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Attorney General J.B. Van Hollen  
114 East State Capitol  
Madison, WI 53707-7857

Re: Request for Formal Opinion

Dear General Van Hollen:

I write in my capacity as the Corporation Counsel for Juneau County to request the formal opinion of your office. The County is involved in comprehensive planning, which we anticipate will encourage more communities in Juneau County to adopt zoning and local enforcement of building codes. As communities do so, questions are being raised as to the authority of local communities to require local certifications or licensing of contractors. In my opinion, the Wisconsin Statutes pertaining to contractor certification are matters of statewide concern such that supplemental local regulations are unlawful. In this letter, I will explain the basis for my opinion.

## History

DEPT. JUSTICE-  
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As recently as 35 years ago, building codes and the regulation of the construction trades were fragmented and inconsistent among the local units of government of Wisconsin. There were differing building codes in each community. Some codes were written deliberately to exclude manufactured housing. There were questions of the relative safety of various codes in use. Variations among the codes were not always understandable. Because each community had its own code, it also issued its own licenses for the construction trades. For that reason, plumbers, electricians, heating contractors and carpenters often could work in just a few communities – and had limited competition within those jurisdictions. The construction industry was highly fragmented as the result of widely varying local regulations.

This changed in 1975 when the Legislature adopted the Uniform Dwelling Code, Chapter 404, Laws of 1975. That law created Subchapter II of Chapter 101, Wis. Stats. The Chapter 404 enacted sec. 101.60, Wis. Stats., which continues to provide:

101.60 Purpose. The purpose of this subchapter is to establish statewide construction standards and inspection procedures for one- and 2-family dwellings and to promote interstate uniformity in construction standards

by authorizing the department to enter into reciprocal agreements with other states which have equivalent standards.

### **State Certification of Contractors**

Since 1975, the Legislature has significantly expanded the scope of the one and two family code regulation system provided by Subchapter II. Most notably for the purposes of this request, in 1993 Wisconsin Act 126 the Legislature adopted sec. 101.654, Wis. Stats. The statute was originally adopted under the title "Contractor financial responsibility certification." Its original purpose was to require one- and two-family dwelling contractors to establish through state registration that the contractor was financially capable of constructing dwellings.

The contractor regulations were subsequently modified and augmented. 1995 Wisconsin Act 392 modified the law to provide that its applicability was limited to dwellings constructed on or after December 1, 1978. 1997 Wisconsin Act 39 made changes in the statute related to assuring that contractors complied with unemployment compensation contribution requirements. 2005 Wisconsin Act 200 made a major expansion of the statute to include continuing education requirements for contractors. 2007 Wisconsin Act 14 amended the statute to increase the biennial continuing education requirements from 6 to 12 hours.

The current language of the statute provides as follows:

101.654 Contractor certification; education.

(1)(a) Subject to par. (b), no person may obtain a building permit unless the person annually obtains from the department a certificate of financial responsibility showing that the person is in compliance with sub. (2).

(b) Paragraph (a) does not apply to an owner of a dwelling who resides or will reside in the dwelling and who applies for a building permit to perform work on that dwelling.

(c) 1. In this paragraph, "license" has the meaning given in s. 101.02 (21) (a).

2. The continuing education requirements under par. (a) and the rules promulgated by the department under sub. (1m) do not apply to any person who holds a current license issued by the department at the time that the person obtains a building permit if the work the person does under the permit is work for which the person is licensed.

(1m) (a) The department shall promulgate rules establishing continuing education requirements for persons seeking to obtain a building permit under sub. (1) (a).

(b) The rules promulgated under this subsection shall require all of the following:

1. Completion every 2 years of at least 12 hours of continuing education relevant to the professional area of expertise of the person seeking to obtain a building permit, approved by the department.

2. Attendance at one or more professional meetings or educational seminars designed for both building contractors and building inspectors.

3. For a person who does not hold a certificate of financial responsibility on April 11, 2006, successful completion of an examination developed by the department on the continuing education courses required under this subsection.

(c) The rules promulgated under this subsection may not require a person who holds a certificate of financial responsibility on April 11, 2006, to take an examination on the continuing education courses required under this subsection.

(cm) The rules promulgated under this subsection may not require a person to take continuing education courses, or to take an examination on continuing education courses, that are not relevant to that person's professional area of expertise.

(d) Subject to the continuing education requirements under pars. (b) and (c), the rules promulgated under par. (a) may specify different continuing education course requirements for persons who hold a certificate of financial responsibility on April 11, 2006, and for persons who do not hold a certificate of financial responsibility on April 11, 2006.

(e) The continuing education approved by the department under par. (b) 1. shall include courses offered by private organizations with whom the department contracts under s. 101.657. The department may approve courses that are offered by other states.

(2) An applicant for a certificate of financial responsibility shall provide to the satisfaction of the department proof of all of the following:

(a) That the applicant has in force one of the following:

1. A bond endorsed by a surety company authorized to do business in this state of not less than \$5,000, conditioned upon the applicant complying with all applicable provisions of the one- and 2-family dwelling code and any ordinance enacted under s. 101.65 (1) (a).

2. A policy of general liability insurance issued by an insurer authorized to do business in this state insuring the applicant in the amount of at least \$250,000 per occurrence because of bodily injury to or death of others or because of damage to the property of others.

(b) If the applicant is required under s. 102.28 (2) (a) to have in force a policy of worker's compensation insurance or if the applicant is self-insured in accordance with s. 102.28 (2) (b), that the applicant has in force a policy of worker's compensation insurance issued by an insurer authorized to do business in this state or is self-insured in accordance with s. 102.28 (2) (b).

(c) If the applicant is required to make state unemployment insurance contributions under ch. 108 or is required to pay federal unemployment compensation taxes under 26 USC 3301 to 3311, that the applicant is making those contributions or paying those taxes as required.

(2m) If an applicant wishes to use a bond under sub. (2) (a) 1. of less than \$25,000 to comply with sub. (2) (a), the applicant shall agree not to perform any work on a dwelling for which the estimated cost of completion is greater than the amount of the bond. The department shall indicate any restriction under this subsection on the certificate of financial responsibility issued under sub. (3).

(3) Upon receipt of the proof required under sub. (2) and the fee required by rules promulgated under s. 101.63 (2m), the department shall issue to the applicant a certificate of financial responsibility. A certificate of financial responsibility issued under this subsection is valid for one year after the date of issuance, unless sooner suspended or revoked.

(4) (a) A bond or insurance policy required under sub. (2) may not be canceled by the person insured under the bond or policy or by the surety company or insurer except on 30 days' prior written notice served on the department in person or by 1st class mail or, if the cancellation is for nonpayment of premiums to the insurer, on 10 days' prior written notice served on the department in person or by 1st class mail. The person insured under the bond or policy shall file with the department proof to the satisfaction of the department of a replacement bond or replacement insurance within the 30-day notice period or 10-day notice period, whichever is applicable, and before the expiration of the bond or policy. The department shall suspend without prior notice or hearing the certificate of financial responsibility of a person who does not file satisfactory proof of a replacement bond or replacement insurance as required by this subsection.

(b) A bond under sub. (2) (a) 1. shall be executed in the name of the state for the benefit of any person who sustains a loss as a result of the person insured under the bond not complying with an applicable provision of the one- and 2-family dwelling code or any ordinance enacted under s. 101.65 (1) (a), except that the aggregate liability of the surety to all persons may not exceed the amount of the bond.

(5) The department may revoke or suspend a certificate of financial responsibility if any of the following apply:

(a) The holder fails to comply with the continuing education requirements specified under subs. (1) and (1m).

(b) The holder engages in the construction of a dwelling without a permit required under this chapter.

(c) The holder is convicted of a crime related to the construction of a dwelling.

(d) The holder has been adjudged bankrupt on 2 or more occasions.

A review of the statute's provisions shows that it operates to forbid anyone from doing work on a one- or two-family dwelling (other than one they occupy) unless the person has a certificate issued by the Department of Commerce. The statutes prescribe the only requirements in the statutes for being certified as a contractor. These are validated by obtaining a certificate establishing one is qualified to operate as a contractor. To do so, the statute requires the contractor to have proof of financial capacity, have workers' compensation coverage, be current in unemployment compensation contributions, and comply with continuing education. The continuing education requirements are carefully integrated with parallel provisions governing skilled trades which have their own continuing education requirements, see, subsec. 101.654 (1)(c) 1., Wis. Stats., The cross-reference in that subdivision is to sec. s. 101.02 (21) (a)., Wis. Stats., which enumerates the specific trades and occupations licensed under the other provisions of Ch. 101, Wis. Stats. These other statutes create separate continuing education requirements.

## Home Rule Versus Statewide Concerns

The issue presented is whether counties, cities, villages or towns may require contractors certified by the State to obtain a local certification or license to operate within the local unit's jurisdiction.

In the case of counties, the question is whether there is statutory authority to require certification or licenses. Counties have only those functional powers which the Legislature has conferred upon them, State ex rel. Sell v. Milwaukee County, 65 Wis.2d 219, 224, 222 N.W.2d 592, 594 - 595 (1974). The local control granted to counties may not be exercised in a manner which conflicts with state law, Jackson County v. State, Dept. of Natural Resources, 293 Wis.2d 497, 518-519, 717 N.W.2d 713, 724 (2006). The statutes empower counties to license a few enumerated occupations such as transient merchants, secondhand car dealers or peddlers, sec. 59.55 (3) – (5), Wis. Stats. There appears to be no grant of authority permitting counties to regulate contractors. Since counties lack functional home rule, the analysis ends there.

In the case of cities, villages and towns exercising village powers, the question is whether their home rule authority authorizes them to enact ordinances providing for local licensing of contractors, or imposing additional requirements beyond those of sec. 101.654, Wis. Stats.

The Wisconsin Constitution authorizes local units of government to exercise plenary legislative discretion:

Section 3. (1) Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.

Wisconsin Constitution, Art. 11, § 3

Since the adoption of constitutional home rule, there has been an ongoing tension between the role of the State in assuring uniformity and that of local communities in meeting unique needs and circumstances. The delineation of state and local roles has emerged through case law over the decades.

Often tensions arise where, as here, some state regulation exists and a city or village would like to enact supplemental rules. It has been held that the existence of some state regulation does not necessarily preclude local regulation, Wisconsin Ass'n of Food Dealers v. City of Madison, 89 Wis.2d 311, 278 N.W.2d 481 (Ct.App. 1979).

In the Food Dealers case, the City of Madison adopted an ordinance mandating that all retailers selling milk in containers of one gallon or more in size make it available in both returnable as well as non-returnable containers. The plaintiffs sued seeking an injunction against the ordinance on the ground that it purported to regulate an industry which state law comprehensively regulated. The Court of Appeals agreed that where the

Legislature has adopted an enactment of statewide concern, the municipality may not act on the basis of its constitutional home rule authority:

As the statewide concern is paramount, the power of the municipality to adopt an ordinance in this area must come from a source other than art. XI, sec. 3, of the Wisconsin Constitution. *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis.2d 518, 530-531, 271 N.W.2d 69 (1978); *State ex rel. Michalek v. LeGrand*, 77 Wis.2d 520, 529, 253 N.W.2d 505 (1977). “The Constitutional authority of cities only extends to local affairs and does not cover matters of statewide concern.” *Plymouth v. Elsner*, 28 Wis.2d 102, 106, 135 N.W.2d 799, 801 (1965).

Food Dealers, 89 Wis.2d 311, 316-317, 278 N.W.2d 481, 484 (Wis.App., 1979)

The Food Dealers court went on to conclude that while the City was barred from exercising its constitutional home rule power, the City was authorized to adopt the ordinance pursuant to the City’s statutory power to regulate industry, contained in sec. 62.11 (5), Wis. Stats., which reads:

(5) Powers. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.

Where there is statutory authority for local action, the city or village may rely on that grant of authority unless the exercise of that power is inconsistent with state law. Food Dealers, 89 Wis.2d 311, 317, 278 N.W.2d 481, 484 (Ct.App., 1979).

For that reason, one of your predecessors has held that the grant of power in sec. 62.11 (5) allowing cities to issue licenses does not allow local units to enact ordinances providing for supplemental regulation of real estate professionals, 44 Op.Atty.Gen. 146 (1955). Municipalities may not rely on their statutory powers to vary from the state scheme for alcohol regulation, State ex rel. Martin v. Barrett, 248 Wis. 621, 628, 22 N.W.2d 663, 667 (1946).

It has also been held that the state’s authority to authorize application of chemical weed-killing treatments of lakes cannot be overridden by contrary local ordinances, Wisconsin's Environmental Decade, Inc. v. Department of Natural Resources, 85 Wis.2d 518, 271 N.W.2d 69 (1978). In the Environmental Decade case, the City of Madison adopted local ordinances which purported to forbid application of lake treatments that the DNR had explicitly permitted. Rejecting the City ordinance, the Wisconsin Supreme Court stated:

Further, it should be noted that pursuant to sec. 144.025(2)(i), Stats., the legislature has expressly sanctioned the chemical treatment of aquatic nuisances under the control of the DNR. A city cannot “ ‘ . . . lawfully forbid what the legislature has expressly licensed, authorized or required, or authorize what the legislature has expressly forbidden.’ ” *Fox v. Racine*, 225 Wis. 542, 545, 275 N.W. 513, 514 (1937). Therefore, not only is sec. 144.025(2)(i) specific authority for the proposition that the DNR possesses the power to issue chemical treatment permits over the objections of the City of Madison, it is also persuasive evidence for the view that Madison may not legitimately forbid these legislatively authorized treatments in any case, regardless of the extent of the DNR's control.

Wisconsin's Environmental Decade, 85 Wis.2d 518, 529, 271 N.W.2d 69, 74 (1978).

In 1984, the Wisconsin Supreme Court reviewed the issue of the tension between home rule and uniform state regulation. The Court laid out a framework for analyzing these issues in Anchor Sav. & Loan Ass'n v. Equal Opportunities Com'n, 120 Wis.2d 391, 355 N.W.2d 234 (1984).

In the Anchor Savings & Loan case, the City of Madison's local equal opportunity commission found that the plaintiff financial institution had discriminated against a loan applicant on the basis of marital status, in violation of the City's non-discrimination ordinance. The Supreme Court began by reviewing the allocation of power between the state and its local governments:

This court considered the issue of the respective powers of the state and municipalities on the subject of legislative enactment in *State ex rel. Michalek v. LeGrand*, 77 Wis.2d 520, 527, 253 N.W.2d 505 (1977), and held that three areas have been outlined as: “(1) Those that are ‘exclusively of statewide concern’; (2) those that ‘may be fairly classified as entirely of local character’; and (3) those which ‘it is not possible to fit ... exclusively into one or the other of these two categories.’ ” (Footnotes omitted.) Madison EOC and the city concede that the regulation of credit is a matter of statewide concern, as well as local concern.

Anchor Sav. & Loan, 120 Wis.2d 391, 394-395, 355 N.W.2d 234, 236 - 237 (1984)

Reviewing the case at bar, the Supreme Court concluded that the question of lending practices by financial institutions fell into the first category, one of exclusively statewide significance. State statutes governing financial institutions demonstrated a comprehensive approach to regulation of those institutions. For that reason, the Supreme Court held:

The regulation and control of Anchor's lending practices has been preempted by the state of Wisconsin in ch. 215, Stats., by establishing a comprehensive and all-encompassing scheme regarding savings and loan association practices, and therefore the Madison EOC was without

authority to review the refusal of Anchor to grant a loan to Roy U. Schenk on the basis of marital status discrimination.

Anchor Sav. & Loan, 120 Wis.2d 391, 401-402, 355 N.W.2d 234, 240 (1984)

The Anchor Savings and Loan case established a four-criteria test to analyze whether local units of government may exercise their home rule power once a matter has been determined to be state-wide concerns:

- (1) whether the legislature has expressly withdrawn the power of municipalities to act;
- (2) whether the ordinance logically conflicts with the state legislation;
- (3) whether the ordinance defeats the purpose of the state legislation; or
- (4) whether the ordinance goes against the spirit of the state legislation.

Anchor Savings & Loan, 120 Wis. 2d at 397, 355 N.W.2d at 238 (1984).

Applying these criteria, the Court of Appeals held in 1987 that cities could not use their home-rule powers to create a position of public safety officer which combined the authority of fire fighters and police officers, Local Union No. 487, IAFF AFL-CIO v. City of Eau Claire, 141 Wis.2d 437, 443-446, 415 N.W.2d 543, 545-546 (Ct.App.1987).

### **Analysis Of Contractor Certification Statute And Home Rule**

Local supplemental regulation of contractors is invalid because the Legislature has withdrawn the power of communities to act, it logically conflicts with state legislation, defeats the purpose and spirit of the state legislation and purports to prohibit what the state has authorized. Local regulations represent a return to the pre-1975 era of fragmented and inconsistent local regulations of the building industry.

First, it is clear that the statutes make the one- and two-family dwelling code a matter of statewide concern. Section 101.60, Wis. Stats. tells us that the purpose of Subchapter II of Chapter 101 is "The purpose of this subchapter is to establish statewide construction standards and inspection procedures for one- and 2-family dwellings and to promote interstate uniformity in construction standards by authorizing the department to enter into reciprocal agreements with other states which have equivalent standards." The statute plainly provides for statewide uniformity, identifying the regulations in the Subchapter as a matter of statewide concern. The statute even provides that the Department of Commerce is to promote uniformity not only within Wisconsin, but with other states.

If the Legislature intended that Wisconsin achieve regulation of the construction industry which would be uniform even with other states, it certainly is logical to assume the Legislature has directed that there be one set of rules within the State. For that reason, the plain language of sec. 101.60, Wis. Stats., establishes that the dwelling code is a matter of statewide concern. It would appear, therefore, that the Legislature has acted to withdraw the general home rule power of localities to regulate contractors. Section



101.654, Wis. Stats., provides for state certification and continuing education requirements for contractors. Under these requirements, no person may apply for a building permit unless they meet the requirements of the statute.

If a local unit of government adopts a supplemental licensing scheme, that local unit frustrates the intent of the Legislature that there be a statewide regulatory scheme for the construction of one- and two-family dwellings. Contractors who meet all the qualifications required by the State will be denied the right to build within localities which adopt supplemental regulations. The State will return to the era in which local units can adopt inconsistent local regulations which restrict access to the local market – and competition.

For that reason, supplemental regulation of contractors conflicts with the specific provisions of the statutes and the broader purpose enumerated in sec. 101.60, Wis. Stats. The Legislature specified the limits of municipal regulation by enacting a provision in Subchapter II, sec. 101.65, Wis. Stats. That section provides, in pertinent part:

101.65 Municipal authority. Except as provided by s. 101.651<sup>1</sup>, cities, villages, towns and counties: (...) (1m) May not issue a building permit to a person who is required to be certified under s. 101.654 unless that person, on applying for a building permit, produces a certificate of financial responsibility issued by the department showing that the person is in compliance with s. 101.654.

Local regulation of contractors would take Wisconsin back to an era which the Legislature has sought wisely to put behind us. If it is in the public interest to adopt further regulations on contractors, that decision must be made by the Legislature through amendment of sec. 101.654, Wis. Stats., or by the Department of Commerce through the exercise of its rule-making authority.

I appreciate your guidance in this important matter.

Very truly yours,



Mark B. Hazelbaker  
Juneau County Corporation Counsel

cc: County Board Chairperson Alan K. Peterson

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<sup>1</sup> This section relates to the authority of small municipalities and is not material to this analysis.