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March 8, 2016

Commissioner Tom Mishefske
Department of Neighborhood Services
841 North Broadway, Room 104
Milwaukee, WI 53202

RE: Legal Impact of 2015 WISCONSIN ACT 176 on DNS Enforcement

Dear Commissioner Mishefske:

On February 18, 2016, you requested the opinion of this office concerning what impact 2015 WISCONSIN ACT 176 has on the enforceability of certain parts of the Milwaukee Code of Ordinances ("MCO") under the purview of the Department of Neighborhood Services ("DNS") of the City of Milwaukee ("City"). For the reasons discussed below, it is the opinion of this office that a reviewing court would likely find the following parts of the MCO to be impacted in the manner indicated as a result of the laws enacted by 2015 WISCONSIN ACT 176:

- § 80-12. Chronic Code Violation Nuisances.
  - Graduated reinspection fees on residential rental properties limited
- § 200-33-48. Reinspection Fee.
  - Graduated reinspection fees on residential rental properties limited
- § 200-51.5. Property Recording.
  - Only allowed to require rental property owner's name and contact person's name, address, and phone number.
- § 200-51.7. Vacant Building Registration.
  - Only allowed to require rental property owner's name and contact person's name, address, and phone number.
- § 200-52. Certificate of Code Compliance.
  - Preempted in its entirety.
- § 200-53. Residential Rental Certificate.
  - Preempted in its entirety.

Legislative History

2015 Assembly Bill 568 was introduced on December 4, 2015. As introduced, it would have significantly impacted DNS enforcement programs. After numerous proposed

amendments, the assembly adopted Substitute Amendment 2 on February 11, 2016. The senate concurred on February 16, 2016, and the governor signed the bill on February 29, 2016. The law, enacted as 2015 WIS. ACT 176, was effective March 2, 2016.

Analysis

The statutory changes that will affect DNS enforcement are listed below. Each section below describes the ordinances that are impacted by the state law change.

1. **LIMITATION ON REQUIRED INSPECTIONS**

   No ordinance can require inspection of a rental property or rental unit unless at least one of three specific exceptions applies. The exceptions are: 1) upon a complaint by any person, 2) as part of a program of regularly scheduled inspections conducted in compliance with s. 66.0119, as applicable, or 3) as required under state or federal law. Wis. Stat. § 66.0104(2)(e)1.

   DNS performs certain inspections, including annual fire prevention and fire escape inspections, permitted inspections for various trades (electrical, plumbing, etc.), occupancy permits, and cross-connection inspections. Those inspections are fall under the state-required exception; however, other City ordinances require inspections of certain properties without state authority in the following instances:

   - Every 6 months, if the building is vacant. MCO § 200-51.7-7.
   - Before issuing a certificate of code compliance. MCO § 200-52-6.
   - Before issuing a residential rental certificate. MCO § 200-53-5.

   Vacant buildings and those subject to residential rental certificates are inspected as part of a regular schedule (six months and one/four years), so the regularly-scheduled exception applies. The certificate of code compliance program does not have regular inspections because the certificate indicates compliance with the code as it relates to the exterior of the building. Despite possibly surviving this state law change, it is important to note that the residential rental certificate and code compliance programs are preempted under other grounds (see below).

2. **LIMITATIONS ON FEES**

   No ordinance may charge a fee for conducting an inspection of a residential rental property unless 1) the amount of the fee is uniform for residential rental inspections and 2) the fee is charged at the time that the inspection is actually performed. Wis. Stat. § 66.0104(2)(e)2. In addition, no ordinance may charge a fee for a subsequent reinspection of a residential rental property that is more than twice the fee charged for an initial reinspection. Wis. Stat. § 66.0104(2)(e)3. Finally, no ordinance may impose an occupancy or transfer of tenancy fee on a rental unit. Wis. Stat. § 66.0104(2)(f).

   DNS charges various fees for conducting inspections, and until this law was in place the only limitation on those fees was that they must "bear a reasonable relationship to the service for which the fee is imposed." Wis. Stat. § 66.0628(2). The uniformity

provision and timing provisions should not be issues because current DNS inspection fees do not vary among rental properties and fees are assessed after inspections occur.

However, the double-fee provision will impact the use of graduated reinspection fees. Currently, reinspection fees start as low as $60 and go as high as $750 in some instances. MCO §§ 80-12 and 200-33-48. Such ordinances authorize reinspection fees of $200, $350, $500, or $750 at times, but DNS may charge no more than $120 at any time that a higher fee would have been charged. Eventually, these ordinances should be changed to reflect a fee structure that complies with state law, but until that time this office can only defend a reinspection fee assessment of up to $120.

The new law applies exclusively to residential rental properties. That is, an owner-occupant could not cite the state law in an effort to fight the City's graduated reinspection fee schedule because the state law does not apply to such a building. The same logic applies to commercial and industrial buildings. This arrangement theoretically creates the possibility of separate reinspection fee schedules for residential rental properties and all other properties. Nonetheless, if DNS wishes to create separate reinspection fee schedules depending on whether the property is a residential rental property, our office would need to perform additional research to ensure such a proposal would pass constitutional muster.

The state law also does not limit the fee for an initial reinspection of a residential rental property. That is, the City could perform an initial inspection, set a new fee for the first **reinspection**, and only then be limited to twice the amount that reinspection fee. Wis. Stat. § 66.0104(2)(e). As long as no ordinance requires DNS to inspect the property, and the total revenues from reinspection fees do not exceed the total cost of the program, there is no limit on the fee charged for an initial reinspection. *Rusk v. City of Milwaukee*, 2007 WI App 7, ¶¶ 14-15, 298 Wis. 2d 407, 416, 727 N.W.2d 358, 363. No statute limits the City from assessing a fee for an initial inspection, but our office would need to perform additional research to ensure such a proposal would pass constitutional muster if DNS wishes to assess fees for initial inspections.

Therefore, this state law change limits the current reinspection fee amounts for residential rental properties, and any changes to the reinspection fee schedule should be reviewed by this office to ensure statutory and constitutional validity.

3. **RESTRICTIONS ON REGISTRATION, CERTIFICATION, AND LICENSING**

No ordinance may require that a rental property or rental unit be certified, registered, or licensed, except an ordinance may require that a rental unit be registered if the registration consists only of providing the name of the owner and an authorized contact person and an address and telephone number at which the contact person may be contacted. Wis. Stat. § 66.0104(2)(e)4. No ordinance may require a residential rental property owner to register or obtain a certification or license related to owning or managing the residential rental property, unless it applies uniformly to all residential rental property owners, including owners of owner-occupied rental property or requires that a landlord be registered if the registration consists only of

providing the name of the landlord and an authorized contact person and an address and telephone number at which the contact person may be contacted. Wis. Stat. § 66.0104(2)(g).

The two semi-repetitive provisions put the following limitations on a City's ability to regulate rental properties: 1) no licensing, 2) no certification, and 3) no registration of any information beyond the owner's name, a contact person's name, address, and phone number. While the provisions of Wis. Stat. § 66.0104(2)(g) provide more exceptions that appear to allow certification or licensing of rental properties under certain circumstances, paragraph (g) is made obsolete because paragraph (e)4. prohibits the same thing but with fewer exceptions. That is, an ordinance designed to satisfy the licensing and certification exceptions in paragraph (g) is nonetheless preempted by paragraph (e)4. Paragraph (g) thus appears superfluous.

Two ordinances currently require certification of rental properties: the certificate of code compliance program (MCO § 200-52) and the residential rental certificate (MCO § 200-53). This state law preempts the provisions of the certificate of code compliance program that relate to any rental property, and the rest of the code compliance program is preempted for reasons stated below. This state law also preempts the provisions of the residential rental certificate in their entirety because no ordinance can require that rental property be certified. Wis. Stat. § 66.0104(2)(e)4.

One ordinance requires registration of rental properties: the property recording program (MCO § 200-51.5). This program can remain in effect as long as it is amended to only require the owner's name, a contact person's name, address, and phone number.

Other ordinances requires registration of vacant buildings (MCO § 200-51.7) and residential properties pending foreclosure (MCO § 200-22.5). To address any possible issues, it would be best to specifically exempt rental properties from registration requirements under those ordinances. Alternatively, the ordinances would continue to be enforceable under all circumstances if amended to only require the owner's name, a contact person's name, address, and phone number.

4. **CERTAIN TIME-OF-SALE REQUIREMENTS PROHIBITED**

No ordinance may restrict the ability to sell or otherwise transfer title to or refinance a property, purchase or take title to real property, or take occupancy of the property by requiring the owner or an agent of the owner to take certain actions with respect to the property before, during, or after the conveyance or occupancy takes place unless a federal or state requirement is in place. Wis. Stat. § 706.22(2). The phrase "take certain actions with respect to the property" includes such actions as having an inspection made by the City; making improvements or repairs; removing junk or debris; mowing or pruning; performing maintenance or upkeep activities; weatherproofing; upgrading electrical systems; paving; painting; repairing or replacing appliances; replacing or installing fixtures or other items; and actions

relating to compliance with building codes or other property condition standards. Wis. Stat. § 706.22(1)(a).

In July 2015, the state preempted ordinances that impose restrictions on the sellers of real estate. 2015 WIS. ACT 55, § 4595C. Certain City ordinances impose requirements on the *purchasers* of real estate (not the sellers) so the July 2015 state law change did not affect those ordinances. However, this state law change expands its application to the purchasers or real estate and the taking of occupancy.

Several ordinances impose time-of-sale duties on the purchasers of real estate, but only those duties related to inspections, repairs, upkeep, etc. are preempted by state law. The certificate of code compliance program is entirely preempted because it requires purchasers to get an inspection of the property, pay a fee, and prove code compliance. MCO § 200-52-5. However, the city can continue to require property recording data within fifteen days after acquisition because that type of action is not prohibited by state law.

5. **SPRINKLER SYSTEMS ORDINANCES MUST CONFORM TO STATE LAW**
   Any ordinance regulating sprinkler systems must be in strict conformity with the state law. 2015 WIS. ACT 176, §§ 13-16. The ordinances already comply with this provision. MCO Ch. 251.

6. **NOTICE OF HISTORIC DESIGNATION**
   An owner of a building or structure must receive notice of a public hearing before the building or structure may be designated as historic, and any designation is appealable to the common council. 2015 WIS. ACT 176, §§ 6-7M. The ordinances already comply with this provision. MCO § 320-21-9.

If you wish to pursue alternatives to the programs that have been affected by 2015 WIS. ACT 176 or desire any further guidance on this matter, please do not hesitate to contact this office.

Very truly yours,

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1053-2016-380/225945

c: Mayor Tom Barrett
Jim Owczarski
Mark Nicolini