

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

Date: September 3, 2013

FORMAL OPINION # 2013-002

TO: Maribeth Witzel-Behl, City Clerk
FROM: Michael P. May, City Attorney
RE: Time to Submit Council Proceedings to the Mayor

You requested my opinion on when the Clerk is to submit the proceedings of the Common Council to the Mayor for the Mayor's approval or disapproval.

SHORT ANSWER

In order to comply with the statutory mandate to publish ordinances within 15 days of passage, sec. 62.11(4)(a), Wis. Stats., the proceedings should be submitted to the Mayor by the close of business on the Friday following a Tuesday Council meeting.

BACKGROUND

A. Statutory Structure.

Sec. 62.09(8)(c), Wis. Stats, provides (emphasis added):

(c) The mayor shall have the veto power as to all acts of the council, except such as to which it is expressly or by necessary implication otherwise provided. *All such acts shall be submitted to the mayor by the clerk* and shall be in force upon approval evidenced by the mayor's signature, or upon failing to approve or disapprove *within 5 days*, which fact shall be certified thereon by the clerk. If the mayor disapproves the mayor's objections shall be filed with the clerk, who shall present them to the council at its next meeting. A two-thirds vote of all the members of the council shall the make the act effective notwithstanding the objections of the mayor.

The provisions of this statute are repeated in substance in sec. 3.03(2), MGO.

Sec. 62.11(4)(a), Wis. Stats., provides (emphasis added):

(a) Proceedings of the council shall be published in the newspaper designated under s. 985.06 as a class 1 notice, under ch. 985. The proceedings for the

purpose of publication shall include the substance of every official action taken by the governing body. Except as provided in this subsection every ordinance shall be published either in its entirety, as a class 1 notice, under ch. 985, or as a notice, as described under par.(c)2., *within 15 days of passage*, and shall take effect on the day after the publication or at a later date if expressly prescribed.

See also, secs. 2.35, 2.36 and 3.05, MGO, regarding the duties of the Clerk.

B. Factual Setting.

In Madison, Common Council meetings are normally the first and third Tuesdays of the month. Following the meeting, the Clerk prepares the proceedings, noting all acts of the Council. This is normally presented to the Mayor within a day or two of the meeting and normally approved by the Mayor within a day or two of submission.

On several occasions, the Mayor has asked the Clerk to delay presenting the proceedings to the Mayor. The request has sometimes covered the entire proceedings, and sometimes an identified item. In these instances, the Mayor's office has indicated that the Mayor was contemplating a veto of an item, and desired more time to consider the matter.

These instances prompted you to ask for a formal legal opinion on the timing of presentation of the proceedings. While we have responded informally in the past, this opinion will serve as a guide in the future.

LEGAL ANALYSIS

The issue arises because none of the statutes cited above explicitly state when the Clerk is to submit the Council proceedings to the Mayor. There are a number of possible outcomes depending on how the statutes are interpreted.

A. Application of the Five Day Rule in Sec. 62.09(8)(c), Wis. Stats.

Sec. 62.09(8)(c), Wis. Stats., requires that the Mayor either approve or disapprove of the "acts" of the Council "within 5 days," and if the Mayor fails to do so, the acts are approved. It also provides that "such acts shall be submitted to the mayor by the clerk" But the statute says nothing about when the Clerk is to submit the acts, or how to calculate the 5 days.

One interpretation is that the 5 days runs not from the date the clerk "submitted" the acts to the mayor, but from the date of the "acts." Under this interpretation, all problems are solved, as the mayor must approve or disapprove within 5 days of the Council meeting, regardless of what the clerk does.¹ Since the acts of the Council occur on Tuesday (or Wednesday for those late meetings), the 5 days for the Mayor to act would

¹ I understand this is the procedure in Kenosha.

run on either the Sunday or Monday following the Council meeting. This effectively means that any veto would have to be exercised by the Monday following the Council meeting.²

Although this interpretation is effective for setting the date for Mayoral action, I find it a strained reading of the law. In the statute, the prior referent to the five days is not the “acts,” but the acts being “submitted” to the Mayor. Second, this interpretation essentially makes superfluous the Clerk’s obligation to submit the Council’s acts – the Mayor has the same duties regardless of when or even whether the Clerk follows the obligation that the acts “shall” be submitted. Finally, in other governmental settings, the time for the executive to exercise the veto is measured from the date the legislation is submitted to the executive, not the date it passes the legislative body. See, e.g., U.S. CONST. art. I, sec. 7; WIS. CONST. art. V, sec. 10(3).

I conclude that sec. 62.09(8)(c), Wis Stats., requires the mayor to approve or disapprove the council proceedings within five days of submittal of the proceedings to the mayor by the clerk. The statute does not tell us, however, when the clerk is to submit the proceedings.

The general rule is that if a statute or contract does not contain a time in which an act is to be accomplished, the act must be done within a reasonable time. *State ex rel. Casper v. Board of Trustees*, 30 Wis. 2d 170, 174, 140 N.W. 2d 301 (1966) (“This rule rests on the principle that when a statute does not prescribe the time within which the right to review must be exercised, such right must be exercised within a reasonable time.”); *Town of Caledonia v. Racine County*, 241 Wis. 271, 276, 5 N.W. 2d 796 (1942) (“Considering the objects intended to be accomplished and purposes intended to be served by the statute, there being no time specified in the statute when the option to charge back should be exercised by the county, compels the conclusion that such option must be exercised within a reasonable time ...”); *Habermehl Electric, Inc., v. State of Wisconsin DOT*, 2003 WI App 39, ¶ 21, 260 Wis. 2d 466, 659 N.W. 2d 463 (Ct. App. 2003), *review denied*, 2003 WI 91. See also, Wis. Stat. sec. 402.309, imposing “reasonable” time limitations under UCC sales if no time is specified in the contract.

I conclude that the Clerk must submit the proceedings to the Mayor within a reasonable time after the acts of the Council. To determine a reasonable time, we may turn profitably to the related statute, sec. 62.11(4), Wis. Stats.

B. Application of the Publication Rule in Sec. 62.11(4), Wis. Stats.

Sec. 62.11(4), Wis. Stats., provides that proceedings of the Council “shall be published”, and that ordinances or a summary of them “shall be published ... within 15

² In counting the five days, weekends and holidays are not excluded because when a law means to count only “business” days, it specifically excludes weekends and holidays. See, e.g., sec. 801.15(1)(b), Wis. Stats., and *Baker v. Dept. of Health Services*, 2012 WI App 71, 342 Wis. 2d 174, 816 N.W. 2d 337 (2012). Nonetheless, under sec. 990.001(4), Wis. Stats., and sec. 1.01(10), MGO, since the fifth day falls on a Sunday or legal holiday, the time runs on the next secular day.

days of passage” and the ordinances “shall take effect” the day after publication. The City Clerk is directed to accomplish the publication, sec. 3.05, MGO. Thus, this statute imposes an obligation on the Clerk to publish ordinances within 15 days of passage.³

Thus, for ordinances, we can work back from the 15 day publication rule to determine when the ordinances, which are part of the proceedings, are to be presented to the Mayor. Fifteen days after a Tuesday Council meeting would be the Wednesday in the second week after the meeting. The official city newspaper requires that items for publication as a legal notice be at the newspaper three days before publication, which would be Sunday. Since the Clerk’s office is closed on Saturday and Sunday, the proceedings have to be to the newspaper by the Friday the week following the Council meeting. In order for the Mayor to have the full five days to consider whether to approve or disapprove a matter, that means the proceedings must be submitted to the Mayor no later than Sunday. Again, since the Clerk’s office is closed on Saturdays and Sundays, this effectively means that the proceedings should be presented to the Mayor by the Friday after the Tuesday Council meeting.

Under the strict language of sec. 62.11(4)(a), Wis. Stats., the above analysis only applies to ordinances, because the statute expressly imposes the 15 day publication rule as to ordinances, and only by implication to other proceedings, such as resolutions or reports. But in interpreting statutes, a cardinal rule is that the court may examine other, related statutes, to be certain the laws operate in a coherent scheme. *Noffke v. Bakke*, 2009 WI 10, ¶ 11, 315 Wis. 2d 350, 760 N.W. 2d 156, citing *State ex re. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W. 2d 110.

Thus, one reading of sec. 62.11(4)(a), Wis. Stats., is that it by implication subjects the proceedings to the same 15-day rule as for ordinances. But even if we reject that implied reading, then we are back to determining what is a “reasonable” time for the Clerk to publish such proceedings. The leading candidate must be the time the Legislature already established for ordinances, that is, 15 days. For example, in the *Casper* decision, cited above, the Wisconsin Supreme Court had to determine the time to commence a court review of the action of an administrative agency when the statute did not specify the time. The Court looked to a similar statute setting the time to appeal from the lower court to the Supreme Court and found that time would be a “reasonable” time.

Applying the 15-day rule to both ordinances and the balance of the proceedings furthers another cardinal rule of statutory construction: that we interpret the laws to avoid absurd results. *Noffke, supra*. It would be absurd to think that the Legislature

³ For an interesting discussion on the usual rule that “shall” is mandatory, when a court may find the word “shall” to be directory rather than mandatory, and determining what remedy to apply if a mandatory obligation is not followed, see *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 15-21, 262 Wis. 2d 720, 665 N.W. 2d 155, cert. denied 540 U.S. 997 (2003). I read the word “shall” in the statute to be mandatory, but, as in the *Marberry* case, the remedy for a failure to meet the deadline is likely a writ of mandamus rather than a nullification of the late published law. I read the word “passage” in its normal sense of approval by the legislative body; see, e.g., WIS. CONST. art. V, sec. 10(1).

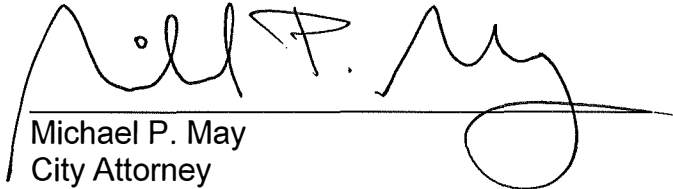
intended ordinances to be published within 15 days, but other actions of the Common Council would be subject to some unknown, undeterminable time for publication.

I conclude that the time for publication of the proceedings should be the same as the time for publication of the ordinances, that is, 15 days after the passage by the Council. Because of that, the time to present all proceedings to the Mayor is the Friday after a Tuesday Council meeting. For other Council meetings, the proceedings should be presented with 72 hours.

The Common Council may wish to consider whether to codify this rule in an ordinance, such as by amendment of sec. 2.36, MGO, to establish a deadline for the Clerk to submit proceedings to the Mayor.

CONCLUSION

Although secs. 62.09(8)(c) and 62.11(4)(a), Wis. Stats., do not explicitly establish the date on which the City Clerk should present the proceedings of the Common Council to the Mayor for his approval or disapproval, the law requires a reasonable time limit. Given the related requirement for publication of ordinances, a reasonable time limit for the Clerk to present the proceedings to the Mayor is the Friday following a Tuesday Council meeting, or within 72 hours of other meetings. The Council may wish to consider codification of this rule, or some other rule, in sec. 2.36, MGO.



Michael P. May
City Attorney

SYNOPSIS: The City Clerk should submit the proceedings of the Council to the Mayor for approval or disapproval within 72 hours of the Council action.

CC: Mayor Soglin
All Alders