

FILED
07-01-2020
Clerk of Circuit Court
Racine County
2020CV001045

BY THE COURT:

DATE SIGNED: July 1, 2020

Electronically signed by Jon E. Fredrickson
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT

RACINE COUNTY

DAVID YANDEL,

Plaintiff,

v.

Case No. 20CV1045

CITY OF RACINE et al.,

Defendants.

DECISION AND ORDER

The above captioned matter having come before the Court, the Honorable Jon E. Fredrickson presiding, on June 30, 2020 on plaintiff, David Yandel's, Motion for a Temporary Injunction and his claims for declaratory relief, Plaintiff David Yandel appearing in person and by counsel Attorneys Anthony Nudo and Todd Terry of the law firm Guttormsen, Terry & Nudo, llc, and defendants the City of Racine and Dottie-Kay Bowersox appearing by their counsel, City Attorney Scott Letteney and Deputy City Attorney Jennifer Williams, the Court having reviewed the parties' briefs and affidavits, heard oral argument, the Court issues the following decision and order.

Background Facts and Procedural Posture

COVID-19, a novel strain of the coronavirus, was first detected in December 2019. Since December, it has spread across the globe and to the City of Racine. On March 12, 2020, Governor Tony Evers declared a public health emergency to direct all resources needed to respond to and contain COVID-19 in Wisconsin. On March 18, and April 9, the Mayor of the City of Racine issued proclamations declaring a state of emergency in the City of Racine, pursuant to his statutory power under Wis. Stat. §323.11(1). On May 13, Local Health Officer Administrator Bowersox issued a COVID-19 order covering the City of Racine titled Safer at Home – Racine. She issued it pursuant to her perceived power as a Local Health Officer under Wis. Stat. § 252.03. On May 19, the Common Council of the City of Racine extended the City’s state of emergency through July 31, 2020.

On May 21, 2020, Plaintiff David Yandel, a local gym owner, filed suit against the City of Racine and Administrator Bowersox so that he could fully open up his gym. At the time of filing his complaint, he was limited by the Safer at Home – Racine order and alleged he would lose his business if he couldn’t open up fully. In his complaint, he alleged that there was no city ordinance to enforce the Safer at Home – Racine order, that Administrator Bowersox did not have the power to issue the order, and that the order was unconstitutional and unlawful. He prayed for entry of a declaratory judgment that the order was unlawful, invalid and unenforceable and in the interim, for a temporary injunction so that he could fully open up his business. He moved for a temporary injunction on the same day. The first judge assigned to this case denied the temporary injunction. After the denial, defendants filed a substitution request and this Court took over the case.

On May 21, 2020, Administrator Bowersox issued another COVID-19 order pursuant to her perceived statutory power under Wis. Stat. § 252.03. This new order, titled “Forward Racine”, was then revised on May 29, 2020. On June 11, this Court issued a Sua Sponte Motion and Order to reconsider the prior court’s denial of the temporary restraining order. A hearing on the motion was held on June 19, and the Court granted Plaintiff a temporary injunction enjoining defendants from enforcing the Safer at Home – Racine Order. The Court also enjoined Administrator Bowersox from issuing any more COVID-19 orders pursuant to her perceived powers under Wis. Stat. § 252.03 – the Court having found that *Wisconsin Legislature v. Palm*, 2020 WI 42 controlled the case, or was of such persuasive authority that it could not be ignored or overlooked.

On June 22, the Racine Common Council enacted emergency health Ordinance 54-33, codifying the enjoined language from within the Forward Racine order as the new Safer Racine COVID-19 Pandemic Response Standards:

Sec. 54-33. – Safer Racine

- (a) The Safer Racine COVID-19 Pandemic Response Standards are adopted and the standards therein apply to business and public activities within the city of Racine. The Safer Racine COVID-19 Pandemic Response Standards shall be published on the City of Racine website and are incorporated into this section as if fully set forth herein.
- (b) The Common Council grants the Public Health Administrator authority to modify the Safer Racine COVID-19 Pandemic Response Standards as necessary to respond to changing COVID-19-related public health conditions. The Public Health Administrator must base any modifications on then-current guidance from the World Health Organization, the Centers for Disease and Prevention, and the Wisconsin Department of Health Services. The Public Health Administrator shall report any such modifications to the Common Council, in writing, within five days of the effective date of such modifications.

- (c) No later than August 5, 2020, the Public Health Administrator shall provide a full report to the Common Council regarding the state of the COVID-19 pandemic in the City of Racine. The Common Council shall take action to extend, modify, or terminate the application of the Safer Racine COVID-19 Pandemic Response Standards to the City of Racine upon receipt of the Public Health Administrator's report hereunder.

The ordinance was enacted under the City of Racine's emergency powers, as set forth in Wis. Stat. § 323.14(4) and ordinance section 34-1. In addition to adopting the Forward Racine order, it also grants the Public Health Administrator the legislative authority to modify the ordinance, but limits the window for her to do so until August 5, 2020.

Plaintiff filed his First Amended Complaint on June 24, 2020. In it, he asked the Court to declare the ordinance unconstitutionally vague and overbroad. He also asked the Court to declare that Administrator Bowersox did not have the power to issue orders such as the Forward Racine Order. Plaintiff filed another motion for a temporary restraining order at the same time. Late in the evening on June 24, the Court issued a Supplemental Temporary Injunction Order enjoining the defendants from enforcing the ordinance or issuing any new COVID-19 ordinances while the previously enjoined language was at issue in this Court. On June 26, this Court issued an Amended Supplemental Temporary Injunction Order easing up some of the injunction language. In particular, the Court stated that: "The City of Racine is *not* enjoined from enacting more specific and detailed constitutional ordinances to address COVID-19 that do not incorporate by reference information from various websites as part of the pandemic." On June 30, this Court heard oral argument on all of plaintiff's claims. At oral argument, plaintiff withdrew his claim

to have this Court decide whether Administrator Bowersox had the statutory power to issue her previous orders, as the enactment of the ordinance rendered the issue moot.

Analysis

This is a narrow decision on narrow grounds. The two questions before this Court are: (1) whether a municipality has the power, during an emergency, to issue an ordinance such as the one at issue in this case; and (2) whether the ordinance is constitutional. The City of Racine's emergency ordinance power is found in Wis. Stat. § 323.14(4), which states the following:

POWERS DURING AN EMERGENCY. (a) The emergency power of the governing body conferred under s. 323.11 includes the general authority to order, by ordinance or resolution, whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within the local unit of government in the emergency, and includes the power to bar, restrict, or remove all unnecessary traffic, both vehicular and pedestrian, from the highways, notwithstanding any provision of chs. 341 to 349.

This statute clearly gives the Common Council of the City of Racine broad emergency powers to issue ordinances that it deems necessary and expedient for the health, safety, protection, and welfare of persons and property within the city. And that is exactly what it did when issuing the ordinance at issue in this case. The City of Racine has the power to issue COVID-19 ordinances.

Defendant's claim for a declaration that the ordinance is unconstitutional is justiciable. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶29. There is a controversy between parties with adverse interests, defendant has a legally protected interest, and the controversy is ripe for judicial determination. *Id.* “An ordinance is unconstitutionally

vague if it fails to afford proper notice of the conduct it seeks to proscribe or if it encourages arbitrary and erratic enforcement. . . . The test for vagueness is whether the ordinance is so obscure that persons of ordinary intelligence must necessarily guess as to its meaning and differ as to its applicability.” *Walworth Cty. v. Tronshaw*, 165 Wis. 2d 521, 526 (Ct. App. 1991). A party challenging an ordinance has the burden to “establish its invalidity beyond a reasonable doubt.” *Id.* at 525. If, however, an ordinance regulates the exercise of First Amendment rights, the government bears the burden of defending the constitutionality of that regulation beyond a reasonable doubt.” “Beyond a reasonable doubt” means that if any doubt exists, it must be resolved in favor of upholding a challenged ordinance. *Clark Oil & Refining Corp. v. Tomah*, 30 Wis. 2d 547, 553-54 (Wis. 1966). And if the challenged ordinance regulates the exercise of First Amendment rights, “beyond a reasonable doubt” means that if any doubt exists, it must be resolved in favor of striking down the ordinance. “A court may sever the unconstitutional portions of a statute or an ordinance to leave intact the remainder of the legislation.” *City News & Novelty, Inc. v. City of Waukesha*, 231 Wis.2d 93, 119 (Ct. App. 1999). But it can do so only if the rest of the ordinance can stand on its own without the severed language. *In Interest of Hezzie R.*, 219 Wis. 2d 848, 865 (1998).

The ordinance at issue in this case is unlike any previous ordinance on the books in the City of Racine. Sec. 54-33(a) states the following:

- (a) The Safer Racine COVID-19 Pandemic Response Standards are adopted and the standards therein apply to business and public activities within the city of Racine. The Safer Racine COVID-19 Pandemic Response Standards shall be published on the City of Racine website and are incorporated into this section as if fully set forth herein.

But what are “the standards therein” that apply to “business and public activities within the city of Racine.” There is no section in the document titled “standards”. The document itself, however, is titled “Standards to Reopen amid the COVID-19 Pandemic Safer Racine.” The document is broken down into eight parts spanning seventeen pages:

- Safer Racine Purpose, p. 2
- Responsible Entities, p. 3
- Safer Racine Metrics, p. 4
- Safer Racine Metric Status, p. 7
- Why a Criteria-Based Approach to Reopening is Important, p. 8
- Public Health Requirements, p. 9
- Public Health Requirements, p. 9
- Enforcement, p. 10
- Safer Racine Strategy, p. 11

In the Responsible Entities section, the document states the following:

PUBLIC HEALTH

Public health professionals have the responsibility for tracking the virus and balancing a community response.

- √ Receive positive test results and conduct contact tracing
- √ Ensure quarantine and isolation
- √ Identify and implement population-level mitigation strategies and provide guidance for the reopening of the community, aligning with state and federal plans
- √ Provide technical assistance to businesses and individuals to implement best practices and contain outbreaks
- √ Report progress and local data
- √ Identify inequities and manage proactive response to managing spread of disease
- √ Facilitate community testing and future vaccination opportunities.

HEALTH CARE SYSTEMS

- √ Identify positive COVID-19 cases through testing; minimally testing symptomatic individuals and contacts of positive cases
- √ Collaborate with public health and local businesses to test other emerging populations

- √ Develop plans and increase overall surge capacity
- √ Utilize infection control procedures to screen and test health care personnel for COVID-19 and mitigate its spread.

EMERGENCY RESPONDERS

Emergency responders provide a critical buffer between health care systems, businesses, and community members.

- √ Communicate, educate, and potentially enforce public health emergency orders.
- √ Engage the public by responding to emergency calls
- √ Ensure the safety of the public during socially and economically challenging times

BUSINESS COMMUNITY

The business community plays a critical role as the driver of our economy.

- √ Protect the health and safety of the employees and customers
- √ Develop flexible policies to ensure employees can work from home when necessary or stay home when ill.
- √ Monitor employees for symptoms and work with local public health when an employee is diagnosed with COVID-19 or is a known contact
- √ Implement CDC recommendations for safe business practices, e.g. frequently disinfecting surfaces, maintaining 6 feet physical distancing, hand washing, and other prevention measures
- √ Communicate to management, employees, and customers the importance of following prevention measures in order to build consumer confidence

COMMUNITY MEMBERS

Everyone shares the burden of keeping our community safe.

- √ Practice good hygiene, including washing hands with soap and water for at least 20 seconds and covering coughs and sneezes with a tissue or into an elbow
- √ Stay home when ill
- √ Call primary care provider for testing, if ill or exposed to someone who has COVID-19
- √ Clean high-touch objects like doorknobs, remotes, cell phones, and light switches frequently

- √ Follow public health recommendations and population-level strategies, such as maintaining physical distancing and wearing cloth face coverings.

The breadth and scope of this section of Ordinance 54-33 is astonishing. Under the “Community Members” section, it seeks to regulate citizens' private behavior in their homes because “Everyone shares the burden of keeping our community safe.” It requires citizens to practice good hygiene. It requires citizens to stay home when ill. It requires citizens to call primary care providers for testing if ill. It requires citizens to frequently clean “high touch” objects in their homes, such as “doorknobs, remotes, cell phones, and light switches. And the ordinance broadly regulates the conduct and responsibilities of “Health Care Systems”, “Emergency Responders”, and the “Business Community”. Who these named entities are is not defined in the ordinance.

There is a separate section titled “Public Health Requirements” that is found on page 8. This section reads as follows:

All institutions and/or businesses must follow the identified material below for compliance with City of Racine Ordinances. The reopening strategy is not meant to be exhaustive and was written with the understanding that consideration may need to be given to unique, extenuating circumstances beyond a business or other public/private entity’s control. These standards were based on, but modified from the Badger Bounce Back plan and Wisconsin Economic Development Corporation (WEDC) Reopen Guidelines for COVID-19.

1. Follow Centers for Disease Control and Prevention (CDC) guidance and recommendations relating to disease prevention measures, including the use of face masks or cloth face covers, social distancing, and proper cleaning and sanitation. Resources are available here:
 - [Hygiene and sanitation](#)
 - [Respiratory etiquette and prevention measures](#)

- Personal care and coping
 - Work place protections, as described for specific industries
2. Business operating multiple services must comply with the individual criteria established for each unique service (i.e. *bar or restaurant components*). Where there are conflicting specifications, the most restrictive applies. Reopening guidelines may be re-evaluated with respect to the emergency public health order.

Wisconsin Economic Corporation (WEDC) Reopen Guidelines

- i. General Guidance (All Businesses)
 - ii. Agriculture
 - iii. Childcare Centers (Dept. of Children and Families)
 - iv. Construction
 - v. Entertainment & Amusement
 - vi. Gyms & Fitness Centers
 - vii. Hospitality & Lodging
 - ix. Manufacturing
 - x. Outdoor Gatherings
 - xi. Outdoor Recreation
 - xii. Professional Services
 - xiii. Public Facilities
 - xiv. Restaurants
 - xv. Retail
 - xvi. Transportation
 - xvii. Warehouse/Wholesale Trade
3. Businesses must ensure that provided reopening strategies are not to be construed as superseding state statutes and/or local licensing or permits issued.
4. Specifications for Faith-Based Services, Religious Entities, Places of Worship, and Indoor Places of Arts, and Culture (such as movie & other theaters, social clubs, and museums).
- **For buildings with less than or equal to 50,000 square feet of public space:** the maximum number of people

allowed is equal to 25% of the space's occupancy load, including personnel, if social distancing can be maintained.

- **For buildings with more than 50,000 square feet of public space:** the maximum number of people allowed is 4 per 1,000 square feet, excluding personnel, if social distancing can be maintained.

Each of the underlined words or phrases contain digital hyperlinks to other websites.

A section titled "Safer Racine Strategy" is found on page 11 of the ordinance. What follows is not a "strategy", but more requirements and regulated conduct. Directly below the "Safer Racine Strategy" header is the following:

Public Health requirements for all institutions, businesses and community members:

1. **Written and implemented hygiene policy and procedures that includes:**
 - a. Ensuring employees who have a fever of 100.4 F or greater or other symptoms of COVID-19 will not be allowed to work.
 - b. Hand washing expectations and supplies available for staff.
 - i. 20 seconds using soap and water as frequently as possible or using hand sanitizer with at least 70% alcohol content
 - c. A posted description of proper cough and sneeze etiquette
2. **Written and implemented cleaning policy and procedure that includes:**
 - a. Cleaning and disinfecting frequently touched surfaces multiple times a day.
 - b. Frequently wiping down any shared equipment between users or at shift changes.
 - c. Cleaning of common areas and equipment between users or at shift changes.
 - d. Protocols to clean and disinfect in the event of a positive COVID-19 case
3. **Written and implemented protective measure policy and procedure that includes:**

- a. Ensuring people are at least 6 feet from others.
- b. Ensuring employees are provided with and wear face coverings when unable to maintain at least 6 feet from others.

These requirements, as broadly stated, apply to "community members" on their private property.

Below these broad public health requirements, the requirements for "businesses" start. The "business" requirements are set forth in three column categories on pages 11 - 18 of the ordinance. The three horizontal categories are titled: "Business Description", "Start Safer Racine (June 22nd)" and "Evaluate Safer Racine (June 30th)". There is no explanation if the regulated conduct automatically shifts to the June 30th column on June 30th, or whether some other administrative act needs to occur.

The regulated "businesses" are the following

- Long-Term Care Facilities
- K-12 Schools
- Post-Secondary Education Institutions
- Childcare Centers, Day Camps & Summer Programs*
- Commercial Offices
- Government Offices
- Restaurants, Bars, & Food Trucks
- Retail Establishments
- Indoor Recreational Facilities*(such as gyms, fitness facilities, martial arts, bowling alleys, pool halls, funplexes, miniature golf, skating rinks, dance-studios, yoga studios, & gymnastics clubs)
- Personal Care Establishments (such as salons, tattoo parlors, tanning, message, & spas)
- Lodging (such as hotels, motels, short-term rentals, campgrounds)

- Cleaning Services (residential & commercial cleaners & Car washes)
- Home Remodeling & Construction (Interior & exterior)
- Faith-based Services, Religious Entities, & Places of Worship*
- Manufacturing, Wholesale Trade, and Warehousing*
- Agriculture, Aquaculture, and Community Gardens
- Transportation
- Low-risk Recreational Activities (such as walking, bike riding, tennis, disc golf, pickle ball, & skateboarding)
- High-risk Recreational Activities (such as football, basketball, soccer, softball, baseball, volleyball, & dog parks)
- Outdoor Playgrounds, Skateboard Parks, & Splash Pads
- Golf Courses, Outdoor Recreational Rentals, Yacht Clubs, & Country Clubs*
- Licensed Swimming Pools*
- Indoor Places of Arts & Culture (such as movie & other theaters, social clubs, and museums)
- Outdoor Places of Amusement & Activity*(such as zoos & farmer markets)
- Public Beaches & Parks*
- Indoor & Outdoor Mass Gatherings in Public Venues*(Occurring on city-owned land or requiring city approval)
- Indoor & Outdoor Mass Gatherings in Private Venues*(such as weddings, banquets, funerals, conferences & festivals)
- Auction, Rummage, & Estate Sales*

The asterisks throughout the chart are to alert bar and restaurant owners that they need to refer to the section titled "Restaurant, Bars, & Food Trucks."

The following language appears throughout many of the categories: ""follow public health requirements & WEDC reopening guidelines", followed by an internet hyperlink that would take an individual reading this on the internet to the WEDC guideline page. There is no mention in this section of the ordinance of also following CDC guidelines, as

ordered in the Public Health Requirements section of the ordinance (p. 9.) It is unclear in this Safer Racine Strategy section (pp. 11 - 18) that the requirement to "follow public health requirements" refers to the "public health requirements" stated at the beginning of the Safer Racine Strategy, or the "public health requirements" stated in the section of that same name on page 9 of the ordinance.

There is nothing in the headers atop each page that would alert a citizen that non-business conduct is being regulated. As previously stated, at the top of each page of business categories, the ordinance states "Business Description". Despite the misleading "business description" headers, it is not just businesses that are being regulated. Individual conduct on public and private land is also being regulated. The right to engage in low-risk recreational activities in public or private, such as walking, bike riding, playing tennis, playing disc golf, playing pickle ball & skateboarding falls under this ordinance. The right to engage in high-risk recreational activities such as lay football, basketball, soccer, softball, baseball, volleyball and take a dog to a dog park falls under this ordinance. The right to look through a nursing home window and waive at a loved one through the glass falls under this ordinance. And the right to peaceably assemble in public spaces or private venues is regulated.

On Page 17 of the ordinance, under the section titled "Mass or Social Gatherings", it states that "Indoor & Outdoor Mass Gatherings in Public Venues* (Occurring on city-owned land or requiring city approval)" are closed. The proper standard to apply when deciding whether an ordinance affords the protections required by the First Amendment is articulated in *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992); *Sauk County v. Gumz*, 2003 WI App ¶ 9. In *Forsyth County*, the Court

concluded that the requirement of a permit and fee before authorizing public speaking, parades, or assemblies was a prior restraint on speech, which carried a heavy presumption against its validity. *Id.* at 130. The standards such an ordinance must meet to be constitutional require that “[i]t may not delegate overly broad licensing discretion to a government official,” and “any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave ample alternatives for communication.”

Id. Article 1, Section 4 of the Wisconsin constitution states the following:

Right to Assemble. Section 4. The right of the people peaceably to assemble, to consult for the common good, and to petition the government, or any department thereof, shall never be abridged.

The Court specifically holds that the Mass or Social Gatherings Indoor & Outdoor Mass Gatherings provision is unconstitutional because it abridges the rights of the citizens of Racine, and anyone visiting, to peaceably assemble, consult for the common good, or to petition the government.

In the best of times, citizens and businesses are entitled to be governed by clear, easy to understand ordinances. And never more so than when citizens are living through a pandemic emergency. The above ordinance can only be read and understood if a person has a computer or cell phone. It incorporates by reference, through digital hyperlinks, a cornucopia of proscribed conduct. The digital hyperlinks to the Centers for Disease Control ("CDC") website consist of at least 100 webpages, most of which themselves contain digital hyperlinks to other pages. All of those pages are part of this ordinance, and the public must follow it to comply. The digital hyperlinks to the Wisconsin Economic Development Corporation ("WEDC") link to 80 web pages of information. All of those

web pages are also incorporated into the ordinance, and must be followed, under penalty of a \$250/day forfeiture for each non-complying day.

In this ordinance, the public is directed to follow the most restrictive conduct if all of this massive amount of data conflicts with itself, which it most likely does. The CDC and WEDC websites were themselves written as guidance and best practices, not as rules, or trade codes (such as electrical, plumbing and building codes), or statutes. Trade codes set a base level of conduct and practices to keep the public safe. The best practices and guidelines on the CDC and WEDC websites cover a broad range of conduct and practices, each and every one of which will help with safety. By incorporating all the CDC and WEDC website best practices and guidelines into the ordinance, and requiring the citizens and businesses of the City of Racine to comply all of them, every day, or face a \$250 forfeiture, the City has enacted an ordinance that is impossible for the average citizen or business owner to understand, or to comply with. It is likely the strictest, and most overarching COVID-19 order or ordinance in the Country. This Court finds that no average person of ordinary intelligence can make sense of its sprawling breadth. Any citizen without a computer or cell phone will not have access to the full ordinance, and will not be able to comply. It is clearly and beyond any reasonable doubt unconstitutionally overbroad and vague, and it is not severable. As such, this Court has no other option than to hold the entire ordinance, as drafted, unconstitutional.

With very limited exception, the legislative branch cannot delegate its power and authority. *Gilbert v. State, Med. Examining Bd.*, 119 Wis. 2d 168 (1984). Any statute or ordinance that purports to delegate power or authority must contain protections against arbitrariness, including both adequate procedural safeguards and standards. *Id.*; *Matter of*

Guardianship of Klisurich, 98 Wis. 2d 274, 280 (1980). As previously stated in this decision, during a declared emergency, the Common Council has the power, by order or ordinance, to do whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within the local unit of government". Wis. Stat. § 323.14(4). As seen in this case, the City of Racine Common Council is meeting by Zoom, and is functioning via Zoom as a legislative body. The ordinance in question was passed within three days of this Court's June 19, 2020 injunction on the Forward Racine Order; proving that the Common Council is able to quickly and effectively serve the needs of the citizens of the City of Racine during this emergency.

In the ordinance, the Common Council has delegated its emergency powers to Administrator Bowersox until August 5, 2020. Section 54-33(b) and (c) read as follows:

- (b) The Common Council grants the Public Health Administrator authority to modify the Safer Racine COVID-19 Pandemic Response Standards as necessary to respond to changing COVID-19-related public health conditions. The Public Health Administrator must base any modifications on then-current guidance from the World Health Organization, the Centers for Disease and Prevention, and the Wisconsin Department of Health Services. The Public Health Administrator shall report any such modifications to the Common Council, in writing, within five days of the effective date of such modifications.
- (c) No later than August 5, 2020, the Public Health Administrator shall provide a full report to the Common Council regarding the state of the COVID-19 pandemic in the City of Racine. The Common Council shall take action to extend, modify, or terminate the application of the Safer Racine COVID-19 Pandemic Response Standards to the City of Racine upon receipt of the Public Health Administrator's report hereunder.

Under Section 54-33(b), Administrator Bowersox has the power to amend this ordinance to say whatever she believes, in her own mind, is good for the citizens of Racine. Subject

only to a 5-day notice to the Common Council. The only "guardrail" to this power is that it must be based upon guidance from the World Health Organization, the Centers for Disease and Prevention, and the Wisconsin Department of Health Services and it has a sunset date of August 5, 2020.

At oral argument, the Court questioned defendants as to what rights alders have under the ordinance to challenge any changes made by Administrator Bowersox. The answer was troubling. The Mayor has the power to call the Common Council into session, if he wants. Individual alders can request a hearing, but are not guaranteed a right to one. Ordinance Sec. 54-33(b) cuts the heart out of representative government at the Common Council level in the middle of an emergency. It silences every Alder's constituent's voices at a critical moment in time when the City of Racine needs all of its citizen's voices to be heard, through their elected representatives.

There is nothing preventing the Common Council from Zooming their hearings at short notice, as they did on June 22nd. True, an emergency has been declared. But the power grid is up and running. WiFi and cell phones are working. There is no impediment in this declared emergency to the Common Council meeting daily to fight this pandemic, should it feel the need. The delegation of legislative powers in this ordinance runs afoul of Wisconsin law, and the Court holds Ordinance Section 54-33(b) illegal. *Gilbert*, 119 Wis. 2d 168 (1984).

Conclusion

This Court has a deep and profound respect for local government, and its powers to protect the people. Thomas Jefferson said it best when he wrote, "The government closest

to the people serves the people best.” This Court commends the Mayor, the Common Council, and Administrator Bowersox for all the hard work they have been doing, and continue to do, to keep the City safe. Just because the ordinance has been held to be vague and overbroad does not mean that many of the particulars were not good public policy. This Court has not taken a public policy position on the City's powers to open and shut businesses to fight the pandemic, require social distancing, masks, or various hygiene, capacity, or cleaning protocols. The City maintains its full power to issue a new ordinance addressing COVID-19. The City has the emergency power and the duty to fight the pandemic and keep the city safe. This Court's job is different. It is not here to make policy. It is here to ensure that the pandemic fight stays constitutional, and it has done so herein.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. Racine Ordinance Sec. 54-33 is unconstitutionally vague and overbroad, and is unenforceable as drafted.
2. Plaintiff's claim for a declaration that Administrator Bowersox's pre-ordinance orders were unconstitutional was withdrawn at oral argument as being moot and is dismissed without prejudice.
3. Plaintiff's request for a temporary restraining order is denied as moot.
4. Judgment shall be entered for plaintiff in accordance with this Order.

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL