



November 10, 2020

Interim Administrator Ken Witt & Chair David Peterson
St. Croix County Court House
1101 Carmichael Rd.
Hudson, WI 54016

Delivered via electronic mail

Interim Administrator Witt & Chair Peterson:

My name is Corydon Fish and I am the general counsel for Wisconsin Manufacturers and Commerce (WMC). I am writing because St. Croix County (the County) is considering passage of a new ordinance entitled “Chapter 41 COVID-19 Communicable Disease Ordinance” (Ordinance). This Ordinance is legally deficient, and will likely rob many St. Croix County residents of their livelihoods.

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 St. Croix 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 unlawful regulatory mandates, including this Ordinance, is the best way to collaboratively move forward and slow the spread of COVID-19.

To begin, the County has cited no statute authorizing it 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). Here, the County has invoked only Wis. Stat. §§ 252.03 and 252.25. Neither of these statutes permit counties to expand the powers and duties of their local health officers. Wis. Stat. § 252.03 spells out local health officers’ duties; it does not empower counties to *augment* them. Similarly, Section § 252.25 allows for a local unit of government to penalize individuals for violating *valid* local ordinances, which the County’s Ordinance is not. The section does not provide authority to the County to create the Ordinance itself.

The County cannot claim Wis. Stat. § 252.03 as its source of authority to expand the power of local health officers because the statute does not give the County any authority to transfer lawmaking power to these officers. *See Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶¶ 23, 28. Wis. Stat. § 252.03 does not provide any authority to local legislative bodies, such as the ability for County’s board of supervisors, to pass an ordinance giving the local health officer authority to create orders, rather it prescribes authorities delegated directly to local health officers. Further, the statute does not give local public health officers the authority to implement orders of any kind, let alone the incredibly broad “orders of general application” envisioned in the Ordinance. In fact, the statute does not contain the word “order” at all.

The County’s Ordinance goes far beyond the statutory authority given to local health officers in Wis. Stat. § 252.03. Any attempt by the County to draw authority for their local health officer to issue “orders of general application” from the broad and vague language in § 252.03 cannot succeed because the statute grants narrow specific powers to local health officials. 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.

It is also important to note the local health official’s authority to create an order in the County’s Ordinance is substantively identical to Governor Evers’ Emergency Order 3, which was recently deemed invalid and unenforceable by the Wisconsin Court of Appeals.¹ *See Tavern League of Wisconsin, Inc. v. Andrea Palm*, No. 2020CV128 (Wis. Ct. App. Nov. 6, 2020).

Further, the authority the County believes it can confer 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. *Palm*, 2020 WI 42, ¶¶ 49-50, 59. For many restaurants and other businesses, a 25% capacity limit

¹ <https://www.tmj4.com/news/coronavirus/wisconsin-appeals-court-rules-evers-covid-19-order-is-invalid-and-unenforceable>

(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 Ordinance 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 ordinance related to protecting the public health is clearly within the bounds of its authority under state law. WMC respectfully requests the County Board vote down the Ordinance and start from scratch with input from the broader St. Croix County community on how to draft a fair, transparent, practical and lawful ordinance that balance both public health and economic considerations.

Sincerely,

/s/ Corydon Fish
General Counsel

cc: St. Croix County Board of Supervisors

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>