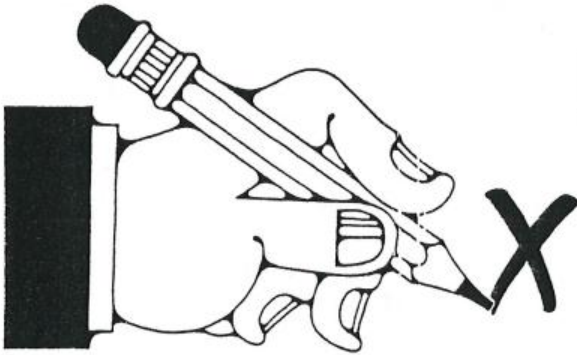


Direct Legislation



by Curtis A. Witynski
Assistant Legal Counsel

Complex questions often arise when citizens, dissatisfied with a decision made by their municipal governing body on a controversial matter, resort to direct legislation procedures to obtain a different result.

Electors in Wisconsin cities and villages are authorized to initiate ordinances and resolutions using the direct legislation procedures described in sec. 9.20, Stats. (Section 9.20 was amended by 1989 Wisconsin 273, effective May 4, 1990, to allow electors in villages to initiate ordinances and resolutions.) City and village electors may also use the direct legislation procedures outlined in sec. 9.20 to initiate charter ordinances. Sec. 66.01(6).

This Comment examines the use of direct legislation procedures and summarizes Wisconsin law on the subject. It also suggests some ways of dealing with direct legislation, including a discussion of the use of advisory referenda and the legality of spending public funds on promoting or opposing direct legislation.

I. Ordinance, Resolution Initiatives

Initiative Procedure

The procedure for initiating or-

dinances and resolutions is set out in sec. 9.20. That statute provides that a number of electors equal to at least 15% of the votes cast for governor in the last general election may file a petition with the municipal clerk requesting that an attached ordinance or resolution (hereafter "ordinance"), without alteration, either be adopted by the governing body or referred to a vote of the electors. Sec. 9.20(1).

The preparation and form of a direct legislation petition is governed by sec. 8.40. Sec. 9.20(2). Once a petition is filed, no name may be removed. In addition, no signature may be counted as valid unless the date of the signature is less than 60 days before the petition is filed. Sec. 9.20(2m).

Clerk's Role: Within 15 days after the petition was filed, the clerk must determine whether the petition is sufficient and whether the proposed ordinance is in proper form.

The clerk must state the findings in a signed and dated certificate attached to the petition. If the petition is found insufficient or the proposed ordinance is not in proper form, the clerk must "give the particulars, stating the insufficiency or improper form." Sec. 9.20(3).

The petition may be amended by petitioners to correct any insuffi-

ciency or the proposed ordinance may be put in proper form within 10 days following affixing of the clerk's certificate and notification to the petitioners.

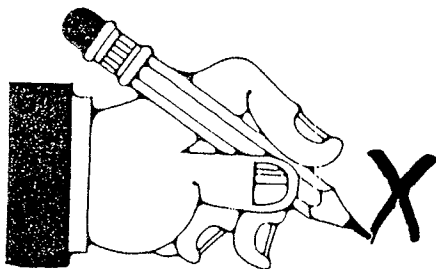
When the original or amended petition is found sufficient and the original or amended ordinance is in proper form, the clerk must so state on an attached certificate and immediately forward it to the governing body. Sec. 9.20(3).

The municipal clerk has a mandatory, nondiscretionary duty to forward to the governing body a sufficient direct legislation petition and proposed ordinance submitted under sec. 9.20. Municipal clerks lack authority to make a substantive evaluation regarding the validity or invalidity of a proposed ordinance submitted under sec. 9.20. *State ex rel. North v. Goetz*, 116 Wis.2d 239, 342 N.W.2d 747 (Ct. App. 1983).

Governing Body's Role: The common council or village board must, without alteration, either pass the ordinance within 30 days following the date of the clerk's final certificate, or submit it to the electors for a vote. Sec. 9.20(4).

A governing body has no authority to make an initial judgment regarding the constitutionality of an

Continued on next page



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ordinance submitted by the electors under sec. 9.20 unless the unconstitutionality is clear from prior adjudications on the same subject manner.

Therefore, "a proposition of unresolved constitutionality must be placed on the ballot even though its constitutionality is in substantial doubt." *State ex rel. Althouse v. City of Madison*, 79 Wis.2d 97, 255 N.W.2d 449, 455 (1977).

Scheduling the Referendum: If the governing body chooses to submit the proposed ordinance to the electors for a vote, the referendum must take place at the next spring or general election, if the election is more than 6 weeks after the date of the governing body's action on the petition or the expiration of the 30-day period, whichever first occurs.

If there are 6 weeks or less before the election, the ordinance must be voted on at the next election thereafter.

A governing body may, by a 3/4 vote of the members-elect, order a special election for the purpose of voting on the ordinance at any time prior to the next spring or general election. Sec. 9.20(4). See *Elections* #560, #567 and #579.

No more than one special election for direct legislation may be ordered in any 6-month period. Sec. 9.20(4).

The clerk must cause notice of the ordinance or resolution that is being submitted to a vote to be given as provided in sec. 10.06(3)(f). Sec. 9.20(5).

The ordinance need not be printed in its entirety on the ballot, but a concise statement of its nature must be printed together with a question permitting a voter to indi-

cate approval or disapproval of its adoption. Sec. 9.20(6).

If a majority of the votes cast are in favor of adoption, the proposed ordinance takes effect upon publication. Publication must be made within 10 days after the election. Sec. 9.20(7).

City ordinances adopted pursuant to sec. 9.20 are not subject to the veto power of the mayor. City or village ordinances adopted pursuant to sec. 9.20 may not be repealed or amended within 2 years of adoption except by vote of the electors.

The governing body may submit a proposition to repeal or amend an ordinance or resolution at any election. Sec. 9.20(8). See *Ordinances and Resolutions* #340 and *Elections* #567.

Limitations on Direct Legislation

Although sec. 9.20(4) provides that a municipal governing body must, when presented with a sufficient petition for direct legislation, either adopt the attached legislation within 30 days or submit it to a vote of the electors, the courts have "carved out certain exceptions which indicate that, under some circumstances, the... [governing body]... may properly refuse to accept either of the statutory choices and may instead reject both of them." *Althouse*, supra, 255 N.W.2d at 453 (1977).

The courts have recognized the following five limitations on direct legislation under sec. 9.20:

1. Administrative in Character. The ordinance sought to be passed must be legislative in character. Proposed legislation which is administrative in character is not a proper subject of initiative proceedings. *Althouse*, supra, 255 N.W.2d at 453-54.

It has been said that actions "relating to subjects of permanent and general character are usually regarded as legislative, and those providing for subjects of temporary and special character are regarded as administrative...."

In addition: "The power to be exercised is legislative in its nature

if it prescribes a new policy or plan; whereas it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it." *State ex rel. Becker v. Common Council of The City of Milwaukee*, 101 Wis.2d 680, 305 N.W.2d 178, 181 (Ct. App. 1981), quoting *Heider v. City of Wauwatosa*, 37 Wis.2d 466, 155 N.W.2d 17 (1967). See also *Ordinances and Resolutions* #367A, #376, #418, #419I and #435.

2. May Not Repeal Existing Legislation. The power of direct legislation cannot be used to amend or repeal existing legislation. Thus, electors cannot compel the passage of an ordinance which is in direct conflict with a prior ordinance and which would constitute an implied repealer of that legislation. *Alt-*

Direct Legislation

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Ballot Endorsements

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house, supra, 255 N.W.2d at 454. See also *Elections* #588; *Ordinances and Resolutions* #377, #383, #384, #388, #390, #413 and #429.

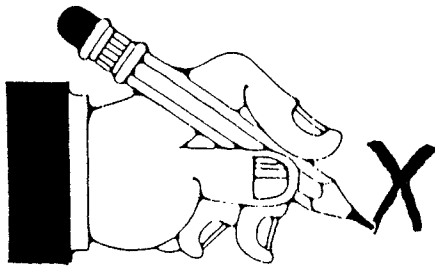
3. Must Be Within Powers Conferred Upon Governing Body. In initiative proceedings municipal electors may exercise only such legislative power or authority as is conferred upon the village board or common council. *Althouse*, supra,

255 N.W.2d at 454. See also *Ordinances and Resolutions* #401 and #427.

4. Must Comply with Statutory Time Limits. An initiated ordinance or resolution, even though within the ambit of the governing body's power, must be exercised under the same time schedules which bind the village board or common council. *Althouse*, supra, 255 N.W.2d at 454.

For example, in *Feavel v. City of Appleton*, 234 Wis. 483, 291 N.W. 830 (1940), the court held that an initiated ordinance changing the salaries of aldermen after the first regular meeting in February, which is the last date that a common council may act to increase its salaries for a new term, violated the time limit set out in sec. 62.09(6) and was therefore invalid.

Continued on next page



II. Charter Ordinance Initiatives

A charter ordinance amends, repeals or otherwise modifies the charter of a municipality (i.e. chapter 61 for villages and ch. 62 for cities and any existing charter ordinances).

A municipality must use a charter ordinance in certain cases, such as when electing not to be governed by a specific state law relating to the local affairs and government of such municipality. Sec. 66.01(4).

A charter ordinance is the most permanent of all local actions and may be altered or nullified only by another charter ordinance. Consequently, municipalities may decide to enact certain important measures by charter ordinance to make the enactment more permanent.

Initiative Procedure

Charter ordinances may be initiated by electors in the manner provided in sec. 9.20(1) to (6). Sec.

66.01(6). The alternative adoption of an initiated charter ordinance by the governing body requires a 2/3 vote of the members elect. Sec. 66.01(2).

If the governing body adopts an initiated charter ordinance by a 2/3 vote, the proposed charter ordinance does not take effect until 60 days after its passage and publication.

If during that time a petition signed by a number of electors of the municipality equal to not less than 7% of the votes cast for governor at the last general election is filed with the clerk demanding that the charter ordinance be submitted to a vote of the electors, it does not take effect until submitted to referendum and approved by a majority of the electors voting. Sec. 66.01(6) and (5).

Scheduling Charter Ordinance Referenda

There is some ambiguity in the statutes with respect to when a charter ordinance referendum may

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5. Cannot Modify Statutorily Prescribed Procedures. If a statute prescribes set procedures, such as in the acquisition of, or additions to a public utility under sec. 66.066, "the electors may not initiate legislation which will modify those statutorily prescribed procedures which bind the [governing body] itself in respect to the limitations which the Wisconsin courts have placed upon direct legislation." *Alt-house*, supra, 255 N.W.2d at 454; *Denning v. City of Green Bay*, 271 Wis. 230, 72 N.W.2d 730 (1955).

Performance Summary

Wisconsin Investment Trust

Latest 12-Month Period Ending	Yield Before Market Gain/(Loss)	Market Gain/(Loss)	Yield After Market Gain/(Loss) (Total Return)*
2/28/91	7.31	1.98	9.29
3/29/91	7.18	2.34	9.52
4/30/91	7.07	3.26	10.32
5/31/91	7.40	2.41	9.81
6/28/91	6.82	2.58	9.40
7/31/91	6.69	2.37	9.05

As of July 31, 1991 there were 154 accounts of which 137 have \$40,762,563.

The average maturity of the fund ranges from 5 to 18 months, which is longer than the average maturity normally

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associated with money market funds. The 5-18 month sector of the fixed-income market has traditionally provided significantly higher returns than shorter maturity alternatives, but with modest increases in market risk. The funds net asset value changes daily as interest rates fluctuate. Thus, participants with extremely short investment horizons should determine if these fluctuations are acceptable given their liquidity requirements.

*Assumes Dividend Reinvestment

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mation about the Trust performance may be obtained by calling FWTCO (414/287-3702).

be held (i.e. spring or fall election).

Section 66.01(8) provides that any election to change the charter of any municipality, other than a special election as provided in sec. 9.20(4), must be held in the *spring election*. Section 66.01(6) provides that any charter ordinance may be initiated in the manner provided in sec. 9.20(1) to (6) and sec. 9.20(4) states that if the governing body does not adopt initiated legislation it must be submitted to the electors "at the next *spring or general election*" or the governing body may order a special election.

These apparently conflicting provisions may be harmonized if sec. 66.01(8) is read to govern the election date of any referendum requested by the electors within 60 days after a charter ordinance has been adopted by 2/3 vote of the governing body and sec. 9.20(4) is construed to control the election

date of any referendum which must occur if the governing body fails to adopt an initiated charter ordinance. See *Elections #579*.

This issue was recently addressed by the State Elections Board. In September 1990 two residents of the Village of Genoa City, who had helped circulate a petition for direct legislation seeking adoption of a charter ordinance prohibiting automobile racing facilities in Genoa City, filed a complaint pursuant to sec. 5.06(1) with the State Elections Board challenging the village board's scheduling of a referendum on the proposed charter ordinance.

The village board had relied on sec. 66.01(8) and scheduled the referendum for the spring election. The complainants argued that sec. 9.20(4) governed the scheduling of the referendum and that since the proposed charter ordinance was acted on by the village board in Au-

gust, more than six weeks prior to the next general election which was scheduled for November 6, 1990, the board was required by sec.

9.20(4) to place the proposed charter ordinance on the ballot for the November election or at a special election held prior to November 6.

The State Elections Board agreed with the complainants and directed that the charter ordinance be placed on the November election ballot.

Charter Ordinance Initiative Limitations

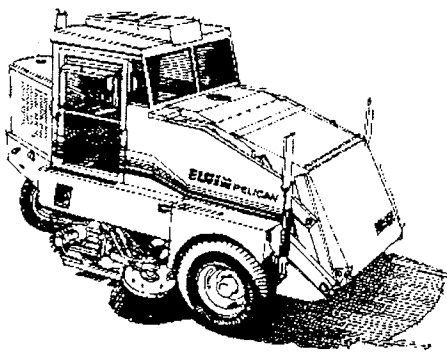
The Wisconsin court of appeals has held that the power of electors to initiate charter ordinances under sec. 66.01 is not free from limitations. *Save Our Fire Department Paramedics Committee v. City of Appleton* 131 Wis.2d 366, 389 N.W.2d 43, 47 (Ct. App. 1986).

The court of appeals has recog-

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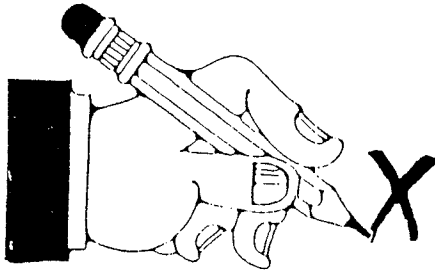
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Continued from page 301

nized the following limitations on charter ordinance initiatives:

1. Must be Legislative in Character. As with noncharter ordinances, a charter ordinance must be legislative in character before it can be validly initiated by direct legislation. *Save Our Fire Department Paramedics, supra.*, 389 N.W.2d at 47.

2. Substantive Limits. "A charter ordinance initiated by direct legislation is bound by the same substantive limits that bind charter

ordinances proposed by the governing body. For example, neither the people nor the governing body may propose a charter ordinance that rejects a state law dealing with a matter of statewide concern. Sec. 66.01(4)." *Save Our Fire Department Paramedics, supra.*, 389 N.W.2d at 48, n. 10.

An important distinction between charter ordinance initiatives and noncharter ordinance initiatives is that the limitation regarding the repeal or amendment of existing legislation does not apply to charter ordinance initiatives.

The court of appeals has concluded that "the legislature clearly intended charter ordinances to control over any prior or subsequent act of the legislative body." *Save Our Fire Department Paramedics, supra.*, 389 N.W.2d at 48-49. See also *Ordinances and Resolutions #416.*

In addition, whenever electors of any municipality have adopted or

determined to continue to operate under the general charter law (ch. 61 or ch. 62), or the manager or commission form of government (ch. 64), or have determined the method of selection of members of the governing body, the question may not again be submitted to the electors, nor action taken thereon within a period of 2 years. Sec. 66.01(8).

III. Coping With Direct Legislation

Dealing with direct legislation is difficult because the proposal may not be well-worded and thought out and because the matter may be very controversial. Some suggestions for dealing with direct legislation follow:

1. Open Government and Communication. Municipal governing bodies may deter direct legislation by encouraging citizen participation

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in the governing process (e.g. holding a public hearing on a controversial topic, giving explicit meeting notices) and keeping citizens informed of the reasons for taking controversial actions.

2. Advisory Referenda.

Governing bodies may want to meet with organized citizen groups who are threatening to file petitions for direct legislation and attempt to reach a compromise by offering to submit a controversial matter to the electors in the form of an advisory referendum. (See discussion below.)

3. Competing Legislation.

Governing bodies faced with the possibility of direct legislation may want to consider adopting competing legislation while the citizen initiative is pending to preclude a referendum election on the initiated legislation.

As discussed above, the power of direct legislation cannot be used to

initiate *noncharter* ordinances which are in direct conflict with prior legislation.

Consequently, a municipal governing body may block the adoption of an initiated ordinance by enacting legislation on the same subject matter as the initiated proposal at any time prior to the clerk's certification of the direct legislation.

Although the above technique cannot be used to preclude the adoption of *charter* ordinance initiatives, a governing body faced with the possibility of a charter ordinance initiative may find it useful at times to propose legislation on the same subject matter as the initiated legislation.

For example, a governing body might deal with a charter ordinance initiative which is confusingly written by enacting or setting for referendum its own charter or-

dinance which clarifies the initiated proposal.

Also, a governing body might want to set for referendum a competing charter ordinance solely for the purpose of giving voters an alternative to the initiated proposal.

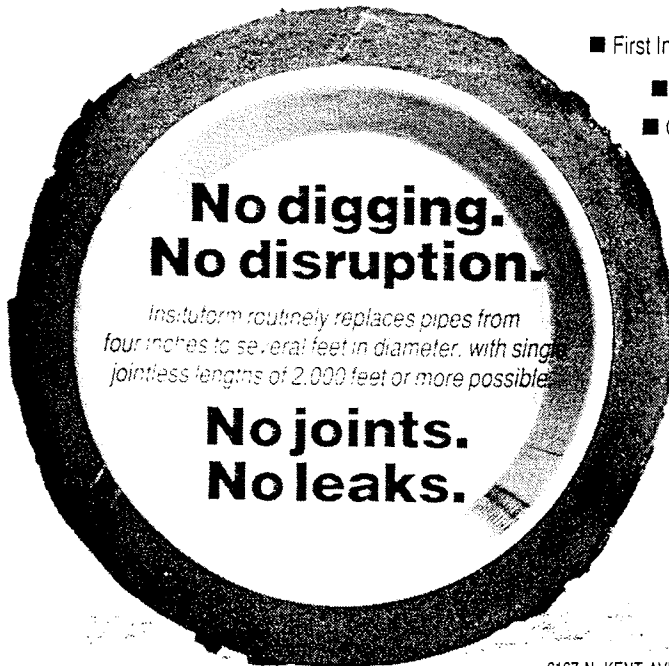
IV. Advisory Referenda

In past opinions the League has consistently concluded that municipal governing bodies may submit advisory referenda to the electors and the results of such referenda are, by their very nature, not binding on the governing body. See *Elections* #565, #578 and *Powers of Municipalities* #730.

There is no specific statutory provision authorizing municipalities to conduct advisory referenda. (Counties, in contrast to municipalities, are expressly authorized by sec. 59.07(67) to conduct a countywide referendum for advisory purposes.)

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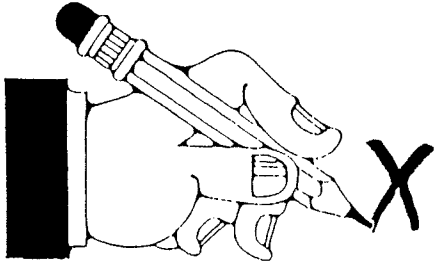
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Continued from page 303

However, sec. 8.06 provides that municipalities may call special elections for any purpose authorized by law and sec. 5.02(16s) defines "referendum" as "an election at which an *advisory*, validating or ratifying question is submitted to the electorate."

In addition, various other sections refer to referenda, such as secs. 5.64(2) (referendum ballot) and 7.15(2)(d) (clerk's duties when a municipality conducts a referendum). However, since municipal advisory referenda are not explicitly covered by the statutes, the refer-

ences in the statutes to referenda seem to apply only to those under statutory procedures. See *Elections* #582 and #565.

The Wisconsin Supreme Court has by implication recognized the existence of advisory referenda in the various cases in which it has invalidated attempts at direct legislation under sec. 9.20 and declared that they have the force only of advisory referenda. See, e.g., *Landt v. City of Wisconsin Dells*, 30 Wis.2d 470, 141 N.W.2d 245 (1966).

Since there are no specific provisions concerning municipal advisory referenda, it is the League's opinion that a municipality may hold such a referendum whenever it pleases, and may follow whatever notice and ballot form it chooses.

However, the State Elections Board strongly recommends that statutory referendum procedures be followed so confusion is minimized. In particular, see sec. 8.55 and ch. 10 for guidance concerning election

dates and notice of special referenda, and sec. 5.64(2), which provides a form for a referendum ballot. See *Elections* #582 and #565.

V. Use Public Funds

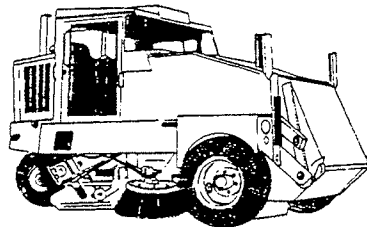
A question related to direct legislation and of interest to municipalities is whether local governments may spend public funds to promote their view of an issue that is before the voters in a referendum election.

There are no Wisconsin cases on this issue. However, nearly all of the courts in other jurisdictions which have examined this issue have concluded that a municipality or similar political subdivision may not expend public funds for the purpose of *influencing* the result of a referendum election. See, e.g., *Burt v. Blumenauer*, 299 Or 55, 699 P.2d 168, 174 (1985).

Actions Municipalities Can Take

1. **Informational Campaign Activities.** Courts have generally con-

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cluded that municipalities may spend public funds on informational and educational programs relating to ballot measures as opposed to promotional activities.

Municipalities, however, may only provide fair and unbiased educational information to the public concerning a ballot measure. *Citizens to Protect Public Funds v. Board of Education*, 13 N.J. 172, 98 A.2d 673 (1953).

Courts acknowledge that it is difficult to distinguish between promotional and informational activities and that "no hard and fast rule governs every case." *Stanson v. Mott*, 17 Cal.3rd 206, 551 P.2d 1, 12 (1976). The *Stanson* court suggested that factors such as the style, tenor or timing of the publication may be determinative. *Id.*

2. Endorsements of Ballot Measures. At least one court has upheld a local government's formal endorsement of a ballot measure.

In *King County Council v. Public Disclosure Commission*, 93 Wash.2d 559, 611 P.2d 1227 (Wash. 1980), the defendant county council passed a motion endorsing an antipornography initiative. The council, however, did not appropriate any public funds for the promotion of its view.

The plaintiffs argued that the endorsement was invalid because it was not for a public purpose, that it infringed the state constitutional guarantee of free elections, and that it violated first amendment rights of those citizens who disagreed with the council's position.

The court rejected all of plaintiffs' arguments on the ground that the endorsement was not an expenditure in support of the antipornography initiative. The court distinguished cases prohibiting electoral campaigning by local governments on grounds that in those cases local governments campaigned, disseminated

literature, and purchased advertising.

The court also noted that the council's endorsement benefited the public by generating interest and by informing citizens of their elected representatives' positions on a controversial issue.

3. Advocacy by Individual Policymakers. Finally, the Oregon supreme court in *Burt v. Blumenauer*, supra, pointed out the importance of distinguishing between advocacy by "governments" as institutions and advocacy by individual policymakers "who not only enjoy constitutional protection to speak but whose position requires them to develop, implement and garner support for their policy choices." 699 P.2d at 176.

VI. Conclusion

As the above discussion shows,

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Q ■ ¹²⁵ What do 90 MUNICIPALITIES across the Midwest have in common?

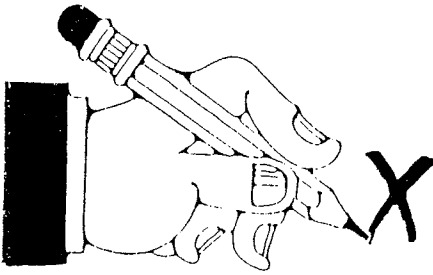
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Legal Opinions

Liability for Failure to Construct and Maintain Sidewalks

You have written with two questions concerning municipal liability with regard to sidewalks.

Ordinarily, we respond to written requests for legal opinions only if they are made by the municipal attorney or at the request of the governing body. See the League's legal policy (below). Usually, the municipal attorney is in a better position to respond quickly to your concerns.

However, since your questions relate to matters of general interest to Wisconsin municipalities I will answer them briefly.

1. What is the liability of a municipality for failing to construct sidewalks (e.g., where a pedestrian is injured or killed in an area that does not have sidewalks)?

Wisconsin courts have consistently held that the determination of whether sidewalks or other public improvements need to be constructed is entirely within the discretion of the governing body and therefore a purely legislative matter. See *S. D. Realty Co. v. Sewerage Commission of the City of Milwaukee*, 15 Wis.2d 15, 30, 112 N.W.2d 177

Continued from page 305

complex issues are often raised when citizens choose to exercise their authority to initiate legislation. Municipal officials are encouraged to consult with their municipal attorney when direct legislation petitions are filed in their municipality.

The League has numerous opinions available on various issues relating to direct legislation. Copies of the League opinions cited in this Comment may be obtained by calling the League office. In addition, the 1991 Municipal Attorneys Institute materials include a comprehensive outline on direct legislation. ■

(Elections #593)

(Ordinances and Resolutions #444)

Early Bird Registration



Municipal officials will realize savings by using the Early Bird Registration form published in this issue on page 295. Hurry! Deadline is Friday, Sept. 27, 1991.