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April 3, 2017

Commissioner Rocky Marcoux
Department of City Development
809 North Broadway, 2nd Floor
Milwaukee, WI 53202

Re: Opinion Regarding Service of Summons to Notify Non-Abutting
Property Owner of a Vacation Petition

Dear Mr. Marcoux:

In a letter dated March 3, 2017, you requested this office's opinion concerning whether a non-abutting property owner must be personally served with notification of a vacation petition. In your letter, you stated that upon receipt of a petition to vacate a portion of the public way from a private property owner, Departments of City Development and Public Works and the Office of the City Clerk follow procedures set out in Wis. Stat. § 62.73 and sec. 308-28-7 of the Milwaukee City Ordinances ("MCO"). It is our understanding that currently when an entire street or alley is proposed to be vacated, all abutting property owners receive notice via personal service and when only a portion of a street or alley is proposed to be vacated all property owners within the same block, regardless of whether their property abuts the proposed street or alley to be vacated, receive notice via personal service. You have asked for clarification as to whether personal service on non-abutting property owners is required under the law or whether that notice can be mailed or served some other way besides personal service.

To answer your question, a discussion of the two methods by which vacation proceedings may be initiated and the notice requirement tied to each method, as well as a review of the legislative history, follow. Wis. Stat. § 62.73(1) provides that discontinuance of public grounds, including vacation in whole or in part of streets and alleys, shall be commenced: "either by a petition presented to the common council signed by the owners of all property which abuts the portion of the public facilities proposed to be vacated, or by a resolution adopted by the common council." MCO 308-28-1 contains similar language and specifically refers to Wis. Stat. § 62.73.



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Wis. Stat. § 62.73(2) outlines notice requirements for a public hearing to be held on the proposed vacation: “all petitions or resolutions shall be referred to a committee of the common council for a public hearing on the proposed discontinuance and at least 7 days shall elapse between the date of the last service and the date of the hearing. A notice of hearing shall be served on the owners of record of all property which abuts the portion of the public facilities proposed to be vacated, in the manner provided for service of a summons.”

MCO 308-28 outlines the procedure for vacating a street or alley and provides some direction regarding notice of hearings under MCO 308-28-7:

Owners of record of all property which abuts upon the street or alley proposed for vacation shall be notified by the city clerk of the common council committee hearing in the manner specified in s. 62.73, Wis. Stats. If only a portion of a street or alley is proposed for vacation, the city clerk shall notify owners of record of all property in the block in which that portion of the street or alley is located.

It is the second sentence quoted above that has caused you to request this opinion. That sentence requires additional notice beyond what is required by Wis. Stat. § 62.73 and it does not specify how that notice is to be provided.

The practical application of the notice requirements to abutting property owners in Wis. Stat. § 62.73(2) and MCO 308-28-7 differs depending on which method is utilized to initiate vacation proceedings. When abutting property owners petition to vacate, no notice to abutting property owners is provided because the petition the abutting property owners sign contains a waiver of such notice: “Owners waive notice of the public hearing on the petition, and all who will take possession of property to which the benefit of public improvements will accrue as a result of this vacation, waive right to notice and hearing and agree to the special assessments for such benefits.” The notice required by Wis. Stat. § 62.73(2) is actually provided, however, when common council initiates the process to vacate public grounds. Thus, when common council initiates the vacation proceedings, Wis. Stat. § 62.73(2) and MCO 308-28-7 require that notice of the public hearing regarding the vacation be issued to abutting property owners and be served in the same manner as a summons (i.e. personal service).

While the practical application of the notice requirements to abutting property owners depends on the method of how vacation proceedings commence, the notification to non-abutting property owners depends on the type of vacation. In practice, when vacation proceedings commence by either abutting property owners or common council, non-

abutting property owners have been notified by personal service of the notice, but only when a portion of the public way is proposed for vacation (MCO 308-28-7). This practice likely began because MCO 308-28-7 directs that notice be provided per Wis. Stat. § 62.73 for abutting property owners, but in the very next sentence regarding notice to non-abutting property owners, MCO 308-28-7 does not reference Wis. Stat. § 62.73 or provide any guidance as to how the notice is to be provided. Thus, the City Clerk likely inferred that the notice must be provided to non-abutting property owners in the same way that abutting property owners were notified because the ordinance provided no other direction.

A review of the legislative history provides some insight into the evolution of the notice requirements and procedures for vacation proceedings. In 1979, MCO 2-54(4) stated that for alley vacations, the City Clerk “shall notify by first class mail all owners of record of properties on the involved block relative to any proposed alley vacation at least one week prior to the appropriate common council committee hearing on said vacation.” Historically, then, both abutting and non-abutting property owners received the same type of notice for any proposed alley vacation. The 1979 ordinance language was amended in 1986 per a recommendation of the City Attorney’s Office in an April 4, 1986 opinion (copy attached). That opinion recommended removing the notification language from MCO 2-54(4) because the waiver of notice was in the petition signed by abutting property owners and because Wis. Stat. § 66.297(2) (since renumbered to Wis. Stat. § 62.73) required notice to abutting property owners if common council, rather than the abutting property owners, initiated vacation proceedings. The effect of this amendment was twofold. First, it saved having to notify abutting property owners who had signed the petition to vacate, which contained a waiver of the notice requirements. Secondly, though, it removed any requirement to notify non-abutting property owners of alley vacations occurring within their block. That requirement was added back into the MCO in 1998 with the creation of MCO 308-28.

While MCO 308-28 was created in 1998 “to codif[y], clarif[y], and simplif[y] the city’s procedure for vacating a street or alley under its control,” (Common Council File No. 980680) the language of MCO 308-28-7 did anything but clarify the notice requirement. Although the language of MCO 308-28-7 differs from the language of its predecessor MCO 2-54, both added a notification requirement for non-abutting property owners not required by state statute. In MCO 2-54 it applied to all alley vacations and in the current ordinance it only applies to partial alley or street vacations and does not specify how that notice is to be provided. It is a reasonable inference that the City Clerk continues to notify non-abutting property owners in the same manner abutting property owners are notified because MCO 308-28-7 does not specifically outline a different form of notification to non-abutting property owners. It is unclear why this additional

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requirement was added to the MCO in 1998 as it is not required by state statute and there seems to be no rationale for providing notice to non-abutting property owners within the same block as the alley or street to be vacated only in cases where just a portion of the alley or street is being vacated, especially when such notification is not required for full alley and street vacations.

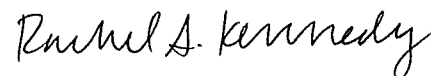
Given the lack of clarity as to how non-abutting property owners are to be notified of partial vacations and the lack of rationale for providing such notice in the first place, this office recommends that MCO 308-28-7 be amended to provide clear direction specifying when and how non-abutting property owners are notified of vacations or perhaps to remove that requirement entirely and limit notifications to just abutting property owners as required by state statute.

If this office can be of any further assistance in this matter, or in the amendment of MCO 308-28-7, please do not hesitate to ask.

Very truly yours,



GRANT F. LANGLEY
City Attorney



RACHEL S. KENNEDY
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CITY OF MILWAUKEE

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April 4, 1986

Mr. Ben E. Johnson
City Clerk
Room 205 - City Hall

RE: Procedure--Vacation of street and alleys

Dear Mr. Johnson:

In a communication dated February 25, 1986 directed to our office, you outlined the present procedure being used with respect to the vacation of streets and alleys, and asked several specific questions with regard to that procedure. The following is in response to those specific questions.

First, you asked whether or not vacation proceedings must be referred to a standing committee of the Common Council for public hearing and then considered by the Council on the report of the committee. The answer to this question is "Yes." Subsection 2 of Sec. 66.297, which governs vacations in cities of the first class, specifically provides that all petitions or resolutions shall be referred to a committee of the Common Council for a public hearing. Thus, whether the proposed vacation is based on a petition of the abutting property owners or on the Council's own motion, the matter must be referred to a committee for a public hearing.

Your second question inquires as to whether or not the seven day notice prescribed in the statute must be provided to owners of abutting property for both street and alley vacations. You further indicate that you are now giving notice only in alley vacation situations as directed by Sec. 2-54(4) of

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the Milwaukee Code of Ordinances. The statute requires that notice be given whenever the vacation of highways, streets, and alleys, grounds, waterways, public walks and other public grounds are to be vacated; however, in the case where such vacations are based upon the petition of the abutting owners, the petitions used by the City contain a waiver of notice and hearing of both the vacation proceeding and the levying of special assessments which may accrue as a result of the vacation. This waiver of notice is contained in all petitions whether they be for the vacation of an alley or a street. Consequently, the special notice requirement for alley vacations contained in Sec. 2-54(4) of the Milwaukee Code of Ordinances is unnecessary. It makes little sense to obtain a waiver of notice from all petitioners and then give a notice of a hearing to those petitioners who have petitioned for the vacation of an alley and not to those who have petitioned for the vacation of a street. Therefore, our office would recommend that that section of the Code be repealed.

In those instances, however, where the Council is proposing a vacation by its own resolution, the notice requirements of Sec. 66.297(2) apply. In that case, a seven day notice must be given to all abutting property owners, and the notice must be served in the manner provided for the service of a Summons. That is, the provisions of Sec. 801.11 of the Wisconsin Statutes must be followed.

For this reason the answer to your third question which asks whether the seven day notice can be served by first class mail is "No."

In summary, then, our opinion is as follows. In all vacation proceedings commenced by a petition of the abutting property owners, the petitioners specifically waive any right to notice of hearing. But for the ordinance that requires notice of hearing in the case of alley vacations, the notice requirement could be entirely dispensed with if the ordinance were

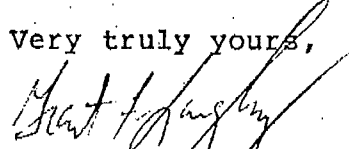
Ben E. Johnson
City Clerk

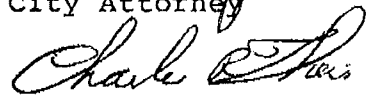
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repealed. In all cases where the Council commences the vacation proceeding by its own resolution, the notice requirements apply, and notice must be given in the manner provided for the service of a summons.

Very truly yours,


GRANT F. LANGLEY
City Attorney


CHARLES R. THEIS
Assistant City Attorney

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