Office of the City Attorney

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APR 27 2005

April 27, 2005

Kevin Kennedy, Executive Director
Wisconsin State Elections Board
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PO Box 2973
Madison WI 53701-2973

George Dunst, Legal Counsel
Wisconsin State Elections Board
17 W. Main Street, Ste. 310
PO Box 2973
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RE: Public Financing of Local Elections

Dear Messrs. Kennedy and Dunst:

I have been asked to provide legal advice to the City of Madison on whether the City could establish public financing of aldermanic elections. I recall a conversation with Mr. Dunst some time ago in which he expressed reservations about a local governmental body's authority to do so.

Although the exact plan to be enacted is not yet clear, the basic element would be to provide some public funds which could be used by the candidates for alder in each district in the City. By accepting the public financing, the candidates would agree to limit their expenditures to an amount established by ordinance.

My review of Chapter 11 of the Wisconsin Statutes does not disclose any express prohibition on local public financing of local campaigns. Indeed, I read sec. 11.50 of the Statutes as demonstrating a state policy that public financing of campaigns is in the public interest under certain circumstances.

However, I did have some concern about the application of sec. 11.38, Wis. Stats. Although I am not certain that the City of Madison as a municipal corporation would fall within the definition of "domestic corporation" under that statute, there is at least an arguable position that sec. 11.38 would bar the City itself from public financing. The City might be able to avoid the strictures of sec. 11.38 pursuant to its home rule powers.

I presume that, under any circumstance, the City could establish a PAC or conduit or other recognized method to assist in financing of local aldermanic races.

I am writing to request that the State Elections Board provide me with your analysis and opinion on the question of local public financing of local aldermanic races. I would appreciate it if you could address some of the issues I have outlined in this letter, and any other issues which you have identified in your consideration of this.

I look forward to your response, and would be happy to answer any questions that you might have.

Very truly yours,

Michael P. May
City Attorney

MPM:ph

cc: Mayor Dave Cieslewicz

State of Wisconsin \ Elections Board

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June 26, 2005

Michael P. May, City Attorney
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Madison, Wisconsin 53703-3345

Re: Public Financing of City (Aldermanic) Elections

Dear Mr. May:

This letter is in response to your inquiry that our office received on April 27, 2005, and that is excerpted or summarized below, to wit:

I have been asked to provide legal advice to the City of Madison on whether the City could establish public financing of aldermanic elections. I recall a conversation with Mr. Dunst some time ago in which he expressed reservations about a local governmental body's authority to do so.

Although the exact plan to be enacted is not yet clear, the basic element would be to provide some public funds which could be used by the candidates for alder in each district in the City. By accepting the public financing, the candidates would agree to limit their expenditures to an amount established by ordinance.

My review of Chapter 11 of the Wisconsin Statutes does not disclose any express prohibition on local public financing of local campaigns. Indeed, I read sec. 11.50 of the Statutes as demonstrating a state policy that public financing of campaigns is in the public interest under certain circumstances.

However, I did have some concern about the application of sec. 11.38, Wis. Stats. Although I am not certain that the City of Madison as a municipal corporation would fall within the definition of "domestic corporation" under that statute, there is at least an arguable position that sec. 11.38 would bar the City itself from public financing. The City might be able to avoid the strictures of sec. 11.38 pursuant to its home rule powers.

I presume that, under any circumstance, the City could establish a PAC or conduit or other recognized method to assist in financing of local aldermanic races.

I am writing to request that the State Elections board provide me with your analysis and opinion on the question of local public financing of local aldermanic races. I would appreciate it if you could address some of the issues I have outlined in this letter, and any other issues which you have identified in your consideration of this.

At the present time, Wisconsin does not have a statute providing for the public financing of any local election or office, (whether city, town, village office or other elective office). Wisconsin does have a statute – s.11.50, Stats. – that provides for public financing of various state offices and defines the candidates eligible for public financing as follows:

> ***11.50 Wisconsin election campaign fund. (1) Definitions.*** *For the purposes of this section:*
> *(a) "Eligible candidate" means:*
>
> *1. With respect to a spring or general election, any individual who is certified under s. 7.08 (2) (a) as a candidate in the spring election for justice or state superintendent, or an individual who receives at least 6% of the vote cast for all candidates on all ballots for any state office, except district attorney, for which the individual is a candidate at the September primary and who is certified under s. 7.08 (2) (a) as a candidate for that office in the general election, or an individual who has been lawfully appointed and certified to replace either such individual on the ballot at the spring or general election, and who has qualified for a grant under sub. (2).*

Under the statute, candidates eligible for public financing under Wisconsin's law do not include candidates for city office or for any other local office. As you have pointed out, however, the statute does not prohibit a local governing body from adopting a system of public financing of candidates for local office.

Although the legislature has not provided for public financing of local campaigns, the legislature has provided, in Chapters 5 to 12 of the Wisconsin Statutes, a system or body of laws that govern elections and campaign finance that apply not only to the election of state offices, but to the election of all local offices as well. Because the legislature has enacted laws in chs. 5 to 12 for election of local offices, including specific laws in ch.11, Stats., applicable to campaign finance in local elections; and has specifically provided for public financing of campaigns for various state offices, but has omitted any provision for public finance of local offices, an inference may be drawn that the legislature's omission of local offices in s.11.50, Stats., was intended to exclude local offices from any public financing of the campaigns for those offices.

An argument counter to the preceding inference has also been made that that, because public financing in ch.11, Stats., is wholly predicated on the Wisconsin Election Campaign Fund, the legislature's exclusion of public financing of local campaigns only applies to financing by, or from, the Wisconsin Election Campaign Fund. Thus, the legislature's omission of public financing of local campaigns only means that local governments may not finance campaigns for local office with money from the WECF, but is not an expression of legislative intent with respect to the authority of local government to establish a local system of public financing from the municipality's own local election campaign fund.

Why the legislature was silent with respect to the authority of local government to establish a local system of public finance predicated on a local election campaign fund and silent with respect to the method by which local government may establish such a system, given the legislature's specific provisions with respect to other election and campaign finance issues, would be an unanswered question. One arguable answer to that question might be that, in light of the "Home Rule" provisions of ch.66, Stats., the legislature had already spoken with respect to local authority over "the local affairs and government of the city or village" in the absence of express statutory pre-emption. The provisions of chapter 66, Stats., that may apply are:

> ***66.0101 Home rule; manner of exercise.*** *(1) Under article XI, section 3, of the constitution, the method of determination of the local affairs and government of cities and villages shall be as prescribed in this section.*
>
> *(4) A city or village may elect under this section that any law relating to the local affairs and government of the city or village other than those enactments of the legislature of statewide concern as shall with uniformity affect every city or every village shall not apply to the city or village, and when the election takes effect, the law ceases to be in effect in the city or village.*

The corollary to this argument is the contention that the legislature, by providing a system of public financing of campaigns for state offices, has approved the concept of public financing of campaigns for elective office which, when combined with the absence of a prohibition of public financing of local campaigns, could be construed as tacit approval of a system of public financing of local campaigns for elective office **if** that financing is not dependent upon the WECF.

Deriving the foregoing conclusion from the legislature's silence with respect to public finance of local campaigns is, arguably, more consistent with the "Home Rule" provisions of ch. 66, Stats., than is the prohibition on local public finance derived from the same legislative silence. In other words, if the legislature had wanted to proscribe public financing of local campaigns, it would have said so – presumably in the same section (11.50, Stats.) in which it established public financing for certain state campaigns.

Even if a local governing body were to attempt to adopt a system of public financing of campaigns for local office, however, that system would be subject to all the campaign finance provisions of ch. 11 of the Wisconsin Statutes because all financing of candidates and campaigns for public office in Wisconsin is subject to ch. 11, Stats. The legislature has so declared in its Declaration of policy, in s. 11.001, Stats., to wit:

> ***11.001 Declaration of policy.***
>
> *(1) The legislature finds and declares that our democratic system of government can be maintained only if the electorate is informed. It further finds that excessive spending on campaigns for public office jeopardizes the integrity of elections. It is desirable to encourage the broadest possible participation in financing campaigns by all citizens of the state, and to enable candidates to have an equal opportunity to present their programs to the voters. One of the most important sources of information to the voters is available through the campaign finance reporting system. Campaign reports provide information which aids the public in fully understanding the public positions taken by a candidate or political organization. When the true source of support or extent of support is not fully disclosed, or when a candidate becomes overly dependent upon large private contributors, the democratic process is subjected to a potential corrupting influence.* ***The legislature therefore finds that the state has a compelling interest in designing a system for fully disclosing contributions and disbursements made on behalf of every candidate for public office, and in placing reasonable limitations on such activities.*** *Such a system must make readily available to the voters complete information as to who is supporting or opposing which candidate or cause and to what extent, whether directly or indirectly. This chapter is intended to serve the* ***public purpose of stimulating vigorous campaigns on a fair and equal basis and to provide for a better informed electorate.*** *(Emphasis supplied)*

That means that – absent amending legislation - the municipality would have to record and, probably report, every contributor and every contribution to the public fund, as well as otherwise comply with campaign finance law. Furthermore, under Wisconsin campaign finance law, the only mechanism for consummating a municipal finance of local campaigns scheme would be to establish a municipally sponsored PAC. In that circumstance, individuals and other PAC's could contribute money to the muni-PAC which would use the money to support participating candidates who, in exchange for that funding, would, presumably, voluntarily limit their spending, self-contributions and contributions from other PAC's.

Besides the issues of legislative preemption and campaign finance regulation, Wisconsin also has a body of law, under what is called the "Public Purpose Doctrine," that may preclude a municipal governing body from authorizing the use of public money to fund campaigns for local office. The Public Purpose Doctrine is a principle developed by the courts – but now accorded constitutional weight – that holds that public appropriations or funds may not be expended for other than a public purpose:

> *Although the public purpose doctrine is not an express provision of the Wisconsin Constitution, this court has long held that public expenditures may be made only for public purposes. Reuter, 44 Wis.2d at 211. In Reuter, we stated "[w]e need not go into the origin or the validity of the doctrine which commands that public funds can only be used for public purposes. The doctrine is beyond contention." Id*
>
> *(Davis v. Grover, 166 Wis.2d 501 at p.540)*

What constitutes a public purpose has been the subject of a number of court decisions,[1] (a list of many of which is available upon request). Using general purpose revenue (as opposed to the funds of a privately-funded, publicly-sponsored PAC), to support a candidate's private campaign for elective office has to, at least, raise the specter of the Public Purpose Doctrine.

Generally, the thrust (or trend, at least) of the Public Purpose decisions has been to concede broad latitude, (in finding a public purpose present), to the governing body that authorized the spending. In two relatively recent Wisconsin Supreme Court cases, (*Libertarian Party v. State of Wisconsin*, 199 Wis.2d 790, 811 (1995), involving a challenge to the legislation creating a stadium taxing authority, and *Davis v. Grover*, 166 Wis.2d 501, 540 (1992), involving a challenge to the use of public funds to send children to private schools), the Wisconsin Supreme Court, in upholding the public purpose of the legislation, said the following:

> *DAVIS p.541*
>
> *In considering questions of "public purpose," a legislative determination of public purpose should be given great weight because "'the hierarchy of community values is best determined by the will of the electorate' and that 'legislative decisions are more representative of popular opinion because individuals have greater access to their legislative representatives.'" State ex rel. Bowman v. Barczak, 34 Wis.2d 57, 65 (1967)..... Without clear evidence of unconstitutionality, "the court cannot further weigh the adequacy of the need or the wisdom of the method" chosen by the legislature to satisfy the public purpose. State ex rel. Warren v. Nusbaum, 59 wis.2d 391, 414(1973)*

[1] The Board has consistently refrained from expressing any opinion on the subject of the application of the public purpose doctrine to the use of public money in connection with referendum issues, believing that to be a citizen/taxpayer versus government matter, not an Elections Board matter. Whether the Board would care to weigh in on the application of the public purpose doctrine to public financing of campaigns for local office would have to be determined on an ad hoc basis.

LIBERTARIAN PARTY

Although this court is not bound by the declaration of public purpose contained in any legislation, what constitutes a public purpose is, in the first instance, a question for the legislature to determine and its opinion must be given great weight by this court. (p.810)

Therefore, legislative determinations of public purpose should be overruled only if it can be established that the particular expenditure is "manifestly arbitrary or unreasonable." State ex rel. Hammermill Paper Co. v. LaPlante, 58 Wis.2d 32 (1973) The Libertarian Party's assertion that the benefit to the public is only incidental in comparison to the benefit to the Milwaukee Brewers does not satisfy this burden. While some private benefit will result, the project is sufficiently public in nature to withstand constitutional challenge. Therefore, we conclude that the Stadium Act authorizes constitutionally permissible expenditures for a public purpose. (at p.812)

The application of the Public Purpose Doctrine to public finance of campaigns for elective office has never been tested in Wisconsin. Considering that the Wisconsin legislature has already authorized the use of general purpose revenue for publicly financed campaigns through the WECF and considering that that use has been ongoing for over 30 years without challenge under the Public Purpose Doctrine, a challenge to a local public finance scheme might escape challenge also. The governing body's determination that financing local campaigns constitutes a public purpose – much like the legislature's pronouncement in s.11.001(1), Stats., would have to be "given great weight by the court." To ensure that this problem is avoided, a local system might have to rely on voluntary contributions from the public rather than on the public purse, itself.

I hope that this letter has been responsive to your questions and concerns, but if it hasn't, or if I can be of any other assistance, please give me a call.

This is an informal opinion of the staff of the State Elections Board and not a formal opinion, issued pursuant to s.5.05(6), Stats., of the Elections Board, itself.

STATE ELECTIONS BOARD

George A. Dunst
Legal Counsel

WISCONSIN - PUBLIC PURPOSE DOCTRINE

1. STATE ex rel. THOMPSON v. GIESSEL (1953) 265 WIS 207

2. STATE ex rel. BOWMAN v. BARCZAK (1967) 34 WIS 2d 57

3. 1969 OPINIONS OF THE ATTORNEY GENERAL, P 120 (SEPTEMBER 15, 1969)

4. STATE ex rel. SINGER v. BOOS (1969) 44 WIS 2d 374

5. STATE ex rel. WARREN v. REUTER (1969) 44 WIS. 2d 201

6. HOPPER v. CITY OF MADISON (1977) 79 WIS. 2d 120

7. STATE EX REL. WISCONSIN DEVELOPMENT AUTHORITY V. DAMMEN 228 WIS 2D 147 (1938) PP 184-186 211-213

8. 68 ATTY. GEN. 167

9. RATH V.TWO RIVERS COMMUNITY HOSP. (1991) 160 Wis 2d 853

10. DAVIS v. GROVER (1992) 166 WIS. 2d 501

11. LIBERTARIAN PARTY V. STATE OF WISCONSIN (1996) 199 Wis 2d 790

12. AMERICAN JURISPRUDENCE: PUBLIC FUNDS pp. 757-758

13. 1957 WIS. LAW REVIEW P 44 MILLS: PUBLIC PURPOSE DOCTRINE IN WISC