

GRANT F. LANGLEY
City Attorney

LINDA ULISS BURKE
VINCENT D. MOSCHELLA
DANIELLE M. BERGNER
MIRIAM R. HORWITZ
Deputy City Attorneys



Milwaukee City Hall Suite 800 • 200 East Wells Street • Milwaukee, Wisconsin 53202-3551
Telephone: 414.286.2601 • TDD: 414.286.2025 • Fax: 414.286.8550

THOMAS O. GARTNER
STUART S. MUKAMAL
THOMAS J. BEAMISH
MAURITA F. HOUREN
JOHN J. HEINEN
SUSAN E. LAPPEN
JAN A. SMOKOWICZ
PATRICIA A. FRICKER
HEIDI WICK SPOERL
KURT A. BEHLING
GREGG C. HAGOPIAN
ELLEN H. TANGEN
MELANIE RUTLEDGE
JAY A. UNORA
DONALD L. SCHRIEFER
MARYNELL REGAN
G. O'SULLIVAN-CROWLEY
KATHRYN Z. BLOCK
ADAM B. STEPHENS
KEVIN P. SULLIVAN
THOMAS D. MILLER
JARELY M. RUIZ
ROBIN A. PEDERSON
MARGARET C. DAUN
JEREMY R. MCKENZIE
MARY L. SCHANNING
PETER J. BLOCK
NICHOLAS P. DESIATO
JOANNA GIBELEV
JENNY YUAN
T.C. MAKAYA
KAIL J. DECKER
ALLISON N. FLANAGAN
LA KEISHA W. BUTLER
Assistant City Attorneys

January 28, 2015

James R. Owczarski
City Clerk
City Hall, Room 205

Re: Impact of Direct Legislation Petition on Common Council Files
141313, 141323, 141263, and 141264

Dear Mr. Owczarski:

On January 22, 2015, you requested a legal opinion regarding the impact of certification of a direct legislation petition on the above-referenced Common Council files, all relating to the Milwaukee Streetcar. On January 21, 2015, the four files were adopted and then entered onto the journal. You indicate that by Common Council rule, the files will return to the Common Council as unfinished business at the Council's regular meeting of February 10, 2015.

You provided an internet link to a petition for direct legislation circulated by CRG Network, pursuant to Wisconsin's direct legislation statute, Wis. Stat. § 9.20. The petition requests that the following proposed ordinance, without alteration, either be adopted by the Common Council or referred to a vote of the electors:

Prior to the start of any physical construction of any municipally financed (in whole or in part) rail transit system requiring a capital expenditure of \$20 million or more in municipal funds or funds guaranteed by or supported by an express or implicit promise of the City, whether or not such promise is legally enforceable, the Common Council shall submit to the electorate a binding referendum for approval of the construction of the system. Failure of the referendum shall preclude the City from proceeding with or otherwise permitting construction of such system or any part thereof using any City funds or revenues. The wording of the referendum shall provide the specific purpose, location, and the total estimated construction costs of the system, including an estimate of the costs to be funded directly or indirectly by the City.



Nothing in this section shall be construed to preclude the City from exercising its role in the engineering, planning or design of an urban rail transit system.

You asked the following question: If the petition is “certified prior to the Common Council meeting date of February 10, 2015, may the Common Council proceed in its deliberations – and potentially adopt – the four resolutions cited above? If the response is different in the case of each of the resolutions, please also so advise.”

Nothing in the direct legislation statute, § 9.20, withdraws from the Council the power to legislate. In our opinion, certification of the petition, assuming it is the proper subject of direct legislation¹, does not prohibit the Council from proceeding to deliberate and adopt the above-referenced resolutions. Of course, the resolutions could be effectively repealed if the proposed ordinance is held to be a proper subject of direct legislation and is ultimately adopted by the electorate.

Regardless of the Common Council’s decision on the pending resolutions, if the petition is certified, the City Clerk would still be required to present the proposed ordinance to the Common Council. Upon final certification of the petition by the City Clerk, the Common Council “shall, without alteration, either pass the ordinance or resolution within 30 days following the date of the clerk’s final certificate or submit it to the electors at the next spring or general election...” Wis. Stat. § 9.20(4).² The Common Council’s obligation to pass the ordinance, without alteration, or submit it to the electors is a mandatory, ministerial, and nondiscretionary duty enforceable in a mandamus action and subject only to four narrow limitations. *Althouse*, 79 Wis. 2d 97, 107.

The Wisconsin Supreme Court stated the limitations on direct legislation as follows:

Direct legislation initiated pursuant to Wis. Stat. § 9.20 is subject to four limitations that we have held are implicit in the statute...An ordinance initiated under Wis. Stat. § 9.20: 1) must be legislative as opposed to administrative or executive in nature; 2) cannot repeal an existing ordinance [or resolution]; 3) may not exceed the legislative powers conferred upon the governing municipal body; and 4) may not modify statutorily prescribed procedures or standards...

¹ We refer to a “proper subject of direct legislation” as legislation that does not fall within any of the four narrow limitations on direct legislation identified in this opinion.

² If the election is six weeks or more after the date of the council’s action on the petition or the expiration of the 30-day period, whichever occurs first, then the proposed ordinance shall be voted on at the next spring or general election. § 9.20(4). If there are six weeks or less before the election, the ordinance or resolution shall be voted on at the next election thereafter. *Id.* The council may, by a three-fourths vote of the members-elect, order a special election for the purpose of voting on the ordinance. *Id.*

Mount Horeb Community Alert v. Village Board of Mt. Horeb, 2003 WI 100, ¶ 17, 263 Wis. 2d 544, 665 N.W.2d 229 (citations omitted). In *Heider v. City of Wauwatosa*, the court extended the second limitation to hold that an existing ordinance or resolution cannot be substantially amended by direct legislation. 37 Wis. 2d 466, 480, 155 N.W.2d 17 (1967) (upholding denial of a request for a writ of mandamus to compel the common council to submit a proposed resolution to the electorate because the proposed resolution was “an attempt to directly amend the previous resolution, and [was] not ‘affirmative legislation upon a new subject.’”).


We note that there is a valid legal argument that the proposed ordinance constitutes a substantial amendment of Common Council Resolutions 110372 and 110324, previously adopted by the Common Council in 2011, and therefore may not be a proper subject of direct legislation. We have not been asked to opine on this issue, which would only arise if a petition is certified as meeting all statutory requirements.

If you have any further questions, please contact the undersigned.

Very truly yours,



GRANT F. LANGLEY
City Attorney



THOMAS D. MILLER
Assistant City Attorney

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