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June 27, 2006

HAND DELIVERED

Mr. Barry Zalben, Manager
Legislative Reference Bureau
200 East Wells Street

Attn: Richard Withers

Re: File No. 060075/A substitute ordinance relating to the
prohibition, suppression and disposal of unlawful
assemblies and providing penalties

Dear Mr. Zalben:

By e-mail dated June 22, 2006, Mr. Richard Withers of your staff forwarded the newest version of the above proposed ordinance for our review. It is scheduled to be heard before the Public Safety Committee on June 28, 2006. We have contacted Mr. Withers with our comments so that revisions could be made in time for the hearing.

In our opinion, the proposal is legal and enforceable, although we have some comments to improve it. The proposal repeats most of the existing language of the current § 105-1, MCO, relating to unlawful assemblage, which is the same as the state law on the same subject, Wis. Stats. § 947.06. That statute was held to be constitutional in *Cassidy v. Ceci, et al.*, 320 F. Supp. 223 (E.D. Wis. 1970).

The proposed ordinance increases the penalty if a motor vehicle is used in the unlawful assemblage. The recitation in the "whereas" clause indicates that the use of motor vehicles presents a higher risk of injury and damage, and requires greater police resources. If there is evidence or testimony in the record to support this assertion, the increased penalty appears to be defensible.

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Finally, the proposal adds a paragraph that declares a motor vehicle operated two or more times in an unlawful assembly to be a public nuisance. It authorizes this office to initiate proceedings to abate the nuisance, upon conviction of a motor vehicle operator for two or more violations of the ordinance, when the same motor vehicle is involved. According to the proposed ordinance, one of the types of relief this office can seek is "forfeiture" of the vehicle.

We have suggested that the term "forfeiture" be replaced with "removal" or "sale," or both. A forfeiture is generally viewed as a punishment. Nuisance abatement is designed to prevent the harm caused by the nuisance. It is not designed to punish the violator; the penalty provision accomplishes the punishment. *State v. H. Samuels Company, Inc.*, 60 Wis. 2d 631 (1973) (which also found that the repeated violations of a City ordinance constitutes a public nuisance as a matter of law). Our ability to successfully remove or sell the vehicles will be, of course, dependent on the courts.

Should this proposal be adopted, we will work with the Milwaukee Police Department to ensure that the motor vehicle is identified on the citation. We will also work with the Municipal Court so that we are informed of situations when the same person is convicted of multiple unlawful assemblage violations.

Very truly yours,



GRANT E. LANGLEY
City Attorney



LINDA ULISS BURKE
Deputy City Attorney

LUB:bl

c: Mr. Ron Leonhardt
Ald. Robert Donovan
Mr. Kurt Behling
Ms. Kristine Hinrichs
Ms. Anna Ruzinski

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