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Vox Populi: Wisconsin's Direct Legislation Statute

Wisconsin's Direct Legislation Statute, section 9.20, gives voters a direct voice in local matters and provides a procedure by which voters may compel local government to pass or put before the public for a popular vote a proposed ordinance or resolution. Here's how it works.

by [Donald Leo Bach](#)

Do you ever feel that your local city council or village board is tone deaf on an issue or so hopelessly divided that it can't or won't do what needs to be done, or that the city council or village board just does not want to take on an important matter? Nothing much can be done except wait for the next election, right? To the contrary, the statutes provide a potential avenue for relief: direct legislation by the electorate.

For almost a century, Wis. Stat. section 9.20 and its predecessors have provided Wisconsin voters direct democracy at the local level.¹ The statute provides a procedure by which voters may compel a city common council or a village board to pass a proposed ordinance or resolution or put the proposed ordinance or resolution before the public for a popular vote.²

The Statute

In substantive part, Wis. Stat. section 9.20 provides that:

- A number of electors in a city or village equal to at least 15 percent of the votes cast for governor at the last general election in the city or village may sign and file a petition with the city or village clerk requesting that an attached proposed ordinance or resolution, without alteration, either be adopted by the common council or village board or be referred to a vote of the electors.
- The common council or village board shall, without altering the ordinance or resolution, either pass it within 30 days following the date of the clerk's final certificate, or submit it to the electors at the next spring or general election, "if the election is more than six weeks after the date of the council's or board's action on the petition or the expiration of the 30-day period, whichever first occurs."³ If there are six weeks or less before the election, the ordinance or resolution shall be voted on at the next election thereafter. The council or board may, by a three-fourths vote, order a special election to vote on the ordinance or resolution at any time before the next election, but not more than one special election for direct legislation may be ordered in any six-month period.
- If a majority of electors vote in favor of adoption, the proposed ordinance or resolution shall take effect on publication, which must be made within 10 days after the election.

In a nutshell, Wis. Stat. section 9.20 "permits local electors to submit a petition requesting that an attached proposed ordinance either be adopted by the municipality's governing body without alteration or be referred to a vote in the next election."⁴



The direct legislative powers of the people "are often exercised when the electorate believes that their elected representatives are not acting in response to the public's will."⁵ Indeed, the Wisconsin Supreme Court has noted that direct legislation is an important and powerful right reserved to the people:

"Direct legislation is a potentially powerful limitation on governmental authority, a remedy available to the people when their representative government has become unresponsive or misrepresentative."⁶

Scope of the Statute

The scope of Wis. Stat. section 9.20 is very broad:

"While it is asserted that Wisconsin is a jurisdiction which limits the scope of direct legislation, our examination of the Wisconsin cases convinces us that Wisconsin law permits the electors under the direct legislation statute to compel a common council to enact or to place on the ballot any proposed ordinance which the common council in its legislative capacity could enact."⁷

Common Council or Village Board Limited Options

When a petition for direct legislation is filed, Wis. Stat. section 9.20(4) gives the common council or village board 30 days to take one of two options: either adopt the measure or refer it for a vote of the electors.

In *State ex rel. Althouse v. City of Madison*, the Wisconsin Supreme Court stated that this duty is mandatory, ministerial, and nondiscretionary:

"[I]t is apparent that the common council's duty, as set forth in sec. 9.20(4), Stats., is unequivocally of a mandatory, ministerial, nondiscretionary nature. That section gives the council only the alternative of passing the ordinance within thirty days after the clerk's certification or of submitting it to the electors at the next election. The duty on its face is positive, plain, and unequivocal. The petitioner, under the statute, has a clear and specific legal right to have the ordinance either passed or placed on the ballot."⁸

Further, section 9.20 recognizes the need for, and mandates, promptness. It directs the city or village clerk to examine the petition for an ordinance or resolution within 15 days and if found sufficient and in proper form, forward it to the city council or village board "immediately."⁹

The Wisconsin Court of Appeals has reiterated that a common council or a village board has an unambiguous duty to act promptly when presented with direct legislation. In ruling that Wisconsin's notice of claim statute did not apply to a mandamus action compelling the city of Oak Creek to take action under Wis. Stat. section 9.20, the court of appeals stated:

"... [T]he legislature did not want proposed direct-legislation to languish _ the common council either has to adopt the proposed ordinance or promptly submit it to the voters. Interposing the Wis. Stat. section 893.80 (1)(b) notice-of-claim process could add as much as two-hundred and forty days to the Wis. Stat. section 9.20 statutory scheme. See *Little Sissabagama Lake*. The legislature has unambiguously told municipalities what they must do and how fast they must act when presented with a direct-legislation petition. We agree with the Committee and Verhalen that section 893.80(1)(b) may not be interposed to extend *those* time limits."¹⁰

Finally, city ordinances or resolutions adopted under Wis. Stat. section 9.20 cannot be vetoed by the mayor, nor can city or village ordinances or resolutions adopted under the statute be repealed or amended within two years of adoption unless by subsequent vote of the electors.¹¹

The Narrow Exceptions

Petitions for direct legislation are qualified only by four narrow limitations that the Wisconsin Supreme Court has declared "are implicit in the statute."¹² Those limitations provide that direct legislation 1) must be legislative in nature; 2) cannot repeal an existing ordinance; 3) cannot exceed the powers of the municipal governing body itself; and 4) cannot modify statutorily prescribed procedures.¹³

However, these limitations are to be narrowly construed:

"These limitations preserve municipal control over executive and administrative functions and protect the integrity of the statutory framework governing municipalities, while at the same time permit the proper invocation by electors of the direct legislation procedure provided by the statute. The limitations, implicit in the statute itself, are narrowly construed and carefully applied so as to avoid judicial dilution of the statutory initiative right."¹⁴

1) **Legislative in Nature.** In *Mount Horeb Community Alert*, the Wisconsin Supreme Court upheld a proposed ordinance that required a public vote on all improvement expenditures of more than \$1 million. The ordinance was challenged as not being legislative in nature. In rejecting this challenge, the Wisconsin Supreme Court reiterated the test to differentiate between legislative and administrative proposals:

"The test of what is a legislative and what is an administrative proposition, with respect to the initiative or referendum, has further been said to be whether the proposition is one to make new law or to execute law already in existence. Again, it has been said: `The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it.'"¹⁵

"We also noted in Heider that `action relating to subjects of permanent and general character are usually regarded as legislative, and those providing for subjects of temporary and special character are regarded as administrative.'"¹⁶

The court held that the ordinance was legislative because it applied to all new construction projects costing more than \$1 million, set forth a permanent rule until repealed, and created new policy.¹⁷

2) **Not Repeal Any Existing Local Ordinance.** Direct legislation cannot repeal any existing ordinance.¹⁸ For example, in *Landt v. City of Wisconsin Dells*,¹⁹ the supreme court held that a proposed ordinance that would have prohibited the fluoridation of the public water supply, after the common council had already adopted an increase in the water supply's fluoride content, was invalid because it repealed an existing ordinance.²⁰

3) **Not Exceed the Powers Held By the Common Council.** Direct legislation cannot exceed powers held by the municipal body.²¹ "Electors cannot do through direct legislation what the municipal governing body cannot do in its own right. That is, direct legislation cannot exceed or enlarge the powers conferred upon the municipal governing body by state law."²²

In *Heitman*, voters sought the passage of direct legislation that would preclude the city of Mauston from allowing a treatment facility for sexually violent persons to be located within city lands. In affirming the circuit court's grant of summary judgment dismissing the voters' mandamus action, the court of appeals held:

"We conclude that Heitman is attempting to do by initiative what the Common Council, itself, cannot do; *i.e.*, avoid the substantive and procedural safeguards established in section 62.23, Stats. Because initiatives may be used for only those legislative acts which a municipality, itself, could do, Heitman's proposal is not one that can be accomplished by initiative. Accordingly, we conclude Mauston reached the correct decision in refusing to adopt or to submit the initiative to the electorate, and we affirm the judgment of the circuit court dismissing Heitman's action for a writ of mandamus and for injunctive relief..."²³

"Because we conclude that the proposed initiative is either a zoning ordinance or an amendment to the zoning ordinances of Mauston and that zoning and amendments to zoning may be accomplished only in compliance with the procedures established in section 62.23, Stats., and not by initiative, which does not utilize those safeguards for individual landowners' rights established by the legislature, we affirm the judgment of the circuit court dismissing the action."²⁴

4) **Not Modify Statutorily-Prescribed Procedures or Standards.** Finally, direct legislation "may not modify statutorily-prescribed procedures or standards that would bind the common council or village board if it attempted to legislate in the same area."²⁵

In *Mount Horeb Community Alert*, as previously indicated, citizens filed a petition for direct legislation that would have required the village board to submit each construction project costing at least \$1 million to a binding referendum before beginning construction on the project.²⁶ However, the village refused to pass the direct legislation, contending that the subject matter of the petition was invalid because, among other things, it would conflict with the statutory procedures with respect to bonding and bidding, including those in Wis. Stat. chapter 67.²⁷ The court rejected this claim, finding the referendum would not interfere with the statutory procedures governing bond issues.²⁸ The court noted that nothing in chapter 67 would specifically prohibit a referendum of the sort required by the proposed ordinance. Thus, the court held that there was nothing unlawful in the proposed legislation, even with respect to a binding referendum.

Mandamus and Injunctive Relief

When a municipality fails to carry out its mandatory duties under Wis. Stat. section 9.20, mandamus is the proper remedy:

"Mandamus is the proper means to challenge a municipality's failure to comply with the requirements of the direct legislation statute."²⁹

Petitioners are entitled to request temporary relief to preserve their rights pending a decision on the mandamus action. Wis. Stat. section 781.02 provides that "[a] plaintiff in an action or proceeding seeking an extraordinary remedy may request, by motion, temporary relief pending disposition of the action or proceeding." Temporary relief is appropriate when, among other circumstances, "during the litigation it shall appear that a party is doing or threatens or is about to do ... some act to be done in violation of the rights of another party and tending to render the judgment ineffectual...."³⁰

Conclusion

Wisconsin's direct legislation statute provides an important check on local government when it fails to respond to or represent the public's will. The courts rightly have construed the statute broadly, and its exceptions narrowly, in favor of the public to avoid diluting the electorate's legislatively bestowed right to a direct voice in local matters that concern them.

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Endnotes

¹In several states, state laws or even amendments to the state constitution may be proposed directly by the public. See, e.g., Calif. Const., art. II, sec. 8. These initiatives occasionally make national news. For example, California's 1978 Proposition 13, imposing a cap on property tax rates, was widely reported as a "taxpayer revolt." However, Wisconsin does not have a statewide initiative process. Perhaps someday such a provision will be proposed as an amendment to article IV, section I of the Wisconsin Constitution, which currently provides that "[t]he legislative power shall be vested in a senate and assembly."

²See *Mount Horeb Cmty. Alert v. Village Bd. of Mt. Horeb*, 2003 WI 100, ¶ 14, 263 Wis. 2d 544, 665 N.W.2d 229.

³Wis. Stat. § 9.20(4).

⁴See *id.* ¶ 2.

⁵*Heitman v. City of Mauston Common Council*, 226 Wis. 2d 542, 548, 595 N.W.2d 450 (Ct. App. 1999) (citing *State ex rel. Althouse v. City of Madison*, 79 Wis. 2d 97, 118-19, 255 N.W.2d 449 (1977)).

⁶*Mount Horeb Cmty. Alert*, 2003 WI 100, ¶ 12, 263 Wis. 2d 544.

⁷*Althouse*, 79 Wis. 2d at 118. On May 29, 2007, a proposal (AB 363) was introduced in the Wisconsin Legislature that would have provided that a city or village is not required to act on a proposed resolution or ordinance if it "does not substantially relate to any city or village governmental function or responsibility" or "is primarily ceremonial or aspirational." On Dec. 4, 2007, an amendment to the proposed bill was offered that broadened the categories under which a common council or village board is not required to act to include an ordinance and resolution that is "advisory, or memorializes an opinion or a request to take or refrain from taking action." Some people have opined that this "exception" would largely negate the statute itself. The bill, as amended, was passed by the Assembly on Jan. 15, 2008, but the Senate did not take up the measure before adjournment of the legislative session.

⁸*Althouse*, 79 Wis. 2d at 107.

⁹Wis. Stat. § 9.20(3).

¹⁰*Oak Creek Citizen's Action Comm. v. City of Oak Creek*, 2007 WI App 196, ¶ 9, 304 Wis. 2d 702, 738 N.W.2d 168 (footnote omitted) (citing *Little Sissabagama Lake Shore Owners Ass'n v. Town of Edgewater*, 208 Wis. 2d 259, 266, 559 N.W.2d 914 (Ct. App. 1997)).

¹¹Wis. Stat. § 9.20(8).

¹²*Mount Horeb Cmty. Alert*, 2003 WI 100, ¶ 4, 263 Wis. 2d 544.

¹³*Id.*

¹⁴*Id.* ¶ 18 (citing *Althouse*, 79 Wis. 2d at 118-19).

¹⁵*Id.* ¶ 21 (quoting *Heider v. Common Council of City of Wauwatosa*, 37 Wis. 2d 466, 475, 155 N.W.2d 17 (1967)).

¹⁶*Id.* ¶ 22 (quoting *Heider*, 37 Wis. 2d at 475).

¹⁷*Id.* ¶ 31.

¹⁸*Id.* ¶ 4.

¹⁹*Landt v. City of Wisconsin Dells*, 30 Wis. 2d 470, 473-75, 141 N.W.2d 245 (1966).

²⁰The statute was then numbered Wis. Stat. section 10.43. The supreme court's last sentence in the opinion summed up the court's holding: "As previously indicated, we conclude that the legislature has not, by sec. 10.43, authorized a procedure for the repeal of existing legislation." *Landt*, 30 Wis. 2d at 480. See also *Schaefer v. Village Bd. of Potosi*, 177 Wis. 2d 287, 501 N.W.2d 901 (Ct. App. 1993).

²¹*Mount Horeb Cmty. Alert*, 2003 WI 100, ¶ 4, 263 Wis. 2d 544.

²²*Id.* ¶ 26.

²³*Heitman*, 226 Wis. 2d at 544-55 (footnote omitted).

²⁴*Id.* at 555 (footnote omitted).

²⁵*Mount Horeb Cmty. Alert*, 2003 WI 100, ¶ 28, 263 Wis. 2d 544.

²⁶*Id.* ¶ 5.

²⁷*Id.* ¶¶ 6, 38.

²⁸*Id.* ¶ 38.

²⁹*Id.* ¶ 9.

³⁰Temporary relief is appropriate when 1) it is necessary to preserve the status quo; 2) there is no other adequate remedy; 3) petitioners will suffer irreparable harm if the action is allowed to continue; and 4) petitioners have a reasonable probability of success on the merits. See *Werner v. A.L. Grootemat & Sons Inc.*, 80 Wis. 2d 531, 520, 259 N.W.2d 310 (1977).

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