

## An Ordinance Providing for Advisory Public Referenda Procedures - Drafted by the League of Wisconsin Municipalities

### *Drafter's Comments:*

This ordinance has been developed by the League of Wisconsin Municipalities legal staff in response to the Wisconsin Supreme Court decision in *Mount Horeb Community Alert v. Village Board of Mt. Horeb*, 2003 WI 100. In the *Mount Horeb* decision, the court found a proposed direct legislation ordinance that would establish a binding public referendum requirement for capital improvement expenditures of 1 million dollars or more to be a proper subject for direct legislation under Wis. Stat. §9.20.

One attempt to prevent submission of the same or a similar type of ordinance under the sec. 9.20 direct legislation authority would be the adoption of a regular or charter ordinance either prohibiting binding referendums or establishing a procedure for their conduct. This enactment would probably allow a governing body to decline to submit a subsequently submitted sec. 9.20 direct legislation ordinance patterned after *Mount Horeb* to the electorate since it would probably be construed as a repeal of the earlier ordinance and the sec. 9.20 direct legislation authority does not extend to proposals that repeal existing legislation. However, this approach is an ineffective response to the *Mount Horeb* decision because citizens may propose a charter ordinance by direct legislation under Wis. Stat. §66.0101(6) and the sec. 9.20 restriction prohibiting direct legislation proposals that repeal existing legislation is inapplicable in that circumstance.

The most effective limitation on the *Mount Horeb* decision may be the invalidity of the proposed ordinance at issue in the case. Although some proponents of popular referendum decisionmaking may argue that the decision validates the proposed ordinance, there is no ruling or judgment on the validity of the ordinance in the decision. However, League counsel think the proposed ordinance in *Mount Horeb* is contrary to Wisconsin law and should be considered invalid. *See* Ordinances and Resolutions 488. Accordingly, adoption of a regular or charter ordinance prohibiting binding referendums or establishing a procedure for them may also be an unnecessary response to *Mount Horeb*.

Nonetheless, the *Mount Horeb* decision has generated significant discussion about direct public participation in city or village government by popular referendum. Although the direct legislation statute might be viewed as a method for such participation, it only authorizes initiative measures (proposed legislation by citizens) not popular referendums (citizen approval of legislation adopted or proposed by a governmental body). Accordingly, some communities may wish to expand the opportunity for direct public participation in city or village government by popular referendum.

This ordinance creates one possible set of procedures for advisory popular referendums. Although the ordinance is an alternative to a *Mount Horeb* ordinance, it is not intended nor will it serve to prevent submission of or action on a sec. 9.20 direct legislation ordinance proposing a *Mount Horeb*-type binding referendum requirement. Rather, it is

principally intended to provide one permissible means for expanding opportunities for direct public participation in local government through advisory popular referendums while respecting the constitutional requirement for representative government and the legislatively established decisionmaking structure for city and village government in Wisconsin. However, development of this ordinance by League legal staff should not be read as an endorsement by the League of such an expansion.

Some specifics of the ordinance should be noted. It does add additional responsibilities for various municipal officials in city/village government, including the municipal clerk and municipal attorney. It may also impose additional costs on a municipality for the conduct of special elections. The ordinance does not specifically require a special election in any circumstance. However, it does provide for such an event while leaving the governing body with full discretion whether to hold a special election on an advisory referendum question. These are just some of the matters to be considered before an advisory referendum ordinance such as this is adopted.

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ORDINANCE NO. \_\_\_\_

An Ordinance Providing for Advisory Public Referenda Procedures

WHEREAS \_\_\_\_\_;

WHEREAS \_\_\_\_\_; and

WHEREAS \_\_\_\_\_.

NOW THEREFORE the [common council][village board] of \_\_\_\_\_ does ordain that section XX of the municipal code of \_\_\_\_\_ is hereby created to read:

**XX. ADVISORY REFERENDUM.**

xx. **PURPOSE.** The purpose of this ordinance is to establish specific guidelines and procedures for an advisory referendum in the [City][Village] of \_\_\_\_\_ and authorize such measures for matters of substantial public interest and discussion while respecting the principles of representative democracy and the decisionmaking responsibilities of the [city council][village board] and other municipal officials provided by state law.

xx. **LIMITATIONS.** Except where an advisory referendum procedure is otherwise established by law, an advisory referendum shall be conducted only in accordance with the procedures provided by this section. This section authorizes only an advisory referendum and no authority for a binding referendum is intended by it or to be construed from it.

xx. LEGISLATIVE MATTER DETERMINATION. Prior to submission of any question for advisory referendum pursuant to this section, the question to be submitted shall be submitted to and reviewed by the [city][village] attorney to determine whether the question involves an administrative or legislative matter. The attorney shall submit a report to the [city council][village board]. The [city council][village board] shall determine whether the question involves an administrative or legislative matter. If the question is found to be legislative, it shall be submitted to the voters upon compliance with the requirements of this section. If the question is found to be administrative, the question shall not be submitted to the voters.

xx. BY VOTE OF [COMMON COUNCIL][VILLAGEBOARD]. An advisory referendum may be held upon a [majority][two-thirds (2/3rds)][three-fourths (3/4ths)] vote of all members of the [common council][village board] approving such referendum on a legislative matter subject to determination by the [common council][village board].

xx. BY PETITION OF ELECTOR COMMITTEE. An advisory referendum may be held upon the filing of a notice of intent to circulate an advisory referendum petition signed by a committee of not less than \_\_\_ registered voters of the [city][village] with the [city][village] clerk prior to a legislative decision of the [common council][village board] on the matter to be submitted for advisory referendum and the filing of a proposed advisory referendum question on the legislative decision with a verified petition signed by a number of registered voters of the [city][village] equal to at least \_\_\_% of the votes in the [city][village] cast for governor at the last general election within \_\_\_ calendar days of the filing of the notice of intent to circulate petition. Submission of the notice of intent to circulate petition for an advisory referendum shall proscribe a final legislative decision on the proposed advisory question by the [council][board] until: 1) the proposed advisory question is found to be an administrative not legislative matter; or 2) the allotted time for filing a verified petition has elapsed without a petition being filed; or 3) a petition is filed within the allotted time but is found to be insufficient; or 4) a sufficient petition is filed and the advisory question has been submitted to the voters. The petition to be circulated may contain more than one paper, but each separately circulated paper shall contain at its head, or attached thereto the names and addresses of the persons submitting the notice of intent to circulate petition and the exact text of the proposed advisory referendum question. Each signer of the notice of intent to circulate petition and the petition shall sign their name and give their address. Each separate page of the petition shall have appended to it a certificate by the circulator, verified by oath, that each signature appended thereto was made in their presence and that the circulator believes it to be the genuine signature of the person whose name it purports to be. Any person whose name appears on a petition may withdraw their name by a written statement filed with the [city][village] clerk before the clerk reports to the [city council][village board] on the sufficiency of the petition. Within \_\_\_ working days, the [city][village] clerk shall examine the petition for its sufficiency and issue a report to the [city council][village board]. If the petition is found sufficient, the [city council][village board] shall submit the advisory referendum question to the voters at a special election, if authorized by the [council][board], or at the next general election. If the petition is not sufficient, the advisory referendum question shall not be submitted to the voters.

Passed and adopted by the [common council][village board] of \_\_\_\_\_  
this \_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
[Mayor][Village President]

Attest: \_\_\_\_\_  
[City][Village] Clerk.