

Ryan J. Walsh

10 East Doty Street, Suite 800  
Madison, Wisconsin 53703  
(608) 441-5798  
rwalsh@eimerstahl.com

October 19, 2020

**VIA EMAIL TO SHILOHJRAMOS@YAHOO.COM  
AND WISCONSINAUCTIONSERVICE@GMAIL.COM**

Shiloh J. Ramos and Thomas J. Egan  
Chairman and Vice Chairman of the Winnebago County Board of Supervisors  
415 Jackson Street  
Oshkosh, Wisconsin 54901

Re: Draft Ordinance 096-102020: Proposed Amendments to Section 11.08  
of the General Code of Winnebago County

Dear Dr. Ramos and Mr. Egan:

We represent Wisconsin Manufacturers and Commerce and the Oshkosh Chamber of Commerce. We have reviewed your newest proposed amendments to Section 11.08 of the General Code of Winnebago County, as described in Draft Ordinance 096-102020. These amendments purport to grant the Winnebago County Health Officer the same powers granted to the State Department of Health Services (DHS): specifically, the power to issue orders for guarding against the introduction of any communicable disease into his or her jurisdiction, for the control and suppression of communicable diseases, for the quarantine and disinfection of persons, localities, and things infected or suspected of being infected by a communicable disease, and for the sanitary care of schools, public buildings, and other places. Yet, as was true of the County's original proposal, the County is prohibited from granting these powers to its Health Officer. An order by the Health Officer under this proposed ordinance would therefore be unlawful for the same reasons that the Wisconsin Supreme Court invalidated DHS's lockdown order in *Legislature v. Palm*, 2020 WI 42. Further, no "affirm[ation]" by the Board of Supervisors of the Health Officer's general orders could cure those orders' legal defects. The Board of Supervisors exercises its lawmaking authority only by passing ordinances and resolutions, and the proposed "affirm[ation]" process is insufficient to enact an ordinance or resolution. The Health Officer's orders thus would not fall under either the statutorily granted powers of local health officers or the lawmaking powers of the Board of Supervisors and would therefore be invalid. The draft ordinance should therefore not be adopted.

1. On August 5, 2020, we wrote to you regarding your proposed amendments to Section 11.08 of the General Code of Winnebago County, as described in draft resolution 027-062020. Those amendments purported to grant the Winnebago County Health Officer an extremely broad range of powers over the people of this County—

powers that would exceed even those of DHS. In particular, the proposal sought to permit the Health Officer to establish systems of communicable-disease surveillance and inspection; enter private property with an inspection warrant; issue all manner of orders that, in the Health Officer's opinion, might help slow the spread of a virus; order quarantines; close schools; and, if that list were not sweeping enough, to "authorize and implement all emergency measures necessary to control communicable diseases." We explained in our letter, however, that the County lacks authority to grant—in fact, is prohibited from granting—its Health Officer those remarkable powers. It followed that an overbroad order by the Health Officer, under the proposed ordinance, if adopted, would itself be unlawful for the same reasons that that DHS's lockdown order was invalidated by the State Supreme Court in *Legislature v. Palm*, 2020 WI 42. We therefore urged the County not to adopt the proposed amendments, and we were pleased that the County did not again propose the Resolution.

But then, on October 9, we learned that you were considering a new proposal. That proposal would grant the Winnebago County Health Officer the power to "issue orders for guarding against the introduction of any communicable disease into his or her jurisdiction, for the control and suppression of communicable diseases, for the quarantine and disinfection of persons, localities and things infected or suspected of being infected by a communicable disease and for the sanitary care of schools, public buildings, and other places." The proposal also provides that "[a]ny General Order" of the County Health Officer "is advisory only until reviewed and reaffirmed or revised and affirmed by the Winnebago County Board of Supervisors at its next regularly-scheduled meeting or within 14 days, whichever is earlier."

**2.** The latest proposal, however, does not mend the legal infirmities of the first. It mirrors them. Therefore, it should not be adopted.

To begin, the County once again has cited no statute authorizing the County to adopt this ordinance. "A county is a creature of the legislature and as such, it has only those powers that the legislature by statute provided." *Jackson Cty. v. State, Dep't of Nat. Res.*, 2006 WI 96, ¶ 16. Thus, "a county board must have a statutory source upon which the power it exercises is based." *State ex rel. Teunas v. Kenosha Cty.*, 142 Wis. 2d 498, 503–04 (1988).<sup>1</sup> Here, the County has invoked only Wis. Stat. §§ 66.0113, 66.0119, and 251.06(3), as well as Wis. Stat. Ch. 252.<sup>2</sup> But none of these statutes permits counties to expand the powers and duties of their local health

---

<sup>1</sup> Additionally, the County cannot delegate to the local health officer power that the County itself does not have. See *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶¶ 23, 28.

<sup>2</sup> To the extent that the County relies on DHS regulations or its own ordinances as sources of authority, these enactments cannot provide the County with authority to regulate. Because the County's authority comes entirely from the Legislature, only legislation can provide the County with authority to pass an ordinance. See *Jackson Cty.*, 2006 WI 96, ¶ 16 ("Wisconsin courts consistently have interpreted counties' powers as arising solely from the statutes.").

officers. Section 66.0113 grants counties the authority only to “adopt and authorize the use of a citation . . . to be issued for violations of ordinances.” Wis. Stat. § 66.0113. And Section 66.0119 simply allows “peace officer[s]” to obtain special inspection warrants. Wis. Stat. § 66.0119. Meanwhile, Chapter 252 spells out local health officers’ duties; it does not empower counties to *augment* them. Similarly, Section 251.06(3) elaborates on the powers and duties of a local health officer, including requiring local health officers to enforce ordinances that are “consistent with state public health statutes and rules.” Wis. Stat. § 251.06(3). Again, this statute grants no power to the counties to augment the powers of their local health officers.

Even if the County could point to some statutory basis for the ordinance, the ordinance would nevertheless be invalid because it would be preempted by state law. When a municipality adopts an ordinance that, “while addressed to local issues, concomitantly regulate[s] matters of statewide concern,” the municipality’s “authority is limited to ordinances that complement rather than conflict with the state legislation.” *State ex rel. Ziervogel v. Washington Cty. Bd. of Adjustment*, 2004 WI 23, ¶ 37 (citation omitted). To determine whether an ordinance conflicts with state legislation, when a county regulates “in areas where the legislature has adopted uniformly applicable statutes on matters of statewide concern,” courts apply four tests to determine the regulation’s validity. *Id.* ¶ 38. Courts ask “1) has the legislature withdrawn the power of municipalities to act; 2) does the local ordinance logically conflict with the state legislation; 3) does the ordinance defeat the purpose of the state legislation; or 4) does the ordinance go against the spirit of the state legislation?” *Id.* If a county’s ordinance meets “any one of these tests,” then the ordinance conflicts with state legislation and therefore “is void.” *Id.* (citation omitted).

Here, the Legislature has enacted uniform statutes of statewide concern directly addressing the powers of DHS and local health officials to handle communicable diseases. The protection of the public health is part of the State’s “police power” and is a matter of statewide concern. *See Wisconsin’s Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 533 (1978). Indeed, the Legislature has stated as much, explaining that “[t]he legislature finds that the provision of public health services in this state is a matter of statewide concern.” Wis. Stat. § 251.001. Accordingly, the Legislature has created a comprehensive scheme for the supervision and protection of public health and has allocated authority between the State Department of Health Services and local health departments and officers. The Legislature has directed that DHS “shall . . . [s]erve as the state lead agency for public health” and “has general supervision throughout the state of the health of citizens.” Wis. Stat. §§ 250.03(1), .04(1). By comparison, local health officers are primarily tasked simply with enforcing the public-health laws and regulations. Wis. Stat. § 251.06(3). In any case, nowhere are counties empowered to *add* to the list of local health officials’ powers and duties that is already set forth by state statute.

Regarding communicable diseases in particular, the Legislature granted specific powers to DHS and specific powers to local health officers. As to DHS, the Legislature provided that DHS “may,” among other things, “establish systems of disease surveillance and inspection to ascertain the presence of any communicable disease,” “issue orders for guarding against the introduction of any communicable disease into the state, for the control and suppression of communicable diseases, for the quarantine and disinfection of persons, localities and things infected or suspected of being infected by a communicable disease and for the sanitary care of . . . schools, and public buildings and connected premises,” and “authorize and implement all emergency measures necessary to control communicable diseases.” Wis. Stat. § 252.02. As to local health officers, the Legislature provided that they “shall promptly take all measures necessary to prevent, suppress and control communicable diseases” and “may inspect schools and other public buildings . . . as needed to determine whether the buildings are kept in a sanitary condition.” Wis. Stat. § 252.03(1). Additionally, “[l]ocal health officers may do what is reasonable and necessary for the prevention and suppression of disease” and “may forbid public gatherings when deemed necessary to control outbreaks or epidemics.” Wis. Stat. § 252.03(2).

Under this legislative scheme addressing an issue of statewide concern, Winnebago County’s proposal would be invalid for three independent reasons: it logically conflicts with state law, it defeats the purpose of state law, and it goes against the spirit of state law. That the Legislature granted DHS certain powers—for example, to issue orders for guarding against and controlling communicable diseases and for the quarantine of persons and places—but, in the very next statutory section, *declined* to grant the same authority to *local* health officers reflects a clear intent not to vest local health officers with that authority. *See Gister v. Am. Fam. Mut. Ins. Co.*, 2012 WI 86, ¶ 33; *see also* Order Issuing Temporary Injunction, *St. Ambrose Academy v. Parisi*, No. 2020AP1446-OA, at 3 (Wis. Sept. 10, 2020) (“Both Wis. Stat. § 252.02 and Wis. Stat. § 252.03 were drafted at the same time and by the same legislature, so no historical quirk or later amendment . . . would suggest anything other than the legislature granted DHS and local health officers different powers.”). By exceeding Section 252.03’s more limited terms, Winnebago County’s proposal directly conflicts with state law. *See Wis. Envtl. Decade*, 85 Wis. 2d at 535. Likewise, Winnebago County’s proposal also defeats the purpose and the spirit of state law. The Legislature intended that DHS alone would have “general supervision throughout the state of the health of citizens” and be “the state lead agency for public health.” Wis. Stat. §§ 250.03(1), .04(1). Granting local officers the same powers as DHS would plainly undermine the Legislature’s “clear [ ] purpose to establish the department as the ‘central unit of state government’ with ‘general supervision’” over public health. *See Wis. Envtl. Decade*, 85 Wis. 2d at 535–36.

3. Perhaps to avoid the previous amendment’s legal deficiencies, the current proposal provides that any general order “is advisory only until reviewed and

reaffirmed or revised and affirmed by the Winnebago County Board of Supervisors.” Proposed Ordinance 096-102020. But there is no procedure in the Wisconsin Statutes for a County Board of Supervisors to “affirm” and thereby cure an otherwise unlawful order of an officer. If the Board of Supervisors wishes to enact law, it may do so by passing an ordinance or resolution. The ordinance or resolution must be within the Board’s power to enact, and the enactment must follow certain procedures, including review and possibly veto by the county executive. Failure on either count makes the ordinance or resolution invalid. Because the proposed procedure by which the Board intends to “affirm[ ]” a health officer’s general order does not follow the procedure required to enact ordinances or resolutions, any affirmation would have no legal effect.

4. Finally, although DHS’s recently issued Emergency Order 3 encourages localities to adopt lockdown rules stricter than those issued by the executive branch, Emergency Order 3 is itself invalid and unenforceable, so it could not possibly augment local government authority. Four months ago, the Supreme Court of Wisconsin held that a document issued by DHS that purported to “regulate[ ] all persons in Wisconsin . . . and . . . all who will come into Wisconsin in the future” is “a general order of general application” and therefore subject to the “statutory emergency rulemaking procedures established by the Legislature” in the Administrative Procedure Act (Chapter 227). *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶¶ 24, 58. The Court also held that, when the rulemaking procedures of Chapter 227 apply but are not followed, any resulting agency directive—no matter the title the agency gives it—“is unenforceable.” *Id.* ¶ 58. Emergency Order 3 also purports to “regulate[ ] all persons in Wisconsin . . . and . . . all who will come into Wisconsin in the future.” *Id.* ¶ 24. It is therefore a “general order of general application” and subject to the Administrative Procedure Act’s emergency-rulemaking procedures. And because the State Legislature’s Joint Committee for Review of Administrative Rules has used its Wis. Stat. § 272.26(2)(b) authority to determine that Emergency Order 3 is an unpromulgated rule, Emergency Order 3 is no longer in effect and therefore cannot supplement Winnebago County’s authority. For these reasons, Emergency Order 3, in its current form, “is unenforceable.” *Id.* ¶ 58.

\* \* \*

We share your concern for the health and safety of all residents and businesses in this County. But Proposed Ordinance 096-102020 would be unlawful and therefore should not be approved.

October 19, 2020

EimerStahl<sub>LLP</sub>

Sincerely,



Ryan J. Walsh  
EIMER STAHL LLP



Amy C. Miller  
EIMER STAHL LLP

cc: Mary Anne Mueller, Corporation Counsel  
Mark Harris, County Executive  
Members of the Winnebago County Board of Supervisors