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OAG–04–17

Secretary Laura Gutiérrez
Department of Safety and Professional Services
1400 East Washington Avenue
Madison, WI 53708

Dear Secretary Gutiérrez:

¶ 1. You have asked for my opinion concerning the application of 2011 Wisconsin Act 21 ("Act 21") to a rule regulating fire sprinkler systems in multifamily dwellings, Wis. Admin. Code § SPS 361.05(1) *as amended by* Wis. Admin. Code § SPS 362.0903 (collective, referred to as "Sprinkler Rule" in this opinion). The Department of Safety and Professional Services (the "Department") enforces and administers the Sprinkler Rule. You raise the following two questions: (1) is the Sprinkler Rule a "standard, requirement, or threshold" that is more restrictive than the relevant provisions in the Wisconsin Statutes, and (2) even if the Sprinkler Rule is a "standard, requirement, or threshold" that is more restrictive than the relevant Wisconsin Statutes, may the rule still be enforced since it was lawfully promulgated before the enactment of Act 21?

¶ 2. I have determined that the Sprinkler Rule contains a requirement that is more restrictive than the Wisconsin Statutes. I have further concluded that Act 21 prohibits the Department from enforcing or administering the Sprinkler Rule even though the rule was lawfully promulgated before Act 21 was passed. There is little question that the answers to the questions will have a substantial impact on other rules and regulations involving the construction of new buildings and the state's building code, in general. However, given the history leading to the passage of Act 21, the analysis below is unavoidable. It will be up to Wisconsin's policymakers to resolve the issues raised by the intersection of administrative rules enacted prior to Act 21 and the law itself.

BACKGROUND

¶ 3. My analysis begins with the fact that every agency's rulemaking authority is defined by statute. Section 227.10 imposes a duty upon each state agency to promulgate as a rule "each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." Wis. Stat. § 227.10(1).

¶ 4. Although chapter 227 imposes this affirmative duty on an agency to promulgate rules, the chapter does not by itself "confer rule–making authority" or "augment" any authority unless the Legislature "expressly provide[s]" such authority, whether in chapter 227 or otherwise. Wis. Stat. § 227.11(1). In short, this statutory language is not a broad mandate for agencies to govern via rulemaking.

¶ 5. Only one section in chapter 227 "expressly provide[s]" rule-making authority: Section 227.11 "expressly confer[s]" four specific categories of rule-making authority upon agencies. *First*, an agency may, within certain parameters, promulgate rules that "interpret[ ] the provisions of any statute enforced or administered by the agency." Wis. Stat. § 227.11(2)(a). *Second*, an agency may "prescribe forms and procedures in connection with any statute enforced or administered by it." Wis. Stat. § 227.11(2)(b). *Third*, an agency authorized to "exercise discretion in deciding individual cases may formalize the general policies evolving from its decisions." Wis. Stat. § 227.11(2)(c). *Fourth*, an agency may promulgate rules as a prospective measure in limited circumstances. *See* Wis. Stat. § 227.11(2)(d). Other than these four specific categories, agencies have no rule-making authority.

¶ 6. Until 2011, Wisconsin courts generally granted state agencies broad rulemaking authority, holding that an agency may promulgate rules "fairly implied from the statutes under which it operates." *Brown Cty. v. Dep't of Health & Soc. Servs.*, 103 Wis. 2d 37, 48, 307 N.W.2d 247 (1981). For example, in 2000, the Wisconsin Court of Appeals upheld a rule by the Department of Natural Resource as "consistent with [DNR's] implied authority . . . to grant or deny permanent boat shelter permits" even though "the legislature did not expressly authorize promulgation" of the rule in question. *Grafft v. Dep't of Nat. Res.*, 2000 WI App 187, ¶¶ 9, 14, 238 Wis. 2d 750, 618 N.W.2d 897.

¶ 7. Act 21 completely and fundamentally altered this balance, moving discretion away from agencies and to the Legislature. The act resulted from a special session of the Wisconsin Legislature called by Governor Scott Walker for the express

purpose of reducing "burdensome regulation." Exec. Order No. 1, Governor Scott Walker, Relating to a Special Session of the Legislature (Jan. 3, 2011).[1] In an informational paper explaining the bill that would become Act 21, the Governor's first example of the need for regulatory reform was the Sprinkler Rule. *See* Press Release, Governor Scott Walker, Regulatory Reform Info Paper (Dec. 21, 2010).[2] The paper explained that the Sprinkler Rule requires "sprinkler systems in all multifamily dwellings except certain townhouse units even though state law explicitly stated that sprinkler systems were required" only in dwellings with more than 20 units. *Id*. Legislation was needed, according to Governor Walker, because "an agency may not create rules more restrictive than the regulatory standards or thresholds" established by the legislature. *Id*. To this end, the Governor specifically called for "[l]egislation that states an agency may not create rules more restrictive than the regulatory standards or thresholds provided by the legislature[ ]." *Id*. The Governor also emphasized the need for a statutory provision that specifically states that statutory provisions relating to "general duties or powers . . . do not empower the department to create rules not explicitly authorized in the state statutes." *Id.*

¶ 8. Among other reforms, Act 21 specifically added Wis. Stat. § 227.11(2)(a)1.–3. to impose specific limitations upon agency authority. These limitations make clear that agencies do not possess any inherent or implied authority to promulgate rules or enforce standards, requirements, or thresholds and that agencies only possess authority "that is explicitly conferred on the agency by the legislature." *See* Wis. Stat. § 227.11(2)(a)1., 2.

¶ 9. This means that statements of "legislative intent, purpose, findings, or policy" found in statutory or nonstatutory provisions do not confer or augment agency rulemaking authority. Wis. Stat. § 227.11(2)(a)1. Likewise, agency rulemaking authority does not arise from statutory provisions "describing the agency's general power or duties." Wis. Stat. § 227.11(2)(a)2.

¶ 10. Furthermore, and most importantly for this opinion, statutory provisions containing "a specific standard, requirement, or threshold" do not "confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the [relevant] statutory provision." Wis. Stat. § 227.11(2)(a)3.

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[1] *Available at* http://docs.legis.wisconsin.gov/code/executive_orders/2011_scott_walker/2011-1.pdf.

[2] *Available at* https://walker.wi.gov/press-releases/regulatory-reform-info-paper.

¶ 11. Additionally, under Wis. Stat. § 227.10(2m), agencies are forbidden from implementing or enforcing "any standard, requirement, or threshold" unless it is "explicitly required or explicitly permitted by statute or a rule promulgated in accordance with this subchapter." *See generally* OAG–01–16 (May 10, 2016).

¶ 12. Taken as a whole, the amendments enacted by Act 21 prevent agencies from relying on any supposed inherent or implicit authority such as "general powers or duties," Wis. Stat. § 227.11(2)(a)2., or statements of "legislative intent, purpose, findings, or policy," Wis. Stat. § 227.11(2)(a)1., when enforcing, administering, or promulgating rules. For rulemaking, agencies may only rely on statutes that "explicitly confer[ ]" authority to make rules. Wis. Stat. § 227.11(2)(a)1., 2. And outside of rulemaking, agencies may only implement or enforce standards, requirements, or thresholds that are "explicitly required or explicitly permitted by statute or by a rule." Wis. Stat. § 227.10(2m).

¶ 13. Act 21 reflects the Legislature's deliberate decision to shift policymaking decisions away from state agencies and to the Legislature. The consequences of Act 21 are far-reaching and will, in some cases, eliminate arguably laudable policy choices of an agency (such as whether sprinkler systems should be installed in apartment buildings with more than four units). But the Legislature has decided that agencies should not make these type of policy choices. As a result, Act 21, where it invalidates rules as it does here, may create gaps of unregulated conduct, and these gaps will remain unfilled until the Legislature chooses to act, or by its silence, decides that particular conduct should remain unregulated. This opinion, therefore, reflects only the legal consequences of applying Act 21 to the Sprinkler Rule, and does not reflect my opinion as to the Legislature's deliberate policy choices, or its decision to shift policymaking power away from agencies.

QUESTION ONE

¶ 14. In your first question, you ask whether the Sprinkler Rule sets a "standard, requirement, or threshold" that is more restrictive than the corresponding statute, Wis. Stat. § 101.14(4m)(b).

¶ 15. Under the Wisconsin Statutes, the Department must require an automatic fire sprinkler system in "every multifamily dwelling that contains . . . [m]ore than 20 dwelling units." Wis. Stat. § 101.14(4m)(b). The Department responded to this mandate by promulgating the Sprinkler Rule, which provides that an automatic sprinkler system must be installed in every multifamily dwelling that "contain[s] more than 4 dwelling units." Wis. Admin. Code § SPS 362.0903(5)(b).

¶ 16. I have applied a three-step analytical inquiry to determine whether the Sprinkler Rule "contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in" Wis. Stat. § 101.14(4m)(b), in violation of Wis. Stat. § 227.11(2)(a)3. This test may be helpful to resolve future questions about whether a particular rule is more restrictive than the Wisconsin Statutes.

¶ 17. Initially, I will examine whether both a rule and a statute contain a "specific standard, requirement, or threshold" governing the same subject matter conduct. *See* Wis. Stat. § 227.11(2)(a)3. Second, I will compare the two standards, requirements, or thresholds to determine if the rule is "more restrictive" than the statute. *Id.* Third, if the Sprinkler Rule is more restrictive than the statute, I will evaluate whether the Sprinkler Rule is otherwise "explicitly permitted by statute or by a rule." Wis. Stat. § 227.10(2m). If the rule is more restrictive than the statute, and not otherwise explicitly permitted, then the Sprinkler Rule may not be "enforce[d]" or "administer[ed]" by the Department under Wis. Stat. §§ 227.10(2m), .11(2)(a)3.

¶ 18. First, both the Sprinkler Rule and the Wisconsin Statutes set a requirement that certain multifamily dwellings must contain a sprinkler system. In the regulatory context, a "requirement" is simply "something required," "something wanted or needed," or "something essential to the existence or occurrence of something else." *Requirement*, Merriam-Webster.com, www.merriam-webster.com/dictionary/requirement (last visited Aug. 28, 2017). Here, the Wisconsin Statutes contains a "requirement" because the statute requires the installation of automatic sprinkler systems in multifamily dwellings with more than twenty units, Wis. Stat. § 101.14(4m)(b). The fact that this is a "requirement" is clear from the statutory language, which provides that "[t]he department *shall require* an automatic fire sprinkler system" in every multifamily dwelling that contains "[m]ore than 20 dwelling units." Wis. Stat. § 101.14(4m)(b) (emphasis added). The Sprinkler Rule likewise contains such a "requirement," Wis. Stat. § 227.11(2)(a)3., because the rule requires the installation of automatic sprinkler systems in multifamily dwellings with more than four units, Wis. Admin. Code § SPS 362.0903(5)(b) (requiring that an automatic sprinkler system that "complies with" the rule on "more than 4 dwelling units").

¶ 19. These two "requirement[s]" could also be characterized as "threshold[s]" or "standard[s]" under Wis. Stat. § 227.11(2)(a)3 because in addition to requiring conduct, the rule and the statute both set a specific numerical limit. In the regulatory context, a "standard" is "something set up and established

by authority as a rule for the measure of quantity, weight, extent, value, or quality." *Standard*, www.merriam-webster.com/dictionary/standard (last visited Aug. 28, 2017). And in the same context, a "threshold" is "a level, point, or value above which something is true or will take place and below which it is not or will not." *Threshold*, www.merriam-webster.com/dictionary/threshold (last visited Aug. 28, 2017).

¶ 20. Second, now that I have determined that the Sprinkler Rule and the Wisconsin Statutes both contain a "requirement" covering the same conduct (i.e. the installation of sprinkler systems in certain multifamily dwellings), I will determine if the rule is "more restrictive" than the Wisconsin Statutes. When evaluating this phrase "more restrictive" in Wis. Stat. § 227.11(2)(a)3., I have used the commonly accepted meaning of the words within that phrase. In other words, the phrase "more restrictive" means that the operative requirement—found here in the Sprinkler Rule—restricts or limits more conduct than does the requirement announced in the statute. *Restrict*, Merriam-Webster.com, www.merriam-webster.com/dictionary/restrict (last visited Aug. 28, 2017) ("to confine within bounds: restrain," "to place under restrictions as to use or distribution."). In the regulatory context, a "more restrictive" standard, threshold, or requirement can also compel additional conduct or be more demanding on the party whom the standard is enforced. For example, a more restrictive permit or approval may require more monitoring or reporting than a less restrictive permit or approval.

¶ 21. In evaluating the two requirements discussed above, I have concluded that the requirement in the Sprinkler Rule (requiring systems in dwellings with more than four units) is more "limit[ing] on the use or enjoyment of property or a facility" than the Wisconsin Statutes (requiring systems in dwellings with more than twenty units). *Restriction*, Merriam-Webster.com, www.merriam-webster.com/dictionary/restriction (last visited Aug. 28, 2017). For example, while a builder of a five-unit multifamily dwelling would *not* be required to install a sprinkler system under the Wisconsin Statutes' sprinkler-system requirement, *see* Wis. Stat. § 101.14(4m)(b), that same builder would be required to install a sprinkler system under the Sprinkler Rule's sprinkler-system requirement, *see* Wis. Admin. Code § SPS 362.0903(5)(b). In other words, the Sprinkler Rule's requirement would put a greater restriction the builder's freedom, and compel the installation of more sprinkler systems, than would otherwise be governed by the requirements located in the Wisconsin Statutes. In no sense is the Sprinkler Rule "equally restrictive" or "less restrictive" than the Wisconsin Statute's "more than 20 dwelling units" requirement.

¶ 22. Third, the Sprinkler Rule's requirements are not otherwise "explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with" chapter 227's rulemaking provision. Wis. Stat. § 227.10(2m). As I explained in a previous opinion, the word "explicit" in Act 21 means "fully and clearly expressed; leaving nothing implied." OAG–01–16, ¶ 26 (citation omitted). While the Legislature conferred upon the Department the general power to "adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities," Wis. Stat. § 101.02(1), this language is best read as "describing the agency's general powers or duties," and therefore, this section "does not confer rule–making authority" under Wis. Stat. § 227.11(2)(a)2. This general language also does not provide explicit authority for the Department to adopt a more restrictive standard than the specific standard in the statute.

¶ 23. Furthermore, no other provision in chapter 101 provides explicit authority to promulgate a rule more restrictive than Wis. Stat. § 101.14(4m)(b). Under Wis. Stat. § 101.14(4), the Department shall make rules concerning "fire detection, prevention or suppression devices as will protect the health, welfare and safety." And Wis. Stat. § 101.973(1) allows the Department to "[p]romulgate rules that establish standards for the construction of multifamily dwellings and their components." Yet these general rulemaking provisions do not grant explicit authority to the Department to adopt a more restrictive requirement than the requirement in the statute.

¶ 24. Therefore, because the requirements of the Sprinkler Rule are "more restrictive" than those found in the Wisconsin Statutes, and no other rule or statute explicitly permits these more restrictive requirements, the Sprinkler Rule may not be "enforce[d]" or "administer[ed]". Wis. Stat. § 227.11(2)(a)3.

¶ 25. My conclusion, based on the relevant statutory language analyzed above, is also in accord with both case law and legislative history.

¶ 26. In 2009, the Wisconsin Court of Appeals considered a predecessor to the Sprinkler Rule in *Wisconsin Builders Ass'n v. Department of Commerce*, 2009 WI App 20, 316 Wis. 2d 301, 762 N.W.2d 845. This case predated Act 21, and therefore, any discussion of agency authority must be viewed through the lens of Act 21.

¶ 27. In *Wisconsin Builders Association*, the plaintiff contended that Wis. Stat. § 101.14(4m)(b) precludes the Department from imposing a more restrictive requirement. In ruling against the plaintiffs, the court of appeals relied upon the general agency powers in Wis. Stat. § 101.02, and that the statute was

"silent on whether the Department may require sprinkler systems in multifamily dwellings with fewer dwelling units." *Wis. Builders Ass'n*, 316 Wis. 2d 301, ¶¶ 10–11. The court concluded that there was "no basis in the language of § 101.14(4m)(b) for limiting the Department's general authority to promulgate rules that require fire protection devices in multifamily dwellings that have fewer dwelling units." *Id.* ¶ 11.

¶ 28. Act 21, passed after *Wisconsin Builders Association*, provides the exact "limit" on the agency's "general authority" that the court of appeals found lacking. Under Wis. Stat. § 227.11(2)(a)1. and 2., an agency can no longer rely on its "general powers or duties" or a "statement or declaration of legislative intent, purpose, findings, or policy." Furthermore, an agency may no longer impose a standard, requirement, or threshold "more restrictive than the standard, requirement, or threshold contained in the statutory provision." Wis. Stat. § 227.11(2)(a)3. Because of Act 21, the reasoning in *Wisconsin Builders* has been abrogated.

¶ 29. Legislative history further confirms my conclusion that the Sprinkler Rule may not be enforced or administered. Although "legislative history need not be" consulted when the statute is clear on its face, legislative history may be used "to confirm or verify a plain-meaning interpretation." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 51, 271 Wis. 2d 633, 681 N.W.2d 110. The legislation that led to Act 21 resulted from a special session of the Wisconsin Legislature, called by Governor Scott Walker. *See* Exec. Order No. 1, *supra.* As explained above, in an informational white paper explaining the bill that would become Act 21, the Governor's first example for the need for regulatory reform was the Sprinkler Rule. *See* Press Release, Governor Scott Walker, *supra.* The Governor specially called for legislation to make clear that "an agency may not create rules more restrictive than the regulatory standards or thresholds provided by the legislature[ ]." *Id.*

QUESTION TWO

¶ 30. Your second question asks whether the Sprinkler Rule may be enforced because it was validly promulgated before Act 21. Your question contemplates only the Department's current and future implementation and enforcement of the Sprinkler Rule, and not any particular past application.

¶ 31. Above, my answer to Question One demonstrates that because the Sprinkler Rule is more restrictive than the Wisconsin Statutes, the Department is not authorized to "enforce" or "administer" the rule pursuant to Wis. Stat. §§ 227.10(2m) and .11(2)(a)3. Though the Sprinkler Rule may have been promulgated in accordance with the procedural requirements in chapter 227, it could not be

lawfully "promulgate[d]" now, and certainly cannot be "enforce[d]" or "administer[ed]" now, regardless of its pre-Act 21 validity.

¶ 32. Act 21's non–statutory provisions do not otherwise permit the Department to "enforce" or "administer" a rule more restrictive than the applicable law. Section 9355 of Act 21 states that certain provisions amending an agency's authority to "promulgate rules," Wis. Stat. § 227.11(2)(a)3, "first apply to a proposed administrative rule submitted to the legislative council staff under section 227.15 of the statutes on the effective date of this subsection." 2011 Wis. Act 21, § 9355. This provision, however, on its face only applies to Act 21's reforms relating to agency authority to promulgate of new rules ("a proposed administrative rule"), not the "enforce[ment]" or "administ[ration]" of existing rules, to which the text of the statute plainly applies. *See* Wis. Stat. § 227.11(2)(a)3.

¶ 33. In summary, Act 21's prospective ban on future enforcement or administration of rules more strict than the Wisconsin Statutes does not implicate any retroactivity or other due process concerns. No case or principle of law would prohibit the application of Act 21 to future Department enforcement actions, applications, or implementations of the Sprinkler Rule consistent with this opinion. In short, it is my opinion that despite its procedurally lawful promulgation in the past, the Sprinkler Rule may not be prospectively enforced or administered in light of Act 21. *See* Wis. Stat. §§ 227.10(2m), .11(2)(a)3.

Very truly yours,

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Wisconsin Attorney General

BDS:DPL:jrs