FILED
12-30-2022
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
CASE NO. 22AP001468

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 DANE COUNTY CIRCUIT COURT
CASE NO. 2021CV001729
THE HONORBLE NIA TRAMMELL, PRESIDING

RESPONSE BRIEF OF DEFENDANT-RESPONDENT CITY OF MADISON

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The City agrees with the Associations that these questions of law can be fully developed in the brief. The City also agrees that the case should be published for the reasons cited in the Associations' brief.

STATEMENT OF ISSUES

1. Does Wis. Stat. § 101.02(7r), which preempts municipalities from imposing codes stricter than the Wisconsin Commercial Building Code, exempt municipal zoning ordinances?
   The Circuit Court answered: Yes.
   This Court should affirm the Circuit Court's decision.
2. Is Madison General Ordinance § 28.129, "Bird-Safe Glass Requirement" a valid zoning code and therefore exempt from pre-emption in Wis. Stat. § 101.02(7r).
   The Circuit Court answered: Yes.
   This Court should affirm the Circuit Court's decision.

STATEMENT OF THE CASE

I. Introduction

At issue is whether or not Madison General Ordinance § 28.129, "Bird-Safe Glass Requirement" ("the Ordinance") violates Wis. Stat. § 101.02(7r). Wis. Stat. § 101.02(7r) was codified by 2013 Wisconsin Act 270 ("Act 270") and prohibits municipalities from enforcing regulations stricter that those promulgated by the Wisconsin Commercial Building Code. Plaintiffs-Appellants (herein "the Associations") allege the City of Madison's (herein "the City") zoning Ordinance does just that. The City argues Act 270 clearly excludes zoning ordinances from

its preemption analysis and, as a valid zoning ordinance, the Ordinance simply does not.

The relevant facts in this case were stipulated to by both parties and adopted by the Circuit Court in its decision (R. 16, 43:2).

II. History of Act 270

In April 2013, the Chief of Staff for Wisconsin State Senator Terry Moulton emailed the Legislative Reference Bureau asking for a redraft of the Wisconsin Commercial Building Code. (R. 20:5-8). In the email, staff clarified how they defined "building code":

> Building code pertains to the design, construction and alternation of Buildings and structures. *Not to interfere with a municipality's zoning code pertaining to land use, setbacks, building heights, materials and other general planning and development issue.* Not intended to interfere with municipal authority to conduct inspections or to contract for inspections, set ad collect fees or issue permits. (emphasis added). *Id.*

The Wisconsin Legislature adopted 2013 Wisconsin Act 270 ("Act 270") in April of 2014, which, among many changes, codified the rewrite of the Wisconsin Commercial Building Code. Act 270 prohibited local municipalities from enacting or enforcing an ordinance that established minimum standards for the construction, or alteration of, or additions to, public buildings unless that ordinance strictly conformed to the rules promulgated by the Department of Safety and Professional Services ("DSPS"). Those rules, found in Wisconsin Administrative Code Chapters SPS 361 to 366, are collectively referred to as the "Wisconsin Commercial Building Code." They contain standards for the design, construction, use, maintenance, alteration and inspection of public buildings but do not regulate zoning.

III. History of the Ordinance

On August 14, 2020, the Madison Common Council adopted the zoning ordinance, MGO § 28.129, "Bird-Safe Glass Requirements" ("the Ordinance"). It

is intended to reduce the heightened risk for bird collisions with glass on certain building designs and configurations.[1] Glass buildings, in particular corner windows, contribute to a hostile built environment for wildlife.[2] (R. 24:6-15). The Ordinance applies to all exterior construction and development activity, similar to other zoning code sections that regulate façade materials.

MGO § 28.129 applies to all exterior construction and development activity, including the expansion of existing buildings and structures within three sub-categories. The three categories are: (1) buildings or structures over ten thousand (10,000) square feet; (2) sky-bridges; and (3) at-grade glass. (R. 16:3, 4). For buildings over ten thousand (10,000) square feet, bird-safe glass treatment requirements depend on the percentage of glass in the building façade. (R. 16:3, 4). Bird-safe glass mitigation has been proven to reduce glass collisions, critical to the conservation of migratory birds. (R. 24:12).

IV. Procedural History

The Associations filed suit in Dane County Circuit Court, seeking to have the Ordinance declared unlawful and enjoin its enforcement. Both parties filed cross motions for summary judgement. (R. 19, 28).

The City moved for summary judgement on the basis that the Ordinance is a valid form-based zoning ordinance and exempted from Act 270 preemption analysis. The Circuit Court agreed with City and issued a final order on August 25, 2022, granting the City's motion for summary judgement and dismissing the case. (R. 43, 47). The Associations appealed the decision. (R. 48).

The Court of Appeals should affirm the decision of the Circuit Court.

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[1] The Ordinance appears in full on Document 16, pgs. 3-4 in the Record.

[2] The American Bird Conservancy, Madison Audubon Society and Wisconsin Society for Ornithology filed an Amicus Brief to the Circuit Court detailing the pressing conservation issue of preventable bird deaths. It appears in full on Document 24, pgs. 6-15 in the Record.

ARGUMENT

I. Standard of Review

Whether or not the circuit court correctly granted summary judgement is a question of law which the court reviews *de novo*. *Nofke ex. rel. Swenson v. Bakke,* 2009 WI 10, ¶9, 315 Wis. 2d 350, 760 N.W.2d 156. Statutory interpretation presents questions of law that the Court of Appeals also reviews *de novo*. *Megal Dev. Corp. v. Shadof,* 2005 WI 151, ¶ 8, 286 Wis. 2d 105, 705 N.W.2d 645.

II. Wis. Stat. § 101.02(7r) exempts municipal zoning codes from the preemption analysis.

The grant of power to zone appears in Wis. Stat. § 62.23(7)(am) and includes local authority to regulate both form and use in zoning codes. The Associations argue that the Ordinance exceeds the City's authority under state law because "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, ¶ 19, 383 Wis.2d 247, 914 N.W.2d 597. The correct classification of the Ordinance as zoning is a foundational to the preemption analysis.

The relevant potions of Wis. Stat. §101.02(7r) which the Associations allege the Ordinance to be preempted by read as follows:

> (a) Not withstanding sub. (7)(a), no city, village or town may enact or enforce an ordinance that establishes minimum standards for constructing, altering or adding to public buildings that are places of employment unless that ordinance strictly conforms to the applicable rules . . . .
>
> (g) 1. The department [DSPS] shall promulgate rules that establish procedures for the administration of the rules promulgated by the department under this subchapter. For purposes of this paragraph, "administration" includes the process an owner must follow when

> applying for a permit for constructing, altering, or adding to a public building or a building that is a place of employment.
> 2. Notwithstanding sub. (7) (a), no county, city, village, or town may enact or enforce an ordinance that establishes minimum standards for the administration of the rules promulgated by the department under this subchapter unless that ordinance strictly conforms to the rules promulgated by the department under subd. 1.

DSPS is given the following powers through the amendment of Wis. Stat. §101.02(15)(j) by Act 270:

> The department [DSPS] shall ascertain, fix and order such reasonable standards or rules for ~~the construction, repair and maintenance of places of employment and~~ constructing, altering, adding to, repairing, and maintaining public buildings~~, as shall~~ and places of employment in order to render them safe.

Those rules are found in Wisconsin Administrative Code Chapters SPS 361 to 366, collectively referred to as the "Wisconsin Commercial Building Code." Relevant to municipal bodies, the Wisconsin Commercial Building Code states in Wis. Admin Code § SPS 361.03(5):

> **(5)** Local ordinances.
>
> (a) 1. Except as provided in par. (b), pursuant to s. 101.02 (7), Stats., no city, village, or town may enact or enforce an additional or more restrictive local ordinance that establishes minimum standards for constructing, altering, or adding to public buildings or buildings that are places of employment.
>
> 2. Nothing in chs. SPS 361 to 366 affect the authority of a municipality to enact or enforce standards relative to land use, zoning, or regulations under ss. 59.69[3], 60.61[4], 60.62[5], 61.35[6], and 62.23 (7), Stats.

[3] Planning and zoning authority for counties.
[4] General zoning authority for towns.
[5] Zoning authority for villages.
[6] Village planning authority.

As noted *supra*, cities are granted the power to zone in Wis. Stat. § 62.23(7):

> **(7)** ZONING.
>
> (am) *Grant of power.* For the purpose of promoting health, safety, morals or the general welfare of the community, the council may regulate and restrict by ordinance, subject to par. (hm), 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. This subsection and any ordinance, resolution or regulation enacted or adopted under this section, shall be liberally construed in favor of the city and as minimum requirements adopted for the purposes stated. This subsection may not be deemed a limitation of any power granted elsewhere.
>
> (b) *Districts.* For any and all of said purposes the council may divide the city into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this section; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings and for the use of land throughout each district, but the regulations in one district may differ from those in other districts. . . . The council may establish mixed-use districts that contain any combination of uses, such as industrial, commercial, public, or residential uses, in a compact urban form. The council may with the consent of the owners establish special districts, to be called planned development districts, with regulations in each, which in addition to those provided in par. (c), will over a period of time tend to promote the maximum benefit from coordinated area site planning, diversified location of structures and mixed compatible uses. Such regulations shall provide for a safe and efficient system for pedestrian and vehicular traffic, attractive recreation and landscaped open spaces, economic design and location of public and private utilities and community facilities and insure adequate standards of construction and planning. Such regulations may also provide for the development of the land in such districts with one or more principal

structures and related accessory uses, and in planned development districts and mixed-use districts the regulations need not be uniform.

(b) *Purposes in view.* Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air, including access to sunlight for solar collectors and to wind for wind energy systems; to encourage the protection of groundwater resources; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; and to preserve burial sites, as defined in s. 157.70 (1) (b). Such regulations shall be made with reasonable consideration, among other things, of the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city.

Statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (internal citations omitted). Statutory language is given its common, ordinary and accepted meaning. *Id.* While the statute is accorded its common meaning, "[in] examining the statutory text, however, . . . ascertaining plain meaning requires . . . . [the court] to do more than focus on 'a single, isolated sentence of portion of a sentence[.]'" *Teschendorf v. State Farm Ins. Cos.,* 2006 WI 89, ¶12, 293 Wis. 2d 123, 717 N.W.2d 258. The Court may "consider the scope, context, structure, and purpose of a statute in determining its plain meaning." *State v. Williams*, 2014 WI 64 ¶17, 355 Wis. 2d 581, 852 N.W.2d 467 (Wis. 2014). The Court may turn to "surrounding or closely-related statutes to reach a sound interpretation and to avoid absurd or unreasonable results." *Id.*

Additionally, "[a]lthough reviewing courts must begin with the statutory language, they sometimes consider it appropriate to turn to extrinsic sources. For example, even if the statute is plain, the court may consider legislative history to

confirm the plain-meaning interpretation." *Id.,* ¶18. "If the meaning of the statute appears to be plain but that meaning products absurd results, . . . [the court] may also consult legislative history. The purpose in this situation is to verify that the legislature did not intend these unreasonable or unthinkable results." *Teschendorf* at ¶15.

It is illogical that Wis. Stat. 101.02(7r) be read in a vacuum. The Circuit Court agreed and found "it must be read along with §101.02(15)(j) and other surrounding and closely related statutes, including §101.01(1)(g) and 62.23(7)." (R. 43:10). It is absurd to interpret that the Legislature enacted a minimum building code – through rules promulgated in the administrative code that explicitly exempt municipal zoning authority – except actually they mean not to exempt zoning authority as the Associations argue.

As explained above, Act 270 prohibits municipalities from "enact[ing] or enforce[ing] an ordinance that establishes minimum standards for constructing, altering, or adding to public buildings or buildings that are places of employment." *See* Wis. Stat. § 101.02(7r). The Ordinance does not set a standard for "construction, alteration or addition," it establishes a building form. More precisely, it establishes a wide range of acceptable building forms. The intent of the Ordinance was to reduce a known hazard to birds, but there are multiple ways to comply that do not include windows or anything adjacent to the International Building Code ("IBC") cited by the plaintiff. *See* MGO Sec. § 28.129.

The Associations' focus on the IBC Chapter 24 "Glass and Glazing" is misleading because the Ordinance does not compel building owners to use a specific glass, glazing, or marker. Options for compliance include window treatments, but could be avoided by reducing the size of windows or modifying the placement of windows. The Ordinance does not create a minimum construction, alteration or addition standard, instead it requires a wide-range of bird-safe mitigation measures *only* if the building is designed in a way that they apply. A

building could be designed without requiring *any* bird-safe mitigation strategies. Plaintiffs fail to provide specifics of when their members were forced to follow the Ordinance's requirements that conflicted with the Uniform Commercial Building Code and had no other mitigation options.

The function of "constructing, altering, repairing and maintaining" public buildings is to keep the people inside and around the building safe. Wis. Stat. § 101.02(15)(j) instructs that "[t]he department [DSPS] shall ascertain, fix and order such reasonable standards or rules for constructing, altering, adding to, repairing, and maintaining public buildings and places of employment in order to render them safe[7]." The link between "safety" and "alteration, construction, and maintenance" illustrates how building codes and zoning codes are different. Material functionality and the safety standards, as outlined in the Wisconsin Commercial Building Code, are distinct from the role of zoning codes play in specifying building design features - including material usage and placement of building elements.

Building codes are oriented toward ensuring that structures are constructed to an appropriate standard and are safe for the intended uses. Zoning codes are oriented toward how a project fits into a community: for example, regulating setbacks, types of uses, height, façade materials, parking requirements and design. Since both types of regulations are not interchangeable, the Circuit Court found an inquiry into the legislative history as warranted. (R. 43:12).

The legislature clearly did not intend that zoning would be included, which is explicit in both the legislative history, statutes and administrative code. As seen in Wis. Stat. § 62.23(7)(am), the zoning grant of power includes both use and form, and zoning is explicitly exempted from the Wisconsin Commercial Building Code by Wis. Admin. Code SPS 361.03(5)(a)2. There is no ambiguity in Admin. Code SPS 361.03(5)(a)2. that it does not regulate or infringe on local zoning code

[7] "Safe" is defined in Wis. Stat. § 101.01(13).

authority. As the Circuit Court noted, the juxtaposition of concepts merited an inquiry into legislative history, where it concluded the drafters intended to reach municipal building codes only. (R. 43:12).

The Circuit Court agreed with the City that the 2013 email from State Senator Terry Moulton's staff to the Legislative Reference Bureau starting the rework of the Wisconsin Commercial Building Code is informative. From the inception of Act 270 April 2013, the email noted:

> Building code pertains to the design, construction and alternation of Buildings and structures. *Not to interfere with a municipality's zoning code pertaining to land use, setbacks, building heights, materials and other general planning and development issue.* Not intended to interfere with municipal authority to conduct inspections or to contract for inspections, set ad collect fees or issue permits. (emphasis added).[8]

The email even acknowledges the expansiveness of zoning to include both form and use, and that form includes "materials." As such, the Circuit Court found the email persuasive since the legislative history was consistent with the entirety of state statutes and administrative codes to exempt zoning from Act 270 preemption. (R. 43:12).

The statutory grant of broad zoning authority in Wis. Stat. § 62.23(7) anticipates it will interact with other state laws:

> *Conflict with other laws*. Wherever the regulations made under authority of this section require a greater width or size of yards, courts or other open spaces, or require a lower height of building or less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this section shall govern. Wherever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts or other open spaces, or require a lower height of building or a less number of

[8] *Id.* at p. 4.

> stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required by the regulations made under authority of this section, the provisions of such statute or local ordinance or regulation shall govern. Wis. Stat. § 62.23(7)(g).

In other words, Wis. Stat. § 62.23(7)(g) explains that when one of the listed regulations is in state statue or local ordinance, the higher standard applies. While the Ordinance is not a regulation of the size of yards, open spaces or any of the other listed items, Wis. Stat. § 62.23(7)(g) is informative because it illustrates zoning is intended to intersect with other state laws. Plaintiffs ignore the statutory grant of zoning authority entirely and ask the Court to focus exclusively on Wis. Stat. § 101.02(7r). But that argument is disingenuous because it is illogical to not read Act 270 and the accompanying administrative code sections alongside municipal zoning authority in Wis. Stat. § 62.23(7).

The Ordinance does not logically conflict with state legislation because it does not attempt to authorize what the legislature has forbidden; in fact, it authorizes what the legislature expressly allowed. Political subdivisions are expressly given zoning power under Wis. Stat. § 62.23(7)(am) and it was explicitly made broad: "[t]his subsection and any ordinance, resolution or regulation enacted or adopted under this section, shall be liberally construed in favor of the city and as minimum requirements adopted for the purposes stated. This subsection may not be deemed a limitation of any power granted elsewhere."

The explicit purpose of the Wisconsin Commercial Building Code is to minimize local building code control – or how administrative code regulations keep people safe in and around buildings. The Ordinance does not defeat the purpose of using the Wisconsin Commercial Building Code to allow DSPS to preserve the life, health, safety and welfare of people as tasked by Wis. Stat. § 101.01(13). The legislature clearly did not intend Act 270 to limit zoning authority and the Ordinance is not contrary to the spirit of the state law. MGO Sec.

§ 28.129 is clearly a form-based zoning code and therefore not in conflict with state law.

III. MGO § 28.129 is a valid zoning ordinance.

The Wisconsin statutes provide a framework for the regulation of land use through planning, zoning, or platting. *Town of Sun Prairie v. Storms*, 110 Wis. 2d 58, 68, 327 N.W.2d 642 (1983). Municipalities are granted the power to control the physical development of land and the kinds of uses allowed in individual properties in Wis. Stat. § 62.37(7)(am). To accomplish that grant of power "[municipalities] may . . . regulate and restrict the *erection, construction, reconstruction, alteration* or *use of buildings, structures or land*." (emphasis added) Wis. Stat. § 62.37(7)(b).

As seen above, zoning encompasses both form – "the erection, construction, reconstruction, alteration" – and use – "use of buildings, strictures or land." The City's hybrid zoning code contains both use and form regulations, but the Ordinance is exclusively a form-based regulation.

a. The history of zoning policy illuminates the legal support of both form and use-based zoning codes.

Early zoning policy directly responded to the stresses industrialization inflicted on built environments by regulating uses.[9] During the Industrial Revolution, American cities' rapid expansion dictated urban form and illuminated the pressing need to control *where* uses were allowed.[10] Zoning addressed separating noxious uses – slaughterhouse, tanneries, and factories, for example – from residential areas and dictated what natural environment would remain unsullied from industrial use.[11]

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[9] Garvin, Elizabeth, and Dawn Jourdan. "THROUGH THE LOOKING GLASS: ANALYZING THE POTENTIAL LEGAL CHALLENGES TO FORM-BASED CODES." *Journal of Land Use & Environmental Law*, vol. 23, no. 2, Florida State University College of Law, 2008, pp. 395–421, 398.

[10] *Id.*.

[11] *Id.*

The United States Supreme Court's 1926 opinion in *Village of Euclid v. Amber Realty Co.* provided the moniker for use-based zoning, or Euclidian zoning. *Village of Euclid v. Ambler Realty Co*., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). Euclidian zoning is a system whereby a community is divided into areas in which specific uses of land are permitted. *Id.* Euclidian zoning dominated the discourse until form-based zoning codes emerged out of a dissatisfaction with suburban sprawl.[12]

Form-based codes regulate the urban form and relationships between buildings, structures and open spaces but do not discuss use.[13] A hybrid zoning code includes form and use-based regulations. While *Village of Euclid v. Amber Realty Co.* cemented the legality of use-based zoning, the opinion also applies to form-based zoning:

> There is no serious difference in opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. *Id.* at 388.

The US Supreme Court explicitly found aesthetic based zoning to be within the municipal police powers (the constitutional foundation for zoning) in *Berman v. Parker* in 1954. *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954). In *Berman*, the Court upheld that zoning authority could be rooted in a municipality's interest to regulate design, today a concept that would be considered "form-based" zoning:

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[12] Geller, Richard S. "THE LEGALITY OF FORM-BASED ZONING CODES." *Journal of Land Use & Environmental Law*, vol. 26, no. 1, Florida State University College of Law, 2010, pp. 35–91, 38

[13] *Id.*

> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. . . . Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river. *Berman v. Parker*, 348 U.S. 26, 32–33, 75 S. Ct. 98, 102, 99 L. Ed. 27 (1954)

b. Wisconsin law supports both form and use based zoning codes.

The Associations incorrectly state that Wisconsin law does not recognize the broad "form-based" zoning power. Zoning for exclusively aesthetic concerns has been endorsed by the Wisconsin Supreme Court since 1955, decades before it would have been called "form-based" zoning.[14] In *State ex. rel. Saveland Park Holding Corp. v. Wieldand,* the Court endorsed aesthetics-based zoning, citing to *Berman*:

> "In *Berman v. Parker* . . . [t]he concept of the public welfare[15] is broad and inclusive. . . . The values it represents are spiritual as well as physical, *aesthetic as well as monetary*. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. *If those who govern the District of Columbia decide that the Nation's capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way*.' (Emphasis supplied.)" *State ex rel. Saveland Park Holding Corp. v. Wieland,* 269

[14] BRIAN W. OHM, WISCONSIN LAND USE & PLANNING LAW (2022 ED.)

[15] "Public welfare" in this context is referring to one of the stated goals of zoning.

> Wis. 262, 272, 69 N.W.2d 217 (1955) quoting *Berman v. Parker*, 348 U.S. 26, 102 (1954).

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." *Town of Rhine v. Bizzell*, Supreme Court of Wisconsin. July 1, 2008, 311 Wis.2d 1751 N.W.2d 7802008 WI 76.[16] The Wisconsin Supreme Court also provided support for form based zoning codes in *Village of Windpoint v. Halverson:*

> There 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. *State ex rel. Saveland P.H. Corp. v. Wieland* (1955) 269 Wis. 262, 69 N.W.2d 217. *Wind Point v. Halverson*, 38 Wis. 2d 1, 155 N.W.2d 654 (Wis. 1968).

Form-based zoning was endorsed by the Legislature as well as the Courts. The Wisconsin Legislature was an early promoter of traditional neighborhood development ordinances, a precursor to form-based codes.[17] Since 2002, Wisconsin law requires that cities and villages with a population of at least 12,500[18] enact a traditional neighborhood development ordinance similar to a model ordinance. Wis. Stat. § 66.1027. The model ordinance[19] is rich with form-based zoning – meaning directives on architectural features, building materials,

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[16] *Town of Rhine v. Bizzell*, Supreme Court of Wisconsin. July 1, 2008311 Wis.2d 1751 N.W.2d 7802008 WI 76 – footnote 6 citing 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; Sonia Hirt, *The Devil is in the Definitions,* 73 Journal of the American Planning Association, at 436 (Autumn 2007).

[17] BRIAN W. OHM, WISCONSIN LAND USE & PLANNING LAW (2022 ED.)

[18] Cities and villages with populations of less than 12,500 are encouraged to enact such an ordinance. Wis. Stat. § 66.1027(3)(a).

[19] The model ordinance is available at doa.wi.gov/DIR/Comp_Planning.tndord.pdf (last viewed Dec. 6, 2022).

and articulation on building facades.[20] It is not limited to setbacks and minimum square footage. Additionally, architectural conservancy districts, whose authority is established in Wis. Stat. § 66.1007, routinely include design (or form) based regulations.

c. Form-based zoning is distinct from building code.

Building materiality appears in both zoning and building code, but that does not mean they are interchangeable. Form-based code is a land development regulatory tool that places primary emphasis on the physical form of the built environment. Building codes are oriented toward ensuring that structures have standardized construction. They ensure structural integrity, electrical, plumbing and mechanical system safety.

Requiring bird-safe façade glass or other mitigation efforts is no different than regulating building façade materials – a common and legal zoning practice. The Ordinance applies to all new exterior construction and development activity *only if* the builders choose to build above a certain percentage of the building's façade made of glass. The builder can create a building that would never trigger the requirement. *If* the Ordinance applies, than several mitigation treatments are available - from building-integrated structures to exterior insect screens or adhesive markings like stickers. *See* MGO § 28.129. A sticker cannot plausibly be considered a building code requirement. Bird-safe glass is a material properly regulated by the zoning code.

The Circuit Court agreed with the City's position that the bird-safe glass mitigation requirements were far from resembling building codes. "They have nothing to do with the stated purpose of the Commercial Building Code or the incorporated IBC provision, which set minimum standards to ensure that buildings are safe and structurally sounds for the person who use and occupy them. . . . .

[20] *Id.* See for examples pgs. 25-29.

they represent building design features and focus on material usage and placement of building elements." (R. 43:15).

d. The Associations mischaracterize the *Zwiefelhofer* factors as determinative.

The Associations dispute the legitimacy of MGO § 28.129 as a zoning ordinance based on *Zwiefelhofer v. Town of Cooks Valley*. However, the argument fails because *Zwiefelhofer* discusses only use-based zoning and not a comprehensive discussion of all legal zoning parameters as discussed *supra*. *Zwiefelhofer v. Town of Cooks Valley*, 338 Wis. 2d 488, 809 N.W.2d 362, 2012 WI 7 (Wis. 2012).

Zwiefelhofer cites six factors, all but one that explicitly discusses "uses". *Id.* As discussed *supra*, use and form are not interchangeable. Even if the first *Zwiefelhofer* factor – "the division of geographic area into multiple zones or districts" – was examined as the only lens that applies to the Ordinance, it is not dispositive.

While the Ordinance does not divide the City into districts that is not dispositive in deciding whether or not the City is exercising its zoning authority. In footnote eighteen, the *Zwiefelhofer* Court acknowledges the statutory language does not preclude a city from choosing to create a single citywide district, as the City of Madison has done with the Ordinance:

> Wisconsin Stat. § 62.23(7)(b) uses permissive language, stating that a local government may divide the jurisdiction into districts. Because we conclude that the Ordinance is not a zoning ordinance, we need not address the legality of an entire jurisdiction being zoned for a single-purpose use. The plaintiffs rely on a dissenting opinion from Town of Hobart v. Collier, 3 Wis.2d 182, 87 N.W.2d 868 (1958), for the assertion that an entire town may be a single zoning district. The dissent in Hobart wrote, "We do not construe the majority opinion as holding that a zoning ... ordinance which zones an entire town or municipality in a single residence use district is per se unconstitutional and void." 3 Wis.2d at 191, 87 N.W.2d 868 (Currie, J., dissenting). *Id* at footnote 18, citing *Town of Hobart v. Collier*, 3 Wis.2d 182, 87 N.W.2d 868 (1958).

The *Zwiefelhofer* Court recognized, "[m]any jurisdictions, including Wisconsin, have certainly recognized the possibility that an ordinance need not fit the traditional mold perfectly in order to constitute zoning." *Id*. at ¶ 43. The Ordinance regulates the *form* of buildings, not the use. As the Circuit Court noted, *Zwiefelhofer* is not dispositive by its own design and, while instructive, is not determinative here. (R. 43:13).

CONCLUSION

For the reasons discussed above, MGO § 28.129 is a valid zoning ordinance and therefore not preempted by state law. The Defendant respectfully requests the Court uphold the Circuit Court's decision,

Respectfully submitted this 30th day of December, 2022

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 8-9.19(8)(b),(bm), and (c) for a brief produced with a proportional serif font. The length of the brief is 6485words.

Dated this 30th day of December, 2022.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I HEREBY CERTIFY THAT:

I have submitted an electronic copy of this brief, which complies with the requirements of § 809.19(12).

I FURTHER CERTIFY THAT:

This electronic brief is identical in content and form to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the portable document format (PDF) copy of this brief filed with the court and electronically served upon all opposing parties.

Dated this 30th day of December, 2022.

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