

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

Date: May 26, 2020

FORMAL OPINION NO. 2020-001

TO: Alder Sheri Carter
Common Council President

FROM: Michael P. May
City Attorney

RE: Open Meetings Law and Council Members at Progressive Dane Meetings

A. BACKGROUND.

On April 22, 2020, I sent an email to all Alders expressing my serious concerns about meetings being held without proper notice under the Open Meetings Law (OML). At that time, I only knew that seven or eight alders had met, under the aegis of a local political party, to discuss matters on the April 21, 2020 Common Council agenda. In my email, I raised concerns that such a large number of Alders – fully 40% of the Alder membership on the Council – may result in violations of the OML. The text of that email is attached to this opinion.

In that email, I referenced several earlier Formal Opinions where our office discussed the problems of negative and walking quorums. Those opinions are:

2004-001: Negative Quorums, Email and the Open Meetings Law

<https://www.cityofmadison.com/attorney/documents/2004opinions/2004-001.pdf>

2015-002: Council Members, Political Meetings and the Open Meetings Law.

<https://www.cityofmadison.com/attorney/documents/2015opinions/Opinion2015-002.pdf>

2019-003: Negative and Walking Quorums

<https://www.cityofmadison.com/attorney/documents/2019opinions/Opinion2019-003.pdf>

B. INVESTIGATION.

After that initial email, I spoke with five Alders regarding the meeting at issue, and other similar meetings.

The meetings are held under the aegis of Progressive Dane, a local political organization (PD). Interestingly, PD asserts that “We believe in openly democratic processes and transparency.¹” I am informed that these meetings have been held for years, almost always on the Sunday before a Tuesday Common Council meeting. The meetings are with the PD Policy Committee, a group of PD members currently made up of five person, including one elected member of the Dane County Board and one former Alder. Members of the Common Council who were endorsed by or are members of the PD attend the meetings. Some members do not regularly attend. Since the outbreak of COVID-19, the meetings are held virtually.

I am told that the number of Council members attending these meetings varies over the years, but is now at a high water mark with 8 Alders attending: Albouras, Evers, Foster, Heck, Kemble, Prestigiacomio, Rummel and Verveer. As noted above, this constitutes 40% of the Council. This is a negative quorum of the Council for any item requiring an extra-majority vote. Depending on which Alders are present, it could be a quorum or negative quorum of other key committees, such as the Finance Committee or the Common Council Executive Committee (CCEC).

I am told the agenda is created by the attendees, and may include broad issues such as the PD platform, policy issues facing the City and County, or national issues. It almost always includes one or more agenda items from the Common Council meeting scheduled for the following Tuesday.²

In discussing this with Alders who attend the meetings, I was assured that steps are taken to avoid violating the OML. These include:

1. If someone proposes to discuss an item that is extra-majority, the item is removed from discussion to avoid a negative quorum.
2. The above rule may sometimes be violated for items that are adopted under suspension of the rules (requiring a 2/3 vote to take the matter up) because members often do not notice an item is under suspension.
3. The members generally do not agree on how to vote on an item, or even ask about votes, but use the meeting for information gathering and

¹ See attached “Progressive Dane Endorsed Elected Official Accountability Policies,” provided to me by a PD member.

² A PD member has urged the City to post agendas for all meetings for the following week by Friday, and to post all meeting agendas at least 48 hours prior to the meeting, as opposed to the 24-hour notice required by the OML. The City has attempted to do so, with imperfect results. Ironically, if the City followed the OML and noticed the Council meetings on the Monday prior to the meeting rather than Friday, it would be nearly impossible for PD to meet and discuss the agenda as it does now.

discussion³. The split votes by members of PD on most issues before the Council shows the lack of agreement.

4. Similar care is taken to avoid bringing up matters that may come before the Finance Committee or CCEC if a quorum or negative quorum of those bodies are at the meeting.
5. In the rare instances where extra-majority or committee matters come up and discussion is desired, one or more members are asked to leave the room to bring the level below negative quorum.
6. I was told that further communications outside the PD meetings are rare, that is, those attending do not generally then contact other Alders to discuss or lobby on a matter. This rule may be abandoned in the case of votes for Council leadership.
7. Despite these efforts, I am told it is likely that at times the group “slips up” and may improperly discuss an item contrary to the OML, either at the meeting or in combination with actions after the meeting.

As to the specific meeting of April 19 that engendered the concerns brought to my office, none of the members in attendance I spoke with recall any specific items discussed other than the Council leadership elections, and the proposal for a 3 month special term for leadership.

C. APPLICATION OF THE OPEN MEETINGS LAW TO PD MEETINGS.

This is not a new issue, as it was addressed specifically in the Formal Opinions noted above, particularly Formal Opinion 2015-002. Indeed, some of the remedies being applied by PD (having Alders leave the meeting) were among suggestions I made at that time.

The rules of negative and walking quorum, though complex, are well known. As detailed in *State ex rel. Newspapers, Inc. v. Showers*, 135 Wis. 2d 77, 103, 398 N.W. 2d 154 (1987), a negative quorum exists whenever enough members gather that they have the **potential** of controlling the outcome of a matter discussed at a meeting. They need not reach any agreement on how to vote. The calculation of a negative quorum depends on the size of the body, the quorum, and the votes needed for a matter to carry. For example, if we look at matters before the Council that require a simple majority or 11 votes, we see this:

1. If all 20 members are present, negative quorum would be 10. Only if 10

³ Members of a governmental body meeting only to gather information related to their duties are engaged in government business, and the meeting is subject to the Open Meetings Law if other requirements are met. *State ex rel. Newspapers v Showers*, 135 Wis. 2d 77, 102, 398 N.W. 2d 143 (1987); *State ex rel. Badke v. Village Board of Greendale*, 173 Wis. 2d 553, 573-74, 494 N.W. 2d 408 (1993).

members had met on a matter could there be a negative quorum issue.

2. If a bare quorum of the Council (14 members) were present, then a meeting of even four members of the Council would have created a negative quorum.
3. One can do the sliding scale for different number of members of the Council, but note that if eight members of the Council meet at PD and discuss any matter before the Council, there must be at least 19 members present to avoid an illegal negative quorum.

When we look at matters that require extra-majority items, such as budget amendments (15 votes), various appeals especially from Planning matters (2/3), and anything requiring suspension of the rules (2/3), we can see the following:

1. If all 20 Council members are present, any six or seven members would be a negative quorum.
2. If a bare quorum were present, any two would be a negative quorum for 2/3 items and no item requiring 15 votes could be taken up.
3. You can do a sliding scale so that, for example, if 17 members were present, any three or four would be a negative quorum.
4. The meeting of seven or eight council members always creates a negative quorum for any extra-majority items.

Despite the best efforts of PD to avoid violations, the meetings of such large numbers of the Council is very risky. In a prior opinion (Formal Opinion 2019-003, page 5), we advised:

In consultation with the Common Council office, we have established a rule that if five or more Council members plan to meet on City business, the meeting should be noticed. As detailed above, this may not always avoid a negative quorum, but it is a good start.

This rule obviously has been ignored by PD, whose meetings are not noticed pursuant to the OML.

If we turn to the Finance Committee and CCEC, it becomes even more difficult to conduct meetings of 7-8 Alders without careful examination of issues. If a bare quorum of either of those committees were meeting (four members), then any two members of the committee would be a negative quorum.

Having laid out those significant problems, let me make two other points before concluding.

First, proving violations of the OML is not easy. I certainly cannot determine that violations occurred at PD meetings, at least I cannot make that determination to the level of preparing a verified complaint and filing it with the District Attorney or Attorney General.⁴ My experience is that, even when violations are relatively clear, overburdened District Attorneys rarely choose to prosecute when they have violent crimes to bring to trial. In one case involving the Madison Water Utility Board, where I thought the evidence was relatively clear, the DA was reluctant to commit precious resources to a prosecution that might result in a penalty that amounted to a “public shaming.” This is particularly so when media coverage of the event amounts to almost the same thing.

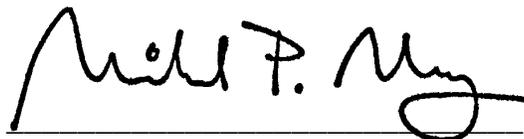
Second, although I do not think the evidence justifies an action to enforce the OML, I have little doubt that violations have taken place. When PD brings such a large number of Alders together, operating on the edge of outright violations of the law, “slip-ups” will occur. This is especially so when a member leaves the meeting to avoid a violation. All it takes is a member to inform the missing Alder what occurred, or contacting a couple of Alders not in the meeting, and there likely is a violation. In my view, the willful decision to bring such large number of Alders in one place, at a meeting not in compliance with the OML, will necessarily result in some violations.

D. CONCLUSION AND RECOMMENDATION.

Progressive Dane gathers City of Madison Alders together about twice a month to discuss city issues, including matters on the upcoming agenda for the Common Council. When the number of these Alders is small, the chances of a violation of the Open Meetings Law is similarly small. But current circumstances, with 8 Alders – 40% of the Council – meeting without notice or access by the public, the odds of an Open Meetings Law violation are much greater. I cannot conclude that the Alders violated the law at their meeting of April 19, 2020, or meetings since that time. I can conclude that such gatherings are dangerous, and will almost certainly result in violations of the Law.

PD is playing with fire when they gather such large number of Council members together to discuss City business. Only time will tell whether they burn themselves with outright violations of the OML that can be proven in court. In the meantime, the gatherings surely appear to be searing the fringes of open government.

I recommend that the Alders gathering at these meetings follow our previous advice. They should limit the number of Alders meeting to 5 or less, or they should issue a notice under the Open Meetings Law and open the meetings to the public.



Michael P. May
City Attorney

⁴ This is the first step in seeking penalties for a violation of the OML, Wis. Stat. sec. 19.97.

CC: All Alders
Mayor Satya Rhodes-Conway
Maribeth Witzel- Behl

SYNOPSIS: Gatherings of eight Alders, or 40% of the Council, may not violate the law if proper precautions are taken, but such gathering will almost inevitably result in violations due to the inability to always police the rules of negative quorum for the Council and related committees. Council members should notice such gatherings, or limit the number of Alders to five or less.

ADDENDUM #1 — TEXT OF CITY ATTORNEY MAY EMAIL OF APRIL 22, 2020:

Alders:

I was deeply disturbed to hear reports this week that 7 or 8 alders met privately to discuss matters on the Common Council agenda. Such meetings almost certainly involve negative quorums on some issues and thus, under the *Showers* decision, could easily be violations of the Open Meetings Law.

The COVID emergency and the conduct of meetings via the internet do not justify violations of the Open Meetings Law. Our office has advised the Council on multiple occasions about gatherings of a number of alders to discuss city business. To remind you again of your obligations, I attach several prior opinions on negative quorums. For example, Formal Opinion 2015-002 discussed the problem of negative quorums at gatherings of political parties. I understand some meetings occur regularly under the aegis of a local political party. Formal Opinion 2019-003 discussed negative and walking quorums, and includes a link to an earlier opinion on the same topic, Formal Opinion 2004-001.

In this case, I was told the group of alders met, went through the agenda and agreed on a position on various matters. The agenda of April 21 was replete with items requiring supermajorities of 14 or 15 votes for approval. A meeting of 7 or 8 alders would be enough to control the outcome of any one of those matters. This included appropriations and numerous matters requiring a suspension of the rules in order to be taken up at the meeting.

It is not a defense to argue that the alders did not actually agree to vote as a bloc on those supermajority items, or that their vote did not in fact control the outcome. The *Showers* case makes it clear that a violation occurs when sufficient members meet to discuss a matter such that there is “the potential” of controlling the outcome:

The fact is that there is always the potential, no matter how divergent the forces, to join together. The Open Meeting Law is concerned with the potential to determine the outcome, not with the likelihood that an alliance may or may not be formed. The

legislature knew, as do these Commissioners, that politics makes strange bedfellows. Today's enemy may become tomorrow's ally. Shifting agendas and shifting alliances can and often do lead to unpredictable results and unlikely alliances. When a group of governmental officials gather to engage in formal or informal government business and that group has the potential to determine the outcome of the proposal or proposals being discussed, the public, absent an exception found within the law has the right to know — fully — the deliberations of that group. The public is entitled to no less.

State ex rel. Newspapers, Inc. v. Showers, 135 Wis. 2d 77, 103, 398 N.W. 2d 154 (1987).

At this point, I have not done or requested any further inquiry on the reports I received. I urge you to be very careful in your private meetings and discontinue those involving more than 5 alders, unless the meetings are properly noticed. As noted in the opinions attached to this email, even a meeting of 5 alders or less may, depending on the circumstances, end up being an illegal negative quorum.

Thank you.



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ADDENDUM #2 – COPY OF A PD POLICY FOR LOCAL ELECTED OFFICIALS

Progressive Dane Endorsed Elected Official Accountability Policies

Progressive Dane is strong when the members and elected officials are communicating well and often and supporting each other. Progressive Dane lends support to elected officials in campaigns and throughout the year in development and passage of policy supported in our platforms. We believe in openly democratic processes and transparency. The strength of our organization depends upon us working together and Progressive Dane has the following expectations:

All endorsed candidates:

- Communicate during the campaign about their events and volunteer needs.
- Participate in **special** elections committee meetings **for current election year candidate teams** or send a campaign team member.
- Share campaign data after the campaign to contribute to Progressive Dane elections database.
- Communicate to voters that you are endorsed by Progressive Dane.
- Incorporate Progressive Dane platform solutions in campaign communications.

All endorsed elected officials

- Communicate about major initiatives they are working on.
- Vote in line with our platforms or bring disagreement to the attention of the **party caucus or the policy or steering committee if there is no caucus.**
- Participate in our caucuses consistent with open meetings laws.
- If no caucus exists for an elected office, keep in regular communication with **and actively respond to** policy and steering committee.

Caucus specific expectations

- Regular attendance at caucus meetings.
- Communicate differences of opinions respectfully
- Not have more than 3 consecutive non-communicated .
- Not have more than absences or 6 consecutive absences whether or not communicated.
- Attend meetings in person, attendance by video or phone should be an exception.
- If you want to invite someone from outside of PD to a meeting to discuss a specific issue or issues, seek approval of other caucus members in advance.
- **If a caucus member is absent create a plan with caucus members to reach out and find out why there has been a lapse in attendance.**

Removal from Caucus/Progressive Dane Endorsement

- If there are more than 3 consecutive non-communicated or 6 consecutive absences:
- The elected official will be notified.
- The issue will be placed on next GMM meeting by the Steering Committee and if the membership votes to remove the elected official they will be
- Removed from the listserve and communications about caucus.
- No longer allowed to participate in caucus without an agreement to invite them to caucus.
- Removed from the website.

Bold comments are City Caucus Suggestions. Draft and changes not bold are from elections committee based on input from others.