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

Date: January 27, 2015

FORMAL OPINION # 2015-001

TO: Mayor Paul Soglin
Council President Chris Schmidt

FROM: Michael P. May
City Attorney

RE: Reconsideration of Council Vote on Override of Mayoral Veto

You have asked my opinion whether, under the circumstances described below, the Madison Common Council may reconsider its vote of January 20, 2015, in which it failed by one vote to override the Mayor's veto of amendments to the City's billboard regulatory ordinance, Legistar No. 35036.

Factual Background.

At its meeting on January 6, 2015, the Common Council adopted an ordinance making changes to the City's billboard regulations in chapter 31, MGO, Legistar No. 35036. Following the meeting, the Mayor vetoed the legislation and delivered his veto message to the Clerk. The matter was then placed on the agenda of the next regular Council meeting for January 20, 2015. At that meeting, the Council voted 13-6 (one member having an excused absence) to override the veto. Under State law and the Council's rules, 14 votes were needed to override the veto. The Council's rules allow an absent member to move reconsideration. A copy of the Legistar Master Report on the file, as it exits of today's date, is attached as App. A.

Question Presented.

May the Common Council reconsider a failed vote on overriding a Mayoral veto?

Short Answer.

The law is unclear, and does not compel a "yes" or "no" answer to this question. Ultimately, it is a policy question to be determined by the Mayor and Common Council.

There is no established rule in Wisconsin. Legislative bodies in Wisconsin and elsewhere have adopted different rules on the matter; those rules are respected by the Courts as internal legislative prerogative. In the few cases from other jurisdictions that

have considered the matter when there are no established rules, a slight majority favor the right of reconsideration. In my judgment, if the issue were presented to a Wisconsin court based upon the existing laws applicable to Madison, it likely would follow the majority rule and allow reconsideration -- but that is not a conclusion I come to with a high level of confidence.

In the first instance, this is a matter committed to the Common Council. Should a motion for reconsideration be made, the chair may rule on whether it is in order. The chair's ruling may be appealed to the body to resolve the propriety of the motion.

The Council should, in any event, adopt an amendment to chapter 2, MGO, to establish a procedural rule on this matter and eliminate confusion in the future.

Legal Analysis.

A. Statutes and Ordinances.

Sec. 62.09(8)(c), Wis. Stats., provides:

> **(c)** The mayor shall have the veto power as to all acts of the council, except such as to which it is expressly or by necessary implication otherwise provided. All such acts shall be submitted to the mayor by the clerk and shall be in force upon approval evidenced by the mayor's signature, or upon failing to approve or disapprove within 5 days, which fact shall be certified thereon by the clerk. If the mayor disapproves the mayor's objections shall be filed with the clerk, who shall present them to the council at its next meeting. A two-thirds vote of all the members of the council shall then make the act effective notwithstanding the objections of the mayor.

Sec. 3.03(2), MGO, mimics the State law:

> 2) The Mayor shall have the veto power as to all acts of the Council, except such as to which it is expressly or by necessary implication otherwise provided. All such acts shall be submitted to the Mayor by the Clerk and shall be in force upon the Mayor's approval evidenced by Mayor's signature, or upon the Mayor failing to approve or disapprove within five (5) days, which fact shall be certified thereon by the Clerk. If the Mayor disapproves the Mayor shall file his or her objections with the Clerk, who shall present them to the Council at its next meeting. A two-thirds (2/3) vote of all the members of the Council shall then make the act effective.

Sec. 2.21, MGO, provides:

> **2.21 RECONSIDERATION OF QUESTION.** It shall be in order for any member who voted in the affirmative on any question which was adopted, or for any member who voted in the negative when the number of affirmative votes was insufficient for adoption to move a reconsideration of such vote, at the same

> or next succeeding regular meeting of the Council. It shall be in order for any member who was, due to an excused absence, not present at the time the question was considered to move reconsideration of such vote at the next succeeding regular meeting of the Council. A motion to reconsider having been lost shall not be again in order. A motion to reconsider shall not be in order when the same result can be obtained by another motion.

B. Application of Statutes and Ordinances.

Unfortunately, none of the statutes or ordinances directly address whether a legislative vote on the override of a veto is subject to reconsideration. There is little to be gleaned from the language directly.

It has been suggested that the language on reconsideration in sec. 2.21, MGO, answers our question, in that it says in part (emphasis added):

> It shall be in order for any member who voted in the affirmative <u>on any question</u> which was adopted . . . to move a reconsideration of such vote,

However, the "on any question" language cannot be taken at face value, since a number of matters are not subject to reconsideration pursuant to Robert's Rules of Order. These include a motion that may be renewed, an affirmative approval that has been partly carried out (including entry into a contract), a motion to reconsider, a motion to adjourn, division of the assembly (roll call), and a division of the question. (See Robert's Rules of Order, 11th Ed., sec. 37, page 318 l.17 ff.; Table of Rules related to Motions, Part II). [1]

In an opinion by one of my predecessors, Edwin Conrad, from December 1, 1970, (attached as App. B), Mr. Conrad considered the Mayoral veto of the approval of a license for the Dangle Lounge. As it happened, the Common Council failed to meet at its next regularly scheduled date, and the issue was whether the Council could then consider the veto at its next subsequent meeting. Mr. Conrad opined that it could, finding no real authority, but reasoning that to rule otherwise would deprive the Council of any chance to consider the veto. In that opinion, Mr. Conrad also states that (Op. at 3):

> I give this opinion with some reservation in view of the fact that the Wisconsin Statutes require that the Mayor's veto be disposed of at the next meeting of the Common Council and may in no manner be taken care of at a subsequent meeting of the Common Council.

I can find no support for the opinion that the mayoral veto must be "disposed of" at the next regular meeting of the Council. It must be presented to the Council (and that this

1 Because Robert's Rules considers the rules applicable to a legislative body, it nowhere discusses the concept of or procedures for override of an executive veto.

did not occur presumably would have the same troubling impact on Mr. Conrad's decision), but the statute says nothing about when the Council is to take action. Based on this, I advised the Council that it could have, if it desired, refer the veto override to its next meeting. Moreover, even if we infer some rule that the Council must act at the meeting when the veto message is presented, that does not tell us whether the Council's action is subject to reconsideration.[2]

I conclude that the relevant statutes and ordinances do not clearly delineate whether the Council has the authority to reconsider a failed vote on overriding a mayoral veto.

C. Comparison to State and Federal Law.

1. Federal Law and Practice:

A number of older treatises, and a few cases, proclaim a rule that a veto is not subject to reconsideration.[3] All of those authorities, however, refer to the practice adopted by the U.S. House of Representatives, where reconsideration of the veto is not allowed. This rule was first adopted in 1844, and remains the rule in the House of Representatives.[4]

In contrast, the practice in the U.S. Senate is that a failed vote to override is subject to reconsideration. Some trace the practice back to 1856; others note the use of this process by Sen. Robert Byrd, an expert in Senate procedure, in the 1980s.[5]

To the extent one wishes to rely on the precedent of the U.S. Congress, one is left in equipoise. Those authorities that based the rule on the House of Representatives have little lasting influence now that the Senate has a different rule.

2. State Law and Practice:

The rules of the Wisconsin Legislature are clear: Under Assembly Rule 73, a vote on a veto override may not be reconsidered. Under Wisconsin Senate Rule 67, the same applies.[6]

The Council may find these rules persuasive precedent to adopt a rule that no reconsideration of a veto is allowed. However, none of the rules are binding on the

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2 I am also aware of an opinion by Stephen Matty, City Attorney of LaCrosse, in which he urged the Council to adopt a rule that a veto override could not be reconsidered. The opinion notes the divergence of legal precedent discussed in this memo.

3 See, for example, the authorities cited in the legal opinion of H. R. Pollard to the Board of Alderman of Richmond Virginia, dated April 5, 1906, and reprinted in 12 *Virginia Law Journal*, Vol. 12, No. 1, pages 84-87 (1906).

4 See *Veto Override Procedure in the House and the Senate,* Congressional Research Service (Elizabeth Rybicki), July 19, 2010, page 2. Also found at http://www.senate.gov/CRSReports/crs-publish.cfm?pid='0DP%2BP%2CC%3E%23P%20%20%0A-37k

5 *Id.,* p. 4, see also *Guide to Congress,* p. 634-35 (CQ Press, 2013).

6 See Assembly Rules at http://docs.legis.wisconsin.gov/2015/related/rules/assembly, and Senate Rules at http://docs.legis.wisconsin.gov/2015/related/rules/senate.

Common Council. Rather, they are the internal operating rules of the other legislative bodies.

One could argue that these adopted Wisconsin rules represent the long-standing rule for deliberative assemblies. One could also argue that such rules were adopted because, without them, reconsideration would be allowed. Both of these inferences are common in statutory interpretation. Compare, for example, *Lang v. Lang,* 161 Wis. 2d 210, 220, 467 N.W. 2d 772 (1991) (legislature's change in language is presumed to change the law) with *Holmen Concrete v. Hardy Construction,* 2004 WI APP 165, ¶16, 276 Wis. 2d 126, 136, 686 N.W. 2d 705, *review denied,* 277 Wis. 2d 153, 691 N.W. 2d (2004) (not all changes in the statutes show an intent to change the law).[7]

I have not examined the rules of other legislative bodies because I have concluded that they are persuasive, but not binding on the Common Council.

D. *Review of Relevant Cases.*

1. Wisconsin Cases.

I found only two related Wisconsin cases, neither of which answers the question presented.

In *Winninger v. City of Waupun,* 183 Wis. 32, 197 N. W. 249 (1924), Winninger was trying to enforce a contract claim against the City. The contract was initially approved by resolution of the Council but, before the Mayor acted to approve or disapprove the resolution, it was effectively reconsidered and placed on file. The Wisconsin Supreme Court held that there was no binding contract until the Mayor approved the resolution, and that the Council's action, while perhaps slightly irregular, was effective to rescind the resolution.

In considering this, the Court commented on the Mayor's right to veto legislation (182 Wis. at 38):

> The act of the mayor in his approval, or in his disapproval by veto, is not a ministerial act but is a legislative act. It does not direct the doing of something which had been provided for by prior municipal legislation, but on the contrary is an independent attempt at original municipal action.

This language suggests that the mayoral veto is part of the legislative process. One could infer that, like other parts of the legislative process, it is subject to all of the Council's rules, including referral and reconsideration. In fact, it was in part based on this language that I opined that the veto could be referred to a later meeting.

7 Such cases illustrate "Levine's Law of Law," named after former State Bar President Steve Levine: "For every rule of statutory construction, there is an equal and opposite rule of statutory construction."

However, I would not read too much into the *Winninger* case. The case did not involve a mayoral veto or the Council's authority to reconsider a vote on a mayoral veto. While it provides some minor direction, it is not dispositive.

An interesting case is *Maier v. Kalwitz,* 134 Wis. 2d 207, 397 N.W. 2d 119 (Ct. App.), *review denied,* 133 Wis. 2d 484, 400 N.W. 2d 471 (1986), a legal battle over a mayoral veto in Milwaukee.[8] The case is not particularly helpful because, again, it does not rule on the ability to reconsider a veto override vote in the absence of an adopted rule on the topic.

In *Maier,* the mayor's veto was presented to the next Council meeting, which meeting was adjourned to a date before the next regularly scheduled meeting of the Council. The Council had not taken up the veto before adjourning to a date certain. Mayor Maier argued that the Council failed to take up the veto at its next meeting. Relying on Robert's Rules, the court found that a meeting adjourned to a specific time, occurring before the next regular meeting, remained a single meeting of the Council, and the Council could address the veto at the adjourned meeting.

The difficulty with reading much into this is that it did not interpret the Wisconsin Statute applicable to Madison. At issue was a Milwaukee Charter provision that stated that upon presentation of the veto, the Council "shall proceed to reconsider the matter." 134 Wis. 2d at 210. Thus, all parties assumed that the vote must be taken at the next regular meeting. Our statute and ordinance have no similar provision. As the Council considers any changes to chapter 2, this might be a topic worthy of consideration.

2. Cases from Other Jurisdictions.

When we turn to cases from other jurisdictions, we find the majority rule to be that a legislative body may reconsider an executive veto. The two most compelling cases come from New York and Massachusetts.

In *Board of Education of the City School District of the City of New York v. City of New York,* 41 N.Y. 2d 535, 362 N.E. 2d 948 (1977), the Court of Appeals of New York ruled directly on the question of whether the New York State Senate could reconsider a vote it had taken on overriding a gubernatorial veto. The dispute came to the Court of Appeals (the highest court in New York) in a factual situation similar to Madison: without a specific Senate rule on the issue, and a constitutional provision similar to the statute at issue here. The New York provision on veto override did use, as does Wisconsin's Constitution, the word "reconsider" with respect to the veto override, that is, after a veto, the New York House is then to "reconsider" the legislation, as is the Senate. Initially, the Court disagreed that the use of "reconsider" in the Constitution had any parliamentary meaning at all (41 N.Y. 2d at 539):

8 One interesting aspect is that the Mayor was represented by an attorney in the Mayor's office while the defendant alderperson was represented by the City Attorney, Grant Langley.

> It is apparent that by the use of the verb "reconsider" in this constitutional provision it was not intended to refer to the familiar parliamentary procedure . . . by which a deliberative assembly again takes up action it has previously effected, to confirm, to amend or to nullify that action; in short, to "reconsider" in the constitutional sense is not the same as to reconsider in parliamentary usage.

Thus, the Court rejects the contention that to reconsider a vote on a veto amounts to a second reconsideration, contrary to Robert's Rules.

The Court then noted a prior instance in which the Senate voted to reconsider a vote on a veto, stating such instances (41 N.Y. 2d at 541):

> . . . provide evidence of the practical interpretation placed by the Senate on its own rules of procedure, namely, that a motion to reconsider is in order when the Senate is disposing of a main motion to override a Governor's veto. It would be inappropriate for the courts to intervene to abrogate the Senate's views as to the conduct of its own legislative procedures other than in some cases to enforce a constitutional prescription.

The Court found that the motion to reconsider was no different than the other standard rules that the Senate had applied to the veto override, such as a motion to table and take off the table, concluding (*Id.)*:

> Even if the provisions of . . . our State Constitution be interpreted to permit but a single legislative consideration of a motion to override, nothing suggests that such consideration must be restricted to a single vote in a truncated process quite foreign to normal parliamentary procedure.

On this question of the right of the Senate to reconsider a vote on overriding the veto, the members of the Court agreed 6-1. The lone dissenter argued that reconsider in the Constitution did have the same effect as a parliamentary motion to reconsider, and thus could only be taken up once.

The factual situation in *Nevins v. City Council of the City of Springfield,* 227 Mass. 538*,* 116 N.E. 881 (1917) is very close to our case. It involved a veto by the mayor of Springfield, the initial failure of the Council to override, a motion to reconsider, and then a vote to override. The Massachusetts Supreme Court had no issue with the procedure (227 Mass at 544-45):

> . . . the parliamentary body is left free to act according to its custom. There are no other restrictions upon its conduct. No time is fixed with which the vote must be taken. There is no prohibition against reference to a committee. There is no limitation upon the freedom or length of debate. There is no inhibition against postponement of the vote …. If the rules of the body permit reconsideration of any vote, there appears to be no reason in the statute why a vote upon such consideration anew of a measure vetoed by the executive may not be permitted.

The Court also stated that the veto override was a "new question never before presented to the body." *Id.* The rule in the *Nevins* case was reaffirmed by the Massachusetts Supreme Court as recently as 1968. *Kubik v. City of Chicopee*, 353 Mass. 514, 233 N.E.2d 219 (1968).

The Supreme Court of South Carolina agreed in *State ex rel. Coleman v. Lewis*, 181 S.C. 10, 186 S.E. 525 (1936), again emphasizing the view that, absent some direct statute or constitutional provision on the topic, whether to allow reconsideration of a vote on a veto override was left to the discretion of the legislative body.

The Supreme Court of Louisiana authored the leading case to take the contrary view, *Burstein v. Morial*, 438 So. 2d 554 (La., 1983). The facts here are fascinating. As in Madison, under New Orleans' charter it takes a 2/3 vote of all the members of the Council to override. With a seven member Council, that means that 5 votes are needed. Unlike Madison, New Orleans also has a rule that, when the Mayor is absent, the president of the Council becomes acting Mayor but may not vote on any matter before the body.

Here, Mayor Morial vetoed an ordinance, delivered his veto message to the Council, and then left the Council chambers and immediately got on a plane to Dallas. As Councilman Giarusso delivered a speech opposing the veto, he was handed a letter designating him as the Acting Mayor in the Mayor's absence and leaving only 6 voting Council members. Upon a vote to override, it was 4-2 in favor, one short of the 5 necessary. The Acting Mayor then also voted to override despite the law to the contrary.

At the next meeting, the Council passed a motion to reconsider the vote on the veto override and, now with all seven members voting, passed the override by a 5-2 vote.

The Supreme Court of Louisiana ruled the Council had no authority to reconsider the veto override vote. The Court said any other rule would allow the Council to extend the time for voting indefinitely, until it got the necessary majority. The law could not mean, the Court said, that the Mayor had only one chance to veto while the Council had more than one chance to override. Noting the several cases above which rule otherwise, the Louisiana Court said (438 So. 2d at 560):

> These courts failed to consider, however, the source, history and function of the qualified executive veto and the very important role it must play in assuring that the legislative power is "exercised in accord with a single, finely wrought and exhaustively considered procedure." (Citations omitted).

The Court also relied on the legislative precedents, all of which trace back to the House of Representatives practice. It should be noted that the Louisiana decision was a 4-3 vote.

The other case finding there could be no reconsideration of an override is *Sank v. City of Philadelphia*, 8 Phila. 117, 4 Brewster 133 (Pa. 1871). This case also concludes

that allowing that the initial "reconsideration" of the vetoed ordinance is the only reconsideration allowed, and to allow otherwise opens up the process to a long and potentially endless series of votes. Other cases note that the Pennsylvania House of Representatives continued to allow reconsideration of veto override votes, in spite of the *Sank* ruling.

3. Conclusion from Other Cases.

Cases from other jurisdictions are not binding in Wisconsin. They are at most persuasive precedent as to the correct path to take.

The slight majority of the cases favor reconsideration. In my judgment, a Wisconsin court would likely follow the majority rule. One of those courts is the Court of Appeals in New York, a court with an excellent reputation. In addition, early in our State's history, many precedents and patterns for laws came from New York. I also think the courts allowing reconsideration have the better of the argument.

However, I do not have a high degree of confidence in my prediction. Other courts have ruled against reconsideration. If a case were to go to our current Wisconsin Supreme Court, the factual setting, the parties and the law at issue might be as important as any discussion of legal precedent. Because of the important competing policy considerations, it is difficult to provide a firm opinion without Wisconsin precedent.

E. Competing Policy Considerations.

As noted in the court decisions, there are competing policy considerations on the reconsideration question.

1. Finality: A rule against reconsideration will bring a swift and final determination on the mayoral veto. This is especially true if a rule were crafted that allowed no referral.

The counter argument is that reconsideration is only allowed once, so there is not a chance for multiple kicks at the cat. Just as with other legislative matters, there are two kicks.

2. Rights of the Mayor and Legislative Body: A reasonable argument may be made that allowing reconsideration intrudes on the power of the executive. It allows the legislative body to move the final vote on a veto to when it is most likely to succeed. Moreover, a single vote on the veto does not handcuff the legislative body. Under sec. 2.05(5), MGO, the Council may take up the same legislation after the passage of 60 days.

The counter argument is that this concern is the reason for the 2/3 majority requirement, and that when 2/3 of the legislative body want the matter to become law, they ought to have the normal parliamentary tools to do so.

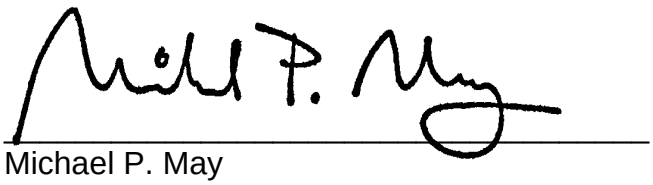
3. Pushing off the Determination Indefinitely: If referral is allowed, the legislative body could put off the determination for some time, again thwarting the executive decision to veto.

The counter argument is that this will not happen as a practical matter and, in any event, the executive has nothing to complain about because the law is not in effect until the override vote succeeds.

Conclusion.

The existing state of the law in Wisconsin does not answer the question presented. The courts and legislative bodies in other jurisdictions have adopted divergent rulings and practices on the question. While I believe a Wisconsin court is more likely than not to allow for reconsideration, I do not come to such a judgment with much conviction.

The courts are, however, deferential to rules adopted by legislative bodies. I recommend that the Council itself resolve the issue in this instance, and adopt a clarifying procedural rule for future guidance.



Michael P. May
City Attorney

CC: All Alders
Maribeth Witzel-Behl

SYNOPSIS: Wisconsin law is not clear on the right of the Council to reconsider a failed vote on a veto override. The Council should adopt rules to govern this procedure.

APPENDIX A TO FORMAL OPINION # 2015-001

Legistar File No. 35036
Master Report as of January 27, 2015

City of Madison

City of Madison
Madison, WI 53703
www.cityofmadison.com

Master

File Number: 35036

File ID:	35036	**File Type:**	Ordinance	**Status:**	Vetoed
Version:	3	**Reference:**		**Controlling Body:**	URBAN DESIGN COMMISSION
Lead Referral:	URBAN DESIGN COMMISSION	**Cost:**		**File Created Date :**	07/29/2014
File Name:	Removal & reconstruction of billboards			**Final Action:**	01/20/2015

Title: **AMENDED** SUBSTITUTE Creating Section 31.112 and Sec. 31.11(2)(o) and amending Sections 31.11(1) and 31.05(2)(b) of the Madison General Ordinances to create a process for Advertising Sign Banks and Replacement Advertising Signs, and amending sec. 31.04(5)(k)4.a. regarding illumination of certain signs.

Notes: 5570billboard

Code Sections:		**CC Agenda Date:**	01/06/2015
Indexes:		**Agenda Number:**	13.
Sponsors:	Chris Schmidt	**Effective Date:**	
Attachments:	Billboard Ordinance Newspaper Articles 100114.pdf, BillBoardOrdinanceReport100114.pdf, 5570billboard ALT LM edits 111414.pdf, BillBoardOrdinanceReport111914.pdf, 010515 Wagner Email, 123114 Adams Letter, Advertising Signs Map, Draft UDC Alternate distributed at Council meeting.1.6.15.pdf, Schmidt Amendment.pdf, Version 1, Mayoral veto message	**Enactment Number:**	
Author:	Lara Mainella	**Hearing Date:**	
Entered by:	dalthaus@cityofmadison.com	**Published Date:**	

Approval History

Version	Date	Approver	Action
1	07/29/2014	Michael May	Approved as to Form
1	07/30/2014	Daniel Bohrod	Approve
3	01/07/2015	Michael May	Approved as to Form

History of Legislative File

Ver-sion:	Acting Body:	Date:	Action:	Sent To:	Due Date:	Return Date:	Result:
1	Attorney's Office/Approval Group	07/29/2014	Referred for Introduction				
	Action Text: This Ordinance was Referred for Introduction						
	Notes: Urban Design Commission, Plan Commission, Economic Development Committee						
1	COMMON COUNCIL	08/05/2014	Referred	URBAN DESIGN COMMISSION	11/19/2014		
	Action Text: This Ordinance was Referred to the URBAN DESIGN COMMISSION						
	Notes: Additional referrals: Plan Commission, Economic Development Committee.						
1	URBAN DESIGN COMMISSION	08/05/2014	Refer	PLAN COMMISSION	09/22/2014		
	Action Text: This Ordinance was Refer to the PLAN COMMISSION						
	Notes:						
1	URBAN DESIGN COMMISSION	08/05/2014	Refer	ECONOMIC DEVELOPMENT COMMITTEE	09/17/2014		
	Action Text: This Ordinance was Refer to the ECONOMIC DEVELOPMENT COMMITTEE						
	Notes:						
1	ECONOMIC DEVELOPMENT COMMITTEE	09/17/2014	Return to Lead with the Recommendation for Approval	URBAN DESIGN COMMISSION	11/19/2014		Pass
	Action Text: A motion was made by Mr. Clarke, seconded by Mr. Her, to Return to Lead with the Recommendation for Approval to the URBAN DESIGN COMMISSION. The motion passed by voice vote.						
1	PLAN COMMISSION	09/22/2014	Return to Lead with the Recommendation for Approval	URBAN DESIGN COMMISSION	11/19/2014		Pass
	Action Text: A motion was made by Rewey, seconded by Berger, to Return to Lead with the Recommendation for Approval to the URBAN DESIGN COMMISSION,. The motion passed by the following vote:						
	Notes: On a motion by Rewey, seconded by Berger, the Plan Commission recommended approval of the proposed ordinance with the following revision moved by Cantrell, seconded by Hamilton-Nisbet, to revise the ordinance to cause one (1) square-foot of applicable signage to be banked/ replaced for ever two (2) square feet removed. The motion to amend the language passed on the following 5-3 vote: AYE: Ald. King, Ald. Zellers, Berger, Cantrell, Hamilton-Nisbet; NAY: Ald. Resnick, Heifetz, Rewey; NON-VOTING: Opin, Sheppard; EXCUSED: Sundquist. The main motion to recommend approval as amended passed on the following 7-1 vote: AYE: Ald. King, Ald. Resnick, Ald. Zellers, Berger, Cantrell, Hamilton-Nisbet, Rewey; NAY: Heifetz; NON-VOTING: Opin, Sheppard; EXCUSED: Sundquist. Ayes: 7 Steve King; Ledell Zellers; Scott J. Resnick; Melissa M. Berger; Michael W. Rewey; Bradley A. Cantrell and Tonya L. Hamilton-Nisbet Noes: 1 Michael G. Heifetz Excused: 1 Eric W. Sundquist Non Voting: 2 Ken Opin and Maurice C. Sheppard						
1	URBAN DESIGN COMMISSION	10/01/2014	Refer	URBAN DESIGN COMMISSION	11/19/2014		Pass
	Action Text: A motion was made by Huggins, seconded by Cnare, to Refer to the URBAN DESIGN COMMISSION. The motion passed by voice vote/other.						
	Notes: A motion was made by Cnare, seconded by Goodhart, to **RECOMMENDED APPROVAL** of the ordinance as originally drafted. The motion was replaced by a substitute motion by Huggins, seconded by Cnare, where the Urban Design Commission **REFERRED** consideration of this ordinance with requests for redraft of amendments from City staff to provide for replacement alternatives based on development proposals as discussed above to return for further consideration.						

1	URBAN DESIGN COMMISSION	11/19/2014	RECOMMEND TO COUNCIL TO ADOPT WITH THE FOLLOWING RECOMMENDATIONS - REPORT OF OFFICER	Pass

Action Text: A motion was made by Cnare, seconded by DeChant, to RECOMMEND TO COUNCIL TO ADOPT WITH THE FOLLOWING RECOMMENDATIONS - REPORT OF OFFICER. The motion passed by voice vote/other.

Notes: Use alternate draft language

1	COMMON COUNCIL	01/06/2015	Adopt the following Amendment(s) to the Substitute	Pass

Action Text: This Ordinance was Adopt the following Amendment(s) to the Substitute

Notes:

Ayes:	14	Lisa Subeck; Lauren Cnare; Shiva Bidar-Sielaff; Scott J. Resnick; Maurice S. Cheeks; Chris Schmidt; Larry Palm; Lucas Dailey; John Strasser; David Ahrens; Denise DeMarb; Joseph R. Clausius; Mark Clear and Matthew J. Phair
Noes:	6	Ledell Zellers; Michael E. Verveer; Marsha A. Rummel; Steve King; Paul E. Skidmore and Anita Weier
Non Voting:	1	Paul R. Soglin

2	COMMON COUNCIL	01/06/2015	Adopt Substitute As Amended	Pass

Action Text: A motion was made by Schmidt, seconded by DeMarb, to Adopt Substitute As Amended. The motion passed by voice vote/other.

3	Mayor	01/14/2015	Veto	

Action Text: This Ordinance was Veto

Notes:

3	COMMON COUNCIL	01/20/2015	Override Mayoral Veto	Pass

Action Text: A motion was made by DeMarb, seconded by Clausius, to Override Mayoral Veto. Alder Cnare made a disclosure.
There were three registrations in support and two in opposition.
The motion requiring 14 votes failed by the following vote:

Ayes:	13	Shiva Bidar-Sielaff; Steve King; Scott J. Resnick; Paul E. Skidmore; Maurice S. Cheeks; Chris Schmidt; Larry Palm; Lucas Dailey; Denise DeMarb; Joseph R. Clausius; Mark Clear; Matthew J. Phair and Lauren Cnare
Noes:	6	Michael E. Verveer; Marsha A. Rummel; David Ahrens; Anita Weier; Ledell Zellers and Lisa Subeck
Excused:	2	John Strasser and Paul R. Soglin

Text of Legislative File 35036

Fiscal Note

There may be a small increase in General Fund revenues derived from additional sign permit fees.

Title

AMENDED SUBSTITUTE Creating Section 31.112 and Sec. 31.11(2)(o) and amending Sections 31.11(1) and 31.05(2)(b) of the Madison General Ordinances to create a process for Advertising Sign Banks and Replacement Advertising Signs, and amending sec. 31.04(5)(k)4.a. regarding illumination of certain signs.

Body

DRAFTER'S ANALYSIS: This ordinance establishes a “cap and replace” program for the removal and reconstruction of billboards (called “Advertising Signs” in Chapter 31, the sign

code.) An Advertising Sign is a sign that advertises something unrelated to the premises upon which the sign is located. Advertising signs are typically owned by outdoor advertising companies. Under current ordinance, new advertising signs are prohibited. Allowing replacement advertising signs represents a departure from the long-standing prohibition on new billboards in the city. This ordinance would allow the owner of an existing, nonconforming advertising sign to remove it and receive credit for the square footage removed, to be applied toward a permit for a new billboard~~**, if the property is to be redeveloped and the sign must be removed to accommodate the redevelopment**~~. This ordinance creates a procedure for the square footage of the removed sign to be "banked" by the sign company, to be used toward a permit to construct a Replacement Advertising Sign, at a ratio of 1:1. Replacement signs would be allowed only in the CC-T, CC, TE, SE, IL, and IG zoning districts, but not in an Urban Design District, a Historic District, Landmark building or Landmark site, the area described in 31.05(2)(a), nor in the area known as the No Advertising District.

Once placed in the bank, the square footage is not transferrable to anyone else and must be used within five years or it expires. Failure to complete the installation of a Replacement Advertising Sign within 6 months of permit issuance will result in the permit becoming void and the banked square footage lost. The Zoning Administrator will be responsible for administering the sign bank. Replacement Advertising Signs will be subject to most of the rules applicable to existing Advertising Signs, except that Replacement Advertising signs will be allowed in annexed lands, will have different set back rules (minimum of 3 feet and maximum of 100 feet) and different rules for height measurement. A Replacement Advertising Sign will have a maximum height of 30 feet but if the base of the sign sits at a grade below the adjacent roadway, the 30 feet can be measured from the top of the sign to the road surface where it is intended to be viewed, rather than from the top of the sign to the ground. Once constructed, a Replacement Advertising Sign would become nonconforming and treated the same as existing, nonconforming advertising signs.

This amendment also makes adjustments to Secs. 31.11 and 31.05 consistent with the new ordinance for Replacement Advertising Signs and deletes the option of measuring illumination by watts for signs up to 300 square feet.

This ordinance will sunset in five years from the effective date.

****

The Common Council of the City of Madison do hereby ordain as follows:

1. Section 31.112 entitled "Advertising Sign Bank and Replacement Advertising Signs" of the Madison General Ordinances is created to read as follows:

"**31.112 ADVERTISING SIGN BANK AND REPLACEMENT ADVERTISING SIGNS**.

(1) If the owner of an existing advertising sign permanently removes a lawfully existing advertising sign ~~**eligible for replacement under sub. (2) below**~~, the net area of each sign face removed may, at the owner's request, be added to an "Advertising Sign Bank" for that owner. The net area banked by the owner will be available to construct a Replacement Advertising Sign as set forth in this section.

~~**(2) Eligibility. The process established in this ordinance is only available for an advertising sign to be removed from a property that is scheduled for redevelopment that includes removal of improvement(s) and construction of new improvement(s), as evidenced by the issuance of a building permit or zoning certificate for the new improvement(s), and only if the advertising sign must be removed to accommodate the new improvement(s).**~~

(~~3~~**2**) Definitions. For purposes of this section:

"Owner" means the lawful owner of the existing advertising sign to be removed as of the date of actual removal of the existing advertising sign.

"Remove" means the complete removal of the entire "sign" as defined in Sec. 31.03(2).

"Replacement Advertising Sign" means a new sign meeting the definition of "Advertising Sign" in Sec. 31.03(2), but authorized under and meeting the requirements of this section. This section shall in no way modify the requirements for an Advertising Sign under Sec. 31.11.

(**43**) Advertising Sign Bank.

(a) One-hundred percent (100%) of the net area of each sign face removed from a lawfully pre-existing advertising sign may be banked.

(b) Procedure. An owner wishing to bank square footage under this ordinance shall file written notification of intent to remove an existing advertising sign with the Zoning Administrator not less than ten (10) business days prior to the intended date of removal. ~~**The written notification shall include information regarding the intended redevelopment and approximate date for commencement of construction on the zoning lot where the existing sign is located.**~~ The Zoning Administrator shall measure the net area of the existing sign prior to removal. The owner shall notify the Zoning Administrator when the existing sign has been removed so the Zoning Administrator can verify its removal**.** ~~**and when a building permit has been applied for on the property in question.**~~ Square footage ~~**may not be banked until a building permit or zoning certificate for new improvement(s) on the property in question has been issued, and**~~ **is considered banked on the date that** the Zoning Administrator gives his or her written approval on the application to bank the square footage.

(c) The Zoning Administrator shall maintain an Advertising Sign Bank for each owner so requesting and who meets the requirements herein. The Advertising Sign Bank will include information about the removed sign including the zoning district, whether the sign was in an Urban Design District and any other information the city deems pertinent. The Zoning Administrator shall draw down an Owner's Advertising Sign Bank when a Replacement Advertising Sign permit is issued.

(d) Failure to complete the installation of a Replacement Advertising Sign within six (6) months of issuance of the sign permit shall cause the permit to expire, per Sec. 31.041(4), and the owner will lose the banked square footage associated with that permit.

(e) Banked square footage expires within five (5) years of the date it is banked or upon the sunset date in sub. (6) herein, whichever occurs first.

(f) Banked square footage may be banked only by the owner of the lawfully-existing removed sign and is not transferrable under any circumstances including but not limited to a transfer by assignment, merger, acquisition, etc.

(g) If a Replacement Advertising Sign is installed in violation of any requirement of the permit for such sign, said permit shall become null and void, the sign shall be immediately and permanently removed, and the banked square footage for that sign permanently forfeited.

(~~5~~**4**) Procedure to Install a Replacement Advertising Sign.

(a) The owner must have accumulated the corresponding amount of unexpired

banked square footage in the Owner's Advertising Sign Bank to construct the Replacement Advertising Sign in question, before applying for a permit for a Replacement Advertising Sign.

(b) A complete application and permit fee meeting all the requirements for an advertising sign permit under this chapter shall be filed by the owner and reviewed according to applicable procedures for the issuance of sign permits established in this chapter.

(~~6~~5) Replacement Advertising Sign Criteria. A Replacement Advertising sign shall conform to the requirements for Advertising Signs in Sec. 31.11(2), "General Regulations for Advertising Signs" except:

(a) Permitted Zoning Districts. Replacement Advertising signs are permitted only in the CC-T, CC, TE, SE, IL, and IG zoning districts and only such districts or portions of such districts that are not located in a Prohibited Location listed in sub. (5)(b), below. A Replacement Advertising Sign may be located in "Annexed Lands" as described in Sec. 31.13(8), if the annexed land is in a zoning district listed in this paragraph and not a Prohibited Location under Sec. 31.112(5)(b) herein.

(b) Prohibited Locations. No Replacement Advertising Sign shall be constructed in an Historic District or on a Landmark building or Landmark site, as defined in Sec. 33.19, an Urban Design District listed in Sec. 33.24, in the geographic area described in Sec. 31.05(2)(a) or in the No Advertising Sign District described in Sec. 31.13(6).

(c) Height. The height of a Replacement Advertising Sign displayed on the ground shall not exceed thirty (30) feet, measured using one of the following two methods:

1. From the top of the sign to the approved grade at the base of the supporting structure, or
2. If the base of the sign's supporting structure sits below the elevation of the adjacent roadway, the height may be measured from the top of the sign to the highest elevation of any roadway surface within the highway right-of-way directly adjacent to the zoning lot where the Replacement Advertising Sign is to be located, except an on-ramp, off-ramp, overpass or pedestrian bridge is not eligible for this measurement. The point at which the elevation of the eligible roadway is measured shall be determined by drawing a line from the base of the sign to the roadway that bisects the roadway at a right angle.

(d) Setback. Replacement Advertising Signs shall be set back not less than three (3) feet and not more than one-hundred (100) feet from any property line.

(e) Net Area. For a Replacement Advertising Sign displayed as a ground sign, the maximum net area of the sign face shall be as set forth in Sec. 31.11(2)(e), with a maximum of two (2) sign faces per structure. If displayed as a wall sign, the maximum net area shall be as set forth in Sec. 31.11(2)(d).

(f) Replacement Advertising Signs, once installed, shall be treated as nonconforming and subject to all of the requirements of Sec. 31.05(2)(b) applicable to existing advertising signs.

(~~7~~6) Sunset Clause. This ordinance, Sec. 31.112, MGO, shall be ineffective as of a date five (5) years from the effective date of this ordinance and any unused, unexpired banked square footage in an Advertising Sign Bank shall expire as of that date."

2. Subsection (1) of Section 31.11 entitled "Advertising Signs" of the Madison General

Ordinances is amended to read as follows:

"(1) Existing advertising signs are nonconforming and permitted to remain only in CC-T, CC, TE, SE, IL, IG Districts as regulated in this section ~~and in Sec. 31.15(3)~~, subject to the nonconforming advertising signs provisions of Sec. 31.05(2). Notwithstanding any other provision of these ordinances, new, relocated and replacement advertising signs are prohibited, except advertising signs that are realigned pursuant to Sec. 31.05(2)(c) and Wis. Stat. § 84.30(5r) (as created by 2011 Wis. Act 32) and Replacement Advertising Signs under Sec. 31.112, MGO."

3. Subdivision (o) entitled "Replacement Advertising Signs" of Subsection (2) entitled "General Regulations for Advertising Signs" of Section 31.11 entitled "Advertising Signs" of the Madison General Ordinances is created to read as follows:

"(o) Replacement Advertising Signs. As defined in Sec. 31.112, a "Replacement Advertising Sign" is a separate type of sign distinct from an Advertising sign. Sec. 31.11 controls Advertising Signs and Sec. 31.112 controls Replacement Advertising Signs. The requirements of Sec. 31.11 shall apply to any Replacement Advertising Sign erected pursuant to Sec. 31.112, except where expressly stated otherwise in that section."

4. Subparagraph a. of Paragraph 4. of Subdivision (k) entitled "Illumination of Signs" of Subsection (5) entitled "Construction Requirements" of Section 31.04 entitled "Administration, Enforcement, and Construction Requirements" of the Madison General Ordinances is amended to read as follows:

"a. Signs with a gross area (for ground signs) or net area (all other signs) of less than three hundred (300) square feet shall have a maximum illumination level ~~equal to the greater of: 1)~~ forty (40) foot-candles average across the sign surface~~, or 2) a total of 50 watts for all fixtures~~."

5. Subdivision (b) of Subsection (2) entitled "Nonconforming Advertising Signs" of Section 31.05 entitled "Nonconforming Signs" of the Madison General Ordinances is amended to read as follows:

"(b) Any other advertising sign existing as of November 1, 1983, including those excepted from or otherwise not included in the areas set forth in sub. (a) above, may be continued provided that it may not be relocated, replaced, expanded, enlarged, repositioned or raised in height, except under sub. (2)(c) or with a permit for a Replacement Advertising Sign issued under Sec. 31.112. Such existing advertising signs may not be restored or reconstructed for any reason, except if damaged or destroyed by fire or other casualty or act of God, and only if the total cost of restoration to the condition in which it was before the occurrence does not exceed fifty percent (50%) of its assessed value or the cost to replace with a new structure of equal quality, whichever amount is lower. The determination of eligibility for restoration or reconstruction in the preceding sentence shall be made by the Urban Design Commission and any restoration or reconstruction (except realignment under (2)(c) below or with a permit for a Replacement Advertising Sign under Sec. 31.112) without the approval of the Urban Design Commission is prohibited. Violation of this subdivision shall result in the said sign being subject to immediate removal by the owner thereof at no cost to the City. Ordinary repairs or normal maintenance shall be considered "required by law" hereunder. A Replacement Advertising Sign permitted under Sec. 31.112, once installed, shall be subject to this sub. (2)(b)."

APPENDIX B TO FORMAL OPINION # 2015-001

Legal Opinion of Former City Attorney Edwin Conrad
December 1, 1970

City Clerk - opinion

CITY OF MADISON
INTER-DEPARTMENTAL
CORRESPONDENCE

#81

Date: December 1, 1970

Mayor Dyke and Members of Common Council

Edwin Conrad, City Attorney

Mayor's Veto Message to the Common Council
re Dangle Lounge

The facts of the matter are simple; the application of the [law] is difficult in view of the dearth of authority on this subject matter. The Mayor's veto was timely presented to the Clerk for presentation to the Common Council on Tuesday, the next regular meeting of the Common Council, November 24, 1970. While it is true that at that time the Fiscal Control Group was in session on the School Budget, I take official notice of the fact that there were sufficient Council members present that it would have been possible literally to recess the Fiscal Control Group and reconvene the Common Council at 7:30 P.M. just to start the Common Council meeting which was regularly scheduled. The Common Council could then have reconvened as part of the Fiscal Control Group. The fact of the matter is that no such motion was made, November 24, 1970 went by, and for all intents and purposes, the next regular meeting of the Common Council, to wit, November 24, 1970, was missed.

The Statutes state that the Mayor in timely fashion shall present his veto message to the Clerk, who shall present it to the Council at its next meeting. Wis. Stats. Sec. 62.09 (8) (c). One could make a good argument that since the next regularly scheduled meeting was November 24, 1970 and since no meeting was held, in effect the Mayor's veto was sustained. However, my examination of the authorities, especially the Wisconsin authorities, leaves me in doubt as to the position that I should take.

RECEIVED
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MADISON, WIS.
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CITY OF MADISON

INTER-DEPARTMENTAL

CORRESPONDENCE

Date: December 1, 1970

Mayor Dyke and Members of Common Council

Edwin Conrad, City Attorney

Mayor's Veto Message to the Common Council
re Dangle Lounge
Page 2

It is my belief that despite the failure of the Council to convene on November 24, 1970, which was their duty by ordinance, the matter of the Mayor's veto upon the basis of reason rather than precedent is properly before the Common Council on Tuesday, December 1, 1970 at 7:30 P.M. I would have to conclude that the City Clerk was in such a position that he was unable, because of the Council's inaction, to present the veto message to the Council on November 24, 1970. Since it would follow that the next regular meeting of the Common Council at which the matter could be taken would be December 1, 1970 at 7:30 P.M., which would then be the next regular meeting, I should emphasize the fact that the Statute places a great deal of stress upon the term "regular" meeting as distinguished from a "special" meeting.

Dubious authority for sustaining the proposition that I have outlined above is contained in State ex rel. Dickson v. Williams, 50 N.W. 410 (S. Dak. 1894), where the Supreme Court of South Dakota ruled that if the Mayor has to do something such as remove one from office, the matter had to be acted upon at the next regular meeting of the Common Council. It is stated there that the act of the Mayor in making the removal had been accomplished and the next regular meeting is the one occurring after such removal; hence, it could be argued that since there was no meeting on November 24, 1970, the next regular meeting at which the veto message could be presented would be the meeting of December 1, 1970. I, therefore, will follow the rule of the South Dakota Case even though I am not satisfied that it is directly in point. A thorough research by me, however, reveals no other authority.

CITY OF MADISON

INTER-DEPARTMENTAL

CORRESPONDENCE

Date: December 1, 1970

Mayor Dyke and Members of Common Council

Edwin Conrad, City Attorney

Mayor's Veto Message to the Common Council
re Dangle Lounge
Page 3

I give this opinion with some reservation in view of the [illegible] that the Wisconsin Statutes require that the Mayor's veto [illegible] disposed of at the next meeting of the Common Council and [illegible] in no manner be taken care of at a subsequent meeting of [illegible] Common Council. For this reason, my opinion is applicable [illegible]ly to the one situation and may be subject to reconsideration [illegible] the future.

I wish to point out, however, the problems which the Common [illegible]uncil has created because of its present stance. The Common [illegible]uncil cannot always assume that its word is final but must [illegible]ke into account that any elector of the City may challenge [illegible]y action of the Council if the elector deems such action [illegible]llegal. Since the Common Council has already established its [illegible]n record and did in fact have an opportunity to convene the [illegible]eting of November 24, 1970, it is entirely possible that any [illegible]tion by the Common Council on the veto on December 1, 1970 [illegible]ght be subject to a challenge by an elector of the City of [illegible]dison. On the other hand, if we do not take any action on [illegible]ecember 1, 1970 on the veto, we are also likely to face the [illegible]ossibility of a lawsuit by the applicant. In view of the [illegible]uddled situation in which we now find ourselves, I can merely [illegible]epeat the phrase, "caveat emptor," (buyer beware). Unfortunately, [illegible] have to accept the record established by the Council and this is [illegible]he best advice that I can give it at this time.

Edwin Conrad

Edwin Conrad
City Attorney

EC:pc