CHAPTER 9

POST−ELECTION ACTIONS; DIRECT LEGISLATION

9.01 Recount.
9.10 Recall.
9.20 Direct legislation.

NOTE: 2005 Wis. Act 451, which made major revisions to the election laws, including to Chapter 9, contains an extensive prefatory note explaining the changes.

Cross−reference: See definitions in s. 5.02.

9.01 Recount. (1) PETITION; FEES; GENERAL PROCEDURES. (a) 1. Any candidate voted for at any election or any elector who voted upon any referendum question at any election may petition for a recount. The petitioner shall file a verified petition or petitions with the proper clerk or body under par. (ar) not earlier than the time of completion of the canvass following canvassing of any valid provisional ballots under s. 6.97 (4) and, except as provided in this subdivision, not later than 5 p.m. on the 3rd business day following the last meeting day of the municipal or county board of canvassers determining the election for that office or on that referendum question following canvassing of all valid provisional ballots or, if more than one board of canvassers makes the determination, not later than 5 p.m. on the 3rd business day following the last meeting day of the last board of canvassers which makes a determination following canvassing of all valid provisional ballots. If the commission chairperson or chairperson's designee makes the determination for the office or the referendum question, the petitioner shall file the petition not earlier than the last meeting day of the last county board of canvassers to make a statement in the election or referendum following canvassing of all valid provisional ballots and not later than 5 p.m. on the 3rd business day following the day on which the commission receives the last statement from a county board of canvassers for the election or referendum following canvassing of all valid provisional ballots.

2. Each verified petition under subd. 1. shall state all of the following:

a. That at the election the petitioner was a candidate for the office in question or that the petitioner voted on the referendum question in issue.

b. That the petitioner is informed and believes that a mistake or fraud has been committed in a specified ward or municipality in the counting and return of the votes cast for the office or upon the question or that another specified defect, irregularity, or illegality occurred in the conduct of the election.

3. The petition under subd. 1. shall specify each ward, or each municipality where no wards exist, in which a recount is desired. If a recount is requested for all wards within a jurisdiction, each ward need not be specified.

4. The petition under subd. 1. may be amended to include information discovered as a result of the investigation of the board of canvassers or the commission chairperson or chairperson's designee after the filing of the petition if the petitioner moves to amend the petition as soon as possible after the petitioner discovers, or reasonably should have discovered, the information that is the subject of the amendment and if the petitioner was unable to include the information in the original petition.

(ad) Upon receiving a petition for a recount, the clerk or body receiving the petition shall reasonably estimate any fee due under par. (ag) 2. The clerk or body shall provide the petitioner promptly with the total due or estimate.

(ag) 1. If the difference between the votes cast for the leading candidate and those cast for the petitioner or the difference between the affirmative and negative votes cast upon any referendum question is less than 10 if 4,000 or fewer votes are cast or not more than 0.25 percent of the total votes cast for the office or on the question if more than 4,000 votes are cast following canvassing of all valid provisional and absentee ballots, the petitioner is not required to pay a fee.

2. If subd. 1 does not apply to the difference between the votes cast for the leading candidate and those cast for the petitioner or the difference between the affirmative and negative votes cast upon any referendum question following canvassing of all valid provisional and absentee ballots, the petitioner shall pay a fee equal to the actual cost of performing the recount in each ward for which the petition requests a recount, or in each municipality for which the petition requests a recount where no wards exist.

3. All fees estimated under par. (ad) shall be prepaid in cash or another form of payment which is acceptable to the officer to whom they are paid. No petition for which a fee is required is valid unless the proper calculated or estimated fee is paid at the time of filing.

3m. The petitioner shall pay any balance owing toward the fee due under subd. 2. within 30 days after the clerk or body receiving the petition provides the petitioner with a written statement of the amount due. If the petitioner has overpaid the fee due under subd. 2. the clerk or body receiving the petition shall refund the amount overpaid within 30 days after the board of canvassers makes its determination in the recount. If, as a result of the recount, the petitioner is the leading candidate, or the majority of votes cast on the referendum changes from affirmative to negative or from negative to affirmative, the clerk or body receiving the petition shall refund the amount paid within 30 days after the board of canvassers makes its determination in the recount. For purposes of this subdivision, a petitioner has not overpaid the fees due under subd. 2., and is therefore not entitled to a refund under this subdivision, if the recount results in a difference in the votes cast that is below the threshold for paying the fee under subd. 2.

4. The commission shall deposit all moneys received by it into the account under s. 20.510 (1) (g), and shall pay the fees required for each recount to the county clerks of the counties in which the recount is to be held. The county clerk shall deposit fees received by him or her with the county treasurer. The municipal clerk shall deposit fees received by him or her with the municipal treasurer.

5. In this paragraph, the "leading candidate" includes every individual whose vote total at the time of the filing of the recount petition would entitle the individual to election or nomination to office. In an election in which more than one office of the same type is to be filled from the same territory, the number and percentage of votes cast under this paragraph shall be determined by first dividing the total number of votes cast for the office by the number of offices being filled at the election from the same territory.

(am) A person who files a petition under par. (a) may withdraw the petition. If the petitioner withdraws a petition before any board of canvassers that canvassed the original election begins its recount, the clerk or body shall refund any fee paid under par. (ag).

(ar) 1. In the event of a recount for any office, the petition shall be filed with the clerk or body with whom nomination papers are filed for that office.

2. In the event of a recount for a referendum, the petition shall be filed with the clerk of the jurisdiction in which the referendum is called, and, in the case of the state, with the commission.

3. Whenever a clerk receives a valid petition and any payment under par. (ag) 3., the clerk shall thereupon notify the proper board

of canvassers. Whenever the commission receives a valid petition and any payment under par. (ag) 3., the commission shall promptly by certified mail or other expeditious means order the proper county boards of canvassers to commence the recount. County boards of canvassers shall convene no later than 9 a.m. on the second day after receipt of an order and may adjourn for not more than one day at a time until the recount is completed in the county, except that the commission may permit extension of the time for adjournment. Returns from a recount ordered by the commission shall be transmitted to the office of the commission as soon as possible, but in no case later than 13 days from the date of the order of the commission directing the recount. The commission chairperson or the chairperson's designee may not make a determination in any election if a recount is pending before any county board of canvassers in that election. The commission chairperson or the chairperson's designee need not recount actual ballots, but shall verify the returns of the county boards of canvassers in making his or her determinations.

(b) The proper board of canvassers shall reconvene no earlier than 9 a.m. on the day following delivery of notice to all candidates under sub. (2) and no later than 9 a.m. on the day following the last day for filing of a petition. The board of canvassers shall then proceed to recount the ballots in the wards or municipalities specified and to review the allegations of fact contained in the petition or petitions. The recount shall proceed for each ward or municipality as follows:

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

2. The board of canvassers shall then examine the absentee ballot envelopes. Any defective absentee ballot envelopes shall be laid aside, properly marked and carefully preserved. The number of voters shall be reduced by the number of ballot envelopes set aside under this subdivision. An absentee ballot envelope is defective only if it is not witnessed or if it is not signed by the voter or if the certificate accompanying an absentee ballot that the voter received by facsimile transmission or electronic mail is missing.

3. The board of canvassers 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.

4. a. When the container or bag has been checked, it shall be opened and the contents removed. The board of canvassers shall, without examination other than what is necessary to determine that each is a single ballot, count the number of ballots in the container or bag, excluding ballots removed under s. 7.51 (2) (e).

b. The board of canvassers shall then, for each opened absentee ballot envelope that was laid aside as defective under subd. 2., without inspection, randomly draw one absentee ballot from the container or bag. In differentiating absentee ballots from other ballots, the board of canvassers shall presume that a ballot initialed only by the municipal clerk, the executive director of the board of election commissioners, or a deputy clerk or secretary is an absentee ballot. If there are more defective absentee ballot envelopes than there are probable absentee ballots, all of the probable absentee ballots shall be removed from the container or bag. Additional ballots shall be removed only if the number of remaining ballots still exceeds the number of voting electors recorded under subd. 1., reduced by the number of defective envelopes set aside under subd. 2. All ballots removed shall not be counted, but shall be marked as to the reason for their removal, set aside and carefully preserved.

c. If, after completing the steps set forth in subd. 4. b., the number of ballots still exceeds the number of voters, the board of canvassers shall place all ballots face up to check for blank ballots. Any blank ballots shall be so marked, set aside and carefully preserved.

d. If, after completing the steps set forth in subd. 4. c., the number of ballots still exceeds the number of voters reduced by the number of defective envelopes set aside under subd. 2., the board of canvassers shall place all ballots face down to check the initials. Any ballot not properly initialed by 2 inspectors or any absentee ballot not properly initialed by the municipal clerk, the executive director of the board of election commissioners, or a deputy clerk or secretary shall be temporarily set aside and the board of canvassers shall, without inspection, randomly draw from these ballots as many as are necessary to reduce the number of ballots to equal the number of voters. Any ballots removed for lack of initials shall not be counted but shall be marked, set aside and carefully preserved.

e. If, after completing the steps set forth in subd. 4. d., the number of ballots still exceeds the number of voters reduced by the number of defective envelopes set aside under subd. 2., the remaining ballots shall be returned to the container or bag and the board of canvassers shall draw a number of ballots equal to the excess number of ballots by chance and without inspection from the container or bag. These ballots shall not be counted but shall be marked as having been removed by the canvassers on recount due to an excess number of ballots, set aside and carefully preserved.

5. When the number of ballots and voters agree, or after noting that the number of voters exceeds the number of ballots, the board of canvassers shall return all ballots to be counted to the ballot box and shall turn the ballot box in such manner as to thoroughly mix the ballots. The recount shall then begin.

5m. Except as otherwise provided in this section, the recount shall be conducted in accordance with s. 7.51.

6. In recounting the votes cast on a voting machine in which the record of the votes cast is contained in the machine, the board of canvassers shall make a record of the number of the seal, if any, the number of the protective counter or other device, if one is provided, and shall open the recording compartment of the machine, and without unlocking the machine against voting, shall recount the votes thereon. If the machine is an electronic voting machine utilizing a detachable record of votes cast, the record shall be retabulated under s. 5.90.

7. When a machine is recounted, the board of canvassers shall proceed to inspect and examine the machine showing the votes cast for each office or referendum specified in the petition, and shall make a record of the votes for that office or referendum as shown on that voting machine, which they shall certify as correct, in the presence of at least one witness.

8. If upon the recount it is found that the original canvass of the returns has been correctly made from a voting machine and that a discrepancy still remains unaccounted for, the board of canvassers shall publicly unlock the voting and counting mechanism of the machine, and shall proceed to examine and test the machine to determine the cause of the discrepancy in returns from the machine. A similar test shall be performed for electronic voting machines to ascertain whether there is any malfunction in the machine. After the completion of the examination and test, the board of canvassers shall prepare a statement giving the results of the examination and test. The statement shall be witnessed by at least one witness.

8m. Where a voting machine or electronic voting system is used, and an error in the vote total as shown on the machine or record of votes cast is clearly apparent, the board of canvassers may change the vote total as shown by the machine or system and certify or use a different total to certify a different result than is indicated by the machine or system if there is evidence of a specific malfunction in the machine or system, if the malfunction could reasonably have caused the error, and if clear and convincing evidence exists which indicates the exact actual total number of votes cast. The burden of demonstrating that a vote total shown on a machine or record of votes cast is incorrect rests with the party seeking to change the recorded result on the basis of clear and convincing evidence.

8s. If an electronic voting system is used in which ballots are distributed to electors, and the board of canvassers makes a deter-

mination of elector intent under s. 7.50, the board of canvassers shall add to the result generated by the automatic tabulating equipment any votes counted by the board of canvassers in making its determination.

9. If upon the recount it appears that the original canvass of the returns by the election officials was incorrect, the statements and determinations of the board of canvassers shall be corrected accordingly.

10. Recounts at polling places utilizing an electronic voting system in which ballots are distributed to electors shall be performed in accordance with the procedure for recounting paper ballots insofar as applicable, except as provided in s. 5.90. Recounts at polling places utilizing electronic voting machines shall be performed in accordance with the procedure for recounting votes cast on mechanical voting machines, insofar as applicable, except as provided in s. 5.90.

11. All steps of the recount shall be performed publicly. Except as provided in subd. 12., 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 board of canvassers and tabulators assisting them may touch any of the materials or ballots. The candidates, the person demanding the recount and their authorized representatives and counsel may object to the counting of any ballot. Any errors shall be corrected.

12. Except as authorized in s. 6.47 (8), the board of canvassers shall not permit access to the name of any elector who has obtained a confidential listing under s. 6.47 (2) during the recanvass.

(2) NOTICE TO CANDIDATES. When the recount concerns an election for an office, the clerk or body with whom the petition is filed shall promptly prepare a copy of the petition for delivery to each opposing candidate for the same office whose name appears on the ballot. In a recount proceeding for a partisan primary, the clerk or body shall prepare a copy of the petition for delivery to each opposing candidate for the same party nomination for the same office, to each opposing candidate for the party nomination of each other party for the same office and to each independent candidate qualifying to have his or her name placed on the ballot for the succeeding election. A candidate or agent designated by a candidate may personally accept delivery of a copy of the petition. Upon such delivery, the clerk or body shall require the candidate or agent to sign a receipt therefor. If a candidate or agent does not personally accept delivery, the clerk or body shall then promptly deliver the copies of the petition to the sheriff, who shall promptly deliver the copies of the petition to each candidate at the address given on the candidate's nomination papers, without fee, in the manner provided for service of a summons in civil actions.

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

(4) RIGHT TO COMPLETE RECOUNT. Whenever a recount petition for part of the wards within a jurisdiction or district, or for part of the municipalities within a district where there are no wards, is filed under this section, the opposing candidate, or any voter 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 wards or municipalities in the jurisdiction or district. 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 next business day following the filing of the petition and proceed to recount the ballots in all wards or municipalities specified and to otherwise review the allegations of fact contained in the petition. Any errors shall be corrected.

(5) OATHS; MINUTES; WITNESS FEES; TABULATORS; TIMING; PUBLICATION. (a) The board of canvassers or the commission chairperson or the chairperson's designee shall keep complete minutes of all proceedings before the board of canvassers or the chairperson or designee. The minutes shall include a record of objections and offers of evidence. If the board of canvassers or the commission chairperson or the chairperson's designee receives exhibits from any party, the board of canvassers or the chairperson or designee shall number and preserve the exhibits. The board of canvassers or the chairperson or chairperson's designee shall make specific findings of fact with respect to any irregularity raised in the petition or discovered during the recount. Any member of the board of canvassers or the chairperson or chairperson's designee may administer oaths, certify official acts, and issue subpoenas for purposes of this section. Witness fees shall be paid by the county. In the case of proceedings before the commission chairperson or chairperson's designee, witness fees shall be paid by the commission.

(b) The board of canvassers conducting a recount may select and employ tabulators to assist it in its duties. Tabulators shall perform their duties under the direction of the board of canvassers. Only the members of the board of canvassers are competent to make any determination as to the validity of any vote tabulated. Compensation of tabulators shall be determined under s. 7.03.

(bm) Upon the completion of its proceedings, a board of canvassers shall deliver to the commission one copy of the minutes of the proceedings kept under par. (a). In addition, in the case of a recount of an election for state or national office, for each candidate whose name appears on the ballot for that office under the name of a political party, the board of canvassers shall deliver one copy of the minutes to the chief officer, if any, who is named in any registration statement filed under s. 11.0302 by the state committee of that political party, and in the case of a recount of an election for county office, for each candidate whose name appears on the ballot for that office under the name of a political party, the board of canvassers shall deliver one copy of the minutes to the chief officer, if any, who is named in any registration statement filed under s. 11.0302 by the county committee of that political party.

NOTE: Par. (bm) is shown as affected by 2015 Wis. Acts 117 and 118 as merged by the legislative reference bureau under s. 13.92 (2) (i).

(c) If the recount is made by a municipal or county board of canvassers and the result is required to be reported to a county board of canvassers or to the commission chairperson or the chairperson's designee, the board of canvassers making the initial recount shall immediately certify the results to the county board of canvassers or to the commission chairperson or designee. If a county board of canvassers receives such results, it shall then convene not later than 9 a.m. on the next business day following receipt to examine the returns and determine the results. If the commission chairperson or the chairperson's designee receives such results, the chairperson or designee shall publicly examine the returns and determine the results not later than 9 a.m. on the 3rd business day following receipt, but if that day is earlier than the latest day permitted for that election under s. 7.70 (3) (a), the commission chairperson or designee may examine the returns and determine the results not later than the day specified in s. 7.70 (3) (a).

(d) Whenever publication of an original determination is required, the county or municipal clerk shall publish the recount determination in the same manner.

(6) APPEAL TO CIRCUIT COURT. (a) Within 5 business days after completion of the recount determination by the board of canvassers in all counties concerned, or within 5 business days after completion of the recount determination by the commission chairperson or the chairperson's designee whenever a determination is made by the chairperson or designee, 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 and persons who filed a written notice of appearance before each board of canvassers whose decision is appealed, or in the case of a statewide recount, before the commission chairperson or the chairperson's designee. The appellant shall also serve notice on the commission if the commission chairperson or the chairperson's designee is respon-

sible for determining the election. The appellant shall serve the notice by certified mail or in person. The appellant shall file the notice with the clerk of circuit court together with an undertaking and surety in the amount approved by the court, conditioned upon the payment of all costs taxed against the appellant.

(b) If an appeal is filed from a recount determination in an election which is held in more than one judicial circuit, the chief judge of the judicial administrative district in which the election is held shall consolidate all appeals relating to that election and appoint a circuit judge, who shall be a reserve judge if available, to hear the appeal. If the election is held in more than one judicial administrative district, the chief justice of the supreme court shall make the appointment.

(7) COURT PROCEDURES. (a) The court with whom an appeal is filed shall forthwith issue an order directing each affected county, municipal clerk, or board, and the commission, to transmit immediately all ballots, papers and records affecting the appeal to the clerk of court or to impound and secure such ballots, papers and records, or both. The order shall be served upon each affected county, municipal clerk, or board, the commission, and all other candidates and persons who filed a written notice of appearance before any board of canvassers involved in the recount.

(b) The appeal shall be heard by a judge without a jury. Promptly following the filing of an appeal, the court shall hold a scheduling conference for the purpose of adopting procedures that will permit the court to determine the matter as expeditiously as possible. Within the time ordered by the court, the appellant shall file a complaint enumerating with specificity every alleged irregularity, defect, mistake or fraud committed during the recount. The appellant shall file a copy of the complaint with each person who is entitled to receive a copy of the order under par. (a). Within the time ordered by the court, the other parties to the appeal shall file an answer. Within the time ordered by the court, the parties to the appeal shall provide the court with any other information ordered by the court. At the time and place ordered by the court, the matter shall be summarily heard and determined and costs shall be taxed as in other civil actions. Those provisions of chs. 801 to 806 which are inconsistent with a prompt and expeditious hearing do not apply to appeals under this section.

(8) SCOPE OF REVIEW. (a) Unless the court finds a ground for setting aside or modifying the determination of the board of canvassers or the commission chairperson or chairperson's designee, it shall affirm the determination.

(b) The court shall separately treat disputed issues of procedure, interpretations of law, and findings of fact.

(c) The court may not receive evidence not offered to the board of canvassers or the commission chairperson or the chairperson's designee except for evidence that was unavailable to a party exercising due diligence at the time of the recount or newly discovered evidence that could not with due diligence have been obtained during the recount, and except that the court may receive evidence not offered at an earlier time because a party was not represented by counsel in all or part of a recount proceeding. A party who fails to object or fails to offer evidence of a defect or irregularity during the recount waives the right to object or offer evidence before the court except in the case of evidence that was unavailable to a party exercising due diligence at the time of the recount or newly discovered evidence that could not with due diligence have been obtained during the recount or evidence received by the court due to unavailability of counsel during the recount.

(d) The court shall set aside or modify the determination of the board of canvassers or the commission chairperson or the chairperson's designee if it finds that the board of canvassers or the chairperson or chairperson's designee has erroneously interpreted a provision of law and a correct interpretation compels a particular action. If the determination depends on any fact found by the board of canvassers or the commission chairperson or the chairperson's designee, the court may not substitute its judgment for that of the board of canvassers or the chairperson or designee as to the weight of the evidence on any disputed finding of fact. The court shall set aside the determination if it finds that the determination depends on any finding of fact that is not supported by substantial evidence.

(9) APPEAL TO COURT OF APPEALS. (a) Within 30 days after entry of the order of the circuit court, a party aggrieved by the order may appeal to the court of appeals.

(b) If an appeal is filed in respect to an election which is held in more than one court of appeals district, the chief justice of the supreme court shall consolidate all appeals relating to that election and designate one district to hear the appeal, except that if an appeal is filed in respect to an election for statewide office or a statewide referendum, the appeal shall be heard by the 4th district court of appeals.

(c) The court of appeals shall give precedence to the appeal over other matters not accorded similar precedence by law.

(10) STANDARD FORMS AND METHODS. The commission shall prescribe standard forms and procedures for the making of recounts under this section. The procedures prescribed by the commission shall require the boards of canvassers in recounts involving more than one board of canvassers to consult with the commission staff prior to beginning any recount in order to ensure that uniform procedures are used, to the extent practicable, in such recounts.

(11) EXCLUSIVE REMEDY. This section constitutes the exclusive judicial remedy for testing the right to hold an elective office as the result of an alleged irregularity, defect or mistake committed during the voting or canvassing process.

History: 1971 c. 251; 1971 c. 304 s. 29 (2); 1971 c. 336; 1973 c. 313; 1973 c. 334 ss. 23 to 26, 57; 1975 c. 41, 422; 1977 c. 394 s. 53; 1977 c. 427; 1979 c. 200; 1979 c. 260 ss. 66 to 68, 93; 1979 c. 311, 355; 1983 a. 183; 1983 a. 484 s. 172 (3); 1983 a. 538; 1985 a. 304; 1987 a. 391; 1989 a. 192; 1993 a. 213; 1997 a. 27; 1999 a. 49, 182; 2001 a. 16; 2003 a. 265, 321; 2005 a. 149, 451; 2007 a. 1, 96; 2011 a. 75, 115; 2015 a. 36, 117; 2015 a. 118 ss. 107 to 119, 266 (10); 2015 a. 261; s. 13.92 (2) (i).

Cross−reference: See also s. EL 6.04, Wis. adm. code.

A challenge of compliance with procedures for absent voting is within the board of canvassers' jurisdiction. Absent connivance, fraud, or undue influence, substantial compliance with statutory voting procedures is sufficient. Appeal From Recount in Election Contest, 105 Wis. 2d 468, 313 N.W.2d 869 (Ct. App. 1981).

Sub. (8) does not require the party against whom the board rules to object to the board's determination to preserve the issue for judicial review. Clifford v. Colby School District, 143 Wis. 2d 581, 421 N.W.2d 852 (Ct. App. 1988).

Post−election eligibility challenges are properly brought under this section. Logerquist v. Nasewaupee Canvassers, 150 Wis. 2d 907, 442 N.W.2d 551 (Ct. App. 1989).

The recount statute does not violate due process or equal protection and does not deny the electorate the right to have the winning candidate hold office. The relationship of recount and quo warranto actions is discussed. Shroble v. Prusener, 185 Wis. 2d 103, 517 N.W.2d 169 (1994).

When the board of canvassers' actions in a recount reflected proper application of the statutes, the reviewing court's finding that the board had another option available to it was immaterial. DeBroux v. City of Appleton Board of Canvassers, 206 Wis. 2d 321, 557 N.W.2d 423 (Ct. App. 1996), 96−1287.

This section is the exclusive remedy for any claimed election fraud or irregularity. Generally, to successfully challenge an election, the challenger must show the probability of an altered outcome in the absence of the challenged irregularity. Carlson v. Oconto County Board of Canvassers, 2001 WI App 20, 240 Wis. 2d 438, 623 N.W.2d 195, 00−1788.

A party's failure to timely file an appeal under sub. (6) does not preclude the party from later intervening in another's appeal. To appeal under sub. (6) requires a party to be aggrieved. A party advocating a position that prevailed is not aggrieved. Roth v. LaFarge School District Board of Canvassers, 2001 WI App 221, 247 Wis. 2d 708, 634 N.W.2d 882, 01−0160.

The sub. (6) (a) requirement that a vote−recount appeal to the circuit court be served on the other candidates is fundamental. That a candidate who was not served knew about the appeal and sought and was permitted to intervene in an appeal of a recount was immaterial to the validity of that appeal. The command that "other candidates" be served with the appeal is mandatory rather than directory. Logic v. City of South Milwaukee Board of Canvassers, 2004 WI App 219, 277 Wis. 2d 421, 689 N.W.2d 692, 04−1642.

9.10 Recall. (1) RIGHT TO RECALL; PETITION SIGNATURES. (a) The qualified electors of the state, of any county, city, village, or town, of any congressional, legislative, judicial, town sanitary, or school district, or of any prosecutorial unit may petition for the recall of any incumbent elective official by filing a petition with the same official or agency with whom nomination papers or declarations of candidacy for the office are filed demanding the recall of the officeholder.

(b) Except as provided in par. (c), a petition for recall of an officer shall be signed by electors equal to at least 25 percent 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.

(c) If no statistics are available to calculate the required number of signatures on a petition for recall of an officer, the number of signatures shall be determined as follows:

1. The area of the district in square miles shall be divided by the area of the municipality in square miles in which it lies.

2. The vote for governor at the last general election in the municipality within which the district lies shall be multiplied by 25 percent of the quotient determined under subd. 1. to determine the required number of signatures.

3. If a district is in more than one municipality, the method of determination under subds. 1. and 2. shall be used for each part of the district which constitutes only a fractional part of any area for which election statistics are kept.

(d) The official or agency with whom declarations of candidacy are filed for each office shall determine and certify to any interested person the number of signatures required on a recall petition for that office.

(2) PETITION REQUIREMENTS. (a) Every recall petition shall have on the face at the top in bold print the words "RECALL PETITION". Other requirements as to preparation and form of the petition shall be governed by s. 8.40.

(b) A recall petition for a city, village, town, town sanitary district, or school district office shall contain a statement of a reason for the recall which is related to the official responsibilities of the official for whom removal is sought.

(c) A petition requesting the recall of each elected officer shall be prepared and filed separately.

(d) No petition may be offered for filing for the recall of an officer unless the petitioner first files a registration statement under s. 11.0902 with the filing officer with whom the petition is filed. The petitioner shall append to the registration a statement indicating his or her intent to circulate a recall petition, the name of the officer for whom recall is sought and, in the case of a petition for the recall of a city, village, town, town sanitary district, or school district officer, a statement of a reason for the recall which is related to the official responsibilities of the official for whom removal is sought. No petitioner may circulate a petition for the recall of an officer prior to completing registration. The last date that a petition for the recall of an officer may be offered for filing is 5 p.m. on the 60th day commencing after registration. After the recall petition has been offered for filing, no name may be added or removed. No signature may be counted unless the date of the signature is within the period provided in this paragraph.

(e) An individual signature on a petition sheet may not be counted if:

1. The signature is not dated.

2. The signature is dated outside the circulation period.

3. The signature is dated after the date of the certification contained on the petition sheet.

4. The residency of the signer of the petition sheet cannot be determined by the address given.

5. The signature is that of an individual who is not a resident of the jurisdiction or district from which the elective official being recalled is elected.

6. The signer has been adjudicated not to be a qualified elector on grounds of incompetency or limited incompetency as provided in s. 6.03 (3).

7. The signer is not a qualified elector by reason of age.

8. The circulator knew or should have known that the signer, for any other reason, was not a qualified elector.

(em) No signature on a petition sheet may be counted if:

1. The circulator fails to sign the certification of circulator.

2. The circulator is not a qualified circulator.

(f) The filing officer or agency shall review a verified challenge to a recall petition if it is made prior to certification.

(g) The burden of proof for any challenge rests with the individual bringing the challenge.

(h) Any challenge to the validity of signatures on the petition shall be presented by affidavit or other supporting evidence demonstrating a failure to comply with statutory requirements.

(i) If a challenger can establish that a person signed the recall petition more than once, the 2nd and subsequent signatures may not be counted.

(j) If a challenger demonstrates that someone other than the elector signed for the elector, the signature may not be counted, unless the elector is unable to sign due to physical disability and authorized another individual to sign in his or her behalf.

(k) If a challenger demonstrates that the date of a signature is altered and the alteration changes the validity of the signature, the signature may not be counted.

(L) If a challenger establishes that an individual is ineligible to sign the petition, the signature may not be counted.

(m) No signature may be stricken on the basis that the elector was not aware of the purpose of the petition, unless the purpose was misrepresented by the circulator.

(n) No signature may be stricken if the circulator fails to date the certification of circulator.

(p) If a signature on a petition sheet is crossed out by the petitioner before the sheet is offered for filing, the elimination of the signature does not affect the validity of other signatures on the petition sheet.

(q) Challenges are not limited to the categories set forth in pars. (i) to (L).

(r) A petitioner may file affidavits or other proof correcting insufficiencies, including but not limited to:

4. Failure of the circulator to sign the certification of circulator.

5. Failure of the circulator to include all necessary information.

(s) No petition for recall of an officer may be offered for filing prior to the expiration of one year after commencement of the term of office for which the officer is elected.

(3) STATE, COUNTY, CONGRESSIONAL, LEGISLATIVE AND JUDICIAL OFFICES. (a) This subsection applies to the recall of all elective officials other than city, village, town, town sanitary district, and school district officials. City, village, town, town sanitary district, and school district officials are recalled under sub. (4).

(b) Within 10 days after the petition is offered for filing, the officer against whom the petition is filed may file a written challenge with the official, specifying any alleged insufficiency. If a challenge is filed, the petitioner may file a written rebuttal to the challenge with the official within 5 days after the challenge is filed. If a rebuttal is filed, the officer against whom the petition is filed may file a reply to any new matter raised in the rebuttal within 2 days after the rebuttal is filed. Within 14 days after the expiration of the time allowed for filing a reply to a rebuttal, the official shall file the certificate or an amended certificate. Within 31 days after the petition is offered for filing, the official with whom the petition is offered for filing shall determine by careful examination whether the petition on its face is sufficient and so state in a certificate attached to the petition. If the official finds that the amended petition is sufficient, the official shall file the petition and call a recall election to be held on the Tuesday of the 6th week commencing after the date of filing of the petition. If Tuesday is a legal holiday, the recall election shall be held on the first day after Tuesday which is not a legal holiday. If the official finds that the petition is 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 5 days after the offering of the amended petition for filing, the official with whom the petition is filed shall again carefully examine the face of the petition to determine sufficiency and shall attach a certificate stating the

findings. Upon showing of good cause, the circuit court for the county in which the petition is offered for filing may grant an extension of any of the time periods provided in this paragraph.

(bm) Within 7 days after an official makes a final determination of sufficiency or insufficiency of a recall petition under par. (b), the petitioner or the officer against whom the recall petition is filed may file a petition for a writ of mandamus or prohibition with the circuit court for the county where the recall petition is offered for filing. Upon filing of such a petition, the only matter before the court shall be whether the recall petition is sufficient. The court may stay the effect of the official's order while the petition is under advisement and may order the official to revise the election schedule contained in the order if a revised schedule is necessitated by judicial review. Whenever the recall petitioner files a petition under this paragraph, the officer against whom the recall petition is filed shall be a party to the proceeding. The court shall give the matter precedence over other matters not accorded similar precedence by law.

(c) The official against whom the recall petition is filed shall be a candidate at the recall election without nomination unless the official resigns within 10 days after the original filing of the petition. Candidates for the office may be nominated under the usual procedure of nomination for a special election by filing nomination papers not later than 5 p.m. on the 4th Tuesday preceding the election and have their names placed on the ballot at the recall election.

(d) If more than 2 persons compete for a nonpartisan office, a recall primary shall be held. The names of the 2 persons receiving the highest number of votes in the recall primary shall be certified to appear on the ballot in the recall election, but if any person receives a majority of the total number of votes cast in the recall primary, a recall election shall not be held. If the incumbent receives a majority of the votes cast, the incumbent shall be retained in office for the remainder of the term. If another candidate receives a majority of the votes cast, that candidate shall be elected to serve for the residue of the unexpired term of the incumbent. Write−in votes are permitted only at a recall primary or at a recall election in which no primary is held.

(e) For any partisan office, a recall primary shall be held for each political party which is entitled to a separate ballot under s. 5.62 (1) (b) or (2) and from which more than one candidate competes for the party's nomination in the recall election. The primary ballot shall be prepared in accordance with s. 5.62, insofar as applicable. The person receiving the highest number of votes in the recall primary for each political party shall be that party's candidate in the recall election. Independent candidates shall be shown on the ballot for the recall election only.

(f) If a recall primary is required, the date specified under par. (b) shall be the date of the recall primary and the recall election shall be held on the Tuesday of the 4th week commencing after the recall primary or, if that Tuesday is a legal holiday, on the first day after that Tuesday which is not a legal holiday.

(4) CITY, VILLAGE, TOWN, TOWN SANITARY DISTRICT, AND SCHOOL DISTRICT OFFICES. (a) Within 10 days after a petition for the recall of a city, village, town, town sanitary district, or school district official, is offered for filing, the officer against whom the petition is filed may file a written challenge with the municipal clerk or board of election commissioners or school district clerk with whom it is filed, specifying any alleged insufficiency. If a challenge is filed, the petitioner may file a written rebuttal to the challenge with the clerk or board of election commissioners within 5 days after the challenge is filed. If a rebuttal is filed, the officer against whom the petition is filed may file a reply to any new matter raised in the rebuttal within 2 days after the rebuttal is filed. Within 14 days after the expiration of the time allowed for filing a reply to a rebuttal, the clerk or board of election commissioners shall file the certificate or an amended certificate. Within 31 days after the petition is offered for filing, the clerk or board of election commissioners shall determine by careful examination of the face of the petition whether the petition is sufficient and shall 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, the clerk or board of election commissioners shall again carefully examine the face of the petition to determine sufficiency and shall attach to the petition a certificate stating the findings. Immediately upon finding an original or amended petition sufficient, except in cities over 500,000 population, the municipal clerk or school district clerk shall transmit the petition to the governing body or to the school board. Immediately upon finding an original or amended petition sufficient, in cities over 500,000 population, the board of election commissioners shall file the petition in its office.

(d) Promptly upon receipt of a certificate under par. (a), the governing body, school board, or board of election commissioners shall call a recall election. The recall election shall be held on the Tuesday of the 6th week commencing after the date on which the certificate is filed, except that if Tuesday is a legal holiday the recall election shall be held on the first day after Tuesday which is not a legal holiday.

(e) The official against whom the recall petition is filed shall be a candidate at the recall election without nomination unless the official resigns within 10 days after the date of the certificate. Candidates for the office may be nominated under the usual procedure of nomination for a special election by filing nomination papers or declarations of candidacy not later than 5 p.m. on the 4th Tuesday preceding the election and have their names placed on the ballot at the recall election.

(f) If more than 2 persons compete for an office, a recall primary shall be held. The names of the 2 persons receiving the highest number of votes in the recall primary shall be certified to appear on the ballot in the recall election, but if any person receives a majority of the total number of votes cast in the recall primary, a recall election shall not be held. If the incumbent receives a majority of the votes cast, the incumbent shall be retained in office for the remainder of the term. If another candidate receives a majority of the votes cast, that candidate shall be elected to serve for the residue of the unexpired term of the incumbent. Write−in votes are permitted only at a recall primary or at a recall election in which no primary is held.

(g) If a recall primary is required, the date specified under par. (d) shall be the date of the recall primary and the recall election shall be held on the Tuesday of the 4th week commencing after the recall primary or, if that Tuesday is a legal holiday, on the first day after that Tuesday which is not a legal holiday.

(h) All candidates for any village, town, and town sanitary district office, other than the official against whom the recall petition is filed, shall file nomination papers, regardless of the method of nomination of candidates for town or village office under s. 8.05.

(5) VOTING METHOD; ELECTION RESULTS. (a) The recall primary or election of more than one official may be held on the same day. If more than one official of the same office designation elected at large for the same term from the same district or territory is the subject of a recall petition, there shall be a separate election contest for the position held by each official. Candidates shall designate which position they are seeking on their nomination papers. Instructions shall appear on the ballot to electors to vote for each position separately.

(b) The official against whom a recall petition has been filed shall continue to perform the duties of his or her office until a certificate of election is issued to his or her successor. The person receiving a plurality of votes at the recall election or a majority of votes at a primary when authorized under sub. (3) (d) or (4) (f) shall be declared elected for the remainder of the term. If the incumbent receives the required number of votes he or she shall continue in office. Except as provided in sub. (4) (f), if another person receives the required number of votes that person shall suc-

ceed the incumbent if he or she qualifies within 10 days after receiving a certificate of election.

(6) LIMITATION ON RECALL ELECTIONS. After one recall petition and recall election, no further recall petition may be filed against the same official during the term for which he or she was elected.

(7) PURPOSE. The purpose of this section is to facilitate the operation of article XIII, section 12, of the constitution and to extend the same rights to electors of cities, villages, towns, town sanitary districts, and school districts.

History: 1977 c. 187 s. 134; 1977 c. 403, 447; 1979 c. 260; 1983 a. 219, 491, 538; 1985 a. 304; 1987 a. 391; 1989 a. 31, 192; 1991 a. 269, 315; 1999 a. 182; 2001 a. 109; 2005 a. 451; 2007 a. 56; 2015 a. 117.

Cross−reference: See also ss. EL 2.09, 2.11, and 6.04, Wis. adm. code.

Striking an entire page of signatures for one invalid signature violated the electorate's right to recall. Stahovic v. Rajchel, 122 Wis. 2d 370, 363 N.W.2d 243 (Ct. App. 1984).

This section applies to members of Congress. 68 Atty. Gen. 140.

9.20 Direct legislation. (1) A number of electors equal to at least 15 percent of the votes cast for governor at the last general election in their city or village may sign and file a petition with the city or village clerk requesting that an attached proposed ordinance or resolution, without alteration, either be adopted by the common council or village board or be referred to a vote of the electors. The individual filing the petition on behalf of the electors shall designate in writing an individual 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. 8.40.

(2m) After the petition has been offered for filing, no name may be erased or removed. No signature may be considered valid or counted unless the date is less than 60 days before the date offered for filing.

(3) Within 15 days after the petition is filed, the clerk shall determine by careful examination whether the petition is sufficient and whether the proposed ordinance or resolution is in proper form. The clerk shall state his or her 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 individual 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 clerk shall so state on the attached certificate and forward it to the common council or village board immediately.

(4) The common council or village board 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 spring or general election, if the election is more than 70 days after the date of the council's or board's action on the petition or the expiration of the 30−day period, whichever first occurs. If there are 70 days or less before the election, the ordinance or resolution shall be voted on at the next election thereafter. The council or board by a three−fourths vote of the members−elect may order a special election for the purpose of voting on the ordinance or resolution at any time prior to the next election, but not more than one special election for direct legislation may be ordered in any 6−month period.

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

(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 city or village ordinances or resolutions adopted under this section shall not be repealed or amended within 2 years of adoption except by a vote of the electors. The common council or village board may submit a proposition to repeal or amend the ordinance or resolution at any election.

History: 1977 c. 102; 1983 a. 484; 1989 a. 192, 273; 2015 a. 37.

This section implements legislative powers reserved by the people. Subject to certain conditions, a common council has no authority to make an initial judgment of the constitutionality or validity of proposed direct legislation. State ex rel. Althouse v. Madison, 79 Wis. 2d 97, 255 N.W.2d 449 (1977).

A proposal that is administrative, rather than legislative in character, is not the proper subject of initiative proceedings. State ex rel. Becker v. City of Milwaukee Common Council, 101 Wis. 2d 680, 305 N.W.2d 178 (Ct. App. 1981).

A city clerk has a mandatory duty to forward to the common council a sufficient petition and ordinance in proper form. State ex rel. North v. Goetz, 116 Wis. 2d 239, 342 N.W.2d 747 (Ct. App. 1983).

The power of initiative does not extend to legislative decisions that have already been made by the legislative body. Schaefer v. Potosi Village Board, 177 Wis. 2d 287, 501 N.W.2d 901 (Ct. App. 1993).

If statutes establish procedures for the accomplishment of legislation in a certain area, an initiative may not effect legislation that would modify the statutory directives that would bind a municipality if it were legislating in the same area. Section 62.23 establishes such procedures for zoning; zoning may not be legislated or modified by initiative. An ordinance constituting a pervasive regulation of, or prohibition on, the use of land is zoning. Heitman v. City of Mauston, 226 Wis. 2d 542, 595 N.W.2d 450 (Ct. App. 1999), 98−3133.

There are 4 exceptions to the sub. (4) requirement that requested direct legislation be either passed or submitted to the electors: 1) when the proposed direct legislation involves executive or administrative matters, rather than legislative ones; 2) when it compels the repeal of an existing ordinance, or compels the passage of an ordinance in clear conflict with existing ordinances; 3) when it seeks to exercise legislative powers not conferred on a municipality; and 4) when it would modify statutorily prescribed directives that would bind a municipality if it were attempting to legislate in the same area. Mount Horeb Community Alert v. Village Board of Mt. Horeb, 2002 WI App 80, 252 Wis. 2d 713, 643 N.W.2d 186, 01−2217.

Mandamus is the appropriate action when a city council refuses either option of sub. (1) Mount Horeb Community Alert v. Village Board of Mt. Horeb, 2002 WI App 80, 252 Wis. 2d 713, 643 N.W.2d 186, 01−2217.

A proposed ordinance, initiated by a group of citizens, to require a 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 was an appropriate subject of direct legislation. Mount Horeb Community Alert v. Village Board of Mt. Horeb, 2003 WI 100, 263 Wis. 2d 544, 665 N.W.2d 229, 01−2217.

Section 893.80 (1) (b), which requires the filing of a notice of claim before an action may be commenced against a municipality, did not apply to an action for mandamus seeking to compel a city council to comply with this section. Oak Creek Citizen's Action Committee v. City of Oak Creek, 2007 WI App 196, 304 Wis. 2d 702; 738 N.W.2d 168, 06−2697.

A "concise statement" under sub. (6), properly construed, means a brief statement of the general purpose of the proposed ordinance. It is not required that the ballot must contain every essential element of the proposed ordinance. Metropolitan Milwaukee Association of Commerce, Inc. v. City of Milwaukee, 2011 WI App 45, 332 Wis. 2d 459, 798 N.W.2d 287, 09−1874.

When an ordinance was never implemented because an injunction was issued and 2 years passed before the injunction was vacated, the 2−year time period excluded the time between the issuance of an injunction and its vacation. In that circumstance, returning the parties to the position they were in as of the date on which the temporary injunction is the only reasonable construction of sub. (8). Metropolitan Milwaukee Association of Commerce, Inc. v. City of Milwaukee, 2011 WI App 45, 332 Wis. 2d 459, 798 N.W.2d 287, 09−1874.

Vox Populi: Wisconsin's' Direct Legislation Statute. Bach. Wis. Law. May 2008.