

FILED
08-16-2022
CIRCUIT COURT
DANE COUNTY, WI
2021CV001729

BY THE COURT:

DATE SIGNED: August 16, 2022

Electronically signed by Honorable Nia Trammell
Circuit Court Judge

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 6

DANE COUNTY

ASSOCIATED BUILDERS &
CONTRACTORS OF WISCONSIN, INC., et al.,
Plaintiffs,

vs.

Case No. 21 CV 1729

CITY OF MADISON,
Defendant.

AMENDED DECISION AND ORDER

The parties have filed cross-motions for summary judgment to determine the validity of Madison General Ordinance (“MGO”) § 28.129, which requires the use of “bird safe” glass on certain buildings. Upon consideration of the parties’ arguments,¹ the Court finds and orders as follows:

¹ The Court acknowledges the amicus curiae brief submitted by the non-parties, American Bird Conservancy, Madison Audubon, and Wisconsin Society for Ornithology (“Amicus Curiae Organizations”), which provided a backdrop of the collision hazards that birds may confront in developed areas with building structures. The Amicus Curiae Organizations’ brief brought value by illuminating the research available on the environmental concerns, as well as the landscape of governmental responses to the bird-glass collision issue.

STIPULATED FACTS

1. Plaintiffs are membership-based trade associations who are either located within the City of Madison or who have members who do business in the City of Madison. (Dkt. No. 16, Stipulated (“Stip.”) Fact 1).

2. Defendant is the City of Madison, a municipality of the State of Wisconsin. (Dkt. No. 16, Stip. Fact 2).

3. On August 14, 2020, the Defendant, City of Madison’s Common Council adopted an ordinance creating MGO § 28.129, entitled “Bird-Safe Glass Requirements.” (Dkt. No. 16, Stip. Fact 3).

4. The ordinance creating MGO § 28.129 was signed by the mayor, and then went into effect on October 1, 2020. (Dkt. No. 16, Stip. Fact 5).

LEGAL STANDARD

The grant or denial of a declaratory judgment rests with the sound discretion of the trial court. *Olson v. Farrar*, 2012 WI 3, ¶24, 338 Wis. 2d 215, 809 N.W.2d 1.

Summary judgment shall be granted to a party “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Wis. Stat. § 802.08(2). On summary judgment, factual assertions must be supported by affidavit or other sworn statements made on “personal knowledge”. See Wis. Stat. § 802.08(2) and (3), Stats. Summary judgment materials are viewed in the light most favorable to the non-moving party. *AccuWeb, Inc. v. Foley & Lardner*, 2008 WI 24, ¶ 21, 308 Wis. 2d 258, 746 N.W.2d 447. “Any reasonable doubt as to the existence of a genuine issue of material fact must

be resolved against the moving party” for summary judgment. *Heck & Paetow Claim Serv., Inc. v. Heck*, 93 Wis. 2d 349, 356, 286 N.W.2d 831 (1980).

ANALYSIS

A. Bird-Glass Collisions and Local Government Response.

Yearly, “nearly one billion birds die following collisions with glass in the U.S... ‘because birds’ don’t see glass as a barrier and don’t avoid it. They collide with glass when they see natural reflections (clouds, sky, or trees) in the glass, when they see plants through windows, and when they are attracted to landscaping or interior lights. Many birds that seem fine following window collisions can later die from internal injuries.” (Dkt. No. 24, p. 10).² A study conducted locally by the Madison Audubon Society, Bird Collision Corps., and local businesses has monitored bird-window strikes at specific buildings in the greater Madison area since 2018. (Dkt. No. 24, p. 11). Through the study, they suggest data showing that there are high rates of “window caused bird mortality that are consistent with published studies.” *Id.* By way of example, with over 20 plus buildings regularly monitored at the UW-Madison campus, their study found “nearly 1000 birds of 79 species that were victims of window strikes, the vast majority proving fatal.” *Id.*

The bird-glass collision problem proved significant enough for some government bodies to enact bird-glass friendly legislation or regulations. *Id.* at 13-14. With similar foresight or vision to reduce the rate of bird-glass collisions within its jurisdiction, the City of Madison’s Common Council adopted an ordinance on August 14, 2020 that created MGO § 28.129. (Dkt.

² Amicus Brief quoting the following sources: (1) US Fish & Wildlife Service, citing Scott R. Loss, Tom Will, Sara S. Loss, and Peter P. Marra "Bird–building collisions in the United States: Estimates of annual mortality and species vulnerability," *The Condor* 116(1), 8-23, (2 January 2014). <https://doi.org/10.1650/CONDOR13-090.1> 11 and (2) <https://www.fws.gov/story/threats-birds-collisions-buildings-glass>.

No. 16, Stip. Fact 3). Effective October 1, 2020, that ordinance subjects specific types of buildings and structures in the City of Madison to a bird-safe glass requirement. (Dkt. No. 16, Stip. Fact 4-5). As expressed by the drafters, the ordinance is “intended to reduce the heightened risk for bird collisions with glass on specified building designs and configurations.” (Dkt. No. 16, Stip. Fact 4, Appendix A).

The bird safe-glass requirement found in MGO § 28.129 applies “to all exterior construction and development activity, including the expansion of existing buildings and structures” as specified in the ordinance. Section 4 of the ordinance more specifically requires that:

...Glass areas on the following buildings or structures shall be treated to reduce the risk of bird collisions by incorporating a pattern of visual markers that are either: a) dots or other isolated shapes that are ¼" in diameter or larger and spaced at no more than a two-inch (2") by two-inch (2") pattern; or b) lines that are ⅛" in width or greater and spaced no more than 2" apart; low reflectance opaque materials; building-integrated structures like non-glass double-skin facades, metal screens, fixed solar shading, exterior insect screens, and other features that cover the glass surface; or other similar mitigation treatments approved by the Zoning Administrator.

(a) Buildings or structures over 10,000 square feet. For any building or structure over 10,000 square feet in size (floor area of above-grade stories), bird-safe glass treatment is required as follows:

1. For building façades where the first sixty (60) feet ... from grade are comprised of greater than or equal to fifty percent (50%) glass:
 - a. At least eighty-five percent (85%) of the glass must be treated; and
 - b. All glass within fifteen (15) feet of a building corner must be treated when see through or fly through conditions exist....
2. For building façades where the first sixty (60) feet from grade are comprised of less than fifty percent (50%) glass:
 - a. At least eighty-five percent (85%) of the glass on glass areas fifty (50) square feet or over must be treated; and
 - b. Of all glass areas over fifty (50) square feet, any glass within fifteen (15) feet of a building corner must be treated.
3. All glass railings must be treated.

4. All glass on enclosed building connections shall be treated up to sixty (60) feet above-grade.
- (b) Sky-bridges. For buildings and structures of any size, all glass on above-ground bridges must be treated.
- (c) At-grade glass. For buildings and structures of any size, all at-grade glass features such as sound walls or glass screens must be treated.

MGO § 28.129(4)³

B. Challenge to the Bird-Safe Glass Requirements.

MGO § 28.129, while an ostensibly well-intentioned conservation measure for the bird population in the Madison area, was met with a level of opposition. A lawsuit was filed in July 2021 by various membership-based trade associations located within the City of Madison or have members who do business in the City of Madison. (Dkt. No. 16, Stip. Fact 1). From their lens, the Plaintiffs see the adoption of MGO § 28.129 as overstepping the City of Madison's authority.

1. Wisconsin's uniform commercial building law.

The tension raised by MGO § 28.129 relates to the Wisconsin Legislature's adoption of 2013 Wisconsin Act 270 (the "Act") on April 16, 2014. *See* 2013 Wisconsin Act 270. The Act created § 101.02 (7r), Stats., and amended § 101.02 (15) (j), Stats. In relevant part, § 101.02(7r) was created to read as follows:

- (a) Notwithstanding sub. (7) (a),⁴ no city, village, or town may enact or enforce an ordinance that establishes minimum standards for constructing, altering, or adding to

³ The ordinance provides that "glass area" is measured "as one (1) continuous panel of glass or other transparent material, or a set of two (2) or more such panels divided by mullions of six (6) inches in width or narrower. Panels surrounded on all sides by solid walls or mullions wider than six (6) inches shall be considered individual windows. Spandrel or opaque glass with reflectivity of 14% or less shall not be included in the calculation of glass area." MGO § 28.129(3)

⁴ Wis. § 101.02 (7)(a) provides that:

...Nothing contained in this subchapter may be construed to deprive the common council, the board of alderpersons, the board of trustees or the village board of any village or city ..., of any power or jurisdiction over or relative to any place of employment or public building, provided

public buildings or buildings that are places of employment unless that ordinance strictly conforms to the applicable rules under sub. (15) (j), except as provided in pars. (b) to (d)....

- (g) 1. The department shall promulgate rules that establish procedures for the administration of the rules promulgated by the department under this subchapter....
2. Notwithstanding sub. (7) (a), no county, city, village, or town may enact or enforce an ordinance that establishes minimum standards for the administration of the rules promulgated by the department under this subchapter unless that ordinance strictly conforms to the rules promulgated by the department under subd. 1.

Wis. § 101.02 (7r)(a) and (g). Section 101.02 (15)(j) of the statutes was amended to vest the following powers with the Wisconsin Department of Safety and Professional Services (“DSPS”):

The department shall ascertain, fix and order such reasonable standards or rules for the construction, repair and maintenance of places of employment and constructing, altering, adding to, repairing, and maintaining public buildings, as shall and places of employment in order to render them safe.

2013 Wisconsin Act 270. These statutes essentially establish a statewide uniform commercial building code, with grandfathered exceptions, an allowance for municipalities to establish stricter property maintenance codes and flexibility for certain cities to enact and enforce ordinances relating to “fire suppression that requires existing buildings to be altered to comply with the rules for the construction of buildings that are promulgated” by DSPS.⁵

2. DSPS’ regulation of public buildings and places of employment.

As directed under § 101.02 (15)(j), DSPS promulgated Wisconsin Administrative Code Chapters SPS 361-366 (the “Commercial Building Code” or “Code”). The stated purpose of the Code “is to protect the health, safety, and welfare of the public and employees by establishing

that, whenever the department shall, by an order, fix a standard of safety or any hygienic condition for employment or places of employment or public buildings, the order shall, upon the filing by the department of a copy of the order with the clerk of the village or city to which it may apply, be held to amend or modify any similar conflicting local order in any particular matters governed by the order of the department. Thereafter no local officer may make or enforce any order contrary to the order of the department.

⁵ None of the parties argue that any of the enumerated exceptions in §101.02(7r) Stats., apply here.

minimum standards for the design, construction, maintenance, and inspection of public buildings, including multifamily dwellings and places of employment.” Wis. Admin. Code § SPS 361.01. The Commercial Building Code adopts and incorporates by reference a variety of international building codes, most relevant here, the 2015 International Building Code (“IBC”), subject to modifications noted in the Code. Wis. Admin. Code § SPS 361.05. The IBC dedicates chapter 24 to the minimum requirements that must be met for glass and glazing.⁶ The stated scope of the chapter is as follows: “provisions of this chapter shall govern the materials, design, construction and quality of glass, light transmitting ceramic and light-transmitting plastic panels for exterior and interior use in both vertical and sloped applications in buildings and structures.” IBC 2401.1. The chapter enumerates a number of requirements “upon each pane of glass used in a building, including requiring a mark on each pane (IBC § 2403.1), the framing (IBC § 2403.3), the durability of the glass to wind, load and human impacts (IBC § 2404).” (Dkt. No. 28, p. 6). As applied to municipal bodies, the Commercial Building Code states:

(5) LOCAL ORDINANCES. (a) 1. Except as provided in par. (b), pursuant to s. 101.02 (7), Stats., a city, village, town or local board of health may enact and enforce additional or more restrictive standards for public buildings and places of employment, provided the standards do not conflict with this code.

2. Nothing in this code affects the authority of a municipality to enact and enforce standards relative to land use, zoning or regulations under ss. 59.69, 60.61, 60.62, 61.35 and 62.23 (7), Stats.

(b) 1. Pursuant to s. 101.02 (7m), Stats., a city, village, town or county may not enact and enforce additional or more restrictive standards for multifamily dwellings, except as provided under s. 101.975, Stats., and that do not conflict with this code.

Wis. Admin. Code § SPS 361.03(5).

⁶ Pursuant to § 902.01, Stats., the Court takes judicial notice of the IBC. The text of IBC Ch. 24 Glass and Glazing may be accessed at <https://codes.iccsafe.org/content/IBC2015/chapter-24-glass-and-glazing>.

C. Validity of MGO § 28.129.

The Plaintiffs argue that the City of Madison's Bird-Safe Glass Requirement violates state law. They maintain that MGO § 28.129 is, in essence, a building code that requires "visual markers or other requirements to prevent bird collisions." (Dkt. 28, p. 7). They further contend that MGO § 28.129 imposes requirements which are "additional or more restrictive" than the uniform standards, as those requirements are not contained in the IBC standards which have been adopted by DSPS and made applicable statewide." *Id.* The Plaintiffs aver that MGO § 28.129 should be declared invalid because it applies to the construction, alteration of, and/or the addition to of public buildings and places of employment, and does not strictly conform to state law. They also argue that state law preempts MGO § 28.129.

Countering these arguments, the City of Madison argues that the enactment of MGO § 28.129 is a valid exercise of its zoning power, which it asserts is exempted by the Act. The City further maintains that even if zoning were not exempted by the Act, MGO § 28.129 does nothing more than regulate material –it does not set a construction standard.

This case presents a novel review of the interplay between the state's uniform commercial building code and a municipal bird safe glass ordinance. No higher state court in Wisconsin has addressed this precise issue. The merits of the parties' arguments are considered as a matter of first impression.

1. Wis. Stat. § 101.02(7r) exempts zoning laws.

To ascertain whether the City of Madison has exceeded its authority by enacting MGO § 28.129, the Court must necessarily interpret § 101.02(7r). The Plaintiffs argue that § 101.02(7r) plainly and unambiguously states that no city "may enact ... *an ordinance* that establishes minimum standards from enacting an ordinance that establishes minimum standards for

constructing, altering, or adding to public buildings or buildings that are places of employment unless the ordinance strictly conforms to the applicable rules under sub. (15) (j),” or the rules adopted by DSPS. Wis. § 101.02(7r). Citing to a cardinal rule of statutory interpretation, the Plaintiffs argue that when conducting statutory interpretation, the court’s examination first begins with the language of the statute itself, and if the meaning is plain, the inquiry typically ends. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Consequently, they urge the Court to take a narrow read of the statute and conclude that the Legislature intended § 101.02(7r) to apply broadly to all ordinances, including those enacted under a municipality’s zoning powers afforded under state law. They criticize the City of Madison for going beyond the plain language of § 101.02(7r) to deduce that municipal zoning authority is exempted under that statute.

To this point, the City of Madison’s counterargument demonstrates that the Plaintiffs may not necessarily be seeing the forest for the trees. In addition to considering the plain text of § 101.02(7r), the Court is mindful that the “purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” *Id.*, ¶ 44. While it is true that statutory language is accorded its common, ordinary, and accepted meaning, “[i]n examining the statutory text, however, ...ascertaining plain meaning requires... [the court] to do more than focus on ‘a single, isolated sentence or portion of a sentence[.]’” *Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶ 12, 293 Wis.2d 123, 717 N.W.2d 258). The Court may “consider the scope, context, structure, and purpose of a statute in determining its plain meaning.” *State v. Williams*, 2014 WI 64, ¶17, 355 Wis. 2d 581, 852 N.W.2d 467 (Wis. 2014)(citation omitted.) The Court may turn to “‘surrounding or closely-related statutes’ to reach a sound interpretation and ‘to avoid absurd or unreasonable results.’” *Id.*

Moreover, “[a]lthough reviewing courts must begin with the statutory language, they sometimes consider it appropriate to turn to extrinsic sources. For example, even if the statute is plain, the court may consider legislative history to confirm the plain-meaning interpretation.” *Id.*, ¶18 (citing *Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶ 14, 293 Wis.2d 123, 717 N.W.2d 258). Also, “if the meaning of the statute appears to be plain but that meaning produces absurd results, ... [the court] may also consult legislative history. The purpose in this situation is to verify that the legislature did not intend these unreasonable or unthinkable results.” *Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶ 15, 293 Wis.2d 123, 717 N.W.2d 258. In the same vein, “if the meaning of a statute is ambiguous after considering all intrinsic sources, ...[the court may] look to extrinsic sources such as legislative history to find legislative intent.” *Id.*

As the City of Madison points out, § 101.02(7r) cannot be interpreted in a vacuum. It must be read along with § 101.02 (15)(j) and other surrounding and closely-related statutes, including § 101.01(1)(g) and 62.23 (7), Stats. Chapter 101 of the Wisconsin statutes applies to building codes—§101.01(1)(g), defines “commercial building code” as “the code adopted by the department under this subchapter for the design, construction, maintenance, and inspection of public buildings and places of employment.” Wis. Stat. § 101.01(1)(g). The Legislature enacted a minimum building code through the Act, and prohibits a municipality from adopting a more restrictive local ordinance. *See* Wis. Stat. § 101.02(7r); § 101.02 (15)(j); Wis. Admin. Code SPS 361.03(5)(a)1. In similar vein, DSPS delineates in its code that “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).

Zoning ordinances and building code ordinances, while closely related police powers, have been distinguished by the Court. *See Wind Point v. Halverson*, 38 Wis. 2d 1, 155 N.W.2d 654 (1968). Under § 62.23(7)(am), municipalities are conferred the following zoning authority:

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).

Notably, Wis. Admin Code SPS Chapters 361-366, which include the rules DSPS uses to administer and enforce the Commercial Building Code, provides that “[n]othing 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 Court acknowledges the Plaintiffs’ position that this administrative rule, which preceded § 107.02(7r), does not supersede the Act. (Dkt. No. 41, pg. 3). However, as proffered by the City of Madison, the “Plaintiffs’ argument to separate the directive of “establishing minimum standards for constructing, altering, or adding to public buildings that are place or employment” from the zoning exemption in Wis. Admin. Code § SPS 361.03(5)(a)2 is illogical because it would cripple local zoning authority.” (Dkt. No. 37, p.1-2). As aptly noted by the City of Madison, zoning codes and building codes do different things (zoning ordinances prescribe permitted uses and forms, whereas building codes “have a more restrictive application to lawful uses of buildings in zoned areas relative to construction and

maintenance”).⁷ *Wind Point*, 38 Wis. 2d at 8-9, 155 N.W.2d 657. With each of these laws juxtaposed and concepts, an inquiry into legislative history is warranted.

Review of the legislative history of the Act is permissible, and also indispensably needed for the Court to confirm if the Legislature did in fact intend to exempt or not exempt zoning ordinances from § 107.02(7r). Such review reveals that the drafters of the Act intended to reach municipal building codes. This is best illustrated by an email sent in April 2013 from State Senator Terry Moulton’s staff to the Legislative Reference Bureau about reworking the Commercial Code. The email, which is telling notes that:

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.... (emphasis added).⁸

⁷ The City of Madison points out that § 62.23(7)(am) allows for zoning that includes regulation of “the height, number of stories and size of buildings, and other structures,” which it equates to form-based zoning; It distinguishes from the “constructing, altering or adding to” language in § 107.02(7r). (Dkt. No. 37, p. 3). It persuasively argues that these regulatory tools are not interchangeable given the specific language exempting zoning in Wis. Admin. Code § SPS 361.03(5)(a)2. The City notes that

[t]he function of ‘constructing, altering, repairing and maintaining’ public buildings is to keep the people inside and around the building safe. Wis. Stat. § 101.02(15)(j) instructs that ‘[t]he department [DSPS] shall ascertain, fix and order such reasonable standards or rules for constructing, altering, adding to, repairing, and maintaining public buildings and places of employment in order to render them safe.’ ‘Safe’ for the purpose of this instruction is defined as “‘applied to an employment or a place of employment or a public building, means such freedom from danger to the life, health, safety or welfare of employees or frequenters, or the public, or tenants, or fire fighters, and such reasonable means of notification, egress and escape in case of fire, and such freedom from danger to adjacent buildings or other property, as the nature of the employment, place of employment, or public building, will reasonably permit.’ Wis. Stat. § 101.01(13)....

Id. at 3-4.

⁸ Dkt. 20, Exhibit 2, p. 3-4. Available also at 2013 Drafting File (#02)SB617 for 2013 WI Act 270 (SB 617), PDF 13-2184df_pt01of02, on the WI State Legislature website at: https://docs.legis.wisconsin.gov/2013/related/drafting_files/wisconsin_acts/2013_act_270_sb_617/02_sb_617/13_2_184df_pt01of02.pdf (last visited March 21, 2022).

Considering all of the foregoing, the Court is satisfied that zoning was intended to be exempt from § 107.02(7r).

2. *MGO § 28.129 is a valid form-based zoning law.*

Having found that § 107.02(7r) exempts zoning, the Court next examines whether MGO § 28.129 is properly characterized as a zoning ordinance and whether anything about the ordinance runs afoul of the Commercial Building Code. The parties provide divergent arguments on how to characterize MGO § 28.129. The Plaintiffs rely heavily on the factors elucidated in *Zwiefelhofer v. Town of Cooks Valley*, 338 Wis. 2d 488, 809 N.W.2d 362, 2012 WI 7 (2012) to argue that the Bird-Safe Glass Requirement is not a zoning ordinance, but a building code. While instructive, *Zwiefelhofer*, is not dispositive. As noted by the *Zwiefelhofer* Court, “[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. “In determining that the ordinance at issue was not a zoning ordinance, the [*Zwiefelhofer*] court did not set a bright-line rule....Instead, it used a functional approach where it ‘catalogue[d] the characteristics of traditional zoning ordinances and the commonly accepted purposes of zoning ordinances.’” *State ex rel. Anderson v. Town of Newbold*, 2021 WI 6, ¶37 395 Wis.2d 351, 954 N.W.2d 323 (internal citations omitted). The *Zwiefelhofer* court “‘compare[d] the characteristics and purposes of the Ordinance to the characteristics and purposes of traditional zoning ordinances to determine whether the Ordinance should be classified as a zoning ordinance.’” *Id.*

The City of Madison argues that unlike the “use” based zoning requirement examined in *Zwiefelhofer* and *Anderson*, MGO § 28.129 is a “form” based zoning ordinance. Its brief provides insightful history on municipal zoning powers, which will not

be repeated here, but suffice to say, Wisconsin law acknowledges both the traditional zoning actions squarely addressed in *Zwiefelhofer*, as well as a more recent type of zoning coined as “form-based zoning.” As to form-based zoning, our highest state court noted that the emerging “alternative to traditional zoning,” is “based on the theory that design controls can resolve inconsistencies between land uses. Design controls for [form-based zoning] ordinances include building envelope standards, building frontage requirements, fermentation (window and entryway), facade coverage, and traditional facade modulation techniques.” *Town of Rhine v. Bizzell*, 2008 WI 76, ¶17 n.6, 311 Wis.2d 1, 751 N.W.2d 780 (2008). Moreover, in *Village of Windpoint v. Halverson*, the Wisconsin Supreme also noted that

[t]here 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....

Wind Point, 38 Wis. 2d at 9, 155 N.W.2d 654 (1968).

The Court agrees with the City of Madison that MGO § 28.129 is no different than ordinances dictating setback lines, building envelope standards,⁹ or minimum square footage. It is akin to regulating building façade materials. Notably, the Bird-Safe Glass Requirement “applies to all exterior construction and development activity, including the expansion of existing buildings and structures within the sub-categories.” MGO § 28.129(2). It is inclusive of three types of buildings or structures: buildings or structures

⁹ “Building envelope standards typically include a diagram and matrix of instructions that illustrate the development of a building on a site, including requirements for height, location on the site, building elements (for example, windows, doors, and porches), and uses.” Elizabeth Garvin & Dawn Jourdan, Through the Looking Glass: Analyzing the Potential Legal Challenges to Form-Based Codes, 23 J. LAND Use & ENVTL. L. 395, 403 (2008).

over 10,000 square feet, sky-bridges, and at-grade glass. MGO § 28.129(4)(a)-(c). If a building or structure is over 10,000 square feet and has the requisite percentage of glass as specified in the ordinance, treatment is required to reduce the risk of bird collisions. MGO § 28.129(4)(a)1-2. All glass railings and glass enclosed in building connections must be treated as specified, as well. MGO § 28.129(4)(a)3-4. As for sky bridges, all glass on above ground bridges must be treated for buildings and structures of any size. MGO § 28.129(4)(b). The ordinance also provides that all at-grade glass features such as sound walls or glass screens must be treated for buildings and structures of any size. MGO § 28.129(4)(c).

No specific treatment option is mandated by the Bird-Safe Glass Requirement for buildings or structures meeting the ordinance's thresholds. Rather, it proposes a variety of options such as the use of "a pattern of visual markers," like "dots or other isolated shapes that are $\frac{1}{4}$ " in diameter or larger and spaced at no more than a two-inch (2") by two-inch (2") pattern; or b) lines that are $\frac{1}{8}$ " in width or greater and spaced no more than 2" apart...." MGO § 28.129(4). Low reflectance opaque materials, building-integrated structures like non-glass double-skin facades, metal screens, fixed solar shading, exterior insect screens, and other features that cover the glass surface are also options under the ordinance. *Id.* Finally, the ordinance permits "other similar mitigation treatments approved by the Zoning Administrator." *Id.* These requirements are far from resembling building codes. They have nothing to do with the stated purpose of the Commercial Code or the incorporated IBC provisions, which set minimum standards to ensure that buildings are safe and structurally sound for the people who use and occupy them. The Court agrees with the City of Madison that they represent building design features and focus on material usage and placement of building elements.

As this Court concludes that zoning ordinances are exempted from the Act, and that MGO § 28.129 is a valid exercise of the City of Madison's zoning powers to adopt form-based codes, the Plaintiffs' Motion for Summary Judgment is denied.

IT IS SO ORDERED.