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September 22, 2014

To the Honorable Members of the
Common Council of the City of Milwaukee
Room 205 – City Hall

Re: A substitute ordinance relating to the sale of city-owned real estate
Common Council File No. 140612

Dear Aldermen and Alderwoman:

This opinion is in response to a discussion that took place at the September 16, 2014 meeting of the Zoning, Neighborhoods & Development Committee regarding the above-referenced file and the ordinance proposed thereby. The ordinance in question concerns the sale of City-owned residential properties.

First, it is without question that the Common Council has the legislative authority to direct how City-owned real estate is to be disposed of. As is the case with any legislation, however, the Common Council's authority is subject to applicable constitutional, statutory, and regulatory limitations. As discussed at the September 16, 2014 Committee meeting, there are several such limitations which raise as to the legality and enforceability of the proposed ordinance, and which prevent us from approving it in its current form. As indicated to the Committee, and further in this opinion, there are several options available for resolving those issues. Our office would be pleased to assist in that effort if so requested.

I.

The Proposed Ordinance

The provision of the ordinance at issue for purposes of this opinion states as follows:

Part 4. Section 304-49-4.5 of the code is created to read:

> 4.5. LOCAL COUNCIL MEMBER APPROVAL OF NEIGHBORHOOD PROPERTY SALES. All conveyances of neighborhood property parcels designated as provided in sub. 3-c shall be after and pursuant to approval by the local council member, or failing approval, after and pursuant to common council approval, and the commissioner shall include in marketing materials and other prospective buyer communications that any conveyance of neighborhood property parcels designated as provided in sub. 3-c is subject to approval by the local council member, or common council approval if the local council member fails to approve the conveyance.

Pursuant to MCO § 304-49-1, "neighborhood property" includes improved residential lots containing 4 housing units or less, vacant residential lots suitable for 1 or 2 housing units, and vacant lots not suitable for improvement. Therefore, the ordinance primarily affects *residential* property, which is an important distinguishing fact for purposes of our legal analysis.

II.

The Fair Housing Act

The Fair Housing Act, as amended ("FHA"), regulates various practices relating to the sale or rental of dwellings. Under the FHA, dwellings are buildings and structures designed or intended for occupancy as a residence, or vacant land that is offered for sale or lease for the construction or location of a building or structure designed or intended for occupancy as a residence. 42 U.S.C. § 3602. The FHA, therefore, regulates actions relating to buildings, structures, and vacant lots designed or intended for *residential* occupancy.

The City of Milwaukee is not exempt from the proscriptions set forth by the Fair Housing Act. Among other things, the FHA makes it unlawful to discriminate against a person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provisions of services or facilities in connection therewith, because of race, color, religion, sex, handicap, familial status, or national origin. 42 U.S.C. § 3604. For these reasons, the City and its officers and employees should be mindful of the FHA when engaging in activities relating to the sale and rental of residential properties.

Under the FHA and Department of Housing and Urban Development ("HUD") regulations adopted pursuant to the FHA, a finding of intentional discrimination is not needed in order to sustain liability on the discriminatory effects of a facially neutral policy or procedure. In other words, the City can face liability under the FHA even if the action or practice complained of appears neutral and is made with all the best intentions. In 2013, HUD adopted regulations that formalize the "discriminatory effects" doctrine. Those regulations provide that "a practice has a discriminatory effect where it *actually or predictably* results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status or national origin." HUD Reg. § 100.500(1)(a). In a complaint posture, the City will be given an opportunity to demonstrate that the action or practice is needed to achieve a legitimate, nondiscriminatory interest; however, a charging party will still prevail if such an interest can be served by alternative means having a less discriminatory effect. HUD Reg. § 100.500(3). This burden-shifting framework now codified at HUD Regulation § 100.500 makes "discriminatory effects" cases difficult to successfully defend, which is why we are careful in the advice we extend on this topic.

It is not that the ordinance at issue presents a per se violation of the Fair Housing Act. Certainly, it does not. The ordinance is also undoubtedly motivated by legitimate, nondiscriminatory interests. Notwithstanding that fact, the ordinance as drafted does present a predictable risk of discriminatory effects because it permits a decision-making process that is essentially comprised of 15 different sets of standards and review criteria. The fact that the ordinance would permit Common Council review *after* a proposed transaction has already been rejected by a local alderperson does not eliminate the risk presented by this particular framework.

If the ultimate goal of this ordinance is to vest more authority with the Common Council with respect to the sale of real estate, we recommend the ordinance be revised to eliminate the intermediate approval of the local alderperson and, instead, to send such proposals directly to the Common Council where a decision can be made by the collective body based on specified criteria that ensure compliance with the FHA.

III.

Constitutional Issues

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 &*

Refining Co. v. Wahner, 25 Wis. 2d 1, 7 (1964); *see also Guse v. City of New Berlin*, 2012 WI App 24, 339 Wis. 2d 399, 405. Failure to prescribe such standards renders the ordinance susceptible to legal challenge on at least two constitutional grounds: 1) that the ordinance is, on its face, unconstitutionally vague, and 2) that, as applied, the ordinance may result in similarly situated persons being treated differently in violation of the Equal Protection Clause of the Constitution.

Ordinances may, and often do, vest governmental officials and boards with significant discretion. What an ordinance may not do, however, is "blanket the [official or board] with unfettered discretion." *Guse* at 406. As such, an ordinance that contains no criteria to guide a discretionary decision-making process is susceptible to challenge on grounds that the ordinance is unconstitutionally vague.

The ordinance at issue lacks any criteria to guide the decision-making process, and as such, is susceptible to challenge on constitutional grounds. To correct this deficiency, we recommend that the ordinance be revised to include reasonable criteria to guide the decision-making process. There is latitude in terms of the level of detail such criteria must contain, but an ordinance such as this with no criteria whatsoever would be very difficult to defend given the current state of the law in this area.

IV.

Conclusion

In conclusion, although we cannot approve of the ordinance in its current form, we do believe the ordinance would be legal and enforceable if it set forth reasonable criteria to guide the decision-making process, and if it eliminated the intermediate local alderperson approval, and instead, sent all such decisions directly to the Common Council to ensure uniform application of such criteria.

Very truly yours,

GRANT F. LANGLEY
City Attorney

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