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“Safer Racine” Ordinance Remains in Effect Pending Appeal

After a Racine County Circuit Court judge invalidated regulations ordered by the City of Racine’s public health administrator, relying in part on the Wisconsin Supreme Court’s decision in *Wisconsin Legislature v. Palm*, the City adopted those regulations by ordinance. The circuit court judge, upset by this action and characterizing it as an end run around his earlier decision, declared the City’s “Safer Racine” ordinance unconstitutionally vague, overbroad, and unenforceable.

On July 3, the City of Racine scored an important victory when the Wisconsin court of appeals granted the City’s request to stay the circuit’s order pending appeal. This means the City’s ordinance remains in effect while the circuit court’s order is appealed.

A court may grant a stay pending appeal when a moving party: (1) makes a strong showing that it is likely to succeed on the merits of the appeal; (2) shows that, unless a stay is granted, it will suffer irreparable injury; (3) shows that no substantial harm will come to other interested parties; and (4) shows that a stay will do no harm to the public interest.

The court of appeals concluded that the City met the criteria for granting a stay. First, it noted that duly enacted ordinances are presumed constitutional and that the City had made a strong showing that Wis. Stat. § 252.03 provides authority for a legislative body to authorize a health official to impose restrictions on the assembly of persons to prevent communicable diseases. The court of appeals was not persuaded that the Safer Racine ordinance unconstitutionally infringes on citizens’ rights to assemble as granted by the Wisconsin Constitution, noting that just as capacity limits set for public establishments for fire safety reasons are not unconstitutional despite limiting the number of people who can assemble in one place, so may capacity restrictions be set for health reasons to control communicable diseases. Second, the court noted that absent a stay, the City would be prevented from enforcing a duly enacted ordinance designed to control an ongoing pandemic and safeguard its residents which constitutes irreparable harm. Third, the court concluded a stay would not cause irreparable harm to the business owner who brought the action because the regulations permit him to operate his business with enhanced safety restrictions. Fourth, the court concluded that the circuit court’s analysis concerning the public interest did not give sufficient weight to the public’s interest in remaining safe from communicable disease as set forth in Wis. Stat. § 252.03, and in the Racine ordinance. The court’s order notes that the City of Racine’s legislative body considers its ordinance necessary to protect the public safety, and the legislative determination is entitled to deference. The circuit court erroneously exercised its discretion in balancing the factors to be considered and not giving the ordinance and the City’s legislative determination the presumptions and deference to which they are entitled.

Importantly, the court of appeals said any argument that the Wisconsin Supreme Court’s decision in *Wis. Legislature v. Palm* controls is “misplaced” because that decision held that Emergency Order 28 issued by Wisconsin’s Secretary of Health Services was unenforceable because it did not comply with the rulemaking procedures of Wis. Stat. § 227.24, i.e., it impermissibly avoided legislative oversight. In contrast, the Safer Racine ordinance was created by the legislative body for the City of Racine in accordance with Wis. Stat. § 252.03.