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OAG—2—08

Mr. Frank Volpintesta
Corporation Counsel
Kenosha County
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Dear Mr. Volpintesta:

In your revised letter dated October 18, 2007, you request an opinion concerning four questions:

1. Must the county designate an official newspaper?

In my opinion, the answer is no.

2. Must the county seek bids for the publication of legal notices and if so must the award go to the lowest bidder?

In my opinion, a county is not statutorily required to seek bids for the publication of legal notices.

3. In lieu of bidding the publication of its own proceedings [as provided in Wis. Stat. § 59.14(3)], may the county print its own proceedings or in the alternative post them to its official web site?

In my opinion, even if a county does not competitively bid the publication of its own proceedings as provided in Wis. Stat. § 59.14(3), it may print its own proceedings or post them on its web site.

4. In lieu of publication in a **printed** newspaper or posting on a **physical** bulletin board, may the county post its legal notices on its official web site?

In my opinion, the answer is no because placing a legal notice on the county's web site is not newspaper publication, is not another form of publication, and does not constitute posting in a public place.

Wisconsin Stat. § 59.14 provides:

Publication of ordinances and proceedings. (1) Whenever a board enacts an ordinance under this chapter the clerk shall immediately publish it as a class 1 notice, under ch. 985; and the clerk shall procure and distribute copies of the ordinance to the several town clerks, who shall file it in their respective offices.

(2) The board shall, by ordinance or resolution, provide for publication in one or more newspapers in the county as a class 1 notice, under ch. 985, a certified copy of all its proceedings had at any meeting, regular or special; said publication to be completed within 60 days after the adjournment of each session.

(3) The board may at any meeting, regular or special, provide by resolution for the publication in pamphlet form by the lowest and best bidder therefor, of a sufficient and designated number of copies of its duly certified proceedings, for general distribution.

(4) The board may order public notices relating to tax redemption and other affairs of the county to be published in a newspaper printed in any other than the English language, to be designated in such order, whenever the board considers it necessary for the better information of the inhabitants of the county, and it shall appear from the last previous census that one-fourth or more of the adult population of the county is of a nationality not speaking the English language, and that there shall have been a newspaper published in the county continuously for one year or more in the language spoken by that nationality; but all of the notices shall also be published in a newspaper published in the English language as provided by law. The compensation for all of the publications shall be paid by the county ordering the publications, and shall be the same as that prescribed by law for publication in the English language; and no extra charge shall be allowed for translation in any case. No irregularity, mistake or informality in any such publication shall affect the validity or regularity of any tax redemptions or other legal proceedings.

Wisconsin Stat. § 985.01 provides in part:

Definitions. As used in this chapter, unless the context requires otherwise:

. . . .

(2) "Legal notice" means every notice required by law or by order of a court to be published in a newspaper or other publication

....

(5) A newspaper is “published” at the place from which its mailing permit is issued, except that if the place where the newspaper has its major concentration of circulation has no primary post office, then at the place it shall designate as its place of publication in the affidavit required by s. 985.03(2), but no newspaper shall have more than one place of publication during the same period of time.

Wisconsin Stat. § 985.02 provides in part:

Method of notification. (1) Except as otherwise provided by law, a legal notice shall be published in a newspaper likely to give notice in the area or to the person affected. Whenever the law requires publication in a newspaper published in a designated municipality or area and no newspaper is published therein publication shall be made in a newspaper likely to give notice.

(2) If the governing body of a municipality elects to post under s. 985.05(1) it shall post in the following manner:

(a) The notice must be posted in at least 3 public places likely to give notice to persons affected.

(b) The notice posted before the act or event requiring notice shall be posted no later than the time specified for the first newspaper publication.

(c) The notice posted after the act or event requiring notice shall be posted within one week after the act or event. Actions of governing bodies posted after the act or event shall be effective upon posting.

Wisconsin Stat. § 985.03 provides:

Qualifications of newspapers. (1)(a) No publisher of any newspaper in this state shall be awarded or be entitled to any compensation or fee for the publishing of any legal notice unless, for at least 2 of the 5 years immediately before the date of the notice publication, the newspaper has been published regularly and continuously in the city, village or town where published, and has had a bona fide paid circulation:

1. That has constituted 50% or more of its circulation; and,

2. That has had actual subscribers at each publication of not less than 1,000 copies in 1st and 2nd class cities, or 300 copies if in 3rd and 4th class cities, villages or towns.

....

(c) A newspaper, under this chapter, is a publication appearing at regular intervals and at least once a week, containing reports of happenings of recent occurrence of a varied character, such as political, social, moral and religious subjects, designed to inform the general reader. The definition includes a daily newspaper published in a county having a population of 500,000 or more, devoted principally to business news and publishing of records, which has been designated by the courts of record of the county for publication of legal notices for a period of 6 months or more.

Wisconsin Stat. § 985.05 provides in part:

Official municipal newspapers. (1) The governing body of every municipality not required to have an official newspaper may designate a newspaper published or having general circulation in the municipality and eligible under s. 985.03 as its official newspaper or utilize the same for specific notices. The governing body of such municipality may, in lieu of newspaper publication, direct other form of publication or posting under s. 985.02(2). Other publication or posting, however, shall not be substituted for newspaper publication in proceedings relating to: tax redemptions or sales of land acquired by the county or city authorized to act under s. 74.87 for delinquent taxes, charges or assessments; civil annexations, detachments, consolidations or incorporations under chs. 59 to 66; or legal notices directed to specific individuals. Posting may not be substituted for publication in school board elections conducted under s. 120.06 or publication under s. 60.80(2) of town ordinances imposing forfeitures. If an eligible newspaper is published in the municipality, other publication or posting shall not be substituted for newspaper publication under s. 61.32 or 61.50.

(2) When any municipality has designated an official newspaper, all legal notices published in a newspaper by such municipality shall be published in such newspaper unless otherwise specifically required by law.

Wisconsin Stat. § 985.065 provides in part:

Publication and printing; counties with population of 250,000 or more.
(2)(a) In counties having a population of 250,000 or more, the county board of

supervisors, at its annual meeting shall direct the county clerk to invite proposals from the English newspapers published daily in said county, for the publication and printing of the proceedings of said board

. . . .

(c) The said board may by resolution suspend the publication of proceedings in newspapers and provide for the printing thereof in pamphlet form until the further action of the board in relation thereto. Separate bids may be called for if so ordered by said board, from printers in the county, for the printing of the proceedings of said county board in pamphlet form in such quantities as shall be determined by said board.

. . . .

(f) The said board of supervisors may, in lieu of the foregoing provisions, provide by ordinance, a method of printing and publication of its proceedings and notices, and the method of obtaining bids and contracts therefor.

Your first question is whether your county must designate an official newspaper.

Kenosha County has a population of less than 250,000. *Wisconsin Blue Book* (2007-08) at 768. Kenosha County therefore is not required to designate an official newspaper or newspapers under Wis. Stat. § 985.065(2)(a).

There is no other statute requiring that a county designate an official newspaper. *See* 62 Op. Att’y Gen. 81, 84 (1973): “Chapter 985, Wis. Stats., which relates to the publication of legal notices, does not require that your county designate a newspaper as its official newspaper.” *Accord* 60 Op. Att’y Gen. 95, 96 (1971): “[C]h. 985, Stats., does not require that your county designate *any* newspaper as its official newspaper.” (Italics in original). There have been no statutory amendments subsequent to the issuance of 62 Op. Att’y Gen. 81 that require a county with a population of under 250,000 to designate an official newspaper.

Your second question is whether your county is statutorily required to seek bids for the publication of legal notices.

Wisconsin Stat. § 59.52(29)(a) requires a county to seek competitive bids for “any contract for the construction, repair, remodeling or improvement of any public work, building, or furnishing of supplies or material of any kind where the estimated cost of such work will exceed \$25,000[.]” The term “public work” therefore contemplates something of a physical nature that can be constructed, repaired, remodeled, or improved. *See Joyce v. County of Dunn*, 192 Wis. 2d 699, 706, 531 N.W.2d 628 (Ct. App. 1995). Publication of legal notices also does

not involve the furnishing of “supplies” that are used or consumed or of “materials” that enter into or form part of a finished structure within the meaning of Wis. Stat. § 59.52(29)(a). *See Joyce*, 192 Wis. 2d at 706. A contract for newspaper publication involves the provision of a service that is not subject to Wis. Stat. § 59.52(29)(a). *Compare* 76 Op. Att’y Gen. 182 (1987).

There is no statute requiring that your county seek bids when publishing legal notices. Consequently, competitive bidding is not required. *See Cullen v. Rock County*, 244 Wis. 237, 240, 12 N.W.2d 38 (1943).

Your third question is whether your county may print its own proceedings or post them on its web site even if it does not seek competitive bids for the publication of its own proceedings as provided in Wis. Stat. § 59.14(3). Wisconsin Stat. § 59.14(3) provides that the county board “**may** at any meeting, regular or special, provide by resolution for the publication in pamphlet form by the lowest and best bidder therefor, of a sufficient and designated number of copies of its duly certified proceedings, for general distribution.” In contrast, Wis. Stat. § 59.14(2) provides that “[t]he board **shall**, by ordinance or resolution, provide for publication in one or more newspapers in the county as a class 1 notice, under ch. 985, a certified copy of all its proceedings had at any meeting”

“[T]he word ‘shall’ in a statute is presumed to be mandatory, especially where the legislature uses the words ‘shall’ and ‘may’ in the same statutory section.” *State v. Stenklyft*, 2005 WI 71, ¶ 33, 281 Wis. 2d 484, 697 N.W.2d 769, citing *State v. Sprosty*, 227 Wis. 2d 316, 324-25, 595 N.W.2d 692 (1999). Wisconsin Stat. § 59.14(3) authorizes a county board to seek outside competitive bids for the publication of its proceedings in pamphlet form if it deems outside publication of such pamphlets to be desirable. Wisconsin Stat. § 59.14(3) does not preclude a county from printing and binding summaries of its own proceedings, nor does it prohibit a county from posting summaries of its proceedings on its official web site.

Your fourth question essentially is whether placing a legal notice on the county’s web site can be considered newspaper publication under Wis. Stat. § 985.05(1), can be considered an “other form of publication” under Wis. Stat. § 985.05(1), or can be considered posting in a public place under Wis. Stat. § 985.02(2).

Wisconsin Stat. § 985.05(1) requires that certain legal notices be published in a newspaper. Wisconsin Stat. § 985.03(1)(c) provides that a “newspaper” is a “publication appearing at regular intervals and at least once a week, containing reports of happenings of recent occurrence of a varied character, such as political, social, moral and religious subjects, designed to inform the general reader.” Counties lack statutory authority to issue publications containing such varied information, and the general reader does not refer to a county web site in order to obtain such information.

Even if counties did possess statutory authority to publish newspapers as defined in Wis. Stat. § 985.03(1)(c), I am not persuaded that such publication could occur solely on a county's web site. Although you cite *Hernandez v. Alcorta*, 2003 WL 22391311 (Terr. V.I., October 8, 2003) for the proposition that there are now "internet newspapers" that do not employ the method of sheet publication at all, providing a source of news on the internet is not providing a source of news on paper. Virtually anyone can buy a newspaper, but not everyone has a computer with access to the internet. Placing a legal notice on a county's web site therefore does not constitute newspaper publication under Wis. Stat. § 985.05(1).

In those situations where newspaper publication of legal notices is not mandatory under Wis. Stat. § 985.05(1), that statute provides that the county board "may, in lieu of newspaper publication, direct other form of publication or posting under s. 985.02(2)." Wisconsin Stat. § 985.03(1)(c) also explicitly states that a newspaper is a "publication." A dictionary may be used to ascertain the meaning of non-technical terms used in a statute. *Garcia v. Mazda Motor of America*, 2004 WI 93, ¶ 14, 273 Wis. 2d 612, 682 N.W.2d 365. *Webster's Third New International Dictionary* 1836 (1986) defines the noun "publication" as "2 a : the act or process of issuing copies . . . for general distribution to the public."

"[S]tatutory language is interpreted in the context which it is used; not in isolation but as part of a whole[.]" *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. The phrase "other form of publication" in Wis. Stat. § 985.05(1) must be construed in the same sense as the phrase "newspaper publication" in that statute and in contradistinction to "posting" under Wis. Stat. § 985.05(2). Placing a legal notice on a county's web site does not involve creating copies of the notice for general distribution in a manner similar to newspaper publication. Placing a legal notice on a county's web site therefore is not an "other form of publication" within the meaning of Wis. Stat. § 985.05(2).

In those situations where posting of a legal notice is authorized in lieu of newspaper publication, Wis. Stat. § 985.02(2)(a) provides that "[t]he notice must be posted in at least 3 public places likely to give notice to persons affected." Since a county's web site is not located in more than one place, placing a legal notice on a county's web site cannot constitute posting in "3 public places" within the meaning of Wis. Stat. § 985.02(2)(a).

The fact that a county's web site is likely to give notice to persons affected by county proceedings does not mean that such a web site is a "public place" within the meaning of Wis. Stat. § 985.02(2)(a). The amendment to Wis. Stat. § 985.02(2)(a) requiring that posting occur in three public places was enacted in 1965. Ch. 252, sec. 280, Laws of 1965. When that language was enacted, the Legislature undoubtedly was referring to physical locations rather than to virtual public places such as the internet. When Wisconsin statutes use the term "public place," they do so to connote a physical location. *See, e.g.*, Wis. Stat. § 103.21(6). The annotation "[w]hat is 'public place' within requirements as to posting of notices,"

90 A.L.R.2d 1210 (1963) also contains only cases involving the posting of notices in physical locations.

In *Central Puget Sound Regional Transit Authority v. Miller*, 128 P.3d 588, 595 (Wash. 2006), the court noted that “[t]here is very little case law on the subject of the sufficiency of web posting for notice requirements.” *Miller*, 128 P.3d at 594, did uphold web posting under a statute requiring notice that “may include, but not be limited to, written notification to the city’s official newspaper, publication of a notice in the official newspaper, posting of upcoming council meeting agendas, *or such other processes as the city determines will satisfy the intent of this requirement.*” (Emphasis by the court.) *Miller* did not hold that placing a legal notice on a municipal web site constitutes posting the notice in a public place. A dissenting justice specifically stated that “[w]hen the term ‘posting’ is used in notice statutes, it always refers to posting of notice in a physical public place or affected area (e.g. on the property itself), but does not refer to posting on a website.” *Miller*, 128 P.3d at 604 (J.M. Johnson, J., dissenting).

While placing a legal notice on a county’s web site is certainly a desirable practice and may in certain circumstances reach more members of the public than would placing the notice in a physical location, Wis. Stat. § 985.02(2)(a) contemplates posting of legal notices in three physical locations. Placing a legal notice on the internet therefore does not constitute posting in a public place under Wis. Stat. § 985.02(2).

I therefore conclude that (1) A county with a population of under 250,000 is not required to designate an official newspaper; (2) Such a county is not statutorily required to seek bids for the publication of legal notices; (3) Even if such a county does not competitively bid the publication of its own proceedings as provided in Wis. Stat. § 59.14(3), it may print its own proceedings or post them on its web site; (4) the placement of a legal notice on a county’s web site is not newspaper publication under Wis. Stat. § 985.05(1), is not an “other form of publication” under Wis. Stat. § 985.05(1), and is not posting in a public place under Wis. Stat. § 985.02(2).

Sincerely,

J.B. Van Hollen
Attorney General

CAPTION: A county with a population of under 250,000 is not required to designate an official newspaper and is not statutorily required to seek bids for the publication of legal notices. Even if such a county does not competitively bid the publication of its own proceedings as provided in Wis. Stat. § 59.14(3), it may print its own proceedings or post them on its web site. The placement of a legal notice on a county's web site is not newspaper publication under Wis. Stat. § 985.05(1), is not an "other form of publication" under Wis. Stat. § 985.05(1), and is not posting in a public place under Wis. Stat. § 985.02(2).