MOUNT HOREB: AN INVALID BLUEPRINT

By Daniel M. Olson, Assistant Legal Counsel

The Wisconsin Supreme Court recently decided that a proposed ordinance establishing a binding popular referendum requirement for certain capital improvement projects in the Village of Mount Horeb is a proper subject for direct legislation. *Mount Horeb Community Alert v. Village Board of Mt. Horeb,* 2003 WI 100. This decision does provide significant support for further expansion of permissible direct legislation proposals but does not resolve the validity of the popular referendum requirement imposed by the proposed ordinance.

Until the validity of a direct legislation ordinance imposing a binding popular referendum requirement on capital project expenditures or an even broader range of legislative decisions is decided by the courts, members of city councils and village boards presented with a direct legislation petition proposing the adoption of a *Mount Horeb*-type ordinance will be faced with a difficult decision. To better inform this decision, an examination into the validity of a binding popular referendum requirement imposed by direct legislation seems in order. The examination that follows indicates the *Mount Horeb* "blueprint"[1] for altering the structure of city or village government in Wisconsin through imposition of a binding popular referendum procedure should be considered invalid.

DIRECT LEGISLATION AUTHORITY

Unlike some states, primarily in the west, where the people reserved certain legislative powers at the time of statehood, the Wisconsin Constitution does not reserve for its citizens a general right to legislate by initiative or referendum at the state or local level. Under the Wisconsin state constitution, the people delegated all lawmaking powers to the legislature with the adoption of the state constitution. Wis. Const. Art. IV sec. 1. Wisconsin residents therefore do not have any constitutionally guaranteed right to direct democracy.

In 1911, the Wisconsin legislature established statutory direct democracy in counties and cities by creating initiative and popular referendum procedures for these local governments. Ch. 513, Laws of 1911. In its present form, the Wisconsin direct legislation statute only provides a process for lawmaking by citizen initiative in cities and villages. Wis. Stat. sec. 9.20. The statute authorizes village and city electors to originate, by petition, local legislation, which is either adopted by the village board or city council or submitted to the people for approval.

Direct legislation authority "is a creature of statute and its use must comport with the requirements established by the legislature." *Heitman v. City of Mauston Common Council*, 226 Wis. 2d 542, 547, 595 N.W.2d 450 (Ct. App. 1999) (citing *Landt v. City of Wisconsin Dells,* 30 Wis. 2d 470, 478-79, 141 N.W.2d 245 (1966)). A petition for direct legislation must be signed by "[a] number of electors equal to at least 15% of the votes cast for governor at the last general election in their city or village." Wis. Stat. sec. 9.20(1). Upon certification as to sufficiency and form by the city or village clerk, "[t]he common council or village board shall, without alteration, either pass the ordinance or resolution 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." Wis. Stat. sec. 9.20(4). If adopted by the council or board or by the voters in the election, the ordinance cannot be vetoed, nor can it be repealed or amended for a period of two years, except by a vote of the electors. Wis. Stat. sec. 9.20.

The direct legislation authority is also subject to four judicially implied limitations. A direct legislation ordinance: "1) must be legislative as opposed to administrative or executive in nature; 2) cannot repeal an existing ordinance; 3) may not exceed the legislative powers conferred upon the governing municipal body; and 4) may not modify statutorily prescribed procedures or standards." *Mount Horeb Community Alert*, 2003 WI 100, ¶17.

These judicial limitations are intended to "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." *Id.* at ¶18. If none of these limitations apply and the statutory requirements have been met, the city council or village

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1. This term is borrowed from Justice Crooks's dissent wherein he stated: "Unfortunately, there are some, who wish to disrupt the wheels of government solely for the purpose of disruption. The majority opinion provides them with a blueprint and an imprimatur." *Mount Horeb Community Alert*, 2003 WI 100, ¶60 (Crooks, J., dissenting).

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board must comply with the directives of Wis. Stat. sec. 9.20 to adopt the proposed legislation or submit it to the electors for a vote.

MOUNT HOREB BACKGROUND

In 2000, a group of Mt. Horeb electors, dissatisfied with a decision by the Mt. Horeb Village Board (Village Board) about the location of a new library, submitted a petition for direct legislation to the Village Board pursuant to Wis. Stat. sec. 9.20. The petition proposed a new ordinance that reads:

> Prior to the start of any physical construction of any municipally financed (in whole or in part) project requiring a Village capital expenditure of $1 million or more, the Village Board shall submit to the electorate a binding referendum for approval of the project. Failure of the binding referendum shall preclude the Village from proceeding with the project. The wording of any referendum shall provide the specific purpose, location and cost of the project. Nothing in this provision shall be construed to preclude the Village from exercising its role in the planning or design of such publicly financed projects.

The Village Board declined to either adopt the ordinance or place it on the ballot. In response, the petitioners commenced an action for a writ of mandamus to force action by the Board.

The trial court concluded that the proposed ordinance would modify municipal borrowing procedures in Wis. Stat. ch. 67 and denied the requested writ. The petitioners appealed the decision to the Court of Appeals.

The Court of Appeals reversed the trial court. It concluded that the proposed ordinance "does not modify statutory procedures, is legislative in nature, does not repeal existing legislation and does not exercise powers that are outside the authority of the Village Board." *Mount Horeb Community Alert v. Village Board of Mt. Horeb*, 2002 WI App 80, 252 Wis. 2d 713, 643 N.W.2d 186. The Village sought and obtained review of the court of appeals decision by the Wisconsin Supreme Court.

THE WISCONSIN SUPREME COURT DECISION

In a close decision sparking a strong dissent, four members of the Wisconsin Supreme Court declined to reverse the court of appeals. Instead, the majority affirmed the court of appeals ruling that the proposed ordinance was a proper subject for direct legislation.

In support of its determination that the proposed ordinance is legislative rather than administrative, the majority stated that the ordinance "is general in application (it applies to all new million dollar construction projects), sets forth a permanent rule until repealed, and creates new policy." *Mount Horeb Community Alert*, 2003 WI 100, ¶31. The majority also stated that the "appropriation of funds for municipal construction projects is a central legislative function" and the "decision to build a new million-dollar project is clearly a legislative one." *Id.* at ¶32.

The majority next noted that the Village did not identify any existing ordinance that would be repealed by the proposed ordinance. Accordingly, it concluded that the second judicial limitation on direct legislation, prohibiting the use of direct legislation to repeal or amend existing legislation, was not implicated.

The majority then rejected the Village Board's argument that the proposed ordinance exceeds the Board's authority because it circumscribes the independent authority of library boards and other entities to make expenditure decisions. It explained that the independent authority of a library board over library funds "only comes into play after library funding is 'appropriated' or 'authorized'" and the proposed ordinance would only impact the initial appropriation decision by the village board and not the library's expenditure decision. *Id.* at ¶35. The majority was therefore "satisfied that the proposed ordinance does not exceed the powers conferred upon the village board." *Id.*

Finally, the majority disagreed with the argument that the proposed ordinance would modify other statutory procedures that govern public contracting and financing of municipal construction projects. On the argument that the ordinance conflicts with public bidding requirements, the majority acknowledged that "there may indeed be some practical difficulties associated with accurately costing a construction project in advance of bidding" but explained that "these are political or policy arguments better addressed to the electorate" and "do not operate to preclude the initiative from ever reaching the ballot in the first place." *Id.* at ¶37. In regard to conflicts or modifications of statutory provisions governing municipal bonding, the majority observed that the proposed ordinance "does not reference bonding or municipal borrowing." Moreover, it explained that "[e]ven assuming that projects that are expected to cost $1 million or more would be financed through bonding, the requirement of prior voter approval via a binding referendum does not interfere with the statutory procedures governing bonding issues." *Id.* at ¶38.

DECISION IMPACTS

Prior to *Mount Horeb*, when a direct legislation proposal affected or controlled government decisions, the Wisconsin Supreme Court looked to the nature of the government entity involved in the decision. In *Heider v. City of Wauwatosa,* 37 Wis. 2d 466, 476, 155 N.W. 2d 17 (1967), the court determined that a proposed resolution that would limit the actions of a plan commission was invalid since " city planning is an administrative function" performed by "an administrative body — the city plan commission."

The proposed direct legislation ordinance in *Mount Horeb* requires the referendum question to identify the location

of the capital expenditure project. This means the location of a variety of capital improvements such as water towers and public buildings established or obtained through capital expenditures will be affected by the ordinance. Under state law or administrative regulation, the decision where to locate these types of facilities is controlled by or within the responsibility of an administrative body. *See* Wis. Admin. Code sec. NR 811.57 (giving Wisconsin Department of Natural resources authority to control location of municipal water towers) and Wis. Stat. sec. 62.23(5) (giving the city or village plan commission shared authority with the governing body to decide the location of public buildings).

The *Mount Horeb* majority, apparently unaffected by this circumstance, did not comment on this consequence of the proposed ordinance. This is particularly troubling in light of the court's prior pronouncements in this area and the clear results under the *Mount Horeb* proposal. This lack of comment also suggests substantially reduced importance for the "administrative body" factor in the administrative-legislative analysis and new judicial support for direct legislation proposals that intrude into the decision-making arena of administrative bodies and areas previously considered off limits to such enactments.

Another important consideration in the administrative-legislative analysis is whether the direct legislation proposal is of general rather than special character. *See Heider*, 37 Wis. 2d at 475 (proposals relating to subject of permanent and general character are usually regarded as legislative and those providing for subject of temporary and special character are regarded as administrative) (citing 5 McQuillin, MUN. CORP. (3rd ed.), pp. 253, 254, sec 16.55). Prior decisions of the court have done little to define this requirement but it might be fairly understood to mean that the ordinance or resolution should have broad application. This was the meaning of "general" applied by the majority in *Mount Horeb* when it stated that "the proposed ordinance is general in application (it applies to all new million dollar construction projects)." *Mount Horeb Community Alert,* 2003 WI 100, ¶31.

However, when a proposal relates to government process or operation, this meaning of "general" is unsatisfactory since the more a proposal intrudes on city and village functions, the more likely it will be administrative in character, not less. If the *Mount Horeb* ordinance is expanded to require a binding popular referendum for any municipal expenditure and become even more "general" under the majority opinion's interpretation of the term because it applies to all expenditures rather than a specific expenditure, the proposal would constitute such a high degree of interference in the basic administration of city or village government that its administrative character seems beyond doubt. The meaning of "general" applied by the *Mount Horeb* majority nonetheless suggests that this hypothetical proposal might be considered more legislative, not less, than the proposed *Mount Horeb* direct legislation.

It is important to note that the *Mount Horeb* majority's analysis focused solely on municipal construction project expenditures of at least $1 million dollars. Accordingly, it does not directly apply to other types of or smaller expenditures. However, the interpretation of "general" applied by the majority creates some unique problems when applied to a proposal that relates to government operations and seems to put a substantial range of city council and village board financial decisions within the scope of a direct legislation proposal. If so, this represents much greater judicial support for intrusion into government operations by direct legislation than previously provided.

Finally, and most unfortunately, the decision energizes the argument that the direct legislation statute can be used to restructure city and village government by imposing binding popular referendum requirements on legislative decisions of a city council or village board. This is the "blueprint" for disrupting the wheels of

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> "Under state law or administrative regulation, the decision where to locate these types of facilities is controlled by or within the responsibility of an administrative body."

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government that Justice Crooks spoke of in his dissent. *Mount Horeb Community Alert*, 2003 WI 100, ¶60 (Crooks, J. dissenting). The majority opinion is however completely silent on the validity of this blueprint.

Undoubtedly, popular referendum advocates will be inclined to interpret the majority's silence as validation of a binding popular referendum requirement. This is a misinterpretation of the decision.

A disciplined reading of *Mount Horeb* reveals that the court only decided that the proposed direct legislation ordinance was a proper subject for direct legislation. *Id.* at ¶39. The decision contains no predetermination or conclusion that the proposed ordinance is valid legislation.

Judicial prejudgment of a direct legislation proposal's validity is in fact strongly disfavored. In *State ex. rel. Althouse v. City of Madison*, 79 Wis. 2d 97, 117-118, 255 N.W.2d 449 (1977), the Wisconsin Supreme Court said:

> We conclude that, where there has been no specific prior adjudication of unconstitutionality, the electorate under the direct legislation statutes, may compel the placement on the ballot regardless of grave doubts in respect to constitutional and statutory validity. Only after the measure has passed and a controversy arises may a court of this state pass upon the question of constitutionality.

To read *Mount Horeb* as expressing some judicial predetermination about the validity of the ordinance in the case or a binding popular referendum requirement would be inconsistent with this holding.

The majority opinion's silence on the use of the direct legislation statute to impose a binding popular referendum requirement on capital improvement expenditure decisions of a village board should be viewed as just that — silence — no comment — and nothing more. The validity of this requirement or a more general binding popular referendum requirement for legislative decisions of a city council or village board is therefore still an open question and worth examining in light of the substantial changes in city and village government validation would bring.

Invalidity of Direct Legislation Binding Popular Referendum Requirement

Cities and villages are creations of the state legislature and their basic structure and means of administration are established by statute. For example, the state legislature assigned city councils and village boards authority to acquire property or manage finances in their respective communities. Wis. Stat. sec. 62.11(5) and 61.34(4). It did not provide any general authorization for city or village electors to share in or review the exercise of these powers by popular referendum except in specific circumstances, such as bond issues. *See* Wis. Stat. sec. 67.05.

If adopted, a direct legislation ordinance that imposes a binding popular referendum requirement on a capital improvement expenditure decision or any other legislative decision of a city council or village board would make the city or village electors, not the city council or village board, the final decision maker. Such an ordinance would be an unquestionable limitation on the powers granted to city council and village boards. However, the powers granted to city councils and village boards by the legislature "shall be limited only by express language." Wis. Stat. sec. 62.11(5) and 61.34(1).

The direct legislation statute does not contain any express language limiting the powers granted to city councils and village boards except to proscribe repeal or alteration of an adopted direct legislation proposal by the council or village board within two years of adoption. Wis. Stat. sec. 9.20(8). On its face, the statute seems to fail the requirement for express language limiting the powers granted to city councils and village boards by the legislature.

It might nonetheless be argued that the direct legislation statute language is sufficiently express to limit the powers granted to city councils and village boards because it is to be liberally construed and provides no specific limits on the substantive content of direct legislation proposals. However, interpreting the statute in this manner to permit adoption of a direct legislation ordinance that imposes a binding popular referendum limitation on powers granted to city councils and village boards is in direct conflict with the legislative history of the statute.

The source of the present direct legislation statute was ch. 513, Laws of 1911, creating "sections 39i to 39l, inclusive of the statutes, relating to the initiative and referendum on acts of municipal councils and of boards of county supervisors." Section 39i "created an initiative procedure, the filing of a petition to compel a city council or county board to adopt an ordinance, or, in default of such adoption, to submit it to popular vote. Sec. 39j created a procedure of the referendum type, the filing of a petition to compel a city council or county board either to repeal an ordinance or resolution already adopted, or, in default of such appeal, to submit it to popular vote." *Landt*, 30 Wis. 2d 475-76. After the referendum authority in section 39j was declared unconstitutional as to counties in *Meade v. Dane County*, 155 Wis. 632, 145 N.W. 239 (1914), it was repealed by the legislature and has not since been reenacted. *See* sec. 27, ch. 383, Laws of 1915. The remaining sections authorizing only initiative procedure were revised and renumbered to Wis. Stat. sec. 10.43. *See* sec. 14, ch. 385, Laws of 1915. Wisconsin Statute sec. 10.43 subsequently became Wis. Stat. sec. 9.20 and expanded to include villages as well as cities. *See* sec. 1, ch. 666, Laws of 1965.

This legislative history of the direct legislation statute "makes clear that the power of referendum has been withdrawn

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from the electors." *Schaefer v. Village Board of Potosi,* 177 Wis. 2d 287, 291, 501 N.W.2d 901 (Ct. App. 1993)(*citing Landt,* 30 Wis. 2d at 476). It also forecloses any reasonable interpretation of the direct legislation statute to find authority to create a popular referendum requirement for any city council or village board decision. Any attempt to resurrect the power of referendum through the back door by piggybacking it onto an initiative measure is clearly an effort to circumvent the legislature's unequivocal decision to remove the power of referendum from the direct legislation statute. Accordingly, the *Mount Horeb* ordinance or any other direct legislation ordinance seeking to impose a binding popular referendum requirement on all or any subset of city council or village board decisions should be considered invalid.

The lack of authority in the direct legislation statute to create a binding popular referendum requirement is not the only reason for considering the *Mount Horeb* ordinance to be an invalid blueprint for restructuring city and village government. The ordinance is also contrary to another area of well-established law.

It is a fundamental principle of municipal law that a municipality's governing body may not surrender its legislative power unless authorized. The basic rule is stated in 2A McQuillin, MUNICIPAL CORP. sec. 10.38, 425 (3d ed):

> Unless authorized by statute or charter, a municipal corporation, in its public character as an agent of the state, cannot surrender, by contract or otherwise, any of its legislative and governmental functions and powers, including a partial surrender of such powers. The principle is fundamental and rests upon policies the soundness of which has never been seriously questioned.

Wisconsin follows this rule and requires explicit authorization for a surrender of governmental power by the governing body of a municipality. *See Save Elkhart Lake v. Elkhart Lake,* 181 Wis. 2d. 778, 789, 512 N.W.2d 202 (Ct. App. 1993).

An irrevocable grant of legislative power is a surrender. *See Mouledoux v. Maestri,* 197 La 525, 2 So. 2d 11, 16 (1941), (a critical factor for determining whether a particular action constitutes a surrender of legislative power is whether the grantor may revoke the power). If a city or village governing body or its electors adopt a direct legislation ordinance that imposes a binding popular referendum requirement on the governing body's capital improvement expenditure or other legislative decisions, this grant of legislative power to the electors cannot be altered or revoked for a period of two years after adoption by the governing body. *See* Wis. Stat. sec. 9.20(8). City council or village board adoption of a *Mount Horeb* ordinance or any direct legislation ordinance imposing a binding popular referendum requirement on legislative decisions of the council or board is therefore a surrender of legislative power by the council or board.

There is no explicit general legislative authorization for a city council or village board to surrender[2] their capital expenditure decision authority to the residents of their city or village or any other non-governmental entity. Accordingly, adoption of a *Mount Horeb* ordinance or any direct legislation ordinance imposing a binding popular referendum requirement on legislative decisions of a city council or village board by a council or board is contrary to the foregoing rule prohibiting surrender of legislative power without express authorization and invalid.

The *Mount Horeb* ordinance however does not require a surrender of legislative power by the governing body. If the governing body declines to adopt the ordinance (as it probably should in light of the rule just noted), the surrender, if accomplished at all, would be the action of the electors at the ballot box not the municipal governing body. This raises the question of whether the rule prohibiting unauthorized surrender of legislative power by a municipal governing body should also apply to electors exercising their direct legislation powers.

The Wisconsin Supreme Court has held that municipal electors exercising the direct legislation initiative power are bound by the same functional limits of legislative authority as their city councils or village boards. *See Althouse,* 79 Wis. 2d at 108 ("city electors may only exercise such powers as are conferred upon the common council of the city by the statute or the constitution"). If the electorate must operate within these limits of a governing body's authority, their legislation should also be subject to other constraints applicable to municipal governing bodies including the prohibition on surrendering legislative power without express authority.

The Eastern District federal court of Wisconsin agreed with the basic premise of this argument in *Otey v. Common Council of the City of Milwaukee,* 281 F. Supp. 264 (E.D. 1968). In *Otey,* the court observed that a proposed direct legislation resolution prohibiting the Milwaukee common council from enacting any ordinance restricting the right of owners to sell, lease or rent private property was contrary to the rule prohibiting a legislative body from irrevocably withdrawing a topic from the scope of future legislation. It then concluded that "[s]ince under a referendum, city electors exercise only such legislative power or authority as is conferred upon the common council, **it follows likewise that the Milwaukee electorate cannot irrevocably bind successor members of the common council.**" 281 F. Supp. at 275, n. 17 [emphasis added].

2 Equating surrender with an irrevocable as compared to a revocable transfer.

If an act is invalid if accomplished by the governing body, it seems unsound to conclude that it should be valid merely because it is the product of a popular vote. Since city council or village board adoption of a direct legislation ordinance imposing an irrevocable binding popular referendum requirement on legislative determinations of the council or board is invalid, the same result accomplished by popular vote should also be regarded as invalid for the same reasons.

Finally, the special concerns regarding piecemeal financial decisions by the electorate also warrant invalidation of the *Mount Horeb* ordinance. The Wisconsin court of appeals recognized these concerns in *Becker v. City of Milwaukee,* 101 Wis. 2d 680, 688, 305 N.W.2d 178 (Ct. App. 1981), when it stated: "To permit the electorate to initiate piece-meal measures affecting the fiscal affairs of the city without regard for the overall fiscal programs, or measures not embodying a basic plan or policy for the entire area of government activity upon which the measure touches, could result in the destruction of the efficient administration of the affairs of the city, and we do not believe the initiative statute so intends."

A *Mount Horeb* ordinance does not merely attempt to control a single municipal financial decision as in *Becker*. It seeks control over an entire class of major municipal financial decisions that are typically part of a municipality's long range capital improvement plan. Subjecting each project in the plan to voter determination certainly increases the risk that the efficient financial administration of municipal government might be destroyed.[3] As the court in *Becker* correctly recognized, this is not a legislatively intended result of the direct legislation authority. Accordingly, the *Mount Horeb* ordinance, like the proposal in *Becker*, should be deemed invalid.

Conclusion

While the *Mount Horeb* decision has expanded the scope of permissible direct legislation proposals, it did not determine the validity of the ordinance or the popular referendum limitation on city council or village board power. The decision simply declares that the ordinance in *Mount Horeb* is a proper subject for direct legislation.

The *Mount Horeb* decision therefore does not require council or board acquiescence to the proposed ordinance in that case or any other direct legislation ordinance imposing binding popular referendum requirements on legislative determinations of the council or board.

Rather, if a city council or village board declines to adopt such a proposed ordinance, which may be required in light of the rule prohibiting a governing body from surrendering legislative power without express authority, the proposal must be submitted to the electorate for a vote even though there are grave doubts about its validity.

We can hope that the apparent legal insufficiency of a *Mount Horeb* ordinance will lead to voter rejection of such proposals and the avoidance of inevitable conflicts over implementation. Nonetheless, the *Mount Horeb* decision has placed the idea of popular referendum squarely on the political stage and some officials may wish for some lawful alternative to the *Mount Horeb* ordinance. Anticipating this desire, League legal staff have developed an advisory referendum ordinance that is not so much a model but a framework for communities to adapt to their own circumstances. This ordinance is available online at <www.lwm-info.org> or upon request to the League office at (800) 991-5502.

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"Subjecting each project in the plan to voter determination certainly increases the risk that the efficient financial administration of municipal government might be destroyed."

3. One might look to California as a possible future if financial decisions are to be controlled by direct legislation. One estimate indicates the California legislature controls only about eight percent of the state budget as a result of initiative taxing and spending measures. *See* Philip P. Frickey, "The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere," 34 Willamette L. Rev. 421, 430 (1998).

Legal Opinion

Use of Direct Legislation Improper Where Proposed Ordinance Repeals Existing Ordinance

The city has received a proposed ordinance which was submitted for direct legislation pursuant to Wis. Stat. sec. 9.20.

The proposed ordinance makes it unlawful and a public nuisance for "any person, agent, or any public or private water system, to introduce, add or maintain any product, substance, or chemical to the public water supplies for the purpose of treating or affecting the physical or mental functions of the body of any person, rather than to make water safe or potable such as in the use of chlorine," unless the substance is FDA-approved and contains no contaminants at concentrations that exceed U.S. Maximum Contaminant Level Goals as described in the U.S. Safe Drinking Water Act. The proposed ordinance contains a severability provision, and a provision stating that all contrary city laws, regulations, resolutions or ordinances are repealed. You believe this proposed ordinance is in direct conflict with sec 42-5 of the city's ordinances which requires the city's water utility to add flourine to the city's water supply.

As you are aware, there are certain limitations on direct legislation. One of the limitations is that the direct legislation process cannot be used to directly or indirectly repeal an existing ordinance. In its most recent decision involving the direct legislation process, the Wisconsin Supreme Court affirmed its continued adherence to this long-standing limitation, stating as follows:

> While the initiative process of Wis. Stat. sec. 9.20 can be used to compel the adoption or popular vote on any local matter legislative in character, it cannot be used to directly or indirectly repeal an existing ordinance. This second limitation on direct legislation was implicated in *Landt*, 30 Wis.2d at 473, 141 N.W.2d 245. There, the proposed ordinance would have prohibited the fluoridation of the public water supply, after the common council had adopted an increase in the water supply's fluoride content. *Id.* Because the proposed fluoridation prohibition was solely an attempt to repeal an existing ordinance, we affirmed the circuit court's judgment quashing the petition for a writ of mandamus. *Id.* at 473-74, 141 N.W.2d 245.

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You have requested that the League issue a formal opinion answering the following questions. Because you need an expedited answer, I will attempt to keep my answer short and to the point.

1. Is the proposed ordinance submitted in direct conflict with the city's current ordinance on water flouridation?
2. What happens if the proposed ordinance is in direct conflict with the city's current ordinance?

Although the proposed ordinance is broader than the city's current ordinance in that it prohibits more than just flourine from being added into the water system, it is my opinion that the proposed ordinance's failure to exclude or make any exception for flourine brings it in direct conflict with the city's current ordinance. If enacted as written, it would prohibit the water utility from adding flourine to the water, and the express language in section 3 of the proposed ordinance would repeal sec. 42-5 as contrary legislation. Because the ordinance seeks to repeal existing legislation, and it is clear that this is not an appropriate use of the direct legislation process, it is my opinion that the submission of the petition and proposed ordinance does not compel the council to adopt this ordinance or refer it to a vote of the electors.

When the clerk forwards it to the council, it is my opinion that the council may, given existing legal precedent, properly decline to do anything further with the ordinance on the ground that it would repeal existing legislation and is therefore an improper subject for direct legislation. In my opinion, this would best be accomplished by a motion or resolution — some sort of formal action so that it is clear that the council did not simply ignore the petition.

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