

ASSOCIATED BUILDERS & CONTRACTORS OF WI, INC., et. al

Plaintiffs,

v.

Case No. 2021CV001729
Action for Declaratory Judgement

CITY OF MADISON,

Defendants.

DEFENDANT’S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

The Defendant, City of Madison (“the City”), by City Attorney Michael Haas, and Assistant City Attorney Kate M. Smith, for the reasons set forth herein, moves the court to grant summary judgement in the above captioned matter in favor the defendant.

INTRODUCTION

The plaintiff, Associated Builders & Contractors of WI, Inc., et. al., filed an Action for Declaratory Relief alleging the City of Madison General Ordinance § 28.129, “Bird-Safe Glass Requirements” is preempted by state law. The City disputes this assertion. At issue before the Court is whether or not MGO § 28.129 is a valid zoning ordinance and if it is preempted by state law, in particular the Uniform Commercial Building Code adopted by 2013 WI Act 270. Both parties agree that there is not a dispute of material facts, therefore asked the Court to order summary judgement motions. Both parties submitted a Joint Statement of Facts, to be supplemented by affidavits in support of each motion for summary judgement

STATEMENT OF FACTS

1. Background of MGO § 28.129, Bird-Safe Glass Requirements

On August 14, 2020, the Madison Common Council adopted the zoning ordinance, MGO § 28.129, “Bird-Safe Glass Requirements.” (Affidavit of Matthew Tucker ¶ 6). MGO § 28.129 went into effect on October 1, 2020. (Affidavit of Matthew Tucker ¶ 6). The bird-safe glass requirement in MGO § 28.129 is intended to reduce the heightened risk for bird collisions with glass on certain building designs and configurations. (Affidavit of Matthew Tucker ¶ 4). Glass buildings, in particular corner windows, contribute to a hostile built environment for wildlife. (Affidavit of Matthew Tucker ¶¶ 4, 12).

MGO § 28.129 applies to all exterior construction and development activity, including the expansion of existing buildings and structures within the sub-categories. (Affidavit of Matthew Tucker ¶ 7). The three categories of buildings are: (1) buildings or structures over ten thousand (10,000) square feet; (2) sky-bridges; and (3) at-grade glass. (Affidavit of Matthew Tucker ¶ 8). For buildings over ten thousand (10,000) square feet, bird-safe glass treatment requirements depend on the percentage of glass in the building façade. (Affidavit of Matthew Tucker ¶ 9). A building could be designed without triggering any bird-safe glass requirements under the City’s ordinance. (Affidavit of Matthew Tucker ¶ 10).

MGO § 28.129 does not mandate how the owner meets the bird-safe glass requirement if it applies to their building. (Affidavit of Matthew Tucker ¶ 11). The ordinance suggests several mitigation options, in addition to providing discretion to the Zoning Administrator to approve other treatments. (Affidavit of Matthew Tucker ¶ 11). For example, acceptable bird-safe mitigation treatments include adding adhesive dots to existing glass or building-integrated

structures like non-glass double-skin facades, metal screens, fixed solar shading or exterior insect screens. (Affidavit of Matthew Tucker ¶ 13).

The mitigation options described above are regulations on the type of materials required only if bird-safe mitigation action applies. (Affidavit of Matthew Tucker ¶ 13). Madison’s zoning code regulates materials throughout the zoning code. (Affidavit of Matthew Tucker ¶ 15). For example, MGO § 28.060(2)(d) prescribes the amount and placement of door and window openings and MGO §28.060(2)(d)1. regulates the tinting of windows and doors. (Affidavit of Matthew Tucker ¶ 15). MGO § 28.060(2)(g) regulates the materials palette, such as stone, masonry, or textured cast stone, in nonresidential and mixed-use buildings. (Affidavit of Matthew Tucker ¶ 15). These sections, in addition to the City’s bird-safe glass ordinance, are all form-based zoning codes. (Affidavit of Matthew Tucker ¶ 16). MGO Chapter 28 is a hybrid zoning code, meaning it contains both form and use-based codes. (Affidavit of Matthew Tucker ¶ 17).

2. Background of Form and Use-Based Zoning Codes

MGO § 28.129 is a form-based zoning code contained in a hybrid zoning code that includes both form and use regulations. In order to contextualize the City’s distinction of form and use in zoning, it would be helpful to understand a brief history of zoning in the American legal and social landscapes. During the Industrial Revolution, American cities’ rapid expansion dictated urban form and illuminated the pressing need to control *where* uses were allowed.¹ Early zoning policy directly responded to the stresses rapid industrialization inflicted on built environments.² Zoning addressed separating noxious uses – slaughterhouse, tanneries, and

¹ 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.

² *Id.*

factories, for example – from residential areas and dictated what natural environment would remain unsullied from industrial use.³

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 town or 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 the dissatisfaction with suburban sprawl.⁴

Unlike conventional Euclidian zoning codes, form-based codes exclusively regulate the physical form and do not separate districts by use.⁵ For the purposes of zoning, a 'form-based code' means a code based primarily on urban form, including the relationship of buildings to each other, to streets and to open spaces –rather than based primarily on land use. (Affidavit of Matthew Tucker ¶ 17). Some cities have an entirely form-zoning code, while others have Euclidian or hybrid codes.⁶ Many cities, including Madison, have a hybrid zoning code that includes form and use-based regulations. (Affidavit of Matthew Tucker ¶ 17).

3. Background of Wisconsin Act 270 (“Act 270”)

Plaintiffs allege in their Complaint that MGO § 28.129 violates Act 270, the Uniform Commercial Building Code. The City disputes this assertion but will provide some background on Act 270 in order to ground our argument.

³ *Id.*

⁴ 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

⁵ *Id.*

⁶ FORM-BASED CODES INSTITUTE, <https://formbasedcodes.org/> (last visited March 19, 2022).

The Department of Safety and Professional Services (“DSPS”) is responsible for ensuring the safe and competent practice of licensed professionals in Wisconsin, and administers and enforces laws to assure safe and sanitary conditions in public and private buildings.⁷ Chapters SPS 361 to 366 (the administrative rules enforced by DSPS) are commonly referred to collectively as the “Wisconsin Commercial Building Code.” (Affidavit of Kyle Bunnow ¶ 5). This uniform statewide building code was adopted by DSPS as required by 2013 Wisconsin Act 270 (“Act 270”). (Affidavit of Kyle Bunnow ¶ 5).

Act 270 went into effect April 18, 2014. (Affidavit of Kyle Bunnow ¶ 3). Act 270 affected local control of building and fire codes.⁸ The bill 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 conforms to the rules promulgated by the Department of Safety and Professional Services (“DSPS”). *See* Wis. Stat. § 101.02(7r). Chapters SPS 361 to 366 contain standards for the design, construction, use, maintenance, alteration and inspection of public buildings and places of employment. (Affidavit of Kyle Bunnow ¶ 6).

The Wisconsin Commercial Building Code does not address or regulate zoning codes. (Affidavit of Kyle Bunnow ¶ 8). Zoning is the division of lands by legislative regulations, into areas or zones, which specify allowable land uses and size restrictions. (Affidavit of Matthew Tucker ¶ 18). While both zoning and commercial building codes affect built environments, they are separate spheres of regulations. (Affidavit of Kyle Bunnow ¶ 8). The state building code

⁷ STATE OF WISCONSIN DEPARTMENT OF SAFETY AND PROFESSIONAL SERVICES: DIVISIONS, <https://dsps.wi.gov/Pages/AboutDSPS/Divisions.aspx> (last visited March 19, 2022).

⁸ See Exhibit 1, Wisconsin Legislative Council Act Memo “2013 Wisconsin Act 270: Commercial Building Code” for a brief summary of the Act. Lovell, David L. “WI LEGISLATIVE COUNCIL ACT MEMO, 2013 WI ACT 270 [2013 SENATE BILL 617]: COMMERCIAL BUILDING CODE,” April 23, 2014, available at <https://docs.legis.wisconsin.gov/2013/related/lcactmemo/act270.pdf> (last visited March 21, 2022).

does not regulate how façade design features and materials are implemented into buildings – for example, glass, brick, wood, vinyl, or other. (Affidavit of Kyle Bunnow ¶ 7). Materials and facades, the exterior facing elements, are the purview of form-based zoning codes. (Affidavit of Kyle Bunnow ¶ 9).

Form-based code is a land development regulatory tool that places primary emphasis on the physical form of the built environment. (Affidavit of Matthew Tucker ¶ 17). Material functionality and the safety standards, as outlined in 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. (Affidavit of Kyle Bunnow ¶ 9). Zoning codes are oriented toward how a project fits into a community: for example, regulating setbacks, types of uses, height, parking requirements and design. (Affidavit of Matthew Tucker ¶ 19). Building codes are oriented toward ensuring that structures are constructed to an appropriate standard and are safe for the intended uses. (Affidavit of Kyle Bunnow ¶ 12). Building codes protect buildings and the people and property inside them from fire, earthquakes, windstorms and other extreme events. (Affidavit of Kyle Bunnow ¶ 12). They also ensure structural integrity, electrical, plumbing and mechanical system safety, as well as accessibility and practical and achievable levels of energy efficiency. (Affidavit of Kyle Bunnow ¶ 12).

The history of Act 270 illustrates that it was intended to impact municipal building codes, not zoning codes. In April 2013, the Chief of Staff for Wisconsin State Senator Terry Moulton emailed the Legislative Reference Bureau asking for a redraft of the Uniform Commercial Building Code.⁹ In the April 16, 2013 email, his Chief of Staff Nathan Duerkop explained that

⁹ Exhibit 2, p. 3. Duerkop, Nathan. Email to Mary Glass-Gibson. 16 April 2013. Materials in 2013 Drafting File (#02)SB617 for 2013 WI Act 270 (SB 617), PDF 13-2184df_pt01of02, publically available at WI State Legislature website at

the attached documents laid out what they wanted to do.¹⁰ The document defined “building code” in Footnote 1:

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).¹¹

The language in the email is mirrored in Wisconsin statutes and administrative code. SPS Chapters 361-366 explicitly do not limit a municipality’s authority in relation to land use and zoning standards: “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, 60.61, 60.62, 61.35, and 62.23 (7), Stats.” Wis. Admin. Code SPS 361.03(5)(a)2.

In Wis. Stat. § 101.01(1)(g), the definitions section of the DSPS statute, “commercial building code” is defined as “the code adopted by the department under this subchapter for the design, construction, maintenance, and inspection of public buildings and places of employment.” The same language is found again in the “purpose of code” section in Chapter SPS 361; “the purpose of chs. SPS 361 to 366 is to protect the health, safety, and welfare of the public and employees by establishing minimum standards for the design, construction, maintenance, and inspection of public buildings, including multifamily dwellings and places of employment.” WI Admin. Code § SPS 361.01 (2022).

https://docs.legis.wisconsin.gov/2013/related/drafting_files/wisconsin_acts/2013_act_270_sb_617/02_sb_617/13_2184df_pt01of02.pdf (last visited March 21, 2022).

¹⁰ *Id.*

¹¹ *Id.* at p. 4.

STANDARD OF REVIEW

Summary judgment is governed by Wis. Stat. §802.08 and is appropriate where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. The mere existence of factual disputes between parties does not preclude the grant of summary judgment. The determining factor is whether there exists a genuine issue of material fact. *Baxter v. Wisconsin Department of Natural Resources*, 165 Wis. 2d 298, 477 N.W.2d 648 (Wis. Ct. App. 1991). If not, summary judgment is appropriate where a determination of law concludes the case. *Id.* To make a *prima facie* case for summary judgment, a moving defendant must show a defense that would defeat the plaintiff. *See Paul v. Skemp*, 242 Wis. 2d 507, 2001 WI 42, 625 N.W.2d 860 (Wis. 2001).

The Court of Appeals detailed the process to be followed by a court in ruling on a motion for summary judgment:

Under that methodology, the court, trial or appellate, first examines the pleadings to determine whether claims have been stated and a material factual issue is presented. If the complaint states a claim and the pleadings show the existence of factual issues, the court examines the moving party's affidavits for evidentiary facts admissible in evidence or other proof to determine whether that party has made a *prima facie* case for summary judgment. To make a *prima facie* case for summary judgment, a moving defendant must show a defense which would defeat the claim. If the moving party has made a *prima facie* case for summary judgment, the court examines the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether a genuine issue exists as to any material fact, or reasonable conflicting inferences may be drawn from the undisputed facts, and therefore, a trial may be necessary. *Preloznik v. City of Madison*, 113 Wis. 2d 112, 334 N.W.2d 580 (Wis. Ct. App. 1983).

The City maintains that by applying the above methodology, the Court should conclude that there is no genuine issue of material fact and that the City is entitled to summary judgment as a matter of law.

ARGUMENT

1. MGO § 28.129 is a valid zoning ordinance and zoning ordinances are exempted from Act 270.

a. MGO § 28.129 is a valid zoning ordinance.

The Wisconsin statutes provide a framework for the regulation of land use by various governmental entities. Such regulation can take the form of planning, zoning, or platting. *Town of Sun Prairie v. Storms*, 110 Wis. 2d 58, 68, 327 N.W.2d 642 (1983). Zoning codes allow municipalities to control the physical development of land and the kinds of uses allowed in individual properties. The two governing state statutes discussing are Wis. Stats. §§ 62.37(7)(am) and (b), relevant language excerpted below:

“For the purpose of promoting health, safety, morals or the general welfare of the community, the council may regulate and restrict by ordinance . . . 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. . . 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.” Wis. Stats. § 62.37(7)(am)

“ 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.” (emphasis added) Wis. Stats. § 62.37(7)(b)

As seen in the two statute sections, zoning encompasses both “use” and “form” (“erection, construction, reconstruction, alteration” in contrast to “the height, number of stories and size of buildings and other structures”). The City’s zoning code contains both use and form regulations, but MGO § 28.129 is exclusively a form-based regulation. (Affidavit of Matthew Tucker ¶ 16).

While *Village of Euclid v. Amber Realty Co.* cemented the legality of use-based zoning, the opinion also applies to form-based zoning. The *Euclid* Court upheld the use-based zoning ordinance as a reasonable, non-arbitrary extension of the Village’s police power and therefore, similar to regulated nuisances, local governments could regulate the location of land uses.

Village of Euclid at 388-389. Judicial support for form-based codes is also in the opinion:

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.

Design controls for form-based zoning ordinances include “building envelope standards, building frontage requirements, fenestration (window and entryway), facade coverage, and traditional facade modulation techniques.” *Town of Rhine v. Bizzell*, Supreme Court of Wisconsin. July 1, 2008, 311 Wis.2d 1751 N.W.2d 7802008 WI 76.¹² 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 ordinance. *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).

¹² *Town of Rhine v. Bizzell*, Supreme Court of Wisconsin. July 1, 2008 311 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).

MGO § 28.129 is analogous to setback lines, building enveloped standards, or minimum square footage – all “forms” legitimately and legally regulated by local zoning code. Requiring bird-safe glass for applicable buildings is no different than regulating building façade materials. MGO § 28.129 applies to all new exterior construction and development activity *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 they choose.

If MGO § 28.129 applies to the building, then the ordinance lays out several mitigation treatments available with varying levels of intensity - 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. Building codes are oriented toward ensuring that structures are constructed to protect buildings and the people and property inside them from danger and ensure structural integrity. Material functionality and the safety standards, as outlined in Wisconsin Commercial Building Code, are distinct from the role of zoning codes play in specifying building design features. Bird-safe glass is a material properly regulated by the zoning code.

The City anticipates the Plaintiffs will dispute the legitimacy of MGO § 28.129 as a zoning ordinance based on the Wisconsin Supreme Court decisions in *Zwiefelhofer v. Town of Cooks Valley* (2012) and *State ex. rel. Anderson v. Town of Newbold* (2021). However, the argument fails because both discuss only use-based zoning, which is not a comprehensive discussion of legal zoning parameters. Neither address form-based zoning codes. In *Zwiefelhofer v. Town of Cooks Valley*, the Wisconsin Supreme Court was asked to answer the question of whether or not the town’s nonmetallic mining ordinance was a zoning ordinance so as to require approval of the county board. *Zwiefelhofer v. Town of Cooks Valley*, 338 Wis. 2d

488, 809 N.W.2d 362, 2012 WI 7 (Wis. 2012). The Court catalogued the characteristics of a traditional zoning ordinance instead of identifying a single dispositive characteristic or bright-line rule. *Id.* at ¶ 9. That comparative analysis, in lieu of identifying a single dispositive characteristic or bright line rule, was used again in *Anderson* to analyze if the town's shore land ordinance should be considered zoning or subdivision. *State ex rel. Anderson v. Town of Newbold*, 395 Wis. 2d 351, 954 N.W.2d 323, 2021 WI 6 (Wis. 2021).

Zwiefelhofer lists the traditional characterizes of a zoning ordinances as: (1) typically divide a geographic area into multiple zones or districts; (2) provide landowners with permitted uses within zones; (3) control *where* a use takes place as opposed to *how*; (4) classify uses in a general terms and attempts to comprehensively all possible uses in a geographic area; (5) make a fixed forward-looking determination about use; (6) allow certain landowners whose land use was legal prior to the code maintain their land use. *Id.* at ¶¶ 36 – 42. 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. However, the characteristics identified constitute the "heart of traditional zoning ordinances." *Id.*

While *Zwiefelhofer* and *Anderson* are both Wisconsin Supreme Court cases that address how to distinguish a zoning ordinance from other municipal police powers, neither case solidly fits the analysis needed in this case. *Zwiefelhofer* and *Anderson* describes zoning characteristics in terms of *use* for their analysis, but zoning regulates both *form* and *use*. MGO § 28.129 regulates the *form* of buildings, not the use. The case law may be helpful in other situations but is not applicable in the analysis of this case.

b. State law exempts zoning ordinances from building code preemption analysis.

Act 270 does not apply to local zoning codes. Act 270 established a minimum building code, prohibiting municipalities from enacting a more restrictive local ordinance. *See Wis. Admin. Code SPS 361.03(5)(a)1. and Wis. Stat. § 101.02(7r).* However, SPS Chapters 361-366 explicitly do not limit a municipality's authority in relation to land use and zoning standards: "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, 60.61, 60.62, 61.35, and 62.23 (7), Stats." *Wis. Admin. Code SPS 361.03(5)(a)2.*

The role of zoning is clearly delegated to local municipalities by Wisconsin statute:

Grant of power. For the purpose of promoting health, safety, morals or the general welfare of the community, the [city] 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. *Wis. Stat. § 62.23(7)(am).*

As seen in *Wis. Stat. § 62.23(7)(am)*, the zoning grant of power includes both use and form zoning, which is explicitly exempted from the Wisconsin Commercial Building Code by *Wis. Admin. Code SPS 361.03(5)(a)2.* The e-mail contained in the legislative history materials also supports that the language of the statute and administrative code created in Act 270 follows the intent to regulate building code, *not zoning code.* There is no ambiguity in *Admin. Code SPS 361.03(5)(a)2.* that the Commercial Building Code does not regulate or infringe on local zoning code authority.

Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane Co.*, 2004 WI 58, ¶ 44, 271 Wis.2d 633, 681 N.W.2d 110. The assumption is that the legislature's intent is expressed in the statutory language. *Id.* Statutory interpretation “begins with the language of the statute. If the meaning of the statute is plain, [courts] ordinarily stop the inquiry.” *Seider v. O’Connell*, 2000 WI 76, ¶ 232, 236 Wis.2d 211, 612 N.W.2d 659. Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstance. *State ex rel. Kalal v. Circuit Court for Dane Co.*, ¶44. Legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation. *Seider*, ¶¶ 51–52.

Preemption analysis under Act 270 does not apply to requirements enacted as land use or zoning requirements. The plain reading of both state statute and administrative code clearly state the exemption. The companion legislative materials that were used to prepare Act 270 also support the distinction. MGO § 28.129 is a form-based zoning code regulating materials. It is property contained in Madison’s Zoning Code (MGO Chapter 28) as it is similar to other form-based zoning codes like façade and height specifications. Wis. Stat. § 62.23(7)(am) establishes zoning can be both form (“height, number of stories and size of buildings and structures”) and use (“the location and use of buildings, structures and land for trade, industry, mining, residence or other purposes “). Therefore, MGO § 28.129 is a valid zoning code and is not preempted by state law.

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 deny the Plaintiff’s

Motion for Summary Judgement and find the Defendant is entitled to summary judgment as a matter of law.

Dated this 1st day of April, 2022.

/s/ Electronically signed by Kate M. Smith

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