



LEGAL ISSUES
RELATING TO COUNTY GOVERNMENT

Post-Pandemic Developments in Local Health Officer Authority

by Andy Phillips, Attorney, Attolles Law, s.c.

The role of the local health officer in combatting the spread of COVID-19 has garnered headline attention over the past few years. Even now, counties continue to discuss policy measures aimed at better defining the role of local health officers as it relates to attempting to curb the spread of diseases.

In August 2020, in an effort to assist counties in understanding the role of public health in combatting the spread of communicable diseases, the Wisconsin Counties Association released the publication, “Guidance in Implementing Regulations Surrounding Communicable Diseases — An Analysis of Local Health Department and Local Health Officer Powers, Duties, and Enforcement Actions,” a copy of which may be downloaded at wicounties.org. Since the WCA guidance was released, the Wisconsin Supreme Court issued a decision in *Becker v. Dane County* in 2022, which provided further direction regarding local health officer authority.

The 2020 WCA guidance outlined the unsettled parameters of local health officer authority with respect to preventing the transmission of communicable diseases following the Wisconsin Legislature *v. Palm* decision earlier that year. In the decision, the court addressed only the

authority of the Wisconsin Department of Health Services secretary to regulate the spread of communicable disease under Wis. Stat. § 252.02, but left unanswered whether the same reasoning would similarly restrict the authority of local health officers under Wis. Stat. § 252.03.

In the *Palm* decision, the court explained that the delegation of powers upon an unelected official, then-DHS Secretary Andrea Palm, raised serious constitutional concerns related to the separation of powers.¹ The WCA guidance explained that because the statutory authority of the DHS secretary and local health officers is similar, another court may, if provided the opportunity, express similar concerns regarding local health officers’ authority to stop the spread of communicable diseases. However, in the 2022 *Becker* decision, the court addressed this exact point and held that the delegation of authority to local health officers pursuant to Wis. Stat. § 252.03 and the corresponding county ordinance at issue was constitutional.²

As such, while the WCA guidance explained that “it may be prudent to have local health officer orders impacting the public at large and implementing mandatory measures (i.e., subjecting a person to a penalty for noncompliance)

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be subject to review by the county board,” we now have guidance from the Wisconsin Supreme Court in Becker that provides otherwise. Put simply, in the Becker decision, the court held that Wis. Stat. § 252.03 authorizes local health officers to issue public health orders and confirmed that there are no separation of power concerns so long as such orders comply with the statutory requirement to be “necessary to prevent, suppress and control communicable diseases” or “reasonable and necessary for the prevention and suppression of disease.”³

It should be noted, however, that enforcement of a local health officer order still must be rooted in authority provided by Wis. Stat. § 252.25 and county ordinance. In the Becker decision, the Dane County local health officer’s enforcement authority for violation of the public health order at issue in the case derived from Dane County Ordinance § 46.40(2), which makes it “a violation of [Dane County Ordinance ch. 46] to refuse to obey an Order of the Director of Public Health Madison and Dane County entered to prevent, suppress or control communicable disease pursuant to Wis. Stat. s. 252.03.” A violation could result in a civil forfeiture of between \$50 and \$200 “for each day that a violation exists.”⁴ Importantly, in Becker, the court concluded that the Dane County ordinance was not preempted by state law and did not exceed the county’s statutory authority to authorize the issuance of civil citations for violations of ordinances.⁵ In light of the court’s underlying analysis, counties should also ensure that any enforcement ordinance makes it clear that a violation

of a public health order is a violation of the underlying ordinance (in order to make sure the ordinance remains within the scope of authority granted to counties under Wis. Stat. § 66.0113(1)(a)).

In addition, it is important to recognize the state Legislature’s recent restriction on the duration of any local health officer order relating to the closure of businesses within the local health officer’s jurisdiction as contained in 2023 Wisconsin Act 12 and codified in Wis. Stat. § 252.03(2j). The new statutory provision provides:

“A local health officer may not issue a mandate to close any business in order to control an outbreak or epidemic of communicable disease for longer than 30 days unless the governing body of the political subdivision in which the order is intended to apply approves one extension of the order, not to exceed 30 days. A mandate to close more than one business as provided under this subsection may not distinguish between essential and nonessential businesses. In this subsection, ‘political subdivision’ means a city, village, town, or county.”

Essentially, a local health officer order to close businesses to control the spread of a communicable disease may not (a) discriminate among classes of businesses based upon a determination of whether a particular business is “essential;” and (b) extend longer than 30 days. Such an order may be extended for an additional 30 days only upon action by the county board providing for such an extension.

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of public health orders, please refer to the section of the WCA guidance captioned, “Enforcement of Local Health Officer Orders.”

As counties discuss potential ordinances to address the role of the local health officer, it is important to remember that issuing broad guidance or “orders” applicable to the general public in the midst of an outbreak is but a sliver of a local health officer’s job. There are many statutes and regulations detailing the important work of health officers and counties need to ensure they do not inadvertently create issues within one area of a local health officer’s

responsibility in attempting to address another area. Given the complexities, counties should work very closely with corporation counsel in this area. And, as always, if WCA can assist in the process, please contact us. ■

Attolles Law, s.c. works on behalf of Wisconsin counties, school districts and other public entities across the state of Wisconsin. Its president & CEO, Andy Phillips, has served as outside general counsel for the Wisconsin Counties Association for nearly 20 years.

1. Palm, 2020 WI at ¶ 67.
2. Becker, 2022 WI at ¶ 45.
3. Becker, 2022 WI at ¶¶ 22 and 45; Wis. Stat. § 252.03.
4. Dane County Ordinance § 46.27(1).
5. Becker, 2022 WI at ¶¶ 25-28.

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