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August 4, 2020

To: Janel Heinrich, Director—Public Health Madison & Dane County

Re: Memorandum Regarding Authority of PHMDC to Enforce COVID-19 Emergency Orders on State-Owned Property Within the City.

Executive Summary

The City Attorney's Office has been asked what authority PHMDC has to enforce its COVID-19 emergency orders on State-owned property within the City of Madison. It is the City Attorney's Office's opinion that the emergency orders are enforceable within the City under Madison General Ordinances Section 7.05(6) and are a lawful exercise of the City's statutory home rule authority under Wis. Stat. § 62.11(5). However, PHMDC does not have the authority to enforce its orders against the State of Wisconsin and the University of Wisconsin-Madison, including their departments, agencies, employees and agents acting within their official capacities. While the orders may be enforceable against non-State employees/agents on State property, it is important to note that there is reason to believe that this legal opinion is not shared by the University or the State, who may assert that the City is preempted from enforcing the order, or other City ordinances, on State lands. Unfortunately, there is no clear legal authority on this issue. Given the legal uncertainty and likely challenges in enforcing the orders on State lands, it is advisable to pursue continued cooperation and communication with the State and the University to minimize and combat the spread of COVID-19 on campus and in the Madison and Dane County area.

Doran Viste

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Doran Viste
Assistant City Attorney

CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, CCB
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MEMORANDUM

TO: Janel Heinrich, Director—Public Health Madison & Dane County

FROM: Doran Viste, Assistant City Attorney

DATE: August 4, 2020

RE: Authority of the City and PHMDC to enforce the COVID-19 emergency orders against persons on State-owned property within the City

A question has been raised as to whether the local public health orders relating to the ongoing COVID-19 pandemic are enforceable against persons on State-owned property, including the State Capitol grounds and the University of Wisconsin-Madison lands, within the City of Madison. It is my opinion that these public health orders are enforceable against people on State-owned lands (other than State employees acting in their official capacities). However, these orders are not enforceable against the State itself.

The Emergency Orders are Lawful and Enforceable Within the City

Public Health Madison and Dane County (PHMDC) was created in 2007 pursuant to the authority provided by Wis. Stat. § 251.02(1m) and under the terms of an intergovernmental agreement entered into between the City of Madison and Dane County pursuant to Wis. Stat. § 66.0301. Under Wis. Stat. § 251.06, the powers of the local health department are administered by the "local health officer", which, as it relates to PHMDC, is the Director of Public Health Madison & Dane County (the Director).[1] Under Wis. Stat. § 251.08, the jurisdiction of PHMDC "shall extend to the entire area represented by the governing body of the county, city, village or town that established the local health department, except that the jurisdiction of a… city-county health department does not extend to cities, villages and towns that have local health departments."

Since March, 2020, a series of local emergency orders have been issued by the Director under the authority provided by Wis. Stat. § 252.03 and a determination that it was necessary to prevent, suppress and control the spread of COVID-19 in the community.[2] This statute directs and empowers the Director to take certain actions to investigate and take action to prevent the spread of communicable diseases. Under § 252.03(1), the Director "shall promptly take all measures necessary to prevent, suppress and control communicable diseases", and is required to report on the status of the disease and the

1 See MGO Sec. 7.02, DCO 46.03(6), and VI.B.3.a. of the 2007 Intergovernmental Agreement Between the City of Madison and Dane County for Creation of City-County Health Department.

2 The most recent order as of the date of this memo, Emergency Order #8, was issued on July 7, 2020 and went into effect on July 13, 2020. The most recent order(s) can be found at PHMDC's website: https://publichealthmdc.com/coronavirus.

measures taken to the Board of Health for Madison and Dane County. Under § 252.03(2), the Director "may do what is reasonable and necessary for the prevention and suppression of disease; may forbid public gatherings when deemed necessary to control outbreaks or epidemics and shall advise the department on measures taken." While the State of Wisconsin Department of Health Services (DHS) has been afforded similar, albeit somewhat different, powers under Wis. Stat. § 252.02, it is important to note that the exercise or non-exercise of those powers by the State does not expressly restrict the authority of the Director to separately act under § 252.03.[3] Ultimately, the Director is accountable to the Board of Health for Madison and Dane County, as well as, under the terms of her employment contract, the County Executive and the Mayor.

As the Emergency Orders are a lawful exercise of the Director's powers under § 252.03, the question then is how the Director and PHMDC enforces the Orders. Within the City of Madison, as indicated in the Emergency Orders themselves, the Orders are enforced under MGO Sec. 7.05(6). Under this subsection, it is unlawful for "any individual to create or permit a health nuisance." Assuming that a violation of an Emergency Order would amount to a "health nuisance"[4], a violation of the Order would thus be an ordinance violation of Sec. 7.05(6), subject to citations of $376 for a 1st offense, $691 for a 2nd offense, and $1,321 for 3rd and subsequent offenses. Citations for violations of this ordinance may be issued by the Madison Police Department or PHMDC.

The City's ordinance allowing enforcement of the terms of the Emergency Orders is a lawful exercise of the City's statutory home rule authority granted under Wis. Stat. § 62.11(5). This subsection grants cities the following powers:

> Except as elsewhere in the statutes specifically provided, the council shall… have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.

The City's statutory home rule is very broad, but it is not unlimited. It may be expressly limited by State law. In addition, the City may not enact and enforce laws that affect a matter of statewide concern, or that may impact certain matters that are both a statewide and local concern. While the issuance of the Emergency Orders and the enforcement thereof could be viewed as a purely local concern, even if viewed as a matter of both statewide and local concern the City would not be preempted from enforcement. In such "mixed bag" matters, the local ordinance must pass the *Anchor* test to avoid preemption (*Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis. 2d 391, 355 N.W.2d

3 Also of importance is that, in striking down the Department of Health Services "Safer at Home" public health order in *Wisconsin Legislature v. Palm*, 2020 WI 42, the Supreme Court only addressed the Department's authority under Wis. Stat. § 252.02. The Court did not address, in any way, the local health officer's authority under Wis. Stat. § 252.03 and therefore that ruling is not directly controlling on the exercise of these powers. *See* also OAG-03-20 (May 15, 2020).

4 A "health nuisance" is defined at MGO Sec. 7.05(2) as "a substance, activity or condition that is known to have the potential to cause acute or chronic illness, to endanger life, to generate or spread infectious diseases, or otherwise injuriously to affect the health of the public."

234 (1984)). Under the *Anchor* test, there are four factors that a court looks at to determine if the local regulation is preempted:

> (1) whether the legislature has expressly withdrawn the power of political subdivisions to act; or
> (2) whether the political subdivision's actions logically conflict with the state legislation; or
> (3) whether the political subdivision's actions defeat the purpose of the state legislation; or
> (4) whether the political subdivision's actions are contrary to the spirit of the state legislation.

Adams v. State of Wisconsin, 2012 WI 85, ¶ 32 (internal citations omitted).

Looking at the *Anchor* factors, there is no state law that expressly limits the powers of cities to enforce public health orders issued under the authority of § 252.03. Nor would the City's ordinance conflict with any state legislation, defeat the purpose of any state legislation, or be contrary to the spirit of any state legislation. Indeed, the issuance of the Emergency Orders and the enforcement thereof would appear to be entirely consistent with the state legislation and the authority provided the Director under § 252.03.

As the City's ordinance allowing for enforcement of the Emergency Orders (MGO Sec. 7.05(6)) is not preempted by any state law and is a lawful exercise of the City's statutory home rule authority and the specific authority granted to the Director under § 252.03, the Emergency Orders are lawful and enforceable within the City.[5]

The Emergency Orders are Not Enforceable Against the State or its Agents

The City's ordinances are generally enforceable against any person or entity within the boundaries of the City, and PHMDC's jurisdiction extends over the entire City and County.[6] However, with some exceptions, the City may not enforce its ordinances against the State of Wisconsin or the United States, including their departments, agencies, and employees and agents acting in their official capacity. Both the State and Federal governments have waived their respective sovereignty on some issues, thereby subjecting themselves to limited local regulation. For example, under Wis. Stat. § 13.48(13)(a), every State building project is subject to local zoning ordinances (although the building is not subject to local building codes or permitting requirements). The State has not waived its sovereignty regarding the enforcement of the Emergency Orders. As a result, the Emergency Orders are not enforceable under MGO 7.05(6) against the State of Wisconsin, including the University of Wisconsin-Madison, or its employees or agents while acting in their official capacity.

5 This memo does not address the enforceability of the Emergency Order outside the City.
6 Under Wis. Stat. § 251.08, because there are no other city, village or town local health departments within Dane County, PHMDC's jurisdiction covers the entire County. There is no provision that would allow the State to establish its own local health department that would supersede this authority.

The Emergency Orders are Enforceable Against Persons on State Property

While the sovereign, the State, is exempt from local regulations except where it has waived that sovereignty, the same is not true of persons who may be on State-owned property. In fact, there is no statute that makes a person exempt from local ordinances upon stepping foot on State-owned land located within a municipality. State-owned land, whether it be a part of the University of Wisconsin-Madison campus, the Capitol grounds, or the Hill Farm office building, does not cease to be in the City merely because it is owned by the State. A person does not obtain the sovereign's shield by their mere presence on the sovereign's land. Quite simply, state-owned land, in the absence of an express statute to the contrary, is not a safe zone where local ordinances do not apply. To conclude otherwise would be contrary to, and an infringement upon, the City's home-rule authority.

Perhaps some of the confusion on this issue arises because campus police lack the authority to enforce local ordinances (unless deputized to do so). Also, the Board of Regents has its own authority to promulgate enforceable rules on University of Wisconsin property, which rules act very much like local ordinances.[7] In addition, campus police or other State police agencies (such as the Capitol Police) may patrol state owned properties and be the first responding officers to calls from those locations. However, advancing interests of comity among law enforcement agencies and between governments does not mean that the City's ordinances do not also apply to persons on these properties. Indeed, as it relates to campus jurisdiction, Wis. Stat. § 36.11(2)(a) has provided the Board of Regents with "concurrent police power, with other authorized peace officers" over University property. In addition, "[s]uch concurrent police authority shall not be construed to reduce or lessen the authority of the police power of the community or communities in which a campus may be located." The Capitol Police, meanwhile, have the authority to provide police and security services at state owned buildings and facilities, but nothing in Wis. Stat. § 16.84(2) "limits or impairs" local police authority.[8] Concurrent jurisdiction, in the absence of any express language to the contrary, means that City ordinances do still apply to persons on State-owned lands, even though, it should be recognized, City officials are unlikely to be called to the property for ordinance enforcement purposes.

Unfortunately, the thought that local ordinances cannot be enforced against persons on State-owned property seems to arise from a 1979 Attorney General opinion that not only misinterpreted prior precedence, but reached a dubious and unfounded conclusion.

In the annotations for Wis. Stat. § 36.11, which details the powers and duties of the board of regents, it indicates that, under § 36.11(2), "Local ordinances are not applicable on

7 See Wis. Admin Code ch. UWS 18.

8 § 16.84(2) specifically states "Nothing in this subsection limits or impairs the duty of the chief and each police officer of the police force of the municipality in which the property is located to arrest and take before the proper court or magistrate persons found in a state of intoxication or engaged in any disturbance of the peace or ***violating any state law*** in the municipality in which the property is located, as required by s. 62.09 (13)." While this language could be read to conclude that local law enforcement may only arrest people on property patrolled by the Capitol Police for intoxication, disturbing the peace or a state law violation, nowhere else in this subsection, or elsewhere in the statutes, are any local enforcement powers on properties patrolled by the Capitol Police withdrawn or limited. Lacking any express language to that effect, this inference is not enough to limit municipal authority under the exercise of its statutory home rule authority.

campus." This statement is attributable to 68 Atty. Gen. 67, which is a 1979 Opinion of the Attorney General in which the Attorney General was asked whether a local municipal court would have jurisdiction to handle violations of local ordinances occurring on a University of Wisconsin campus. The Attorney General answered as follows:

> Property of the state is exempt from municipal regulation in the absence of waiver on the part of the state of the right to regulate its own property. *Milwaukee v. McGregor*, 140 Wis. 35, 37, 121 N.W. 642 (1909); 62 C.J.S. Municipal Corporations sec. 157, pp. 319-320. Therefore, since there is no statute waiving the right of the state to regulate its campus property, local ordinances would not be applicable on campus.
>
> This does not mean, however, that local police are powerless to arrest for violations of state law which occur on campus property. Section 36.11(2)(a), Stats., expressly provides that it "does not impair the duty of any other peace officers within their jurisdictions to arrest and take before the proper court persons found violating any state law on property under the jurisdiction of the board."

OAG 23-79, issued on March 1, 1979 (68 Op. Atty Gen. Wis. 67).

For starters, it is important to note that, while an Opinion of the Attorney General may provide guidance to State officials, this Opinion it is not a statement of law. It has persuasive value only and courts are not bound by these opinions.

Looking then at the Opinion itself, the author relies upon two sources of authority—neither of which actually support the conclusion made. The citation to *Corpus Juris Secundum*, a secondary source, states:

> The municipality cannot impose regulations upon the state that contradict or exceed those to which the state consents to subject itself, and is exempt from municipal regulation, although state agencies are subject to local laws and regulations when acting in a proprietary capacity.

62 C.J.S. Municipal Corporations § 210.[9] In the *McGregor* case, the Supreme Court was asked whether a City's ordinance regulating the construction of buildings applied to the construction of a State building. The Court found that the City's ordinance didn't apply because the construction itself was the subject of special legislation that superseded any local or general legislation to the contrary and also by applying "the familiar principle that statutes, in general terms, do not apply to acts of the state." Milwaukee v. McGregor, 140 Wis. 35, 37 (1909). However, the City is not looking to regulate the State itself here—but rather people on State property acting contrary to the Emergency Orders. The *McGregor*

9 It appears that the sections contained in Vol. 62 of C.J.S. Municipal Corporations have changed since 1979 when used by the Attorney General in the opinion. § 157 currently addresses the City's home rule authority: "Constitutional and statutory provisions relating to home rule are intended to enlarge rather than abridge the powers of municipal corporations, their purpose being to secure to such corporations a greater degree of home rule than they formerly possessed. In order to carry out such intention, the provisions should be liberally construed." This language actually supports the City's arguments. It appears that § 157 from 1979 is likely now § 210, which section addresses the exercise of municipal authority against the State and is consistent with the context used in the Opinion of the Attorney General.

court, in fact, noted that "general prohibitions, either express or implied, apply to all private parties, but 'are not rules for the conduct of the state.'" Id. (internal citations omitted).

Even though neither of these pieces of authority support or even lead to its conclusion, the Opinion of the Attorney General relies upon these two pieces of authority to jump to the unfounded, unreasoned and largely unexplained conclusion that because "there is no statute waiving the right of the state to regulate its campus property, that local ordinances would not be applicable on campus." The Opinion of the Attorney General did not address a municipality's statutory home rule authority under § 62.11(5) nor the law on preemption—which are directly contrary to this conclusion, and controlling in this matter. As noted above, the enforcement of the Emergency Order against persons within the City is a lawful exercise of the City's statutory home rule authority and the enforcement thereof against persons on State property would not be a violation of the *Anchor* test.

Risks Associated with Enforcement

While the City Attorney's Office's opinion is that the City's ordinance applies to persons violating the emergency orders on State property for the reasons set forth above, it should be noted that there is reason to believe that this opinion is not shared by the University. Also, public comments made by legislative leaders would seem to suggest that this opinion may also not be shared by that body. The Attorney General's opinion noted above, which is advisory to State agencies, would provide the University with a basis for this determination. However, more salient, it is important to note that there is no case law that addresses this specific issue and the courts have not been formally asked this question. And, the courts have also been reluctant to rule in favor of municipal home rule authority, not to mention broadening their view of matters of "statewide concerns". Indeed, there is reason to believe that the University may assert that Chapter 36 of the Wisconsin Statutes does expressly preempt the City's exercise of its home rule authority against persons on University lands and that conduct on University campuses is a matter of statewide concern where uniform application across the State would override the application of local ordinances. Suffice to say that if the City began enforcing the Emergency Orders against persons on State property, PHMDC and the City should expect disagreement from University or State officials.

Given prior court decisions related to public health orders, the view of the courts regarding this specific issue is uncertain. To date, I have been told that PHMDC and the University are working cooperatively on implementing actions to address the pandemic and minimize the spread of COVID-19 on campus and in the Madison and Dane County area. It is certainly advisable to pursue continued cooperation and communication with University and State interests in fighting COVID-19.

Conclusion

The COVID-19 Emergency Orders issued by the Director of PHMDC under Wis. Stat. § 252.03 are lawful exercises of authority and the enforcement thereof, pursuant to Madison General Ordinances Sec. 7.05(6), is a lawful exercise of the City's statutory home rule authority granted to it under Wis. Stat. § 62.11(5). It is the opinion of the City Attorney's Office that, while this authority cannot be exercised against the State of Wisconsin, including the University of Wisconsin-Madison and its employees and agents acting in their official capacity, this enforcement authority can be exercised against persons violating the order who are located on State-owned property.[10] However, caution should be exercised if enforcement is pursued as there is reason to believe that the State and the University do not share this opinion, and there is a lack of clear case law on this issue. Continued cooperation and ongoing communication with the State and the University is encouraged and we can certainly revisit this issue in light of specific circumstances as they arise in the event there is not a consensus among all parties on how to move forward.

Doran Viste

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Doran Viste
Assistant City Attorney

10 Of course, City police officers or PHMDC employees would still need some lawful basis to be present on the State-owned property in order to enforce the ordinance, and enforcement on State-owned property may come at the expense of comity between the City and State agencies. Police and/or PHMDC employees should consult with counsel if they are uncertain about the legality of any such action.