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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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ARGUMENT

The City of Madison (herein, "the City") adopted Madison General Ordinance (MGO) § 28.129 (herein, "the Ordinance"), which establishes minimum standards for constructing, altering, and adding to public buildings that are places of employment. This action was brought because state law *explicitly prohibits* the City from adopting or enforcing such an ordinance.

The City argues that the state law in question exempts "zoning" ordinances, and further that the Ordinance is a "form-based" zoning ordinance, and is therefore lawful. For the reasons stated in the associations' opening brief, and as further explained herein, the City is incorrect, the Ordinance should be declared unlawful, and the circuit court's decision should be reversed.

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

All parties agree that the appropriate standard of review for this Court is *de novo.* The parties appear to disagree, however, on the basic principles of statutory interpretation that are to be applied during that *de novo* review. The City asks the Court to ignore the plain language of the statute, and instead look to a regulation which was adopted prior to

the statute, and to the City's general grant of zoning power. But that's not how the caselaw instructs Courts to engage in statutory interpretation. Instead, where a statute's meaning is plain and unambiguous, the statute should simply be interpreted as written. That is exactly the case here.

A. Under the rules of statutory interpretation, the meaning of the statute is plain and unambiguous, and it should be enforced accordingly.

As the Associations noted in their opening brief: "…[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). Yet disregarding the plain, clear words of the statute is exactly what the City asks this Court to do.

The statutory language in question, 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) . . ."

There is no ambiguity to that statute, and the City makes *no attempt* at all to even try to claim the statute is ambiguous. Nor could they, 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 other way to reasonably read the statute.

What's more is that there is no exemption in that statute for "zoning" ordinances.[1] Instead, the City takes the position that the legislature's text is "illogical" because they also granted municipalities broad zoning powers under Wis. Stat. § 62.23(7), and because a *regulation* in place before the statute was created mentions zoning.

But the city's argument is unavailing, and looking at other statutory sections does not change the plain and unambiguous language of the statute at issue in this case. This Court should declare that the

[1] The statute does contain several explicit exemptions. The Associations discussed those in our opening brief, and none of them apply to zoning ordinances. *See* Opening Br. at 10.

law means exactly what it says, and conclude that the statute plainly does not exempt zoning ordinances.

B. The proper interpretation of the statute put forward by the Associations would not lead to an "illogical" or "absurd" result.

Recognizing that the plain language of the statute simply does not say, or in any way could be read, to even imply what the City suggests, they instead ask this Court to go digging through the legislative history of the statute (as the circuit court incorrectly did) to find a single e-mail from a legislative staffer which they argue means the entire legislature intended for their plain unambiguous language to actually include the exemption for zoning which they did not include. This, the City ironically argues, is necessary to avoid an "illogical" or "absurd" result. Resp. Br. at 12.

However, in every situation where the legislature has pre-empted a particular action by local governments, there will *always* be a more generalized statute purporting to allow it—that is how pre-emptions work. Otherwise, there would have been no need for the pre-emption language in the first place. This is because, as the Associations noted in our opening brief, "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 City only has those powers given to it. The existence of the pre-emption necessarily implies that some other statute granted them the powers being pre-empted. The existence of that other powers statute, however, does not mean the pre-emption does not apply those powers. That would render the statutory pre-emption superfluous, and would *itself* be an absurd result. "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Kalal*, 271 Wis. 2d 633, ¶ 46.

This Court should reject the City's arguments that the statute is anything other than plain, and unambiguous. By its own terms the statute does *not* exempt zoning ordinances, and despite the City's wishes to the contrary, this Court should not read such language where the Legislature never wrote it.

C. The ordinance plainly sets a standard for "construction, alteration or addition" to buildings.

The City also argues in response that the ordinance "does not set a standard for 'construction, alteration or addition,' it establishes a building form." Resp. Br. at 12. They claim that the "form" requirements from their ordinance are not "minimum standards," because they only apply if the building "is designed in a way that they apply." *Id*. But the City's logic here is flawed, requiring a particular "form" of a building is obviously a "minimum standard" such that the statute applies.

The City argues that a "building could be designed without requiring *any* bird-safe mitigation strategies." Resp. Br. at 13. Thus, the City believes, their requirement is not a "minimum standard." Indeed, not every building code line needs to apply to every building, some standards apply to some buildings, other standards apply to other buildings. They are all standards, however. Where, a city establishes some minimum design requirement that must be met for a particular building (whether they refer to it as a "form" requirement or anything else) they necessarily have set a "minimum standard."

* * *

As discussed herein, and in the Association's opening brief, state law plainly prohibits the City from adopting an ordinance which establishes such standards. The Ordinance is unlawful.

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

The City urges this Court to find that the Wis. Stat. § 101.02(7r) pre-emption excludes zoning ordinances, and then it asks this Court to find that the Ordinance is a valid "form-based" zoning ordinance under that non-existent exemption. However, Wisconsin law does not recognize the broad form-based zoning power that the City claims for itself, and so even if zoning ordinances were generally exempted, the Ordinance is not a zoning ordinance.

The circuit court erred in concluding otherwise and should be reversed.

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

In their opening brief the Associations explained how the *Zwiefelhofer v. Town of Cooks Valley,* 2012 WI 7, 338 Wis. 2d 488, 809 N.W.2d 362, factors for determining if an ordinance is a *zoning* ordinance or a *non-zoning* ordinance apply in this case. Opening Br. at 25–28.

The City states *Zwiefelhofer* is "instructive" but argues it is not "determinative" as to whether the Ordinance is a zoning ordinance or not. Resp. Br. at 22. Instead, the City argues the first *Zwiefelhofer*, may be met, and ignores all the others. But *Zwiefelhofer* does apply, and despite the City's request this Court cannot simply overrule it.

The Supreme Court has stated that its *Zwiefelhofer* decision is "guidance and a framework of analysis for the determination of *whether an ordinance springs from a governmental entity's zoning authority*." *State ex rel. Anderson v. Town of Newbold*, 2021 WI 6, ¶ 36, 395 Wis. 2d 351, 954 N.W.2d 323 (emphasis added). That is exactly what the Associations ask this Court to do here: apply the *Zwiefelhofer* factors to determine whether an ordinance springs from a governmental entity's zoning authority.

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

As discussed *supra,* and in the Associations' opening brief, the Ordinance itself imposes construction standards on the design of buildings when they are 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 broad "form-based" zoning power that the circuit court recognized in this case, and which the City is now asking this court to recognize, simply does not exist under state law.

The City's brief discusses the history of zoning policy and argues such history "illuminates the legal support of both form and use-based zoning codes." Resp. Br. at 16-18. Then they argue Wisconsin law supports both form and use based codes. Resp. Br. at 18-20.

Except, the Associations do not dispute that some *limited* powers which the City characterizes as "form-based zoning" may exist under the statutes—rather, the Associations' argument is that this power is limited to just that statutory authorization, and *nothing more*.[2] There is no broad "form-based" zoning power under state law, and no case recognizes the kind of broad "form-based" powers which the City has claimed for itself.

[2] Indeed, the statutes explicitly allow the City to establish "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.

For authority, the City cites to *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) and *Berman v. Parker*, 348 U.S. 26 (1954). However, neither of those cases interpret Wisconsin law, and they were both decided many decades before the statute in question in this case came into being. They are of no value to the question of whether current Wisconsin law recognizes a broad "form-based" zoning power for municipalities.

Furthermore, to the extent the City is attempting to argue that the "form-based" zoning alternative *was* well established by those cases, this argument cuts against their *Zwiefelhofer* argument. If, as the City argues, "form-based" zoning was so well established and well known, why would the Court in *Zwiefelhofer* not have included some formalized recognition of "form-based zoning" in its analysis of zoning and non-zoning ordinances. Or even included any discussion of the "use" versus "form" distinction amongst zoning ordinances, which the city claims is so well established? The answer is obvious: because Wisconsin law simply does not recognize a broad form-based zoning power for municipalities, no matter how badly the City wishes to create one out of whole cloth. If the City wants Wisconsin law to grant them such powers, they should ask the Legislature, not the Courts.

As far as Wisconsin cases which they cite to, the City's argument is equally as unavailing. They cite to *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). Resp. Br. at 19. The Associations already addressed both of those cases in our opening brief (Opening Br. at 31) and nothing the City responds with changes our argument that they offer no help here.

The City argues that the Legislature has "endorsed" form-based zoning as well. They cite to the existence of a "traditional neighborhood" model ordinance to support this claim. Resp. Br. at 19. Here again, the Associations do not dispute that some *limited* powers exist (see footnote 3, *supra*), but those powers are *explicit* in the statute—and where the legislature *explicitly* empower the City to do certain things, they have necessarily *not* empowered them to do things not listed. As the Associations argued in our Opening Brief, *James v. Heinrich*, 2021 WI 58, ¶ 18, 397 Wis.2d 517, 960 N.W.2d 350 is instructive here, and the City does not even attempt to address that argument in any way. Opening Br. at 33–34.

* * *

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 the decision should be reversed.

CONCLUSION

For the reasons in the Associations' Opening Brief and as further explained herein, the Associations respectfully request that the decision of the circuit court be reversed.

Dated: January 16, 2023.

Respectfully submitted,

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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 2,317 words.

Dated: January 16, 2023.

Electronically signed by Lucas T. Vebber

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