

COMMITTEE OF THE WHOLE MEETING

The Common Council of the City of Ashland will meet as the Committee of the Whole on July 14, 2020 immediately following the City Council meeting which begins at 5:30 PM in the Ashland City Hall Council Chambers.

The following items will be considered:

1. Roll Call
2. Council President's Report
3. Administrator's Report
4. Approval of Agenda
5. Committee Updates
6. Discussion Items
 - A. Discussion and Possible Action Regarding Implementing an Ordinance Requiring Water Lateral Replacement of Properties Directly Involved with Road Reconstruction *(Mayor)*
 - B. **AMENDED TITLE:** Discussion and Possible Action to Enact a Local Ordinance to Empower Municipal Power to Issue Emergency Orders by the City of Ashland under Wisconsin State Statute 323 in the Absence of County Health Officer Order, *including use of face coverings in public indoor spaces or public outdoor spaces when social distancing is not an option. (Mayor)*
 - C. Discussion Regarding Policing
7. Adjournment

The City of Ashland does not discriminate on the basis of sex, race, creed, color, national origin, sexual orientation, age or disability in employment or provision of services, programs or activities.

NOTE: Upon reasonable notice, the City of Ashland will accommodate the needs of disabled individuals or individuals with limited English proficiency through auxiliary aids or services. For additional information or to request this service, contact Denise Oliphant at 715-682-7071 (not a TDD telephone number) or FAX: 715-682-7048

SUBJECT: Committee Updates

RECOMMENDATION: Discussion only

DEPARTMENT OF ORIGIN:

CLEARANCES:

EXHIBITS:

FINANCIAL IMPACT:

SUMMARY STATEMENT:

Harbor Commission: Pufall
Plan Commission: MacKenzie
Police & Fire: Lewis
Library Board: Jackson
Housing Authority: Franek
Housing Committee: Tochterman
Parks and Rec Committee: Haas
Public Works Committee: Moore
Sustainability Committee: Ullman
Historic Preservation Committee: Franek
Disabled Parking Committee: Whitebird
Source Water Protection Committee: Ortman

SUBJECT: Discussion and Possible Action Regarding Implementing an Ordinance Requiring Water Lateral Replacement of Properties Directly Involved with Road Reconstruction (*Mayor*)

RECOMMENDATION: Discussion

DEPARTMENT OF ORIGIN: Mayor

CLEARANCES: City Administrator
Council President

EXHIBITS:

1. Guidebook for Wisconsin Municipalities and Citizens on Replacement of Lead Service lines Using Wisconsin Act 137
2. November 2018 Municipal Magazine (LWM) Kenosha "Gets the Lead Out"
3. WI State Statutes 196.372
4. Eau Claire Sample Ordinance (No 7357)

FINANCIAL IMPACT: NA

SUMMARY STATEMENT:

This is a continuation of a discussion started at the Committee of the Whole on June 30, 2020 about the feasibility of enacting an ordinance to require the replacement of lead water laterals when a street is being completely reconstructed, and that lead water mains are replaced with non-lead. Currently there is no requirement that lead laterals (responsibility of the homeowner) be replaced at the same time and there are instances where a homeowner has elected to re-hook a lead lateral to a non-lead main.

The City has received grant dollars from the State of Wisconsin to pay the homeowners' cost at no expense, and expects that the grant funding will continue for the foreseeable future.

At the COW meeting on June 30, 2020, Council expressed interest in getting further information about how other communities have enacted an ordinance that would mandate replacement so long as grant dollars are available to residents to help finance the cost. (see Exhibit resources)



Guidebook for Wisconsin Municipalities and Citizens on Replacement of Lead Service Lines Using Wisconsin Act 137

A step-by-step guide with links to related tools and
information

Developed by:

Associate Professor David Soll – University of Wisconsin: Eau Claire
Ryan Leckel – University of Wisconsin: Stout

Funded By:

University of Wisconsin System Undergraduate Water Fellow Program

Overview

Statement of Intent

This guidebook is intended to help municipal leaders, including community action leaders and concerned citizens, gain a more complete understanding of Wisconsin Act 137, a law passed by Wisconsin's legislature in early 2018.

The goal is to promote the removal of lead service lines and improve the health of Wisconsinites. This guidebook draws on information obtained from individuals, nonprofit organizations, and public officials who seek to improve public health and water utility infrastructure for current and future Wisconsin citizens.

Organization of this guidebook

- Acknowledgements
- Introduction to Lead and Lead Service Lines
 - What are lead service lines (LSLs)?
 - What are the effects of lead on public health?
- Introduction to Wisconsin Act 137
- Wisconsin Act 137 Implementation Overview
- Wisconsin Act 137 Implementation Process
- Navigating the Public Service Commission
- Index
 - Links to additional information
 - Sample application documents



Important information

Tips, links, and other important information in this guidebook are marked with:



Acknowledgements

This guidebook was written using the vast knowledge of multiple agencies and individuals working with and for the state of Wisconsin. Because of their knowledge, we are able to provide a comprehensive guide on understanding lead service line replacement and the accompanying legislation in Wisconsin.

This project is funded by the University of Wisconsin System Undergraduate Water Fellow Program, and by selecting and funding this project, they have acknowledged the importance of promoting a healthy living environment for Wisconsinites.

The following individuals gave generously of their time to ensure the accuracy of the information provided. These individuals include:

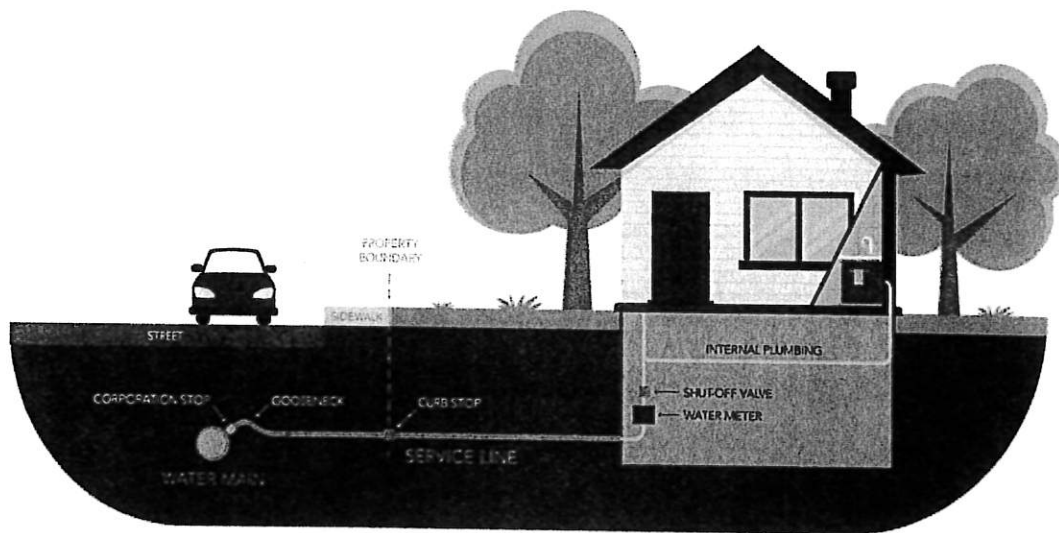
- | | |
|---|---|
| • Denise Schmidt, Public Service Commission | • Curt Witynski, League of Wisconsin Municipalities |
| • Zach Ramirez, Wisconsin Legislative Council | • Jason Mugnaini, Office of Senator Cowles |
| • Nicole Mathews, Wisconsin Department of Natural Resources | • Robert Cowles, Wisconsin State Senate |



Introduction to Lead and Lead Service Lines

What are water service lines?

Water service lines are water distribution systems that run below ground from a water main to a consumer's water meter. The line consists of two sections, the **public** service line leading from the utility water main to the curb stop, and the **private** service line leading from the curb stop to the water meter. In Wisconsin Act 137, public lines are called utility-side lines, and private ones are referred to as customer-side lines.



Source: Lead Service Line Collaborative (LSLR), 2018

Why are some water service lines made from lead?

Lead is a pliable material that was used to transport water in the United States for centuries, and was in continued use until 1986. Despite health concerns, the use of lead in water service lines was a standard practice in much of the United States as recently as the 1970s. However, in 1986 the U.S. Environmental Protection Agency banned its use in water service lines. In 1991, the Environmental Protection Agency put in place the Lead and Copper Rule, which called for monitoring of lead in water supplies. Leaching of lead from water service lines is likely the source of a significant percentage of the lead found in the blood of citizens in some Wisconsin cities and towns.

Introduction to Lead and Lead Service Lines

Why should we be concerned about lead?

Lead exposure, especially in children, the elderly, and those pregnant or nursing, can limit brain development, result in learning disabilities, and cause behavioral problems. Children and infants are particularly sensitive to lead exposure, which can contribute to lifelong developmental challenges.

How are individuals exposed to lead in water service lines?

According to the Wisconsin Childhood Lead Poisoning Prevention Program (WCLPPP), children in Wisconsin are exposed to lead based on the age of Wisconsin's housing stock. Older homes, especially those built prior to 1986, are more likely to contain lead water service lines, lead plumbing fixtures, and other sources of lead, such as lead paint. (EPA, 2018) The cost of replacement is often expensive, which explains why many older homes still contain these fixtures and lines.

What is lead poisoning?

According to the Centers for Disease Control and Prevention (CDC), an individual with a blood lead level (BLL) equal to or greater than 5 micrograms of lead in 1 deciliter of blood (5 mcg/dL) is considered to suffer from lead poisoning. The state of Wisconsin, through Wis. Stat. § 254.11(9) defines lead poisoning as a BLL equal to or greater than 10 mcg/dL.



Lead and Public Health

Additional information on the health effects of lead can be found through the Wisconsin Department of Health Services and the Lead Service Line Replacement Collaborative (links provided in the "Index").

Introduction to Lead and Lead Service Lines

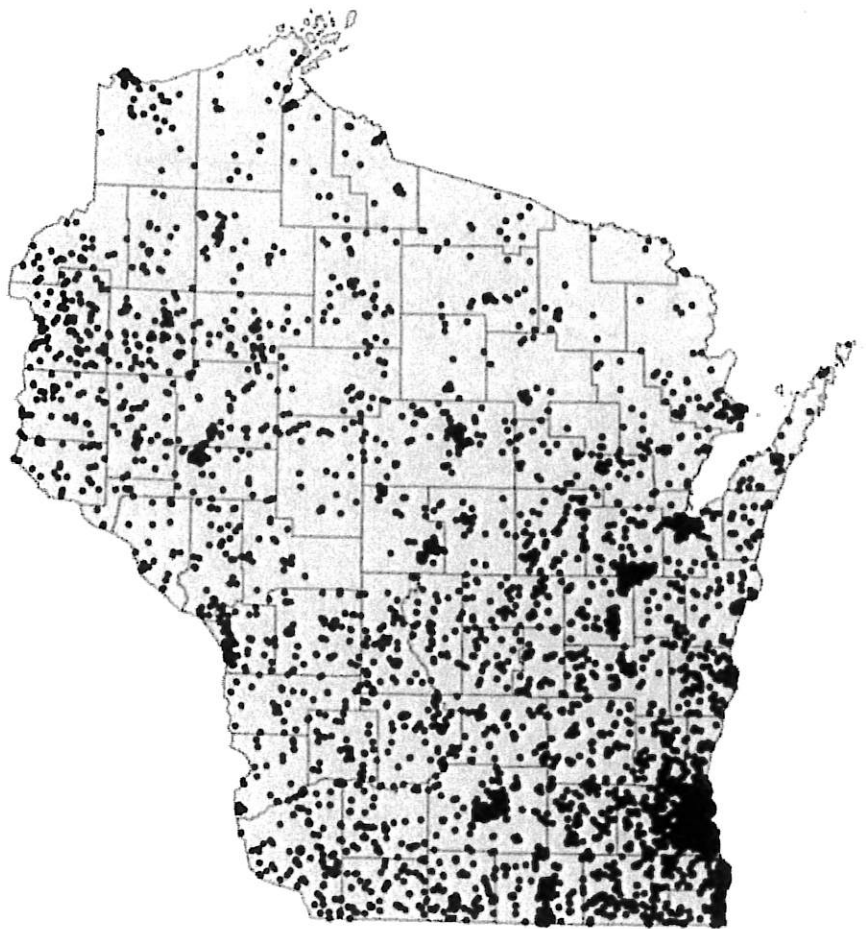
How is lead poisoning tracked in Wisconsin?

Lead poisoning in Wisconsin is tracked in children up to 6 years old who meet one or more of the following conditions: reside in or frequent a home/building built prior to 1950, live in the cities of Milwaukee or Racine, are enrolled in Medicaid and/or the Women, Infants, and Children Nutrition Program (WIC).



Lead and Children

In 2016, rates of lead poisoning in children in Wisconsin (5% of those tested) were higher than those in Flint, Michigan (2.4% of those tested). More than 200,000 children in Wisconsin were diagnosed with lead poisoning between 1996 and 2016. (Department of Health Services, "Wisconsin Blood Lead Testing", 2016)



Each dot represents the address of a child diagnosed with lead poisoning, 1996-2016 (Source: DHS, 2016)

Data on lead poisoning in children is gathered yearly by the Department of Health Services and the Wisconsin Department of Public Health and released as annual public reports.

Introduction to Wisconsin Act 137

What is Wisconsin Act 137

Wisconsin Act 137 (which created Wis. Stat. § 196.372 and amended sections of Wis. Stat §§ 62 and 66) is recent legislation that has its roots in efforts by the city of Madison to replace privately owned lead water service lines. To help pay for the lead service line (LSL) replacements, Madison requested an increase in water rates to provide financial relief to homeowners. However, the lack of a clear legal precedent permitting public funds to be used to pay for private infrastructure prevented the city from using water rates to cover these costs. Recognizing the need to provide municipalities financial tools to accelerate the replacement of LSLs, the state legislature passed Wisconsin Act 137, which permits utilities and municipalities to provide financial assistance, through loans and grants, to private consumers for the express purpose of replacing private LSLs.

Why is Act 137 important?

The existing lead infrastructure in Wisconsin has marked effects on the health of Wisconsinites, particularly pregnant women, children under the age of 6, and the elderly. Prior to Wisconsin Act 137, there were no utility-subsidized programs in place to help consumers cover the cost of replacing lead service lines with lead-free alternatives. Prior to passage of the legislation in January of 2018, many municipalities had taken advantage of public funding, such as federal monies and state revolving funds, to replace public LSLs, initiating the first steps to reducing the exposure of the state's citizens to lead from service lines. The passage of Wisconsin Act 137 also contributes to economic growth within municipalities because communities who have removed lead service lines can promote their lead-free status to prospective residents and businesses while also retaining current residents and businesses.

Introduction to Wisconsin Act 137

Who can take advantage of Wisconsin Act 137?

Wisconsin Act 137 is a tool available to all Wisconsin municipalities that receive funding through consumer water rates approved by the Public Service Commission and that have customer-side water service lines that contain lead. Local utilities must collaborate with municipal leaders to take the steps needed to receive state approval under Wisconsin Act 137. Wisconsin Act 137 is intended to be utilized by municipal leaders under the guidance of public utilities' management for any municipality that has customer-side LSLs. These agencies can also partner with local school boards, county economic development committees, regional REALTORS associations, and community action committees.

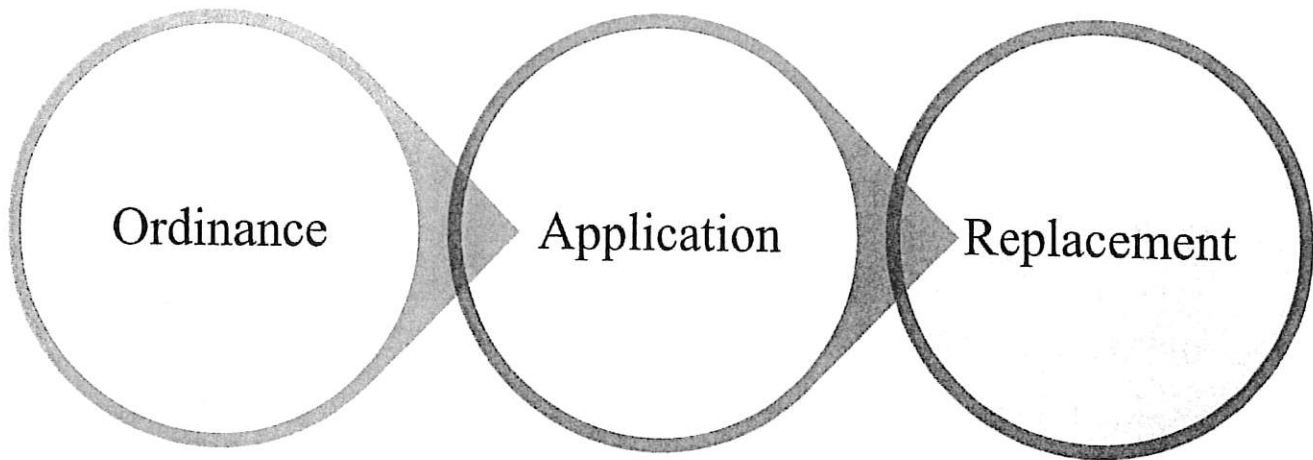


Wisconsin Legislative Council Act Memo

“2017 Wisconsin Act 137 (the Act) creates: (1) a process by which a water public utility may provide a grant, a loan, or both to a property owner for the purpose of assisting the property owner in replacing the portion of a lead-containing water service line that is owned by the property owner; and (2) a process by which a city, village, town, or county may provide a loan or facilitate owner-arranged financing from a third party for the purpose of replacing the portion of a lead-containing water service line that is owned by the property owner. The Act also authorizes a political subdivision to use its own workforce to perform, on private property, certain work that is ancillary to replacing the portion of a water service line that is owned by a public utility.” (Wisconsin Legislative Council, *Financial Assistance for Water Service Lines Containing Lead*, 2018)

Wisconsin Act 137 Implementation Process

Wisconsin Act 137 requires municipalities to follow a 3-step, detailed process in order to receive state approval to participate in the program. These steps are designed to ensure that municipalities are following the letter of the law and that the proposed replacement programs are sufficient in meeting their intended goal of full LSL replacement.



Municipalities must pass an ordinance that outlines their general approach to implementing Wisconsin Act 137, such as the type of financial assistance that will be provided to customers with LSLs. Many requirements from Wisconsin Act 137 can be included in the ordinance, such as requirements to replace all LSLs during the construction process.

Municipalities must submit a detailed application to the Wisconsin Public Service Commission, which oversees and facilitates the efficient and fair provision of quality utility services in the state. Prior to the submission of the application material, the PSC recommends the local utility schedule an in-person or web conference with PSC and DNR staff to ensure the utility understands the requirements of the application process and submits the information necessary for the PSC to make a decision.

Once the ordinance is in place and the PSC approves the application, municipalities can then begin the process of replacement. Depending on the community's needs, achieving complete removal of all LSLs may potentially take several years. Each utility will replace LSLs according to the schedule it outlines in its application to the PSC. The law places no time limits on the replacement schedule.

Wisconsin Act 137 Implementation Process

Grants, Loans, and Political Subdivisions

Wisconsin Act 137 gives municipalities some discretion regarding the nature and amount of financial assistance (grants, loans, or both) provided to customers. Before a utility can provide financial assistance to customers with lead service lines, it must meet three requirements:

1. Pass a municipal ordinance that permits the water utility to provide financial assistance to customers.
2. Replace all public service lines that contain lead at the same time as the customer-owned LSL.
3. Receive approval from the PSC of the utility's plan for providing financial assistance.

Wis. Stat. § 66.0627, amended during the creation of Wisconsin Act 137, allows political subdivisions (city, village, town, or county) the authority to provide loans or connect consumers with 3rd party lenders.

Loan Repayments

As per Wisconsin Act 137, these loans cannot be forgiven and are transferred with the property at the point of sale. If an installment payment becomes delinquent, the loan becomes a lien on the property and is repaid as a special charge on the property owner's property tax bill.

Use of Collected Revenue

Municipalities that receive approval may use revenue collected from water rates to fund all or a portion of the cost of replacing customer-side LSLs. Utilities may also use cash on hand to cover replacement costs for a period of years.

Wisconsin Act 137 Implementation Process

Important Details

- The law requires that a municipality provide the same level of financial assistance to each customer in a customer class. This information is required to be provided in the municipal ordinance. Further information will be provided during the pre-application conference with the PSC.
- Municipalities must replace all utility-side LSLs prior to or during the replacement of customer-side LSLs. To minimize the total cost of replacement, it is recommended by the PSC that utilities coordinate LSL replacement with road construction and main replacement projects where possible.
- Many municipalities will need to request a rate increase from the PSC to raise funds for the financial assistance provision.
- Participation in Wisconsin Act 137 requires all LSLs to be replaced, both utility-side and customer-side.
- Depending on the needs of the community, the complete process of removal and replacement of LSLs may take years.
- Wisconsin Act 137 gives the PSC 90 to 180 days to act on an application and provide a final determination. Therefore, municipalities should submit applications well in advance of the anticipated replacement schedule.
- There is no time limit set on completion of LSL replacements through Wisconsin Act 137. Therefore a municipality can take as long as necessary to identify the issue, apply for approval from the PSC, and begin replacement.

Navigating the Public Service Commission

In conjunction with Wisconsin Act 137, the Wisconsin Public Service Commission (PSC) released a detailed application guide to assist municipal leaders and utility managers. This checklist provides information necessary for municipal leaders and consumers to understand the requirements set forth by the PSC.



Checklist Information

See <https://psc.wi.gov/Pages/ForUtilities/Water/Lead-Service-Line.aspx> for updated version of checklist.

Information on the PSC Application

- Kenosha is the only municipality so far that has been approved under Wisconsin Act 137 for LSL replacements, therefore the application provided by Kenosha should not be considered the PSC's final interpretation.
- The PSC's sample ordinance was based on the required ordinance passed by PACE WI member counties. (<http://www.pacewi.org/>)
- Much of the information requested by the Public Service Commission as part of the Wisconsin Act 137 application consists of material that the PSC requests for any proposed modification of municipal water systems. Any information that is unclear can be explained during the pre-application conference required by each municipality.

Index

Lead and Public Health Resources

- **American Water Works Association (AWWA)**
 - Resources to communicate the harmful effects of lead with consumers
 - <https://www.awwa.org/Resources-Tools/Water-Knowledge/Lead/>
- **Wisconsin Department of Health Services (DHS) – Lead-Safe Wisconsin**
 - Information on lead, renovator certifications, and health topics
 - <https://www.dhs.wisconsin.gov/Lead/>
- **Centers for Disease Control (CDC)**
 - Full topic on lead with links to articles on risk and public action
 - <https://www.cdc.gov/nceh/Lead/>

Lead Service Line Replacement Resources

- **Lead Service Line Replacement Collaborative (LSLRC)**
 - Guide to help communities facilitate lead service line replacement
 - <https://www.lslr-collaborative.org/>
- **Public Service Commission (PSC)**
 - Information on current legislature for municipal authorities
 - <https://psc.wi.gov/Pages/ForUtilities/Water/Lead-Service-Line.aspx/>
- **Wisconsin Department of Natural Resources (DNR)**
 - Guide to public funding sources for LSL replacement projects
 - <https://dnr.wi.gov/Aid/documents/EIF/leadServiceLineFunding.html/>
- **Environmental Defense Fund (EDF)**
 - Descriptions of community programs and initiatives
 - <https://www.edf.org/health/recognizing-community-efforts-replace-lsl/>

Application Sample and Template

The city of Kenosha, instrumental in the passage of Wisconsin Act 137, is the first Wisconsin municipality that has submitted an application under this new legislation. On August 30, 2018, the PSC approved Kenosha's application. Information about this application as well as the final decision are publicly available on the PSC website under the E-Services Portal through case number **2820-LS-100**.

- **PSC E-Services Portal**
 - <http://apps.psc.wi.gov/>



E-Services Portal



Welcome to the E-Services Portal of the Public Service Commission and Office of Commissioner of Railroads.
Here you can access our database applications from one central interface.

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Information

Case Management System
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PSC Events, Hearings, Meetings, and News Releases

Event Calendar	Live Broadcast	News Releases	Docket Calendar

Once the case number is entered, the entirety of Kenosha's application and discourse with the PSC is available for viewing.



Kenosha Program "Gets the Lead Out"!

Edward St. Peter, Kenosha City Administrator and Water Utility General Manager

Lawrie J. Kobza, Partner, Boardman & Clark LLP

Jared Walker Smith, Attorney, Boardman & Clark LLP

There has been a surge in public awareness of the risks of lead exposure in drinking water. Exposure to lead has been linked to adverse health effects in infants, young children, and pregnant women, and is potentially harmful to adults. Wisconsin drinking water sources have little to no measurable lead. However, if water passes through lead pipes and plumbing, lead may enter the water and cause elevated lead levels at the tap¹. Many communities across the state are investigating the prevalence of lead pipes both in their public distribution system and on private property. Nationally, lead was used in water distribution systems and private plumbing until 1986, although Wisconsin utilities have not installed lead service lines and water mains since the 1960s. Kenosha banned the use of lead plumbing in utility projects in 1937, and the installation of private lead lines was stopped by 1945.

Kenosha, like many other communities with lead pipes, manages lead levels at the tap by using chemical treatment and following good operational practices. The most permanent prevention method, however, is to remove the lead pipes and plumbing which provide the source of the lead. Communities across the state have been removing utility owned lead water mains and service lines, especially during street projects. But financial constraints have limited the removal of the privately owned portion of the lead service line which typically runs from the curb stop to the water meter.

In 2017 Wisconsin Act 137, the Legislature provided municipalities and their water utilities with the authority to establish a financial assistance program to help customers replace their private lead service lines and to fund that financial assistance with utility rates. Prior to Act 137, Wisconsin utilities were prohibited from using revenue from water utility rates to provide funding for private lead service line replacements. While some Wisconsin communities have been able to take advantage of limited state funding or the municipality's own revenues to help fund replacement of

private lead service lines, many communities, like Kenosha, did not have funds available to provide this type of assistance. By allowing municipal utilities to fund financial assistance for private lead service line replacements with utility rates, Act 137 provides a reliable funding source for long-term lead service line removal.

The authority to establish this financial assistance program is principally found in a new statutory section, Wis. Stat. § 196.372. Utilities may provide financial assistance in the form of a grant, a loan, or a combination thereof. In order to establish this type of financial assistance program, the city, village, or town in which the water utility provides service must first enact an ordinance that permits the water utility to provide financial assistance. It must also enact an ordinance that requires every property owner with a private lead service line within its borders to replace that line. Finally, the Public Service Commission of Wisconsin (PSC) must approve the water utility's program. The PSC must grant its approval if it finds that a public utility's proposal is not unjust, unreasonable, or unfairly discriminatory, and if the program satisfies the conditions set out in the legislation. These conditions include a 50 percent of total-cost limit on the amount of any grant, no forgiveness of loans, proportional treatment of customers within the same customer class, and limits on funding sources for the program.

On April 2, 2018, the Common Council of the City of Kenosha adopted a lead service replacement ordinance. The next day, the Kenosha Water Utility filed an application with the PSC seeking approval of its financial assistance program. As the first community to apply for and undergo PSC review, Kenosha met PSC staff and answered questions regarding the specifics of its financial assistance program. This back-and-forth effort paid off. On August 31, 2018, the PSC approved Kenosha's program.

The Kenosha program covers the following considerations:

1. **Replacement priority.** While ordinances adopted under Wis. Stat. § 196.372 must require each owner of property in the community that is serviced by a private lead service line to replace that line, Kenosha, like other utilities, needs to be able to prioritize when private lead service line replacements occur for logistical and financial reasons. The top priorities for funding replacements in Kenosha are (a) properties with leaking or failed lead service lines, (b) private replacements done in conjunction with road projects, (c) schools and day care facilities, and (d) properties where children under the age of 7 or pregnant women reside. Assistance for other replacements will be provided if and when funds are available.
2. **Inventory of private lead service lines.** Kenosha's program requires private lead service lines to be removed. Kenosha, like most utilities, does not have a complete inventory of where private lead service lines exist within the city. Therefore, Kenosha's ordinance requires that property owners provide access to the Utility to inspect service lines and provides for compliance options should access be denied.
3. **Private replacements done in conjunction with utility replacements.** It is likely that, at least initially, most private lead service line replacements will be done in conjunction with utility-owned replacements done as part of a road project. Wis. Stat. § 196.372(2)(b) requires that the private service line be replaced at the same time as the utility service line. This can be difficult to accomplish since in most cases the utility service line is being replaced by a utility contractor and the private service line is being replaced by a different private plumbing contractor. While more specificity on how this coordination is to occur might be wished for, it was important that Kenosha's program not be overly prescriptive and that the program contain enough flexibility to be workable.
4. **Failure to replace private service lines within deadline.** It is especially important that private lead service lines be replaced if utility-owned lead service lines are replaced. If a property owner fails to do so, a utility may need to take steps to mandate compliance. In addition to other authorized compliance methods, Kenosha's ordinance authorizes disconnection of a noncompliant property owner's water service. Kenosha is required to submit a tariff to the PSC which will authorize disconnection for failure to replace a lead service line.
5. **Financial assistance program – amount of assistance provided.** Wis. Stat. § 196.372(3)(e) requires that (a) if a utility provides “financial assistance” as a specific dollar amount that dollar amount must be the same for each owner, and if the utility provides “financial assistance” as a specific percentage of cost, that percentage of cost must be the same for each owner; and (b) grants are limited to no more than one-half of the total replacement cost. Under Kenosha's program, a private property owner served by a private service line constructed of lead may receive financial assistance equal to 100% of the replacement cost. The financial assistance offered is a grant for 50% of the cost of replacement up to a maximum of \$2,000, with a loan available for the rest. The PSC found that this satisfied the statutory requirement of providing each property owner the same percentage of financial assistance.
6. **Financial assistance program – creation of pre-qualified plumbing contractor list.** Private property owners will be responsible for contracting with a private plumber for the replacement work. Kenosha will maintain a list of plumbing contractors that the Utility has pre-approved for lead service line replacements within the community. This list will provide property owners with information on plumbing contractors willing and able to do private replacement work, and provide a vehicle for Kenosha to inform contractors about the private lead service line replacement program, the need for coordination, and the requirements related to financial assistance.
7. **Financial assistance program – two bid requirement.** Kenosha's ordinance requires that a property owner obtain at least two bids from pre-qualified plumbing contractors for the replacement work. The property owner does not have to select the contractor with the lowest bid, but the available financial assistance will be based on the lowest bid. The owner will be responsible for paying all remaining costs.
8. **Financial assistance program – loan terms.** A property owner may obtain a loan from the utility to fund the property owner's share of the replacement. If a loan is to be provided, loan terms must be determined, a loan agreement must be entered into, and loan installments must be collected. Act 137 provides two different ways loan repayments can be collected. Loan repayments can be collected along with utility bills (and delinquent repayments can be placed on the property tax roll under Wis. Stat. § 66.0809), or they can be collected as special charges under Wis. Stat. § 66.0627(8).

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Kenosha's program will provide a 10-year, low interest rate loan at terms established in the loan agreement with the annual collection of loan repayments as special charges. This method reduces administrative work by using the well-established process of property tax collection.

9. Financial assistance – application. Before providing financial assistance, Kenosha requires that property owners apply for financial assistance on a form that will be furnished by the utility. The application will identify the type of financial assistance the property owner is requesting along with certification that the property owner meets basic eligibility requirements established by the ordinance.

10. Financial assistance – payment to plumbing contractor. Kenosha's ordinance provides that after the replacement work is done, the property owner must provide to the utility the contractor's invoice and documentation of satisfactory completion. Upon receipt of this information, the utility must pay the plumbing contractor directly – up to the amount of the financial assistance provided. The property owner is to pay any invoiced amount that exceeds the amount of financial assistance provided.

One issue that was addressed during the PSC's review of Kenosha's program was whether the financial assistance program should be extended to the replacement of galvanized steel pipes. PSC staff pointed out information on the potential for deposits on the inside of galvanized steel pipes to trap lead. While the PSC's final decision encouraged Kenosha to look at the galvanized steel pipe issue, it did not require Kenosha to extend its program to galvanized steel pipe replacement. The PSC's decision seemingly leaves open the option for each community to make its own decision on whether it wants to, or can, extend the community's financial assistance program to cover replacement of galvanized steel pipes.

The PSC's approval of Kenosha's financial assistance program does not result in a water rate increase. In order to include the private lead service line replacement costs in rates, Kenosha will need to file a full rate case. The PSC's decision requires that Kenosha apply for a full rate case that includes private lead service line replacement costs within two years.

Kenosha expects its financial assistance program to be in full swing for the 2019 construction season, but, living up to its motto "Let's Get the Lead Out!", Kenosha has already provided financial assistance for the removal of several leaking private lead service lines in Kenosha. With the first program approved, the PSC expects to begin to receive additional applications from interested communities. Manitowoc Public Utilities became the second applicant on September 11, 2018.

About the Authors:

Lawrie Kobza is a partner at the Madison law firm of Boardman & Clark and legal counsel to the Municipal Environmental Group - Water Division (MEG - Water). She has worked with municipal water systems for over 30 years. Contact Lawrie at lkobza@boardmanclark.com

Ed St. Peter has worked for the Kenosha Water Utility for 47 years. In addition to being the General Manager of the Utility, on September 5, 2018, he was appointed as the new City Administrator for the City of Kenosha.

Jared Walker Smith is an attorney at Boardman & Clark LLP, where his practice focuses on general municipal, water utility, and real estate law. He is a graduate of St. Olaf College and the UW Law School, and is admitted to practice law in Wisconsin. Contact Jared at jsmith@boardmanclark.com

Boardman & Clark LLP is a Madison law firm that provides a full range of legal services to Wisconsin municipalities and their municipal utilities.

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¹ WIS. DEP'T OF NATURAL RES., PUB-DG-015 2017, LEAD IN DRINKING WATER (2017), available at <https://dnr.wi.gov/files/PDF/pubs/DG/DG0015.pdf>

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shall describe the public utility's proposal for the recovery of such costs, including all of the following:

- (a) The economic useful life of the facility.
- (b) The proposed return on equity and rate of return for the facility.
- (c) The proposed financing mechanisms for the facility.
- (d) The proposed method for determining the costs that may be recovered in rates.
- (e) Any other proposals or information regarding the recovery of the costs that the public utility determines are necessary for providing certainty to the public utility, investors, and ratepayers in future rate-making proceedings.
- (f) Any other information specified by the commission.

(3) PROCEDURE.

- (a) The commission shall conduct a hearing on an application for an order under this section. The commission may hold the hearing in conjunction with a hearing, if any, on the application for the certificate or the commission may hold a separate hearing on the application for the order. If the public utility has applied for a certificate for the facility, the commission shall determine whether to deny an application for an order or to issue an order no later than the date that the commission takes final action on the application for the certificate. If the public utility has not applied for a certificate, the commission shall determine whether to deny an application for an order or to issue an order no later than 180 days after the commission determines that the application for the order is complete using the method and deadlines specified under s. 196.491 (3) (a) 2. The commission may issue an order if the commission determines that the order will provide a sufficient degree of certainty to the public utility, investors, and ratepayers with respect to future recovery of the facility's capital costs and that the order is otherwise in the public interest.
 - (am) The commission shall specify in an order under this section a deadline at least 60 days after the date of issuance of the order for the public utility to notify the commission in writing about whether the public utility accepts or waives acceptance of the order. If the public utility does not make the notification by the deadline specified in the order, the public utility is considered to have waived acceptance of the order.
 - (b) If the public utility accepts the order, then, in all future rate-making proceedings regarding the public utility, the order shall be binding on the commission in its treatment of the recovery of the capital costs of the facility that is subject to the order and the commission may not consider the order or the effects of the order in its treatment of the recovery of any other cost of the public utility.
 - (bm) If the public utility waives or is considered to have waived acceptance of the order, the commission shall withdraw the order and consider the capital costs of the facility in all future rate-making proceedings in the same manner as the commission considers capital costs for which no order has been issued under this section.
 - (c) The commission may not require a public utility to apply for or accept an order under this section.
- (4) RULES.** The commission shall promulgate rules for administering this section, including rules specifying the information that must be included in an application for an order under this section.

History: 2005 a. 7.

196.372 Financial assistance for lead-containing customer-side water service lines.

- (1) DEFINITIONS.** In this section:

- (a) "Customer-side water service line" means the portion of a water service line owned by a property owner.
 - (b) "Financial assistance" means a grant, loan, or combination thereof.
 - (c) "Utility-side water service line" means the portion of a water service line owned by a water public utility.
- (2) FINANCIAL ASSISTANCE. A water public utility may provide financial assistance to the owner of a property to which water utility service is provided for the purpose of assisting the owner in replacing customer-side water service lines containing lead if all of the following are satisfied:
- (a) The city, town, or village in which the water public utility provides utility service to the property has enacted an ordinance that permits the water public utility to provide the financial assistance and requires each owner of a premises located in the city, town, or village that is serviced by a customer-side water service line containing lead to replace that customer-side water service line.
 - (b) The utility-side water service line and the water main pipe that are connected to the customer-side water service line meet one of the following conditions:
 1. Do not contain lead.
 2. The lead-containing portion of the utility-side water service line or water main pipe is replaced at the same time as the customer-side water service line is replaced.
 - (c) The commission has granted its approval under sub. (3).
- (3) COMMISSION APPROVAL.
- (a) A water public utility seeking approval under sub. (2) (c) shall submit to the commission an application that includes a description of the proposed financial assistance, a description of the method for funding the financial assistance, a description of the customers served by the water public utility that would be eligible for financial assistance, and any other information relevant to the action requested by the commission.
 - (b) Upon receipt of a complete application, the commission shall investigate the application. The investigation may be with or without public hearing. If the commission conducts a public hearing, the public hearing shall be upon such notice as the commission may require.
 - (c) If a hearing is held on an application, the commission shall take final action on the application within 180 days after the commission issues a notice of hearing on the application. The chairperson of the commission may extend the time period for an additional 180 days for good cause. If the commission fails to take final action within the initial 180-day period, or the extended 180-day time period, the commission is considered to have granted its approval.
 - (d) If a hearing is not held on an application, the commission shall take final action on the application within 90 days after the commission issues a notice opening a docket on the application. The chairperson of the commission may extend the time period for an additional 90 days for good cause. If the commission fails to take final action within the initial 90-day period, or the extended 90-day time period, the commission is considered to have granted its approval.
 - (e)
 1. Except as provided in subds. 2. and 3., if the commission finds that the actions described in the application are not unjust, unreasonable, or unfairly discriminatory, it shall grant its approval in writing.
 2. The commission may not approve an application under subd. 1. unless the application satisfies all of the following conditions:

- a. Grants that are provided as financial assistance to an owner are limited to no more than one-half of the total cost to the owner of replacing the customer-side water service line containing lead.
 - b. Any loan provided may not be forgiven by the water public utility or the municipality.
3. The commission may not approve an application under subd. 1. unless the application satisfies one of the following conditions:
- a. If the water public utility intends to provide financial assistance as a percentage of the cost of replacing the customer-side water service line containing lead, that percentage is the same for each owner in a class of customers.
 - b. If the water public utility intends to provide financial assistance as a specific dollar amount, that dollar amount is the same for each owner in a class of customers.

History: 2017 a. 137.

196.373 Water heater thermostat settings.

(1) In this section:

- (a) "Periodic customer billing" means a demand for payment of utility services by a public utility to a residential utility consumer on a monthly or other regular basis.
 - (b) "Residential utility consumer" means any individual who lives in a dwelling which is located in this state and which is furnished with a utility service by a public utility. "Residential utility consumer" includes, but is not limited to, an individual engaged in farming as defined under s. 102.04 (3).
- (2) At least annually every public utility furnishing gas or electricity shall include in its periodic customer billing a statement recommending that water heater thermostats be set no higher than 125 degrees Fahrenheit in order to prevent severe burns and unnecessary energy consumption.

History: 1987 a. 102.

196.374 Energy efficiency and renewable resource programs.

(1) DEFINITIONS. In this section:

- (a) "Agricultural producer" means a person engaged in an agricultural activity, as defined in s. 101.10 (1) (a).
- (b) "Commitment to community program" means an energy efficiency or load management program by or on behalf of a municipal utility or retail electric cooperative.
- (c) "Customer application of renewable resources" means the generation of energy from renewable resources that takes place on the premises of a customer of an energy utility or municipal utility or a member of a retail electric cooperative.
- (d) "Energy efficiency program" means a program for reducing the usage or increasing the efficiency of the usage of energy by a customer or member of an energy utility, municipal utility, or retail electric cooperative. "Energy efficiency program" does not include load management.
- (e) "Energy utility" means an investor-owned electric or natural gas public utility.
- (em) "Large energy customer" means a customer of an energy utility that owns or operates a facility in the energy utility's service area that has an energy demand of at least 1,000 kilowatts of electricity per month or of at least 10,000 decatherms of natural gas per month and that, in a month, is billed at least \$60,000 for electric service, natural gas service, or both, for all of the facilities of the customer within the energy utility's service territory.

ORDINANCE NO. 7357

ORDINANCE CREATING SECTION 14.04.110 ENTITLED "LEAD SERVICE LINE REPLACEMENT" AND AMENDING SECTION 1.24.030 ENTITLED "DEPOSIT SCHEDULE" OF THE CITY OF EAU CLAIRE CODE OF ORDINANCES.

THE CITY COUNCIL OF THE CITY OF EAU CLAIRE DO ORDAIN AS FOLLOWS:

***SECTION 1.** That Section 14.04.110, entitled "Lead Service Line Replacement" is hereby created to read as follows:*

14.04.110 Lead Service Line Replacement. A. Purpose. The city council finds it in the public interest and for the protection of public health, safety, and welfare to establish a comprehensive program for removing and replacing all lead service lines within and connected to the city's water service. Lead service lines have the potential to leach lead into drinking water; in particular, the disturbance or reconnection to an existing lead service line may increase lead levels in drinking water. The city's water service is an interconnected system and lead in any service line is a potential contaminant throughout the system. There is no safe level of exposure to lead and lead in drinking water has been determined to cause health problems in young children, pregnant women and their unborn children, and is also potentially harmful to adults.

B. Definitions. The following definitions shall apply to this section, in addition to those terms defined in Section 14.04.020 of this Chapter:

1. Customer-side service line. The property owner's water service line, from the outlet of the curb stop to the inlet of the customer's water meter.
2. Eligible lead service line. A customer-side water service line that contains lead, for which the service lateral or main has already been replaced, or is in the process of being replaced.
3. Lead service line. A water service line constructed of lead. This term includes the customer-side service line, mains, and service laterals.
4. Property. Real property as defined in Wis. Stats. s. 70.03.
5. Property owner. A person or legal entity having a possessory interest, legal or equitable, in property which shall include an estate, trust or lien.
6. Plumbing contractor. A person, firm, corporation or other entity licensed by the state of Wisconsin to perform plumbing work in the city.

C. Connection prohibited. No person shall connect a customer-side lead service line to a non-lead service lateral.

D. Lead service line replacement requirement. All eligible lead service lines connected to city water service shall be replaced with water service laterals made of material approved by the city, at the property owner's expense or through available financial assistance for customer-side lead service line replacements, in accordance with the requirements of this section.

E. Identification of lead service lines. For city projects involving water mains or replacement of service laterals, property owners affected by the city project shall be notified in writing at least 30 days prior to commencement of construction. The director of community services or her or his designee shall inspect all connections to the mains for the presence of lead prior to, if possible, or at the time that the mains are to be reconstructed and if unable to gain access for inspection, may pursue an inspection warrant or any other steps necessary to conduct the inspection, and shall collect the cost therefor from the property owner, including by imposition of a special charge.

F. Customer-side lead service line replacements.

1. In the event that a customer-side service line is found to contain lead, the director of community services or her or his designee shall immediately notify the property owner, in writing, of that fact, whether it is an eligible lead service line, and available funding options. The director of community services or her or his designee shall further provide information to the affected property owner regarding an effective flush of all water lines within the affected property. The affected property owner shall provide proof of arrangements for replacement of the eligible lead service line to the director of community services or her or his designee within 30 days of the date of the notification letter.

2. Replacement of eligible lead service lines shall be completed either in conjunction with the replacement of the city's side of the water service during a utility replacement project, or if the city's side has already been replaced, shall be replaced within 90 days of notice to the property owner of the presence of lead.

G. Financial assistance for customer-side lead service line replacements.

1. Customers may apply for financial assistance for lead service line replacement through any available grant source, including those funds provided through the State of Wisconsin's Safe Drinking Water Loan Program.

2. The city may provide financial assistance for customer-side lead service line replacements in the form of grants, loans, or other funding sources. Funds shall be paid directly to the plumbing contractor on behalf of the property owner. The total amount of the funds provided shall not exceed the actual cost of replacement of the customer-side lead service line.

H. Penalty. Failure to commence work on the replacement of the customer-side lead service line when required pursuant to this ordinance, or for such work to be completed within a reasonable time after commencement of the work, may result in a citation to the property owner of at least sixty dollars and no more than five hundred dollars for each day of the violation, together with the costs of prosecution.

SECTION 2. That section 1.24.030, entitled "Deposit schedule" is hereby amended to include the following at a forfeiture of \$125, plus applicable costs:

1.24.030B. Deposit schedule. 10. Section 14.04.110, lead service line replacement.

(SEAL) President Terry L. Weld
(SEAL) City Manager Dale Peters
(ATTESTED) City Clerk Carrie L. Riepl

First Reading	December 10, 2019
Final Reading	January 14, 2020
Adopted	January 14, 2020
Published	January 19, 2020

SUBJECT: *AMENDED TITLE: Discussion and Possible Action to Enact a Local Ordinance to Empower Municipal Power to Issue Emergency Orders by the City of Ashland under Wisconsin State Statute 323 in the Absence of County Health Officer Order, including use of face coverings in public indoor spaces or public outdoor spaces when social distancing is not an option. (Mayor)*

RECOMMENDATION: As Council Desires

DEPARTMENT OF ORIGIN: Mayor

CLEARANCES: City Attorney
City Administrator
Council President

EXHIBITS:

1. WI State Statute 323.14 (4)(a)(b)
2. Correspondence from State of Wisconsin Department of Justice Attorney General, May 15, 2020
3. LWM Toolkit for Implementing Municipal Safer at Home Restrictions
4. FAQs

FINANCIAL IMPACT: NA

SUMMARY STATEMENT:

This item is a continuation of previous discussions held by the Committee of the Whole on 5/26/20 and 6/30/20. At the last COW meeting, the Council, in an effort to be proactive, directed Administration to bring back a proposal for further discussion in the event that our area experiences a serious COVID-19 spike in confirmed cases.

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, the Wisconsin League of Municipalities and others have issued guidance regarding the powers of municipalities to issue enforceable orders during the coronavirus emergency.

Wisconsin Statute 323.14 Local government; duties and powers.

...

4) POWERS DURING AN EMERGENCY.

- (a) The 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 and includes the power to bar, restrict, or remove all unnecessary traffic, both vehicular and pedestrian, from the highways, notwithstanding any provision of chs. [341](#) to [349](#).
- (b) If, because of the emergency conditions, the governing body of the local unit of government is unable to meet promptly, the chief executive officer or acting chief executive officer of any local unit of government shall exercise by proclamation all of the powers conferred upon the governing body under par. (a) or s. [323.11](#) that appear necessary and expedient. The proclamation shall be subject to ratification, alteration, modification, or repeal by the governing body as soon as that body can meet, but the subsequent action taken by the governing body shall not affect the prior validity of the proclamation.

History: [2009 a. 42](#) ss. [98](#) to [102](#), [111](#), [112](#), [234](#) to [236](#), [294](#) to [299](#); Stats. 2009 s. [323.14](#).



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

Josh Kaul
Attorney General

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608/266-1221
TTY 1-800-947-3529

May 15, 2020

OAG-03-20

Mr. Thomas Nelson
Outagamie County Executive
410 South Walnut Street
Appleton, Wisconsin 54911

Dear County Executive Nelson:

¶ 1. You have asked for an emergency Attorney General opinion to address the immediate need for clarity about the effect of the Wisconsin Supreme Court's decision in *Wisconsin Legislature v. Palm*, 2020 WI 42, on local powers to combat COVID-19. The May 12 supreme court decision struck down, in most respects, the Wisconsin Department of Health Services' (DHS) statewide Safer-at-Home order issued to combat COVID-19.

¶ 2. The Wisconsin Legislature's lawsuit that led to the invalidation earlier this week of most of the Safer-at-Home order has resulted in substantial uncertainty as counties and municipalities rapidly adopt measures to fight a virus that does not respect national borders, much less municipal or county lines. In an update posted Wednesday, for instance, the Wisconsin Counties Association wrote that "it is unclear whether a local health order would, in the Court's view, suffer from the same deficiencies that caused the Court to invalidate the Safer at Home Order." Wis. Ctys. Ass'n, *COVID-19 Updates for County Officials* (May 13, 2020), <https://covid19.wicounties.org/covid-19-daily-update-5-13-2020/>. Kenosha and Brown Counties, two of the state's counties that have been most impacted by the coronavirus outbreak, withdrew their public health orders in light of confusion regarding their authority in the wake of the supreme court's decision.

¶ 3. This Attorney General opinion addresses the following questions: whether the Wisconsin Supreme Court's decision in *Wisconsin Legislature v. Palm* controls local powers; whether that decision's discussion of criminal penalties should be considered by local authorities; whether that decision's specific focus on certain DHS powers related to staying at home, travel, and closing businesses should be

considered by local authorities; and whether there are any other substantive limits on local powers implied by the *Palm* decision.

¶ 4. *First*, the supreme court's decision addressed only DHS's authority found in Wis. Stat. § 252.02. That statute does not govern the authority of local health officers, which is separately set out in Wis. Stat. § 252.03. That separate grant of local authority provides, among other things, powers to "prevent, suppress and control communicable diseases" and "forbid public gatherings when deemed necessary to control outbreaks or epidemics." Wis. Stat. § 252.03(1)–(2).¹ Because the court decision addressed a different statute applicable to a state agency, and not the statute applicable to local authorities, the *Palm* decision is not directly controlling on powers under the latter statute.

¶ 5. *Second*, although the court did not directly address Wis. Stat. § 252.03, there are statements about criminal sanctions in the *Palm* decision that local authorities should consider. The court concluded that Safer at Home "does not rely on a statute within ch. 252 defining the elements of the crime" and that "in order to constitute criminal conduct proscribed by statute, the conduct must be set out with specificity in the statute to give fair notice." *Palm*, 2020 WI 42, ¶¶ 37, 40.² It is advisable to limit enforcement under Wis. Stat. § 252.03 to ordinances or administrative enforcement.

¶ 6. *Third*, the *Palm* decision highlighted three particular exercises of DHS's powers as outside the scope of its statutory authority under Wis. Stat. § 252.02: directing people to stay at home, forbidding certain travel, and closing certain businesses. Even as to those three measures, the analysis may not apply to local powers under Wis. Stat. § 252.03. The court's reasoning emphasized the availability of criminal sanctions for violations, and applied an interpretative analysis using provisions of 2011 Wis. Act 21 and Wis. Stat. ch. 227 that apply only to state agencies. *Palm*, 2020 WI 42, ¶¶ 45–47, 51, 52. A local order issued under Wis. Stat. § 252.03 that does not threaten criminal penalties, as recommended above, cannot run afoul of the court's first concern, and 2011 Wis. Act 21 and chapter 227 would not apply to a local authority. Nevertheless, the local authority should ensure that any measures that direct people to stay at home, forbid certain travel, or close certain businesses speak specifically to the local authority's statutory power to "prevent, suppress and

¹ Local authorities also have emergency powers under Wis. Stat. §§ 323.11 and 323.14. This opinion does not address measures taken pursuant to those powers.

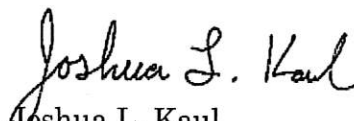
² This reasoning may not extend to subsections like Wis. Stat. § 252.02(3). For example, the *Palm* decision does not apply to Section 4.a. of Safer at Home, which closes schools pursuant to Wis. Stat. § 252.02(3). *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 58 n.21.

control communicable diseases” and “forbid public gatherings when deemed necessary to control outbreaks or epidemics.” Wis. Stat. § 252.03(1)–(2).

¶ 7. *Fourth*, nothing in the supreme court’s decision even arguably limits other measures directed by a local authority under Wis. Stat. § 252.03. The court rested its rejection of Safer at Home’s provisions other than staying at home, travel, and business closure solely on its conclusion that DHS had to engage in emergency rulemaking under Wis. Stat. § 227.24. *Palm*, 2020 WI 42, ¶¶ 2–4, 58–59. Local authorities are not subject to chapter 227, and so that reasoning has no application to an order issued by a local authority.

¶ 8. The foregoing observations provide immediate guidance in light of the pandemic. Because of the emergency circumstances, this opinion is not being released according to this office’s ordinary process, in which we have voluntarily instituted an opportunity for public comment. However, this opinion will be posted on the AG Opinion Requests page of the Department of Justice’s website, where the public may comment on it. In turn, this opinion may be supplemented at a later date.

Sincerely,


Joshua L. Kaul
Attorney General

JLK:ADR:jrs



League of Wisconsin Municipalities Toolkit for Implementing Municipal Safer at Home Restrictions

When the Wisconsin Supreme Court struck down DHS's Emergency Order 28, Safer at Home, as invalid and unenforceable on May 13, local governments were presented with the question of whether to adopt and enforce local safer at home restrictions to quell the spread of COVID-19 within their communities and to ensure local health facilities have adequate capacity for dealing with COVID patients. Municipalities without a health department must abide by any safer at home restrictions imposed by the county health officer. If the county health officer has not issued a county safer at home order, municipal policymakers have the discretion to issue safer at home orders to prevent or minimize the spread of COVID-19 within their communities, pursuant to their emergency powers under Ch. 323. While most communities as of early summer 2020 have decided not to enact local safer at home orders, the League has prepared this Local Safer at Home Toolkit in case circumstances change in the future and local policymakers become interested in adopting safer at home orders or ordinances to address a surge in COVID-19 cases within their community. The Toolkit explains municipal authority to implement safer at home restrictions, includes sample local safer at home orders, and provides links to county level COVID-19 data and metrics to support local safer at home orders.

Updated 6-29-2020

1. Municipal authority to issue local safer at home orders

- a. League FAQ <https://lwm-info.org/1591/Emergency-Orders-Plans---Local>
- b. Legal opinion from Local Solutions Support Center <https://files.constantcontact.com/719b6d0b001/015bc710-2a8e-4be8-b256-ab1030534bd5.pdf>
- c. Wisconsin Attorney General opinion <https://www.doj.state.wi.us/sites/default/files/OAG-03-20.pdf>
- d. Local Powers to Address COVID-19 in the Wake of Wisconsin Legislature v. Palm and OAG 03-20 <https://www.boardmanclark.com/publications/municipal-newsletter/local-powers-to-address-covid-19-in-the-wake-of-wisconsin-legislature-v-palm-and-oag-03-20>

2. Sample local safer at home type orders, ordinances, policies

- a. Eau Claire's City-County Health Department order <https://www.eauclairewi.gov/Home/ShowDocument?id=32605> See also, Eau Claire FAQ <https://www.eauclairewi.gov/Home/ShowDocument?id=32621>
- b. Madison and Dane County Health Agency order <https://publichealthmdc.com/coronavirus/forward-dane/requirements>
- c. Beloit Resolution <https://files.constantcontact.com/719b6d0b001/d86568c5-05c3-4525-9aff-33d62ac002cf.pdf> (also see attached).

- d. Racine's Safer at Home Ordinance
<https://files.constantcontact.com/719b6d0b001/bf98afce-3fe4-475d-95dd-2c8ee88d6da1.pdf> Caveat: (The ability of Racine to enact and enforce this order has been challenged in Racine County circuit court by a local business. On June 19 a Racine Circuit Court judge issued a preliminary injunction ordering the city to not enforce the order while the case is pending.)
- 3. **Sample Municipal plans, strategies, and guidelines for reopening safely, including regulatory relief**
 - a. City of River Falls Recovery Guide <https://www.rfcity.org/crushingcovid19>
 - b. Tosa Restarts Temporary Regulatory Relief Program <https://lwm-info.org/DocumentCenter/View/4036/R-20-076-Tosa-Restarts-Temporary-Regulatory-Relief-Program>
 - c. Racine's Standards for Reopening During Pandemic
<https://www.racinecoronavirus.org/wp-content/uploads/2020/06/City-of-Racine-COVID-19-Safer-Racine.pdf>
 - d. Madison "Streeters" Restaurant Recovery Program (PDF)
 - e. Milwaukee [Active Streets for Businesses](#) through the DPW [Guidelines Application Instructions](#)
- 4. **Local COVID Health Data/Metrics Supporting Municipal Safer at Home Health Orders**
 - a. Find county and regional COVID-19 data on Wisconsin DHS website here: <https://www.dhs.wisconsin.gov/covid-19/local.htm> Also, check your county health office's website.
 - b. Beloit FAQ regarding its safer at home order. [https://www.beloitwi.gov/vertical/sites/%7B662E25CC-A6A0-4B38-B151-A18A081D6A0A%7D/uploads/Beloit Reopening - recommendations - Updated June 2 2020.pdf](https://www.beloitwi.gov/vertical/sites/%7B662E25CC-A6A0-4B38-B151-A18A081D6A0A%7D/uploads/Beloit%20Reopening%20-%20recommendations%20-%20Updated%20June%202%202020.pdf)
 - c. Dane County Dashboard
<https://cityofmadison.maps.arcgis.com/apps/opsdashboard/index.html#/e22f5ba4f1f94e0bb0b9529dc82db6a3>

FAQs

On May 13, 2020, the Wisconsin Supreme Court struck down DHS's Emergency Order 28, Safer at Home, as invalid and unenforceable. See *Wisconsin Legislature vs. Andrea Palm*, 2020 WI 42. For more information on the Court's opinion click [here](#).

The following FAQs address some of the questions member municipalities are asking:

In the absence of a county or local health department order, does a municipality have authority to impose restrictions similar to Safer at Home, such as prohibiting public gatherings of a certain size and imposing restrictions on businesses?

Yes, municipalities may impose such restrictions pursuant to an emergency declaration under Wis. Stat. § 323.11, but any regulations should be narrowly tailored to the particular circumstances of the local emergency.

Under Wis. Stat. § 323.14(4)(a), which governs local governments' powers and duties during a declared emergency, local governments have 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," including "the power to bar, restrict, or remove all unnecessary traffic, both vehicular and pedestrian, from the highways..." Although § 323.14(4)(a) doesn't explicitly mention controlling communicable diseases – in contrast to Wis. Stat. § 252.03 which provides that local health departments may do whatever is reasonable and necessary to prevent and suppress disease, including forbidding public gatherings when deemed necessary to control outbreaks or epidemics – § 323.14(4)(a) is broadly written to grant local governments authority to enact measures to protect the public health and welfare in an emergency.

Any restrictions declared pursuant to a local emergency should be narrowly tailored to address the particular circumstances of the municipality's emergency; those circumstances should be detailed in the emergency resolution or ordinance. Restrictions that may be justified in one municipality may not be justifiable in another. Additionally, a municipality should clearly articulate the rationale underlying the restrictions imposed to illustrate that the restrictions are based on facts rather than suppositions – e.g., capacity limits should be based on a defined formula derived to achieve compliance with the CDC's social distancing recommendations in a given amount of square footage rather than setting a numerical capacity limit with no explanation for how it was reached. Municipalities should avoid imposing restrictions that appear arbitrarily defined. Moreover, some restrictions may impact individuals' constitutional rights (e.g., right of assembly), so municipalities should strive to craft restrictions in a content-neutral manner and as narrowly as possible to address the emergency situation in their community.

The Wisconsin Supreme Court's recent decision overturning DHS's Safer at Home Order (see [Wisconsin Legislature v. Andrea Palm](#)) should not be read as precluding local governments from enacting similar restrictions; narrowly crafted municipal restrictions should withstand judicial scrutiny. First, the Court's opinion was limited in scope and did not address local government authority. It only pertained to DHS's authority under Wis. Stat. § 252.02 and

largely found fault with an unelected official promulgating a rule without following the emergency rulemaking procedures outlined in Ch. 227 of the Wisconsin Statutes. Local governments, however, are not subject to those rulemaking procedures, and restrictions imposed under § 323.14(4)(a) are imposed by elected officials – e.g., elected members of governing bodies. Second, the Court was concerned about the ability to impose criminal liability for violations of DHS's order. However, that should not be a concern here because Wisconsin municipalities cannot create crimes; therefore, they cannot impose either a fine or imprisonment as a sanction for violation of a municipal ordinance. *State v. Thierfelder*, 174 Wis. 2d 213, 222, 495 N.W.2d 669 (1993).

Finally, an interim opinion issued by Wisconsin Attorney General Josh Kaul on May 15, 2020 ("opinion") supports the conclusion that the Supreme Court's decision did not impact local authority to address the COVID-19 pandemic. The AG opinion concludes that the Supreme Court's decision is limited in scope and does not constrain local health departments' authority to issue similar orders under Wis. Stat. § 252.03. The opinion notes local government authority under Ch. 323 as an additional source of local powers but does not specifically address those powers.

In conclusion, it is the League's opinion that municipalities' broad emergency powers enable them to enact restrictions addressing the COVID-19 pandemic in the absence of local health department orders. 5/19/20

Following the Wisconsin Supreme Court's decision invalidating DHS's Safer at Home Order 28 can a municipality choose to keep municipal facilities such as playgrounds, parks, athletic fields, etc. closed?

Yes. The legislature has granted municipalities management and control over municipal property and power to act for the health, safety and welfare of the public. See Wis. Stat. §§ 61.34(1) and 62.11(5). In the absence of an express limitation on those powers, a municipality has authority to decide whether municipal property should be open or closed. 5/14/20

Now that the Supreme Court has overturned Emergency Order 28 Safer at Home, what is the status of Emergency Order 5 which prohibited gatherings of ten people or more?

With Safer at Home overturned, Emergency Order 5 has no effect. The language in Emergency Order 5 specified the order would remain in effect for the duration of the public health emergency declared in Governor Evers' Executive Order #72, which expired on May 11, or until a superseding order was issued. Emergency Order 28 Safer at Home appears to be a superseding order; therefore, Emergency Order 5 presumably is no longer in effect. 5/14/20

Would a county health order control in a municipality without a local health department?

Yes. Wisconsin Stat. § 251.08 provides that the jurisdiction of a county health department applies throughout the county unless a municipality within the county has its own local health department. 5/14/20

SUBJECT: Discussion Regarding Policing

RECOMMENDATION: Discussion only

DEPARTMENT OF ORIGIN: Councilor Ullman

CLEARANCES: Council President

EXHIBITS:

FINANCIAL IMPACT:

SUMMARY STATEMENT:

This agenda item is intended to provide council members an opportunity for an initial discussion related to policing. With the recent resignation of the Police Chief, we are presented with an opportunity to seek out a new leader for the Police Department that shares the community's vision for our values and goals related to policing. In addition, there has been a significant shift in public perception about the roles, responsibilities and practices of the police, especially in relation to the use of force. Chief Gregoire indicated that he intended to evaluate the current policies and practices of our police department, and the Mayor stated at the last meeting that she was planning to organize and host a listening session related to policing and equity.

This conversation is happening in small and large towns and cities around the country. Many municipalities have moved swiftly to adopt new policies, and both state and federal governments have begun the process of adopting new legislation. Our community has made it clear through recent protests and marches that this is an issue of importance.

I would like to suggest that each council member consider the following questions (or other questions they find important) and prepare to share some of their thoughts with the rest of the body.

What is the purpose of policing in our community? What role should the police play?

What values do you think are foundational to policing in our community?

Do you have personal experiences that shape your perspective on these issues?

Are there roles and responsibilities that are currently in the hands of our police department which could be better served in a different way?

What questions do you have for the city staff and administration related to the police department?

