



MEMORANDUMⁱ

To: Interested Parties
From: The Local Solutions Support Center
Re: Wisconsin Local Government Authority to Issue Local Stay-in-Place Orders
Date: May 14, 2020

Question Presented: In light of the Wisconsin Supreme Court’s decision on May 13, 2020 invalidating the order by the Wisconsin Department of Health Services to remain at home during the coronavirus pandemic, do local governments—cities, towns, villages, and counties—in Wisconsin have the authority to issue local stay-in-place orders to protect the health, safety, and welfare of their residents during the coronavirus emergency?ⁱⁱ

Short Answer: Yes. Wisconsin state law grants local governments in Wisconsin power to declare a local emergency arising out of the coronavirus pandemic and issue stay-in-place orders.

Analysis:

Chapter 323 of the Wisconsin Statutes concerns emergency management. As part of state policy empowering and supporting local governments to respond to emergencies, it provides local governments with express authority to declare emergencies and issue stay-in-place orders to cope with those emergencies.ⁱⁱⁱ

Chapter 323 declares that “[t]o prepare the state and its subdivisions to cope with emergencies resulting from a disaster, or the imminent threat of a disaster, it is declared to be necessary to establish an organization for emergency management, conferring upon the governor and others specified the powers and duties provided by this chapter.” Wis. Stat. Ann. § 323.01(1). In addition, it recognizes the unique role and responsibility borne by local governments, stating that “[u]nless otherwise specified by law, the role of any state agency . . . in an emergency declared under this chapter, is to assist local units of government and local law enforcement agencies in responding to a disaster or the imminent threat of a disaster.” Wis. Stat. Ann. § 323.01(2).

Section 323.11 expressly allows the “governing body of any local unit of government” to “declare, by ordinance or resolution, an emergency existing within the local unit of government 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. Ann. § 323.11. The Section further states that “[t]he 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.*^{iv}

Section 323.14 provides that “[t]he emergency power of the governing body conferred under s. 323.11 includes 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” Wis. Stat. Ann. § 323.14(4).

Thus, pursuant to Section 323.11, a local government in Wisconsin, including a county, city, village, or town, may declare an emergency due to the harm that the coronavirus pandemic has inflicted (and is expected to inflict) on residents’ health and every other area of potential concern listed in Section 323.11. In addition, pursuant to the broad power granted by Section 323.14 to order “whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property” within the local government, a local government may issue a stay-in-place order. Wis. Stat. Ann. § 323.14(4).

Notably, the Wisconsin Supreme Court has long upheld the use of local powers to impose curfews. In *Ervin v. State*, 163 N.W.2d 207 (Wis. 1968), the court considered a challenge to a Milwaukee curfew order on the basis that the curfew and the state statute authorizing it were unconstitutional. *Id.* at 209. In 1967, the mayor of Milwaukee had declared a state of emergency due to rioting and civil unrest. *Id.* at 210, n.3. The order closed streets, sidewalks, and public ways to cars and pedestrians, and it was ratified by the city’s common council. *Id.* The order was issued pursuant to authority in a Wisconsin statute that is substantially similar to the powers now granted through Sections 323.11 and 323.14.^v The court rejected the challenge to the statute and curfew itself.

While acknowledging the importance of upholding the U.S. Constitution and noting that “[t]he freedom to move about is a basic right of citizens under our form of government,” the court explained that “[w]hatever the cause, given the fact of widespread riotous conditions and criminal activities, the restoration of domestic tranquility becomes, not alone a constitutional right, but a constitutional obligation.” *Id.* at 211 (internal quotations omitted). It concluded that “[t]he temporary imposition of a curfew, limited in time and reasonably made necessary by conditions prevailing, [was] a legitimate and proper exercise of the police power of public authority.” *Id.*

Ultimately, as local governments in Wisconsin continue to respond to the coronavirus pandemic and pursue local policies to protect the health, welfare, and safety of their residents, residents and local officials should rely on Sections 323.11 and 323.14 of the Wisconsin Statutes as strong sources of authority to implement stay-in-place orders—as well as other important public health measures—crucial to protecting residents.

ⁱ The information provided in this document does not, and is not intended to, constitute legal advice. Individuals and organizations should contact an attorney licensed to practice in their state to obtain advice with respect to a particular legal matter.

ⁱⁱ On May 13, 2020, the Wisconsin Supreme Court invalidated Emergency Order 28 issued by Andrea Palm, the Secretary-designee of the Department of Health Services, ordering people in Wisconsin to remain in their homes, not travel, and close all businesses not considered “essential.” *Wisconsin Legislature v. Secretary-Designee Andrea*

Palm et al., No. 2020AP765-OA (Wis. May 13, 2020). The court’s decision was based on the court’s interpretation of rulemaking authority and did not concern the governor’s own emergency order or the powers of the governor or local governments.

ⁱⁱⁱ This document addresses the general authority of local governments in Wisconsin; it does not address any potential preemption of any specific policy a local government might adopt.

^{iv} The term “disaster” is defined as “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. Ann. § 323.02(6). The term “local unit of government” means “a county, city, village, or town.” Wis. Stat. Ann. § 323.02(15).

^v The statute, Section 66.325, stated: “Emergency powers, cities of the first class. (1) Notwithstanding any other provision of law to the contrary, the common council of any city of the first class is empowered to declare, by ordinance or resolution, an emergency existing within such city whenever conditions arise by reason of war, conflagration, flood, heavy snow storm, blizzard, catastrophe, disaster, riot or civil commotion, acts of God, and including conditions, without limitation or restriction because of enumeration, which impair transportation, food or fuel supplies, medical care, fire, health or police protection or other vital facilities of such city. The period of such emergency shall be limited by such ordinance or resolution to the time during which such emergency conditions exist or are likely to exist. (2) The emergency power of the common council herewith conferred shall include * * * the power to bar, restrict or remove all unnecessary traffic, both vehicular and pedestrian, from the local highways * * * The common council may provide penalties * * * (3) In the event because of such emergency conditions the common council shall be unable to meet with promptness, the mayor or acting mayor of any city of the first class shall exercise by proclamation all of the powers herewith conferred upon the common council which within the discretion of the mayor are necessary and expedient for the purposes herein set forth; * * *.” *Id.* at 210, n. 2 (internal quotations omitted).