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DATE: August 30, 2024

TO: The Milwaukee County Board of Supervisors'
Committee on Park and Culture

FROM: Scott F. Brown, Corporation Counsel
James G. Davies, Assistant Corporation Counsel

SUBJECT: File No. 24-575: "A resolution/ordinance amending Section 47.48 of the Milwaukee County Code of General Ordinances to increase the penalty for illegal dumping on county property to \$5,000"

The Office of Corporation Counsel ("OCC") has been asked to opine on the following question¹:

- What are the limitations on the dollar amount that Milwaukee County can impose as a civil penalty² under the Milwaukee County Code of General Ordinances ("MCGO") § 47.48?

BRIEF ANSWER:

Pursuant to Wis. Stat. § 27.05(1s), Milwaukee County (the "County") has the authority to "[m]ake rules for the regulation of the use and enjoyment of the county parks and open spaces by the public." Thus, the County may increase the dollar amount imposed as fines under Milwaukee County General Ordinances ("MCGO") § 47.48, but there are constraints imposed by Wisconsin state law(s) as well as the jurisprudence of its Courts. While there are some restrictions on the

¹ OCC was also asked to provide general information regarding the illegal dumping ordinances in municipalities within Milwaukee County. That information has been supplied in the form of a chart.

² For purposes of this memorandum, the terms "civil penalty," "forfeiture," and "fine" shall be used interchangeably.
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dollar amount that may be imposed as a civil penalty for violation of an ordinance, the Wisconsin Courts have established a standard that any fines imposed must generally bear some reasonable relationship to the cost of enforcement.³

ANALYSIS:

1. Any Increase To The Civil Penalty Imposed Under MCGO § 47.78 Must Be Proportionate To The Cost Of Enforcement

The Wisconsin Supreme Court in *City of Madison v. McManus* explained that excess forfeitures can be invalid if the “amount of the forfeiture is excessive and unreasonable in view of the nature and object of the ordinance.” 44 Wis. 2d 396, 402, 171 N.W.2d 426, 429 (1969). The court continued that in evaluating the reasonableness of a fine for the violation of a municipal ordinance, the forfeiture should not be more “than the penalty proscribed for the same act as a crime,” and it cannot be so high as to make revenue generation its primary purpose. *Id.* Rather, it should bear some relationship to the cost of enforcement. *Id.* (citing *City of Milwaukee v. Hoffmann*, 29 Wis. 2d 193, 200, 138 N.W.2d 223, 227 (1965)).

Any civil penalty imposed under MCGO § 47.78 must have a reasonable relationship to the cost of enforcement. The cost of remediating the damages caused by a violation is inherently connected to enforcement of the ordinance. The “cost of enforcement” is not clearly defined in caselaw, but it is reasonable to conclude that cost of remediation of a given violation would be a permissible basis for imposing a fine or forfeiture. Accordingly, a court would likely find that a forfeiture

³ See e.g., *City of Madison v. McManus*, 44 Wis. 2d 396, 402, 171 N.W.2d 426, 429 (1969) and *City of Milwaukee v. Hoffmann*, 29 Wis. 2d 193, 200, 138 N.W.2d 223, 227 (1965).

based, in part or wholly, on the cost of remediation to be reasonably related to the cost of enforcement and therefore permissible.

2. Any Increase To The Civil Penalty Imposed Under MCGO § 47.48 Must Be Consistent With Wisconsin State Law.

a. Wis. Stat. § 287.81(2)(a)

The State of Wisconsin already has a statute that prohibits illegal dumping in parks. Under Wis. Stat. § 287.81(2)(a) any person who “[d]eposits or discharges any solid waste on or along any highway, in any waters of the state, on the ice of any waters of the state *or on any other public or private property*” may be required to forfeit “not more than \$500.” Wisconsin Statute section 287.81(2m) allows the fine to go up to \$1,000 for “any large item.”

In order for a local ordinance to survive preemption by Wisconsin state law, it must comply with the preemption doctrine propounded by Wisconsin courts. Under the preemption doctrine, “local control must yield [to state law] if: (1) the legislature has clearly and expressly withdrawn the power of municipalities to act; (2) the local regulation logically conflicts with state legislation; (3) the local regulation defeats the purpose of the state legislation; or (4) the local regulation violates the spirit of the state legislation.”⁴

In this instance, the proposed amended to MCGO § 47.48 is not preempted by state law because the legislature has not explicitly withdrawn the County’s authority in this regard and the proposed

⁴ *Adams v. State Livestock Facilities Siting Rev. Bd.*, 2010 WI App 88, ¶ 12, 327 Wis. 2d 676, 686, 787 N.W.2d 941, 946 (citing *American Transmission Co. v. Dane County*, 2009 WI App 126, ¶ 9, 321 Wis.2d 138, 772 N.W.2d 731 and *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis.2d 642, 657, 547 N.W.2d 770 (1996)), *aff'd*, 2012 WI 85, ¶ 12, 342 Wis. 2d 444, 820 N.W.2d 404.

ordinance does not conflict with state law. Further, the proposed amendment to MCGO § 47.48 neither defeats the purpose of the related state legislation⁵ nor violates the spirit of the same.

b. Wis. Stat. § 59.70(1)

Under Wis. Stat. § 59.70(1), the County may “enact building and sanitary codes, make necessary rules and regulations in relation thereto and provide for enforcement of the codes, rules and regulations by forfeiture or otherwise. The codes rules and regulations do not apply within municipalities which have enacted ordinances or codes concerning the same subject matter.” There is some risk that a court could interpret Wis. Stat. § 59.70(1) to mean that MCGO § 47.48 is invalid in a municipality that had an ordinance addressing the same subject matter. However, Wis. Stat. § 59.70 is entitled “Environmental protection and land use,” and when read in its entirety, the purpose of this statute is not to address illegal dumping on park land. Rather, the focus of this particular statute is issues such as building and sanitary codes, solid waste management, wells, drainage districts, recycling, and other related municipal functions. When taken in its entirety, this statute is addressing concerns that are tangentially related to illegal dumping, but its focus is on administering broader environmental protection concerns than illegal dumping. Notably, certain issues, such as building codes, are traditionally determined on a city/village level rather than on a county wide basis. The risk that a court would find MCGO § 47.48 invalid because of a municipality having its own illegal dumping ordinance is relatively low.

⁵ Wis. Stat. § 287.81

3. Milwaukee County's Municipalities' Illegal Dumping Ordinances

Every municipality within the County has its own illegal dumping ordinance. Some municipalities have adopted the County's ordinance, but most have established their own. Below are they municipalities and the associated penalties:

Municipality	Penalty
Bayside	\$25-5,000 with prosecution
Brown Deer	1st: \$25-3,000. 2nd: \$50-5,000
Cudahy	\$5-2,000, each day as separate offense. Execution against property
Fox Point	\$50-2,000 for each violation
Franklin	\$200 for each day
Glendale	1st: \$25-3,000, 2nd: \$50-5,000
Greendale	\$5-\$1,000
Greenfield	1st: \$5-\$3,000 with costs of prosecution. 2nd: \$10-\$3,000 with costs of prosecution
Hales Corners	1st: Not more than \$400, with costs of prosecution. 2nd: \$10-400 with costs of prosecution
Milwaukee	\$1,500-\$5,000 for each incident
Oak Creek	Not more than \$1,000
River Hills	\$10-500 for each and every offense
Shorewood	\$200 each day
South Milwaukee	Not more than \$200
St. Francis	1st: \$20-1,000, 2nd: \$100-2,000. Each day/violation as separate offense
Wauwatosa	\$200 each day
West Allis	\$25-250, with costs of prosecution. Each day as a separate offense.
West Milwaukee	\$10-1,000. Each day as a separate offense.
Whitefish Bay	\$25-1,500, with costs of prosecution.

CONCLUSION AND RECOMMENDATION:

The County has the authority to increase the civil penalties under MCGO § 47.48. However, to mitigate legal risk and ensure that the ordinance survives judicial review if challenged, OCC respectfully recommends the following:

- Any increase to the civil penalty should be implemented with the use of range for the dollar amount so that violations of varying severity can be fined proportionately.
- The bottom of the range should either be:
 - \$200, the existing penalty;
 - \$500, the minimum penalty under Wis. Stat. § 287.81;
 - \$1,000, the maximum penalty under Wis. Stat. § 287.81;

Any of these options would maximize harmony with state law.

- MCGO § 47.48 should state explicitly that the cost of remediation will either be part of the penalty or at least considered in the determination thereof.
