

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

Date: May 9, 2013

OPINION # 2013-001

TO: David Schmiedicke, Finance Director

FROM: Michael P. May, City Attorney

RE: Actions Constituting "Appropriations" and Requiring a Super-majority Vote
By the Common Council

You requested my legal opinion on when super-majority votes are required by the Common Council to approve amendments to the City budget. On a regular basis, questions arise as to whether a certain resolution before the Common Council constitutes a "Budget Amendment" such that it needs a 3/4 majority vote, or 15 votes, for approval by the Common Council. The term "Budget Amendment" is used somewhat loosely and is a misnomer. The correct legal question is whether the vote constitutes an "appropriation."

The City has informal practices to decide whether certain types of actions constitute appropriations such that they become a 15-vote item on the Council floor, usually based on discussions between your office and the City Attorney.

In at least one respect, relating to receipt and expenditure of grants or other approvals that do not change the bottom line for the City's budget, I believe the City's practices are contrary to the legal definition of an appropriation, and I recommend those practices change immediately. I also note other areas where either the Common Council with respect to ordinances, or the Mayor and the Finance Department in conjunction with other City Departments with respect to administrative interpretations, might wish to consider changes to current practice.

This Opinion has three sections. The first section examines the statutes, ordinances, and case law surrounding what constitutes an appropriation and when a super-majority may or may not be needed to approve an item. The second section examines the current practices of the City in a number of areas, and compares them to what appears to be required under the law. The third section sets out my recommendations on the correct legal treatment of an "appropriation."

I. THE LEGAL PARAMETERS.

There are few state statutes governing common council votes on budget matters. Chapter 65 of the Wisconsin Statutes relates to municipal budgets, but most of the

chapter is applicable only to first class cities. Madison is a second class city. Nonetheless, the City of Madison has, pursuant to Wis. Stat. sec. 65.01, adopted portions of Chapter 65 to govern its budget operations.

One portion that Madison has not adopted is Wis. Stat. sec. 65.06. Indeed, it appears that the limitations in Wis. Stat. sec. 65.01 would prohibit the City from adopting Wis. Stat. sec. 65.06. Thus, the following provision in Wis. Stat. sec. 65.06(6)(a) does not apply to Madison:

The common council by resolution adopted by a three-fourths vote of all the alderpersons, may appropriate money from its contingent fund for any lawful purpose.

Rather, Madison is covered by Wis. Stat. sec. 65.90. This statute provides in part in Wis. Stat. sec. 65.90(5)(a):

. . . the amount of tax to be levied or certified, the amounts of the various appropriations and the purposes for such appropriations stated in a budget required under sub. (1) may not be changed unless authorized by a vote of two-thirds of the entire membership of the governing body of the municipality.

In addition to these state statutes, several Madison Ordinances and resolutions govern modifications to budgets or appropriations.

Sec. 2.19, MGO, reads:

No appropriation shall be made or voted from any City fund for any purpose except upon an affirmative vote of three-fourths of all members of the Common Council provided, however, that adoption of the annual budget shall be a simple majority vote item.

Sec. 4.03, MGO, states as follows:

The Board of Estimates and the Common Council shall annually provide for a contingent fund of not less than One Hundred Thousand Dollars (\$100,000). No appropriation shall be made from said fund except upon an affirmative vote of three-fourths (3/4) of all the members of the Common Council.

In these two ordinances, the City has imposed upon itself a three-fourths majority requirement for appropriations outside of the budget process. State law would only require a two-thirds majority.

There are several Wisconsin court decisions that discuss what constitutes an appropriation, usually arising within the context of the governor's authority to line-item veto any appropriation bill.

The most commonly accepted definition is one that originated in *State ex. rel. Finnegan v. Dammann*, 220 Wis. 143, 148, 264 N.W. 622 (1936). Quoting favorably from an Arizona decision, the Wisconsin Supreme Court said:

An appropriation is “the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.”

This definition was cited with approval in *Flynn v. Department of Administration*, 216 Wis. 2d 521, 538-39, 576 N.W.2d 245 (1998), and in *Risser v. Klauser*, 207 Wis. 2d 176, 192-93, 558 N.W.2d 108 (1997).

Thus, taking these definitions, it appears that any time the Common Council takes a certain sum of money and sets it aside for a specified purpose, the Council has made an appropriation. This certainly allows for much leeway in determining what constitutes a “purpose,” that is, you could have a “purpose” as broad as “the Police Department” or as limited as “pencils for the Office of the City Attorney.”

II. PAST PRACTICE OF THE CITY

This portion of the memorandum will examine the City’s past practice in seven areas, with comparisons to the statutory language set out above.

- A. Adoption of the Annual Budget: This has always been done by a majority vote (11 votes). This is in accordance with state statute and with the current language of Sec. 2.19, MGO.
- B. Appropriations from the Contingent Fund for Another Purpose: In Madison, the so-called Contingent Fund is normally called the Contingent Reserve. Pursuant to Sec. 4.03, MGO, these appropriations have always required a 3/4 vote (or 15 votes) of the Common Council.

No state law requires that these be a 15-vote item. If the City were to change its ordinances, appropriations from the contingent reserve could be treated as matters requiring 2/3 majority (14 votes), pursuant to Sec. 65.90(5)(a), Stats.

- C. Operating Budget Transfers: Major Objects: The City has effectively defined the “purpose” of an appropriation as being the Major Objects within a Department or Division.

The major objects in the budget are the following items:

- (1) Permanent Salaries
- (2) Hourly Employee Pay
- (3) Overtime Pay

- (4) Fringe Benefits
- (5) Purchased Services
- (6) Supplies
- (7) Interdepartmental Charges
- (8) Debt, Other Financing Uses
- (9) Capital Assets

If the transfer were to exceed \$5,000 from one Major Object to another¹, it would need approval of the Common Council. Current practice has been to consider this as a modification of the budget, but not an appropriation within Sec. 2.19, MGO, that required a 3/4 vote.

However, based upon the definition of “appropriation” as described above, it would appear that any amount not previously authorized by the Common Council (that is a movement of more than \$5,000 between Major Objects), would constitute an additional appropriation because the “purpose” of the appropriation has changed. Absent some other action by the Common Council, these modifications above \$5,000 should be considered appropriations requiring a three-fourths vote of the Council. The same rule would apply if the transfers were between Divisions or Departments, above \$5,000.

- D. Grant Funds or Other Revenues with Offsetting Expenditures: When grant funds and their potential use are set forth in the budget, no further authorizing resolution is needed. But what does the City do when it applies for and receives unanticipated grant funds during the year?

My understanding is that your office has relied upon informal opinions of prior City Attorneys that, if no further appropriation from the general fund is needed with respect to the grants, there is no appropriation requiring a 3/4 vote. This was based on the analysis that the receipt and expenditure of the grant funds ended up being a wash, with no impact on tax generated revenues and no funds taken from the contingent reserve. Since there was no impact on funds generated by taxes, the use and receipt of grant funds, or other revenue, when there was a corresponding equal expenditure, has traditionally been approved by a simple majority vote.

However, the mere fact that the receipt and expenditure is a wash does not exclude the action from the definition of “appropriation” set forth in the cases above. The funds may have come from a source other than tax revenue, but once they are held by the City, they become funds of the City and the resolution certainly constitutes an action setting aside those funds for a specific purpose or purposes.

¹ Pursuant to sec. 4.02(5), MGO, and the annual budget resolution, transfers up to \$5,000 are considered minor and thus are delegated to the Finance Director and Mayor to accomplish administratively.

I conclude that designating how grant funds are to be spent constitutes an appropriation and would require a super majority vote. This could be a 2/3 vote under state statute, although a 3/4 vote is required under current city ordinance. This same rationale would apply to other unexpected revenues which are set aside for a specific purpose.

- E. Language Changes in the Budget: If the Council makes minor language changes in the use of funds identified in the budget, it likely does not constitute a new appropriation. This presumes that the language change does not mean that a specified amount is moving from one of the major objects to another or moving between departments. More significant language changes, making a proposed use of the funds into a very different project or proposal, may effectively constitute a new appropriation. Determining whether language changes constitute a change in “purpose” must be done on a case by case basis.
- F. Capital Budget Items: The capital budget contains a list of projects. Every project is given an Account Number. Some Account Numbers contain several projects of a similar type. The traditional City interpretation has been that, so long as the funds stay within a specified Account Number, it does not constitute a new appropriation to move funds from one project to another, and there is no need for any action by the Council because it does not constitute a new appropriation.

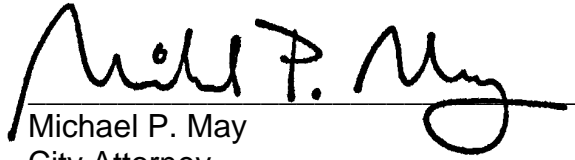
The Finance Director may wish to prepare an Administrative Procedure Memorandum (APM), for approval by the Mayor, that more clearly describes when these changes would be considered an “appropriation”, that is, when the modification of a capital budget item changes the purpose of the appropriation.

III. RECOMMENDATIONS OF THE CITY ATTORNEY

Based upon the above, my recommendations are as follows:

- A. Approval of the Budget: No change needed.
- B. Appropriation from the Contingent Fund: The City should very seriously consider modifying the 3/4 majority to a 2/3 majority for any new appropriations.
- C. Operating Budget Transfers: Major Objects: The current practice of treating transfers of over \$5,000 between Major Objects should change. These transfers constitute an appropriation and should require a super-majority vote rather than a simple majority. This policy of allowing these administrative transfers of \$5,000 or less, set forth each year in the Budget resolution, is proper, but I recommend the practice be brought into Chapter 4, MGO, setting out the current practice allowing the Finance Director to approve transfers between Major Objects of up to \$5,000. I note that the \$5,000 limit has not changed since 1988. The City may wish to consider updating that figure.

- D. Grant Funds or other Revenue/Expenditure Neutral Approvals: Current practice should be modified so that the expenditure of grant funds received from outside sources is considered an appropriation, and a super-majority vote is required. The same would apply to other revenue/expenditure neutral changes that constitute an appropriation, where unexpected revenues are offset by equal expenditures. In each instance, the City is setting aside funds for a specified purpose, thus meeting the definition of an appropriation.
- E. Language Changes in the Budget: No change is needed in the current practice.
- F. Capital Budget Items: While no change is legally required in the current practice, there ought to be some discussion of how projects are grouped into Account Numbers and whether the existing practice meets the intent of the Council. The Finance Director may wish to propose an APM on this topic.



Michael P. May
City Attorney

CC: Mayor Paul Soglin
All Alders
Department and Division Heads
Deb Simon
Maribeth Witzel-Behl

SYNOPSIS: Once the City budget is approved, state law and City ordinance require that any new appropriations require a super-majority vote for approval. The Opinion discusses the legal definition of what constitutes an “appropriation”, and recommends several changes in some current city practices to bring them in line with legal requirements.