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December 15, 2025

James R. Owczarski, City Clerk
City of Milwaukee
200 East Wells Street, Room 205

RE: Common Council File No. 241536 – A substitute ordinance relating to reporting requirements for certain positions

Dear Mr. Owczarski:

We are returning Common Council File Number 241536 unsigned as to legality and enforceability. The proposed ordinance conflicts with Wis. Stat. § 62.51(2), under which public officials serve at the pleasure of the mayor. The ordinance also conflicts with the mayor's authority as chief executive officer with the duty to "take care that all officers of the city discharge their respective duties." Charter § 3-01.

The proposed ordinance provides:

350-248. Reporting Requirements for Footnoted Positions. Each employee with an annual reporting footnote designation in the positions ordinance shall annually:

1. Contact each member of the common council for the purpose of obtaining feedback from each council member relating to that employee's performance in their position using the appropriate form provided by the department of employee relations.
2. Report to the common council on the results of the feedback obtained.

See Common Council File No. 241536.

The affected employees are mayoral appointees; all but two of whom are "public officials" under Wis. Stat. § 62.51. The proposed ordinance subjects these mayoral

appointees to a job performance review conducted by individual alderpersons. Attached to the legislative file is a job performance evaluation worksheet to facilitate the alderpersons' review of the mayoral appointees' job performance, including a checklist of "Executive Expectations."

The common council possesses a broad grant of authority over "management and control of the . . . public service," "[e]xcept as elsewhere in the statutes specifically provided." Wis. Stat. § 62.11(5). This power "shall be limited only by express language." *Id.* The common council's legal authority over the public service consists chiefly of the *legislative* power to create or eliminate positions and to establish the salaries to be paid such positions. City Att'y Op., Nov. 19, 1979, at 3.

Under Wis. Stat. § 62.51(2), the common council is also authorized to confirm the statutorily-enumerated public officials, or their equivalents, appointed by the mayor. These public officials, however, serve at the pleasure of the mayor. § 62.51(2). Accordingly, the mayor has final authority in assessing the job performance of these mayoral appointees.

The power to confirm public officials every four years does not grant the common council the authority to require that they participate in annual performance reviews conducted by the common council and its members. The common council has no authority to hire, fire, discipline, supervise, promote, or demote these public officials. Accordingly, the common council cannot compel the mayoral appointees to participate in a job performance evaluation system in which the mayoral appointees are answerable to the common council or its individual members.

Moreover, the proposed ordinance conflicts with the City Charter, which assigns to the mayor, as the chief executive officer, the duty to "take care" that the state laws and city ordinances are observed and enforced and that the city officers execute their duties. City Charter § 3-01. The Wisconsin Legislature conferred the following authority on the mayor:

The mayor shall take care that the laws of the state and the ordinances of the city are duly observed and enforced; and that all officers of the city discharge their respective duties. He shall from time to time give the common council such information and recommend such measures as he may deem advantageous to the city. The mayor shall be the chief executive officer

Charter § 3-01; *see also* 1874 Wis. Laws, ch. 184, subch. III, § 2.¹

¹ Through the above-cited 1874 session law, the Wisconsin Legislature revised, consolidated, and amended the 1852 Charter and prescribed the mayor's executive authority in its present form.

While the common council cannot compel the mayoral appointees to participate in the proposed job performance evaluation system, communication between department heads and the common council is essential to good government and accountability. To that end, the common council may require mayoral appointees, or their departments, to report on the execution of policies enacted by the common council. Such reporting requirements are established throughout the Milwaukee Code of Ordinances. The annual budget process also provides an opportunity for the common council's finance and personnel committee to question departments and department heads regarding their execution of policies adopted by the common council, more generally, as well as the needs of the departments in the next fiscal year.

Aside from these reporting opportunities, the extent to which the common council may compel communication from department heads regarding their general performance as leaders of their departments, without interfering with the mayor's executive's power, is not entirely clear. Efforts to mandate communication by department heads through legislation must give due consideration to the separation of powers set forth in the City Charter and the distinctions between executive and legislative powers recognized by Wisconsin courts. These principles limit the common council's authority to control the departments' execution of the common council's policies as promulgated by ordinances and resolutions.

The *constitutional* requirement of separation of powers has not historically applied to municipal government. City Att'y Op., Jan. 27, 1987. Unlike the federal and state governments, which derive their separation of powers from the United States and Wisconsin constitutions, respectively, at the municipal level, the separation of powers is instead based on state statutes. Thus, as discussed below, the Wisconsin Supreme Court long ago recognized that the Wisconsin Legislature applied separation of powers principles in establishing the office of the mayor and the common council in the City's Charter. *See* 1874 Wis. Laws., ch. 184, subch. III, § 2.

The common council's powers as set forth in section 62.11(5) of the Wisconsin Statutes do not extend to execution of the laws, a broad power that resides in the mayor as chief executive officer under Charter § 3-01. In an early case involving the City of Milwaukee, the Wisconsin Supreme Court analogized the mayor's authority under Charter § 3-01 to the chief executive officer authority conferred on the President of the United States and the governor of the State of Wisconsin. *State ex rel. Davern v. Rose*, 140 Wis. 360, 366, 122 N.W. 751 (1909); *see also* City Att'y Op., Apr. 24, 1986. In *Davern*, the court explained:

In organizing the government of the city of Milwaukee the legislature followed the general lines of the governments of the United States and of the several states *in creating legislative and executive departments and officers, mainly independent of each other*. The charter provided for a mayor having, within the limited territory, the substantial characteristics of

a chief executive in analogy to the President of the United States and the governors of the several states. The charter declared that the mayor should be “the chief executive officer and the head of the fire department and of police in said city,” and that he should “take care that the laws of the state and the ordinances of the city are duly observed and enforced.” These expressions signify the conferring of all the powers of a chief executive, except as elsewhere limited, with the necessary right of discretion and judgment.

Id. (emphasis added).

The *Davern* court also emphasized the broad nature of the mayor’s executive power: the mayor “is in no sense a mere ministerial officer to perform only acts as to which the legislature has exercised all discretion and judgment and made him a mere implement of expression.” *Id.* Instead, the court explained, “the words of the charter go much further... [and] indicate reliance in his discretion rather than mere ministerialism.” *Id.* at 367.

The Wisconsin Supreme Court again compared the authority of the mayor to the governor in *State ex rel. Roelvink v. Zeidler*, in which the court held that the mayor, like the governor, had authority under the “take care” provision of the charter to question the validity of a resolution and “is not to be compelled by mandamus to execute a contract provided by an *invalid* ordinance or resolution.” 268 Wis. 34, 42-43, 66 N.W.2d 652 (1954) (“The mayor, as chief executive of the city, occupies a position of responsibility comparable to that of the governor of the state in a matter of this nature.”).

Recent Wisconsin court decisions have further defined the distinctions between executive and legislative authority. For example, in a case interpreting the county executive’s statutory “take care” duty as the chief executive officer of Outagamie County, the Wisconsin Court of Appeals held that:

“Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them, or appoint the agents charged with the duty of such enforcement.” *See* 2A McQuillin, Municipal Corporations § 10.06 at 311 (3d ed. 1996). “The crucial test for determining what is legislative and what is administrative has been said to be whether the ordinance is one making a new law, or one executing a law already in existence.” *Id.*

Schuette v. Van De Hey, 205 Wis. 2d 475, 480-81, 556 N.W.2d 127 (Ct. App. 1996). In *Schuette*, the county executive issued an executive order terminating all farm leases near the county airport after determining that the county board’s ordinance inadequately addressed safety concerns. *Id.* at 478. Applying the statutes conferring legislative and administrative authority on the county board and county executive, respectively, the court determined that the county zoning ordinance setting forth the conditions for farm land

leases at the airport was one of “overall policy rather than a matter of administration of existing law.” *Id.* Therefore, the court declared that the executive order was void and of no legal effect, having encroached into the legislative authority of the board. *Id.* at 482.

In a recent Wisconsin Supreme Court decision involving the constitutional separation of powers at the state level, the court relied, in part, on *Schuette*’s definition of the legislative power:

[T]he “legislative power” ... “is the authority to make laws, but not to enforce them.” *Koschkee v. Taylor*, 2019 WI 76, ¶11, 387 Wis. 2d 552, 929 N.W.2d 600 (quoting *Schuette v. Van De Hey*, 205 Wis. 2d 475, 480-81, 556 N.W.2d 127 (Ct. App. 1996)). The legislative power encompasses the ability to determine whether there shall be a law, to what extent the law seeks to accomplish a certain goal, and any limitations on the execution of the law. *Id.*; see also *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 505, 220 N.W. 929 (1928); *SEIU*, 393 Wis. 2d 38, ¶1 (“Legislative power is the power to make the law, to decide what the law should be.”).

Evers v. Marklein, 2024 WI 31, ¶ 12, 412 Wis. 2d 525, 8 N.W.3d 395 (“*Evers I*”).

The *Evers I* court expounded further upon the governor’s executive authority under the “take care” provision. Just as the *Davern* court held that the City Charter confers discretionary power on the mayor and renders the mayor “no mere implement of [the council’s] expression,” the Wisconsin Supreme Court held that:

The executive branch’s role is to effectuate the policies passed by the legislature. The “executive, however, is not a legislatively-controlled automaton. Before executing, he must of necessity determine for himself what the law requires him to do.” . . .

In executing the law, the executive branch must make decisions about how to enforce and effectuate the laws . . . Put simply, “the legislature’s authority comprises the power to make the law, whereas the executive’s authority consists of executing the law. The distinction between the two has been described as the difference between the power to prescribe and the power to put something into effect[.]” *SEIU*, 2020 WI 67, 393 Wis. 2d 38, ¶95, 946 N.W.2d 35. Neither the legislature nor the executive “ought to possess directly or indirectly, an overruling influence over the other[] in the administration of their respective powers.” *The Federalist* No. 48, *supra*, at 332 (James Madison).

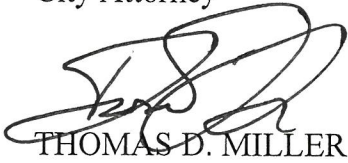
Evers I, 2024 WI 31, ¶¶ 15-16.

Applying these principles, the common council has broad legislative authority to prescribe the policies to be executed by the departments. In turn, the power to execute those policies resides in the mayor and the public officials who serve at the mayor's pleasure. The law here is broadly stated and while the proposed ordinance is clearly violative of Wis. Stat. § 62.51(2) and City Charter § 3-01, the validity of any substitute ordinance along similar lines will depend on the details of the legislation.

Very truly yours,



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