Wisconsin Legislative Council

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Director

TO: REPRESENTATIVE GORDON HINTZ

FROM: Anna Henning, Senior Staff Attorney

RE: County Board Authority to Grant Funds to a Nonprofit Food Pantry

DATE: March 26, 2021

You asked whether a county board may grant funds to a nonprofit organization to support the organization's operation of a food pantry in the county. An attorney general's opinion, issued to the Shawano County Corporation Counsel on September 1, 2017, concludes that counties lack the authority to make such a grant. [OAG-01-17.] Thus, in absence of a court decision to the contrary, a county may be wise to exercise some caution before doing so. However, as discussed in more detail below, a court may reasonably conclude that counties do have the authority to make a grant to a nonprofit organization for food pantry operation.

COUNTY BOARD AUTHORITY

The Wisconsin Constitution structures counties differently from incorporated municipalities. Cities and villages have constitutional "home rule" power to "determine their local affairs and government, subject only to [other provisions of the Wisconsin] Constitution and such enactments of the Legislature of statewide concern as with uniformity shall affect every city or every village." [Wis. Const. art. XI, s. 3.] Counties are, instead, dependent on the Legislature for their power. The Legislature may "establish one or more systems of county government" and "confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe." [Wis. Const., art. IV, ss. 22 and 23.]

"Administrative Home Rule" and Other Statutory Authority

Reflecting the difference between counties and municipalities under the Wisconsin Constitution, the statutes grant broad police powers to cities and villages,[1] and they grant counties a "more limited" form of statutory home rule, often called "administrative home rule." [*Jackson County v. Department of Natural Resources*, 2006 WI 96, ¶ 17.] Specifically s. 59.03 (1), Stats., allows counties to exercise "any organizational or administrative power" that is not preempted by state law.

[1] Cities and villages "shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public" under their local police powers and "may carry out [their] powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means." [ss. 61.34 (1) and 62.11 (5), Stats.] Towns that adopt village powers may also exercise police powers granted to cities and villages, except when preempted by state law. [See, ss. 60.10 (2) (c) and 60.22 (3), Stats.]

The statutes likewise grant county boards, in particular, "the authority to exercise any organizational or administrative power," subject only to preemption by state law. [s. 59.51 (1), Stats.] In addition, subch. V of ch. 59, Stats., grants county boards more specific powers, relating to county administration, health and human services, veterans' affairs, public protection and safety, consumer protection, cultural affairs, economic development, and transportation. However, the statutes also make clear that county boards may exercise their statutory home rule authority "without limitation because of enumeration." [Id.] In addition, a county board may levy taxes and appropriate money to "carry into effect any of the board's powers and duties." [s. 59.51 (2), Stats.]

Judicial Interpretation

Noting that counties derive their power from the statutes, the Wisconsin Supreme Court has consistently held that "a county board has only such powers as are expressly conferred upon it or necessarily implied from the powers expressly given or from the nature of the grant of power." [See, e.g., *Jackson County*, 2006 WI 96 at ¶ 16; *Town of Vernon v. Waukesha County*, 102 Wis. 2d 686, 689 (1981).]

However, to "give counties the largest measure of self-government under the administrative home rule authority granted to counties," the statutes direct courts to construe counties' authority liberally, "in favor of the rights, powers and privileges of counties to exercise any organizational or administrative power." [s. 59.04, Stats.] Thus, within the parameters described above, Wisconsin courts have in some cases characterized counties' power as "broad" and as "reflect[ing] a legislative intent to allow county governments to act on matters of local concern in any manner they deem appropriate." [*Town of Grant v. Portage County*, 2017 WI App 69, ¶¶ 19-20.]

The Wisconsin Supreme Court has characterized county administrative home rule authority as being "a broad grant of power." [*Jackson County*, 2006 WI 96 at ¶ 19.] In addition, the Court has emphasized the statutory language allowing county boards to exercise their administrative home rule authority "without limitation because of enumeration" to conclude that counties' administrative home rule authority empowers them to exercise powers other than those specifically enumerated in other statutory provisions. For example, in *Hart v. Ament*, the Wisconsin Supreme Court held that Milwaukee County had the statutory authority to enter into a contract with a nonprofit organization for management of the Milwaukee Public Museum, despite no specific statutory authority for doing so. [176 Wis. 2d 694, 702-03 (1993).]

Wisconsin courts have generally declined to define the parameters of county administrative home rule. As mentioned, counties may exercise "any organizational or administrative power" not preempted by state law. Although courts have characterized counties' "organizational and administrative" powers as being more limited than the broader police powers exercised by cities and villages, the distinctions between the two sets of powers remain largely undefined.

Instead, when county authority is challenged, courts have typically analyzed such authority under a preemption framework. [See, e.g., *Jackson County*, 2006 WI 96.] That approach reflects a more general judicial trend toward merging the local home rule authority and preemption analyses in cases addressing local government authority. [See, e.g., *Black v. City of Mke.*, 2016 WI 47.]

In Wisconsin, state law preempts local regulation if: (1) the Legislature has expressly withdrawn the power of municipalities to act; (2) the municipality's actions logically conflict with the state legislation; (3) the municipality's actions defeat the purpose of the state legislation; or (4) the municipality's actions are contrary to the spirit of the state legislation. [*Anchor Savings & Loan Association v. Madison EOC*, 120 Wis. 2d 391, 397 (1984).]

APPLICATION TO A GRANT TO A NONPROFIT FOOD PANTRY

No statutory provision specifically authorizes counties to provide grants to nonprofit organizations for operating a food pantry. Arguably, the closest specific authority is county boards' power to establish relief programs, but because the provision authorizing relief programs refers to "eligibility criteria" for a "specific class or classes of persons," it appears to contemplate a program that provides direct financial assistance, rather than grants to nonprofit organizations. [See, s. 59.53 (21), Stats.]

Thus, a county board would likely need to rely on its more general administrative home rule authority as its source of authority for granting county funds to a nonprofit organization that operates a food pantry. To do so, a county board would argue that providing the funds constitutes an exercise of "organizational or administrative power" that is not preempted by state law. As mentioned, Wisconsin courts have not clearly defined the parameters of counties' administrative home rule authority, but have focused instead on a preemption analysis.

Under Wisconsin case law, the grant would be preempted if it was expressly preempted by, logically conflicted with, defeated the purpose of, or was contrary to the spirit of a state statute or constitutional provision. I am not aware of a state law that would arguably preempt a county grant of this type. Thus, it appears that a court would be likely to uphold the grant under the court's current case law.

The attorney general's opinion does not discuss county administrative home rule authority. Instead, it concludes that a grant to a nonprofit organization for purposes of a food bank is not authorized under any of the more specific powers enumerated in ch. 59, Stats., and is therefore not authorized.

The opinion also notes that the statutes explicitly authorize county boards to make payments to nonprofit organizations that provide assistance to individuals who are the victims of domestic violence and related crimes. [s. 59.53 (3), Stats.] Relying on a common "canon" of statutory construction,[2] the attorney general's opinion views that authority to provide grants to certain other types of nonprofit organizations as evidence that the Legislature did not intend to allow county boards to provide grants to nonprofit organizations for purposes of operating a food bank.

However, Wisconsin courts tend to "use caution" when relying on that canon of construction, and employ it only when there is "factual evidence" that the Legislature truly intended a list to be exclusive. [*Wis. Patients Compensation Fund v. Wis/ Health Care Liab. Ins. Plan*, 200 Wis. 2d 599, 609-610 (1996).] As mentioned above, the statutes state that counties may exercise their authority under ch. 59, Stats., "without limitation because of enumeration," suggesting that the specific grant of authority for grants to nonprofit organization for other purposes should not imply a legislative intent to limit grants to nonprofit organizations for food pantry purposes.

Thus, although it is impossible to reach a definitive conclusion in absence of a judicial opinion, it appears very possible that a court would hold that a county is authorized to grant funds to a nonprofit organization for operating a food pantry. However, particularly given the contrary conclusion in the attorney general's opinion, there may currently be some legal risk in doing so.

Please let me know if I can provide any further assistance.

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[2] The *expressio unius, exclusio alterius* ("express mention, implied exclusion") canon of construction suggests that, when a statute contains an enumeration or listing of specific items, the Legislature intended to exclude other items that are not specifically mentioned.