



## Home Rule

Prepared by: Patrick Ward, Staff Attorney

Home rule power is the ability of a political subdivision to determine its local affairs and government. The source, scope, and legal analysis of a political subdivision's home rule power depend on the political subdivision's type. However, in practice, because courts have interpreted constitutional home rule power narrowly, home rule cases primarily focus on home rule powers found in statute. These cases focus on whether a state statute preempts a local regulation because the regulations conflict. This issue brief summarizes the history of municipal home rule and the law related to municipal and county home rule, including the analysis used when these powers are challenged.

### HISTORY OF HOME RULE

Until the 1920s, the state Legislature routinely considered hundreds of bills affecting the local matters of individual cities. In 1911, the Legislature passed a home rule statute. The following year, the Wisconsin Supreme Court voided the statute, holding that the statutory delegation of the Legislature's power to affect municipal charters was unconstitutional. [*State ex rel. Mueller v. Thompson*, 149 Wis. 488 (1912).] In 1921, the Legislature repealed special city charters and made cities subject to the newly adopted general charter that included a broad grant of statutory home rule power to cities.<sup>1</sup> The constitutional home rule amendment was adopted in 1924 with the recognized purpose of conferring "upon cities and villages a measure of self-government not theretofore possessed." The amendment gave cities and villages more local authority, but they remained subject to constitutional and statutory limitations. [*Black v. City of Mke.*, 2016 WI 47, ¶ 24.]

### HOME RULE IN CITIES AND VILLAGES

Cities and villages derive home rule power from both Wisconsin's Constitution and statutes. Constitutional home rule power, as interpreted by the Wisconsin Supreme Court, is very limited. For that reason, the most contested issue in a home rule case, and the focus of a court's analysis, is the scope of statutory home rule, or whether the local regulation is preempted by state statute.

### Constitutional Home Rule

The Wisconsin Constitution grants constitutional home rule power by providing that cities and villages "may determine their local affairs and government, subject only to [other provisions of the Wisconsin] Constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village." [Wis. Const. art. XI, s. 3.] This home rule amendment directs the Legislature to specify the method cities and villages use to determine their local affairs and government. The Legislature created the charter ordinance process to comply with this directive.<sup>2</sup>

When a local ordinance is challenged for being inconsistent with state law, one defense is that the state law is unconstitutional under the home rule amendment. In this situation, courts use a two-step process to test the constitutionality of the state law. In the first step, the court determines whether the state law involves a matter of statewide or local concern.<sup>3</sup> Sometimes a matter involves both statewide and local concerns and is a "mixed bag." For a "mixed bag" matter, the court uses a paramountcy test to determine whether the matter is "paramountly" or "primarily" of statewide or local concern. If the state law involves a matter of statewide concern, then the "home rule amendment grants no city or village the authority to regulate the matter" and the inquiry stops. If the state law involves a matter of local concern, then the analysis moves to step two. [*Black*, 2016 WI 47, ¶ 29.]

In the second step, the court determines whether the state law, on its face, uniformly affects every city or village in the state. If the state law is facially uniform, then the statute passes the constitutional home

test. Thus, a state law can survive a challenge under the home rule amendment if it either: (1) involves a matter of statewide concern; or (2) is facially uniform. Put differently, a local ordinance is protected by the home rule amendment only if the state law addresses a matter of local concern and is not facially uniform. However, because courts typically determine that a statute is a matter of statewide concern, the analysis rarely reaches the question of uniformity. [*Black*, 2016 WI 47, ¶¶ 7, 25, 29.]

## Statutory Home Rule and Preemption

Statutory home rule provides that a city or village “shall have power to act for the government and good order of the [city or village], for its commercial benefit, and for the health, safety, and welfare of the public” under its local police powers and “may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means.” [ss. 61.34 (1) and 62.11 (5), Stats.] Towns that adopt village powers can exercise the local police powers granted by statute to cities and villages, except where such powers conflict with statutes. [ss. 60.10 (2) (c) and 60.22 (3), Stats.]

Because the home rule amendment provides narrow protection to a local ordinance, a municipality may also defend the ordinance by arguing that it is a valid exercise of statutory home rule power because it does not conflict with state law, even if it is in the same field and subject as state law. Preemption analysis is used to determine the limits of city and village statutory home rule power. In preemption analysis, a state law overrides a local ordinance if any of the following factors are present: (1) the Legislature has expressly withdrawn the power of municipalities to act; (2) the municipality’s actions logically conflict with the state legislation; (3) the municipality’s actions defeat the purpose of the state legislation; or (4) the municipality’s actions are contrary to the spirit of the state legislation. [*Anchor Sav. & Loan Ass’n v. Madison EOC*, 120 Wis. 2d 391, 397 (1984).]

In cases with no express preemption, Wisconsin courts have been especially likely to conclude that a local regulation is preempted when the local regulation is more stringent than state law. In *Wisconsin Carry, Inc. v. City of Madison*, the Wisconsin Supreme Court invalidated a city transit rule because it regulated the carrying of concealed weapons more restrictively than state statute. Quoting a 1937 case, the court stated that “a municipality cannot lawfully forbid what the Legislature has expressly licensed, authorized, or required, or authorize what the Legislature has expressly forbidden.” [2017 WI 19, ¶ 56.]

## COUNTY HOME RULE

Counties have a more limited type of home rule, referred to as “administrative home rule power,” which is only statutory. A 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.” [s. 59.03 (1), Stats.] County home rule is more limited than municipal home rule, because a county cannot rely on constitutional authority to act and a county’s statutory authority provides only “organizational and administrative power,” which is narrower than city and village police powers. At the same time, courts have characterized administrative home rule as “a broad grant of power.” [See *Jackson Cnty. v. Dep’t of Natural Res.*, 2006 WI 96, ¶¶ 17, 19.]

When a county’s exercise of home rule power is at issue, courts consider whether there are any relevant state laws of statewide concern which uniformly affect every county. Courts view a statute that applies to every county uniformly as evidence that the law is of statewide concern, which limits the county’s action in that area. When both the state and county may act in a policy area, courts use the four-factor preemption analysis detailed above to determine whether the county’s action complements rather than conflicts with state law. [*Jackson Cnty.*, 2006 WI 96, ¶¶ 19-20.]

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<sup>1</sup> The changes did not affect first class cities. Similar powers were granted to villages in 1933.

<sup>2</sup> The charter ordinance process requires a two-thirds vote of the legislative body and is subject to a petition referendum. A charter ordinance may also be enacted by a majority of the voting electors through presentment of the question by the legislative body or a citizen initiative. [s. 66.0101, Stats.] For a discussion of the exercise of constitutional home rule, see Thomas P. Solheim, *Conflicts Between State Statute and Local Ordinance in Wisconsin*, 1975 Wis. L. Rev. 840, at 844-848.

<sup>3</sup> In *Black*, the court held that legislative determinations regarding whether a policy matter is of statewide concern are “entitled to great weight.” [¶ 30.]