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March 9, 2021

Mr. Jim Owczarski
City Clerk
City Hall, Room 205

Re: Common Council File 201365 - Couture

Dear Mr. Owczarski:

The Common Council passed Resolution File No. 201365 containing a motion by Ald. Bauman amending Section 13.4 of the Restated Development Agreement for the Couture Project. To our understanding, neither the City Attorney's Office nor the Department of City Development (DCD) negotiated or drafted that Section 13.4 language proposed by Alderman Bauman. Mayor Barrett sent an email to the Council about that resolution and aldermanic motion (contract amendment), stating:

"At committee, an amendment was added tying passage of the resolution to a contribution from Mr. Barrett. That amendment was unnecessary in light of his commitment to contribute to the Anti-Displacement Fund. I also believe the best public policy is to have my Administration work with the Council to develop a path toward funding the Anti-Displacement Fund in a manner that is transparent and consistent so that both prospective developers and the City will not face uncertainty with each and every project."

Once presented with the proposed Development Agreement that is the subject of Council File 201365, our office intends on not signing approval of the contract's provisions (MCO 304-21) because individual Alderpersons do not have the authority to negotiate or to draft Development Agreements or provisions therein or amendments thereto.

While, the Common Council has broad authority over City finances and property (Wis. Stat. 62.11 (5) and Charter 4-10), that authority is in the Council as a body and not in its individual Alderperson members. While individual Alderpersons are statutory officers under Wis. Stat. 62.09 (1)(a), the individual Alderpersons do not possess the authority that the Council body does. The right and authority in Individual Alderpersons is to cast a vote at Council body hearings. Charter 4-05. It is not to draft or negotiate Development



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Agreements or amendments thereto. See, also, “Roles and Authority of Governing Body Members,” League of Wisconsin Municipalities, June 2019:

“Alders and trustees are leaders, responsible for setting policy and charting the future of the municipality. Although the statutes provide some detail as to the duties and powers of city mayors and village presidents, the statutes provide no detail regarding the duties and authority of alders and trustees. This lack of detail reflects the fact that alders and trustees do not have authority in their individual capacity. Instead, the statutes address the responsibilities and powers of village boards and common councils as a whole. This is because the governing body’s authority is collective; it holds power as a unit rather than through its individual members. This does not mean individual governing body members are prohibited from doing anything related to their roles outside of the common council or village board meeting setting. They may still carry out certain functions of their role as an alder or trustee. For example, governing body members can and should function as a liaison between the municipality and the members’ constituents. Alders and trustees may engage with their constituents – e.g., hold listening sessions, write newsletters, survey constituents. However, certain actions remain outside the scope of the role as alder or trustee. For example, individual governing body members do not have supervisory authority over municipal employees and, as such, should refrain from directing municipal staff. While it’s not necessarily inappropriate to request information from staff, governing body members should not demand that certain information be provided or actions taken unless local law authorizes governing body members to do so – such actions stray into executive authority territory.” Emphasis added.

The Common Council delegated to DCD authority under MCO Ch. 308-1-2: to provide assistance to further economic development in the City; to actively manage and promote redevelopment and projects related to community development; to coordinate the use of land; to provide real estate services; and to exercise DCD’s powers subject to approval by the Common Council as a body. MCO 308-1-3 gives the DCD Commissioner “supervision, control and direction over all matters related to community development, city planning, urban renewal and real estate (except demolition and vacant lot maintenance).” In line with this, DCD’s City website page says that DCD’s “mission” “is to improve the quality of life in Milwaukee by guiding and promoting development that creates jobs, builds wealth and strengthens the urban environment, and at the same time respects equity, economy and ecology.”

Accordingly, while the Common Council body, as a body, has broad management and control over City finances and property, DCD has the authority as enumerated and indicated above. And, under that authority, DCD is the department that typically serves as the entry way and path way to the City for economic development transactions that are then subject to Common Council body approval. For example, DCD generally deals with the City’s use of Tax Increment Financing, subject to Council body approval. See, Wis.

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Stat. 66.1105 and MCO 304-93, 95, and 96. The final decision on the City's use of TIF (assuming approval of the Joint Review Board) rests with the Common Council body. Likewise, DCD is the entry way and path way to the City regarding the sale of City-owned real estate, and DCD brings proposed commercial sale files to the Common Council body (along with land disposition reports and due diligence checklists) for Council approval by the Council body. MCO 304-49. The Common Council body then votes on the matters brought before it, with each individual alderperson having one vote (Charter 4-05).

MCO Ch. 355 (Community Participation in Development Agreements) supports the above. Per MCO 355-5-4, DCD "shall negotiate development agreements governing the implementation of projects for which direct financial assistance is approved. Such agreements shall incorporate the conditions contained in the term sheet approved by the common council. No city funds may be released for any project governed by this chapter without the approval of a term sheet and execution of a development agreement. Development agreements shall require compliance with all provisions of ss. 355 7 to 355 13, except that the common council may by resolution impose lesser or different requirements." This MCO provision reinforces that it is DCD, in large commercial projects involving direct financial assistance (per MCO 355-1-2 essentially City assistance of \$1M or more) that negotiates the development agreements. Of course, the City Attorney as the City Officer responsible for the law business of the City, would assist DCD in that regard.

Similarly, MCO 355-7-2, concerning participation by City residents in Development Agreements, provides that DCD "and office of equity and inclusion shall be responsible for the planning, implementation and enforcement of this section. a. Prior to submitting a proposed term sheet for a project, the commissioner of city development, in consultation with the office of equity and inclusion or such other entity as may be designated by the city from time to time, shall determine the appropriate level of participation of unemployed and underemployed residents of the city for the project to reflect the job or trade categories required for the project and the pool of available certified and qualified workers within each job or trade category. The total appropriate level of participation shall be presumed to be 40%, unless the commissioner determines there is sufficient reason to impose a lesser requirement..." Again, this section too presumes that DCD negotiates with the developer, and that DCD then submits to the Common Council body a term sheet, or agreement(s), for consideration and approval by the Common Council body.

The City Attorney is a City officer under Wis. Stat. 62.09 (1)(a). Per Wis. Stat. 62.09 (12)(a), the City Attorney "shall conduct all the law business in which the city is interested." Per 62.09 (12)(d), the City Attorney shall "draft ordinances, bonds and other instruments as may be required by city officers." This is also reflected in local law. Per

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City Charter 3-03-1 provides that the City Attorney “shall: a. Conduct all the law business of the corporation and of the departments thereof, and all other law business in which the city shall be interested, when so ordered by the common council” and the City Attorney drafts “contracts, leases, conveyances and other such instruments of writing as may be required by the business of the city...”

If the consideration of a City contract (agreement) “exceeds...or...can reasonably be interpreted to exceed a value of \$25,000” then pursuant to MCO 304-21, the Office of the City Attorney must “approve the provisions of said agreement...and said fact [must] appear on the face of such document.” Failure to comply with this requirement “shall render such agreement void.” MCO 304-21. Not voidable, but void.

In light of the above, since, we understand that (1) neither the City Attorney nor DCD negotiated or drafted the Section 13.4 contract alteration that is reflected by Alderman Bauman’s motion, and (2) that Alderman Bauman’s motion came about due to individual Aldermanic negotiation with the developer, we view that as being beyond the authority of an individual Alderperson.

How the Common Council proceeds from here is up to the Council. If the Council wants, it could take up the Couture Development Agreement again and consider it as a body without the drafting of, or negotiation of, contract section provisions by an individual Alderperson. Alternatively, the council could take action to authorize the actions taken by Alderman Bauman in relation to the Couture Development Agreement.

Very truly yours,


TEARMAN SPENCER
City Attorney

TS/ml