

# HUSCH BLACKWELL

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## **VIA EMAIL**

Chairman Kurt Gibbs  
Marathon County Board Of Supervisors  
500 Forest Street  
Wausau, Wisconsin 54403

Chairman Gibbs and Supervisors:

I write on behalf of the Greater Wausau Area Chamber of Commerce (“the Chamber”) regarding the proposed ordinance entitled “COVID-19 (Novel Corona Virus 2019): Powers of Local Health Officer; Enforcement; Penalty” (the “Reclosure Ordinance” or “proposed ordinance”) that seeks to severely restrict the activities of all individuals, businesses, and organizations, including places of worship, if the county public health official makes an independent determination that positive cases of COVID-19 are “epidemiologically linked” to any particular individual, business, organization, or activity. The Chamber believes not only that the Reclosure Ordinance will result in severe negative economic consequences for the region and our entire State, but also that the proposed ordinance is unsupported by law.

The Chamber represents 900 businesses and community members in Marathon County whose interests would be directly and negatively impacted by the enactment of the proposed Reclosure Ordinance. The Chamber is the region’s indispensable source for business connections, opportunities and solutions and its mission is to strengthen businesses and enhance the community by building business success. In light of the Chamber’s vision and mission, its members have reopened responsibly, recognizing that simple measures can protect the health of their customers and the community generally. After all, the Chamber’s members are not only business owners and operators, but community members themselves who care deeply about the health and welfare of Marathon County residents.

Well ahead of the opening of the economy, and following the Wisconsin Supreme Court decision, the Greater Wausau Chamber of Commerce developed and implemented “Ready. Let’s Grow!”, a business and consumer assistance program that provides an array of resources and guidance to businesses in various industry sectors to protect their employees, vendors, and customers in the COVID 19 environment. Efforts to enhance the “Ready. Let’s Grow!” program with designated staff assistance to all businesses is planned for July 1, 2020.

Despite the Chamber's efforts to find common ground on any COVID-19 related ordinance, the Chamber cannot support the proposed Reclosure Ordinance. Unfortunately, the ability for the Chamber and its members to be heard on this matter has been severely limited as the committees have chosen to suspend public comment on this matter for the foreseeable future, including at its upcoming Executive Committee meeting. The Chamber understands that health and safety is an important concern for the board. However, technology allows for public comment to be conducted remotely by video conference or telephone. Thus, prohibiting public comment for health and safety reasons is simply unfounded.

The Chamber appreciates the proposed ordinance's recognition that a clear majority of businesses and individuals would follow recommendations and guidance of health officials, and the Chamber is certainly not opposed to reasonable and narrowly tailored guidance and recommendations. However, while purporting to be voluntary, the proposed Reclosure Ordinance is anything but. Violation of the Reclosure Order carries with it a potential penalty of \$25,000, the equivalent maximum fine for Class F felonies in the State of Wisconsin. Thus, a violation of this "voluntary compliance" Ordinance results in the same penalty prescribed for crimes like Operating While Intoxicated and Causing Great Bodily Harm, certain drug trafficking offenses and Stalking Involving a Weapon. The \$25,000 penalty applies each day that an individual, organization, or business is found in violation of the "voluntary" Reclosure Ordinance.

Aside from the draconian penalties, perhaps the most troubling provision of the proposed ordinance is that the unfettered ability of the public health officer to take enforcement action on the basis of unilateral, unreviewable determinations that certain businesses, non-profits, and other organizations or entities, like places of worship, are "epidemiologically linked" to COVID-19 cases. According to Section 2(b) of the proposed ordinance, "epidemiologically linked" "means that the Local Health Officer has made a determination that the cases have a common cause or are related to one another in some way by time, place and person."

If a local health officer, in his or her sole judgment, determines that a business is somehow connected by time, place or person, a local health official may do any of the following, including, *but not limited to*: (1) directing the entity to create an Incident Response Team; (2) mandating daily health monitoring of employees and non-employees entering the premises for symptoms; (3) mandating testing of employees; (4) requiring environmental modifications to reduce the spread; (5) mandating the use of PPE; (6) prohibiting employees under isolation or quarantine from coming to work; (7) reducing the number of employees and/or stagger shifts; (8) limiting face-to-face interactions with customers; (9) reducing hours or days of operations; or (10) *temporarily close operations*.

These severe penalties, coupled with the overwhelmingly broad language triggering enforcement authority, raise significant due process issues for all subject to the ordinance. Although the proposed ordinance states in conclusory fashion that it is narrowly tailored, it permits the local health official to enforce these measures in any locality, and potentially even county-wide. According to Section 6(d), a triggering measure for a county-wide reclosure includes a finding that there is "insufficient testing." "Insufficient testing" means that "testing is unavailable or interrupted, such that local health care systems are unable to meet the Center for Disease Control

or Wisconsin Department of Health Services priority levels.” Reclosure Ordinance Sec. 6(d)(2). It is unclear, at best, what set of circumstances constitute insufficient testing, and yet again, a determination to that effect rests solely with the local health officer of the county.

The proposed Reclosure Ordinance purports to rely upon Wis. Stat. §§ 252.03 and 59.54(6) as authorizing the County to take effectively unlimited action if it is deemed “necessary” for public health purposes by the local health official. In considering this Reclosure Ordinance, the County Board and its Committees should note that under Wisconsin law, “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.” *Town of Vernon v. Waukesha Cty.*, 102 Wis. 2d 686, 689, 307 N.W.2d 227 (1981). Unlike cities and villages which are granted home rule power, the Wisconsin Constitution provides that “[t]he legislature may 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, § 22.

A reading of all statutes relating to the bounds of authority of a local health official do not provide either express or implied powers to take any of the action above as it relates to businesses or organizations.<sup>1</sup> The power vested in the local health officials closely mirrors the authorities provided to the Wisconsin Department of Health Services (“DHS”). The Wisconsin Supreme Court recently determined that the powers vested in DHS under Wis. Stat. § 252.02 cannot be limitless and certainly do not permit the DHS Secretary to forbid travel and close business. *Legislature v. Palm*, 2020 WI 42.<sup>2</sup>

Further, Wis. Stat. § 59.54(6), if interpreted in a manner consistent with the directives in the proposed Reclosure Ordinance, would be without limits. If Wis. Stat. § 59.54(6) were indeed limitless, the entirety of Chapter 59 would be rendered superfluous. Statutes are to be interpreted “as part of a whole” in relation to the language of surrounding or closely-related statutes” and “to avoid surplusage.” *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58 ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

The Chamber would appreciate the opportunity to once again work directly with the County Board to craft a solution that is reasonable and narrowly tailored and that protects public health without the negative economic and social consequences of this particular proposal. The Chamber has no interest in a protracted and costly legal dispute. However, if this proposed ordinance is enacted, the Chamber and several of its members intend to avail themselves of all remedies available at law.

Sincerely,

HUSCH BLACKWELL LLP

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<sup>1</sup>The Chamber does not contend that the remainder of the proposed Reclosure Ordinance is legally sound, in fact there are a number of provisions in the Ordinance which are constitutionally and statutorily suspect, but the Chamber is not the party to challenge these matters directly. As noted by the Wisconsin Supreme Court, “individual rights secured by the Constitution do not disappear during a public health crisis.” *Id* (citing *Temple Baptist Church v. City of Greenville*, No. 4:20-cv-64-DMB-JMV (N.D. Miss. April 14, 2020).

<sup>2</sup> Much like the lack of authority provided for by Wis. Stat. § 252.02 to the DHS Secretary, Wis. Stat. § 252.03 is equally limited.

/s/Lane E. Ruhland  
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