



ATTORNEYS AT LAW

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Stuart G. Mondschein
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Rhea A. Myers
Mary Beth Peranteau
Jessica J. Shrestha
Justin W. Chasco
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IN MEMORIAM
Norman C. Anderson
(1928-2020)

October 13, 2020

VIA ELECTRONIC MAIL

Brian Kolstad, President and
Members of the City Council
City of Fond du Lac
160 South Macy 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. Kolstad and Council Members:

This firm represents the Friends of Lakeside Park in connection with two petitions for direct legislation submitted to the City pursuant to Wis. Stat. § 9.20. I understand that you are in receipt of my letter dated September 22, 2020, to John Papenheim, Chair of the Friends group, analyzing the two proposed ordinances in light of the City Attorney's opinion that they indirectly repeal the Council's Resolution 8859, adopted earlier this year. The proposed ordinances would require majority approval by the voters for new development on Lighthouse Point Island and Oven Island, respectively. I am in receipt of a copies of the Clerk's certifications which verify that the Lighthouse Point Island and Oven Island petitions each have a sufficient number of valid signatures and are in the proper form, pursuant to Wis. Stats. §§ 9.20(3) and 8.40.

Section 9.20(4), Wis. Stats., directs the Council to adopt the ordinances without alteration or submit them to the electors at the next spring or general election. I understand that the Council, upon the advice of counsel, is considering doing neither on the grounds that these ordinances fall within a judicially created exception to the direct legislation statute which prohibits direct legislation that directly or indirectly repeals a prior ordinance or resolution.

As you know, the Council's earlier Resolution No. 8859 adopted the general concepts contained in the Alternative Master Plan for Lakeside Park, and directed staff to start planning and investigation for implementing that Plan. As my letter of September 22nd concluded, the provisions of the proposed ordinances are not "so contrary to or

irreconcilable with those of the earlier [resolution] that only one of the two can stand in force.” See *Heider v. City of Wauwatosa*, 37 Wis. 2d 466, 474, 155 N.W.2d 17, 21 (1967). The City’s resolution adopted “general concepts” of a plan, while the proposed petitions would require elector approval of two of the plan elements.

Perhaps because the original opinion lacks case law support, the City Attorney has further opined that the proposed ordinances are administrative rather than legislative in nature, and thus fall under another recognized exception to the direct legislation statute. That conclusion also does not withstand analysis.

In *Mount Horeb Community Alert v. Village Bd.*, 2003 WI 100, ¶ 263 Wis.2d 544, 665 N.W.2d 229 (2003), the Village refused to adopt a direct legislation petition calling for it 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 Wisconsin Supreme Court disagreed that the proposed referendum requirement was administrative in nature, holding that “the decision to build a new million-dollar project is clearly a legislative one.” *Id.* at ¶ 33. The court rejected the argument that the public referendum in any way interfered with the Village Board’s public bidding authority. So too, the proposed referendum requirements for Lighthouse Point Island and Oven Island are essentially policy determinations concerning whether or not to proceed with specific improvements in those areas of Lakeside Park. Like the referendum in *Mt. Horeb*, they would not restrict the City’s administrative decision-making regarding bidding, planning and design of construction projects. The proposed ordinances expressly reserve to the City the “exclusive authority to approve the specific terms and conditions of any such lease, development agreement or improvement project.”

By contrast, in *State ex rel. Becker v. Common Council of City of Milwaukee*, 101 Wis. 2d 680, 305 N.W.2d 178 (Ct. App. 1981), the court of appeals rejected a proposal for direct legislation that sought to remove the Milwaukee police chief, concluding that it was administrative rather than legislative in character. The *Becker* court cited the facts that the proposal was specific in application to the current chief, would have only a temporary effect, did not set forth a general and permanent rule of conduct, and did not create a new policy or a new plan. *Id.* at 687. Applying that test to the two petitions here, the referenda are general in application to any new development on Lighthouse Point Island and Oven Island, and are intended to have permanent effect. They create new policy by subjecting development to majority voter approval.

The court in *Becker* stated that the test of what is legislative and what is an administrative measure is “whether the proposition is one to make new law or execute the law already in existence.” *Id.* at 686. An analogy to zoning may help to illustrate the difference between legislative measures, on the one hand, and administrative measures on the other. The Council adopts and may amend the City zoning ordinance to establish land

use rules that apply generally within the various zoning districts. These ordinances are administered by the issuance or denial of permits, when the zoning regulations are applied to a particular lot or parcel. Each such determination is administrative in nature.

Here, the direct legislation seeks to establish, by ordinance, a policy that the public should have approval power over development within the most prominent areas in the City's premier public park. This would be a new law, not the implementation of an existing law. The fact that these ordinances would affect a limited geographical area does not make them administrative in nature.

I understand that the Council will consider a "Resolution Finding that the Friends of Lakeside Park's Petitions Are Not Proper Subjects for Direct Legislation" at its October 14th meeting. I believe a court would find that the petitions are indeed appropriate subjects for direct legislation, and I therefore urge you to vote no on this resolution.

Thank you for your consideration.

Very truly yours,

WHEELER, VAN SICKLE & ANDERSON, S.C.



Mary Beth Peranteau
mperanteau@wheelerlaw.com
608.441.3832 direct line

/mbp

cc: City Attorney Deborah Hoffmann (via email)