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DISTRICT II

July 3, 2020

To:

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You are hereby notified that the Court has entered the following order:

2020XX1092

David Yandel v. City of Racine (L.C. # 2020CV1045)

Before Reilly, P.J.

The City of Racine and Dottie-Kay Bowersox move to stay pending appeal the circuit court's July 1, 2020 order declaring a duly enacted City ordinance unconstitutionally vague, overbroad, and unenforceable.¹ The plaintiff, David Yandel, has not yet filed a response. We grant the requested stay.

In this action, the legislative body of the City of Racine enacted Ordinance 0004-20 pursuant to the report of their local health officer regarding the 2019 novel corona virus (COVID-19). The ordinance created sections 54-33 and 54-34 (the "Safer Racine" plan), which

¹ The City filed a timely notice of appeal which has been transmitted to but not yet received by the Clerk of the Court of Appeals.

together give the local health official the power to take the measures “necessary to prevent, suppress and control communicable diseases,” as authorized by WIS. STAT. § 252.03 (1).²

Any argument that *Wis. Legislature v. Palm*³ controls is misplaced. The *Palm* court held that Emergency Order 28 issued by Wisconsin’s Secretary of Health Services was unenforceable because it did not comply with the rulemaking procedures of WIS. STAT. § 227.24, *i.e.*, it impermissibly avoided legislative oversight. In contrast, the Safer Racine ordinance was created by the legislative body for the City of Racine in accordance with WIS. STAT. § 252.03. Duly enacted ordinances are presumed constitutional and the moving party, in this case, Yandel, has the burden of proving its invalidity beyond a reasonable doubt. *See Clark Oil & Refining Corp.*

² **252.03 Duties of local health officers.**

(1) Every local health officer, upon the appearance of any communicable disease in his or her territory, shall immediately investigate all the circumstances and make a full report to the appropriate governing body and also to the department. The local health officer shall promptly take all measures necessary to prevent, suppress and control communicable diseases, and shall report to the appropriate governing body the progress of the communicable diseases and the measures used against them, as needed to keep the appropriate governing body fully informed, or at such intervals as the secretary may direct. The local health officer may inspect schools and other public buildings within his or her jurisdiction as needed to determine whether the buildings are kept in a sanitary condition.

(2) Local health officers may do what is reasonable and necessary for the prevention and suppression of disease; may forbid public gatherings when deemed necessary to control outbreaks or epidemics and shall advise the department of measures taken.

(3) If the local authorities fail to enforce the communicable disease statutes and rules, the department shall take charge, and expenses thus incurred shall be paid by the county or municipality.

(4) No person may interfere with the investigation under this chapter of any place or its occupants by local health officers or their assistants.

v. Tomah, 30 Wis. 2d 547, 553, 141 N.W.2d 299 (1966). Just as capacity limits set for public establishments for fire safety reasons are not unconstitutional despite limiting the number of people who can assemble in one place, so may capacity restrictions be set for health reasons to control communicable diseases.

A stay pending appeal may be granted when a moving party: (1) makes a strong showing that it is likely to succeed on the merits of the appeal; (2) shows that, unless a stay is granted, it will suffer irreparable injury; (3) shows that no substantial harm will come to other interested parties; and (4) shows that a stay will do no harm to the public interest. *Leggett v. Leggett*, 134 Wis. 2d 384, 385, 396 N.W.2d 787 (Ct. App. 1986). This court reviews the circuit court's decision to grant or deny relief pending appeal for an erroneous exercise of discretion. *State v. Gudenschwager*, 191 Wis. 2d 431, 439-40, 529 N.W.2d 225 (1995). In weighing the factors, the probability of success that must be shown is inversely proportional to the amount of irreparable injury the movant will suffer absent the stay. *See id.* at 442.

First, in evaluating the likelihood of success, there is a presumption of constitutionality to a duly enacted ordinance. Further, a strong showing is made that pursuant to WIS. STAT. § 252.03, a legislative body (State or local) has the authority to authorize a health official to impose restrictions on the assembly of persons to prevent communicable diseases. We are not persuaded that the Safer Racine ordinance unconstitutionally infringes on its citizens' rights to assemble under WIS. CONST. art. I, § 4. Second, absent a stay, the City is prevented from enforcing a duly enacted ordinance designed to control an ongoing pandemic and safeguard its residents. This constitutes irreparable harm. Third, a stay will not cause irreparable harm to

³ *Wisconsin Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900.

Yandel, who is permitted to operate his business with enhanced safety restrictions. Fourth, the circuit court's analysis concerning the public interest did not give sufficient weight to the public's interest in remaining safe from communicable disease as set forth in WIS. STAT. § 252.03, and in Racine Ordinance sec. 54-33. The City of Racine's legislative body considers its ordinance necessary to protect the public safety, and the legislative determination is entitled to deference. The circuit court erroneously exercised its discretion in balancing the factors to be considered and not giving the ordinance and the City's legislative determination the presumptions and deference to which they are entitled. Therefore,

IT IS ORDERED that the circuit court's July 1, 2020 order is stayed pending appeal.

Sheila T. Reiff
Clerk of Court of Appeals