

CONFIDENTIAL LEGAL MEMORDANDUM

ATTORNEY-CLIENT PRIVILEGED

TO: Mark O’Connell, Executive Director
Kyle Christianson, Director of Government Affairs
Wisconsin Counties Association

FROM: Andrew T. Phillips and Bennett J. Conard
von Briesen & Roper, s.c.

RE: Local Health Officer Authority and County Emergency Management Powers

DATE: March 13, 2020

BACKGROUND

The Association has requested an analysis of county government authority during a public health emergency. Particularly with respect to a Local Health Officer’s¹ authority to forbid public gatherings, and also county emergency management powers generally. This request arises due to the Coronavirus Disease 2019 (COVID-19) (the “COVID-19”) pandemic and the effort to mitigate the spread and effects of COVID-19.

Every county must establish a county health department and appoint a Local Health Officer. In addition to ongoing duties and responsibilities for managing the county health department, Local Health Officers are vested with certain powers to curtail the spread of communicable diseases. One of the powers granted to Local Health Officers is the authority to forbid public gatherings when deemed necessary to control outbreaks or epidemics. While “public gatherings” is not defined, the term likely includes any gathering, meeting, or assembly that is accessible to all members of the public, or otherwise located at a facility open to the public, including privately owned facilities. Moreover, the ability of a Local Health Officer to forbid public gatherings does not require a declaration of emergency by the state or the county. Rather, this power may be invoked when deemed necessary to control the spread of disease.

In addition to a Local Health Officer’s authority to forbid public gatherings, counties also possess the authority to declare a local state of emergency. A declaration of emergency provides counties with broad authority to take steps to curb the disaster causing the declaration of emergency, and likely provides even greater authority to limit or forbid gatherings than the

¹ A “Local Health Officer” means the person appointed to oversee and administer a local health department under Wis. Stat. § 251.06.

authority granted to Local Health Officers. Counties are also provided with certain emergency powers during an emergency declared by the Governor.

This memorandum will provide a legal analysis of a Local Health Officer's authority to forbid public gatherings, and also the scope of county emergency management powers during a public health emergency. Then, we will apply our analysis to the current outbreak of COVID-19 and provide options that counties should evaluate and discuss with their corporation counsel to address the outbreak.

ANALYSIS

A. Local Health Officer Authority to Forbid Public Gatherings

1. Summary of Statutory Authority, Duties and Powers

Every county is required to establish a county health department responsible for providing and administering certain health and welfare programs within the county.² Wis. Stat. § 251.02. Local Health Officers are appointed under Wis. Stat. § 251.06 and are responsible for administering the local health department, enforcing local regulations, enforcing state public health statutes and rules, and administering all funds received by the local health department for public health programs. Wis. Stat. § 251.06(3).

A county health department's jurisdiction (and, therefore, a county's Local Health Officer's jurisdiction) extends to the entire area represented by the county board. Wis. Stat. § 251.08. However, a county health department's jurisdiction does not extend to cities, villages and towns that have local health departments unless the applicable city's, village's, or town's local board of health determines to come under the jurisdiction of the county health department. *Id.*

In addition to these general duties, Local Health Officers have certain duties and powers with respect to communicable diseases under Wis. Stat. ch. 252. Upon the appearance of a communicable disease within a Local Health Officer's jurisdiction, a Local Health Officer must immediately investigate all the circumstances and make a full report to the applicable governing body and also to the Wisconsin Department of Health Services (the "DHS"). Wis. Stat. § 252.03(1). The Local Health Officer must also "promptly take all measures necessary to prevent, suppress and control communicable diseases." *Id.* In addition to this foregoing broad grant of authority, Local Health Officers are also granted express authority to do each of the following:

1. Inspect schools and other public buildings within the Local Health Officer's jurisdiction as needed to determine whether the buildings are kept in a sanitary condition;

² Counties may establish single county health departments or establish multi-county health departments in conjunction with other counties. Wis. Stat. § 251.02(3). Further, there are also circumstances in which counties may form a city-county health department. Wis. Stat. § 251.02(1m).

2. Whatever is reasonably necessary for the prevention and suppression of disease; and
3. Forbid public gatherings when deemed necessary to control outbreaks or epidemics.

The ability to invoke such authority does not require a formal declaration of emergency by the Governor or by the county. Rather, a Local Health Official's duties to investigate a communicable disease and provide reports thereon are triggered "upon the appearance of any communicable disease in his or her territory." Wis. Stat. § 252.03. Actions under Wis. Stat. ch. 252 requiring emergency declarations are qualified as such. *See e.g.* Wis. Stat. § 252.041.

Section 252.03 appears to provide Local Health Officer's a broad grant of authority with respect to stopping the transmission of communicable diseases and to forbid public gatherings as a means to accomplish this. However, the scope of the authority with which a Local Health Officer may forbid public gatherings is not entirely clear. This is because this authority is not well defined in statute, has not been interpreted by Wisconsin courts or other legal authorities, and Wis. Stat. ch. 252 itself contains inconsistent language. For this reason, a statutory analysis of Wis. Stat. § 252.03 follows.

2. Statutory Analysis of a Local Health Official's Authority to Forbid Public Gatherings

The statutory language authorizing a Local Health Official to forbid public gatherings is set forth under Wis. Stat. § 252.03(2) and provides:

Local health officers 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 of measures taken.

Section 252.03(2) is fairly straightforward in the fact that a Local Health Official may likely forbid any public gathering when necessary in the Local Health Official's judgment to control outbreaks or epidemics. However, the term "public gatherings" is not defined in statute and has not been directly interpreted by Wisconsin courts. For this reason, an analysis of what constitutes a "public gathering" according to the rules of statutory interpretation is necessary.

Statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124 (citing *Seider v. O'Connell*, 236 Wis.2d 211, 232, 612 N.W.2d 659). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* Context is also important to meaning, as well as the structure of the statute in which the operative language appears. *Id.* For this reason, "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* A statute is only ambiguous if a plain, ordinary

meaning cannot be established and it is capable of being understood by reasonably well-informed persons in two or more senses. *Id.*

As set forth below, the result in this situation is that “public gatherings” includes all places and events that are open to the public at large, including privately owned facilities. Therefore, a local health official may forbid public gatherings in both public facilities (*e.g.*, parks, libraries, bus stations, technical colleges, etc.) and private facilities (*e.g.*, theaters, arenas, bars, etc.).

i. Plain Meaning Interpretation

As noted above, the plain meaning of the language contained in Wis. Stat. § 252.03(2) is straightforward. A Local Health Official may forbid any or all public gatherings in order to control an outbreak or epidemic. The only question is what constitutes a “public gathering.” Application of the plain meaning analysis suggests that the term “public gathering” includes all places and events that are open to the public at large, including privately owned facilities.

The term “public gathering” is not defined in statute or by Wisconsin courts. In light of this, the term should be construed according to common, ordinary, and accepted meaning. This can be derived from examining the dictionary definition of the term. While “public gathering” itself is not defined in the dictionary, the meaning of both “public” and “gathering” can be utilized.

Two meanings of “public” are informative here. According to the Merriam-Webster dictionary, “Public” means:

1. accessible to or shared by all members of the community; and
2. of or relating to business or community interests as opposed to private affairs.³

The term “gathering,” means “assembly, meeting.”⁴

Taken together, a “public gathering” is essentially an assembly or meeting of people that is accessible to or shared by all members of the community or otherwise generally related to business or community interests as opposed to private affairs. This means that “public gatherings” includes assemblies, meetings, or crowds in any location that is open to the public at large, whether publicly or privately owned and operated.

The limited Wisconsin case law that utilizes the term “public gathering” also suggests this broad meaning. For example, the Wisconsin Supreme Court has stated that:

...certain nongovernmental entities have taken over the role the government formerly played by providing areas that are used for

³ Merriam-Webster Dictionary, accessed on March 12, 2020, available at: <https://www.merriam-webster.com/dictionary/public>

⁴ Merriam-Webster Dictionary, accessed on March 12, 2020, available at: <https://www.merriam-webster.com/dictionary/gathering>

public gatherings. The more than 25,000 shopping centers in the United States, for example, have been described as “new downtowns,” where people not only shop but also stroll, socialize and participate in community activities as they once did in downtown business districts. *Jacobs v. Major*, 139 Wis. 2d 492, 532–33, 407 N.W.2d 832, 849 (1987) (emphasis added).

Additionally, in analyzing the only other Wisconsin Statute that utilizes the term “public gathering,” the Wisconsin Court of Appeals referred to Wisconsin Department of Natural Resources permit conditions that required the town to obtain “all necessary signatures from residents and *proprietors of places of public gathering*.” *Town of Cottage Grove v. State Dep't of Nat. Res.*, 140 Wis. 2d 869, 412 N.W.2d 903 (Ct. App. 1987) (emphasis added). The phrase “proprietors of places of public gathering” indicates that places of public gathering may have a private owner (*i.e.*, a proprietor). Other courts have also taken this broad approach. Indeed, the United States District Court for the Northern District of Illinois has provided that:

...every public gathering place in modern American life – elementary schools, high schools, community colleges, universities, churches and other houses of worship, movie theaters, nightclubs, shopping malls, airports, concert venues, offices, and restaurants...

Swenie v. Vill. of Maywood, No. 17-CV-1010, 2018 WL 4635645, at *4 (N.D. Ill. Sept. 27, 2018).

ii. Contextual Interpretation

Context and the structure of the statute in which the operative language appears is also important to determining meaning. For this reason, “statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Id.*

First, context informs as to the meaning of individual words. In performing the plain meaning analysis above, a key element in determining the appropriate dictionary definition is that “[m]any words have multiple dictionary definitions; the applicable definition depends upon the context in which the word is used. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 49, 271 Wis. 2d 633, 665, 681 N.W.2d 110, 125.

Also important is the fact that Local Health Officials are provided an extremely broad mandatory authority to “promptly take *all measures necessary* to prevent, suppress and control communicable diseases.” (emphasis added) Wis. Stat. § 252.03(1). Moreover, the authority to forbid public gatherings is preceded by the authority for Local Health Officers to “do what is reasonable and necessary for the prevention and suppression of disease.” This authority is broad in scope in and of itself, and also informs as to the breadth of the subsequent provision permitting Local Health Officers to forbid public gatherings. Stated another way, the broad grants of general authority in the same section suggests that the authority to forbid public gatherings should also be viewed broadly.

A potential counterargument to the view that a Local Health Official's authority to forbid public gatherings should be liberally construed is the fact that DHS is granted express authority to forbid public gatherings in any place. See Wis. Stat. § 252.02(3). Section 252.02(3) provides that the “department may close schools and forbid public gatherings in schools, churches, and other places to control outbreaks and epidemics” (emphasis added). However, the authority of DHS and of Local Health Officials in this respect need not be interpreted differently. The reason for this is that DHS's grant of authority to forbid public gatherings is not preceded by the broad grant of authority afforded to Local Health Officials. Even though the authority provided to DHS under Wis. Stat. § 252.02 is substantially, DHS is not provided the same broad authorizing language as Local Health Officials. For this reason, DHS's authority to forbid public gatherings needed to be more clearly defined.

The broad application of a Local Health Officer's authority to forbid public gatherings also avoids absurd results. It would not make sense for the legislature to afford Local Health Officials such broad authority to do all things necessary to stop the spread of communicable diseases, but then limit that authority with respect to limiting public gatherings, particularly when it afforded such authority of DHS.

iii. An Ambiguity Test is Not Needed

An ambiguity test is only undertaken when a plain, ordinary meaning cannot be established. The test for ambiguity generally keeps the focus on the statutory language: a statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses. *Id.* It is not enough that there is a disagreement about the statutory meaning; the test for ambiguity examines the language of the statute “to determine whether ‘well-informed persons *should have* become confused,’ that is, whether the statutory...language *reasonably* gives rise to different meanings.” *Id.*

As set forth above, the plain meaning of the statute is evident through the ordinary meaning of the term “public gathering” and also with respect to the context in which it is used.

B. County Emergency Management Authority

In addition to the authority provided to Local Health Officials, a county is also vested with certain powers and duties during a declared state of emergency. Importantly, a state of emergency may be declared either by the Governor or by a local government (including counties). However, these powers and duties differ depending on whether the state of emergency was declared by the Governor or by the county.

1. Emergencies Declared by the Governor

The Governor may issue an executive order declaring a state of emergency for the state or any portion of the state if the Governor determines that an emergency resulting from a disaster or the imminent threat of a disaster exists. Wis. Stat. § 323.10. When an emergency is declared by the

Governor, a county within the emergency area may employ personnel, facilities, and other resources consistent with the county's emergency management plan⁵ to manage the problems that resulted in declared state of emergency. Wis. Stat. § 323.14(3)(b). Additionally, nothing prohibits a county from employing its personnel, facilities, and resources consistent with its emergency management plan to manage the problems of local disasters (subject to any restrictions imposed by federal regulations on property donated by the federal government). *Id.*

Additionally, the Governor may also specifically declare a “public health emergency.”⁶ *Id.* In that case, the Governor may designate DHS as the lead state agency to respond to that emergency. *Id.* DHS is then the lead state agency to respond to the public health emergency.

Section 250.042 also authorizes DHS to take certain actions during a public health emergency, including designating a local public health department as an agent of DHS. As DHS's agent, a local public health department maintains the powers and duties of DHS in its role as the public health authority. This includes the authority to: (a) purchase, store, or distribute antitoxins, serums, vaccines, immunizing agents, antibiotics, and other pharmaceutical agents or medical supplies that DHS determines are advisable to control a public health emergency; (b) order any individual to receive a vaccination unless the vaccination is reasonably likely to lead to serious harm to the individual or unless the individual, for reasons of religion or conscious, refuses to obtain the vaccination; and (c) isolate or quarantine any individual who is unable or unwilling to require vaccinations.

Furthermore, a county's head of emergency management⁷ is also granted certain powers and duties during a declared state of emergency. During a state of emergency declared by the Governor, the head of emergency management is granted special purchasing authority. Wis. Stat. § 323.15(4). This means that the head of emergency may contract with any person on behalf of the county to provide equipment and services on a cost basis to be used to respond to a disaster, or the imminent threat of disaster. Wis. Stat. § 323.15(4).

⁵ Each county board must develop and adopt an emergency management plan and program and designate a committee of the board as the “county emergency management committee. The plan must also be compatible with the state's emergency management plan, including incorporating the use of the “incident command system” developed by the Wisconsin Department of Administration and administered by the adjutant general. The “incident command system” is “a functional management system established to control, direct, and manage the roles, responsibilities, and operations of all of the agencies involved in a multi-jurisdictional or multi-agency emergency response.” Wis. Stat. §§ 323.14(1) and 323.02(9).

⁶ “Public health emergency” means the occurrence or imminent threat of an illness or health condition that meets all of the following criteria:

- (a) Is believed to be caused by bioterrorism or a novel or previously controlled or eradicated biological agent.
- (b) Poses a high probability of any of the following:
 1. A large number of deaths or serious or long-term disabilities among humans.
 2. A high probability of widespread exposure to a biological, chemical, or radiological agent that creates a significant risk of substantial future harm to a large number of people.

⁷ Each county must also designate a “head of emergency management.” In counties with a county executive, the county executive (or the executive's designee) is required to serve as the head of emergency management. Wis. Stat. §§ 323.14(1)(a)1. and 2.

2. Emergencies Declared by the County

The county board is also authorized to declare a state of emergency within the county whenever conditions arise by reason of a riot or civil commotion, a disaster, or an imminent threat of a disaster, that impairs transportation, food or fuel supplies, medical care, fire, health or police protection, or other critical systems of the local unit of government. Wis. Stat. § 323.11. The declaration must be made by ordinance or resolution, and the period of the emergency shall be limited by the ordinance or resolution to the time during which the emergency conditions exist or are likely to exist. *Id.*

Importantly, the term “disaster” is broadly defined and may be applied to a wide array of scenarios. Specifically, a “disaster” includes any event that is “a severe or prolonged, natural or human-caused, occurrence that threatens or negatively impacts life, health, property, infrastructure, the environment, the security of this state or a portion of this state, or critical systems, including computer, telecommunications, or agricultural systems.” Wis. Stat. § 323.02(6).

Under a county declared state of emergency, the county board is vested with broad authority “to order, by ordinance or resolution, whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within the [county] in the emergency and includes the power to bar, restrict, or remove all unnecessary traffic, both vehicular and pedestrian, from the highways, notwithstanding any provision of chs. 341 to 349.” Wis. Stat. § 323.14(4)(a). This grant of authority provides counties a multitude of options to restrict public movement and gatherings, and likely provides the greatest extent of emergency management authority available to counties.

If the county board is unable to timely meet due to the emergency conditions, the county’s chief executive or administrative officer (*i.e.*, the county executive or county administrator) is authorized, by proclamation, to exercise all of the powers conferred upon the county board that “appear necessary and expedient.” Wis. Stat. § 323.14(4)(b). Such a proclamation is subject to ratification, alteration, modification, or repeal by the county board as soon as it can meet. *Id.* However, any subsequent action taken by the county board does not affect the prior validity of the proclamation. *Id.*

During an emergency declared by the county, the county’s head of emergency management is charged with implementing his or her duties prescribed by the county board under the county’s emergency management plan. Wis. Stat. § 323.15(1)(a).

C. Application to the COVID-19 Pandemic and Options for Counties

Counties have several options available to them to respond to the COVID-19 pandemic. The first two options present emergency management powers that are available to all counties as of the date of the memorandum. The third option would require action by individual county boards in order to authorize and implement the additional emergency management powers. All three options may also be used in conjunction with one another and are not mutually exclusive.

1. County Local Health Official Action

As set forth above, Local Health Officials possess broad authority to “take all measures necessary to prevent, suppress and control communicable diseases.” Wis. Stat. §252.03(1). This authority appears to be exercisable upon the presence of a communicable disease within the County Health Department’s jurisdiction. *Id.* This authority includes the ability to forbid public gatherings, which likely includes assemblies, meetings, or crowds in any location that is open to the public at large, whether publicly or privately owned and operated. A county’s Local Health Official could implement an outright ban on public gatherings or simply place restrictions on public gatherings, such as the maximum number of people permitted to gather at a particular public gathering.

A county Local Health Official may of course also take other reasonable and necessary steps to prevent, suppress and control the spread of COVID-19 in addition to implementing restrictions on public gatherings.

2. Action under the Governor’s Emergency Declaration

The Governor issued Executive Order #72 on March 12, 2020, which proclaimed that a public health emergency exists for the state, and designated DHS as the lead agency to respond to the public health emergency. Counties and their Local Health Officer should coordinate with DHS and determine whether DHS has designated local health departments as its agents with authority to act with the powers of the State’s public health authority as detailed above.

Even if a County Health Department is not a designated agency of DHS under the public health emergency, a county may still employ other powers available to it during a state of emergency declared by the Governor. This includes the authority to employ personnel, facilities, and other resources consistent with the county’s emergency management plan to manage the problems that resulted in the declared state of emergency. Wis. Stat. § 323.14(3)(b). Additionally, a county may employ its personnel, facilities, and resources consistent with its emergency management plan to manage the problems of local disasters. *Id.* Furthermore, the head of emergency management is granted special purchasing authority. Wis. Stat. § 323.15(4).

3. Declaration of Emergency by the County Board

A county board may also declare a local emergency pursuant to Wis. Stat. § 323.11. The declaration must be made by ordinance or resolution, and the period of the emergency shall be limited by the ordinance or resolution to the time during which the emergency conditions exist or are likely to exist. *Id.* While it is not known how long emergency conditions related to COVID-19 will last, we currently recommend limiting the period of emergency to sixty (60) days based on information available at this time. Counties may always extend/renew the emergency declaration by way of an additional resolution.

This option affords counties the greatest extent of emergency powers of the options addressed in this memorandum. Given current and expected conditions, we believe that it would be beneficial to declare a local emergency in the near future so that these emergency powers are available to

counties in the event they are needed. Though we also advise that counties use the powers provided under this option sparingly for purposes of addressing issues that cannot be addressed under the previous two options. The powers and authority already granted to county and County Local Health Officers under Sections C1 and C2 above already give counties a number of tools to address the public health concerns presented by COVID-19 at this time. Implementing greater emergency powers than are necessary at this time may negatively impact public trust and sentiment.

However, it is important to have measures already in place and at the ready. COVID-19 poses serious health risks and it is recommended that public gatherings be limited. For this reason, we believe that the applicable statutes provide county boards the authority to enact special emergency rules/suspend regular board rules allowing the board to meet remotely (*i.e.*, via telephone, WebEx, etc.).⁸ Indeed, Wis. Stat. § 323.14(4)(a) provides the board “the general authority to order, by ordinance or resolution, whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within the local unit of government in the emergency...” Moreover, Wis. Stat. § 59.11(2)(a) also provides that “[t]he board by ordinance may establish a separate procedure for convening the board in a “declared emergency” as defined by county ordinance.”

CONCLUSION

Counties are provided a great deal of emergency management powers and authority in the event of a public health emergency, particularly with respect to a communicable disease like COVID-19. Local Health Officers are vested with certain powers to curtail the spread of communicable diseases. One of the powers granted to Local Health Officers is the authority to forbid public gatherings when deemed necessary to control outbreaks or epidemics. The authority to forbid public gatherings should be construed broadly to include any assembly or meeting of people that is open to the public at large.

Additionally, counties are granted broad authority during a declared emergency. Counties are provided with additional powers during an emergency declared by the Governor. Such powers may be particularly significant during a declared public health emergency. Furthermore, a declaration of emergency by the county board provides counties with the most emergency powers to take steps to curb the disaster causing the declaration of emergency.

Counties should carefully review the options discussed above with their corporation counsel in order to determine which option or combination of options are best suited to accomplish their immediate goals in addressing the COVID-19 disease within their county. If you have any questions surrounding this memorandum, please do not hesitate to contact us. We appreciate the opportunity to be of service to the Association and its member counties.

34487590_1

⁸ However, all meetings must still comply with open meetings requirements under Wis. Stat. ch. 19.