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CITY ATTORNEY LETTERHEAD, CAO 279069

February 18, 2022

Via Email

Common Council President/Acting Mayor

Common Council Members

City Clerk

Chris Lee

Re: Couture Matter, Common Council Resolution File 211682

Dear Persons:

City Clerk, please place a copy of this letter and the EXHIBITS in Legistar for File 211682.

I urge you to not pass Council File 211682, scheduled to be heard February 22 at the Zoning, Neighborhoods and Development Committee. That file, sponsored by Ald. Bauman, is an attempt (1) to avoid the illegalities behind the \$100,000 MKE United property tax relief payment in the Couture contract that Ald. Bauman moved to require (File 201365), and (2) to avoid the illegalities/ethical issues associated with Ald. Bauman's solicitation of that \$100,000 payment just days before the February 23, 2021 ZND Committee vote in File 201365. Again, I urge you not to adopt File 211682 because other Council members should not be complicit in that illegal behavior.

The Couture contract (section 13.4), requiring the developers to pay \$100,000 to the MKE United property tax relief fund:

- violates Wis. Stat. 66.0617 as an unlawful impact fee
- violates the state constitution's Uniformity Clause
- violates the U.S. and state constitutions' equal protection clauses, and
- is an unlawful exaction under the unconstitutional conditions doctrine.

I contend that Ald. Bauman's 11th hour solicitation of that payment also:

- violated state and local ethics laws – Wis. Stat. 19.59 (1)(b) and MCO 303-5-3 (no vote peddling), and MCO 303-5-5 (misuse of position).

HEIDI WICK SPOERL
GREGG C. HAGOPIAN
KATHRYN Z. BLOCK
THOMAS D. MILLER
JEREMY R. MCKENZIE
PETER J. BLOCK
JENNY YUAN
ALLISON N. FLANAGAN
HEATHER H. HOUGH
ANDREA J. FOWLER
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NICHOLAS ZALES
JENNIFER T. DEMASTER
JOHN D. MCNALLY
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Couture Matter, Common Council Resolution File 211682

I am copying the Wisconsin Attorney General's Office on this letter as well as the Wisconsin Ethics Commission and the U.S. Attorney's Office.

Council File 211682, sponsored by Ald. Bauman, to be heard February 22, is an attempt to usurp addressing the illegalities. Other Council members - please do not be complicit in Ald. Bauman's attempt. Do not cover up the issues involved, and do not remove sending this matter to Judge Clevert for a decision per Council File 201573. The full Common Council should await Judge Clevert's decision.

I attach as **EXHIBIT A** Ald. Bauman's proposed File 211682, and as **EXHIBIT B** File 201573 with X-outs of "further resolved" clauses that would happen if the Council were to adopt 211682 (which it should not adopt). Again, please do not be complicit in any attempt by Ald. Bauman to brush aside illegalities or to avoid a decision on those illegalities.

My office has asked Council Pres. Johnson and the Council's attorney Mike Maistelman a number of times for a meeting to reach agreement on the Scope of Work required by File 201573 for Judge Clevert's review of this. Pres. Johnson has not agreed to meet, and now Judge Clevert's Office is awaiting direction on terms of his engagement to be the decision-maker. On December 17, 2021, I proposed a very reasonable Scope to Pres. Johnson whereby File 201573 would itself be the Scope and I proposed a reasonable briefing schedule. Pres. Johnson has not accepted that. Since it is apparent that Pres. Johnson is avoiding this, I view that as being complicit with Ald. Bauman.

In an extraordinary measure of good faith to move this matter along to final resolution, I transmitted to Pres. Johnson and to Mr. Maistelman an initial position statement from my office. See **EXHIBIT C**. That document shows the illegalities of the \$100,000 property tax relief payment in the Couture contract (Section 13.4) and Ald. Bauman's violations of state and local ethics laws. Only after I transmitted our position statement did Ald. Bauman attempt to remove the "further resolved" clauses in File 201573 in hopes to have this matter disappear and to not face the consequences of his illegal acts.

Even MKE United knows that the Uniformity Clause prohibits City involvement in the MKE United property-tax relief fund. See the MKE United internet pages about the fund and the Uniformity Clause restrictions.

https://www.mkeunited.com/files/ugd/2b1d08_47cb5955a63245908fcee20327e1be5f.pdf. Also, on January 27, 2022, MKE United and the Greater Milwaukee Foundation held a virtual seminar about the Uniformity Clause in Wisconsin's Constitution, with Attorney Andy Phillips presenting. That seminar reinforced the Uniformity Clause's prohibition of the City being behind any scheme to provide targeted property tax relief.

The Milwaukee Journal Sentinel wrote a number of articles about Couture. However, not one of them dealt with or mentioned the Uniformity Clause, or the Equal Protection

Clauses, or Wis. Stat. 66.0617 impact fees, or unlawful exactions, or the ethics laws issues surrounding Ald. Bauman's solicitation of the payment from the developers on the eve of a vote.

Expenditure of funds for the Council's lawyer and for Judge Clevert could have been avoided when, early on, I raised problems and concerns about the \$100,000¹. I wanted that requirement removed from the Couture contract. I refused to sign off on the contract, and Mayor Tom Barrett refused to sign off on Couture Council File 201365. Despite City Attorney and Mayoral objections, the Couture contract was signed with the understanding that, under File 201573, a decision-maker would rule on the illegalities.

Again, do not attempt to usurp the law and what transpired. Do not be complicit in File 211682's and Ald. Bauman's attempt to avoid. In any event, Council File 211682 will not fix the problem because:

- Council File 211682 does not remove the first "Resolved" clause of File 201573 approving the Couture contract that contains Ald. Bauman's illegal \$100,000 property tax relief requirement
- Council File 211682 does not amend or do away with the signed Couture contract that contains section 13.4 and the \$100,000 payment (the City, RACM, The Couture LLC, The Couture Holdings Group Inc. all signed the contract)
- Council File 211682 does not amend or do away with the signed Escrow Agreement and amendment thereto whereby Chicago Title is holding the money **pending a decision by Judge Clevert under File 201573** (Chicago Title Insurance Company, the City, The Couture Holdings Group Inc., The Couture LLC, Rick Barrett, and Tan Lo all signed the Escrow Agreement)
- Council File 211682 does not absolve Ald. Bauman of his illegal acts.

My office learned that yesterday, in Milwaukee County Circuit Court Case 2007-CV-013965, involving Tri Corp Housing and Ald. Bauman, two counts of defamation were awarded against Ald. Bauman personally for \$1.4 million (but the Council had previously agreed to indemnify Ald. Bauman). There have been many actions by Ald. Bauman that have cost the City millions of dollars (for example, the downtown Boston Store TID to pay them to keep them in Milwaukee and they filed bankruptcy shortly thereafter and left, the acquisition of the gas station on 27th and Wisconsin where a significant amount was spent to acquire the gas station and to demolish it and now it remains a vacant lot). Now, here, in the matter at hand, there are issues in this Couture matter that must be addressed. Do not adopt File 211682.

¹ Judge Clevert's fees and Mr. Maistelman's fees are both capped at \$45,000 each. To date, Mr. Maistelman has been paid \$11,150 for October and November 2021 billings. His December bill is \$8,775 and his January bill is \$9,400. The City Clerk approved Mr. Maistelman's bills which, when paid, will mean that \$29,325 of the \$45,000 cap will have been consumed leaving only \$15,675 left.

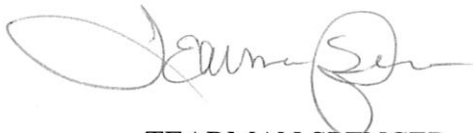
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Couture Matter, Common Council Resolution File 211682

This letter is hope to avoid further exposure to the City brought on by Ald. Bauman's actions and behavior.

Pres. Johnson, let us – without further delays, and within the next few days - agree upon a Scope and have Judge Clevert decide.

Sincerely,

A handwritten signature in black ink, appearing to read "Tearman Spencer". The signature is fluid and cursive, with a large initial "T" and "S".

TEARMAN SPENCER
City Attorney

C

Attorney Mike Maistelman

Wisconsin Attorney General's Office

Wisconsin Ethics Commission

U.S. Attorney's Office, E. District of Wisconsin

DCD Commissioner Crump



City of Milwaukee

200 E. Wells Street
Milwaukee, Wisconsin 53202

Legislation Details (With Text)

EX A

File #: 211682 **Version:** 0

Type: Resolution **Status:** In Committee

File created: 2/8/2022 **In control:** ZONING, NEIGHBORHOODS & DEVELOPMENT COMMITTEE

On agenda: **Final action:**

Effective date:

Title: Resolution amending Common Council File Number 201573, a resolution relating to redevelopment of the property at 909 East Michigan Street for the Couture Project.

Sponsors: ALD. BAUMAN

Indexes:

Attachments: 1. Equity Impact Statement, 2. Hearing Notice List

| Date | Ver. | Action By | Action | Result | Tally |
|----------|------|----------------|-------------|--------|-------|
| 2/8/2022 | 0 | COMMON COUNCIL | ASSIGNED TO | | |

211682
ORIGINAL
201573
ALD. BAUMAN

Resolution amending Common Council File Number 201573, a resolution relating to redevelopment of the property at 909 East Michigan Street for the Couture Project.

This resolution rescinds the 5 "Further Resolved" clauses of Common Council File Number 201573 relating to special counsel review of the Common Council's actions adopting an amendment to the Amended and Restated Cooperation, Contribution, and Redevelopment Agreement for the Couture Project requiring the developer to make a \$100,000 contribution to the Anti-Displacement Fund. Specifically, this resolution removes the provision requiring that the contribution be held in escrow by the developer until an outside counsel, selected by the Common Council President and the City Attorney, is able to determine whether the amendment requiring the contribution was adopted in a manner consistent with law.

Resolved, By the Common Council of the City of Milwaukee, that the first, second, third, fourth and fifth "Further Resolved" clauses of Common Council File Number 201573, a resolution relating to the Amended and Restated Cooperation, Contribution, and Redevelopment Agreement as well as personal guaranties for the redevelopment of the property at 909 East Michigan Street for the Couture Project, are rescinded.

LRB177234-1
Jeff Osterman
02/04/2022



Legislation Details (With Text)

EX B

File #: 201573 **Version:** 0

Type: Resolution-Immediate Adoption **Status:** Passed

File created: 3/19/2021 **In control:** COMMON COUNCIL

On agenda: **Final action:** 3/19/2021

Effective date:

Title: Resolution relating to the Amended and Restated Cooperation, Contribution, and Redevelopment Agreement as well as personal guaranties for the redevelopment of the property at 909 East Michigan Street for the Couture Project.

Sponsors: ALD. BAUMAN

Indexes: LAKEFRONT DEVELOPMENT

Attachments: 1. Courture Agreement, 2. Escrow Agreement-Couture, 3. File #201365, 4. File #201573, 5. File #210109, 6. Uniformity and Anti-Displacement Fund, 7. Municipality Article-Roles and authority of governing body members, 8. May 4th email, 9. Email - Courture, 10. Letter re Common Council File No 210232. Proposed Repeal of MCO 304-21, 11. Mayor's Veto Letter

| Date | Ver. | Action By | Action | Result | Tally |
|-----------|------|----------------|---------|--------|-------|
| 3/19/2021 | 0 | COMMON COUNCIL | ADOPTED | Pass | 15:0 |
| 3/19/2021 | 0 | MAYOR | SIGNED | | |

IMMEDIATE ADOPTION

201573

201365

ORIGINAL

ALD. BAUMAN

X's per 211682

Resolution relating to the Amended and Restated Cooperation, Contribution, and Redevelopment Agreement as well as personal guaranties for the redevelopment of the property at 909 East Michigan Street for the Couture Project.

The Common Council, on March 2, 2021, adopted Common Council File Number 201365, approving an amended and restated cooperation, contribution, and redevelopment agreement as well as personal guaranties, for the redevelopment of the property at 909 East Michigan Street for the Couture Project. The development agreement approved by that file was amended on February 23, 2021, by the Zoning, Neighborhoods, and Development Committee to require the developer to make a contribution of \$100,000 to the Anti-Displacement Fund administered by MKE United

at closing. This resolution affirms this earlier action, but also inserts a provision requiring that the contribution be held in escrow by the developer until an outside counsel, selected by the Common Council President and the City Attorney, is able to determine whether the amendment requiring the contribution was adopted in a manner consistent with law. The work of the special counsel is to be completed within 90 days of the effective date of this resolution.

..Body

Whereas, By passage of Common Council Resolution File No. 141263, on February 10, 2015; No. 170169 on May 31, 2017; and No. 201062 on December 15, 2020, the City of Milwaukee ("City") created and amended Tax Incremental District No. 82 (East Michigan) ("TID 82") and approved and amended the Project Plan for TID 82 and authorized the execution of various development documents related to the Couture Project at 909 East Michigan Street (the "Property") including a Cooperation, Contribution and Redevelopment Agreement dated April 28, 2017 (the "Original Development Agreement"); and

Whereas, The Property is located within the boundaries of TID 82; and

Whereas, Due to concerns about potential liability related to possible loss of outstanding TIGER Grants funds from the Federal Transit Administration in the event of future delays in the project timeline, the City is requiring personal guaranties from Richard Barrett and Tan Lo in the amount of \$1,411,713 to cover such potential liability; now, therefore, be it

Resolved, By the Common Council of the City of Milwaukee that the Amended and Restated Cooperation, Contribution and Redevelopment Agreement ("Amended Agreement") that is in File 201365 as amended by ZND 2-23-2021 is approved contingent upon the Developer closing on the Couture Project financing and the proper City officials are authorized and directed to sign it for the purposes of implementing the Project Plan; and, be it

~~Further Resolved, That the contribution required in Section 13.4 of the Amended Agreement shall be held in escrow by the developer pending a review by a special counsel selected by the Common Council President and the City Attorney as to whether the Common Council's actions adopting the amendment providing for this contribution as part of approval of the Amended Agreement were done in a manner consistent with law; and, be it~~

~~Further Resolved, That the Common Council President and the City Attorney shall agree to a set of terms, conditions, and a scope of work consistent with this resolution for the hiring of a special counsel and a request for funding based on this agreement~~

shall be submitted to the Common Council; and, be it.

Further Resolved, That the special counsel shall submit his or her findings to the Common Council, Mayor, and the City Attorney no later than 90 days after the effective date of this resolution; and, be it

Further Resolved, That if the Common Council's actions are found to have been done in a manner consistent with law, the funds held in escrow shall be released as indicated in the Amended Agreement; and be it

Further Resolved, That if the Common Council's actions are found to have been done contrary to law, then the provision of Section 13.4 of the Amended Agreement requiring the contribution shall be deemed severed from Section 13.4 of the Amended Agreement and of no further force or effect and the funds held in escrow shall be returned to the developer; and be it

Further Resolved, That the proper City officials are authorized and directed to execute the Personal Guaranty Agreement and any additional documents and instruments necessary to carry out the provisions of the Amended Agreement and to implement the Project Plan; and, be it

Further Resolved, That Common Council File Number 201365 is rescinded.

James R. Owczarski
March 17, 2021

EXC

Hagopian, Gregg

From: Spencer, Tearman
Sent: Friday, January 7, 2022 3:48 PM
To: Mayor; msm@maistelmanlaw.com
Cc: Hagopian, Gregg; Farris, Todd
Subject: Couture, Special counsel, Scope, Position Paper
Attachments: CADB01-#278344-v1-Kahn_Initial_Position_#2.docx; couture special counsel attachment.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

To Council President Johnson and Mike Maistelman.

Mike, please note that I am also copying you on this and lawyers in my office. Under Council File 201573, it is the Council President and I who select a special counsel. Under that same file, it is the Council President and I who must agree to a Scope for that special counsel.

Regarding possible replacements for Judge Kahn, thank you Mike for your December 28 suggestions. We respond by proposing lawyer Ben Stern. Chevy, is he acceptable to you? I could also agree to your/Mike's Charles Clevert recommendation.

We hope to get the replacement special counsel in place soon, and Chevy I hope to be able to agree with you soon on a Scope.

Meanwhile, I submit to you now, without duty to do so, my initial brief.

Tearman Spencer
City Attorney
Office of the City Attorney
City of Milwaukee
841 N. Broadway Street Suite 716
Milwaukee, WI 53202
Direct Dial-414-286-2660
tspencer@milwaukee.gov

CITY ATTORNEY INITIAL POSITION PAPER, COUNCIL FILE 201573
COUTURE, SPECIAL COUNSEL

CAO DOC 278344, 1-6-2022

I. INTRODUCTION; RULING REQUEST. This is the City Attorney's initial position paper under Council File 201573¹. Special Counsel, please determine and rule as follows.

1. Council Acted Unlawfully; Contribution Is Unlawful. Determine that the Common Council's actions adopting the amendment to Section 13.4 of the **Couture Development Agreement**² to contractually obligate the \$100,000 "contribution" required to be made to the MKE United Anti-Displacement Tax Fund (the **Tax Relief Fund**) by Rick Barrett and Tan Lo (the **Couture Developers**) were done in a manner inconsistent with the law, and are unlawful, because:

A. Oath Requires Lawful Behavior. Elected alderpersons comprising the Common Council must take an oath to uphold the law. Milwaukee City Charter 3-22³. Therefore, neither alderpersons nor the Council should have approved the Couture Development Agreement with the unlawful "contribution" requirement.

B. Unlawful 66.0617 Impact Fee. The contractually mandated "contribution" to the Tax Relief Fund (solicited by Ald. Bauman and passed by the Council) is an unlawful impact fee that violates Wis. Stat. 66.0617. That statute requires: Milwaukee, if it wants to lawfully impose an impact fee, to have an impact fee ordinance; city-imposed impact fees to be limited to defraying capital costs for public facilities associated with the particular development at the development site; impact fees to be payable to the City (not to a third-party fund); impact fees to be payable in installments; and impact fees to be appealable by the developer. The "contribution" requirement is an unlawfully imposed impact fee. The City of Milwaukee has no impact fee ordinance, the City imposed fee here is not to defray capital costs for public facilities at the Couture Site; the imposed fee here had to be paid to MKE United (not to the City), in a lump sum; and it was not appealable by the Couture Developers. Thus, the Council violated Wis. Stat. 66.0617, and the "contribution" is an unlawful impact fee.

C. Uniformity Violation. The contractually mandated "contribution" to the Tax Relief Fund violates Wisconsin Constitution's Uniformity Clause, Art. VIII, section 1 because the net effect of the City-mandated "contribution" of \$100,000 to that fund means that City government disrupted uniformity of taxes, causing certain homeowner taxpayers in the City to pay less in property taxes than other taxpayers who own like-valued, taxable real estate in the City.

¹ Milwaukee Common Council Resolution Files, and materials in those files, can be accessed at: <https://milwaukee.legistar.com/Legislation.aspx>

² The "Amended and Restated Cooperation, Contribution and Redevelopment Agreement for the Couture Project" TID No. 82, dated as of 4-30-2021.

³ The Milwaukee City Charter and the Milwaukee Code of Ordinances (MCO) are at: <https://city.milwaukee.gov/cityclerk/LRB/ordinances>

D. Equal Protection Violation. The contractually mandated “contribution” to the Tax Relief Fund violates the U.S. Constitution (14th Amendment) and Wisconsin Constitution (Article 1, section 1) Equal Protection Clauses because the net effect of the City-mandated “contribution” of \$100,000 to that fund means that City government took action to benefit a limited/narrow class of homeowner-taxpayers who qualify for MKE United funding of property taxes while other property-owner (commercial and residential) taxpayers in the City (not in that classification) do not get the benefit of the City imposition/actions; and the MKE United classification is arbitrary and without rational basis sufficient to allow the City government to so act.

E. Unlawful Exaction, Unconstitutional Condition. The contractually mandated “contribution” to the Tax Relief Fund is an unlawful exaction of the Couture Developer’s money, that violates the “unconstitutional conditions doctrine.” That doctrine prevents City government from coercing people into giving up constitutional rights or interest (here the Developer’s own \$100,000 money) for ends that lack essential nexus and rough proportionality to the impact. Here, the City-mandated “contribution” of the Developer’s own money to pay down property taxes of the limited class of homeowners who benefit from MKE United’s Tax Relief Fund lacks any nexus or proportionality, let alone essential nexus, to the Couture Development. A predicate to an “unconstitutional conditions doctrine” violation is that the City could not have ordered the Developers to pay into the Tax Relief Fund. See above - the City and its Council could not lawfully require the “contribution.”

Accordingly, Ald. Bauman and other alderpersons may not, and the Common Council body itself may not, under applicable law, contractually mandate the Couture Developers to make the “contribution” to the Tax Relief Fund. That is unlawful. Therefore, the Common Council acted contrary to law when it required the \$100,000 “contribution” in Section 13.4 of the Couture Development Agreement.

2. Under Local Law, Only DCD Negotiates Development Agreements. Determine that no individual alderperson (including Ald. Bauman) had Common Council authority to negotiate the amendment to the Couture Development Agreement calling for the “contribution” to the Tax Relief Fund. Under local law (MCO 308-1-2, 308-1-3, and 355-5), DCD, not any alderperson and not the Council, negotiates development agreements.

3. Ethics Law – No Vote Peddling. Determine that state and local ethics laws, i.e. Wis. Stat. 19.59 (1)(b) and MCO 303-5-3, prohibit an alderperson (and prohibited Ald. Bauman) from soliciting anything of value, including the Developer “contribution” to the Tax Relief Fund, when (as here) the Developer could have reasonably expected, and alderpersons could have reasonably expected, that the aldermanic solicitation of the mandated “contribution” that happened here, 4 days prior to a vote, might influence alderperson voting.

4. Ethics Law – Misuse of Position. Determine that Ald. Bauman violated MCO 303-5-5, “misuse of position,” by using, or attempting to use, his position to solicit and require the

Developer “contribution” and to gain an unlawful government-required benefit for homeowners served by MKE United’s Tax Relief Fund.

5. Sever the Unlawful “Contribution” Mandate. Determine that, since it is unlawful for the Council (and/or the City and/or individual alderpersons) to mandate the Developer “contribution” to the Tax Relief Fund (see above), and since it was unlawful for alderpersons to solicit or coerce that “contribution,” per Council Resolution File 201573, the provision in Section 13.4 requiring the \$100,000 “contribution” is deemed severed from the Couture Development Agreement and of no force or effect. Under *Baierl v. McTaggart*, 245 Wis.2d 632, 629 N.W.2d 277 (WI S. Ct. 2001), the illegality of a contract provision does not necessarily render the whole contract unenforceable. Couture Development Agreement, Section 18.6, entitled Severability, provides that, if any provision in the agreement is unenforceable because the provision conflicts with “any constitution or statute...” that won’t render the other provisions of the agreement invalid; and the invalidity of any one provision of the agreement will not affect the remaining portions of the contract. *Save Elkhart Lake, Inc. v. Village of Elkhart Lake*, 181 Wis.2d 778, 512 N.W.2d 202 (Ct. App. 1993) (appellate court upheld trial court’s severing of illegal provisions from development agreement).

II. BACKGROUND POINTS TO CONSIDER.

1. MKE United’s Tax Relief Fund. MKE United and the Greater Milwaukee Foundation established the Tax Relief Fund in 2019 to provide cash grants to pay property taxes of low-to-mid-income homeowners who own homes in two narrowly defined neighborhoods in the City. Per MKE United’s FAQ page about the Tax Relief Fund, qualifying homeowners must own and reside in their homes in the two neighborhoods, they must be below defined income limits that vary depending on family size, and they must have owned their homes since 1-1-2015 or earlier.

ATTACH. 1.

The FAQ page has the question, “**Are any government funds used in the program?**” and the answer, “**There are no federal, state or local government funds being use to provide assistance in the program**” and “**No public funds are being used to provide the tax assistance payments available through the Fund.**” The FAQ also says: “**Why can’t the City reduce the taxes of low-income or elderly residents directly? The Wisconsin Constitution prohibits that. Local governments cannot provide relief to specific groups of homeowners or create rebates or programs to reduce property taxes for groups of property owners.**”

Exactly! The City’s Common Council must also abide by the law. By ruling as the City Attorney requests in Section I above, the Special Counsel’s decision will harmonize with this MKE United FAQ.

Per MKE United itself, the Wisconsin Constitution prohibits the City of Milwaukee from providing relief to specific groups of homeowners or from creating rebates or programs to reduce property taxes for groups of property owners. That’s exactly correct! Ergo, the Wisconsin Constitution also prohibits the City from contractually mandating that the Couture Developers pay into the Tax Relief Fund. Constitutionally, the City cannot pay into the Tax Relief Fund (directly or indirectly), so the City also cannot contractually make others do so. The Common

Council acted in a manner contrary to law by contractually mandating the payment into the Tax Relief Fund by the Developers.

As explained below, the Uniformity Clause in Wisconsin's Constitution prohibits direct, *and indirect*, governmental payments, rebates, schemes, or programs to pay, offset, or reduce homeowner property taxes. Consequently, the Uniformity Clause prevents the City directly - *or indirectly* by contractually obligating a developer to do what the City cannot do – from reducing property taxes of subsets of homeowners. And, the Equal Protection Clauses in the U.S. and Wisconsin Constitutions further prohibit such direct or indirect governmental intervention in property tax reduction schemes that benefit certain subsets of homeowners to the detriment of others (such as those that don't live in the two neighborhoods served by the Tax Relief Fund, or such as a homeowner who does live in one of the neighborhoods but who hasn't owned their home since before the 1-1-2015 cut-off date). MKE United knows the City cannot do this. That's why MKE United's own FAQ page expressly states that the City cannot provide property tax relief schemes to reduce property taxes for homeowner groups.

The City Attorney called to Council President Johnson's attention the Uniformity Clause concern about the "contribution" requirement, but that warning from the City's lawyer was not heeded⁴, and the Council approved the Couture Development Agreement anyway with the unlawful provision.

2. City Government – Council Authority vs. Alderperson Authority. The City Attorney also called to Council President Johnson's attention that individual alderpersons had no authority to negotiate any change to the Couture Development Agreement because under local law, DCD negotiates development agreements⁵. That advice was also not heeded.

Per the City Attorney's 3-9-21 letter, and his 5-4-21 email, to President Johnson⁶, and the League of WI Municipalities' June 2019 article⁷, and Wisconsin Statutes, the Council itself, as a body, has a great deal of authority regarding City business and affairs. However, individual alderpersons have very narrow individual authority, limited to voting at Council meetings.

The Common Council body has broad power over City finances and property. Wis. Stat. 62.11 (5) provides, "Except as elsewhere in the statutes specifically provided, *the council* shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language."

That broad power of the Common Council *body* is also reflected by City Charter Section 4-10, that provides that the Common Council "shall have the management and control of the finances,

⁴ See materials contained in Common Council Resolution File Numbers 201365 and 201573.

⁵ See materials contained in Common Council Resolution File Numbers 201365 and 201573.

⁶ Both are in Common Council File 201365. And, Common Council File 201573 itself references Council File 201365.

⁷ This article is in Common Council File 201573.

and of all the property of the city, except as in this act or otherwise provided.” That Charter section also gives the Council “in addition to all other powers herein vested in them . . . full power and authority to make, enact, ordain, establish, publish, enforce, alter, modify, amend, and repeal all such ordinances, rules, by-laws and regulations for the government and good order of the city...for carrying into effect the powers vested in said common council, as they shall deem expedient.” Those are Council body powers; however, they are not the power of an individual alderperson.

Alderpersons are City officers under Wis. Stat. 62.09 (1)(a). Charter Chapter 3, entitled “Duties and Authority of City Officers,” contains sections for such officials as the Mayor, the Common Council President, the Treasurer, the Comptroller, and the City Clerk, but it does not contain specific, separate provision for duties and authority of individual alderpersons (other than the Council President) who make up the Common Council body. Why? Because, as stated, an alderperson has the limited power and limited authority to cast a vote at Council body and Council committee meetings. Charter 4-05 (Conduct of Common Council Business) provides, in subsection 3, that “Each member of the common council shall have one vote on any one question...” *As discussed below, this limited aldermanic authority (i.e. vote casting) is a reason why state and local ethics laws prohibit alderpersons from soliciting anything of value in exchange for votes.*

In the June 2019 article by the League of Wisconsin Municipalities, entitled, “Roles and Authority of Governing Body Members,” the League stated as follows regarding authority of alderpersons:

“Alders and trustees are leaders, responsible for setting policy and charting the future of the municipality. Although the statutes provide some detail as to the duties and powers of city mayors and village presidents, the statutes provide *no* detail regarding the duties and authority of alders and trustees. This lack of detail reflects the fact that alders and trustees do not have authority in their individual capacity. Instead, the statutes address the responsibilities and powers of village boards and common councils as a whole. This is because the governing body’s authority is collective; it holds power as a unit rather than through its individual members. This does not mean individual governing body members are prohibited from doing anything related to their roles outside of the common council or village board meeting setting. They may still carry out certain functions of their role as an alder or trustee. For example, governing body members can and should function as a liaison between the municipality and the members’ constituents. Alders and trustees may engage with their constituents – e.g., hold listening sessions, write newsletters, survey constituents. However, certain actions remain outside the scope of the role as alder or trustee. For example, individual governing body members do not have supervisory authority over municipal employees and, as such, should refrain from directing municipal staff. While it’s not necessarily inappropriate to request information from staff, governing body members should not demand that certain information be provided or actions taken unless local law authorizes governing body members to do so – such actions stray into executive authority territory.”

Thus, while the Common Council body itself has broad authority to act for the City (in a lawful manner⁸), an individual alderperson has the very limited authority of vote-casting. There is *no* state statute and there is *no* City Charter provision, and there is *no* City Ordinance, giving or delegating authority to any City alderperson (including Ald. Bauman) to negotiate development agreements like the Couture Development Agreement. Accordingly, Ald. Bauman should not have contacted Rick Barrett to solicit the “contribution” or to negotiate that requirement in the Couture Development Agreement. An alderperson’s sole authority is to cast votes at Council hearings (not to negotiate or draft development agreements, or amendments thereto).

3. Under State and Local Law, DCD and the City Attorney’s Office Negotiate Development Agreements – Not Alderpersons. In Milwaukee, the Common Council body did not delegate to any individual alderperson authority to negotiate or draft development agreements like the Couture Development Agreement or amendments thereto. Instead, the Council, as a body, did just the opposite. The Council body enacted ordinances delegating that function to the City’s Department of City Development (**DCD**). Milwaukee Code of Ordinances (**MCO**) Ch. 308 created DCD and that chapter sets forth DCD’s functions, powers, and duties. Under MCO 308-1-2, DCD has the authority, function and responsibility, subject to Common Council body approval, regarding economic development, community development, and redevelopment of real estate in the City. Under MCO 308-1-3, DCD has “supervision, control and direction over all matters related to community development, city planning, urban renewal and real estate (except demolition and vacant lot maintenance).”

Accordingly, the Common Council, as a body, delegated authority to DCD regarding community and real estate development matters, like Couture. DCD is the department that serves as the entry way to the City for economic development transactions that are then subject to Common Council body approval. For example, DCD deals with the City’s use of Tax Increment Financing, subject to Council body approval. See, Wis. Stat. 66.1105 and MCO 304-93, 95, and 96. Likewise, DCD is the entry way to the City regarding the sale of City-owned real estate, and DCD brings proposed commercial sale files to the Common Council body (along with land disposition reports and due diligence checklists) for Council body approval. MCO 304-49. The Common Council body then votes on the matters brought before it, with each individual alderperson having one vote.

This is more definitively driven home by MCO Ch. 355-5 (Community Participation in Development Agreements), subsection 4, pursuant to which DCD (not any individual alderperson):

“shall *negotiate development agreements* governing the implementation of projects for which direct financial assistance is approved⁹. Such agreements shall incorporate the conditions contained in the term sheet approved by the common council. No city funds

⁸ The Council does not have authority to act in an unlawful, unconstitutional manner. The Council body should not have approved the Couture Development Agreement that unlawfully required the Developers to pay \$100,000 into the Tax Relief Fund.

⁹ The Couture is a project for which direct financial assistance (MCO 355-1-2, \$1m or more assistance) was provided. Per Recital 3 of the Couture Development Agreement, the City is providing up to \$50,500,000 in costs related to the Couture project (public infrastructure, Milwaukee streetcar infrastructure, and sewer-related work). See, also, Sections 2.3 and 2.4, and Articles III, XX, and XI of the Couture Development Agreement.

may be released for any project governed by this chapter without the approval of a term sheet and execution of a development agreement.”

Clearly, per local law (the Council’s own MCO 355-5-4), in the Couture development project involving direct financial assistance (over \$50 million), DCD (not any individual alderperson) had the authority to negotiate the Couture Development Agreement including its Section 13.4 that is now at issue.

The City Attorney is a City officer under Wis. Stat. 62.09 (1)(a). Per Wis. Stat. 62.09 (12)(a), the City Attorney “shall conduct all the law business in which the city is interested.” Per 62.09 (12)(d), the City Attorney shall “draft ordinances, bonds and other instruments as may be required by city officers.” This is also reflected in local law. Per City Charter 3-03-1, the City Attorney shall “Conduct all the law business of the corporation and of the departments thereof, and all other law business in which the city shall be interested, when so ordered by the common council” and the City Attorney drafts “contracts, leases, conveyances and other such instruments of writing as may be required by the business of the city...”

Accordingly, under applicable state and local law, DCD, with the assistance of the City Attorney, was responsible for, and had the authority to, draft and negotiate the Couture Development Agreement (including its Section 13.4). No individual alderperson had that authority. Ald. Bauman did not have that authority.

4. So, What Happened Here?

A. The Couture Development, 909 E. Michigan Street. The Couture, a \$188 million, 44 story, high-rise development at 909 E. Michigan Street (with \$50,500,000 of funding coming from the City), was years in the making. The May 2021 groundbreaking was almost 9 years after the project was first publicly announced¹⁰. This massively expensive project faced many hurdles and delays – legal claims that the site was on former Lake Michigan lakebed preventing development¹¹; County Board approval of Milwaukee County’s land sale to the Developer at a below market rate; federal approval of the County sale; financing and HUD loan guarantee delays; investor and lender participation; and...Common Council approval.

B. Couture Development Agreement Approvals 2015-2020. The first development agreement for the Couture was approved by the Common Council on 2-10-2015 in Common Council Resolution File 141313 when the Council approved the Project Plan for Tax Incremental District (TID) 82 and City entry into a development agreement consistent with the term sheet attached to the TID 82 Project Plan. The Couture Developer was to acquire the subject real estate, 909 E. Michigan Street, from the County and construct the Couture, using TID funding in the project.

¹⁰ “Downtown Milwaukee’s Couture high-rise has groundbreaking ceremony – nine years after it was proposed,” Milwaukee Journal Sentinel, 6-16-2021. Milw. LRB, Kathleen Brengosz 3-11-2021 Memo to Ald. Perez, **ATTACH. 2.**

¹¹ The legislature passed 2013 Wisconsin Act 140 to establish the shoreline boundary of Lake Michigan to avoid protracted litigation on whether the Couture could be built at its location. Brengosz Memo. However, a court battle happened and the Circuit Court ruled in 2015 that the County could sell the site for development. Id.

On 5-31-2017, in Common Council Resolution File 170169, the Council approved amending the TID 82 Project Plan to increase the TID money for the project.

The Couture Developer and the City, based on the 2015 and 2017 Council Resolutions, entered into a Cooperation, Contribution, and Redevelopment Agreement, dated 4-28-2017 (the **Original Couture Development Agreement**), regarding the Couture Project and the City's provision of funding for the project.

However, the Couture Developer encountered delays getting other funding, making that 2017 Original Couture Development Agreement outdated and in need of amendment. Consequently, on 12-15-2020, the Council approved Resolution File 201062, and the Council approved further amending the TID 82 Project Plan to put even more TID money into the project, and it authorized an amendment to the Original Couture Development Agreement, with that amendment being in the form of a 12-15-2020 Amended and Restated Cooperation, Contribution and Redevelopment Agreement that is contained in Council File 201062 (the **2020 Amended Agreement**). Brengosz 3-11-2021 memo, **ATTACH. 2**.

That 2020 Amended Agreement, however, was never entered.

Realize, however, that, nowhere in the Original Couture Development Agreement or in the 2020 Amended Agreement was there a provision mandating that the Couture Developers "contribute" money to the MKE United Tax Relief Fund.

C. Late January, and February 2021; Commissioner Crump's 2-4-2021 Warning to Ald. Bauman About "Contributions;" and Alderman Bauman's 2-19-2021 Call to the Developer.

The 2020 Amended Agreement was supposed to have been signed, and the Couture deal was supposed to have closed on 1-29-2021, with a groundbreaking on 2-1-2021. But, more issues arose with the Developer's other financing. Investors of the Developer became concerned about potential liability if the project was not completed timely, and if a TIGER Grant would have to be repaid as a result.

On 1-29-2021, DCD emailed Ald. Bauman (a member of the Zoning, Neighborhood and Development Committee [**ZND**] of the Common Council and the alderperson in whose district the Couture Development is located), to alert him that the closing on the Couture Development was delayed again, and asking for a meeting. On 2-1-2021, DCD again asked for a meeting with Ald. Bauman to seek his support and sponsorship of a resolution to further amend the previously approved Couture development agreements (either the Original Couture Development Agreement or the 2020 Amended Agreement). On 2-2-2021, Ald. Bauman responded asking for information about accounting for the TIGER grant and cost estimates to complete the Lake Front Line for the Streetcar, and saying that his answer, as of then, was "no to any amendments."

That same day, 2-2-2021, DCD transmitted to Ald. Bauman the then-existing (but not signed) 2020 Amended Agreement, and a proposed amendment to Article XIII, calling for Rick Barrett and Tan Lo to provide personal guaranties to cover outstanding TIGER grant funds if not reimbursed by the FTA due to Developer failure to meet timelines, and calling for the release of the personal guaranties when the TIGER Grant audit is completed. DCD explained that the Developer's

investors were concerned about potential payback relating to the TIGER Grant to the FTA and consequently for the deal to move forward, *DCD had negotiated* personal guarantees by Barrett and Lo to cover the unspent portion of the TIGER Grant (roughly \$1.4M million)¹². On 2-3-2021, Ald. Bauman again informed DCD that he was “leaning against any amendments” and he suggested that DCD consider forgetting the Couture building project and to just instead build the street car line extension. Later that night, on 2-3-2021, at 9:26 P.M., Ald. Bauman suggested to DCD:

“An additional thought has come to mind: perhaps the party requesting the city to amend the development agreement on the day of closing might see their way clear to provide an incentive such a contribution to the displacement fund, the housing trust fund or the housing infrastructure preservation fund.” **ATTACH. 3.**

On 2-4-2021, DCD Commissioner Crump responded to Ald. Bauman, warning him that:

“we want to be careful about implicitly tying any approvals to contributions...” **ATTACH. 3.**

DCD Commissioner Crump’s warning was spot-on! Alderperson – do not tie Council approvals or aldermanic votes to developer contributions. Commissioner Crump warned Ald. Bauman. Not only should an alderperson not “implicitly” tie a contract approval to a “contribution,” but no alderperson, and the Common Council itself, should not “explicitly” do so – especially where the mandatory “contribution” itself violates the law. See discussion regarding state and local ethics laws below, Section I above, and Section III below regarding law prohibiting the “contribution.”

Ald. Bauman, on 2-4-2021, responded that the “developer does not have a property right to our money. We already set conditions on private development where city financing is involved through the MORE ordinance¹³.” **ATTACH. 3.**

On Friday 2-19-2021, *a mere four days before the 2-23-2021 Zoning, Neighborhood and Development Council Committee meeting*, Ald. Bauman (a member of ZND) spoke with Rick Barrett asking him to “contribute” to the Tax Relief Fund. **ATTACH. 4.** On Monday 2-22-2021:

(a) Jeff Osterman of the City’s Legislative Reference Bureau (**LRB**) sent a draft motion/amendment to Ald. Bauman to alter Section 13.4 of the Couture Development Agreement to mandate that “contribution.”

¹² Again, under Milwaukee Code of Ordinances, DCD has the authority to negotiate development agreements (not individual alderpersons). MCO 308-1-2 and 308-1-3 and MCO 355-5-4.

¹³ See, <https://community-wealth.org/content/milwaukee-opportunities-restoring-employment-more-ordinance>, “M.O.R.E.” ordinance (Milwaukee Opportunities Restoring Employment) adopted in 2009 requiring such things as certain construction projects to employ a percentage of un or underemployed residents, and that certain development and public works projects be awarded to emerging business enterprises. See MCO Ch. 355 (Community Participation in Development Agreements), Ch. 365 (Local Business Enterprise Contracting Program), and Ch. 370 (Small Business Enterprise). While a developer may not have a property right to City money or TID funds, the Couture Developers do, and did, have a property right in and to their own funds – their \$100,000. See “unconstitutional conditions” doctrine discussion below.

(b) Ald. Bauman sent the draft LRB amendment to DCD Commissioner Crump saying that Ald. Bauman spoke with Rick Barrett on 2-19-2021 about the “contribution” but that Rick Barrett had not seen the actual proposed language for the Development Agreement amendment,

(c) DCD Commissioner Crump suggested to Ald. Bauman that he have the City Attorney’s office review the language and provide advice,

(d) Ald. Bauman responded to Commissioner Crump that “This is a policy issue...” (that is, Ald. Bauman was not going to seek advice from the City Attorney’s Office on the propriety of the alderman-solicited “contribution”), and

(e) Ald. Bauman directed Mr. Osterman to “Fill the file” with the drafted motion (i.e. to go ahead with getting it before ZND), contractually requiring the “contribution” to the Tax Relief Fund. **ATTACH. 5.**

D. Developer’s Call of Concern to DCD. Think of the high legal, architectural, engineering, and development costs that Rick Barrett and Tan Lo had invested in the 9-plus years of trying to launch the Couture. On 2-19-2021, despite having been warned by Commissioner Crump not to tie any vote/approval to any “contribution,” a mere 4 days before the ZND Committee’s vote on approving the Couture Development Agreement, Ald. Bauman, a member of the ZND Committee, without any authority under the Milwaukee Code of Ordinances or under State Statutes to negotiate development agreements (that authority rests with DCD), solicited the 6-figure “contribution” requirement from Rick Barrett, bypassing DCD negotiators and the City Attorney¹⁴.

One can imagine the intense stress and pressure that any developer might feel or perceive in that situation, after having invested so much time, money and effort, and knowing that the ZND vote and the Council vote (just days away) were the very last hurdles for the enormously complex project. One can imagine that any developer may have perceived the solicitation as being reasonably expected to influence aldermanic voting in violation of Wis. Stat. 19.59 (1)(b) and MCO 303-5-3.

After being contacted by Ald. Bauman, the Developer’s lawyer contacted DCD to voice concern over the aldermanic contact and solicitation.

E. Council File 201365, the 2-23-2021 ZND Committee Where Ald. Bauman Moved to Amend the Couture Development Agreement to Mandate the “Contribution;” the Mayor’s Objection; and the City Attorney’s Objection. The City Attorney had not been privy to the emails referred to in Section C above (those attached as **ATTACH. 3-5**).

Remember, not only did Commissioner Crump warn Ald. Bauman on 2-4-2021 against tying approval to any “contribution,” but on 2-22-2021, Commissioner Crump had suggested to Ald. Bauman that he contact the City Attorney’s Office for advice about soliciting the “contribution”

¹⁴ See the emails referred to in Section C above. **ATTACH. 3-5.**

or tying the “contribution” to aldermanic/Council approval, but Ald. Bauman did not seek City Attorney advice. **ATTACH. 3-5.**

After the Developer’s lawyer called DCD (Mary Schanning) voicing concern over the 11th hour solicitation by Ald. Bauman, DCD’s Mary Schanning contacted the City Attorney’s Office.

At the 2-23-2021 ZND Committee, Ald. Bauman did make the motion to amend Section 13.4 of the Couture Development Agreement to contractually mandate the Developer “contribution” that Ald. Bauman had solicited a mere four days earlier.

Ald. Bauman’s motion altering Section 13.4 is as follows, and we have highlighted in yellow the particular change to Section 13.4 that Ald. Bauman required:

“I move to amend the Amended and Restated Cooperation, Contribution and Redevelopment Agreement for the Couture Project that is attached to Common Council File Number 201365 by amending Section 13.4 as follows: 13.4 Notwithstanding anything to the contrary in this Article XIII, in exchange for the Personal Guaranties to be provided to CITY pursuant to this Agreement, >>and in exchange for a contribution to the Anti-Displacement Fund administered by MKE United in the amount of One Hundred Thousand Dollars (\$100,000.00) payable by the Developer’s principals, Rick Barrett and/or Tan Lo, at closing,<< CITY hereby limits liability of DEVELOPER and its Affiliates as stated below and waives any potential claims against the Conventional Lender(s) and HUD Insured Lender related to FTA seeking reimbursement of TIGER Grant funds paid to CITY or FTA’s refusal to provide TIGER Grant funds for the Streetcar Amenities due to delays caused by DEVELOPER or its Affiliates, contractors or suppliers, Conventional Lender(s) or the HUD Insured Lender that result in the deadlines in Sections 2.2.F and 2.2.I. of this Agreement not being met. Any liability related to the TIGER Grant hereunder shall be limited to an amount not to exceed \$1,411,713, and shall be solely recoverable from Rick Barrett and Tan Lo pursuant to the terms of the Personal Guaranties, and not the DEVELOPER.

The ZND Committee (including Ald. Bauman) voted in favor of the amendment. Later, so too did the full Council vote (including Ald. Bauman) to approve the change to Section 13.4.

The City Attorney notified the Council, the Council President, the City Clerk, and the Mayor’s Office about legal and ethical concerns concerning the mandated “contribution” (including absence of aldermanic authority to negotiate or draft development agreements, state and local ethics law concerns, and Wisconsin Constitution Uniformity Clause concerns). The Council and the Council President, however, refused to remove the “contribution” requirement. The City Attorney then refused to sign approval of the Couture Development Agreement containing that “contribution” requirement, as was the City Attorney’s duty under MCO 304-21 as that ordinance then required for the agreement to be valid¹⁵. See the City Attorney’s 3-16-2021 letter to the

¹⁵ See City Attorney: 3-9-2021 letter to City Clerk; 3-12-2021 letter to Council President; 3-16-2021 letter to Council President and City Clerk; 5-4-2021 email to Council President. These are in Council File 201365. At the time of Council File 201365 and File 201573, MCO 304-21 provided that, if the consideration of a City contract (agreement), “exceeds...or...can reasonably be interpreted to exceed a value of \$25,000” then pursuant to MCO

Council President and City Clerk informing them that the City Attorney did not approve the Couture Development Agreement as amended by the Ald. Bauman amendment requiring the \$100,000 “contribution.” The City Attorney said, “with the \$100,000 contribution requirement in Section 13.4 of the agreement added by Alderman Bauman motion...” there is, and can be, no signature” by the City Attorney approving the contract “and there should not have been Council approval...”

The City Attorney was not alone. Commissioner Crump had warned Ald. Bauman back on 2-4-2021. **ATTACH. 4.** And, Mayor Barrett too voiced concern. Mayor Barrett too refused to sign approval of Council File 201365 as is his right under Charter 4-23. See Mayor’s 3-2-2021 email (Myra Edwards) in Council File 201365. The Mayor is a City officer under Wis. Stat. 62.09 (1)(a). Under Wis. Stat. 62.09 (8)(a), the Mayor is the City’s chief executive officer who “shall take care that city ordinances and state laws are observed and enforced and that all city officers and employees discharge their duties.” Mayor Barrett would not go along with File 201365.

Again, despite City Attorney and Mayor Barrett opposition, the Council refused to back down.

F. Commissioner Crump 2-24-2021 Email. Remember, DCD Commissioner Crump, on 2-4-2021, warned Ald. Bauman that:

“we want to be careful about implicitly tying any approvals to contributions...”

(**ATTACH. 3**), and on 2-22-2021 Commissioner Crump suggested to Ald. Bauman that Ald. Bauman seek City Attorney advice about the solicited “contribution” (**ATTACH. 4**). Ald. Bauman did not seek advice or heed the warning. Commissioner Crump sent a 2-24-2021 email to the City Attorney concerning the change to Section 13.4 saying that he wasn’t able to:

“provide any insight into that negotiation, as the terms of that amendment were not negotiated by DCD staff. Rather, I believe that Ald. Bauman, and perhaps other alderpersons on the [ZND] committee, negotiated directly with Rick Barrett on the terms of Ald. Bauman’s amendment.”

G. The “Do-Over” Council File 201573 - the Compromise Setting Up Special Counsel Intervention and the Chicago Title Escrow Agreement. With the Common Council’s approval of the \$100,000 “contribution” requirement in File 201365 facing Mayoral opposition and City Attorney opposition, the Council (still refusing to remove the “contribution” requirement) took the matter up again in a “do-over” Council File, No. 201573¹⁶, setting up the compromise between the Common Council President and the City Attorney whereby a Special Counsel would be hired to review the matter and to determine whether things were lawful. With that, Council File 201573 was passed by immediate adoption, the Couture Development Agreement was signed (with the

304-21, the Office of the City Attorney must “approve the provisions of said agreement...and said fact [must] appear on the face of such document.” Failure to comply with this requirement “shall render such agreement void.” Not voidable, but void.

¹⁶ This Council File 201573 was passed by the Council on 3-19-2021 by immediate adoption, with the Council rescinding File 201365. See, also, Council File 210223 whereby the Council authorized the hiring of an outside lawyer to represent the Common Council before the reviewing “special counsel.”

offending Section 13.4 requiring the Developer to “contribute” the \$100,000 to the Tax Relief Fund), and with that mandated “contribution” being put in escrow with Chicago Title Insurance Company. That money remains in escrow, under a 4-30-2021 Escrow Agreement (amended 11-19-2021), with its release depending on how the reviewing Special Counsel rules.

H. Council File 210232 Amending MCO 304-21 regarding City Attorney Approval and Signature of City Contracts. Ald. Perez represents District 12. One of the neighborhoods served by the MKE United Tax Relief Fund is in District 12. Ald. Perez, aware of the “contribution” requirement in the Couture Development Agreement, and aware of City Attorney and Mayoral opposition to the “contribution” requirement, sponsored Resolution File 210232. That file dilutes City Attorney authority, and dilutes City protection against unlawful contracts. Nonetheless, the Council adopted the file, thereby amending MCO 304-21 so that the City Attorney’s review and signature on contracts over \$25,000 and on contracts involving transfer of property is no longer required in order for a Common Council approved contract to be enforceable. Now, under the revised MCO 304-21, the City Attorney only reviews contracts if requested by the Mayor or by an alderperson. Mayor Barrett vetoed this Common Council file and effort to dilute City Attorney contract review, but the Council overrode Mayor Barrett’s veto.

III. THE LAW PROHIBITS THE CONTRACTUALLY REQUIRED “CONTRIBUTION.”

The above shows: that MKE United knows that the constitution prohibits government funding of the Tax Relief Fund; that DCD Commissioner Crump warned Ald. Bauman not to tie any “contribution” to approval of the Couture Development Agreement and to seek advice from the City Attorney; that Ald. Bauman did not heed that warning or suggestion; that, instead Ald. Bauman (a ZND Committee member) contacted Rick Barrett 4 days prior to the ZND meeting and ZND voting to solicit the “contribution:” and that the Council ultimately approved the Ald. Bauman amendment requiring the contractually mandated Developer “contribution” to the Tax Relief Fund, thereby triggering Mayor Barrett and City Attorney opposition and the need for Special Counsel review of the Common Council’s approval and actions.

1. Dictionary Definition of “Contribution.” The online dictionary, Miriam-Webster.com, defines the essential meaning of “contribution” as follows:

“something that is given to help a person, a cause, etc. She made a 100-dollar *contribution* [=donation] to breast cancer research. They thanked him for his *contribution* of time and money. He made an important *contribution* to the debate.”
Emphasis added.

In the case at hand, *really*, there is no “contribution” as that word is commonly understood and dictionary-defined. Rick Barrett, 4 days before ZND’s vote, was contacted by Ald. Bauman (a ZND member) and the payment into the Tax Relief Fund was solicited. It is a contractually mandated payment by the City. It is required by the Couture Development Agreement, Section 13.4. If Rick Barrett or Tan Lo would not have made the payment, that would be a developer breach of the Development Agreement and constitute an Event of Default (Couture Development Agreement, Art. X), giving the City the right to sue or to

terminate the agreement (Art. XI). That contractually mandated “contribution,” that is not a “contribution” at all, is unlawful.

2. Ald. Bauman Had No Authority to Negotiate Section 13.4; State and Local Ethics Laws, Wis. Stat. 19.59 (1)(b) and MCO 303-5-3, Prohibit Vote Peddling. Remember, an individual alderperson’s authority is his or her right to cast votes. Section II.2. above and Charter 4-05. Remember, only DCD has the authority to negotiate development agreements. MCO 308-1-2 and 308-1-3, and MCO 355-5-4. Ald. Bauman doesn’t have that authority. Remember, on 2-4-2021, DCD Commissioner Crump warned Ald. Bauman that:

“we want to be careful about implicitly tying any approvals to contributions...” ATTACH.

3.

State law and local law, state ethics code Wis. Stat. 19.59 (1)(b) and local ethics code MCO 303-5-3, prohibit an alderperson from soliciting, directly or indirectly, anything of value if it could reasonably be expected to influence the alderperson’s official vote¹⁷. Those state and local ethics laws do *not* require that the alderperson solicit a thing of value for himself or herself. They don’t require the alderperson to personally benefit. Instead, they prohibit alderperson solicitation of anything of value (here a \$100,000 contribution to the Tax Relief Fund) if it could reasonably be expected to influence the alderperson’s vote. Surely, Rick Barrett, the Couture Developer, contacted directly by ZND Committee member Ald. Bauman (bypassing DCD negotiators), 4 days before the 2-23-2021 ZND vote, would or could reasonably expect that acquiescence to the “contribution” (i.e. the mandated payment) was needed in order to obtain aldermanic votes, and in order to “close” the deal. Under the law, neither alderpersons nor the Council should have approved the Couture Development Agreement containing that “contribution” requirement; and, as Commissioner Crump warned, the “contribution” should never have been solicited.

3. Local Ethics Code MCO 303-5-5, Misuse of Position. Aside from the state and local ethics laws discussed in Section 2 prohibiting solicitation to influence an aldermanic vote, local ethics code MCO 303-5-5 (“misuse of position”) also prohibits any City official or employee (i.e. an alderperson) from using, or attempting to use, his or her position to influence or gain unlawful benefits, advantages, or privileges for himself or herself *or for “others.”*

In the case at hand, it is unlawful (an unlawful impact fee, an unlawful exaction that violates the “unconstitutional conditions doctrine,” and unlawful under the Uniformity Clause and Equal Protection clauses) for a City (either by its full Common Council body or by any alderperson) to

¹⁷ Wis. Stat. 19.59 (1)(b): “No person may offer or give to a local public official, directly or indirectly, and no local public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the local public official’s vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the local public official.” MCO 303-5-3: “No person may offer or give to an official or other city employee, directly or indirectly, and no official or other city employee may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the official’s vote, the official’s or other city employee’s official actions or judgment, or could reasonably be considered as a reward for any official action or inaction of the party of the official or other city employee...”

mandate a “contribution” to the MKE United Tax Relief Fund. Consequently, under MCO 303-5-5, neither alderpersons nor the Common Council may lawfully use aldermanic role or votes to gain the unlawful Section 13.4 contract provision, requiring the unlawful “contribution” to the MKE United Tax Relief Fund, thereby unlawfully benefitting Tax Relief Fund grantees.

4. Oath. Per Charter 3-22, those appointed or elected to office (alderpersons) must take the oath and uphold the law. Accordingly, an alderperson should respect local law whereby DCD was to be the negotiator of development agreements (including the Couture Development Agreement). Ald. Bauman should not have bypassed DCD to negotiate change to Section 13.4 of that agreement. Ald. Bauman, and all alderpersons, must respect the state and local ethics laws, including Wis. Stat. 19.59, MCO 303-5-3, and MCO 303-5-5 (see Sections 2 and 3 above). Ald. Bauman (a ZND member) should not have contacted the Developer, 4 days prior to a ZND vote, to solicit the “contribution” especially since Commissioner Crump had warned against tying any contribution to project approval, and since the solicitation was so close to the vote whereby the Developer could suspect that the “contribution” was required in order to get votes, and especially where it is unconstitutional for City government to contractually mandate a Developer “contribution” to a fund that pays some homeowners’ property taxes. See Sections 5-8 below.

5. Unlawful Impact Fee. The City contractually-mandated \$100,000 “contribution” (that really is not a “contribution”) is, really, an “unlawful impact fee” by the City that violates Wis. Stat. 66.0617, entitled “Impact fees.” **ATTACH. 6 and 7.**

Wis. Stat. 66.0617 only allows a municipality to exact an impact fee from a developer if the municipality enacts an ordinance under Wis. Stat. 66.0617 (2)(a). Because the City of Milwaukee has not enacted any impact fee ordinance (**ATTACH. 7**), the City cannot impose the \$100,000 “contribution” (unlawful impact fee) that is in Section 13.4 of the Couture Development Agreement.

Even if the City did have an impact fee ordinance (it does not), per Wis. Stat. 66.0617 (2)(b), a City-imposed impact fee may only be used “to pay for the capital costs” (defined in Wis. Stat. 66.0617 (1)(a) as capital costs “to construct, expand or improve public facilities”) “that are necessary to accommodate” the “land development” that the developer is undertaking. Here, the “impact fee” (the mandated “contribution”) is to fund MKE United’s Tax Relief Fund, it is not to pay or offset capital costs for public improvements at the Couture Project Site, so the \$100,000 “contribution” violates Wis. Stat. 66.0617. **ATTACH. 6.**

Also, any impact fee imposed by the City under an ordinance enacted under Wis. Stat. 66.0617 (again, Milwaukee has no such ordinance) must, per 66.0617 (6) “bear a rational relationship to the need for new, expanded or improved public facilities that are required to serve the land development” and meet other specific criteria in subsection (6). The \$100,000 “contribution” required from this Developer under Section 13.4 bears no rational relationship to public facilities required to serve the Couture Project Site, and violates Wis. Stat. 66.0617. **ATTACH. 6.**

Furthermore, Wis. Stat. 66.0617 (6)(g) provides that an impact fee imposed by a municipality is to be paid by the developer to the City (not to some third-party fund); and if the impact fee is “more than \$75,000,” then the developer must be allowed to defer the impact fee “for a period of

4 years from the date of the issuance of the building permit or until 6 months before the municipality incurs the costs to construct, expand, or improve the public facilities related to the development for which the fee was imposed, whichever is earlier.” **ATTACH. 6.** Again, the \$100,000 “contribution” here violates Wis. Stat. 66.0617 since the City is requiring the Developer to pay the sum, in lump sum, to MKE United (not to the City).

The legislature is concerned about impact fees or “contributions” that a city mandates from a developer. Wis. Stat. 66.0617 (10) requires municipalities to provide developers with appeal rights regarding municipal imposition of an impact fee. Rick Barrett and Tan Lo had no appeal rights.

Here, we had Ald. Bauman (a ZND member), having been warned by DCD Commissioner Crump against tying approvals to mandated “contributions,” a mere 4 days prior to a ZND vote, contact Rick Barrett to solicit a mandatory “contribution” to the MKE United Tax Relief Fund, with disregard for, and in violation of, Wis. Stat. 66.0617 and the rights of the developer.

Under *Metropolitan Builders Assn. of Greater Milwaukee v. Village of Germantown*, 2005 WI App 103, a municipality cannot expect developer money to subsidize existing residents’ proportionate share of costs. Impact fees are to hold a developer responsible only for the portion of capital costs whose necessity is attributable to their developments. Precisely! The City cannot make the Couture Developers pay certain homeowner property tax bills. That has nothing to do with capital costs of developing the Couture Project Site. That violates Wis. Stat. 66.0617 and *Metropolitan Builders*.

Again, the Council-approved amendment to Section 13.4 of the Couture Development Agreement, mandating the Developer \$100,000 “contribution” to the third-party MKE United Tax Relief Fund is an unlawful impact fee, that was wrongly imposed upon the Developer, in violation of Wis. Stat. 66.0617, that bears no relationship to public facilities associated with Couture Project Site development, and concerning which the Developer had no appeal rights.

6. Unlawful Exaction; Violation of “Unconstitutional Conditions” Doctrine, *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013) (U.S. Supreme Court). The “unconstitutional conditions doctrine” prevents government from coercing people into giving up constitutional rights. Government may not pursue governmental ends that lack an essential nexus and rough proportionality to the impacts. In the *Koontz* case, the water management district could not evade the “unconstitutional conditions doctrine” by conditioning its approval of a land use permit on the developer’s funding of offsite mitigation projects. Extortionate demands by government of a developer run afoul of the “takings clause” because they impermissibly burden the right not to have property taken without just compensation. The impermissible denial of a government benefit under coercive pressure is a constitutionally cognizable injury. A predicate for an “unconstitutional conditions claim” is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing.

Precisely! Here, neither alderpersons nor the Council body could lawfully require or coerce the Couture Developers to “contribute” or pay their own personal funds to the Tax Relief Fund because such a City-mandated “contribution” to that fund, which pays some, but not all, peoples’

property taxes, itself violates the Uniformity Clause of Wisconsin's Constitution and the Equal Protection Clauses of the U.S. and Wisconsin Constitutions, and Wis. Stat. 66.0617. And, that payment duty lacks any nexus to the development of the Couture Project Site.

Rick Barrett and Tan Lo had ownership and constitutional right to their property (their \$100,000 cash) that was wrongly exacted from them for a government mandated "contribution" to the Tax Relief Fund. That mandated payment to that third-party fund has no essential nexus or rough proportionality to impacts of the Developer's Couture project or to development of the Project Site. And, in any event, the government (the City of Milwaukee whether by its Common Council or its alderpersons) violates constitutional and statutory law by ordering or contractually requiring the Developers to pay to the Tax Relief Fund (i.e. that government action violates Wisconsin's Uniformity Clause, is an unlawful impact fee that violates Wis. Stat. 66.0617, and violates Equal Protection clauses of the U.S. and Wisconsin Constitutions). That is, the Common Council cannot constitutionally order or require the Couture Developers to contribute to, or pay Developer cash into, the Fund. That violates the "unconstitutional conditions" doctrine.

7. Uniformity Clause Violation.

A. City Attorney 3-22-2021 Memo. The City Attorney's Office released a 3-22-2021 memo (made part of Council Files 201365 and 201573) indicating, based on Wisconsin Constitution Article VIII, Section 1 (the Uniformity Clause), and case law interpreting the Uniformity Clause (*Gottlieb, Torphy, and Sigma Tau Gamma Fraternity House Corp.*), that when local government (the City of Milwaukee) requires a developer (Rick Barrett and Tan Lo), contractually, to pay money to the MKE United Tax Relief Fund to help pay property taxes of a subset of property owners, that violates the Constitution's Uniformity Clause. It is unlawful. The City, local government, a taxing body, may not lawfully play any role in any scheme, fund, or program, that has the effect of some taxpayers not paying property tax in a uniform manner. All taxpayers in the City of Milwaukee, owning equally valuable real estate, must, under Wisconsin's Constitution, pay a uniform property tax.

B. Wisconsin Constitution Uniformity Clause. Article VIII, section 1, of the Wisconsin Constitution states:

The rule of taxation shall be uniform but the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods. Taxes shall be levied upon such property with such classifications as to forests and minerals including or separate or severed from the land, as the legislature shall prescribe. Taxation of agricultural land and undeveloped land, both as defined by law, need not be uniform with the taxation of each other nor with the taxation of other real property.

This constitutional provision is known as the Uniformity Clause. In *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 429 (1967), the Wisconsin Supreme Court established an analytical framework for the Uniformity Clause that has endured to the present day. That standard is:

1. For direct taxation of property under the uniformity rule, there can be but one constitutional class.
2. All within that class must be taxed on a basis of equality so far as practicable and all property taxed must bear its burden equally on an *ad valorem* basis.
3. All property not included in that class must be absolutely exempt from property taxation.
4. Privilege taxes are not direct taxes on property and are not subject to the uniformity rule.
5. While there can be no classification of property for different rules or rates of property taxation, the legislature can classify as between property that is to be taxed and that which is to be wholly exempt, and the test of such classification is reasonableness.
6. There can be variations in the mechanics of property assessment or tax imposition so long as the resulting taxation is borne with as nearly as practicable equality on an *ad valorem* basis with other taxable property.

Wisconsin courts have consistently indicated that the Uniformity Clause mandates consistency of taxation among properties in a taxing district. *See, e.g., Paul v. Town of Greenfield*, 232 N.W.2d 770, 774, 202 Wis. 257 (1930). “Article VIII, section 1 of the Wisconsin Constitution requires that the method or mode of taxing real property must be applied uniformly to all classes of property within the tax district.” *U.S. Oil Co., Inc. v. City of Milwaukee*, 2011 WI App 4, ¶ 22, 331 Wis. 2d 407, 424-25.

C. Uniformity Echoed in Wis. Stat. Ch. 70. The Wisconsin Constitution Uniformity requirement is echoed in Wisconsin Statutes. The general statutory rules are that all property is taxed (Wis. Stat. 70.01) except that which is specifically exempt (Wis. Stat. 70.11) so long as the property owner proves entitlement to tax exemption (Wis. Stat. 70.109 and 70.11), understanding that the presumption is in favor of taxation (Wis. Stat. 70.109). So, unless an owner proves entitlement to a property tax exemption that the legislature has statutorily allowed, that owner’s property must be taxed by the City, on a basis of equality and uniformity, so that taxable property bears equal tax burden with all other taxable property on an *ad valorem* basis. Government may not lawfully disrupt uniformity.

D. MKE United’s Anti-Displacement Fund (i.e. the Tax Relief Fund). As stated on its website, the MKE United Anti-Displacement Fund was created “to provide grants to help ensure that long-time, income eligible homeowners living in near downtown neighborhoods are not displaced due to increasing property taxes associated with rising property values and new development.” <https://www.mkeunited.com/antidisplacementfund>. As further described on the website:

“In response to significant input about the urgency of this issue from neighborhood residents, MKE United partners have come together to launch the MKE United Anti-Displacement Fund to assist eligible homeowners. The Fund will be available to offset property tax increases for eligible homeowners in neighborhoods adjacent to Downtown Milwaukee that have experienced significant property tax increases above city averages during the past five years and where long term homeowners

may be at risk of displacement due to rising property taxes. This is one of multiple strategies being advanced by MKE United partners to address the issue of displacement in Milwaukee neighborhoods.

The MKE United Anti-Displacement Fund will be available to assist income eligible homeowners beginning with their 2019 property taxes. Applications will be accepted beginning in November 2019.

The Fund will operate for an initial five-year pilot period and MKE United is committed to continued fundraising efforts with a goal of extending the program to have a 15-20 year lifespan.”

Of particular interest, a “Frequently Asked Questions” (FAQ) portion of the MKE United website includes the following questions & responses:

“Why can’t the City reduce the taxes of low-income or elderly residents directly?”

The Wisconsin Constitution prohibits that. Local governments cannot provide relief to specific groups of homeowners or create rebates or programs to reduce property taxes for groups of property owners.”

“Are any government funds used in the program?”

There are no federal, state or local government funds being use to provide assistance in the program.”

The Tax Relief Fund only provides property-tax relief grants to homeowners in certain areas of the City; namely, the Halyard Park/Brewers Hill/Harambee neighborhood and the Walker’s Point neighborhood east of I43/I94. Grant recipients are subject to income limits and must have owned their property since at least January 1, 2015. **ATTACH. 1.**

MKE United’s flyer for the Fund states:

“For new applicants, if you meet program eligibility requirements and your application is approved, the program will make a tax payment on your behalf in an amount that is the difference between your tax bill for 2019 and your tax bill for 2020. For example, if your property taxes were \$2,000 in 2019 and are \$2,400 in 2020 – the program will pay the difference of \$400...”

E. Further Analysis. Uniformity Clause cases often fall into two main categories: challenges to property assessments and challenges to specific taxation schemes. The following Wisconsin Supreme Court Uniformity Clause cases support the illegality of the City’s Common Council (or any alderperson) contractually mandating a “contribution” to the Tax Relief Fund so that some property owners in the City will get part of their property taxes paid.

- In *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408 (1967), the Court held that state statutory provisions (known collectively as the “Urban Redevelopment Law”) permitting municipalities to partially exempt properties held by a local “redevelopment corporation” from property taxes for up to 30 years violated the Uniformity Clause. The Court concluded that the Urban Redevelopment Law resulted in property taxes that were “not uniform in their impact on property owners.” *Id.* at 429. “[I]f redevelopment corporations are assessed at a figure less than that which would be assigned to other taxpayers holding equally valuable property, other taxpayers will be paying a disproportionately higher share of local property taxes.” *Id.*
- While the partial exemption from property tax deemed unconstitutional in *Gottlieb* was achieved directly - by partially exempting certain properties from property taxes - subsequent decisions considered less direct means of providing property tax relief. For example, in *State ex rel. La Follette v. Torphy*, 85 Wis. 2d 94 (1978), the Court held that a law granting tax credits to owners of certain residential properties in a taxation district—but not to others—violated the Uniformity Clause. The law in question in this case, the Improvements Tax Relief Law, provided homeowners who placed garages and other improvements on their properties with an income tax credit. The Court explained that “[t]he fact that a rebate credit is paid to certain property owners and not to others leads to the indisputable conclusion that taxpayers owning equally valuable property will ultimately be paying disproportionate amounts of real estate taxes. This is not uniformity.” *Id.* at 108.

That is precisely what is happening here with the City-mandated Developer “contribution” to the Tax Relief Fund.

- Not long after *Torphy*, the Court discussed how Wisconsin’s Tax Incremental Financing (“TIF”) laws align with the Uniformity Clause. *Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie*, 93 Wis. 2d 392 (1980). The Court clarified that “[w]ith respect to the question of uniformity of taxation among individual taxpayers, the Tax Increment Law is clearly distinguishable, both in form and effect, from the tax provisions struck down by the court in *Gottlieb* and in *Torphy*.” *Id.* at 411. The Court noted that “[i]n both of those cases, the court based its conclusion that the provisions were unconstitutional upon its finding that taxpayers owning equally valuable property were required to pay disproportionate amounts of taxes. Under tax increment financing, however, there is no such disproportionate impact upon taxpayers within the same territorial boundaries of the unit imposing the tax.” *Id.* In other words, TIF laws do not violate the Uniformity Clause because their effect on taxpayers in a given district is proportionate.

With the City, here, however, mandating a Developer “contribution to the Tax Relief Fund, knowing that that fund helps pay property taxes of some homeowners who have owned their homes in certain limited areas since 1-1-2015 or before, the result is that the City Common Council created a contract scheme where taxpayers in the City, owning equally valuable homes, end up paying disproportionate amounts on real estate taxes – precisely what the Uniformity Clause prohibits.

Accordingly, per *Gottlieb, Torphy, and Sigma Tau Gamma*, government actions run afoul of the Uniformity Clause when they provide partial property tax exemptions, or rebates, or offsetting credits, or grants, to some—but not all—taxpayers within the City. Consequently, the City cannot, under Wisconsin’s Uniformity Clause, directly *or indirectly* provide rebates, or credits, or offsets, to some taxpayers of taxable residential property thereby creating lack of uniformity, and the City cannot engage itself in a scheme that has that prohibited end result. This is recognized by the MKE United Fund itself in the “Frequently Asked Questions” provisions on its website, which state that the Wisconsin Constitution “prohibits Local governments” from providing relief to specific homeowner groups to reduce their property taxes.” **ATTACH. 1.**

Under the Uniformity Clause, it is unlawful for the City to contractually require the Couture Developers to contribute to MKE United’s Tax Relief Fund.

A private fund or private donor, not connected with government, has far greater latitude with respect to making charitable donations because neither government, nor governmental power, nor restrictions on governmental power¹⁸, are involved. Private donors thus have more freedom to make charitable contributions of non-public (non-government) funds. The fact that the MKE United Tax Relief Fund does not use public dollars (or government-mandated dollars), and does use private (non-governmental, non-public, non-governmentally mandated) funds to offset residential property taxes of only certain, limited and select taxpayers does not, in and of itself, appear to violate the Uniformity Clause. The private, non-governmental, nature of those funds removes them from the purview of the Uniformity Clause. That is, if private donors, of their own volition (i.e. not required by government contract), *wish* to give money (i.e. to “contribute” under the Webster Dictionary understood definition of “contribute”) to MKE United’s Fund to help individual taxpayers with property taxes—or for any other legally permissible reason—the Uniformity Clause does not stop them from doing so.

A public entity (such as the City), however, does violate the Uniformity Clause if it directly, or indirectly, subsidizes some, but not all, taxpayers’ property tax bills. In the words of the *Torphy* Court, such a payment to certain taxpayers but not to others “leads to the indisputable conclusion that taxpayers owning equally valuable property will ultimately be paying disproportionate amounts of real estate taxes” and, therefore, “is not uniformity.”

Thus, the City cannot “indirectly” “contribute,” or cause “contribution” to the Tax Relief Fund by contractually obligating others to “contribute” to the Tax Relief Fund because the end result is the same – government creating a scheme whereby taxpayers owning equally valuable property pay disproportionate amounts of real estate taxes, thus disrupting, and violating, uniformity.

The City of Milwaukee may not lawfully require developers (whether, for example, by ordinance or by contractual commitment) to donate money to the MKE United Tax Relief Fund. The City-mandated contractual commitment to “contribute” (when it is not a true “contribution” at all) private dollars is only occurring as the cost of doing business with the City, and as a City-mandated requirement (an unlawful exaction and unlawful impact fee), with the knowledge and intent that those government-mandated contribution dollars will work as a partial rebate, or partial credit, or partial offset, or grant, to certain, eligible, owners of certain, eligible, taxable real estate in certain,

¹⁸ Such as the Uniformity Clause, the Public Purpose Doctrine, Equal Protection constraints.

eligible, discrete geographical areas. In other words, by the City requiring a payment and direction of funds toward certain limited taxpayers for the purpose of easing their property tax burdens and combating gentrification—no matter how laudable that goal might otherwise be—the City is impermissibly, unlawfully, and unconstitutionally, using government authority to disrupt uniformity of taxation. Ald. Bauman’s (ZND’s) (the Council’s) amendment to Section 13.4 of the Couture Development Agreement violates the Wisconsin Constitution’s Uniformity Clause.

It is unlawful for the City to mandate or require public or private funds to be paid to the Tax Relief Fund. That disrupts Uniformity, and has the net result of different owners paying disproportionate amounts of property taxes on like-valued real estate.

F. Wis. Stat. 17.14. Wis. Stat. 17.14, entitled “Removal; assessors; boards of review; county boards; procedure” provides for removal from office of assessors and board of review members: for acts relating to the assessing of property at other than its true value with the intent that the property owner pay less than its lawful share of taxes; and for acts that would show favoritism to certain groups of taxpayers over other groups of taxpayers; and for aiding, abetting, or assisting, in combination or conspiracy with others, regarding these impermissible ends. It is likewise unlawful for an alderperson, or the full Council, to act in a manner, or to contractually mandate a payment, that results in some favored group of property owners paying less than their lawful share of taxes.

8. Equal Protection.

As MKE United’s website explains, the Property Tax Relief Fund provides property tax relief for a subset of property owners in the City of Milwaukee meeting maximum income limits and owning real property (homes) in a “program target area” being two discreet areas north and south of downtown. Per MKE United, the “northern area” served by property tax relief through the fund “includes Halyard Park, Brewers Hill, Bronzeville, and the southern portion of the Harambee neighborhood” while the “southern area” served by the fund “includes the Walker’s Point neighborhood east of I43/I94.” **ATTACH. 1.**

First of all, even as MKE United recognizes, the City itself cannot fund the Tax Relief Fund because that violates the Uniformity Clause, and the City also cannot mandate, by contract, that others fund the fund because that too violates the Uniformity Clause. That is, the City cannot indirectly violate the Uniformity Clause by contractually requiring the Couture Developers to fund the fund. Second, even if one assumes away the Uniformity Clause problem, there remain Equal Protection violations. Why would a low income homeowner living across the street from a qualifying homeowner not be entitled to property tax relief through the Tax Relief Fund (and government-mandated “contribution” to the fund)? Why would a low income homeowner living within the fund’s qualifying district, but who acquired ownership of their home after the fund’s arbitrary “ownership cut-off” date of 1-1-2015 or earlier, not be entitled to property tax relief through the fund? Equal Protection problems further prevent government involvement and intervention with MKE United’s Tax Relief Fund.

Under the Equal Protection clauses of the 14th Amendment to the U.S. Constitution and to Wisconsin Constitution Article 1, section 1, equal protection is violated when the legislature makes an irrational or arbitrary classification, one that has no reasonable purpose or relationship to the facts or proper governmental policy. *Nankin v. Village of Shorewood*, 2001 WI 92, paragraphs 11, 15. Here, we have government (Milwaukee's Common Council), prohibited by the Uniformity Clause of Wisconsin's Constitution, from indirectly or directly funding payoff or reduction of property taxes, and without an ordinance as would be required by Wisconsin's "impact fee" statute, Wis. Stat. 66.0617, contractually mandating Rick Barrett and Tan Lo (the Couture's Developers) to pay \$100,000 into MKE United's Tax Relief Fund, when the Council knows that that fund reduces and pays property taxes of *some* homeowners, below defined income limits, in narrowly defined geographical areas, who apply, and who have owned their homes on or before 1-1-2015. That is, City government knowingly mandated the funding of a property-tax reduction scheme with an arbitrary and limited class of beneficiary homeowners, where there is no rational relationship for the classification or for government intervention into the classification scheme, and where government intervention into the scheme is itself illegal.

City action, imposing the contractually mandated Tax Relief Fund "contribution" upon the Developers, that will benefit one class of people - only the taxpayer-homeowners who meet the MKE United's eligibility requirements (income limits, residential only, in two discreet geographical areas, who owned on or prior to 1-1-2015), and exclude (not benefit) all other taxpayer-property owners in the City (and all other taxpayer-property owners in the two benefitted neighborhoods themselves who do not meet the fund eligibility requirements), violates not only the Uniformity Clause, and the "impact fee" statute (Wis. Stat. 66.0617), and the "unconstitutional conditions doctrine" (as an unlawful exaction), but also it violates the U.S. and State Equal Protection clauses.

For example, a property owner who owns a residential home across the street from the MKE United Fund-eligible area but who otherwise meets the other requirements of the Fund, will not be entitled to apply to, or to receive monies from, the Tax Relief Fund. Likewise, a low-income, residential property-owner, who lives in another area of the City not covered by MKE United's geographical area but who is still at high risk of displacement due to nearby development or market value escalation or gentrification, cannot benefit from the Fund. Likewise, a low-income, residential property-owner, who lives in the Fund-eligible area but who did not own his/her house on or before 1-1-2015 cannot benefit from the Fund. These scenarios present equal protection problems (apart from the Uniformity Clause problem) that prohibit City government mandating payment into the Fund. There is not a rational reason for the Common Council to take action (Council approval of the Developer-mandated "contribution" to the Fund) that favors MKE United's classification scheme, favoring the limited group of taxpayer-owners eligible for MKE United funding over other property-owner taxpayers in the City of Milwaukee who are at risk of displacement and who struggle to pay their taxes.

9. Council Procedure. It is anticipated that the Common Council will argue that the Couture resolution was properly introduced and voted upon and approved by the Common Council. Special Counsel reviewing this matter, please recognize the applicable law explained in this

document, and for all the above reasons, please determine that the City Council mandated “contribution” is unlawful.

V. CONCLUSION.

MKE United’s FAQ page for the Tax Relief Fund recognizes that the City cannot put money into that fund, and that the City cannot create programs or rebates to reduce property taxes for groups of property owners, because Wisconsin’s Constitution’s prohibits that.

On 2-4-2021, DCD Commissioner Crump warned Ald. Bauman:

“we want to be careful about implicitly tying any approvals to contributions...”

Despite the FAQ, and despite the warning, ZND Committee member, Ald. Bauman, contacted Rick Barrett 4 days prior to a ZND vote to “solicit” a “contribution” that really isn’t a “contribution” at all since it is contractually mandated. That solicitation violated Wis. Stat. 19.59 (1)(b) and MCO 303-5-3, and MCO 303-5-5. That “contribution” is also unlawful because City government (1) cannot mandate the “impact fee” that happened since the City does not have an impact fee ordinance as Wis. Stat. 66.0617 requires and the impact fee imposed (the “contribution” to the fund) violates the other limitations that 66.0617 imposes, (2) cannot mandate the unlawful exaction that occurred due to the “Unconstitutional Conditions” doctrine, and (3) cannot mandate a payment or scheme such as the Section 13.4 “contribution” requirement because that violates the Uniformity Clause and the Equal Protection Clauses of the U.S. and Wisconsin Constitutions.

The City Attorney and Mayor Barrett opposed the “contribution” requirement (File 201365). The Common Council and its President, despite the objections, would not remove the “contribution” mandate. Under Common Council File 201573, please rule that the Common Council acted unlawfully. Please rule as requested in Section I above. Developers should not face solicitation for unlawful, contractually-mandated, “contributions.” And, despite the good purposes of the Tax Relief Fund, that fund must be left, on its own – privately administered and privately funded – without City-mandated funding.

This City Attorney Initial Position Statement is dated as of January 6, 2022.

TEARMAN SPENCER, CITY ATTORNEY

ATTACHMENTS

ATTACH. 1: MKE United FAQ page and information about the Tax Relief Fund

ATTACH. 2: Kathleen Brengosz 3-11-2021 Memo to Ald. Perez

ATTACH. 3: Ald. Bauman and Commissioner Crump 2-3-2021 and 2-4-2021 emails

ATTACH. 4: Ald. Bauman and Commissioner Crump 2-22-2021 emails

ATTACH. 5: Ald. Bauman 2-22-2021 direction to LRB to fill Council File 201365 with the Ald. Bauman Amendment to Section 13.4.

ATTACH. 6: Wis. Stat. 66.0617

ATTACH. 7: DCD webpage, City has no impact fee ordinance.