

Village of Elm Grove Board of Trustee Meeting Minutes

Board of Trustee Call to Order:

The meeting was called to order by the Clerk at 8:33AM.

Roll Call:

PRESIDENT PALMER  
TRUSTEE DOMASZEK  
TRUSTEE HAAS  
TRUSTEE MICHALSKI  
TRUSTEE CORNELL  
TRUSTEE KRESSIN  
TRUSTEE SAYAS  
DAVID DE ANGELIS, VILLAGE MANAGER  
THOMAS HARRIGAN, ZONING ADMINISTRATOR  
HECTOR DE LA MORA, VILLAGE ATTORNEY  
REMZY BITAR, VILLAGE COUNSEL  
MICHELLE LUEDTKE, VILLAGE CLERK/DEPUTY TREASURER

Closed Session - May convene into closed session pursuant to Wis. Stat. ss.19.85(1)(g) to confer with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved. More specifically the petition for writ of mandamus filed January 21, 2021 from petitioners Michael Rohr, Marc McSorley, and Jan Termuehlen.

**MOTION BY PRESIDENT PALMER, SECOND BY TRUSTEE DOMASZEK, TO CONVENE INTO CLOSED SESSION.**

**ROLL CALL VOTE: YAY – PALMER, HAAS, MICHALSKI, CORNELL, KRESSIN, DOMASZEK, SAYAS. MOTION CARRIED. CLOSED SESSION BEGAN AT 8:33AM.**

Open Session - May convene into open session to take action on any closed session items.

**MOTION BY PRESIDENT PALMER, SECOND BY TRUSTEE SAYAS, TO CONVENE INTO OPEN SESSION. 9:13AM.**

**ALL IN FAVOR. MOTION CARRIED.**

President Palmer started by stating we are here today because we received an order from the Waukesha county court that the court requires us to consider the petition that had previously been filed and act upon the order. There was a petition circulated by the residents that would restrict or change the process of financing for projects in the Village. The judge indicates we need to consider the petition that never came before us. The options are to accept the petition and put it in front of the voter, adopt the language, or we can deny the petition based on the four exceptions. Today we are here

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to complete the order of the court. The board members will each discuss and describe their opinion. At the end, we will see if we have a motion and take some action.

Trustee Domaszek stated that he has done a significant amount of research on the direct legislation law both before and after the litigation started. He has read all of the briefing and hearing transcripts from recent cases. We are here to adhere to the court order. The Mount Horeb case has four exceptions that were relied upon by both sides. The petition before us now would repeal the existing ordinance we have on the books (Ord 30-2). The direct legislation petition puts the limit to \$1M to trigger a referendum, whereas the ordinance passed by the village had put a \$5M limit to trigger a referendum; taking into account inflation and the rising cost of projects in the village. There is a direct conflict here.

The timing of the ordinance was brought into question during the hearing. The court asked if this was actually repealing an existing ordinance. The timing is important. Petition was filed on Oct 21, 2020. The clerk had 15 days to certify the petition under the statute. At that time if she certifies, it moves on to the board, if not it dies. With the clerk here, it never came to the board. The clerk certified and then de-certified it the next day. There is nothing in the statute that says you can pull it back. The clerk's line of demarcation was October 21<sup>st</sup>. There is nothing in the statute that allows the clerk to pull back the authentication. Wisconsin doesn't have any really good law on what that certification process entails; what the clerk should and should not be doing; what the board should be doing and not be doing. The law is clear that without verification or sufficient authentication by the clerk, the petition is not legally sufficient. It is not a legally sufficient petition until you get an authentication by the clerk.

During that 15 days, there was nothing in front of the board. Paperwork gets filed all the time and it gets rejected because it is not good enough. This happens at every municipality at every level. Until here is something in front of the board, there is nothing for the board to act on. We had a normal meeting on October 26 and there was no petition on front of the board. There are no provisions to preclude the board from taking action that it wanted to within the bounds of the law. There was nothing in front of the board to consider regarding the petition on October 26<sup>th</sup>. This is important. The line of demarcation for the clerk by the judge's standpoint was when the clerk received it. There was nothing in front of the board on Oct 26<sup>th</sup>. The first point the board had something to consider was today's meeting. Even if you go back in time - what existed at the time of the petition even if the clerk would have given it to the board on November 4<sup>th</sup> would still be the existing ordinance passed on October 26<sup>th</sup> - which causes the conflict. What is the line of demarcation for the board? The attorney for the petitioner made some good points - When they get notice? Constructive notice? It's when something is in front of you? There is nothing in the statute for this. At a minimum, when something was in front of the board. If the petition was in front of the board and then the board passed the ordinance that would be an entirely different analysis here.

This is a small village. The people who circulated these things are friends and neighbors. He was aware of what he was going on but didn't know the particulars, the language of

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the petition. Many of the issues brought up are issues for the legislature. If there is ambiguity in this statute, this should be taken up with the legislature. The statute is clear and sets up a framework on what should be done. If the village is to be precluded from acting as of a certain date – that should have been part of the statute and it's not. When you read the case law, there is no identification for the board to be prohibited. What makes the most sense? When it is in front of you.

This is not only a repeal of existing ordinance, but it may also may conflict with state law. Referring to the George Haas' memo – there are other items I will let him address. There is not a lot of good law on this. At a certain point, if there is no resolution, the circuit court will need to move this up to the Supreme Court. It has been a while since Mount Horeb was decided. They may take a look at this and decide updates need to be made. The four exceptions are not exhaustive. The direct legislators only have as much power as we have to act. Neither we nor the direct legislature has the right to act on an ambiguous or crummy ordinance. It is important to create a record of that.

Trustee Haas asked a question to counsel: After the petition was submitted with an ordinance, the petitioners amended their ordinance with a change of a word. Are we reviewing the amended ordinance? Or the original. The petitioners changed "contract" vs. "project".

President Palmer indicated if this was set back in time, we would be reviewing the original.

Counsel Bitar clarified that the petitioners filed on October 21st. The clerk has 15 days to review. The clerk issued the initial certification on November 4<sup>th</sup>. The certification dated November 4<sup>th</sup> is the certification the judge said should have come to the village board. I don't think the judge envisions the board looking at the amended proposed ordinance. The court is saying the clerk's amended certification is a nullity therefore the petitioners amended ordinance is also a nullity.

Trustee Haas stated although the Elm Grove Direct Legislation Ordinance was crafted in light of the Mount Horeb case, the proposed ordinance significantly modified the language. It is because of those modifications that there are some unresolved ambiguities making the ordinance extremely difficult if not impossible to follow. For example: The proposed ordinance requires a referendum to be held prior to letting of any contract one million dollars or more which causes a catch 22 dilemma. Engineering design contracts are needed to determine the cost of the project. Even after the design and cost estimate, the estimate could be off. For example: the pool splash pad was estimated at six hundred to seven hundred thousand dollars. After bids it came in, it was well over one million dollars. A second round of bids came in the same. We spent over one million dollars on a project we didn't think would cost that much.

The language in the ordinance talks about contracts or a contract. Many of the major public works project involve multiple contracts entered into at differing stages. For

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example: the Village's fourteen million dollar storm water project comprised separate contracts for engineering, earth moving, underground culvert installation, acquisition of a hotel and apartments, and a separate contract for relocating tenants of an apartment complex. It is unclear in the wording of the proposed ordinance if every one of those contract is to be listed or not.

Another component is when a project is well underway and unforeseen circumstances are encountered. We may not know another contract will be required. Do we need to have a second referendum with the cost going up?

The language of the ordinance states that the referendum question has to state the location of the contract. This seems ridiculous because you can list the file cabinet as the location. At the point of the referendum there is no contract to be had. There might be a draft contract. Without a vote, we would not have one in the first place. Here too is a catch 22. The Mount Horeb indicated the Public Works "project". The proposed ordinance asks to state the total cost of the contract. Some contracts do not have a fixed cost, but vary based on time and materials. Several village projects have engineering oversight that costs more due to delays. The storm water project had a nine month delay. The method to be used by the Village for payment is cited. The language is ridiculous. We use checks or direct bank transfers. Perhaps the petitioners are asking how the village will finance, but it does not make that clear. Also, after the referendum, we may receive a grant to finance part of the project - such as the stream improvements and daylighting of the creek. We would finance through a bond issue initially and then remove it with the grant. Back in October, I noted a number of these issues. A number of these issues would not pass muster on the legislative committee especially with this kind of language.

President Palmer wants to add a few specific points too. He wants to make the residents aware. Besides all of the obvious conflicts this would create for the way the village operates, there is a strong possibility that such a requirement - if this was written correctly - would conflict with the state law and the issuing of bonding. Whether we hold referendums for the bonds or not hold referendums for the bonds. Chapter 67. Even if it were written in the correct way and didn't have the problems outlined by Trustee Domaszek and Trustee Haas, it may be in conflict with other state law. From the time he heard about it, but had never seen it - the petitioners never came to his house or showed him the petition. He heard from residents who were confused at what it was and signed and then found out what it was and asked to have their names removed from the petition. The state law on direct legislation is confusing and vague and invites these problems for communities who are trying to follow their normal policy and do things in an organized way. There is no requirement in Wisconsin state law to have the municipality to be put on notice for a petition. He doesn't know what else they could do without having a certified petition in front of them. Until we have the petition on front of the board, we don't have anything. We hear people all the time saying they will come to the board, but most don't show. We cannot act if we don't have anything. He supports the legal arguments from Trustee Domaszek and Trustee Haas, how would we

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ever interpret this? With this language, how would we know when to enact it, when to hold a referendum. There are multiple parts of this petition that you can interpret differently legitimately. How do we figure that out? He heard from residents after the petition was filed. We never needed anything in the past because Elm Grove has never had any projects over one million dollars. This is simply not accurate – we had a 16 year water project. The future is clear with inflation. One million dollars is not what is used to be. We have many houses over one million dollars. Most of the pathways will be over one million dollars. Trustee Haas highlighted the splash pad. The level suggested does not allow government to operate as it is supposed to under Wisconsin Constitution. We would be in rolling referendums. That is ridiculous and not possible. President Palmer is ready to act.

Trustee Kressin agrees with the previous points. The residents he heard from indicated they were not given the whole story. Even the people circulating stated this was done to stop a particular development. Residents were not given the full story. He is ready to act based on the comments made previously.

Trustee Cornell had nothing to add. The points made were excellent. There was a lot of confusion as a resident and as a trustee. Nothing was truly in front of the board at that time. Trustee Cornell is also ready to act.

Trustee Michalski is also ready to act. He agree with the points made. We have reasons to deny this. We have an ordinance on the books. The content of the ordinance is ambiguous and not practical. The one million dollar threshold is too low to operate. He is also ready to act.

Trustee Sayas was aware of the petition when it was being circulated. She backed away from it and had always had faith in the process of government. She agrees with the timeline and the comments from Domaszek, Haas, and Palmer. There was just nothing in front of the board based on the timeline. She is also ready to act. She is concerned on how this could impact multiple projects and how to determine when/if this goes on referendum.

Trustee Domaszek had one thing to add. The petition submitted October 21<sup>st</sup> late in the day. The clerk was on a preplanned vacation 22<sup>nd</sup> and 23<sup>rd</sup>. The clerk's first day back in the office on the Monday October 26<sup>th</sup>. Trustee Domaszek only brings this up because if it is ever brought up that the clerk was dragging her feet – she was out of town. This was preplanned. If this makes a difference any time in the future.

Trustee Haas added that we don't have a huge staff. We have one clerk. No one else could certify this.

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President Palmer thought the way the clerk handled it was right. It takes time to count names and addresses accurately.

Trustee Domaszek stated that everyone has in front of them 2 resolutions. One is to adopt the language and approve a referendum of the petition and the other is to deny the petition.

**MOTION BY TRUSTEE DOMASZEK, SECOND BY TRUSTEE MICHALSKI, TO DENY THE PETITION FOR ALL THE REASONS STATED.**

Attorney De La Mora asked that the motion be amended to include the language from the 3 page resolution.

**MOTION BY TRUSTEE DOMASZEK, SECOND BY TRUSTEE MICHALSKI, TO AMEND THEIR ORIGINAL MOTION TO INCLUDE THE FOLLOWING:**

**NOW, THEREFORE, BE IT RESOLVED, THAT THE VILLAGE OF ELM GROVE BOARD OF TRUSTEES HEREBY MAKES THE FOLLOWING DETERMINATIONS:**

**1. ALL OF THE WHEREAS CLAUSES IN THE RESOLUTION ARE ADOPTED AND INCORPORATED IN THIS RESOLUTION AS FINDINGS OF THE BOARD.**

**2. THIS RESOLUTION CONSTITUTES AN EXERCISE OF THE AUTHORITY GRANTED BY WIS. STATS. §WIS. STAT. §9.20.**

**3. THE PROPOSED ORDINANCE IS AN IMPROPER SUBJECT FOR DIRECT LEGISLATION AND NOT IN PROPER FORM FOR THE FOLLOWING REASONS:**

**A. THE PROPOSED ORDINANCE CONFLICTS WITH AN EXISTING VILLAGE OF ELM GROVE ORDINANCE NO. 30-2 DULY ENACTED ON OCTOBER 26, 2020 MARKED AND ATTACHED AS EXHIBIT B AND WOULD THUS REPEAL AN EXISTING ORDINANCE.**

**B. THERE ARE INCONSISTENCIES BETWEEN THE SUBMITTED PROPOSED ORDINANCE AND CERTAIN WISCONSIN STATE STATUTES AND WOULD THUS MODIFY STATUTORILY PRESCRIBED PROCEDURES.**

**C. THE AFOREMENTIONED REPEAL AND MODIFICATION OF STATUTORILY PRESCRIBED PROCEDURES ARE COMPOUNDED BY THE FACT THE CONTENT OF THE PROPOSED ORDINANCE IS AMBIGUOUS, THUS INCAPABLE OF BEING POSED TO THE ELECTORS AS PROVIDED FOR BY WIS. STAT. §9.20 (6)**

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**4. THIS BOARD THEREFORE DECLINES TO ENACT THE PROPOSED ORDINANCE AS STATED IN WIS. STAT. §9.20 (4), OR TO CAUSE NOTICE OF A REFERENDUM TO BE ISSUED AUTHORIZING THE CONSIDERATION OF THE PROPOSED ORDINANCE BY THE ELECTORS AS STATED IN WIS. STAT. §9.20 (5).**

**ALL WERE IN FAVOR. MOTION CARRIED.**

Adjournment

There was no further business.

**MOTION BY TRUSTEE HAAS, SECOND BY TRUSTEE SAYAS, TO ADJOURN THE MEETING.**

**ALL WERE IN FAVOR. MOTION CARRIED. MEETING ADJOURNED AT 10:00AM.**

Minutes transcribed by: Michelle Luedtke

Minutes Approved on: 6/28/21