AGENDA #_____

CITY OF MADISON, WISCONSIN

REPORT OF: **City Attorney**

TITLE: Redistricting Ordinance
Legistar File No. 22231

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City Attorney

DATED: June 20, 2011

PRESENTED **June 21, 2011**
REFERRED
REREFERRED
REPORTED BACK
ADOPTED POF
RULES SUSPENDED
ID NUMBER

TO THE MAYOR AND COMMON COUNCIL:

RE: Redistricting Ordinance
Legistar File No. 22231

I was asked at the Common Council meeting of June 7, 2011, to prepare an additional report regarding this proposed ordinance.

The purpose of the ordinance was to clarify what happens upon redistricting when an alder no longer resides in the same numbered district in which he or she was elected. As such, it arose out of my Formal Opinion #2011-001, which is available on the website at this location:

http://www.cityofmadison.com/attorney/documents/2011opinions/Opinion2011-001.pdf

A copy of the opinion, together with the attached advice from the Elections Board delivered to the City in 2001 which relates to the same subject, is also attached to this memorandum as Attachment A.

This report will first re-examine the law, then note some of the City's past practices, and finally note potential litigation which might arise from the City's failure to follow the legal redistricting requirements.

Legal Issues

Effective Date of Redistricting.

In Opinion #2011-001, I concluded that the newly drawn districts are effective upon the effective date of the City ordinance drawing the districts, but in no event could they be effective any later than January 1, 2012. This is due to the mandatory language set out in the statutes with respect to redrawing districts.

Wisconsin employs a three step process for redistricting at the local level. The wards created at the local level are the building blocks for subsequent redistricting for municipalities, counties, and the state.

The first step under Sec. 59.10(3) (b), Stats., requires the County Board of Supervisors "within 60 days after the population count . . . but no later than July 1 following the year of each decennial census . . ." to adopt a tentative county supervisory district plan. The plan is then sent to municipalities.

The second step is for municipalities to adjust their wards. Under Sec. 5.15(1) (b), Stats., the municipality is required to do the following:

> ". . . within 60 days after the receipt of a tentative supervisory district plan and written statement, if any, from the county board in which a municipality is located, the governing body of the municipality shall adjust its wards . . ."

The City Clerk is required to forward the new wards to the County Clerk within 5 days of adoption or enactment. Sec. 5.15(4) (b), Stats.

The third step is the creation of new supervisory and aldermanic districts from the wards. Following the creation of the wards, the county is required to adopt its final supervisory district plan. Sec. 59.10(3) (b) 2. , Stats., states in part:

> "Within 60 days after every municipality in a county adjusts its wards under s. 5.15, the board shall hold a public hearing and shall then adopt a final supervisory district plan. . . ."

Similarly, the municipalities are required to adopt new districts within 60 days after the creation of the wards. This is pursuant to Sec. 62.08(1), Stats., which reads in part:

> "Within 60 days after the wards have been readjusted under s. 5.15(1) and (2), the common council of every city, including any city of the first class, shall redistrict the boundaries of its aldermanic districts by an ordinance introduced at a regular meeting of the council, published as a class two notice, under ch. 985, and thereafter adopted by a majority vote of all the members of the council. . . ."

Each of these statutes makes the time limit mandatory. In each instance, the statutes use the word "shall." For example, in a dispute regarding the redistricting in Rock County following the 1980 census, the city of Janesville sued Rock County. In that decision the Wisconsin Court of Appeals stated:

> Municipalities, like counties, have an absolute duty to perform as directed by the legislature in the three stage process required by Wis. Stats. Sec. 5.15 and 559.03 [citation omitted], Sec. 5.15(1) (a) provides in relevant part, 'Every city, village, or town in this state *shall* by its common council or village or town board, respectively, be divided into wards as provided in this section.' (Emphasis added.) Sec. 5.81(1) refers to the division into wards under Sec. 5.15 as 'imperative.'

City of Janesville v. County of Rock, 107 Wis. 2d 187, 201, 319 N.W.2d 891 (Ct. App. 1982). Later in that same decision the court stated that "adherence to that time schedule is mandatory." *Id*.

Similarly, in *County of Lacrosse v. City of Lacrosse*, 108 Wis. 2d 560, 322 N.W.2d 531 (Ct. App 1982), the court again found that municipalities had an absolute duty to perform the redistricting.

The argument has been submitted that the City could adopt a new plan, but not make it effective until some later point in time, and retain the old districts in the interim. There are two distinct problems with that. First, under Wis. Stats. Sec. 5.15(1) (c), the new wards and districts govern for "local elections beginning on January 1 of the second year commencing after the year of the census . . ." Thus, the new districts are effective no later than January 1, 2012, for all subsequent elections.

Second, the language of the statutes requires that the municipality "shall adjust its wards" and "shall redistrict the boundaries of its aldermanic districts . . ." To suggest that one can meet the requirements of the statutes by an ordinance that is not in effect strikes me as too clever by half.

Moreover, this was the very issue which the City put to the Elections Board ten years ago and which resulted in the advice from the Elections Board which is attached to my opinion. Among the statements in that advice are the following:

> The purpose of redistricting is not only to establish new aldermanic districts, county supervisory districts and legislative districts for purposes of conducting elections, but also for purposes of equality of representation – to ensure that voter representation isn't diluted by districts having become substantially unequal in population. ...
>
> . . .
>
> To say that the timetable for establishing new wards is mandatory and must be accomplished within the statutory 60 day period, and that aldermanic districts are required to be established within 60 days thereafter, but that the new aldermanic districts (which are based on the new wards) will not go into effect until the next aldermanic election some 16 months later is inherently self-contradictory. . . .
>
> . . .
>
> Furthermore, the new wards go into effect in 2002 for purposes of establishing county supervisory districts and legislative districts. Maintaining old wards for purposes of preserving the old aldermanic districts while, at the same time, recognizing new wards for purposes of county supervisory districts and legislative districts is incongruous, at best.

I continue in my opinion that new aldermanic districts are effective upon publication of the City's ordinance or, at a minimum, as of January 1, 2012. I do not believe that State law contemplates two sets of wards and districts, one for some purposes and another for other purposes.

<u>Is an Alderperson's Office Rendered Vacant by Redistricting</u>?

The second issue addressed in my opinion was whether redistricting in which an alder no longer resided in same numbered district from which they were elected meant that the alder's office was vacant. Although I concluded that the statutes were vague, I followed the established guidance from the state's Election Board and the Attorney General in providing that such alders may serve out the remainder of their term.

Since that time, I have found additional support for this position.

First, in an opinion of the Attorney General from 1982, 71 OAG 157, Attorney General Lafollette also concluded that all legislators could serve out the remainder of their terms. Relying on Sec. 17.03(4), Stats., which I referenced in my opinion, the Attorney General said that no vacancy would be created by that result. Interestingly, in this Attorney General's Opinion, the Attorney General also stated:

> "Thus, it [the federal court] appears to have given tacit consent to senators having two years remaining on their terms to *serve in the newly created districts* without running in fall elections of 1982. . . .
> . . .
>
> In reapportioning "members" as well as "districts" and in permitting senators having two years left on the term for which they were elected to continue to serve on newly created districts without standing for election in 1982, the court recognized the proposition that such senators are responsible *to the inhabitants of the District to which their numbers correspond, that is the new district*, and not to the inhabitants of the district from which they were elected.
>
> 71 OAG 159-160.

Similarly, the legal counsel to the League of Municipalities issued an opinion in 1981 which reached the same result, namely, that alders continue to serve out their terms regardless of the fact that they may no

longer live in the same numbered district from which they were originally elected. In that opinion, the attorney stated:

> "In my opinion, an alderman continues to represent the district number her or she was originally elected to represent until the expiration of his or her term of office."

Copies of these opinions are attached as Attachment B to this report.

Recent History of City of Madison Redistricting.

I looked at the last two ordinances which redistricted aldermanic districts in the City of Madison, that from 1991, and that from 2001. Portions of copies of those ordinances are included as Attachment C to this report.

In 1991, the City of Madison changed from 22 to 20 aldermanic districts. The ordinance stated that the new wards and ward boundaries "are established as follows and as shown on a map entitled City of Madison Wards on file in the Office of the City Clerk . . ."

The next section of the ordinance stated that "Aldermanic Districts are established as follows by combining contiguous whole wards . . . provided such Aldermanic Districts shall become effective beginning with the 1993 spring election." (Emphasis added).

Finally, the ordinance included Sec. 15.06 with respect to present aldermanic districts. It stated that those districts "shall be automatically repealed without further action by the Common Council, effective after the 1993 spring election, notwithstanding the above sections 15.02 and 15.03 which shall be effective for purposes of said spring election as well as the 1992 Dane County supervisory elections. . ."

Thus, in 1991, the City attempted to do, or did, exactly what some alders desire here: they enacted new aldermanic districts, but said they were not effective until the next election.

In 2001, the ordinance was adopted in September, and had language similar to that in 1991, although it had a specific date of the map to be filed with the City Clerk.

It was after this that the City had a special election and sought the advice of the Elections Board as to whether the old or the new districts applied. It was at that time that the letter attached to my opinion came from the Elections Board, advising the City that the new districts are effective as of January 1, and that the special election had to be held in the new district despite the fact that the ordinances stated the old districts were in effect until the next City regular election in 2003.

The opinion from the State Elections Board was not received kindly by all members of the Common Council. Attachment D to this Report is an article from the *Wisconsin State Journal* from December 20 of 2001. Also included in Attachment D is the email from then Assistant City Attorney Larry O'Brien, informing the alders that the districts are effective as of January 1, and that the directive of the Elections Board was "unequivocal."

I conclude that the City's prior attempts to have both old and new districts in effect for different purposes was at least a technical violation of the state law. The City's practice was modified in 2001.

Potential Litigation if the City Fails to Put New Districts Into Place.

Assuming that the City did not comply with the requirements in Sec. 5.15 and Sec. 62.08, Stats., to draw new wards and district boundaries, the statutes explicitly provide the right of any elector of the City to submit a plan to the Circuit Court, and that the court "may promulgate the plan, or any plan, in compliance

with this section, as a temporary aldermanic district plan until superseded by a districting plan adopted by the Council in compliance with this section." Sec. 62.08(5), Stats; see also Sec. 5.18, Stats. In addition to the right to go to court under those provisions, failure to have an effective new districting plan in place might subject the City to a lawsuit by any elector claiming that the City's districts are unconstitutional because of disproportionate representation. Such an action could be brought under the federal civil rights laws, 42 USC Sec. 1983, allowing the party bringing the lawsuit to collect actual attorney's fees and costs from the City.

Potential Alternative.

The key issues that face the City are when the new plan is effective, and what to do with alders who may no longer be in the district number from which they were elected. The question of when the plan is effective is settled by State law: It is effective no later than January 1, 2012. State law also seems to require that all alders have the right to serve the remainder of their respective terms, regardless of where the district lines end up, or even if a district is eliminated. The Alders having been lawfully elected from established districts for a two year term, redistricting does not create a vacancy in office.

In drafting the ordinance that was previously before the Council, I explicitly referred to an alder "representing" the new but same numbered district. Although this conclusion is in accord with the opinion of the Attorney General and the opinion of the counsel for the League of Municipalities, both referenced above, I am not certain that the statement of the area represented is critical for the proposed ordinance. That is, although I believe the alder effectively does represent the newly numbered district, the question of who an alder "represents" is in some sense a conceptual or philosophical one. An alder may continue to provide assistance to City residents from an old district, from the new district or from anywhere in the City, regardless of which district they "represent."

In addition, the reference to the district represented would cause difficulties if the number of districts were ever reduced. The language suggests that an alder whose district was eliminated would have to leave the Council. I do not think that is allowed under sec. 62.08(3), Stats.

With that in mind, an alternative ordinance might simply deal with the question of aldermanic vacancies and could read as follows:

> "Upon reapportionment and redistricting of the districts of alderpersons after the decennial census, all alderpersons have the right to serve out the remainder of their terms, regardless of whether they reside in the same numbered district from which they were elected. Redistricting shall not cause a vacancy of the office of any alderperson."

This ordinance answers the key issue so that it need not be revisited again in 2021[1].

CONCLUSION

I come to three conclusions based upon my legal research.

1. The new wards and aldermanic districts are effective upon being adopted by the City, and certainly no later than January 1, 2012.

2. Redrawing of the districts does not work a vacancy in any aldermanic position. All alders may serve out their term.

[1] The Council might wish to consider moving all aldermanic elections to even numbered years. Then the period of time that an alder might not live in the redrawn districts would be reduced by a year. Such a change would be complex, both legally and politically.

3. An ordinance explicitly stating the second of these two items would be advisable. The Council may consider whether they wish to use the form previously proposed which specifically speaks to representation of the districts, or prefers the alternative language I put forth in this report.

Michael P. May
City Attorney

Attachments:

A. Formal Opinion #2011-001
B. Attorney General and League Counsel Opinions
C. Portions of Redistricting Ordinances from 1991 and 2001
D. News Article and Legal Advice from 2001