COURT OF APPEALS OF WISCONSIN
DISTRICT II
APPEAL NO. 2024AP994

WISCONSIN REALTORS ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

CITY OF NEENAH,

Defendant-Respondent.

On Appeal from the Circuit Court of Winnebago County
The Honorable Daniel J. Bissett, Presiding
Case No. 2022CV000707

BRIEF OF APPELLANT, WISCONSIN REALTORS ASSOCIATION, INC.

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STATEMENT OF THE ISSUES

1. Whether Wis. Stat. § 66.1014[1] bars or otherwise preempts Neenah, Wisconsin, Code of Ordinances, ch. 26, art. XV, § 26-661(8)'s "primary residence" restriction on the rental of residential dwellings.

The Circuit Court answered this question NO.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is welcomed and requested to the extent the Court believes it would supplement the briefs to more fully present the issue above. Publication is appropriate as the opinion would apply a relatively new statute to a factual situation that has not been decided by any appellate court yet. Moreover, this case addresses an issue of substantial and continuing public interest, as the statute at issue applies to every municipality in the state and every owner of residential property that is used or designated to be used for short-term rental. *See* Wis. Stat. § (Rule) 809.23(1)(a).

STATEMENT OF THE CASE

The Wisconsin Realtors Association, Inc. (the "WRA"), is a Wisconsin non-stock corporation with over 17,500 members statewide comprised of residential and commercial real estate sales agents, brokers, appraisers, inspectors, property managers, bankers, and other professionals who touch real estate. R.12 at 1–2; App. at 25–26. The purpose of the WRA is to preserve and advance the rights of over two million homeowners in Wisconsin by protecting and defending property rights, promoting economic growth, and keeping housing affordable. R.12 at 2; App. at 26.

[1] All references to the Wisconsin Statutes are to the 2021–22 version, unless specifically noted otherwise.

The City of Neenah (the "City") is a municipal corporation organized under the laws of the State of Wisconsin. R.5, ¶ 2. In 2017, the City adopted a Tourist Housing Ordinance (the "Ordinance"), enacted as Article XV of Chapter 26 of the Neenah, Wisconsin, Code of Ordinances, ("Neenah Code of Ordinances"). R.14; App. at 31. The Ordinance requires any tourist housing property to first receive a permit from the City, which will be granted only on the condition that the "tourist rental property shall be the primary residence of the applicant." Neenah Code of Ordinances § 26-661(7)–(8).

Also in 2017, the Wisconsin Legislature enacted Wis. Stat. § 66.1014. 2017 Wis. Act 59, § 996g. Entitled "Limits on residential dwelling rental prohibited," § 66.1014 withdraws and preempts municipal authority by prohibiting certain municipal regulations or conditions on private residential dwelling rentals.

The WRA commenced this action against the City seeking, among other things, a judicial declaration that the Ordinance's limiting condition that tourist housing rental properties be the applicant's primary residence violates, or is otherwise preempted by, Wis. Stat. § 66.1014. R.2 at 6; App. at 12. As relevant to this appeal, the circuit court concluded on summary judgment that the Ordinance's "primary residence" limitation on residential dwelling rentals neither violated nor was preempted by § 66.1014.[2] R.24; App. at 4.

[2] The circuit court's other summary judgment rulings are not part of this appeal, including its determination that: (1) the Ordinance's requirement that a "tourist housing property may be rented up to 120 days within a calendar year" violates Wis. Stat. § 66.1014; and (2) the challenge to the Ordinance's provision that "Tourist housing permits, once granted, may be revoked by the Director of Community Development Department for cause" as violating Wis. Stat. § 66.1014 was not ripe. R.24; App. at 4. The circuit court also held that if a permit were revoked, the City has

STANDARD OF REVIEW

Whether a statute preempts a municipal ordinance raises a question of law reviewed independently. *Lake Beulah Mgmt. Dist. v. Village of East Troy*, 2011 WI 55, ¶ 11, 335 Wis. 2d 92, 799 N.W.2d 787.

ARGUMENT

The Ordinance's "primary residence" limit on private rentals of residential dwellings is unlawful. The Court should hold as much for either one of two alternative reasons. First, the Ordinance's "primary residence" limitation falls squarely within Wis. Stat. § 66.1014's express prohibition against such limitations. Alternatively, § 66.1014 preempts municipal ordinances, such as the Ordinance, that attempt to limit citizens' ability to rent their residential dwellings in this manner. Both alternative avenues to the same result are addressed in turn.

I. THE ORDINANCE'S REQUIREMENT THAT TOURIST HOUSING RENTAL PROPERTIES BE THE PRIMARY RESIDENCE OF THE APPLICANT VIOLATES WIS. STAT. § 66.1014.

The Ordinance's limiting condition on short-term residential property rentals requiring that the residence "be the primary residence of the applicant" is void because it violates Wis. Stat. § 66.1014's express prohibition. Section 66.1014 states in relevant part:

> **66.1014 Limits on residential dwelling rental prohibited.**
>
> **(1)** In this section:
>
> . . .
>
> **(b)** "Residential dwelling" means any building, structure, or part of the building or structure, that is used or intended to be used as a home, residence, or sleeping

to comply with due process in doing so and provide an opportunity for the applicant to be heard before the appropriate City board. R.24 at 3; App. at 6.

> place by one person or by 2 or more persons maintaining a common household, to the exclusion of all others.
>
> **(2)**
>
> **(a)** Subject to par. (d), a political subdivision may not enact or enforce an ordinance that prohibits the rental of a residential dwelling for 7 consecutive days or longer.
>
> **(b)** If a political subdivision has in effect on September 23, 2017, an ordinance that is inconsistent with par. (a) or (d), the ordinance does not apply and may not be enforced.
>
> **(c)** Nothing in this subsection limits the authority of a political subdivision to enact an ordinance regulating the rental of a residential dwelling in a manner that is not inconsistent with the provisions of pars. (a) and (d).
>
> **(d)**
>
> **1.** If a residential dwelling is rented for periods of more than 6 but fewer than 30 consecutive days, a political subdivision may limit the total number of days within any consecutive 365-day period that the dwelling may be rented to no fewer than 180 days. The political subdivision may not specify the period of time during which the residential dwelling may be rented, but the political subdivision may require that the maximum number of allowable rental days within a 365-day period must run consecutively. A person who rents the person's residential dwelling shall notify the clerk of the political subdivision in writing when the first rental within a 365-day period begins.
>
> . . .

Section 66.1014's plain text prohibits the ordinances municipalities may enact to limit residential dwelling rentals. The definition of a "residential dwelling" in § 66.1014(1)(b) is broad: it covers "*any* building, structure, or part of the building or structure, that is used or intended to be used as a home, residence, or sleeping place by one person or by 2 or more persons maintaining a common household, to the exclusion of all others" (emphasis added). *See, e.g.*, *Marotz v. Hallman*, 2007 WI 89, ¶ 25, 302 Wis. 2d 428, 734 N.W.2d 411 (the legislature's use of the modifier "any" is to be interpreted broadly). The legislature's chosen language in § 66.1014(1)(b) demonstrates that it means to expansively prohibit municipal limitations on renting residential

dwellings well beyond those being used as a primary residence. Said differently, § 66.1014(1)(b) broadly protects even non-primary residents in their exercise of the right to rent their dwellings on a short-term basis.

With that broad definition in mind, the interpretative analysis then turns to § 66.1014(2)(a) and (d). Per para. (a), "a political subdivision may not enact or enforce an ordinance that prohibits the rental of a residential dwelling for 7 consecutive days or longer." This provision therefore: (1) regulates political subdivisions, including the City here; (2) bars the City from enacting or enforcing an ordinance that attempts to prohibit private rentals; and (3) protects all homeowners who rent a "residential dwelling for 7 consecutive days or longer."

Reading § 66.1014(1)(b) and (2)(a) together, the law plainly protects the right of any renter who makes any residence rentable for a week or longer to rent out that dwelling, regardless of whether it is the renter's primary residence or not. A municipality may neither enact nor enforce any ordinance limiting that short-term rental right. The only exception permitting a limit on the right to rent appears in § 66.1014(2)(d), which addresses certain timing restrictions that municipalities can promulgate. Given the plainness of the statute, the interpretive inquiry ends there. *See State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

Applying that plain interpretation here, the City's enactment of the Ordinance violates § 66.1014. As the title "Limits on residential dwelling rental prohibited" indicates, § 66.1014(2)(a) bars any limitations on renting residential dwellings, except for the timing restrictions in § 66.1014(2)(d). Nowhere in § 66.1014 does the text contemplate allowing municipalities to limit residential rentals to only

those residential dwellings qualifying as the renter's primary residence. In sharp contrast, the Ordinance's class-based restriction categorically denies all non-primary homeowners—tens of thousands of Wisconsin properties are owned by people, corporations, limited liability companies, and trusts not considered the "primary resident"—the fundamental property right to rent their residential dwellings. That limitation on residential dwelling rentals is expressly prohibited by § 66.1014, and, therefore, unlawful and unenforceable.

II. THE ORDINANCE IS PREEMPTED BY WIS. STAT. § 66.1014.

If the State chooses to legislate on a matter of statewide concern, then the state legislation preempts local ordinances. *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 651–52, 547 N.W.2d 770 (1996). A municipality's ability to regulate matters of statewide concern is limited: "municipalities may enact ordinances in the same field and on the same subject covered by state legislation where such ordinances do not conflict with, but rather complement, the state legislation." *Fox v. City of Racine,* 225 Wis. 542, 546, 275 N.W. 513 (1937) (quoting *City of Milwaukee v. Childs Co.,* 195 Wis. 148, 151, 217 N.W. 703 (1928)).

In *Anchor Savings & Loan Ass'n v. Madison Equal Opportunities Comm'n,* 120 Wis. 2d 391, 399, 355 N.W.2d 234 (1984), the Wisconsin Supreme Court announced four tests to determine whether a state statute preempts a municipal ordinance: (1) whether the legislature has expressly withdrawn the power of the municipality to act; (2) whether the ordinance logically conflicts with the state legislation; (3) whether the ordinance defeats the purpose of state legislation; or (4) whether the ordinance violates the spirit of the state legislation. *DeRosso Landfill*,

200 Wis. 2d at 651–52. If any one of these four tests is met, the municipal ordinance is void. *Id.* at 652.

No dispute exists that Wis. Stat. § 66.1014, in prohibiting municipal limitation on residential dwelling rentals, regulates a matter of statewide concern. In this case, the Ordinance's "primary residence" limitation runs afoul of three of the preemption tests, therefore voiding that part of the Ordinance.

A. The Ordinance's "primary residence" limitation logically conflicts with Wis. Stat. § 66.1014.

The Ordinance's "primary residence" requirement logically conflicts with Wis. Stat. § 66.1014(2)(a)'s total prohibition on such limitations, as outlined in Part I above. The conflict is plain. On the one hand, the Ordinance attempts to impose a class-based limitation that flatly denies all non-primary residents their fundamental right to rent out their residential properties in the City by categorically denying them a rental permit. To the contrary, Wis. Stat. § 66.1014 contains a clear prohibition on such substantive limitations on short-term rentals for any residential property, regardless of its status as a primary residence. Had the legislature desired to permit such local limitations, then § 66.1014(1)(b) would contain the qualifier "primary" before the clause "home, residence, or sleeping place."

Moreover, the vagueness of what qualifies as one's "primary residence" under the Neenah Code of Ordinances creates logical conflicts with § 66.1014(2)(d). What a government defines as a "primary residence" typically incorporates some element of time spent residing on the property. By leaving vague this timing element, the "primary residence" limitation on residential dwelling rentals could operate in

effect as a limitation on the total number of days a residence could be rented within a consecutive 365-day period. For example, if the City silently interprets "primary residence" to require living at the residence even one day over six months out of the year, the requirement would violate § 66.1014(2)(d)1.'s prohibition against restricting the total number of rentable days to fewer than 180 days (six months). In sum, the Ordinance's "primary residence" limitation logically conflicts with § 66.1014 in multiple regards and should therefore be declared void. *See DeRosso Landfill*, 200 Wis. 2d at 651–52.

B. The Ordinance's "primary residence" limitation defeats the purpose of Wis. Stat. § 66.1014.

The Ordinance defeats the purpose of Wis. Stat. § 66.1014. The textually evident purpose of § 66.1014 is to establish significant statewide uniformity in protecting the fundamental right to rent private residential dwellings. "The ability to share one's things, or let others use them, is fundamental in the idea of property. . . . [T]he ability of owners to 'include' others in their property is a central attribute of ownership and fundamental to any system of private property." *See* Donald J. Kochan, *The Sharing Stick in the Property Rights Bundle: The Case of Short Term Rentals & HOAs*, 86 U. Cin. L. Rev. 893, 901–03 (2018) (quoting James E. Penner, *The Bundle of Rights Picture of Property*, 43 UCLA L. Rev. 711, 745 (1996) and Daniel B. Kelly, *The Right to Include*, 63 Emory L.J. 857, 859 (2014)).

To protect this fundamental right to rent, § 66.1014 enacted broad language encompassing protections for the rental of all types of residential properties. Wis. Stat. § 66.1014(1)(b). The text contains no exceptions based on who owns the residential property (individual,

corporation, limited liability company, trust, etc.), nor does the text remove protections for rentals of residential dwellings that are not used as a primary residence. The express bar on municipalities enacting or enforcing any ordinance prohibiting such rentals further communicates a purpose to protect owners of this broad swath of residential properties from local overregulation.

The Ordinance's class-based, categorical exclusion from the permit of non-primary residents denies a vast number of properties—properties owned by a corporation, a limited liability company, or a trust, for example—from exercising the basic property right that § 66.1014 expressly protects: renting a residential dwelling. The Ordinance therefore unequally denies certain homeowners their full property rights within the City in ways they would not be denied elsewhere in Wisconsin. The Ordinance's primary residence limitation on residential dwelling rentals does not comport with the broad deregulatory sweep the legislature meant to enact through § 66.1014. Because the Ordinance's "primary residence" limitation contravenes § 66.1014's purpose, the Ordinance's limitation must be declared void as a result of preemption. *See DeRosso Landfill*, 200 Wis. 2d at 651–52.

C. The Ordinance's "primary residence" limitation violates the spirit of Wis. Stat. § 66.1014.

Wisconsin Stat. § 66.1014 exists as the result of a deregulatory spirit to ensure consistency in how municipalities regulate short-term rentals of residential dwellings. The Ordinance's requirement that the property eligible for a short-term rental be the primary residence of the applicant is contrary to the spirit of, and therefore preempted by, § 66.1014.

The "spirit" of state legislation is discerned from the law's express language and implicit intent understood from the regulations overall. *See U.S. Oil, Inc. v. City of Fond Du Lac,* 199 Wis. 2d 333, 351–52, 544 N.W.2d 589 (Ct. App. 1996). For the same reasons set forth in Section II.B. above, the spirit of Wis. Stat. § 66.1014 is deregulatory and meant to promote the free exercise of homeowners' property right to put up their residential dwellings—primary residences or not—for short-term rental. The promotion of this fundamental right to rent promotes the expansion of affordable housing and bolsters Wisconsin's tourism economy. The textual evidence is § 66.1014(1)(b)'s broad "Residential dwelling" definition and § 66.1014(2)(d)'s expansive bar against local overregulation of residential short-term rentals.

The Ordinance contravenes this deregulatory spirit by creating a limitation that prohibits a large faction of residential properties in the City from ever exercising the right to be shared as short-term rentals. A class-based, categorical bar on a wide range of residential property owners from even seeking a permit does not comport with § 66.1014's equitable and deregulatory spirit. The inequitable treatment between primary residence and other residence-ownership types finds no support in § 66.1014's already broad text or even broader spirit. The Ordinance's "primary residence" limitation violates the spirit of § 66.1014, and, as such, is preempted and void. *See DeRosso Landfill*, 200 Wis. 2d at 651–52.

CONCLUSION

The Ordinance's provision limiting short-term rental permits to only those properties serving as the applicant's primary residence is contrary to Wis. Stat. § 66.1014, and, therefore, is unlawful. Alternatively, that "primary residence" provision of the Ordinance is preempted by § 66.1014 because it logically conflicts with § 66.1014, defeats the purpose of § 66.1014, and violates the spirit of § 66.1014. For any of these reasons, the WRA asks that the circuit court be reversed and that this Court declare the Ordinance's "primary residence" limitation in Neenah Code of Ordinances § 26-661(8) void and unenforceable.

Dated: July 30, 2024.

Respectfully Submitted,

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief. The length of those portions of the brief referred to in Wis. Stat. § (Rule) 809.19(1)(d), (e) and (f) is 2,695 words.

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