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February 16, 2018

Jennifer C. Gonda
Superintendent
Milwaukee Water Works
841 N. Broadway, Suite 409
Milwaukee, WI 53202

Re: Lead Service Line Replacement Mandate for Child Care Centers

Dear Ms. Gonda:

By letter dated January 9, 2018, you requested a legal opinion regarding whether the City may, by ordinance, mandate that a child care center[1] replace its lead service line even if the replacement is not due to a leaking lead service line or otherwise currently required by Milwaukee Code of Ordinances ("MCO") § 225-22.5 ("Lead Service Line Replacement Ordinance"). For the reasons explained below, it is our opinion that the City could require by ordinance that licensed child care centers replace the privately-owned portion of their lead service lines.

City ordinances do not currently require the replacement of lead service lines under all circumstances. MCO § 225-22.5-3 requires that the privately-owned portion of a lead service line shall be replaced under the following circumstances: (1) where a leak is discovered on either the privately-owned portion or the utility-owned portion; and (2) when the utility-owned portion is replaced on either a planned or emergency basis. The Lead Service Line Replacement Ordinance includes not only the requirements for full replacement but also a funding mechanism to assist property owners in complying with the ordinance's requirements.

The City has received from the Wisconsin Department of Natural Resources ("DNR"), federally-funded Safe Drinking Water Loan Program ("SDWLP") Principal Forgiveness funds for replacing lead service lines on private property for projects that result in full replacements. A significant portion of the City's

[1] We refer to "child care centers" as child care centers licensed by the Wisconsin Department of Children and Families under Wis. Stat. §§ 48.65-67.

SDWLP funds are allocated to full lead service line replacements at licensed child care centers, under which the child care center would not incur any of the costs of replacement. The City, through its contractors, has replaced lead services at nearly 150 licensed child care centers through this program. However, you have indicated that some of the remaining licensed child care centers (or property owners leasing to licensed child care centers) have not yet consented to the full replacement of their lead service.

I. STATE LAW DOES NOT PREEMPT THE CITY FROM REQUIRING CHILD CARE CENTERS TO REPLACE THEIR LEAD SERVICE LINES.

The question at hand involves three areas of comprehensive statewide regulation: the state plumbing code; the state childhood lead poisoning prevention program; and child care center licensing statutes and regulations. Accordingly, any municipal regulation on this issue must be consistent with state statutes and regulations. *DeRosso Landfill Co. Inc. v. City of Oak Creek*, 200 Wis. 2d 642, 651, 547 N.W.2d 770 (1996). "Where 'the state has entered the field of regulation, municipalities may not make regulation inconsistent therewith' because 'a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required, or authorize what the legislature has expressly forbidden.'" *Id.* (quoting *Fox v. Racine,* 225 Wis. 542, 545, 275 N.W. 513 (1937) (citations omitted). For the reasons explained below, it is our opinion that a requirement that a child care center replace the privately-owned portion of the lead service lines would be consistent with state law.

The test for whether the state has withdrawn the power of the municipality to act, or preempted the matter, was set forth in *Anchor Savings & Loan Association v. Equal Opportunities Commission*:

> (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.

120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984). "Should any one of these tests be met, the municipal ordinance is void." *DeRosso*, 200 Wis. 2d at 652.

A. <u>State Plumbing Code</u>

The state plumbing code applies statewide and is uniform in application. Wis. Stat. § 145.13. A municipality "may not enact an ordinance for the design,

construction, installation, supervision, maintenance and inspection of plumbing which is more stringent than the [state plumbing code], except as specifically permitted by rule." Wis. Admin. Code § SPS 382.03(2).

Under the state plumbing code, existing plumbing facilities, including lead service lines, are allowed to remain unless the existing plumbing creates a health hazard. Specifically, § SPS 382.22(2) provides, in pertinent part:

> EXISTING SYSTEMS. (a) Except as specified in par. (b), any existing plumbing system may remain and maintenance continue if the maintenance is in accordance with the original system design and...[t]he plumbing system was installed in accordance with the code in effect at the time of installation.
>
> (b) When a hazard to life, health or property exists or is created by an existing system, that system shall be repaired or replaced.

The City enacted the Lead Service Line Replacement Ordinance consistent with SPS § 382.22(2) and pursuant to the City's authority to regulate connections to the public water supply mains under Wis. Stat. § 281.45[2] and to act for the public health, safety, and welfare under Wis. Stat. § 62.11(5). In so doing, the Common Council, based on a lengthy and detailed legislative record, made specific findings that lead service line disturbances, particularly through partial replacement of the lead service line, pose significant public health and safety risks. MCO § 225-22.5-1-a.

Similarly, in our opinion, under Wis. Stat. §§ 62.11(5) and 281.45, the City has authority to mandate that licensed child care centers replace the privately-owned portions of their lead service lines provided that the Common Council finds that the continued use of lead service lines at child care centers poses a health hazard. Such findings should be supported by a detailed legislative record.

The required legislative record likely already exists or in any case should not be difficult to compile. For example:

- According to the Wisconsin Department of Health Services ("DHS"): "Lead in water contributes about 10 to 20 percent of the total lead

[2] Wis. Stat. § 281.45 provides, in pertinent part: "To assure preservation of public health, comfort and safety, any city...having a system of waterworks or sewerage, or both, may by ordinance require buildings used for human habitation and located adjacent to a sewer or water main, or in a block through which one or both of these systems extend, to be connected with either or both *in the manner prescribed...*" (emphasis added).

exposure for the average young child. Infants and young children may consume large quantities of water in formula and other liquids...Because of the volume consumed, formula made with lead-contaminated water is especially dangerous to infants." DHS, *Wisconsin Childhood Lead Poisoning Prevention and Control Handbook for Local Public Health Departments*, ("DHS Handbook") Rev. November 2014, at 9.2.

- According to the U.S. Environmental Protection Agency ("EPA"): "Young children, infants, and fetuses are particularly vulnerable to lead because their behavior patterns typically lead to higher exposures, they absorb a greater proportion of the lead they inject than adults, physical and behavioral effects of lead occur at lower exposure levels in children than in adults, and the central nervous system of children undergoes rapid development and impacts during this period can have lifelong impacts. EPA estimates that drinking water can make up 20 percent or more of a total exposure to lead. In some circumstances, infants who consume mostly mixed formula can receive 40 to 60 percent of their exposure to lead from drinking water." U.S. Environmental Protection Agency, Office of Water, *Lead and Copper Rule Revisions White Paper*, October 2016, at 17.

- The City's Lead Poisoning Prevention and Control ordinance declares that "[l]ead is especially harmful to the developing brains of fetuses and young children." MCO § 66-20-2.

- The Wisconsin Childhood Lead Poisoning Prevention Program targets lead poisoning and lead exposure of children under six years of age. Wis. Stat. §§ 254.11-254.181.

- The DNR's private lead service line replacement funding program, *supra* at 1, does not allow program funds to be used for commercial properties, unless the building also contains a residence, but makes an express exception to allow for funding private lead service line replacements at licensed child care centers. *See* https://dnr.wi.gov/Aid/documents/EIF/leadServiceLineFunding.html (last accessed on February 14, 2018).

With regard to preemption by the state plumbing code, an ordinance that requires replacement of lead service lines at child care centers based on a determination that the continued use of lead service lines at child care centers poses a health hazard would not, in our opinion, fail any part of the *Anchor Savings* test. First, the state has not expressly withdrawn municipalities' ability to act on plumbing matters; municipal ordinances must instead be consistent with the plumbing code. § SPS 382.03(2). Second, the proposed requirement would not logically conflict

with state statutes or regulation; § SPS 382.22(2) expressly contemplates municipal restrictions to address health hazards even in existing plumbing. *Metropolitan Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee*, 2011 WI App 45, ¶ 84, 332 Wis. 2d 459, 508 (citation omitted) (An ordinance "logically conflicts with state legislation if it 'attempt[s] to authorize…what the legislature has forbidden… [or] forbid[s] what the legislature has expressly licensed, authorized, or required.'"). For the same reason, the proposed requirement would not defeat the purpose of the legislation (part 3) or violate the spirit of the legislation (part 4).

There are conflicting statements in the materials referenced above about the roles that lead-in-drinking water and lead service lines, in particular, play in contributing to lead poisoning of children. For example, DHS has publicly stated that "[t]he major source of lead in Wisconsin children's environment is deteriorated lead-based paint." DHS Handbook, at 7.2. DHS has also claimed that "[l]ead contaminated water is rarely identified as a source of lead for Wisconsin children, where the primary source is deteriorated lead-based paint." DHS Handbook, at 9.2 ("However, to rule out lead[3] as a source of exposure, water testing can be done through the Wisconsin State Laboratory of Hygiene (WSLH).") The DHS Handbook also states:

> The most common source of contamination of drinking water is lead in plumbing solder. Contamination from lead pipes, lead connectors, and lead service lines is less frequent.

Id. at 3.10.

Nonetheless, it is the Common Council's role as the legislative body to weigh the competing evidence to determine whether the continued use of lead service lines at child care centers constitutes a health hazard. *Safe Water Ass'n v. City of Fond du Lac*, 184 Wis. 2d 365, 375, 516 N.W.2d 13 (Ct. App. 1994) ("The court may not reweigh the facts found by the legislative body…"). The Common Council's exercise of the police power will withstand judicial scrutiny provided that the measure is reasonably related to any legitimate municipal objective, i.e., the protection of the health and safety of children under the age of six who are most vulnerable to lead poisoning and its effects. *Metropolitan Milwaukee*, 2011 WI App, at ¶ 51; *Froncek v. City of Milwaukee*, 269 Wis. 276, 69 N.W.2d 242 (1955) (City's resolution providing for fluoridation of water supply is a reasonable and valid exercise of the police power).

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[3] Presumably the reference to "lead" here should instead be to "water."

We further note that on January 23, 2018, the Wisconsin legislature forwarded to the governor for signature Senate Bill 48. This legislation would authorize the use of water utility ratepayer funds for full lead service line replacement provided that, among other requirements, the municipality adopts an ordinance requiring all properties to replace the privately-owned portion of the lead service line. If SB 48 becomes law, this legislation will make very difficult any potential argument that the state plumbing code preempts or restricts a municipality's authority to require full lead service line replacement at any property within its jurisdiction.

B. <u>State Lead Poisoning Prevention Program</u>

We have found nothing in the statutes and administrative rules governing the state's lead poisoning prevention program that would lead us to conclude that a requirement that child care centers replace their lead service lines would conflict with or otherwise be preempted by state law.

Wisconsin statutes and DHS administrative rules provide for a statewide lead poisoning prevention and control program. Wis. Stat. §§ 254.11 to 254.181; Wis. Admin. Code §§ DHS 163, 181-82. Despite this comprehensive statutory and regulatory scheme, the legislature has not expressly withdrawn the power of municipalities to act on lead poisoning prevention. In fact, Wis. Stat. § 254.154 declares:

> This subchapter does not prohibit any city, village, town or other political subdivision from enacting and enforcing ordinances establishing a system of lead poisoning or lead exposure control that provides the same or higher standards than those set forth in this subchapter.

Moreover, we find nothing in the state's comprehensive statutory and regulatory scheme with which the proposed requirement would logically conflict. In an opinion dated October 2, 2001, this office opined that the legislature, through this comprehensive statutory scheme, has preempted any authority that a school district may have to implement rules requiring lead screening of children. 2001 CAO 495, 497 (copy attached). We specifically cited the statute sections that authorized the Wisconsin Department of Health and Family Services, now DHS, to promulgate rules regarding lead screening recommendations and requirements for children and that prohibited the state agency from delegating this rulemaking authority. *Id.*

However, unlike lead screening requirements, the relevant statutes, §§ 254.11-254.181, do not address lead service lines. The statutes do contemplate lead in drinking water as a potential source of lead poisoning. For example, "lead investigation" is defined as "a measure or set of measures designed to identify the

presence of lead or lead hazards, including examination of painted or varnished surfaces, paint, dust, water and other environmental media." Wis. Stat. § 254.11(8s). Under this statutory framework, as we have advised the Milwaukee Health Department, where the department, through a lead investigation of a child's dwelling or premises[4] under Wis. Stat § 254.166, determines that a lead service line constitutes a "lead hazard" or an "imminent lead hazard," the department is authorized to order the owner to replace the lead service line. There does not appear to be anything in this regulatory framework that would conflict with a requirement that child care centers replace their lead service lines.

C. Child Care Center Statutes and Rules

It is our opinion that a requirement that child care centers replace their lead service lines would not conflict with or be preempted by the statutes and administrative rules governing child care centers.

Child care centers are licensed and regulated by the Wisconsin Department of Children and Families ("DCF"). Wis. Stat. §§ 48.65-48.67. With certain exceptions, no person may provide child care for four or more children under the age of seven for less than 24 hours per day unless the person is licensed by DCF. Wis. Stat. § 48.65.

DCF regulations break down licensed child care centers into "family child care centers," regulated by Wis. Admin. Code ch. DCF 250, and "group child care centers," regulated by ch. DCF 251. A family child care center is defined as "a facility where a person provides care and supervision for less than 24 hours a day for at least 4 and not more than 8 children who are not related to the provider." § DCF 250.03(9). A group child care center refers to a facility where nine or more children receive child care. § DCF 251.03(13).

The statues and regulations grant no authority to municipalities to license child care centers. In a City Attorney opinion dated March 30, 1977, the City Attorney opined that municipalities are preempted from regulating day care centers and therefore the City could not enact an ordinance prohibiting the employment of certain individuals in child care centers. 1977 CAO 353.

Further, for a subset of child care centers, a family child care center operated in a premises actually used as a residence, the legislature has expressly withdrawn municipal authority to act, though there is some question whether this provision applies beyond local zoning regulations. Thus, Wis. Stat. § 66.1017 provides in pertinent part:

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[4] "Premises" is defined, in part, as "[a]n educational or child care facility…that provides services to children under 6 years of age."

> (2) No municipality may prevent a family child care home from being located in a zoned district in which a single-family residence is a permitted use. **No municipality may establish standards or requirements for family child care homes that are different from the licensing standards established under s. 48.65.** This subsection does not prevent a municipality from applying to a family child care home the zoning regulations applicable to other dwellings in the zoning district in which it is located. (emphasis added).

Wisconsin Stat. § 66.1017 defines "family child care home" as a "*dwelling* licensed as a child care center by [DCF] under s. 48.65, where care is provided for not more than 8 children." (emphasis added). In a City Attorney opinion dated May 5, 2004 relating to Common Council File No. 031244, this office opined that it was reasonable and defensible to interpret § 66.1017 as applying only to a premises that is actually used as a residence. In any case, for the reasons explained below, a requirement that child care centers replace their lead service lines would seem to be consistent with the licensing standards applicable to all child care centers.

DCF rules contain detailed regulations regarding the physical plant and equipment at licensed child care centers. §§ DCF 250.06, 251.06. While the regulations do not address water service lines, the regulations obligate child care centers to comply with applicable building codes, including the plumbing code. Wis. Admin. Code § DCF 250.06(1)(a) provides:

> Family child care centers located in a building that is not a one or 2-family dwelling shall conform to the applicable Wisconsin commercial building codes.

It follows that family child care centers located in one or two-family dwellings must comply with the uniform residential dwelling code. Wis. Stat. § 101.61. The regulation governing group child care centers, DCF § 251.06, contains somewhat different language:

> The building in which a center is located shall comply with applicable state and local building codes. The licensee shall maintain a report of inspection of the building, which specifies that the building meets the applicable Wisconsin commercial building codes for use as a group child care center.

Whether a child care center is subject to the residential dwelling code or the commercial building code, the center is subject to the state and local plumbing code. *See* § SPS 325.01(1)[5] and § SPS 361.04(12)[6], respectively. The City's Lead Service Line Replacement Ordinance is contained in the City's plumbing code and, as discussed above at page 3, is consistent with the state plumbing code because the Common Council has reasonably determined that the disturbance of lead service lines, particularly through partial replacements, is a health hazard under § SPS 382.22(2). Presumably, a proposed ordinance to require that child care centers replace their lead service lines would also be incorporated into the City's plumbing code following a Common Council determination that the continued use of lead service lines at child care centers presents a health hazard. In sum, the proposed mandate would appear to be consistent with DCF regulations.

While there is reason to doubt that the City can impose licensing requirements on child care centers, we believe that a lead service line replacement mandate would not constitute a licensing regulation. Rather, as with the lead service replacement mandate in MCO § 225-22.5, the City can enforce its requirement through citations or other means without directly impacting a license issued by DCF to operate a child care center.

Finally, the need for the City to be able to act independently of the state regulatory framework here is underscored by the nature of the particular water supply infrastructure involved. As discussed above, Wis. Stat. § 281.45 grants authority to the City to prescribe the manner in which properties may connect to the public water supply provided that such requirements are consistent with the state plumbing code.

The Milwaukee Water Works controls the portion of the lead service line from the water main to the curbstop; the private property owner controls the portion of the service line from the curbstop to the meter in the building. The City has prohibited partial lead service line replacements on the basis that partial replacements pose a health hazard. It follows that the utility needs to be able to replace the utility-side of the service line unencumbered by the fact that the owner of the privately-owned portion of the lead service line happens to be a child care center subject to a comprehensive state licensing scheme. Therefore, it would be unreasonable to apply the child care licensing framework in a way that frustrates the City and its utility from ensuring safe connection to the public water supply, particularly when the licensed facilities provide services to children under six

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[5] Wis. Admin. Code § 325.01(1) provides: "The design, construction, and installation of plumbing shall comply with the requirements of the Wisconsin Plumbing Code, chs. SPS 382 to 387, except as provided in this section."

[6] Wis. Admin. Code § 361.04(12) provides: "'IPC' and 'International Plumbing Code' mean chs. SPS 381 to 387."

years old, the population most vulnerable to lead exposure and the effects of lead poisoning.

II. A REQUIREMENT THAT CHILD CARE CENTERS REPLACE THEIR LEAD SERVICE LINES WOULD NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

City ordinances do not currently require that lead services must be replaced at all properties under all circumstances. Nonetheless, a requirement that licensed child care centers replace their portion of the lead service would not violate the equal protection clause, provided there is a rational basis for targeting child care centers.

The fact that a classification scheme results in some inequity does not provide a sufficient basis for invalidating it. *Metropolitan Assocs. v. City of Milwaukee*, 2011 WI 20, ¶ 62. Equal protection "does not deny a [municipality] the power to treat persons within its jurisdiction differently..." *Nankin v. Village of Shorewood*, 2001 WI 92, ¶ 12, 245, Wis. 2d 86, 630 N.W.2d 141. Unless a suspect class or fundamental interest is involved, courts will sustain a classification if any rational basis exists to support it. *Metropolitan Assocs,* at ¶ 60, n. 20. Any doubts must be resolved in favor of the reasonableness of the classification. *Id.* at ¶ 61 (citation omitted).

The Wisconsin Supreme Court has specified five factors as relevant to the determination whether a classification is reasonable for purposes of equal protection:

(1) All classifications must be based upon substantial distinctions which make one class really different from another;

(2) The classification adopted must be germane to the purpose of the law;

(3) The classification must not be based upon existing circumstances only [it must not be so constituted as to preclude addition to the numbers included within the class];

(4) To whatever class a law may apply it must apply equally to each member thereof; and

(5) The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Metropolitan Assocs., at ¶ 64.

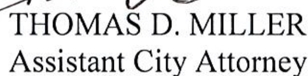
In *Brennan v. City of Milwaukee*, the Wisconsin Supreme Court enjoined the City's Health Commissioner from enforcing an ordinance that required the installation of a private bathtub or shower in apartments containing more than three rooms while permitting apartments with three or fewer rooms to have fewer facilities per apartment. 265 Wis. 52, 57-58, 60 N.W.2d 704 (1953). The court held that the ordinance violated the equal protection clause because there was no reasonable basis for classifying on the basis of the number of rooms. *Id.*

However, as discussed above, there would seem ample support for distinguishing child care centers from other properties connected to the public water supply. *Supra* at 3-5. If the City can identify a rational basis for requiring licensed child care centers to replace their lead service lines then such a targeted effort will not violate the equal protection clause.

If you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

GRANT F. LANGLEY
City Attorney



THOMAS D. MILLER
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c: Ghassan Korban, DPW Commissioner
James Owczarski, City Clerk

Form CA-43

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October 2, 2001

Ms. Jacqueline Patterson
Milwaukee Public Schools
P.O. Box 2181
Milwaukee, WI 53201-2181

Re: Recommendations of Lead Poisoning Task Force

Dear Ms. Patterson:

In a letter dated June 7, 2001, you provided us with a copy of the recommendations of the Lead Poisoning Task Force established two years ago by the Milwaukee Board of School Directors. You have asked us to comment on three of the recommendations, discussed below.

Recommendation No. 4 of the Lead Poisoning Task Force proposes that MPS ask parents of kindergarten children at their times of admission for evidence of previous blood lead tests or for written consent for MPS to obtain blood lead test records. You have asked whether we advise that MPS establish rules requiring blood lead testing for preschool children. For the reasons discussed below, it is our opinion that the matter of lead screening of children has been comprehensively addressed by the state legislature and that any such MPS rules would be preempted by state law.

The Wisconsin Supreme Court has considered the issue of the respective powers of the state and municipalities on the subject of legislative enactment. While a school district is not a municipality, we believe a similar analysis would apply.[1]

[1] Municipalities have been granted broad "home rule" powers under the Wisconsin Constitution and as specified in sec. 62.11(5), Stats. While public schools districts may not have such extensive powers, the legislature did expand school boards' authority with the enactment of secs. 118.001, 120.13 (intro.), and sec. 119.18(1g), Stats. Even in light of this expanded authority, we cannot say with certainty that a school district would have the necessary statutory authority to impose blood lead testing requirements. Even assuming that a school district would otherwise

The court has limited a municipality's exercise of authority pursuant to a broad statutory grant of power, stating that an ordinance may not "infringe the spirit of a state law or . . . general policy of the state." Fox v. Racine, 225 Wis. 542, 545 (1937). In determining whether a municipal ordinance has been preempted by state law, the court advises to "assess whether express statutory language has withdrawn, revoked, or restricted the city's power; the probability that the challenged ordinance is logically inconsistent with state legislation; and the probability that the challenged ordinance infringes the spirit of a state law or general policy of the state." Anchor Savings & Loan Ass'n v. Equal Opportunities Commission, 120 Wis. 2d 391, 396 (1984).

In Anchor Savings & Loan Ass'n, the City of Madison adopted an ordinance regulating the credit practices of savings and loan associations. The ordinance was challenged on the grounds that it was preempted by state law, which included a comprehensive statutory structure dealing with all aspects of credit and lending in the state. Applying the test set forth above, the court determined that the state legislature had adopted a complex, comprehensive and all-encompassing statutory scheme regarding savings and loan practices, that application of a city ordinance to a credit practice was contrary to the spirit of the state's law, and that it was without authority and in conflict with the state comprehensive plan. Anchor Savings and Loan Ass'n, 120 Wis. 2d at 401-02.

Similarly, in regard to lead poisoning screening, it appears that the legislature has adopted a comprehensive statutory scheme that is to be administered by the Wisconsin Department of Health and Family Services, and that this statutory scheme would preempt any related requirements adopted by a school board. The state legislature has adopted detailed legislation regarding lead poisoning screening of children. Section 254.15, Stats., imposes upon the Wisconsin Department of Health and Family Services ("department") the duty to "develop and implement a comprehensive statewide lead poisoning or lead exposure prevention and treatment program." (emphasis added). The department has the authority to promulgate rules, including rules regarding lead screening recommendations and requirements for children. Secs. 254.158; 254.162, Stats. While the department may designate local health departments as its agents in administering and enforcing state law and rules, the law specifically prohibits the department from delegating its rule-making authority. Sec. 254.152, Stats. Moreover, while the law gives the department exclusive authority to promulgate rules, it does not require the department to do so. To date, the department has chosen not to promulgate such rules.

If the department chooses to promulgate such rules, state law sets forth specific items to be included in the rules. Section 254.158, Stats., provides that the rules must include such

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have the statutory authority to require blood lead testing of students, a school district's authority may still be preempted by some other state law or policy of the state, as discussed above.

things as the federal requirements for screening children, specific persons who may provide screening services, and provisions for exemption from screening.

In addition, sec. 254.162, Stats., authorizes the department to make rules requiring certain institutions, including school-based programs serving children under six years of age, to obtain written evidence that each child has obtained a lead screening, or is exempt from one, in accordance with the rules and time periods specified by the department. Subsection (2) of the statute further provides that, if an institution is required to request written evidence of a lead screening under department rules, the institution must, at the time of the request, "inform the parent, guardian, or legal custodian of the child in writing, in a manner that is prescribed by the department by rule, of the importance of lead screening, of how and where lead screening may be obtained, and of the conditions under which a child is exempt from recommended lead screening requirements under the department's rules." Thus, under sec. 254.162, Stats., the department could choose to promulgate detailed rules regarding lead screening for children, including a rule that would require MPS to obtain written evidence that a child under age six has obtained a lead screening, or is exempt from one. The department has chosen not to promulgate such rules.

Considering the test set forth in Anchor Savings & Loan Ass'n, we note that the legislature specifically stated that the department's duty was to establish a comprehensive statewide lead poisoning prevention program. The law identifies what the department must include in any such program. In Anchor Savings & Loan Ass'n, the comprehensive statutory scheme of savings and loan practices was an indication that the state law was intended to preempt action by the municipality. Furthermore, the state law regarding lead screening specifically grants rule-making authority regarding lead screening to the department and plainly states that this authority cannot be delegated. Any attempt by a public school district to implement rules regarding lead screening of children would be inconsistent with this state law. Consequently, it is our opinion that the state legislature has preempted the authority of a school district to implement requirements for children regarding lead screening, and that any such requirements would conflict with the state's comprehensive plan.

Recommendation #6 of the Lead Poisoning Task Force proposes that MPS support the expansion of the recent pilot lead ordinance to protect all Milwaukee children from lead-based paint hazards. You have asked whether this office recommends that the district proceed with this recommendation and, if so, how the district would do so.

The Lead Pilot Project is a three-year project (May 1, 1999 - April 30, 2002) that requires lead-safe housing standards of all pre-1950 rental properties in two select areas of the city, identified in the ordinance as "economically distressed neighborhoods." Housing requirements include standard treatment (abatement) to windows and lead-safe maintenance of other deteriorated painted surfaces. Funding is available to property owners in the pilot areas through the Milwaukee Health Department.

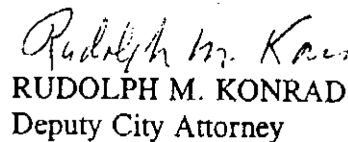
We assume that the task force reference to expansion of the pilot program refers to an expansion of the number of pilot project areas. Whether the school board should actively support the expansion of the pilot program in this way is a policy judgment for the board, rather than a legal question. If the board is interested in pursuing this matter, we suggest that you contact city alderpersons to discuss the issue. In addition, you may want to discuss this matter with the City Health Department, which we understand maintains data on reports of lead exposure or lead poisoning in children in various parts of the city.

Finally, you have asked whether the Board should file a lawsuit against lead-based paint manufacturers to recover the cost of removing lead-based paint from school buildings. The City has filed a lawsuit against certain lead-based paint manufacturers to recover past and future costs related to the abatement of lead in privately owned housing units in the City. The City solicited proposals from a number of law firms to investigate the viability of filing a lawsuit and make a recommendation to the City without charge, and to represent the City in a lawsuit on a contingency-fee basis. After reviewing the proposals, a law firm was selected. The selected firm investigated and reported to the City on the viability of filing a lawsuit, and agreed to represent the City on a contingency-fee basis if the City decided to file the lawsuit. After reviewing the law firm's report and recommendation, the City decided to file a lawsuit. Our office advised the City to proceed in this fashion because of the anticipated cost of the litigation, the lack of certainty about the results, the need to employ attorneys who have expertise and experience in suing lead-based paint manufacturers, and the financial ability to investigate the viability of the suit without charge and to pursue the suit on a contingency fee. For these same reasons, we advise the Board to proceed in the same way.

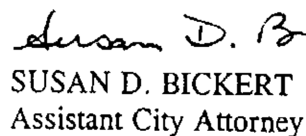
If you have any further questions regarding these matters, please do not hesitate to contact us.

Very truly yours,

GRANT F. LANGLEY
City Attorney



RUDOLPH M. KONRAD
Deputy City Attorney



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March 30, 1977

Alderman Wayne P. Frank
8th Aldermanic District
205 City Hall

Dear Alderman Frank:

We are writing in response to your letter of December 8, 1976. In your letter you state that the state rules for licensing day care centers and the Wisconsin Statutes do not prohibit persons who have a record of child molestation from employment in child care centers. You assert that you are planning to introduce an ordinance to prohibit employment of such persons in child care centers. You request our legal opinion as to whether the City can require additional standards in child care centers.

The general rule with respect to conflicts between municipal and state licensing is found in 51 *Am. Jur.* 2d, Licenses and Permits, sec. 100 at page 97:

> "Municipal corporations may not enact ordinances that infringe on the spirit of a state law or that are repugnant to the general policy of the state. And it has often been stated that a municipality may not forbid what the state legislature has expressly licensed, authorized, or permitted. In determining whether the provisions of a municipal ordinance conflict with the statute covering the same subject, the test is whether the ordinance prohibits an act that the statute permits, or permits an act that the statute prohibits. . . ."

In *Johnston v. Sheboygan*, 30 Wis. (2d) 179, a provision of the Sheboygan municipal code requiring a license for the sale, delivery or exchange of food products was challenged on the ground that it conflicted with Section 97.12, Wis. Stats., requiring licensing to operate a bakery or confectionary. The Court stated that an ordinance adopted by a city under its home rule authority and police power will be upheld unless it is in direct conflict with a state statute on the same subject. The Court upheld the ordinance on the ground that the statute regulated one operation of a bakery and the ordinance regulated another, so that no direct conflict resulted.

Section 48.65, Wis. Stats., provides that no person shall provide care and supervision for children under the age of 7 unless he obtains a license to operate a day care center. Section 48.62, Wis. Stats., provides that no person shall provide care and maintenance for a child unless he obtains a license to operate a foster home. Under Section 48.67, Wis. Stats., the Department of Health and Social Services is to prescribe rules establishing minimum requirements for the issuance of licenses to and establishing standards for the operation of foster homes and day care centers, etc. These rules shall be designed to protect the health, safety and welfare of the children in the care of all licensees.

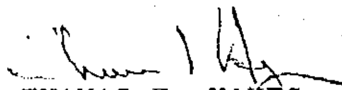
In 63 *O.A.G.* 34 (1974), the Attorney General held that the statutes precluded municipalities from licensing foster homes stating as follows:

> ". . . The state has completely preempted the field of foster home licensing. See *Hartford Union High School v. Hartford* (1971), 51 Wis.2d 591, 187 N.W. 2d 849. Accordingly, I conclude that municipal foster home licensing ordinances are unenforceable. Moreover, other municipal licensing ordinances with the effect of prohibiting group foster homes would conflict with ch. 48, and therefore would be invalid to the extent they prohibited such homes under *Johnston, supra*."

It would appear that the licensing statutes regulating foster homes are so nearly identical and in fact, intertwined with the licensing statutes regulating day care centers, that the rule which would obtain for the one, would likewise obtain for the other. Applying the reasoning of the Attorney General as it relates to foster home licensing would require one to reach the conclusion that municipalities are preempted from regulating day care centers as well. Consequently, in our opinion, the proposed ordinance would not be enforceable.

Very truly yours,

JAMES B. BRENNAN
City Attorney



THOMAS E. HAYES
Assistant City Attorney

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