CITY OF MILWAUKEE

Form CA-43

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Honorable Common Council
City Hall, Room 205

Re: Review as to the legality and enforceability of File No. 020963, a substitute ordinance regulating shows or exhibitions

Dear Council Members:

You have forwarded to us File No. 020963 for an opinion respecting legality and enforceability. Because of the reasons set forth in this letter, we return this file to you with our opinion that the ordinance is not yet legal or enforceable.

This file contains an amendment of Chapter 84 of the Milwaukee Code of Ordinances ("MCO") respecting shows and exhibitions. Basically, the ordinance requires that before one operates a show or an exhibition, one must obtain a license, which is granted by the Common Council. A decision to grant or deny is reposed to the discretion of the Common Council. Currently, if the license applicant met the objective requirements of the ordinance, the license is granted by authority delegated to the City Clerk. Because Aldermen wish to have input in this process, a change in the ordinance is being proposed. This opens the door to a more subjective determination as to whether or not the license will be granted. Under the proposal, a show is defined to be:

> Presentations which are designed to or may divert, entertain or otherwise appeal to members of the public who are admitted to a place of entertainment, which is produced by any means, including radio, phonograph, television, video reproduction, tape recorder, piano, orchestra, or band or any other musical instrument, slide or movie projector, spotlights, or interruptible or flashlight devices and decoration.

(Section 84-40-1, MCO).

Specifically exempted are shows or exhibitions which are held in taverns which also holds a tavern amusement or theater license or permanent theaters and any show or exhibition conducted exclusively by a charitable, eleemosynary, education, or religious organizations on their own premises. (Sec. 84-40-3).

An application process is set forth which, among other things, requires in § 84-40-4-b-8, MCO, on indication of the "type of entertainment to be provided." That opens the door to the possibility of some form of governmental censorship regarding the content of the show or exhibition.

Applications are forwarded to the Chief of Police, the Commissioner of Neighborhood Services, the Commissioner of Health, all of whom shall cause an investigation to be made and report their findings to the Utilities and Licenses Committee. (Sec. 84-40-5, MCO).

If there is a possibility the license will not be granted, a due process hearing is required, which includes notification of the basis for the possibility of a denial of the license, opportunity to examine witnesses, representation by an attorney.

We note with particularity, sec. 84-40-5-e, MCO, regarding recommendations of the committee as specifically e-1 through e-5, which generally set forth the standards upon which a license shall be granted or denied. Specifically, they state:

> e-1. Whether or not the applicant meets the municipal requirements.
> e-2. The appropriateness of the location or premises where the show or exhibition is to be held.
> e-3. Whether the location of the show or exhibition will create undesirable neighborhood problems.
> e-4. Whether or not the applicant has charged with or convicted of any felony, misdemeanor, municipal offense or other offense, the circumstances of which substantially relate to the permitted activity.
> e-5. Any other factors which reasonably relate to the public health, safety and welfare.

We are also examining carefully sec. 84-40-8, MCO, of the proposal which states:

> CHANGE IN ENTERTAINMENT. If, after the license has been granted or issued, the licensee wishes to substantially deviate from the type of entertainment that was listed on the original application, the licensee shall file a

> sworn, written request with the city clerk which states the change and the type of entertainment. No changes in entertainment shall take place until the request has been approved by the common council. The common council's approval shall be given only if it determines that the new type of entertainment is compatible with the normal activity of the neighborhood in which the premise is located.

In the review of any proposal such as the licensing of "shows or exhibitions", a principle concern is whether or not the licensing scheme represents a "prior restraint" upon protected free speech, or, if in the grand scheme of all possibilities, such could be the case.

We note first of all that this is a licensing scheme applicable to all shows and exhibitions, not merely shows and exhibitions that may contain content some people would find objectionable (such as sexually-explicit content or political content some would find objectionable, such as a show depicting the Third Reich favorably). A principle concern in an ordinance such is this is whether or not there are sufficient procedural safeguards to correct any inappropriate exercise of discretion. Those procedural safeguards include:

1. A limitation on the exercise of discretion by the decision-making official or officials;
2. A time limit within which the decision-maker must issue a license; and
3. Prompt judicial review of the exercise of such decision-making authority.

FW/PBS, Inc., d/b/a Paris Adult Bookstore II v. City of Dallas, et al., 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed. 2d 603 (1990), citing *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649 (1965).

For guidance as to the exercise of discretion, we turn to the matter of *Thomas v. Chicago Park District*, 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed. 2d 783 (2002).

In that case, the Supreme Court held that where a content-neutral permitting scheme regulating uses of a public forum (such as a public park) did not contain all of the procedural safeguards described in *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed. 2d 649 (1965), where the ordinance is not subject matter censorship but content-neutral time, place, manner regulation of the use of a public forum, and none of the grounds for denying a permit has anything to do with the content of the speech, the ordinance would pass muster.

In that case, the ordinance specified the grounds for denial as follows:

Section C.5.e of the ordinance provides in relevant part:]

> "To the extent permitted by law, the Park District may deny an application for permit if the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of the applicant. The Park District may also deny an application for permit on any of the following grounds:
> "(1) the application for permit (including any required attachments and submissions) is not fully completed and executed;
> "(2) the applicant has not tendered. the required application fee with the application or has not tendered the required user fee, indemnification agreement, insurance certificate, or security deposit within the times prescribed by the General Superintendent;
> "(3) the application for permit contains a material falsehood or misrepresentation;
> "(4) the applicant is legally incompetent to contract or to sue and be sued;
> "(5) the applicant or the person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District;
> "(6) a fully executed prior application for permit for the same time and place has been received, and a permit has been or will be granted to a prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular park or part hereof;
> "(7) the use or activity intended by the applicant would conflict with previously planned programs organized and conducted by the Park District and previously scheduled for the same time and place;
> "(8) the proposed use or activity is prohibited by or inconsistent with the classifications and uses of the park or part thereof designated pursuant to this chapter, Section C.1., above;
> "(9) the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public;
> "(10) the applicant has not complied or cannot comply with applicable licensure requirements, ordinances or regulations of the Park District concerning the sale or offering for sale of any goods or services;

> "(11) the use or activity intended by the applicant is prohibited by law, by this Code and ordinances of the Park District, or by the regulations of the General Superintendent. . . ."

(534 U.S. 316 at 319, 122 S.Ct. 775 at 778).

We note that very little guides the Utilities and Licenses Committee in the exercise of its discretion. For example, by what standard will the Council decide the "appropriateness of the location"? What are the "undesirable neighborhood problems the council wants to avoid"? How will the Council decide such issues? What evidence will be probative of such issues? At a minimum, we believe such issues need to be addressed by setting them forth in the body of the ordinance.

Interestingly, under the proposed sec. 84-40-5 nothing is stated as a cause for denial, a materially false statement on the application or a failure to pay the fee. Nothing is mentioned about obtaining the requisite permits for the cite. These are objective criteria that could guide the committee in the exercise of its discretion. The more such objective criteria are set forth, the more the decision of the committee will be guided by factors not capable of being used as a subterfuge for denial of First Amendment freedoms, the more the ordinance will be legal and enforceable.

Further, we have examined the show and exhibition permit application used by the City of Milwaukee. We note that nothing with respect to the type of presentation to be made is set forth, as it currently exists within the terms of the proposed ordinance. For example, there is no space for the applicant to indicate whether the proposed exhibition or entertainment includes radio, a phonograph, a television, a video reproduction, a tape recorder, a piano or orchestra band a slide movie projector spotlights or interruptible flashing light devices and decoration.

We believe that those terms should be identified within the ordinance. To the extent that they are, and that the application form be made to comport to the provisions of the new ordinance and the application form should identify those items within the ordinance.

Additionally, we believe that the ordinance should contain a minimum time period prior to the intended event, that the application form must be filed in order for it to be processed prior to the time of the event. Otherwise compliance with due process hearings may be obviated.

Sincerely,

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