DATE: May 30, 2003

OPINION NO. 3-003

TO: Ald. Austin King, District 8
               Ald. Gregory Markle, District 15

FROM: James L. Martin, City Attorney

SUBJECT: **SECTION 2.16, MADISON GENERAL ORDINANCES**

You have requested an opinion on how to interpret Section 2.16 of the Madison General Ordinances. You indicate that there is confusion among new alders about when and how an abstention or non-vote is counted to determine whether the Mayor may cast the eleventh vote.

RELEVANT ORDINANCES AND STATUTES

Madison General Ordinances (MGO)

Sec. 2.16 <u>Aye and No Vote</u>.

(1)   The ayes and noes shall be taken and recorded upon any question before the Council, upon the call of any two members. While the Clerk is calling the ayes and noes, the members shall vote from seat, and it shall not be in order for any member to explain his vote during the calling of the ayes and noes.

(2)   Any member present who, when a matter is put to a roll call vote, passes, fails to vote or refuses to vote shall be recorded as voting "No" for the sole purpose of determining the Mayor's entitlement to vote. This rule shall not apply where a member abstains from voting by reason of a conflict of interest.

(3)   Any unexcused absence at the time a roll call vote is taken shall be recorded as "not present". (Emphasis Supplied).

Sec. 2.18 <u>Majority Vote of All Members Required</u>. All laws, ordinances, rules, resolutions and motions shall be passed by an affirmative vote of a majority of all the members of the Common Council unless an extraordinary vote is required by law.

Sec. 2.32 <u>Roberts Rules of Order to Govern Council</u>. In the absence of a standing rule the Council shall be governed by Roberts Rules of Order.

Wisconsin Statutes (Wis. Stats.)

62.11 Common Council. (1) How Constituted. The Mayor and alderpersons shall be the Common Council. The Mayor shall not be counted in determining whether a quorum is present at a meeting, but may vote in case of a tie. When the Mayor does vote in case of a tie the Mayor's vote shall be counted in determining whether a sufficient number of the Council ayes voted favorably or unfavorably on any measure.

DISCUSSION

Pursuant to Sec. 2.16(2), MGO, any Council member <u>present</u> who, when a matter is put to a roll call vote, passes, fails to vote or refuses to vote shall be recorded as voting "no" for the sole purpose of determining the Mayor's entitlement to vote. (Emphasis supplied). The Council operates by a "rule of eleven": all laws, ordinances, rules, resolutions and motions must receive the favorable vote of eleven members to pass. Sec. 2.18, MGO.   This is regardless of whether the other nine members vote against the item or abstain from voting.

Chapter 2, Standing Rules of the Common Council, does not speak to how to count an abstention. As a result, we look to Robert's Rules of Order for guidance. Sec. 2.32, MGO. An abstention is an attempt by a member to remain neutral. Robert's Rules of Order, 9th Ed., §43, page 398. A vote of present is an abstention. Id., §44, p. 414. In <u>Detroit Terrazzo Contractors Assoc. v. Board of Trustees of the B.A.C. Local 32 Ins. Fund</u>, 176 F. Supp.2d 733 (2001), the court, speaking about Robert's Rules of Order, stated:

The trustees are correct in that Robert's Rules of Order provides that "Abstentions have no effect on calculation of votes. (When a ballot is marked "abstain," it is considered a blank.)" 176 F. Supp.2d at 740.

In <u>Wrzeski v. City of Madison</u>, 558 F.Supp. 664 (1983), the court ruled that an alder had a right to abstain from voting even in the absence of a conflict of interest and that an alderperson could not be compelled to vote on any item, contrary to a Council rule at the time that required a "aye" or "no" vote. The court indicated that because of the majority vote requirement, a failure to vote did not prevent the Council from functioning. Id. at 668. For the reasons stated above, an abstention cannot be counted as a "no" vote for purposes of determining when the Mayor is entitled to vote in case of a tie.

Section 3.47(5)(f), MGO, requires an alderperson to abstain from voting:

(1) ...if the matter under consideration involves her or his or her or his immediate family member's financial or personal interests to the extent that such interests conflict or appear to conflict with her or his official duties or would impair or reasonably be expected to impair her or his independence of

judgment or actions.

Where, as indicated above, an alderperson's personal or financial interests conflict with his or her official duties or independence of judgment, this office has consistently counseled that an alderperson not only abstain from voting, but also from participating in the debate. See also Opinion on *Abstention From Voting*, June 27, 1989, Henry A. Gempeler, City Attorney. While the ordinance is not particularly clear on what procedure to follow (the ordinance only refers to disqualification from voting) the better practice is for the alderperson to leave the chamber for the item. The alders should clearly refrain from the discussion and voting, for to do otherwise, would be contrary to the spirit of the Ethics Code and could raise questions as to the appearance of conflict of interest of the entire body and its deliberative process. Id.

It is fundamental that a person who has an excused absence pursuant to sec. 2.025, MGO, should be recorded as "not present" on all roll call votes. By rule, an unexcused absence at the time a roll call vote is taken shall be recorded as "not present". Sec. 2.16(3), MGO. Therefore, excused and unexcused absences shall be recorded as "not present" during roll call votes and shall not be treated as votes for purposes of determining who voted for and against an item on the Council agenda.

Section 62.11(1), Wis. Stats., provides that the Mayor may vote in the case of a tie vote but only in determining whether a sufficient number of the Council has voted favorably or unfavorably on any measure. As a result, the Mayor can only vote when there is a ten-ten tie vote. Alders who pass, fail to vote or refuse to vote shall be recorded as voting "no" for the sole purpose of determining the Mayor's entitlement to vote. Sec. 2.16(2). Abstentions and absences from the Chamber, whether excused or unexcused, shall not be deemed votes for the purpose of determining when the Mayor can vote.

Finally, the Wrzeski court stated the following about legislators who refuse to vote on difficult or controversial issues:

> There can be no doubt that a representative who consistently dodges difficult or controversial issues by not voting on them does a disservice to his or her constituency. However, in our government system, the proper remedy for such behavior lies with the electorate. "A fundamental principle in our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them.'" (Citations omitted) 558 F.Supp. at 668.

If you have any further questions with respect to this matter, please feel free to contact me.

James L. Martin
City Attorney

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Summary: For the purposes of sec. 2.16(2), Madison General Ordinances, abstentions and absences from the chamber during roll call votes shall not be considered votes for the purpose of determining when the Mayor can vote in case of a tie. By rule, only passes, failures to vote or refusals to vote can be considered "no" votes.