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September 22, 2020

Friends of Lakeside Park
c/o John Papenheim, Chair
15 Fifth Street
Fond du Lac, WI 54935

RE: Direct Legislation Petitions Affecting Development of
Lighthouse Point and Oven Island in Lakeside Park, Fond du Lac

Dear Mr. Papenheim:

This letter is in response to your request for an opinion concerning the legal validity of two petitions sponsored by the Friends of Lakeside Park for direct legislation pursuant to Wis. Stat. § 9.20. The first petition seeks the adoption of an ordinance that would provide in pertinent part:

No part of Lighthouse Point Island in Lakeside Park which remains in free and open use as of the effective date of this Ordinance shall be leased, developed or improved with structures unless such lease, development or improvement is first approved by a majority of the electors in a general or special election.

The second petition contains substantially identical language for an ordinance that would require a public referendum prior to new development on Oven Island.

Wisconsin cases deciding whether a proposed ordinance is the proper subject of a Wis. Stat. § 9.20 petition for direct legislation establish that there are four limitations on such petitions that are inherent in the legislature's statutory grant of authority: (1) they cannot exceed the powers of the governing body; (2) they cannot modify procedures imposed by State statute; (3) they must be legislative in nature (rather than executory or administrative), and (4) they cannot repeal an existing ordinance.

Last week, the City Attorney provided an opinion to the Council in connection with the Friends' petition drive, which concludes that the measures are in "clear conflict" with a resolution adopted by the Council on February 12, 2020. The text of Resolution 8859 provides:

BE IT RESOLVED by the City Council of the City of Fond du Lac that the City Council accepts and adopts the general concepts contained in the Alternative Master Plan for Lakeside Park and instructs staff to start planning and investigation for implementing the Alternative Master Plan for Lakeside Park.

The City Attorney's opinion cites *State ex rel. Althouse v. City of Madison*, 79 Wis. 2d 97, 255 N.W.2d 449 (1977) for the proposition that "direct legislation cannot be used to compel a city council to repeal an existing ordinance or resolution or to compel the passage of an ordinance which would be in clear conflict with one already in existence, such that it would act as a repealer of the existing ordinance."

The issue in *Althouse* was whether the City of Madison could legally refuse to adopt or place on the ballot a petition for a "fair rent ordinance" on the basis that the proposed ordinance was arguably unconstitutional. (The court said no, the City was required to place the direct legislation on the ballot, and the issue of its constitutionality would have to be brought as a separate case if the measure succeeded.)

The *Althouse* case did not involve the issue of whether the proposed ordinance directly repealed or clearly conflicted with an existing resolution. However, the court cited a previous case, *Landt v. Wisconsin Dells*, 30 Wis. 2d 470, 475, 141 N.W.2d 245 (1966), for the rule that direct legislation petitions cannot be used to repeal existing legislation. In *Landt*, the City Council had adopted a resolution to increase the fluoride content of the public water supply. The direct petition proposed an ordinance to prohibit fluoridation of the public water supply and to repeal the resolution previously adopted by the Common Council. The *Landt* court held:

[W]hen a common council has adopted an ordinance or resolution dealing with a particular subject, [the direct legislation statute] does not authorize the filing of petitions to compel the council to repeal such ordinance or resolution.

The question presented by *Landt* is whether the Friends' measures that would require submission of development project proposals for Lighthouse Point and Oven Island to a public referendum effectively repeal the City's resolution which "adopt[ed] the general concepts contained in the Alternative Master Plan."

In the case of *Heider v. City of Wauwatosa*, 37 Wis.2d 466, 474, 155 N.W.2d 17, 21 (1967), the court defined "repeal" to mean "the enactment of a subsequent statute which declares that the former law shall be revoked and abrogated, (which is called 'express' repeal), or which contains provisions so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force, (which is called 'implied' repeal)." (Emphasis added.)

Unlike the *Landt* case, the proposed Lighthouse Point and Oven Island ordinances do not directly repeal Resolution 8859. They do not “disapprove” the Alternative Master Plan, nor do they direct staff to stop planning and investigating the implementation of elements of the Plan. Instead, the ordinances would subject project proposals for Lighthouse Point and Oven Island to a public referendum. If the referendum resulted in disapproval of any element of the Alternative Master Plan, the Plan would simply need to be amended. This result would neither be contrary to nor irreconcilable with the Council’s adoption of the general Plan concepts, which the City made subject to a feasibility study. Amendment of the Plan is implicitly contemplated as an outcome of the feasibility study.

Moreover, Resolution 8859 is quite preliminary in that it directs staff to “plan” and “investigate” the implementation of the Plan. The project is still subject to design review and code approvals. No plans have been submitted for approval and no funds committed to the implementation of the Plan. Ultimately the effect of the direct legislation proposed by the Friends would be to add another approval requirement to the projects outlined in the Alternative Master Plan. This is not “clearly contrary” to Resolution 8859 because the February resolution does not in any way limit the scope of approvals required for those projects.

While there is no case that expands on *Heider’s* definition of how a petition for direct legislation might repeal an existing ordinance, subsequent cases have emphasized that this limitation must be construed narrowly. “The limitations, implicit in the statute itself, are narrowly construed and carefully applied so as to avoid judicial dilution of the statutory initiative right.” *Mount Horeb Community Alert v. Village Bd.*, 2003 WI 100, ¶ 263 Wis.2d 544, 665 N.W.2d 229 (2003). For example, in *Althouse*, the Wisconsin Supreme Court held that the direct legislation statute “implements the legislative powers that have been reserved to the people” by their elected representatives in the legislature. 79 Wis. 2d at 118-19. Therefore, the statute cannot be interpreted so as to unduly restrict those reserved local legislative powers, which “are exercised with particular appropriateness under circumstances where the people are of the opinion that their elected representatives are not acting in response to the public will.” *Id.* (emphasis added).

In the *Mount Horeb* case, the Wisconsin Supreme Court considered a direct legislation petition calling for the Village to hold a binding referendum prior to the start of construction on any new village building project requiring a capital expenditure of \$1 million or more. The Village refused to adopt the proposal or place it on the ballot, arguing that it was not a proper subject for direct legislation and was contrary to State statutes establishing the procedures for borrowing funds for municipal expenditures. The court dismissed each of the Village’s rationales for refusing to adopt the measure or place it on the ballot, holding that “the decision to build a new million-dollar project is clearly a legislative one.” *Id.* at ¶ 33. In deciding that the ballot measure did not conflict with municipal budget statutes, the court rejected the notion that the public referendum in any

way interfered with the Village Board's authority to bid public projects or proceed without public bidding in an emergency. Finally, the court noted that "the proposed ordinance carefully specifies that it does not restrict the village's administrative decision making regarding planning and design of construction projects." Similarly, the Friends' direct legislation measures expressly reserve to the City the "exclusive authority to approve the specific terms and conditions of any such lease, development agreement or improvement project."

In summary, Wisconsin cases establish that direct legislation proposals do not "repeal" or "clearly conflict" with an existing municipal ordinance or resolution merely because the two address the same subject matter in different ways. Such claims will be met with extreme skepticism by the courts, based on the policy of preserving the legislative powers reserved to the people. In my opinion, for the reasons set forth above, the Council's preliminary resolution adopting the "general concepts" of the Alternative Master Plan is no barrier to an ordinance that would require public approval for specific elements of that Plan.

Please contact me should you have any questions or if you have additional information relevant to the above analysis.

Very truly yours,

WHEELER, VAN SICKLE & ANDERSON, S.C.



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