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Q & A FOR COUNTY RESTRICTIONS OR BANS ON CAMPGROUNDS AND ATV/UTV USAGE

April 14, 2020

Summer in Wisconsin means getting outdoors with a wide range of recreational activities. Camping and using all terrain/utility terrain vehicles (“ATV/UTV”) are just two of the favorite summer activities that draw people to Wisconsin’s many recreational destinations. In light of the COVID-19 pandemic, many counties have expressed concerns regarding the influx of tourists to their counties for summer activities, especially when tourists may come from areas that have a high number of reported COVID-19 cases.

Emergency Order #12, the Safer at Home Order (“EO #12”), was issued on March 24, 2020 and orders people within Wisconsin to stay at home, with certain exceptions, including the ability to engage in “Essential Activities.” “Essential Activities” include types of outdoor recreation with certain restrictions. While EO #12 included visiting state parks as “Essential Activities” in outdoor recreation, the COVID-19 pandemic continues to present new challenges, including increased risks of exposure due to high use of popular state recreational areas. In response, Governor Evers ordered the Wisconsin Department of Natural Resources (“DNR”) Secretary to close 40 state parks, forests and recreational areas effective April 10, 2020. The DNR already closed campgrounds in state parks and recreational areas through April 30, 2020.

The Wisconsin Counties Association and its general counsel, von Briesen & Roper, s.c., have received many questions regarding a county’s ability to restrict or prohibit certain recreational activities, particularly campgrounds (both public and private) and ATV/UTV activities. Our general counsel has prepared the Q & A below to provide information related to a county restricting or completely closing campgrounds and ATV/UTV activities in light of the COVID-19 pandemic and the particular issues facing counties during Wisconsin’s summer recreation season.

This information should be reviewed carefully with corporation counsel to ensure county compliance with other applicable laws and regulations.

CAMPGROUND CLOSURES:

Q: Our county has many campgrounds, both public and private. Does EO #12 allow the county to close these campgrounds?

A: Generally, yes, so long as the local health officer (“LHO”) determines that the action is “reasonable and necessary for the prevention and suppression of the COVID-19

virus.” Wis. Stat. § 252.03(2). However, a county should be mindful of the legal considerations when setting forth an order restricting or closing campgrounds.

A question of preemption arises if a local order conflicts with a state order issued pursuant to Wis. Stat. § 252.02(4) for the “control and suppression of communicable diseases,” such as EO #12. Paragraph 19 of EO #12 reaffirms this point in stating that EO #12 “supersedes any local order that is in conflict with this order.”

In applying the standard preemption test to this situation, any local order closing campgrounds must be consistent with EO #12 or it will be void. Campgrounds are not cited as an “Essential Business” in EO #12, nor is camping defined as an “Essential Activity.” However, DHS’s FAQs accompanying EO #12 lists campgrounds as an “Essential Business.” Despite this apparent inconsistency, it must be remembered that the FAQs are an interpretation of EO #12, not the order itself. In addition, Governor Evers directed the DNR to close all state campgrounds through April 30, 2020, thus deviating from the FAQs. As a result, while counties are encouraged to act consistently with the FAQs, DHS and DNR’s deviation from the FAQs also illustrates the ever-changing impact of the COVID-19 pandemic on public health and the latitude provided an LHO.

Q: EO #12 specifically exempts hotels and motels as “Essential Businesses.” Aren’t campgrounds a similar type of accommodation to hotels and motels?

A: Not really. While some case law identifies campgrounds within the same category of “lodging establishments,” the factors placing campgrounds and hotels/motels in the same category do not include public health considerations, such as required bathroom facilities, number of occupants per unit and cleaning/sanitation requirements. The Wisconsin Admin. Code Ch. ATCP also recognizes the public health differences between campgrounds and hotels/motels by regulating each under separate chapters of the Wisconsin Administrative Code.

Q: Many campgrounds are privately owned, and people depend on the summer season for income. Can a county close a privately owned campground? If so, does a county need to take different steps to close a private campground than if it closes a public campground?

A: Yes, a county may close or otherwise restrict privately owned campgrounds. If an LHO determines that closing campgrounds is “reasonable and necessary for the prevention and suppression” of the COVID-19 virus, the LHO may order the campground closed; ownership should only be a consideration if that factor impacts whether it is “reasonable and necessary for the prevention and suppression” of COVID-19. An LHO’s order closing campgrounds should only treat public and privately owned campgrounds differently if the order clearly identifies differentiating circumstances between public and private campgrounds.

Q: What considerations should an LHO look to in determining whether to close campgrounds in the county?

A: An LHO should look to the particular circumstances in the county to determine whether closure is necessary to prevent and suppress the spread of COVID-19 in the county. Circumstances that may be appropriate to consider may include:

- *The county's general population and whether steps need to be taken to protect populations especially vulnerable to the COVID-19 virus.*
- *The number and size of campgrounds in the county.*
- *The number of visitors outside the county that visit campgrounds and whether camping in the county is conducive to non-essential travel.*
- *Whether camping in the county encourages congregation of groups greater than ten (10) people.*
- *Consideration of facilities at which the camping activity occurs such as the space between campsites, whether the campsites are enclosed structures (such as camping cabins, RVs or motor homes), bathroom and shower facilities, food service facilities and other communal locations.*

Q: If a county's LHO determines that closing campgrounds is reasonable and necessary to prevent and suppress the COVID-19 virus, what steps are needed to close the campgrounds?

A: If the LHO determines that it is reasonable and necessary to close campgrounds for the prevention and suppression of the COVID-19 virus, the LHO must issue an order with the reasons, terms of closure and the order's effective and expiration dates. The order should be very specific and narrowly tailored to establish the specific reasons why closing campgrounds is "reasonable and necessary" for the prevention and suppression of the COVID-19 virus. The more specific the order, the more likely an order will withstand legal scrutiny. Including the effective and expiration dates allows people to properly plan for activities even though campgrounds may be temporarily closed. Also, an order should include a statement that the order may be extended if such extension is reasonable and necessary for the prevention and suppression of the COVID-19 virus. LHOs should work closely with their corporation counsel when drafting such an order to ensure proper form and substance.

Q: Does the county sheriff have authority to enforce a local order closing campgrounds?

A: Yes. Like enforcement of EO #12 and other DHS and LHO orders, Wis. Stat. § 252.25 and Paragraph 17 of EO #12 allow county sheriffs to enforce an LHO order closing campgrounds.

ATV/UTV RESTRICTIONS AND TRAIL CLOSURES

Q: Like campgrounds, counties draw visitors and tourists for ATV/UTV activities. Should a county evaluate closing ATV/UTV activities in the same manner as closing campgrounds?

A: Yes and no. Like campgrounds, an LHO's order closing or restricting any ATV/UTV activities must be consistent with EO #12 and other DHS orders. As of this writing, there are no executive orders or other DHS orders specifically addressing ATV/UTV activities. Like orders regulating campgrounds, any LHO order restricting ATV/UTV use must set forth the reasons why the restrictions are "reasonable and necessary for the prevention and suppression" of the COVID-19 virus.

However, the statutes have "preempted" much local ATV/UTV regulation and therefore counties must consider the unique legal considerations for ATV/UTV restrictions. The statutes only allow counties to regulate ATV/UTVs on trails maintained by the county or as designated by the county, and only if a county's regulatory ordinance is in strict compliance with the provisions set forth in Wis. Stat. § 23.33. Accordingly, an LHO's order restricting ATV/UTV use will only be effective on trails maintained by the county and on routes designated by the county.

Q: Doesn't ATV/UTV use fall under the category of EO #12's permitted exception of "outdoor recreation"?

A: Maybe. The outdoor recreation exception applies to activities such as walking, hiking and biking. Contact and team sports are specifically excluded from permitted activities, and all playgrounds in the state are closed. Social distancing requirements must be met in all outdoor recreation.

A county should closely consider the facts and circumstances that surround ATV/UTV use in the county when determining whether any restrictions are "reasonable and necessary" to prevent or suppress the COVID-19 virus. In addition, any LHO order restricting ATV/UTV use should be very specific and narrowly tailored to set forth the specific reasons, factors and circumstances to justify the restrictions as "reasonable and necessary" for the prevention and suppression of the COVID-19 virus. LHOs should work closely with their corporation counsel when drafting such an order to ensure proper form and substance.

Q: Are there additional factors that make restricting or prohibiting ATV/UTV activities different than restricting other outdoor activities?

A: Yes. The statutes explicitly preempt local ATV/UTV regulation unless certain conditions are met. Counties may only regulate ATV/UTVs on trails maintained by the county or as designated by the county, and only if a county's ordinance is in strict compliance with the provisions set forth in Wis. Stat. § 23.33. In addition, local regulations must be approved by the Wisconsin Department of Transportation if adjacent to a state highway. Routes must be on file with WisDNR, and routes must adhere to specific legal requirements such as signage requirements. A county's restrictions on

ATV/UTV use must pass both the preemption test for a local health order and a preemption test for county regulation of ATV/UTV use.

Q: Counties oftentimes have contractual obligations with local ATV/UTV clubs that may prohibit closing of routes or trails. Do the contractual obligations trump an LHO order restricting ATV/UTV use?

A: No, so long as an LHO determines that restricting or closing a county designated ATV/UTV route or county maintained ATV/UTV trail is “reasonable and necessary” for the prevention and suppression of the COVID-19 virus.

Q: Many counties depend on tourists, including campers and ATV/UTV enthusiasts, for summer revenue. How do we tell tourists to stay away by closing campgrounds or restricting ATV/UTV use, but then welcome them back later?

A: The COVID-19 pandemic has caused counties to make difficult decisions for both the short term and long term welfare of its residents and visitors. Below are some suggestions for counties to consider:

- Issue public statements and post online information with facts and recommendations from DHS, the county’s health department and the LHO. State how that information directly relates to recreational activities and tourism in the county.*
- Share the public health factors justifying closure of campgrounds and restrictions on ATV/UTV use and share steps that the county will take to address those factors.*
- Avoid targeted references to any privately owned campground or specific trails/routes that may appear to target specific areas unless those areas have unique characteristics that justify different regulations. This will avoid an argument that the LHO order is unreasonably targeting a specific owner or trail/route.*
- Partner with other economic development organizations, the Wisconsin Department of Tourism, and other local organizations to share information and provide re-opening details. Make sure that information and messaging is consistent.*
- Provide enforcement information and a number for individuals to call with questions. Oftentimes, the contact will not be the LHO or the county’s health department, but rather a local tourism or economic development organization.*