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DEPARTMENT OF JUSTICE

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Mr. Mark B. Hazelbaker
Corporation Counsel
Juneau County
3555 University Avenue
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Dear Mr. Hazelbaker:

¶ 1. You indicate that during the course of Juneau County's comprehensive planning process questions have arisen as to whether local units of government can require local licensure of contractors who obtain building permits to perform work on one and two family dwellings in which they have no legal or equitable interest.[1] You note that in Wis. Stat. § 101.654 the Legislature has prescribed detailed financial responsibility requirements for dwelling contractors. You also note that 2005 Wisconsin Act 200 added a six-hour minimum annual continuing education requirement for dwelling contractor qualifiers to Wis. Stat. § 101.654 and that the minimum continuing education requirement was changed to twelve hours biennially in 2007 Wisconsin Act 14.

BACKGROUND

¶ 2. You indicate that you have become aware of cities in Wisconsin outside of Juneau County that require local licensure of dwelling contractors. One such city ordinance requires a "general contractor" to have either four years of apprenticeship plus four years as a journeyman, eight years working for a general contractor in the construction industry, or four years of architectural or engineering education and one year of on-the-job training. Passage of an examination is required in order to obtain a local "general contractor" license. The same ordinance requires a "carpentry contractor" to have four years of apprenticeship, plus two years working as a journeyman in the residential trade, or six years experience in the construction industry. Passage of an examination is required in order to obtain a local "carpentry contractor" license. In order to obtain a building permit to perform work on one and two family dwellings, the ordinance appears to require that a dwelling contractor have at least one locally-licensed "general contractor" or "carpentry contractor" on staff. An ordinance enacted by another city seems to require a minimum of four years of experience and passage of an examination in order

[1]Hereafter, the term "dwelling contractors" refers to persons who obtain building permits to perform work on one and two family dwellings in which they have no legal or equitable interest.

to obtain a local contractor's license. Under that ordinance, at least one such license is apparently required in order to obtain a building permit to perform work on one and two family dwellings in that city. Neither city ordinance appears to impose financial responsibility or continuing education requirements. You apparently are concerned that local units of government in Juneau County may attempt to enact ordinances similar to the two ordinances described.

QUESTION PRESENTED AND BRIEF ANSWER

¶ 3. You ask whether the local ordinances requiring local licensure of dwelling contractors are preempted by the "ONE-AND-2-FAMILY DWELLING CODE," Wis. Stat. ch. 101, subch. II (the "Dwelling Code").

¶ 4. A particular municipal licensure requirement may be preempted if that requirement logically conflicts with, defeats the purpose of, or violates the spirit of state contractor financial responsibility and continuing education requirements. In my opinion, ordinances requiring local licensure are preempted if they impose on persons seeking a building permit for one- or 2-family dwellings greater financial responsibility, education, or examination requirements than required by state law.

ANALYSIS

¶ 5. To ascertain whether a municipality may license dwelling contractors, it is first necessary to examine structure of the Dwelling Code.

¶ 6. The Legislature's stated purpose in enacting the Dwelling Code was to "establish statewide construction standards and inspection procedures" for such dwellings and "promote interstate uniformity in construction standards[.]" Wis. Stat. § 101.60.

¶ 7. To that end, the Dwelling Code vests in the Department of Commerce the power to adopt rules establishing uniform standards for construction and inspection of one- and 2-family dwellings. Wis. Stat. § 101.63(1). The standards are to be nationally recognized, when feasible. *Id.* In addition to other powers, the Department of Commerce is given rulemaking authority over the certification of inspectors and the certification of dwelling contractors. Wis. Stat. §§ 101.63(2), (2m), 101.654. The certification of dwelling contractors includes education and financial responsibility components. Wis. Stat. § 101.654(1m), (2). The Department of Commerce must also develop a standard building permit form for all new one- and 2-family dwellings. Wis. Stat. § 101.63(7).

¶ 8. Municipal powers are also established in the Dwelling Code. Wis. Stat. § 101.65. The municipal powers provisions are set forth as things municipalities may do, things municipalities may not do, and things municipalities must do. In the first category, municipalities may "[e]xercise jurisdiction over the construction and inspection of new dwellings by passage of

ordinances, provided such ordinances meet the requirements of the one- and 2-family dwelling code adopted in accordance with this subchapter." Wis. Stat. § 101.65(1)(a). These municipalities may also collect fees to defray the costs of jurisdiction, and may also by ordinance provide for remedies and penalties for violations of ordinances passed to enforce the Dwelling Code. Wis. Stat. § 101.65(1)(c), (d).

¶ 9. In the second category, municipalities may not issue building permits to individuals who are not in compliance with the education and financial responsibility certification requirements in Wis. Stat. § 101.654, so long as those requirements apply.[2] Wis. Stat. § 101.65(1m).

¶ 10. In the third category, municipalities must use the Department of Commerce's standard building permit for new dwellings. Wis. Stat. § 101.65(3). They must also require an owner who applies for a building permit to sign a statement acknowledging certain liabilities if the owner hires a contractor who is not bonded or insured as required by Wis. Stat. § 101.654(2)(a) to perform work. Wis. Stat. § 101.65(1r).

¶ 11. Absent from the provisions delineating a municipality's powers under the Dwelling Code is any reference to a municipal power to license or certify contractors. Curiously, however, Wis. Stat. § 101.63(2)—which otherwise governs the state certification of inspectors and not contractors—provides that "[t]he department [of commerce] may not adopt any rule which prohibits any city, village, town or county from licensing persons for performing work on a dwelling in which the licensed person has no legal or equitable interest." This language, which appears to prevent the Department of Commerce from preventing local licensure of dwelling contractors,[3] was added to Wis. Stat. § 101.63(2) in ch. 221, sec. 545, Laws of 1979.

¶ 12. In construing the meaning of this language, "'It must be presumed that the legislature did not intend to legislate in vain, and that it had a specific purpose in mind.'" *Haas v. Welch*, 207 Wis. 84, 86, 240 N.W. 789 (1932), quoting *Harris v. Halverson*, 192 Wis. 71, 76, 211 N.W. 295 (1927). "When the legislature enacts a statute, it is presumed to act with full knowledge of the existing laws, including statutes." *Mack v. Joint School District No. 3*, 92 Wis. 2d 476, 489, 285 N.W.2d 604 (1979). The Legislature is presumed to know the meaning

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[2]For example, the certification requirements do not apply to the owner of a dwelling who resides or will reside in the dwelling. Wis. Stat. § 101.654(1)(b).

[3]While the remainder of Wis. Stat. § 101.63(2) addresses inspectors, as opposed to contractors, the placement of this provision in this subsection does not overcome the plain reading that dwelling contractors, and not inspectors, are the subject of the limitation on the Department of Commerce's power to prohibit licensure. The phrase "performing work on" contemplates building, not inspecting. The phrase "inspecting" is used elsewhere in Wis. Stat. § 101.63(2), indicating the Legislature was not referring to inspectors and inspecting when it chose the phrase "performing work on" in the last sentence of Wis. Stat. § 101.63(2).

of the words it selects, and to "'cho[o]se its terms carefully and precisely to express its meaning.'" *Johnson v. City of Edgerton*, 207 Wis. 2d 343, 351, 558 N.W.2d 653 (Ct. App. 1996), quoting *Ball v. District No. 4, Area Board*, 117 Wis. 2d 529, 539, 345 N.W.2d 389 (1984). "It should never be presumed that any part, much less all, of a statute is meaningless." 73 Op. Att'y Gen. 120, 121 (1984), citing *Associated Hospital Service v. Milwaukee*, 13 Wis. 2d 447, 109 N.W.2d 271 (1961). *Accord State v. Wisconsin Telephone Co.*, 91 Wis. 2d 702, 714-15, 284 N.W.2d 41 (1979). Although the last sentence of Wis. Stat. § 101.63(2) does not itself grant authority to local units of government to require local licensure of dwelling contractors, it appears that when the language was enacted the Legislature must have been of the view that cities, villages, towns, and counties did possess the authority to require local licensure of dwelling contractors. If that were not the case, there was no apparent purpose for the enactment of that language.

¶ 13. When ch. 221, sec. 545, Laws of 1979 was enacted, the only possible source of authority to justify the Legislature's view that all four principal local units of government—cities, villages, towns, and counties—may require local licensure of dwelling contractors was Wis. Stat. § 101.65(1) (1979). That subsection authorized all four local units of government to "[e]xercise jurisdiction over the construction and inspection of new dwellings by passage of ordinances, provided such ordinances meet the requirements of the one- and 2-family dwelling code . . . ."[4] In *Town of Clearfield v. Cushman*, 150 Wis. 2d 10, 20-21, 440 N.W.2d 777 (1989), the court held that "[f]rom its statutorily assigned responsibilities, the Town has implicit power to require building permits." The court reasoned that "'[W]hen specific duties are intrusted to [towns] and made obligatory on their part, it must be assumed that it was the legislative intent to give them ample authority to carry out those duties.'" *Cushman*, 150 Wis. 2d at 21. In light of the enactment of the last sentence of Wis. Stat. § 101.63(2), the Legislature must have been of the view that the language in Wis. Stat. § 101.65(1) (1979) authorizing cities, villages, towns, and counties to "[e]xercise jurisdiction over the construction and inspection of new dwellings by

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[4]Cities and villages possess both constitutional and statutory home rule authority. Wis. Const. art. XI, § 3(1); Wis. Stat. §§ 62.11(5) and 61.34(1). Counties have only statutory administrative home rule powers. Wis. Stat. § 59.03(1). Towns do not have home rule powers. In 1979, existing legal authority was to the effect that even those towns that possessed village powers could not exercise those statutory powers granted villages under Wis. Stat. § 61.34(1) because "[t]he attempted exercise by towns of the general home rule power is inherently inconsistent with the constitutional rule requiring one system of uniform town government." 66 Op. Att'y Gen. 58, 59 (1977). *Compare Town of Beloit v. County of Rock*, 2003 WI 8, ¶ 23, 259 Wis. 2d 37, 657 N.W.2d 344. In 1979, the county administrative home rule statutes had not yet been enacted. 77 Op. Att'y Gen. 113, 116 (1988) subsequently concluded that county administrative home rule statutes "expand upon and 'fill the gaps' in the organizational and administrative structure which is already in place[.]" *Also see Jackson County v. State*, 2006 WI 96, ¶ 17, 293 Wis. 2d 497, 717 N.W.2d 713 (holding that a county's power to rescind a tax deed "must be found in a statute or necessarily be implied from a statute [other than the county administrative home rule statutes], in order for that power to exist.").

passage of ordinances . . ." constituted an implied legislative grant of authority to require local licensure of dwelling contractors.

¶ 14. Although the Legislature appears to have implicitly acknowledged the ability of municipalities to license dwelling contractors and prohibited the Department of Commerce from promulgating a rule that prohibits all licensure, that does not make every local licensure scheme valid. Indeed, as explained above, the implied source of statutory authority for cities, villages, towns, *and* counties to license dwelling contractors arose from their statutory power to "[e]xercise jurisdiction over the construction and inspection of new dwellings by passage of ordinances . . . ." Wis. Stat. § 101.65(1)(a). But this exercise of jurisdiction is expressly limited to "such ordinances meet the requirements of the one- and 2-family dwelling code adopted in accordance with this subchapter." *Id.* As shown below, licensure requirements that impose financial responsibility, education, and examination requirements beyond those required by state law are not permitted because they would not meet the requirements of the Dwelling Code.

¶ 15. After the enactment of ch. 221, sec. 545, Laws of 1979, the Legislature amended the Dwelling Code to provide for the certification of dwelling contractors. In order to obtain a building permit, a person who does not own and live in (or intend to live in) a dwelling must annually obtain from the Department of Commerce a certificate of financial responsibility. Wis. Stat. § 101.654. In order to obtain a certificate of financial responsibility from the Department of Commerce to perform work estimated to cost $25,000 or more, a dwelling contractor must have obtained either a surety bond of not less than $25,000 or a general liability insurance policy of at least $250,000 per occurrence, *see* Wis. Stat. § 101.654(2)(a) and (2m); must have obtained any worker's compensation insurance that is required under Wis. Stat. § 102.28(2)(a) and (b), *see* Wis. Stat. § 101.654(2)(b); and must have demonstrated that all required state and federal unemployment taxes were paid, *see* Wis. Stat. § 101.654(2)(c). The Department of Commerce may deny, suspend, or revoke the certification of a dwelling contractor who fails to comply with state financial responsibility requirements. *See* Wis. Admin. Code § Comm 5.10(1)(a). While the statute uses the term "certificate," because a person (other than a home owner) is required to hold the certificate to obtain a building permit, the state certificate is effectively a license.

¶ 16. In 2006, the Legislature added education and examination requirements to the state's certification requirements necessary to obtain a building permit. 2005 Wisconsin Act 200, secs. 11-13; Wis. Stat. § 101.654 (2005). The Dwelling Code now requires that persons seeking to obtain a building permit, with certain exceptions, must complete continuing education requirements and provide proof that those requirements have been completed. Wis. Stat.

§ 101.654(1)(a).[5] As amended by 2007 Wisconsin Act 14, these education requirements now include 12 hours of education relevant to the professional area of expertise every 2 years and also attendance at one or more professional meetings or educational seminars designed for both building contractors and building inspectors. Wis. Stat. § 101.654(1m)(b). Persons newly wishing to be certified—*i.e.*, those who did not hold a certificate of financial responsibility on April 11, 2006 (the day after the date 2005 Wisconsin Act 200 was published)—must also successfully complete an examination developed by the Department of Commerce. Wis. Stat. § 101.654(1m)(b)3.

¶ 17. In 2005 Wisconsin Act 200, the Legislature also created the "contractor certification council," which replaced the "contractor financial responsibility council" and expanded on its powers. 2005 Wisconsin Act 200, sec. 3. The new council is comprised of members appointed by the Secretary of Commerce who are involved in or have demonstrated an interest in continuing education for contractors. Wis. Stat. § 15.157(5). It is charged with recommending to the Department of Commerce rules for certifying financial responsibility of contractors and recommending to the Department of Commerce for its approval courses that meet continuing education requirements. Wis. Stat § 101.625(1), (2). In addition, the contractor certification council is required to advise the Department of Commerce on the development of course examination for those individuals who are required to pass examinations. Wis. Stat. § 101.625(3).

¶ 18. The Department of Commerce has promulgated rules to administer the continuing education requirements in the Dwelling Code. The rules create a "dwelling contractor qualifier certification" that is issued by the Department of Commerce, which serves as proof required under Wis. Stat. § 101.654(1)(a) that a person has completed his or her education requirements. Wis. Admin. Code § Comm 5.315(1). The rules also require that to obtain the "dwelling contractor qualifier certification," an applicant must, among other requirements, show that he or she completed 12 hours of an approved education course, which must include instruction and an examination concerning construction laws, construction codes, and construction business

[5]Exempted from this provision are owners who reside or intend to reside in the dwelling for which he or she is seeking a permit and persons who hold a current license as defined in Wis. Stat. § 101.02(21)(a), so long as the work to be performed is work for which the license is held. Wis. Stat. § 101.654(1)(b), (c).

practices. Wis. Admin. Code § Comm 5.315(2)(c)1.a.-c.[6] A dwelling contractor may renew a certification by obtaining additional hours of approved continuing education during the applicable 2-year time period. Wis. Admin. Code § Comm 5.315(3).

¶ 19. The Department of Commerce may deny, suspend, or revoke the certification of a dwelling contractor qualifier who fails to comply with state continuing education requirements. *See* Wis. Stat. § 101.654(5)(a); Wis. Admin. Code § Comm 5.10(1)(a).

¶ 20. 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 state legislation; or (4) it violates the spirit of state legislation." *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 651-52, 547 N.W.2d 770 (1996) (footnotes omitted).

¶ 21. The Legislature has not expressly withdrawn the authority of municipalities to regulate the local licensure of dwelling contractors. Wisconsin Stat. § 101.65(1) continues to authorize municipalities to "[e]xercise jurisdiction over the construction and inspection of new dwellings by passage of ordinances . . . ." and Wis. Stat. § 101.63(2) also continues to provide that the Department of Commerce "may not adopt any rule which prohibits any city, village, town or county from licensing persons for performing work on a dwelling in which the licensed person has no legal or equitable interest."

¶ 22. A municipal licensure provision may nevertheless logically conflict with, defeat the purpose of, or violate the spirit of state legislation. The validity of local licensure requirements must therefore be decided by determining whether the individual local licensure requirement can reasonably coexist with the state requirements with which dwelling contractors and dwelling contractor qualifiers must comply.

¶ 23. With respect to any municipal license requirements that impose additional financial responsibility requirements or educational qualifications beyond those required by state law on those seeking a building permit involving construction of dwellings covered by the Dwelling

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[6]Certain individuals who had held or applied for a certificate of financial responsibility between April 11 and 14, 2006 were not required to take these classes and examinations to obtain dwelling contractor certification qualifier, but must meet specified continuing education requirements to obtain a renewal. Wis. Admin. Code § Comm 5.315(2)(c)2., (3); *see also* Wis. Stat. § 101.654(1m)(c), (d) (stating that the rules promulgated under Wis. Stat. § 101.654(1m) shall not require a person holding a certificate of financial responsibility on April 11, 2006 to pass an examination on continuing education courses and permitting different course requirements for persons who held a certificate of financial responsibility on April 11, 2006 and for those who did not).

Code, it is my opinion that such municipal ordinances logically conflict with state law and also frustrate its purpose and spirit, and are therefore preempted.[7]

¶ 24. The Dwelling Code is not designed to set minimal requirements that can be exceeded by local ordinance. Instead, the stated purpose of the Dwelling Code is to promote *uniformity* with respect to the construction and inspection of one- and 2-family dwellings. Wis. Stat. § 101.60. As demonstrated above, the Legislature's implicit recognition in 1979 that municipalities have licensure authority stems from the Dwelling Code's grant of authority to the municipalities to exercise jurisdiction "over the construction and inspection of new dwellings[.]" Wis. Stat. § 101.65(1)(a). But that exercise must "*meet* the requirements of the one- and 2-family dwelling code[.]" *Id.*

¶ 25. The Dwelling Code expressly creates state requirements relating to the financial responsibility and education of those applying for building permits. Wis. Stat. § 101.654. The Legislature's education requirements addressed both those who were qualified to obtain building permits when education requirements were enacted—continuing education but not examination—as well as those wishing to be newly qualified to obtain a permit—education and examination. Wis. Stat. § 101.654(c); Wis. Stat. § 101.654(1m)(b)3. Thus, the state education requirements speak to not only continuing education, but also the education requirements for those who wish to enter the field. *Id.*; *compare also* Wis. Stat. § 101.625(2) to Wis. Stat. § 101.625(3) (distinguishing dwelling contractor certification council's duties to recommend to the Department of Commerce those courses appropriate for continuing education and those examination requirements that would be required for new dwelling contractors). In sum, for a municipality's jurisdiction to "meet the requirements" of the Dwelling Code, it may not impose additional certification or licensure requirements with respect to the financial capability, education, and examination requirements of those seeking to obtain building permits. To do so would logically conflict with the Dwelling Code, defeat its purpose, and violate its spirit.

¶ 26. The fact that Wisconsin law restricts the ability of the Department of Commerce to prohibit local licensure by rule does not undermine my conclusion. Wisconsin Stat. § 101.63(2) limits only the authority of the Department of Commerce to adopt certain rules, it does not (and cannot) prevent subsequently enacted state law from doing so. The acts creating the state's certification criteria for dwelling contractors with respect to financial responsibility, education, and examination requirements were passed after the Legislature enacted Wis. Stat. § 101.63(2). It is these acts, not an agency rule, that give rise to preemption in the context addressed in this opinion.

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[7]Any *lesser* financial responsibility or education requirement required by a local ordinance is expressly prohibited, as municipalities are prohibited from issuing building permits that those who have not complied with the financial responsibility and education requirements in Wis. Stat. § 101.65(1m).

CONCLUSION

¶ 27. A particular municipal licensure requirement may be preempted if that requirement logically conflicts with, defeats the purpose of, or violates the spirit of state contractor financial responsibility and continuing education requirements. In my opinion, ordinances requiring local licensure are preempted if they impose on persons seeking a building permit for one- or 2-family dwellings greater financial responsibility, education, or examination requirements than required by state law.

Sincerely,

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