WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

Memo No. 1

TO: MEMBERS OF THE SPECIAL COMMITTEE ON DIFFERENCES IN LAWS APPLICABLE TO CITIES AND VILLAGES

FROM: Don Dyke, Chief of Legal Services, and Ronald Sklansky, Senior Staff Attorney

RE: Selected Issues for Special Committee Consideration

DATE: July 24, 2008

This Memo, prepared at the direction of Representative Mark Gottlieb, Special Committee Chair, and Senator Plale, Special Committee Vice-Chair, identifies for consideration by the Special Committee selected differences in laws that apply to cities and villages that appear to be within the Special Committee's directive. It is anticipated that the issues identified in the Memo will be discussed by the Special Committee at its first meeting and, if the committee is interested in further consideration of an issue, that staff will be directed to prepare draft legislation.

Among the sources of the issues identified in this Memo are: Curt Witynski, Assistant Director, League of Wisconsin Municipalities; differences in cities and villages described in the *Handbook for Wisconsin Municipal Officials* at pages 2 through 5, *League of Wisconsin Municipalities* (2002) and *Powers of Municipalities, Frequently Asked Question 10*, "What are the Differences Between Cities and Villages?" on the League of Wisconsin Municipalities website, www.lwm-info.org; and responses by city and village attorneys to a request by Curt Witynski to identify possible issues for Special Committee consideration.

1. Salary Changes for Certain Elected and Appointed and City Officers

Section 62.09 (6) (b), Stats., directs that salary changes for elected city officers (other than the mayor and members of the city council) and appointed city officers serving definite terms be made no later than the first regular city council meeting in February if they are to take effect that year. There is no corresponding provision that applies to elected and appointed village officers.

The s. 62.09 (6) (b) provision has been characterized as confusing by the League of Wisconsin Municipalities. The League offers the following interpretation of the provision:

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536
(608) 266-1304 • Fax: (608) 266-3830 • Email: leg.council@legis.state.wi.us
http://www.legis.state.wi.us/lc

> 1. Changes may be made at or before the first regular council meeting in February to take effect at the beginning of the term that spring for elected officers and appointed officers serving definite terms;
>
> 2. For these officers, changes may be made at any time during the second (or later) year of the term to take effect at the time during such second or later year of that term; and
>
> 3. Appointed officers serving indefinite terms may have their salaries increased at any time, since there is no applicable statutory restriction. League opinion Salaries 405.
>
> The conclusion for (2) above, is based in part on legislative history. At one time sec. 62.09 (6) (b), Stats., included this sentence: "The salary of an officer so elected shall not be increased or diminished during his term of office." The sentence was deleted by Ch. 24, Laws of 1967. The Legislative Reference Bureau analysis to the bill which deleted this sentence explained that the bill would allow elected officers, other than members of the governing body, to receive mid-term increases, as is the case with appointed city officers (1967 Senate Bill 61). Since the statute clearly limits salary changes for elected city officers and officers appointed for a definite term, the League has worked out the above interpretation to give meaning to the statute in light of the legislative history.
>
> [Handbook for Wisconsin Municipal Officials, *Id*., at p. 32.]

The following questions are offered for committee consideration:

a. Should the provision be clarified and also be made applicable to villages? Or, should the provision be repealed?

b. If clarified, should the provision only apply to establishing the salaries of elective city offices, i.e., is there a need to specify when the compensation for an appointive office must be established? Note that for town and county elected offices, compensation generally must be established prior to the latest date and time for filing nomination papers for the office. Sections 60.32 (4) and 59.22 (1) (a) 1., Stats., respectively.

2. Peace Officer Status of Village President and Trustees

Section 61.31, Stats., confers officer-of-the-peace status on village presidents and trustees: "The president and each trustee shall be officers of the peace, and may suppress in a summary manner any riotous or disorderly conduct in the streets or public places of the village, and may command assistance of all persons under the same penalty for disobedience provided in s. 61.28 [$10 forfeiture]."

There is no corresponding provision currently applicable to city council members. At one time, city council members had the "powers of a city policeman." Section 62.09 (14), 1981-82 Stats. That provision was repealed by 1983 Wisconsin Act 210. Should consideration be given to reinstating police powers for common council members or repealing police powers of village presidents and trustees?

3. Publication of Receipts and Disbursements by City Clerk

Section 62.09 (11) (g), Stats., requires the city clerk to publish, as a Class 1 notice under ch. 985, a statement showing the receipts and disbursements as to each fund during the preceding fiscal year. The provision can be traced to 1889; see SEC. 41, Ch. 326, Laws of 1889; s. 925h, sub. 41, 1889 Stats. (The requirement does not apply to cities operating under the commission form of government; in those cities similar requirements are imposed on the comptroller and city council; see s. 64.34 (1), Stats.) There is no corresponding requirement for village clerks. In the past, the League of Wisconsin Municipalities requested draft legislation that would repeal the requirement on city clerks, but it does not appear that the legislation was formally introduced in the Legislature.

Should the publication requirement on city clerks be repealed? Instead of repealing the requirement, should the requirement apply also to village clerks? Note that cities and villages must annually publish a budget summary which, among other things, must include for both the current budget and the proposed budget "revenue and expenditure totals, by funds, for each governmental fund, and for each proprietary fund and the revenue and expenditure totals for all funds combined." Section 65.90 (3) (b) 6., Stats.

4. Regulation of Political Signs

Section 12.04 (2), Stats., generally permits an individual to place a sign containing a political message on residential property owned or occupied by that individual during an election campaign period. ("Political message," "residential property," and "election campaign period" are defined terms under the statute.)

Section 12.04 (4) (a), Stats., authorizes counties and municipalities to regulate the size, shape, or placement of any political sign that has an electrical, mechanical, or audio apparatus and to regulate any political sign in order to ensure traffic or pedestrian safety. Section 12.04 (4) (b), Stats., authorizes towns and first, second, and third class cities, but not fourth class cities and villages, to regulate the size, shape, or placement of any political sign that is more than 11 square feet in area.

Section 12.04, Stats., was originally enacted by 1985 Wisconsin Act 198. The provision under discussion, sub. (4) (b), first appeared in the Senate version of the legislation. See Senate Amendment 1, as amended by Senate Amendment 1 to the amendment, to 1985 Assembly Bill 191. The Senate version extended regulatory authority to cities, villages, and towns (although that version simply allowed regulation of signs placed on residential property exceeding six square feet in area). The legislation ultimately went to conference committee; the conference committee report proposed the language of current sub. (4) (b), extending the authority only to first, second, and third class cities. The conference report was adopted by the Legislature. Towns were given the authority in s. 12.04 (4) (b) by 1993 Wisconsin Act 246 (sometimes referred to as the "town parity" bill).

Should the authority to regulate the size, shape, or placement of political signs more than 11 square feet in area be extended to fourth class cities and villages? Note that 2003 Assembly Bill 605, authored by Representative Jeskewitz, proposed to extend the regulatory authority to fourth class cities and villages. The bill was supported by the League of Wisconsin Municipalities. The bill received a public hearing in the Committee on Campaigns and Elections, but received no further action. Note, also, that it is recognized that the exercise of the authority granted under s. 12.04 to regulate political signs can raise constitutional issues under the First Amendment as content-based restriction on speech.

5. Liability for Mob Damage

Section 893.81, Stats., provides that counties and cities are strictly liable for injury to person or property by a mob or riot within their respective jurisdictions. See *Interstate Fire and Casualty Co. v. Milwaukee*, 45 Wis. 2d 331, 173 N.W.2d 187 (1970); and *American Insurance Co. v. Milwaukee*, 51 Wis. 2d 346, 187 N.W.2d 142 (1971). However, a person may not recover under the statute if the injury "was occasioned or in any manner aided, sanctioned or permitted by that person or caused by that person's negligence, nor unless that person shall have used unreasonable diligence to prevent the same, and shall have immediately notified the mayor or sheriff if after being apprised of any threat of or attempt at such injury." Section 893.81 (4), Stats. In addition, an insurer who pays for riot or mob damage has no subrogation claim under this section against a county or city. [*Id*.]

There is no corresponding liability on the part of villages for mob damage (although under s. 893.80, Stats., a village would be liable for a negligent ministerial act on its part in connection with a mob or riot). The origin of s. 893.81, Stats., can be traced to Ch. 211, Laws of 1863. While the original law differed from the current statute in several respects, e.g., it only applied to property damage, not personal injury, from its inception it extended liability only to counties and cities. It does not appear that villages have ever been made liable under the provision.

Is there any interest in addressing the disparity in the treatment of cities and villages under s. 893.81? (Note that a Legislative Council study committee introduced legislation in 1976 to repeal s. 893.81. See 1977 Assembly Bill 376. The bill was not reported out of the standing committee to which it was referred.)

6. Election of Village Trustees by District

Various statutory provisions contemplate the election of city council members by district, rather than at large. There are no corresponding statutory provisions for electing village trustees by district. The League of Wisconsin Municipalities has opined that a village may, through adoption of a charter ordinance, establish districts for the purpose of providing district, or area, representation by village trustees as an alternative to the election at large method. See League of Wisconsin Municipalities, Legal Opinions, Elections, No. 585, August 19, 1987.

Is it desirable to include express statutory authority for villages to provide for election of village trustees by district? (Note, also, that the statutes do not contemplate at-large elections for city council members. It is the opinion of the League that cities, by charter ordinance, may provide for the at-large election of city council members.)

7. Trains Blocking Highways

Section 192.292, Stats., makes it unlawful "to stop any railroad train, locomotive or car upon or across any highway or street crossing, outside of cities, or leave the same standing upon such crossing longer than 10 minutes, except in cases of accident…." The statute provides that a railroad company that violates the statute may be fined not more than $500; any officer of a railroad company responsible for the violation may be imprisoned for not more than 15 days. There is no corresponding prohibition on obstructing highways or streets in cities.

The first iteration of current s. 192.292 was enacted by Ch. 70, Laws of 1907. Until the 2005 Legislative Session, the statute remained unchanged, except for renumbering, from the version in SEC. 213, Ch. 108, Laws of 1923. Cities were never covered by the provision.

2005 Wisconsin Act 179 revised the penalty by imposing the monetary penalty on the railroad company, rather than on any person in charge or responsible, and by increasing the monetary penalty from $25 to $500. Act 179 made a number of revisions to statutes relating to railroad regulation, found in chs. 189 to 192 and 195, Stats. As originally introduced, the legislation (2005 Assembly Bill 588) proposed to repeal s. 192.292. During the course of legislative deliberations on the bill, the section was reinstated, with the previously described revisions to the penalties.

The following background information, from the Federal Railroad Administration, briefly describes the preemption issue that state "blocked crossing" laws can present:

> …[T]he issue of a state's authority to legislate or regulate blocked crossings is highly contentious and still being defined in the courts. Railroads have on occasion mounted "pre-emption" defenses, citing FRA regulations and other federal requirements which they believe take precedence over state laws or local ordinances. Where there is a conflict between the state law and federal rail safety requirements, the courts have found the state law to be pre-empted and, thus, unenforceable.

Federal Railroad Administration, Trains Blocking Highway-Rail Grade Crossings, Fact Sheet, at page 2, May 2008.

Does the committee wish to consider further the disparate treatment of cities and villages under s. 192.292, Stats.?

DD:jal