

CHAPTER 9

POST ELECTION ACTIONS; DIRECT LEGISLATION

9.01 Recount.
9.10 Recall.

9.20 Direct legislation.

9.01 Recount. (1) (a) Any candidate voted for at any election or any elector who voted upon any referendum question at any election may request a recount. A verified petition and \$2 for each precinct for which the petition requests a ballot recount shall be filed with the proper clerk not later than 5 p.m. on the 3rd day following the last meeting day of the board of canvassers that determined the election for that office or on that referendum question. The verified petition shall state that at the election he was a candidate for the office in question or that he voted on the referendum question in issue; that he is informed and believes a mistake or fraud has been committed in specified precincts in the counting and return of the votes cast for the office or upon the question; or shall specify any other defect, irregularity or illegality in the conduct of the election.

(b) The proper board of canvassers shall reconvene at 9 a.m. on the day following the filing of a petition and proceed to recount the ballots in all precincts specified and otherwise check the fact allegations of the petition. The recount shall proceed for each precinct as follows:

1. The board shall first compare the registry lists and determine the number of voting electors.

2. They shall then examine the container or bag containing the ballots to be certain it has not been tampered with, opened, or opened and resealed. Any irregularities or possible tampering with the container or bag shall be noted.

3. When the container or bag has been checked, it shall be opened and the contents removed. The board shall, without examination other than is necessary to determine that each is a single ballot, count the number of ballots therein. If the number of ballots and the totals recorded under subd. 1 do not agree, this fact shall be noted. When the number of ballots exceeds the number of electors, all the ballots shall be returned to the container or bag and a number of ballots equal to the excess number of ballots shall

be drawn by chance and without inspection from the container or bag. These ballots shall be specially marked as having been removed by the canvassers on recount due to an excess number of ballots and carefully preserved.

4. When the number of ballots and electors agree, or after noting that there are fewer ballots than electors, the board shall proceed to place all ballots face down to check the ballot clerks' initials. Any ballots not properly initialed by 2 ballot clerks shall be laid aside, properly marked and carefully preserved. After ascertaining that all the remaining ballots have been properly indorsed, the canvass shall begin.

5. All steps of the recount shall be performed publicly and all materials and ballots may be viewed and identified by the candidates, the person demanding the recount and their authorized representatives and counsel, but only members of the official board of canvassers shall be allowed to touch any of the materials or ballots. Any errors shall be corrected.

(2) When the recount concerns a candidate, notification of the intent to file a petition shall first be sent by registered mail or served as is a summons in circuit court on each opposing candidate addressed to the address given on the nomination papers. In recount proceedings for a partisan primary the notice to the candidates shall be served only on opposing candidates for the same party nomination. The petition and the sender's receipt for each registered letter or the affidavit of service upon each opposing candidate shall be filed with the proper clerk.

(3) (a) The petitioner, all opposing candidates and interested persons shall be entitled to be present in person and by counsel to observe the proceedings.

(b) When a recount proceeding affects candidates in districts of more than one county, the county clerk shall immediately notify the secretary of state.

(4) Whenever a recount petition for part of the precincts within an election district is filed under the above provisions, the opposing

candidate, or any elector or other interested party including a municipality if on a referendum question, may similarly file a petition for recount in any or all of the remaining precincts. The petition shall be filed not later than 5 p.m. 2 days after the board of canvassers completes the first recount. The proper board of canvassers shall reconvene at 9 a.m. on the day following the filing of the petition and proceed to recount the ballots in all precincts specified and otherwise check the fact allegations of the petition. Any errors shall be corrected.

(5) Any member of the board of canvassers may administer oaths, certify official acts and issue subpoenas for purposes of this section. Witness fees shall be paid by the county.

(6) Within 5 days after completion of the recount determination by the board of canvassers in all counties concerned, any candidate, or any elector when for a referendum, aggrieved by the recount may appeal to circuit court. The appeal shall commence by serving a written notice of appeal on the other candidates or persons who filed a written notice of appearance before the board. The appellant shall file the notice with the clerk of circuit court together with an undertaking and surety in the amount approved by the clerk of court or the judge, conditioned upon the payment of all costs taxed against the appellant.

(7) The circuit judge shall forthwith issue an order directing the proper county or municipal clerk to transmit immediately all ballots, papers and records affecting the appeal to the clerk of court. The order shall fix a place and a time for the hearing within 5 days of the order either in open court, at chambers or before a referee. The order shall be served upon the proper county or municipal clerk and all other candidates or persons who filed a written notice of appearance before the board. A reference may be ordered upon any and all questions. At the assigned time and place, the matter shall be summarily heard and determined and costs taxed as in other civil actions.

(8) Nothing in this section shall be construed to abrogate any right or remedy that any candidate may now have affecting the trying of title to office.

History: 1965 c. 666.

Legislative Council Note, 1965: Sub. (1) (a) is a restatement of s. 6.66 (1) (1st sentence and 2nd sentence, in part). Par. (b) is in part based on s. 6.66 (1) (1st sentence, last part). The recount procedure is not in the present law but states present practice. A specific time for the recount to begin is added.

Sub. (2) is a restatement of ss. 5.012 (2) and 6.66 (1) (2nd sentence, in part, and 3rd sentence).

Sub. (3) (a) is a restatement of s. 6.66 (1) (4th

sentence). Par. (b) is a restatement of s. 6.66 (1) (last sentence).

Sub. (4) is based on s. 6.66 (1a) with 3 changes. Provision is made to allow municipalities to ask for a recount. The time provision is changed from ". . . within 5 days after the last day of a regular meeting . . ." Specific times for the deadline and for the recount to begin are added.

Sub. (5) is a restatement of s. 6.66 (2).

Sub. (6) is a restatement of s. 6.66 (3) (sentences 1 and 2).

Sub. (7) is a restatement of s. 6.66 (3) (last part).

Sub. (8) is a restatement of s. 6.66 (4). (Bill No. 755-A)

(4) [(8)] does not apply to actions to challenge referendum elections. Mandamus is not a proper remedy in such cases. This section is constitutional, although the provision in (3) [(7)] for a reference may not be valid. See also note to 66.021, citing this case. *Burke v. Madison*, 17 W (2d) 623, 117 NW (2d) 580.

As to defects, illegality, irregularities, mistakes, and fraud having as their immediate effect the disqualification of a ballot or ballots, the remedy provided by 6.66 is exclusive; but the remedy covers only those matters which are of such a character that the board of canvassers can correct them; and the statute contemplates that after such correction a recount of the ballots which are properly determined valid votes in the election shall be made; but the statute does not contemplate a judicial determination by the board of canvassers of the legality of the entire election. *Clapp v. Joint School Dist.*, 21 W (2d) 473, 124 NW (2d) 678.

There is no time limitation in (3) [(6)] within which a notice of appeal from a determination of the board of canvassers must be filed with the clerk of the circuit court, the only timeliness requirement expressed being that the notice be served upon contending candidates within 5 days after the recount determination. *Gradinjan v. Boho*, 29 W (2d) 674, 139 NW (2d) 557.

Town board of canvassers has authority to determine legality of voting on referendum and to recertify results of the election. This includes authority to subtract 2 votes from totals based on affidavits of 2 ineligible voters as to how they voted, even though the voters were not challenged at the polls. 49 Atty. Gen. 32.

9.10 Recall. (1) The qualified electors of the state, county, congressional, judicial or legislative district, or city may petition for the recall of any elective official after the first year of the term for which he is elected by filing a petition with the same official with whom the petition for nomination to the office was filed demanding the recall of the officeholder. The petition shall be signed by electors equal to at least 25% of the vote cast for the office of governor at the last election within the same district or territory as that of the officeholder being recalled. In cities, if at the last election any group of candidates were voted for in common to fill 2 or more offices of the same designation, the required number of petition signers shall be equal to 25% of the number computed by dividing the total vote for that office by the number of offices filled jointly.

(2) (a) The preparation and form of the recall petition shall be governed by s. 8.15. In addition, a recall petition for a city office shall contain a specific statement of good and sufficient reason upon which removal is sought.

(b) After the recall petition has been of-

ferred for filing, no name shall be erased or removed. No signature shall be valid or counted unless the date is less than 60 days before the date offered for filing.

(3) (a) The provisions of this subsection apply for the recall of all elective officials other than city officials. City officials are recalled under sub. (4).

(b) Within 3 days after the petition is offered for filing, the official with whom the petition is left shall determine by careful examination whether the petition is sufficient and so state in a certificate attached to the petition. If the petition is found to be insufficient, the certificate shall state the particulars creating the insufficiency. The petition may be amended to correct any insufficiency within 5 days following the affixing of the original certificate. Within 2 days after the offering of the amended petition for filing, it shall again be carefully examined to determine sufficiency and a certificate stating the findings shall be attached. Immediately upon finding an original or amended petition sufficient, the official shall file the petition and call a special election to be held not less than 40 nor more than 45 days from the filing date.

(c) The official against whom the recall petition is filed shall be a candidate at the special election without nomination unless he resigns within 10 days after the original filing of the petition. There shall be no primary. Candidates for the office may be nominated under the usual procedure of nomination for a primary election by filing nomination papers not later than 5 p.m. 4 weeks preceding the election and have their names placed on the ballot at the special election.

(4) (a) For the recall of any city official, the municipal clerk shall verify the eligibility of the respective signers and circulators, shall certify thereto and shall transmit the petition to the clerk of circuit court within 10 days of the filing date. The circuit court within 10 days after receipt of the petition shall determine by hearing whether the petition states good and sufficient reason for the recall. The clerk of circuit court shall notify the incumbent of the hearing date. The person subject to recall and the petition circulators may appear by counsel and the court may take testimony with respect to the recall petition. If the circuit court judge determines the grounds stated in the petition and proof offered at the hearing show good and sufficient reasons for recall, the judge shall issue a certificate directing the common council to hold an election under this section. If the reasons are found insufficient

or do not show good cause, issuance of the certificate shall be denied. Any party aggrieved by the circuit court determination may appeal to the supreme court within 10 days following the circuit court determination by filing a notice of appeal with the clerk of the supreme court. An appeal under this section shall have preference on the supreme court calendar. The appeal shall stay enforcement of a certificate issued by the circuit court until the supreme court determines the appeal.

(b) The common council upon receiving the certificate from the circuit court shall call a special election not less than 50 nor more than 60 days from the date of the certificate. The special election for recall of more than one official may be held on the same day.

(c) The official against whom the recall petition is filed shall be a candidate at the special election without nomination unless he resigns before the deadline for filing nomination papers. Other qualified persons may become candidates by filing their nomination papers not later than 5 p.m. of the day 6 weeks before the day of the election. If the number of candidates including the incumbent, when he is a candidate, is more than twice the number of offices of that designation to be filled, a special primary shall be held. The incumbent's name shall not appear on the primary ballot. When a primary is held, the name of the person receiving the highest number of votes shall be placed on the special election ballot with the incumbent. When the incumbent is not a candidate, the 2 persons receiving the highest number of votes shall be placed on the special election ballot. When an election to recall more than one official of the same designation is held at the same time, the names of all candidates nominated shall be grouped together on the ballot with instructions to vote for the number of offices to be filled.

(5) The official against whom a recall petition has been filed shall continue to perform the duties of his office until the result of the special election is officially declared. The person receiving the highest number of votes at the special election shall be declared elected for the remainder of the term. If the incumbent receives the highest number of votes he shall continue in office. If another receives the highest number of votes he shall succeed the incumbent if he qualifies within 10 days after receiving notification.

(6) After one recall petition and special election, no further recall petition shall be filed against the same official during the term

for which he was elected.

(7) The purpose of this section is to facilitate the operation of article XIII, section 12, of the constitution and to extend similar rights to city electors.

History: 1965 c. 666.

Legislative Council Note, 1965: Sub. (1) is based on ss. 6.245 (1) and 10.44 (1) (1st sentence, in part and 4th sentence). The provision of s. 10.44 (1) requiring the petition to be filed with the clerk of circuit court is changed.

Sub. (2) (a) is a restatement of ss. 6.245 (2) (1st sentence) and 10.44 (1) (1st sentence, in part) and (2) (1st sentence). Par. (b) is based on ss. 6.245 (2) (2nd sentence) and 10.44 (2) (2nd sentence).

Sub. (3) (a) is provided for clarification. Par. (b) is a restatement of s. 6.245 (3). Par. (c) is based on s. 6.245 (4), but the deadline of 32 days prior to the election has been changed.

Sub. (4) (a) is based on ss. 10.44 (1) (2nd and 3rd sentences) and 10.44 (3). The requirement that the petition be filed with the clerk of circuit court who then transmits it to the municipal clerk has been changed. Par. (b) is a restatement of s. 10.44 (4). Par. (c) is based on s. 10.44 (5) and (6). A specific deadline for the incumbent's resignation has been added. The 40-day deadline was changed to 6 weeks. The 5 p.m. deadline was added for uniformity.

Sub. (5) is a restatement of ss. 6.245 (5) and 10.44 (7).

Sub. (6) is a restatement of s. 6.245 (6) but is new for cities.

Sub. (7) is based on s. 6.245 (7) and is broadened to include cities. (Bill No. 755-A)

9.20 Direct legislation. (1) A number of electors equal to at least 15% of the votes cast for governor at the last general election in their city may sign and file a petition with the city clerk requesting that an attached proposed ordinance or resolution, without alteration, either be adopted by the common council or referred to a vote of the electors. The person filing the petition shall designate in writing a person or organization to be notified of any insufficiency or improper form under sub. (3).

(2) The preparation and form of the direct legislation petition shall be governed by s. 8.15.

(3) Within 15 days after the petition is filed, the city clerk shall determine by careful examination whether the petition is sufficient and whether the proposed ordinance or resolution is in proper form. He shall state his findings in a signed and dated certificate attached to the petition. If the petition is found to be insufficient or the proposed ordinance or resolution is not in proper form, the certificate shall give the particulars, stating the insufficiency or improper form. The petition may be amended to correct any insufficiency or the proposed ordinance or resolution may be put in proper form within 10 days following the affixing of the original certificate and notification of the person designated under sub. (1). When the original or amended petition is found to be sufficient and the original or

amended ordinance or resolution is in proper form, the city clerk shall so state on the attached certificate and forward it to the common council immediately.

(4) The common council shall, without alteration, either pass the ordinance or resolution within 30 days following the date of the clerk's final certificate, or submit it to the electors at the next election, if the election is more than 6 weeks after the date the order is given. If 6 weeks or less before election the ordinance or resolution shall be voted on at the next election thereafter. The council by a three-fourths vote of the members-elect may order a special election for the purpose at any time prior to the next election, but not more than one special election for direct legislation shall be called in any 6-month period.

(5) Not more than 3 nor less than one week before the election, the city clerk shall cause the ordinance or resolution that is being submitted to a vote to be published once in a newspaper as are city ordinances.

(6) The ordinance or resolution need not be printed in its entirety on the ballot, but a concise statement of its nature shall be printed together with a question permitting the elector to indicate approval or disapproval of its adoption.

(7) If a majority vote in favor of adoption, the proposed ordinance or resolution shall take effect upon publication under sub. (5). Publication shall be made within 10 days after the election.

(8) City ordinances or resolutions adopted under this section shall not be subject to the veto power of the mayor and shall not be repealed or amended within 2 years of adoption except by a vote of the electors. The common council may submit a proposition to repeal or amend the ordinance or resolution at any election.

History: 1965 c. 666.

Legislative Council Note, 1965: Sub. (1) is a restatement of s. 10.43 (1) except it adds that with the petition there shall be filed the name of a person or organization to facilitate execution of sub. (3).

Sub. (2) is a restatement of s. 10.43 (2).

Sub. (3) is a restatement of s. 10.43 (3), except it adds a provision to allow placing the proposed ordinance or resolution in proper form which is intended to prevent mere technicalities from defeating the petition's purpose.

Sub. (4) is based on s. 10.43 (4). The 40-day provision was changed to 6 weeks.

Sub. (5) is based on s. 10.43 (5) (1st sentence). The dates were changed from "... not more than 20 nor less than 5 days..." The publication provision was changed.

Sub. (6) is a restatement of s. 10.43 (5) (last sentence).

Sub. (7) is based on s. 10.43 (6) (1st sentence, in part and 3rd sentence). The provision has been changed so the ordinance takes effect upon publi-

cation rather than immediately.

Sub. (8) is a restatement of s. 10.43 (6) (1st sentence, in part and the 2nd and 4th sentences). (Bill No. 755-A)

This section does not authorize the filing of pe-

titions to compel a city council to repeal an existing ordinance or resolution, or, in default of repeal, to submit the question to a popular vote. *Landt v. Wisconsin Dells*, 30 W (2d) 470, 141 NW (2d) 245.