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May 30, 2008

Mr. Ronald D. Leonhardt
City Clerk
Room 205 – City Hall

Re: Common Council File No. 080042 – Amendment of Milwaukee
Code of Ordinances § 350-183 Pertaining to Private Transportation
Monthly Reimbursement Provided to Members of the Common Council

Dear Mr. Leonhardt:

On May 15, 2008 you inquired of this office as to the legality and enforceability of the above-referenced File, including whether its adoption and implementation would be precluded by state or federal law. We are please to respond to this request.

This File would amend § 350-183-8, Milwaukee Code of Ordinances (“MCO”), the provision according “private transportation monthly reimbursement” (usually, an automobile allowance) to members of the Common Council. The amendment would render a member of the Common Council ineligible to receive such reimbursement for any month during which “the member is incapacitated for an entire month by illness, injury or otherwise fails to discharge the duties of the office.” The purpose of this amendment is quite apparent. The form of reimbursement in question is to provide some measure of recompense to Common Council members for expenses incurred by utilizing their private vehicles for City business. This necessarily assumes that they are actively discharging their duties as members of the Common Council. It also assumes that they are utilizing and paying for their own private transportation for this purpose. This amendment is aimed at those situations wherein a member of the Common Council is not in a position to fulfill these requisites.

Your inquiry actually raises two issues: (1) the legality and enforceability of the text of the current version of the proposed ordinance; and (2) whether that text could be modified in order that “the conditions under which it would be applied could be made more specific.” We shall address these matters in turn.

First, we address the legality and enforceability of the current draft. The City Charter and City ordinances accord plenary authority to the Common Council to fix the compensation of its own members. Milwaukee City Charter § 4-10 provides in pertinent part that: “The

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common council shall have the management and control of the finances, and of all the property of the city, except as in this act or otherwise provided....” Although the Charter does not specifically address a reimbursement allowance of this type, Milwaukee City Charter § 4-12 accords authority to the Common Council over sick leave, vacation, and overtime benefits accorded to all city employees. The Common Council, in the exercise of this authority, has adopted ch. 350, MCO, entitled “Employee Regulations and Benefits,” which govern, *inter alia*, all elements of wage and benefit compensation to City employees, except as otherwise limited by state and federal law, and the City’s obligations to collectively bargain with those of its employees represented by certified labor organizations. Among the provisions of ch. 350, MCO, is § 350-100, which governs the salaries of Common Council members, and § 350-183-8, which establishes the automobile allowance reimbursement benefit constituting the subject of your inquiry. Thus, subject to any limitations imposed by state or federal law, the Common Council has retained and exercised control over the compensation of its members, which would include this particular reimbursement allowance as a component part.

We now turn to consideration of whether any such limitations exist impinging upon the legality and enforceability of the proposed amendment to § 350-183-8, MCO. First, you have raised the issue of the applicability of the federal Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201-219. Our opinion is that the FLSA is inapplicable to the proposed amendment, for two reasons. First, the FLSA is concerned with assuring that employees receive payment for “time worked” (a category that includes both actual time worked and other time spent by employees primarily for the benefit of the employer). It does not address entitlement to employee benefits such as reimbursement for transportation expenses incurred by employees on behalf of the employer, and accordingly would not require payment of this type of reimbursement allowance to Common Council members. Second, members of the Common Council, being elected officials, are not “employees” within the scope or coverage of the FLSA. See 29 U.S.C. §§ 203(e)(2)(C)(i) and (ii)(I). Thus, the proposed amendment to § 350-183-8, MCO does not violate the FLSA.

A similar conclusion applies to the provisions of Wis. Stat. ch. 109, Wisconsin’s wage claim law. Even assuming that this form of reimbursement allowance constitutes a component of “wages” as defined in Wis. Stat. § 109.01(3) (a proposition that is at least somewhat doubtful), a Common Council member’s underlying entitlement to this form of allowance is not addressed by or within the scope of Wis. Stat. ch. 109. That chapter is designed to confirm an employee’s entitlement to whatever wages the employer is legally obligated to pay, and a method to collect any wages that an employer fails to pay in a timely manner. It does not dictate the level of wages or benefits; nor does it affect an employer’s authority to prospectively adjust the level of wages and benefits due

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to employees. Nothing within Wis. Stat. ch. 109 would, in our opinion, preclude the Common Council from adjusting the transportation reimbursement allowance that it affords to its own members on a prospective basis, as indicated by the ordinance amendment in question.¹

We are not aware of any other provision of state law or regulation that even addresses this type of reimbursement allowance, mandates that the City provide such an allowance to members of the Common Council, or affects the City's authority to adjust any such allowance that it chooses to so provide in the manner suggested by this ordinance amendment. Of course, if the affected individuals were City employees who were also members of a certified labor organization, the City could not do so unilaterally without collectively bargaining this type of change of benefits with the appropriate labor organization per Wis. Stat. § 111.70, the Municipal Employment Relations Act. Members of the Common Council, however, as "managerial" employees having the authority to direct and control the expenditure of City funds and property, do not fall within the scope of Wis. Stat. § 111.70 (*see* Wis. Stat. § 111.70(1)(i)), and thus that statute does not impinge upon the validity of the proposed ordinance amendment.

Next, we turn to whether the text of the proposed ordinance might be improved by modification of its language so as to address more "specific" conditions with which the Common Council might be concerned. Apparently, this portion of your inquiry refers to the recent situation in which an incarcerated alderman remained eligible for receipt of a "private transportation monthly reimbursement," although he was clearly not in a position to utilize such transportation. The current text of the proposed ordinance might not remedy this type of situation should it ever reoccur, because it utilizes the ambiguous phrase "otherwise fails to discharge the duties of the office," without further definition as to what those "duties" might include. An incarcerated alderman, for example, might contend that he or she is capable of perform those "duties" from a place of confinement, and the ambiguity of the current text renders it at least possible that such an interpretation might prevail.

We believe that this deficiency can be resolved by a rather simple modification of the current text so as to specify in greater detail those "duties of the office" of alderman that must be performed in order to trigger eligibility for this particular form of allowance.

¹ Additionally, the issue of whether Common Council members fall within the coverage of Wis. Stat. ch. 109 raises an interesting question. That chapter addresses the obligation of employers to fully and timely pay wages due to "employees." The term "employee" is defined in Wis. Stat. § 109.01(1r), and excludes "an officer or director of a corporation." It also excludes individuals employed in a "managerial" or "executive" capacity. One or both of these exclusions in all likelihood applies to members of the Common Council, which constitutes the governing body of a municipal corporation.

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The duties of an alderman go beyond those related to constituent service or other functions that may be performed from a remote location. They include physical presence at City Hall and physical attendance at committee meetings and meetings of the full Council. Indeed, the Common Council may "compel the attendance of its members upon its sessions, and employ the police of the city for that purpose" (Milwaukee City Charter § 4-05-4-b) and "fine or expel any member for neglecting his or her duty as such member, or for unnecessary absence from the sessions of the Council." (Milwaukee City Charter § 4-05-4-c). Obviously, an incarcerated or otherwise confined Common Council member is, by definition, incapable of performing this vital aspect of the duties of his or her office.

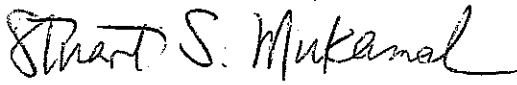
In order to address this situation, we would suggest that the current ordinance draft be amended by adding, after the word "injury" the phrase "fails to appear at meetings of the common council or at any meetings of the committees of the common council to which the member is assigned for a period of ____ [number] days." The number of days in this respect may be selected with reference to the calendar cycle upon which the transportation allowance in question is earned and paid by Common Council members.

For the foregoing reasons, it is our opinion that File No. 080042, amending § 350-183-8, MCO is legal and enforceable, and does not violate any provision of state or federal law. If you have any further questions concerning this matter, please do not hesitate to contact this office.

Very truly yours,



GRANT F. LANGLEY
City Attorney



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SSM:lmb
c: Alderman Terry Witkowski
1055-2008-1659:133298