

CITY OF MILWAUKEE

Form CA-43

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November 18, 2002

To the Honorable Members
of the Common Council
200 East Wells Street, Room 205
Milwaukee, WI 53202

RE: Common Council File No.: 020968
Substitute Resolution Accepting Proposal for Sale of Surplus City-Owned
Real Estate at 923 East Kilbourn Avenue, Milwaukee, Wisconsin

Dear Council Members:

We are aware that the opponents to sale of the surplus City property at 923 East Kilbourn Avenue, and construction of a high rise residential condominium at that location, have raised several issues regarding the propriety and constitutionality of City action on this file and the enactment by the Common Council of 304-49-17, Milwaukee Code of Ordinances (MCO). Because most of the issues raised are legal in nature, we believe it necessary to address them at this juncture and give you our opinion in advance of any request to do so, but in anticipation that such request would be made before a final vote.

Briefly, the background situation is as follows: a new section, subsection 17 of the City's property disposal ordinance, 304-49 MCO, was adopted by the Common Council on November 6, 2002 in File No. 020935. This ordinance allows the City to convey City property that has been declared surplus by the City to a designated entity for adequate fair market consideration (either monetary or non-monetary). This section of the ordinances adopts subsection 62.22(1) and 62.23(17) of the Wisconsin Statutes. This subsection of the property disposal ordinance is in addition to other methods by which the City can dispose of its surplus property, e.g., by transfer to a non-profit, or the Housing Authority of the City of Milwaukee or Redevelopment Authority of the City of Milwaukee for a special use, or to the Housing Authority to provide affordable rental housing for low-income persons and families, or by conveyance to adjacent owners, or by conveyance under the so-called "open listing method", or by solicitation of bids.

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FACTS

The first project to utilize this new subsection 17, is found in Common Council File No. 020968, the proposal for sale of surplus City-owned real estate at 923 East Kilbourn Avenue. The significant facts related to such property are as follows: the site was acquired in 1939 under a warranty deed (with no restrictions attached), accepted by the Common Council in File No. 51231-j, adopted September 11, 1939, with the statement in the file that part of the parcel acquired was to be used for "widening of East and West Kilbourn Avenue" and the remainder of the parcel was identified "remnant", a right-turn bypass lane was constructed over the northerly portion of the parcel, and the "remnant" portion was simply treated as excess right-of-way, and none of the site was ever identified as park or open space. Then, in Common Council File No. 000270, adopted June 25, 2002, vacation of the right-turn bypass was approved pursuant to the procedures set out in 62.73, Stats. and 81-116 and 308-28 MCO. The vacation resulted in reuniting this right-of-way with the southerly remnant portion of the original site and the site was once again a whole under City ownership without any right-of-way encumbrance. The City Plan Commission on November 11, 2002 found that the site, as reunited, was surplus to the City's needs and that the proposed project found in File No. 020968, including both the monetary and economic benefits of the project, represented adequate fair market value for the site.

CONSTITUTIONAL ISSUES

It should first be noted that the law accords enactments of local governments a presumption of constitutionality. State ex. rel Grand Bazaar Liquors, Inc. v. City of Milwaukee, 105 Wis. 2d 203, 208 (1982). Much ado has been made about the provisions of Article XI, sec. 3a. The relevant portions of this constitutional provision are as follows:

The State or any of its counties, cities . . . may acquire by gift dedication, purchase or condemnation lands for establishing, laying out, widening, enlarging, extending, and maintaining . . . streets . . . may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate, so as to protect such public works and improvements and their environments, and to preserve the view, appearance, light, air, and usefulness of such public works.

In Newell v. City of Kenosha, 7 Wis. 2d 516 (1959) the Wisconsin Supreme Court made it clear that this section of the Constitution was not an "express restriction on the power of the State [or cities] to convey land" and in fact, was an attempt to broaden the authority for the State and its cities in the matter of excess condemnation. Indeed in the Newell case, the

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Wisconsin Supreme Court determined that the sale of former park land by the City of Kenosha to Carthage College did not contravene this section of the Constitution even though the sale was alleged by the opponents to make the remaining portion of the Kenosha park more inaccessible to the public. However, in the matter at hand, the vacation of the right-turn bypass removes this matter from the sec. 3a provisions. In essence, the vacation removes the original public work and there remains no need to protect it. In other words, the purpose for which the northerly portion of the parcel was acquired has been removed by the vacation process and that portion of the property is now released from the encumbrance of the right-turn bypass. Further, the term sheet for the project in File No. 020968 includes \$250,000 of developer funds to be used by the City for landscaping upgrades to East Kilbourn Avenue that will enhance and protect the esthetics of the East Kilbourn Avenue right-of-way.

Article XI sec. 3a is therefore not applicable in this instance because there no longer remains any public work i.e. the right-turn lane, that needs to be "protected" within the meaning of that Constitutional provision. This conclusion is set forth in the findings in File No. 020968: "Whereas, the Common Council further finds and determines that the vacation of the right-turn bypass was a complete vacation of such use and there is therefore no need to establish future Site reservations or protections to preserve the use of that portion of the Site previously established for the right-turn bypass use." The Supreme Court made it clear in Hermann v. City of Lake Mills, 275 Wis. 537, 540 (1957), that once a municipality determines that the public purpose for holding a particular piece of municipal real estate had ended, the municipality was then free to convey a surplus property for fair market value which can be either monetary or non-monetary in form. In effect, the municipality is converting a surplus asset into cash or other valuable consideration that can serve the public interest.

OTHER ISSUES

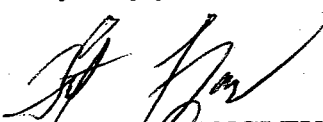
Several other issues have been raised relative to City actions to convey away this property. First of all, it should be noted that any challenge to City conveyance of its own property must meet a high burden in order to void such conveyance. The Wisconsin Supreme Court in Hermann stated that taxpayers "must establish illegality, fraud, or clear abuse of discretion on the part of the governing board of the municipality, which has authorized the sale, before a court will void the sale." Secondly, the issue has been raised that the Common Council should solicit bids and sell to the highest bidder, the Newell case clearly puts this issue to rest. Newell announces that sec. 62.22(1) and 62.23(17)(b), Stats. "vest considerable discretionary power in the council and governing body in that there is no requirement for them to either solicit bids or sell to the highest bidder." Finally, there is the issue of consideration, and in this respect the Hermann case notes that "the consideration to be received by a municipality necessary to support a sale of municipal property does not have to be money." Indeed, the Court of Appeals in a 2001 case, Bishop v. City of Burlington, 246 Wis. 2d 879 (Ct. App.

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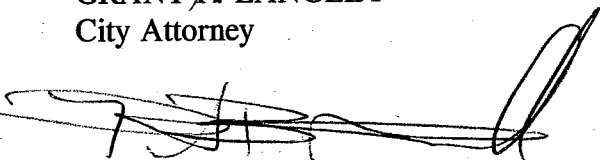
2001), cites with favor the case of State ex. rel Tomasic v. Kansas City, 237 Kan. 572 (1985) for the proposition that "transfer of municipal property to private buyer in exchange for cash payment and economic benefits expected to flow from buyer's presence in the municipality" is sufficient consideration. While a municipality may not make a gift of municipal property, the courts have looked to more than just cash as justification to establish that there was adequate fair market value as consideration for the conveyance. In the matter at hand the term sheet establishes that the monetary consideration, standing alone, is adequate and added to that monetary consideration is the substantial addition to the tax basis that the project will bring about.

In short, it is the opinion of this office that File No. 020968, if approved by the Common Council, meets the requirements of the law in Wisconsin for disposing of surplus municipal property and that the City should be successful in defending against any challenge brought to its actions on such file.

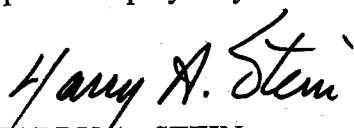
Very truly yours,



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