

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-2705
STATE OF WISCONSIN**

Cir. Ct. No. 02-CV-394

**IN COURT OF APPEALS
DISTRICT III**

LAWRENCE LARSEN,

PLAINTIFF-RESPONDENT,

V.

**BOARD OF TRUSTEES OF THE VILLAGE OF NORTH
HUDSON,**

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: SCOTT R. NEEDHAM, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. The Board of Trustees of the Village of North Hudson appeals a summary judgment granted in favor of Lawrence Larsen. The circuit court ordered the board to place a direct legislation proposal on the ballot in the next general election. The board argues the legislation conflicts with a pre-existing ordinance as well as state law and that it intrudes on the

administrative authority of the village. We disagree and affirm the judgment and order.

BACKGROUND

¶2 Village of North Hudson planned a project pursuant to VILLAGE OF NORTH HUDSON, WIS., ORDINANCE § 94-196(e) (1990), which provides:

The Village shall install public sewer and water in any area of the village that is without such services at such time as the public roadway is reconstructed, but in no event, later than December 31, 2010.

The cost of the project was anticipated to be \$1.5 million to \$1.8 million. Lawrence Larsen is a resident of the village and is the elected coordinator of the Coalition for Responsible Spending in the village. Members of the coalition circulated a petition in June 2002 for direct legislation pursuant to WIS. STAT. § 9.20.¹ The group proposed an ordinance that would require the board to seek voter approval before making capital expenditures exceeding \$150,000.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

WISCONSIN STAT. § 9.20(1) provides:

A number of electors equal to at least 15% 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)

¶3 The board took no action regarding the petition, determining it was administrative in nature and directly or impliedly repealed existing ordinances in the village. Larsen consequently commenced this lawsuit, seeking mandamus relief ordering the board to place the proposed ordinance on the ballot.

¶4 Larsen filed a motion for summary judgment. After a hearing, the court granted Larsen's motion for summary judgment and ordered that the board place the proposed ordinance on the ballot. The board appeals, arguing the proposed ordinance is an inappropriate subject for direct legislation.

STANDARD OF REVIEW

¶5 When reviewing a summary judgment, we perform the same function as the trial court and our review is independent. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). On summary judgment, a court must view the facts in the light most favorable to the non-moving party. *State Bank of La Crosse v. Elsen*, 128 Wis. 2d 508, 511-12, 383 N.W.2d 916 (Ct. App. 1986).

DISCUSSION

¶6 The supreme court recently issued its decision in *Mount Horeb Cmty. Alert v. Village Bd.*, 2003 WI 100, 263 Wis. 2d 544, 665 N.W.2d 229. That case dealt with the same issue we face here—whether a similar proposed ordinance was an appropriate subject for direct legislation. There, the ordinance required a referendum on any construction project costing \$1 million or more. *Id.*, ¶2. The court analyzed four factors that must be present in order to require the village board to act under WIS. STAT. § 9.20(4). *Id.*, ¶4. The direct legislation (1) must be legislative in nature, (2) cannot repeal an existing ordinance,

(3) cannot exceed the powers of the municipal governing body, and (4) cannot modify statutorily prescribed procedures. *Id.* Here, the board argues the first, second, and fourth factors require that we reverse the summary judgment.

¶7 First, we must determine whether the proposed ordinance is legislative in nature. If it is administrative or executive in nature, it is inappropriate for direct legislation. *Id.*, ¶19. In *Mount Horeb*, the proposed ordinance called for a referendum for spending exceeding \$1 million. *Id.*, ¶2. The court concluded

the proposed ordinance is general in application (it applies to all new million dollar construction projects), sets forth a permanent rule until repealed, and creates new policy. It does not condition or direct the execution of existing law, but, rather, makes new law. Accordingly, the proposed ordinance is legislative rather than administrative in nature.

Id., ¶31 (citations omitted) (applying *Heider v. Wauwatosa*, 37 Wis. 2d 466, 155 N.W.2d 17 (1967) (discussing the guidelines for distinguishing between legislative and administrative actions)).

¶8 Here, the board argues the proposed ordinance intrudes on the village's administrative authority because it applies to expenditures of only \$150,000 rather than \$1 million. The board contends that "[w]hen the dollar amount specified in an ordinance becomes sufficiently small it will become applicable to the administrative activities of the municipality subject to the ordinance." However, the board has not shown what administrative functions would be affected by the proposed ordinance.

¶9 As with the ordinance in *Mount Horeb*, the proposed ordinance here applies generally to all expenditures greater than the specified dollar amount, here \$150,000. It also sets forth a permanent rule unless the ordinance is repealed, it

creates new policy, and it creates new law. Finally, as in *Mount Horeb*, “[t]he proposed ordinance ... does not restrict administrative decisionmaking in connection with municipal construction projects; rather, it requires a referendum prior to the commencement of municipally-financed construction projects expected to cost [\$150,000] or more.” See *id.*, ¶32. We therefore conclude that the proposed ordinance is legislative in nature.

¶10 Next, we look at whether the proposed ordinance repeals an existing ordinance. In *Mount Horeb*, the village “did not identify any existing ordinances that would be repealed by the proposed ordinance,” and therefore this factor was not implicated. Here, however, the board maintains the proposed ordinance conflicts with ordinance 94-196(e), which states:

The Village shall install public sewer and water in any area of the village that is without such services at such time as the public roadway is reconstructed, but in no event, later than December 31, 2010

The board argues that while the proposed ordinance does not expressly repeal the current ordinance, it is an implied repeal because the two ordinances are irreconcilable so that neither would be given full effect. Larsen, however, contends both ordinances “can easily remain on the books.”

¶11 The proposed ordinance is not aimed solely or even primarily at sewer and water projects, which ordinance 94-196(e) covers. Instead, it is generally aimed at all capital expenditures greater than \$150,000. The proposed ordinance would only come into conflict with the existing ordinance if voters reject a sewer and water project and then continued to reject it until 2010. Whether this will in fact occur is mere speculation. Thus, the proposed ordinance

neither directly nor impliedly repeals ordinance 94-196(e). It simply allows voters to have a say in the capital expenditures within the village.

¶12 Finally, we must determine whether the proposed ordinance modifies statutorily prescribed procedures. The board contends the ordinance is contrary to the state platting law, WIS. STAT. § 236.293,² which allows the village to enforce plat restrictions regarding installation of public improvements. The board notes a 1977 village resolution in which the board reserved to itself the exclusive right to construct utilities in the Plat of St. Croix Station. The board argues the proposed ordinance violates the statute because it would take away its authority to act under the resolution.

¶13 However, the proposed ordinance does not affect the village's statutorily-granted authority to enforce platting restrictions. The village still maintains the exclusive authority to install improvements, although it may be required to change its procedures and policies regarding capital expenditures if the village's citizens vote against a project. As with the proposal's potential conflict with ordinance 94-196(e), whether there will actually be any conflict is speculative.

² WISCONSIN STAT. § 236.293 states:

Any restriction placed on platted land by covenant, grant of easement or in any other manner, which was required by a public body or which names a public body or public utility as grantee, promisee or beneficiary, vests in the public body or public utility the right to enforce the restriction at law or in equity against anyone who has or acquires an interest in the land subject to the restriction. The restriction may be released or waived in writing by the public body or public utility having the right of enforcement.

¶14 The board also argues the trial court acted prematurely in granting summary judgment. However, this issue was not raised in the docketing statement. By our July 8, 2003, order we confined the issues on appeal to those identified in the docketing statement.

¶15 Accordingly, we conclude the proposed ordinance fully complies with WIS. STAT. § 9.20 and therefore is an appropriate subject for direct legislation under the statute.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

