



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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OAG—2—11

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

¹Counties 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 (c) 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[.]” 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

JBVH:FTC:cla

³Slightly different statutory provisions apply to Milwaukee County. *See* Wis. Stat. § 83.01(1)(b).