

Municipal Home Rule in Wisconsin

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Common council and village board members may find it helpful to have a general understanding of municipal authority. The general rule is that municipalities are creatures of the state and have only the powers given them.¹ In other words, municipalities have no inherent powers.² Fortunately, Wisconsin cities and villages have been granted broad home rule powers by the legislature and Wisconsin electors. "Home rule" is the ability of cities and villages to govern themselves in local matters without state involvement or interference. Broad home rule authority differentiates Wisconsin cities and villages from other local units of government. Towns do not have home rule powers and, with the exception of those towns who have adopted village powers pursuant to sec. 60.10(2)(c), require specific statutory authorization to exercise particular powers. Counties have limited "organizational or administrative" home rule powers.³

Although Wisconsin cities and villages enjoy extensive home rule powers, those powers have been significantly eroded in recent years by court decisions interpreting the scope of municipal home rule powers and by the legislature which has, with increasing frequency, enacted legislation preempting municipalities from acting in a given area.

This legal comment briefly reviews the history of municipal home rule in Wisconsin, and explains the two sources of home rule power and the different analyses that are employed, depending on the source of the power exercised, to determine whether a municipality is able to exercise its home rule powers in a given area. It is hoped that an understanding of these different sources of municipal home rule power and their constraints, will enable municipalities to exercise home rule powers more effectively.

I. BRIEF HISTORY OF MUNICIPAL CHARTERS AND HOME RULE IN WISCONSIN⁴

Municipal Charters: Wisconsin cities and villages initially were incorporated and received their charters by special act of the legislature. However, abuses in the special act procedure eventually led to adoption of constitutional amendments prohibiting the legislature from incorporating any city or village by special act. After 1892, municipal charters could only be modified by general law. Eventually, the legislature repealed all special charters, except for Milwaukee's, and adopted general charters for cities and villages. These general charters are found in the Wisconsin Statutes. Chapter 61 of the Wisconsin Statutes is the general charter for Villages and was first adopted in 1919. Chapter 62 is the general city charter law and, with limited exceptions that specifically pertain to 1st class cities, does not apply to Milwaukee which has its own special

¹ *Van Gilder v. City of Madison*, 222 Wis. 58, 85, 268 N.W. 108 (1936).

² *City of Madison v. Schultz*, 98 Wis.2d 188, 295 N.W.2d 798, 801 (1980).

³ Wis. Stat. secs. 59.03 and 59.04. See also *Jackson County v. DNR*, 2006 WI 96, 293 Wis.2d 497, 510-512, 717 N.W.2d 713, 720-721.

⁴ For more detail, see the 1979-1980 WISCONSIN BLUE BOOK at 46-47.

charter.⁵ Chapter 62 was adopted in 1921. Amended in 1927 and in 1933, these chapters provide the basic framework for current law governing cities and villages.

Home Rule: Home rule proponents, seeking to keep control at the local level and exempt cities and villages from state legislative control as much as possible, were successful in getting the legislature to pass a home rule statute in 1911. However, the Wisconsin Supreme Court voided the home rule statute in 1912 on constitutional grounds, explaining that the Wisconsin constitution gave the legislature, not municipalities, the power to affect municipal charters. The Court held that the legislature’s statutory delegation of that power was unlawful.⁶

After the home rule statute was declared unconstitutional, home rule proponents turned their efforts towards amending the state constitution to allow home rule. After it was passed by two successive sessions of the legislature, voters adopted the constitutional home rule amendment in a 1924 referendum. This amendment empowered municipalities to determine their local affairs and government by use of a method to be specified by the legislature. In 1925, the legislature adopted Wis. Stat. sec. 66.01, later renumbered as sec. 66.0101, which sets forth the procedure for enacting charter ordinances. Section 66.0101 is often referred to as the enabling legislation for implementing the powers granted municipalities by the constitutional home rule amendment. Comprehensive home rule powers were also given to cities and villages in the general charter laws (chapters 61 and 62) referred to above.

II. SOURCES OF HOME RULE POWER

Wisconsin municipalities have two sources of home rule authority: (a) Constitutional and (b) statutory. There are important differences between these two sources of authority which are explained below.

A. Constitutional

The Constitutional home rule amendment authorizes municipalities to determine their “local affairs and government,” subject only to the Wisconsin constitution and to legislative enactments “of statewide concern as with uniformity shall affect every city or every village.”⁷ Although the constitutional home rule amendment is limited to local affairs, the courts have recognized that because almost every municipal activity has some statewide effect, matters that are local affairs may also be matters of statewide concern. To exercise constitutional home rule powers, a municipality must use a charter ordinance pursuant to Wis. Stat. sec. 66.0101.⁸

The courts have interpreted the constitutional home rule amendment as doing two things:

1. It directly grants legislative power to municipalities by expressly giving cities and villages the power to determine their local affairs and government; and

⁵ Wis. Stat. sec. 62.03.

⁶ *State ex rel. Mueller v. Thompson*, 149 Wis. 488 (1912).

⁷ Wis. Const., Art. XI, sec. 3.

⁸ *Gloudean v. City of St. Francis*, 143 Wis.2d 780, 422 N.W.2d 864, 867-68 (Ct. App. 1988).

2. it limits the legislature in its enactments in the field of local affairs of cities and villages.⁹

With regard to the limitation, although the home rule amendment explicitly states that the grant of authority is subject only to the Constitution and legislative enactments 1) *of statewide concern* that 2) *with uniformity* affect every city or every village, recent case law conflates these two requirements,¹⁰ ostensibly doing away with the requirement that the legislative enactment be one of statewide concern. This undermines constitutional home rule authority as a source of protection shielding municipalities from legislative incursions into matters involving local affairs and government.

To determine whether a municipality has validly exercised its constitutional home rule authority or whether the state legislature has unconstitutionally interfered with a municipality's "local affairs," the legislative enactment, whether state or local, must first be classified as one of three kinds:

1. exclusively of statewide concern;
2. exclusively a matter of a municipality's local affairs and government; or
3. a "mixed bag." The "mixed bag" includes matters that are not exclusively of local or statewide concern.¹¹

If the matter is exclusively of statewide concern, the home rule amendment grants no power to a municipality to deal with it.¹² The legislature may either delegate to municipalities a limited authority or responsibility to further public interests or may preempt the field by expressly banning local legislative action.¹³ Thus, when the legislature deals with matters that are primarily of state-wide concern, it may deal with them free of any restriction contained in the home-rule amendment. It can enact a law touching on a matter of state-wide concern which applies in one city and not in another, provided that the classification is proper.

If however, the subject can be classified as an area primarily and paramountly a matter of the local affairs and government of the municipality, then the municipality is authorized by the home rule amendment to enact a charter ordinance regulating that subject matter.¹⁴ Furthermore, any state legislative delegation of authority to legislate on such a subject is unnecessary and any

⁹ *State ex rel. Michalek v. LeGrand*, 77 Wis.2d 520, 253 N.W.2d 505, 506 (1977).

¹⁰The Court wrote, under "controlling precedent, no merit exists in the plaintiffs' contention that the legislative enactment at issue in a home rule challenge must be a matter of statewide concern and uniformly applied statewide to withstand constitutional scrutiny. *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶ 95, 358 Wis. 2d 1, 64-65, 851 N.W.2d 337, 368, *reconsideration denied*, 2015 WI 1.

¹¹ "[M]any matters while of state-wide concern, affecting the people and state at large somewhat remotely and indirectly, yet at the same time affect the individual municipalities directly and intimately, [and] can consistently be, and are, local affairs of this [home rule] amendment." *State ex rel. Michalek v. LeGrand*, 77 Wis.2d 520, 253 N.W.2d 505, 507 (1977).

¹²*Van Gilder* at 83.

¹³ *Michalek*, 253 N.W.2d at 508.

¹⁴ *Id.*

attempt by the legislature to preempt or ban local legislative action in such an area would be unconstitutional.¹⁵ Finally, if the legislature elects to deal with the local affairs and government of a city or village, its act is subordinate to a charter ordinance unless the legislature's act uniformly affects every city or village across the state.¹⁶

If a matter falls into the "mixed bag" category, it is necessary to apply what is referred to as the "paramountcy" test which asks whether the legislative enactment in question is "primarily or paramountly a matter of 'local affairs and government' under the home rule amendment or of 'state-wide concern.'"¹⁷ Although legislative pronouncements classifying a subject as a "local affair" or a "matter of state-wide concern" are entitled to great weight, they are not controlling¹⁸ and the classification of a matter as primarily or paramountly a matter of "local affairs and government" or of "state-wide concern" is for the courts to determine.¹⁹ Once the legislative enactment has been classified as being paramountly a matter of local affairs and government or a matter of statewide concern, it is analyzed accordingly.

Most recently, the Wisconsin Supreme Court has characterized the analysis for deciding whether a legislative enactment violates the home rule amendment as a two-step process as follows.

First, as a threshold matter, the court determines whether the statute concerns a matter of primarily statewide or primarily local concern. If the statute concerns a matter of primarily statewide interest, the home rule amendment is not implicated and our analysis ends. If, however, the statute concerns a matter of primarily local affairs, the reviewing court then examines whether the statute satisfies the uniformity requirement. If the statute does not, it violates the home rule amendment.²⁰

An important constitutional home rule case is currently pending before the Wisconsin Supreme Court with a decision expected by early this summer. The issue is whether Milwaukee's longstanding charter ordinance requiring city employees to reside in the city remains viable following the legislature's enactment of sec. 66.0502 which prohibits municipalities from adopting or enforcing residency requirements.²¹

With one notable exception, the court has classified legislative enactments falling into the mixed category as matters which are paramountly of statewide concern. In *State ex rel. Ekern v.*

¹⁵ *Id.*

¹⁶ *City of West Allis v. Milwaukee County*, 39 Wis.2d 356, 159 N.W.2d 36, 41 (1968). *Thompson v. Kenosha County*, 64 Wis.2d 673, 686, 221 N.W.2d 845, 852-53 (1974); *Van Gilder* at 85.

¹⁷ *Id.*

¹⁸ *Van Gilder* at 74.

¹⁹ *State ex rel. Michalek v. LeGrand*, 77 Wis.2d 520, 253 N.W.2d 505, 507 (1977).

²⁰ *Id.*

²¹ The Milwaukee Professional Police Association appealed the Wisconsin Court of Appeals decision holding that the City's charter ordinance requiring employees to reside within city trumped sec. 66.0502, a contrary state law prohibiting municipalities from enacting or enforcing residency requirements, because sec. 66.0502 did not involve a matter of statewide concern and did not affect all cities and villages uniformly. *Milwaukee Professional Police Ass'n v. City of Milwaukee*, 2015 WI App. 60, ¶ 15, 364 Wis. 2d 626, 640, 869 N.W.2d 522, 528, review granted.

Milwaukee,²² the Wisconsin Supreme Court upheld a Milwaukee charter ordinance which declared a state statute limiting the height of buildings in first class cities to 125 feet inapplicable and permitted a higher maximum height. The court held that building heights in a community was primarily a matter of the local affairs of the community. The *Ekern* case is significant because it marks the only time a municipality has successfully asserted constitutional home rule powers in the face of a contrary statute.

In contrast to *Ekern*, most court decisions analyzing a municipality's attempt to exert constitutional home rule authority have classified the municipal enactment as primarily a matter of statewide concern.²³ This has consistently been the case in matters involving law enforcement.

Use of Constitutional Home Rule in Wisconsin

Municipalities have not used constitutional home rule with any frequency. Some reasons that have been suggested are that the procedures for using constitutional home rule are complicated, there is uncertainty as to what the law allows municipalities to do, local officials tend to pass responsibility on to the legislature on controversial issues, and municipalities can use statutory or legislative home rule (discussed below) which is a broader and more flexible grant of power.²⁴ Perhaps another reason is that, with the exception of *Ekern*, municipalities have not fared well in asserting constitutional home rule in the courts.

Although the Wisconsin Supreme Court has said that the constitutional home rule amendment should be liberally construed "looking toward virility rather than impotency,"²⁵ the fact of the matter is that courts have interpreted the constitutional home rule amendment very narrowly since *Ekern* and municipalities have generally been unsuccessful in using constitutional home rule to avoid state law.

B. Statutory or Legislative

The statutory grants of home rule power are found in Wis. Stat. secs. 62.11(5) (cities) and 61.34(1) (villages). Statutory home rule power is separate and distinct from the constitutional home rule power. Sections 62.11(5) and 61.34(1) are not "enabling statutes" of the constitution.²⁶

²² 90 Wis. 633, 209 N.W. 860 (1926).

²³ Most recently, in *Madison Teachers, Inc. v. Walker*, the Wisconsin Supreme Court held that sec. 62.623 which prohibits the City of Milwaukee from paying the employee share of contributions to the City of Milwaukee Employees' Retirement System as required by a Milwaukee charter ordinance does not violate constitutional home rule. The Court concluded the subject matter is predominantly a matter of statewide concern because the State has a substantial interest in maintaining uniform regulations on public pension plans in order to reduce the fiscal strain caused by state and local expenditures for public employee compensation and is obligated to maintain a functioning civil service system. Public employees work in areas of fundamental importance and the State has an interest in seeking to safeguard the vitality of these essential services in times of economic uncertainty and duress. 2014 WI 99.

²⁴ 1979-80 WISCONSIN BLUE BOOK at 48..

²⁵ *State ex rel. Ekern v. Milwaukee*, 190 Wis. 633, 638, 209 N.W. 860, 862 (1926).

²⁶ *U.S. Oil, Inc. v. City of Fond Du Lac*, 199 Wis.2d 333, 544 N.W.2d 589, 596 n.2 (Ct. App. 1996).

The grants of power are very broad and give the governing body of the municipality, except as otherwise provided by law, management and control of the municipality's property, finances, highways, navigable waters, and the public service. The statutes empower the governing body to act for the government and good order of the municipality, for its commercial benefit, and for the health, safety, and welfare of the public, and authorize the governing body to carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means.

The legislature has declared that the statutory sections giving municipalities statutory home rule power are to be liberally construed in favor of the rights, powers and privileges of villages and cities to promote the general welfare, peace, good order and prosperity of the municipalities and their inhabitants.²⁷ Furthermore, the courts have said that the statutory grant of power confers upon a municipality "all the powers that the legislature could by any possibility confer upon it."²⁸ Finally, the statutes expressly state that the powers thereby conferred are in addition to all other grants, and shall be limited only by express language.

Unlike constitutional home rule, statutory home rule is not limited to local affairs and government. The courts have reasoned that legislative home rule would be a nullity if it were construed to confer on municipalities only that authority which relates to "local affairs" since that power is already constitutionally guaranteed by the home-rule amendment.²⁹ Thus, municipalities may act even in matters of statewide concern when exercising statutory home rule powers although there are limits to what they can do.³⁰

Municipalities may enact ordinances in the same field and on the same subject covered by state legislation where such ordinances do not conflict with, but rather complement, the state legislation.³¹ However, a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required, or authorize what legislation has forbidden.³² If the state has expressed public policy concerning a subject through legislation, a municipality cannot ordain an effect contrary to or in qualification of the public policy so established unless there is a specific, positive, lawful grant of power by the state to the municipality to so ordain.³³

Where a municipality acts within the legislative grant of power, the state has the authority to withdraw the power of the municipality to act. The Wisconsin Supreme Court has devised a four-part test for determining whether such a legislatively intended withdrawal of power has occurred.³⁴ Although the statutes clearly state that a municipality's home rule powers shall be

²⁷ Wis. Stat. secs. 61.34(5) and 62.04.

²⁸ *Hack v. Mineral Point*, 203 Wis. 215, 219, 233 N.W. 82 (1931).

²⁹ *Wisconsin Environmental Decade, Inc. v. DNR*, 85 Wis.2d 518, 533, 271 N.W.2d 69 (1978); *Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis.2d 391, 355 N.W.2d 234, 237 (1984).

³⁰ *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis.2d 642, 547 N.W.2d 770 (1996).

³¹ *Johnston v. City of Sheboygan*, 30 Wis.2d 179, 184, 140 N.W.2d 247, 250 (1966); *La Crosse Rendering Works v. City of La Crosse*, 231 Wis. 438, 455, 285 N.W. 393 (1939) and *Fox v. City of Racine*, 225 Wis. 542, 545, 275 N.W. 513 (1937).

³² *Volunteers of America Care Facilities v. Village of Brown Deer*, 97 Wis.2d 619, 294 N.W.2d 44 (Ct. App. 1980).

³³ *Id.*

³⁴ *Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis.2d 391, 355 N.W.2d 234 (1984).

limited only by express language, the court's test deals a blow to municipal home rule by allowing preemption to be implied rather than express. The four-part test is set forth below. If any one of the following questions is answered with a "yes," the ordinance will fail.³⁵ The questions are:

1. whether the legislature has expressly withdrawn municipalities' power to act;
2. whether the ordinance logically conflicts with the state legislation;
3. whether the ordinance defeats the purpose of the state legislation; or
4. whether the ordinance goes against the spirit of the state legislation.

With increasing frequency, the courts have found municipalities preempted from regulating in certain areas. For more information on particular cases of note, see the earlier legal comment on this topic, Home Rule 59 R-1.

III. AREAS OF PREEMPTION OR LIMITED LOCAL CONTROL

For examples of areas where local regulation has been preempted, see Tables 1 to 3 included in prior Home Rule legal comment 59 R-1. The list of preempted areas or areas with limited local control has expanded in recent years. With increasing frequency, the legislature has been preempting or limiting municipalities from exercising local control in certain areas. A few recent examples include sec. 66.0602, imposing levy limits, sec. 66.0502 prohibiting municipalities from enacting or enforcing local residency ordinances, sec. 66.104 limiting local control over landlords, sec. 66.XXX prohibiting municipalities from enacting local development moratoria, sec. 66.0404 limiting municipal authority over siting of cell towers and sec. 440.465 limiting local control over transportation network companies (e.g., Uber). For more examples of recent limitations, see a document prepared by Wisconsin's Legislative Fiscal Bureau containing recent instances of legislative preemption of municipal authority, available at <http://www.lwm-info.org/DocumentCenter/View/522> .

IV. CONCLUSION

Although Wisconsin municipalities are quite fortunate to have extensive home rule powers which have their basis in the Wisconsin Constitution and statutes, municipal home rule has been shrinking. Municipalities have not fared well asserting constitutional home rule powers in the courts and statutory home rule powers have been whittled away both by court analysis which allows implied preemption and by the increasing frequency with which the legislature has been willing to strictly limit or preempt municipal regulation. In order to protect home rule in Wisconsin and keep it strong, municipalities need to be aware of the framework for exercising their home rule powers and be vigilant in protesting against unwarranted incursions.

Corresponding Legal Caption
Home Rule #59R-2

³⁵ *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis.2d 642, 547 N.W.2d 770, 773 (1996).