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March 13, 2008

Alderman Michael S. D'Amato, Chair
Zoning Neighborhoods and Development Committee
200 East Wells Street, Room 200
Milwaukee, WI 53202

Re: Common Council File No. 071392
The Aloft Riverwalk Development Agreement

Dear Alderman D'Amato:

We are writing in response to your February 15, 2008 e-mail message seeking our response to correspondence from a citizen opposing the above-referenced Common Council file for various reasons, including the Developer's refusal to agree to a request from a union to approve a "card check" arrangement.

Your e-mail request asked us to address whether such requirements may be placed upon developers, whether the Zoning, Neighborhoods and Development Committee may recommend disapproval of the file based upon a developer's failure to make such a commitment and, indeed, whether the City has any role in such matters at all.

The issues raised relative to this file are very similar to those addressed in a December 9, 2003 legal opinion prepared by this office for the Commissioner of City Development relative to a Community Benefits Proposal. In that opinion we addressed the imposition of various requirements upon developers pursuant to development agreements under which the Redevelopment Authority provides assistance for projects. In that opinion letter we stressed that:

> " . . . the adoption of such a [Community Benefits] proposal or elements of such a proposal is strictly a policy question for the Redevelopment Authority and/or the Common Council."

We believe that with respect to this file, the determination as to whether a "card check" arrangement should be required in conjunction with the approval of the file is likewise strictly a matter of policy for the Common Council and the Mayor.

It is significant to note that this term sheet authorizes City funding only for the partial funding of the public Riverwalk, a public plaza, a public boatslip and dockwall adjacent to the Aloft Hotel Project. These improvements are to be constructed on an easement provided by the Developer and the Developer will be responsible not only for construction and maintenance of these new public facilities but also for a portion of the overall costs. The term sheet for the Aloft Hotel Project does not include any direct subsidy to the private elements of the Project or any gap financing for this Developer.

In summary, the Common Council may certainly consider the position of the Developer on the proposed "card check" arrangement in reaching a legislative determination as to whether Common Council File No. 071392 should be approved. As noted in the attached December 9, 2003 opinion relative to the Community Benefits Proposal, the determination as to whether such requirements are necessary and desirable is strictly a policy question for the Common Council and the Mayor to determine.

Very truly yours,

GRANT F. LANGLEY
City Attorney

THOMAS O. GARTNER
Assistant City Attorney

TOG/mll:130277
Enclosure

c: Alderman Willie Wade, Vice Chair
Alderman Michael Murphy
Alderman Ashanti Hamilton
Alderman Robert Baumann
Ronald D. Leonhardt, City Clerk
Rocky Marcoux, Commissioner

1033-2008-929

CITY OF MILWAUKEE

Form CA-43

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December 9, 2003

Ms. Julie Penman
Commissioner
Department of City Development
809 Building

Re: Community Benefits Proposal

Dear Ms. Penman:

At its December 8, 2003 meeting, the City Plan Commission was presented with a document styled as a Community Benefits Agreement. This proposal was presented in the context of the Plan Commission's consideration of a resolution approving the Redevelopment Plan for the Park East Redevelopment area ("Park East Plan"). We offered our informal oral reaction to that proposal at the meeting. This opinion formalizes those observations.

We note at the outset that renewal plans are not listed as one of the matters that mandatorially must be referred to the City Plan Commission pursuant to sec. 62.23(5), Stats. Arguably, renewal plans involving the acquisition of lands for "slum clearance" must be referred to the Plan Commission pursuant to sec. 62.23(5), Stats. However, it is our understanding that the Park East Plan contains no such acquisition provisions.

The only other formal renewal plan role for the City Plan Commission is specified in sec. 66.1333(6)(c) which provides:

> "In relation to the location and extent of public works and utilities, public buildings and public uses in a comprehensive plan or a project area plan, the authority shall confer with the planning commission and with such other public officials, boards, authorities and agencies of the city under whose administrative jurisdictions these uses fall."

The Common Council may, of course, refer a matter such as the Park East Plan to the Plan Commission for review. This would be especially pertinent in this instance since all renewal plans must "conform to the general plan of the city" pursuant to sec. 66.1333(6)(b)2. and the Plan Commission adopts that general plan, i.e., the "Master Plan," pursuant to sec. 62.23(3)(a) and therefore is qualified to advise the Common Council on the plan conformance issue.

We understand that the Plan Commission conditionally approved the Park East Plan as being in conformity with the Master Plan, conditioning that approval on the Redevelopment Authority setting a goal for affordable housing in the Park East renewal area and mandating Community Benefit type requirements when the Redevelopment Authority provides certain levels of subsidy to developers within the renewal area. (Please refer to the official minutes of the Commission meeting for the precise nature of the Plan Commission's conditional approval.) The Plan Commission action is advisory and not binding upon the Common Council or Redevelopment Authority. *Scanlon v. City of Menasha*, 16 Wis. 2d 437, 444 (1962).

Now turning to the specifics of the Community Benefits proposal.

As you know, we have advised in the past (see our January 24, 2003 opinion to you and our April 3, 2003 opinion to former Alderman Henningsen), that the content of renewal plans should be limited to the specified land use categories listed in sec. 66.1333(6)(b)2., Stats. We have also advised that any renewal plan requirements imposed on land owners must satisfy the "essential nexus" or "rough proportionality"[1] test articulated by the United States Supreme Court in order to avoid running the risk of becoming a "regulatory taking."

We have also advised that Community Development type requirements could be placed in development agreements under which the Redevelopment Authority provides assistance to renewal area developers and/or in cooperation agreements in which the City provides aid to the Redevelopment Authority which in turn provides aid to developers in renewal areas. We note that such a proposal to mandate the inclusion of Community Benefit type requirements in development agreements and in cooperation agreements is currently pending before the Common Council's Steering & Rules Committee in Common Council File No. 031050. The Steering & Rules Committee conducted a public hearing on that matter on December 4th and voted to hold the matter in committee.

Alternatively, the Redevelopment Authority could pursue an approach similar to the one pending before the Common Council. The Redevelopment Authority has the general authority to "exercise other powers that may be required or necessary to effectuate the purposes of this section [i.e., the Authority's powers of blight elimination enumerated in sec. 66.1333(5)]."

[1] In other words, the plan imposition must be "roughly proportional" to the burdens placed on the community by the development.

Section 66.1333(5)(a)8., Stats. This section would enable the Redevelopment Authority to adopt general blight elimination policies independent of a specific renewal plan. In that regard, we advised in our April 3, 2003 opinion that: "If the Authority agrees with the 'Community Benefits' objective, it could, independent of the adoption of the redevelopment plan, adopt a resolution directing staff to include appropriate elements of the 'Community Benefits' objectives in development agreements with property owners in the renewal area who request Authority redevelopment assistance."

The Community Benefits proposal at issue conceptually meets many of the concerns that we have listed above. We stress that the adoption of such a proposal or elements of such a proposal is strictly a policy question for the Redevelopment Authority and/or the Common Council. We do, however, have certain concerns with respect to various aspects of the Community Benefits proposal.

The proposal's first point is:

> "No public land, no public subsidy. The Redevelopment Plan would be amended to include a list of goals, as written in the attached document. The goals would apply to all land in the Redevelopment area. Land developed without public resources would be expected to strive to meet these goals, but there would be no enforcement and no penalty."

An extensive list of items is found in the attachment to point no. 1. With respect to the substance of those items, we would advise against inclusion of minority business enterprises ("MBE") or women's business enterprise ("WBE") requirements without conducting the extensive studies necessary to constitutionally justify such requirements. The emerging business enterprise requirements ("EBE") in Chapter 360, Milwaukee Code of Ordinances, are race neutral and therefore legal and enforceable. Therefore, we have no objection to EBE requirements. We comment below on where it is most appropriate to place such requirements.

We would advise against the inclusion in a renewal plan of mandatory "Community Benefit" type requirements on publicly owned lands not owned by the Redevelopment Authority. We understand that a majority of land in the Park East renewal area is County owned. If the Redevelopment Authority attempted to unilaterally impose such requirements on the County, a "regulatory taking" would arise. We note, however, that if a development agreement is required to develop County land, that such requirements could be mandated through that agreement. The County can also be approached independent of the renewal plan process and requested to mandate such requirements in its land sales.

We advise that with the exception of the "low to moderate income" housing requirement and the requirement concerning green space access to the river bike trails, etc., that the other requirements[2] referenced in the attachment are non-land use related and, therefore, as we have advised in the past, a renewal plan does not appear to be the proper vehicle for inclusion of such requirements. The better vehicle would be, as we noted in our April 3, 2003 opinion, the adoption of an independent Redevelopment Authority policy resolution and/or the adoption by the Common Council of an ordinance like that currently being considered before the Steering & Rules Committee. Such a Redevelopment Authority or Common Council resolution could be generally referenced in a renewal plan, but not become part of the plan. The delivery mechanism for such requirements would be, as we noted previously, through development and cooperation agreements.

The affordable housing and green space requirements do appear to be land use related and, therefore, could be in a renewal plan and be mandatory for Redevelopment Authority owned land and mandatory for other land within the renewal area, County owned or otherwise, if the owner or developer of such land received specified levels of assistance through development agreements.

The next proposed community development category is:

> "Publicly-owned land. Publicly-owned land will be subject to an affordable housing provision. The provision will require these sales to include an agreement for developers to set aside 20% of housing developed for affordable units. Alternatively, developers can make a contribution to a Housing Development Trust instead of building affordable housing on-site. All publicly-owned land sales are subject to this provision, including land to be developed for commercial use. The Housing Development Trust contribution will be assessed at 10% of the market value of the land.
>
> "The Housing Development Trust fund will be used to develop affordable housing in parts of Milwaukee County that have not traditionally been open to low-income families."

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[2] Those other requirements (modified in accordance with this opinion's discussion of minority and women's issues) are: (1) construction jobs should pay prevailing wage rate; (2) construction projects should include 25% Emerging Business participation; (3) tenant jobs should pay a living wage, defined as $9.73/hr plus health insurance; (4) preferred jobs will be family-friendly, offering full-time with benefits, including health insurance, paid sick leave and vacation time; (5) enhanced apprenticeship programs will make construction jobs more accessible for low-wage workers and minorities; and (6) for post-construction hiring, the City will create and staff a First Source Referral System, using community-based organizations, congregations and community learning centers.

We have already commented on the mandatory application of such a requirement to County owned land. Again, our opinion is that it could be applied only if the County and/or the eventual private developer receives specified levels of assistance through a development agreement.

We also note that any unilateral attempt to impose a financial contribution requirement as a condition of development would trigger the Impact Fee provisions of sec. 66.0617, Stats. This detailed statutory process is the exclusive method for imposition of such Impact Fees. Section 66.0617(2)(c), Stats. The process described in the statute requires a "public facilities needs assessment" prior to the imposition of such fees and further requires that the fees "bear a rational relationship to the need for new, expanded or improved facilities that are required to serve land developed." Section 66.0617(4) and (6)(a). The last referenced requirement is a statutory expression of the "essential nexus" or "rough proportionality" test which we have referred to previously in the context of potential regulatory takings.

The third suggested Community Benefits provision is:

> "Any development that uses City subsidy. All land developed with direct financial assistance from the city will be subject to additional mandates. Those mandates will include mandatory prevailing wage, EBE requirements and RPP worker requirements for the construction phase, as well as enhanced apprenticeships. Additionally these developments will be required to use the first source hiring provision outlined in our CBA, for the tenant/end-use jobs.
>
> "Direct financial assistance from the city is defined as the cash value of below-market rate land sales, the cash value of city financing, any direct subsidies to developers, and city expenditures for site improvements targeted specifically to the development. Compliance with these provisions is required by any development that receives direct financial assistance of $500,000 or more. Money allocated for the purposes of environmental remediation for any brownfield cleanup and money used to purchase easements for building the Riverwalk do NOT qualify as direct financial assistance, but projects that receive other kinds of assistance in addition to these two categories are required to comply with these provisions."

We have already commented on the "MBE" requirements and offer a similar comment on the "minority worker" requirement referenced in this section. Such a requirement would be legal and enforceable if stated as a residents preference program requirement under the provisions of sec. 309-41, Milwaukee Code of Ordinances. We have also advised that such non-land use requirements would be better placed in an independent Redevelopment Authority resolution or a Common Council ordinance, either of both of which could be referenced in the renewal plan, but not as a part of the plan. We agree that such requirements could be placed in development agreements delivering direct City financial assistance.

In summary, the advice that we offer herein on the Community Benefits proposal is intended to be procedural in nature. The substantive decisions as to what should be contained in any Community Benefits policy, whether adopted by the Redevelopment Authority or the Common Council, is left to those policy makers.

Very truly yours,

GRANT F. LANGLEY
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