

**REUTER, WHITISH & EVANS, S.C.**

Attorneys at Law  
4600 American Parkway, Suite 104  
Madison, Wisconsin 53718

ALLEN D. REUTER  
BARBARA O. WHITISH (1953-2013)  
DANIEL J. EVANS  
DAVID D. RELLES (Of Counsel)  
KEVIN F. MILLIKEN (Of Counsel)

TELEPHONE  
(608) 250-9053

FACSIMILE  
(608) 250-9054

**MEMORANDUM**

To: Village of DeForest Board  
From: Assistant Village Attorney Daniel J. Evans  
Date: January 5, 2026  
Re: Petition for Direct Legislation

**CONFIDENTIAL:** This document contains information which is protected by the attorney-client privilege and is exempt from disclosure pursuant to sections 19.35(1) and 905.03 of the Wisconsin Statutes. Use or disclosure of this document by or to any person other than appropriate officers and employees of the Village of DeForest, without prior approval by the Village Board is prohibited.

**I. Introduction-Petition for Direct Legislation.**

Under the direct legislation law, Wis. Stat. § 9.20, residents may compel their local government to either enact a proposed ordinance or put the proposed ordinance to a referendum vote.

On November 24, 2025, a petition for direct legislation was submitted to the Village. The petition calls for a new ordinance to be enacted that would provide as follows:

*Section 1. Referendum Required for any development of annexed areas beyond the size of thirty (30) acres or the encumbrance of the village residents of a financial obligation of more than ten million dollars (\$10,000,000) to allow the residents of DeForest to approve said annexation.*

*Section 2. Interpretation; Exceptions.*

*(a) If, by prior referendum which covered the area now intending to be annexed, the residents of DeForest have approved annexation of an area of more than thirty (30) square acres, or the encumbrance of the village residents of a financial obligation of more than ten million dollars (\$10,000,000), an additional referendum is not required.*

A copy of the ordinance, as submitted with the petition, is attached for reference. The Village Clerk has certified that an adequate number of electors signed the petition, and the petition has now been forwarded to the Village Board for consideration.

## **II. Analysis of the Petition for Direct Legislation.**

Since the petition has been certified by the Clerk, the Village Board must now determine whether the ordinance is legally proper. If the ordinance is legally proper, then the Board must either adopt the proposed ordinance or refer it for a vote by referendum. However, if the proposed ordinance is determined to be legally improper, then the Board can decide to take no action on the petition, that is, not adopt the ordinance or set the ordinance for a referendum vote. This is because an improper ordinance would have no legal effect even if enacted, regardless of how it was enacted. Importantly, as the petition demands, the proposed ordinance must be enacted “without alteration.” Therefore, the Board’s must consider the proposed ordinance *as written*.

### **A. When is proposed direct legislation improper?**

The Wisconsin Supreme Court has determined that the following rules limit the right of direct legislation:

1. The direct legislation cannot repeal an existing ordinance or other legislative act.
2. The direct legislation cannot exceed the legislative powers conferred on the governing municipal body.
3. The direct legislation cannot modify statutorily prescribed procedures or standards.
4. The direct legislation must be legislative, rather than administrative.

*Mount Horeb Community Alert v. Village Board of Mt. Horeb*, 263 Wis. 2d 544 (2003).

Before the Board decides to act on the proposed ordinance, or refer it for a referendum vote, it is important to first determine whether the ordinance is a proper subject of direct legislation. The above categories of “improper” subject matter for direct legislation intertwine with each other to a great extent, but it is helpful to consider the following examples in understanding each category.

As an example, of the first category above, in *Landt v. City of Wisconsin Dells*, 30 Wis. 2d 470 (1966), a proposed ordinance by direct legislation that sought to prohibit fluoridation of city water was held improper because the city council had already voted by resolution to increase the amount of fluoride in the city’s water supply. The Court held that direct legislation under these circumstances cannot be used to repeal an existing legislative act.

As an example of the second category above, if a municipality desires to adopt state traffic laws as an ordinance (as many have), state law requires that the ordinance be in strict conformity with state law, including any penalty provisions. Under state law, the penalty for speeding is a forfeiture of between \$30 and \$300, and a municipality can only impose that same penalty range by ordinance. It would be improper for a new ordinance, proposed by direct legislation or otherwise, to impose a higher penalty (say \$1,000 forfeiture for speeding) because that is beyond the legal authority of the governing municipal body. In other words, direct legislation cannot do what the governing municipal government cannot otherwise do on its own.

As an example of the third category above, the Wisconsin Court of Appeals in *Heitman v. City of Mauston Common Council*, 226 Wis. 2d 542 (1999), determined that a proposed ordinance by direct legislation would prohibit the City from allowing development of a residential treatment facility for sexually violent persons anywhere in the City of Mauston or areas annexed to the City. The Court determined that the proposed ordinance would be a zoning regulation, and therefore invalid. Approving that ordinance by referendum would violate the statutorily provided zoning process, including a requirement that proposed zoning regulations receive a recommendation from a planning commission.

We also conclude that Heitman's proposed initiative is an invalid use of the initiative process because the zoning enabling act has established procedures and standards for zoning and Heitman may not modify them by zoning through the initiative process. To explain more fully: if Mauston were to enact the land use restrictions proposed by Heitman under the zoning enabling act, it would be required to first submit them to the planning commission.

*Heitman v. City of Mauston Common Council*, 226 Wis. 2d 542, 553. Because the proposed ordinance by direct legislation was, in effect, a zoning ordinance, the Court held the proposed initiative invalid under the law, and the Court declined to require the City to hold a referendum.

The final category distinguishes legislative enactments, which can be achieved through direct legislation, and administrative decisions, which cannot. In *State ex rel. Becker v. Common Council*, 101 Wis. 2d 680, 305 N.W.2d 178 (1981), electors in Milwaukee petitioned for direct legislation that would require the Milwaukee Common Council to remove the chief of police from his position. The Wisconsin Court of Appeals held that the proposed resolution was administrative in nature and, therefore, was not a proper subject for direct legislation.

The proposed ordinance must comply with each of the foregoing rules to be a valid subject of direct legislation.

**B. What does the ordinance being proposed for direct legislation in DeForest propose to do?**

Before addressing whether the proposed ordinance is legally permissible, we must first determine what the proposed ordinance would do if enacted. The first paragraph of the proposed ordinance provides:

*Referendum Required for any development of annexed areas beyond the size of thirty (30) acres or the encumbrance of the village residents of a financial obligation of more than ten million dollars (\$10,000,000) to allow the residents of DeForest to approve said annexation.*

The first part of the paragraph, *Referendum Required for any development of annexed areas beyond the size of thirty (30) acres*, by its terms, would apply to all “annexed areas” that consisted of 30 acres or more at the time of annexation. The referendum requirement would apply “for any *development*” of that land. Contrary to how the proposed ordinance has been

publicly described, it does not require a referendum for an annexation, as it applies only to land that has already been annexed. It is the proposed *development* of that land that would trigger the referendum requirement. Of note, the ordinance would apply prospectively to development of areas already annexed into the Village, including all those located in Village TIDs and planned for future development.

However, the last portion of the ordinance paragraph provides that the purpose of the referendum is “*to allow the residents of DeForest to approve said annexation.*” This last part clearly means that residents are to be given the opportunity to approve the annexation only, and not the development of land that is part of the annexation. But the ordinance does not say what happens if the voters approve or disapprove of the annexation that previously occurred.

**C. A referendum vote cannot invalidate an annexation.**

Annexations of land by municipalities are effective upon enactment of an annexation ordinance, per Wis. Stat. § 66.0217(8), and there is no statutory procedure for the Village alone to “undo” an annexation once in effect. Regardless of the results of the referendum the direct legislation ordinance would require, the annexation ordinance would remain in effect.

The proposed ordinance does not state that a disapproved annexation is invalid, only that a referendum on the annexation be held “for development.” But the ordinance neither authorizes nor prohibits any development (since the development is not subject to vote in the proposed ordinance, only the annexation) nor does it purport to affect the validity of the annexation itself.

The proposed ordinance also provides that a referendum is required “*for the encumbrance of the village residents of a financial obligation of more than ten million dollars (\$10,000,000)*” followed by “*to allow the residents of DeForest to approve said annexation.*” It is unclear what that provision of the paragraph means. Village residents are not personally encumbered by Village debt, rather the Village, as a municipal entity, is responsible for Village debts (which may be paid by Village residents in the way of taxes, or by other means, such as grants or other non-tax revenues). But this ordinance is not limited to debt that is tied to an annexation. Rather, it requires a referendum to approve an annexation, even when the debt has no connection to an annexation decision.

**D. Under any reasonable interpretation of the proposed ordinance, it would be legally improper.**

As noted above, the proposed ordinance requires only that a referendum be held. It does not say what the impact of approval or disapproval of the referendum would be. Since the ordinance does not regulate anything based on the results of the referendum, it appears the referendum would be advisory only. However, advisory referenda are generally prohibited by statute. Under Wis. Stat. § 66.0144, no city, village or town may conduct a referendum for advisory purposes, except for very limited purposes listed in the statute. The proposed future referenda under the proposed ordinance do not fall under any of these listed exceptions. Therefore, the proposed ordinance would be legally improper as direct legislation because it would violate the rule that direct legislation cannot be used to enact an ordinance that would exceed the authority of the

legislative body itself. In my opinion, the Village Board cannot enact an ordinance that requires an advisory referendum for development approval because such advisory referenda are prohibited by the state legislature.

If the referendum vote is intended to be binding, the ordinance would be invalid for a variety of other reasons. The proposed ordinance would require a referendum that would accomplish what the Village Board itself could not do on its own, it would conflict with statutory development approval regulations, it would regulate administrative decisions and would override the Village's legislatively enacted zoning code.

### **1. The proposed ordinance violates statutory procedures for zoning and land development.**

Per the Wisconsin Supreme Court in *Mount Horeb Community Alert v. Village Board of Mt. Horeb*, direct legislation cannot modify statutorily prescribed procedures or standards, that is, a legal process or procedure already established by the state legislature. To the extent the proposed ordinance is intended to require a referendum *to approve developments* in annexed areas, it would delay any new development until a referendum could be held, adding a process not contemplated by the statutory processes. The ordinance would change the legal requirements for most development. It would, in effect, delegate the authority to approve rezoning petitions, conditional use permits, site plan approval authority and building permit issuance, among other things, to the voters.

Property owners, however, have a right to use and develop their property as permitted by law, and this right cannot be taken away by a referendum vote by the public. Zoning ordinances are required to allow some "permitted" uses as a matter of right. *See Town of Rhine v. Bizzell*, 2008 WI 76. In addition, building permits must be issued when an application meets all existing land use and building code requirements. Likewise, a proposed development that meets the Village's subdivision ordinance is entitled to plat approval.

The proposed ordinance however, would add another layer of approval, and development of most properties would be conditioned upon approval by referendum. That "condition" would effectively make all development conditional, an approach prohibited according the *Town of Rhine* case.

In addition, if a property owner meets all the requirements of the building code and other ordinances, he or she is entitled to a building permit. Building permits cannot be arbitrarily denied based on the popularity of the development. A referendum requirement would change the issuance of building permits from ministerial to discretionary, allowing the denial of permits contrary to state law. *See, Heitman v. City of Mauston Common Council*.

### **2. The proposed ordinance would repeal prior legislative decisions by the Village Board.**

The Village has exercised its authority to enact a comprehensive zoning code. That code divides the Village into districts and provides for various land uses in each district as either permitted,

conditionally permitted, or prohibited. As noted above, a referendum requirement for each development would change that code to make all uses conditional. Direct legislation cannot be used to repeal or amend prior legislative decisions. *Landt v. City of Wisconsin Dells*, 30 Wis. 2d 470 (1966).

**3. The proposed ordinance would accomplish what the Village Board could not do directly.**

The proposed ordinance would be valid only if it does something the Village Board has the power to do on its own. In my opinion, the Village Board does not have the authority to condition development of private property on the results of a referendum vote.

For example, the Village's zoning code requires the Planning & Zoning Commission to make findings as to whether a development proposal meets the applicable standards in determining conditional use applications. §15.16(3), DeForest Municipal Code. State law requires that a conditional use be approved if the applicant meets all requirements set forth in the applicable ordinance. Wis. Stat. § 62.23(7)(de)2. If the Commission makes findings that each of the approval standards has been met, a rejection of the conditional use permit by referendum would clearly violate state law. In addition, the proposed ordinance that allows for denial of a conditional use that meets all requirements would improperly modify the existing ordinance procedure.

Similarly, Village ordinances provide that if a proposed building meets all the requirements of the ordinances and other applicable laws, the building inspector "shall issue a building permit." §14.05(9), DeForest Municipal Code. See, also, Wis. Admin. Code §SPS 320.09(9)(a)1 ("The Wisconsin uniform building permit shall be issued if the requirements for filing and fees are satisfied and the plans have been conditionally approved"). The proposed ordinance would say the building inspector cannot issue the permit, unless it is also approved through a referendum, contrary to both existing ordinances and state law.

It has long been established law in Wisconsin that a municipal governing body cannot delegate to "property owners the right to say how a particular person shall use a particular piece of property." *State ex rel. Nehrbass et al. v. Harper*, 162 Wis. 589, 156 N.W. 941 (1916). Since the Village Board could not delegate its land use approval authority to private citizens, the proposed ordinance would go beyond the power possessed by the Board itself.

The requirements of a referendum would also create two classes of property in the Village; those subject to a future referendum and those that are not. Most likely such as distinction would be considered unconstitutional in its disparate treatment of similarly situated property owners, where one owner can develop his or her property without being subject to a public referendum while another similarly situated property owner cannot. Under the Equal Protection Clause of the 14<sup>th</sup> Amendment to the U.S. Constitution, a governmental classification that creates a disparity of treatment between similarly situated persons is invalid if there is no rationale or legitimate governmental purpose for this distinction. Under the proposed ordinance, there would be no clear governmental purpose in distinguishing the future use of property solely on the basis

that it was brought into the Village as part of a 29-acre annexation vs. a 31-acre attachment. Once land is made part of the Village, the concerns that any development may bring are addressed through zoning uses and site plan approvals, and it is difficult to articulate any legitimate governmental reason why property would be treated differently solely because of how it came into the Village by annexation.

### **III. Recommendation.**

We recommend that the Village Board take no action on the proposed ordinance for various reasons. First, because the ordinance calls for an advisory referendum on future development, it violates the prohibition on advisory referenda set forth under Wis. Stat. § 66.0144. Second, to the extent the proposed ordinance does not call for an advisory referendum, but instead seeks to require voter approval prior to a development proceeding, the proposed ordinance violates several of the prohibited categories for direct legislation. Furthermore, if enacted and applied, the ordinance would certainly be challenged as an unlawful delegation of the Village's governmental authority as afforded by the legislature. For all these reasons, we recommend the Village Board neither enact the proposed ordinance nor refer the ordinance for referendum vote.

**PETITION FOR THE ENACTMENT OF AN ORDINANCE BY DIRECT LEGISLATION  
PURSUANT TO SECTION 9.20, WISCONSIN STATUTES - AN ORDINANCE REQUIRING  
VOTER APPROVAL BY REFERENDUM FOR CERTAIN LARGE ANNEXATIONS AND  
MAJOR DEVELOPMENT ACTIONS**

To: Village Clerk, Village of DeForest, Wisconsin

We the undersigned hereby petition the Village Board of DeForest, pursuant to §§ 9.20, 61.34, 66.0217, and 66.1001 of the Wisconsin Statutes to enact the following ordinance without alteration, or in the event that said Village Board fails to enact the ordinance, we demand pursuant to the above referenced statutes that said ordinance be submitted to the electors at the next appropriate general election for their approval or disapproval:

An ordinance referring to any proposed annexation of land larger than thirty (30) square acres or creates a projected public financial obligation of more than ten million dollars (\$10,000,000) to the electorate for approval.

Whereas, any annexation of property beyond the thirty (30) square acres has the potential to significantly expand the size of the current village beyond its current boundaries; and

Whereas annexation of property beyond the thirty (30) square acres has in the past brought with it the implementation of TIF areas which has impacted the residents of DeForest; and

Whereas annexation of property beyond the thirty (30) square acres constitute the potential of significant additional taxes to residents of the village,

Whereas the encumbrance of the village residents of a financial obligation of more than ten million dollars (\$10,000,000) would significantly impact the taxes and limit other opportunities for future investment within the village,

Therefore, the Village Board of DeForest, Wisconsin do ordain as follows:

Section 1. Referendum Required for any development of annexed areas beyond the size of thirty (30) acres or the encumbrance of the village residents of a financial obligation of more than ten million dollars (\$10,000,000) to allow the residents of DeForest to approve said annexation.

Section 2. Interpretation; Exceptions.

(a) If, by prior referendum which covered the area now intending to be annexed, the residents of DeForest have approved annexation of an area of more than thirty (30) square acres, or the encumbrance of the village residents of a financial obligation of more than ten million dollars (\$10,000,000), an additional referendum is not required.



Adopted this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
DeForest Village Board President

Attested: \_\_\_\_\_  
Village Clerk of DeForest