

SOCIAL HOST ORDINANCES SHOULD BE REVIEWED

By: Claire Silverman, Legal Counsel, League of Wisconsin Municipalities

In recent years, many municipalities have enacted social host ordinances aimed at preventing adults from hosting underage drinking parties at private homes. Certain provisions in those ordinances are likely unenforceable following the Wisconsin court of appeal's October 26 decision in *County of Fond du Lac v. Muche*, 2016 WI App 84. In the wake of the decision, municipalities with social host ordinances should consult with the municipal attorney to determine whether which provisions, if any, of the ordinance remain viable, and which provisions should be modified or repealed.

Muche appealed to the court of appeals after the circuit court imposed a \$1,000 forfeiture against him for violating the county's social host ordinance when underage persons consumed alcohol at a graduation party for his son which Muche hosted for family and friends at his residence. Alcohol was served at the party and it was undisputed that underage persons who were not invited by Muche joined the gathering toward the end of the evening and that Muche had reason to believe that these underage individuals brought beer to the party and "intended to or were consuming it." Although Muche confiscated their keys shortly before county sheriff's deputies arrived on the scene, he admitted that he did nothing to stop the underage individuals from drinking the alcohol they brought to the party. Muche maintained that he did not host an underage drinking party. The court of appeals reversed the circuit court, concluding that the county's ordinance did not strictly conform to state law and therefore exceeded the county's authority.

According to the decision, the county's social host ordinance provides:

It is unlawful for any person(s) to host or allow an event or gathering at any residence, premises or on any other private or public property where alcohol or alcoholic beverages are present when the person knows that an underage person will or does consume any alcohol or alcoholic beverage or will or does possess any alcohol or alcoholic beverage with the intent to consume it and the person fails to take reasonable steps to prevent possession or consumption by the underage person(s).

The ordinance defines "Residence," "premises," or "public or private property" as encompassing "any home, yard, farm, field, land, apartment, condominium, hotel or motel room or other dwelling unit, or a hall or meeting room, park or any other place of assembly, whether occupied on a temporary or permanent basis, whether occupied as a dwelling or specifically

for a party or other social function, and whether owned, leased, rented or used with or without permission or compensation."

Under the ordinance, an individual may also be held responsible for violating the ordinance "if the person intentionally aids, advises, hires, counsels or conspires with or otherwise procures another to commit the prohibited act" or even if the individual who hosts the event or gathering is not present at the time.

Wisconsin Statute § 125.07(1) contains restrictions relating to alcohol and underage persons. Wis. Stat. § 125.10(2) allows a municipality or county to enact an ordinance regulating certain conduct regulated by 125.07 only if the ordinance strictly conforms to the statute. The court held that the term "premise" as used in § 125.07 means "the area described in a license or permit," as defined in § 125.02(14m), and that Fond du Lac County's social host ordinance was not in strict conformity with Wis. Stat. § 125.07(1) because it regulates private property and therefore "forbids what the statute does not forbid" *Muche* at ¶28. An additional problem with the county ordinance, noted by the court but not addressed at any length, is that it prohibits passive conduct while the statute prohibits affirmative conduct. Finally, the court concluded that penalties for violating the county ordinance were not in strict conformity with the state statute, explaining that while strict conformity does not mean the same or identical penalty, it does mean that a penalty may not be in excess of the state penalty. In a separate concurrence, Judge Reilly agreed that the penalties for violating the county ordinance were not in strict conformity with state law, but contended that the court should resolve the case on that basis alone, and avoid the "premises" debate.

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SOCIAL HOST ORDINANCES SHOULD BE REVIEWED (CONTINUED)

Although the *Muche* decision will likely affect the validity of certain provisions in social host ordinances, the court's decision does not necessarily mean that all provisions in a social host ordinance are invalid. There are provisions in sec. 125.07 which do not involve "premises." For example, sec. 125.07(1)(a)1 provides, "No person may procure for, sell, dispense or give away any alcohol beverages to any underage person not accompanied by his or her parent, guardian or spouse who has attained the legal drinking age." A social host ordinance provision mirroring this language would not have provided a basis for citing *Muche* since the underage persons brought

their own alcohol to the party, but it could have been a basis for citing *Muche* if he had given alcohol to any underage person at the party who was not accompanied by his or her parent, guardian or spouse who is 21 or older. Municipalities with social host ordinances should ensure their ordinance and any penalties are in strict conformity with state law.

At least one state legislator has suggested he will pursue a legislative fix, so stay tuned.



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