No. 22AP001468

In the Wisconsin Court of Appeals

DISTRICT IV

ASSOCIATED BUILDERS & CONTRACTORS OF WISCONSIN, INC., COMMERCIAL ASSOCIATION OF REALTORS WISCONSIN, INC., NAIOP WISCONSIN CHAPTER, INC., WISCONSIN BUILDERS ASSOCIATION, AND WISCONSIN REALTORS ASSOCIATION, INC.,
PLAINTIFFS-APPELLANTS,

v.

CITY OF MADISON,
DEFENDANT-RESPONDENT

On Appeal from the Dane County Circuit Court,
The Honorable Nia Trammell, Presiding,
Case No. 2021CV001729

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

WISCONSIN INSTITUTE FOR
LAW & LIBERTY

RICHARD M. ESENBERG
LUCAS T. VEBBER
ANTHONY F. LOCOCO
LUKE N. BERG
330 E. Kilbourn Ave., Ste. 725
Milwaukee, WI 53202
Phone: (414) 727-9455
Facsimile: (414) 727-6385

Attorneys for Plaintiffs-Appellants

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ISSUES PRESENTED

1. Does Wis. Stat. § 101.02(7r), which pre-empts local ordinances imposing building codes, exempt municipal zoning ordinances?

The circuit court decided that it does.

This court should determine that it does not.

2. Is MGO § 28.129 a zoning ordinance which is exempt from the pre-emption in Wis. Stat. § 101.02(7r)?

The circuit court determined that MGO § 28.129 was a "form-based" zoning ordinance, and as such, that it was exempt from Wis. Stat. § 101.02(7r).

This court should determine that MGO § 28.129 is not a zoning ordinance, and is preempted by Wis. Stat. § 101.02(7r).

INTRODUCTION

The Legislature required the Wisconsin Department of Safety and Professional Services ("DSPS") to adopt a uniform statewide building code. Subsequently the Legislature adopted additional legislation prohibiting cities, villages and towns from adopting or enforcing "an ordinance that establishes minimum standards for constructing, altering, or adding to public buildings or buildings that are places of employment unless that ordinance strictly conforms to" the statewide building code. Wis. Stat. § 101.02(7r)(a)

Following the passage of those laws, the Defendant-Respondent City of Madison ("the City") has done that which the Legislature expressly forbade it from doing: it adopted an ordinance which establishes minimum standards for constructing, altering or adding to buildings, imposing requirements beyond those allowed by law. That ordinance is challenged in this action by the Plaintiffs-Appellants, various trade associations ("the Associations") who are located in or who have members who do business in, the City.

The City claims that despite the statutory pre-emption language, their ordinance is lawful as a "zoning" ordinance, and it claims such "zoning" ordinances were exempted from the state law pre-emption.

However, the plain language of the pre-emption text says otherwise and no such exemption exists. Furthermore, even if such "zoning" ordinances were exempt, the ordinance challenged herein is not a zoning ordinance, and so it would still be unlawful.

The circuit court agreed with the City, and for the reasons stated herein, the Associations respectfully request this Court reverse the circuit court's decision.

ORAL ARGUMENT AND PUBLICATION

This case presents important questions of law regarding local government authority which are of substantial and continuing public interest. For this reason, publication of this case is warranted.

The Associations believe these questions of law can be fully developed in the briefs and are not requesting oral argument.

STATEMENT OF THE CASE

A. Factual Background

The relevant facts in this case were stipulated between the parties and are not in dispute. (R. 16.) The circuit court adopted these stipulated facts in its decision. (R. 43:2.)

Plaintiffs-Appellants (herein "the Associations") in this action are membership-based trade associations who are either located within the

Defendant-Respondent City of Madison (herein "the City") or who have members who do business in the City. (R. 16: ¶1.)

The City is a municipality of the State of Wisconsin. (R. 16: ¶2.) On August 14, 2020, the City adopted an ordinance creating MGO § 28.129 entitled "Bird-Safe Glass Requirements." (R. 16: ¶3; a copy of MGO § 28.129 was attached to the stipulated facts as Attachment A, R. 16:3-4.)

The ordinance went into effect on October 1, 2020. (R. 16: ¶5.)

B. Legal Background

1. The statewide building code

Under state law, the Wisconsin Department of Safety and Professional Services ("DSPS") is required to promulgate rules or standards for constructing, altering, adding to, repairing, or maintaining public buildings and buildings that are places of employment in order to render them safe. Wis. Stat. § 101.02(15)(j). To comply with this state law requirement, DSPS has promulgated the Commercial Building Code, Wis. Admin. Code Chs. SPS 361-366.

The Commercial Building Code incorporates various uniform codes developed by third parties, including the 2015 version of the

International Building Code ("IBC"). Wis. Admin. Code § SPS 361.05(1).[1] Among other things, the incorporated IBC contains an entire chapter which governs the materials, design, construction and quality of glass used in buildings and structures, including requiring a marking on the glass from the manufacturer. *See generally,* IBC, Chapter 24, available at https://codes.iccsafe.org/content/IBC2015/chapter-24-glass-and-glazing.

In April of 2014, the Wisconsin Legislature adopted 2013 Wisconsin Act 270 ("Act 270"). Act 270 prohibited cities from adopting and enforcing a local-specific commercial building code, unless that local code is in *strict conformity* with the statewide code. Wis. Stat. § 101.02(7r)(a). By prohibiting varying local-specific building codes, the legislature made DSPS's Commercial Building Code a uniform statewide building code.

[1] Wis. Admin. Code § SPS 361.05(1) adopts by reference the 2015 version of the *International Building Code*® ("IBC") which it notes is "on file in the offices of the Department [of Safety and Professional Services] and the Legislative Reference Bureau." *See* Wis. Admin. Code § SPS 361.05(1) (note). The International Code Council also makes the IBC code available for viewing only (not printing) on its website at https://codes.iccsafe.org. Citations in this brief to the IBC will include a website link to the referenced IBC chapter. The circuit court took judicial notice of the IBC. (R. 43:7, fn. 6.)

Under the statutory provisions created by Act 270, a local ordinance may not establish a minimum standard for constructing, altering, or adding to public buildings or buildings that are places of employment unless the ordinance "strictly conforms" to the DSPS-adopted Commercial Building Code. Wis. Stat. § 101.02(7r)(a). For a local ordinance to "strictly conform" it must not be "additional or more restrictive" than the DSPS-adopted Commercial Building Code. Wis. Admin. Code § SPS 361.03(5)(a)1. As the circuit court summarized, "[t]he Legislature enacted a minimum building code through the Act, and prohibits a municipality from adopting a more restrictive local ordinance." (R. 43:10.)

The statutory pre-emption exempts certain ordinances adopted before May 1, 2013 so long as the municipality who adopted the ordinance followed a specific statutory procedure. *See* Wis. Stat. § 101.02(7r)(b). State regulations also provide that nothing of the statewide building code regulations "affect the authority of a municipality to enact or enforce standards relative to land use, zoning, or regulations under ss. 59.69, 60.61, 60.62, 61.35, and 62.23 (7), Stats." Wis. Admin. Code § SPS 361.03(5)(a)2. As discussed *infra*, these exemptions do not apply to the ordinance challenged herein.

2. The ordinance

The City adopted Madison General Ordinance ("MGO") § 28.129, entitled "Bird-Safe Glass Requirements" (herein the "Ordinance"), on August 14, 2020, several years after Act 270 was enacted. (R. 16, ¶3.) The Ordinance took effect on October 1, 2020. (R. 16, ¶5.) It requires glass on buildings to be treated, covered, or modified in order to reduce the risk of birds colliding into glass on buildings. *See generally*, MGO § 28.129, a copy of which can be found at (R. 16:3-4.) The Ordinance applies to (1) all glass on any building's above-ground bridges which are connected to the building (such as a "skywalk"), MGO § 28.129(4)(b); (2) all at-grade (i.e., ground level) glass features, MGO § 28.129(4)(c); and (3) for buildings over 10,000 square feet, the ordinance applies differently depending on the percentage of glass within the first 60 feet from grade: where the percent is over 50%, at least 85% must be treated, and all glass within 15 feet of corners must be treated. Where the percent is less than 50%, at least 85% of glass areas over 50 ft^2 must be treated, including all glass within 15 feet of a building corner in such an area, MGO § 28.129(4)(a).

The Ordinance applies to "all exterior construction and development activity, including the expansion of existing buildings and

structures…" MGO § 28.129(2). The Ordinance requires glass to be "treated" by or with: (1) incorporating dots or other shapes that are ¼" or larger and spaced no more than 2" by 2" pattern; (2) incorporating lines that are 1/8" in width or greater and spaced no more than 2" apart; (3) low reflectance opaque materials; (4) building-integrated structures like non-glass double-skin facades, metal screens, fixed solar shading, exterior insect screens, and other features that cover the glass surface; or (5) "other similar mitigation treatments approved by the Zoning Administrator." MGO § 28.129(4)(intro).

C. Procedural Background

On March 4, 2021, the Associations served the City with a Notice of Claim challenging the legality of the Ordinance. After this suit was timely filed on July 22, 2021, the parties agreed that the questions presented were best handled through summary judgment (R. 13, 14) and the circuit court issued a scheduling order. (R. 15.) The parties filed a brief Stipulation of Facts. (R. 16.) The parties each filed motions for summary judgment (R. 18, 27) and then fully briefed those motions. (R. 19, 28, 37, 39, 40, 41.)

On August 15, 2022, the circuit court issued a Decision and Order denying summary judgment for the Associations and dismissing the

action. (R. 42.) On August 16, 2022, the circuit issued an amended Decision and Order making some typographical corrections. (R. 43.) On August 25, 2022, the circuit court issued a final order which incorporated its August 16 amended order, denied Plaintiffs' motion for summary judgment, granted Defendant's motion for summary judgement and then dismissed the case. (R. 47.)

This appeal followed.

STANDARD OF REVIEW

Whether a circuit court correctly granted summary judgment is a question of law which this Court reviews de novo, as are issues of statutory interpretation. *See, e.g., Noffke ex rel. Swenson v. Bakke*, 2009 WI 10, ¶9, 315 Wis. 2d 350, 760 N.W.2d 156.

ARGUMENT

The Ordinance is pre-empted by state law because it establishes minimum standards for constructing, altering, and adding to public buildings and buildings that are places of employment. In concluding that it is not pre-empted, the circuit court erred in two ways: (1) the circuit court incorrectly determined that municipal zoning ordinances were *exempt* from the statewide pre-emption; and (2) the circuit court incorrectly declared that the Ordinance challenged in this action was a

"form-based" zoning ordinance, and therefore, was exempt and not pre-empted.

The statutory pre-emption, however, plainly does not exempt zoning ordinances, and even if it did, the Ordinance at issue in this action is not a zoning ordinance – and so it would not be exempt.

As a result, the ordinance is pre-empted and the circuit court should be reversed.

I. The building code pre-emption statute did not exempt local zoning ordinances.

The first error the circuit court made was determining that Wis. Stat. § 101.02(7r) exempts zoning laws. (R. 43:8-13.) The circuit court looked at the plain language of the statute, then looked at other statutes, then determined it had to review the legislative drafting file to determine the meaning of the statute. After all of this analysis, the circuit court incorrectly determined that the legislature intended for Act 270 to exempt zoning codes. The circuit court never explained why, if that is what the Legislature intended, the plain language of the statute did not reflect that intent.

1. The circuit court's statutory interpretation was erroneous.

For its statutory interpretation, the circuit court determined that "Wis. Stat. § 101.02(7r) cannot be interpreted in a vacuum. It must be read along with § 101.02(15)(j) and other surrounding closely-related statutes, including § 101.01(1)(g) and 62.23 (7), Stats." (R. 43:10.) After reviewing those sections, the Court then reviewed Wis. Admin. Code Chs. SPS 361-366 and noted, as discussed *supra*, that Wis. Admin. Code § SPS 361.03(5)(a)2 states "[n]othing in chs. SPS 361 to 366 affect the authority of a municipality to enact or enforce standards relative to and use, zoning, or regulations . . ." (*See* R. 43:11.)

The circuit court also adopted the City's argument that failing to exempt zoning would be "illogical" and would "cripple local zoning authority." *Id*. Based upon its analysis of the text, and its review of those statutes and the regulations, the circuit court determined "an inquiry into legislative history is warranted." (R. 43:12.) It then reviewed an email from the legislative drafting file for the bill which ultimately became Act 270, in which a staff member of one of the bill's authors made statements about the draft bill. The circuit court interpreted the legislative staff members e-mail to mean the legislature intended to exempt zoning ordinances from Act 270. *Id*.

Finally, after noting that legislative staff email, the circuit court concluded that it was "satisfied that zoning was intended to be exempt from § 107.02(7r)." *Id*. at 13.

The circuit court's statutory analysis was flawed, however. The meaning was plain, and there was no need for it to revert to legislative history – and its final interpretation ignores the plain text of the statute itself.

"…[S]tatutory interpretation 'begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.'" *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.,* 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *Id.* at ¶ 46. "In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *Id.* at ¶ 46, citing *State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967).

2. This Court must engage in its own *de novo* statutory interpretation.

The circuit court's statutory interpretation was flawed. "Statutory interpretation presents a question of law that [the Appellate Court]

review[s] de novo." *State v. Stewart*, 2018 WI App 41, ¶ 18, 383 Wis. 2d 546, 916 N.W.2d 188. Thus, to determine whether Act 270 exempted zoning ordinances, the Court must engage in its own interpretation of the statutory text created by Act 270, namely the pre-emption language in Wis. Stat. § 101.02(7r)(a).

Wis. Stat. § 101.02(7r)(a) reads:

> ". . . no county, city, village, or town may enact or enforce an ordinance that establishes minimum standards for constructing, altering, or adding to public buildings or buildings that are places of employment unless that ordinance strictly conforms to the applicable rules under sub. (15)(j) . . ."

The meaning of this statute is plain and unambiguous: it prohibits municipalities like the City from adopting "an ordinance" which falls under that statute. There is no exemption in that statute for "zoning" ordinances. As discussed *infra*, there are actually several exemptions in the statute – but none of them are for zoning ordinances. By its plain language, Section 101.02(7r)(a) applies to *all* ordinances. Since the text's meaning is plain, and unambiguous, this Court should stop the analysis and conclude that the statute plainly does not exempt zoning ordinances.

Nonetheless, the Court could also review the surrounding sections of the statute to confirm this plain meaning. As noted, under the statute, there are only three exceptions to the Act 270 pre-emption: (1) a

municipality may enact and enforce an ordinance which strictly conforms to statewide standards adopted by DSPS; (2) ordinances that pre-dated Act 270; and (3) amendments to ordinances that pre-dated Act 270. The Legislature clearly knew what it was doing with the statutory pre-emption language, and demonstrated that it knew how to exempt certain ordinances which it did not want to be covered by the pre-emption. Nowhere in the statutory text are zoning ordinances generally exempted.

"Cities are creatures of the state legislature and have no inherent right of self-government beyond the powers expressly granted to them." *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 89, 358 Wis. 2d 1, 851 N.W.2d 337. "Municipal corporations have only those powers that were specifically conferred on them and those that are necessarily implied by the powers conferred." *Milwaukee Police Association v. City of Milwaukee*, 2018 WI 86, ¶ 19, 383 Wis. 2d 247, 914 N.W.2d 597.

The statutory text is plain and unambiguous. Unlike the circuit court, this Court should not delve into the legislative drafting file, much less consider the input of a single legislative staffer to ascertain the meaning of the act; that staffer's intent certainly does not matter – and neither would the intent of the legislator who employs that staffer. This

is because "[i]t is the enacted law, not the unenacted intent, that is binding on the public." *Kalal*, 271 Wis. 2d 633, ¶ 44.

3. Wis. Admin. Code § SPS 361.03(5)(a)2 cannot override the Act 270 pre-emption.

The statutory pre-emption, by its plain language, prohibits all ordinances "establishing minimum standards for constructing, altering, or adding to public buildings or buildings that are places of employment" which do not strictly conform to the statewide code. Wis. Stat. § 101.02(7r)(b). As explained *supra*, the statutory preemption text does *not* exempt zoning ordinances – and the Ordinance challenged herein establishes the type of standards which are expressly prohibited by the statute.

Nonetheless, in determining that zoning ordinances were exempted, the circuit court cited to Wis. Admin. Code § SPS 361.03(5)(a)2, which provides that nothing of the statewide building code regulations "affect the authority of a municipality to enact or enforce standards relative to land use, zoning, or regulations under ss. 59.69, 60.61, 60.62, 61.35, and 62.23 (7), Stats." Wis. Admin. Code § SPS 361.03(5)(a)2. But that rule pre-dates the Act 270 statutory pre-emption by more than a decade. That particular rule was originally created as

Wis. Admin. Code § Comm. 61.03(4)(a)2 by CR 00-179, which was effective July 1, 2002. This rule could not possibly be read as a limitation on the statutory text created by Act 270, which was enacted more than a decade later – and for that reason alone, it should be disregarded.

To the extent that the rule does purport to control over the Act 270 pre-emption statutory text, the rule would be invalid. Administrative regulations cannot conflict with statutes. See Wis. Stat. § 227.10(2) ("No agency may promulgate a rule which conflicts with state law"). "An administrative agency has only those powers given to it by statute and an agency may not promulgate a rule that conflicts with a statute." *Wisconsin Builders Ass'n v. State Dep't of Com.*, 2009 WI App 20, ¶ 8, 316 Wis. 2d 301, 762 N.W.2d 845. To the extent that Wis. Admin. Code § SPS 361.03(5)(a)2 purports to allow that which the statute prohibits, it is invalid. Giving an administrative agency the ability to override a statute would raise serious constitutional concerns. Our Supreme Court has made clear that courts in Wisconsin are to "generally avoid[] interpreting statutes in a way that places their constitutionality in question." *Segregated Acct. of Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 2017 WI 71, ¶ 21, 376 Wis. 2d 528, 898 N.W.2d 70.

But that constitutional issue can be avoided altogether because the rule in question and the Act 270 pre-emption statute can be read in harmony with one another. The rule text states nothing in the *regulations* affect the authority of a municipality, and that is because it is not the regulations, but rather the *statute* which does so. Wis. Stat. § 101.02(7r)–contains that restriction, and as discussed herein, the restriction is plain and unambiguous, and contains no carve out for zoning ordinances.

This reading of the rule text is further bolstered by the authority granted in the particular statutes which are listed in Wis. Admin. Code § SPS 361.03(5)(a)2. That statutory list is far more extensive, and broader, than just the authority to establish "minimum standards for constructing, altering, or adding to public buildings or buildings that are places of employment" which was pre-empted by Wis. Stat. § 101.02(7r). All the regulation does is make clear that the rules themselves do not (and should not be read to) place any limits on power that may have otherwise been granted by statute, but the regulation cannot override Act 270 which was adopted a decade later, and is controlling here.

Further, the Legislature could easily have incorporated an exemption for zoning ordinances into the statutory preemption language,

but it did not. The circuit court improperly read such an exemption into the statute based upon what it determined to be the legislature's true intent. But such an "intent" is not present in the statutory text, and as noted *supra*, "[i]n construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute." *Kalal* at ¶ 46.

4. The proper interpretation of the statute put forward by the Associations would not lead to an absurd result.

Finally, interpreting the statute as written does not create an absurd result. While the circuit court implied that it did (R. 43:11), that was simply inaccurate. The legislature did not seek to establish, and the Associations are not arguing, that the interpretation of the statute would "cripple local zoning authority."

Instead, the statutory pre-emption applies to a very explicit and limited subset of ordinances. The legislature *only* sought to do exactly what the statute says: eliminate a municipality's ability to "enact or enforce an ordinance that establishes minimum standards for constructing, altering, or adding to public buildings or buildings that are places of employment." Wis. Stat. § 101.02(7r)(a). Those are the only types of ordinances which municipalities may no longer adopt or enforce, and nothing more. The remainder of municipal powers (zoning or non-

zoning) are all untouched by Wis. Stat. § 101.02(7r)(a). There is nothing absurd about enforcing the statute as written by the legislature.

* * *

Act 270 plainly did not exempt zoning ordinances, and the circuit court erred in concluding otherwise, and should be reversed.

II. Regardless, MGO § 28.129 is not a zoning ordinance; it is a building code.

Act 270 plainly did not exempt zoning ordinances, and this Court's inquiry could stop there. However, if this Court wishes to reach the second issue in this appeal it should conclude that the Ordinance is not a zoning ordinance.

The circuit court erred in concluding that the Ordinance was a valid "form-based" zoning ordinance. (R. 43:13-16.) Under the current caselaw, the Ordinance does not meet the requirements to be a zoning ordinance. The circuit court distinguished this case from the current case law. In doing that, the circuit court classified the current caselaw as "traditional" or "use" zoning, and found that caselaw was inapplicable to the Ordinance which was a different type of zoning called "form-based" zoning. But Wisconsin law does not recognize a broad municipal power to enact "form-based" zoning ordinances.

Even if zoning ordinances were exempt from the state law preemption (they are not), the Ordinance is not a zoning ordinance, and so that hypothetical exemption would not apply. The circuit court erred in concluding otherwise and should be reversed.

A. The ordinance is a building code, not a zoning ordinance.

As noted *supra*, state law preempts local units of government, including Defendant, from enacting and/or enforcing "an ordinance that establishes minimum standards for constructing, altering, or adding to public buildings or buildings that are places of employment unless that ordinance strictly conforms to" the statewide standards adopted by DSPS. Wis. Stat. § 101.02(7r)(a). However, the circuit court concluded that zoning ordinances are exempted from that pre-emption. The second issue in this appeal is whether the circuit court properly concluded that the Ordinance was a lawful zoning ordinance, as opposed to a non-zoning ordinance which all parties agree would be preempted.[2]

[2] While the parties disagree as to whether Act 270 pre-empted zoning ordinances or not, there is no dispute that Act 270 pre-empts all non-zoning ordinances. Wisconsin Courts have long recognized that a local ordinance is pre-empted by state law if "the legislature has expressly withdrawn the power of municipalities to act." *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 64, 373 Wis.2d 543, 892 N.W.2d 233 (citing *Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984)).

"Zoning ordinances and non-zoning ordinances that are enacted pursuant to a local government's police power … inhabit closely related spheres." *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, ¶ 5, 338 Wis. 2d 488, 809 N.W.2d 362. "Despite the similarity and potential overlap between zoning ordinances and non-zoning police power ordinances, the legislature imposes different procedural requirements on these two forms of ordinances." *Id* at ¶ 6.

Our Supreme Court has called for a "functional approach" to determining whether an ordinance is a zoning ordinance or not. *Id.* at ¶ 8. "We catalogue the characteristics of traditional zoning ordinances and the commonly accepted purposes of zoning ordinances. We then compare the characteristics and purposes of the Ordinance to the characteristics and purposes of traditional zoning ordinances to determine whether the Ordinance should be classified as a zoning ordinance." *Id*.

With that functional approach in mind, and understanding that there is no bright line test, the Wisconsin Supreme Court has identified six characteristics which are typically present in zoning ordinances, namely: (1) the division of a geographic area into multiple zones or

Clearly, through the adoption of Act 270, the Legislature has expressly withdrawn the power of municipalities to act in this area.

districts; (2) the allowance or disallowance of certain uses by landowners within established districts or zones; (3) a goal of controlling where a use takes place, as opposed to how that use takes place; (4) the classification of uses in general terms and the attempt to comprehensively address all possible uses in a particular geographic area; (5) a fixed, forward-looking determination about what uses will be permitted, as opposed to case-by-case, ad hoc determinations; and (6) permission for existing uses to continue despite their failure to conform to the ordinance. *Id.* at ¶¶ 36-42.

In *Zwiefelhofer*, the Supreme Court reviewed a local ordinance which sought to regulate certain mining operations. In that case the Plaintiff challenged it as a "zoning" ordinance, and the Court sought to determine whether the challenged ordinance possessed the characteristics of a zoning ordinance (as outlined above) or not. Ultimately there, the Court concluded that the challenged ordinance was *not* a zoning ordinance, but rather a non-zoning police powers ordinance. *Id.* at ¶ 80. Applying the Supreme Court's analysis to the Ordinance challenged in this case will yield similar results: the Ordinance is not a zoning ordinance.

The Ordinance lacks many (if not all) of the characteristics of a typical zoning ordinance that the Supreme Court outlined in *Zwiefelhofer*.

The Ordinance clearly does not divide a geographic area into multiple zones or districts – rather it applies to the entire City (first characteristic). Likewise, it also does not allow or disallow certain uses within any established districts or zones (second characteristic), it does not control *where* a use takes place (third characteristic), and it does not relate to the classification of uses in general terms (fourth characteristic).

The fifth and sixth characteristics are arguably closer, but still do not apply to the City's Ordinance. The fifth and sixth characteristics, like the first four, deal with "uses" of property – whereas the Ordinance challenged herein does not govern "uses," but rather construction requirements for a wide range of buildings. To the extent the Ordinance is considered to govern "uses," it is still ambiguous as to whether these characteristics would apply to the Ordinance. For the fifth characteristic, the Ordinance is "forward-looking," but also allows for case-by-case *ad hoc* approvals by the City; for the sixth characteristic, the Ordinance

appears to grandfather in existing buildings and structures unless they are expanded.

Like in *Zwiefelhofer*, "many traditional characteristics of zoning ordinances are absent from the Ordinance." *Id.* at ¶ 72. It is questionable whether *any* of the *Zwiefelhofer* characteristics are present here, much less enough of them that would indicate the ordinance is a zoning ordinance. Moreover, the text—applicable to buildings citywide rather than their location in a particular district or their classification as, say, commercial versus industrial—indicates that the Ordinance is not a zoning code.

On balance, the Ordinance cannot be reasonably read as a zoning ordinance – and thus – even if such an exemption zoning existed, it would not apply here.

As a final step in the analysis established in *Zwiefelhofer*, courts are to compare "the purposes of the Ordinance with the purposes of zoning." *Id*. at ¶ 75. The stated purpose of the ordinance challenged in this action is: "The Bird-Safe Glass Requirements in this section are intended to reduce the heightened risk for bird collisions with glass on specified building designs and configurations." MGO § 28.129(1). The stated purpose is not to "establish[] limitations on the use of private

property" which the Supreme Court called "a broad statement of the general purposes of zoning law…" *Zwiefelhofer*, 338 Wis. 2d 488, ¶ 76.

Like the Supreme Court did in *Zwiefelhofer*, this Court should also consider "a more specific and analytically helpful formulation of the 'purpose' of zoning …" *Id.* at ¶ 78. In that case the Court found the "broad statements of the purposes of zoning" to be unhelpful, and applied a more specific definition of zoning: "to separate incompatible land uses." *Id.* Applying the same to this case will yield a similar conclusion as the Supreme Court came to in *Zwiefelhofer*, "the Ordinance does not seem even loosely similar to zoning. The Ordinance does not explicitly separate different land uses, nor does it explicitly declare any land uses incompatible with any others." *Id.*

Based on all of the foregoing, even if there is a valid exemption for zoning ordinances (there is not), MGO § 28.129 is not a zoning ordinance, and therefore would not be exempted from the restrictions of Wis. Stat. § 101.02(7r)(a) and Wis. Admin. Code § SPS 361.03(5)

B. Wisconsin law does not recognize the broad "form-based" zoning power the circuit court relied upon.

As noted *supra*, "Cities are creatures of the state legislature and have no inherent right of self-government beyond the powers expressly

granted to them." *Madison Teachers*, 358 Wis. 2d 1, ¶ 89. "Municipal corporations have only those powers that were specifically conferred on them and those that are necessarily implied by the powers conferred." *Milwaukee Police Association*, 383 Wis. 2d 247, ¶ 19.

The application of the *Zwiefelhofer* factors to the Ordinance makes it clear that it is a non-zoning ordinance. Nonetheless, the circuit court set *Zwiefelhofer* aside calling it "instructive" but "not dispositive" and then blazed its own path to create a heretofore unrecognized broad power for municipalities to engage in what the circuit court termed "form-based" zoning. In doing so, the circuit court conferred powers on municipalities that the Legislature has never granted, and its decision should be reversed.

The Ordinance itself imposes construction standards on the design of buildings before they're built (i.e., it establishes minimum standards for *constructing* buildings); and it further imposes construction standards on buildings that did not comply with their minimum standards at the construction phase (i.e., it establishes minimum standards for *altering* or *adding to* buildings).

The type of zoning power that the circuit court recognized in this case simply does not exist under state law. The statutes and the caselaw

do not recognize such powers as "zoning" power. The circuit court cited to two cases in finding otherwise: *Town of Rhine v. Bizzell*, 2008 WI 76, 311 Wis. 2d 1, 751 N.W.2d 780, and *Village of Wind Point v. Halverson*, 38 Wis. 2d 1, 155 N.W.2d 654 (1968). But neither of those cases offers much support.

In *Bizzell*, the Supreme Court simply noted in a footnote that "form-based" zoning was one of several alternatives which other jurisdictions have implemented as alternatives to "traditional zoning." That footnote reads:

> Alternatives to traditional zoning have arisen over the years, such as "form based zoning" or "mixed use zoning." S. Mark White, *Classifying and Defining Uses and Building Forms: Land–Use Coding for Zoning Regulations*, American Planning Association Zoning Practice, Sept. 2005, at 2–3; Sonia Hirt, *The Devil is in the Definitions*, 73 Journal of the American Planning Association, at 436 (Autumn 2007). " '[F]orm-based zoning' is the latest trend in the planning profession." White, *supra*, at 3. It is "based on the theory that design controls can resolve inconsistencies between land uses. Design controls for [form-based zoning] ordinances include building envelope standards, building frontage requirements, fermentation (window and entryway), facade coverage, and traditional façade modulation techniques." Id. at 2. In contrast, "mixed use zoning" mixes a number of different uses in respective zones rather than limiting mixed uses. Hirt, supra, at 436. Many urbanists believe that mixed use districts are the key to restoring vibrancy to American cities. Id. However, traditional "use districting remains the mainstay of most zoning ordinances" and "this is expected to continue for the foreseeable future." White, *supra*, at 3.

Bizzell, 311 Wis. 2d at 14 n.6. In acknowledging this alternative to "traditional zoning," the Supreme Court never stated that Wisconsin law authorizes such an alternative. Indeed, in *Zwiefelhofer* and *State ex rel. Anderson v. Town of Newbold*, 2021 WI 6, 395 Wis.2d 351, 954 N.W.2d 323, the Supreme Court *exclusively* recognized traditional zoning in Wisconsin. The circuit court cited no case which recognizes this broad "form-based" zoning power; indeed, no such case exists. Recognizing that an alternative exists is a far cry from declaring that the "latest trend in the planning profession," as described in trade journals, is the law of the land in Wisconsin.

Instead, the circuit court cited to *Wind Point* for the proposition that the Supreme Court recognized municipalities may enact form-based zoning codes. The cited text from *Wind Point* reads:

> "[t]here is no doubt that an ordinance requiring setback lines can be validly enacted by a city or village as a zoning ordinance pursuant to [Wis. Stat.] secs. 62.23(7). This Court has sustained a fifteen foot setback requirement as a valid zoning ordinances. *Hayes v. Hoffman* (1927) 192 Wis. 63, 211 N.W. 271. Zoning ordinances requiring homes to have a minimum square footage of floor space have also been upheld . . . ."

Wind Point, 38 Wis. 2d at 9; (*see also*, R. 43:14). From that passage, the circuit court concluded that Wisconsin law does indeed recognize a broad

"form-based" zoning power, stating that the Ordinance is "no different than ordinances dictating setback lines, building envelope standards, or minimum square footage." (R. 43:14) (footnote omitted).

But that is simply incorrect. The Ordinance is decidedly *not* like those things – because state law (as the Supreme Court in *Wind Point* recognized) plainly authorizes setbacks and minimum square footage requirements. Specifically, under its statutory powers, the City may adopt ordinances controlling "the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, subject to s. 66.10015(3) the density of population, and the location and use of buildings, structures and land for trade, industry, mining, residence or other purposes if there is no discrimination against temporary structures." Wis. Stat. § 62.23(7)(am).

The circuit court went further and read into the statute the ability to establish broad "form-based" zoning ordinances that go *beyond* the explicitly allowed powers in the statute to regulate what it called "building envelope standards." (R. 43:14.)

But that cannot be. As the Supreme Court recently recognized in *James v. Heinrich*, where the Legislature expressly grants certain

specific powers and excludes other power, the "exercise of that power is not authorized." *James v. Heinrich*, 2021 WI 58, ¶18, 397 Wis. 2d 517, 960 N.W.2d 350 (citing the statutory interpretation doctrine of *expressio unius est exclusio alterius*.)

The same application applies to the Ordinance in this case. In Wis. Stat. § 62.23(7)(am), the Legislature expressly conferred upon cities the ability to adopt ordinances which control: the height, number of stories and size of buildings and other open spaces, population density, as well as the location and use of buildings, structures and land for trade, industry, mining or other purposes.

Under *James*, Wis. Stat. § 62.23(7)(am) plainly does not authorize the type of broad "form-based" zoning ordinances which the circuit court authorized, such as the Ordinance in this case. Rather, municipalities have only been conferred those limited powers in the statute, such as setbacks and or minimum square footage which the Court in *Wind Point* recognized.

The Ordinance challenged in this action, MGO § 28.129, is not a zoning ordinance, and as discussed herein, is not authorized by statute. The circuit court concluded otherwise, and should be reversed.

CONCLUSION

For the foregoing reasons, the Associations respectfully request that the decision of the circuit court be reversed.

Dated: October 31, 2022.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY, INC.

Electronically signed by Lucas T. Vebber
Richard M. Esenberg (WI Bar No. 1005622)
Lucas T. Vebber (WI Bar No. 1067543)
Anthony F. LoCoco (WI Bar No. 1101773)
Luke N. Berg (WI Bar No. 1095644)
330 E. Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
Telephone: (414) 727-9455
Facsimile: (414) 727-6385
Rick@will-law.org
Lucas@will-law.org
ALoCoco@will-law.org
Luke@will-law.org

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 6,032 words.

Dated: October 31, 2022.

Electronically signed by Lucas T. Vebber

LUCAS T. VEBBER