

**CITY OF MADISON  
OFFICE OF THE CITY ATTORNEY  
Room 401, CCB  
266-4511**

Date: May 20, 2011

**MEMORANDUM**

TO: Alder Bridget Maniaci

FROM: Lana J. Mades, ACA

RE: Impact of proposed landlord pre-emption bill (LRB 1296/3)

The Office of the City Attorney has been asked to summarize how this proposed bill could impact existing Madison General Ordinances. In summary, if it becomes law, this bill would render portions of several Madison General Ordinances unenforceable.

Municipalities are creatures of the state, and have only the powers given them. Van Gilder v. City of Madison, 222 Wis. 58 (1936). While the Madison Common Council has powers to act for the good order, health, safety and welfare of the public, its ability to do so can be limited by the express language of the Wisconsin Statutes. Wisconsin Statutes 62.11(5). Put another way, "a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required, or authorize what the legislature has expressly forbidden." Fox v. Racine, 225 Wis. 542, 545 (1937). Therefore, as LRB-1296/3 uses express language to prohibit cities from placing certain limitations on landlords, certain Madison General Ordinances which do place said limitations on landlords would be unenforceable.

The Madison General Ordinances that would be pre-empted by this legislation would include the following:

1. MGO 39.03(4)(a) and 32.12(7)(b): Relates to prohibiting landlords from requiring disclosure of social security numbers. Under (2)(a)6 of the proposed bill, a city may not prohibit a landlord from obtaining and using or attempting to obtain and use the tenant's social security number.
2. MGO 32.12(8): Relates to prohibiting landlords from showing apartment for re-rental until ¼ of the lease term has passed. Under (2)(d) of the proposed bill, a city may not prohibit a landlord obtaining from showing a premises to a prospective tenant during the tenancy of the current tenant.
3. MGO 32.12(7)(a): Relates to prohibiting landlords from denying an application for housing based solely on minimum income requirements. Under (2)(a)1 of the proposed bill, a city may not prohibit or place limitations on a landlord from obtaining and using or attempting to obtain and use information regarding the tenant's monthly household income.
4. MGO 39.03(4)(d): Relates to prohibiting landlords from denying housing on the basis of the tenant's conviction record, and limiting the time limit on certain excludable

offenses to 2 years. Under (2)(a)5 of the proposed bill, a city may not prohibit or place limitations on a landlord from obtaining and using or attempting to obtain and use information regarding publicly accessible arrest and conviction records. Additionally, under (2)(b), a city may not limit how far back in time a prospective tenant's conviction record may be taken into account by a landlord.

5. MGO 39.03(2)(II) and (4): Relates to prohibiting housing discrimination based on the tenant's legally derived income. Under section (2)(a)2 of the proposed bill, cities may not place limitations on landlords obtaining and using information regarding a tenant's "occupation." While there are some potential conflicts in Wisconsin statutes in this area that could provide a foothold for the City of Madison to litigate this issue, the chances of success are not high enough to merit the expense of litigation. <sup>1</sup>

6. MGO 32.12(9) relates to renting out an apartment to future renters before ¼ of the lease term has passed. Although (2)(c) of the proposed bill would seem to prohibit this on its face, it is possible (although not probable) that this MGO might withstand attack if litigated, as the ordinance provides a mechanism by which landlords can engage in this practice (making it a part of the lease agreement).

Please let me know if I can be of any more assistance on this matter.

Sincerely,

Lana J. Mades  
Assistant City Attorney  
Madison City Attorney's office

---

<sup>1</sup> Wisconsin Statute 66.1011 specifically authorizes cities to enact ordinances prohibiting discrimination on the basis of an individual being a member of a protected class. Under the statutes, a "member of a protected class" means a person who is categorized because their status. "Lawful source of income" is listed as one of the protected classes in Wisconsin statute 106.50(1m)(nm), and has been adopted as a protected class by MGO 39.03(2)(II) and (4). Although, depending on the facts, "occupation" and "source of income" could be synonymous, conflicts between statutes are not favored by the courts, and if there is any construction that avoids the conflict, it will be utilized. Raisanen v. City of Milwaukee, 35 Wis. 2d 504 (1967). Because the statutes use different language and statutory construction demands the mitigation of conflicts between statutes, it is unlikely that this conflict would make the City of Madison ordinance enforceable.