

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

Date: May 16, 2007

OPINION #07-002

TO: Members of the Board of Park Commissioners
Jim Morgan, Parks Superintendent

FROM: Michael P. May, City Attorney

**RE: AUTHORITY OF BOARD OF PARK COMMISSIONERS TO DISPOSE
OF CITY PARKLAND**

You have asked my opinion on two related issues: (1) the statutory powers of the Madison Board of Park Commissioners to dispose of parklands; and (2) whether the Board of Park Commissioners, if it recommends a member to serve on the James Madison Park Property Planning Committee, "legitimizes" the Committee by such action. As to the first issue, I understand your question to include within it the question of whether the Common Council could dispose of City parkland if the Board of Park Commissioners opposes such disposal.

As is set forth more fully below, it is my opinion that the Common Council retains the authority to dispose of City parkland without the concurrence of the Board of Park Commissioners. I also conclude that the Board of Park Commissioners may recommend a member to serve on the James Madison Park Property Planning Committee without in any way affecting the legitimacy of the Committee.

Background

The City acquired several properties abutting James Madison Park for the purpose of future park expansion. The City owns the land and buildings at 640 and 646 East Gorham Street, the land underneath the former Lincoln School, and the land and building known as The Collins House located at 704 East Gorham Street. The buildings on all four properties have been declared landmarks. In 2004, the Board of Park Commissioners (hereafter, the "Park Commission") recommended that the surplus property procedure be used to sell the buildings at 640 and 646 East Gorham, and to enter into a long-term lease of the land underneath them to the purchasers of the buildings. In January of 2006, the Park Commission declined to recommend that the City-owned lands under Lincoln School be sold to the building's owner, but in the same year recommended the sale of the Collins House building and a similar long-term lease

of the land under the Collins House. None of these proposed transactions have occurred.

By Enactment No. RES-07-00224, adopted on February 27, 2007, the Common Council created the James Madison Park Property Planning Committee whose sole responsibility is to submit a proposal to the Board of Park Commissioners for the former Collins House, the land underlying Lincoln School, and the properties located at 640 and 646 East Gorham Street.

Statutory Authority

Section 27.08, Wis. Stats., grants every city the power to create a board of park commissioners and sets forth powers and duties of such a board. The City of Madison created its Board of Park Commissioners through the enactment of Section 3.07, Madison General Ordinances.¹ The ordinance is silent as to the Commission's powers and duties (except as regards appeals of permit revocations) but refers to state statute:

There is hereby created for the City of Madison, pursuant to Section 27.08 of the Wisconsin Statutes, a Board of Park Commissioners.

Subsection (2) of Sec. 27.08, Wis. Stats., delineates the powers of boards of park commissioners:

- (2) The board of park commissioners is empowered and directed:
 - (a) To govern, manage, control, improve and care for all public parks, parkways, boulevards and pleasure drives located within, or partly within and partly without, the corporate limits of the city, and secure the quiet, orderly and suitable use and enjoyment thereof by the people; also to adopt rules and regulations to promote those purposes.
 - (b) To acquire **in the name of the city** for park, parkway, boulevard or pleasure drive purposes.....real or personal property.....

¹ Sec. 3.07, MGO, was recently renumbered to sec. 33.05. This Opinion will use the old number, since the revised Code of Ordinances with the new numbering system has not yet been published.

- (c) **Subject to the approval of the common council** to buy or lease lands in the name of the city for park, parkway, boulevard or pleasure drive purposes within or without the city and, **with the approval of the common council**, to sell or exchange property no longer required for its purposes. Every city is authorized, **upon recommendation** of its officers, board or body having the control and management of its public parks, to acquire by condemnation **in the name of the city** such lands...as it may need for public parks.....
(emphasis added)

Legal Analysis

Sec. 27.08(2)(c), Wis. Stats., makes clear that the Board of Park Commissioners is without any power of its own to acquire, sell, lease or condemn land for park purposes; these functions are to be exercised only with “the approval of the common council.” The language in this section nowhere suggests that the Common Council may only exercise this authority with the approval of or concurrence of the Board of Park Commissioners. As will be noted below, other statutes give the authority over City property to the Common Council, and this statute indicates that the Council retains that authority, but may delegate it to the Park Commission by the Council’s “approval.”

Moreover, the Park Commission is not a municipal corporation, and it does not possess the traditional statutory powers held by municipal corporations, such as the power to sue, to contract, to issue bonds or other indebtedness, or to acquire or dispose of real property. A Park Commission is empowered to govern, manage, control, improve and care for City parks, but not to buy, sell, lease or hold title to them, absent approval of the Council. It is noteworthy that the broad authority given to a Park Commission in sec. 27.08(2)(a) is limited by the specific requirement of Common Council approval in subs. (2)(b) and (c). Thus, the language of sec. 27.08, Stats., is unlike language in other statutes where the Legislature clearly intended to give a body separate corporate status to act independently of the Common Council. See, e.g., the authority given to municipal housing authorities in sec. 66.1201(9), Wis. Stats., or redevelopment authorities in sec. 66.1333(3)(f), Wis. Stats.

The authority of a Park Commission under sec. 27.08, Stats., also is strikingly different than the independence given some other commissions by state law. See, e.g., the authority of a utility commission under sec. 66.0805, Stats., and *Schroeder v. City of Clintonville*, 90 Wis. 2d 457, 280 N.W. 2d 166 (1979), and the authority given to a police and fire commission under sec. 62.13, Stats.

The differences in the statutory power given these municipal corporations and commissions and the authority given to Park Commissions under sec. 27.08, Wis. Stats., is relevant in determining the meaning of the statutes. The Legislature, in enacting statutes, is presumed to do so with full knowledge and awareness of existing statutes. *State ex rel. McDonald v. Circuit Court for Douglas County, Branch II*, 100 Wis.2d 569, 578, 302 N.W.2d 462 (1981).

A cardinal rule in interpreting statutes is to consider the statutory language “not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes.” *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 663, 681 N.W. 2d 110. As will be pointed out below, absent a Park Commission, the Common Council has full authority to sell, lease or dispose of city property. The language of sec. 27.08(2), Wis. Stats. – requiring approval of the Common Council for the Park Commission to take certain acts, but nowhere suggesting the Common Council’s powers were otherwise limited -- simply cannot be read as removing that authority and placing it in the Park Commission.

The legislature first granted cities the authority to establish boards of park commissioners in 1889. This early legislation was very brief (just four sentences long) and it reserved to common councils the “full power to legislate with reference to public parks.” Subsequent legislation, enacted in 1897 and 1898, fleshed out the powers, terms and duties of park commissions and permitted park commissions, with the prior authorization of their common councils, to purchase and lease lands for public park purposes.

The sale or other transfer of park lands was not addressed in the statutes until 1915, when the legislature created Section 959-17m, relating to park districts in cities of the 2nd and 3rd classes. This law expanded the power of the board of park commissioners to sell or exchange property no longer required for its purposes “with the approval of the council of the city constituting the original park district.” This language, although amended slightly to delete the references to park districts, which were abolished, still exists today as Section 27.08(2)(c), Wis. Stats.

The power held by common councils to approve the purchase of, sale of, and condemnation for parklands, is consistent with other statutory provisions regarding city powers. Section 62.22(1), Wis. Stats., designates the common council as the authorized body to acquire real property for public purposes and to sell such property once acquired.

Section 62.22, Acquiring property; opening or changing streets:

- (1) Purposes. The **governing body** of any city may by gift, purchase or condemnation acquire property, real or personal, within or outside the city, for **parks**,

recreation...and for any other public purpose;...may construct, own, lease and maintain buildings on such property for public purposes; and may sell and convey such property. (Emphasis added)

Similarly, Section 62.23(17), Wis. Stats., grants to cities the right to acquire lands by purchase, gift, lease or condemnation in order to establish parks, parkways, playgrounds and for any other public purpose, and to "...convey or lease any such real estate thus acquired and not necessary for such improvements...." Sec. 62.23(17)(b), Wis. Stats.

Sections 62.22(1) and 62.23(17), Wis. Stats., relating to the sale of parklands, have been found by the Wisconsin Supreme Court to vest considerable discretionary power in cities' common councils to dispose of parklands. In *Newell v. Kenosha*, 7 Wis. 2d 516, 96 N.W.2d 845 (1959), the City of Kenosha sold approximately 70 acres of parkland to a private nonprofit corporation which intended to establish a sectarian college on the site. Kenosha's board of park commissioners had deemed the property surplus and recommended the sale. A taxpayer challenged the sale, alleging it was an abuse of discretion because the purchase price was inadequate and the sale would render the remainder of the park inaccessible by the public. The court disagreed, and in citing the authority given to common councils by the statutes noted above, upheld the council's conveyance of parkland. A court will void the sale of municipal property authorized by a vote of the common council only if a plaintiff taxpayer can establish fraud, illegality, or a clear abuse of discretion on the part of the governing body which authorized the sale. *Newell*, at 523.

In *Kranjec v. West Allis*, 267 Wis. 430, 66 N.W.2d 178 (1954), the Wisconsin Supreme Court addressed a taxpayer challenge to the leasing of parkland by the City of West Allis to a trucking company for truck parking. Neighborhood residents alleged the lease was entered into without proper procedures being followed and that it should be declared null and void. The parties to the lease were the City of West Allis and the trucking company; the Mayor and Clerk signed the lease on behalf of the city. The board of park commissioners was not a party to the lease, except that an additional signature page was added to the lease containing an execution by the board by its president and secretary. The Supreme Court stated that this additional signature page "adds nothing to the lease nor does it subtract anything from it." The Court found that, pursuant to Sections 62.22(1) and 62.23(17), Wis. Stats., the common council was the proper body to authorize the execution of the lease, and the mayor and city clerk, as a result of such authorization, would be the proper parties to sign the same." *Kranjec*, at 435. The approval of the lease by the board of park commissioners, therefore, was irrelevant.

There is only one Wisconsin case directly construing the powers of a park commission to dispose of and convey parklands under Section 27.08(2)(c). That case, *State ex rel. Historical Society et al. v. Carroll*, 261 Wis. 6, 51 N.W.2d 723 (1952) arose from a dispute over the conveyance of a portion of the Villa Louis historical site from the City of Prairie du Chien to the State Historical Society. In short, Mayor Carroll of Prairie du Chien refused to execute a deed conveying the property to the Historical Society and the Society sued to make him comply.

In 1935, the Dousman family donated certain properties to the City of Prairie du Chien, with one condition of the conveyance being that several Dousman family members are made life members of the Dousman municipal park board, which was to be created by the city. This board was created by the city with the Dousmans as members, and its jurisdiction was limited solely to the Villa Louis property. In 1949, the Dousman family, the City of Prairie du Chien and the State Historical Society entered into an agreement whereby certain tracts of the 1935 site were to be conveyed by the City to the Society, and the Society was thereafter obligated to maintain and operate such tracts as a historical site and museum.

The Mayor, however, refused to execute the deed, and alleged that the 1949 agreement was void because the provisions of Sec. 27.08(2)(c), Wis. Stats., were not complied with. The Mayor alleged that pursuant to Sec. 27.08(2)(c), the board of park commissioners and not the common council had the right to dispose of park property, including the right to govern, manage, control, improve and care for all public parks and also to acquire in the name of the city land for park purposes. The Supreme Court disagreed, and found that the municipal park board created in compliance with the donors' wishes was not a board of park commissioners created pursuant to Sec. 27.08, Wis. Stats., because it was charged with overseeing a museum and not a park, parkway, or pleasure drive over which a statutory park board has jurisdiction.

The Court did not find the Mayor's argument or the provisions of Sec. 27.08 persuasive, and found no Wisconsin Statute limiting by express language the city's power to transfer the land. "The city has properly retained such power unto itself, where it must be exercised by the proper city authority, to wit, the common council, under and according to the spirit and intention expressed in the source of its title." *Carroll*, at 18. In finding that the common council was the proper entity to exercise the city's power to dispose of its lands, the Court cited as its authority the home rule statute, at Sec. 62.11(5), Wis. Stats., and Prairie du Chien's amended charter.²

² While some might argue this language is dicta, because the Court had already found that the land at issue was not park land, it is clear that the Supreme Court took up and decided the question of the Council's authority. Under such circumstances, the Court's determination is binding. *State v. Kruse*, 101 Wis. 2d 387, 392, 305 N.W.2d 85 (1981).

Section 62.11(5), Wis. Stats., known as the home rule statute, provides:

- (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 power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its 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.

The home rule statute grants the council the sole power to act as regards city property and provides that such power may be limited only by express language. Neither the legislature nor the Council has delegated or limited the council's power to act on behalf of the City as regards the sale of parklands. Through the express wording of Section 27.08(2), Wis. Stats., the Council retains the power to approve all land transactions regarding city parklands, and to make such determinations even when the Park Commission may disagree with the Council.

With respect to the Park Commission "legitimizing" the special Committee established to look at issues in James Madison Park, the Committee has been authorized by the Common Council and the Park Commission can neither increase nor decrease the legitimacy of the Committee. The Committee has already been legitimately created pursuant to resolution adopted in accordance with all applicable rules of the Common Council, and any recommendation would merely be in keeping with the proposed Committee composition as approved by the Council.

Conclusion

The statutory power to dispose of parklands is held by the Common Council and not the City's Park Commission. The Park Commission may take such acts only with the approval of this Council. If the Park Commission recommends one of its members to serve on the James Madison Park Property Planning Committee, its recommendation will not "legitimize" the Committee.



Michael P. May

MPM:AZ:sob

SYNOPSIS: The Common Council, not the Park Commission, has the ultimate authority to dispose of City park properties.