

OFFICE OF CITY ATTORNEY - MEMORANDUM

To: Task Force on Government Structure Implementation Group
From: John W. Strange, Assistant City Attorney
Re: Use of City Funds for Advisory Referendum
Date: February 17, 2021

ISSUE

Whether the City may use public resources to educate the public about the spring 2021 advisory referendum questions related to the Madison Common Council.

BRIEF ANSWER

The city may use public resources to educate the electorate about the referendum questions, as long as it does so in a manner that does not advocate for a particular result. In addition, alderpersons may use city resources to state their position on the questions as long as they do not then use city resources to actively campaign for that position. Finally, alderpersons may use personal or campaign funds and/or non-city resources to actively campaign for a referendum position.

BACKGROUND

The Common Council recently enacted Resolution File No. RES-21-00025 and Resolution File No. RES-21-00044 authorizing the City to place four advisory referendum questions related to the structure of Madison's Common Council on the spring 2021 Election ballot. The referendum questions ask about alderperson pay, size of the Common Council, length of alderperson terms, and whether alderpersons should be subject to term limits.

These questions are rooted in the Common Council resolution that created the eleven-member Task Force on Government Structure ("TFOGS"), which asked whether changes to the structure of Madison's government, including to the Common Council, could improve representation and engagement for all Madison residents, including specifically residents of color and those living with low incomes.

The TFOGS Final Report recommended transitioning to a full-time 10-member Common Council with members being paid approximately \$67,000 per year. The Final Report also recommended transitioning to four-year alderperson terms with alderpersons being prohibited from serving more than 12 consecutive years. These recommendations were made after nearly two years of discussion and debate. The TFOGS acknowledged that these important questions are complex. For example, not all members supported moving to a full-time Common Council. Further, not all those who supported moving to a full-time Common Council supported reducing the size of the Common Council.

The purpose of this advisory referendum is to gather information directly from the electorate as to its interest in pursuing changes such as those recommended by the TFOGS. As noted in previous memorandums, the implementation of these changes would require further action by the Common Council or by the electorate in a future binding referendum or the Common Council.

DISCUSSION

The public purpose doctrine is a long-recognized constitutional doctrine in Wisconsin prohibiting governments from using public appropriations for a private purpose. Wisconsin courts have used this doctrine to review a wide array of public expenditures, from rural counties contracting for private snow removal services to large cities funding professional sports stadiums. Under current Supreme Court precedent, courts generally will not interfere with an expenditure unless it appears that a law or appropriation was obviously designed to benefit private persons, with only an indirect or remote public benefit.¹ If there is any conceivable public purpose that would justify the expenditure, the constitutional test is satisfied.²

As it relates to municipal political activity in referendum elections, some have argued that these constitutional concerns require government neutrality when the government places a question on the ballot:

“When a municipal legislature allocates public resources to advocate a particular referendum result, the policies supporting government neutrality apply with special force. In referenda and initiatives, the statewide electorate assumes a legislative function by voting on measures which either the state legislature or members of the electorate have placed on the ballot. Either the state legislature or the voters, but not city governments, are thus empowered by state constitutions to decide whether or not to submit a referendum proposal to the voters. Cities are usually free to lobby before the legislature to prevent a measure from being put before the statewide electorate in referendum form. But once the state legislature decides to entrust the final legislative decision to the popular electorate, it explicitly removes the decision from the hands of state or municipal officeholders. Permitting those officials to use public funds to attempt to influence the outcome of that decision would partially return them to a role from which they have been excluded by constitutional design. Municipal governments should thus refrain from establishing an official

¹ *Town of Beloit*, 259 Wis.2d 37, ¶ 27, 657 N.W.2d 344.

² *Id.* (citing *Bishop v. City of Burlington*, 2001 WI App 154, ¶ 11, 246 Wis.2d 879, 631 N.W.2d 656).

political viewpoint during the time that the popular electorate, rather than its elected representatives, makes law.”³

While this comment relates to statewide referendums, we believe the same concept generally applies to local referendums and, particularly, local referendums initiated by a local legislature.

Two provisions of Madison’s Ethics Code support this interpretation and provide some further guideposts for what the city can and cannot do when it comes to using public resources in a referendum election. M.G.O. Sec. 3.35(5)(b)2. provides:

“The use of City equipment and property including City-owned vehicles, cameras, projectors, audio systems, copy machines, fax machines, computers, telephones, software and uniforms is prohibited for both partisan and non-partisan political activity. Use of City property which is available and accessible to the general public is not considered a violation of this ordinance, nor is it a violation for an incumbent to use photographs existing before the first date that nomination papers may be circulated and taken during the regular course of the incumbent's duties. For the purposes of this paragraph (b)2., political activity has the meaning found in Section 3.35(8), MGO.”

M.G.O. Sec. 3.35(8)(a) then defines political activity:

No employee while on duty or on official City business shall, for the apparent purpose of influencing the outcome of any referendum, or improving the chance of election of a person seeking elective office:

1. Wear or display any campaign material.
2. Distribute any campaign literature.
3. Solicit, receive or give subscriptions, contributions or service for any candidate or referendum position.
4. Actively campaign for any candidate or any referendum position.

Thus, both the public purpose doctrine and Madison general ordinance set the general rule that cities may not use public resources to advocate for a particular

³ See *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 Harv. L. Rev. 535, 556 (1980).

referendum result. The city must, as much as practicable, remain neutral.⁴ However, this does not prevent the city from using public resources to neutrally educate the public about an upcoming referendum. Practically speaking, we believe this translates into the following guideposts for the City and alders for the coming Spring advisory referendum:

- The City may use public funds, resources, and materials for the purpose of objectively educating the electorate on the upcoming election, to include:
 - Placing Facts and Information about the Referendum Issues on the City Website;
 - Distributing paper copies of facts and information related to the referendum;
 - Answering questions about the referendum questions, such as explaining why the questions are being, describing the difference between an advisory and binding referendum, and referencing previous city work that has been done to investigate the issues;
 - Providing background on the Task Force on Government Structure and linking or providing reference to its Final Report and the materials it considered; and
 - Using city staff, such as public information officers, to push educational materials out on social media platforms.
- Alders may use city resources, such as their Alder blogs, to state their position on the referendum, as long as they do not then proceed to use city resources to actively campaign for a particular result.
- Alders may use their own personal or campaign funds or resources to advocate for a particular referendum result.

This is by no means an exhaustive list of activities the City could undertake to inform or educate the public about the upcoming referendum. Regardless of activity, the key principle is that when using city resources the information provided must be presented as neutrally as possible and neither the city nor the alders should use city resources to actively campaign for a particular referendum result. Crossing that line could potentially result in either a violation of the public purpose doctrine or the Madison Code of Ethics. As noted above, nothing prevents an alder from using their own personal or campaign funds from advocating for a particular position.

⁴ It is worth a reminder here that one of the options for initiating a binding referendum is for the Common Council to first pass a charter ordinance and then subject that ordinance for approval by referendum as required by state statute. This would be one way for the City to take a “position” on a referendum question without using city resources to campaign for a result – sending a charter ordinance to the voters that has been approved by the Council would send the signal that the Council is in favor of the proposed change. I explained this option in an earlier memo to the Implementation Group about the difference between initiating a referendum by charter ordinance and resolution.