

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

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MEMORANDUM

TO: Task Force on the Structure of City Government

FROM: Michael P. May, City Attorney
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RE: Becoming a First Class City in Wisconsin

This memorandum is a report on what it might mean for Madison to become a first class city in Wisconsin.

Before reading this memo, you should first read the attached descriptions that come from the League of Wisconsin Municipalities (LWM). These short descriptions show the classification of cities under Wisconsin law, outline the three steps that must be taken to alter a city classification, and highlight a few of the differences in government structure between Wisconsin's only first class city, Milwaukee, and cities of the second, third and fourth class.

In addition to this basic information, it is also important to understand that the general scheme of classification of cities in Wisconsin is only valid if the classes remain open to additions. Thus, the first class city classification in Wisconsin cannot be restricted only to Milwaukee, despite how the legislature and courts may refer to it from time to time. *White Const. Co. v. City of Beloit*, 189 Wis. 5, 7 (1926).

To become a first class city, Madison would need to change its ordinances to comply with state laws regarding the governance of first class cities.¹ By our quick estimate, over 300 different laws apply or may apply to first class cities. Thus, amending city ordinances to comply with the mandatory laws and determining whether to adopt the optional laws would take significant time and effort. Furthermore, as the city went through all those changes, almost any item could become an insurmountable matter, killing the entire process. Finally, since no city has ever gone from second class status to first class status, the transition process is unknown.

As the City contemplated changes in its ordinances to comply with state laws, we would realize that many of these state laws were enacted with only Milwaukee in mind and, therefore, do not fit Madison. So, in addition to amending its ordinances to match state law, Madison may also need to approach the Legislature about changing certain state

¹ Madison's population is already sufficient for it to become a first class city. Thus, the biggest obstacle to becoming a first class city would be for Madison to change its ordinances to comply with state laws applicable to first class cities.

laws in order to accommodate Madison's transition to a first class city. This could prove time consuming and difficult, especially with the current Legislature.

Having highlighted the key logistical steps to be becoming a first class city, we also wanted to highlight a few of the state laws pertaining to first class cities that are important to examine as we consider what it would mean to be a first class city:

1. As a general matter, first class cities are not included in the Wisconsin Retirement System (WRS). Sec. 40.21(4), 40.22(2)(f), 62.622, Wis. Stats. All Madison employees are in the WRS.
2. Unlike all other cities, a first class city retains all the parts of its special charter existing before 1923, and does not fully fall under the general charter law of chapter 62. We do not know how or if this would apply to a city transitioning from second class to first class. Would Madison's old charter, rescinded by the general charter law, spring alive if it becomes a first class city? If sec. 62.02, Stats., is to be believed ("All special charters for cities of the 2nd, 3rd and 4th classes are hereby repealed ..."), Madison's old charter would not be revived.
3. The rules for governing police departments and the powers of the Police and Fire Commission (PFC) are very different in a first class city. In a 1st class city, the PFC sets policy for the department. Police and Fire chiefs are appointed for a 10-year term; in other cities, the chiefs serve unless removed for cause. In a first class city, an officer suspended or sought to be discharged by the chief is not paid before review of that discipline by the PFC. The officer, if reinstated, gets back pay. In Madison and other cities, the officer is paid until the PFC acts. Sec 62.50, Stats.
4. In Madison, high-level employee-managers are appointed to 5-year terms. In a first class city, those officials serve at the pleasure of the Mayor. Sec. 62.51, Stats.
5. There are very different budget procedures, and the Mayor has a line-item veto. Sec. 65.05(6), Stats.
6. There is an entire chapter devoted to the school system in a first class city, chapter 119, Stats. The rules for operation are very different. The school district is coterminous with the city's boundaries, meaning that in most annexations, students move to the city school system. While the district has its own board and authority, it is closely entwined with the first class city. For example, the city attorney provides all legal services to the school district. While sec. 119.06, Stats., provides some guidance on transition procedures for a school district, it does not address all the details of a school district changing as the city transitions to first class city.
7. First class cities are subject to the Oak Creek law, sec. 66.0215, Stats. For the most part, any township contiguous to the city with a population of 5,000 or more

may become a village or city, ending any chances for annexation by the first class city.

Obviously, these are just 7 of the over 300 laws that might apply to first class cities that Madison would need to consider in making a transition to a first class city. Others include different procedures for handling elections, filling vacancies in elected offices, exercising eminent domain, creating and enforcing civil service rules, and operating a community development authority. The City would also need to consider how a transition to first class city status might impact its constitutional home rule authority. The classification of cities allows the Legislature to treat different classes of cities differently as it relates to the home rule amendment: "the legislature can thus make effective a law touching on a matter of state-wide concern in one city and not in another, provided that the classification is proper." *City of West Allis v. County of Milwaukee*, 39 Wis.2d 356, 365-366 (1968).

Conclusion

Transitioning to a first class city would take considerable time and effort. Policymakers must carefully analyze whether the potential benefits outweigh the costs, the efforts in transition, and the uncertainty of how the laws will apply. Becoming a first class city would result in a very different form of government as it relates to both structure and operation. We recommend that the Task Force include in its final report a recommendation as to whether Madison should enter into the long and arduous task of examining transition to a first class city, or leave that question and task for the future.

Classes of Cities

Wisconsin law divides cities into 4 classes for purposes relating to governmental administration and the exercise of corporate power. The division is based on population as determined by the last federal decennial census or a special interim census. Section 62.05(l), Stats., provides that the 4 classes of cities are as follows:

- Cities of 150,000 population and over constitute cities of the first class.
- Cities of 39,000 and less than 150,000 population constitute cities of the second class.
- Cities of 10,000 and less than 39,000 population constitute cities of the third class.
- Cities of less than 10,000 population constitute cities of the fourth class.

Altering City Classifications

A city changes from 1 class of city to another only when all of the following conditions are met:

- A federal census shows that the city's population has reached the required population
- Provisions for any necessary changes in government have been duly made
- A proclamation by the mayor (manager), declaring the change, has been published under ch. 985. Sec. 62.05(2), Stats

The city of Milwaukee is the only first class city in Wisconsin. There are 16 cities of the second class, 30 cities of the third class and 143 cities of the fourth class.

Taking Steps Toward Reclassification

There are cities, such as Madison, whose populations would permit their inclusion in a higher or lower classification but which have not taken the 2 discretionary steps necessary to alter their official classification. Indeed, sec. 9901(15), Stats., expressly provides that "[i]f a statute refers to a class of city specified under s. 62.05(1), such reference does not include any city with a population which makes the city eligible to be in that class unless the city has taken the actions necessary to pass into the class under s. 62.05(2)."

Section 9901(15), Stats., was enacted in response to *City of Madison v. Town of Fitchburg*, 112 Wis.2d 224, 332 N.W.2d 782 (1982), in which the court treated Madison as a first class city even though it had not taken the steps to change its classification.

Distinctions Among Classes of Cities

For the most part, few differences exist between the structures of government in the first 3 classes of cities. Moreover, since all Wisconsin cities have home rule powers, both constitutional and statutory, the basic governmental powers of all classes of cities are essentially the same.

Structure & Authority

The greatest discrepancies in structure and authority exist between first class cities and the other classes of cities. In 1921, the legislature repealed all special city charters except the City of Milwaukee's and provided that cities would subsequently operate under ch. 62 of the Wisconsin statutes. The City of Milwaukee, at its discretion, was authorized to adopt the provisions of ch. 62, Stats., by simple ordinance. However, the legislature did not refer to the City of Milwaukee by name but rather as a "city of the first class."

Over the years, special grants of authority and other provisions relating to cities of the first class have been adopted with only the City of Milwaukee in mind. These laws include ch. 119, Stats., relating to the "Milwaukee school system;" sec. 62.50, Stats., governing police and fire departments in first class cities; sec. 62.73, Stats., relating to discontinuance of streets in first class cities; secs. 74.81, 74.83 and 74.87, Stats., authorizing first class cities to sell land for nonpayment of taxes; and secs. 65.01 to 65.20, Stats., relating to municipal budget systems in first class cities.

Budget Systems

Part of the municipal budget system applicable to first class cities may be adopted by cities of the second, third and fourth class. Specifically, the common council of any second, third, and fourth class city may by ordinance adopted by three-fourths of all its members, accept the provisions of secs. 65.02, 65.03 and 65.04, Stats., relating to the creation of a board of estimates. Sec. 65.01, Stats. All cities besides the City of Milwaukee that have not adopted secs. 65.02, 65.03 and 65.04, Stats., are governed by sec. 65.90, Stats., when developing or modifying an annual budget.

Zoning Laws

Fourth class cities have extraterritorial zoning and plat approval jurisdiction for only 1.5 miles beyond their corporate boundaries as contrasted with 3 miles for other classes of cities. Secs. 62.23(7a)(a) and 236.02 (s), Stats. Certain regulations with respect to firefighters also differ for fourth class cities. Secs. 62.13(IIa) and 213.13, Stats.

Library Boards

Library boards in fourth class cities consist of 7 members while library boards in cities of the second or third class consist of 9 members. Sec. 43.54(1)(a), Stats. Library boards in first class cities consist of 12 members as specified in sec. 43.54(1)(am), Stats.

Shared Revenue

With respect to shared revenue and other financial provisions of the Wisconsin statutes, distinctions are based on population rather than class of city. In recent years, little use has been made of class distinctions among cities except with respect to Milwaukee, the state's only first class city. Therefore, the act of changing from 1 class of city to another, except for the change from a second to a first class city, will have a relatively minor effect on the structure or powers of city government.