

HOME RULE 101

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MICHAEL J. MORSE
MENOMONEE FALLS VILLAGE ATTORNEY

- I. In the absence of home rule, the powers of local governments are limited.
 - A. Single Sovereign Rule
 1. Dual Sovereign Doctrine
 - a) Also called Separate Sovereignty Doctrine, the doctrine defines the relationship between the states and the federal government.
 - b) The U.S. Constitution established a system of dual sovereignty under which states surrendered many of their powers to the federal government, but retained residuary and inviolable sovereignty.
 - (1) “It is incontestable that the Constitution established a system of "dual sovereignty. (Citations omitted.) Although the States surrendered many of their powers to the new Federal Government, they retained ‘a residuary and inviolable sovereignty’ ...” *Printz v. United States*, 521 US 898,918-919 (1997).
 - (2) “The Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people.” *Id.* at 919.
 2. Prior to 1970 many states recognized a similar doctrine with respect to a local government and state government. *Waller v. Florida*, 397 U.S. 387, 392 (1970).
 - a) Under this doctrine, the relation of a state and a local government was viewed as being analogous to the relation between the states and the federal government.
 - b) Municipalities and the state were treated as separate sovereign entities, each capable of imposing punishment for the same alleged crime.
 - c) At least 20 states recognize this dual sovereignty doctrine (*Id.* at 392, Fn. 3), including Wisconsin (*Milwaukee v. Johnson*, 192 Wis. 585, 213 NW 335 (1927)).

3. In *Waller v. Florida*, 397 U.S. 387 (1970) the Supreme Court rejected the doctrine as applied to local governments. The Court instead found that a better analogy of the relationship between a state and a municipal government was the legal relation between the United States government and a U.S. Territory.

B. State generally controls its relationship of local governments.

1. As a general rule, local governments are subject to the complete control of the states in which they are located, except as such control is limited by state constitutions. Reynolds, **Local Government Law**, (3rd Ed. 2009) §27; 2 **McQuillin Mun. Corp.** §4:3 (3d ed.2013).

a) In the exercise of that control, a state can take away the powers of municipalities, transfer the functions of one municipality to other units of government, and transfer the property of one local government to another governmental unit without compensation. Reynolds, **Local Government Law**, *supra*.

b) Local government powers are generally delegated to them by the state legislature, either through express statutory delegations, or through the granting of charters to individual incorporated municipalities.

2. Wisconsin follows these general rules.

a) “In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit.” *Van Gilder v. Madison*, 222 Wis. 58, 267 N.W. 25, 30 (1936).

b) Wisconsin cities and villages initially received individual charters by special acts of the legislature. Susan C. Paddock, **The Changing World of Wisconsin Local Government**, in Wisconsin 1997-1998 Blue Book, at 101, 106 (1998). Eventually, all individual charters except that of the City of Milwaukee were repealed and replaced by general charter laws that are currently set out in Chapters 61 and 62 of the Wisconsin Statutes. **Municipal Home Rule in Wisconsin**, Home Rule 59R-1 (League of Wisconsin Municipalities, 2009).

C. Courts have also limited local governments' non-home rule powers.

1. Dillon's Rule

a) "Dillon's Rule" is a canon of statutory construction that calls for the strict and narrow construction of local governmental authority. 2 **McQuillin Mun. Corp.** §4:11 (3d ed.2013).

(1) Under Dillon's Rule a municipal corporation possesses and can exercise only the following powers: (a) those granted in express words; (b) those necessarily or fairly implied in or incident to the powers expressly granted; and (c) those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable.

(2) Any reasonable doubt concerning the existence of power is resolved against the existence of the power.

b) The rule was promulgated by former Iowa Supreme Court Justice John Dillon in opinions of that court, and set out in the first American treatise on municipal corporations.¹ **The City As A Legal Concept**, 93 Harv. L. Rev. 1059, 1111 (Frug, 1980).

2. Inherent Home Rule Doctrine or the "Right to Local Self-Government."

a) The Inherent Home Rule Doctrine challenged the existence of absolute state supremacy over cities. **The City As A Legal Concept**, 93 Harv. L. Rev. 1059, 1113 (Frug, 1980).

b) Instead, local government was either a matter of "absolute right" protected by an implied restriction on the powers of the legislature under the state constitution, or a "right to local self-government" that existed prior to state incorporations and that could not be subjected to state restriction. *Id.* Alternatively, others argued that the right of local self-government was one of the rights retained or reserved to the people under the 9th and 10th Amendments to the U. S. Constitution. Reynolds, **Local Government Law**, (3rd Ed. 2009) §25.

c) The doctrine arose in the late 19th and early 20th centuries among a few courts, mostly in the Midwest [Reynolds, **Local Government Law**, *supra*] or among other municipal treatise writers [**The City As A Legal Concept**, 93 Harv. L. Rev. 1059, 1113-1116 (Frug, 1980)].

¹ J. Dillon, **Treatise On The Law Of Municipal Corporations** (1st ed. 1872).

d) The doctrine has now been rejected by almost all state courts. Reynolds, **Local Government Law**, (3rd Ed. 2009) §26.

3. Wisconsin

a) Early in the state's history, Wisconsin courts appeared to recognize certain common law powers of municipal corporations. See, **Home Rule and the Inherent Powers of a Municipal Corporation**, 7 Marq. Law Rev. 192 (Schoetz, 1923).

(1) These powers were defined as "such powers as are necessary to and inseparable in every corporation, and the come into existence as a matter of course as soon as a municipality is created." **Id.**

(2) They were not dependent upon state grant or charter. **Municipal Home Rule in Wisconsin** 21 Marq. Law Rev. 74 (Hansen 1936).

b) Later courts appeared to have moved away from this concept and towards Dillon' Rule, at least as to those forms of local government that do not have home rule powers.

(1) *Madison Metropolitan Sewerage Dist. v. Committee on Water Pollution*, 260 Wis. 229, 50 N.W.2d 424 (Wis. 1951)

(2) *County of Milwaukee v. Williams*, 2007 WI 69, ¶24, 301 Wis.2d 134, 732 N.W.2d 770.

II. Historical Development of Home Rule

A. History of Home Rule in the United States

1. Some trace the concept of home rule to the powers & privileges enjoyed by some localities in England through a grant from the Crown or through long use. Reynolds, **Local Government Law**, (3rd Ed. 2009) §36.

2. The home rule movement in the United States began in the 1870's. (**Id.**) The earliest form of constitutional home rule is believed to be Missouri constitutional amendment adopted in 1875. **Id.** at §36.

3. 48 states now have provide some form of municipal home rule. **Id.** at §36, FN 14.

B. History of Home Rule in Wisconsin

1. The 1848 constitution did not contain a home rule provision.

2. In 1911, the state legislature passed a home rule statute. **Municipal Home Rule in Wisconsin**, Home Rule 59R-1 (League of Wisconsin Municipalities, 2009). However, this statute was held unconstitutional by the Wisconsin Supreme Court in *State ex rel Thompson v. Mueller*, 149 Wis. 488, 137 NW 20 (1912).
3. Voters adopted the constitutional Home Rule Amendment [Art. IV, §3(1)] in a 1924 referendum.
4. In 1925, the legislature adopted Wis. Stat. §66.01, later renumbered as §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.

III. Constitutional Home Rule in Wisconsin

A. Art. XI §3(1) of Wisconsin Constitution

Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.

B. Exercising Constitutional Home Rule Powers under Wis. Stats. §66.0101

1. Wis. Stats. §66.0101 defines a charter ordinance as “an ordinance that enacts, amends or repeals the charter, or any part of the charter, of a city or village or that makes the election not to be bound by a state statute or part of a statute.”
2. A charter ordinance enacted or approved by a vote of the electors controls over any prior or subsequent act of the legislative body of the city or village.
3. Special Format
 - a) The ordinance must be designated as a charter ordinance;
 - b) A charter ordinance that amends or repeals a charter must designate specifically the portion of the charter that is amended or repealed;
 - c) A charter ordinance that makes the election not to be bound by a state statute or part of a statute must designate specifically each enactment of the legislature or portion of the enactment that is made inapplicable to the city or village by the election;

4. Special Procedures

- a) Requires a two-thirds vote of the members-elect of the legislative body of the city or village;
- b) Is subject to referendum as provided in the statute;
- c) Must be published as a class 1 notice;
- d) Must be recorded by the clerk in a permanent book kept for that purpose, with a statement of the manner of its adoption;
- e) A certified copy of the charter ordinance must be filed by the clerk with the secretary of state;
- f) A charter ordinance does not take effect until 60 days after its passage and publication.

5. Initiative and Referendum

- a) Charter ordinance may be initiated under Wis. Stats. §9.20.
- b) Referendum
 - (1) Adoption of the charter ordinance by the legislative body is subject to referendum.
 - (2) A charter ordinance may be submitted to a referendum by the legislative body without an initiative petition, and becomes effective when approved by a majority of the electors voting in the referendum.

6. Charter Convention

- a) The legislative body of a city or village, adopts a resolution a by a two-thirds vote of its members-elect and submits to the electors the question of holding a charter convention.
- b) A charter convention may adopt a charter or amendments to the existing charter. The charter or charter amendments adopted by the convention shall be certified as soon as practicable to the city or village clerk and submitted to the electors. They take effect when approved by a majority of the electors voting.

C. Basic Principles of Constitutional Home Rule in Wisconsin

1. Limited nature of municipal powers

a) In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. *van Gilder v. City of Madison*, 222 Wis. 58, 267 N.W. 25, 31 (1936)

b) A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit. *Id.*

c) However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the sovereign will. *Id.*

2. Impact of Home Rule Amendment on local powers

a) Municipal home rule authority under the state constitution is not an authority granted all local governmental units.

(1) The Home Rule Amendment by its terms confers constitutional home rule powers only on cities and Villages.

(2) The amendment did not grant home rule authority to counties or towns. Rick Champagne, *Wisconsin Constitution Article XI, Section 3: Municipal Home Rule, Constitutional Highlights from the Wisconsin Legislative Reference Bureau*, July 2004.²

b) The Home Rule Amendment is a direct grant of power to cities and villages rather than an enlargement of the power of the legislature to delegate legislative functions to those municipalities. *Id.*, 267 N.W. at 30.

c) The Home-Rule Amendment confers upon cities and villages plenary powers to deal with local affairs and government subject to the limitations contained in the amendment itself and other provisions of the state constitution. *Id.*, 267 N.W. at 31.

² Available at <http://legis.wisconsin.gov/lrb/pubs/consthi/04consthiIV3.htm>

3. The Home Rule Amendment leaves a large measure of control over municipal affairs with the state legislature. **Id.**

a) The powers of municipalities are subject to the limitation that the municipality cannot by its charter deal with matters which are of state-wide concern. **Id.**, 267 N.W. at 31, 35.

b) Municipal authority under the Home Rule Amendment to adopt a charter ordinance dealing with local affairs and government is also subject to such acts of the Legislature relating thereto as are of state-wide concern and affect with uniformity all cities. **Id.**, 267 N.W. at 35-36.

4. The Supreme Court decides what is local and what is statewide under the Home Rule Amendment.

a)] The home-rule amendment does not lodge the power to determine what is a "local affair" or what is a "matter of state-wide concern" either with the municipality or with the Legislature or attempt to define those terms.

b) In the event of a controversy between municipalities and the state therefore, the court is required to make the ultimate determination.

c) In the first instance the determination of what is a "local affair" and what is a "matter of state-wide concern" would seem to be for the Legislature for the reason that such a determination must involve large considerations of public policy. Even though the determination made by it should be held not to be absolutely controlling, nevertheless it is entitled to great weight because matters of public policy are primarily for the Legislature.

D. Resolving Conflicts between state power and Constitutional Home Rule³

1. The court must initially determine if the subject matter sought to be regulated falls within one of three areas

a) Areas of exclusively statewide concern;

b) Areas that exclusively within a municipality's local affairs and government; or

c) Areas involving matters that are not exclusively of local or statewide concern.

³ Adapted from **Municipal Home Rule in Wisconsin**, Home Rule 59R-1 (League of Wisconsin Municipalities, 2009).

2. If the matter is exclusively of statewide concern, home rule amendment grants no power to a municipality to deal with it.
 - a) 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.
 - b) 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.
3. If the matter involves area primarily and paramountly a matter of the local affairs and government of a city or village, the municipality is authorized by the Home Rule Amendment to enact a charter ordinance regulating that subject matter.
 - a) State legislative delegation of authority to legislate on such a subject is unnecessary.
 - b) Any attempt by the legislature to preempt or ban local legislative action in such an area would be unconstitutional
 - c) State legislation dealing with the local affairs and government of a city or village would be subordinate to a charter ordinance unless the legislation uniformly affects every Wisconsin city or village.
4. If a matter falls into an area that is not exclusively of local or statewide concern, the court must determine whether the enactment in question “primarily or paramountly involves a matter of ‘local affairs and government’ under the Home Rule Amendment or is instead a matter of state-wide concern.”
 - a) The classification of a matter as being of “local affairs and government” or of “state-wide concern” is exclusively for the courts to determine.
 - b) The legislature’s classification of a subject as a “local affair” or a “matter of state-wide concern” is entitled to great weight, but is not controlling
 - c) 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 as noted above.

d) Wisconsin courts have classified the vast majority of legislative enactments falling into this category as being matters of statewide concern.

IV. Statutory Home Rule

A. Cities and Villages

1. Statutory Home Rule delegates broad powers to villages & cities.

a) Statutory Home Rule powers are in addition to those obtained under the Home Rule Amendment.

b) Statutory Home Rule authorizes a village or city to act notwithstanding statewide concern of the matter to be regulated. . *Anchor Savings & Loan Assn v. Equal Opportunities Commission*, 120 Wis.2d 391, 395,355 N.W.2d 234, 237 (1984)

c) If the village or city ordinance exercises a power which the legislature could confer on it, then the municipality possesses that power under statutory home Rule unless preempted.” *Anchor Savings & Loan Assn, supra*, 120 Wis.2d at 395-396,355 N.W.2d at 237.

2. Language of statutes authorizing home rule for cities and villages is similar but not identical.

a) Villages: Wis. Stats. §61.34(1) & (5)

61.34. Powers of village board: (1) General grant. Except as otherwise provided by law, the village board shall have the management and control of the village property, finances, highways, streets, navigable waters, and the public service, and shall have power to act for the government and good order of the village, for its commercial benefit and for the health, safety, welfare and convenience of the public, and may carry its powers into effect by license, regulation, suppression, borrowing, taxation, special assessment, appropriation, fine, imprisonment, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language.

(5) Construction of powers. For the purpose of giving to villages the largest measure of self-government in accordance with the spirit of article XI, section 3, of the constitution it is hereby declared that this chapter shall be liberally construed in favor of the rights, powers and privileges of villages to promote the general welfare, peace, good order and prosperity of such villages and the inhabitants thereof.

- b) Cities: Wis. Stats. §62.11(5)

62.11. Common council

(5) **Powers.** Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.

B. Preemption

1. General Principles

a) Where a municipality acts within the legislative grant of power but not within the constitutional initiative, the state has the authority to withdraw the power of the municipality to act. *Anchor Savings & Loan Assn v. Equal Opportunities Commission*, 120 Wis.2d 391, 355 N.W.2d 234 (1984)

b) Statutory Home Rule authority is limited to ordinances that complement rather than conflict with the state legislation.” Cf., *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶32, 342 Wis.2d 444, 820 N.W.2d 404.

2. The Wisconsin Supreme Court has created a test to determine whether a particular exercise of Statutory Home Rule authority has been pre-empted.

a) It has been called the *Anchor test* because it first appeared, in its modern form, in *Anchor Sav. & Loan Association v. Equal Opportunities Commission*, 120 Wis.2d 391, 355 N.W.2d 234 (1984).⁴

⁴ *Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85, ¶31 at Fn. 17, 342 Wis.2d 444, 820 N.W.2d 404

b) Under the *Anchor* test⁵, a local ordinance adopted under Statutory Home Rule powers will be pre-empted if the court finds that:

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

C. Do other forms of local government have home rule powers?

1. Counties

a) Counties are a more limited form of government than cities or villages.

- (1) A County is a political subdivision and governmental agency of state, not created for local convenience of inhabitants. *State v. Schinz*, 194 Wis. 397, 216 N.W. 509, 510 (1927).
- (2) It exists, not by virtue of its own will or consent, but as a result of the superimposed will of the state. *State v. Schinz*, 194 Wis. 397, 216 N.W. 509, 510-511 (1927).
- (3) Counties are, at most, but local organizations, which, for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence. *Jackson County v State*, 2006 WI 96, ¶16, citing *Frederick v. Douglas County*, 96 Wis. 411, 416-17, 71 N.W. 798 (1897).
- (4) It is a creature of the legislature and has only those powers that the legislature by statute provides. *Jackson County v State*, 2006 WI 96 ¶16.
- (5) Its powers must be derived from a statutory source. *Id.*

⁵ *Anchor Savings & Loan Assn v. Equal Opportunities Commission*, 120 Wis.2d 391, 395-397, 355 N.W.2d 234 238 (1984)

b) The state legislature is authorized to delegate certain local or administrative powers to counties.

(1) Art. IV, § 22 of the Wisconsin Constitution provides that "[t]he legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe."

(2) The state legislature has delegated certain powers to counties under Wis. Stats. §59.03(1):

§59.03. Home Rule

(1) **Administrative home rule.** Every county may exercise any organizational or administrative power, subject only to the constitution and to any enactment of the legislature which is of statewide concern and which uniformly affects every county.

c) Though it has been described as "home rule" authority by the legislature and the courts, the authority delegated to counties under Wis. Stats. §59.03(1) is a limited delegation of power.

(1) By its terms, it delegates only organizational & administrative power to county boards.

(2) The Wisconsin Supreme Court has recognized that a county's home rule power is more limited than the home rule power that is afforded to cities and villages. . *Jackson County v State*, 2006 WI 96 ¶17.

(3) The Wisconsin Attorney General also appears to recognize that these powers re limited to organizational and administrative matters. See OAG-01-10: January 28, 2010 *Opinion to Ozaukee County Corporation Counsel Dennis E. Kenealy*, 2010 WL 337675 (2010)

2. Towns

a) Towns without village powers

(1) Generally, towns in Wisconsin possess those powers granted by statute and any powers that are necessarily implied from a power expressly provided by statute. *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, ¶22, 338 Wis.2d 488 809 N.W.2d 362, citing *Town of Clearfield v. Cushman*, 150 Wis.2d 10, 20, 440 N.W.2d 777 (1989).

(2) It therefore appears that Towns that have not obtained village powers do not have home rule powers.

3. Towns with Village Powers

a) Obtaining Village Powers

(1) Wis. Stats. §60.10(2)(c) provides that the town meeting may authorize the town board to exercise powers of a village board under Wis. Stats. §60.22(3).

(2) If authorized under Wis. Stats. §60.10 (2) (c), the Town Board “may exercise powers relating to villages and conferred on village boards under ch. 61, except those powers which conflict with statutes relating to towns and town boards.” Wis. Stats. §60.22(3).

b) It is less clear whether towns with village powers can exercise the statutory home rule authority delegated to villages under Wis. Stats. § 61.34(1). *Language in Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, 338 Wis.2d 488, 809 N.W.2d 362 seems to say that they may:

(1) The Town of Cooks Valley adopted village powers in 2001, pursuant to Wis. Stat. § 60.10(2)(c). Thus, by virtue of the statutes and the Wisconsin Constitution, the Town possesses the full panoply of powers enjoyed by villages, including police power and the more specific zoning power. 2012 WI 7, ¶ 28

(2) Wisconsin Stat. § 60.22(3), in turn, cross-refers to Chapter 61, which endows town boards with powers conferred on village boards under Chapter 61. “If authorized under s. 60.10(2)(c), [the town board] may exercise powers relating to villages and conferred on village boards under ch. 61, except those powers which conflict with statutes relating to towns and town boards.” *Id.* at ¶ 23

(3) Chapter 61 grants a broad range of powers to villages. Its underpinning is the “home rule amendment,” Wis. Const. Art. XI, § 3, adopted in 1924 to allow cities and villages greater control over their local affairs.¹¹ Wisconsin Stat. § 61.34 lists the powers of the village board, and Wis. Stat. § 61.34(5) states that “[f]or the purpose of giving to villages the largest measure of self-government in accordance with the spirit of [the *502 home rule amendment] it is hereby declared that this chapter shall be liberally construed in favor of the rights, powers and privileges of villages to promote the

general welfare, peace, good order and prosperity of such villages and the inhabitants thereof.”

Id. at ¶24

(4) The police power of a village board is governed by Wis. Stat. § 61.34(1), which provides as follows:

Except as otherwise provided by law, the village board shall have the management and control of the village property, finances, highways, streets, navigable waters, and the public service, and shall have power to act for the government and good order of the village, for its **369 commercial benefit and for the health, safety, welfare and convenience of the public, and may carry its powers into effect by license, regulation, suppression, borrowing, taxation, special assessment, appropriation, fine, imprisonment, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language.

Id. at ¶ 25 (Footnote omitted).

