

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

Date: January 28, 2014

FORMAL OPINION #2014-001

TO: Alder Shiva Bidar-Sielaff

FROM: Michael P. May, City Attorney

RE: Jurisdiction of Plan Commission and Alcohol License Review Committee
Regarding Density of Licensed Premises

You have asked for my opinion on the related jurisdictions of the City's Plan Commission and the Alcohol License Review Committee (ALRC) on the approval of the location of premises to be licensed to sell alcoholic beverages.

The ALRC is considering changes to the City's Alcohol Licensing Density Ordinance (ALDO), codified at sec. 38.05(9)(o), MGO. ALDO places certain limitations on the granting of new licenses or transfer of existing licenses within a defined area in the central business district of Madison. There are a number of exceptions to the limitations. The ALRC is considering replacing some aspects of ALDO with a zoning regulation, perhaps an overlay district, regulating density of licensed premises through the City's zoning power.

Questions Presented

1. May the Common Council remove the Plan Commission's authority with respect to zoning decisions on licensed premises by delegating that authority to the ALRC or designating the ALRC as the City body to make such zoning decisions on licensed premises?
2. If the Plan Commission's authority may not be removed, may the ALRC be designated the lead committee on these licensed premises zoning decisions, so that the ALRC recommendation would be the presumptive action by the Council on such matters?

Short Answers

1. No. Once the City establishes a Plan Commission, State law and City ordinances require that zoning amendments be referred to the Plan Commission for recommendation to the Common Council.

2. No, for the same reason as the response to the first question, zoning recommendations must come from the Plan Commission. There is no reason, however, that the Council could not also refer such matters to the ALRC for its input.

Legal Analysis

City authority for planning and zoning is set out in Wis. Stat. sec. 62.23. Wis. Stat. sec. 62.23(7)(d)(2) provides in part (emphasis added):

The council may adopt amendments to an existing zoning ordinance after first submitting the proposed amendments to the city plan commission

Similarly, sec. 28.182(5)(a) and (b), MGO, provide in part:

(a) Recommendation by the City Plan Commission.

1. The Plan Commission shall hold a public hearing on each application for an amendment. . . .
2. After the public hearing, the City Plan Commission shall submit its recommendation to the Common Council prior to the Council's public hearing.

* * *

- (b) Action by Common Council. The Common Council shall not act upon a text amendment or map amendment until it has received a recommendation from the City Plan Commission as provided above.

Wis. Stat. sec. 62.23(5) has a related requirement that decisions with respect to public lands shall be referred to the Plan Commission before action by the Council. In *Scanlon v. City of Menasha*, 16 Wis. 2d 437, 114 N.W. 2d 791 (1962), the Wisconsin Supreme Court held that, while a City is not required to set up a Plan Commission, once it does so, matters entrusted to the Commission must be referred to the Commission. The Court stated (16 Wis. 2d at 444):

It does not seem unnatural, illogical, or an unreasonable procedure for the legislature to require a mandatory referral to the planning commission of certain matters, and particularly the sale of city property. We hold, therefore, that [the statute requiring referral] is mandatory and qualifies the exercise of the powers of the common council granted by sec. 62.11(5), Stats.

Although not exactly on point since it concerned another section of 62.23, the analysis of the *Scanlon* Court supports a similar reading for the referral under Wis. Stats. sec. 62.23(7)(d)2. The City has followed this rule in adopting the cited provisions of sec. 28.182(5), MGO.

Since both the State statutes and the Madison Ordinances require referral to and a recommendation by the Plan Commission on zoning amendments, the Council may not take that authority away from the Commission and lodge it in the ALRC.

This conclusion is buttressed by the jurisdiction of the ALRC. Under sec. 33.02(3), MGO:

Duties. The Alcohol License Review Committee shall be charged with the responsibility and duty to review and examine all applications for the granting of all fermented malt beverage licenses, intoxicating liquor licenses, and operator's licenses, to receive all recommendations relating thereto from staff personnel and to review and make recommendations as to the subsequent granting of all such licenses by the Common Council ...

The ALRC is given additional duties under chapter 38, MGO, the Alcohol Beverage chapter. But the ALRC is given no authority to take the place of the Plan Commission on zoning questions. Given the distinct authorities granted in Wis. Stat. sec. 62.23 (planning and zoning) and Wis. Stat. ch. 125 (alcohol beverage regulation), I do not see any way that the Council could attempt to create some hybrid body, or mix the distinct questions of zoning and alcohol regulation.

In an analogous setting involving utility commissions, the Supreme Court held that a city could not both create a utility commission under state law and then remove some of the commission's authority. *Schroeder v. City of Clintonville*, 90 Wis. 2d 457, 280 N.W. 2d 166 (1979).

Thus, for the very same reasons that the Council could not replace the Plan Commission on zoning questions, the Council could not make the ALRC the lead committee, whose recommendation would be the presumptive action of the Council, on zoning questions. The two functions are legally distinct and must remain distinct.¹

This does not mean, however, that the Council could not seek input from the ALRC on a zoning overlay district, or some other zoning device, that has an impact on the ALRC's actions on issuance of licenses or permits under ch. 38, MGO. Just as the ALRC has little experience and no rightful jurisdiction over zoning questions, the Plan Commission has little experience and no rightful jurisdiction over the issuance of liquor licenses or operators' permits. The development and application of zoning authority to assist the City in the regulation of licensed premises may very well be informed, both practically and legally, by information and recommendations from the ALRC on the nature of the ordinance. The only legal limitation is that the Plan Commission is the body ultimately charged with making recommendations on zoning amendments. The

¹ While theoretically the City could create some super-commission to undertake the roles of the Plan Commission and the ALRC, such a body would still have to make clear when it was exercising the zoning power under sec. 62.23, Wis. Stats., and ch. 28, MGO, and when it was regulating premises licensed to sell alcohol under ch. 125, Wis. Stats., and ch. 38, MGO.

Council could, if it so desired, refer such an issue to the ALRC for its input as to how the zoning ordinance might affect regulation under the liquor laws.

Finally, and I think this is known to the ALRC, the ALRC and the City may effectively regulate the density of licensed premises under existing law, without a zoning district related to the density of premises. The powers granted to the City under ch. 125, Wis. Stats., and exercised by the ALRC under ch. 38, MGO, are more than adequate to deal with concerns about density of licensed premises. This can be done in a number of ways: even absent the ALDO or any zoning ordinance, the ALRC may exercise its discretion to deny licenses for the public health, safety, and welfare, on the ground that there already exist too many licensed premises in an area. The ALRC could adopt policies determining when the density of licensed premises may lead to a denial of an application for a new license. The ALRC could apply an ordinance adopted by the Common Council, like the ALDO, that sets rules on the issuance of new licenses in areas with a high density of licensed premises. The City also may wish to pursue this policy goal through exercise of its zoning powers.

Conclusion.

The City may not authorize the ALRC to act in the place of the established Plan Commission on matters related to planning and zoning within the Commission's jurisdiction, including which body is to make the recommendations to the Council with respect to zoning. Nothing prevents the Council from seeking, in addition to the recommendation of the Plan Commission, secondary recommendations from other bodies like the ALRC on the impact of zoning amendments.

Michael P. May
City Attorney

CC: Mayor Paul Soglin
City Clerk Maribeth Witzel-Behl
Mark Woulf
Katherine Cornwell
All Alders

SYNOPSIS: The ALRC may not replace the Plan Commission for recommendations to the Common Council on zoning issues for licensed premises.