



Agenda Control and Presiding Officers*

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Introduction

Although agendas are not required by any state law, many governmental bodies, by custom or procedural rule, use them. They serve important practical purposes by providing a structure that facilitates efficient and effective use of meeting time and curtails unproductive distractions by individual members of an assembly.

Agendas are the most common method local government bodies use to satisfy the subject matter and other notice requirements of the Wisconsin Open Meetings Law. This is probably the most important purpose served by an agenda. When agendas are used to provide the legally required Open Meetings Law subject matter notice, if a subject is not on the agenda, then the body cannot discuss or act on it.

An essential component of a healthy democracy is the opportunity to speak freely. If reasonable but different viewpoints are stifled or debatable subjects are shunned, our democracy suffers. Reflecting on the importance of the opportunity to speak in a democracy, Voltaire said more than 200 years ago “I may not agree with what you say, but I will fight to the death for your right to say it.”

A government strategy or process that prevents open discussion and debate is anti-democratic and encourages conflict or dysfunction. These are risks associated with agendas and, especially, agenda control.

The agenda control threat to local democracy and civil discussion arises when a mayor, village president, or other presiding officer seeks to assert dominance over the agenda of a governmental body, deny agenda access to a particular member of a body, or keep certain subjects off of an agenda unilaterally without the assent of a majority of the body. Inevitably, this circumstance raises questions about presiding officer power to set or control an agenda.

In Governing Bodies 292, the League responded to this issue and concluded that a mayor’s status as presiding officer does not confer any power to determine rules of procedure. Interestingly, a contrary conclusion, without reference to the earlier opinion, was reached in Governing Bodies 311. Given this inconsistency, the regularity of the issue and the importance of it to local democracy, this comment considers it in more detail than either of these legal opinions with a focus on the agenda control power of mayors and village presidents under state law, commonly employed rules of parliamentary procedure, and delegation of agenda control by local ordinance or rule.

Does State Law Grant a Mayor or Village President Authority to Set a City Council or Village Board Agenda?

There is no state law that explicitly grants a mayor or village president power to set the agenda of their respective governing body. Accordingly, the next

question is whether such power might be inferred from some statutory authority, which is precisely what was suggested in the Governing Bodies 311 opinion.

Governing Bodies 311 addressed whether a mayor can control what is put on the agenda for common council meetings. It concluded that a common council’s authority under Wis. Stat 62.11(3)(e) to “determine the rules of its procedure” does encompass “the method of setting the agenda.” However, it further stated that in the absence of a common council rule, “the mayor very likely would have the power to set the agenda.” The opinion writer reached this conclusion “because the mayor is the presiding officer of the council, sec. 62.09(8)(b), and the mayor has the duty, under the open meeting law, sec. 19.84(1)(b) and (2), to give notice of the subject, time and place of the meeting.” The opinion did not provide any analysis of either statute.

Governing Bodies 311 rightly noted a mayor’s statutory presiding officer and open meetings law notice powers in response to the question asked. They are the only state laws that reasonably invite examination for implied mayoral agenda control authority. However, a close analysis of the presiding officer statutes for mayors and village presidents as well as the notice duties imposed on them by the open meetings law shows that they do not grant mayors or village presidents any authority to set the agenda for a city council or village board.

Presiding Officer Statutes

Section 62.09(8)(b) of the Wisconsin Statutes provides that “When *present* the mayor shall preside at the meetings of the council.” [Emphasis added.] Similarly, section 61.24 states that “The village president shall preside *at* all meetings of the board.” [Emphasis added.] And, section 61.32 further states that “The president shall preside at all meetings of the village board when *present*.” [Emphasis added.] Accordingly, the power to preside is plainly stated as a power exercised by a mayor or village president “when present” and “at” a meeting of their respective governing body.

The term “present” is defined as “being with one or others or in the specified or understood place: *to be present at a wedding*.” [Emphasis in original.]¹ Therefore, the phrase “when present” means that the presiding officer power of mayors and village presidents exists only when they are with the city council or village board in meeting. The power does not exist in any non-meeting circumstance, such as pre-meeting agenda development.

The meaning of “at” supports this conclusion. The word “at” is a preposition that, among other uses, is “(used to indicate presence or location): *at home, at hand*.” [Emphasis in original.]² Thus, the meaning of “at” also indicates that presiding officer authority vested in mayors and village presidents by state law requires a concurrent presence with their city council or village board for the exercise of the power.

The plain language of secs. 62.09(8)(b) and 61.34 establish that the statutory authority granted to mayors and village presidents by the legislature to “preside” is a power that exists only during a meeting of a city council or village board. It is authority confined to the period during which the body is conducting a

meeting and secs. 62.09(8)(b), 61.24, and 61.32 do not grant any power to mayors or village presidents over pre-meeting activities such as agenda development or access. Therefore, the presiding officer statutes do not provide any support for the contrary conclusion suggested in Governing Bodies 311.

The conclusion that secs. 61.34 and 62.09(8)(b) do not grant mayors and village presidents power to set the agendas of their respective bodies outside of a meeting is also consistent with a common understanding of presiding officer duties. In Robert’s Rules of Order, Newly Revised (10th ed.) (RONR), a set of procedural rules that have been widely adopted by Wisconsin city councils and village boards, the duties of a presiding officer are listed as follows:

- 1) to open the meeting at the appointed time, by taking the chair and calling the meeting to order, having ascertained that a quorum is present; 2) to announce in proper sequence the business that comes before the assembly or becomes in order in accordance with the prescribed order of business, agenda, or program, and with existing orders of the day; 3) to recognize members who are entitled to the floor; 4) to state and to put to vote all questions that legitimately come before the assembly as motions or that otherwise arise in the course of proceedings (except questions that relate to the presiding officer himself in the manner noted below), and to announce the result of each vote; or, if a motion that is not in order is made, to rule it out of order; 5) to protect the assembly from obviously frivolous or dilatory motions by refusing to recognize them; 6) to enforce the rules relating to debate and those relating to order and decorum within the assembly; 7) to expedite business in every way compatible with the rights of members; 8) to decide all questions of order, subject to appeal – unless, when in doubt, the presiding

officer prefers initially to submit such a question to the assembly for decision; 9) to respond to inquiries of members relating to parliamentary procedure or factual information bearing on the business of the assembly; 10) to authenticate, by his or her signature, when necessary, all the acts, orders, and proceedings of the assembly; 11) to declare the meeting adjourned when the assembly so votes or – where applicable – at the time prescribed in the program, or at any time in the event of a sudden emergency affecting the safety of those present.³

Notably, all of these duties concern matters during a meeting. None of the duties refer to or suggest any presiding officer authority outside of a meeting of the assembly. Therefore, like the plain language of secs. 62.09(8)(b), 61.24, and 61.32, the common understanding of presiding officer authority does not include any power to control the agenda of an assembly outside of a meeting at which he/she presides.

Open Meetings Law Notice Authority

The State of Wisconsin recognizes the importance of having a public informed about governmental affairs. Accordingly, the legislature declared in the Wisconsin Open Meetings Law that:

In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business.⁴

To implement this policy, the law imposes two basic requirements. First, every meeting of a governmental body must be preceded by public notice as provided in Wis. Stat. sec. 19.84.⁵ Second, all business must be conducted

in open session unless an exemption to the open session requirement applies.⁶

The law gives the “chief presiding officer of a governmental body or such person’s designee” responsibility and authority for providing the public notice the law requires.⁷ In *Governing Bodies 311*, the opinion cited this duty in support of the conclusion that a mayor has power to set the agenda of a city council in the absence of a contrary ordinance or rule.

The open meetings law specifies that the meeting notice provided by the presiding officer “shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof.”⁸ The issue then is whether the duty to “set forth the . . . subject matter” of a meeting includes the power to set the agenda.

The phrase “set forth” is defined as “to give account of; state; describe.”⁹ In contrast, the term “set” is defined as “to determine or fix definitely” or “to establish for others to follow.”¹⁰ Thus, the plain language of the open meetings law only vests a presiding officer with authority to describe an agenda, not establish one.

Interpreting the phrase “set forth” to not grant agenda setting power to a presiding officer is consistent with the context of the language. The duty to “set forth” the “subject matter” of meeting is stated in relation to the “form” of the notice.¹¹ This duty obligates the presiding officer to provide “subject matter” notice that is sufficiently specific to inform the public.¹² Therefore, the context of the phrase “set forth” links it to specificity of the agenda, not control of it.

The plain language interpretation that the open meetings law notice duty does not vest any power to set the agenda is

also consistent with legislative intent. As noted, the legislature enacted the open meetings law to further the public’s right to information about its government.¹³ The law does not even require that a governmental body use

an agenda.¹⁴ Accordingly, the law does not state or reasonably imply in any provision that a purpose of the law is the allocation of agenda power in municipal government or the control of subject matter discussed at a city council or

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village board meeting. Instead, the stated policy of the law is to make sure that the public knows what these and other governmental bodies intend to discuss. Thus, the open meetings law does not reflect any legislative intent to address, and is therefore not concerned with, who has power to control the agenda of a city council or village board.¹⁵

Does Robert's Rules Grant a Mayor or Village President Authority to Set a City Council or Village Board Agenda?

Many Wisconsin city and village governing bodies have adopted Robert's Rules of Order to guide their meetings. Accordingly, in the absence of some other explicit rule, it might be asked whether these rules vest a presiding officer with control over the agenda of a city council or village board that has adopted Robert's Rules of Order. The answer is no.

Robert's sets forth a fairly detailed list of duties to be performed by presiding officers, which have been mentioned.¹⁶ None of the listed duties even remotely suggest any presiding officer authority to set the agenda for the assembly. In fact, the rules provide two methods for agenda development that demonstrate agenda control belongs to the assembly or body, not its presiding officer.

The first method under Robert's is to introduce a matter under the "New Business" portion of the standard order of business described in the rules. The method is described as follows:

After unfinished business and general orders have been disposed of, the chair asks, "Is there any new business?"

Members can then introduce new items of business or can move to take from the table any matter that is on the table, in the order in which they are able to obtain the floor when no question is pending, as explained in 3 and 4. So long as members are reasonably prompt in claiming the floor, the chair cannot prevent the making of legitimate motions or deprive members of the right to introduce legitimate business, by hurrying through the proceedings.¹⁷

Thus, under Robert's, every member of a body has authority to add an item to the agenda during a meeting by introducing the item for discussion under the "New Business" heading.

However, introducing a matter for discussion at a meeting of a city council, village board, or any other Wisconsin governmental body under a generic "New Business" agenda item is contrary to the Wisconsin Open Meetings Law since such subject matter designations, by themselves, do not satisfy the specificity requirements of the law.¹⁸

Accordingly, although allowed under Robert's, this method cannot be used in the manner described in the rules at any meeting of a local government body since it is contrary to higher legal authority. Nonetheless, it does illustrate that Robert's Rules do not vest agenda authority in the presiding officer.

The second method for developing an agenda under Robert's is the use of orders or orders of the day. An order of the day "is a particular subject, question, or item of business that is set in advance to be taken up during a given session, day, or meeting, or at a given hour, provided that no business having precedence over it interferes."¹⁹ Orders of the day can be special orders or general orders.²⁰ Special orders are those that "are made with the stipulation that any rules interfering with its consideration at the specified time shall be suspended" subject to some exceptions²¹. Orders adopted without such stipulations are general orders.²² Notably, a special order motion requires a two-thirds vote in favor for adoption.²³ A general order motion is approved by a simple majority.²⁴

Robert's indicates that a special order or general order motion can be introduced whenever business of its class or new business is in order and nothing is pending.²⁵ However, like the first method, unless a meeting notice

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includes a subject heading indicating that the body will be considering motions for special or general orders, and the proposed orders are sufficiently identified, this Robert's procedure also appears to present notice problems under the open meetings law due to lack of specificity. But, like the first method, the use of special or general orders for agenda development expressly provided in Robert's demonstrates again that, under those rules, the authority to set the agenda belongs to the body, not the presiding officer.

Can a City Council or Village Board Grant Its Mayor or Village President Authority to Set a City Council or Village Board Agenda?

Given the constraints on agenda development under Robert's Rules imposed by the Wisconsin Open Meetings Law and that neither state law nor Robert's vests a presiding officer with authority to set an agenda, a city council or village board might consider a local ordinance or rule establishing an agenda setting procedure. The ordinance or rule might reflect the Robert's New Business method and allow any member of a city council or village board to add a new business item to an agenda subject to a filing deadline and a reintroduction constraint (i.e., no reintroduction of same or similar item within 30 or 60 days). A rule or ordinance might reflect the Robert's "order" method for agenda development and allow any member of a body to file a proposed order subject to the same kinds of limits imposed on New Business, which would then be subject to a vote of the whole body before placement on a future agenda for full consideration and debate. Some consideration might also even be given to an ordinance or rule simply granting the mayor or village president agenda control, which necessitates some reflection on the rule-making authority

of city councils and village boards and other relevant legal rules.

The McQuillin treatise on municipal corporations states:

The charter or a statute applicable may prescribe rules for the government of the proceedings of councils, municipal boards, etc., and oftentimes the organic law provides that the council or representative body may adopt its own rules of action. The council may abolish, suspend, modify or waive its own rules.²⁶

Wisconsin law expressly follows this general rule for cities. Section 62.11 establishes minimal guidelines for time and openness of meetings, quorum and voting. For all other procedures, sub. (3)(e) provides: "The council shall in all other respects determine the rules of its procedure."

Like sec. 62.11, sec. 61.32 establishes some basic procedural rules for village board meetings. However, while sec. 61.32 implies some authority to adopt village board bylaws, there is no express provision comparable to sec. 62.11(3)(e) in the general charter law for villages. Nonetheless, the broad general grant of powers to villages set forth in sec. 61.34(1) unquestionably gives village boards the power to establish procedural rules not already provided by statute.

As to sec. 62.11(3)(e), League counsel stated in *Governing Bodies* 292: "Absent any explanatory language to the contrary, this broad grant of authority reasonably confers on the council the power to determine all rules for procedure in setting an agenda." There is no reason why the same conclusion should not be made as to village boards. Accordingly, the more significant agenda rule-making issue is what limits there might be on the use of rule-making power by a city council or village board to adopt an ordinance or rule that delegates

agenda control to their mayor or village president.

Whenever a city council or village board considers a delegation of power, delegation of powers principles must be considered. One oft-cited rule is that a legislative body, such as a city council or village board, may not delegate any of its legislative powers without explicit authorization from the legislature.²⁷

Legislative power is defined as:

The lawmaking powers of a legislative body, whose functions include the power to make, alter, amend and repeal laws.²⁸

Thus, legislative power is the power to promulgate a law.

There is no reasonable question that an ordinance or rule adopted by a city council or village board is a law with legal binding force. Therefore, an ordinance or rule that delegates power to control the agenda of a city council or village board to the mayor or village president, is an exercise of legislative power.

None of the foregoing provisions that authorize city councils or village boards to establish local laws that govern the procedures for such bodies expressly authorize the delegation of this power to a mayor, village president, or anyone else. Accordingly, a city or village ordinance or law that grants a mayor or village president agenda control power by such authority cannot delegate legislative power.

*The Village of Little Chute v. Van Camp*²⁹ case provides a useful illustration of an impermissible delegation of legislative power. It involved a local ordinance which stated:

All saloons in said village shall be closed at 11 o'clock p.m. each day and remain closed until 5 o'clock on the following morning, unless by special permission of the president.

After a trial court found Van Camp, a village resident, guilty of violating the ordinance, he challenged the conviction on the grounds that the ordinance improperly delegated legislative power to the village president. The appellate court agreed with Van Camp and stated:

In the present case the ordinance by its terms gives power to the president to decide arbitrarily and in the exercise of his own discretion when a saloon shall close. This is an attempt to rest legislative discretion in him, and cannot be sustained.

The legislative discretion vested in the village president by the Little Chute ordinance followed from the lack of an identifiable standard for the exercise of the "special permission" power of the village president.³⁰ This omission

meant the exercise of legislative power by the Little Chute village board was incomplete and granted the village president the legislative authority to determine the purpose or policy to be achieved by the law. It granted the village president power to make law.

An ordinance or rule that grants a mayor or village president power to set the city council or village board agenda is also an incomplete exercise of legislative power. Such an ordinance or rule, like the ordinance adopted by the Little Chute village board, would impermissibly vest the mayor or village president with legislative discretion to determine what purpose or policy the agenda ordinance or rule should serve. This discretion would allow the policy preferences of the mayor/village president to be considered and those he/she opposes to receive

no consideration, even if supported by a majority of the membership. In effect, such discretion could be used to completely control the exercise of all of legislative powers of a city council or village board.

The particular limitations that might be imposed by a city council or village board on any agenda authority it grants to a mayor or village president are too numerous to detail in this general review of agenda control. Moreover, any limitations will undoubtedly reflect the unique preferences in each municipality. However, the effectiveness of the limitations imposed by the ordinance or rule can be considered in relation to a basic question: Does the ordinance or rule grant the mayor/village president discretionary authority to determine the subject matter of the city council or

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village board agenda? If the answer is yes, the ordinance or rule has transferred legislative discretion to the mayor/village president and is an impermissible delegation of legislative power.

Conclusion

Although not required by the open meetings law, a good agenda can produce the specificity the law requires. And, a well-planned agenda will also facilitate the efficient conduct of business by keeping the body on track and preventing grandstanding or other unhelpful conduct by members.

The widespread use of agendas in cities and villages means agenda control is an important issue in these communities. Whoever holds the power to determine the items on an agenda, can exert

substantial control over the exercise of local government power.

While neither state law nor Robert's Rules grant the presiding officer of a Wisconsin governmental body any authority to set the agenda for the body, a city council or village board, pursuant to its authority to establish rules of procedure, including rules for developing an agenda, might vest some agenda-setting power in the mayor or village president. However, the delegation of such agenda authority must not violate legal rules that prohibit the delegation of legislative power. Accordingly, an ordinance or rule delegating agenda authority to a mayor or village president may not grant any discretionary authority to determine the subject matter of the agenda.³¹

Governing Bodies 391R1

About the author:

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Endnotes

1. Random House Dictionary of the English Language, 1529 (2d ed. 1987).
2. *Id.* at 129.
3. RONR, pp. 433-436.
4. Wis. Stat. sec. 19.81(1).
5. Wis. Stat. sec. 19.83(1).
6. *Id.*
7. Wis. Stat. sec. 19.84(1)(b).
8. Wis. Stat. sec. 19.84(2).
9. Random House Dictionary of the English Language, 1751 (2d ed. 1987).
10. *Id.*
11. Wis. Stat. sec. 19.84(2).
12. See *State ex rel. Buswell v. Tomah Area School District*, 2007 WI 71, para. 22, 301 Wis. 2d 178, 732 N.W.2d 804 (noting that "whether notice is sufficiently specific will depend upon what is reasonable under the circumstances" and discussing factors to be considered).
13. Wis. Stat. sec. 19.81(1).
14. The Wisconsin Attorney General noted very shortly after the open meetings law was enacted that the notice requirement in 19.84(2) "does not require a governmental body to utilize a detailed agenda." 66 Wis. Op. Att'y Gen. 143, 144 (1977).
15. The Wisconsin Attorney General has further stated that "The purpose of the [open meetings law] is not to interfere with or limit the power of a governmental body to carry out its statutory duties." *Id.* at 144-145. Accordingly, a presiding officer would be ill-advised to use the open meetings law notice requirements as a tool to thwart the exercise of power vested in a city council, village board or any other governmental body.
16. RONR, pp. 433-436.
17. RONR, 349.
18. See Wis. Stat. 19.84(2); and see Wisconsin Open Meetings Law Compliance Guide, Wisconsin Dept. of Justice, 16 (2015) ("Purely generic subject matter designations such as "old business," "new business," "miscellaneous business," "agenda revisions," or "such other matters as are authorized by law" are insufficient because, standing alone, they identify no particular subjects at all.") [Citations omitted].
19. RONR, 353.
20. RONR, 353-355.
21. RONR, 353.
22. RONR, 354.
23. *Id.*
24. RONR, 354-355.
25. RONR, 354-355.
26. 4 McQuillin Mun. Corp., sec. 13.42 (3d ed.).
27. See *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis.2d 32, 80, 205 N.W.2d 784; see also 2A McQuillin Mun. Corp., sec. 10:43 (3rd ed.) ("The rule is well settled that legislative power cannot be delegated by a municipality unless expressly authorized by the statute conferring the power.")
28. Black's Law Dictionary 810-11 (5th ed. 1979).
29. 136 Wis. 526, 117 N.W. 1012 (1908).
30. The Wisconsin Supreme Court has stated that the "serious questions raised by the problem of delegation relate normally to the absence of standards" to guide the exercise of delegated power. *Wisconsin Solid Waste Recycling Authority v. Earl*, 70 Wis. 2d 464, 235 N.W.2d 648, 666 (1975).
31. While the focus of this article is agenda control by presiding officers it is important to note that agenda control by city or village administrators, managers, clerks or other non-members of governmental bodies is even more legally suspect and very ill-advised.

*This article was originally published in the August 2010 *The Municipality*. The Introduction section has been revised from the original, citations updated and an important endnote (31) added.