

STATE OF WISCONSIN
BEFORE THE WISCONSIN ELECTIONS COMMISSION

Kenneth Brown
610 Main Street
Racine, WI 53403

Complainant,

EL 22-59

v.

Tara McMenamin
Office of the City Clerk
730 Washington Ave.
Racine, WI 53403,

Respondent.

RESPONSE OF RESPONDENT TARA MCMENAMIN

Respondent Tara McMenamin, in her capacity as City Clerk of the City of Racine, by and through her attorneys, the City of Racine City Attorney's Office by City Attorney Scott Letteney and Assistant City Attorney Ian Pomplin, hereby submits the following response to the Complaint filed by Kenneth Brown with the Wisconsin Elections Commission.

INTRODUCTION

On August 5, 2020, the City of Racine Common Council lawfully approved the purchase of a vehicle generally to be used for voting purposes. Municipal governments are permitted to designate alternate absentee voting sites pursuant to Wisconsin Statutes section 6.855. There is nothing in Wisconsin Statutes section 6.855 prohibiting the use of a vehicle at an alternate absentee voting site. The mobile election vehicle has been used at sites designated as alternate absentee ballot sites by the Racine Common Council. The Racine Common Council did not select sited based on a consideration of whether any location would confer a political advantage, but chose

locations all over the City of Racine that were best suited for the City's goal of having voting accessible to all legal voters in the City of Racine. All agendas of all meetings of legislative bodies of the City of Racine may be found online at <https://cityofracine.legistar.com/Calendar.aspx>.

ARGUMENT

The Commission should dismiss the instant complaint because the City of Racine and Clerk McMenamin have followed the law as it applies to alternate absentee ballot sites. The Complainant makes five arguments in an effort to prevent the City of Racine from allowing as many legal voters to vote as possible. All five of those arguments fail. All alternate absentee ballot sites were designated in accordance with the law. These sites did not provide an advantage to any political party. The City did not allow contemporaneous voting both at alternate sites and at the office of the municipal clerk. The designated sites were in effect for the appropriate amount of time, and nothing in the relevant statutes prevent the use of a mobile van for an alternate absentee ballot site.

I. TREATING THE LEGAL TERM OF ART "NEAR AS PRACTICABLE" AS A PURELY GEOGRAPHIC STANDARD IS A MISTAKE OF LAW

Complainant alleges that because the locations selected by Clerk McMenamin were not as close as possible to the clerk's office, that Wisconsin Statutes section 6.855 and the requirement that the locations "shall be located as near as practicable to the office of the municipal clerk or board of election" was violated. However, Complainant misunderstands the word "practicable" and reads it much too narrowly.

It is long standing precedent that the phrase "as near as practicable" encompasses something other than simply a pure geographic standard resolved through the use of a ruler on a map. *See Ashwaubenon v. Pub. Serv. Com.*, 22 Wis. 2d 38, 50-51, 125 N.W.2d 647, 654 (1963). In fact, treating the legal term of art "as near as practicable" as purely distance based is an "erroneous concept of law." *Id.* Complainant repeats this decades old error. The use of the word

“practicable” necessarily encompasses evaluating many factors to determine appropriate locations.¹

The Complainant’s reading of the statute also necessarily contradicts itself. Under Wisconsin Statutes section 6.855(1), the designated sites shall be located as near as practicable to the office of the municipal clerk. However, under Wisconsin Statutes section 6.855(5), the legislature expressly permitted more than one alternate absentee ballot site to be designated. *See Trump v. Biden*, 2020 WI 91, ¶¶99, 394 Wis. 2d 629, 951 N.W.2d 568, (Roggensack, C.J., dissenting) (“It is conceivable that the 200 sites [...] could have become alternate absentee ballot sites.”) Using a standard of pure measurement of distance, there can only be one closest location. Under Complainant’s reading, if a municipality designated two locations, and one were closer, the

¹ Clearly, the *Ashwaubenon* case, which involves the approval of a bulkhead line on a river, is based upon a set of facts quite different from the instant matter. Importantly, however, the concept of “as near as practicable” or “as nearly as practicable” has been interpreted in a wide variety of circumstances as not being capable of definition based upon a strict geographical or mathematical calculation. *See, e.g., Kirkpatrick v. Preisler*, 394 U.S. 526, 530, 89 S. Ct. 1225, 1228, 22 L. Ed. 2d 519, 524 (1969) (In a case involving congressional redistricting, “[t]he whole thrust of the ‘as nearly as practicable’ approach is inconsistent with adoption of fixed numerical standards.”); *United States v. Delgado-Hernandez*, 283 Fed. Appx. 493, 499 (9th Cir. 2008) (A driver momentarily leaving his lane of travel does not violate a statute requiring a vehicle to be driven “as nearly as practicable” within a single lane.); *Lee v. City of San Diego*, 492 F. Supp. 3d 1088 (S.D. Cal. 2020) (A municipal ordinance that made it unlawful for a pedestrian to stand on the sidewalk “except as near as practicable” to the building line or curb line, was unconstitutionally vague, as it failed to provide notice to the public and guidance to officers.); *State ex rel. Martin v. Howard*, 96 Neb. 278, 290, 147 N.W. 689, 693 (Neb. 1914) (The words “as nearly as practicable” in a statutory provision requiring a specific insurance form contract be used “should be construed to mean as nearly as practicable considering the other provisions contained in the insurance code which in anywise are inconsistent with or modify the provisions.”); *Losier v. Consumers Petroleum Corp.*, 131 Conn. 161 38 A.2d 670 (Conn. 1944) (Whether a stop sign complied with the statutory requirement that it be located as near as practicable to the entrance to a through way was a question of fact based upon the particular circumstances involved.); *Frye v. Tobler*, 2 Ohio App. 3d 358, 442 N.E.2d 98 (Ohio App. 1981) (Whether a pedestrian was walking as near as practicable to the edge of the roadway is a question of fact based upon the particular circumstances involved.); *State v. McBroom*, 179 Ore. App. 120, 124-125, 39 P.3d 226, 228 (Ore. App. 2002) (In a case involving travel within a single lane of traffic, “[p]racticable means ‘possible to practice or perform,’ ‘capable of being put into practice, done or accomplished’ or ‘feasible.’ What is practicable or feasible will vary with the circumstances of each case.”); *Farmer v. Baldwin*, 346 Ore. 67, 77-78, 205 P.3d 871, 877 (Ore. 2009) (An Oregon rule of appellate procedure providing that a litigant must “attempt to present his or her claims in proper appellate brief form, as nearly as practicable” “does not require exact compliance with the forms and rules of appellate briefing that lawyers observe.”)

Of particular note, *see Beck v. Board of Comm'rs*, 105 Kan. 325, 338, 182 P. 397, 403 (Kan. 1919 Kan.) (A statutory requirement that the county settlement of public welfare institutions be located “[a]s near as practicable to the county seat,” does not mean within one-half mile, nor within one mile, nor within two miles, nor within any other prescribed distance; but it does mean that the settlement shall be located at a place as near to the county seat as will supply all the conditions necessary to enable the county commissioners to carry out the purposes of the law.”)

further would be unlawful. This is clearly an absurd reading of the law and would render section 6.855(5) as surplusage, which a result to be avoided under Wisconsin's rules of statutory construction. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

Instead, to give every part of the statute meaning, and to comply with a decades old understanding of the phrase "as near as practicable," it is necessary to evaluate each alternate absentee ballot site holistically and based on factors that evaluate its impact on the overall statutory scheme. *See, Ashwaubenon*, 22 Wis. 2d 38, 51. The City of Racine chose alternate absentee sites on the basis of making voting accessible to every single legal voter in the City of Racine, and it required placing alternate absentee ballot sites across the entire city to do so. The City of Racine consists of more than seventy-seven thousand people spread across over fifteen and a half square miles, by necessity to achieve the City's goals these alternate absentee ballot sites needed to be spread across the City. All alternate absentee ballot sites were reasonably calculated to achieve these aims while still being as close as practicable to the clerk's office.

II. THE COMPLAINANT'S INTERPRETATION OF POLITICAL ADVANTAGE IS UNWORKABLE.

Complainant alleges that that Clerk McMenamin has selected alternate absentee ballot sites that afford an advantage to the Democratic Party. To do so, the Complainant has hired someone to analyze each ward and determined that the residents each ward, bar one, has voted more for Democratic Party candidates than Republican Party candidates in the last three general partisan elections.² Complainant's conclusion then is that due to the location of the alternate absentee ballot sites in areas that residents vote predominantly for the Democratic Party, Clerk McMenamin has violated the prohibition on designating sites that afford an advantage to any political party under

² Nothing herein should be read as conceding that Complainant's statistical analysis is correct.

Wisconsin Statutes section 6.855.

To begin, the Complainant bases his math on incorrect facts. On May 17, 2022, the City of Racine approved new district wards as part of the redistricting process that occurs every ten years. *See McMnamin Aff. Ex. 1, Ex. 3.* The Complainant combined old ward boundaries that applied in the previous decade and their resultant partisan split with the locations selected for use in the August 9, 2022, primary and November 1, 2022, general election. This was a clear error, evidenced upon the Complaint citing 36 wards in the City of Racine, while the City of Racine now has 49 wards. *Compare* Compl. Ex. E, p. 7, McMnamin Aff. Ex. 1-3. The Complainant then placed those alternate absentee ballot sites within those old wards to argue that the locations are biased in favor of the Democratic Party. The Complainant does not analyze, or even address, whether the alternate absentee ballot sites are still alleged to be biased based upon the new ward boundaries that were in effect for the August 9, 2022, primary election.

It is also important to note that the Wisconsin Statutes section 6.855 does not specify in what way an alternate absentee ballot site may be determined to “advantage” any political party. Complainant has chosen one measure—the voting habits of residents within formerly-established wards. That measure necessarily assumes that only residents of a particular ward cast ballots at alternate absentee ballot sites within that ward. Complainant does not consider such other factors as where voters work or attend school compared to their residences, if alternate sites are near bus routes, if alternate sites are in business districts, industrial districts, or residential districts, if alternate site are adjacent to places people shop or recreate, or any other factor that may be relevant in determining if a particular site advantages or does not advantage any political party.

The problems with Complainant’s interpretation of the statute are apparent. By Complainant’s own math, thirty-five out of thirty-six old electoral wards in the City of Racine

favor the Democratic Party. (Compl. Ex. E.) By Complainant's math the remaining ward, old ward 26, supported the Democratic Party around 45% of the time. The question then arises, where exactly would be an allowable place to locate an alternate absentee ballot site? The City of Racine has no wards in which the percentage of the vote is split evenly between the Republican Party and the Democratic Party.

To the extent that the Complainant argues that Clerk McMenamin has a duty to complete statistical models in an effort only to select sites that are proportionally similar to the total percentage of votes the Democratic Party receives in the City of Racine, such argument is equally absurd for the same reasons. The Complainant's math suggests that 66% of the City of Racine votes for the Democratic Party. The City only had a single ward, old ward 15, which aligns with this percentage of voting. Surely the City would not be required exclusively to place alternate absentee ballot locations in wards that exactly align with the City's voting habits as a whole.

This is notwithstanding the fact that "third party" candidates exist and run in these major elections. *See Johnson v. Wis. Elections Comm'n*, 2021 WI 87, ¶ 49, 399 Wis. 2d 623, 967 N.W.2d 469. Even had City of Racine the ability to select alternate absentee ballot sites that perfectly reflected an even distribution of Republican and Democratic voters, the statute specifies "any political party." These hypothetical sites may show preference for the two major parties at the expense of third parties such as the Green Party and the Libertarian Party or others, a result that under the Complainant's read of the statute would also be prohibited.

Under Wisconsin's method of statutory interpretation, absurd or unreasonable results are to be avoided. *Kalal*, 2004 WI 58, ¶46. It cannot be that the alternate absentee ballot sites are understood to "afford an advantage to any political party" simply by the sake of being located in an area in which the population votes for one party over the others. A result such as this would

practically prohibit nearly every municipality in the state from selecting alternate absentee ballot sites, including municipalities that predominantly support the Republican Party. Further, Complainant's argument ignores the fact that no eligible voter is prohibited or prevented from choosing to use any alternate absentee ballot site—whether sited in their neighborhood or across town—nor prevented from voting in any other lawful manner.

A much more reasonable way to read this clause is as preventing discreet locations that would directly and unambiguously advantage a political party, such as placing a polling place at a political party's local office or at any location where a political party is holding a rally. The City has no plans to place an alternate absentee ballot location at 507 6th Street (the headquarters of the Racine County Democratic Party), 339 Main Street (the downtown location of the Racine County Republican Party),³ or at any location in which a political party is holding a rally.

Even assuming that Complainant's use of old ward boundaries and that statistical analysis would be a correct way to evaluate whether an advantage has been afforded to a political party is correct, the analysis ignores the difference in absentee voting compared to Election Day voting. Election Day voting has voters assigned to a specific polling location, whereas absentee voting at an alternate site is not confined to strict boundaries. Put another way, on Election Day, a voter in old ward 17 must vote at the voter's assigned polling place, whereas if that voter chooses to vote absentee, that voter could attend any of the alternate absentee ballot sites, even those not in the voter's assigned ward, and the clerk would ensure that the voter received the correct ballot. Some locations are situated at the border of wards, for example, the Cesar Chavez Community Center, located at 2221 Douglas Avenue, Racine, is on the border of old ward 17 and old ward 11. While

³ The City is unaware of any third parties having party offices within the City of Racine, but if and when they do so, a reasonable interpretation of the law would prohibit the City from designating their offices as alternate absentee ballot sites.

the Community Center is nominally in old ward 17, it is just as likely that voters in old ward 11 seeking to use an alternate absentee site would use this site. According to Complainant's data, old ward 17 votes for the Democratic Party 73% of the time, while old ward 11 votes for the Democratic Party 62%. The Complainant reports that the City average vote for the Democratic Party is 66%, meaning that this site services individuals in old wards that both voted more often *and* less often for the Democratic Party than the City as a whole. These nuances are not reflected in the Complainant's statistics. Ward boundaries are simply lines on maps, voters are free to vote at any alternate absentee site they so choose, including those closer to their home but outside their ward boundary. Complainant's statistical analysis does not account for the ability of a voter to vote at an absentee ballot site not in the voter's ward.

In sum, the Complainant's reading of the statute would render absurd results that prohibit most, if not all, municipalities from placing alternate absentee ballot sites. The statute cannot be read to require statistical analysis that would in effect prohibit the vast majority of municipalities from selecting any alternate absentee ballot sites. Further, the Complaint bases his statistical analysis on incorrect wards, rendering the analysis useless for elections post-dating the ward changes.

III. THE CITY DID NOT ALLOW VOTING AT THE CITY CLERK'S OFFICE WHILE USING ALTERNATIVE SITES.

The City of Racine properly followed Wisconsin Statutes section 6.855 and did not allow voting and returning absentee ballots in the Office of the City Clerk. The statute clearly states "[i]f the governing body of a municipality makes an election under this section, no function related to voting and return of absentee ballots that is to be conducted at the alternate site may be conducted **in the office of the municipal clerk** or board of election commissioners." Wis. Stat. § 6.855. (emphasis added). As is well known, "statutory interpretation begins with the language of the

statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.” *Kalal*, 2004 WI 58, ¶45 (internal quotations removed). Here the meaning of the statute is clear, the City cannot allow voting in the City Clerk’s office and at alternate absentee ballot sites at the same time.

The City did not allow any votes to be cast or returned *in* the City Clerk’s office, as the Complainant admits. Compl. at ¶ 32. Instead, the Complainant takes issue with the City allowing votes to be cast and/or returned in a different portion of City Hall, a conference room, on a different floor of City Hall from the City Clerk’s office, specifically not part of the City Clerk’s office or overseen by her department.

There is no support in the statute that the voting cannot occur within a specific proximity of the clerk’s office.⁴ Nonetheless, Complainant baseless asserts, without citation to legal authority, “It is no defense for Ms. McMenamin to argue that the in-person absentee ballot voting at City Hall was in a different room than her office.” Compl. at ¶ 31. However, the City only needs to cite Wisconsin Statutes section 6.855 in response. The statute clearly and simply states that voting and returning ballots cannot occur at the city clerk’s office. The City of Racine did not conduct voting in the clerk’s office, nor did it accept the return of ballots in the city clerk’s office. There is no support in the statute stating that the entire building in which the city clerk’s office resides becomes the city clerk’s office by inference. The Complainant is reading requirements into the statute that simply are not there.

IV. THE STATUTE SPECIFYING A LENGTH OF TIME FOR THE SITES TO BE IN EFFECT ONLY APPLIES TO DESIGNATION, NOT USE

The City of Racine has fully complied with the requirement that alternate site designations are in effect for the requisite length of time. Wisconsin Statutes section 6.855 states “An election

⁴ There is irony in the fact that Complainant argues that some designated alternate absentee ballot sites are not as near as practicable to the City Clerk’s office and yet argues that a different room in the same building as the City Clerk’s office is too near too be used.

by a governing body **to designate an alternate site** under this section shall be made no fewer than 14 days prior to the time that absentee ballots are available for the primary under s. 7.15 (1) (cm), if a primary is scheduled to be held, or at least 14 days prior to the time that absentee ballots are available for the election under s. 7.15 (1) (cm), if a primary is not scheduled to be held, and **shall remain in effect** until at least the day after the election.” (emphasis added). The City elected to use alternate sites, and those same alternate site elections will be in use for both primary and general elections.

On December 7, 2021, the City of Racine designated numerous alternate sites, and that designation will remain in effect until at least the day after the November 8, 2022, election. (Compl. Ex. C.) The statute very specifically states “designate” and not “use” and provides a deadline upon which the designation must be made. If the Legislature had wanted to require a municipality continuously to use the sites it designated, the Legislature could draft a statute that states this requirement. It has not done so. The City complied with the designation deadline, and its elections for locations of alternate sites continue through the calendar year of 2022, well past the minimum “in effect” deadline.

V. COMPLAINANT’S ASSERTION THAT THE STATUTES DO NOT SUPPORT THE USE OF A MOBILE VOTING LOCATION IS UNSUPPORTED THE PLAIN LANGUAGE OF THE STATUTE.

The final argument by the Complainant is that the City has used a mobile van as an alternate absentee ballot site when the statute requires a building also fails. Nothing in Wisconsin Statutes section 6.855 requires the use of a permanent building. The statute does not include the word building and does not specify that the alternate sites must be a building.

Further, Respondent misreads the statutes he cites in support of his assertion that the alternate site must be a permanent building. Taken in turn, the first statute he cites is Wisconsin Statutes section 5.25. That statute states in full:

All elections under chs. 5 to 12 shall be held at the polling places provided in this section. The places chosen shall be public buildings, unless the use of a public building for this purpose is impracticable or the use of a nonpublic building better serves the needs of the electorate, as determined by the authority charged with the responsibility for establishing polling places under sub. (2).

A plain reading of the statute shows that polling places must be public buildings, with two exceptions. The first exception occurs if using a public building is impracticable. The second is if the use of a nonpublic building is better to serve the needs of the electorate. These two options are plainly stated in the disjunctive. Both are at the discretion of the governing authority that establishes polling places, in this case, the Racine Common Council. It is clear that the Common Council used its discretion under the first exception, and found that using a public building was impracticable compared to an alternate absentee site such as a van due to the cumbersome nature of the equipment required to be set up and taken down every day. While the Complainant may disagree with this choice, the Common Council used its discretion to find that the use of public buildings compared to a mobile van was “impracticable,” as required under statute.

The next statute cited is inapplicable. Wisconsin Statutes section 6.55(2)(c)1 applies to election day voting, not early voting at alternate absentee sites. The statute states, in part,

As an alternative to registration at the polling place under pars. (a) and (b), the board of election commissioners, or the governing body of any municipality, may by resolution require a person who qualifies as an elector and who is not registered and desires to register **on the day of an election** to do so at another readily accessible location in the same building as the polling place serving the elector's residence or at an alternate polling place assigned under s. 5.25 (5) (b), instead of at the polling place serving the elector's residence.

Wis. Stat. § 6.55(2)(c)1 (emphasis added). The City has not used the mobile voting vehicle on the day of an election and has no plans to use it on an election day. The statute is inapplicable to alternate absentee ballot sites. Under Wisconsin Statutes section 6.55(2)(b), an individual may register to vote at an alternate absentee ballot site, again with no mention of the word “building.”

The third statute cited has the same error as the second. Wisconsin Statutes section

12.03(2)(b)2 states that “No person may engage in electioneering during the hours that absentee ballots may **be cast on any public property within 100 feet of an entrance to** a building containing the municipal clerk’s office or **an alternate site under s. 6.855.**” (emphasis added). Again, it is clear that the statute contemplates that voting will be done in one of two locations, either a building containing the municipal clerk’s office, or at an alternate site under section 6.855, citing to a statute in which the word “building” does not appear. The City opted to use an alternate site, which does not require the use of a building.

The final statute cited by the complainant, Wisconsin Statutes section 6.88, relates to the chain of custody required upon the return of absentee ballots. The statute states, in pertinent part, “The clerk shall keep the ballot in the clerk’s office or at the alternate site, if applicable until delivered, as required in sub. (2).” Again, a municipal clerk has been granted two options, either store the ballot at the clerk’s office, or store the ballot at the alternate site. City Clerk McMenamin has opted to store the ballots at the clerk’s office.

The assertion that storing ballots in the clerk’s office would be in violation of Wisconsin Statutes section 6.855 is unsupported by the plain text of the statute. Section 6.855 clearly prohibits two actions at the clerk’s office while alternate absentee ballot sites are used, voting a ballot and returning an absentee ballot. Storing ballots voted elsewhere and returned elsewhere is not a prohibited activity in in the clerk’s office as asserted by Complainant.

CONCLUSION

Taken as a whole, Complainant’s Complaint does not demonstrate that “absentee ballots [were] cast in a manner inconsistent with Wis. Stat. § 6.855.” The city clerk has not violated any portion of any statute cited in the complaint. The City of Racine’s use of a mobile alternate absentee ballot site is well within the requirements of the relevant statutes. The Complaint should

be dismissed.

Dated this 29th day of August, 2022.

Respectfully submitted,

s/ Ian R. Pomplin

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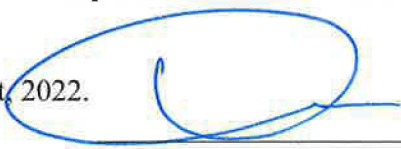
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VERIFICATION

I, Tara McMenamin, being first duly sworn upon oath, state that I personally read the above verified Response, and that the above Response is true and correct based upon my personal knowledge.

Dated this 29th day of August, 2022.



Tara McMenamin
City Clerk, City of Racine

STATE OF WISCONSIN)
)ss.
COUNTY OF RACINE)

Subscribed and sworn to before me this 29th day of August, 2022, by



Signature
Notary Public, State of Wisconsin
My commission expires 10-14-22

