

Constitutional Highlights

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Wisconsin Constitution Article XI, Section 3 MUNICIPAL HOME RULE

Cities and villages ... may determine their local affairs and government, subject ... to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village....

History and purpose of the section

For most of the 19th Century, the legislature governed the political organization of Wisconsin cities and villages by enacting charters for their incorporation. Amendments to the Wisconsin Constitution in 1892, however, prohibited the legislature from incorporating any city or village by special act. In part, advocates of local control sought to reduce the role of the legislature in establishing the governing institutions of particular municipalities, as well as to provide cities and villages with increased authority to determine their own affairs. Indeed, by 1911, this local control movement had prevailed in enacting into law a home rule statute, permitting cities to determine their own municipal affairs. But this provision was ruled unconstitutional in *State ex rel. Mueller v. Thompson*, 149 Wis. 488 (1912), as an unlawful delegation of legislative power.

The only recourse for advocates of local government autonomy in the area of municipal home rule, therefore, was amending the constitution. In 1924, the Wisconsin Constitution was amended to establish municipal home rule. Municipal home rule consisted in limiting legislative power in the area of local affairs by carving out a sphere of city and village influence over local affairs and government. The amendment permitted cities and villages to determine their local affairs and government, subject only to other provisions of the Wisconsin Constitution and to legislative enactments of statewide concern that uniformly affect every city and village.

How courts currently interpret the section

The constitutional amendment made a direct grant of legislative power to cities and villages and it limited

the powers of the legislature. See *State ex rel. Ekern v. Milwaukee*, 190 Wis. 633, 637 (1926). It is important to note, though, that the amendment did not grant home rule authority to counties or towns. Municipal home rule authority under the constitution is not an authority granted all local governmental units. Municipal home rule jurisprudence consists largely in demarcating the boundaries between those areas of local affairs and government that are within the legislative purview of cities and villages and those areas that are of statewide concern and, therefore, subject to control by the legislature.

In determining whether a city or village has properly exercised its constitutional home rule authority or whether the state has unlawfully intruded upon a city's or village's home rule authority, the courts, as in other areas of constitutional jurisprudence, are the ultimate arbiters. *State ex rel. Brelsford v. Retirement Board*, 41 Wis. 2d 77, 82 (1968). To establish the legal boundaries between state and local government political authority, the courts will classify a legislative enactment according to whether it is: 1) exclusively a statewide concern; 2) entirely a matter of a city's or village's local affairs and government; or 3) a "mixed bag." *State ex rel. Michalek v. LeGrand*, 77 Wis. 2d 520, 526-527 (1977).

If a given public policy matter is exclusively of statewide concern, the home rule constitutional amendment does not grant any city or village political authority over the matter. *Van Gilder v. City of Madison*, 222 Wis. 58, 83 (1936). The legislature may prohibit cities and villages from enacting ordinances in matters that are exclusively of statewide concern and it may enact laws regulating such concerns without regard to municipal home rule authority. Importantly, the home rule amendment does not prohibit the legislature from delegating to cities and villages authority over public policy matters that are of statewide concern. *Wisconsin Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 533 (1978). Any such delegation of authority, of course, may be rescinded, preempted, or regulated by the legislature. *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 651-652 (1996). The home rule amendment limits legislative authority in the area of local affairs and government, but it does not limit legislative authority in allowing cities and villages to regulate matters of statewide concern.

In contrast, if a given public policy is entirely a matter of a city's or village's local affairs and government, the home rule constitutional provision authorizes a city or village to regulate that matter and prohibits any legislative enactment that would preempt or make unlawful any city or village regulation over that public policy matter. *Michalek*, at 527-528. An exception to this rule is that the legislature may enact legislation relating to a public policy area that is under a city's or village's home rule authority if the enactment uniformly applies to every city or village in the state. See *Van Gilder*, at 84; *City of West Allis v. Milwaukee County*, 39 Wis. 2d 356, 366 (1968). Moreover, the legislature may still enact legislation in areas that are entirely a matter of local affairs and government, but only with the understanding that a city or village is free to acquiesce to the enactment or to override the enactment through adoption of a charter ordinance. The charter ordinance requirement is one imposed by state law.

Finally, if a public policy matter falls into the "mixed bag" classification in which the policy has both statewide and local government attributes, the courts must determine whether the matter is primarily or

paramountly a matter of local affairs and government or the matter is primarily or paramountly a matter of statewide concern. See *Ekern*, at 640-641; *Van Gilder*, at 82; *Michalek*, at 528. After establishing that a given public policy is primarily or paramountly a matter of local affairs or government or a matter of statewide concern, the court will apply the appropriate test for matters that are exclusively of statewide concern or for matters that are entirely a city's or village's local affairs and government.

Although case law provides that the home rule constitutional amendment be given liberal construction in matters of local affairs, as can be seen in *City of Madison v. Tolzmann*, 7 Wis. 2d 570, 574 (1959), the courts, in practice, have generally been unwilling to carve out an unnecessarily large sphere of local government autonomy under the home rule constitutional amendment. In fact, there are only two cases in which local governments have successfully asserted constitutional home rule authority in the face of seemingly contrary statutes.

In *Ekern*, the court found that a state law limiting the height of buildings in first class cities to 125 feet was a local affair under the home rule constitutional amendment and, as a result, the city of Milwaukee could exempt itself from that state law by adopting a charter ordinance to that effect. Similarly, in *Michalek*, the court upheld a city of Milwaukee rent-withholding ordinance, finding that the ordinance was primarily and paramountly an enactment of a matter of local affairs and government. (In this case, though, the court found that the ordinance and state law did not conflict.)

Far more typical of constitutional jurisprudence relating to municipal home rule is the result in *Van Gilder*, in which the court determined that compensation paid by the city of Madison to its police officers, which would seem to be a fairly local matter, was instead primarily a matter of statewide concern and, thus, not protected from state regulation under municipal home rule authority. In sum, based on case law, it seems that the home rule constitutional amendment is not a substantial impairment to legislative enactments affecting cities and villages. The reason may be because the terms of the amendment are limited to "local affairs and government" and, for most practical purposes, "local affairs" have statewide impact and are therefore of statewide concern.

Strategies for reconciling legislation with the section

Even though the courts for the most part have not used municipal home rule authority under the constitution to limit or strike down legislative enactments, municipal home rule authority is still a limitation on legislative power. To be sure, the home rule constitutional provision is not a significant legal constraint on legislative activity in matters affecting local governments in this state. Nonetheless, in drafting legislation that will directly or indirectly impact on cities and villages, a legislator may use a couple of strategies to address issues involving municipal home rule under the constitution:

1. If the legislation involves a public policy area that is arguably a matter of local affairs and government, but the legislator intends to have state regulation of this policy area, the

legislation could contain a broad public policy declaration that the subject matter of the legislation is primarily or predominantly a matter of statewide concern. While such statements are not determinative, courts have held that legislative declarations as to whether a public policy matter is a matter of statewide concern are entitled to “great weight.” *Van Gilder*, at 73-74; *Brelsford*, at 86. In addition, or as an alternate drafting strategy, the legislation could be fashioned so as to apply uniformly to every city and village in this state.

2. If the legislation involves a public policy area that is arguably a matter of local affairs and government, but the legislator wants to ensure that a city or village can opt out from the application of the law, the legislation could contain a broad public policy declaration that the subject matter of the legislation is primarily or paramountly a matter of local affairs and government and could affirm that any affected city or village may adopt a charter ordinance to insulate itself from the law’s application. In this way, the courts are put on alert that the legislature is not asserting that the public policy is primarily or paramountly a statewide concern for purposes of the home rule constitutional provision.

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