman* does not create two distinct elements of uniqueness and local concern for deference to apply to the County's interpretation of its own ordinance. Rather, there is a presumption of

correctness once it is established that the ordinance is unique. It is undisputed that the ordinance here is unique, and the burden shifts to Petitioners to overcome this presumption of correctness, which they have failed to do.

Petitioners fail to meet the requirements under Wis. Stat. § 809.62(1r), and therefore, review by this Court is unwarranted.

STATEMENT OF THE CASE

I. INTRODUCTION

This case involves the Bayfield County Board of Adjustment's (the "Board") denial of Kristle KLR's conditional use permit application submitted February 25, 2021. The application was ultimately denied by the Board because it did not describe one of the permissible land uses in the applicable zoning district. On Certiorari review, the circuit court held that the Board reasonably interpreted the County's ordinances and affirmed the Board's denial. (Pet. App. 23-36). The Court of Appeals affirmed the Board's denial and the circuit court's decision on June 11, 2024. (Pet. App. 1-22).

II. CUP APPLICATION PROCESS

Petitioner Kristle KLR, submitted a Conditional Use Permit ("CUP") to the Board, seeking permission to construct a "water collecting facility" on their property, which would allow tanker trucks to "fill from [two] underground tanks supplied by an artesian well and the water w[ould] then be taken off[-]site for bottling and sale." (Pet. App. 2). Petitioner's property is in zoning district R-RB,

which "is intended to provide for permanent or seasonal residential development and associated recreational use." (Bayfield County Code § 13-1-61(e)). Prior to the CUP application, the Department of Natural Resources ("DNR") issued a "well notification" to construct the artesian well on Petitioner's property, pursuant to WIS. STAT. § 281.34(3)(a).

Petitioner's CUP proposal was presented at a Bayfield County Planning and Zoning Committee public hearing on April 15, 2021. (Dkt. 51:3). On April 27, 2021, the Zoning Department sent the Petitioner a letter informing it that its CUP proposal had been denied. (Dkt.52:63-64). The Board unanimously denied the application, concluding the DNR did not have concurrent jurisdiction over the proposal, that no ordinance granted an exemption to the CUP requirement, and that the proposal did not fall under a permissible use in the appropriate zoning. (Pet. App. 2).

III. ROLE OF COUNTY'S PLANNING AND ZONING DEPARTMENT

The County's Planning and Zoning Department grants certain "powers and duties" to the Director and Assistant Administrator. More specifically, these powers and duties are outlined in Ordinance § 13-1-106. Zoning Director Robert Schierman and Assistant Administrator Todd Norwood have the power and duty to advise applicants concerning the provisions of the zoning code and assist them in preparing the application. Ordinance § 13-1-106 (b). When the Petitioner submitted the Proposal to the County for the CUP application, Schierman and his staff determined that the application best fit within classification for "Irrigation Facilities, Canals,

Dams, Reservoirs, Etc." as characterized by Ordinance § 13-1-62(a). Director Schierman classified Petitioner's proposal under these uses because this ordinance "deals with the use of water, the manipulation of a water source, [and] infrastructure for controlled discharge of the water." (Pet. App. 89). By classifying it under this ordinance, the Proposal and CUP application were permitted to go before the Committee and ultimately the Board of Adjustment. The Committee and Board both determined that the Proposal failed to meet the requirements to satisfy Ordinance § 13-1-62(a)'s requirements. (Pet. App. 100-101). The Board rejected the application specifically because the Proposed use was not (1) a "conditional" use "classification" for "Irrigation Facilities, Canals, Dams, Reservoirs, Etc." nor (2) another "permitted" or "conditional" use in the proper zoning district. Therefore, it was determined a prohibited use. (Pet. App. 38). It was also determined by the Board that there is no concurrent jurisdiction exemption for this Proposal. (Pet. App. 37). Specifically, where a property is "[w]ithin the Shoreland, a permit shall be required for any and all structures" and the concurrent jurisdiction exception does not apply. Ordinance § 13-1-21(b)(7).

ARGUMENT

I. THIS COURT SHOULD NOT ELIMINATE MUNICIPAL DEFERENCE

Municipal deference is well established law in Wisconsin and is distinctly separate concept from "administrative deference." Changes to administrative deference at the state and federal level do not impact the narrow scope of municipal deference. Municipal deference concerns "unique" ordinances with a local impact, and ordinances that parallel state statues or other ordinances are excluded from municipal deference. Therefore, the law of municipal deference should be preserved.

A. Municipal Deference is Well-Established Law and Changes to Administrative Deference Do Not Warrant a Change in the Law.

Wisconsin courts have repeatedly held that, during judicial review of a municipality's decision, there is a "presumption of correctness and validity" to that decision. *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 48, 332 Wis. 2d 3, 796 N.W.2d 411; *see also Lamar Cent. Outdoor, Inc. v. Bd. of Zoning Appeals City of Milwaukee*, 2005 WI 117, ¶16, 284 Wis. 2d 1, 700 N.W.2d 87; *State ex rel. Ziervogel v. Washington Cnty. Bd. Adjustment*, 2004 WI 23, ¶13, 269 Wis. 2d 549, 676 N.W.2d 401; *Herman v. Cnty. of Walworth*, 2005 WI App 185, ¶9, 286 Wis. 2d 449, 703 N.W.2d 720. A "presumption" operates similarly to a "burden," both of which are relatively common practice in litigation. *See Ottman*, 2011 WI 18, ¶50, n.20. Similar to other presumptions and burdens, a presumption in the context of municipal deference can be overcome and does not prevent judicial review. *Id* at

¶51. Thus, municipal deference operates similarly to other functions within state litigation practice and has been upheld repeatedly.

B. Changes to administrative deference do not affect municipal deference

Wisconsin administrative deference applied to state agency interpretation of state statutes, whereas municipal deference only applies to unique local ordinances. Municipal deference does not apply when the ordinance closely mirrors state statutes or other ordinances in Wisconsin. *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 33, 498 N.W.2d 842 (1993). A reviewing court will defer to a municipality's reasonable interpretation of an ordinance if the ordinance is "unique" and "does not parrot a state statute but rather the language was drafted by the municipality in an effort to address a local concern." *Ottman,* 2011 WI 18, ¶60. Thus, municipal deference applies only when a specific municipality is uniquely well suited to interpret the ordinance that they drafted. *Id.*

Pre-*Tetra Tech* administrative deference required courts to give one of three levels of deference during review of a state agency's interpretation of a state statute. *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶13, 382 Wis. 2d 496, 914 N.W.2d 21 (2018). Following *Tetra Tech*, courts no longer defer to agencies' conclusions of law, but give "due weight" to the agency's expertise and knowledge. *Id.* at ¶108. *Ottman* flatly declined to use the pre-*Tetra Tech* framework in the context of municipal deference. *Ottman*, 2011 WI 18, ¶65. The division of power between the judicial and executive branches was dissimilar from the division

of authority between state courts and the municipal governments interpreting local laws. *Id.*

The disconnect between administrative agency review and municipal deference has not changed. The *Tetra Tech* decision did not change the "standard of review for municipal decisions" for reviewing courts. *Grycowski v. Milwaukee Employees' Ret. Sys./Annuity & Pension Bd.*, 2021 WI App. 7 ¶29 n.2, 395 Wis. 2d 722, 953 N.W.2d 904. Petitioner's argument that the recent overturning of *Chevron* deference by the United States Supreme Court in *Loper* is not relevant to municipal deference. (Petition, p.20). The *Loper* decision abolished judicial deference to federal agencies' interpretation of federal statutes. *Loper Bright Enterprises et al. v. Raimondo, Secretary of Commerce, et al.*, 603 U.S. ___, at 35 (2024). Division of power between the executive and judicial branches does not impact Wisconsin courts' narrow deference to municipalities' reasonable interpretation of their own, unique ordinances.

C. Municipal deference does not defeat judicial review or due process

Municipal deference does not defeat judicial review, rather, it introduces a presumption that the adverse party must overcome, which is common in litigation. Courts retain the ability to review municipal interpretation of unique ordinances for reasonableness despite a presumption of validity on part of the municipality. *Ottman,* 2011 WI 18, ¶ 60. A municipality's interpretation would be unreasonable if it is contrary to the law, clearly contrary to the purpose of the ordinance, if lacks

a rational basis or if it directly contravenes the words of the ordinance. *Id*. at ¶62. Thus, a court does not lack the ability to review municipal interpretations of unique ordinances. Rather, the review is confined to whether the interpretation was reasonable.

A municipality's interpretation of a unique ordinance, and subsequent judicial review of the interpretation, affords all parties due process. In *Marris*, the court acknowledged that courts sometimes defer to a municipality's interpretation of its own ordinance. *Marris*, 176 Wis. 2d 14, at 33. The court also found the municipality violated Marris' due process, and therefore the municipality did not act according to the law in their interpretation of the ordinance. *Id*. at 31. Accordingly, the *Marris* court vacated the municipality's decision. *Id*. *Ottman*, which is grounded in the *Marris* case, affirms that municipal interpretations must be in accordance with the law to be reasonable. *Ottman,* 2011 WI 18, ¶ 62. Thus, the due process rights of all parties are incorporated into judicial review of municipal interpretations.

D. Municipal Deference Promotes Judicial Efficiency and Courts Do Not Struggle to Apply Municipal Deference.

The current system of municipal deference promotes judicial efficiency. A municipality's interpretation of their own, unique, ordinances is given deference because that municipality is uniquely suited to understand the meaning of the ordinance. *Ottman,* 2011 WI 18, ¶ 60. The governmental body that drafted a locally focused ordinance should be given presumption of validity when interpreting that

ordinance. That municipality has the best understanding of the context in which that unique ordinance exists, including, among other things, the local economy, ecology, demographics and history. Municipal deference removes the need for a court to spend time briefing the issue by instead deferring to a municipality's decision, if was reasonable.

The application of municipal deference to municipal interpretations of unique, local, ordinances is uncomplicated. Petitioner baselessly argues that Wisconsin courts have "struggled" to apply municipal deference. (Petition, p.24). There is scant evidence to support this argument. In fact, Wisconsin courts have applied the rules of municipal deference articulated in *Ottman* without issue. *See O'Connor v. Buffalo Cnty. Bd. of Adjustment*, 2014 WI App 60, 354 Wis. 2d 231, 847 N.W.2d 881; *Grycowski*, 2021 WI App. 7 at ¶30. Thus, there is no indication courts have struggled to apply municipal deference in its current form and no change in the law is warranted.

II. THE STANDARD UNDER OTTMAN ESTABLISHES A PRESUMPTION IN FAVOR OF DEFERENCE TO A MUNICIPALITY'S INTERPRETATION OF ITS OWN UNIQUE ORDINANCE.

A. Courts have consistently interpreted Ottman to apply a presumption of correctness once basic facts show the ordinance was unique (i.e., does not parrot a state statute).

i. Ottman does not create a two-condition test to afford deference.

Petitioners first argue that the Court in *Ottman* restates the rule in *Marris* that "generally, there is not municipal deference." (Pet. p. 25). But Petitioners do not cite

to this generalization and regardless, it is a mischaracterization of *Marris*. To the contrary, *Marris* states that "Courts … frequently refrain from substituting their interpretation for that of the agency charged with administration of the law." *Marris v. City of Cedarburg*, 176 Wis.2d 14, 33, 498 N.W.2d 842 (1993) (citing *West Bend Educ. Assn. v. WERC*, 121 Wis.2d 1, 11–12, 357 N.W.2d 534 (1984)).

The Wisconsin Supreme Court concluded that "[i]n situations where the language of a municipality's ordinance appears to be unique and does not parrot a state statute but rather was drafted by the municipality in an effort to address a local concern, we will defer to the municipality's interpretation if it is reasonable." *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 3, 332 Wis.2d 3, 796 N.W.2d 411. Petitioner attempts to create a two-prong test from this quotation by inserting bracketed numbers and misstating the original language, despite putting it in quotations:

> Again, however, this is a limited exception with two distinct conditions: to qualify for deference, an ordinance must be "[(1)] unique, not parroting a state statute, but rather [(2)] drafted by the municipality in an effort to address a local concern." *Ottman*, 2011 WI 18, ¶3 (bracketed information added).

(Pet. p. 25). However, the Court in *Ottman* itself does not appear to apply the alleged elements Petitioners extract from its standard for deference. Its inquiry of whether the "presumption of correctness" applies stops at the determination that the ordinance at issue does not parrot the language of a state statute. *Ottman*, 2011 WI 18 at ¶ 67. Satisfied that the ordinance was "unique," the Court moved onto the

reasonableness analysis. *Id*. Any "elements" created from the quotation Petitioners cited appear to be only whether the ordinance is unique, which the Court looks at whether it merely restates a state statute, and then whether it is reasonable. The Court declined to give deference to the City's interpretation of its own ordinance in *Marris* because the ordinance essentially restated the language in the state statute. 176 Wis.2d at 33. In other words, the Court in *Marris* stopped at the assessment of whether the ordinance was unique, such that it did not recite state statute.

Petitioners then argue that most ordinances are either unique or drafted to address a local concern but cite to nothing to support this assertion. Uniqueness and addressing a local concern are not mutually exclusive. Petitioners provide two hypotheticals to support the argument that these two are distinct conditions. The first hypothetical is as follows: "a municipality could address a local concern by borrowing language from other ordinances or statutes." (Pet. p. 26). However, this seems contradictory as using the language from other ordinances or statutes implies the issue is shared, rather than a matter of local concern. The second hypothetical is inconsistent as well: "a municipality could address a universal issue by crafting a unique ordinance." *Id*. Unique means "being the only one."[1] It is an oxymoron to argue a one-of-a-kind ordinance can be drafted to address a universal issue.

As the Court of Appeals points out, uniqueness and addressing a local concern are not distinct and instead go hand in hand: "Logically, however, if an

[1] "Unique." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/unique. Accessed 23 Jul. 2024 (July 23, 2024).

ordinance does not parrot a state statute or other ordinances from around the state, the ordinance's uniqueness demonstrates that it was 'drafted by the municipality in an effort to address a local concern.'" App.6, n.5. Petitioners concede that the ordinance uses unique language, Pet. p. 27, which ends the inquiry as to whether the presumption of correctness applies. The lower court and Court of Appeals were not required to come forth with additional evidence that the ordinance related to a local concern. Rather, Petitioners bear the burden of overcoming the presumption of correctness, *Ottman*, 2011 WI 18 at ¶ 50, which they have failed to do.

ii. *The Court of Appeals has consistently applied the standard set forth in Ottman.*

Petitioners argue the Court of Appeals has repeatedly misinterpreted *Ottman*. (Pet. p. 27). The first case they point to is *Grycowski v. Milwaukee Employees' Retirement System/Annuity and Pension Board*, 2021 WI App 7, 395 Wis.2d 722, 953 N.W.2d 904. The court in *Grycowski* cites to *Ottman's* presumption of correctness to a municipality's decision and that deference will be afforded if the interpretation is reasonable. *Id*. at ¶ 30 (citing *Ottman*, 2011 WI 18 at ¶¶ 48, 60). Petitioners claim *Grycowski* "entirely misstated" *Ottman* by failing to apply the two-pronged analysis of (1) uniqueness and (2) local concern.[2] (Pet. Br. p. 27). Petitioners also claim the Court of Appeals in *Baldwin* quoted the two conditions in *Ottman* but failed to "meaningfully analyze the two conditions." (Pet. Br. at 27;

[2] Petitioners also cite to *Bleichwhel v. City of Milwaukee Employee's Ret. Sys.*, 2017 WI App 71, ¶ 14, 378 Wis.2d 328, 904 N.W.2d 409 as an example. However, this is a per curiam opinion that does not meet the limited exceptions for citation specified in Wis. Stat. § 809.23(3).

citing *Baldwin v. Milwaukee Cty.*, 2018 WI App 29, ¶ 15, 382 Wis.2d 145, 913 N.W.2d 194). *Baldwin*, like *Grycowski*, applies the presumption of correctness but quotes the following statement from *Ottman*: "[when] the municipality's ordinance appears to be unique and does not parrot a state statute but rather the language was drafted by the municipality in an effort to address a local concern ... we will defer to the municipality's interpretation if it is reasonable." 2018 WI App 29 at ¶ 17 (quoting *Ottman*, 2011 WI 18 at ¶ 60). Again, Petitioners take issue with *Baldwin* because it does not separately analyze uniqueness and local concern. Petitioners also mention *Mohs v. City of Madison*, 2011 WI App 155, ¶ 27, 337 Wis.2d 737, 807 N.W.2d 34, as implying deference could be refuted by arguing the ordinance does not address a local concern. (Pet. p. 28). The only case Petitioners claim correctly applied *Ottman's* rule is *Park 6 LLC v. City of Racine*, but Petitioners concede *Park 6* is distinguishable because it interprets a state statute instead of an ordinance. *Id.*

These examples provided by Petitioners fall far short of showing the Court of Appeals misinterprets *Ottman*. Rather, all these cases have two things in common: they applied the presumption of correctness, and they did not view *Ottman* as creating two distinct elements. There is nothing for the Supreme Court to clarify here and review should not be granted just because imposing two elements from *Ottman* would excuse Petitioners from meeting their burden of overcoming the presumption of correctness.

B. Affording deference to the County is not an exception to the rule; rather, there is a presumption of correctness that Petitioners have the burden of overcoming and have not done so.

Petitioners argue that deference to the County's interpretation of its own ordinance is an exception to the rule. (Pet. p. 28). However, Petitioners are blatantly disregarding that "Wisconsin courts have repeatedly stated that on certiorari review, there is a presumption of correctness and validity to a municipality's decision." *Ottman*, 2011 WI 18 ¶ 48 (citing *Lamar Outdoor Advertising*, 284 Wis.2d 1, ¶ 16, 700 N.W.2d 87; Ziervogel, 269 Wis.2d 549, ¶ 13, 676 N.W.2d 401; *Herman v. Cnty. of Walworth*, 2005 WI App 185, ¶ 9, 286 Wis.2d 449, 703 N.W.2d 720). This presumption of correctness is applied to a municipality's interpretation of its own ordinance as well. *Ottman*, 2011 WI 18 at ¶ 60. "[A] presumption is a rule of law by which a finding of a basic fact gives rise to an existence of a presumed fact, and the party against whom the presumption is directed bears the burden of proving that the nonexistence of the presumed fact is more probable than its existence." *Id*. at n. 20 (citing Wis. Stat. § 903.01; *Keen v. Dane Cnty. Bd. of Supervisors*, 2004 WI App 26, ¶ 6, 269 Wis.2d 488, 676 N.W.2d 154.).

The undisputed basic fact here is that the ordinance is unique, as Petitioners agree, and it is presumed that "the municipality may be uniquely poised to determine what that ordinance means." *Ottman*, 2011 WI 18 at ¶ 60. The presumption of correctness is the rule and the burden shifts to Petitioners to overcome this presumption. Interestingly, Petitioners attempt to support its argument that deference should be narrowly construed by citing to a case that discusses narrowly

construing the privilege of confidentiality. (Pet. p. 29). We are not dealing with evidentiary privileges here, so this citation is irrelevant.

Finally, Petitioners argue the burden of establishing that the County's ordinance is both unique and drafted to address a local concern falls on the County. *Id*. This argument relies on the assertion that deference is an exception to the rule. As previously stated, the presumption of correctness is the rule and not the exception. Furthermore, the decisions of the Court of Appeals cited by Petitioners in the previous section affirm that *Ottman* does not create a two-prong test for deference. Petitioners are tasked with the burden of overcoming the presumption of correctness, which they have failed to do.

III. THE COURT OF APPEALS APPROPRIATELY AFFIRMED THAT THE REASONABLE INTERPRETATION OF THE ORDINANCE WAS NOT AMBIGUOUS.

Petitioner argues that the Court of Appeals' decision is in conflict with the controlling opinions of the Wisconsin Supreme Court, specifically as it relates to the interpretation of the ordinances. While this Court has held that ambiguous zoning ordinances are to be construed in favor of the free use of property, none of the relevant ordinances here are ambiguous, and therefore, the lower courts did not erroneously rule in favor of the Board. There is no authority that supports Petitioner's position that the ordinances should be construed in favor of the free use of the property because these ordinances are not ambiguous.

It is undisputed that zoning ordinances are to be construed in favor of the free use of private property. *Cohen* v. *Dane Cnty. Bd. of Adjustment*, 74 Wis. 2d 87, 91, 246 N.W.2d 112 (1976). Derogation from the common law practice of free use of private property requires the zoning ordinance be clear and unambiguous. *Heef Realty & Invs., LLP* v. *City of Cedarburg Bd. of Appeals*, 2015 WI App 23, ¶7, 361 Wis. 2d 185, 861 N.W.2d 797. "A statute is ambiguous if reasonable minds can understand it in more than one way." *Seider v. O'Connell*, 2000 WI 76, ¶ 30, 236 Wis. 2d 211, 612 N.W.2d 659. "The analysis of statutory ambiguity begins with the language of the statute itself." *Id*., ¶ 31. In this first analytical step, "[t]he statutory language is given its common and ordinary meaning," and if, unlike here, some of the words are "technical or specially-defined," those words are given the "technical or special definitional meaning assigned to them." *Bruno v. Milwaukee Cty.*, 2003 WI 28, ¶ 20, 260 Wis. 2d 633, 660 N.W.2d 656. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." *Id.*

Neither of the ordinances here are ambiguous, so derogation from the common law practice of free use of private property is appropriate. The Court of Appeals properly applied the ordinances to the case, and therefore, this Court should deny the Petition for Review.

A. Ordinance 13-1-21(b)(6) unambiguously denied concurrent jurisdiction over the Proposal.

Petitioner contends that the Court of Appeals erroneously found there was no concurrent jurisdiction over the Petitioner's proposal. Bayfield County requires that "[a] land use permit . . . be obtained prior to the initiation of construction or a change in land use." Bayfield County Code § 13-1-21(b)(1). This requirement applies to "*any* new residence, *any* building or structure erected, relocated, rebuilt or structurally altered . . .; *any* change in the use of the land; or where *any* use of the land is altered." Bayfield County Code § 13-1-21(b)(1) (emphasis added). A land use permit is required for structures or uses that are permitted by right within a zoning district—such as single-family home or a private garage in a residential district. *See* Bayfield County Code §§ 13-1-21(a)(2), 13-1-62(a). However, the permit is not required where the DNR "has (1) concurrent jurisdiction and (2) the substantive concerns of this Chapter are addressed and resolved by issuance of a permit under the authority of that regulatory agency." Bayfield County Code § 13-1-21(b)(6). Petitioner reads this to mean that the DNR had jurisdiction over the Board and Proposal, and further that the substantive concerns of the County's ordinance are already permitted by the DNR's approval. (Pet. p. 31). This is plainly incorrect.

Petitioner argues that Ordinance 13-1-21(b)(6) exempts a landowner from needing a CUP. However, this is textually incorrect, as there are exceptions not identified by Petitioner, but were identified by the Court of Appeals. Ordinance 13-1-21(b)(6) is not ambiguous, and the Court of Appeals properly held that the concurrent jurisdiction exception does not apply to this proposal. Further, § 13-1-

21(b)(7) clearly and conspicuously describes an exception to the rule of the DNR's concurrent jurisdiction, a fact that Petitioner fails to address at the Appellate stage or in the Petition to this Court. Where a property is "[w]ithin the Shoreland, a permit shall be required for any and all structures" and the concurrent jurisdiction exception does not apply. *See* ZONING CODE § 13-1-21(b)(7). It is undisputed that Petitioner's property is within the Shoreland, and this unambiguous and clear ordinance bars Petitioner from relying on the concurrent jurisdiction exception. Giving the plain text meaning of this ordinance, the Court of Appeals properly determined that this ordinance is unambiguous and explicitly bars concurrent jurisdiction for properties within 300 feet of the Shoreland. No reasonable mind could give this ordinance multiple interpretations.

Assuming, *arguendo,* that Ordinance 13-1-21(b)(6) *does* apply to Petitioner's Proposal, there is no concurrent jurisdiction over the property. Ordinance 13-1-21(b)(1) regulates land uses within the County whereas the DNR has authority extending to "groundwater withdrawals". *See* Wis. Stat. § 281.34. Specifically, the DNR oversees private wells, specifically approval or denial of a proposed high capacity well, which is not what Petitioner's Proposal encompassed. The County's Zoning ordinances and the DNR's authority are not concurrent, and they represent different powers over the land and water regulation. *See Willow Creek Ranch, LLC* v. *Town of Shelby,* 2000 WI 56, ¶22, 235 Wis. 2d 409, 611 N.W.2d 693. Accordingly, the Petitioner, a "well driller" as defined by the Wisconsin Administrative Code, needs to obtain required permits from counties

authorized to administer this chapter." This is clear and unambiguous. According to the Administrative Code, Petitioner needed to obtain a permit from the County before the Proposal could be granted. They did not. Therefore, the Respondents correctly denied Petitioners any CUP.

The ordinances and statutes are clear and descriptive, and the Court of Appeals appropriately applied the laws to the facts of this case. Therefore, the language of Ordinance 13-1-21(b)(6) is not ambiguous.

B. The Petitioner's Proposal is unambiguously excluded by Ordinance 13-1-62(a)(107)

Petitioner next argues that Ordinance 13-1-62(a)(107) is ambiguous, and therefore, the Court of Appeals erred in finding that the exclusion was proper. In areas zoned R-RB, such as this, Ordinance 13-1-62(a)(107) limits permissible uses to "Irrigation Facilities, Canals, Dams, Reservoirs, etc." The proposal was for the "collecting, storing and transporting Artesian water off-site for sale." (Pet. App. 1, p. 14). While this is outside the scope of permissible uses, as defined in Ordinance 13-1-62(a)(107), Petitioner argues that it should fall under the catch-all "Etc." Specifically, Petitioner argues that the ordinance is ambiguous, thus petitioning this Court determine that the CUP should have been granted.

"Statutory interpretation involves the ascertainment of meaning, not a search for ambiguity." *Bruno v. Milwaukee Cty.*, 2003 WI 28, ¶ 25, 260 Wis. 2d 633, 660 N.W.2d 656. The Court of Appeals properly assigned meaning to the list of permissible uses in Ordinance 13-1-62(a)(107). The Proposal conspicuously fails to

meet the definitions of Irrigation Facilities, Dams, Canals, or Reservoirs. The term "Etc." is the only potential outlier that Petitioner argues is ambiguous, here. This Court has held that the term "Etc." is to be limited by the terms and precede it, thus limiting it only to the same type of things as what was listed before. *Stroede* v. *Society Ins*., 2021 WI 43, ¶14, 397 Wis. 2d 17, 959 N.W.2d 305. Before us, "Irrigation Facilities, Canals, Dams, Canals, [and] Reservoirs" all involve the intersection of land and water management. However, the Proposal is for functions completely unrelated, specifically, collecting and transporting water offsite for bottling and selling. Applying the term "Etc." to this function would contradict the preceding terms of the ordinance completely.

Reading the ordinance in conjunction with this Court's rulings in *Heef Realty* and *Seider*, the Court of Appeals appropriately determined that the ordinance's language is not ambiguous and the term "Etc." does not encompass Petitioner's Proposal here. Therefore, under a reasonable reading of Ordinance 13-1-62(a)(107), the Proposal does not qualify as a conditional use under this section's classification.

C. Ordinance § 13-1-106 unambiguously denies the Department director the authority and power to determine the ordinance's interpretation.

Petitioner incorrectly argues that Ordinance § 13-1-106's expressly delegated 'powers and duties' is ambiguous and therefore the ordinance should be applied in favor of the free use of property. Respondents do not deny that there are duties and powers outlined in Ordinance § 13-1-106. However, these duties and powers do not grant the director and assistant director the authority to overrule or

make the final determination on a proposal, especially over the Board's ultimate decision. Like the lower courts reiterated, even though the zoning code grants these duties and powers to the director and assistant director, the ordinance does not grant them the power to overrule the Board's interpretation or ultimate decision.

The language in Ordinance § 13-1-106 is not ambiguous. To restate, in determining if an ordinance is ambiguous, the Court begins with the language of the ordinance itself. *Seider v. O'Connell,* 2000 WI 76, ¶ 31. The language is given its common and ordinary meaning, and if any words are "technical or specially defined," those are words are assigned a definitional meaning. *Bruno v. Milwaukee Cty.,* 2003 WI ¶ 20. The language of the ordinance cannot be construed in other meanings than what the plain reading of the text provides.

Nowhere in Ordinance § 13-1-106 or any of its counterparts does the County defer exclusively to the interpretation or classification of the Director or Assistant Director of the conditional use classification. There is no ambiguity here, and the Court of Appeals properly dismissed Petitioner's argument as such. Thus, construal in "favor of the free use of private property" is inappropriate here, and this Court should deny this Petition.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court AFFIRM the Court of Appeals' decision and DENY this Petition for Review. No genuine issue warrants review in this case, pursuant to Wis. Stat. § 809.62(1r).

Dated this 25th day of July, 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I certify that this Brief in Response to Petitioners-Plaintiffs' Petition for Review conforms to the rules contained in § 809.50(1), Stats., for a petition produced with a Times New Roman font. The length of this petition is 6,709 words.

Dated this 25th day of July, 2024.

Respectfully submitted,

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