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September 17, 2015

Alderman Joe Davis, Sr.
City Hall, Room 201

Re: Proposed Motion Regarding Set-Asides in the Arena Agreement

Dear Alderman Davis:

You asked for a legal opinion regarding a proposed motion related to the arena agreement that would require developers to set aside a certain amount of square footage in the "eight-block" phased development area for lease to minority businesses at reduced rates. For the reasons set forth below, in our opinion this motion would not be legal or enforceable at this time.

As you are aware, race-based contracting requirements are reviewed by the courts under strict scrutiny, meaning they will only be upheld if supported by evidence of a compelling governmental interest, and are narrowly tailored to address that identified interest. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and many subsequent decisions in federal and state courts throughout the United States. (See attached Opinion of the City Attorney dated May 16, 1989, one of many legal opinions explaining the impact of *Croson* on the City's existing and proposed race and gender-based preference programs.) *Croson* and it progeny still constitute valid law.

The City, as you are also aware, has, since *Croson*, conducted two disparity studies in an attempt to determine if a race and/or gender-based contracting program could be legally enacted. The study conducted in the early 1990s would have justified only a very limited program. The second study, conducted in 2010, purportedly justified a broader program, which was adopted; however, suit was brought by the Hispanic and Native American Chambers of Commerce challenging the disparity study and the ordinance and resulting in repeal of the

City's race and gender specific contracting preference program. The City never adopted a strict set-aside program.

To our knowledge, there has been no disparity study conducted to justify the proposed amendment. In order to justify a race-conscious distinction that will survive strict scrutiny review, very detailed findings are required. Testimony regarding difficulties faced by minority contractors will not suffice in and of itself to establish a sufficient record to support upholding the proposed amendment to the resolution. Evidence would need to include facts related to the City's discrimination, or participation in such discrimination, against the specific minority groups to whom the amendment is directed and evidence as to the extent of the discrimination against those groups. Further then, the amendment would need to be narrowly tailored to address the extent of the discrimination, (a blanket 25% set-aside applicable to every minority group would not be legal).

If you have any additional questions or concerns, please feel free to contact the undersigned.

Very truly yours,

GRANT F. LANGLEY
City Attorney

Kathryn Z Block

KATHRYN Z. BLOCK
Assistant City Attorney

KZB:kzb
c: Mr. Jim Owczarski, City Clerk
1033-2015-2294:219700

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May 16, 1989

Equal Opportunities Enterprise
Committee
Room 102, City Hall
200 East Wells Street
Milwaukee, WI 53202

Attention: Mr. Larry Thomas

RE: Chapter 360, Milwaukee Code of Ordinances

Dear Mr. Thomas:

By letter dated May 5, 1989, you requested a written legal opinion as to the impact of the United States Supreme Court's decision in City of Richmond v. J. A. Croson Company on Chapter 360 of the Milwaukee Code of Ordinances. That decision has received widespread publicity because of its effect on state and local minority business programs. In our opinion, the Croson decision required a change in the manner in which the City of Milwaukee's minority business enterprise program was being implemented.

Before analyzing the City's minority business ordinance and the methods used by the contracting departments to comply with it, it is helpful to review the facts of Croson and the specifics of the Supreme Court's ruling.

The City of Richmond, which has a minority population in excess of 50%, enacted a plan requiring all non-Minority Business Enterprise ("MBE") contractors to subcontract 30% of the value of their City contracts to MBEs. The plan was adopted by the City Council after it conducted hearings. The record consisted of statistics showing the low number of MBEs participating in City contracts; statistics revealing that

Richmond contractors' associations had few, if any, MBE members; and general testimony concerning discrimination in the national and local construction industry. There was no direct evidence of discrimination by the City or particular contractors. The J. A. Croson Company was the sole bidder on a particular City contract, and requested a waiver from the plan's requirements. The request was denied and the bid rejected. Croson commenced a legal challenge to the City's MBE ordinance.

The Supreme Court held that such "race-based measures" must be "strictly scrutinized" by reviewing courts. The Court then concluded that the Richmond plan was violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The "strict scrutiny" test is a two-prong inquiry. First, the court determines whether a compelling governmental interest justifies the use of a race-based measure. The government must show that the goal it is attempting to achieve is sufficiently important to justify giving an advantage to one particular racial or ethnic group over another. Second, the court reviews the actual measure to determine whether it is narrowly tailored to achieve that goal. The Court held that this standard of review should be applied regardless of whether the measure gives an advantage to blacks or to whites, or to any other racial or ethnic group.

Applying the strict scrutiny test, the Court concluded that the record before the City Council did not support remedial action in the form of a race-conscious plan. The general claims of industry-wide discrimination, devoid of any evidence of a violation by the City or a Richmond contractor, did not sufficiently or specifically identify discrimination either by the City or private parties. The statistics on MBE participation did not take into account the number of qualified MBEs available. And the inclusion of Eskimos and Aleuts, for example, in the definition of "minority", served no remedial function because there was absolutely no evidence of discrimination against those groups.

In addition, the majority did not believe that the plan was narrowly tailored. As examples, the court noted that successful, non-local businesses could receive automatic preferences; that the quota of 30% was not justified by the record; and that race-neutral measures should be considered before race-conscious measures are implemented.

The Court discussed alternatives available to rectify the effects of identified discrimination. It observed that measures could be taken against those who have been proven to discriminate, and, in "extreme cases", a narrowly tailored racial preference could be used to break down patterns of "deliberate exclusion." The Court also stated that a municipality could use race-neutral devices designed to help new or small entrepreneurs of all races, even without any evidence of discrimination.

We now turn to Chapter 360, and its implementation by City contracting departments.

Chapter 360 was enacted after the Common Council conducted hearings and made certain findings. Chapter 360 itself merely establishes and defines the City's Equal Opportunities Enterprise Program. The program requires the City's contracting departments to use their best efforts, "consistent with law", to utilize minority businesses for a specified percentage of total dollars spent. No particular method of achieving the goal, other than developing lists and reporting results, is either suggested or mandated. On its face, therefore, Chapter 360 does not require the City to use race-based measures in a manner inconsistent with law.

However, the contracting departments did in fact use race-based measures in order to achieve the goals of Chapter 360. These practices included a variety of strategies designed to direct business to minorities. In some instances, majority contractors were excluded from obtaining contracts and purchases under $25,000 in value (and, therefore, outside of the low-bid requirements of the City Charter). In other cases, a formula was developed which required that a larger number of MBEs than non-MBEs be contacted as potential vendors for quotes on individual

purchases. Negotiated contracts, such as development agreements, contained provisions requiring the developer to hire or use stated percentages of minorities. Revolving loans were offered only to MBEs.

When evaluating these types of contracting practices we must remember that if a City acts so as to provide a benefit to one individual which is not offered to another, solely because of race or ethnic background, it may be susceptible to a challenge under Croson. Similarly, a program which acts to deny someone an opportunity based on those factors is also at risk. Each one of these programs would have to withstand both prongs of the "strict scrutiny" test: the program would have to rest on a factual basis which clearly identifies specific acts or patterns of discrimination; and the program would have to be narrowly tailored to remedy the problem.

Because the record before the City's Common Council was substantially similar to that deemed insufficient in Croson, it is our opinion that it cannot be used to justify race-based measures. Therefore, it has been our advice that, until a program is devised which meets the Croson standard, the City's officers and employees hold in abeyance all practices they have used to meet the goals established by Chapter 360 in which race or ethnic background is a consideration. Practices designed to promote awareness of contracting opportunities, and record-keeping functions, may continue.

As mentioned above, the City need not abandon all efforts to act in this area. As we have advised the Mayor, the following alternatives are available: (1) a disadvantaged business ordinance which is based on both social and economic disadvantage; (2) an ordinance which aids businesses solely based on economic criteria; (3) a program under which the City assists contractors in voluntarily acting to increase minority participation in City contracts; and (4) if detailed factual findings satisfying the Croson test could be made, a race-conscious program to increase minority participation in City contracts.

At the Mayor's request, we have been working with his office to develop a program which would focus on socially and economically disadvantaged businesses.

We are available to meet with you or respond to any questions you may have in this regard.

Very truly yours,

GRANT F. LANGLEY
City Attorney

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Assistant City Attorney

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LUB/ead