BEFORE THE DANE COUNTY BOARD OF ADJUSTMENT

In the matter of the appeal of

Maier Farms Real Estate, LLC

Regarding the property located at:

7085 Schumacher Rd., Town of Vienna
Tax Parcel Nos. 0909-212-8500-7 & 090-212-8140-7

Appeal No. 3727

RESPONSE BRIEF OF MAIER FARMS REAL ESTATE, LLC REGARDING JURISDICTION AND PREEMPTION

I. THE BOARD OF ADJUSTMENT MAY AND SHOULD DETERMINE WHETHER THE ZONING ADMINISTRATOR IS AUTHORIZED TO ENFORCE DANE COUNTY CODE OF ORDINANCES CHAPTER 11 AGAINST APPELLANT.

Maier Farms Real Estate, LLC ("Maier") filed its notice appeal of the Zoning Administrator's violation notice on July 19, 2024. In its notice of appeal, Maier asserts its installation of a drainage system on its property does not violate Dane County Code of Ordinances ("DCCO") § 11.07(2)(c) because the installation constitutes maintenance and repair of an existing drainage system necessary to maintain the level of drainage required to continue the existing agricultural use of the property. This issue remains before the Board of Adjustment.

Since Maier filed its appeal, the Wisconsin Department of Natural Resources ("WDNR") determined that the wetland on Maier's property is a nonfederal wetland. The WDNR notified Maier of its determination on October 15, 2024. (Maier Decl. ¶ 18, Ex. 1). Maier alerted the Zoning Administrator and Corporation Counsel to the WDNR's determination, but the Zoning

Administrator has not changed its violation determination based on the nonfederal wetland status of the wetland on Maier's property.

The Zoning Administrator argues that submission of a notice of appeal specifying the grounds therefore is a jurisdictional issue. However, the Zoning Administrator ignores the fact that there is no dispute the Board of Adjustment has jurisdiction over Maier's appeal—indeed, Maier and the Zoning Administrator have submitted arguments and evidence to the Board of Adjustment, which is scheduled to hear the contested case on March 27, 2025. The Board of Adjustment's jurisdiction over Maier's appeal of the Zoning Administrator's violation notice, dated March 20, 2024, is not in dispute.

Accordingly, the case cited by the Zoning Administrator, *State ex rel. Russell v. Board of Appeals of Village of Prairie du Sac*, 250 Wis. 394, 27 N.W.2d 378 (1947) is inapposite. In *Russell*, the appellant failed to file a notice specifying the grounds for appeal. Accordingly, the Wisconsin Supreme Court determined the Village board of appeals did not have jurisdiction to hear the appellant's appeal. That is not an issue in this case—all parties agree the Board of Adjustment has jurisdiction to hear Maier's appeal. The issue is whether the Board of Adjustment may address an issue that developed after Maier submitted its notice of appeal, which calls into question whether the Zoning Administrator had the authority to issue the violation letter. The Zoning Administrator cites no authority to support the conclusion that the Board of Adjustment lacks the discretion to address an issue—namely, state law preemption—that arose after Maier submitted its notice of appeal. Generally, the issue of preemption may be raised at any time in a proceeding. *See Chicago & N.W. Ry. Co. v. La Follette*, 27 Wis. 2d 505, 512, 135 N.W.2d 269 (1965).

The Board of Adjustment's Rules and Procedures grant the Board the discretion to decide to hear the preemption issue. Under Rule 8, the Board of Adjustment is authorized to suspend its

rules in a contested case with the consent of the appellant. Further, under Rule 7, an appeal may be reconsidered within one year if there has been a significant material alteration. In this case, the material change or alteration occurred after Maier submitted its notice of appeal, but before the Board has heard the appeal. Maier notified the Zoning Administrator and Corporation Counsel that the wetland on its property was classified by WDNR as a nonfederal wetland and now raises this issue before the Board of Adjustment. It would be a waste of the parties' time and resources if the Board of Adjustment did not address the nonfederal wetland issue on the merits because this very issue could end up back before the Board. Furthermore, the Zoning Administrator will not suffer prejudice if the Board of Adjustment hears the preemption issue. The Zoning Administrator was notified that Maier would raise preemption as an issue in November 2024 and has now had the opportunity to brief the issue on the merits.

The parties to this appeal are best served by a full and final decision by the Board of Adjustment on the merits, which requires the Board to address whether the Zoning Administrator has the authority to enforce DCCO Chapter 11 over nonfederal wetlands. Accordingly, the Board of Adjustment should exercise the discretion it has under Wis. Stat. § 59.694(4) and its own Rules and Procedures and elect to hear and decide all issues present in Maier's appeal.

II. THE ISSUE OF WHETHER THE ZONING ADMINISTRATOR MAY ENFORCE DANE COUNTY CODE OF ORDINANCES CHAPTER 11 AGAINST APPELLANT IS NOT A LEGAL OR CONSTITUTIONAL CHALLNEGE TO CHAPTER 11.

The Zoning Administrator cites a line of cases standing for the proposition that the Board of Adjustment may not invalidate or declare unconstitutional a duly enacted County ordinance. *State ex rel. Tingley v. Gurda*, 209 Wis. 63, 243 N.W. 317, 319 (1932); *Kmiec v. Town of Spider Lake*, 60 Wis. 2d 640, 646 211 N.W. 2d 471(1973); *Ledger v. City of Waupaca Bd. of Appeals*, 146 Wis. 2d 256, 262, 430 N.W.2d 370 (Ct. App. 1988). Maier does not dispute this proposition.

Maier is not asking the Board of Adjustment to invalidate DCCO Chapter 11 or declare it unconstitutional. Rather, Maier argues that DCCO Chapter 11 does not apply to and may not be enforced regarding nonfederal wetlands, pursuant to Wis. Stat. § 281.36(12m).

Maier's argument more closely resembles the issue before the Wisconsin Supreme Court in *Nodell Investment Corp. v. City of Glendale*, 78 Wis. 2d 416 (1977). In *Nodell*, the issue before the municipal board of appeals was not declaring a municipal ordinance invalid or unconstitutional; rather, the issue was whether the board of appeals had the power to invalidate conditions imposed by the plan commission without invalidating the ordinance itself. *Id.* at 426. Because a municipal board of appeals has the statutory power to "hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of this section or of any ordinance adopted pursuant thereto," the Supreme Court determined that the issues raised on the landowner's appeal were appropriate for determination before the administrative body. *Id.* at 421, 427-28. Accordingly, the Wisconsin Supreme Court held in *Nodell* that the landowner was required to appeal to the municipal board of appeals before initiating any judicial proceeding. *Id.* at 428.

Wis. Stat. § 59.694(4) provides the Board of Adjustment jurisdiction over appeals "taken by any person aggrieved…by any decision of the building inspector or other administrative officer." Under DCCO § 11.99(2)(b), the Board of Adjustment "shall hear and decide appeals of decisions made by the zoning administrator in accordance with the standards and procedures of s. 10.26 Dane County Code." Under DCCO § 10.101(9)(a), "[a]ny person aggrieved…by any decision of the zoning administrator or other administrative officer, may appeal that decision to the board of adjustment." On appeal, the Board of Adjustment has the power to "affirm, reverse, reverse partly or modify the order, requirement, decision or determination that is the subject of the

appeal" and "may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken." DCCO § 10.101(9)(e). Therefore, the Board of Adjustment is expressly empowered to consider whether the Zoning Administrator had the authority to issue the violation letter in the first place.

On appeal, Maier does not ask the Board of Adjustment to invalidate DCCO Chapter 11. This is why the cases cited by the Zoning Administrator, including *Savich v. Columbia Cnty. Bd. of Adjustment*, 2024 WI App. 43, 413 Wis. 2d 140, 11 N.W.3d 160, are inapposite. In *Savich*, the issue again was whether the county board of adjustment had the authority to declare a county ordinance invalid because it was preempted by state statute. The Court of Appeals determined that the board of adjustment could determine the county ordinance was preempted by state law, but only because Columbia County had a general preemption ordinance stating that if any county ordinance conflicted with state statutes, state statutes controlled. 413 Wis. 2d 140, at ¶¶ 33-41.

Maier's appeal remains factually distinguishable from the issue in *Savich*. In *Savich*, the question was whether a county ordinance was preempted and therefore generally unenforceable. Maier, however, does not contend that any portion of Chapter 11 is invalid, unconstitutional, or unenforceable due to state law; rather, Maier's argument is only that the Zoning Administrator erred by applying a generally applicable and valid ordinance to nonfederal wetlands, because Wis. Stat. § 281.36(12m) prohibits the enforcement of county ordinances over nonfederal wetlands. Accordingly, the Board of Adjustment has the authority to reverse, modify, or change the Zoning Administrator's violation determination in this case because Maier is not challenging the ordinance itself as invalid or unconstitutional.

III. THE PLAIN LANGUAGE OF WIS. STAT. § 281.36(12m) DEMONSTRATES THE ZONING ADMINISTRATOR IS NOT AUTHORIZED TO ENFORCE CHAPTER 11 AGAINST NONFEDERAL WETLANDS.

The Zoning Administrator's argument that Wis. Stat. § 281.36(12m) does not preempt enforcement of DCCO Chapter 11 against Maier's property ignores the plain language of the statute. "Statutory interpretation begins with the language of the statute." *Westmas v. Creekside Tree Serv., Inc.*, 2018 WI 12, 379 Wis. 2d 471, 907 N.W.2d 68 (*citing State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110). "If the words chosen for the statute exhibit a 'plain, clear statutory meaning,' without ambiguity, the statute is applied according to the plain meaning of the statutory terms." *State v. Grunke*, 2008 WI 82, ¶ 22, 311 Wis. 2d 439, 752 N.W.2d 769 (*quoting State ex rel. Kalal*, 271 Wis. 2d 633, ¶ 46).

Wis. Stat. § 281.36(12m) states in full as follows:

> Local regulation of nonfederal or artificial wetlands. A local government may not enact an ordinance or adopt a resolution regulating a matter regulated under sub. (3n) (d) 1. or (3r) (a) (intro.) or (am), with respect to a discharge exempt from permitting requirements under sub. (4n) (b) or (c), or a matter regulated under sub. (4n). If a local government has in effect on March 30, 2018, an ordinance or resolution regulating nonfederal wetlands or artificial wetlands, the ordinance or resolution does not apply and may not be enforced.

The terms of § 281.36(12m) are plain and clear. Local governments may not apply or enforce ordinances governing nonfederal wetlands that were in effect as of March 30, 2018. There is no dispute that DCCO is a local ordinance in effect as of March 30, 2018 (Nelson Decl. Ex. 5). There is also no dispute that the Zoning Administrator is attempting to regulate a nonfederal wetland by alleging Maier has violated DCCO Chapter 11. Wis. Stat. § 281.36(12m) clearly and unambiguously prohibits local governments from regulating nonfederal wetlands.

The Zoning Administrator claims that, despite the plain language of the statute, "it is obvious that the legislature intended that local governments are prohibited from enacting an ordinance or resolution that regulates discharges into nonfederal or artificial wetlands[.]" (Cnty. Br. at 7). However, the plain language goes beyond that, stating local ordinances that regulate nonfederal wetlands are unenforceable. While the plain language controls, to the extent the Board of Adjustment has any question about the legislature's intent with this provision, the Board has before it a letter from Jason Mugnaini, Executive Director of Government Relations for the Wisconsin Farm Bureau Federation, who served as chief of staff to the principal author of the legislation that became Wis. Stat. § 281.36(12m). According to Mr. Mugnaini, the legislature's goal was "to simplify the complex patchwork of regulations affecting wetlands and to ensure regulatory consistency at the state level." Therefore, the legislature's intent was to preempt local regulation of nonfederal wetlands. The language of Wis. Stat. § 281.36(4n) and (12m) demonstrates that regulation of and permitting regarding nonfederal wetlands are state-level issues, which may not be regulated at the local level.

Regardless, the language of Wis. Stat. § 281.36(12m) is plain and unambiguous, which ends the interpretive inquiry. The Zoning Administrator is not permitted to apply or enforce DCCO Chapter 11 over nonfederal wetlands.

CONCLUSION

For the reasons stated above, Maier asks the Board of Adjustment to hear and decide the issue of state law preemption as part of Maier's appeal, to find that the Zoning Administrator erred when he issued the violation letter to Maier, and to reverse the Zoning Administrator's decision.

Dated this 14th day of March, 2025.

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Electronically signed by Christopher T. Nelson

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