STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Paul W. Connell
Deputy Attorney General

Delanie M. Breuer
Chief of Staff

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

September 1, 2017

OAG–01–17

Mr. Tony A. Kordus
Shawano County Corporation Counsel
311 North Main Street
Shawano, WI 54166

Dear Mr. Kordus:

¶ 1. You have requested an opinion on whether a county board is legally authorized to appropriate money to a private nonprofit corporation whose sole mission is to operate a food pantry in the county for the benefit of the county's citizens.

¶ 2. I conclude that a county board is not authorized to appropriate money to a nonprofit food pantry. 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). Because the statutes granting powers to county boards do not authorize appropriations to nonprofit corporations for the purpose of operating food pantries and no such authority can be implied, I conclude that county boards do not have the authority to make such an appropriation.

¶ 3. As the Wisconsin Supreme Court requires, I begin with the plain language of the relevant statutes. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. When interpreting statutory language, we may infer that the Legislature's "express mention of one matter excludes other similar matters [that are] not mentioned." *FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶ 27, 301 Wis. 2d 321, 733 N.W.2d 287 (alteration in original) (citations omitted). County boards have general authority to "represent the county, have the management of the business and concerns of the county in all cases where no other provision is made, apportion and levy taxes and appropriate money to carry into effect any of the board's powers and duties." Wis. Stat. § 59.51(2). Under

this general authority, the board can "appropriate money" only "to carry into effect any of the board's powers and duties." *Id.*

¶ 4. Wisconsin Stat. § 59.53 grants county boards the authority to perform many specific functions with respect to health and human services, but none of the twenty-five subsections in Wis. Stat. § 59.53 authorizes the appropriation of funds to nonprofits that operate food pantries. The county board has the authority to "establish and operate a program of relief for a specific class or classes of persons residing in that county." Wis. Stat. § 59.53(21). The program "may provide such services, commodities or money as relief, as the county determines to be reasonable and necessary under the circumstances." *Id.* While county boards may establish and operate programs to serve residents of the county who need assistance in securing adequate food, the statute does not grant authority to make appropriations to nonprofits to perform this task. Because the statute specifically addresses a county board's authority in this area without granting the authority to make appropriations to nonprofits, county boards do not have the authority, either express or implied, to make such appropriations.

¶ 5. Nor can the statutes be read to imply a power to appropriate funds to a nonprofit food pantry when Wis. Stat. § 59.53 specifically authorizes appropriations to nonprofits for other purposes. When we interpret a statute, the absence of an item from an enumerated list suggests the Legislature did not intend to include it. *See Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶¶ 35–37, 341 Wis. 2d 607, 815 N.W.2d 367 (holding that public records law did not allow fees for redaction because redaction was not one of the four specific tasks for which fees were allowed). County boards are authorized to "appropriate funds . . . making payments to a nonprofit organization . . . that has as a primary purpose providing assistance to individuals who are the victims of domestic violence and related crimes." Wis. Stat. § 59.53(3). In addition, county boards are authorized to "[a]ppropriate money to defray the expenses incurred by private organizations that provide homemaking services to elderly and handicapped persons within the county if the services will enable the persons to remain self–sufficient and to live independently or with relatives." Wis. Stat. § 59.53(11)(c). There is no similar authorization for appropriating money to a nonprofit food pantry. Given that the Legislature authorized appropriating money to nonprofits in certain circumstances, if the Legislature intended that county boards could appropriate money to nonprofit food pantries, it would have said so in the statute.

¶ 6. This interpretation is consistent with Wisconsin case law and prior opinions of the Attorney General. The Wisconsin Supreme Court held that a town could not appropriate money to various charitable organizations because "[n]owhere in those provisions [setting forth the power of town boards] is authority granted to expend money from the town treasury for charitable purposes." *Pugnier v. Ramharter*, 275 Wis. 70, 74, 81 N.W.2d 38 (1957). In two previous opinions, the Attorney General has concluded that a county board had no authority to fund certain community-wide nonprofit corporations by appropriating money to specific nonprofits, 67 Op. Att'y Gen. 297 (1978), or to appropriate funds to a nonprofit that would provide information to the public about services offered by various public and private agencies in the county, 64 Op. Att'y Gen. 208 (1975). The Attorney General reached these conclusions because the statutes outlining the powers of county boards did not authorize such appropriations. 67 Op. Att'y Gen. at 300; 64 Op. Att'y Gen. at 209.

¶ 7. You suggest that the county board's power to "enact and enforce ordinances to preserve the public peace and good order within the county . . . and provide a forfeiture for a violation of the ordinances," Wis. Stat. § 59.54(6), authorizes the appropriation of money to nonprofits. That language does not encompass that authority. An appropriation to a nonprofit for providing services is not an "ordinance[] to preserve the public peace and good order." Wis. Stat. § 59.54(6). Instead, the power to enact ordinances "to preserve the public peace and good order" grants county boards the authority to enact ordinances such as prohibiting false fire alarms, 72 Op. Att'y Gen. 153 (1983), prohibiting trespass on land, 69 Op. Att'y Gen. 92 (1980), or imposing a curfew, 56 Op. Att'y Gen. 126 (1967). Further, interpreting Wis. Stat. § 59.54(6) as broadly as you suggest would be inconsistent with the detailed scheme of county boards' powers with respect to health and human services in Wis. Stat. § 59.53, including subsections specifically dealing with relief programs and appropriations to other types of nonprofits. 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." *Kalal*, 271 Wis. 2d 633, ¶ 46. The detailed scheme of board powers in Wis. Stat § 59.53 would be surplusage if Wis. Stat. § 59.54(6) already conveyed that authority.

¶ 8. In support of your interpretation, you cite an unpublished Attorney General opinion, OAG 23-80 (Apr. 4, 1980), 1980 WL 119464, which concluded a town board had authority to appropriate money to a nonprofit corporation that promoted a retirement community under the broad grant of power to villages in Wis. Stat. § 61.34(1). The reasoning in that opinion does not apply to the power of county boards because villages and towns are granted broader powers than those granted to counties. This distinction is reflected in Wis. Stat. § 59.53(11), which

specifically grants county boards the authority to make appropriations for senior citizen programs. This specific authorization is necessary because county boards do not have authority to appropriate such money to nonprofits under their general powers in Wis. Stat. § 59.51(2).

¶ 9. The powers granted to county boards must be distinguished from the much broader power granted to cities and villages (and towns in certain circumstances) over their local affairs. The Wisconsin Constitution grants home rule power to cities and villages to "determine their local affairs and government." Wis. Const. art. XI, § 3(1). In contrast, 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.

¶ 10. The Legislature has given the common councils of cities the "power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public," a power which is "in addition to all other grants, and shall be limited only by express language." Wis. Stat. § 62.11(5). Similarly, village boards also "have power to act for the government and good order of the village, for its commercial benefit and for the health, safety, welfare and convenience of the public," which is "in addition to all other grants and shall be limited only by express language." Wis. Stat. § 61.34(1). Town boards are able to exercise the powers of village boards if they adopt a resolution to that effect. Wis. Stat. § 60.22(3).

¶ 11. This "power to legislate for the purposes of the health, safety, and welfare of the public" is called the police power. *Metro. Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee*, 2011 WI App 45, ¶ 50, 332 Wis. 2d 459, 798 N.W.2d 287. The Wisconsin courts recognize that "under the provisions of sec. 61.34, Stats., villages have been vested with very broad, if not full, police powers in local affairs." *City of Fond du Lac v. Town of Empire*, 273 Wis. 333, 337, 77 N.W.2d 699 (1956).

¶ 12. County boards, however, do not have a similarly broad grant of police power. *Compare* Wis. Stat. §§ 61.34(1), and 62.11(5), *with* Wis. Stat. § 59.51(2). Instead, as noted above, county boards have the power to "appropriate money to carry into effect any of the board's powers and duties," Wis. Stat. § 59.51(2), which are specifically enumerated in chapter 59. A county board's powers with respect to health and human services are enumerated in Wis. Stat. § 59.53, which does not authorize appropriations to private nonprofit food pantries.

¶ 13. Because county boards have only the powers expressly conferred or necessarily implied by statute, and the statutes outlining the powers of county boards cannot be read to grant the authority to appropriate money to nonprofit food pantries, I conclude that county boards cannot make such an appropriation.

Very truly yours,

BRAD D. SCHIMEL
Wisconsin Attorney General

BDS:BPK:mlk

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Paul W. Connell
Deputy Attorney General

Delanie M. Breuer
Chief of Staff

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

September 1, 2017

OAG–02–17

Mr. Jon E. Litscher
Secretary
Wisconsin Department of Corrections
3099 East Washington Avenue
Post Office Box 7925
Madison, WI 53707-7925

Dear Secretary Litscher:

¶ 1. You ask if a statute governing law enforcement bulletins for sex offenders with multiple criminal convictions applies when the convictions occur at the same time or stem from the same criminal complaint. Your question concerns Wis. Stat. § 301.46(2m)(am), which is triggered by convictions, or findings of not guilty by reason of mental disease or defect, "on 2 or more separate occasions."[1] When triggered, the statute requires an agency releasing a sex offender into the community to send a bulletin to local law enforcement.

¶ 2. I conclude that the language referring to convictions "on 2 or more separate occasions" refers to the number of convictions, including multiple convictions imposed at the same time and based on the same complaint.[2] The Wisconsin Supreme Court has interpreted the "separate occasions" language in an analogous sentencing statute and concluded that the term refers to the number of convictions. I reach the same conclusion here.

[1] The statute applies both to convictions and to findings of not guilty by reason of mental disease or defect. The remainder of this opinion only discusses the statute in terms of convictions, but the analysis holds true for findings of not guilty for reason of mental disease or defect.

[2] You pose your question in two ways: whether it matters if convictions occur at the same time, and whether it matters if the convictions stem from counts in the same complaint. The discussion that follows applies equally to both questions.

¶ 3. The meaning of "separate occasions" is a question of statutory interpretation. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. "The legislature is presumed to act with full knowledge of existing case law when it enacts a statute," so statutes are interpreted in light of the law at the time of their enactment. *Strenke v. Hogner*, 2005 WI 25, ¶ 28, 279 Wis. 2d 52, 694 N.W.2d 296.

¶ 4. The statutory language you ask about appears in Wis. Stat. § 301.46(2m)(am). The section was created by 1995 Wis. Act 440, which revised some existing sex offender registration and notification regulations and also created new ones, including section 301.46(2m)(am). *See* 1995 Wis. Act 440, § 75; *State ex rel. Kaminski v. Schwarz*, 2001 WI 94, ¶ 52, 245 Wis. 2d 310, 630 N.W.2d 164 (describing the statutory changes). The resulting sex offender statutes "reflect an 'intent to protect the public and assist law enforcement' and are 'related to community protection.'" *Kaminski*, 245 Wis. 2d 310, ¶ 41 (quoting *State v. Bollig*, 2000 WI 6, ¶¶ 21–22, 232 Wis. 2d 561, 605 N.W.2d 199).

¶ 5. For example, Act 440 created subsections in Wis. Stat. § 301.45 that govern sex offender registration by requiring sex offenders to provide information, including their current residence and other data. It also created Wis. Stat. § 301.46, which complements Wis. Stat. § 301.45. Section 301.46 includes provisions for accessing or distributing sex offender information, including law enforcement access, notification for victims, and public access to some registry information. *See, e.g.*, Wis. Stat. § 301.46(2)–(3), (5)–(5n).

¶ 6. In addition to general law enforcement access to information, Wis. Stat. § 301.46 includes a bulletin provision. When certain sex offenders are released into the community, the agency with jurisdiction over the offender may be required to send a bulletin to local law enforcement. *See* Wis. Stat. § 301.46(2m). The bulletins include the registrant's identifying information, residence, offense history, and other information that may be useful to law enforcement. Wis. Stat. § 301.46(2m)(b).

¶ 7. The bulletins are either optional or mandatory depending on the offender's circumstances. The non-mandatory provision applies if the offender has a conviction "on one occasion only." *See* Wis. Stat. § 301.46(2m)(a)1. In that instance,

the agency may issue a bulletin if "such notification is necessary to protect the public." Wis. Stat. § 301.46(2m)(a)1.–2. (using "may" instead of "shall").

¶ 8. In contrast, the mandatory provision, Wis. Stat. § 301.46(2m)(am), applies to offenders with sex offense convictions "on 2 or more separate occasions":

> If an agency with jurisdiction confines a person under s. 301.046, provides a person entering the intensive sanctions program under s. 301.048 with a sanction other than a placement in a Type 1 prison or a jail, or releases a person from confinement in a state correctional institution or institutional care, and the person has been found to be a sexually violent person under ch. 980 or has, *on 2 or more separate occasions*, been convicted or found not guilty or not responsible by reason of mental disease or defect for a sex offense or for a violation of a law of this state that is comparable to a sex offense, the agency with jurisdiction *shall notify* the police chief of any community and the sheriff of any county in which the person will be residing, employed, or attending school and through or to which the person will be regularly traveling.

Wis. Stat. § 301.46(2m)(am)1. (emphasis added); *see also* § 301.46(2m)(am)2. (applying the same language to offenders who have moved from another state). Thus, whether a bulletin is mandatory turns on whether the offender has been convicted of a sex offense on two or more "separate occasions." The term "separate occasions" is not defined in the statute.

¶ 9. You ask whether "separate occasions" means the quantity of convictions regardless whether the convictions occur at the same time and stem from counts in the same criminal complaint. While no case has squarely analyzed the term "separate occasions" in section 301.46(2m)(am),[3] the Wisconsin Supreme Court has interpreted "separate occasions" in an analogous sentencing statute. *See State v. Wittrock*, 119 Wis. 2d 664, 350 N.W.2d 647 (1984); *State v. Hopkins*, 168 Wis. 2d 802, 484 N.W.2d 549 (1992). Both *Wittrock* and *Hopkins* addressed the repeat offender statute, Wis. Stat. § 939.62(2), which applies if an offender has been convicted of a misdemeanor on three "separate occasions." *Wittrock*, 119 Wis. 2d at 666; *Hopkins*, 168 Wis. 2d at 805. Those cases held that "separate occasions" refers to the quantity of convictions, regardless whether they occurred at the same time in one court proceeding or arose from a single course of criminal conduct.

---

[3] Although the Wisconsin Supreme Court has noted that Wis. Stat. § 301.46(2m)(am) refers to someone who "has been convicted of two or more sex offenses," the court has not specifically analyzed the meaning of "separate occasions" in the provision. *See Kaminski*, 245 Wis. 2d 310, ¶ 33 n.8.

¶ 10. In *Wittrock*, the defendant argued that "3 separate occasions" meant three separate court appearances. He contended that the repeater statute did not apply to him because his three convictions occurred in only two appearances. 119 Wis. 2d at 667. The State argued that the statute did apply because the defendant had been "previously convicted of three separate offenses of disorderly conduct." *Id.* The supreme court held that "separate occasions" was ambiguous, permitting resort to legislative history. *Id.* at 670–71, 674. Looking at that history, the court noted a focus on "quantity of crimes" rather than "time of conviction." *Id.* at 674. The court also reasoned that it would make little sense for sentencing enhancement to turn on whether someone happened to plead to more than one offense in one court appearance. *Id.* at 674–75. The court concluded that "separate occasions" referred to the number of offenses, not the number of court appearances. *Id.*

¶ 11. In *Hopkins*, the supreme court confirmed *Wittrock*'s holding and addressed a question left open by the earlier case. The defendant in *Hopkins* argued that "separate occasions" meant separate incidents of crime, not multiple convictions stemming from a single course of conduct. 168 Wis. 2d at 805. The supreme court disagreed, holding that each conviction is a "separate occasion" for purposes of the statute. *Id.* Thus, the statute is triggered when a defendant is convicted of three qualifying crimes, regardless whether they were committed on separate occasions and "regardless of the number of court proceedings." *Id.* at 805, 808–09. The court focused on the fact of additional criminal activity because that was what the Legislature intended the repeater provision to address. *Id.* at 810, 813. The *Hopkins* court made clear that "the quantity of the crimes" was the critical factor and that convictions imposed in the same proceeding could each be counted. *Id.* at 808–10.

¶ 12. I conclude that "separate occasions" in Wis. Stat. § 301.46(2m)(am) should be interpreted as referring to the number of convictions, consistent with the supreme court's interpretation of the repeater statute in *Wittrock* and *Hopkins*. In both statutes, the term is used in a similar way: to count convictions either as a measure of criminality or potential dangerousness to the community. It is the fact of additional criminality, as measured by multiple convictions, that matters.

¶ 13. The timing of the legislation that created the sex offender bulletin law supports this view. The legislation, 1995 Wis. Act 440, postdates *Wittrock* and *Hopkins*. This is notable because courts "presume that the legislature acts with full knowledge of existing statutes and how the courts have interpreted these statutes." *State v. Victory Fireworks, Inc.*, 230 Wis. 2d 721, 727, 602 N.W.2d 128

(Ct. App. 1999). "The legislature is presumed to act with full knowledge of existing case law when it enacts a statute. A statute must be interpreted in light of the common law and the scheme of jurisprudence existing at the time of its enactment." *Strenke*, 279 Wis. 2d 52, ¶ 28 (citing *Czapinski v. St. Francis Hosp.*, 2000 WI 80, ¶ 22, 236 Wis. 2d 316, 613 N.W.2d 120, and *State v. Hansen*, 2001 WI 53, ¶ 19, 243 Wis. 2d 328, 627 N.W.2d 195). When the Legislature chose to use "separate occasions" to count convictions in section 301.46(2m)(am), it did so against the backdrop of clear precedent interpreting that term to mean the quantity of convictions, not the number of proceedings or criminal incidents. It should be presumed that the Legislature intended "separate occasions" would have the same meaning in section 301.46(2m)(am).

¶ 14. Further, terms are read in the context of surrounding statutory provisions. *Kalal*, 271 Wis. 2d 633, ¶ 46. Wisconsin Stat. § 301.46 reflects the Legislature's concern with offenders' potential danger to the public. The number of convictions, not court proceedings, best measures that risk.

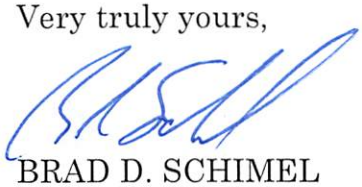
¶ 15. For example, offenders convicted "on one occasion only" are not automatically subject to a bulletin. However, a bulletin may still issue if "necessary to protect the public." Wis. Stat. § 301.46(2m)(a)1.–2. For one conviction, the statute does not require a bulletin because it recognizes that onetime offenders typically are not among the most dangerous. Yet it recognizes that the proxy may not always be accurate, and so provides discretion to issue a bulletin when an individual poses special dangers to the public. In contrast, for offenders with convictions on two or more occasions, the bulletin is mandatory. Wis. Stat. § 301.46(2m)(am)1.–2. The statute assumes that a bulletin for these offenders is needed to protect the public. The link between offenses and danger makes sense only if the provision refers to the number of convictions, not the number of court appearances, as a single proceeding may address multiple crimes.

¶ 16. Also telling is that mandatory bulletins are required for offenders released from civil commitment under Wis. Stat. ch. 980, i.e., "sexually violent persons." Wis. Stat. § 301.46(2m)(am); *see also* Wis. Stat. § 980.01(6)–(7) (defining "sexually violent person"). Like multiple convictions, that status serves as a proxy for heightened danger to the public. The presumption is that the individual adjudicated a sexually violent person and subject to mandatory institutionalization remains more dangerous than a typical offender. This again demonstrates that the Legislature's focus was on dangerousness, not court proceedings.

¶ 17. Further, the policies underlying the sex offender law are best served by this interpretation. The sex offender registration and notification laws, Wis. Stat. §§ 301.45 and 301.46, "reflect an 'intent to protect the public and assist law enforcement' and are 'related to community protection.'" *Kaminski*, 245 Wis. 2d 310, ¶ 41 (citing *Bollig*, 232 Wis. 2d 561, ¶¶ 21–22). As the U.S. Supreme Court has recognized, these kinds of policy goals are properly part of sex offender regulations, and those regulations may properly treat offenders "as a class" based on dangerousness. *Smith v. Doe*, 538 U.S. 84, 103 (2003) (generally discussing sex offender regulations). These goals, including the goal of assisting law enforcement, are served by applying section 301.46(2m)(am) to require mandatory law enforcement bulletins when an offender has multiple convictions.

¶ 18. I conclude that convictions on "separate occasions" in Wis. Stat. § 301.46(2m)(am) refers to multiple convictions, regardless whether they were part of the same proceeding, occurred on the same date, or were included in the same criminal complaint.

Very truly yours,



BRAD D. SCHIMEL
Wisconsin Attorney General

BDS:ADR:jrs

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Paul W. Connell
Deputy Attorney General

Delanie M. Breuer
Chief of Staff

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

November 6, 2017

OAG–03–17

The Honorable Scott Walker
Governor
State of Wisconsin
115 East, State Capitol
Madison, WI 53702

Dear Governor Walker:

¶ 1. You ask whether chapter 40 of the Wisconsin Statutes authorizes the State of Wisconsin Group Insurance Board (the "Board") to establish a self-insured group insurance plan open to municipal employers. If so, you ask whether article VIII, section 3 of the Wisconsin Constitution, which prevents extending "the credit of the state," would prohibit municipal participation in those plans. As described on the Board's website, self-insurance means that, "instead of paying health plans a monthly premium for coverage, the State will pay medical claims directly through third-party administrators."[1]

¶ 2. Under chapter 40, the Board is authorized to offer group health insurance plans that public employers, including the State and other public employers, may offer to their employees. *See* Wis. Stat. §§ 40.03(6), 40.51(6)–(8m). The Board is authorized to contract with insurers for those plans or may offer any plan on a self-insured basis. Wis. Stat. § 40.03(6)(a)1.–2. In turn, municipal employers may offer their employees a plan through "a program offered by" the Board. Wis. Stat. § 40.51(7)(a). I conclude that the plain language of these statutes allows municipalities to offer a self-insured plan if offered by the Board. Further, article VIII, section 3 of the Wisconsin Constitution poses no bar. That section forbids legally binding the State as a guarantor of a private corporation's debt. Because offering municipalities self-insured plans does not involve that kind of relationship, the constitutional provision does not bar it.

[1] http://www.etf.wi.gov/faq/gib_self_ins.htm#self-insurance (last visited Aug. 8, 2017).

¶ 3. The meaning of provisions in chapter 40 presents a question of statutory interpretation. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Id.* "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." *Id.* (citation omitted).

¶ 4. Wisconsin Stat. § 40.03(6) grants the Board authority to offer group insurance plans. The Board may either contract with an insurer or may provide any plan on a self-insured basis:

> The group insurance board:
>
> (a) 1. Shall, on behalf of the state, enter into a contract or contracts with one or more insurers authorized to transact insurance business in this state for the purpose of providing the group insurance plans provided for by this chapter; or
>
> 2. May, wholly or partially in lieu of subd. 1, on behalf of the state, provide *any group insurance plan on a self-insured basis* in which case the group insurance board shall approve a written description setting forth the terms and conditions of the plan, and may contract directly with providers of hospital, medical or ancillary services to provide insured employees with the benefits provided under this chapter.

Wis. Stat. § 40.03(6)(a) (emphasis added).[2]

[2] The Legislature created Wis. Stat. § 40.03(6)(a) with 1981 Wis. Laws, ch. 96, § 24, and Wis. Stat. § 40.51(7) with 1985 Wis. Act 29, § 741.

¶ 5. Chapter 40 specifically allows municipal employers to provide Board plans to their employees. Wisconsin Stat. § 40.51, titled "Health care coverage," provides that "[a]ny employer, other than the state, . . ., may offer to all of its employees a health care coverage plan through a program offered by the group insurance board." Wis. Stat. § 40.51(7)(a).[3] "[E]mployer" includes "any county, city, village, town, school district, other governmental unit or instrumentality of 2 or more units of government." Wis. Stat. § 40.02(28).[4] An "employee" is "any person who receives earnings as payment for personal services rendered for the benefit of any employer." Wis. Stat. § 40.02(26).

¶ 6. Thus, the Board may offer "any group insurance plan on a self–insured basis," and a municipal employer may "offer . . . a health care coverage plan through a program offered by the group insurance board." Wis. Stat. §§ 40.03(6)(a)2., 40.51(7)(a). Applying these sections as written, a municipal employer may offer a self-insured plan if offered by the Board.[5]

¶ 7. An Attorney General opinion from 1987 reached a contrary conclusion, but it contains no significant analysis. 76 Op. Att'y Gen. 311 (1987), 1987 WL 341185. Rather, the opinion largely discusses other topics. Only the final statements summarily address whether the Board may establish a "self-funded" plan available to municipal employers. The opinion states that the words "on behalf of the state" in the self-insurance subsection, Wis. Stat. § 40.03(6)(a)2., should be dispositive because the clause references only "the state," as opposed to other public employers. 76 Op. Att'y Gen. at 315. However, that conclusion incorrectly conflates the duties delegated to the Board to establish plans with the State's separate role as an employer.

---

[3] The provision governs procedures only for employers "other than the state," as the preceding subsection governs plans offered by the State as an employer. Wis. Stat. § 40.51(6).

[4] For the sake of brevity, this opinion refers to these employers as "municipal" employers.

[5] Although the statutes do not prevent municipalities' participation, the Department of Employee Trust Funds "may by rule establish different eligibility standards or contribution requirements for [municipal] employees and employers." Wis. Stat. § 40.51(7)(a).

¶ 8. In the present context, "on behalf of the state" means that the Board—which is a part of the State of Wisconsin's Department of Employee Trust Funds—may act *for* the State by offering plans that are made available to public employers. A common meaning of "on behalf of" is as to act "in place of" or as an "agent" of another entity. *See, e.g.*, Wis. Stat. § 49.454(1)(a)3. (discussing actions of "[a] person . . . to act in place of or on behalf of the individual" whose assets are used to form a trust); *Green v. Heritage Mut. Ins. Co.*, 2002 WI App 297, ¶ 17, 258 Wis. 2d 843, 655 N.W.2d 147 ("[A]gent merely contracts on behalf of a disclosed principal . . . ." (citation omitted)). The Board acts "on behalf of the state" when it contracts for, approves of, and otherwise makes available insurance plans. *See* Wis. Stat. § 40.01 (creating ETF, including the Board, to benefit public employee participants).

¶ 9. In reaching a contrary conclusion, the 1987 opinion appears to conflate the Board's plan-establishment role with the State's separate role as an *employer* that offers plans to state employees. Wisconsin Stat. § 40.51(6) addresses the latter role, providing that the State offers plans "approved by the group insurance board" to "all of its employees." The State thus acts in two capacities: (1) it delegates its power to the Board to establish group insurance plans for public employees and (2) it selects plans and offers them to state employees. Wis. Stat. §§ 40.03(6), 40.51(6). Paralleling that second role, Wis. Stat. § 40.51(7) allows municipal employers to offer a "plan through a program offered by the group insurance board." The State's first role—the delegation of authority to the Board to establish plans—is not limited by the second role as an employer offering plans.[6]

¶ 10. That plain reading is further supported by the surrounding statutory text. The insurance-contract subsection uses the same phrase as the self-insurance subsection to describe the Board's authority: the Board "[s]hall, on behalf of the state, enter into a contract or contracts with one or more insurers . . . for the purpose of providing the group insurance plans provided for by this chapter [i.e., chapter 40]." Wis. Stat. § 40.03(6)(a)1. If it were true that "on behalf of the state" excludes municipalities from self-insured plans under subsection (6)(a)2., the same language

---

[6] Wisconsin Stat. § 40.03(6)(L) states that the Board must notify the joint committee on finance that it intends to execute a contract for self-insurance plans for state employees, and provides that the committee may decide whether to authorize it. That section does not state a separate procedure if a municipal employer elects to offer self-insured plans under Wis. Stat. § 40.51(7)(a). It may be that the Legislature only requires review of state employee self-insurance because of the State's role as employer and its possible effect on State budgeting.

would exclude municipalities from insurer-based plans under subsection (6)(a)1. That result would be contrary to express language in Wis. Stat. §§ 40.03(6)(a) and 40.51(7)(a).

¶ 11. To illustrate, the Board's powers stated in Wis. Stat. § 40.03(6)(a)1.–2. apply to "any" plans under "this chapter," which is a reference to chapter 40. The municipal plan provision is part of chapter 40. Under the plain language, it is therefore encompassed by the authority granted to the Board. Further, the statutes broadly allow municipal employers to offer plans "through a program offered by" the Board, without relevant limitation. Wis. Stat. § 40.51(7)(a). The 1987 opinion does not give effect to that express language, in conflict with the principles of statutory interpretation. *State ex rel. Kalal*, 271 Wis. 2d 633, ¶ 46.

¶ 12. The second question posed is whether the statutes allowing the Board to offer self-insured plans to municipalities would violate article VIII, section 3 of the Wisconsin Constitution. That section states, as relevant here: "the credit of the state shall never be given, or loaned, in aid of any individual, association or corporation." Wis. Const. art. VIII, § 3.

¶ 13. The Wisconsin Legislature "has plenary power except where forbidden to act by the Wisconsin Constitution." *Libertarian Party v. State*, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996). Statutes are presumed constitutional. *Id.* When determining constitutionality, the Wisconsin Supreme Court is the final arbiter of the meaning of provisions in Wisconsin's Constitution. *State v. Beno*, 116 Wis. 2d 122, 134–36, 341 N.W.2d 668 (1984).

¶ 14. The Wisconsin Supreme Court has interpreted article VIII, section 3 on multiple occasions. The court has explained that "[t]his section prohibits the state from granting its credit in aid of a private business." *Libertarian Party*, 199 Wis. 2d at 821. However, "this section says nothing about grants of cash or subsidies, or the provision of services." *Id.* Thus, it does not prohibit programs such as "unemployment compensation, welfare, and tuition grants." *Id.* at 822.

¶ 15. The court has explained that "the only purpose of this provision is to prohibit the state from acting as a surety or guarantor of the collateral obligation of another party. It is the promise by the state as a guarantor to answer for the debt of another that is proscribed by the state constitution." *State ex rel. Thomson v. Giessel*, 271 Wis. 15, 29, 72 N.W.2d 577 (1955). The section forbids creating an "enforceable legal obligation on the part of the state to pay the obligations of [corporations]," where, in the event of default, the State would be legally obligated "to pay all or any

portion of the sums that are borrowed by the . . . corporations for use by those corporations." *Thomson*, 271 Wis. at 31–32. Thus, the constitutional provision was violated where state funds were advanced to the national American Legion corporation as "security" for "performance of [a local American Legion corporation's] obligation under a contract made between it" and the national entity. *State ex rel. Am. Legion 1941 Convention Corp. of Milwaukee v. Smith*, 235 Wis. 443, 461, 293 N.W. 161 (1940). Those concerns about extending the State's credit to guarantee debts of a corporation are absent here.[7]

¶ 16. Self-insurance offered to municipal employers thus would not violate article VIII, section 3 of the Wisconsin Constitution, as interpreted by the Wisconsin Supreme Court, because it does not extend "credit" in the sense that the State acts as a guarantor of a private entity's debt. Rather, administering a self-insurance program for public employees, like other programs the State administers, is akin to the "provision of services" that does not implicate the constitutional provision. *See Libertarian Party*, 199 Wis. 2d at 821.[8]

¶ 17. That conclusion is especially appropriate because the group health plans are designed to be self-funded. The programs authorized by chapter 40 are funded through premiums from public employers and employees that, in turn, are used to pay for healthcare. The Board may either contract with an insurance company to provide that service or may offer a self-insured plan where it collects premiums and pays medical claims directly. In either case, the statutes contemplate that "[r]evenues collected for and balances in the accounts of a specific benefit plan shall be used only for the purposes of that benefit plan." Wis. Stat. § 40.01(2). The statutes further provide for "[s]eparate group health . . . accounts" and that "any insurance benefit to be paid directly by the fund and reimbursements of 3rd parties for benefits paid on behalf of an insurance plan shall be charged to the corresponding account established for that benefit plan." Wis. Stat. § 40.04(9). When "excess moneys" are collected, they may be used "to establish reserves to stabilize costs in subsequent years" and, if a

---

[7] The analysis here is based on the understanding that, for purposes of the insurance plans, the State's relationship with the municipal employees would mirror its relationship with State employees, in that the State would not be a third-party guarantor of an insurance program run by a municipality but rather would directly administer the plan.

[8] The same 1987 Attorney General opinion discussed above states in passing that barring municipalities from self-insured plans "avoids the potential of creating an obligation on the part of the state to pay the debt of another, which is prohibited by article VIII, section 3 of the Wisconsin Constitution." 76 Op. Att'y Gen. at 315. That assertion is unsupported by any reasoning or discussion of the Wisconsin Supreme Court precedent.

deficit were to occur, it is eliminated by "increasing the premiums, contributions or other charges applicable to that benefit plan." Wis. Stat. §§ 40.03(6)(e), 40.04(1). In one model, payments are made to an insurance company that then pays claims and, in the other, claims are paid directly, but the underlying funding relationship with municipalities is, for present purposes, essentially the same. Both models are funded through premiums, and neither is the giving of State "credit" as the Wisconsin Supreme Court has interpreted the term.

¶ 18. I conclude that, because the Board may offer any group health insurance plan on a self-insured basis, and municipalities are authorized to offer Board plans, a municipality may offer a self-insured plan if offered by the Board. Further, under the precedent, article VIII, section 3 of the Wisconsin Constitution poses no bar because offering self-insured plans does not extend the State's "credit."

Very truly yours,

BRAD D. SCHIMEL
Wisconsin Attorney General

BDS:ADR:mlk

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Paul W. Connell
Deputy Attorney General

Delanie M. Breuer
Chief of Staff

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

December 8, 2017

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.

---

[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,

BRAD D. SCHIMEL
Wisconsin Attorney General

BDS:DPL:jrs