

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

Date: October 2, 2017

FORMAL OPINION 2017-003

TO: Mayor Paul Soglin
Aldersperson Paul Skidmore

FROM: Michael P. May
City Attorney

RE: Application of Administrative Procedure Memoranda to Alderspersons

You requested my opinion on whether the City's Administrative Procedure Memoranda (APM) are applicable to elected Alderspersons.

The APM are a series of policies, procedures and directives issued by the Mayor of Madison. They cover a wide range of topics such as Finance and Accounting, Administration, Personnel and Buildings and Grounds. The collection of APM can be found here:

<http://www.cityofmadison.com/mayor/apm/>

The APM, on their face, apply almost exclusively to city employees, not members of the Common Council. As such, they represent directives from the City's chief executive officer, the Mayor, to city employees who are part of the City's administration or executive branch. One APM (3-5, relating to prohibited harassment or discrimination) purports to cover the Alders, but a close examination shows that it directs city staff as to how they are to respond when a claim of discrimination or harassment is made against an Alder. It contains no authority to discipline the elected official.

In the last year or so, a number of benefits normally applicable only to city employees were reexamined and made available to elected Alderspersons. These include (if eligible) participation in WRS, health insurance and flex savings accounts. Other benefits such as deferred compensation and life insurance are being examined. In addition, the salary paid to an Aldersperson has been increased several times and is now indexed to increase on a regular basis.

These changes raised the question whether the Alders have begun to so resemble city employees that the APM should be applied to them.

Questions Presented:

1. As a general rule, may APM issued by the Mayor under his or her executive authority be applied to the other elected members of the Common Council?
2. Have the recent changes to the benefits and salary available to Alders made them so like city employees that the APM now may be applied to them?
3. If the answers to 1 and 2 are no, how might the APM be applied to Alders?

Short Answers:

1. No, the division of power between the Mayor and Alderpersons as set out in state law generally does not allow Mayoral orders to apply to Alderpersons.
2. While these changes might support a policy argument for application of the APM to Alderpersons, the changes do not so fundamentally change the nature of Alderpersons to make them automatically subject to the APM.
3. The Alderpersons could adopt an ordinance or resolution to apply selected APM to themselves, as was proposed several years ago.

Discussion:

Wisconsin Statutes and case law define the relative powers and authority of the Mayor and the Alders. The first section of this memorandum will examine those legal lines, and the remaining sections will apply those standards to the questions presented.

A. The Doctrine of Separation of Powers.

This division of authority between the Mayor and Alderpersons under state law and city ordinances is analogous to the doctrine of separation of powers found in the U.S. and State Constitutions.

This doctrine was one of the founding precepts of our national government. James Madison explores the concept at some length, particularly in *The Federalist Papers* Nos. 47-51, where he notes that the proposed Constitution is designed so that no department “ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.” *Federalist* No. 48. Madison and the other writers of the Constitution feared the tyranny of the legislature as much as the tyranny of the executive. Thus, the government was designed, as Madison famously put it in *Federalist* No. 51, so that “Ambition must be made to counteract ambition.”

The U.S Supreme Court has applied the doctrine in a number of settings, perhaps the most famous being *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952),

where President Truman ordered a seizure of steel mills based upon the power of the executive. The Supreme Court struck down the order for a number of reasons, one of which was that the President's executive order had invaded legislative powers that rested only with Congress.¹

In at least two Wisconsin cases, the courts found that executive orders violated the separation of powers by invading legislative prerogatives. In *Wisconsin v. Department of Industry, Labor & Human Relations*, 77 Wis. 2d 126, 252 N.W. 2d 353 (1977), the court found that actions of Governor Lucey, acting through the Department of Administration, had invaded legislative powers in establishing a commission on affirmative action. And, in *Schuette v. Van de Hey*, 205 Wis. 2d 475, 556 N.W. 2d 127 (Ct. App. 1996), the Outagamie County Executive was found to have invaded legislative authority in cancelling leases without approval of the County Board.

In the municipal context, the analogy to the doctrine of separation of powers is not perfect. First, the doctrine of separation of powers arises directly out of the structure of the U.S. and State Constitutions. Municipal authority and structure arise almost exclusively out of statutes approved at the state level, and are thus subject to legislative change.² Thus, the question at the local level is not one of constitutional separation of powers, but of the relative authorities granted by the state.

Second, separation of municipal government into executive and legislative functions is a relatively recent emergence. Many municipal governments were, for decades, modeled on the Town Hall meeting, in which all powers were lodged in a single legislative branch. Only gradually have forms emerged with a stronger Mayor or City Manager with executive powers, thus raising questions of the relative authority of the executive and legislative branches. See, Morris, "Separation of Powers in Municipal Government: Division of Executive and Legislative Authority", 1978 *B.Y.U. Law Review* 961 (1978).³

The result of these trends is that, unlike the separation of powers at the federal or state level, municipal authority must be found in the relevant statutes or ordinances. There appears to be, in many states, a default position that power rests with the legislative body unless clearly given to the executive. As one of the leading treatises on municipal law puts it:

¹ A good summary of the doctrine of separation of powers may be found in the Congressional Research Service report to Congress, *The Separation of Powers Doctrine: An Overview of its Rationale and Application*, by T. J. Halstead,

<http://congressionalresearch.com/RL30249/document.php?study=THE+SEPARATION+OF+POWERS+DOCTRINE+AN+OVERVIEW+OF+ITS+RATIONALE+AND+APPLICATION> (Last accessed August 30, 2017).

² The exception is that, in many states, municipalities have powers granted directly from the state constitution through a home rule provision. While Wisconsin has such authority in its Constitution, see, Art. XI, sec. 3(1), the Wisconsin Supreme Court has all but read the municipal home rule provision out of the Wisconsin Constitution. See, May, "Rejected: Municipal Home Rule Powers in Milwaukee Cases," *Wisconsin Lawyer* (November 2016).

³ <http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=1177&context=lawreview> (Last accessed August 30, 2017).

The powers and duties of the mayor or chief executive rest almost entirely upon the proper construction of the charter and the ordinances or bylaws and municipal regulations passing pursuant of such authority.

3 *McQuillin Mun. Corp.* §12:73 (3d Ed).

B. Powers of the Mayor.

Wis. Stat. sec. 62.09 describes the “Officers” of the City, and sec. 62.09(8) describes most of the powers of the Mayor:

(8) MAYOR.

(a) *The mayor shall be the chief executive officer. The mayor shall take care that city ordinances and state laws are observed and enforced and that all city officers and employees discharge their duties.*

(b) *The mayor shall from time to time give the council such information and recommend such measures as the mayor may deem advantageous to the city. When present the mayor shall preside at the meetings of the council.*

(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 then make the act effective notwithstanding the objections of the mayor.*

(d) *Except in cities that have adopted s. 62.13 (6), the mayor shall be the head of the fire and police departments, and where there is no board of police and fire commissioners shall appoint all police officers, and the mayor may, in any city, appoint security personnel to serve without pay, and in case of riot or other emergency, appoint as many special police officers as may be necessary.*

(e) *The council at its first meeting subsequent to the regular election and qualification of new members, shall after organization, choose from its members a president, who, in the absence of the mayor, shall preside at meetings of the council, and during the absence or inability of the mayor shall have the power and duties of the mayor, except that the president shall not have power to approve an act of the council which the mayor has disapproved by filing objections with the clerk. The president shall when so officiating be styled “Acting Mayor”.*

In an old Wisconsin Supreme Court case, the first clause of this statute was interpreted to grant broad executive powers on the Mayor. The case arose out of the Milwaukee

charter, but the language was essentially the same as is now reflected in Wis. Stat. sec. 62.09(8)(a).

In *State ex rel. Davern v. Rose*, 140 Wis. 360, 122 N.W. 751 (1909), a resident of Milwaukee challenged the decision of the Mayor not to suspend the Milwaukee fire chief. Although the police and fire commission law had been adopted for Milwaukee, the law retained in the Mayor the option of suspending the officer while the complaint was processed at the police and fire commission. In upholding the Mayor's discretion to suspend or not, the Court said this about the nature of the Mayor's power:

In organizing the government of the city of Milwaukee the Legislature followed the general lines of the governments of the United States and of the several states in creating legislative and executive departments and officers, mainly independent of each other. The charter provided for a mayor having, within the limited territory, the substantial characteristics of a chief executive in analogy to the President of the United States and the Governors of the several states. The charter declared that the mayor should be "the chief executive officer and the head of the fire department and of police in said city," and that he should "take care that the laws of the state and the ordinances of the city are duly observed and enforced." These expressions signify the conferring of all the powers of a chief executive, except as elsewhere limited, with the necessary right of discretion and judgment.

140 Wis. at 366.

This ruling is important in two respects. The Court finds that the Wisconsin Legislature applied the same separation of powers concepts to municipal government as were applied in the U.S and Wisconsin Constitution. Second, it makes it clear that a Mayor has very broad executive powers, essentially akin to those exercised by the President of the United States or the Governor of Wisconsin.

Wis. Stat. sec. 62.09(8)(a) also requires that the Mayor "shall take care that . . . all city officers and employees discharge their duties." This creates a bit of confusion when the list of city officers in sec. 62.09(1)(a) is examined:

ENUMERATION AND CHANGE.

(a) The officers shall be a mayor, treasurer, clerk, comptroller, attorney, engineer, . . . 2 alderpersons from each aldermanic district, and such other officers or boards as are created by law or by the council. If one alderperson from each aldermanic district is provided under s. 66.0211 (1), the council may, by ordinance adopted by a two-thirds vote of all its members and approved by the electors at a general or special election, provide that there shall be 2 alderpersons from each aldermanic district.

This statute says that alderpersons are city officers, and they are considered as such. Sec. 62.09(8)(a) says the Mayor is to "take care . . . that all city officers and employees discharge their duties." Together these might suggest some superintending authority of

the Mayor over the other members of the Council because they are “city officers”. But it is also clear the Mayor has no power to discipline or direct the actions of the Alderpersons. So in the case of the Alders, the Mayor’s power is one of persuasion only, asking them to discharge their duties. Any authority of the Mayor beyond this is either of a minor or ministerial nature (such as the Mayor’s power to call a meeting of the Council, discussed below) or should be read as extending the Mayor’s authority to those officers other than elected Alderpersons.

There are other inconsistencies that must be accounted for in the statutes. Under Wis. Stat. sec. 62.11(1):

62.11 (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 has voted favorably or unfavorably on any measure.*

Very few people realize that the Mayor is a member of the Common Council.⁴ Yet other nearby statutes, such as sec. 62.09(7)(a) (“The corporate authority of the city shall be vested in the mayor and common council.”) and much of 62.09(8) cited above, refer to the “common council” to mean the elected Alderpersons. In interpreting statutes regarding the powers of the Mayor and elected Alderpersons, we must carefully examine the context to see if the term “Common Council” or “Council” is meant to include the elected Alders only or the Mayor and the Alders.⁵

Two other cases on the powers of the Mayor are worth noting. In *State ex rel. Pieritz v. Hartwig*, 201 Wis. 450, 230 N.W. 42 (1930), the mayor of Watertown attempted to remove the members of the police and fire commission. While admitting that the executive power would include the power to remove lower officials if the mayor had sole power of appointment, the court noted that the members of the commission required the confirmation of the elected Alders. Thus, the mayor’s removal power did not reach the commission members.

Removal of city officials is governed by Wis. Stat. sec. 17.12, which codifies the rule of the *Pieritz* case:

17.12. Removal and suspension of city officers

(1) General and special charter. Officers of cities, except public officials, as

⁴ That the Mayor presides at the meetings of the Council per state law and has the right to vote in the place of a tie shows that the separation of powers doctrine includes some gray edges where there is shared power.

⁵ Because of this dual use in the statutes, I and others often use “Council” to refer only to the elected Alderpersons. I have tried, in this memo, to always use the terms Mayor and Alderpersons or Alders to make the separation of powers distinctions accurate.

defined in s. 62.51(1)(b) [a reference to first class cities], operating under the general law or under special charter including school officers, may be removed as follows:

(a) Elective. Elective officers by recall as provided in s. 9.10, or by the common council, for cause.

(c) Appointive. Appointive officers, by whomsoever appointed, by the common council, for cause, except officers appointed by the council who may be removed by that body, at pleasure. Officers appointed by any other officer or body without confirmation or concurrence by the council, by the officer or body that appointed them, at pleasure. The council may conduct a hearing thereon by a committee which committee shall proceed in such manner as may be determined by it and make full report to the council, which shall determine the question upon such appeal.

(d) Votes required. Removals by the common council may be made only by an affirmative vote of three-fourths of all the members thereof, and by any other body consisting of 3 or more members, by an affirmative vote of two-thirds of all the members thereof.

In *State ex rel. Roelvink v. Ziedler*, 268 Wis. 34, 66 N.W. 2d 652 (1954), the Mayor of Milwaukee refused to sign a deed turning over certain school property to the original owners. The School Board had not agreed to relinquish the property. When the Council directed the Mayor by resolution to sign the deed, the Mayor refused, arguing the resolution was illegal. The Court stated:

*. . . the Common Council of the city of Milwaukee is not empowered by law to validly direct the conveyance of real estate in control of the Board of School Directors without that body's consent. Were the Mayor to sign the deed, he too would participate in the illegal action of the Common Council and violate the law, the observance of which he is specifically charged to 'take care of.' The Mayor, as chief executive of the city, occupies a position of responsibility comparable to that of the governor of the state in a matter of this nature. In *State ex rel. Martin v. Zimmerman*, supra, it was said that 'if it turns out that an invalid law is published the responsibility therefor rests with the Governor, not with the Secretary of State.' In that case also it was inferred that the governor may well have an interest in his official capacity to raise the question of the validity of the enacted law. Here, the Mayor being similarly situated, had like authority in his official capacity to question the validity of the resolution.*

268 Wis. at 42.

Here again, our Supreme Court compares the power and authority of the Mayor to that of the Governor.

C. Powers of the Alderpersons

Wis. Stats. secs. 62.09(7) and 62.11 are the most important sources of authority for the Council, sometimes meaning the Alders only. The relevant sections provide:

(7) General provisions. (a) The corporate authority of the city shall be vested in the mayor and common council.

(b) Officers shall have generally the powers and duties prescribed for like officers of towns and villages, except as otherwise provided, and such powers and duties as are prescribed by law and except as to the mayor shall perform such duties as shall be required of them by the council. Officers whose powers and duties are not enumerated in this subchapter shall have such powers and duties as are prescribed by law for like officers or as are directed by the council.

* * *

62.11 (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 has voted favorably or unfavorably on any measure.

* * *

(3) PROCEDURE.

(a) The council shall be the judge of the election and qualification of its members, may compel their attendance, and may fine or expel for neglect of duty.

(b) Two-thirds of the members shall be a quorum, except that in cities having not more than 5 alderpersons a majority shall be a quorum. A less number may compel the attendance of absent members and adjourn. A majority of all the members shall be necessary to a confirmation. In case of a tie the mayor shall have a casting vote as in other cases.

(c) Meetings shall be open to the public; and the council may punish by fine members or other persons present for disorderly behavior.

(d) The ayes and noes may be required by any member. On confirmation and on the adoption of any measure assessing or levying taxes, appropriating or disbursing money, or creating any liability or charge against the city or any fund thereof, the vote shall be by ayes and noes. All aye and nay votes shall be recorded in the journal.

(e) The council shall in all other respects determine the rules of its procedure.

(f) The style of all ordinances shall be: "The common council of the city of do ordain as follows".

* * *

(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.

In sub (3)(a), above, the Council – which here I interpret to be the elected Alderpersons -- like the federal and state legislatures, is to be the judge of the qualification of its members, and to establish the rules of its procedures.⁶ The legislative body, not the mayor, also is given the power to fine or expel the Alderpersons. This is an important indication of the Mayor’s lack of superintending authority over the legislative body.

The powers conferred by Wis. Stat. sec. 62.11(5) are far reaching. In the seminal decision of *Hack v. Mineral Point*, 203 Wis. 215, 233 N.W. 82 (1930), the Supreme Court had one of its first opportunities to interpret this new law. It was enacted when Wisconsin moved from special municipal charter to a general charter law. The Supreme Court explained the seismic change this law created:

That section 62.11 confers power far beyond that conferred in the so-called general welfare clause of the general charter as it stood prior to 1921 is plain, and a city operating under the general charter finding no limitations in express language has under the provisions of this chapter all the powers that the Legislature could by any possibility confer upon it. The provisions of the chapter as it stood prior to 1921 clearly limited the power to enforce the ordinances to the imposition of penalties. It now has the power to enforce it by fine, imprisonment, confiscation, and other necessary or convenient means.

203 Wis. at 219-20.

Under this new law, rather than having to search for specific grants of authority to a municipality, we assume the city has “all the powers that the Legislature could by any possibility confer upon it.” One must search for a specific limitation on that power.

In the time since 1930, the Wisconsin Supreme Court has greatly limited the power of cities under this section, but it is still one of the most important grants of power to the Common Council.⁷

⁶ “Each house shall be the judge of the elections, returns and qualifications of its own members . . . Each house may determine the rules of its proceedings.” U.S. Constitution, Art. I, sec. 5. See also, Wisconsin Constitution, Art. IV, secs. 7 and 8.

⁷ A recent example of the Court’s reluctance to recognize the power of this statute was in the guns on buses case, *Wisconsin Carry v. Madison*, 2017 WI 19, where the court approached the case from the proposition that the City had to show authority to regulate weapons on its vehicles, rather than requiring a showing that that power had been

D. Application of the relative powers to the APMs.

(1) General.

If one examines the division of authority and powers above, it becomes relatively obvious that the Mayor may not direct, by executive order, the conduct of the legislative body in any significant respect:

- The Mayor is not the supervisor of the elected Alderpersons.
- The Alderpersons determine the qualifications of its members.
- The Alderpersons may be disciplined or removed only by electoral recall or by action of the Common Council, not the Mayor.
- While the Mayor has the very significant powers of the chief executive, those powers do not extend to directing the conduct of the legislative body.⁸

From this authority, it is clear that the Mayor may not, as a general matter, subject the legislative body to all of the directives of the APMs. While they may be required to follow some procedures on ministerial matters, such as what they must file to obtain their salaries, the Alderpersons are generally not subject to the myriad APM rules that other city officers and employees must follow. Of course, where the mayor is given explicit statutory authority to make an order impacting the Alders (e.g., call a special meeting of the common council, Wis. Stat. sec. 62.11(2)), he has that power as the legislature has adjusted the separation of powers.⁹

There is one area where Mayoral APM may effectively cover Alders. Since the Mayor generally is the official in charge of city properties – generally, that is, in the absence of action by the full Council -- it may be that some APM would apply to alders when they use the property. For example, APM 2-13 governs the use of City-owned cars for city purposes (“CARS Policy and Rules”). The APM as written only applies to “employees” using City cars. But if an Alderperson wanted to make use of a City car, presumably they would have to follow the procedures and methods for reserving and return of the car, and could not simply escape with one for their use in

taken away.

⁸ In my research, I was unable to find any instance where the President, a governor, or a mayor attempted to direct the conduct of the legislative body by executive order, except where granted that power or in some emergencies.

⁹ I do not discuss in this memo the obvious distinctions that the Alderpersons could create an administrative body by ordinance, and subject themselves to rules made by that body, see, e.g., the City’s Ethics Board, sec. 3.35, MGO, or that Alderpersons are subject to some level of control by the third branch of government, the judiciary.

complete disregard of the system established for use of City cars, under the guise of some legislative prerogative.¹⁰ The same analysis might apply to use of City computers, see APM 3-9.

(2) Other Benefits.

The next question is whether, by taking advantage of their eligibility for certain benefits, the Alders have effectively declared that they are the same as City employees. I can find no support for this proposition. As elected legislative representatives, the Alderspersons are definitely **not** employees of the City in the traditional legal use of the term employee. Under state and city laws and regulations, elected representatives are entitled to certain benefits. In some instances, such as chapter 40 of the Wisconsin Statutes governing the Employee Trust Fund, the laws take the easy approach of saying certain elected officials qualify as “employees” for purposes of all the rest of the description of benefits; they have their wages treated like an employee’s wages for tax purposes, also. But such definitional shortcuts do not change the nature of the elected officials. Were one to suggest to members of Congress that the many federal benefits they obtain means they have become employees of the executive department, one would not be taken seriously.

The increase in those benefits and salaries may have other effects on the nature and operation of the Common Council and might suggest other policy outcomes, but that is beyond this inquiry.

(3) Future Application of APM to Alderspersons.

A careful review of the APM shows that many could never have any application to the elected Alderspersons. A few examples:

- APM 1-1, Completion and Execution of City Contracts
- APM 2-2, Travel Expenses of Job Applicants Invited to Madison for Interviews
- APM 2-28, Lunch and Break Periods
- APM 3-8, Blood Donations by City Employees

There are a number of other APM that might have explicit application to Alderspersons. About two years ago, the Mayor and Alder Skidmore proposed a resolution applying

¹⁰ I am informed that Alders rarely use City cars, but when they do, they follow the procedures in APM 2-13. Similarly, reimbursement of Alder travel expenses is subject to APM 1-5 as a practical matter, since the Finance Department must approve those expenses. Alders are likely limited to this same reimbursement in any event due to the restrictions in the Ethics Code, sec. 3.35, MGO.

some APM to the Alderpersons. These included APM on Workplace Violence, Rules of Conduct, Nepotism, Harassment and Discrimination, and Appropriate Use of City Computers. See Legistar File 37207:

[https://madison.legistar.com/ViewReport.ashx?M=R&N=Master&GID=205&ID=2166400&GUID=4723B741-6F12-4FEE-AF25-4A5F005333A4&Extra=WithText&Title=Legislation+Details+\(With+Text\)](https://madison.legistar.com/ViewReport.ashx?M=R&N=Master&GID=205&ID=2166400&GUID=4723B741-6F12-4FEE-AF25-4A5F005333A4&Extra=WithText&Title=Legislation+Details+(With+Text))

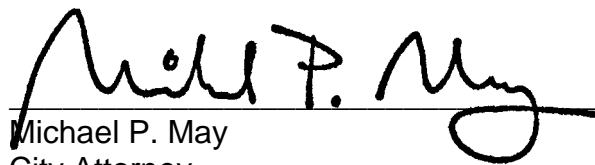
The resolution was placed on file without prejudice. My recollection is that the Council instead directed staff to prepare a brochure on the obligations of Alderpersons. Those directives, of course, have no legal force.

Conclusion and Recommendation.

As orders of the executive without specific statutory authority, the APM generally have no application to Alderpersons. The specific powers and authority of the mayor and Alderpersons demonstrate a separation of powers which make such application legally improper. APM related to the use of City property would appear to be the common exception to this rule.

This result is not changed by the fact that Alderpersons are taking advantage of their legal rights, if any, to certain benefits, or salaries, as elected officials. This does not transform them into employees.

A number of the APM could properly be applied to the Alderpersons if a resolution doing so were adopted. The City Attorney believes there would be a positive effect if the Alderpersons would take actions to formally regulate their conduct in certain areas, and would recommend that such a proposal be taken up by an appropriate body: the Common Council Executive Committee, or a subcommittee thereof, or an ad hoc committee established by the Council.



Michael P. May
City Attorney

CC: All Alders
Department and Division Heads

SYNOPSIS: The doctrine of separation of powers and the general inapplicability to elected Alderpersons of Mayoral executive orders, Administrative Procedure Memoranda.