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

DATE: August 2, 2004

OPINION #04-002

TO: **Mayor Dave Cieslewicz**
Ald. Paul Van Rooy, District 18
Nino Amato, Chairman of Ad Hoc Swimming Pool Committee

FROM: Michael P. May, City Attorney

SUBJECT: **Amendment of Sec. 8.35, Madison General Ordinances**

You have requested my opinion regarding the method of amending Sec. 8.35 of the Madison General Ordinances so as to exclude municipal swimming pools from the requirements therein, and specifically whether such an amendment could be approved by the Madison Common Council or must be submitted to a referendum.

As set forth below, I have concluded that Sec. 8.35, MGO, may be amended by action of the Common Council.

Sec. 8.35, MGO.

Sec. 8.35, MGO, is entitled "Preservation of Shoreline Parks." The ordinance requires a city referendum before "major construction" takes place in any city park bordering on lakes or navigable waterways. "Major construction" is defined as "erecting a building or structure, changing land elevations or shore contours, and paving over land ...." The ordinance includes a number of exceptions to the definition of "major construction," including a complicated formula related to size and cost of construction, and blanket exceptions for Olbrich Botanical Gardens and the Henry Vilas Zoo. These last two exceptions were added by separate ordinances enacted by the Common Council in 1996 and 1997.

Sec. 8.35 is called a Charter Ordinance. It was enacted through the referendum process for citizen initiative in 1992.

Amending a Charter Ordinance Adopted by Referendum.

In initially considering your request, I researched the question of the proper method for amending a charter ordinance which was adopted by referendum. Sec. 8.35 is labeled a charter ordinance and so states in its body. Moreover, Sec. 8.35 was adopted by a referendum of the electors of the City of Madison in April of 1992. This question raised an interesting legal conundrum involving the interplay between Sec. 66.0101 and Sec. 9.20, Wis. Stats.

Sec. 66.0101, Stats., is the section dealing with adoption of charter ordinances. Charter ordinances may be adopted by the governing body, or may be enacted by the electors through the initiative process of Sec. 9.20, Stats., or approved by the electors upon submission by the governing body.

Sec. 66.0101(8) provides in part:

> A charter ordinance enacted or approved by a vote of the electors controls over any prior or subsequent act of the legislative body of the city or village.

I interpret this provision to require that a charter ordinance adopted by vote of the electors can only be amended by a vote of the electors.

In contrast, Sec. 9.20(8), which governs initiative legislation, provides in part:

> City ordinances or resolutions adopted under this section shall not be subject to the veto power of the mayor and city or village ordinances or resolutions adopted under this section shall not be repealed or amended within two years of adoption, except by a vote of the electors.

I interpret this provision to say that an initiative type ordinance that is not also a charter ordinance cannot be amended by the governing body for two years, but, thereafter, could be amended by the Common Council without submitting it to the electors.

If I were to apply standard statutory interpretation to these two seemingly conflicting statutes, I likely would conclude that a charter ordinance adopted by a vote of the electors must be amended by a vote of the electors. This is because sec. 66.0101 (8), Wis. Stats., is specific legislation that applies only to charter ordinances adopted through the referendum process. Sec. 9.20(8), Stats., on the other hand, is a more general statute that applies to resolutions, regular ordinances, and by reference, to charter ordinances. The usual rule is that the more specific statute governs over the more general. *Gillen v. City of Neenah*, 219 Wis. 2d 806, 822, 580 N.W. 2d 628 (1998). In addition, the predecessor to sec. 66.0101(8) Stats., was enacted in 1925, while the predecessor to sec. 9.20(8), Stats., was enacted in 1911. The Legislature is presumed to know the relationship of a new act to existing legislation – indeed, in this case, the Legislature referred explicitly to the earlier legislation. *Storm v. Legion Ins. Co.*, 2003 WI 120 ¶ 29, 265 Wis. 2d 169, 189, 665 N.W. 2d 353 (2003). It is difficult to conceive of a reason for the legislature to adopt a separate provision for charter ordinances adopted by referendum if it intended the existing procedure of the predecessor of Sec. 9.20(8) to apply. Finally, the legislative history of these sections, in particular the drafting history of 1925 Senate Bill 125, which became the original enactment of what is now Sec. 66.0101(8) by 1925 Wis. Laws c. 198, strongly suggests that a charter ordinance adopted by referendum may only be amended by subsequent referendum.

However, I need not resolve with certainty this conflict in the statutes due to the fact that Sec. 8.35, MGO, despite being labeled a charter ordinance, does not qualify as such[1].

[1] I have provided some analysis of this legal issue despite the fact it does not apply in this case. The reason is that our search of the City's other charter ordinances revealed only one extant charter ordinance adopted by referendum. Charter Ordinance No. 39, adopted by referendum in 1950, returned Madison to a Mayor / Common Council form of government, with a specification of 20 alders. If the question ever arose of modifying this charter ordinance, such as increasing or decreasing the number of alders, we likely would opine that a referendum was needed.

Section 8.35 Is Not a Charter Ordinance.

Despite being called a charter ordinance, Sec. 8.35, MGO, fails to meet one of the necessary requirements of a charter ordinance. Sec. 66.0101(2)(b) establishes a requirement for any charter ordinance, and reads as follows:

> A charter ordinance that amends or repeals a City or village charter shall designate specifically the portion of the charter that is amended or repealed. A charter ordinance that makes the election under (4) shall designate specifically each enactment of the legislature or portion of the enactment that is made inapplicable to the city or village by the election.

Madison does not have a special charter, but like all cities other than Milwaukee, operates under the general charter law of Chapter 62 of the Statutes. Sec. 62.02, Wis. Stats. Thus, any charter ordinance for Madison must explicitly state which provision of state law is being amended or is no longer to be applicable within the municipality. Sec. 8.35, MGO, makes no such explicit or implicit determination.

The Wisconsin Supreme Court has ruled that any ordinance purporting to be a charter ordinance, but that fails to explicitly mention this election, and the state statutes involved, is not a valid charter ordinance. *State ex rel. Coyle v. Richter*, 203 Wis. 595, 601, 234 N.W.2d 909, 911 (1931). This rule was recently applied to the City of Beloit in an unpublished decision of the Wisconsin Court of Appeals, *Craig v. City of Beloit*, 2003 WL1889440 (Wis. App.) 2003 WI APP 111 (Case No. 02-2614, April 17, 2003).

Because Sec. 8.35, MGO, is not in fact a valid charter ordinance, it exists simply as a regular ordinance of the City of Madison, adopted through the initiative process under Sec. 9.20, Wis. Stats. In this instance, Sec. 9.20(8), Wis. Stats., governs amendment of the ordinance. As noted above, that statute allows the governing body to amend such an ordinance when two years have elapsed following its adoption through the referendum process. Since sec. 8.35, MGO, was adopted in 1992, it could be amended by the Council at any time after 1994.

Michael P. May
City Attorney

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SYNOPSIS: Sec. 8.35, MGO, may be amended by action of the Common Council.