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DEPARTMENT OF JUSTICE

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Mr. Dennis E. Kenealy
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Dear Mr. Kenealy:

¶ 1. You indicate that the Ozaukee County Administrator currently appoints all prospective members of the boards and commissions of Ozaukee County. All such appointments are confirmed by the Ozaukee County Board. A proposed county board resolution would require that all county board members who are prospective appointees to county boards and commissions be appointed by the chairperson of the county board rather than by the county administrator. Such appointments would remain subject to confirmation by the county board. You advise that the county administrator supports the proposed resolution out of concern that "his naming of county board members will alienate some board members who may have applied for the position[s], thus jeopardizing his effectiveness and potentially his job." You note that the proposed resolution may be in conflict with Wis. Stat. § 59.18(2)(c), which provides that the county administrator "[a]ppoint[s] the members of all boards and commissions where the statutes provide that such appointments shall be made by the county board or by the chairperson of the county board." A similar provision, Wis. Stat. § 59.17(2)(c), applies to appointments to boards and commissions by elected county executives.

QUESTION PRESENTED AND BRIEF ANSWER

¶ 2. You ask whether a county board in a county with a county administrator or a county executive can exercise its home rule authority so as to enact a resolution requiring that all county board members who are prospective appointees to all county boards and commissions be appointed by the chairperson of the county board rather than by the county administrator.

¶ 3. In my opinion, a county board in a county with a county administrator or a county executive cannot reassign the power of appointment that is statutorily granted to a county executive or a county administrator in cases where the statutes provide that appointments to a particular board or commission are to be made by the county board, by the chairperson of the county board, or by the county administrator or county executive.

ANALYSIS

¶ 4. Wisconsin Const. art. IV, § 22 provides that "[t]he legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe."

¶ 5. In *Jackson County v. State*, 2006 WI 96, ¶ 16, 293 Wis. 2d 497, 717 N.W.2d 713, the court delineated the nature of the authority possessed by counties:

> A county is a creature of the legislature and as such, it has only those powers that the legislature by statute provided. Wis. Const, art. IV, § 22. For more than a century, Wisconsin courts consistently have interpreted counties' powers as arising solely from the statutes[.]

¶ 6. As a direct consequence of the fact that all county powers must be derived from a statutory source, "[a] county's home rule power is more limited than the home rule power that is afforded to cities . . . ." *Jackson County*, 293 Wis. 2d 497, ¶ 17.

¶ 7. Selecting or appointing an individual to perform a particular task or function in this context is an organizational or administrative power. *See Harbick v. Marinette County*, 138 Wis. 2d 172, 176-77, 405 N.W.2d 724 (Ct. App. 1987). Wisconsin Stat. § 59.51(1), which speaks directly to a county board's administrative and organizational powers, provides:

> 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. Any organizational or administrative power conferred under this subchapter shall be in addition to all other grants. A county board may exercise any organizational or administrative power under this subchapter without limitation because of enumeration, and these powers shall be broadly and liberally construed and limited only by express language.

¶ 8. Among the legislative enactments granting organizational or administrative powers to a county administrator is the power to "[a]ppoint the members of all boards and commissions where the statutes provide that such appointment shall be made by the county board or by the chairperson of the county board." Wis. Stat. § 59.18(2)(c). A county administrator's appointments under this provision are subject to the county board's approval. *Id.*

¶ 9. In a county that has elected to create the office of county administrator, the appointment power conferred upon a county administrator is exclusive. Wis. Stat. § 59.18(2)

(providing that the "duties and powers of the county administrator *shall be* . . . to" appoint such members of boards and commissions as provided in Wis. Stat. § 59.18(2)(c)).[1] The word "shall" is presumed to be mandatory. *See Fond du Lac County v. Elizabeth M.P.*, 2003 WI App 232, ¶ 21, 267 Wis. 2d 739, 672 N.W.2d 88. Nothing in the language or context of the relevant statutes indicates a reason to depart from this presumption. The statutory scheme involves a mandatory or exclusive power to appoint, as the appointment power conferred on a county administrator by Wis. Stat. § 59.18(2)(c) expressly involves appointments that the laws would otherwise vest in the county board or county board chairperson.

¶ 10. Moreover, the interpretation that a county administrator's power to appoint is mandatory and exclusive in this context is strengthened by the fact that the Legislature has provided counties of populations under 500,000 with the option of creating the position of administrative coordinator in lieu of having a county administrator. Wis. Stat. § 59.19. Like county administrators, administrative coordinators are responsible for "coordinating all administrative and management functions of the county government not otherwise vested by law in boards or commissions, or in other elected officers." *Id.* Administrative coordinators are not, however, provided by statute with appointment powers. *Compare* Wis. Stat. § 59.19 (enumerating administrative coordinator duties) *with* Wis. Stat. § 59.18(2) (enumerating county administrator duties).

¶ 11. Because the "[s]tatutory powers and duties conferred upon a county officer cannot be narrowed, enlarged, or taken away by a county board . . .," *Harbick*, 138 Wis. 2d at 179, a county board in a county with a county administrator cannot reassign a county administrator's statutory appointment duties to the chairperson of the county board.

¶ 12. The county home rule statute, Wis. Stat. § 59.03, does not change this analysis. Wisconsin Stat. § 59.03(1) provides in part that "[e]very 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." The Legislature directed that this statutory administrative home rule provision be "liberally construed in favor of the rights, powers and privileges of counties to exercise any organizational or administrative power." Wis. Stat. § 59.04. Your request suggests that a possible conflict between Wis. Stat. § 59.18(2)(c) and Wis. Stat. § 59.03 exists if a county administrator's power to appoint is not a matter of uniform statewide concern, presumably because not every county has an office of county administrator.

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[1]In addition, the word "shall" is also used in Wis. Stat. § 59.17(2), which grants similar powers of appointment to county executives. Statutes other than Wis. Stat. §§ 59.17(2) and 59.18(2) also grant county administrators and county executives the power to appoint certain local officials. *See, e.g.*, Wis. Stat. § 27.02(2) (members of certain county park commissions).

¶ 13. In answering your question, it is not necessary for me to resolve whether the statutory scheme granting powers to county administrators are enactments "'of statewide concern which uniformly affect[] every county.'"[2]

¶ 14. The relevant provisions of what are now Wis. Stat. §§ 59.03(1) and 59.51(1) were enacted at the same time. *See* 1985 Wisconsin Act 29, secs. 1147, 1148, and 1169. Each contains provisions making a county's organizational and administrative powers subject to the constitution and legislative enactments of statewide concern which uniformly affect every county. Wisconsin Stat. § 59.51(1) provides additional limitations upon a county board's authority to exercise organizational and administrative powers. One of these additional limitations expressly makes a county board's exercise of such powers "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[.]" Wis. Stat. § 59.51. The Legislature acknowledged the possibility that some organizational or administrative powers granted by statute to a county administrator might not be of statewide significance uniformly affecting every county, but provided that those laws would still prevail over a county's statutory home rule authority. The language providing additional limitations in Wis. Stat. § 59.51(1) must be given effect. *See State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage."). To conclude otherwise would render meaningless the limitations on a county's organizational and administrative powers contained in Wis. Stat. § 59.51(1).

¶ 15. This interpretation is also supported by another cannon of statutory construction: Where statutes provide detailed statutory directives, the more specific statutory directives presumptively are intended to prevail over statutes of general application. 77 Op. Att'y Gen. at 116 (citing *Schlosser v. Allis-Chalmers Corp.*, 65 Wis. 2d 153, 161, 222 N.W.2d 156 (1974)). With respect to a county's organizational or administrative power to appoint, the specific and detailed provisions are contained in Wis. Stat. § 59.18 in cases where a county has chosen to have a county administrator. Wisconsin Stat. § 59.03 is a less specific directive with respect to a county's organizational and administrative power. It is a provision that authorizes counties to "expand upon and 'fill the gaps' in the organizational and administrative structure which is already in place[.]" 77 Op. Att'y Gen. at 116. When the Legislature enacted the provisions relating to a county's organizational and administrative home rule powers, the specific statutory

[2]I note that a prior opinion of the Attorney General held that "legislative enactments 'of statewide concern and which uniformly affects every county'" included the statutory scheme for elective county officers. 77 Op. Att'y Gen. 113, 115 (1988).

directives that are now contained in Wis. Stat. § 59.18(2)(c) were already in place and were left undisturbed by 1985 Wisconsin Act 29. *See* Wis. Stat. § 59.033(2)(c) (1983).[3]

¶ 16. In sum, Wis. Stat. § 59.51(1) is an express statutory limitation upon the administrative home rule authority granted by Wis. Stat. § 59.03(1). Wisconsin Stat. § 59.51(1) forbids county boards from utilizing their statutory administrative home rule authority to alter or remove the powers of appointment granted to county administrators and county executives by Wis. Stat. §§ 59.17(2) and 59.18(2) or by other statutes.[4]

CONCLUSION

¶ 17. I therefore conclude that a county board in a county with a county administrator or a county executive cannot exercise its home rule authority so as to enact a resolution requiring that all county board members who are prospective appointees to county boards and commissions be appointed by the county board chair rather than by the county administrator. A county board cannot reassign the appointment powers granted to a county administrator or county executive in

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[3]Nor would my conclusion change if the powers granted to the office of county administrator in Wis. Stat. § 59.18(2)(c) were promulgated after the enactment of 1985 Wisconsin Act 29. As a practical matter, one legislature cannot, by statute, place limitations or conditions upon a future legislature's power to alter or limit a county's organizational or administrative powers. *See Flynn v. Department of Administration*, 216 Wis. 2d 521, 539, 543, 576 N.W.2d 245 (1998). *Cf. State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 365, 338 N.W.2d 684 (1983). Consequently, the Legislature can create an infinite number of statutory exceptions to the "statewide concern" and "uniform[]" provisions in Wis. Stat. § 59.03(1).

[4]In rare situations, there may be no statutory requirement that appointments to a particular board or commission that is not the head of a county department be made by the county board, by the chairperson of the county board, or by the county administrator or county executive. *See* 67 Op. Att'y Gen. 231, 234-35 (1978), *partially withdrawn*, 67 Op. Att'y Gen. 343 (1978). In such situations, subject to the restrictions in Wis. Stat. § 59.03(1), a county board in a county with a county administrator or county executive could enact an ordinance or resolution requiring that county board members who are prospective appointees to such a board or commission be nominated by the chairperson of the county board and confirmed by the entire county board.

Further, the statutory compatibility of office provisions applicable to county supervisors that were discussed in 67 Op. Att'y Gen. at 234-35 have been changed. Wisconsin Stat. § 59.10(4) provides in part that "a supervisor may also be a member of a committee, board or commission appointed by the county executive or county administrator or appointed or created by the county board[.]"

cases where the statutes provide that appointments to the particular board or commission are to be made by the county board, by the chairperson of the county board, or by the county administrator or county executive.

Sincerely,

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