

Memo

To: Supervisor David Baker
From: Mike Puerner, Corporation Counsel
Date: October 21, 2022
Re: County Authority over Library Materials

Supervisor Baker,

On October 18, 2022, you requested a legal opinion as to the County Board's authority to pass an ordinance that would prohibit the Marathon County Library from lending certain items that may depict harmful materials.¹

In summary, for the reasons below, I do not believe that the State Legislature has granted counties the authority to regulate materials catalogued in public libraries. In reaching my conclusion, I have examined the powers expressly delegated to library boards under Chapter 43, a county's authority to regulate pursuant to enumerated powers under Chapter 59, administrative home rule authority, police and public safety powers, and consumer protection powers. Because I do not find a specific grant of such authority by the Legislature that does not provide an exception for materials catalogued by a public library, I find such a regulation is outside the scope of the regulatory power granted to counties by the State and that any exercise of such power by a county would be contrary to law.

Analysis

Limits of County Regulatory Authority – In General

Under Wisconsin law, a county is “a creature of the legislature and as such, it has only those powers that the legislature by statute provided.” *Frederick v. Douglas County*, 96 Wis. 411, 416017 (1897). More succinctly put, counties

¹ In this memorandum, I use the term “harmful materials” in the way the State Legislature defines them. Wis. Stat. § 948.11(1)(ar) defines “harmful material” to include: “[a]ny picture, photograph, drawing, sculpture, motion picture film or similar visual representation or image of a person or portion of the human body that depicts nudity, sexually explicit conduct, sadomasochistic abuse, physical torture or brutality and that is harmful to children” as well as “[a]ny book, pamphlet, magazine, printed matter however reproduced or recording that contains any matter enumerated in subd. 1., or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexually explicit conduct, sadomasochistic abuse, physical torture or brutality and that, taken as a whole, is harmful to children.”

derive their powers solely from the State through legislative enactments, and a county board is only authorized to exercise such powers that are within the scope of authority expressly ceded to the counties by the State Legislature. *State ex rel. Conway v. Elvod*, 70 Wis. 2d 448, 450 (1975).

Because of these restrictions on county authority, counties are only empowered to exercise those regulatory authorities specifically permitted by state law. Accordingly, an analysis of a county's authority to regulate materials within a public library necessitates an analysis of what pronouncements the Legislature has made regarding libraries and their materials.

State Legislative Enactments Regarding Public Libraries

Regarding materials within a public library, the Wisconsin Legislature has vested "exclusive control of the expenditure of all monies collected, donated or appropriated for the library fund" in the public library's governing Board of Trustees. Wis. Stat. § 43.58(1). The Legislature also has given library boards "exclusive charge, control and custody of all . . . other property devised, bequeathed, given or granted to, or otherwise acquired or leased by, the municipality for library purposes." *Id.* The State Legislature placed governing library boards in the position to "supervise the administration of the public library" and to "prescribe the duties" related to administration. Wis. Stat. § 43.58(4). Wis. Stat. § 43.52(2) authorizes a library board to establish "reasonable regulations" related to the use of library materials and grounds, evidencing the Legislature's intent to empower library boards to enact regulations relative to library operation.

These legislative enactments demonstrate that the State Legislature has specifically delegated authority over library operations and property, as well as regulations relative to library operations, to a library's governing board of trustees. Because the legislature has granted this authority to library boards and not to counties, it is my opinion that a county board is without legislative authority to regulate a public library's internal operations. I also find that a county board is not authorized to restrict materials within a library, as the Legislature has provided exclusive control over those decisions to library boards of trustees.

Administrative Home Rule

Although the Legislature has specifically and exclusively delegated the regulation of library materials and property to library boards, the analysis of a county's scope of regulation does not end with Chapter 43. In certain circumstances, counties may establish regulations pursuant to administrative home rule, which permits counties to "exercise any organizational or administrative power, subject to constitutional restrictions and to any enactment of the legislature which is of statewide concern and which uniformly affects every county." Wis. Stat. § 59.03.

Relative to libraries, the Wisconsin Attorney General has opined that legislative enactments relative to libraries are matters of statewide concern that may not be regulated by counties pursuant to their administrative home rule authority. 76 Op. Atty. Gen. 203, 206 (1987). This interpretation rests upon, and is consistent with, statements of the State Legislature, which has recognized in statute that the operation and regulation of public libraries are matters of statewide concern. Wis. Stat. § 43.001. Because of the language of Wis. Stat. § 43.001 and the associated Attorney General opinion interpreting the same, my opinion is that a county does not have administrative home rule authority to establish regulations relative to the operation of a public library beyond providing for an annual budgetary appropriation to a library. Administrative home rule authority applies solely to organizational or administrative powers that do not conflict with legislative enactments of statewide concern. With the legislative pronouncement indicating that libraries are of statewide concern, counties are precluded from enacting organizational or administrative rules relative to library-specific policy.

Public Peace and Good Order

Notwithstanding the specific delegation of authority present in Wis. Stat. Ch. 43, counties are empowered under Wisconsin law to “enact and enforce ordinances to preserve the public peace and good order within the county.” Wis. Stat. § 59.54(6). However, this power is not limitless, as a county’s power to prohibit certain conduct that is “the same as or similar to that prohibited by chs. 941 to 948” is restricted to enacting ordinances that are not in conflict with those statutory chapters. Wis. Stat. § 59.54(22). Any exercise of a county’s public safety or policy power must be exercised in conformity with these statutory provisions.

Wis. Stat. Ch. 948 has specific subsections relative to criminal liability for exposing minors to statutorily-defined harmful materials.² For instance, Wis. Stat. § 948.11 prohibits exposing a child to harmful materials. Wis. Stat. § 948.11(4) states as follows:

(a) The legislature finds that the libraries and educational institutions under par. (b) carry out the essential purpose of making available to all citizens a current, balanced collection of books, reference materials, periodicals, sound recordings and audiovisual materials that reflect the cultural diversity and pluralistic nature of American society. The legislature further finds that it is in the interest of the state to protect the financial resources of libraries and educational institutions from being expended in litigation and to permit these resources to be

² This opinion does not address whether any specific book meets the definition of a harmful material under statute.

used to the greatest extent possible for fulfilling the essential purpose of libraries and educational institutions.

(b) No person who is an employee, a member of the board of directors or a trustee of any of the following is liable to prosecution for violation of this section for acts or omissions while in his or her capacity as an employee, a member of the board of directors or a trustee:

1. A public elementary or secondary school.
2. A private school, as defined in s. 115.001 (3r), or a tribal school, as defined in s. 115.001 (15m).
3. Any school offering vocational, technical or adult education that:
 - a. Is a technical college, is a school approved by the department of safety and professional services under s. 440.52, or is a school described in s. 440.52 (1) (e) 6., 7. or 8.; and
 - b. Is exempt from taxation under section 501 (c) (3) of the internal revenue code, as defined in s. 71.01 (6).
4. Any institution of higher education that is accredited, as described in s. 39.30 (1) (d), and is exempt from taxation under section 501 (c) (3) of the internal revenue code, as defined in s. 71.01 (6).
5. A library that receives funding from any unit of government.

Pursuant to Wis. Stat. § 59.54(22), a county could enact an ordinance in conformity with Wis. Stat. § 948.11; however, a county could not apply such regulations to public library employees or trustees given the specific language of Wis. Stat. § 948.11 (4).

Regulation of Obscenity

Wis. Stat. § 59.55(6) expressly allows a county to “enact an ordinance to prohibit conduct that is the same as that prohibited by s. 944.21.” Wis. Stat. § 944.21 (4) prohibits the exhibition or distribution of obscene materials to minors. However, Wis. Stat. § 944.21(8) mirrors the Legislative language of Wis. Stat. § 948.11(4), stating:

(a) The legislature finds that the libraries and educational institutions under par. (b) carry out the essential purpose of making available to all citizens a current, balanced collection of books, reference materials, periodicals, sound recordings and audiovisual materials that reflect the cultural diversity and pluralistic nature of American society. The legislature further finds that it is in the interest of the state to protect the financial resources of libraries and educational institutions from being expended in litigation and to permit these resources to be used to the greatest extent possible for fulfilling the essential purpose of libraries and educational institutions.

(b) No person who is an employee, a member of the board of directors or a trustee of any of the following is liable to prosecution for violation of this section for acts or omissions while in his or her capacity as an employee, a member of the board of directors or a trustee:

1. A public elementary or secondary school.
2. A private school, as defined in s. 115.001 (3r), or a tribal school, as defined in s. 115.001 (15m).
3. Any school offering vocational, technical or adult education that:
 - a. Is a technical college, is a school approved by the department of safety and professional services under s. 440.52, or is a school described in s. 440.52 (1) (e) 6., 7. or 8.; and
 - b. Is exempt from taxation under section 501 (c) (3) of the internal revenue code.
4. Any institution of higher education that is accredited, as described in s. 39.30 (1) (d), and is exempt from taxation under section 501 (c) (3) of the internal revenue code.
5. A library that receives funding from any unit of government.

Accordingly, a county seeking to regulate obscenity is required to regulate consistent with the exclusion of libraries from that regulation as required under Wis. Stat. § 944.21(8).³

³ Marathon County has an ordinance entitled "Minor Pornography" codified in Marathon County Code Section 9.42. This ordinance prohibits selling, lending, giving away, showing, or

While counties retain authority to enact public safety ordinances and to regulate obscenity, this authority, like the authority a county board has in other areas, is limited to exercising consistent with, and not contrary to, pronouncements of state law. In my review of state law, I do not find that a county may enact an ordinance that impacts policies relative to the items within a public library's catalogue.

First Amendment Implications

Although not specifically related to a county's authority to regulate in this area, I wanted to note the presence of some specific case law related to the regulation of certain materials within publicly funded libraries. The Constitutional analysis in these cases I think is important to this discussion.

In a plurality opinion of the United States Supreme Court, justices concluded that there are limits to the discretion of governing officials to remove library books from high school and junior high school libraries. *Board of Education v. Pico*, 457 U.S. 853, 871-72, 102 S.Ct. 2799 (1982). In *Pico*, a plurality of the Court found that the motivations of school officials in removing certain titles would be unconstitutional if the officials "intended by their removal decision to deny respondents access to ideas with which they disagreed, and if this intent was the decisive factor in the decision." *Id* at 871. The *Pico* court further held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books." *Id* at 872. Accordingly, I would advise any action taken regarding books displayed at a public library to be consistent with these Constitutional requirements so as to not expose the County to litigation.



Michael Puerner

Marathon County Corporation Counsel

distributing to minors for a monetary consideration certain obscene works. This ordinance does not, in my opinion, regulate materials in a public library given its limitation to an exchange of monetary consideration. However, I also note that this ordinance is not written in conformity with state statute in that it does not incorporate the exception for public libraries present in Wis. Stat. § 944.21 (8). To that extent, our ordinance is also likely not enforceable as written.