CITY OF MILWAUKEE

Form CA-43

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February 1, 2006

Honorable Common Council
City of Milwaukee
Room 205, City Hall
200 East Wells Street
Milwaukee, Wisconsin 53202

Attention: Mr. Ronald Leonhardt, City Clerk

RE: Common Council File # 051314 (version 1), Loitering by Gang Members

On January 3, 2006, Alderman Zielinski requested from this office an opinion on whether it would be legal for the City to enact a gang loitering ordinance like the one promulgated by the City of Chicago, Illinois. Alderman Zielinski also asked whether the City of Milwaukee possesses the statutory authority to include a jail term for violation of the ordinance, as does Chicago.

Apparently, a version of the ordinance was placed on a Public Safety Committee supplemental agenda shortly before being heard by the committee on January 26, 2006. This office was not informed of this hearing and, even though we believe the proposed ordinance is legal and enforceable, we were unable to apprise the committee of certain concerns. Furthermore, we are unaware as to whether the Police Department received notice of the hearing or provided comments to the committee prior to vote.

The proposed ordinance is based upon Chicago Municipal Code § 8-4-015 (Gang Loitering), which was amended after the United States Supreme Court held that the original version of the ordinance was unconstitutional in *Chicago v. Morales*, 527 U.S. 41 (1999). In a plurality opinion, the Court held that the original ordinance, requiring police to order the dispersal of all persons loitering in the company of a suspected gang member in certain designated areas of the city, had too broad a sweep because it violated the requirement that the legislature establish minimal guidelines to govern police discretion. *Id.* at 60. The original ordinance defined

'loitering' as "to remain in any one place with no apparent purpose." *Id.* at fn.2. Because the original ordinance gave absolute discretion to a police officer to determine whether or not a person had an "apparent" purpose, the ordinance went too far. *Id.* at 61-62. The Court noted the irony of the original ordinance, that harmless conduct may violate the law while illicit activity would be exempt (i.e., if a suspected gang member was engaged in an apparent harmful purpose such as illegal drug sales or neighborhood intimidation, the ordinance would not apply). *Id.* at 63. Furthermore, because the original ordinance applied to all persons, and not just suspected gang members, the ordinance was too broad in granting police discretion because innocent persons would be guilty of the offense if their purpose of being in the company of a suspected gang member was not apparent to a police officer. *Id.* at 62-63. The Court agreed with the Illinois Supreme Court that the promulgation of internal police rules that regulated its enforcement did not sufficiently limit the otherwise vast police discretion. *Id.* at 63-64.

In a concurring opinion, Justices O'Connor and Breyer offered that the ordinance may have been acceptable if the term 'loiter' was limited to mean "to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal activities." *Id.* at 68. The City of Chicago thereafter amended the ordinance to apply only to 'gang loitering' (not just 'loitering') that mimicked the suggested definition. *See*, Chicago Municipal Code § 8-4-015 (Gang Loitering).

The proposed ordinance is based on the post-*Morales* amendment of the gang loitering ordinance. It provides the additional definition and enforcement guidelines that the *Morales* court found wanting in the original version. Further, through legal research we were unable to document any appellate challenges, successful or otherwise, to Chicago's amended ordinance. Milwaukee's proposed ordinance also appropriately uses Wisconsin statutory definitions of "Criminal gang" (Wis. Stat. § 939.22(9)), "Criminal gang member" (Wis. Stat. § 939.22(9g)), "Criminal gang activity" (Wis. Stat. § 941.38(1)(b)), and "Pattern of criminal gang activity" (Wis. Stat. § 939.22(21)) that have withstood constitutional challenge. *See*, *State v. Lo*, 228 Wis.2d. 531 (1999). However, please note that the proposed ordinance must be modified for consistency purposes to eliminate the word "street" in the five references to "criminal street gang" in subsections (2)(a), (b), (b-1), and (3)(a).

It is our opinion that, while without certainty as to the outcome, this office could in good faith defend the proposed ordinance as legal and enforceable, and we have signed the file. However, this office would be remiss to not point out that the ordinance would require the expenditure of police resources to enforce it (e.g., the training of officers to identify suspected gang members and the sharing of intelligence between units as to specific gang activities) that would only result in the imposition of a $100 to $500 forfeiture upon successful prosecution in municipal court. The ability of Chicago to actually incarcerate a violator is a key difference between Chicago and the proposed ordinance for Milwaukee. This point thus segues into Alderman Zielinski's second request for an opinion.

Regarding the authority of the City of Milwaukee to impose incarceration for violation of this ordinance, please direct your attention to the May 31, 2005 opinion of this office to Alderman Robert Donovan, Chair of the Public Safety Committee (attached hereto). In *State v. Thierfelder*, 174 Wis. 2d. 213, 222 (1993), the Wisconsin Supreme Court held that municipalities cannot impose imprisonment as a sanction for a violation of municipal ordinance. The statutory distinction between crime and forfeiture is found in Wis. Stat. § 939.12, which states: "A crime is conduct which is prohibited by *state* law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime." (Emphasis added). Therefore, the proposed ordinance could not penalize offenders by a jail term, though incarceration is permitted after conviction and non-payment of the imposed forfeiture.

In addition, the prosecution of ordinance violators in municipal court would be time-consuming. There are at least eight elements of this ordinance, each of which would have to be proven by evidence that is clear, satisfactory and convincing.

1.) An observation by a police officer of "a member of criminal gang,"
2.) Engaged in "gang loitering,"
3.) With one or more other persons,
4.) In a public place designated for the enforcement of this ordinance; then,
5.) The police must inform all persons that they are engaged in prohibited behavior,
6.) Order those persons to disperse,
7.) Inform that violation of the order to disperse will subject violators to arrest; and then,
8.) Arrest those who do not promptly obey or who engage in further gang loitering within sight or hearing of the place and within three hours of the dispersal order.

In order to prove the first element, the city would have to prove that a gang existed (by proving a pattern of criminal gang activity by an ongoing group of three or more persons that share a common name or symbol), and that one of the loiterers was a member of a gang. This element would thus require substantial intelligence of gang activity. The second element would require the city to prove that a reasonable person would believe that the purpose or effect of the gang loitering behavior would be to enable a gang to establish control over identifiable areas, intimidate others from entering the area or to conceal illegal activities. This element would most probably require surveillance prior to the issuance of the dispersal order, and, if gang loitering behavior was observed, should lead to citation or arrest for violations of current law, notwithstanding this ordinance. For example, if a group of individuals were standing in the street, each may be violating § 101-1 MCO, adopting Wis. Stat. § 346.29(2) (Standing or Loitering in Roadway Prohibited). If members of the group were engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct, under

circumstances in which such conduct tends to cause or provoke a disturbance, each may be violating § 106-1 MCO or Wis. Stat. § 947.01 (Disorderly Conduct). If members of the group "aid or countenance any disorderly assembly" then each may be in violation of § 105-1 MCO (Disorderly Assemblage) and subject to a $50 forfeiture. In addition, Wis. Stat. § 947.06 (Unlawful Assemblies and their Suppression) currently outlaws an assembly of three or more persons that cause a disturbance that may be reasonably believed will cause injury to persons or damage to property unless immediately dispersed. If members of the group were observed dealing drugs or unlawfully possessing weapons during surveillance, arrest for that crime would obviously be warranted.

In sum, the evidence that would be required prior to issuing the dispersal order under the ordinance would likely qualify as probable cause to arrest for a violation of current law. In addition, please note that a second surveillance period would be required to arrest and prosecute a violator because once the gang loiterers are dispersed, they must *re-engage* in gang loitering (and not just loitering) a second time after the dispersal order is issued (thus requiring additional surveillance). Again, the only penalty, once the case is proven, would be a forfeiture in the maximum amount of $500.

Very Truly Yours,

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