



October 22, 2020

Administrator Steve O'Malley & Board Chair Monica Kruse
212 6th St. N.
La Crosse, WI 54601

Delivered via electronic mail

Administrator O'Malley & Chair Kruse:

My name is Corydon Fish and I am the general counsel for Wisconsin Manufacturers and Commerce (WMC). I am writing because La Crosse County (the County) has issued a "County Health Department Advisory Order" (Order). This Order is legally deficient, and will inflict significant economic harm upon the citizens and businesses of La Crosse County.

WMC is the state chamber of commerce and largest general business association in Wisconsin. We were founded over 100 years ago, and are proud to represent approximately 3,800 member companies of all sizes, and from every sector of our economy, many of whom are located right here in La Crosse County. Our mission is to make Wisconsin the most competitive state in the nation in which to do business. **One way WMC works to make our mission a reality is to push back against ill-conceived and unlawful micromanagement of businesses by local units of government.**

WMC understands and appreciates the public health concerns revolving around the COVID-19 pandemic. Indeed WMC has been in constant contact with our members and the business community at large to operate in a safe and responsible manner that protects both their employees and customers. WMC believes this education, rather than regulatory mandates including this "advisory" Order, is the best way to collaboratively move forward and slow the spread of COVID-19.

While the County claims the Order is "advisory," likely to protect against public backlash, the plain language of the Order makes clear it is enforceable and it puts the livelihoods of county residents and the existence of local businesses at stake. In order to claim the Order is "advisory" the County states that *if you violate a standard in the Order* the health department must first issue you a "directive," which is then enforceable. Violating an order or directive is a distinction without a difference. Either way, the County is creating a system through which they can fine local businesses and suspend or withdraw local permits, which can effectively force businesses to stop operating, resulting in more business closures and unemployment in the middle of one of the worst economic crises in modern history (Order at 5; La Crosse County Ordinance § 11.25). Using such strong enforcement measures is deeply concerning at any time, but it is all the more concerning given the County likely does not have the authority to implement or enforce the Order in the first place.

The County's Order goes beyond the authority the legislature delegated to local public health officers in Wis. Stat. § 252.03. The County takes various sections of § 252.03 out of context to weave together "authority" to implement a local version of Governor Evers' Emergency Order 3¹. The County selectively cites general language in the statute while omitting the more specific powers that constrain the general language. These more specific powers include:

- Investigate on the health conditions to the state.
- Report on health conditions to the state.
- Inspect schools and other public buildings to determine if they are in sanitary condition.

Wis. Stat. § 252.03(1)-(2). The statute's broad language must be read together with the more narrow text. In order to avoid surplusage, the general grant of authority cannot be so broad as to swallow up these narrower actions by public health officials. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 663, 681 N.W.2d 110. The County's reading of the statute would do just that, and therefore is likely not a valid interpretation of the law.

Further, the authority the County believes is conferred upon unelected unaccountable local bureaucratic officials is substantively the same as the authority that the Wisconsin Supreme Court ruled the state Department of Health Services did not have. Specifically, the Order recreates capacity restrictions, limitations on public gatherings, and the distinction between "essential" and "non-essential" businesses. In *Legislature v. Palm* the court struck down slightly more strict capacity limits (0% instead of 25%), limitations on public gatherings of healthy individuals, and the ability to distinguish between essential and non-essential businesses. 2020 WI 42, ¶¶49-50, 59. For many restaurants and other businesses, a 25% capacity limit (which includes staff) is too low to be profitable and will lead to closures, up to 50% of which could be permanent.² The County's authority under Wis. Stat. § 252.03(2) is similar to – but more narrow than – the state's authority under Wis. Stat. § 252.02(6). It is narrower because the County's authority is cabined by the word "reasonable," notably absent from the statutory language describing the authority of the State. If the state did not have the authority to take similar actions, then it is unlikely the County does here.

The County's Order is both legally suspect and bad public policy that will simply create confusion, uncertainty, and fear, which will negatively impact local employers, workers, and customers. WMC encourages the County to provide certainty to its residents by ensuring that any order related to protecting the public health is clearly within the bounds of its authority under state law. WMC respectfully requests the county board withdraw the Order and start from scratch with input from the broader La Crosse County community on how to draft a fair,

¹ http://www.thewheelerreport.com/wheeler_docs/files/100620dhsthing_02.pdf

² <https://spectrumnews1.com/wi/madison/news/2020/10/08/wisconsin-restaurant-association---50--of-restaurants-are-at-risk-of-going-out-of-business--under-governor-s-new-order>

transparent, practical and lawful ordinance that balances both public health and economic considerations.

Sincerely,

Corydon Fish
General Counsel

cc: La Crosse County Board of Supervisors