

LEGAL MEMORANDUM

TO: Wisconsin Counties Association

FROM: Andrew T. Phillips and Jacob J. Curtis

RE: Spring Election Options

DATE: March 20, 2020

EXECUTIVE SUMMARY

In the event Governor Evers were to postpone the Spring General Election because of the COVID-19 emergency, county governments could face an unprecedented challenge – no county supervisors will have been elected, and therefore no county supervisors would qualify to serve, for the next 2-year term. With no counties adopting staggered terms, counties would effectively be left with no boards until the rescheduled Spring election takes place. In light of the statutory requirement to meet “on the 3rd Tuesday of each April,” counties would find themselves in a difficult position as it relates to continuity of governance.

The analysis below provides four possible options for counties to consider in the event the Governor postpones the Spring General Election, including (1) self-organized counties making a determination, pursuant to Wis. Stat. § 59.10(1)(d), to simply establish the procedure for filling a vacancy by approving a resolution allowing supervisors to continue to serve and fill such vacancies until such time as an election may be held; (2) extending the term of county supervisors pursuant to Executive Order #72; (3) allowing county boards to make interim appointments under the authority granted by Wis. Stat. Chap. 323; or (4) the Legislature amending current law to allow current county supervisors to continue in office until successors qualify.

In addition to the legal options considered below, counties can look to more creative methods to “get out the vote.” For example, the Village of Richfield in Washington County is facilitating drive through absentee voting, *i.e.* secure an absentee ballot and drive through a location and simply drop it into a box, which will be monitored and secured by Village staff.

While all of the options listed below are worth considering, it is important to note none of the options has been explicitly sanctioned. The spread of the COVID-19 virus has impacted every facet of society and it is imperative continuity in government is maintained. For this reason, counties may decide that different options or different combinations of options work best for their respective counties (with the exception of the Executive Order option, which would apply statewide).

ANALYSIS

The Spring General Election is scheduled for April 7, 2020. In addition to the statewide election for Supreme Court and partisan presidential preference, entire county boards will be elected across the state. Specifically, “[s]upervisors shall be elected at the election to be held on the first Tuesday in April next preceding the expiration of their respective terms and shall take office on the 3rd Tuesday in April following their election.” Wis. Stat. § 59.10(1)(b).

When an office, such as county supervisor, is an elective office, the office becomes vacant when “the incumbent’s term expires.” Wis. Stat. § 17.03(10). The exception to this rule is for offices with a term that “shall continue for 4 years *and until his or her successor qualifies*.” Wis. Stat. §§ 17.03(10), 59.20(2)(a) and (b) (e.g., the sheriff, coroner, register of deeds, and district attorney). County board supervisors, therefore, only hold office until the expiration of their current term. Wis. Stat. § 17.03(10). Any vacancies on a county board may only be filled by appointment by a county board chair (with the approval of the board) or upon a special election ordered by a board under Wis. Stat. § 59.10(3)(e). The problem is, however, there would be no board/board chair having the power to fill a vacancy if all supervisor positions are vacant.

In addition, it is necessary that a board be in place immediately following the Spring General Election because of the meeting requirement under Chapter 59 (in addition to other concerns regarding the absence of a duly elected board). Section 59.11(1)(c) provides a board (except in counties with a population of 750,000 or more) “shall meet on the 3rd Tuesday of each April to organize and transact business. At this meeting the board may transact any business permitted at the annual meeting, including the appointment of all county commissions and committees.” In the event the Governor rescheduled or otherwise delayed the Spring General Election, county supervisor seats would become “vacant” and no board would exist to “meet on the 3rd Tuesday” in April.

There is no clear statutory guidance on what happens if county board seats suddenly become vacant by operation of law because a Spring General Election is postponed. Below are four options that counties may consider to address this question in the event the election is postponed.

Option 1: For Self-Organized Counties, Determine Procedure for Filling Vacancy under Wis. Stat. § 59.10(1)(d)

Pursuant to Wis. Stat. § 59.10(1)(d), self-organized counties¹ could determine to simply establish the procedure for filling a vacancy. This statute simply provides that “[a county] board may determine the procedure for filling a vacancy.”

If this option is utilized, a current board would preemptively declare a vacancy in the office of county board supervisor for all seats in the event the election is postponed. A board could then proceed to preemptively fill the vacancies with current board members and such appointment would prevail until the election.

¹ Currently, our records show that 47 of the 72 counties are self-organized. This Option 1 is not available for counties that have not elected to be self-organized.

It should be noted that this process, like the other processes discussed in this memorandum, has not been tested. There are questions surrounding the validity of a preemptive declaration of vacancy and concomitant appointment to fill the vacancy. Nonetheless, as noted at the beginning of the memorandum, the challenges presented by postponing the election are equally unprecedented.

Option 2: Extension of Term Pursuant to Executive Order #72

Section 17.03(13) provides a public office is vacant when “[a]ny other event occurs which is declared by any special provision of law to create a vacancy.” Executive Order #72 could be considered an “other event” which is “declared by any special provision.” As explained above, if the offices of county supervisor are declared vacant, then the problem relates to the absence of a county board chair who, pursuant to Wis. Stat. § 59.10(3)(e), appoints a successor. If the elections are postponed, there would be no chair to appoint the rest of a board.

Therefore, an option to consider would be to view Executive Order #72 as an “other event” under Wis. Stat. § 17.03(13) and request that Governor Evers issue an order allowing incumbent supervisors to fill the vacancies created by Executive Order #72 and continue serving until the rescheduled election takes place.

The difficulty with this potential solution is that the Executive Order is based primarily on Wis. Stat. § 323.10, and in particular the section relating to a public health emergency. According to Wis. Stat. § 323.12(4)(b), the Governor is authorized to “[i]ssue such orders as he or she deems necessary for the security of persons and property.” It is certainly open to question as to whether delaying the election but ordering incumbents to continue serving despite the vacancy is truly necessary for purposes of securing our “persons,” or at least the health of the persons.

Option 3: Interim Appointment under Chapter 323

Under the Emergency Management chapter, political subdivisions are given the authority to provide for interim appointments to governing bodies in emergency situations. In particular:

[t]he governing body of any political subdivision may enact ordinances and resolutions to provide a method by which interim appointments to public office are made during periods of emergency *to fill vacancies in offices that result from enemy action*. The ordinances or resolutions shall define the scope of the powers and duties that interim appointees may exercise, and shall provide for termination of the interim appointments.

Wis. Stat. § 323.54(1) (Emphasis added).

However, as noted by the emphasized language, this provision only applies during periods of emergency that result from “enemy action.” While 2009 Wis. Act 42 amended this provision to apply to vacancies that result from a “disaster or the imminent threat of a disaster,” the revision is

only “effective the day after the secretary of state notifies the legislature that an amendment to the Wisconsin Constitution has been approved that requires the legislature to provide for temporary succession to the powers and duties of public offices for the period of an emergency resulting from a cause other than an enemy action.” The secretary of state has not issued such a notification and, therefore, the triggering event would appear to remain an emergency resulting from “enemy action.” In light of Governor Evers’ Executive Order #72 and its reliance on Wis. Stat. § 323.10 for purposes of declaring a “public health emergency,” it may prove difficult to match the public health emergency declared by the Governor with the “enemy action” currently contemplated in Wis. Stat. § 323.54.

Option 4: Legislative Solution

A final solution could include the Legislature taking specific action to address the issue of how vacancies on county boards are treated. Such a fix could be very simple in that, similar to other local government offices, county board supervisors could be allowed to hold office in the event of a declared emergency until successors qualify, *i.e.* until the Spring General Election is held.

CONCLUSION

The analysis above provides four possible options for the Association to consider in the event the Governor postpones the Spring General Election. Unfortunately, none of the options provide a clear solution. As a result, counties are encouraged to consult with the Association, respective corporation counsels, or outside counsel prior to implementing any of the options.

If you have any questions surrounding this memorandum, please do not hesitate to contact us. We appreciate the opportunity to be of service to the Association.

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