**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

November 10, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 97-2382**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**CITY OF MILWAUKEE,**

**PLAINTIFF-APPELLANT,**

**V.**

**NEAL MOHAMMAND,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. The City of Milwaukee appeals from the circuit court's order affirming the municipal court's dismissal of the City's complaints against Neal Mohammand for building code violations. Both the municipal court and the circuit court held that the City could not seek to hold Mohammand liable

for the violations because he was the operator, rather than the owner, of the non-compliant buildings. We reverse and remand.

## BACKGROUND

Mohammand was the operator of two residential buildings on Vliet Street in Milwaukee. On November 7, 1995, the City of Milwaukee filed two complaints against Mohammand for building code violations at those two buildings. The complaints summoned Mohammand to appear before the municipal court and answer the complaints on December 7, 1995. Mohammand failed to appear on December 7, and the court entered default judgments for the City in the total amount of $2,064.

Mohammand moved to vacate the default judgments, and requested a hearing on the matter. On May 28, 1996, Mohammand appeared before the municipal court and asserted both that he was not liable for the violations because he was not the owner of the buildings, and that he was never served with the complaints. The municipal court did not address the service issue but instead requested briefs on the issue of operator liability. The City provided a brief to the court, but Mohammand, who had appeared *pro se*, did not.

The parties again appeared before the municipal court on September 17, 1996. At that time, the municipal court vacated the default judgments and dismissed the complaints against Mohammand. In a written decision entered on September 24, 1996, the municipal court held that the City had no common law or statutory authority to seek to hold a building operator liable for building code violations, and that the provisions of the Milwaukee Code of Ordinances that permitted imposition of liability on building operators were invalid because they conflicted with a state statute.

The City appealed the municipal court's ruling to the circuit court. The circuit court affirmed the municipal court's dismissal of the complaints, holding that the provisions of the Milwaukee Code of Ordinances that imposed liability on operators were an unreasonable and oppressive exercise of the City's police powers and were "not rationally related to a legitimate government objective," because they "impose[] personal liability for local building code violations upon individuals who may not be empowered to address such violations." The circuit court also affirmed the municipal court's conclusion that the provisions of the Milwaukee Code of Ordinances authorizing operator liability were invalid because they conflicted with a state statute.

## DISCUSSION

The Milwaukee Code of Ordinances defines the terms "operator" and "owner" as follows:

> 64. OPERATOR means any person who rents to another or others or who has charge, care or control of a building or part thereof, in which dwelling units, rooming units or hotel units are let, or who has charge, care or control of any premises or part thereof upon which no structures have been erected or upon which nondwelling structures are present. Such person may be appointed to act as an owner's agent for service of process.
>
> ….
>
> 66. OWNER means any person who alone or jointly or severally with others:
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> a. Is the recorded or beneficial owner or has legal title or equitable title to any premises upon which no structures have been erected or upon which nondwelling structures are present, or is the recorded or beneficial owner or has legal or equitable title to any dwelling, dwelling unit, rooming unit or hotel unit; or
>
> b. Has charge, care or control of premises upon which no structures have been erected or upon which nondwelling structures are present, or has charge, care or

> control of any dwelling, dwelling unit, rooming unit or hotel unit as executor, executrix, administrator, administratix, trustee or guardian of the estate of the owner.

MILWAUKEE CODE OF ORDINANCES §§ 200-08-64 and 200-08-66. At the time of the underlying proceeding, the provision setting forth those who were subject to penalties for building code violations provided, in relevant part, as follows:

> **Penalties. 1.** Any person being the owner or controlling or managing any building or premises or tenant thereof wherein or whereon there shall be placed or there exists anything in violation of any of the regulations of this code; or who shall build contrary to the plans and specifications submitted to and approved by the commissioner; or who shall omit, neglect or refuse to do any act required in this code … shall be subject to [penalties].

MILWAUKEE CODE OF ORDINANCES § 200-19 (1996).

As noted, the municipal court held, and the circuit court affirmed, that Mohammand could not be liable under the foregoing ordinances, because the municipal court concluded that the City had no common law or statutory authority to seek to impose operator liability, and that the ordinances conflicted with a statute requiring that only owners be subject to personal liability for building code violations. The City argues that it has authority to impose operator liability pursuant to its constitutional home rule powers, and that the ordinances do not conflict with state statute. We agree.

> Municipalities in Wisconsin … have broad home rule powers pursuant to art. XI, sec. 3 of the Wisconsin Constitution[,] which reads as follows:
>
> > (1) Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every

> village. The method of such determination shall be prescribed by the legislature.
>
> The home rule provision of the constitution is to be liberally construed. This home rule provision does two things. First, it makes a direct grant of legislative power to cities and villages by expressly giving cities and villages the power to determine their local affairs and government. Second, it limits the state legislature in the exercise of its general grant of power by limiting enactments in the field of local affairs of cities and villages.

***Local Union No. 487 v. City of Eau Claire***, 147 Wis.2d 519, 522–523, 433 N.W.2d 578, 579–580 (1989) (citations omitted).

In determining whether a particular matter is included within this constitutional grant to cities and villages to "determine their local affairs and government," the Wisconsin Supreme Court has outlined three areas of legislative enactment: (1) those that are exclusively of state-wide concern; (2) those that may be fairly classified as entirely of local character; and (3) those that do not fit exclusively into one of the two foregoing categories. *See* ***State ex rel. Michalek v. LeGrand***, 77 Wis.2d 520, 526–527, 253 N.W.2d 505, 507 (1977).

> As to the third "mixed bag" category of situations, [the supreme] court has recognized "…that many matters while of 'state-wide concern,' affecting the people and state at large somewhat remotely and indirectly, yet at the same time affect the individual municipalities directly and intimately, can consistently be, and are, 'local affairs' of this home rule amendment."
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> Whether a challenged legislative enactment, state or local, possessing aspects of "state-wide concern" and of "local affairs," is primarily or paramountly a matter of "local affairs and government" under the home rule amendment or of "state-wide concern" under the exception thereto is for the courts to determine.

***Id.***, 77 Wis.2d at 527–528, 253 N.W.2d at 507 (footnote omitted). If the challenged ordinance is exclusively, primarily or paramountly "in the field of

'local affairs and government' under the home rule amendment, the doctrine of preemption does not apply." ***Id.***, 77 Wis.2d at 529, 253 N.W.2d at 508.

If, however, the challenged ordinance addresses a matter that is solely or paramountly of state-wide concern, a municipality's regulatory powers are limited. *See* ***id.***; ***DeRosso Landfill Co. v. City of Oak Creek***, 200 Wis.2d 642, 651, 547 N.W.2d 770, 773 (1996). In areas of state-wide concern "'municipalities may enact ordinances in the same field and on the same subject covered by state legislation where such ordinances do not conflict with, but rather complement, the state legislation.'" ***DeRosso Landfill Co.***, 200 Wis.2d at 651, 547 N.W.2d at 773 (citation omitted). We consider four factors in determining whether a state statute invalidates a local ordinance.

> A municipal ordinance is preempted if (1) the legislature has expressly withdrawn the power of municipalities to act; (2) it logically conflicts with state legislation; (3) it defeats the purpose of the state legislation; or (4) it violates the spirit of state legislation. Should any one of these tests be met, the municipal ordinance is void.

***Id.***, 200 Wis.2d at 651–652, 547 N.W.2d at 773 (footnotes omitted).

The lower courts concluded that the ordinances permitting operator liability for building code violations were void because they conflicted with § 62.17, STATS., which the courts construed to require that liability for such violations be placed solely on owners of the buildings.[1] However, we conclude

[1] Section 62.17, STATS., provides:

> **Enforcement of building codes.** For the purpose of facilitating enforcement of municipal and state building, plumbing, electrical and other such codes, ordinances or statutes established for the protection of the health and safety of the occupants of buildings referred to elsewhere in this section as "building codes", any municipality may adopt an ordinance with any of the following provisions:

(continued)

that the trial court erred in holding that § 62.17, STATS., preempted the challenged ordinances, because, as a first-class city under special charter, Milwaukee is

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> **(1)** Requiring the owner of real estate subject to any building code to record with the register of deeds a current listing of the owner's address and the name and address of any person empowered to receive service of process for the owner. Any changes of names or address in the recording shall be reported within 10 days of the change. This subsection does not apply to owner-occupied one- and 2-family dwellings.
>
> **(2)** Establishing as sufficient notice to an owner that a building inspector or agency entrusted with the enforcement of the building code has found a violation of any applicable building code, if the building inspector or agency, after making an unsuccessful attempt of personal service during daytime hours at the latest address recorded with the register of deeds as that of the owner or agent of the owner, sends the notice by certified mail to the address noted and in addition posts a copy of the notice in a conspicuous place in or about the building where the violation exists. If the owner has not recorded under sub. (1) with the register of deeds a current address or name and address of a person empowered to receive service of process, then posting of a notice of violation on the premises and certified mailing of the notice to the last-known address of the owner as well as to the address of the premises in violation is sufficient notice to the owner that a violation has been found.
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> **(3)** That when notice of a violation of the building code which is found by a building inspector or agency entrusted with the enforcement of the building code is made according to sub. (2), such notice shall be effective notice to anyone having an interest in the premises, whether recorded or not, at the time of the giving of such notice; and shall be effective against any subsequent owner of the premises as long as the violation remains uncorrected and there exists a copy of the notice of violation in a public file maintained by the local agency charged with enforcement of the building codes.
>
> **(4)** Requiring an owner to give notice to any prospective purchaser that a notice has been issued concerning a building violation, where the condition giving rise to the notice of violation has not been corrected; providing for a fine not exceeding $500 for failure to so notify; and granting the purchaser who has not received the required notice the right to make any repairs necessary to bring the property up to the requirements of the local building code and to recover the reasonable cost of those repairs from the seller.

excluded from the effect of § 62.17, STATS.[2] *See* § 62.03(1), STATS. ("This subchapter … does not apply to 1st class cities under special charter.").

Moreover, we conclude that the challenged ordinances are consistent with the goal sought to be achieved by § 62.17, STATS. Section 62.17, STATS., seeks to facilitate enforcement of the building code by permitting municipalities to establish procedures to inform building owners of building code violations and to impose liability upon building owners for uncorrected violations. Similarly, the challenged ordinances facilitate enforcement of the building code by imposing liability for violations upon persons who either own or control the buildings.[3] These ordinances provide an additional and consistent method of enforcing the building codes, and we conclude that the "'ordinances do not conflict with, but rather complement, the state legislation.'" ***DeRosso Landfill Co.***, 200 Wis.2d at 651, 547 N.W.2d at 773 (citation omitted).

As noted, the circuit court also concluded that the imposition of liability on operators was unconstitutional because it was an unreasonable and oppressive exercise of the City's police powers and because it was "not rationally related to a legitimate government objective." The circuit court based these conclusions on the premise that the ordinances would impose "personal liability for local building code violations upon individuals who may not be empowered to address such violations."

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[2] Under § 62.03(2), STATS., a first-class city may adopt by ordinance any sections of chapter 62, subchapter I; however, Milwaukee has not adopted § 62.17, STATS.

[3] Significantly, § 200-51.5 of the Milwaukee Code of Ordinances provides, in relevant part: "If there is a person acting as an operator, that person shall sign a statement acknowledging acceptance of liability for a code violation and provide his or her business or personal telephone number." MILWAUKEE CODE OF ORDINANCES § 200-51.5(4)a-2.

Ordinances, like statutes, are presumed to be valid. *See* ***State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee***, 105 Wis.2d 203, 208, 313 N.W.2d 805, 808 (1982). The party challenging an ordinance bears the burden of proving beyond a reasonable doubt that the ordinance is unconstitutional. *See* ***id.***, 105 Wis.2d at 209, 313 N.W.2d at 808. "The ordinance must be sustained if there is any reasonable basis for its enactment, and the courts will only interfere with the exercise of police power by a municipality when it is clearly illegal." ***Chicago & N.W. Ry. v. La Follette***, 43 Wis.2d 631, 647, 169 N.W.2d 441, 448 (1969) (internal quotation marks omitted). "The function of a reviewing court is solely for the purpose of determining whether legislative action under the power delegated to the municipality passes boundaries of its limitations or exceeds boundaries of reason." ***Id.*** (internal quotation marks omitted).

Due process requires that an exercise of a municipality's police powers "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." ***Id.***, 43 Wis.2d at 645, 169 N.W.2d at 447. We conclude that the imposition of liability for building code violations upon operators, as defined in the Milwaukee Code of Ordinances, is not unreasonable or oppressive, and is reasonably and substantially related to the legitimate government purpose sought to be attained.

The obvious purpose sought to be attained by the ordinances is compliance with the building code. "It is well recognized that it is a legitimate exercise of the police power to require existing buildings used for human habitation to meet reasonable prescribed standards in order to protect the health and safety of the occupants." ***Boden v. City of Milwaukee***, 8 Wis.2d 318, 324, 99 N.W.2d 156, 160 (1959). The penalty provision of the ordinances, § 200-19,

provides that "[a]ny person being the owner or controlling or managing any building or premises or tenant thereof" may be penalized for a violation of the building code. MILWAUKEE CODE OF ORDINANCES § 200-19. Thus, an operator of a building may be subject to liability under the statute because an operator, by definition, is one "who rents to another or others or has charge, care or control of a building or part thereof." MILWAUKEE CODE OF ORDINANCES § 200-08-64. It is reasonable and consistent with the enforcement of the building code for a municipality to impose liability upon a person who has control of the building. The circuit court erred in concluding that the challenged ordinances were unconstitutional.

## CONCLUSION

We reverse the circuit court order affirming the dismissal of the complaints against Mohammand and reinstate the complaints. As noted, the municipal court did not reach the issue of whether Mohammand was properly served with the complaints because the court dismissed the complaints on the ground that the operator of the building was not liable for building code violations. We therefore remand this cause to the municipal court for a determination of whether Mohammand was properly served.

*By the Court*.—Order reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.