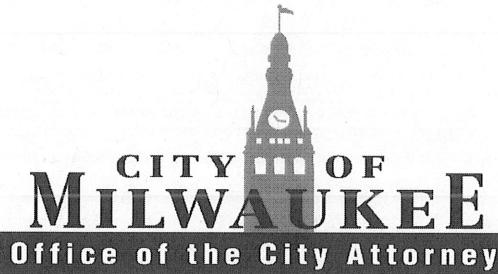


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May 19, 2020

Alderman Cavalier Johnson  
Common Council President  
City Hall, Room 205

Re: Expenditure of CARES Act Payment

Dear Alderman Johnson:

On May 15, 2020, you asked our office to opine on the following issue:

*Does the Mayor have sole discretion to spend CARES Act funds, or does the Common Council have authority to direct funding of all or some of the programs included in the CARES Act?*

Specifically, you asked whether the funds available to help small businesses were controlled by the Mayor, the Common Council, or both. We believe that the answer to both of your questions is the same: the Department of Administration (“DOA”) controls the expenditure of all money that the City received through the CARES Act. Because the Director of DOA is appointed by and serves at the pleasure of the Mayor,<sup>1</sup> the Mayor effectively has control over the expenditure of CARES Act funds.

### BACKGROUND

The Coronavirus Aid, Relief, and Economic Security (“CARES”) Act became law on March 27, 2020. Section 5001 of the CARES Act, entitled Coronavirus Relief Fund (“CRF”), creates 42 U.S.C. § 801 of the Social Security Act. That section appropriates \$150,000,000,000 “for making payments to States, Tribal governments, and units of local government.” 42 U.S.C. § 801(a)(1). A “unit of local government” is defined to include a municipality with a population that exceeds 500,000. 42 U.S.C. § 801(g)(2). Because it satisfies the definition of a “unit of local government” under CARES, the City qualified for a direct payment from the federal government. 42 U.S.C. § 801(b)(2).

<sup>1</sup> Wis. Stat. §§ 62.51(1)(a) and (2).



The CARES Act provides three basic rules for using money from the CRF. The money may be used to cover only those costs that

1. are necessary expenditures incurred due to the public health emergency with respect to the Coronavirus Disease 2019 (COVID-19)
2. were not accounted for in the budget most recently approved as of the date of enactment of this section for the State or government; and
3. were incurred during the period that begins on March 1, 2020, and ends on December 30, 2020.

42 U.S.C. § 801(d). The City was also required to provide “a certification signed by the Chief Executive” of the City verifying that its proposed use of the funds are consistent with the rules in subsection (d). 42 U.S.C. § 801(e). The Mayor serves as the City’s chief executive officer under Section 3-01 of the Milwaukee City Charter, and he provided the certification on April 14, 2020.

The United States Department of the Treasury has issued multiple guides to help navigate the permissible uses of CRF money. The “Guidance for State, Territorial, Local, and Tribal Governments” dated April 22, 2020 states that “[e]xpenditures related to the provision of grants to small businesses to reimburse the costs of business interruption caused by required closures” are an eligible expense.<sup>2</sup> Another guide, issued on May 4, 2020, clarifies that governments have discretion to determine what payments are necessary to help small businesses with interruptions caused by COVID-19.<sup>3</sup>

On May 6, 2020, the Finance and Personnel Committee held a special meeting. One of two items considered at that meeting was File Number 200022, a “substitute resolution authorizing the City of Milwaukee to apply for, accept, and expend funding under the Local Government Grant portion of the CARES Act” (the “resolution”). The resolution authorized “the Department of Administration to accept funding from the United States Department of the Treasury for the Coronavirus Relief Fund grant in the amount of \$102.98 million.” The resolution stated that the grant was intended to fund expenditures incurred due to the COVID-19 public health emergency, including “expenses associated with the provision of economic support in connection with the COVID-19 public health emergency” and “other COVID-19 related expenses reasonably necessary to the function of government.”

The resolution authorized DOA to “accept and expend the Coronavirus Relief Fund without further approval unless the terms of the grant change as indicated in Milwaukee Code of Ordinances Section 304-81.”

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<sup>2</sup> <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Guidance-for-State-Territorial-Local-and-Tribal-Governments.pdf>

<sup>3</sup> <https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Frequently-Asked-Questions.pdf>

Finally, the resolution instructed that the CRF money be “appropriated to the Department of Administration and other such city departments and agencies as appropriate, which are authorized to...[e]xpend from the amount appropriated sums for specified purposes as indicated in the grant budget and incur costs consistent with the award date.”

File 200022 included both of the U.S. Treasury guidelines cited above. The file also included a “Relief Fund Budget Summary” which allocated \$35,998,933 for “Rental & Other” expenses, the great majority of which was budgeted directly to DOA.

The resolution was passed by the Finance & Personnel Committee 5-0 on May 6. It was passed 15-0 by the full Common Council on May 8, 2020 and signed by the Mayor the same day.

### ANALYSIS

The text of the CARES Act afforded significant discretion to state, local and tribal governments to spend CRF money as they deemed appropriate. The U.S. Treasury guidance even provides a generous definition of a “necessary” expenditure as one that “is reasonably necessary for its intended use in the reasonable judgment of the government officials responsible for spending Fund payments.” The certification signed by the Mayor only certifies that the City will spend the money consistent with the three requirements provided in 42 U.S.C. § 801(d). In short, the CARES Act gives great autonomy to a local government in deciding how to handle CRF funds and does not specify which officer or set of officers (e.g. Mayor or Common Council) must decide how to expend those funds.

In the absence of instructions in the CARES Act, the terms of the resolution control. On its face, the resolution authorizes DOA to accept and expend the CRF money. DOA is authorized to accept and spend the money “without further approval unless the terms of the grant change as indicated in Milwaukee Code of Ordinances Section 304-81.”

MCO 304-81 states, in relevant part, that

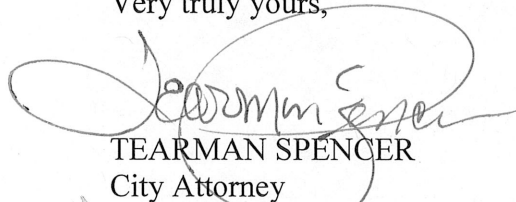
- c. The administering city department shall prepare amendments to the original resolution prior to the execution of the grant award if:
  - c-1. The purpose of the grant is significantly changed.
  - c-2. The amount of city share - out-of-pocket changes from that specified in the original resolution.

- c-3. The amount of city share increases by more than 10% of the total cost or \$5,000, whichever is greater.
- c-4. The total grant exceeds that originally specified by more than 10%.
- c-5. The ratio of out-of-pocket match to grant increases from that specified in the original resolution.
- c-6. Position authority is changed from that originally approved.

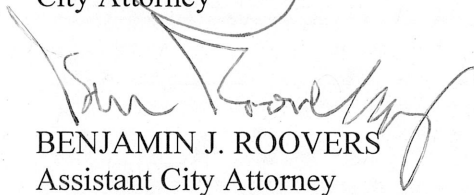
MCO 304-81-5-c. Subsections c-2 through c-6 are not implicated. The only subsection that might apply is c-1. If grants for small businesses affected by COVID-19 are significantly different from the purpose stated in the resolution, then DOA would be required to prepare amendments to the resolution for the Common Council's review. However, that is not the case.

One of the stated purposes of the funds is to cover "expenses associated with the provision of economic support in connection with the COVID-19 public health emergency." That purpose is reasonably interpreted as encompassing grants to small businesses affected by COVID-19. This interpretation is especially reasonable because both of the Treasury guides specifically address grants to small businesses and were included as part of File Number 200022. Finally, the approximately \$36 million allocated to "Rental & Other" expenses in the Relief Fund Budget Summary could include grants to small businesses. The small business grants do not represent a "significant change" in the purpose of the CRF money. Therefore, DOA, and by extension the mayor, have been granted the authority to spend the money how they see fit so long as it is consistent with the requirements of 42 U.S.C. § 801(d).

Very truly yours,



TEARMAN SPENCER  
City Attorney



BENJAMIN J. ROOVERS  
Assistant City Attorney

c: Mayor Tom Barrett  
Budget Director Dennis Yaccarino