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To: County Board Chairman Theodore Lipscomb, Sr.

From: Corporation Counsel Margaret C. Daun *MCA*
Assistant Corporation Counsel Nicholas R. DiUlio *NAD*

Date: June 23, 2017

Re: Effective dates of County Ordinances and Resolutions

Summary

It is the opinion of the Office of Corporation Counsel (OCC) that:

1. A new ordinance or an ordinance amendment¹ becomes effective the day it is published in print in the Daily Reporter newspaper.² Generally, this occurs within 2-3 business days of a request for publication by the County Clerk, following:
 - a. Signature by the Executive,
 - b. Override of the Executive's veto by the Board, or
 - c. If no action is taken by the Executive, the day of the next board meeting after passage.
2. A resolution is effective immediately upon signature of the Executive, the overriding of the Executive's veto by the Board, or, if no action is taken by the Executive, the day of the next Board meeting after passage. Only ordinances are published by the County Clerk; resolutions and other board actions are not.³

¹ Throughout this memorandum, any reference to an "ordinance," should be understood to include the enactment of a new ordinance and/or the adoption of an amendment to an already existing ordinance.

² Virtually all files containing either newly proposed ordinances or amendments to existing ordinances contain language expressly stating that the ordinance or the amendment shall take effect upon "passage and publication." The effective date of the rare proposed ordinance or amendment without such language would be as described herein for a resolution. In keeping with this past practice and to clarify the effectiveness of all ordinances, the OCC advises that the Board may want to consider codifying that an ordinance or amendment thereto shall take effect upon passage and publication of the ordinance as a Class 1 notice under ch. 985, Wis. Stats., after all other applicable statutory prerequisites have been met. [CONSIDER FURTHER ADVISING CLARIFICATION OF CORP COUNSEL SIGNATURE AS TO FORM – OR SHOULD IT BE THE CLERK?]

³ If a resolution is blended with an ordinance, the more restrictive standard will apply, and both the resolution and ordinance will take effect upon publication, as with an ordinance.

Detailed Analysis

State law requires, “Whenever a board enacts an ordinance under this chapter the clerk shall immediately publish the ordinance... as a class 1 notice.”⁴ Wis. Stat. §59.14 (1). This must be a printed publication in the county paper of record (the Daily Reporter) under ch. 985. State law is unclear whether the effectiveness of an ordinance is tied to publication, but the opinion of OCC is that an ordinance must be published before it is effective.

An ordinance is required to be presented to the County Executive before it is effective. “Every resolution adopted or ordinance enacted by the board shall, before it becomes effective, be presented to the county executive.” Wis. Stat. §59.17(6). The Executive then may (1) sign the ordinance, (2) veto the ordinance, or (3) take no action. *Id.* If signed, if the veto is overridden, or if the Executive decides to take no action, the ordinance is sent by the Office of the County Clerk for publication in the Daily Reporter, as outlined below.

Signed by the Executive

If the Executive signs the ordinance, it is sent out for publication by the County Clerk after it is returned to the Clerk by the Executive. The Clerk typically sends the ordinance for publication to the Daily Reporter on the day it is received,⁵ and will also send a copy of the ordinance via electronic mail to Municode, the online repository of county ordinances and enactments. The Daily Reporter will then publish the ordinance in a hardcopy print edition within 2-3 business days. The day the ordinance is first published in the Daily Reporter is the official effective date.

Resolutions are effective immediately upon signature by the Executive, as they are not published.

Veto by Executive Overridden

If the Executive vetoes a resolution or ordinance, he must do so before the next regularly scheduled meeting of the Board, and the vetoed resolution or ordinance is then presented to the Board at that next meeting for a vote to override the veto. “If, after such reconsideration, two-thirds of the members-elect of the board agree to adopt the resolution or enact the ordinance or the part of the resolution or ordinance objected to, it shall become effective on the date prescribed but not earlier than the date of passage following reconsideration.” Wis. Stat. §59.17(6). The Board is not required to act on a veto override immediately; non-budgetary vetoes can be referred to committee or tabled indefinitely (and thus can be taken up at a later time). Milw. Cty. Ord. §1.04(f).

Upon the override of a veto by the Board, the County Clerk will request publication of the ordinance, in accordance with Wis. Stat. §59.14, in the same manner as when an ordinance is

⁴ Per statute, a notice can be either the entire text of the ordinance or a summary. The Office of the County Clerk typically publishes a summary of the ordinance as a cost-savings measure.

⁵ Signed ordinances received by the Clerk just before close of business may be sent out the next day, but the clear majority are transmitted for publication the same day.

signed by the Executive, described above. An ordinance passed by a veto override is effective on the day it is first published in the Daily Reporter.

Resolutions that have been vetoed by the Executive and overridden by the Board are effective immediately upon the passage of the veto override.

No-Action by Executive

The Executive also has the authority to take no action in response to an ordinance or resolution. Wis. Stat. section 59.17(6) specifies, "If any resolution or ordinance is not returned [or signed] by the county executive to the board at its first meeting occurring not less than 6 days, Sundays excepted, after it has been presented to the county executive, it shall become effective unless the board has recessed or adjourned for a period in excess of 60 days, in which case it shall not be effective without the county executive's approval."

If the Executive takes no action on a proposed ordinance contained in a file which contains the language "effective upon passage and publication," the proposed ordinance becomes effective following publication in the Daily Reporter upon request of the County Clerk after first Board meeting after the initial Board meeting in which the ordinance was first adopted (so long as the ordinance was initially approved by a proper majority vote of the Board and was presented to the Executive no less than seven days prior to the next Board meeting). See Wis. Stat. §§ 59.02(2), 59.17(6).

If the Executive takes no action on a resolution, the proposed resolution becomes effective as soon as the Board's next meeting is gavelled to order (so long as the resolution was initially approved by a proper majority vote of the Board and was presented to the Executive no less than seven days prior to the next Board meeting). See Wis. Stat. §§ 59.02(2), 59.17(6).

How to Address No-Action Items During the Meeting

The Clerk publishes the agenda for Board meetings, which includes a list of the items that have not been acted upon by the Executive at that time of the agenda's publication.⁶ To be clear, under state statute, Wis. Stat. § 59.17(6), despite the publication of the "no action" list in the agenda, the Executive retains the authority to act on an ordinance or resolution via signature or veto up until the minute a Board meeting is gavelled to order.

As to ordinances that remain unacted upon at the commencement of the subsequent Board meeting and include language predicating that ordinance's effectiveness upon passage "and publication," the OCC advises that when the Board reaches the appropriate item in the published agenda during

⁶ Board agendas are typically published on the Monday or Tuesday prior to a regularly scheduled Thursday Board meeting. Files that have not been acted upon by the Executive are listed in the Board agendas as "Matters Returned Unsigned by the County Executive from the Previous County Board Meeting." It is the typical practice of the Executive to return all files to the Clerk, whether signed, vetoed, or if no action has been taken. Technically, the Executive could simply elect to not return a file to the Clerk (i.e., take no action), but that would have no impact on the analysis contained herein.

the meeting, the Clerk should announce that, “With respect to File ##-###, Ordinance ##-## shall take effect upon publication following this meeting.” This represents a departure from current practice. The Clerk’s current practice, which has been the historic practice for many years, is to announce that an ordinance upon which the Executive took no action “*remains in full force and effect.*” It is the opinion of the OCC that this language is misleading since publication of the ordinance is required to become effective and the ordinance therefore *has not yet taken effect.* Thus, the OCC recommends that the Clerk instead state that, “With respect to File ##-###, Ordinance ##-## shall take effect upon publication following this meeting,” when the Board reaches the appropriate item in the published agenda during the meeting.

As to ordinances that remain unacted upon at the commencement of the subsequent Board meeting that *omit* any language conditioning effectiveness upon passage “and publication,” the OCC advises that when Board reaches the appropriate item in the published agenda during the meeting, the Clerk should announce that, “With respect to File ##-###, Ordinance ##-## took effect at the commencement of this meeting.” This represents a departure from current, historical practice as noted above. Although publication is not required in this circumstance, it is nonetheless the opinion of the OCC that use of the phrase “remains in full force and effect” is nonetheless misleading, since it could be reasonably inferred to mean that the ordinance took effect at the time of the first board meeting, which is contrary to state statute. Thus, the OCC recommends the Clerk instead state that, “With respect to File ##-###, Ordinance ##-## took effect at the commencement of this meeting,” when the Board reaches the appropriate item in the published agenda during the meeting.

As to resolutions that remain unacted upon at the commencement of the subsequent Board meeting, the OCC advises that when the Board reaches the appropriate item in the published agenda during the meeting, the Clerk should announce that, “With respect to File ##-###, the accompanying resolution took effect at the commencement of this meeting.” For the same reasons noted above, the OCC advises the use of this new language to avoid any confusion among the general public or the courts.

Propriety and Status of a No-Action Message

The Executive, in taking no action on an ordinance, may draft a no-action message, which is properly part of the legislative record. The Executive’s authority to draft a no-action message arises because the deliberate exercise of no action has an affirmative legislative impact – it results in the proposed legislation becoming law. As such, non-action is a legislative act largely indistinguishable from the Executive affirmatively opting to sign or veto legislation. *See* Wis. Stat. § 59.17(6); *Winninger v. City of Waupun*, 197 N.W. 249, 252 (1924) (holding that approval or veto is a legislative act and not a ministerial act); *Wis. Carry, Inc. v. Madison*, 2017 WI 19 ¶25, 373 Wis. 2d 543, 892 N.W.2d 233 (“The label given to a legislative device is not dispositive—one identifies the device’s taxonomy functionally.”). The Executive’s power to take no action and thus permit legislation to become law is a privilege that the executive enjoys, distinct from the acts and powers available to the board. By extension then, a no-action message is properly part of the

“legislative record,”⁷ since it is part of the legislative process. *See State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43 ¶13, 334 Wis. 2d 70, 798 N.W.2d 436. In addition, if a no-action message is issued before enactment, it can be properly relied upon by courts to interpret and construe the ordinance or resolution that is the subject of the message if its meaning is disputed later.⁸

Conclusion

An ordinance is effective the day it is published in the Daily Reporter newspaper, which is 2-3 business days after the following:

1. The ordinance is signed by the Executive and the Clerk requests publication, typically on the same day, in the Daily Reporter;
2. The Executive’s veto is overridden by the Board and the Clerk requests publication, typically on the same day, in the Daily Reporter; or
3. If no action is taken by the Executive, the Clerk will send out the ordinance for publication typically the same day that the Board first meets following the non-action by the Executive.

⁷ Any no-action message by the county executive is part of the official legislative record, which the County Clerk must ensure is properly maintained. State law requires the County Clerk to forward “all proceedings of the board, and of all printed reports made under authority of such board or by the authority of other county officers” to the county historical society. Wis. Stat. §59.23 (2)(p). Legislative history is “[t]he background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates.” *See Black’s Law Dictionary*, p. 911 (7th Ed., 1999). “It is apparent that an explanatory note contained in an appendix to the budget bill is a message from the governor, through his policy agency, to the legislature of the executive’s interest in the effects and intent of a section contained in that bill. It is also apparent that a court can ascertain that the legislature adopted the executive’s intent behind a section contained in the budget bill if it goes through legislative scrutiny without amendment.” *See Milwaukee County v. Labor and Indus. Review Comm’n*, 113 Wis. 2d 199, 205, 335 N.W.2d 412, 416 (Ct. App. 1983). By analogy, just as an explanatory note attendant to a budget is properly part of the legislative history, so too is a no-action message, since that no-action message is part of the “background and events leading to the enactment of a [law].” Furthermore, just as this court inferred that the legislature “adopted the executive’s intent behind a section [of the budget bill]” if it adopts it without amendment, then the Executive’s legislative intent could also be imputed from the County Board’s stated policy intent if he were prevented from submitting a no-action message of his own (or if it was not properly part of the legislative record). If the executive’s rationale for no-action differs from the Board’s rationale for passing the resolution or ordinance, it is appropriate that he be permitted to express those views and have them included in the legislative record.

⁸ County ordinances and session laws are interpreted by courts in the same manner as statutes. *Stoker v. Milwaukee County*, 2014 WI 130 ¶17, 359 Wis. 2d 347, 857 N.W.2d 102. This means that courts may look at statements made by the executive, including a no-action message, to interpret county ordinances or resolutions, just as courts routinely look to veto messages to interpret statutes. *See, e.g., Juneau County v. Courthouse Employees*, 221 Wis. 2d 630, 649, 585 N.W.2d 587 (1998); *Wisconsin Patients Compensation Fund v. St. Paul Fire & Marine Ins. Co.*, 116 Wis. 2d 537, 342 N.W.2d 693 (1984); *Landwehr v. Landwehr*, 2006 WI 64, ¶ 25, 291 Wis. 2d 49, 68, 715 N.W.2d 180, 189; 73 Op. Atty’s Gen. 92, 96 (1984); compare Wis. Stat. § 59.17(6) with Wis. Const. Art. IV, § 23a. In addition, in *Medlock v. Schmidt*, 29 Wis. 2d 114, 121–22, 138 N.W.2d 248, 252 (1965) (internal citations omitted), the Wisconsin Supreme Court stated that “an executive message published [in legislative journals] may be used by a court in determining the legislative history of a particular act of the legislature.” By not specifying veto message in this decision, the Supreme Court arguably intended that all executive messages, veto or otherwise, are a properly part of the legislative history.

A resolution, since it is not published, is effective immediately upon signature by the Executive, a veto override by the Board, or the commencement of the next Board meeting following passage of the resolution, if no action is taken by the Executive.
