

## Corporation Counsel



305 E. WALNUT STREET  
P.O. BOX 23600  
GREEN BAY, WI 54305-3600

John F. Luetscher

PHONE (920) 448-4006  
luetscher\_jf@co.brown.wi.us

FAX (920) 448-4003

February 14, 2011

Mr. J.B. Van Hollen  
Wisconsin Attorney General  
Wisconsin Department of Justice  
P.O. Box 7857  
Madison, WI 53707-7857

I am the Corporation Counsel for Brown County. I am requesting you review the issue presented and give a legal opinion on it.

### Issue Presented:

Does the county have lawful authority to enact an ordinance giving municipalities entering cost share agreements for joint projects with the county highway department the right to require all work be let by contract in lieu of the county performing work on the county road?

### Facts:

The highway commissioner enters agreements for the improvement of county highways with cities, villages and towns pursuant to Wis. Stat. §§ 83.03 and 83.035. Typically, the agreements are joint projects to construct a road with many of the features of urban area streets. The county's policy is to share the cost of those projects on a 50% - 50% basis with the municipality (ies).

In the agreements, the highway commissioner determines what work the county can directly perform on the project. Sometimes the municipalities perform work directly on these projects as well. The highway department owns equipment and vehicles suitable for road building and has a labor force capable of doing road construction work. The highway department can do planning and engineering, road bed preparation and asphaltting on these joint projects and will contract with private companies for the remaining work. The agreements require the municipality to reimburse the county for 50% of the cost of work the county performs directly on a project.

One or more municipalities here object to paying the county for 50% of the cost of work performed by the county. These municipalities contend the labor and material cost will be less if the county contracts with private companies for all of the project work using a competitive bid process. The county disputes this contention and wants to continue to perform direct work on county roads when it is able to do so.

In Brown County, the Highway Committee is a standing committee of the Board of Supervisors, the Planning, Development and Transportation Committee. A supervisor on this committee wants to propose an ordinance that would give a municipality the option to require all of the work on a joint county-municipality project be let by contract regardless of the highway commissioner's determination the county should perform work directly.

Analysis:

My analysis leads me to conclude the proposed ordinance would go beyond the county's lawful authority, but I have included what I believe would be an ordinance proponent's argument for an opinion such an ordinance would be a proper exercise of county authority.

In Brown County, the county executive appoints the highway commissioner pursuant to Wis. Stat. § 83.01 (1) (c). Accordingly, pursuant to Wis. Stat. § 83.015 (2)(b), Stats., the highway commissioner possesses the administrative powers and duties prescribed for the county highway committee under numerous statutes including Wis. Stat. §§ 85.035 and 83.04.

Following Wis. Stat. § 83.035, the Brown County Board of Supervisors has enacted an ordinance giving the highway commissioner authority to enter into contracts with cities, villages, and towns to construct and maintain streets and highways in such municipalities (See § 6.10 Brown County Code). The joint responsibility – cost sharing agreements for road construction at issue here fit within the ambit of this statute and the county's ordinance.

Two separate statutory provisions give the highway commissioner the discretion to determine how work is to be completed on county highway construction projects. Wis. Stat. §§ 83.015 (2) (a) and (2) (b) read together authorize the highway commissioner "to determine whether each piece of county aid construction shall be let by contract or shall be done by day labor, enter into contracts in the name of the county, and make necessary arrangements for the prosecution of the construction and maintenance of highways provided for by the county board . . ." The ordinance being considered would remove the determination of how work is to be completed from the highway commissioner's responsibilities and give it to the other contracting municipality in joint highway – cost share projects.

Similarly, Wis. Stat. § 83.04 read in conjunction with Wis. Stats. 83.015 (2) (b) states all highway improvements made by the commissioner shall be by contract, unless the commissioner determines that some other method would better serve the public interest. The proposed ordinance would require that highway improvements be let by contract unless the other municipality in a joint highway cost shared project determined some other method would better serve the public interest.

Pursuant to the statutory scheme in Chapter 83, the legislature has given authority to the highway commissioner to determine how work is performed on county highway projects. An ordinance limiting this administrative authority in joint responsibility highway projects would conflict with those statutes.

Counties do have administrative home rule authority to "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". Wis. Stat. § 59.03 (1). A proponent of the ordinance would characterize it as an exercise of organizational or

administrative authority to redefine the highway commissioner's powers and duties. The ordinance could be characterized as a policy decision consistent with the highway committee's responsibilities in counties where the county executive appoints the commissioner (See Wis. Stat. § 83.015) (2)(b)). The board of supervisors does decide when the county will construct or improve any highway in the county in the first place pursuant to Wis. Stat. § 83.03 (1). The authority to enact the ordinance could derive from this statutory authority.

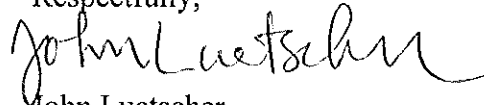
The county's administrative home rule powers are limited by the language in Wis. Stat. § 59.03 (1) and specifically by the Wis. Stat. § 59.51 (1). The Attorney General in OAG 01-10 stated these two provisions must be read together to understand the extent of a county's home rule authority. Wis. Stat. § 59.51 (1) states 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 to a person supervised by the county executive." The Brown County executive supervises the highway commissioner pursuant to Wis. Stat. § 83.01 (1) (c). The county's administrative home rule authority cannot be used to eliminate administrative powers granted by statute to the highway commissioner. This is not a situation in which the board of supervisors can deviate from statutory directives using administrative home rule power.

Tentative Conclusion:

The proposed ordinance would transfer administrative authority given to the highway commissioner by statute and would transfer it to the other governmental entity entering the joint highway project agreement with the county. The ordinance would be contrary to statute and could not be justified as an exercise of county administrative home rule power.

Brown County looks forward to your response.

Respectfully,



John Luetscher

CORPORATION COUNSEL

JL:smg

cc: Supervisor Bernie Erickson –  
Chairman - Planning, Development & Transportation Committee

Supervisor Dave Kaster –  
Planning, Development & Transportation Committee

Brian Lamers –  
Brown Co. Highway Commissioner

Thomas J. Hinz –  
Brown County Executive