

CITY OF MADISON  
CITY ATTORNEY'S OFFICE  
Room 401, C.C.B.  
266-4511

December 20, 2001 ✓

**MEMORANDUM**

TO: Mayor Susan J.M. Bauman  
Department and Division Heads  
Common Council

FROM: Eunice Gibson, City Attorney

RE: Delegating approval authority to individual Council members

About a year ago, an Alcohol License Review Committee report, on the Common Council agenda for action, contained a statement that in the future, licenses would not be recommended for Council adoption without the written approval of the alder of the district where the licensed premises were to be located. I cautioned the ALRC that such an alder approval requirement would be illegal. Subsequently, I learned that this item had appeared in the report by mistake and that there had never been any such requirement.

Yesterday, in our message related to redistricting, we referred to instances calling for "... an alderperson's approval of a Plan Commission action or alcohol licensing and the like ...." This statement was not meant to imply that agencies may delegate authority assigned to them by ordinance or resolution to a member of the Common Council

What follows is a very brief explanation of the difference between legislative and administrative action, and of why administrators must make sure that administrative decisions are not unlawfully delegated to individual Council members, who would then be acting in an administrative, not a legislative capacity.

The Common Council, exercising its legislative authority, has created numerous approval processes. Often the Council authorizes a board, committee or commission to carry out the process. The Plan Commission and ALRC are examples, but there are many others. The ordinances also require departments and divisions to prepare reports and recommendations and,

sometimes, make administrative decisions. Most often, these reports and recommendations contain information as to whether or not certain ordinance standards have been met or not by the applicants. The boards and commissions and the Council need this information in order to make their decisions.

This process is legal and constitutional because the ordinances which authorize decision-making by agencies, boards and commissions and the Council provide definite standards to guide those decisions. Applicants have access to the ordinances and they know in advance what standards they have to meet in order to gain approval of their proposals.

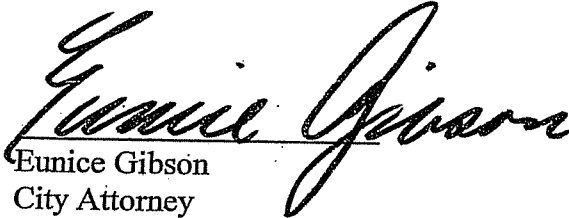
Individual Council members contribute to this process by providing decision-makers with first-hand knowledge of situations in their districts, and by aiding individual citizens in transmitting their experience and knowledge to decision-makers. Council members are not acting as administrators when they do that, but are simply making it possible for agencies or boards with administrative responsibilities to have full information when they make their decisions.

If, however, a Council member is asked to "sign off", to "okay" or otherwise give "thumbs-up or thumbs-down", the Council member is being asked to act as an administrator, not a legislator. Furthermore, since the ordinances do not authorize such an action, there are no standards to guide the Council member's administrative decision. A court would hold such an action unconstitutional. See Staub v Baxley, 355 U.S. 313, 78 S. Ct. 277, 284, 2 L. Ed.2d. 302 (1958) where the U.S. Supreme Court voided a conviction for violation of an ordinance because the ordinance gave "uncontrolled discretion" to the Mayor and Council to grant or deny a permit.

Whether the Council member's action is "thumbs up" or "thumbs down" really does not make any difference to this analysis. It is still the exercise of "uncontrolled discretion," it is still unauthorized and it is still unconstitutional. It could even result in the loss of the Council member's absolute legislative immunity. See Bogan v Scott-Harris, 523 U.S. 44, 118 S. Ct. 966, 973, 140 L.Ed.2d 79 (1998), where the U.S. Supreme Court holds that members of local legislative bodies are entitled to absolute immunity for their legislative acts. Legislative immunity is not available to legislators when they are acting administratively. 118 S.Ct. at 970-973. The immunity provided by Wisconsin law for discretionary acts might still be available.

Page 3  
December 20, 2001

City administrators need to ensure that we make the information provided by Council members available to decision-makers, but we also need to ensure that we do not, whether through formal procedures or through informal understandings and customs, place Council members in the position of acting individually as administrators. If you have any questions or comments about this advice, please don't hesitate to contact me.

  
Eunice Gibson  
City Attorney

EG:skm

cc: Attorney staff