

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 15, 2004

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. 03-2901
STATE OF WISCONSIN**

Cir. Ct. No. 03CV000488

**IN COURT OF APPEALS
DISTRICT II**

**JOHN HEYER AND SHIRLEY HEYER,

PLAINTIFFS-APPELLANTS,**

v.

**VILLAGE BOARD, VILLAGE OF WALWORTH, AND
TRUSTEES OF THE VILLAGE OF WALWORTH,

DEFENDANTS-RESPONDENTS.**

APPEAL from an order of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. John and Shirley Heyer appeal from the order of the circuit court that denied their request for a petition of mandamus. The Heyers argue that they are entitled to a writ of mandamus ordering the Village of Walworth to adopt direct legislation. Because we conclude that the Heyers are

attempting by direct legislation to repeal an existing resolution or ordinance, we affirm the order of the circuit court.

¶2 In October 2001, a fountain in a park in the Village of Walworth was destroyed by a drunken driver. In September 2002, the Village Board passed a resolution to rebuild the fountain and to construct a new park pavilion, if private funds could be raised. In May 2003, citizens submitted a petition for direct legislation under WIS. STAT. § 9.20 (2001-02).¹ The petition proposed that the Village Board adopt a resolution that a “similar type” of fountain be erected in the same place in the park, and that no other structures would be erected in the park unless approved by a referendum. The Village Board refused to act on the petition, finding that the resolution was administrative in character and that the Village Board had already passed a resolution about the reconstruction of the fountain and approving a pavilion in the park.

¶3 The Heyers, on behalf of the citizens who signed the petition, then brought a petition for a writ of mandamus in the circuit court to compel the Village Board to act on the original petition. The circuit court denied the petition, concluding that the subject matter of the proposed resolution was administrative in character, and therefore, not the proper subject of direct legislation. We affirm the decision of the circuit court, but for a different reason. *See Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (this court may affirm on grounds different than those relied on by the trial court).

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

¶4 “Mandamus is a discretionary writ, which lies only if no other remedy is adequate, grave or irreparable harm will otherwise result, the trial court’s duty is plain, and the court has violated the petitioner’s clear legal rights.” *State ex rel. Staples v. DHSS*, 130 Wis. 2d 285, 288-89, 387 N.W.2d 118 (Ct. App. 1986) (citations omitted). Mandamus is the proper remedy to compel a public officer to perform statutory duties. *State ex rel. S.M.O. v. Resheske*, 110 Wis. 2d 447, 449, 329 N.W.2d 275 (Ct. App. 1982). However, the petitioner must establish that the request for mandamus is based on a clear, specific legal right which is free from substantial doubt. *Eisenberg v. DILHR*, 59 Wis. 2d 98, 101, 207 N.W.2d 874 (1973).

¶5 Direct legislation is allowed under WIS. STAT. § 9.20. This statute permits a certain number of citizens to sign a petition requesting that the governing body adopt a proposed ordinance or resolution or refer the matter to a vote of the electors. The courts have recognized four exceptions to this rule. *See Mount Horeb Cmty. Alert v. Village Bd. of Mt. Horeb*, 2003 WI 100, ¶4, 263 Wis. 2d 544, 665 N.W.2d 229. The one exception relevant to this appeal is that the direct legislation cannot repeal an existing ordinance or resolution. *See id.*, ¶17; *Heider v. Common Council of City of Wauwatosa*, 37 Wis. 2d 466, 478, 155 N.W.2d 17 (1967).

¶6 The parties do not dispute that the Village Board passed a resolution directing that the fountain be reconstructed in the southwest corner of the park and that a pavilion be erected, when each could be paid for by private donations. The resolution proposed by the citizens requires that a fountain be erected in the center of the park within twelve months, and provides for a binding referendum to approve the construction of a pavilion. These provisions directly conflict with the provisions of the Village Board resolution. We conclude that the proposed

resolution is a direct attempt to repeal the resolution previously passed by the Village Board and, as such, is not a proper subject of the direct legislation statute. *See Heider*, 37 Wis. 2d at 479. Because we conclude that this was an attempt to repeal existing legislation, and therefore, not a proper subject of direct legislation, we need not reach the question of whether the action was administrative or legislative. We affirm the order of the circuit court.

By the Court.—Order affirmed.

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

