

In the Board Room: County Funding of Nonprofit Organizations

April 23, 2025

Attorneys Andy Phillips and Malia Malone

ATTOLLES
LAW, s.c.





Agenda

1. The Legal Background
 - a. OAG 01-17
 - b. WCA Memo #1
 - c. Legislative Council Memo
 - d. WCA Memo #2
2. A Proposed Legislative Fix – AB 645
3. The Analysis

The Legal Background

County Funding of Nonprofits





Where We Start

- It is true counties, unlike cities and villages, derive their respective powers from the state. See *Frederick v. Douglas County*, 96 Wis. 411, 416-17, 17 N.W. 798 (1897) (citations omitted) (“Counties are, at most, but local organizations, which for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence...[T]he statutes confer upon them all the powers they possess.”).
- The power to carry out a specific program or appropriate funds to support a program must be grounded in independent statutory authority. See *Dane County, Through Dane County Dept. of Social Services v. Wisconsin Dept. of Health and Social Services*, 19 Wis. 2d 323, 255 N.W.2d 539 (1977).



2017 Attorney General Opinion


- Question posed to Attorney General: May a county board appropriate funds to support a local food pantry?
- Wis. Stat. § 59.53(21):

Operation of relief programs. **The board may establish and operate a program of relief for a specific class or classes of persons residing in that county**, except that in a county with a population of 750,000 or more, the county executive shall be in charge of the operation of the program of relief. The county may set such eligibility criteria to obtain relief, and may provide such services, commodities or money as relief, as the county determines to be reasonable and necessary under the circumstances.
- Is this language a limitation on a county board's authority?



OAG 01-17 (cont)

While Wis. Stat. § 59.53(21) grants the county board the authority to operate its own relief programs, such as providing food for those in need, the Attorney General determined the statute does not expressly confer authority to appropriate funds to a nonprofit food pantry to accomplish the goal of providing food to those in need. As an explanation, the Attorney General opined “[b]ecause the statute specifically addresses a county board’s authority in this area without granting the authority to make appropriations to nonprofits, county boards do not have the authority, either express or implied, to make such appropriations.” OAG 01-17, ¶ 4.



OAG 01-17 (cont)

The Attorney General further determined that because Wis. Stat. §§ 59.53(3) and (11)(c) enumerate a county board's authority to appropriate funds to nonprofit organizations for purposes other than operating a food pantry, the Legislature did not intend to include food pantries in the list of authorized entities. Specifically, the Attorney General reasoned that, pursuant to the rules of statutory construction, the absence of an item from an enumerated list evidences the Legislature's intent to exclude that item. *Milwaukee Journal Sentinel v. City of Milwaukee*, 341 Wis. 2d 607, 621-622, 815 N.W.2d 367, 375, 2012 WI 65, ¶¶ 35-37 (Wis. 2012).



OAG 01-17 – Explicit Authority

Wis. Stat. § 59.53(3):

(3) COMMUNITY ACTION AND NONPROFIT AGENCIES. The domestic violence and related crimes. The county may also appropriate money for board may appropriate funds for promoting and assisting any community action agency under s. 49.265, and for making payments to a nonprofit organization, as defined in s. 23.197 (4) (a) 1., that has as a primary purpose providing assistance to individuals who are the victims of making payments to such a nonprofit organization for its capital and operational expenses.

Wis. Stat. § 59.53(11):

(11) SENIOR CITIZEN PROGRAMS; APPROPRIATION; COMMISSION ON AGING. The board may:

- (a)** Appropriate funds to promote and assist county commissions on aging and senior citizens clubs and organizations within the county in their organization and activities. A county may cooperate with any private agency or group in such work.
- (b)** Appoint a commission on aging under s. 46.82 (4) (a) 1., if s. 46.82 (4) (a) 1. is applicable.
- (c)** Appropriate money to defray the expenses incurred by private organizations that provide homemaking services to elderly and handicapped persons within the county if the services will enable the persons to remain self-sufficient and to live independently or with relatives.



WCA Memo – a Response to OAG 01-17

- What about Wis. Stat. § 59.51(1), which grants broad discretion to a county in exercising organizational or administrative powers?

ORGANIZATIONAL OR ADMINISTRATIVE POWERS. The board of each county shall have the authority to exercise any organizational or administrative power, subject only to the constitution and any enactment of the legislature which grants the organizational or administrative power to a county executive or county administrator or to a person supervised by a county executive or county administrator or any enactment which is of statewide concern and which uniformly affects every county. Any organizational or administrative power conferred under this subchapter shall be in addition to all other grants. A county board may exercise any organizational or administrative power under this subchapter without limitation because of enumeration, and these powers shall be broadly and liberally construed and limited only by express language.

- Is eliminating hunger not a part of a local government's traditional police powers? What "police powers" does a county have?
- Would the analysis differ if a county were to contract with a nonprofit to operate a program to combat hunger?



2021 Legislative Council Memo

- A court “may reasonably conclude that counties do have authority to make a grant to a nonprofit organization for food pantry operation.”
- Wis. Stat. § 59.04 – Chap. 59 (and presumably the powers granted therein) shall be “liberally construed in favor of the rights, powers and privileges of counties to exercise any organizational or administrative power.”
- The Memo suggests a traditional preemption (or lack of preemption) analysis applying the broad parameters of a county’s administrative home rule could be utilized by a court to allow such appropriations.



WCA's Second Memo - 2025

- In addition to the concerns identified in the First WCA Memo and the Legislative Council Memo, OAG 01-17 wholly ignores the entire statutory system that specifically authorizes contractual relationships between counties and food pantries.
- Under Wis. Stat. § 46.22(1)(c)6 and 7, a county department of social services or human services is empowered to (among other things):
 - furnish services to families or persons other than the granting of financial or material aid where such services may prevent such families or persons from becoming public charges or restore them to a condition of self-support; and
 - certify eligibility for and distribute surplus commodities and foodstuffs.



WCA's Second Memo – 2025 (cont)

- To carry out these powers, Wis. Stat. § 46.22(1)(e)1 provides:

(e) *Purchase of care and services*. 1. In order to ensure the availability of a full range of care and services, a county department of social services may contract, either directly or through the department of health services, the department of children and families, or the department of corrections, with public or voluntary agencies or others to purchase, in full or in part, care and services which the county department of social services is authorized by any statute to furnish in any manner...



WCA's Second Memo – 2025 (cont)

- So what does this mean?
 - Wis. Stat. § 46.22(1)(c) authorizes a department of social services or human services to furnish services to persons with food insecurity.
 - Wis. Stat. § 46.22(1)(e)1. authorizes the department to contract with other agencies or organizations (including, without limitation, nonprofits) to carry out the provision of such services.
- HOWEVER, it is important to emphasize the need for a contract if a county were to rely upon this statute as a source of authority – the statute does not authorize an appropriation without an agreement relating to the provision of care and services. The relevant statutes do not dictate any particular form of contract nor are there any statutorily-required terms. **Counties should work closely with corporation counsel in drafting contracts related to the provision of these services.**



WCA's Second Memo – 2025 (cont)

- Examples of statutory authority beyond food pantries
 - **Wis. Stat. § 46.22(1)(c)8a.** – The county department of social services may avail itself of the cooperation of any individual or private agency or organization interested in the social welfare of children in the county with a single-county department of social services or in the counties with a multicounty department of social services.
 - **Wis. Stat. § 46.22(1)(e)1** – In order to ensure the availability of a full range of care and services, a county department of social services may contract, either directly or through the department of health services, the department of children and families, or the department of corrections, with public or voluntary agencies or others to purchase, in full or in part, care and services which the county department of social services is authorized by any statute to furnish in any manner.
 - **Wis. Stat. § 46.22(1)(e)2, 3a, 3b, 3c.** – A county department of social services shall develop...contract[s] for the purchase of “care and services,” “juvenile delinquency-related services,” “juvenile correctional services.”
 - **Wis. Stat. § 27.065(5)(a)** – A county may contract for improvements to county parks and parkways.

The Legislative Fix?

County Funding of Nonprofits





2023 Assembly Bill 645

- Legislature introduced bill to specifically allow appropriation to nonprofit food pantries.
- 2023 Assembly Bill 645 provides (in relevant part):
 - SECTION 2. 59.53 (3) (c) of the statutes is created to read:

59.53 (3) (c) Making payments to a nonprofit organization, as defined in s. 23.197 (4) (a) 1., whose primary purpose is to operate a food bank or food pantry and who serves the county as part of that operation.
- Provides authority for direct appropriation to support a food pantry.



Why in the World Would WCA Oppose this Bill??

- First and foremost, the bill isn't necessary – for all of the reasons outlined in the various memos, counties already possess the appropriate authority if the appropriate procedures are followed.
- Next, the statutory interpretation doctrine of *expressio unius est exclusio alterius* which means that “the express mention of one thing excludes all others” causes potential confusion.
 - If food pantries are included in the list, does that mean all other nonprofit entities are excluded?



WCA's Proposal

- Amend Wis. Stat. § 59.53(21) to read:

59.53 (21) OPERATION OF RELIEF PROGRAMS. The board may establish and operate a program of relief for a specific class or classes of persons residing in that county, except that in a county with a population of 750,000 or more, the county executive shall be in charge of the operation of the program of relief. The county may set such eligibility criteria to obtain relief, and may provide such any services, commodities, or money as relief, as that the county determines to be is reasonable and necessary under the circumstances. The *county may directly provide relief under this subsection or may provide an appropriation to a nonprofit organization, as defined in s. 23.197 (4) (a) 1., for the purpose of funding a program of relief provided by that nonprofit organization.* A relief program under this subsection may include work components...

The Analysis

County Funding of Nonprofits





Questions to Ask When Evaluating an Appropriation to a Nonprofit

- Is a direct appropriation authorized by statute?
- What is the purpose of the appropriation?
 - Is it in furtherance of a county program?
 - What statute authorizes the county program?
- Is it necessary to document the relationship through a contract or MOU?
 - (HINT: In almost all cases, YES)
- How will the “public purpose” associated with the appropriation be documented?
 - By resolution?

It is important to work through the analysis with corporation counsel.



ANDY PHILLIPS



414.279.0962



aphillips@attolles.com



EMBRACING CHALLENGE.
DELIVERING OPPORTUNITY.

THANK YOU

ATTOLLES
LAW, s.c.