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

Date: May 26, 2020

FORMAL OPINION NO. 2020-002

TO: Mayor Satya Rhodes-Conway
Common Council President Sheri Carter

FROM: Michael P. May
City Attorney

RE: Separation of Powers: Legislative Functions v. Executive Functions

The prior Common Council President asked for a memorandum generally outlining the concept of the separation of powers between the Executive (the Mayor and administrative employees) and the Legislature (the alderpersons and legislative employees). The Mayor asked that I complete the opinion after a change in the Council Presidency.

In addition to general principles, I was asked if there were any implications if legislators assisted in executive actions.

Discussion.

A. Framework of Separation of Powers.

I discussed the origins of the doctrine of separation of powers in Formal Opinion 2017-003. The context there was the ability of the Mayor to force alderpersons to be subject to the Mayor's Administrative Procedure Memoranda (APM). I won't repeat that extensive analysis, which plumbed matters going back to the 18th century[1] and noted that Wisconsin has adopted the concepts of separation of powers as applied to mayors and alderpersons of cities. The first seven pages of the Opinion are worth reviewing:

https://www.cityofmadison.com/attorney/documents/2017opinions/Opinion2017-003.pdf

1 The opinion quoted from *The Federalist Papers*, written in 1787-88 as the States considered ratification of the U.S. Constitution: "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.'"

In Wisconsin, our Supreme Court has been discussing the concept of separation of powers at least since 1863, in the case of *In re Griner*, 16 Wis. 423 (1863). The dispute was over whether Congress had improperly delegated legislative powers to the President in calling up the state militias during the Civil War. Our court stated the basic principles:

> . . . by the spirit and principles of the constitution, the powers of the government are divided into three departments: the legislative, the executive, and the judicial; that it is the peculiar function of the legislative department to make the law, of the executive to execute it, and the judicial to construe it, that these powers are not to be confounded or delegated by the one department to the other; . . . (Emphasis added).

16 Wis. at 432-33. The Court went on to uphold the legislation at issue, stating in part that

> "[t]he enrollment and detaching of the militia are largely ministerial acts, which could be wisely and discreetly performed under the direction of the chief executive officer of the nation." *Id.,* at 443[2].

More recent Wisconsin cases have expanded on the analysis of separation of powers questions. In considering separation of powers issues, the courts first look to whether the authority in question is a "core" power of one of the three branches of government. *State ex rel. Friedrich v. Circuit Court for Dane County,* 192 Wis. 2d 1, 13, 531 N.W. 2d 32 (1995). The Court stated (*Id.,* 13-14, citations omitted):

> The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is implicit in the division of governmental powers among the judicial, legislative and executive branches. . . . "The Wisconsin constitution creates three separate coordinate branches of government, no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution, and no branch to exercise the power committed by the constitution to another." Id.
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> Each branch has a core zone of exclusive authority into which the other branches may not intrude. . . . "Great borderlands of power" lie in the interstices among the branches' core zones of exclusive authority. . . . In these borderlands it is neither possible nor practical to categorize governmental action as exclusively legislative, executive or judicial. . . .
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> The separation of powers doctrine was never intended to be strict and absolute. Rather, the doctrine envisions a system of separate branches sharing many

2 In a different context – whether a proposal was subject to direct legislation -- the Wisconsin Court of Appeals said that "something is legislative when it proposes a new law and administrative when it executes a law already in existence." *State ex re. Becker v. Common Council of Milwaukee,* 101 Wis. 2d 680, 687, 305 N.W. 2d 178 (1981)

> powers while jealously guarding certain others, a system of "separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952); State v. Holmes, 106 Wis.2d at 42–43, 315 N.W.2d 703. When the powers of the legislative and judicial branches overlap, the court has declared that the legislature is prohibited from unreasonably burdening or substantially interfering with the judicial branch.

Thus, in any dispute between the executive and legislative branches, the first question is if the authority at issue is a "core" power of one branch or the other. If it is, then no intrusion on that power is allowed. If it is a shared power, the question is if the intrusion by one branch "unreasonably burdens or substantially interferes" with the other branch.[3]

Without getting into a detailed analysis of state law and Madison's ordinances, a few areas are within core authorities, and many are shared between the Mayor and the Common Council.

Among the core powers of the Mayor are:

1. To see that the laws are faithfully executed.
2. To propose the annual budget.
3. To appoint, discipline, and remove city employees, primarily through the detailed procedures established by the Human Resources Department.
4. To engage in collective bargaining[4.]
5. To appoint Deputy Mayors.
6. To appoint Managers, subject to Council confirmation.
7. To appoint many of the resident members of boards, commissions and committees, subject to Council confirmation.
8. To veto legislation.

Similarly, one can identify core powers of the Council:

1. To determine the qualifications of its members.
2. To choose Council leadership.
3. To amend the budget as proposed by the Mayor.
4. To adopt or defeat legislation, subject to the Mayor's veto and the Mayor's vote in the event of a 10-10 tie.
5. To override Mayoral vetoes.
6. To choose the membership of specific legislative committees such as the Common Council Executive Committee.

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3 See also, *Flynn v. Dep't of Admin*., 216 Wis. 2d 521, 545-47, 576 N.W.2d 245, 255 (1998); *State v. Horn*, 226 Wis. 2d 637, 644-45, 594 N.W.2d 772, 776-77 (1999); *Panzer v. Doyle*, 2004 WI 52, ¶¶51-58, 271 Wis. 2d 295, 332-36, 680 N.W.2d 666, 684-86 (discussing the complexity of separation of powers and delegation of powers).

4 See Formal Opinion 2011-002, https://www.cityofmadison.com/attorney/documents/2011opinions/Opinion2011-002.pdf

And we can identify shared powers:

1. To propose legislation.
2. To enter into contracts, including the power of delegation by the Council to the Mayor.
3. To determine certain appointments through the appointment and confirmation process.
4. To establish sub-units, through legislation or by order of the Mayor or Council President.
5. To amend an annual budget, once approved.

Particularly with respect to the budget, the City follows the model of federal and state governments, where the "executive proposes and the legislature disposes."[5]

From this general background, it is obvious that any dispute over separation of powers is very fact intensive, depending on the issue. The general principles discussed in this Opinion need to be applied in each individual case.

B. The Impact of Legislators Taking on Executive Functions.

In *In re Griner, supra*, the Wisconsin Supreme Court referred to an executive act as being "ministerial" in nature. This distinction has grown be an important one.

Courts have long held that legislators are immune from suit or liability for acts they take in their legislative capacity; the same is not necessarily true of acts taken outside the legislative bounds and verging on the executive. An illustrative case is *Gravel v. United States,* 408 U.S. 606 (1972). The case involved subpoenas issued by a Grand Jury to a U.S. Senator and his aide, related to an investigation into the release of the Pentagon Papers. The U.S. Supreme Court emphasized that members of Congress and their aides were absolutely immune for votes or actions they take in Congress or in committee meetings. But when they go beyond that to do non-legislative type things, they may be questioned or held responsible:

> In *Kilbourn*, [a prior Supreme Court case] the Speech or Debate Clause protected House Members who had adopted a resolution authorizing Kilbourn's arrest; that act was clearly legislative in nature. But the resolution was subject to judicial review insofar as its execution impinged on a citizen's rights as it did there. That the House could with impunity order an unconstitutional arrest afforded no protection for those who made the arrest. . . . The Speech or Debate Clause could not be construed to immunize an illegal arrest even though directed by an immune legislative act.

5 See, e.g., "The President Proposes, Congress Disposes. Does the Budget Still Work that Way?" FedSmith.com, July 21, 2018 (last accessed May14, 2020). https://www.fedsmith.com/2018/07/21/president-proposes-congress-disposes-budget-still-work-way.

404 U.S. at 618-19. The Court went on to hold that Sen. Gravel and his aide were absolutely immune for any acts taken on legislation in the Senate or Senate committees, but could be questioned about their non-legislative acts in turning over the Pentagon Papers to the media:

> That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity.
> . . .
>
> Here, private publication by Senator Gravel through the cooperation of Beacon Press was in no way essential to the deliberations of the Senate; nor does questioning as to private publication threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence. The Senator had conducted his hearings; the record and any report that was forthcoming were available both to his committee and the Senate. Insofar as we are advised, neither Congress nor the full committee ordered or authorized the publication. We cannot but conclude that the Senator's arrangements with Beacon Press were not part and parcel of the legislative process.

Id., at 625-26.

The distinction between legislative acts and ministerial acts comes into play under Wisconsin's statute on claims against local units of government and their agents. Wis. Stat. Sec. 893.80(4) provides:

> (4) No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions. (Emphasis added).

In a 2014 decision, the Wisconsin Supreme Court summarized its interpretation of this section:

> The court has interpreted the words "legislative, quasi-legislative, judicial or quasi-judicial functions" in Wis. Stat. § 893.80(4) to be synonymous with the word "discretionary." If an act is discretionary, then governmental immunity provided by Wis. Stat. § 893.80(4) applies. There is no immunity, however, for liability associated with "the performance of ministerial duties imposed by law."(Citations omitted).

Legue v. City of Racine, 2014 WI 92, ¶ 42, 357 Wis. 2d 250.

Although not an exact match, it is much more likely that an act that is executive in nature will be considered ministerial, making liability more likely. Purely legislative acts – consideration of resolutions and ordinances at Council meetings or in committees – will almost always be legislative and therefore discretionary[6].

The discretionary/ministerial distinction was applied in the municipal setting in *Coffey v. City of Milwaukee,* 74 Wis. 2d 526, 247 N.W. 2d 132 (1976). Coffey was Milwaukee's Building Inspector. He and the city were sued for alleged negligent inspection of water pipes, which allegedly failed to pump enough water to upper floors to put out a fire. The city argued that such acts were discretionary (quasi-judicial) and not ministerial. The Supreme Court of Wisconsin disagreed:

> None of those [discretionary] characteristics are present in the conducting of an inspection of a building under sec. 101.14, Stats. The duty to inspect is statutorily imposed. There is no discretion to inspect or not inspect. Violations exist or do not exist according to the dictates of the regulations governing the inspection, and not according to the discretion of the inspector. As to the actual conducting of the inspection, no essentially judicial procedures are accorded to the building owner. Only when it is determined that violations do exist, might quasi-judicial actions take place involving enforcement procedures. But the actual inspection as is involved here does not involve a quasi-judicial function.

74 Wis. 2d at 534-35.

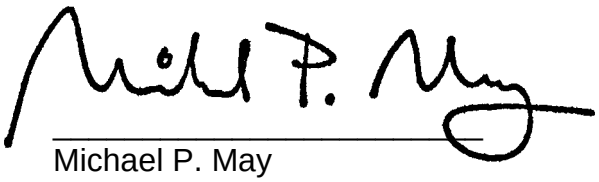
Thus, Coffey and by extension, the city, could be held liable when a member of the executive branch was engaged in executive functions that were ministerial in nature. A legislator who engaged in such executive functions might bring about the same result.

Conclusion.

Much like the federal and state governments, city government in Madison involves application of the doctrine of separation of powers. Certain functions are core functions of the Mayor, and certain functions are core functions of the Council. Other are shared, where the issue will be if an intrusion is an unreasonable burden on the other branch of government.

Mayors and Council members should take care to stay in their lanes, and to exercise shared functions with an aim of reasonable accommodation.

6 Whether a legislator who exercises executive authority is thereby acting beyond their authority, and thus outside of the protection of state statutes requiring indemnification by the City, or outside the protection of the City's insurance policies, is an issue outside the scope of this memo.



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SYNOPSIS: A discussion of the doctrine of separation of powers as applied to city government, and possible consequences of intrusion on core authority of another branch.

CC: All Alders
Maribeth Witzel-Behl