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December 21, 2017

Honorable Members of the Common Council
City Hall, Room 205

Re: 2017 Common Council File No. 171047 "Substitute Ordinance relating to the contents of a special event permit."

Dear Honorable Members of the Common Council:

Pursuant to the City Attorney's review obligation under Milwaukee Code of Ordinances § 50-3.2(b), we offer the following legal opinion as to the legality and enforceability of the above referenced proposed ordinance. The citizens of Milwaukee have a right to input regarding the issuance of special event permits in the City of Milwaukee, and object through their representatives on the Common Council. That includes the authority of a local alderperson to object to the issuance of a special events permit in his or her district. However, Council members' authority is subject to the applicable constitutional, statutory, and regulatory limitations. Consistent with those limitations, this Office cannot approve this proposed ordinance as legal and enforceable.

I. THE EFFECT OF THE PROPOSED ORDINANCE ON THE CURRENT LICENSING SCHEME

The proposed ordinance would add, as a requirement for issuance of a special event permit, the signature of the local alderperson. To wit:

3. Contents of Permit. Each special event permit shall contain the following information...

h. The name and signature of the common council member in whose district the event is to occur.



While this proposed ordinance may seem to add an innocuous requirement, for the reasons discussed below, it drastically changes the City's licensing process for special event permits. It is our opinion that this change would render the City's licensing scheme constitutionally infirm.

Currently, MCO § 105-55.5-2 contains a multi-step process for an applicant to secure a special event permit. The existing ordinance clearly explains the process and the considerations made by every arm of city government impacted as follows:

- (1) An applicant must submit an application for a special events permit to the Commissioner of Public Works ("Commissioner"), not less than one week prior to the event. The more complicated the event, the more lead time required by the Code.
- (2) The application is also submitted to the Milwaukee Police Department ("MPD") to determine the classification of the special event.
- (3) Contemporaneously, the application is submitted to the local alderperson for review.
- (4) If the application is approved by the Commissioner, the MPD, and the local alderperson, a physical permit, which contains a summary of the information in the application, is issued.
- (5) If the application is denied, no physical permit is ever issued, and the applicant has the right to an appeal before the full Licenses Committee.
- (6) Should the full Licenses Committee vote to uphold the denial of the permit, the applicant may petition a court for *certiorari* review.¹

In addition to a clear process, the current Code also vests the City of Milwaukee with significant discretionary authority. The Commissioner may modify the time, place, or route of the special event to minimize its impact on good order and public safety – so long as these considerations do not interfere with the applicant's First Amendment rights, as discussed below. An assessment must be conducted to ensure that the allocation of public safety personnel required for the event does not impact services for the City as a whole. Furthermore, the Code provides a list of 11 permissible reasons for denial of such a permit. MCO § 105-55.5-2-c. Of note, the eleventh reason is the opposition of the local alderperson based upon one of the other ten reasons. MCO § 105-55.5-2-c-11.

The proposed ordinance would nullify the process described above. The proposed ordinance allows the local alderperson, for any stated or unstated reason, to withhold his or her signature, thus preventing the issuance of a valid permit. The proposed ordinance vests unfettered discretion in the hands of a single alderperson. It allows a potential override of the Commissioner's decision, a

¹ A type of court review conducted with great deference to the City of Milwaukee's decision.

decision of the Licenses Committee, or a court order. This leaves the applicant with no ability to appeal the single alderperson's decision to deny issuance of the permit.

When an ordinance vests discretionary power in governmental officials or boards, it is important that it prescribe standards to guide their action. *State ex rel. Humble Oil & Ref. Co. v. Wahner*, 25 Wis. 2d 1, 7, 130 N.W.2d 304 (1964); see also *Guse v. City of New Berlin*, 2012 WI App 24, 339 Wis. 2d 399, 405, 810 N.W.2d 838. Failure to prescribe such standards may render the ordinance constitutionally infirm on three grounds: (1) that the ordinance is, on its face, unconstitutionally vague, (2) that the ordinance may result in similarly situated persons being treated differently, and (3) that the ordinance represents a prior restraint on an applicant's First Amendment right to free speech. The proposed ordinance at issue most heavily implicates the third item – that the ordinance would be an unconstitutional prior restraint on free speech.

II. PRIOR RESTRAINT AND THE FIRST AMENDMENT

Courts have defined unconstitutional “prior restraint” as any system where the licensing scheme places “unbridled discretion in the hands of a government official or agency.” *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988). While a system involving a prior restraint is not automatically unconstitutional, there is a heavy presumption against the licensing body in court. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990), *holding modified by City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004) (internal citations omitted).

More importantly, a licensing scheme that “fails to place limits on the time within which the decisionmaker must issue the license is impermissible.” *FW/PBS, Inc.*, 110 S. Ct. at 605. Ordinances may, and often do, vest government officials and boards with significant discretion. In fact, the sections of the current Code that govern the special events application process do, but an ordinance may not “blanket the [official or board] with unfettered discretion.” *Guse*, 2012 WI App 24, ¶11.

While a particular event may not implicate traditionally expressive activity such as speech, assembly, or worship, the law strongly disfavors any licensing scheme likely to have a “chilling effect” on expressive activity. As such, this proposed ordinance would not survive a facial challenge to its constitutionality. Courts have held that “where a scheme creates a risk of delay, such that every application...creates an impermissible risk of suppression of ideas, we have permitted parties to bring facial challenges.” *FW/PBS, Inc.*, 110 S. Ct. at 606. Courts have also held that,

[t]he Government has broad powers, but the means it uses to achieve its ends must be consistent with the letter and spirit of the constitution. . . . [a] strong desire to improve the public condition is

not enough to warrant achieving the desire by a shorter cut than the constitutional way.

Horne v. Dep't of Agric., 135 S. Ct. 2419, 2428, 192 L. Ed. 2d 388 (2015) (internal citations omitted).

Unfortunately, the proposed ordinance at issue does exactly what the United States Supreme Court and the Wisconsin Supreme Court deem impermissible. This proposed ordinance allows an alderperson to prohibit the fulfillment of an otherwise lawfully valid license by simply refusing to sign the physical permit, even after the current approval process has otherwise been completed. This is precisely the “unbridled discretion” the law disallows. The proposed ordinance contains no guidelines upon which the alderperson may rely to refuse to sign a permit, it provides no appeals process should an alderperson decline to sign a permit, it provides no requirement that the City even issue an explanation as to the reasons for denial. Finally, and most damaging, it provides no timetable where the local alderperson whose signature is required, must act, thus, there is no time limit on the decisionmaker.²

III. LEGISLATIVE HISTORY

As part of this assessment, this Office has reviewed items that will become part of the legislative history of this proposed ordinance. The proposed ordinance and the factors leading to its introduction were discussed at length during the October 25, 2017, Public Works Committee meeting. The impetus for the introduction of this proposed ordinance was the 2017 Milwaukee Marathon. Specifically, issues regarding improper street closures, parking regulation changes, and the placement of street closure signage.

The record includes a statement by Alderman Robert J. Bauman that event organizers may be “risking cancellation of their events days and maybe hours before the scheduled start if the actual permit does not conform to each alderperson’s expectations.” While Ald. Bauman is correct that permits should accurately reflect street closures and traffic modifications, this proposed ordinance does not solve the problem of miscommunications between event organizers, DPW staff, MPD personnel, and Common Council members.

This sentiment was echoed in emails exchanged between parties involved in the aftermath of the Milwaukee Marathon. An October 15, 2017, email from Ald. Bauman’s office to, among others, the City Clerk and the Milwaukee Marathon organizers, includes the following language:

² This proposed ordinance also provides a “pocket veto” of a Licenses Committee decision by any local alderperson. The current licensing scheme allows an appeal to the Licenses Committee if an applicant disagrees with the non-issuance of a permit. Under the proposed ordinance, even if the Licenses Committee votes to approve the license, the local alderperson could veto that decision by simply refusing to sign the physical permit.

“I will consider legislation that requires aldermanic sign off on the actual permit and not just an application or in the case of this event, an operating agreement. Aldermen would thereby retain the right to block an event even at the last minute in the interests of their constituents. But be aware: every event would be susceptible to cancellation weeks or even days prior to the event’s scheduled date.”

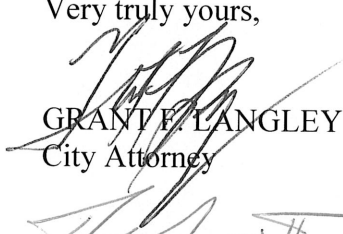
Simply put, this type of discretion in matters that implicate the First Amendment, vested in any single member of the Council or any Committee, absent a mechanism for court review, would be unconstitutional.

By way of example, additional review of the record revealed that in the case of the Milwaukee Marathon, the erroneous street closures were the fault of DPW, not the race organizers. If the proposed ordinance had been in effect on the day of the Marathon, an alderperson would have had the authority to unilaterally cancel the event hours before the start time. Canceling the event because of erroneous street closures, later revealed to be the City’s fault, could have made the City liable for financial losses suffered by the organizers and runners.³

IV. CONCLUSION

In conclusion, this Office cannot approve the proposed ordinance as legal or enforceable in its current form. To do so would render the entirety of the special event permit application process void. Modifications to this proposed ordinance to make it legal and enforceable would simply recreate the current licensing scheme found in Milwaukee Code of Ordinances § 105-55.5. If local alderpersons are not being provided with copies of finalized special event permit applications in a timely fashion, and given an opportunity to lodge objections consistent with those delineated in the Code, these matters must be addressed with either the Police Department or the Department of Public Works.

Very truly yours,



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³ The explanation of this particular issue can be viewed during the October 25, 2017 meeting the Public Works Committee referenced above. The most relevant portion of the video begins at the 19:00 minute mark and ends at approximately the 23:00 minute mark.
http://milwaukee.granicus.com/MediaPlayer.php?view_id=2&clip_id=1489 (Current as of 12/12/2017.)