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DISTRICT II

July 14, 2021

To:

Hon. Jon E. Fredrickson
Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Racine County
Electronic Notice

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Deputy City Attorney
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1137 David Yandel v. City of Racine (L.C. #2020CV1045)

Before Reilly, P.J., Gundrum and Kloppenburg, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

The City of Racine and Dottie-Kay Bowersox (collectively, the "City") appeal an order declaring a public health ordinance unconstitutional. *See* Racine, Wis. Ordinance 0004-20—Safer Racine 2019 Novel Coronavirus Response (June 22, 2020) (the "Safer Racine Ordinance"). In the same order, the circuit court declined to make any declaration regarding the validity of similar pre-ordinance public health orders issued by Bowersox pursuant to her authority as the City of Racine's Public Health Administrator, concluding that issue was moot. The City argues the Safer Racine Ordinance was constitutional and that the dispute concerning the validity of

Bowersox's pre-ordinance orders was not moot. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject the City's arguments and summarily affirm the order. *See* WIS. STAT. RULE 809.21 (2019-20).[1]

In early 2020, concern regarding the SARS-CoV-2 virus and the disease it causes, COVID-19, prompted government action in Wisconsin. One such response was Emergency Order 28, issued by Andrea Palm as secretary-designee of the state Department of Health Services. That statewide order was largely struck down by the Wisconsin Supreme Court in ***Wisconsin Legislature v. Palm***, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900.

On May 13, 2020, in response to the supreme court's decision, Bowersox issued a "Safer At Home—Racine" order, invoking her authority under WIS. STAT. § 252.03 to make the majority of Emergency Order 28's provisions applicable within the City of Racine. On May 21, 2020, Bowersox issued a "Forward Racine" order, which contained standards for reopening amidst the COVID-19 pandemic. Bowersox issued a revised "Forward Racine" plan on May 29, 2020.

Yandel, the owner of a CrossFit business in Racine, filed the present suit on May 21, 2020, seeking an order declaring the "Safer At Home—Racine" order unlawful, invalid and unenforceable. He also sought a temporary injunction prohibiting the City from enforcing the order. Following substitution, the circuit court held a hearing on June 19, 2020, at the conclusion of which it vacated the prior court's order denying a temporary injunction, enjoined

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

the enforcement of the "Forward Racine" order, and prohibited Bowersox from enacting any other orders pursuant to her authority under WIS. STAT. § 252.03.[2]

In response to the temporary injunction, the Common Council for the City of Racine met in session on June 22, 2020, and passed the Safer Racine Ordinance. The Safer Racine Ordinance amended or created certain sections in chapter 54, art. II of the Racine Municipal Code, including § 54-33. Section 54-33(a) adopted a document similar to the "Forward Racine" order, retitled "Safer Racine—Standards to Reopen amid the COVID-19 Pandemic." Subsection (b) granted the Public Health Administrator authority to modify those standards "as necessary to respond to changing COVID-19-related public health conditions," which modifications were to be based on guidance from the World Health Organization, the Centers for Disease Control and Prevention (CDC), and the Wisconsin Department of Health Services. Subsection (c) required Bowersox to report to the Common Council regarding COVID-19 spread in Racine no later than August 5, 2020, and anticipated further action from the Common Council at that time. Violations of the Safer Racine Ordinance were made punishable by daily forfeitures in the amount of $250.

Yandel filed a first amended complaint challenging the Safer Racine Ordinance, and the circuit court issued a supplemental temporary injunction enjoining its enforcement. Following a hearing, the court granted a declaratory judgment finding the Safer Racine Ordinance unconstitutionally vague and overbroad. The court dismissed as moot Yandel's claim requesting

[2] The "Safer At Home—Racine" order expired at 8:00 a.m. on May 26, 2020, the same date and time that the "Forward Racine" order went into effect. At the injunction hearing, the parties disputed whether the "Forward Racine" order superseded the prior order. That issue is immaterial for purposes of this appeal.

a declaration that Bowersox's pre-ordinance orders were unconstitutional. We subsequently granted the City's motion for a stay pending appeal.

We decline to reach any of the issues raised regarding the validity of Bowersox's COVID-19 orders. Any determination regarding those issues would have no practical effect on the existing controversy, and those issues are therefore moot. *See* ***PRN Assocs. LLC v. DOA***, 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559. The "Safer At Home—Racine" order has been long expired, and the "Forward Racine" order, as amended, was effectively incorporated into the Safer Racine Ordinance. The City argues we should nonetheless reach the merits because the matter is one of great public importance and because Bowersox's COVID-19 orders may be reinstated in the absence of a municipal ordinance. In our view, however, the controversy regarding the scope of a local health officer's authority under WIS. STAT. § 252.03 is best addressed in a context in which the officer's orders have not been incorporated into a legislative enactment. Accordingly, we decline to apply any of the exceptions to the mootness doctrine. *See* ***Marathon County v. D.K.***, 2020 WI 8, ¶19, 390 Wis. 2d 50, 937 N.W.2d 901.

The only remaining issues concern the constitutionality of the Safer Racine Ordinance, which presents a question of law. *See* ***Urmanski v. Town of Bradley***, 2000 WI App 141, ¶4, 237 Wis. 2d 545, 613 N.W.2d 905. Ordinances benefit from a presumption of constitutionality, but when an ordinance regulates the exercise of First Amendment rights, the burden shifts to the government to demonstrate the constitutionality of the regulation beyond a reasonable doubt. ***Id.*** While the decision whether to grant a declaratory judgment is a matter addressed to the circuit court's discretion, we conduct an independent review when the exercise of that discretion turns on a question of law. ***Great Lakes Beverages, LLC v. Wochinski***, 2017 WI App 13, ¶13, 373 Wis. 2d 649, 892 N.W.2d 333.

We agree with the circuit court that the Safer Racine Ordinance is overbroad and vague, and it is therefore unconstitutional for the reasons the court articulated. An ordinance is overbroad when its language, given its normal meaning, is so sweeping that its sanctions may be applied to constitutionally protected conduct that the state cannot regulate. ***State v. Jackson***, 2020 WI App 4, ¶12, 390 Wis. 2d 402, 938 N.W.2d 639. In a facial overbreadth challenge, the claimant must show that a substantial number of the ordinance's applications are unconstitutional, judged in relation to the ordinance's plainly legitimate sweep. ***Id.***, ¶13.

The Safer Racine Ordinance prohibits all indoor or outdoor mass gatherings on city-owned land or that would require city approval. The blanket prohibition on group expressive activity captures constitutionally protected conduct within the ambit of the ordinance and is therefore overbroad. *See* ***Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.***, 482 U.S. 569, 574-75 (1987). Even assuming that the ordinance has a "plainly legitimate sweep" that aims to restrict the spread of SARS-CoV-2, the City's own submissions suggest that regulation short of a complete prohibition on mass gatherings in public spaces could potentially achieve that goal.[3]

Moreover, even if the overbroad portion could be severed from the Safer Racine Ordinance, *see* ***State v. Stevenson***, 2000 WI 71, ¶15, 236 Wis. 2d 86, 613 N.W.2d 90, the entire

[3] The City's reply brief does not directly deny the overbreadth of the Safer Racine Ordinance. Rather, the City makes a pseudo-forfeiture argument, arguing the issue of overbreadth was insufficiently litigated and briefed because Yandel failed to allege that his First Amendment rights were infringed and failed to present testimony showing that the ordinance infringed on anyone's right to peaceably assemble. It is well established, however, that a law is subject to challenge by someone who has not engaged in proscribed conduct if it is written so broadly that it may inhibit the constitutionally protected rights of third parties. ***Members of City Council of Los Angeles v. Taxpayers for Vincent***, 466 U.S. 789, 798 (1984).

ordinance suffers from vagueness that requires its complete invalidation. An ordinance is unconstitutionally vague if it fails to afford proper notice of the conduct it seeks to proscribe or if it encourages arbitrary and erratic enforcement. ***Walworth County v. Tronshaw***, 165 Wis. 2d 521, 526, 478 N.W.2d 294 (Ct. App. 1991). The test for vagueness is whether the ordinance is "so obscure that a person of ordinary intelligence must necessarily guess as to its meaning and differ as to its applicability." ***Id.***

The circuit court described in great detail the constitutional infirmity of the Safer Racine Ordinance on vagueness grounds, and we adopt its analysis as our own. In sum, upon reading the ordinance and referring to the "Safer Racine—Standards to Reopen amid the COVID-19 Pandemic" document incorporated into it, a person of ordinary intelligence is confronted with a dizzying array of ill-defined categories of individuals and entities to which certain rules apply, standards and metrics that can be altered at will by the Public Health Administrator without prior notice or adoption by the Common Council, and best practices that are seemingly now required under penalty of civil forfeiture in Racine. Notably, the document requires that all institutions and businesses follow all CDC "guidance and recommendations relating to disease prevention measures," as well as reopening guidelines issued by the Wisconsin Economic Development Corporation for the applicable business category or categories—requirements that, by the circuit court's count, compel the reader to peruse at least 180 web pages of information, much of it written as guidelines or best practices.

Contrary to the City's argument, the Safer Racine Ordinance is constitutionally problematic not merely because it cross-references external content and regulations. Rather, we agree with the circuit court's assessment that "no average person of ordinary intelligence can make sense of [the ordinance's] sprawling breadth." Given our conclusion that the ordinance is

unconstitutional on overbreadth and vagueness grounds, we need not address any of Yandel's alternative arguments regarding the Safer Racine Ordinance's validity. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716.

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals