


**CITY OF MADISON  
CITY ATTORNEY'S OFFICE  
Room 401, CCB  
266-4511**

December 16, 2008

**MEMORANDUM**

TO: Mayor Dave Cieslewicz  
All Alders

FROM: Michael P. May, City Attorney   
Carolyn Hogg, Assistant City Attorney

RE: Authority of Common Council and the Authority of the Transit and Parking Commission (TPC)

The Mayor's Office and several Alders have asked a number of questions regarding the authority of the TPC generally and the authority of the TPC in relation to the Common Council. These questions have been asked in the context of the Common Council's recent action in approving the 2009 Metro Transit budget, and the TPC's recent decision not to implement a Metro fare increase assumed in that budget. Excerpts from the budget and adopted amendments relevant to this discussion are included below. In particular, I note the following budget highlight and amendment:

**Metro Transit**

**Executive Budget Highlights**

**The Budget Includes:**

1. An increase in adult cash fares with corresponding increases for all other fare categories as determined by the Transit and Parking Commission (TPC). This increase is projected, for purposes of this budget, to occur on 3/1/2009 and is expected to generate \$682,000 in additional revenues in 2009.

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**2009 Operating Budget: Adopted Common Council Amendments**

**Amendment 30**

Eliminate funding for Clean Air Action Days (this will increase fare revenues and reserved generated by \$40,000). Add a budget highlight to require that Metro Transit create a report on the impacts of fare increases on:

- 1) the long-term health of Metro;

- 2) business growth in Madison; and
- 3) low-income ridership;

Metro should also develop a series of recommendations to provide fare relief to low income riders in order to prepare for future fare increase recommendations should economic and budget conditions warrant.

### QUESTIONS PRESENTED AND SHORT ANSWERS

1. Does the TPC have the authority to establish in the first instance Metro Transit fares, routes and schedules? If so, can such decisions be appealed to the Common Council?

*Brief answer: Yes; yes.*

2. Must the Common Council approve a Transit and Parking Commission Report containing fare, route and/or schedule changes; that is, are TPC decisions merely recommendations?

*Brief answer: As a general rule, no; however, such decisions may be appealed to the Council. If the changes effectively require an additional appropriation from the Council, the Council will need to pass a budget amendment requiring 15 votes to appropriate the requisite funds before the changes can be implemented.*

3. Can the TPC unilaterally reallocate monies from one category of major object of expenditures to another in Metro's budget that was approved by the Common Council in order to fill the budget gap without raising fares, if the reallocations do not alter the total budget?

*Brief answer: No, such a reallocation (if beyond the minimal authority granted to Department Managers and the Comptroller) would require a budget amendment subject to the approval of the Common Council; however, the Metro Transit General Manager has the same authority as any other manager to make reallocations or reductions within budget categories without triggering the requirement of a budget amendment by the Council.*

4. Can the TPC decline to raise fares in response to a Common Council budget that effectively creates a deficit if fares are not raised and simply leave the Metro budget with a deficit to be addressed by the Metro Transit General Manager and Mayor however they deem appropriate?

*Brief answer: Yes; however, such action is subject to the appeal process under the ordinance. Failure to raise fares in itself is not an appropriation requiring a 15-vote approval by the Council because it reduces revenues. However, it does leave the Metro budget in a deficit which must be addressed by service cuts or an appropriation that would require 15 votes on the Council to enact.*

5. How is reconsideration accomplished at the TPC?

*Brief answer: A member of the TPC who voted on the prevailing side (in this instance, the 7 member majority) must move for reconsideration at the next meeting. If reconsideration was noticed on the agenda, it may be taken up at that meeting. If not so noticed, it must be placed on the agenda of the next meeting of the TPC.*

6. What is the appeal process to the Common Council from TPC decisions?

*Brief answer: Any person wishing to appeal must file a written appeal and the reasons for the appeal with the Transit General Manager, who submits the appeal to the City Clerk. It is then placed on the Council agenda as a public hearing matter.*

## DISCUSSION

These questions go to the heart of the balance of authority between the TPC and the Common Council as it relates to Metro Transit operations, service delivery and funding. As indicated by the language quoted from the budget highlights, the adopted Metro Transit budget is premised on there being an increase in adult cash fares and other fare categories as determined by the TPC in order to generate additional revenues of \$682,000 in 2009. In a recent meeting, the TPC declined to institute the fare hikes assumed in the Metro budget. Consideration of the authority of the TPC in this context requires a review of the legislative enactments that affect both the TPC and the Common Council

### 1. Authority of TPC.

The Madison General Ordinance creating the Transit and Parking Commission has conflicting language regarding the extent of the independent authority of the TPC. Sec. 3.14, MGO. In many respects, the difficulties with the TPC ordinance are similar to problems that existed in the Water Utility ordinance, which was recently amended by the Council to provide greater clarity. City staff, including the City Attorney, has been discussing methods of similarly clarifying the TPC ordinance, but no final draft of proposed changes has been created.

On the one hand, the reference to the TPC as the body that constitutes a public utility within the meaning of Sec. 66.0805, Wis. Stats., suggests a broad level of independence consistent with that statutory reference. The practical effect of this designation is problematic, however, since the Wisconsin Statutes do not include transit utilities within the definition of "public utility" for purposes of this statute and the Common Council has limited such independence by the charter ordinance which established and empowered the TPC. On the other hand, there is other language in the ordinance which suggests a more subordinate role for the TPC and would arguably support a conclusion that final decisions regarding fare, route and schedule changes are the responsibility of Common Council and not the Commission to the extent that they are considered "policy matters" under the ordinance. Finally, the ordinance also refers to the TPC as

the statutory transit commission within another state law, sec. 66.1021, Wis. Stats., a state law that does not give the sort of independence provided to utility commissions.

This memo attempts to harmonize these provisions and interpret the MGO provisions based on the ordinance as a whole, the history of the practical application of the ordinance, and the statutory powers of the Common Council.

Section 3.14(4), MGO, which creates the Transit and Parking Commission and identifies its duties and responsibilities grants the Commission authority to adopt and publish “standards, warrants, objectives and criteria” for transit, parking and paratransit operations as well as rules and procedures which may be necessary to carry out the purpose and provisions of the ordinance. §§ 3.14(4)(g) and (h), MGO. In addition, the Commission shall “provide overall management, operation and control of the assets of the City’s transit and paratransit system to ensure that it functions as an integrated part of the overall transportation system”. Sec. 3.14(4)(h) MGO. Policy matters for which the Commission is given responsibility include: service standards, route additions, extensions or contractions, changes in schedules, fare structures, and hours of service. Sec. 3.14(4)(h)(2). The range of policy matters within its purview is extensive:

*"The Commission shall consider policy matters including but not limited to service standards, performance targets, route additions, extensions or contractions, changes in schedules, fare structures, hours of service, specifications for new transit vehicles and equipment, establish maintenance standards for all transit vehicles, bus passengers, shelters, maintenance equipment and building grounds, marketing and advertising programs, insurance programs, charter service, hiring practices and policies, personnel recruitment and training, consultation on labor and management contracts and any other policy matters pertaining to the operation of the city-owned transit and paratransit transportation system and may receive and approve or deny requests for changes of these items."* 314(4)(h)2. MGO. (Italics added)

Significantly, there is no explicit language regarding authority over the Metro Transit budget. The budget follows the standard City budget process used by all other City Agencies.

## 2. Authority of the Common Council.

The Common Council retains control over the TPC and Metro Transit matters in several respects. First as explicitly stated in the ordinance, the Council retains control over final decisions regarding *policy*. Section 3.14(4)(a) states that the Commission “shall *make recommendations* to the Common Council” regarding policies on all transit and parking matters. Section 3.14(4)(g), too, states: “It shall be the general duty of the Transit and Parking Commission to develop, *and recommend* to the Common Council policies on the various elements of transit and parking and transit and parking facilities” (emphasis added). Second, the Common Council retains ultimate control over actions by the Commission as evidenced by sec. 3.14(4)(j), MGO. That section provides that any decision of the Commission may be appealed to the Common Council. Following public notice and a hearing, the Common Council by majority vote can reverse or modify any action of the Commission. § 3.14(4)(j) MGO. Third, the Transit General Manager generally functions as any other City Manager. Under §3.14(4) MGOs, the

Transit Division, under the direction of the Director of Transportation, is responsible for planning, developing, operating, maintaining and coordinating the Transit System and Facilities of the City of Madison. (The position of the Director of Transportation having been vacant for some years, the Metro Transit General Manager functions as the Transit Division Head). Fourth, as described below, the Common Council also retains control of the purse strings.

The statutory authority of the Common Council, set forth in § 62.11(5), Wis. Stats., is very broad:

(5) Powers. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have the power to act for the government good order of the city, for its commercial benefit, and for health, safety, and welfare of the public, and may carry out powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.

In construing the above language, the court has characterized the statute as a legislative grant to the common council of "significant powers of home rule." *Derosso Landfill Co. v. City of Oak Creek*, 191 Wis. 2d 46, 50 (1995). The power granted to a municipality under this statute is broader than that granted by the Constitutional Home Rule Amendment (Article XI, § 3(1). *Id.*, p. 51.) The bottom line, absent a specific statute to the contrary in a particular case, is that "... the common council and mayor must, as elected officials, have final control over the city purse strings". *State ex rel. Wilson v. Shocker*, 142 Wis. 2d 179, 418 N.W.2d 8 (1987). That authority has not been delegated to the TPC in §3.14 MGO.

Consistent with the foregoing, the TPC has no direct role in the preparation and approval of the Metro Transit budget. The Transit General Manager prepares a budget request according to the Mayor's budget guidance and parameters. Once submitted to the Mayor, this budget proposal may be placed on the TPC agenda for informational purposes. This document becomes the foundation for the Metro Transit budget in the Mayor's Executive Budget submitted to the Common Council. The Common Council ultimately acts to approve, reject or approve with amendments the City's annual budget, both capital and operating. The Metro Transit budget is approved by the Council as part of the general City budget process. Sec. 4.02(1) MGO and Secs. 65.02-65.04 Wis. Stats.

### 3 Conclusions on Authority.

With the above as a foundation, we reiterate that a determination of the exact scope of the TPC's authority necessarily contains areas of doubt, particularly given the contradictions and inconsistencies in the ordinance. Section 66.0805, Wis. Stats., which is referenced in sec. 3.14

MGO, requires cities owning a public utility to establish a commission for the management of the utility. Such a commission is authorized to "take entire charge and management of the utility", while remaining "under the general control and supervision of the governing body." The governing body exercises the control and supervision of the Commission by enacting ordinances governing the Commission's operation. The "governing body" in this case refers to the Common Council. However, other than this reference, the City has not taken legislative steps to empower the TPC as such. The Transit General Manager is hired by the City. The General Manager functions much like any other City Manager. The Mayor and Common Council retain ultimate control of the agency's budget. Essentially, the core area carved out for TPC authority concerns the elements of service delivery of the transit system: fares, routes, schedules and the like. Moreover, the definition of "public utility" subject to this statute is limited to a public utility as defined in the Public Service Commission statutes, sec. 196.01(5), Wis. Stats. See sec. 66.0801(1)(b), Wis. Stats. Now, presumably the Council could create a utility commission for an enterprise that is not a "public utility" in the chapter 196 sense, with the same authority set out in the state statutes for such a utility, but the Council is under no obligation to do so and sec. 3.14, MGO, surely does not do so.

Given the ordinance as it currently reads, we conclude the following: The TPC is empowered to make decisions in the first instance on fares, routes and schedules; provided that route and schedule changes that require an additional appropriation for the Metro Transit budget cannot be implemented unless and until the Common Council acts to increase the Metro Transit budget and provide the funds necessary to effectuate the changes. Such appropriations require 11 votes when the City's budget is approved and 15 votes at other times. The TPC may also decline to raise fares as anticipated by the Common Council in order to close the expected 2009 budget gap. The TPC decisions in each instance, however, may be appealed to the Common Council which may reverse or modify the decision of the TPC pursuant to Sec. 3.14(4)(j) MGO. With respect to the TPC's ability to readjust the Metro Transit budget in order to fill a budget gap without raising fares, we conclude that the TPC has not been delegated that authority by the Common Council nor does the body have such authority otherwise by operation of law. The Transit General Manager himself has some authority in this regard. However, reallocating funds from one large object of expenditures category to another or reallocating funds that have been explicitly earmarked in the budget by the Common Council for a specific purpose (for example, the \$100,000 to provide additional security at transfer points) would require Council approval and a budget amendment.

Whether the Transit General Manager could reach a similar result by indirection, that is, simply not expending the funds for additional security, a new marketing position, an added contribution to the Metro Transit contingency fund and the like, is unclear. Ultimately, there is a possibility that major objects of expenditures would go beyond the Council appropriation and require an amendment, but such is not always the case. In any event, the determination in the first place as to how to structure such budget problems falls to the Transit General Manager, and the TPC does not have the authority to rewrite the Transit budget.

## FURTHER DISCUSSION OF SPECIFIC QUESTIONS

1. *Does the TPC have the authority to establish in the first instance Metro Transit fares, routes and schedules? If so, can such decisions be appealed to the Common Council?*

As noted above, these questions fall in the first place to the TPC under the authority given in sec. 3.14, MGO. Based on information from Metro Transit and Comptroller staff, these matters have been historically handled consistent with this conclusion. The TPC's decisions on such matters are final unless someone invokes the appeal process set out in sec. 3.14(4)(j), MGO. This subsection reads:

(j) Any decision of the Transit and Parking Commission may be appealed to the Common Council. Such appeal must specify the reason therefore and be filed with the Transit General Manager. The Transit General Manager shall transmit such appeal to the City Clerk who shall file such appeal with the Common Council. The Common Council shall fix a reasonable time for the hearing of the appeal and give public notice thereof as well as due notice to the parties in interest, and decide the same within a reasonable time. The action of the Transit and Parking Commission shall stand unless the Common Council, by a majority vote of its members, reversed or modifies the action of the Transit and Parking Commission.

The manner of pursuing such an appeal will be discussed below.

2. *Must the Common Council approve a Transit and Parking Commission Report containing fare, route and/or schedule changes; that is, are TPC decisions merely recommendations?*

While the TPC may make recommendations to the Council on some matters of policy, questions of fares, routes and schedules are initially committed to the TPC. They need not come to the Council for final approval, as is the case with many other City boards, commissions and committees.

However, this does not mean that the Council has no oversight. The TPC decisions may be appealed to the Council. If the TPC decision means that an additional appropriation is necessary, the Council is the body that must approve such an appropriation, which requires 15 votes of the Council if the action is taken outside of the annual budget approval process. Sec. 2.19, MGO.

3. *Can the TPC unilaterally reallocate monies from one category of major object of expenditures to another in Metro's budget that was approved by the Common Council in order to fill the budget gap without raising fares, if the reallocations do not alter the total budget?*

The TPC does not have such authority. The TPC's budget authority is very limited; the Transit General Manager, like other Department Heads, has some authority to move funds within Major objects of expenditure and a very limited authority, with the Comptroller's approval, to move

funds between major objects. We note that the TPC does have the authority, subject to appeal to the Common Council, to approve service reductions in order to fill the budget gap without raising fares. Thus, there is logic in having the TPC view fares and services not in isolation but in relation to one another.

If the TPC takes actions, such as it recently did, that effectively reduce the revenues expected for Metro, then other actions will be required to balance the budget. Like other departments, Metro may decide not to make certain expenditures approved by the Council, if necessary to balance the budget (compare, for example, a decision by a manager not to fill a position in order to keep the expenditures for salary within the Council's appropriation). Normally, these actions do not require any approval by the Council, since they are not an "appropriation" within sec. 2.19, MGO. However, it is possible that the end result of such actions by the TPC could trigger the need for an additional appropriation, if there are insufficient funds appropriated to a major object of expenditures. In this regard, not spending funds in one major object of expenditures to remedy a shortfall in another area may end up effectively constituting a reallocation of a specific earmark by the Council, which again may constitute an appropriation requiring Council approval. Neither our office nor the Comptroller can determine at an early stage whether a decision not to increase revenues ultimately might end up requiring a related appropriation from the Council.

4. *Can the TPC decline to raise fares in response to a Common Council budget that effectively creates a deficit if fares are not raised and simply leave the Metro budget with a deficit to be addressed by the Metro Transit General Manager and Mayor however they deem appropriate?*

While this can be done by the TPC, it leaves the Metro Transit General Manager in a difficult position. With a deficit budget, the Manager must take steps to bring the budget back into balance. This will create the necessity of reducing services elsewhere or seeking an additional appropriation from the Council, as discussed above.

The TPC's decision also could be appealed to the Council.

5. *How is reconsideration accomplished at the TPC?*

Reconsideration by Boards and Committees is addressed in the ordinances in sec. 33.01(4)(b), MGO, which provides in relevant part as follows:

(b) . . . Unless modified by its own rules of procedure or otherwise required by ordinance or statute, boards, committees and commissions shall follow the procedure set forth in sec. 2.21, MGO, on motions for reconsideration.

The TPC has its own rules of procedure. Consequently, the procedure in sec. 2.21 MGO does not apply. The TPC rule regarding motions generally includes a procedure for motions to reconsider. It reads as follows:



(F) Motions. . . . A motion to reconsider an item may be made at the following meeting, but if notice of reconsideration has not been published, the motion is to be referred to the next meeting so that adequate public notice can be provided. A motion for reconsideration of any agenda item from the immediately preceding previous meeting may only be made by a member who was present at the meeting and voted on the prevailing side. All members who are in attendance at the meeting where reconsideration is being considered may vote on the issue.

The Mayor has requested that the TPC reconsider its recent action. Based on the above, the following process applies:

- A. Any motion to reconsider must be made at the next TPC meeting;
- B. The motion can only be made by a member who was present at the meeting and voted in the majority;
- C. If notice of reconsideration is on the agenda for the meeting, the motion can be heard and, if successful, reconsideration can occur at the same meeting at which the motion was made;
- D. If notice of reconsideration was not placed on the agenda for the meeting, the motion must be referred to the next meeting to allow public notice to be given.

6. *What is the appeal process to the Common Council from TPC decisions?*

The process for appealing a decision of the TPC is set forth in sec. 3.14(4)(j), MGO, set out in full above.

The language is surprisingly broad and general as to the appeal process.

*Who may appeal:* Ordinances regarding appeals of administrative agency decisions typically have limiting language concerning who has standing to initiate an appeal (alderperson of a district; unsuccessful applicant; person aggrieved; person whose interests are adversely affected; etc). This insures that individuals who appeal actually have a stake in the outcome. Sec. 3.14(4)(j) MGO contains no such qualifiers. While there is no express limiting language regarding individuals who would have standing to appeal, logic would suggest some implied outer limit: City of Madison elected officials; residents; taxpayers; transit riders.

*How is an appeal initiated:* The ordinance spells out modest appeal filing requirements; i.e., in writing; specifying a reason; filed with the Transit General Manager; transmitted to the City Clerk.

*What is the hearing process:* Once the City Clerk has placed the appeal on the Council agenda,

the process is a straightforward one. The Council schedules a hearing; public notice is given pursuant to sec. 19.84, Wis. Stats., (the Open Meeting law) in the same way notice is given for any other agenda item; the matter appears on the agenda as a public hearing; the Council determines the matter by majority vote, affirming, reversing or modifying the action of the TPC.

*What are the Council's options on appeal in the present situation:* The TPC's recent action was to vote not to raise any fare categories for Metro Transit riders for 2009. On appeal, the Council may affirm the decision as a whole; reverse the decision as a whole and request the TPC to readdress the question based on information introduced at the hearing; or modify individual components of the TPC decision by setting higher rates in any one or all of the fare categories.

## CONCLUSION

The ordinance describing the powers of the TPC is conflicting, suffering from some of the same problems as the old Water Utility ordinance. In general, however, the ordinance commits to the TPC the initial authority on questions of fares, routes and schedules of Metro Transit. Such decisions of the TPC may be appealed to the Council and overturned or modified by majority vote of the Council.

In addition, the TPC has limited authority over the budget. Decisions that impact revenues are not in and of themselves an "appropriation" requiring Council approval, but such decisions may force the Transit General Manager to consider other actions to balance the Metro budget, or may effectively end up requiring an appropriation from the Council, a 15 vote item.

The appeal process to the Council from TPC decisions is straightforward, requiring that an appeal be in writing, with reasons, and filed with the Transit General Manager. The appeal is forwarded to the City Clerk, and placed on the Council agenda as a public hearing item. The Council may, by majority vote, affirm, reject or modify the TPC actions.

cc: Chuck Kamp, Transit General Manager  
Dean Brassler, Comptroller