BEFORE THE DANE COUNTY BOARD OF ADJUSTMENT

In the matter of the appeal of Maier Farms Real Estate, LLC

Appeal No. 3727

BRIEF OF THE DANE COUNTY ZONING ADMINISTRATOR REGARDING THE APPELLANT'S CLAIM OF STATE PREEMPTION

I. THE BOARD OF ADJUSTMNT DOES NOT HAVE JURISDICTION OVER THE CLAIM THAT THE COUNTY'S ZONING ORDINANCE IS PREEMPTED BY STATE STATUTE.

The Board of Adjustment has no jurisdiction over the Appellant's claim that application of the County's Inland-Wetland Zoning Ordinance is preempted by state statute. The Board of Adjustment has no jurisdiction over that issue because the Appellant's Notice of Appeal did not specify preemption as a ground for appeal.

A board of adjustment is a creature of the legislature, and as such, its powers are prescribed by statute. Wis. Stat. § 59.694(7). Section (4) of that statute sets forth specifies the Board's appellate jurisdiction:

> (4) APPEALS TO BOARD. Appeals to the board of adjustment may be taken by any person aggrieved or by any officer, department, board or bureau of the municipality affected by any decision of the building inspector or other administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board of adjustment, by filing with the officer from whom the appeal is taken and with the board of adjustment **a notice of appeal specifying the grounds thereof.** The officer from whom the appeal is taken shall forthwith transmit to the board of adjustment all the papers constituting the record upon which the action appealed from was taken. (emphasis added)

Pursuant to Wis. Stat. § 59.694(3) the Board has adopted the Dane County Board of Adjustment Rules and Procedures. Section 4(d) of those Rules states:

> (d) An appeal of an administrative decision shall be made in writing to the Board of Adjustment in care of the Zoning Division. The letter shall state the date on

> which the decision was made, date the appellant received the decision, the name and position of the administrative officer, a description of the project regarding which the decision was made, the specific sections of the Code of Ordinances cited by the administrative officer, **and the reason(s) why the person is aggrieved by the decision.** A copy of the written decision of the administrative officer shall accompany the written decision. (emphasis added)

The Appellant's Notice of Appeal dated July 19, 2024 did not list preemption as a ground for appeal. The grounds listed in the Notice stated:

> Maier now appeals to the Board of Adjustment the Zoning Administrator's determination that the installation of drain tile and a pump on its property violates Dane County Code of Ordinances (DCCO) Section 11.07(2)(c). The Zoning Administrator's determination fails to account for the fact that maintenance and repair of an existing drainage system on agricultural property is a permitted use under DCCO Section 11.07 and does not require a shoreland zoning permit. The use in which Maier engaged constituted maintenance and repair of an existing drainage system on agricultural property. Maier is aggrieved by the Zoning Administrator's decision because it prevents Maier from fully utilizing its property for permitted agricultural uses.

The Appellant's only stated ground for appeal is that the Zoning Administrator erred in determining that the installation of the drainage system on their property was not a permitted use under Section 11.07. The Appellant made no allegation that enforcement of Section 11.07 is preempted by state law.

In Wisconsin a board of adjustment has no jurisdiction unless the notice of appeal specifies the grounds for appeal. *State ex rel. Russell v. Board of Appeals of Village of Prairie du Sac*, 250 Wis. 394, 27 N.W.2d 378 (1947); 8A *McQuillin Mun. Corp*. § 25.350; 3 *Rathkopf's The Law of Zoning and Planning* § 57:45 (4th Ed.). In *Russell*, the court found that the Village's ordinance made "the allegation of the grounds for appeal a vital part of the appeal, and since that requirement of the ordinance was not met, the matter was not before the Board of Appeals." *Id*., at 396. The court also held that although all the parties likely knew the reason for the appeal, "this court cannot

in effect change legislation which requires a written notice of appeal specifying the grounds thereof. *Id.*

The Appellant's Notice of Appeal did not list preemption of the DCCO § 11.07 as a ground for appeal. The Board's enabling statute as well as the Board's Rules require an allegation of the grounds for appeal. Therefore, the Board has no jurisdiction over the issue of preemption.

II. LEGAL OR CONSTITUTIONAL CHALLENGES TO A ZONING ORDINANCE ARE NOT A PROPER SUBJECT FOR THE BOARD OF ADJUSTMENT.

It has long been held that legal or constitutional challenges to zoning ordinances are not appropriate subject matter for a board of adjustment. *State ex rel. Tingley v. Gurda*, 209 Wis. 63, 67-68, 243 N.W. 317, 319 (1932); *Kmiec v. Town of Spider Lake,* 60 Wis. 2d 645-46, 211 N.W.2d 471, 473 (1973). In *Tingley*, the court held:

> It has been held that zoning boards of adjustment are not created as appellate bodies, and that legal or constitutional questions involved in zoning requirements are not a subject matter determination of such boards, but must be presented for consideration to the proper legal forum, it seems that, generally, their powers of review are limited to practical difficulties, or unnecessary hardship, in the way of carrying out the strict letter of the law…"

Tingley, 243 N.W. at 319. See also, *Ledger v. City of Waupaca Bd. of* Appeals, 146 Wis. 2d 256, 264, 430 N.W.2d 370 (1988).

In *Ledger,* the Court of Appeals held that the powers of local zoning boards "do not include the authority to ignore or invalidate any part of a duly adopted zoning ordinance. The board must accept the ordinance as written. *Id.*, at 265, citing 3 Yokley, *Zoning Law and Practice,* sec. 19-2, at 200 (4th ed. 1979) and 3 Rathkopf, *The Law of Zoning and Planning*, sec. 37.02(8), at 37-37 (1988); *Kmiec*, 60 Wis. 2d at 646. The court in *Ledger* held that legal challenges to a zoning ordinance should be presented to the proper legal forum. *Ledger*, 146 Wis. 2d at 264. This is

consistent with the Supreme Court's holding that legal challenges "may properly be made by commencing an action for declaratory judgment." *Kmiec*, 60 Wis. 2d at 646.

The Court of Appeals most recently considered this issue in *Savich v. Columbia County Board of Adjustment*, 2024 WI App 43, 413 Wis. 2d 140, 11 N.W.3d 160. There the court determined that a board of adjustment could consider statutory preemption of a zoning ordinance, but only because the Columbia County Ordinance had a "county preemption ordinance" that stated "To the extent that the provisions of this Code of Ordinances conflict with the Wisconsin Statutes or federal regulations, said statutes and regulations shall control." But, the court recognized "the long-standing Wisconsin rule that local zoning boards of appeals lack authority to ignore or invalidate ordinances that have been enacted by local lawmakers. *Id*, at 163, citing *Ledger*, 146 Wis. 2d at 262-66; *Tingley*, 209 Wis. at 67-68; *Kmiec*, 60 Wis. 2d 645-46.

After reviewing the precedent set by *Ledger, Tingley,* and *Kmiec*, the court noted that the boards of adjustment are not generally permitted to treat ordinances enacted by county boards as unenforceable. *Ledger*, 2024 WI App 43, ¶ 32. The court then distinguished that case and held "these cases applies equally when in the absence of an ordinance that has the effect of the county preemption ordinance here- a zoning board deems a zoning ordinance unenforceable due to preemption by state or federal statutes. Therefore, in the absence of a county preemption ordinance a board of adjustment should not decide whether a county ordinance is preempted by state statute.

The Dane County Code of Ordinances does not have a "county preemption ordinance" similar to Columbia County in *Savich*. Therefore, the precedent set in *Ledger*, *Tingley* and *Kmiec* should be applied. The Board should determine that it is not the appropriate forum to determine a legal challenge to the county zoning ordinance. The Board cannot treat as unenforceable the zoning ordinance duly adopted by the county board.

III. WISCONSIN STAT. § 281.36(12m) DOES NOT PREEMPT ENFORCEMENT OF DANE COUNTY'S INLAND-WETLAND ZONING ORDINANCE.

As argued above, the Board of Adjustment does not have jurisdiction of Appellant's claim of state preemption of the County's ordinance, and legal challenges to the enforcement of the County's ordinance is not an appropriate subject for the Board of Adjustment. However, if the Board determines that it can consider the preemption argument, Wis. Stat. §281.36(12m) does not preempt enforcement of DCO § 11.07. The scope of Wis. Stat. § 281.36(12m) is limited to local regulation of discharge permits into nonfederal and artificial wetlands. Dane County Ordinance § 11.07 does not regulate discharges, but rather is a zoning ordinance that regulates uses within the inland-wetland zoning district.

The Appellant's preemption argument relies upon the second sentence of Wis. Stat. § 281.36(12m) that states:

> LOCAL REGULATION OF NONFEDERAL OR ARTIFICIAL WETLANDS. A local government may not enact an ordinance or 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.

If that sentence is read in a vacuum, the Appellant's have a valid argument. But, that is not how statutes are interpreted. Rather, the second sentence must be interpreted in the context of the "whole text" of the statute, and in conformance with the rules of statutory interpretation.

Statutory interpretation centers on the 'ascertainment of meaning' not the recitation of words in isolation. *Brey v. State Farm Mutual Automobile Ins. Co.*, 2022 WI 7, ¶ 13, 400 Wis. 2d 417, 970 N.W.2d 1, citing, *Kalal v. Circuit Ct. for Dane County*, 2004 WI 58, ¶ 47, 271 Wis. 2d 633, 681 N.W.2d 110. In *Kalal*, the Supreme Court set forth the following rules of statutory interpretation:

> Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is interpreted in the context in which it is used, not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably to avoid absurd or unreasonable results. *State v, Delaney*, 2003 WI 9, ¶ 13, 259 Wis. 2d 77, 658 N.W.2d 416; *Landis v. Physicians Ins. Co. of Wis.*, 2001 WI 86, ¶ 16, 245 Wis. 2d 1, 628 N.W.2d 893; *Seider*, 236 Wis. 2d 211, ¶ 43, 612 N.W.2d 659. Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. *Martin*, 162 Wis. 2d at 894, *Bruno,* 260 Wis. 2d 633, ¶ 24, 660 N.W.2d 656.

In *Brey*, the Supreme Court held that "perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Brey*, 2022 WI 7, ¶ 13, citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 167 (2012). See also, *Sanders v. State of Wisconsin Claims Board*, 2023 WI 60, ¶ 19, 408 Wis. 2d 370, 992 N.W.2d 126. The court has explained the appropriate role of the "whole text" canon to assess the meaning of statutory language:

> Properly applied, it typically establishes that only one of the possible meanings that a word or phrase can bear is compatible with the use of the same word or phrase elsewhere in the statute; or that one of the possible meanings would cause the provision to clash with another portion of the statute. It is not a proper use of the canon to say that since the overall purpose of the statute is to achieve x, any interpretation of the text that limits achieving of x must be disfavored. …{L]imitations on a statute's reach are as much a part of the statutory purpose as specifications of what is to be done.

Segregated Account of Ambac Assurance Companies v. Countrywide Home Loans, Inc., 2017 WI 71, n.17, 376 Wis. 2d 528, 898 N.W.2d 70, citing Scalia & Gardner, *Reading Law* at 168.

Applying the rules of statutory interpretation, the second sentence of Wis. Stat. § 281.36(12m) must be construed in the context of the entire section. Although the first sentence is convoluted with reference to multiple subsections, it basically prohibits local governments from enacting an ordinance or resolution "with respect to a discharge" into nonfederal and artificial

wetlands. The scope of that sentence is limited to only discharges into wetlands. The second sentence then states that a local ordinance or regulation in effect on March 30, 2018 regulating nonfederal wetlands or artificial wetlands may not be enforced. Reading the second sentence in context with the first, it is obvious that the legislature intended that local governments are prohibited from enacting an ordinance or resolution that regulates discharges into a nonfederal or artificial wetland, and that any such ordinance or resolution that is in effect on March 30, 2018 is unenforceable. That is how the legislature typically writes such statutes limiting local government authority. The legislature clearly did not intend to change the scope of this statute from the first sentence to the second sentence.

Wisconsin Stat. § 281.36(12m) was created by 2017 Wisconsin Act 183 that was published on March 29, 2018 and effective on March 30, 2018. The Appellant's proposed construction of Wis. Stat. § 281.36(12m) results in an absurd result and renders the phrase "with respect to a discharge" in the first sentence surplusage. Under their interpretation any local ordinance that in any way regulates nonfederal or artificial wetlands in existence on March 30, 2018 is unenforceable. But after that date, only local regulation "with respect to a discharge" into these wetlands is prohibited. It makes no sense for the legislature to declare all regulation of these wetlands that existed prior to March 30, 2018 to be unenforceable, yet then only prohibit new regulations "with respect to discharge" into the wetland. Clearly the legislature intended both sentences of Wis. Stat. §281.36(12m) to only apply to discharges into a wetland. As such Dane County's Inland-Wetland Zoning Ordinance is not preempted by § 281.36(12m), because it does not regulate discharge permits into the wetlands, but is rather an exercise of the County's police powers to zone.

CONCLUSION

The Board of Adjustment does not have jurisdiction of the state preemption claim because the Appellant did not list it as a ground for appeal in its Notice of Appeal. Both Wis. Stat. § 59.694(4) and the Board's Rules adopted pursuant to statute require that notice specify the grounds for appeal. Additionally, Wisconsin case law clearly establishes that a legal challenge to the enforceability of a county zoning ordinance is not a proper subject for consideration by the Board of Adjustment. Finally, if the Board determines that consideration of preemption is appropriate for the Board, the rules of statutory interpretation clearly dictate that Wis. Stat. § 281.36(12m) does not preempt a county zoning ordinance that regulates uses within the Inland-Wetland Zoning District. For all of those reasons, the decision of the Zoning Administrator should be affirmed.

Dated this 7th day of March, 2025.

DANE COUNTY CORPORATION COUNSEL

ELECTRONICALLY SIGNED BY:

David R. Gault
Deputy Corporation Counsel
State Bar No. 1016374
City-County Building
210 Martin Luther King, Jr. Blvd., Room 419
Madison, WI 53703