MICHAEL BEST
& FRIEDRICH LLP

Michael Best & Friedrich LLP
Attorneys at Law
One South Pinckney Street
Suite 700
Madison, WI 53703

P.O. Box 1806
Madison, WI 53701-1806

Phone 608.257.3501
Fax 608.283.2275

William F. White
Direct 608.283.2246
Email wfwhite@michaelbest.com

November 19, 2007

VIA HAND DELIVERY

Nan Fey, Chair
City of Madison Plan Commission
215 Martin Luther King Jr. Blvd
Room G100
Madison, WI 53709

Re: Rezone of 639 Pleasant View Road

Dear Chair Fey:

We represent Churchill Crossing LLC, the owner and developer of the above-referenced residential rental project. Churchill Crossing has sought a major alteration to a previously approved plan unit development general development plan. The proposed amendment reduces the density of the project with a consequent reduction in parking spaces. We are pleased that staff has recommended approval of this major alteration and we will be present on Monday evening to answer any questions concerning this matter.

One concern is an indication that the inclusionary zoning requirements for this rental housing project currently remains in effect for this project. As you know, the Court of Appeals has invalidated the inclusionary zoning ordinance as it applies to rental housing. The question is whether or not that ruling extends back in time or only prospectively. We have attempted to work with the City Attorney's office to achieve a common-sense resolution of these issues.

We are attaching to this letter a memorandum which has been provided to the City Attorney's office outlining our position on this matter. We provide it to you for your information and consideration. In short, we do not believe that the inclusionary zoning requirements currently apply to this project or any other rental housing project.

Again, we look forward to being with you on Monday evening and securing approval of this major alteration.

Sincerely,

MICHAEL BEST & FRIEDRICH LLP

William F. White

WFW:sas

Attachment

cc: Commissioners, City of Madison Plan Commission
Bradley A. Murphy
Tim Parks
Michael P. May
Katherine C. Noonan
Churchill Crossing LLC

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MICHAEL BEST
& FRIEDRICH LLP

MEMORANDUM

TO: Bill White

FROM: Melissa S. Caulum

DATE: November 19, 2007

SUBJECT: Apartment Association of South Central Wisconsin, Inc. v. City of Madison, Case No. 05-CV-0423

I. Question Presented.

You asked me to analyze whether the City of Madison's adoption of MGO § 28.04(25)(e), effective February 15, 2004, had any legal impact or validity at the time it was enacted, through the date the Court of Appeals determined it was preempted by Wis. Stat. § 66.1015 on August 10, 2006.

II. Brief Answer.

It is unlikely that MGO § 28.04(25)(e) had any effect, or continues to have any effect, on rental agreements in Madison. Because the Court of Appeals determined MGO § 28.04(25)(e) was preempted by Wis. Stat. §66.1015, it is *void ab initio*, or void from inception. Also, application of MGO § 28.04(25)(e) after it was determined void is out of step with how courts construe statutes the legislature enacts that are outside its powers under state and federal constitutions, because those statutes are also *void ab initio*. Finally, retroactive or prospective application is simply not an issue where an ordinance or rule is determined void because it preempts a statute. As a result, the case law upon which the City's argument rests is improperly applied to the present case. It is likely that a court would find that the City's argument lacks merit.

III. Relevant Background.

On February 15, 2004, the City enacted MGO § 28.04(25)(e), titled "Inclusionary Housing." The purpose of the ordinance was "to further the availability of the full range of housing choices for families of all income levels in all areas of the City of Madison." § 28.04(25)(a). The ordinance stated the purpose could be accomplished "by providing dwelling units for families with annual incomes less than the area median income." *Id.*

The Apartment Association challenged that this ordinance was preempted by Wis. Stat. § 66.1015, and on August 10, 2006, the Court of Appeals agreed. The Court of Appeals reversed the Circuit Court's order granting summary judgment to the City and remanded the case with

instructions to enter a judgment in the Association's favor, declaring MGO § 28.04(25)(e) void because it preempted Wis. Stat. § 66.1015.

The Apartment Association drafted a proposed "Order for Judgment and Judgment" for Judge Albert of the Dane County Circuit Court which stated in part that as it applied to rental property, MGO § 28.04(25)(e), "from its inception has been void, unenforceable and outside the City of Madison's statutory authority." On January 12, 2007, the City of Madison sent Judge Albert their own proposed "Order for Judgment and Judgment," including a letter objecting to the Apartment Association's proposed language for summary judgment, and arguing that "[t]he language stating the City's ordinance is preempted retroactively is beyond the scope of the Court of Appeal's decision." On January 23, 2007, the Court set forth a Judgment which held "the Court orders summary judgment in favor of the plaintiff Apartment Association and declares that §28.04(25)(e) is void because it is preempted by Wis. Stat. [§] 66.1015."

In his Order, Judge Albert did not reach the issue of whether MGO § 28.04(25)(e) had any effect, or shall continue to effect rental agreements commenced between February 15, 2004 and the date of the Court of Appeals decision on August 10, 2006.

In recent correspondence with developers, the City attempts to apply MGO § 28.04(25)(e) to agreements entered into between the time the ordinance was passed and the Court of Appeals determination that the ordinance was void. Particularly, the City approved a planned unit development ("PUD") for the Churchill Crossing site in December 2004. As a condition of approval, the Churchill Crossing PUD included compliance with § 28.04(25)(e) (at that time, the City had passed § 28.04(25)(e), but Court of Appeals had not ruled the ordinance was void). The owner of Churchill Crossing, the Gallina Companies, never moved forward with its proposed development on the property, and now desires to sell the site with an approved PUD to another developer, Steve Brown. When the Gallina Companies inquired as to whether removal of compliance with § 28.04(25)(e) was a "minor alteration," the City responded it was a "major alteration," indicating the City's position that the ordinance still applies to the PUD and to the property at issue. The Gallina Companies also notes that it did not receive any incentives from the City to comply with the ordinance, nor did it increase density relating to the project.

IV. Analysis.

There are three primary reasons the City's application of MGO § 28.04(25)(e) from the time it was enacted, through the date of the Court of Appeals' decision, is likely invalid. The first is that because the Court of Appeals determined § 28.04(25)(e) was preempted by Wis. Stat. § 66.1015, it is void from its inception. Second, the application that the City supports is contrary to how courts construe statutes the legislature enacts that exceed its powers under state and federal constitutions, since such statutes are also void from their inception. Finally, retroactive or prospective application is simply not an issue where an ordinance or rule is determined void because it preempts a statute. As a result, the case law upon which the City's argument rests is improperly applied to the present case.

A. There Is Limited Merit To The City's Argument Because MGO §28.04(25)(e) Improperly Preempted Wis. Stat. §66.1015.

1. The Fundamental Rule Is that Every Municipality Is A Creation Of The Legislature And Has Only Those Powers Conferred By Statute.

A municipality is a creation of the legislature, and therefore only has those powers conferred to it via statute. *Wisconsin Envtl. Decade, Inc. v. DNR*, 85 Wis. 2d 518, 530-31, 271 N.W.2d 69 (1978). *See also Silver Lake Sanitary Dist. V. DNR*, 2000 WI App 19, ¶ 8, 232 Wis. 2d 217, 221, 607 N.W.2d 50 ("Agencies, municipal corporations and quasi-municipal corporations are all creatures of the state and their powers are only ascribed to them by the state") *review denied*, 234 Wis. 2d 178 (2000). In 1991, when the legislature enacted Wis. Stat. § 66.1015, the power to enact rent control was expressly and directly withdrawn from the City of Madison and other municipalities. The question raised here is whether the City's adoption of MGO § 28.04(25)(e), effective February 15, 2004, had any legal impact or validity at the time it was enacted, through the date of the Court of Appeals' decision, such that it continues to effect agreements entered into during that time. As shown below, it likely does not.

When Madison enacted §28.04(25)(e), Wisconsin law provided: "A municipality may not pass ordinances which infringe the spirit of a state law or are repugnant to the general policy of the state." *County of Dane v. Norman*, 174 Wis. 2d 683, 689, 497 N.W.2d 714 (1993) (citations omitted). As stated by the Wisconsin Supreme Court,

> It follows that if the state has expressed through legislation a public policy with reference to a subject, a municipality cannot ordain an effect contrary to or in qualification of the public policy so established, unless there is a specific, positive, lawful grant of power by the state to the municipality to so ordain.

Id. (quoting 5 Eugene McQuillin, *The Law of Municipal Corporations*, § 15.21 (3d ed. 1989)). In other words, an action that falls outside a city's powers has no legal effect at the time of the action or subsequently, therefore it is *void*—not merely *voidable* if someone raises a successful challenge.

This issue was addressed in *City of La Crosse v. La Crosse Gas & Electric Co.*, 145 Wis. 408, 130 N.W. 530 (1911), where the issue involved a city's legal authority to tax a public utility franchise granted by the city. The Wisconsin Supreme Court held that the city did not have the power, thus excusing the utility from future, present and past tax liability. Although the majority did not expressly refer to the "*void ab initio*" doctrine, the dissent referred to it:

> So I feel impelled to dissent from the view of the court herein that this ordinance was invalid in its inception in so far as it required the defendant to contribute 2 percent of its gross income to the city.

145 Wis. at 430 (Barnes, J., dissenting). In *State ex rel. Ryan v. Pietrzykowski*, 42 Wis. 2d 457, 167 N.W.2d 242 (1969), the Court recognized that even a procedural defect renders an ordinance invalid from the start. It stated that the municipality's "action was insufficient to adopt the ordinance," and further stated that "[a]n ordinance passed in noncompliance with the empowering statute is invalid." *Id.* at 462-63. Thus, in that case, the Court held that the illegal enactment had no legal effect in determining whether a use of land was a preexisting nonconforming use.

Furthermore, McQuillin's treatise on *The Law of Municipal Corporations* shows that Wisconsin law is consistent with the rest of the nation. McQuillin states:

> The power of a municipal corporation to enact ordinances is itself, as are other powers of the corporation, a delegated power. It is a general power to enact an ordinance to carry out any specific power or powers delegated to it, but it is not a power to enact any conceivable ordinance on any possible subject or with any content material whatsoever, or to enact any ordinance that any other municipal corporation can adopt; the general power of any municipal corporation to enact ordinances must be restricted to the exercise of those legislative powers committed or delegated to it, either expressly or by implication, by the constitution, the charter, or the statute. The exercise of a power by ordinance must conform to the grant of that power; it cannot embrace an exercise of power beyond the meaning of the words of grant in the charter or statute, and it must strictly observe any conditions imposed by the grant of power. In addition, it must be in conformity in all respects with the constitution, statutes, public policy, and common law of the state, the municipality's charter, and the federal constitution and law. Aside from a curative legislative act, the proposition is indisputable that no given ordinance can have force or vitality unless it emanates from power existing in the municipal corporation at the time of its adoption.

5 Eugene McQuillin, Law of Municipal Corporations, § 16:8 (3d ed. 2004) (footnotes omitted).

Thus, it is likely that when the Court of Appeals determined MGO § 28.04(25)(e) was void because it is preempted by Wis. Stat. § 66.1015, it is *void ab initio*, or from its inception, and therefore has no legal impact.

B. <u>The City's Proposed Application of MGO § 28.04(25)(e) Is Contrary To How Courts Construe Statutes The Legislature Enacts That Are Outside Its Powers Under State And Federal Constitutions</u>.

When a municipality enacts an ordinance that is outside its powers, the situation is similar to a legislature adopting a statute outside of its powers under the state and federal constitutions. In that situation, it is well established that the legislation is *void ab initio*. *See*

Burlington Northern, Inc. v. City of Superior, 149 Wis. 2d 190, 205, 441 N.W.2d 234 (Ct. App. 1989).

Additional case law offers further insight into how courts view the legal impact of unconstitutional statutes or acts. "An unconstitutional act of the Legislature is not a law; it confers no rights, it imposes no existence." *State v. Huebner*, 2000 WI 59, 235 Wis. 2d, 611 N.W.2d 727 (citing State *ex rel. Kleist v. Donald*, 164 Wis. 545, 552-53, 160 N.W.1067 (1917) (quoted with approval in *Hunter v. School Dist. Of Gale-Ettick-Trempealueau*, 97 Wis. 2d 435, 293 N.W.2d 515 (1980)). *See also State ex rel. Martin v. Zimmerman*, 233 Wis. 16, 288 N.W. 454, 457 (1939) ("with respect to an unconstitutional law...the matter stands as if the law had not been passed"); *Bonnett v. Vallier*, 136 Wis. 193, 200, 116 N.W. 885 (1908) (an unconstitutional legislative enactment is no law at all); *Butzlaff v. Van Der Geest & Sons, Inc.*, 115 Wis. 2d 535, 538-540, 340 N.W.2d 742 (Ct. App. 1983) (recognizing *Kleist* rule but holding that private persons should not be held liable for acting in good faith pursuant to statutes that are later declared unconstitutional).

Other jurisdictions support that when a legislature enacts an unconstitutional law, it is void from its inception (*see Shirley v. Getty Oil Co.*, 367 So.2d 1388, 1391 (Ala. 1979) ("[i]f the act is unconstitutional, it was void from the beginning"); *Martinez v. Scanlan*, 582 So.2d 1167, 1174 (Fla. 1991) ("a penal statute declared unconstitutional is inoperative from the time of enactment"); *People v. Manuel*, 446 N.E.2d 240, 244-45 (Ill. 1983) ("[w]hen a statute is held unconstitutional in its entirety, it is void *ab initio*"); *State ex rel. Stenberg v. Murphy*, 527 N.W.2d 185, 192 (Neb. 1995) ("an unconstitutional statute is a nullity, void from its enactment"); *Fairmont v. Pitrolo Pontiac-Cadillac Co.*, 308 S.E.2d 527, 534 (W.Va. 1983) ("when a statute or ordinance is declared unconstitutional, it is inoperative, as if it had never been passed" (citations omitted).

Following this general rule, it is likely a court would find MGO § 28.04(25)(e) is *void ab initio*, and therefore has no legal effect whatsoever.

C. Retroactive Or Prospective Application Was Not A Proper Issue For Determination By The Court Of Appeals.

In its letter to Judge Albert, the City argues two points regarding retroactivity of the Court of Appeals' decision. First, that retroactive or prospective application was not raised before the trial court or the appellate court, and therefore should not be the subject of a judicial Order relating to summary judgment. Second, that prospective application of the Court of Appeals decision is proper.

1. Retroactive or Prospective Application Does Not Apply.

The City claims that because the issue of retroactive or prospective application of the Court of Appeals decision was not raised before the Trial Court or before the Court of Appeals, it should not be a part of the judicial Order granting summary judgment to the Apartment Association. The City also attempts to enforce MGO § 28.04(25)(e) on rental agreements entered into after the City passed the ordinance and before the time of the Court of Appeals decision. While the City is correct that neither party raised the issue of retroactive or prospective

operation, it fails to take notice that the issue was not proper for either side to dispute at trial. Questions relating to retroactive or prospective application arise only where a case is overruled, where the law changes, or where a new rule is announced.

Here, no case law was overruled. Likewise, there was no change in the law or announcement of a new rule. Instead, the Court of Appeals *reversed and remanded* the trial court decision because it found the City's Ordinance was void. *See Apartment Assoc. of South Central Wisconsin., Inc. v. City of Madison*, 2006 WI App 192 ¶ 37 ("[w]e reverse the circuit court's order granting summary judgment in the City's favor and remand with instructions to enter summary judgment in the Association's favor declaring MGO §28.04(25)(e) is void because it is preempted by Wis. Stat. § 66.1015"). Therefore, the City is grasping at straws when it attempts to liken the facts in this case to cases where retroactive or prospective *application* is at issue. Because the Court of Appeals found that the City's Ordinance was preempted and void, it has *no application whatsoever*. *See supra* section IV B. It is therefore unlikely that a court would find the City has the authority to enforce MGO § 28.04(25)(e).

2. Because The City Misconstrues The Court of Appeals Decision, The Case Law Upon Which It Relies Is Not Properly Applicable.

The City relies on *Harmann v. Hadley*, 128 Wis. 2d 371, 378-79 (1986) and *State v. Picotte*, 2003 WI 42, 261 Wis. 2d 249 (2003) for the proposition that prospective application of a ruling is a policy question and can be imposed to mitigate hardships resulting from retroactive application. However, as demonstrated below, these cases are easily distinguishable from the case at hand.

In *Harmann*, the court dealt with a change in the law and the announcement of a new rule. *See generally* 128 Wis. 2d at 371-382. It determined that the equities relating to the procedural background of the case required that the rule set forth in *Koback v. Crook*, 123 Wis. 2d 259, 276, 366 N.W.2d 857 (1985) be applied to the *Harmann* case despite the *Koback* holding that the rule be given prospective effect only. *Harmann*, 128 Wis. 2d at 386. (In *Koback*, the court held that social hosts may be held liable for a third person's personal injury caused by conduct of a minor driver to whom the hosts negligently furnished intoxicating beverages. 123 Wis. 2d at 276. *Harmann* similarly raised issues related to social host liability. 123 Wis. 2d at 373). The court denied the *Harmann* petition for review but granted the *Koback* petition five months later. Eventually, the court determined there was little justification for the result that the *Koback* plaintiffs received the benefit of the new social host rule and the *Harmann* plaintiffs, who presented the court with a nearly identical issue just months before, would not. *Harmann*, 129 Wis. 2d at 384-85. The *Harmann* exception is a narrow one: it is "based on considerations of equity when sufficiently similar procedural histories are shared by factually and legally similar cases." *Delvaux v. Langenberg*, 130 Wis. 2d 464, 490, 387 N.W.2d 751 (1986).

The present case is easily distinguishable from *Harmann*. First, two separate cases raising the same issue of law did not exist. Second, no new rule was announced, nor did the law change. Instead, the City passed an ordinance that conflicted with an *existing* statute, and for that reason it was later determined the ordinance was void. The Court of Appeals then reversed and remanded the case. For these reasons, retroactive or prospective application was simply not a proper issue for determination by the Court in this case.

The City also cites *State v. Picotte* in support of its position regarding retroactive or prospective enforcement of MGO §28.04(25)(e). In *Picotte*, the issue was whether the defendant's conviction for first-degree reckless homicide was barred because it violated the common law year-to-day rule, which established "an irrebuttable presumption that death occurring more than one year and one day after an accused's injury-inflicting act was not caused by the accused." 261 Wis. 2d at 253. The court held that the defendant's conviction was barred by the rule, and also considered prospective versus retroactive overruling of the common law rule. 261 Wis. 2d at 271 ("The decision to overrule a rule of law purely prospectively is therefore a 'question of policy.'" *Id.* at 272, citing *Harmann*, 128 Wis. 2d at 379; Thomas E. Fairchild, *Limitation of New Judge-Made Law to Prospecive Effect only: "Prospective Overruling" or "Sunbursting"*, 51 Marq. L. Rev. 254, 254 (1967-68) ("We only employ the technique of prospective overruling as an exceptional expedient when the traditional retroactivity would wreak more havoc in society than society's interest in stability will tolerate") (additional citations omitted)). Again, it is clear that the City's reliance on *Picotte* is misplaced. No rule of law was overruled when the Court of Appeals reversed and remanded the Trial Court and determined that MGO § 28.04(25)(e) preempted Wis. Stat. § 66.1015. Moreover, because the Court of Appeals determined MGO § 28.04(25)(e) preempted Wis. Stat. § 66.1015, it is *void ab initio*, meaning it is inoperative, as if it had never been passed. *See supra* section IV B.

Retroactive or prospective application of a decision is a policy question as the City states, and can be imposed to mitigate hardships resulting from retroactive application. However, retroactive or prospective application is simply not an issue where an ordinance or rule is determined void because it preempts a statute. Therefore, the case law upon which the City's argument rests is not properly applicable to the case at hand.

VI. Conclusion.

There are three primary reasons the City's application of MGO § 28.04(25)(e) from the time it was enacted, through the date of the Court of Appeals' decision, is likely invalid. The first is that because the Court of Appeals determined § 28.04(25)(e) preempted Wis. Stat. § 66.1015, it is *void ab initio*, or void from its inception. Second, the application that the City supports is contrary to how courts construe statutes the legislature enacts that exceed its powers under state and federal constitutions, since such statutes are also void from their inception. Finally, retroactive or prospective application is simply applicable where an ordinance or rule is determined void because it preempts a statute. As a result, the case law upon which the City's argument rests is improperly applied to the present case. It is likely that a court would find that the City's argument lacks merit, and that enforcement of § 28.04(25)(e) is improper.

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