



**WISCONSIN TOWNS
ASSOCIATION**

Empowering Town Officials

W7686 County Road MMM
Shawano, WI 54166
715-526-3157
wtowns@wisctowns.com
www.wisctowns.com

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**Frequently Asked Questions Following the WI Supreme Court's May 13, 2020 Ruling on
Emergency Order 28 (Safer at Home)**

Q. Does the Wisconsin Supreme Court opinion invalidating the Safer at Home order mean that businesses may reopen in our town or village immediately?

A. It depends. Many counties around the state have used their public health authority under s. 252.03(2), Wis. Stat. to adopt their own version of the Safer at Home order. So, if your town or village is located in such a county, a local order may still restrict business activity in your area. If your county has not adopted such an order, the state restrictions would now be lifted in your area and business may reopen immediately without restrictions.

Q. If our county has adopted its own Safer at Home type order, can our town board adopt some sort of order making it inapplicable to our town and allow all businesses to reopen?

A. No. The state statutes do not give towns authority to override a county public health order unless you have established your own local health department. s. 251.08, Wis. Stat.

Q. If our county has not adopted its own Safer at Home order, can the town adopt a Safer at Home type public health order and close town businesses?

A. Probably not. Under s. 252.03(2), Wis. Stat., local health officers may do “what is reasonable and necessary for the prevention and suppression of disease, may forbid public gatherings when deemed necessary to control outbreaks or epidemics...” Local health officers must be appointed by a local board of health created under chapter 251 of the state statutes. So, a town or village with its own local board of health may have their local health officer issue such an order. But, very few towns have taken the step of creating their own local board of health. Also, note that enforcement of any public health order issued by a town local health officer would need to be enforced by the town. The Wisconsin Supreme Court decision took issue with the enforcement of Emergency Order 28 under s. 252.25, Wis. Stat. Section 252.25 makes a violation of local health ordinances

adopted under chapter 252 by counties, cities, and villages subject to criminal penalties. But, that section does not extend to town ordinances. So, the town would also have to draft its own ordinance making violators subject to civil forfeitures for violations. In short, most towns lack the authority to issue public health orders and even those towns with their own local board of health may find enforcement difficult.

Q. Is there any other statutory authority a town or village might use to declare a public health emergency that places restrictions on local businesses or requires businesses to engage in social distancing?

A. Towns have the general power to declare emergencies by resolution or ordinance under s. 323.11, Wis. Stat. In reading that statute, the town would need to find that there is a disaster or imminent threat of disaster that impairs transportation, food or fuel supplies, medical care, fire, health or police protection, or other critical systems of the local unit of government. Further, s. 323.14(4), Wis. Stat. also provides the general authority to order “whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within the local unit of government in the emergency...” While these emergency powers read pretty broadly, there are no court cases that have tested how far a local government may go in exercising these powers during a pandemic. Given the current atmosphere in the state, use of local emergency powers in an attempt to restrict business operations or impose social distancing requirements would likely be challenged in the courts and we cannot say with any confidence that a court would find in favor of the local government. As a result, any town or village considering adopting such emergency restrictions should work closely with their local municipal attorney for advice on the legality of any proposed restrictions or requirements and the feasibility of local enforcement.

Q. Now that the state Safer at Home order is no longer in place, should the town still be following social distancing guidelines for town board meetings, etc.?

A. If no local health orders are in place affecting your area and the state does not adopt any new requirements, compliance with social distancing guidelines would now be optional. But, the town board still has control over its own buildings and facilities and may continue to limit access to such facilities and require that social distancing guidelines be adhered to for board meetings, etc. WTA strongly recommends requiring adherence to social distancing guidelines for board meetings, elections, and other gatherings occurring on town property.