

RECEIVED

02-05-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

COUNTY OF FOND DU LAC,

Plaintiff-Respondent,

Appeal No. 15AP2223

vs.

STUART D. MUCHE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND DENIAL OF
MOTION FOR DISMISSAL ORDERED AND ENTERED IN FOND DU LAC
COUNTY CIRCUIT COURT BRANCH 5, THE HONORABLE ROBERT J.
WIRTZ PRESIDING

BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

Curtis A. Borsheim
ASSISTANT DISTRICT ATTORNEY
160 S. MACY STREET
FOND DU LAC WI 54935
(920) 929-3048
Attorney for Plaintiff-Respondent
Wisconsin Bar Number 1004536

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES	ii-iii
STATEMENT ON ORAL ARGUMENT AND PUBLICATION	1
STATEMENT OF THE ISSUE	1
ARGUMENT	2
A. HOME RULE	
1. County Power	
2. Counties do not have constitutional home rule.	
3. Enacting the Social host ordinance was valid exercise home rule power	
4. The social host ordinance does not conflict with, defeat the purpose of or run contrary to the purpose of the state legislation	
CONCLUSION	7
INDEX TO APPENDIX	9
APPENDIX CERTIFICATION	10
BRIEF FORMAT CERTIFICATION	13
ELECTRONIC COPY CERTIFICATION	13
CERTIFICATION OF MAILING	14

TABLE OF AUTHORITIES

CASES CITED:

<u>Anchor S&L Ass'n v. EOC</u> , 120 Wis. 2d 391, 397, 355 N.W.2d 234, 238 (1984))	4
<u>Janesville v. Garthwaite</u> , 83 Wis.2d 866, 266 N.W.2d 418,(1978).....	5
<u>Mommsen v. Schueller</u> , 228 Wis.2d 627, 635, 599 N.W.2d 21 (Ct.App.1999)	3
<u>Oshkosh v. Campbell</u> , 151 Wis. 567, 139 N.W. 316 (1913).....	6
<u>Smith v. Kappell</u> , 147 Wis. 2d 380, 433 N.W.2d 588 (Ct. App. 1988),	5
<u>State ex rel. Teunas v. County of Kenosha</u> , 142 Wis. 2d 498, (Ct. App. 1995).....	2
<u>State ex rel. Ziervogel v. Washington County Bd. of Adjustment</u> , 2004 WI 23, ¶ 37, 269 Wis.2d 549, 676 N.W.2d 401.....	4
<u>State v. Cole</u> , 2003 WI 59, ¶ 12, 262 Wis.2d 167, 663 N.W.2d 700 418 N.W.2d 833, (1988).....	2
<u>State v. Mattson</u> , 140 Wis. 2d 24, 409 N.W.2d 138, (Ct. App. 1987).	5
<u>Tahtinen v. MSI Ins. Co.</u> , 122 Wis.2d 158, 166, 361 N.W.2d 673 (1985) ...	1
<u>U.S. Oil v. City of Fond du Lac</u> , 199 Wis. 2d 333, 544 N.W.2d 589, (Ct. App. 1996)	4

STATUTES CITED:

Wis. Stats. § 59.03, Wis. Stats.....	2
Wis. Stats. §125.02(14m)	5
Wis. Stats. §125.07(2), Wis. Stats.....	2
Wis. Stats. §125.10(2)	4

Wis. Stats. §125.07(1)(a)3.....	4
Wis. Stats. §§349.03(1)	6
Chapter 125, Wis. Stats	5

ORDINANCES:

Fond du Lac County Ordinance 6-5 (2012)	3
§ 6-5(b) Definitions	3

STATEMENT OF THE ISSUES

1. Does Fond du Lac County Ordinance No. 6-5. Social host ordinance violate Wis. Stats. Ch. 125?

Trial Court Decision: No

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary as the County believes that the briefs of the parties will fully meet and discuss the issues of appeal.

Publication may be appropriate as this Court's decision may modify, clarify or criticize an existing rule. Wis. Stats. §§ 809.22 and 809.23(1)(a)1.

STANDARD OF REVIEW

This case requires this Court to interpret and to apply statutes and a county ordinance to undisputed facts. The interpretation of statutes and their application to facts are questions of law, subject to this Court's independent review, Tahtinen v. MSI Ins. Co., 122 Wis.2d 158, 166, 361 N.W.2d 673 (1985), but benefiting from the analysis of the circuit court. State v. Cole, 2003 WI 59, ¶ 12, 262 Wis.2d 167, 663 N.W.2d 700.

ARGUMENT

A. HOME RULE

1. County Power

Wisconsin counties have only such powers as are expressly conferred by or necessarily implied from a grant of power. State ex rel. Teunas v. County of Kenosha, 142 Wis. 2d 498, 504, 418 N.W.2d 833, 835 (1988). As a creature of the legislature, a county must exercise its powers within the scope of authority that the State confers upon it. *Id.* at 504, 418 N.W.2d at 835-36.

Wis. Stat. § 59.03 is a broad grant of power to counties. The County also asserts that its home rule power is complimented by Wis. Stat. §125.07(2), from which it asserts it has the implied, if not the expressed, power to legislate private action on private property.

The County contends that § 59.03, Wis. Stats., and the Chapter 125, Wis. Stats., empower it to regulate matters relating to police and health issues. The County contends that it may enact its social host ordinance because Chapter 125, Wis. Stats., does not expressly prohibit regulation of behavior on private premises and further that the social host ordinance does not conflict with the purpose, spirit or language of Chapter 125, Wis. Stats.

2. Counties do not have constitutional home rule.

The county does not dispute the contents of the Wisconsin Constitution on this topic.

3. Enacting the Social host ordinance was valid exercise home rule power.

In 2012, Fond du Lac County enacted the social host ordinance. (App.

“§ 6-5(b) *Definitions. Residence, premises or public or private property.*

“Residence”, premises,” or “public or private property” means any home, yard, farm, field, land, apartment, condominium, hotel or motel room or other dwelling unit, or a hall or meeting room, park or any other place of assembly, whether occupied on a temporary or permanent basis, whether occupied as a dwelling or specifically for a party or other social function, and whether owned, leased, rented or used with or without permission or compensation.”

A county must be cognizant of the limitation imposed upon legislation if the subject matter has been addressed in a statute that uniformly affects every county as such legislation shows the matter is of statewide concern. MommSEN v. Schueller, 228 Wis.2d 627, 635, 599 N.W.2d 21 (Ct.App.1999).

Wisconsin courts have previously recognized that while some subjects are exclusively a statewide concern, others may be entirely a local concern and some subjects are not exclusively within the purview of either the state or of a county. *Id.* at 636, 599 N.W.2d 21. For those subjects where both the state and a county may act, the county's actions must "complement rather than conflict with the state legislation." State ex rel. Ziervogel v. Washington County Bd. of Adjustment, 2004 WI 23, ¶ 37, 269 Wis.2d 549, 676 N.W.2d 401.

The home rule statute, § 59.03(1), Wis. Stats., provides in part:

Every county may exercise any organizational or administrative power, subject only to the constitution and to any enactment of the legislature which is of statewide concern and which uniformly affects every county.

(2) ... (a) Except as elsewhere specifically provided in these statutes, the board of any county is vested with all powers of a local, legislative and administrative character, including ... the subject matter of ... police, and health,

.....

(f) The powers conferred by this subsection shall be in addition to all other grants of power and shall be limited only by express language.

Chapter 59, Wis. Stats., thus gives counties the power to enact local legislation affecting their police and health issues, subject to any legislation that is of statewide concern and uniformly affects every county.

Four factors guide are utilized when analyzing whether a County may act:

- (1) whether the legislature has expressly withdrawn the power of municipalities to act;
- (2) whether the ordinance logically conflicts with the state legislation;
- (3) whether the ordinance defeats the purpose of the state legislation; or
- (4) whether the ordinance goes against the spirit of the state legislation.

U.S. Oil v. City of Fond du Lac, 199 Wis. 2d 333, 345, 544 N.W.2d 589, 594 (Ct. App. 1996) (citing Anchor S&L Ass'n v. EOC, 120 Wis. 2d 391, 397, 355 N.W.2d 234, 238 (1984)).

The legislature has expressly granted the power to counties to enact ordinances in this area as follows: §125.10 (2), Wis. Stats.:

A municipality or a county may enact an ordinance regulating conduct regulated by §125.07 (1) or (4) (a), (b) or (bm), §125.085 (3) (b) or §125.09 (2) only if it strictly conforms to the statutory subsection. A county ordinance enacted under this subsection does not apply within any municipality that has enacted or enacts an ordinance under this subsection.

4. The social host ordinance does not conflict with, defeat the purpose of or run contrary to the purpose of the state legislation

§125.07 Wis. Stats., establishes restrictions relating to alcohol and underage persons. §125.07(1)(a)3 Wis. Stats. states in part:

“No adult may knowingly permit or fail to take action to prevent the illegal consumption of alcohol beverages by an underage person on premises owned by the adult or under the adult’s control.”

“Premises” is defined in §125.02(14m) Wis. Stats., as “the area described in a license or permit.” This court is bound by this definition because “[i]f a word is specifically defined by statute, that meaning must be given effect.” Smith v. Kappell, 147 Wis. 2d 380, 385, 433 N.W.2d 588 (Ct. App. 1988), State v. Mattson, 140 Wis. 2d 24, 28, 409 N.W.2d 138, 140 (Ct. App. 1987).

Since the Fond du Lac County Social host ordinance does not apply to licensed premises, it does not conflict with, defeat the purpose of nor go against the spirit of Chapter 125, Wis. Stats.

In City of Janesville v. Garthwaite, 83 Wis.2d 866, 266 N.W.2d 418 ,(1978) the Wisconsin Supreme Court addressed the issue of whether a City of Janesville ordinance, which prohibited certain noise made in the operation of a motor vehicle, was in conflict with traffic regulations contained in the motor vehicle code.

The Supreme Court had previously held that a local traffic regulation was not inconsistent with the motor vehicle code simply because the vehicle code does not contain a provision on the same subject. In Oshkosh v. Campbell, 151 Wis.

567, 139 N.W. 316 (1913), they upheld a municipal ordinance which required a driver in turning right to make the corner as near to the right-hand curb as possible. Such conduct was not regulated by the state. At that time the Wisconsin statutes did require statewide uniformity with regard to existing motor vehicle statutes. The Supreme Court said:

“It is too well settled that a city may make reasonable police regulations respecting the use of its streets, not contravening the letter or spirit of any statute on the subject, to warrant discussing the subject in this case. The statutes relied on expressly reserve to municipalities the usual powers of regulation not inconsistent therewith, and require automobile drivers to observe the rules of the road. The ordinance in question seems to be in perfect harmony therewith.” Id. at 569, 139 N.W. at 317.

Though Oshkosh v. Campbell, supra, antedates the enactment of the present motor vehicle code, it represents sound law. In fact, the 1957 Committee Notes to §349.03(1)(a), Stats., cite Oshkosh to illustrate the type of ordinance which satisfied §349.03(1)(a).⁵ In the City of Janesville case, as in Oshkosh v. Campbell, supra, the conduct prohibited by the ordinance was not prohibited by the vehicle code. Since the ordinance was consistent with, and not contrary to, other noise regulations in the vehicle code, the Supreme Court held that the requirements of §349.03(1)(a) were met.

For the same reasons, the Fond du Lac County “social host” ordinance seeks to regulate activity which is not covered by Chapter 125, Wis. Stats. It neither defeats the purpose nor the spirit of regulation scheme created in Chapter 125, Wis. Stats.

CONCLUSION

For the reasons noted herein, this Court should uphold the trial court's findings. The appeal should be denied.

Respectfully submitted this 5th day of February, 2016.

By: _____
Curtis A. Borsheim
ASSISTANT DISTRICT ATTORNEY
160 S. MACY STREET
FOND DU LAC WI 54935
(920) 929-3048
Attorney for Plaintiff-Respondent
Wisconsin Bar Number 1004536

FORM AND LENGTH OF CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of the brief is 7 pages, 1,478 words.

Further, I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief as filed on this date. A copy of this certificate had been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this ____ day of February, 2016.

Curtis A. Borsheim
State Bar No. 1004536
FOND DU LAC COUNTY DISTRICT
ATTORNEY'S OFFICE
160 S. Macy St.
Fond du Lac, WI 54935
920-929-2931

INDEX TO APPENDIX

Record Page	Document	Appendix Page
6 : 2	Notice and Motion to Dismiss	101
12 : 3	Stipulation	102 – 104
13 : 2	Findings of Fact, Conclusions of Law, Judgment and Stay Pending Appeal	105 - 106

CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stats. § (Rule) 809.10(2)(a); That is and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. I have submitted an electronic copy of this brief, including the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of February, 2016.

FOND DU LAC COUNTY
DISTRICT ATTORNEY'S OFFICE
Attorney for the Plaintiff-Appellant

BY: _____
Curtis A. Borsheim
Assistant District Attorney
State Bar No. 1004536

160 S. Macy St.
Fond du Lac, WI 54935
(920) 832-5024

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the finding or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names or persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of February, 2016.

Curtis A. Borsheim

BRIEF FORMAT CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8)(b) and (c) for a brief and appendix produced with mono spaced font. This brief has seven (7) pages.

Dated this _____ day of February, 2016.

Curtis A. Borsheim

ELECTRONIC COPY CERTIFICATION

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of February, 2016.

Curtis A. Borsheim

CERTIFICATION OF MAILING

I hereby certify that:

This brief was, on February 5, 2016, delivered to the United States Postal Service (USPS) for delivery to the Clerk of Court of Appeals within three calendar days pursuant to Wis. Stat. § 809.80 (3)(b).

I further certify that the brief was correctly addressed and postage was pre-paid.

I further certify that on the date of signature I routed this brief to our office station for first class US Mail Postage to be affixed and mailed to:

Clerk's Office (10 copies)
Wisconsin Court of Appeals
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Attorney Alexander L. Ullenberg (3 copies)
Attorney Kevin M. Lastres
Ullenberg Law Offices SC
101 Camelot Drive, Suite 2B
Fond du Lac, WI 54935

Dated this ____ day of February, 2016.

Curtis A. Borsheim