



Wisconsin Legislative Reference Bureau

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## Local Government

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## Local Government

In October 2000, the city of New London, Connecticut, initiated condemnation proceedings against a number of private homeowners. The homes owned by these people were not asserted to be in disrepair. Rather, the homes sat upon land that the city wanted to redevelop to meet the demands of Pfizer, a large pharmaceutical company. Pfizer had indicated that it was interested in establishing a substantial presence in the area, but wanted the city to provide some improvements, which the city intended to make in the area of the to-be-displaced homeowners. Eventually, the dispute between the city and the homeowners landed in the United States Supreme Court.<sup>1</sup> The court determined that the city had not exceeded its authority in using eminent domain power—the power of a governmental entity to take private property for public use with just compensation—to essentially transfer property from one private party to another.

On September 29, 2010, firefighters from the South Fulton, Tennessee, fire department arrived at the scene of a house fire. Instead of attempting to save the structure, fire department personnel focused their attention on preventing the fire's spread to a neighboring field. Far from being derelict in their duties, the firefighters were complying strictly with local policy. The owner of the house had not opted to subscribe to the local fire protection service, while the owner of the field had.

Both of these examples demonstrate something quite obvious: that decisions made at the local level can have immense impact on our everyday lives. Another thing that these examples demonstrate is that actions of local governments often spur attempts by state legislatures to supervise local decision making. Shortly after the 2005 Supreme Court decision upholding the city of New London's eminent domain actions in *Kelo v. New London*, Governor Jim Doyle signed 2005 Wisconsin Act 233. This act made Wisconsin one of over 40 states to limit the eminent domain powers of local governments in the wake of *Kelo*. Although the bill did not become law, 2011 Wisconsin Assembly Bill 192 was introduced in June 2011 and passed the Wisconsin Assembly. The bill would have prohibited any local government from providing a subscription-based police or fire service, even though no local government in Wisconsin apparently provides service in this manner.

The state government and the hundreds of local governments in Wisconsin share legislative authority over the territory of Wisconsin. Clearly, local governments are subject to some state oversight. However, local governments have many powers, by design, and for various reasons not many determinations by local governments are undone by state legislation.

### GENERAL PURPOSE LOCAL GOVERNMENTS AND THEIR POWERS

There are several types of local governments in Wisconsin. Some of these are special purpose districts, which exist only to provide a specific service. These include, for example, school districts, agricultural drainage districts, sewerage districts, and professional sports stadium districts. Of concern here, however, are general purpose local governments, the local governments that have the power to regulate most of the broad range of legislative issues that may arise in a particular area.<sup>2</sup>

In Wisconsin, every parcel of land is located within the jurisdiction of two general purpose local governments: a county and a municipality. The territory of the state is divided into 72 counties and the territory of each county is divided into municipalities. Unless the residents of an area have taken steps to incorporate the municipality, which gives the municipal government additional authority and duties, the

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<sup>1</sup>*Kelo v. City of New London*, 545 U.S. 469 (2005).

<sup>2</sup>See Marc Shovers, *Governing Wisconsin* no. 12, "Special Purpose Districts: Types, Powers, and Duties," (Madison, WI: LRB, 2006) at <http://lrbdigital.legis.wisconsin.gov/cdm/singleitem/collection/p16831coll2/id/1499/rec/2>.

municipality is a town. If the residents of the area have incorporated the municipality, the municipality is either a village or a city. In general, areas that are rural and whose residents demand fewer governmental services tend to remain towns, while areas that are urbanized or whose residents seek greater local governmental services and authority become, or become attached to, villages or cities.

General purpose local governments have, in general, broad authority. The source of the authority varies depending upon the type of local government. The Wisconsin Constitution grants to villages and cities the general authority to “determine their local affairs and government.”<sup>3</sup> This authority is often referred to as municipal home rule authority.

The state legislature has granted a similarly broad range of powers over local affairs to counties and towns. This grant of authority is not, however, constitutionally mandated and the powers specifically granted are generally understood to comprise the complete sum of powers over local affairs exercised by counties and towns.

In addition, the state has delegated to local governments more limited authority to regulate matters of statewide interest. The limits of this grant of authority vary depending upon the particular area of regulation. Most basically, local regulation may not conflict with state legislation. In some instances, a local government may have only the power to choose between limited options, or even lack the power to set standards different from those provided in state legislation. As an example of the latter, traffic regulation is generally considered a matter of statewide interest. The state specifically allows local governments to enact traffic ordinances, but these ordinances generally must be in strict conformity with state traffic statutes.<sup>4</sup>

#### **STATE CONTROL OF LOCAL GOVERNMENT**

Whatever the source of local governmental authority, the state legislature retains great influence over most aspects of local government. The state legislature has, in most cases, the authority to override local regulation or preclude local regulation, even in municipalities with home rule authority. In addition, the state legislature limits local governmental power by exercising significant control over the finances of local governments.

#### **DIRECT CONTROL**

As mentioned above, counties and towns have only the powers granted in the statutes, while cities and villages have broad general powers granted by the Wisconsin Constitution in addition to the powers granted in the statutes.

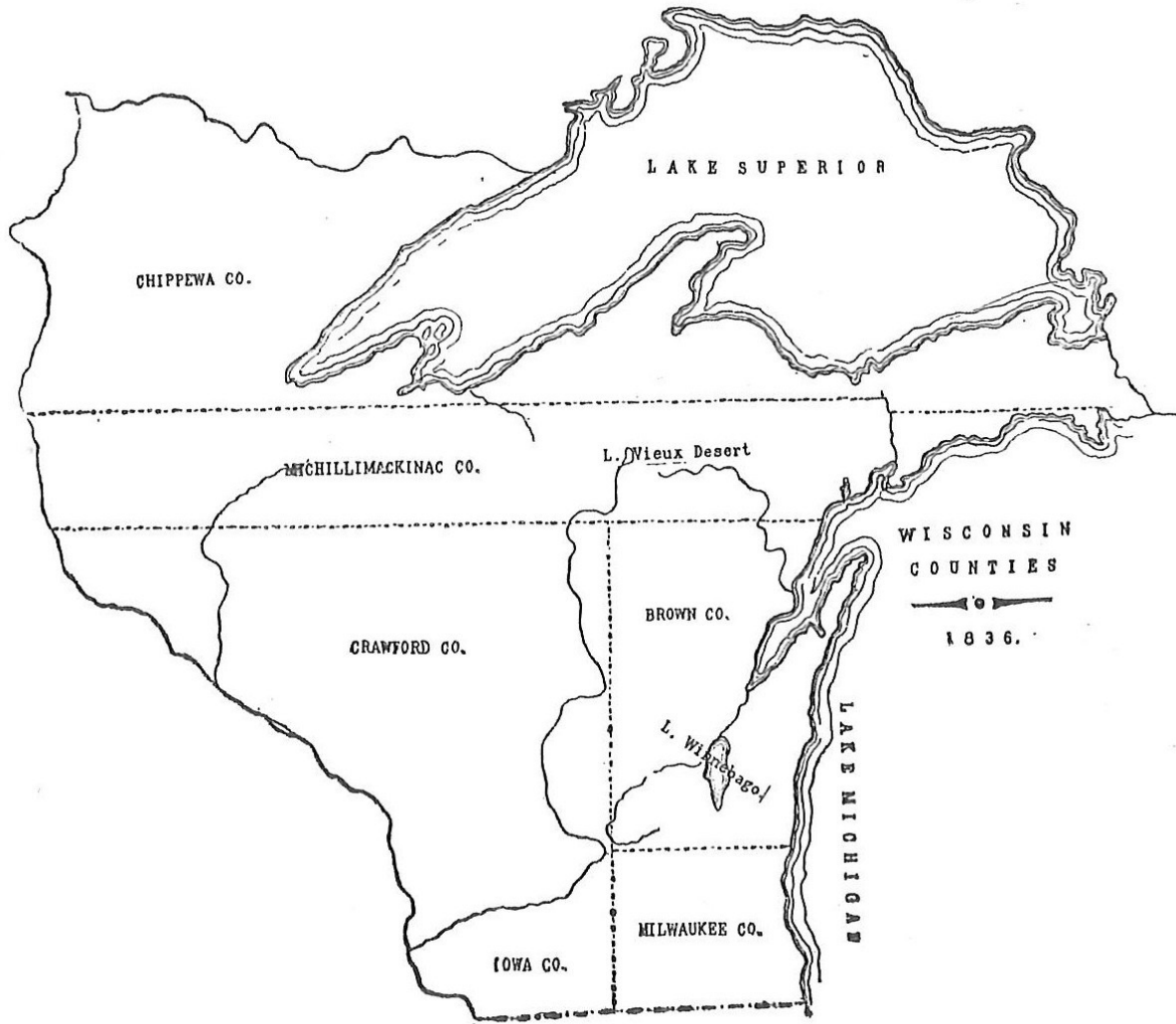
The ability of the state legislature to intervene in local regulation depends on what type of local government is being addressed and, more directly, on the source of the power being exercised by the local government. In the case of counties and towns, because the powers exercised by these local governments are a matter of legislation, the state government need merely adopt additional legislation to alter the local government’s authority. For example, if a county adopted an ordinance prohibiting its employees from checking the immigration status of persons seeking public services, the state legislature could simply enact a statute prohibiting the county from adopting such an ordinance.<sup>5</sup> Likewise, when legislating on matters of statewide concern, the legislature is empowered to limit or extend the granted authority regardless of the form of local government.

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<sup>3</sup>Wisconsin Constitution, article XI, section 3.

<sup>4</sup>See Wisconsin Statutes, sections 349.03 and 349.06.

<sup>5</sup>See, e.g., 2011 Assembly Bill 173.



Distribution of Population 1836.

*Image courtesy of the Wisconsin Historical Society.*

In the case of villages and cities, the ability of the state legislature to intervene in local regulation is somewhat limited. The home rule provision in the Wisconsin Constitution grants cities and villages a certain amount of authority to conduct their own affairs without state government interference. The provision reads:

Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.<sup>6</sup>

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<sup>6</sup>Wisconsin Constitution, article XI, section 3.

This provision is obviously somewhat ambiguous. It clearly grants some authority to cities and villages, i.e., the authority to determine local affairs and government. However, it also provides an apparently broad exception to that authority for legislation of statewide concern that affects every city or every village. In practice, when the state legislature seeks to control the actions of a village or city, the state legislature acts much as in the case of a county or town, passing legislation limiting a village or city power. In the case of a state regulation of the local affairs of a village or city, however, the village or city may assert home rule authority by enacting a “charter ordinance” that asserts the determination of the village or city not to be covered by legislation that the village or city believes is not a sufficiently statewide concern.

In cases where a state statute allegedly interferes with the home rule authority of a village or city, Wisconsin’s courts have applied a primacy test. The court examines the state legislation to determine if it addresses an exclusively local concern, an exclusively statewide concern, or a mixed concern. If the statute addresses an exclusively statewide concern, home rule provides no protection. If the statute addresses an exclusively local concern, the local government may choose not to be governed by the state legislation. If the legislation addresses a mixed concern, the court further determines whether the legislation addresses a primarily local concern or a primarily statewide concern. If the statute addresses a primarily local concern, a village or city may choose to not be governed by the statute. If the statute addresses a primarily statewide concern, home rule offers no protection to the village or city.

When exactly is an issue primarily local or primarily statewide? Perhaps not unexpectedly, the answer is unclear. The charter ordinance power is not frequently exerted and only a few Wisconsin court cases have attempted to distinguish between statewide and local interests. These cases have not resulted in a clear test for whether an interest is local or statewide. On a case-by-case basis, courts have determined that public notice of zoning ordinance changes is a statewide interest and that building height is a local interest, and have implied that zoning itself is a local interest. The state legislature has also, at times, specifically indicated in the statutes that certain matters are of statewide interest.<sup>7</sup> A court reviewing such a law would likely take into account the state legislature’s assertion, but is not likely to defer entirely to the legislature.

Another provision of the Wisconsin Constitution that limits state regulation of local governments is the provision regarding private or local bills.<sup>8</sup> This provision requires that, to be validly enacted by the state legislature, a bill affecting only one locality must encompass only one subject and the subject must be expressed in the title. Though not a substantive limitation, this provision does prevent the state legislature from combining numerous local bills for a single vote or from attaching local legislation to unrelated legislation. Although it is sometimes ignored (for example, the budget often contains many provisions related to specific localities), courts have invalidated legislation that violates this provision. For example, a recent budget bill contained a provision allowing the Town of Ledgeview in Brown County to incorporate into a village without following the usual procedure for incorporation.<sup>9</sup> In subsequent litigation, a court invalidated the special Ledgeview incorporation provision due to its violation of the local bill provision of the Wisconsin Constitution.<sup>10</sup>

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<sup>7</sup>See, for example, Wisconsin Statutes, sections 66.0505 (timing of salary increases for local government officials) and 104.001 (statewide minimum wage).

<sup>8</sup>Wisconsin Constitution, article IV, section 18.

<sup>9</sup>Wisconsin Statutes, section 66.0203 (11), 2007.

<sup>10</sup>*Kuehne v. Burdette*, 2009 WI App 119.

## **FINANCIAL CONTROL**

Although the state legislature does not always engage in direct, substantive regulation of local government policy, the state legislature profoundly affects local governments through the legislature's influence over local government finances. The two most significant ways the state legislature influences local government finances is by providing funding to local governments and by controlling local government taxation authority.

## **DIRECT AIDS**

In the 2013-15 fiscal biennium, the state budget provided for approximately \$20 billion in local assistance. While much of this money, more than \$11 billion, is directed to school districts, a substantial portion is also directed to general purpose local governments. Of the portion allotted to counties and municipalities, the largest share, about \$1.8 billion, is general local aid. General local aid, often called "shared revenue," is aid that is provided without any particular restrictions on its use.

The balance of the money provided to counties and municipalities is state funding directed to particular programs. One of the largest programs is general transportation aid, which provides more than \$800 million to local governments to be used solely for transportation-related purposes. Similar aid programs provide money to local governments for providing recycling services, mass transit services, health care services, and corrections services, among many others. State funding is also made available to local governments on a grant basis, under which local governments must apply and compete for limited dollars made available for specific types of projects. For example, under the harbor assistance program, local governments can apply for limited funding to be used solely for the purposes of making harbor improvements.<sup>11</sup>

Each of these restricted aids or grants, unsurprisingly, comes with specific conditions. As would be expected, money provided for particular types of services generally must be used only to provide those specific services. In addition, money provided as aids or grants often comes with many requirements or restrictions. To receive general transportation aid, for example, a local government must provide the state with reports related to costs and permit an independent audit of the report. More onerously, to receive a grant from the state for a local government recycling program, the local government must ensure that the recycling program meets a dozen requirements ranging from providing an adequate public information campaign, to mandating and enforcing the separation of certain materials from the waste stream, to marketing recycled products. By using funding in this manner, the state legislature is able to influence local government policy—particularly when, as in the case of transportation funds, state money is necessary to provide adequate service, or when, as in the case of recycling grants, state money provides an additional strong incentive to undertake a service that would be popular among many constituents.

## **TAX CONTROLS**

As mentioned above, the largest portion of state aid to general purpose local governments is shared revenue. While there are no conditions on how the local government may spend this money, the state does use the money to enforce taxation policy. Most of any county's or municipal government's revenue comes from property tax. The property tax is generally set by determining the amount needed for government operations in the coming year, which is called the "levy," and distributing that burden among the property owners within the government's boundaries. That is, the local government's revenue is determined not by applying a particular rate of taxation to something and collecting the proceeds

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<sup>11</sup>Wisconsin Statutes, section 85.095.

resulting from that rate, but by setting an amount to collect and distributing this amount among people owning property in the governmental unit.

Since 2005, the state has imposed a levy limit on counties and municipalities. Under the levy limit law, a county or municipality is not permitted to increase its levy for the current year over last year's levy by more than the greater of the percentage increase in property value due to new construction or a different, specified percentage. In prior years, the specified percentage varied between 2 percent and about 4 percent. Currently the levy limit is zero percent, meaning that counties and municipalities are allowed to increase their levy only if property values have increased, and only by the amount that they have increased. A county or municipality is permitted to exceed the levy limit only if the electorate of the county or municipality approves exceeding the limit in a popular referendum.

The state uses shared revenue to enforce the levy limit. If the county or municipality exceeds the levy limit without having received approval from the electorate, the state simply reduces the amount of shared revenue provided to the county or municipality by an amount equal to the overage.

### **INFORMAL LIMITS ON THE STATE LEGISLATURE**

It may appear that local governments are largely at the mercy of the state legislature. To an extent this is true. The state legislature has great authority to determine what local governments may and may not do and to influence which issues are dealt with or ignored by local governments. It is not true, however, that the state legislature frequently intervenes in the activities of local governments. In the 2015-16 legislative session, for example, only about 30 (of 392 enacted) bills and about 15 provisions (of more than 250) in the budget bill that were primarily focused on local issues were enacted.<sup>12</sup> Of these, about 10 were essentially special exceptions from general rules for specific counties or municipalities. Many of the others expanded or clarified the powers of local governments. The several pieces of legislation limiting the power of local governments demonstrate, however, that the state legislature will act when it perceives that some local governments have exceeded reasonable regulatory limits.

There are several reasons that the state government, despite its authority, generally only infrequently limits the powers of local government. First, the concept of home rule may temper legislative involvement in local governmental matters. Also, there is significant persuasive strength in the argument that the people directly impacted by an issue should have the most direct influence on its resolution. State legislators familiar with the related concept of federalism—the sharing of governance between state governments and the national government, as enshrined in the U.S. Constitution—can often be persuaded to refuse to act when essential statewide functions are not at issue.

Second, and relatedly, local governments sometimes play a role similar to that of states in the federal system, acting as laboratories of legislative experimentation. Local governments are generally smaller, made up of legislators representing smaller constituencies, and subject to fewer time-consuming legislative procedures. Thus, local governments are often more apt to try approaches to problems that would be difficult to attempt at the state level. State legislators may be inclined to allow experimentation, even when the local government is not taking their preferred approach, especially with regard to issues that have proven difficult to resolve.

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<sup>12</sup>See the Legislative Reference Bureau's *Summary of the 2015-16 Wisconsin Legislative Session*.



Third, most lawmakers have a background working with or serving in local government and, thus, are cognizant of the concerns of local governments. It would be unusual if persons with such direct experience in the local governmental arena did not have at least some concern for the roles of those currently in local governments.

Fourth, local governments can and do lobby on their own behalf. Organizations like the Wisconsin League of Municipalities, the Wisconsin Towns Association, and the Wisconsin Counties Association are quite active, both in sharing the views of local governments with legislators and with pursuing a legislative agenda supported by local governments. In addition, local governments and members of local governments frequently lobby on behalf of their specific local governments.

Finally, legislators have limited time and resources. Matters of primarily local interest are simply not often a priority for state legislators. Thus, many strictly local issues will end in an enactment only if there is at least some strong support, little or no opposition, and relatively few resources involved in enacting the legislation.

#### **CONCLUSION**

Shortly after the United States Supreme Court decided *Kelo*, Wisconsin's state government eliminated the power of local governments to condemn non-blighted property if the condemning government intends to convey the property to a private person. Given the outrage expressed by many over the *Kelo* decision, this legislative reaction was quite restrained. Other states, for example, prohibited their local governments from using eminent domain for purposes of economic development or entirely forbade the use of eminent domain when transfer of property ownership to another private party was intended. It is not entirely clear why Wisconsin acted less severely than other states, but the enactment does reflect the respect the state legislature has generally shown local governments and that, while the state legislature will act to rein in or avoid perceived excesses, the legislature permits and expects local governments to exercise broad powers.

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