



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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January 28, 2020

OAG-01-20

Ms. Mary Ann Hook Swan
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Dear Corporation Counsel Swan:

¶ 1. Your predecessor requested an opinion, which you have adopted, regarding a practice by some counties of entering into lease agreements with a private entity, where that lessee obtains gravel from county-owned land. Although the opinion request provides no specific agreement, according to the description, I understand that the lessee provides some of the gravel to the county and also sells some to private entities. The request asks whether such a lease agreement conflicts with a statute, Wis. Stat. § 83.035, and a previous attorney general opinion, OAG-2-01 (Feb. 14, 2001), which discussed the constitutional public purpose doctrine.

¶ 2. I conclude that Wis. Stat. § 83.035 would not govern the gravel lease described because it purports only to address contracts to construct or maintain streets. Rather, a separate statute specifically addresses mineral leases. Further, I conclude that the Wisconsin Supreme Court's interpretation of the public purpose doctrine would not bar a gravel lease where a lessee provides adequate consideration for that property right. To the extent that some statements in OAG-2-01 suggest a different analysis, that portion of the opinion is withdrawn.

¶ 3. The first question involves the meaning of a statute, Wis. Stat. § 83.035. "[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. "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. The opinion request asks whether Wis. Stat. § 83.035, located in the “COUNTY HIGHWAYS” code chapter, bars leases of county land where a private lessee obtains and sells gravel. More specifically, I understand the request as referring to the following type of agreement: (1) a lease where a private business is granted the right to obtain gravel from county land, some of which the lessee provides to the county for the county’s use and (2) the lessee also sells some of the gravel to private entities.¹

¶ 5. Wisconsin Stat. § 83.035 does not bar such agreements because it does not address the issue. Instead, the statute simply empowers a county board to enter into contracts with certain public entities “to construct and maintain streets and highways”:

Any county board may provide by ordinance that the county may, through its highway committee or other designated county official or officials, enter into contracts with cities, villages and towns within the county borders to enable the county to construct and maintain streets and highways in such municipalities.

Wis. Stat. § 83.035. Consistent with that language, the court of appeals has explained that Wis. Stat. § 83.035 “allows the county to contract with towns for repair of roads lying within the town.” *Fond du Lac County v. Town of Rosendale*, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989). On its face, that statute has no application to simply leasing gravel rights.

¶ 6. The opinion request also may have in mind another highway-related statute, Wis. Stat. § 83.018. That statute addresses a different aspect of road construction, namely, the selling of road supplies by a county highway committee to municipalities. It states:

The county highway committee is authorized to sell road building and maintenance supplies on open account to any city, village, town or

¹ To the extent the request means to reference a situation where a county itself engages in a gravel-selling business, as opposed to simply leasing a property right, that kind of scenario is not analyzed here. Rather, the discussion here is premised on the assumptions stated in the text.

school district within the county; and any such city, village, town or school district is authorized to purchase such supplies.

Wis. Stat. § 83.018. Like Wis. Stat. § 83.035, however, section 83.018 also does not address the ability to lease gravel rights on county land. On its face, it is about selling “supplies,” not leasing property rights.

¶ 7. Rather, other statutes address leases, including mineral leases. A section titled “County administration” specifically contemplates leasing property rights like gas or “mineral rights.” Wis. Stat. § 59.52(6)(c). Under that provision, a county board may:

Direct the clerk to lease, sell or convey or contract to sell or convey any county property, not donated and required to be held for a special purpose, on terms that the board approves. . . . Oil, gas and mineral rights may be reserved and leased or transferred separately.

Wis. Stat. § 59.52(6)(c).

¶ 8. The term “mineral” is undefined, but this office has previously opined that gravel typically “would be included within the meaning of the word ‘minerals.’” 67 Op. Att’y Gen. 236, 236 (1978). The U.S. Supreme Court similarly has held that the general term “minerals” in the federal Stock-Raising Homestead Act includes gravel, observing that, “[i]n the broad sense of the word, there is no doubt that gravel is a mineral.” *Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 43 (1983).² Thus, it would appear that the leasing of mineral rights referenced in Wis. Stat. § 59.52(6)(c) encompasses gravel rights.

¶ 9. The Legislature has provided for broad construction of these kinds of administrative powers. In the immediately preceding subsection, the Legislature instructed that the administrative powers enumerated in subchapter V (which includes section 59.52) are “in addition to all other grants” of power and are to be “broadly and liberally construed and limited only by express language.” Wis. Stat. § 59.51(1).

² In contrast, the term “valuable mineral” in the federal Pittman Act did not include gravel because it was not considered “valuable” in the applicable historical context, namely, Nevada circa 1919. See *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 184 (2004).

¶ 10. Consistent with that grant of authority, this office has opined that, although land may not initially be acquired for a non-public purpose, “[c]ounty land initially acquired for valid public purposes, may . . . generally be leased to private entities,” potentially subject to certain restrictions. 80 Op. Att’y Gen 80, 81 (1991). For example, applying Wis. Stat. § 59.52(6)(c) to different facts, the Wisconsin Supreme Court has summarized it as meaning that “county boards may convey county property on terms within the board’s discretion.” *Hart v. Ament*, 176 Wis. 2d 694, 704, 500 N.W.2d 312 (1993) (applying the previous codification of Wis. Stat. § 59.52(6)(c), Wis. Stat. § 59.07(1)(c)). In *Hart*, the court applied the “lease, sell or convey” language, together with a provision about museums, to authorize a “conveyance of museum property” through a lease from a county to a nonprofit corporation. *Id.* at 703–04.

¶ 11. While the foregoing is intended to clarify what general statutory authority is relevant to your question, this opinion is not intended to provide a comprehensive explanation of what steps may be required for a county to exercise authority under Wis. Stat. § 59.52(6)(c) in a particular case. *See, e.g.*, Wis. Stat. § 59.02 (describing the exercise of county powers). Similarly, an attorney general opinion is not the vehicle for determining factual matters, including “whether any particular lease arrangement would be permissible.” 80 Op. Att’y Gen. at 82 (citing 77 Op. Att’y Gen. Preface, No. 3.C (1988)). That is especially true where, as here, no specific lease is provided and the factual circumstances could matter. *See, e.g.*, 66 Op. Att’y Gen 209, 210 (1977) (noting an instance where particular statutory procedure may govern a land sale). It is enough to point out that the highway construction statutes inquired about should not be read to generally govern leases of property rights, including rights to gravel.

¶ 12. The opinion request’s second question is whether the gravel-leasing scenario summarized above would violate the constitutional “public purpose” doctrine, as it was discussed in a previous attorney general opinion, OAG-2-01. That opinion discussed whether a county highway department could, consistent with that doctrine, sell salt and sand to private entities. *See* OAG-2-01, at 3. The opinion concluded that the public purpose doctrine would require that the purchaser be subject to a contract that “requires . . . a specific public purpose, such as the sanding/salting of public roads.” OAG-2-01, at 4.

¶ 13. While there may be other limits on a particular conveyance, I conclude that the opinion went too far when stating that the constitutional public purpose doctrine always requires a purchaser to have a public purpose. Rather, as applied here, the Wisconsin Supreme Court cases support that a private purchaser would not

need a public purpose if the property rights are conveyed for adequate consideration. To the extent OAG-2-01 suggests otherwise, that language is withdrawn.

¶ 14. While “there is no specific language in the state constitution establishing the public purpose doctrine,” the Wisconsin Supreme Court has explained that the doctrine provides this limit: “[P]ublic appropriations may not be used for other than public purposes.” *Town of Beloit v. County of Rock*, 2003 WI 8, ¶ 27, 259 Wis. 2d 37, 657 N.W.2d 344. In other words, the public purpose doctrine provides a limit on the “*expenditure* of public funds.” *Id.* ¶ 36 (emphasis added).

¶ 15. OAG-2-01 suggested that the doctrine went beyond limiting public expenditures to also require a private purchaser to have a public purpose. However, the cases support a narrower rule. While a public aim would be necessary if the government expends funds or gives away valuable public property, that constitutional concern is absent where there is no expenditure or gift in the first place.

¶ 16. OAG-2-01 cited *Hermann v. City of Lake Mills*, 275 Wis. 537, 82 N.W.2d 167 (1957), to support the premise that a private purchaser must always have a public purpose. OAG-2-01, at 4. However, *Hermann*, read as a whole, does not support that blanket conclusion.

¶ 17. *Hermann* addressed a city’s selling of park property to a corporation. *Hermann*, 275 Wis. at 540. There was a dispute about whether the “city in effect made a gift of part of the value of the property.” *Id.* at 541. Notably, it was undisputed that the purchaser had “a private rather than a public purpose.” *Id.* at 543. However, and important here, that conclusion did not end the inquiry. Rather, the court proceeded to discuss whether the purchaser’s “payment represent[ed] only part of the fair market value of the property” or a full payment. *Id.* at 542. Lacking sufficient evidence on that point, the court remanded to determine whether the price was for “fair market value.” *Id.* at 544. Thus, read as a whole, *Hermann* does not stand for the proposition that private aims automatically void a transaction. Rather, the remand there was to determine whether there was adequate consideration, *absent* a public purpose. *Id.* at 542, 544.³

³ The court further explained that “consideration . . . necessary to support a sale . . . does not have to be money”; it could be, for example, construction. *Hermann*, 275 Wis. at 542. In other words, while the cases at times speak in terms of “fair market value,” the required adequate consideration is not limited to fair market value sales, and the analysis also contemplates some “discretion.” *See id.* at 544.

¶ 18. Of significance to the lease scenario here, *Hermann* also noted cases where the “power of municipal authorities to lease municipal real estate” was recognized. *Id.* at 544 (discussing, for example, *Smith v. City of Wisconsin Rapids*, 273 Wis. 58, 63, 76 N.W.2d 595 (1956)). Treating it the same way as a sale, *Hermann* noted that the “adequacy of the consideration agreed to be paid by the lessees” would be the relevant question under its public purpose analysis. *Id.*

¶ 19. *Hermann* thus supports the proposition that a sale or lease of property rights for adequate consideration generally would suffice for purposes of the constitutional public purpose doctrine. Absent some other barrier, the conveyance would not be void merely because the purchaser lacked a public purpose; rather, where there is adequate consideration, no public resources have been given away. OAG-2-01 therefore was mistaken when it cited *Hermann* for the proposition that a purchaser must always have a public purpose.

¶ 20. The other cases and opinions cited in OAG-2-01 would not dictate a different result. *See* OAG-2-01, at 1–4. To the contrary, some of those sources do not discuss the topic at hand, and the others simply reinforce that the public purpose doctrine concerns expenditures. *See, e.g., State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 414, 208 N.W.2d 780 (1973) (“Public funds may be expended for only public purposes.”); *Heimerl v. Ozaukee County*, 256 Wis. 151, 155, 40 N.W.2d 564 (1949) (“[T]he expenditure of public funds for a private purpose is unconstitutional”); *State ex rel. Bowman v. Barczak*, 34 Wis. 2d 57, 62, 148 N.W.2d 683 (1967) (“[P]ublic appropriations may not be used for other than public purposes.”); *Jackson v. Benson*, 218 Wis. 2d 835, 896, 578 N.W.2d 602 (1998) (concerning “expenditure”); *State ex rel. Wis. Dev. Auth. v. Dammann*, 228 Wis. 147, 176, 280 N.W. 698 (1938) (concerning “expenditures”); *State ex rel. Am. Legion 1941 Convention Corp. of Milwaukee v. Smith*, 235 Wis. 443, 463, 293 N.W. 161 (1940) (discussing an “expenditure”); 76 Op. Att’y Gen. 69, 70 (1987) (“Public funds must be spent for public benefit.”); 67 Op. Att’y Gen. 304, 309 (1978) (in context of plowing private property, discussing that counties may be limited when undertaking certain tasks that mimic a private business, and noting difficulties of ensuring payment); 61 Op. Att’y Gen. 304, 305 (1972) (“[W]here the benefit is primarily private in nature, use of county or town funds and county or town equipment is prohibited.”); 50 Op. Att’y Gen. 98, 101 (1961) (discussing limits on a county engaging in a private driveway construction business).

¶ 21. Other cases reflect similar reasoning. *See, e.g., Glendale Dev., Inc. v. Bd. of Regents of Univ. of Wis.*, 12 Wis. 2d 120, 135, 106 N.W.2d 430 (1960) (stating that question of whether a government land sale violated public purpose doctrine “goes to the sufficiency of the consideration received”); *Newell v. City of Kenosha*, 7 Wis. 2d

516, 525, 96 N.W.2d 845 (1959) (discussing adequate consideration). Likewise, this office has opined that, “[a]lthough a county may not make a gift of property to a private corporation, it may, under section 59.07(1)(c) [now section 59.52(6)(c)], convey property upon such terms as the county board approves. Consideration for a conveyance need not be monetary.” 80 Op. Att’y Gen. 341, 343 (1992). A past opinion has recognized that the same reasoning would apply to mineral rights: “county mineral rights cannot be given away” without “legal consideration.” 67 Op. Att’y Gen. at 237.

¶ 22. A more recent case helps confirm the expenditure-based trigger for the constitutional public purpose analysis. For example, more recently, the Wisconsin Supreme Court addressed the doctrine in *Town of Beloit*. Like the cases noted above, there, the court addressed the doctrine in the context of “expenditure of public tax monies.” 259 Wis. 2d 37, ¶ 19. The Town of Beloit had used public money to develop its property for eventual sale. *Id.* In recognizing a public purpose for that expenditure, the court noted as relevant that “any profit realized from the sale of the subdivision would in fact benefit the Town . . . in that the profit would go into the Town Treasury and ultimately benefit all of the citizens of the town by way of decreased taxes and reduced debt.” *Id.* ¶ 47.⁴

¶ 23. Lastly, I note that one court of appeals case could suggest a different analysis, but the precedent cited above counsels otherwise. In *Bishop v. City of Burlington*, 2001 WI App 154, 246 Wis. 2d 879, 631 N.W.2d 656, the court of appeals used phrasing that suggested that a purchaser offering adequate consideration *also* must use the property for a public purpose. There, the court asked whether “the conveyance serves a direct public purpose *and* . . . adequate consideration exists.” *Id.* ¶ 30 (emphasis added). That phrasing did not seem to require an expenditure to trigger the analysis. However, *Bishop*’s statement does not change the established analysis for two reasons. First, the *Bishop* court was not presented with the question here: whether a sale for adequate consideration, standing alone, would suffice. Rather, both adequate consideration and a public purpose were present there. *See id.* ¶ 29. Second, and more to the point, the Wisconsin Supreme Court precedent, including the more recent *Town of Beloit*, applies the doctrine to expenditures, not standalone sales. Indeed, rather than purport to change the analysis, *Bishop* cited

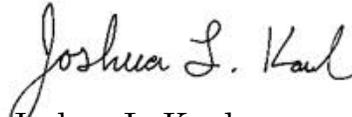
⁴ As discussed, the public purpose doctrine is triggered by an expenditure. However, if a court were to analyze a standalone sale (without an expenditure component), such sales might be analyzed using *Town of Beloit*’s reasoning that a public purpose generally is served when benefiting public coffers. 259 Wis. 2d 37, ¶ 47.

Ms. Mary Ann Hook Swan
Page 8

Hermann, but it simply did not discuss *Hermann*'s adequate consideration analysis. *See id.* ¶¶ 15–16.

¶ 24. In summary, the highway construction statute cited in the opinion request, Wis. Stat. § 83.035, does not address mineral leases on county land and so does not forbid them. Further, Wisconsin Supreme Court precedent supports that the constitutional public purpose doctrine is triggered only where there is an expenditure or gift of public funds or property. As the cases explain, that may occur when conveying property for inadequate consideration.

Sincerely,

A handwritten signature in black ink that reads "Joshua L. Kaul". The signature is written in a cursive style with a large initial 'J' and 'K'.

Joshua L. Kaul
Attorney General

JLK:ADR:jrs



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March 10, 2020

OAG-02-20

Secretary Kevin Carr
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Dear Secretary Carr:

¶ 1. Incarcerated persons or people under the Wisconsin Department of Corrections' (DOC) supervision through probation, parole, or extended supervision (collectively, "offenders") sometimes die before paying all of the restitution ordered in their judgments of conviction. You have adopted your predecessor's request for an opinion whether, under those circumstances, the deceased offender's sentencing court may enter a civil judgment for the amount of unpaid restitution in favor of the crime victim and whether DOC has the authority or duty to ask the court to enter such a judgment.

¶ 2. I conclude that sentencing courts may enter such judgments after an offender's death. Wisconsin law provides both that restitution be converted to a civil judgment after probation "terminat[es]" and that unpaid restitution be treated the same as a civil judgment after the end of incarceration, probation, parole, or extended supervision. Wis. Stat. § 973.20(1r). Supervision or incarceration "terminat[es]" if, among other reasons, the offender dies. And, since the sentencing court ordered restitution in the offender's judgment of conviction before his death, the entry of a civil judgment is merely a clerical act that can occur after the offender dies. I also conclude that DOC has no affirmative legal duty to ask sentencing courts to enter these civil judgments, but that DOC may choose—and that it would be advisable—to do so.

¶ 3. A crime victim's right to restitution is guaranteed by the state constitution: Wisconsin "shall ensure that crime victims have . . . the . . . privilege[] and protection[] . . . [of] restitution." Wis. Const. art. I, § 9m. The Wisconsin statutes codify this right. "Victims of crimes have the . . . right[] . . . [t]o restitution . . ."

Wis. Stat. § 950.04(1v)(q). “When imposing sentence or ordering probation for any crime . . . the court . . . shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing” Wis. Stat. § 973.20(1r).

¶ 4. While the offender is incarcerated or on supervision, DOC has an active role in collecting restitution for the crime victim. An offender under supervision must deliver money due as restitution to DOC, and DOC must create an account for collecting that restitution and disbursing it to victims. Wis. Stat. § 973.20(11)(a)–(b). DOC may collect unpaid restitution directly from an incarcerated offender’s wages and gift money. Wis. Stat. §§ 301.31, 301.32(1), 303.01(8)(b). For offenders on probation, DOC must notify the sentencing court of an offender’s unpaid restitution 90 days before probation expires. Wis. Stat. § 973.09(3)(b). And “[i]f an inmate in a state prison or a person sentenced to a state prison has not paid, at the time of his or her death, restitution ordered under [Wis. Stat. § 973.20], [DOC] shall assess, collect, and disburse the amount owed from the inmate’s wages or other moneys.” Wis. Stat. § 973.20(11)(f).¹

¶ 5. When an offender has not paid all ordered restitution by the time his supervision ends, the crime victim has an express statutory right either to a civil judgment or to have unpaid restitution treated the same as a judgment. For an offender who was on probation, a crime victim has a right “[t]o a judgment for unpaid restitution” upon the expiration of the offender’s probation. Wis. Stat. § 950.04(1v)(r) (cross-referencing Wis. Stat. § 973.09(3)(b) (probation restitution)). Likewise, when an offender’s period of probation, extended supervision, or parole “terminat[es],” a crime victim has a right to enforce unpaid restitution “in the same manner as a judgment in a civil action.” Wis. Stat. § 973.20(1r). This right applies even if the offender is never placed under supervision at all. *Id.* (unpaid restitution is enforceable as a civil judgment “if the defendant is not placed on probation, extended supervision, or parole”). Because the crime victim’s rights are equivalent to those of a judgment creditor, *Huml v. Vlazny*, 2006 WI 87, ¶ 28, 293 Wis. 2d 169, 716 N.W.2d 807, they continue after the offender’s death. *See generally* Wis. Stat. chs. 859 (probate claims), 877 (actions against heirs and legatees); Wis. Stat. § 815.14 (execution of judgment liens after debtor’s death).

¹ Wisconsin Stat. § 973.20(11)(f) does not answer the question you ask because DOC might not be able to recover all the outstanding restitution from “the [deceased] inmate’s wages or other moneys” to which DOC has access. The issue still arises of whether the sentencing court may enter a civil judgment for the amount of any restitution that remains unpaid after DOC exercises its authority under this statute.

¶ 6. While, unlike Wis. Stat. § 950.04(1v)(r), section 973.20(1r) does not explicitly provide for the entry of a judgment when an offender’s supervision period terminates, it provides that any unpaid restitution obligation has the same effect as a civil judgment. The state supreme court has reasoned that section 973.20(1r) treats victims as having the rights of a judgment creditor, which indicates that unpaid restitution can and should be converted to a civil judgment under that provision. *Huml*, 293 Wis. 2d 169, ¶ 28. Likewise, the supreme court explained that, through section 973.20(1r), the Legislature “intended a restitution order to become a civil judgment” when supervision ends, which further supports this conclusion. *Id.* ¶ 33.²

¶ 7. The request for an opinion asks whether a sentencing court’s ability to enter a civil judgment for unpaid restitution changes if the offender dies after the court orders restitution but before it enters a civil judgment. I conclude that the sentencing court has authority to enter a civil judgment after the offender dies under these circumstances, for two reasons. First, the statutory language indicates that restitution shall have the effect of a civil judgment, no matter why the offender’s supervision terminates. Second, the court retains authority to enter the civil judgment, both because statutory language enables the court to do so and because the entry of a civil judgment is merely a clerical act.

¶ 8. As a matter of plain language interpretation, restitution orders should be entered as a civil judgment under Wis. Stat. § 973.20(1r) whenever supervision “terminat[es],” whatever the reason for the termination. “[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. “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). “[T]he restitution statute should be interpreted broadly and liberally in order to allow

² The request for an opinion asks whether a circuit court may only enter a civil judgment for unpaid restitution under the two specific provisions cross-referenced in Wis. Stat. § 950.04(1v)(r), which address juvenile restitution and restitution as a probation condition. I conclude that no sound reason exists to interpret Wis. Stat. § 950.04(1v)(r) as limiting crime victims’ right to judgments for unpaid restitution to only those situations. This reading would conflict with Wis. Stat. § 973.20(1r) and Wis. Const. art. I, § 9m, which guarantee crime victims’ right to restitution when all forms of supervision end, not just probation. *See State v. Gilbert*, 2012 WI 72, ¶ 43, 342 Wis. 2d 82, 816 N.W.2d 215 (“[I]t is this court’s duty to harmonize the statutes, not ignore one section, while enforcing another.”).

victims to recover their losses as a result of a defendant’s criminal conduct.” *State v. Gibson* 2012 WI App 103, ¶ 10, 344 Wis. 2d 220, 822 N.W.2d 500.

¶ 9. Unpaid restitution is “enforceable in the same manner as a judgment in a civil action” whenever DOC’s supervision over an offender “terminat[es].” Wis. Stat. § 973.20(1r). The statute does not limit the term “terminat[e]” to situations where the offender completes his period of supervision before dying. The ordinary meaning of “terminate” is “to bring to an end.” *Terminate*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/terminate> (last visited Mar. 6, 2020). Applying this ordinary definition, an offender’s death terminates his period of supervision because it brings it to an end. Under the plain language of section 973.20(1r), unpaid restitution thus becomes enforceable as a civil judgment when an offender dies while under supervision.³

¶ 10. The same is true when an offender who still owes restitution dies while in prison. Wisconsin Stat. § 973.20(1r) provides that unpaid restitution is enforceable as a civil judgment “if the defendant is not placed on probation, extended supervision, or parole.” When an offender dies in prison, he is “not placed on probation, extended supervision, or parole.” *Id.* This plain language thus supports enforcing unpaid restitution obligations as civil judgments against an offender who dies in prison, just as against one who dies while under supervision.

¶ 11. The statutory language also shows that the circuit court has the authority to enter a civil judgment after the offender’s death. Some pending causes of action “abate[]” when a litigant dies, depriving the court of authority to hear the case. *See, e.g., Socha v. Socha*, 183 Wis. 2d 390, 393, 515 N.W.2d 337 (Ct. App. 1994) (party’s death abates a divorce action, divesting the court of jurisdiction to hear the case). But even for causes of action where common law abatement would otherwise apply, the Legislature can supersede it by statute. In *Davis v. Rahkonen*, 112 Wis. 2d 385, 387–88, 332 N.W.2d 855 (Ct. App. 1983), for example, the court of appeals held that a statute providing that circuit courts “shall” grant judgments for attorney services applied even after a party to the action died. Although abatement would otherwise have terminated the action and precluded such judgments, the statutory language indicated that the Legislature intended to allow judgments after a party’s death. *Id.* Here, Wis. Stat. § 973.20(1r) uses the broad term “terminat[e]” to trigger a

³ The request for an opinion asks whether “a criminal sentence terminates immediately upon the death of a person in prison or on probation, extended supervision, or parole.” The narrower issue of how to interpret the term “terminat[e]” in Wis. Stat. § 973.20(1r) answers that question as it relates to civil judgments for unpaid restitution upon an offender’s death.

crime victim's right to a civil judgment, indicating that common law abatement does not apply and instead that a court may enter a civil judgment even if the offender dies while in prison or on supervision.

¶ 12. And even in an action that would otherwise abate upon a party's death, the circuit court may carry out acts that are merely clerical after the party's death. For example, if a court has orally announced a judgment before the action abated, the court may reduce the judgment to writing after the party's death. *Pettygrove v. Pettygrove*, 132 Wis. 2d 456, 461, 393 N.W.2d 116 (Ct. App. 1986). Entering a judgment is then a "clerical duty" needed only to "preserve the evidence of the judgment." *Barbian v. Lindner Bros. Trucking Co.*, 106 Wis. 2d 291, 298–99, 316 N.W.2d 371 (1982) (quoting *Comstock v. Boyle*, 134 Wis. 613, 617, 114 N.W. 1110 (1908)). Like the oral judgment in *Pettygrove*, an order for criminal restitution resides in a judgment of conviction that was entered while the offender lived. After the offender dies, the written civil judgment simply provides evidence of the pre-existing restitution judgment so that the crime victim can collect the amount owed. Thus, the sentencing court retains the power to enter a civil judgment after the offender dies, even if it no longer has the authority to make judicial decisions in the criminal case.⁴

¶ 13. The request for an opinion also asks whether DOC has the authority or affirmative legal duty to request that sentencing courts reduce unpaid restitution to a civil judgment after an offender's death. I conclude that, although DOC does not have an affirmative legal duty to do so, it may choose to make such requests.

¶ 14. The most relevant provision, Wis. Stat. § 973.09(3)(b), requires DOC to notify the sentencing court that unpaid restitution exists as probation nears its end, but it does not require DOC to provide such a notification under other circumstances, let alone request that unpaid restitution be reduced to a civil judgment. Government officials have no duty to act absent a "clear, specific legal right that is free from substantial doubt." *State ex rel. Lewandowski v. Callaway*, 118 Wis. 2d 165, 171, 346 N.W.2d 457 (1984). The Wisconsin Legislature could have expressly required DOC to ask sentencing courts to enter judgments for unpaid restitution when an offender dies, and the absence of any express provision indicates that no such duty exists.

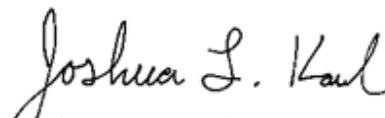
⁴ Note, however, that a defendant's death does not deprive the court of appeals of jurisdiction over an ongoing criminal appeal. *See State v. McDonald*, 144 Wis. 2d 531, 536, 424 N.W.2d 411 (1988).

¶ 15. I conclude, however, that DOC may permissibly either notify the sentencing court that unpaid restitution exists upon an offender's death or ask the court to reduce unpaid restitution to a civil judgment. No statute bars DOC from doing so, and because asking a court to act accordingly would not require DOC to exercise its own statutory authority over the offender, such action would not implicate limits on DOC's authority. *Cf. Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶ 62, 342 Wis. 2d 444, 820 N.W.2d 404 (“[A]n administrative agency has ‘only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates.’” (citation omitted)).

¶ 16. DOC's ability to request civil restitution judgments furthers the sound public policy, embodied in both the state constitution and statutes, of ensuring that crime victims receive the restitution they are due. Indeed, a contrary result could undermine crime victims' right to restitution. Because relevant offenders were under DOC's authority upon their deaths due to their incarceration or supervision, DOC would be in the best position to notify the sentencing court of any unpaid restitution that should be reduced to a civil judgment. Leaving the task of obtaining civil restitution judgments to crime victims, district attorneys, or circuit courts risks some unpaid restitution going unnoticed, contrary to our state constitution's command that Wisconsin “shall ensure that crime victims have . . . the . . . privilege[] and protection[] . . . [of] restitution.” Wis. Const. art. I, § 9m. To avoid this troublesome result, it would be advisable for DOC to begin assisting circuit courts, district attorneys, and crime victims with this important task.

¶ 17. I conclude that sentencing courts may enter a civil judgment for unpaid restitution where an offender dies while incarcerated or under DOC supervision. While DOC is not obligated to ask the court to enter such a judgment, it may choose to do so.

Sincerely,



Joshua L. Kaul

Joshua L. Kaul
Attorney General



STATE OF WISCONSIN
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May 15, 2020

OAG-03-20

Mr. Thomas Nelson
Outagamie County Executive
410 South Walnut Street
Appleton, Wisconsin 54911

Dear County Executive Nelson:

¶ 1. You have asked for an emergency Attorney General opinion to address the immediate need for clarity about the effect of the Wisconsin Supreme Court's decision in *Wisconsin Legislature v. Palm*, 2020 WI 42, on local powers to combat COVID-19. The May 12 supreme court decision struck down, in most respects, the Wisconsin Department of Health Services' (DHS) statewide Safer-at-Home order issued to combat COVID-19.

¶ 2. The Wisconsin Legislature's lawsuit that led to the invalidation earlier this week of most of the Safer-at-Home order has resulted in substantial uncertainty as counties and municipalities rapidly adopt measures to fight a virus that does not respect national borders, much less municipal or county lines. In an update posted Wednesday, for instance, the Wisconsin Counties Association wrote that "it is unclear whether a local health order would, in the Court's view, suffer from the same deficiencies that caused the Court to invalidate the Safer at Home Order." Wis. Ctys. Ass'n, *COVID-19 Updates for County Officials* (May 13, 2020), <https://covid19.wicounties.org/covid-19-daily-update-5-13-2020/>. Kenosha and Brown Counties, two of the state's counties that have been most impacted by the coronavirus outbreak, withdrew their public health orders in light of confusion regarding their authority in the wake of the supreme court's decision.

¶ 3. This Attorney General opinion addresses the following questions: whether the Wisconsin Supreme Court's decision in *Wisconsin Legislature v. Palm* controls local powers; whether that decision's discussion of criminal penalties should be considered by local authorities; whether that decision's specific focus on certain DHS powers related to staying at home, travel, and closing businesses should be

considered by local authorities; and whether there are any other substantive limits on local powers implied by the *Palm* decision.

¶ 4. *First*, the supreme court’s decision addressed only DHS’s authority found in Wis. Stat. § 252.02. That statute does not govern the authority of local health officers, which is separately set out in Wis. Stat. § 252.03. That separate grant of local authority provides, among other things, powers to “prevent, suppress and control communicable diseases” and “forbid public gatherings when deemed necessary to control outbreaks or epidemics.” Wis. Stat. § 252.03(1)–(2).¹ Because the court decision addressed a different statute applicable to a state agency, and not the statute applicable to local authorities, the *Palm* decision is not directly controlling on powers under the latter statute.

¶ 5. *Second*, although the court did not directly address Wis. Stat. § 252.03, there are statements about criminal sanctions in the *Palm* decision that local authorities should consider. The court concluded that Safer at Home “does not rely on a statute within ch. 252 defining the elements of the crime” and that “in order to constitute criminal conduct proscribed by statute, the conduct must be set out with specificity in the statute to give fair notice.” *Palm*, 2020 WI 42, ¶¶ 37, 40.² It is advisable to limit enforcement under Wis. Stat. § 252.03 to ordinances or administrative enforcement.

¶ 6. *Third*, the *Palm* decision highlighted three particular exercises of DHS’s powers as outside the scope of its statutory authority under Wis. Stat. § 252.02: directing people to stay at home, forbidding certain travel, and closing certain businesses. Even as to those three measures, the analysis may not apply to local powers under Wis. Stat. § 252.03. The court’s reasoning emphasized the availability of criminal sanctions for violations, and applied an interpretative analysis using provisions of 2011 Wis. Act 21 and Wis. Stat. ch. 227 that apply only to state agencies. *Palm*, 2020 WI 42, ¶¶ 45–47, 51, 52. A local order issued under Wis. Stat. § 252.03 that does not threaten criminal penalties, as recommended above, cannot run afoul of the court’s first concern, and 2011 Wis. Act 21 and chapter 227 would not apply to a local authority. Nevertheless, the local authority should ensure that any measures that direct people to stay at home, forbid certain travel, or close certain businesses speak specifically to the local authority’s statutory power to “prevent, suppress and

¹ Local authorities also have emergency powers under Wis. Stat. §§ 323.11 and 323.14. This opinion does not address measures taken pursuant to those powers.

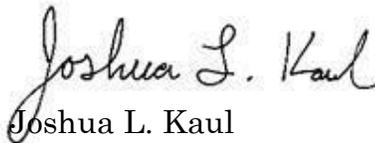
² This reasoning may not extend to subsections like Wis. Stat. § 252.02(3). For example, the *Palm* decision does not apply to Section 4.a. of Safer at Home, which closes schools pursuant to Wis. Stat. § 252.02(3). *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 58 n.21.

control communicable diseases” and “forbid public gatherings when deemed necessary to control outbreaks or epidemics.” Wis. Stat. § 252.03(1)–(2).

¶ 7. *Fourth*, nothing in the supreme court’s decision even arguably limits other measures directed by a local authority under Wis. Stat. § 252.03. The court rested its rejection of Safer at Home’s provisions other than staying at home, travel, and business closure solely on its conclusion that DHS had to engage in emergency rulemaking under Wis. Stat. § 227.24. *Palm*, 2020 WI 42, ¶¶ 2–4, 58–59. Local authorities are not subject to chapter 227, and so that reasoning has no application to an order issued by a local authority.

¶ 8. The foregoing observations provide immediate guidance in light of the pandemic. Because of the emergency circumstances, this opinion is not being released according to this office’s ordinary process, in which we have voluntarily instituted an opportunity for public comment. However, this opinion will be posted on the AG Opinion Requests page of the Department of Justice’s website, where the public may comment on it. In turn, this opinion may be supplemented at a later date.

Sincerely,

A handwritten signature in cursive script that reads "Joshua L. Kaul".

Joshua L. Kaul
Attorney General

JLK:ADR:jrs



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October 27, 2020

OAG-04-20

The Honorable Tony Evers
Governor
State of Wisconsin
115 East, State Capitol
Madison, WI 53702

Dear Governor Evers:

¶ 1. You have requested an Attorney General opinion regarding certain provisions enacted by 2011 Wis. Act 21 (“Act 21” or “the Act”), and how those provisions apply to an agency’s ability to promulgate and enforce administrative rules. Specifically, you have asked (1) whether, in light of Wis. Stat. § 227.11(2)(a)2., state agencies may promulgate administrative rules pursuant to a statute providing explicit, broad rulemaking authority; and (2) whether, in light of Wis. Stat. § 227.11(2)(a)3., state agencies may rely on explicit, broad statutory grants of authority to promulgate standards, requirements, or thresholds in administrative rules.¹ Your request also implicates an additional issue regarding the enforceability of existing rules after Act 21, particularly its enactment of Wis. Stat. § 227.10(2m) and Wis. Stat. § 227.11(2)(a)1.–3. Your request relates to this office’s previous opinion regarding Act 21, OAG-04-17 (Dec. 8, 2017), and raises the question whether that opinion incorrectly interpreted these statutory provisions.

¶ 2. As to your first question, I conclude that the plain language of Wis. Stat. § 227.11(2)(a)2. does not alter explicit grants of rulemaking authority, regardless of whether the rulemaking provision in which the authority is granted could be characterized as broad or “general.”

¹ As shorthand, this opinion will use the term “standards” to refer to the statutory phrase “standard, requirement, or threshold” used in Wis. Stat. §§ 227.10(2m) and .11(2)(a)3.

¶ 3. As to your second question, I conclude that the plain language of Wis. Stat. § 227.11(2)(a)3. does not alter explicit grants of rulemaking authority to prescribe standards. The fact that the Legislature mandates a specific standard in one statute does not, in itself, alter the agency’s ability to promulgate, enforce, or administer a different standard enacted pursuant to a second statutory source of rulemaking authority. This holds true even where the second standard could be characterized as “more restrictive” than the first. *See* Wis. Stat. § 227.11(2)(a)3.

¶ 4. Finally, regarding the enforceability of existing rules after Act 21, I conclude that nothing in the language of Act 21 alters existing, properly promulgated rules. Under Wis. Stat. § 227.10(2m), agencies may continue to implement and enforce existing rules, including standards therein, provided the rule was “promulgated in accordance with” the rulemaking procedures in place at the time the rule was adopted.

¶ 5. Because OAG–04–17 reached several conclusions contrary to the plain language of the governing statutes, as explained herein, that opinion is withdrawn.

PROVISIONS AT ISSUE

¶ 6. 2011 Wis. Act 21 was enacted in a special legislative session in early 2011 and took effect on June 8, 2011. Relevant here, Act 21 made the following changes to Wis. Stat. §§ 227.10 and .11. First, the Act created Wis. Stat. § 227.10(2m), which reads:

No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter The governor, by executive order, may prescribe guidelines to ensure that rules are promulgated in compliance with this subchapter.

Wis. Stat. § 227.10(2m). Next, Wis. Stat. § 227.11(2)(a) (2009–10) was amended to read:

Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by ~~it~~ the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if ~~it~~ the rule exceeds the bounds of correct

interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

Act 21, § 2. The Act then created three new subdivisions of Wis. Stat. § 227.11(2)(a), which read:

1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

3. A statutory provision containing a specific standard, requirement, or threshold does 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 statutory provision.

Wis. Stat. § 227.11(2)(a).

DISCUSSION

¶ 7. Your request presents questions of statutory interpretation, which begins with the language of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. “Statutory language [will be] given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.* The statutory language will be “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.” *Id.* ¶ 46. Additionally, insofar as a statute's scope, context, and purpose are “ascertainable from the text and structure of the statute itself,” those factors may also be relevant to the interpretive inquiry. *Id.* ¶ 48. If this textual analysis “yields a plain, clear statutory meaning, then there is no ambiguity,” and the statute should be applied according to that plain meaning.

Id. ¶ 46 (quoting *Bruno v. Milwaukee County*, 2003 WI 28, ¶ 20, 260 Wis. 2d 633, 660 N.W.2d 656). When interpreting statutes, the Attorney General, just like a court, “is not at liberty to disregard the plain, clear words of the statute.” *Id.* (quoting *State v. Pratt*, 36 Wis. 2d 312, 317, 153 N.W.2d 18 (1967)).

¶ 8. Applying these principles, I conclude that neither Wis. Stat. § 227.11(2)(a)2. nor 3. alters any legislative grants of agency rulemaking authority outside of Wis. Stat. ch. 227. Thus, where a statute explicitly authorizes agency rulemaking, that ends the inquiry—that explicit authority must be given effect.

I. Wisconsin Stat. § 227.11(2)(a)2. does not alter explicit legislative grants of rulemaking authority.

¶ 9. Your first question asks whether, in light of Act 21, “state agencies may promulgate rules pursuant to a statute that provides for explicit, broad rulemaking authority.” As examples, you point to Wis. Stat. § 85.16(1), which authorizes the Secretary of Transportation to “make reasonable and uniform . . . rules deemed necessary to the discharge of the powers, duties and functions vested in the department”; Wis. Stat. § 16.004(1), which mandates that the Secretary of Administration “shall promulgate rules for administering the department and performing the duties assigned to it”; and Wis. Stat. § 150.03, which requires the Department of Health Services to “adopt rules and set standards to administer [certain statutory subchapters].”

¶ 10. As you also note, OAG–04–17 interpreted a provision of this sort, Wis. Stat. § 101.02(1)(b), in the context of analyzing the so-called “Sprinkler Rule.”² That statute mandates that the Department of Safety and Professional Standards (DSPS) “shall adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities.” Wis. Stat. § 101.02(1)(b). Notwithstanding the statute’s direct instruction to adopt rules, OAG–04–17 concluded that the statute “does not confer rule–making authority’ under Wis. Stat. § 227.11(2)(a)2.,” because section 102.02(1)(b) “is best read as ‘describing [DSPS’s] general powers or duties.’” OAG–04–17, ¶ 22. Your request therefore requires analysis of Wis. Stat. § 227.11(2)(a)2., as well as the reasoning of OAG–04–17.

² At the time, the Sprinkler Rule was codified at Wis. Admin. Code SPS § 362.0903(5) (Feb. 2017). Following OAG–04–17 (Dec. 8, 2017), the Sprinkler Rule was repealed.

A. Interpretation of Wis. Stat. § 227.11(2)(a)2.

¶ 11. Agencies have historically exercised “those powers which are expressly conferred or which are necessarily implied by the statutes under which [the agency] operates.” *Wis. Ass’n of State Prosecutors v. Wis. Emp’t Relations Comm’n (WASP)*, 2018 WI 17, ¶ 37, 380 Wis. 2d 1, 907 N.W.2d 425 (quoting *Wis. Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 14, 270 Wis. 2d 318, 677 N.W.2d 612). Therefore, to understand the impact of Act 21 on the questions presented, it is useful to examine the text of Wis. Stat. § 227.11(2)(a), much of which predates Act 21.

¶ 12. As noted above, in Wis. Stat. § 227.11(2), the Legislature has “expressly conferred” rulemaking authority on agencies to “promulgate rules interpreting the provisions of any statute enforced or administered by the agency,” so long as the agency “considers it necessary to effectuate the purpose of the statute.” Wis. Stat. § 227.11(2)(a).

¶ 13. Wisconsin Stat. § 227.11(2)(a) then continues that an agency’s rule “is not valid if the rule exceeds the bounds of correct interpretation.” Wis. Stat. § 227.11(2)(a). This clause makes clear that even where an agency determines that a rule is “necessary,” that determination alone is not sufficient to allow the agency to promulgate any rule the agency might prefer. Rather, a rule must be “within the boundaries of enabling statutes passed by the legislature.” *Koschkee v. Taylor*, 2019 WI 76, ¶ 15, 387 Wis. 2d 552, 929 N.W.2d 600. Wisconsin Stat. § 227.11(2)(a) thus confirms the “elemental” approach for agency rules, which provides that the elements of a rule must correspond to those in the enabling statute. *WASP*, 380 Wis. 2d 1, ¶¶ 38–39. While an agency must stay within the boundaries that the Legislature has provided, this does not require that “the exact words used in an administrative rule appear in the statute.” *Id.* ¶ 38 (quoting *Wis. Hosp. Ass’n v. Nat. Res. Bd.*, 156 Wis. 2d 688, 706, 457 N.W.2d 879 (Ct. App. 1990)).

¶ 14. The statutory language just discussed predates Act 21. The fact that the Legislature did not modify these principles provides useful context for interpreting the language the Legislature added as part of Act 21. See *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 22, 309 Wis. 2d 541, 749 N.W.2d 581.

¶ 15. The first provision that Act 21 added to Wis. Stat. § 227.11(2)(a) (2009–10) is an additional sentence in the introduction, prefacing three provisions added by the Act: “All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency.”

¶ 16. The first question raised here relates to one of those provisos, Wis. Stat. § 227.11(2)(a)2., which reads, “A statutory provision describing the agency’s general powers or duties does not confer rule–making authority on the agency or augment the agency’s rule–making authority *beyond the rule–making authority that is explicitly conferred on the agency by the legislature.*” Wis. Stat. § 227.11(2)(a)2. (emphasis added).

¶ 17. The first clause of Wis. Stat. § 227.11(2)(a)2. (un-italicized above) provides that “general powers or duties” provisions in the statutes do not confer or augment rulemaking authority. Read in isolation, this clause could be read to suggest that if a statute could be characterized as a “general powers or duties” provision, the provision would not confer rulemaking authority.

¶ 18. But the second clause of Wis. Stat. § 227.11(2)(a)2. makes clear that this provision does not alter existing, explicit rulemaking authority. Specifically, the second clause clarifies that “general powers or duties” provisions do not confer *additional* rulemaking authority “*beyond the rule–making authority that is explicitly conferred on the agency by the legislature.*” Wis. Stat. § 227.11(2)(a)2. (emphasis added). This means that if the Legislature explicitly confers rulemaking authority in a statute—such as by stating that an agency “shall adopt reasonable and proper rules and regulations,” *see* Wis. Stat. § 101.02(1)(b)—section 227.11(2)(a)2. does not alter that authority.

¶ 19. Thus, read as a whole, Wis. Stat. § 227.11(2)(a)2. explains that a statutory provision merely describing an agency’s general powers or duties does not confer additional rulemaking authority on the agency beyond what the statutes explicitly provide. Nonetheless, if a statute explicitly confers rulemaking powers on the agency, that language must be given reasonable effect.

¶ 20. Closely related statutes confirm that Wis. Stat. § 227.11(2)(a)2. does not alter other statutory grants of explicit rulemaking authority. For example, as noted previously, in the same statutory section, the Legislature “expressly confer[s]” rulemaking authority on agencies to “promulgate rules interpreting the provisions of *any statute enforced or administered by the agency,*” dependent on the agency determining that a rule would be “necessary to effectuate the purpose of the statute” and application of the elemental test summarized above. Wis. Stat. § 227.11(2)(a) (emphasis added). Act 21 did not alter this “general grant of [rulemaking] authority.” Kirsten A. Koschnick, Comment, *Making “Explicit Authority” Explicit: Deciphering Wis. Act 21’s Prescriptions for Agency Rulemaking Authority*, 2019 Wis. L. Rev. 993, 1030–31.

¶ 21. The Legislature also has explicitly directed agencies to engage in rulemaking through various agency-specific statutes. For example, as you note, Wis. Stat. § 101.02(1)(b) provides that DSPS “shall adopt reasonable and proper rules and regulations relative to the exercise of its powers and authorities.” On its face, this provision explicitly permits the agency to engage in rulemaking. Because nothing in the text of Wis. Stat. § 227.11(2)(a)2. alters this type of explicitly conferred rulemaking authority, agency-specific grants of rulemaking authority like that in Wis. Stat. § 101.02(1)(b) continue to provide rulemaking authority after Act 21.

¶ 22. This interpretation of Wis. Stat. § 227.11(2)(a)2. not only gives full effect to all of the statutory language, it avoids multiple unreasonable results that would arise if the dispositive inquiry for rulemaking authority was whether a statutory provision “is best read as ‘describing [an] agency’s general powers or duties.’” OAG–04–17, ¶ 22. Most notably, that approach would nullify numerous explicit grants of rulemaking authority. As Justice Scalia recognized in the opinion for the Court in *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001), the Legislature “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”

¶ 23. Thus, all of the tools of statutory construction point in one direction. The plain language of Wis. Stat. § 227.11(2)(a)2. mandates that a statute that “explicitly confer[s]” rulemaking authority on the agency continues to provide such authority following Act 21. This is confirmed in Wis. Stat. § 227.11’s longstanding language that remained unchanged after Act 21, as well as surrounding and closely related statutes, which demonstrate that Act 21’s language did not alter explicit grants of rulemaking authority. Moreover, this reading of Wis. Stat. § 227.11(2)(a)2. avoids the unreasonable result of potentially nullifying a wide variety of statutes explicitly authorizing agency rulemaking. The dispositive inquiry, as always, must be based on the plain language of the applicable rulemaking statute. If it explicitly authorizes rulemaking, that ends the inquiry.

B. OAG–04–17 did not correctly interpret the language of Wis. Stat. § 227.11(2)(a)2. and did not meaningfully examine the applicable statutes authorizing agency rulemaking.

¶ 24. Although OAG–04–17 interpreted parts of Wis. Stat. § 227.11(2)(a)2., the opinion did not analyze the full statute and did not give effect to the statute’s second clause. As discussed, that clause confirms that agencies continue to possess all “rule–making authority that is explicitly conferred on the agency.” Wis. Stat. § 227.11(2)(a). In failing to give effect to that second clause, the opinion also did not meaningfully examine the full extent of “rule–making authority that [the statutes] explicitly conferred” on DSPS relative to the “Sprinkler Rule” at issue in the opinion. *See* Wis. Stat. § 227.11(2)(a)2. Instead, OAG–04–17 concluded that various statutory provisions (which mandated that the agency *shall promulgate rules* on various topics) were merely “general powers or duties” provisions, and that Wis. Stat. § 227.11(2)(a)2. therefore prohibited DSPS from relying on those provisions to support the Sprinkler Rule’s ongoing validity. OAG–04–17, ¶¶ 22–23.

¶ 25. The opinion’s focus on whether a provision can be characterized as a “general powers or duties” provision was mistaken. Instead, to ascertain whether an agency possesses rulemaking authority on the topic at issue, OAG–04–17 should have interpreted *all* of the relevant statutes authorizing rulemaking, while adhering to traditional canons of statutory interpretation. These include, most simply, starting with the statutory text and applying that text as written whenever reasonably possible. *See State v. Neill*, 2020 WI 15, ¶ 21, 390 Wis. 2d 248, 938 N.W.2d 521. The relevant statutory language should be read in context with related statutes, giving effect to all the statutory terms in a coherent, cohesive manner. *See Westmas v. Creekside Tree Serv., Inc.*, 2018 WI 12, ¶ 19, 379 Wis. 2d 471, 907 N.W.2d 68. And “[i]f possible, every word and every provision is to be given effect.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012); *see also Westmas*, 379 Wis. 2d 471, ¶ 19.

¶ 26. Likewise, “[r]epeals by implication are disfavored—‘very much disfavored.’” Scalia & Garner, *supra*, at 327 (quoting James Kent, *Commentaries in American Law* *467 n.(y1) (Charles M. Barnes ed., 13th ed. 1884)). If the Legislature intends to alter or amend a statute, it does so explicitly and directly, not by amending a separate statute. *See State v. Black*, 188 Wis. 2d 639, 645, 526 N.W.2d 132 (1994). Unless there is an irreconcilable conflict between statutes, “every attempt” should be made “to give effect to both by construing them together . . . to be consistent with one another.” *Id.*

¶ 27. OAG–04–17 did not apply these traditional tools of statutory interpretation when analyzing the rulemaking provisions at issue there. Instead, the opinion presupposed that numerous grants of rulemaking authority were null, without undertaking the required analysis. That was erroneous. Because the opinion failed to apply the correct analytical framework, that opinion is withdrawn.

II. Wisconsin Stat. § 227.11(2)(a)3. does not alter explicit legislative authorization for agencies to promulgate “standard[s], requirement[s], or threshold[s].”

¶ 28. Your second question asks “[w]hether an agency may rely on explicit, broad rulemaking authority to prescribe standards, requirements, or thresholds in an administrative rule.” This request relates to Wis. Stat. § 227.11(2)(a)3. and OAG–04–17’s interpretation of it. *See* OAG–04–17, ¶¶ 18–29.

¶ 29. Wisconsin Stat. § 227.11(2)(a)3. states, “A *statutory provision* containing a specific standard, requirement, or threshold does 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 statutory provision*.” Wis. Stat. § 227.11(2)(a)3. (emphasis added). On its face, the statute speaks only about the effect of a single statute: “A statutory provision” does not confer more rulemaking authority than what is contained in “*the* statutory provision.” *Id.* (emphasis added). Wisconsin Stat. § 227.11(2)(a)3. thus simply codifies a principle of administrative common law: when the Legislature in one statute directs an agency to promulgate a specific standard, the agency may not rely on that statutory authority to promulgate a different standard. *See WASP*, 380 Wis. 2d 1, ¶ 37 (evaluating rulemaking authority under specific enabling statute requires “ascertain[ing] whether the statute grants express or implied authorization for the rule” (quoting *Wis. Citizens Concerned for Cranes & Doves*, 270 Wis. 2d 318, ¶ 14)); *see also* Koschnick, *supra*, at 1016 (recognizing that Act 21 simply “restat[ed] and clarif[ied] the constitutional principles that necessarily govern agency rulemaking”).

¶ 30. Importantly, Wis. Stat. § 227.11(2)(a)3. does not purport to alter explicit rulemaking authority found in *other* statutes. Wisconsin Stat. § 227.11(2)(a)3. refers only to the effect of “[a] statutory provision” that contains a standard; however, that provision has no effect on *other* statutes that also authorize rulemaking on the same topic. Wis. Stat. § 227.11(2)(a)3. (emphasis added). Thus, Wis. Stat. § 227.11(2)(a)3. does not prohibit an agency from promulgating a standard that could be characterized as “more restrictive” than a statutory standard, provided that the agency’s standard is authorized by another statute’s

explicit authorization of rulemaking. *See WASP*, 380 Wis. 2d 1, ¶ 42 (recognizing that “statutory mandates are also statutory authorizations” (citing Scalia & Garner, *supra*, at 192 (discussing Predicate-Act Canon))).

¶ 31. To illustrate, where the Legislature establishes a statutory floor to ensure *minimum* safety standards while separately directing an agency to promulgate rules on a broad range of topics encompassing the minimum standards, the existence of the minimum statutory standards will not alter the agency’s explicit statutory authority to promulgate rules in accordance with the broader grant of authority. *See Wis. Builders Ass’n v. Dep’t of Comm.*, 2009 WI App 20, ¶¶ 11–12, 316 Wis. 2d 301, 762 N.W.2d 845; *see also Mallo v. DOR*, 2002 WI 70, ¶ 26, 253 Wis. 2d 391, 645 N.W.2d 853 (holding that a statutory grant of authority permitted agency to take action necessarily included in non-exclusive statutory terms). In each instance, determining whether the agency may promulgate a “more restrictive” standard will require evaluation of the relevant statutory provisions, applying the traditional tools of statutory interpretation discussed above.

¶ 32. To be sure, there may be instances in which the specific language that the Legislature uses to grant rulemaking authority in one statute *does* alter rulemaking authority on the same topic under another statute. The Legislature may do so explicitly, or the alteration may be called for by necessary construction of two conflicting statutes. *See State v. Reyes Fuerte*, 2017 WI 104, ¶ 29, 378 Wis. 2d 504, 904 N.W.2d 773 (“Where conflict between statutes is *unavoidable*, specific statutes take precedence over general statutes.” (emphasis added)).

¶ 33. But the language of Wis. Stat. § 227.11(2)(a)3. does not support a blanket rule abrogating explicit rulemaking authority in other statutes. Instead, that statute provides that when *one statute* dictates a specific standard, an agency may not rely on *that standard* to promulgate another, more restrictive standard. Because Wis. Stat. § 227.11(2)(a)3. says nothing about agencies’ ability to rely on other grants of rulemaking authority, the statute does not alter those other sources of authority.

¶ 34. As discussed above, OAG–04–17 analyzed how Wis. Stat. § 227.11(2)(a)2. and 3. affected an agency’s authority to promulgate rules. For the reasons discussed *supra*, § I.B., the opinion also erred in its interpretation of Wis. Stat. § 227.11(2)(a)3. In particular, OAG–04–17 stated that agencies may “no longer impose a standard . . . ‘more restrictive than the standard . . . contained in *the* statutory provision.’ Wis. Stat. § 227.11(2)(a)3.” OAG–04–17, ¶ 28 (emphasis added). The opinion thus seemed to suggest that *any* statutory standard would preclude an agency from promulgating a standard “more restrictive” than *that*

statute, regardless of whether another statute “explicitly conferred” rulemaking authority on the agency on the regulatory subject. See OAG–04–17, ¶¶ 16, 28, 31–32.

¶ 35. As explained, that methodology was incorrect. If a statute provides explicit rulemaking authority, that statute’s language must be given effect. Whether a grant of rulemaking authority is precluded by a specific statutory standard will require comparison of the relevant statutory and rule provisions and will be resolved on a case-by-case basis. This is an additional reason OAG–04–17 is withdrawn.

III. Act 21 did not alter the enforceability of standards promulgated before the Act’s effective date.

¶ 36. The preceding analyses resolve your questions regarding agencies’ authority to promulgate rules after Act 21. Your inquiry, however, also implicates another issue addressed in OAG–04–17—namely, the ability of agencies to implement, enforce, and administer rules promulgated *before* Act 21’s effective date.³ As discussed below, Act 21 did not alter agencies’ ability to enforce those rules.

A. Act 21 did not alter the enforceability of existing, properly promulgated rules.

¶ 37. As relevant here, the enforceability of existing rules is governed by one non-statutory provision and two statutes: Act 21’s initial-applicability provision, section 9355(1); Wis. Stat. § 227.11(2)(a)2.; and Wis. Stat. § 227.10(2m).

¶ 38. Act 21’s initial-applicability provision is included in a non-statutory section of the Act. It states, “The renumbering and amendment of section 227.11 (2) (a) of the statutes and the creation of section 227.11 (2) (a) 1. to 3. of the statutes *first apply to a proposed administrative rule submitted to the legislative council staff . . . on the effective date of this subsection.*” Act 21, § 9355(1) (emphasis added). Act 21’s effective date was June 8, 2011.

³ As shorthand, this discussion occasionally uses “enforcement” or “enforceability” to refer collectively to implementation, enforcement, and administration of rules.

¶ 39. The effect of that language on Wis. Stat. § 227.11(2)(a)3. is clear. That section limits an agency’s ability to rely on a statutory standard “to promulgate, enforce, or administer a rule that contains a standard . . . that is more restrictive than the standard . . . contained in the statutory provision.” Wis. Stat. § 227.11(2)(a)3. The initial-applicability provision is explicit that Wis. Stat. § 227.11(2)(a)3.’s limits on “promulgat[ing], enforc[ing], or administer[ing]” rules “first apply” to rules proposed on or after June 8, 2011. *See* Act 21 § 9355. Stated plainly, Wis. Stat. § 227.11(2)(a)3. has no bearing on the promulgation, enforcement, or administration of a rule promulgated before June 8, 2011. The creation of Wis. Stat. § 227.11(2)(a)3. thus did not alter the enforceability of pre-Act 21 rules.

¶ 40. Analyzing Wis. Stat. § 227.10(2m) leads to the same result.⁴ That provision states, “No agency may implement or enforce any standard, requirement, or threshold . . . unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with [Wis. Stat. ch. 227, subch. II].” Wis. Stat. § 227.10(2m). As relevant here, Wis. Stat. § 227.10(2m)’s limitation on “implement[ing] or enforc[ing]” a standard in an existing rule turns on whether the rule at issue “*has been promulgated in accordance with*” Wis. Stat. ch. 227’s rulemaking procedures. Wis. Stat. § 227.10(2m) (emphasis added). Restated, if a standard is required or permitted by a rule “promulgated in accordance with” ch. 227’s rulemaking procedures, the agency may enforce that standard. *See* Wis. Stat. § 227.10(2m). Reasonably read, this provision and Act 21’s initial-applicability provision mean that rules promulgated *after* Act 21’s effective date must be promulgated in compliance with the Act’s updated rulemaking procedures, including Wis. Stat. § 227.11(2)(a)1.–3. *See* Act 21, §§ 1r–61, 9355(1).

⁴ Although certain applications of Wis. Stat. § 227.10(2m) may be addressed in two cases currently pending before the Wisconsin Supreme Court, *see Clean Wisconsin, Inc. v. DNR*, No. 2016AP1688; and *Clean Wisconsin, Inc. v. DNR*, No. 2018AP0059, this opinion’s limited discussion of Wis. Stat. § 227.10(2m) does not implicate “an issue that is the subject of current or reasonably imminent litigation,” which this office has previously instructed may be a basis to decline a request for an opinion. *See* 77 Op. Att’y Gen. Preface (1988). This opinion addresses agencies’ rulemaking authority under various provisions in Wis. Stat. § 227.11(2)(a), and the discussion of Wis. Stat. § 227.10(2m) concerns only whether that statute nullified previously promulgated rules. The two *Clean Wisconsin* cases do not involve that issue.

¶ 41. But for rules promulgated *before* Act 21, Wis. Stat. § 227.10(2m) requires only that the rule was promulgated in accordance with the rulemaking procedures in place at the time. This reading rests on the text of Wis. Stat. § 227.10(2m), which makes no reference to any specific version of Wis. Stat. ch. 227’s rulemaking procedures. For example, there is nothing in the statute to suggest that the version of Wis. Stat. ch. 227 in place immediately after Act 21 would be the operative version by which to evaluate all rules. This makes sense because rules necessarily are promulgated based on the statutes in force at the time of promulgation. Further, the contrary reading—requiring that the enforceability of pre-Act 21 rules be analyzed under post-Act 21 rulemaking procedures—could cast doubt on the validity of nearly every page of the Wisconsin Administrative Code. *See, e.g.,* OAG–04–17, ¶ 13 (asserting “far-reaching” consequences of opinion’s interpretation of Act 21). Such a result would be absurd, a classic “elephant[] in [a] mousehole[].” *Whitman*, 531 U.S. at 468; *see also Black*, 188 Wis. 2d at 645 (disfavoring statutory construction that results in implied repeal of another law).

¶ 42. Reading Wis. Stat. § 227.10(2m) as requiring compliance with contemporaneous rulemaking procedures also comports with the statutory presumption of validity for published administrative rules. Wisconsin Stat. § 227.20 provides, “Filing a certified copy of a rule with the legislative reference bureau creates a presumption . . . [t]hat the rule was duly promulgated by the agency,” and that “all of the rule–making procedures required by this chapter were complied with.” Wis. Stat. § 227.20(3)(a), (c). Notably, this includes a presumption that the rule was promulgated in compliance with the legislative review provisions under Wis. Stat. § 227.19, and that the Legislature was satisfied with the rule.⁵ *See* Wis. Stat. § 227.19(2)–(3), (4)–(6). All of this naturally contemplates an evaluation of the rule in light of the contemporaneous statutes.

¶ 43. In sum, these provisions make clear that the Act did not alter the enforceability of properly promulgated rules. After Act 21, agencies may “implement or enforce” pre-Act 21 rules that contain standards, provided that the rule was promulgated in accordance with the rulemaking procedures in place when the rule was adopted. *See* Wis. Stat. § 227.10(2m).

⁵ The Wisconsin Supreme Court has confirmed that while these presumptions of validity are rebuttable, they are “similar in operation to the generally recognized rebuttable presumption of the constitutionality of a statute,” and a challenger to the rule will bear the burden to overcome the presumption. *See Wis. Realtors Ass’n v. PSC*, 2015 WI 63, ¶ 66, 363 Wis. 2d 430, 867 N.W.2d 364. The court emphasized that in evaluating challenges to rules, the statutes “require[] courts to respect the legislature’s role in reviewing and approving agency rules by presuming the validity of rules that have survived the legislature’s scrutiny.” *Id.*

B. OAG–04–17 incorrectly interpreted Act 21 to limit the enforceability of existing, properly promulgated rules.

¶ 44. OAG–04–17 incorrectly interpreted Act 21’s initial-applicability provision, section 9355(1); Wis. Stat. § 227.11(2)(a)3.; and Wis. Stat. § 227.10(2m). Contrary to the explanation above, that opinion concluded that Act 21 potentially invalidated existing, properly promulgated rules. *See* OAG–04–17, ¶¶ 13, 24, 31–33.

¶ 45. In reaching that conclusion, OAG–04–17 first pointed to Wis. Stat. § 227.11(2)(a)3. and its limits on “promulgating, enforcing, or administering” certain standards. The opinion acknowledged that Act 21’s initial-applicability provision prevented retroactive application of section 227.11(2)(a)3.’s limits on “promulgation,” but asserted that “enforce[ment]’ or ‘adminis[tration]’ of existing rules” should be treated differently. OAG–04–17, ¶¶ 31–32 (alterations in original). It concluded that if a rule “could not be lawfully ‘promulgate[d]’ now,” it “may not be prospectively enforced or administered in light of Act 21.” OAG–04–17, ¶¶ 31, 33 (alteration in original).

¶ 46. That view cannot be reconciled with the relevant provisions of Act 21. To begin, there is no textual support in the initial-applicability provision for OAG–04–17’s different treatment of limits on the “promulgation” of rules and limits on “enforcement or administration.” Instead, as noted above, that provision states that “the creation of” all of Wis. Stat. § 227.11(2)(a)1.–3. first applies starting on the Act’s effective date. Act 21, § 9355(1). The initial-applicability provision therefore treats all of Wis. Stat. § 227.11(2)(a)3.’s terms—promulgation, enforcement, or administration—the same. All of them “first apply” to a rule proposed on or after June 8, 2011. Act 21, § 9355(1).

¶ 47. Further, OAG–04–17’s premise—that if a rule “could not be lawfully ‘promulgated’ now” it cannot be enforced—also finds no support in Wis. Stat. § 227.10(2m). OAG–04–17, ¶ 31. As discussed above, application of Wis. Stat. § 227.10(2m) to previously promulgated rules turns on whether the rule was “promulgated in accordance with” the rulemaking procedures in force when the rule was promulgated. Evaluating the enforceability of a pre-Act 21 rule based on the rule’s compliance with rulemaking procedures enacted *after* the rule was promulgated contravenes the text of Wis. Stat. § 227.10(2m), defies common sense, and turns the initial-applicability provision on its head. OAG–04–17 therefore is withdrawn for this additional reason.

CONCLUSION

¶ 48. In summary, neither Wis. Stat. § 227.11(2)(a)2. nor 3. alters any explicit legislative grant of agency rulemaking authority. If a statute explicitly authorizes rulemaking, that statutory language continues to control. Likewise, nothing in Act 21 altered an agency's ability to enforce existing, properly promulgated rules.

Sincerely,


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