

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

Date: April 6, 2011

OPINION #2011-001

TO: Brad Murphy, Planning Director
Brian Grady, Planner 1, Planning & Development Unit

FROM: Michael P. May, City Attorney

RE: Redistricting of Aldermanic Districts

You asked for my legal opinion on two questions relating to the ongoing redistricting of aldermanic districts in the City of Madison. Redrawing the aldermanic districts is required after the decennial census in 2010.

Questions Presented:

1. Once the new districts are drawn by the City later this year, when do they go into effect and when do they apply to new elections?
2. If the redistricting results in an alder no longer residing in the numbered district for which the alder was elected, is the position considered vacant, or is the alder allowed to serve out the term for that redrawn district, even though the alder does not reside in the district?

Brief Answers:

1. Under Wis. Stats. §5.15(1)(c) and §62.08(1) and (3), the new aldermanic districts are effective immediately upon publication of the ordinance changing them, and will apply to any elections held after January 1, 2012.
2. In my opinion, state law on this issue is hopelessly vague, and would support either that the aldermanic position is vacant, or that the alder may serve out the balance of his or her term for the same numbered district. Based upon the consistent application by the City and the State of Wisconsin in the past, the elected official has been allowed to serve out the term. I recommend we continue that practice, and further recommend that it be codified in the City ordinances for future reference and use.

DISCUSSION:

A. Effective Date of Aldermanic Districts.

Wis. Stats. §5.15(1)(c) states that the new wards and districts govern for “local elections beginning on January 1 of the 2nd year commencing after the year of the census . . .” Under this statute, the new districts would govern all elections held after January 1, 2012, whether it be a regular or special election.

Wis. Stats. §62.08(1) and (3) read as follows:

62.08 Alteration of aldermanic districts. (1) Within 60 days after the wards have been readjusted under s. 5.15 (1) and (2) the common council of every city, including any city of the first class, shall redistrict the boundaries of its aldermanic districts, by an ordinance introduced at a regular meeting of the council, published as a class 2 notice, under ch. 985, and thereafter adopted by a majority vote of all the members of the council, so that all aldermanic districts are as compact in area as possible and contain, as nearly as practicable by combining contiguous whole wards, an equal number of inhabitants according to the most recent decennial federal census of population.

...

(3) Whenever the boundaries of aldermanic districts are altered, or new aldermanic districts created, every aldermanic district or ward officer residing within the territory of a new or altered aldermanic district shall hold the same respective office therein for the remainder of the officer’s term; and all other vacancies shall be filled as provided by law for the filling of such vacancies.

These statutes make it clear that the new districts are effective upon adoption by the Common Council. The statutes also make it clear that any alder who remains within the numbered district for which they are elected continues to serve out his or her term for the newly drawn district.

The statute is not so clear on what happens to an alder that is drawn out of the district from which they were elected.

B. Status of an Alder who No Longer Resides in the Numbered District for which He or She Was Elected.

Wis. Stats. § 62.08(3) suggests that an alder drawn out of the district from which they were elected would create a vacancy. This comes from a close reading of the statute, and the application of standard rules of statutory construction.

The first clause of the statute clearly states that an alder who is residing within the territory of the new district continues to hold the office. But the statute specifically refers to the status of alders remaining within the new district. It says nothing about alders who are drawn out of the district which they formerly served. If the Legislature

meant to say that all alders are to serve out their terms, the statute could have said so. But it does not. Indeed, by stating that alders within the new district serve out their terms and saying nothing about other alders, the implication is that the exclusion of alders drawn out of their district means they do not serve out their terms. This is the standard statutory rule of *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of the other. See, e.g., *FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶27, 301 Wis. 2d 321, 773 N.W. 2d 287 (2007). Thus one reading is that since the Legislature said that alders remaining in the district serve their terms, then alders who do not fit that definition do not.

The statute then goes on to say that “all other vacancies shall be filled as provided by law for the filling of such vacancies.” This language further suggests that an alder drawn out of the numbered district from which they were elected would create a vacancy. If that were not the case, the second clause of this statute would be superfluous. Statutes are to be interpreted to avoid surplusage. *Miller v. Hanover Ins. Co.*, 2010 WI 75 ¶44, 326 Wis. 2d 640, 785 N.W. 2d 493 (2010).

However, such a reading of Wis. Stats. §62.08(3) appears to conflict with the general statute governing vacancies. Wis. Stats. §17.03 provides in part:

§17.03: Vacancies, how caused: Except as otherwise provided, a public office is vacant when:

...

(4) The incumbent ceases to be a resident of:

...

(c) If the office is local and elective, the county, city, village, town, district or area from which elected, except as provided in ss. 60.30(6), 119.08(1)(c) and 120.05(1)(d); or

None of the exceptions listed at the end of (4)(c) apply in this case.

Harmonizing Wis. Stats. §17.03(4)(c) and §62.08(3) is not easy. One reading of §17.03(4)(c) is that the alder continues to be a resident from the “district or area from which elected,” and therefore would continue to serve out the remainder of the term for the district, as redrawn, even if the alder does not reside there. Under this reading, the final clause of Wis. Stats. §62.08(3) merely refers back to §17.03, which by its terms does not create a vacancy.

In addition, there is another portion of (4)(c) that would support a reading that an alder no longer residing within the numbered district as redrawn still serves out his or her term. Wis. Stats. §17.03(4)(c), at the very end, lists the exceptions in it for vacancy. But the statute does not list Wis. Stats. §62.08(3). Since it is not listed, it does not create a vacancy.

However, there is an equally plausible reading of §17.03(4)(c): That the “district or area from which elected” no longer exists. The old district has been eliminated and a new district has been drawn, and there is no way that the alder is still a resident of the non-existent political district or area from which elected. This reading would also explain the second clause in §62.08(3), Stats.

Moreover, this reading of §17.03 may be buttressed by the initial clause of the statute, which seems to allow other methods of vacancy when it says “except as otherwise provided”, a vacancy is created under certain circumstances. The argument would be that §62.08(3) is exactly a statute that has “otherwise provided.”

My research revealed only two related precedents, both very old. In *State ex rel. Gill v. The Board of Supervisors of Milwaukee County*, 21 Wis. 443 (1867), the Wisconsin Supreme Court held that a Milwaukee County Supervisor continued to hold his position even though he was no longer a resident of the district from which elected. The court relied upon the predecessor of §17.03 of the statutes. The opinion makes no reference to a statute like §62.08(3).

In an Opinion from the Attorney General from 1920, the Attorney General looked at the predecessor of §62.08(3) and stated as follows:

Where it chances that an alderman resides in a newly created ward, he fills the office of alderman. That office is not vacant, but in case no supervisor is found resident in the newly created ward, the office of supervisor is unoccupied. There is no supervisor for the ward, and the office of supervisor must be one of the vacancies intended to be provided for by the clause just quoted. I am of the opinion that all ward offices and newly created wards not filled by operation of statute from resident office holders are to be regarded as vacant and to be filled as other vacancies are filled.

9 Op. Atty. Gen. 34, 36 (1920)

Yet, in the very same opinion, the Attorney General went on to say that if two supervisors ended up in the same ward, they could both continue to serve at the same time. That conclusion seems inconsistent with the first conclusion that one of the offices would be vacant. If that were the case, it would have the practical effect of increasing the size of the Madison Common Council. All alders could continue to serve out there new terms, and if there were no alder in a newly drawn district, that vacancy could be filled by the Common Council pursuant to Madison General Ordinances §2.03, until such time as a special election could be held. This could result in an increase in the size of Council, a result not possible.

In my opinion, the statutes and interpretations are ambiguous and in conflict. Either reading seems plausible. In such a situation, the lawyer normally must choose the interpretation more likely to be accepted by a court. Luckily, in this instance, we have other guidance that may be applied.

C. The Practical Application of the Statutes:

Although I find the statutes hopelessly in conflict, there has been a practical application of the statutes both by the State of Wisconsin and by the City of Madison.

I confirmed with attorneys from the Legislative Reference Bureau that, when there is a redrawn legislative district and a State Senator no longer resides in the district, the Senator continues to serve out the term as if he or she represented the same numbered district. Similarly, in the last redistricting in Madison, some alders were no longer in their revised district, but were allowed to continue to serve until the next election. In fact, the Madison City Clerk received a letter from the Legal Counsel to the State Elections Board in 2001, indicating that this was the practice (a copy of that letter is attached to this opinion). The practical application and administrative interpretation of a statute is an accepted guide in interpreting the statute. *Town of Vernon v. Waukesha County*, 102 Wis. 2d 686, 694, 307 N.W. 2d 227 (1981).

Given this practice, and given that it is one plausible reading of the statutes, I recommend that the City continue this practice following this redistricting. I also recommend that a member of the Common Council consider sponsoring an amendment to the ordinances which would codify this practice.

Conclusion:

The law is clear that, following redistricting after the decennial census, newly redrawn alder districts go into effect upon the effective date of the City's ordinance, and govern elections after January 1, 2012.

The law is very unclear as to the treatment of an alder that ends up being drawn out of the numbered district that he or she represented in the past. But the City and the State have a consistent practice of allowing such elected representatives to serve out their terms, even without residing in the newly drawn district, absent some other reason to say that a vacancy exists. This practice finds support under one reading of the statutes, and the City should follow this practice.

Michael P. May
City Attorney

MPM:pah
Attachment

cc: Mayor Cieslewicz
All Alders
City Clerk

April 6, 2011

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SYNOPSIS: Wards and alder districts redrawn after the 2010 census take effect once adopted by the Common Council, and govern elections held after January 1, 2012. While the statutes are less clear on the impact on an alder who no longer resides in the numbered district from which he or she is elected, the City should continue its practice of allowing such alders to serve out the remainder of their terms.

State of Wisconsin \ Elections Board

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JERALYN B. WENDELBERGER
Chairperson

KEVIN J. KENNEDY
Executive Director

December 12, 2001

Ms. Sharon Christensen
City Clerk's Office
City-County Building
201 Martin Luther King Jr. Boulevard, Room 103
Madison, Wisconsin 53703-3342

RE: Special Election to Fill the Office of Alderman for the 5th Aldermanic District
of the City of Madison

Dear Ms. Christensen:

This letter is in response to your inquiry of December 7, 2001, regarding a special election to fill a vacancy that was created after the spring, 2001 election. The person elected to the office of Alderman for the 5th Aldermanic District for the City of Madison declined to take the office, thereby creating a vacancy in that office. The office was temporarily filled by appointment of the person currently holding the office, Tom Powell. Pursuant to s.17.23, Stats., the office is to be filled by special election held "on the first Tuesday of April next after the vacancy happens," because the vacancy occurred before "December 1 preceding the first Tuesday in April."

17.23 Vacancies in city offices; how filled.

(1) General and special charter cities. Vacancies in offices of cities operating under the general law or special charter shall be filled as follows:

(a) In cities of the 2nd, 3rd or 4th class, in the office of mayor, except as provided in s. 9.10, by appointment by the common council. In the office of alderperson, by the common council, except as provided in s. 9.10. A person so appointed shall hold office until a successor is elected and qualified. A successor shall be elected for the residue of the unexpired term on the first Tuesday of April next after the vacancy happens, in case it happens no later than December 1 preceding the first Tuesday in April, but if the vacancy happens after December 1 preceding the first Tuesday in April and before that day, then the successor shall be elected on the first Tuesday in April of the next ensuing year; but no election to fill a vacancy in such office may be held at the time of holding the regular election for that office.

In the course of filling that vacancy by appointment, the Madison Common Council adopted a resolution that read, in part, as follows:

Whereas Alder-elect Jessy Tolkan has communicated to the City that she will not take the official oath of office as Alderperson for District 5, thus creating a vacancy for that position, and

Whereas the Common Council wishes to fill that position on an interim basis until a successor can be elected on April 2, 2002, in District 5 as it existed as of April 3, 2001,

.....

The person appointed by the Common Council will serve as Alderperson of the 5th Aldermanic District until a successor is elected on April 2, 2002 and takes the official oath of office.

More recently, pursuant to s.5.15, Stats., and pursuant to the 2000 federal decennial census and the receipt of the Dane County Supervisory District Plan, the Madison Common Council has adopted a plan adjusting its ward boundaries and establishing new aldermanic districts. With respect to the repeal of the existing aldermanic districts, the plan provides as follows:

"15.06 PRESENT ALDERMANIC DISTRICTS. The following subsection (1) describing the present First through Twentieth Aldermanic Districts by combining contiguous whole wards and subsection (2) describing Wards 1 through 96, inclusive, shall be automatically repealed without further action by the Common Council, effective after the 2003 Spring Election, notwithstanding the above sections 15.02 and 15.03 which shall be effective for purposes of said Spring Election as well as the 2002 Dane County Supervisory Election.

The question that you have asked of this office is whether the special election to be held in conjunction with the 2002 spring election to fill the 5th Aldermanic District office will be based on aldermanic district boundaries established under the old aldermanic district plan, (extant 2001), or on aldermanic district boundaries established under the new plan, (circa 2002).

The applicable provisions of the statute governing re-districting and its effective date is s.5.15(1)(c), Stats.. That statute reads, in pertinent part, as follows:

5.15 Division of municipalities into wards.

(1) (c) The wards established by municipal governing bodies under this section on the basis of the published results of each federal decennial census of population shall govern the adjustment of supervisory districts under s. 59.10 (2) (a) and (3) (b) and of aldermanic districts under s. 62.08 (1) for the purpose of local elections beginning on January 1 of the 2nd year commencing after the year of the census until revised under this section on the basis of the results of the next decennial census of population unless adjusted under sub. (2) (f) 4., (6) (a) or (7), or unless adjusted, as a matter of statewide concern, in the enactment of legislative districts under article IV, section 3, of the constitution on the basis of the most recent decennial census of population.

The Board's staff believes that what s.5.15(1)(c), Stats., means is that the new wards and aldermanic districts created by municipal re-districting take effect with respect to any local elections after January 1 of the 2nd year commencing after the year of the census, other than recall elections, because those elections, other than recall, elect officers from the newly constituted districts. Also to hold office, each of those newly elected officers must be a resident of the newly constituted district. Consequently, not only regularly scheduled elections, but also elections to fill vacancies, are elected on the basis of the newly created districts.

The Board's staff believes that the above rule applies even in those cities, like Madison, in which no regularly scheduled aldermanic election will be held in the 2nd year commencing after the year of the census, because the staff believes that re-districting takes effect on January 1 of the 2nd year commencing after the year of the census whether or not an election for municipal office is scheduled for that year. The purpose of re-districting is not only to establish new aldermanic districts, county supervisory districts and legislative districts for purposes of conducting elections, but also for purposes of equality of representation -- to ensure that voter representation isn't diluted by districts having become substantially unequal in population:

The equal protection clause of the fourteenth amendment to the United States Constitution guarantees the right not to have one's vote diluted by the unequal distribution of state legislative seats. Reynolds v. Simms, 377 U.S. 533, 565-66 (1964). The principle of population equality applies as well to county and local legislative elections, Abate v. Mundt, 403 U.S. 182, 185 (1971) and in Wisconsin is further guaranteed by art. I, sec. 1 of the Wisconsin Constitution. State ex rel. Sonneborn v. Sylvester, 26 Wis.2d 43, 49, 57 . . . (1965). For this reason redistricting is required every ten years to reflect the population shifts shown by the federal decennial census.
(Emphasis supplied)

Pursuant to changes effected by ch. 4, Laws of 1981, a three-step process governs the reapportionment of local wards and county supervisory districts following the census. Within sixty days of receipt of the census results, each county board "shall adopt and transmit to each municipal governing body in the county a tentative county supervisory district plan." . . . The municipalities then have sixty days to divide into wards giving consideration to the tentative plan. . . . Each municipality must "make a good faith effort to accommodate the tentative plan submitted by the county . . . and shall divide itself into wards in such a manner that will permit the creation of county supervisory districts in accordance with the population requirements for the plan. . . ." . . . The wards are used to form "election districts of substantially equal population." Sec.5.02(25), Stats. They have been described as the "basic building blocks" to be used in redrawing the boundaries of state, county and municipal election districts.

County of LaCrosse v. City of LaCrosse, 108 Wis.2d 560 (1982) at pp.563-565

Municipalities, like counties, have an absolute duty to perform as directed by the legislature in the three-stage process required by Wis. Stat. Ann. Secs. 5.15(1)(a) and 59.03 . . . Section 5.15(1)(a) provides in relevant part, "Every city, village or town in this state shall by its common council or village or town board, respectively, be divided into wards as provided in this section. (Emphasis added) Section 5.18(1) refers to the division into wards under sec.5.15 as "imperative."

Second, the three-stage process envisioned by Wis. Stat. Ann. Secs. 5.15 and 59.03 . . . contemplates redistricting and ward adjustment according to a time schedule initiated by availability of the results of the federal decennial census. Adherence to that time schedule is mandatory. Indeed, if a municipality fails to adjust its wards within the sixty-day period allowed under sec. 5.15(1)(b), subsec. (3) authorizes the circuit court to promulgate a plan in compliance with sec. 5.15 "as a temporary ward plan for the affected municipality to remain in effect until superceded by a ward plan adopted by the governing body in compliance with this section." . . .

City of Janesville v. Rock County, 107 Wis.2d 187 (1982) at pp.201-202

What the courts are affirming in the above two cases is that redistricting is a procedure that is required by the Equal Protection Clause of the United States Constitution and that in s.5.15, Stats., the Wisconsin Legislature has established the mandatory rules for that procedure, including adherence to the time schedule set forth in s.5.15, Stats. That time schedule includes a sixty-day period in which cities must establish wards and from those wards aldermanic districts.

The legislature has added to that time schedule by further providing, in s.62.08, Stats., that "Within 60 days after the wards have been readjusted under s. 5.15 (1) and (2) the common council of every city, including any city of the first class, shall redistrict the boundaries of its aldermanic districts":

62.08 Alteration of aldermanic districts.

(1) Within 60 days after the wards have been readjusted under s. 5.15 (1) and (2) the common council of every city, including any city of the first class, shall redistrict the boundaries of its

aldermanic districts, by an ordinance introduced at a regular meeting of the council, published as a class 2 notice, under ch. 985, and thereafter adopted by a majority vote of all the members of the council, so that all aldermanic districts are as compact in area as possible and contain, as nearly as practicable by combining contiguous whole wards, an equal number of inhabitants according to the most recent decennial federal census of population.

To say that the time table for establishing new wards is mandatory and must be accomplished within the statutory sixty-day period, and that aldermanic districts are required to be established within 60 days thereafter, but that the new aldermanic districts (which are based on the new wards) will not go into effect until the next aldermanic election some 16 months later is inherently self-contradictory.

The necessity of establishing new wards, and doing so to be effective by January 1, 2002, emanates not only from the statutory time schedule but also from the reason for establishing wards in the first place: "to facilitate the division of such municipalities into election districts of substantially equal population numbers along common boundaries observing the community of interest of existing neighborhoods and other settlements." (See s.5.02(25), Stats.) Aldermanic districts are re-created effective January 1, 2002, because the new districts more accurately reflect aggregations of "substantially equal population numbers along common boundaries observing the community of interest of existing neighborhoods and other settlements," than did the old districts. To perpetuate the old aldermanic districts until the next aldermanic election, (April, 2003), would be to perpetuate representation that no longer reflects "substantially equal population numbers [distributed] along common boundaries observing the community of interest of existing neighborhoods and other settlements." Furthermore, the new wards go into effect in 2002 for purposes of establishing county supervisory districts and legislative districts. Maintaining old wards for purposes of preserving the old aldermanic districts while, at the same time, recognizing new wards for purposes of county supervisory districts and legislative districts is incongruous, at best.

If redistricting is required because of inequality of population representation and if the law requires that that plan be adopted before the second year after the federal decennial census to address that inequality, why would it be permissible to delay the plan for one year? Why would inequality of representation be acceptable for one year after adoption of a plan to redistrict just because the municipality does not elect its governing body in that year?

Legislative recognition exists, (albeit indirectly or inversely, in sub.(1)(b) of the statute governing filling vacancies in city offices -- s.17.23, Stats.), that special elections, held in the 2nd year commencing after the year of the census, to fill vacancies in aldermanic offices, are based on the aldermanic districts created by re-districting:

(1)(b) In 1st class cities, in the office of mayor, except as provided in s. 9.10, the vacancy shall be filled by the president of the common council as acting mayor until a special election can be held under this paragraph. . . . When an aldermanic seat becomes vacant, a successor shall be elected for the residue of the unexpired term on the first Tuesday of April or the Tuesday after the first Monday in November next after the vacancy happens, in case it happens no later than December 1 or June 1 preceding that day, but if the vacancy happens after December 1 or June 1 preceding that day, then the successor shall be elected on the following first Tuesday in April or Tuesday after the first Monday in November; but no election to fill a vacancy in such office may be held at the time of holding the regular election for that office. In addition, the president of the common council of any 1st class city may order a special election to be held under s. 8.50 to fill a vacant aldermanic seat prior to the time when that seat is required to be filled under this paragraph. If a special election is held under this paragraph after a redistricting plan is adopted, the election shall be held in the aldermanic district as it existed when the office was filled at the last preceding election. (Emphasis supplied)

The emphasized language shows that in 1st class cities, (*and only in 1st class cities - no such provision exists for cities of the 2nd, 3rd or 4th class*), the special election to fill a vacancy in the year in which re-districting takes effect is *held in the aldermanic district as it existed when the office was filled at the last preceding election*. Unless the legislature thought the rule was otherwise for all other cities -- that special elections after re-districting are held in aldermanic districts based on re-districting -- it would not have needed to enact this provision for 1st class cities.

Although it is true that some persons who were eligible to vote for the district 5 seat on April 3, 2001, will not be eligible to vote for that office on April 2, 2002, that is not an anomaly caused only by having a special election, it is an anomaly also caused by re-districting. On a similar level, some people in aldermanic district 2, or aldermanic district 3 or 4, or aldermanic district whatever, will not, after January 1, 2002, have voted for the person that represents them either. And, after re-districting takes effect, some common council members may represent districts within whose boundaries the member no longer resides. That is also an anomaly of re-districting and one that the legislature has recognized and accepted in s.62.08(3), Stats.:

(3) Whenever the boundaries of aldermanic districts are altered, or new aldermanic districts created, every aldermanic district or ward officer residing within the territory of a new or altered aldermanic district shall hold the same respective office therein for the remainder of the officer's term; and all other vacancies shall be filled as provided by law for the filling of such vacancies.

I hope that this letter has been responsive to your questions and concerns, but if it hasn't, or if I can be of any other assistance, please give me a call.

This is an informal opinion of the staff of the State Elections Board and not a formal opinion, issued pursuant to s.5.05(6), Stats., of the Elections Board, itself.

STATE ELECTIONS BOARD

George A. Dunst
Legal Counsel

cc: Larry O'Brien, Assistant City Attorney
City of Madison

(NOTE: The following letter was e-mailed to Assistant City Attorney Larry O' Brien on December 27, 2001, in response to e-mails from Attorney O'Brien)

December 27, 2001

Larry O'Brien
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