Dear Mr. Lawrence:

1. Your special assistant inquires concerning the eligibility of a sitting member of the county board of supervisors to be appointed to the permanent position of administrative coordinator.

BACKGROUND

2. Your county board apparently created the office of administrative coordinator more than fifteen years ago. Your special assistant advises that the county board chair has recently been appointed to fill the position of interim administrative coordinator and has simultaneously held the offices or positions of county supervisor, county board chair, and interim administrative coordinator since that time. Your special assistant also indicates that the county board would like to fill the position of administrative coordinator on a permanent part-time basis. He further states that "it became apparent to members of the County Board that one member of the Board, in particular, demonstrated both the skills, interest, and ability within the County’s budgetary limitations to fill the office [of administrative coordinator] on a part-time basis."

QUESTION PRESENTED AND BRIEF ANSWER

3. I have rephrased the principal question posed by your special assistant, as follows: Must a sitting member of the county board resign the office of supervisor before being appointed to the permanent position of county administrative coordinator under Wis. Stat. § 59.19?

Your special assistant also asks whether Wis. Stat. § 19.59(1) or Wis. Stat. § 946.13 prohibits a sitting county supervisor from negotiating employment terms for his or her prospective permanent appointment as administrative coordinator or from participating in the approval of such employment terms. In light of my answer to the principal question, it appears to me to be unnecessary at this time to address the applicability of those statutes to those facts.
¶ 4. In my opinion, the answer is yes.

ANALYSIS

¶ 5. Wisconsin Stat. § 66.0501(2) precludes a sitting county supervisor from accepting any other county office or position unless expressly authorized to do so:

Except as expressly authorized by statute, no member of a . . . county board . . . during the term for which the member is elected, is eligible for any office or position which during that term has been created by, or the selection to which is vested in, the board . . . . This subsection does not apply to a member of any board . . . described in this subsection who resigns from the board . . . before being appointed to an office or position which was not created during the member's term in office.

Because the county board does select the administrative coordinator, see Wis. Stat. § 59.19, a supervisor must resign from the board before accepting the administrative coordinator position unless a statutory exception applies. Wis. Stat. § 66.0501(2). Compare, e.g., 55 Op. Att’y Gen. 260, 261 (1966): “If the supervisor were to resign as supervisor, he could thereafter be elected or appointed to the veterans’ service officer position. Such member takes a risk in resigning, since he cannot be assured of being selected county veterans’ service officer.” The statutory authorization must be “express[].” Wis. Stat. § 66.0501(2). An example of express statutory authorization for a county supervisor to hold another office or position is Wis. Stat. § 59.52(9), which provides: “The board may appoint a person or committee as county purchasing agent, and provide compensation for their services. Any county officer or supervisor may be the agent or a committee member.” There is no comparable statutory language expressly authorizing a county supervisor to serve as administrative coordinator.

¶ 6. Furthermore, Wis. Stat. § 59.10(4) indicates that, with certain stated and very limited exceptions not relevant to your inquiry, the office of county supervisor is incompatible with any other county office or employment: “COMPATIBILITY. No county officer or employee is eligible for election or appointment to the office of supervisor . . . .” A person employed as an administrative coordinator could not be elected or appointed to the office of county supervisor without relinquishing his employment as administrative coordinator. Because there is no greater degree of compatibility between the two positions in the reverse situation in which the office of
county supervisor is the first position that is held, there is no apparent reason why the Legislature would permit a county supervisor to accept the permanent position of administrative coordinator.2

¶ 7. It can be argued that Wis. Stat. § 59.19 contains a statutory exception to Wis. Stat. § 66.0501(2) for situations in which a supervisor is appointed to the position of administrative coordinator. Wisconsin Stat. § 59.19 provides:

In any county which has not created the office of county executive or county administrator, the board shall designate, no later than January 1, 1987, an elected or appointed official to serve as administrative coordinator of the county. The administrative coordinator shall be responsible for coordinating all administrative and management functions of the county government not otherwise vested by law in boards or commissions, or in other elected officers.

Exceptions within a statute are strictly construed. See McNeil v. Hensen, 2007 WI 56, ¶ 10, 300 Wis. 2d 358, 731 N.W. 2d 273. Wisconsin Stat. § 59.19 contains no language expressly authorizing a county supervisor to serve as administrative coordinator.

¶ 8. I construe the language contained in Wis. Stat. § 59.19 as limiting the office of administrative coordinator to persons who are elective or appointive county officials rather than as authorizing any and all elective or appointive county officials to serve as administrative coordinator. “[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” State ex rel. Kalal v. Circuit Court, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. If Wis. Stat. § 59.19 were construed as permitting a sitting county supervisor to accept the position of administrative coordinator, upon such acceptance at a minimum Wis. Stat. § 59.10(4) would prohibit the supervisor from continuing to serve in that capacity beyond the end of his or her supervisory term. Had the Legislature intended that result, it would have made an explicit statement to that effect. Compare Wis. Stat. § 59.52(9). In light of the limitations and explicit incompatibility provisions contained in Wis. Stat. § 59.10(4), Wis. Stat. § 59.19 cannot reasonably be construed to expressly authorize a county supervisor to serve as administrative coordinator.

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2A county supervisor is expressly authorized to temporarily accept appointment to the office of county administrator. Wisconsin Stat. § 59.18(1) provides that, in the case of a vacancy of the office of county administrator, the county board “may appoint any member of the board as acting county administrator to serve for a period of 15 days while the board is considering the selection of a county administrator.” Wisconsin Stat. § 59.18(1) expressly prohibits a county supervisor from simultaneously serving permanently as county administrator: “If any member of the board is appointed as [permanent] county administrator, his or her status as a member of the board is thereby terminated[.]”
CONCLUSION

¶ 9. I therefore conclude that a sitting member of the county board must first resign the office of county supervisor before being appointed to the permanent position of county administrative coordinator under Wis. Stat. § 59.19.

Sincerely,

J.B. VAN HOLLEN
Attorney General

JBVH:FTC:cla
Nov. 2, 2011

Mr. John F. Luetscher
Corporation Counsel
Brown County
Post Office Box 23600
Green Bay, WI 54305-3600

Dear Mr. Luetscher:

¶ 1. You are concerned about the county board’s authority to limit the statutory prerogatives of the county highway commissioner.

BACKGROUND

¶ 2. You indicate that your county has a county executive and a county highway commissioner. The duties of the highway commissioner include entering into agreements with cities, villages, and towns pursuant to Wis. Stat. §§ 83.03 and 83.035 for the purpose of improving county highways. A typical agreement in your county involves a joint project with one or more local municipalities to construct a road that has many of the features of an urban street. The county normally shares the cost of such projects equally with each contracting local municipality. The form of agreement currently in use grants the highway commissioner the authority to determine which of the work that is necessary under the agreement will be performed directly by the county highway department. A contracting local municipality is obligated under the agreement to reimburse the county for half of the county’s costs when the county highway department performs the work directly.

¶ 3. You advise that certain local municipalities believe that highway construction costs could be reduced if the county did not perform any of the work on joint county highway projects. Those municipalities want the county to use a competitive bidding process and then contract with private companies for all of the work on the agreements to which those municipalities are parties.1

1 Counties that contract under Wis. Stat. § 83.035 are not required to competitively bid those projects. See OAG 5-09, ¶¶ 5, 13 (November 12, 2009).
QUESTION PRESENTED AND BRIEF ANSWER

¶ 4. You ask if the county board in a county with a county executive may enact an ordinance precluding the highway commissioner from determining that the county highway department will directly perform any of the work on any joint county highway project under Wis. Stat. §§ 83.03 and 83.035 if a contracting local municipality requests that all of the work on the project be competitively bid and let to private companies.

¶ 5. In my opinion, the answer is no.

ANALYSIS

¶ 6. Wisconsin Stat. § 83.015(2)(b) delineates many of the powers of the highway commissioner in a county with a county executive or a county administrator:

In any county with a highway commissioner appointed under s. 83.01(1)(b) or (c), the county highway committee shall be only a policy-making body determining the broad outlines and principles governing administration and the county highway commissioner shall have the administrative powers and duties prescribed for the county highway committee under par. (a), sub. (3)(a) and ss. 27.065(4)(b) and (13), 32.05(1)(a), 82.08, 83.01(6), 83.013, 83.018, 83.025(1) and (3), 83.026, 83.035, 83.04, 83.05(1), 83.07 to 83.09, 83.12, 83.14(6), 83.17, 83.18, 83.42(3) and (4), 84.01(5), 84.06(3), 84.07(1) and (2), 84.09(1), (3)(a) to (e) and (4), 84.10(1), 86.04(1) and (2), 86.07(2), 86.19(3), 86.34(1), 114.33(5), 349.07(2), 349.11(4) and (10) and 349.15(2). No statutory power, duty or function specified elsewhere for the county highway commissioner may be deemed impliedly repealed for the sole reason that reference to it has been omitted in this paragraph.

Wisconsin Stat. § 83.04 is made applicable to the highway commissioner by operation of Wis. Stat. § 83.015(2)(b).² Wisconsin Stat. § 83.04(1) provides that “[a]ll highway improvements . . . shall be by contract . . .” unless the highway commissioner “determines that some other method would better serve the public interest.” Wisconsin Stat. § 83.015(2)(a), which is also made applicable to the highway commissioner by operation of Wis. Stat. § 83.015(2)(b), grants the highway commissioner the authority to “determine whether each piece of county aid construction shall be let by contract or shall be done by day labor” and to “enter into contracts in the name of the county, and make necessary arrangements for the proper prosecution of the construction and maintenance of highways provided for by the county board[.]” Wisconsin Stat.

²Although Wis. Stat. § 83.03 is not cross-referenced, the last sentence of Wis. Stat. § 83.015(2)(b) cautions that, even though not specifically enumerated, other statutory provisions granting powers and duties to the highway commissioner remain applicable.
§ 83.015(2)(b) describes these and other statutory powers of the highway commissioner as “administrative powers and duties.”

¶ 7. The Legislature has also granted county boards broad administrative and organizational powers concerning highways: See Wis. Stat. § 59.03, which provides in part:

(1) ADMINISTRATIVE HOME RULE. Every county may exercise any organizational or administrative power, subject only to the constitution and to any enactment of the legislature which is of statewide concern and which uniformly affects every county.

(2) . . . (a) Except as elsewhere specifically provided in these statutes, the board of any county is vested with all powers of a local, legislative and administrative character, including . . . the subject matter of . . . highways . . . .

. . .

(f) The powers conferred by this subsection shall be in addition to all other grants of power and shall be limited only by express language.

See also Mommsen v. Schueller, 228 Wis. 2d 627, 635, 599 N.W.2d 21 (Ct. App. 1999). The Legislature has further directed that the administrative home rule powers granted to county boards be “liberally construed.” Wis. Stat. § 59.04.

¶ 8. The administrative home rule powers of county boards are extensively discussed in OAG 1-10 (January 28, 2010). A county board’s organizational and administrative home rule powers are purely statutory. Because all county board powers must be derived from a statutory source, a county board’s home rule powers may be limited by other statutes. See OAG 1-10, ¶ 6.

¶ 9. Wisconsin Stat. § 59.51(1) imposes specific limitations upon the exercise of a county board’s organizational or administrative home rule powers:

The board of each county shall have the authority to exercise any organizational or administrative power, subject only to the constitution and any enactment of the legislature which grants the organizational or administrative power to a county executive or county administrator or to a person supervised by a county executive or county administrator or any enactment which is of statewide concern and which uniformly affects every county. . . . [T]hese powers shall be broadly and liberally construed and limited only by express language.

The home rule powers of a county board are “subject . . . to . . . any enactment of the legislature which grants the organizational or administrative power to a . . . person supervised by a county executive or county administrator or any enactment which is of statewide concern and which uniformly affects every county.”
executive[]" Wis. Stat. § 59.51(1). The highway commissioner possesses the statutory administrative power to determine whether county highway projects are competitively bid. Wis. Stat. §§ 83.04(1) and 83.015(2)(a) and (b). Wisconsin Stat. § 83.01(1)(c) grants the county executive supervisory authority over the highway commissioner: “[I]n any county with a county executive . . . the county executive . . . shall appoint and supervise the county highway commissioner.”3 As a direct result of the fact that the highway commissioner is supervised by the county executive, Wis. Stat. § 59.51(1) precludes the county board from establishing any policy or exercising any administrative power that infringes upon the highway commissioner’s administrative power to determine whether county highway projects are competitively bid. The county board therefore may not enact an ordinance requiring competitive bidding on a highway project if a contracting local municipality requests that all of the work be competitively bid and let to private companies.

¶ 10. The county board is not without power or authority concerning joint county highway projects. The county board can determine as a matter of policy whether the county should undertake a joint county highway project at all. See Wis. Stat. § 83.03(1). The county board also exercises budgetary control over the county highway department. See Wis. Stat. § 65.90. The county board may not, however, by ordinance limit the statutory administrative powers of a county highway commissioner appointed and supervised by the county executive.

CONCLUSION

¶ 11. I therefore conclude that a county board in a county with a county executive cannot enact an ordinance precluding the highway commissioner from determining that the county highway department will perform any of the work on any joint county highway project under Wis. Stat. §§ 83.03 and 83.035 if a contracting local municipality requests that all of the work on the project be competitively bid and let to private companies.

Sincerely,

J.B. VAN HOLLEN
Attorney General

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3Slightly different statutory provisions apply to Milwaukee County. See Wis. Stat. § 83.01(1)(b).
Mr. Rian W. Radtke
Corporation Counsel
Trempealeau County
Post Office Box 67
Whitehall, WI 54773-0067

Dear Mr. Radtke:

¶ 1. Your predecessor advised that a fifty-member private All Terrain Vehicle ("ATV") Club operating within Trempealeau County has requested the county board to designate three short sections of county trunk highways as ATV routes. Your predecessor was concerned that such designations would violate the public purpose doctrine.

BACKGROUND

¶ 2. The club has developed a number of trails on privately-owned land. Such trails can only be used by club members or their invitees. Other persons must pay the club a fee to use the club's trails.

¶ 3. The club has persuaded at least two towns to designate certain sections of town roads as ATV routes and has also persuaded at least one city to designate certain sections of city streets as ATV routes. In each such case, the club indicated that the reason for requesting the municipal designations was that it had been unable to secure the permission of private landowners to connect the club's off-road trails. The municipally-designated, publicly-owned ATV routes connect the club's private off-road trails.

¶ 4. The club has made a similar request to the county to designate three short sections of county roads as ATV routes. The longest of these sections is 1.3 miles. The designated portions of the county roads would be open to the public as ATV routes. In response to a request for further information, you indicate that it is very unlikely that persons who are not members or invitees of the club would trailer their ATVs to the county highway segments for which designations have been sought and use their ATV's on those segments because they are so short.

¶ 5. In response to the request for further information, you have also advised that insofar as you have been able to ascertain no county funds or resources would be expended in designating the trails or in maintaining the trails after they are designated. All signage and road approaches would be paid for and maintained by the club at its sole expense. The county highway
commissioner has advised you that ATV traffic on the county highway segments would not result in additional wear and tear upon the road segments such that additional county expenditures for maintenance or repair would be required.

¶6. A proposed county ordinance would permit the county board to grant the designations requested by the private club. Relevant sections of the proposed county ordinance provide as follows:

SECTION 1 ...

B. Following due consideration of the recreational and economic value to connect trail opportunities and weighted against protecting the safety of motorists by maintaining the road edge, surface and integrity of the right-of-way, public safety, liability aspects, terrain involved, traffic density and history of automobile traffic, this ordinance has been created pursuant to County Board authority under Wis. Statutes 59.02, 23.33(11)(a) and (am), and 23.33(8).

D. Private trails. In addition to establishing ATV routes to connect ATV trails as defined in Section 23.33(1)(d), the County Highway Department may also establish routes for the purpose of connecting off-road trails established by private entities for the exclusive use of their members, their invitees or other persons paying a fee for use of the trail. However, the use of the route along the roadway may not be limited to those persons approved by or paying a fee to the private entity.

SECTION 4 ...

C. The permittee shall furnish all materials, do all work, and pay all costs in connection with the construction or maintenance of the approach or crossing and its appurtenances within the right-of-way. The County shall not give, sell, or otherwise provide any equipment, labor or materials for the project.
D. Maintenance of approaches or crossings is the responsibility of the organization and/or the person signing the permit application. The Highway Department will monitor the approaches/crossings on a periodic basis. The results of these reviews may indicate a periodic need for maintenance. In such case the Highway Department will notify the person signing the application of those needs and the permittee will have 10 days to complete the maintenance or the route/crossing may be closed until such time as the maintenance is done and approved by the Department.

SECTION 5 ....

A. Initial installation. During the Highway Department review of the route or crossing, the Department will determine the necessary signage on the route or crossing. At such time as the permit is approved the Highway Department shall install the necessary signage. The projected costs for signage and installation shall be paid by the permittee prior to commencing construction on the approach or crossing ....

B. Sign Maintenance. The Highway Department will maintain the signage necessary for the route/crossing and bill the permittee for that maintenance. Should the permittee fail to pay for the maintenance then the route will be closed and signage removed until such time as the removal costs, the sign maintenance costs, and the projected resigning costs are paid in full.

QUESTION PRESENTED AND BRIEF ANSWER

¶ 7. I have reworded your predecessor’s question, as follows: If the primary purpose of designating short county highway segments as ATV routes is to allow a private organization to enhance its system of trails that benefit club members and their invitees, would such designations violate the public purpose doctrine if no county resources are expended and no county expenditures occur as a result of those designations?

¶ 8. In my opinion, the answer is no. The proposed ordinance could be improved to assure that no county resources are expended and that no county expenditures occur as a result of the designations.
ANALYSIS

¶ 9. Wisconsin Stat. § 23.33(8)(b) provides explicit authority to counties to designate county roads as ATV routes: “Routes. A town, village, city or county may designate highways as all-terrain vehicle routes.” Wisconsin Stat. § 23.33(8)(a) provides that “[t]he department [of natural resources] may establish standards and procedures for certifying the designation of all-terrain vehicle routes and trails.” The standards referred to in Wis. Stat. § 23.33(8)(a) are found in Wis. Admin. Code § NR 64.12. Those standards are largely prohibitory. They provide no affirmative direction to municipalities as to what types or sections of streets, roads, or highways should be designated as ATV routes.

¶ 10. The public purpose doctrine is derived from the Wisconsin Constitution. See Libertarian Party v. State, 199 Wis. 2d 790, 809, 546 N.W.2d 424 (1996) (per curiam). It was thoroughly discussed in OAG 2-01 (February 14, 2001). It “prohibits the use of public funds, public equipment or public supplies to provide a benefit that is primarily private, rather than public, in nature.” OAG 2-01, at 1. See 76 Op. Att’y Gen. 69 (1987); State ex rel. Bowman v. Barczak, 34 Wis. 2d 57, 148 N.W.2d 683 (1967). “The essence of the doctrine, that public funds may be expended only for public purposes, rests on the theory that governmental power should be used for the benefit of the entire community.” Bishop v. City of Burlington, 2001 WI App 154, ¶ 10, 246 Wis. 2d 879, 631 N.W.2d 656; Barczak, 34 Wis. 2d at 62-63.

¶ 11. “Because the public purpose doctrine is a constitutional rule, it limits the authority conferred on counties and other municipalities by statute.” OAG 2-01, at 1-2. “Even where statutory authority for a county’s action exists, the county must be cautious not to exercise that authority in a way that contradicts the public purpose doctrine.” OAG 2-01, at 2. Nevertheless, “Wisconsin municipalities have traditionally been given wide discretion to determine whether a public expenditure is warranted due to public necessity, convenience, or welfare. As such, the public purpose doctrine has been broadly interpreted.” Town of Beloit v. County of Rock, 2003 WI 8, ¶ 30, 259 Wis. 2d 37, 657 N.W.2d 344 (footnote omitted).

¶ 12. To satisfy the public purpose doctrine, “the benefit to the public must be direct and not remote.” Bishop, 246 Wis. 2d 879, ¶ 10. See Alexander v. City of Madison, 2001 WI App 208, ¶ 7, 247 Wis. 2d 576, 634 N.W.2d 577. “If any public purpose can be conceived which might rationally justify the expenditure, the constitutional test is satisfied.” Bishop, 246 Wis. 2d 879, ¶ 11. “[N]o public purpose exists only if it is clear and palpable that there can be no benefit to the public.” Id.

¶ 13. Section 1.B. of the proposed ordinance indicates that the county board will engage in “due consideration of the recreational and economic value to connect trail opportunities” and that any proposed trail designation will be “weighted against protecting the safety of motorists by maintaining the road edge, surface and integrity of the right-of-way, public safety, liability aspects, terrain involved, traffic density and history of automobile traffic[.]” Courts are required to accord deference to this statement of public purpose because “local governments are often in
the best position to determine the needs of the public in that locality."

Town of Beloit, 259 Wis. 2d 37, ¶ 30.

¶ 14. "‘[A]nything calculated to promote the education, the recreation or the pleasure of the public is to be included within the legitimate domain of public purposes.’" Libertarian Party, 199 Wis. 2d at 820, quoting Capen v. City of Portland, 228 P. 105, 106 (Or. 1924). Designation of a county highway as an ATV route is not impermissible solely because the ATV route connects one or more private snowmobile trails. "The fact that a private entity receives direct benefit from an expenditure of public funds does not render the expenditure unconstitutional." Bishop, 246 Wis. 2d 879, ¶ 10. The designation of ATV routes normally does serve an independent public purpose, which is to provide the general public with recreational opportunities.

¶ 15. Although you indicate that the recreational value of these designations to the general public would be slight, the mandate of the public purpose doctrine is that “public appropriations may not be used for other than public purposes.” Town of Beloit, 259 Wis. 2d 37, ¶ 27. See 74 Op. Att’y Gen. 25, 27 (1985): “Although the doctrine’s history is admittedly confused, its present day meaning is quite clear: public funds may be spent only for public purposes.” The proposed ordinance is intended to insure that no county resources are expended and that no county expenditures occur where designations connecting private trails are made. Your factual investigation indicates to you that that would be the case. You note that all signage and road approaches would be paid for and maintained by the club at its sole expense. The county highway commissioner also has advised you that ATV traffic on the county highway segments will not result in any county expenditures. Because the public purpose doctrine prohibits only the expenditure of public funds or resources by the county, the designations would not violate the public purpose doctrine if no such expenditures occur.

¶ 16. The proposed ordinance does not explicitly require reimbursement for the expenditure of staff time in all situations. Under the proposed ordinance, the county also assumes a risk of non-payment. See, e.g., Proposed Ordinance, sec. 5.B. Even under the proposed ordinance, the resulting expenditure of county funds or county resources might be de minimis in most cases. See Wisconsin Dep’t of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214, 231 (1992). Nevertheless, it may be preferable to amend the proposed ordinance to require the applicant or permittee to post a bond requiring indemnification of the county for all of the costs resulting from a particular designation, including but not limited to staff time. Requiring a bond to be posted would also avoid the risk of future non-payment and would minimize the possibility of legal challenges to any designations that might be made.
CONCLUSION

¶ 17. I therefore conclude that even if the primary purpose of designating short county highway segments as ATV routes is to allow a private organization to enhance its system of trails that benefit club members and their invitees, such designations would not violate the public purpose doctrine if no county resources are expended and no county expenditures occur as a result of those designations.

Sincerely,

[Signature]

J.B. VAN HOLLEN
Attorney General

JBVH:FTC:cla
QUESTION PRESENTED

¶ 1. You have requested an opinion regarding the scope of a recall election involving the office of the governor. Specifically, you ask whether, in a recall election for governor, there must be an election of governor and lieutenant governor jointly under article V, section 3 of the Wisconsin Constitution, regardless of whether there has been a recall petition for the lieutenant governor under article XIII, section 12 of the Wisconsin Constitution.

SHORT ANSWER

¶ 2. I conclude that article XIII, section 12 of the Wisconsin Constitution requires a separate petition for the recall of each individual incumbent elective officer. A petition for the recall of an incumbent governor under article XIII, section 12(1) requires the filing officer to call a recall election for that incumbent’s office, provided that the terms of article XIII, section 12 have been met. A recall election of a lieutenant governor shall be called only if a petition for recall is filed for that incumbent elected officer. In such a case, voters shall vote separately for that office.

ANALYSIS

¶ 3. Article XIII, section 12 describes the procedure for the recall of “any incumbent elective officer.” Several of its requirements are structured around a singular, individual officer being recalled. A petition for recall must specify the individual officer who is sought to be recalled, permitting electors to petition for the recall of “any incumbent elective officer.” Wis. Const. art. XIII, § 12. Electors seeking recall must file a petition “demanding the recall of the incumbent.” Id. A recall petition may be offered for filing only after the expiration of the first year of the particular officer’s term. Id. The incumbent officer is an automatic candidate in
the recall election unless the incumbent officer affirmatively declines. Wis. Const. art. XIII, § 12(4). The number of recall elections is limited for each individual officer: if the elected officer prevails in one recall election, no further petition shall be filed against the officer for the remainder of the term for which the officer was elected. Wis. Const. art. XIII, § 12(6).

¶ 4. The focus of article XIII, section 12 on the individual officer requires that the Government Accountability Board call a recall election only of the officer named in the petition. A petition for the recall of the governor must follow the same rule. Article XIII expressly applies to “any incumbent elective officer” and provides no exception under which a petition for recall of the governor would be treated as requiring a joint recall election of the governor and lieutenant governor. Calling a joint recall election of the two officers would contravene the plain language of article XIII, section 12 and would force electors to vote for the recall of two candidates or none, a result that would deny electors the opportunity to petition for the recall of “any incumbent elective officer” as the Constitution requires.

¶ 5. This conclusion also follows from the language in article XIII indicating that a petition to recall an officer results in only one winning candidate. Under article XIII, section 12(2), a petition compliant with the requirements of section 12(1) causes the filing officer to call a recall election for a certain date. The resulting winner of that recall election is described in the singular: “The person who receives the highest number of votes in the recall election shall be elected for the remainder of the term.” Wis. Const. art. XIII, § 12(5).

¶ 6. Article XIII, section 12 thus contemplates a sequence of events through which a petition for recall results in a single elected candidate. Calling a joint recall election based on the filing of a petition to recall the governor would be inconsistent with that sequence. It would cause a petition to recall the governor to lead to recall elections for two officers and would result in the election of two winning candidates. Article XIII, section 12 prohibits the recall election of multiple candidates based on the filing of a petition for the recall of only one officer.

¶ 7. As you note, in a general election, the governor and lieutenant governor are elected jointly and for the same term. Wis. Const. art. V, §§ 1, 3. You ask whether these provisions require that, following the filing of a petition to recall the governor, the Board must call a joint recall election of both the governor and lieutenant governor. I conclude that the cited article V provisions are inapplicable to a recall election.

¶ 8. Article V, section 1 provides that the governor and lieutenant governor “shall be elected at the same time and for the same term.” Article V, section 3 provides more specifically:
voter of a single vote applicable to both offices beginning with the general election in 1970.

The phrase “times and places of choosing members of the legislature” refers to the general election. Article IV, section 4 provides that members of the assembly shall be chosen biennially “on the Tuesday succeeding the first Monday of November.” Article IV, section 5 provides that senators shall be elected “at the same time and in the same manner as members of the assembly.” Article V, section 3 thus applies to those gubernatorial elections that coincide with the partisan general elections at which members of the legislature are elected.

¶ 9. A recall election, in contrast, is scheduled “for the Tuesday of the 6th week after the date of filing the petition or, if that Tuesday is a legal holiday, on the first day after that Tuesday which is not a legal holiday.” Wis. Const. art. XIII, § 12(2). A recall election is not required to coincide with any legislative election. The different scheduling rules for the two procedures illustrate that article V, section 3 does not apply to a recall election under article XIII, section 12.

¶ 10. Further, although article V, section 1 provides that the two officers shall be elected “at the same time and for the same term,” other provisions of the Constitution contemplate that a governor and lieutenant governor will not always continue to hold office jointly. When the lieutenant governor fills a vacancy in the governor’s office caused by the governor’s death, resignation or removal from office, they will not continue to serve jointly. Wis. Const. art. V, § 7(1). The legislature’s impeachment of a governor results in the removal of only the governor, not the lieutenant governor. The lieutenant governor assumes the governor’s office in the event of removal, Wis. Const. art. V, § 7(1), and the lieutenant governor’s exclusion from the court trying the governor’s impeachment, Wis. Const. art. VII, § 1, indicates that the lieutenant governor is not jointly impeached. If a vacancy occurs in the office of the lieutenant governor, the governor continues to serve and appoints a successor to serve the remainder of the lieutenant governor’s term. Wis. Const. art. XIII, § 10(2).

¶ 11. In each of these circumstances, when the vacancy is filled, a governor and lieutenant governor will serve together who were not jointly elected. Importantly, in these scenarios, the new officeholder serves the balance of the unexpired term, not a new term. See Wis. Const. art. V, § 7(1); Wis. Const. art. XIII, § 10(2). This is also true with respect to recalls. Wis. Const. art. XIII, § 12(5).

¶ 12. Because the Constitution contemplates a number of circumstances under which a governor and lieutenant governor serve concurrently without being elected jointly, article V, sections 1 and 3 are properly interpreted to provide for the joint election of the two officers only at a general election for a new term. Those circumstances also reinforce the plain language interpretation of article XIII, section 12 applying recall petitions and recall elections only to individual officers.
¶ 13. In addition, construing article V, section 3 to require a joint recall would require the Board to call a recall election of the governor if only a petition for recall of the lieutenant governor were filed. To require a recall election of an incumbent governor, the chief executive of the state, based on a petition for the recall of the lieutenant governor, an officer with few constitutional duties, would work an absurd result.

¶ 14. The Constitution must be construed to harmonize and give effect to all its provisions. *State ex rel. Blockwitz v. Diehl*, 198 Wis. 326, 332-33, 223 N.W. 852 (1929); *State ex rel. Wausau St. Ry. Co. v. Bancroft*, 148 Wis. 124, 136, 134 N.W. 330 (1912); *Lumsden v. Cross*, 1 Wis. 277 (*317*) (1860). In order to give full effect to article XIII, section 12, establishing the right of electors to recall “any incumbent elective officer,” and in light of the application of article V, section 3 only to general elections, I read article V not to apply to a recall election of the governor.

¶ 15. I conclude that, under the Wisconsin Constitution, a petition to recall a governor requires the filing officer to call a recall election of only the governor, not the lieutenant governor. Article XIII, section 12, which focuses on the incumbent officer holding office, permits the electorate to petition for the recall of a single elected officer. A recall election of the lieutenant governor may be called only if a petition is filed for that elected officer. The requirements of article V, that the governor and lieutenant governor be elected jointly and for the same term, do not apply to a recall election conducted under article XIII, section 12. Should petitions for recall meeting the requirements of article XIII, section 12(1) be filed for both the governor and the lieutenant governor, a recall election conforming to the requirements of article XIII, section 12 would be held for each office, not jointly.

Sincerely,

J.B. VAN HOLLEN
Attorney General

JBVH:KMS:SPM:CG:cla
December 19, 2011

Mr. Frank Volpintesta
Corporation Counsel
Kenosha County
912 - 56th Street
Kenosha, WI 53140

Dear Mr. Volpintesta:

¶ 1. You are concerned about health insurance costs for county board supervisors in your county, which is a self-organized county under Wis. Stat. § 59.10(1).

QUESTION PRESENTED AND BRIEF ANSWER

¶ 2. You ask whether state law prohibits either discontinuation of all health insurance for county supervisors in self-organized counties during supervisors’ terms of office or modest but involuntary increases in health insurance premiums for county supervisors in self-organized counties during supervisors’ terms of office.

¶ 3. In my opinion, the answer is no.

ANALYSIS

¶ 4. Your county is a self-organized county. The compensation for supervisors in such counties is established under Wis. Stat. § 59.10(1)(c), which provides: “The method of
compensation for supervisors shall be determined by the board.” A recognized dictionary such as BLACK’S LAW DICTIONARY may be used to ascertain the meaning of the term “compensation,” which is not defined in Wis. Stat. § 59.10(1)(c). See State v. Polashek, 2002 WI 74, ¶¶ 19-20, 253 Wis. 2d 527, 646 N.W.2d 330. BLACK’S LAW DICTIONARY 301 (8th ed. 2004) defines “compensation” as follows:

n. 1. Remuneration and other benefits received in return for services rendered; esp., salary or wages . . .

“Compensation consists of wages and benefits in return for services. It is payment for work. If the work contracted for is not done, there is no obligation to pay. [Compensation] includes wages, stock option plans, profit-sharing, commissions, bonuses, golden parachutes, vacation, sick pay, medical benefits, disability, leaves of absence, and expense reimbursement.” Kurt H. Decker & H. Thomas Felix II, Drafting and Revising Employment Contracts § 3.17, at 68 (1991).[2]


¶5. Wisconsin Stat. § 59.10(1)(c) “vest[s] broad discretion in county boards of supervisors in self-organized counties to determine how supervisors in such counties will be compensated.”

293-94, 11 N.W. 486 (1882) (identifying the purposes behind the enactment of the language contained in what is now Wis. Stat. § 59.10(3)(f) and (i)):

It is quite clear that the statute contemplates that the power [to establish compensation for county supervisors] shall be exercised at a period remote from the time when such officers were to be chosen, in order to prevent the influence of partisan bias or personal feeling on the part of members of the board in fixing the salary. And, furthermore, it was probably deemed desirable that candidates for office should know precisely what compensation was attached to the office. Hence the statute provided that the board should fix at its annual meeting, the amount of annual salary which each county officer should receive.


2Although this definition indicates that the ordinary and accepted meaning of “compensation” includes reimbursement for out-of-pocket expenses, the Legislature has provided for separate treatment of such expenses. See Wis. Stat. § 59.22(3).
79 Op. Att’y Gen. 122, 123 (1990), citing 65 Op. Att’y Gen. 16 (1976). Unlike Wis. Stat. § 59.10(3)(f) and (i), Wis. Stat. § 59.10(1)(c) contains no requirement that supervisor compensation be established at the annual meeting for ensuing terms of office. In self-organized counties, supervisor compensation including health insurance premiums may be established or changed at any time.

¶ 6. Wisconsin Stat. § 66.0505(2), which provides as follows, prohibits only salary increases during the terms of office of local elected officials:

An elected official of any political subdivision, who by virtue of the office held by that official is entitled to participate in the establishment of the salary attending that office, shall not during the term of the office collect salary in excess of the salary provided at the time of that official’s taking office.

Supervisors in self-organized counties do establish their own salaries. Wis. Stat. § 59.10(1)(c). Even if health insurance premiums constitute “salary” within the meaning of Wis. Stat. § 66.0505(2), the prohibition contained in that statute is limited to the acceptance of salary increases during the term. Because the statute does not prohibit salary decreases, it has no possible application to the elimination of health insurance premiums for county supervisors or to modest increases in such premiums for county supervisors.

¶ 7. Wisconsin Const. art. IV, sec. 26(2), prohibits increases or decreases in the compensation only of state public officials: “Except as provided in this subsection, the compensation of a public officer may not be increased or diminished during the term of office[.]” The constitutional prohibition applies only to certain public officers who are paid out of the state general fund. See State ex rel. Singer v. Boos, 44 Wis. 2d 374, 380, 171 N.W.2d 307 (1969); State ex rel. Sachjen v. Festge, 25 Wis. 2d 128, 134-36, 130 N.W.2d 457 (1964) (“public officer” in Wis. Const. art. IV, sec. 26 has been interpreted virtually as if it read “state public officer”); State ex rel. Smith v. Outagamie County, 175 Wis. 253, 263-64, 185 N.W.2d 184 (1921); The Board of Supervisors of Milwaukee County v. Hackett, 21 Wis. 620, 625 (1867). County supervisor is not a statewide public office. County supervisors also are not paid out of the state general fund. The term “public officer” in Wis. Const. art. IV, sec. 26 does not include county officers. See 79 Op. Att’y Gen. 149, 152-53 (1990). Wisconsin Const. art. IV, sec. 26(2), therefore has no application to county supervisors.
CONCLUSION

¶ 8. I therefore conclude that state law does not prohibit either discontinuation of all health insurance for county supervisors in self-organized counties during supervisors’ terms of office or modest but involuntary increases in health insurance premiums for county supervisors in self-organized counties during supervisors’ terms of office.

Sincerely,

J.B. VAN HOLLEN
Attorney General

JBVH:FTC:ela
Ms. Kimberly R. Walker  
Corporation Counsel  
Milwaukee County  
901 North Ninth Street, Rm. 303  
Milwaukee, WI 53233

Dear Ms. Walker:

QUESTIONS PRESENTED AND BRIEF ANSWERS

¶1. Your predecessor, then-acting Corporation Counsel Timothy R. Schoewe, requested a legal opinion concerning two questions:

1. May a Joint Review Board ("Board") created under Wis. Stat. § 66.1105(4m) approve an amendment to a Tax Incremental District ("TID") to provide for payment of already-scheduled street paving work, if the sole stated reason for the amendment is "freeing up street paving dollars in the [City of Milwaukee's ("City")] regular capital budget for use on street projects in areas more than one-half mile from a TID?"

2. May a Board approve the creation of a TID that includes street paving expenses that were already planned by the City before the creation of the TID in order to free up "street paving dollars in the City's regular capital budget for use on street projects in areas more than one-half mile from a TID?"

¶2. In my opinion, the answer to each of these questions is the same. The goal of freeing up city street paving dollars for a city's regular capital budget is not a valid legal basis to include expenses in the initial project plan for a TID or in an amendment to a project plan for an existing TID. However, the fact that a city has such a purpose does not, in itself, preclude the Board from approving or amending a TID. The Board must evaluate whether to approve the creation of or amendment to a TID based on whether the proposal as a whole meets the statutory criteria.

¶3. In conducting this analysis, the Board is required to review city council and planning commission resolutions under Wis. Stat. §§ 66.1105(4)(gm) and 66.1105(4)(h)1., to examine the city council's project-specific findings under Wis. Stat. § 66.1105(4)(gm)4., and to
consider the project-specific information provided by the city under Wis. Stat. § 66.1105(4)(i). The legal standards that the Board must apply are contained in Wis. Stat. §§66.1105(4m)(b)2. and 66.1105(4m)(c)1. Under those standards, the Board could conclude—but would not be required to conclude—that the costs of street paving planned before a TID is created or amended are appropriate project costs under Wis. Stat. § 66.1105(4m)(d). The Board is accorded considerable legal latitude in making these determinations.

BACKGROUND

¶4. We were advised that the City of Milwaukee Common Council has enacted two general resolutions concerning TIDs. The first resolution notes that tax incremental financing may be used for public works or improvements outside a TID but within one-half mile of the TID’s boundaries. It further notes that the project plans for an active TID could be amended to include certain street-paving projects within the TID, or within one-half mile of the TID’s boundaries, that have already been identified in the City’s most current six-year street paving program. The resolution specifically notes that such amendments would “free up street paving dollars in the City’s regular capital budget for use on street projects in areas more than one-half mile from a TID.” The second resolution makes similar affirmations with respect to project plans for prospective TIDs, and then states:

The Mayor and Common Council of the City of Milwaukee do ordain as follows:

Part I. Section 304-95 of the [Milwaukee Code of Ordinances] is created to read:

304.95. Tax Incremental Districts—Inclusion of Street Paving Costs in Project Plan. In preparing the project plan for any new tax incremental district, the department of city development shall include in the plan, as project costs, the costs of all street paving projects anticipated to occur within the district and within one-half mile of the district’s boundaries within the next 6 years, as identified by the city’s most recent 6-year local street paving program. The department of city development shall consult with the department of public works in identifying all street paving projects to be included in the project plan.

¶5. We were advised that, based upon the first of these resolutions, the Board has been requested to approve a project plan amendment for an existing TID solely to include the costs of previously-planned street paving.

ANALYSIS

¶6. The Board’s functions are set out in Wis. Stat. § 66.1105(4m). The Board reviews three kinds of proposals: “Any city that seeks to create a tax incremental district, amend a project plan, or incur project costs as described in sub. (2)(f)1.n. for an area that is outside of a
district’s boundaries, shall convene a ... joint review board ... to review the proposal.” Wis. Stat. § 66.1105(4m)(a). When considering a proposal, the Board “shall review the public record, planning documents and the resolution passed by the local legislative body or planning commission under sub. (4)(gm) [project plan] or (h)1. [project plan amendment].” Wis. Stat. § 66.1105(4m)(b).1.

¶ 7. Before a city council submits a proposal to the Board to approve the creation or amendment of a TID, the city council must enact a resolution with provisions and findings specific to the proposal that is before the Board. Wis. Stat. § 66.1105(4)(gm)(h). All proposed “project costs” must be included in the project plan. Wis. Stat. § 66.1105(4)(f). “Project costs” are the city’s costs in implementing the project plan; the city council’s resolution must include findings that the costs “relate directly to eliminating blight, directly serve to rehabilitate or conserve the area or directly serve to promote industrial development, consistent with the purpose for which the tax incremental district is created[.]” Wis. Stat. § 66.1105(4)(gm)4.bm. The city council is also required to furnish the Board with project-specific information stating “[t]he reasons why the project costs ... may not or should not be paid by the owners of property that benefits by improvements within the tax incremental district.” Wis. Stat. § 66.1105(4)(i)3.

¶ 8. If the city council resolution submitted to the Board states only that street paving costs have been included in the project plan or plan amendment in order to free up street paving dollars in the city’s regular capital budget for use on street projects in areas more than a one-half mile radius from a TID, then the resolution is legally insufficient under Wis. Stat. § 66.1105(4)(gm)4. Assuming that the city council’s resolution is not so limited, however, the Board must apply the appropriate statutory criteria.

¶ 9. Initially, the Board must consider whether to approve the city council resolution that creates the TID or the amendment to the project plan. Wis. Stat. §§ 66.1105(4)(gm); 66.1105(4)(h); 66.1105(4m)(b)2. The Board’s approval must “contain[] a positive assertion that, in its judgment, the development described in the documents the board has reviewed ... would not occur without the creation of a tax incremental district.” Wis. Stat. § 66.1105(4m)(b)2.

¶ 10. The “positive assertion” concerning the “development” mandated by Wis. Stat. § 66.1105(4m)(b)2. is also required in connection with any amendment. Wis. Stat. §§ 66.1105(4)(h)1.; 66.1105(4m)(b)2. The “development” referred to in Wis. Stat. § 66.1105(4m)(b)2. and (c)1.a. is the “project plan,” which is defined in Wis. Stat. § 66.1105(2)(g) as the “properly approved plan for the development or redevelopment of a tax incremental district, including all properly approved amendments thereto.”

¶ 11. The “development” is described in the project plan for the district as a whole. See Wis. Stat. § 66.1105(2)(g); see also State ex rel. Olson v. City of Baraboo, 2002 WI App 64, ¶ 29, 252 Wis. 2d 628, 643 N.W.2d 796 (interpreting prior law). The Board’s judgment that the
development would not otherwise occur applies to the development in the entire TID, without reference to individual categories of project costs.

¶ 12. The Board must also apply the criteria contained in Wis. Stat. § 66.1105(4m)(c)1.a.-c. Each of the required findings examines the TID taken as a whole. The first criterion is “[w]hether the development expected in the tax incremental district would occur without the use of tax incremental financing.” Wis. Stat. § 66.1105(4m)(c)1.a. Because this provision examines the “development,” the analysis turns on the TID or amendment as a whole, not just one feature or the amendment in isolation. Wis. Stat. § 66.1105(2)(g); see also Olson, 252 Wis. 2d 628, ¶ 29 (interpreting prior law).¹

¶ 13. The second criterion in Wis. Stat. § 66.1105(4m)(c)1.b. is “[w]hether the economic benefits of the tax incremental district, as measured by increased employment, business and personal income and property value, are insufficient to compensate for the cost of the improvements.” Although Wis. Stat. § 66.1105(4m)(c)1.b. has not been judicially construed, its focus is again on the TID taken as a whole. The phrase “the cost of the improvements” in Wis. Stat. § 66.1105(4m)(c)1.b. refers to the proposed cost of the improvements for the entire TID, and not to the proposed cost of particular improvements. Where a TID or amendment thereto includes numerous already-planned, ordinary expenses, the Board may find that the total costs of the project outweigh the economic benefits of the TID.

¶ 14. The third item the Board must consider is “[w]hether the benefits of the proposal outweigh the anticipated tax increments to be paid by the owners of property in the overlying taxing districts.” Wis. Stat. § 66.1105(4m)(c)1.c. This criterion is specific to the proposal before the Board. For a proposal creating a TID, the Board determines whether the benefits of the proposal to create the TID outweigh the anticipated tax increments to be paid by the owners of property in the overlying taxing districts, again without reference to any specific category of project costs. For a proposal amending a TID, the Board determines whether the benefits of the amendment outweigh the anticipated tax increments.

¶ 15. If the Board finds that the proposal to create or amend a TID meets the standard in Wis. Stat. § 66.1105(4m)(b)2. and the three criteria set forth in Wis. Stat. § 66.1105(4m)(c)1., it may approve the proposal even if the inclusion of certain expenses was intended to free up dollars the City had already planned to spend apart from any TID.

¶ 16. The questions discussed above raise another issue that should be addressed. Project costs and liabilities that are outside of a TID, but within a half-mile radius of its

¹This requirement existed before the Board was required to make a similar positive finding under Wis. Stat. § 66.1105(4m)(b)2. See Wis. Stat. § 66.1105(4m) (2001-02); Comment, “A Modest Proposal: Eliminating Blight, Abolishing But-For, and Putting New Purpose In Wisconsin’s Tax Increment Financing Law,” 89 Marq. L. Rev. 407, 423 (2005).
boundaries, are subject to an additional layer of review. Wis. Stat. § 66.1105(4m)(d) states: “Before a city may make or incur an expenditure for project costs, as described in sub. (2)(f)1.n., for an area that is outside of a district’s boundaries, the joint review board must approve the proposed expenditure.” Review under that subsection is not triggered until after a project plan has been approved. I conclude that the principal function of the Board’s review under Wis. Stat. § 66.1105(4m)(d) is to determine if the money to be spent in the area outside the TID’s boundaries will, in fact, be spent in accordance with the approved plan and any approved amendments. When acting under that provision, the Board should not independently analyze individual expenditures to determine if each expenditure itself satisfies the specific criteria for initial plan approval under Wis. Stat. § 66.1105(4m)(c)1.

¶ 17. The Board possesses considerable legal latitude in making its determinations. The Board’s determinations are reviewable by certiorari. See Olson, 252 Wis. 2d 628, ¶ 8. A court will therefore review only whether the board “(1) kept within its jurisdiction; (2) proceeded on a correct theory of law; (3) acted in a way that was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) might reasonably make the order or determination in question, based on the evidence.” Olson, 252 Wis. 2d 628, ¶ 8.

CONCLUSION

¶ 18. To summarize, the Board reviews all relevant information provided by the city council and the city planning commission. The principal criteria that the Board applies to proposed street paving costs is approval under Wis. Stat. § 66.1105(4m)(b)2. and the three-part legal standard contained in Wis. Stat. § 66.1105(4m)(c)1. The Board could conclude that the costs of street paving that had already been planned before a TID is created or before a project plan for an existing TID is amended are appropriate for inclusion as proposed project costs. The Board could also approve actual street paving expenditures incurred outside of a TID and within a one-half mile radius of the TID’s boundaries, if the expenditures are in accordance with the approved project plan.

Sincerely,

J.B. VAN HOLLEN
Attorney General

JBVH:FTC:cla:lkw