



## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

### Constitutional Home Rule

This Information Memorandum describes a city or village's power to enact a charter ordinance under its constitutional home rule authority. The Information Memorandum also discusses how a city or village's charter ordinance would interact with statewide legislation on the same matter.

Generally, a city or village may enact a charter ordinance that preempts a state law, but local preemption of a state law is not effective if the state law applies uniformly to every city or village, or if the matter is solely of statewide concern. If a matter is primarily of statewide concern, and the legislation does not expressly or implicitly forbid local regulation on the matter, a local ordinance may stand if it does not conflict with the legislation.

#### **CONSTITUTIONAL HOME RULE**

The Wisconsin Constitution provides that cities and villages “may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village.” Under this provision, the method for a city or village to determine its own affairs is to be prescribed by the Legislature. [Art. XI, s. 3 (1), Wis. Const.]

This provision is known as “constitutional home rule,” and means that if a policy is entirely a matter of a city or village's local affairs and government, a city or village is authorized to regulate that matter, and the Legislature is prohibited from enacting a law that would preempt the local regulation of that matter. However, if a matter is exclusively of statewide concern, or a legislative enactment applies uniformly to every city or village, the Legislature may prohibit a city or village from enacting an ordinance on the matter and may regulate the matter through state laws.

The constitutional home rule authority is granted only to a city or village. Other units of local government such as counties, towns, and school districts do not have constitutional home rule authority. However, the administrative home rule authority, which is provided to every county under the state statutes, is limited in a similar manner by any legislative enactment of statewide concern that uniformly affects all counties, and is reviewed in a similar manner to constitutional home rule authority. Likewise, a town that has adopted village powers is subject to review of its ordinances in a similar manner to constitutional home rule authority.

## **CHARTER ORDINANCE PREEMPTION OF STATE LAW**

As directed by the constitutional home rule provision, the Legislature enacted s. 66.0101, Stats., titled, "Home rule; manner of exercise."

This section includes a procedure for a city or village to enact a "charter ordinance" to override a state law as it relates to the local affairs and government of the city or village. Any such charter ordinance that is intended to preempt a state law must specifically designate which law is made inapplicable to the city or village by the charter ordinance.

To be effective, a charter ordinance must be designated as a charter ordinance, and must be passed by a two-thirds vote of the members of the city or village's governing body. If a petition demanding a referendum is filed within 60 days of the charter ordinance's passage and publication, and the petition is signed by an adequate number of electors (according to a specified formula), the charter ordinance takes effect after it is submitted to a referendum and is approved by a majority of the electors who voted. Alternatively, a city or village may choose to submit a charter ordinance to a referendum, on its own initiative. If no petition demanding a referendum is filed within the 60 days after the charter ordinance's passage and publication, it takes effect on the 60th day.

A charter ordinance may also be initiated by a petition for direct legislation, to either be adopted by the city or village's governing body, or by referendum. If adopted by the governing body, the charter ordinance may still be subject to a referendum if a demand petition is filed within 60 days of the charter ordinance's passage.

Under both the state Constitution and statutes, the procedures for a charter ordinance to preempt a state law are not available when the legislative enactment was of statewide concern in its uniform effect on every city or every village.

## **CASELAW**

Under constitutional home rule analyses, the ability for a city or village to regulate a matter, if there are state statutes regulating the same matter, depends upon the statewide and local interests involved. For the purposes of a court's analysis, statutes are classified in one of three ways:

- (1) *Statutes exclusively of statewide concern.* When a matter under the statutes is entirely of statewide concern, a city or village may not elect to override the statute.
  
- (2) *Statutes entirely of a local character.* When a statute is entirely of a local character, a city or village may elect not to be bound by that statute.

(3) *Statutes of mixed statewide and local character.* When a statute topic has mixed statewide and local character, the test depends upon whether the statute involved is primarily or paramountly a matter of local affairs and government or of statewide concern. A court must make this determination on a case-by-case basis looking at legislative intent and other evidence. If a statute is paramountly a matter of local affairs, the charter ordinance will prevail, but if a statute is paramountly a matter of statewide concern, the statute will prevail over any conflicting provisions, and to the extent that it expressly or implicitly forbids local legislation.

[*State ex rel. Michalek v. LeGrand*, 77 Wis. 2d 520, 526–527, (1977); *Gloudean v. City of St. Francis*, 143 Wis. 2d 780, 789 (Ct. App. 1988); *Anchor Sav. & Loan Ass’n v. Equal Opportunities Comm’n*, 120 Wis. 2d 391, 397 (1984).]

A few cases are briefly described below to illustrate the analysis used by Wisconsin courts in reviewing a city or village’s constitutional home rule authority.

#### ***DECISIONS IN FAVOR OF LOCAL CHARACTER***

In *State ex rel. Ekern v. Milwaukee*, the Wisconsin Supreme Court reviewed the narrow question of whether the subject matter of the maximum height of buildings in a city is a matter of a city’s “local affairs and government” within its constitutional home rule authority. The Court stated that there is a “substantial difference between a building in a congested community and one in a rural district,” and held that building heights are a matter of “local affair” within the city’s constitutional home rule authority. [*State ex rel. Ekern v. Milwaukee*, 190 Wis. 633 (1926).]

In *State ex rel. Michalek v. Le Grand*, the Wisconsin Supreme Court applied the “test of paramountcy” to determine whether the city ordinance was primarily a matter of local affairs or of statewide concern. The Court noted that the analysis is not whether specific state statutes preempt a local ordinance, but, rather, whether the subject is paramountly a local affair or a matter of statewide concern.

In *Michalek*, the Court first held that the ordinance, enacted to secure compliance with the city’s building and zoning code, was primarily and paramountly a matter of the city’s local affairs. The Court then reviewed whether there might be any conflict between specific statutes and the ordinance. The Court held that, because the ordinance and the statutes did not conflict, the ordinance was a valid exercise of the city’s home rule authority, and the statutes were valid enactments of statewide concern.

#### ***DECISIONS IN FAVOR OF STATEWIDE CHARACTER***

In *Van Gilder v. Madison*, the Wisconsin Supreme Court commented that the Legislature’s declaration of what constitutes “local affairs” or “matters of statewide concern” involves large considerations of public policy, and, although not controlling, should be entitled to great

weight. The Court noted that the Legislature had statutorily declared that the police and fire statutes should be construed as enactments of statewide concern, for the purpose of providing a uniform regulation of police and fire departments. The Court held that the statutory procedures for reducing police and firefighter salaries is primarily a matter of statewide concern. [*Van Gilder v. Madison*, 222 Wis. 58 (1936).]

In its discussion in *Van Gilder*, the Wisconsin Supreme Court commented that if a statute deals with local affairs and government of a city, a charter ordinance may still be subordinate to the state statute if the statute affects every city with uniformity.

In *Madison v. Tolzmann*, the Wisconsin Supreme Court held that a statute conferring general police powers did not contain an *express* authority to enact a fee relating to the use of navigable waters within the city's boundaries.

The Court then turned to a search for any *implied* authority, in order to give a liberal construction to matters of local affairs, under the city's constitutional home rule authority. The Court held that the beds of navigable waters are held by the state in trust for use by the public, and that the free and unobstructed use of navigable waters under the trust doctrine is a matter of statewide concern, which could be delegated only by express authority. [*Madison v. Tolzmann*, 7 Wis. 2d 570 (1959).]

In *Gloudeaman v. St. Francis*, the Wisconsin Court of Appeals held that statutory notice provisions are primarily of statewide concern and, therefore, may not be elected against by a city or village. The court noted that notice and hearing provisions are "invariably intertwined" with due process considerations, and that the Legislature attempted to protect the right to due process by requiring an adequate notice and hearing before a change in municipal zoning could affect the character of a neighborhood. The court stated that the city could not by ordinance overrule the Legislature's safe-guarding of the constitutional right to due process.

#### ***DECISIONS ANALYZING LOCAL AUTHORITY TO ACT IN A MATTER OF STATEWIDE CONCERN***

In *Local Union No. 487, IAFF-CIO v. Eau Claire*, the Wisconsin Supreme Court noted that a municipality may act even in an area of statewide concern, if there is no express language in the statutes restricting the power and the ordinance does not infringe the spirit of a state law or general policy. The Court utilized a test of four separate criteria to determine whether state legislation expressly or implicitly forbids local legislation in an area of statewide concern:

1. Whether the Legislature has expressly withdrawn the power of municipalities to act.
2. Whether the ordinance logically conflicts with the state legislation.
3. Whether the ordinance defeats the purpose of the state legislation.
4. Whether the ordinance goes against the spirit of the state legislation.

The Court found that the Legislature had not expressly withdrawn the power of a city to establish a public safety officer program, but that the city failed to meet the three remaining criteria. The Court held that, under the other criteria, the program would conflict with, defeat, and go against the spirit of the statutes' separate organization for police officers than for firefighters. The Court noted that the Legislature had expressly stated in the statutes that "uniform regulation" of those departments should "be construed as an enactment of statewide concern." [*Local Union No. 487, IAFF-CIO v. Eau Claire*, 147 Wis. 2d 519 (1988).]

In *Adams v. State Livestock Facilities Siting Review Board*, based on the state siting law's statement that the law was an "enactment of statewide concern for the purpose of providing uniform regulation of livestock facilities," the Wisconsin Supreme Court determined that livestock facility siting is an issue of statewide concern. However, the Court found that livestock facility siting is not exclusively a matter of statewide concern, because it "clearly affects local concerns," and has traditionally been regulated at the local level. As a "mixed bag," the Court noted that a municipality could concomitantly regulate matters of statewide concern, if the ordinances did not conflict with state law. [*Adams v. State Livestock Facilities Siting Review Bd.*, 2012 WI 85.]

The Court utilized the four separate criteria test to determine whether the state legislation expressly or implicitly forbids local legislation, noting that if any one factor is met, the municipality's conflicting action is void. The Court held that the town failed the first of the criteria, because the Legislature had expressly withdrawn the power of municipalities to act in the field of livestock facility siting, by providing uniform state standards and only limited circumstances in which a permit could be disapproved or conditioned.

## **DISCUSSION**

In a court's review of whether a statute or a local ordinance would prevail on a matter, the analysis first requires a determination of whether the topic is solely a matter of statewide concern, solely a matter of local affairs and government, or whether both levels of government share an interest in the matter. A court would look to prior analyses regarding constitutional home rule for guidance.

If a court were to find that the issue is solely a matter of local concern, the court's inquiry could end there, because a charter ordinance on the matter would be within the municipality's constitutional home rule authority. However, as stated in *Van Gilder*, if a state law does deal with local affairs and government of a city, a charter ordinance may still be subordinate to a state statute if the statute affects every city with uniformity. The constitutional home rule provision, and the charter ordinance statute, specify that a city or village's election to preempt a state law is subject to enactments of statewide concern that uniformly affect every city or every village, and preemption by a charter ordinance could not be elected in those circumstances.

Where a statute states that the subject is a matter of statewide concern, a court is likely to give great weight to this statement of the Legislature's opinion. A court could nevertheless determine that the matter is not *exclusively* a matter of statewide concern, with the matter

affecting local concerns that in some instances have traditionally been regulated at the local level. This could allow local regulations to be in place, if, under the four separate criteria, the state legislation does not expressly or implicitly forbid local regulation.

Under the four criteria, a court would evaluate: (1) whether the Legislature has expressly withdrawn the power of municipalities to act; (2) whether the municipality's actions logically conflict with the state legislation; (3) whether the municipality's actions defeat the purpose of the state legislation; or (4) whether the municipality's actions are contrary to the spirit of the state legislation.

## **SUMMARY**

In summary, a city or village may enact a charter ordinance that preempts a state law, but local preemption of a state law is not effective if the state law applies uniformly to every city or village, or if the matter is solely of statewide concern.

Ultimately, the question of whether a city or village has properly exercised its constitutional home rule authority, or whether the state has unconstitutionally interfered with a city or village's home rule authority, would be decided by a court based on the particular facts and circumstances presented. However, it appears likely that a uniform statewide law would be found to preempt a city or village's charter ordinance on the same matter. In such a circumstance, the local ordinance could maintain its authority only if it does not conflict with the state law.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

This memorandum was prepared by Margit Kelley, Staff Attorney, on May 1, 2013.

---

---

### **WISCONSIN LEGISLATIVE COUNCIL**

One East Main Street, Suite 401 • P.O. Box 2536 • Madison, WI 53701-2536

Telephone: (608) 266-1304 • Fax: (608) 266-3830

Email: [leg.council@legis.state.wi.us](mailto:leg.council@legis.state.wi.us)

<http://www.legis.state.wi.us/lc>