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October 4, 2016

Tom Mishefske
Operations Manager
Department of Neighborhood Services
City of Milwaukee
841 North Broadway
Milwaukee, WI 53202

Re: Request to Amend Rent Withholding Ordinance (MCO 200-22) to Permit the
Collection of Delinquent Property Taxes

Dear Mr. Mishefske:

On September 16, 2016, you requested an opinion from our office on whether the City's rent withholding ordinance for open code violations, Milwaukee Code of Ordinances 200-22, could be amended to permit the City to collect delinquent property taxes or to use previously collected funds and apply them towards property tax delinquencies at the same property or other properties owned by the same owner. We are pleased to respond.

Under the current MCO 200-22, the Department of Neighborhood Services (DNS) can collect and hold in escrow a tenant's rent payment for code violations when an owner of real property fails or neglects to comply with DNS abatement order until all code violations have been abated (with the exception of failure to comply with an exterior painting order). The ordinance also provides property owners with due process appeal rights for any payments withheld for this purpose.

There is no express statutory authorization for the City's rent withholding ordinance. However, in *State ex rel. Michalek v. LeGrand*, 77 Wis.2d 520 (1977), the court held that a rent withholding ordinance for housing code violations with a due-process provision for a property owner to appeal was constitutionally sound. Such an ordinance is authorized by the Wisconsin Constitution's municipal home rule (Art. XI, sec. 3, Wis. Const.) and a city's police power to preserve and protect the public welfare. *Id.* at 530-532. The court found that the rent-withholding ordinance was not in conflict with a landlord's right to collect rent as provided in Wis. Stat. 704 because "the obligation of contract is not an absolute right, but is one that may be obliged to yield to the compelling interest of the



public the exercise of the police power.” *LeGrand* at 532, quoting *State ex rel. Bldg. Owners v. Adamany*, 64 Wis. 2d 280, 292 (1974).

Similarly, there is no express statutory authorization for the City to withhold rent for delinquent property taxes. However, Wis. Stat. § 74.73 provides:

“An occupant or tenant of property who pays real property taxes, special assessments, special charges or special taxes levied against the property, including any interest or penalties, may recover the amounts paid, plus interest at the rate of 1.0 percent per month or portion of a month, from the person under whom he or she is an occupant or tenant. Unless otherwise agreed between the parties, *the occupant or tenant may deduct the amounts paid, plus interest, from rental payments otherwise due to the person under whom he or she is an occupant or tenant.*” (emphasis added).

While there are no cases to supplement the plain language of the statute and no previous opinions issued by the City Attorney’s Office, the statute is clear that a tenant may pay taxes on a property and deduct these payments from rent payments, unless an alternative agreement exists between the tenant and the property owner.

The express authority for tenants to withhold rents to pay delinquent taxes, coupled with the City’s home rule authority and police power suggest that the City may have the authority to collect withheld rent for delinquent property taxes.

Wisconsin Statutes §62.09 (9) (a) expressly provide the City Treasurer authority to collect taxes:

“...the treasurer shall collect all city, school, county, and state taxes, receive all moneys belonging to the city or which by law are directed to be paid to the treasurer, and pay over the money in the treasurer’s hands according to law.”

Thus, a provision for withholding for delinquent taxes might be considered for inclusion in the taxation and assessment chapter of the Milwaukee Code of Ordinance because only the Treasurer has the authority to collect taxes as per Wis. Stat. §62.09 (9) (a), not the Commissioner of DNS.

MCO 200-22 may, however, be amended to transfer already collected funds held in escrow to tax delinquencies on the same property as long as the City receives and the ordinance provides for the express authorization of the tenant whose rents would be used for this purpose. If the ordinance makes clear that it is based upon the tenant exercising the tenant’s right as per Wis. Stat. § 74.73, and the tenant is required to authorize such a transfer, there is less foreseeable legal risk involved in transferring those funds held in escrow to a delinquent property tax balance on the same property.

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Because we determine the authority for such an amendment to be based upon Wis. Stat. §74.73, we believe that these funds held in escrow cannot be applied to a delinquent property tax balance on a different property under common ownership. Wis. Stat. § 74.73 provides that a tenant of a property may pay delinquent taxes on behalf of a property owner and deduct such payments, along with interest, from rent payments. This does not give the tenant authority to pay delinquent taxes on a property that is not rented by said tenant.

In sum, case law and Wisconsin Statute provide the City the authority to create an ordinance provision for the purpose of collecting withheld rent for tax delinquency. Milwaukee Code of Ordinances 200-22 may be amended to provide that funds already held in escrow may be applied to delinquent tax balances for the same property with the express authority of the tenant. This amendment would be limited to the property that the funds were being held for, and not for other properties under the same ownership.

Very truly yours,



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