GRANT F. LANGLEY
City Attorney

MIRIAM R. HORWITZ
ADAM B. STEPHENS
MARY L. SCHANNING
JAN A. SMOKOWICZ
Deputy City Attorneys

CITY OF MILWAUKEE
Office of the City Attorney

Milwaukee City Hall Suite 800 • 200 East Wells Street • Milwaukee, Wisconsin 53202-3551
Telephone: 414.286.2601 • TDD: 414.286.2025 • Fax: 414.286.8550

STUART S. MUKAMAL
JOHN J. HEINEN
SUSAN E. LAPPEN
PATRICIA A. FRICKER
HEIDI WICK SPOERL
GREGG C. HAGOPIAN
ELLEN H. TANGEN
JAY A. UNORA
KATHRYN Z. BLOCK
KEVIN P. SULLIVAN
THOMAS D. MILLER
ROBIN A. PEDERSON
JEREMY R. MCKENZIE
PETER J. BLOCK
NICHOLAS P. DESIATO
JOANNA FRACZEK
JENNY YUAN
KAIL J. DECKER
ALLISON N. FLANAGAN
PATRICK J. LEIGL
HEATHER H. HOUGH
ANDREA J. FOWLER
PATRICK J. MCCLAIN
NAOMI E. GEHLING
CALVIN V. FERMIN
BENJAMIN J. ROOVERS
ELLENY B. CHRISTOPOULOS
RACHEL S. KENNEDY
TYRONE M. ST. JUNIOR
HANNAH R. JAHN
SAVEON D. GRENELL
ROSE SIMON-SILVA
Assistant City Attorneys

November 15, 2017

Jim Owczarski, City Clerk
Room 205 – City Hall

Re: Common Council File No. 170938 – A substitute ordinance relating to the provision of affordable housing units in conjunction with certain types of residential development

Dear Mr. Owczarski:

We have been asked to review Common Council File No. 170938, referenced above and commonly denoted as the so-called "inclusionary zoning" proposal. We understand that this file will be considered tomorrow at the Housing Trust Fund Advisory Board and on Tuesday, November 21st, by the Zoning, Neighborhoods and Development Committee of the Common Council. The purpose of this letter it to inform you that, based upon our review, portions of this File are illegal and unenforceable because they violate Wis. Stat. § 66.1015.

Our review is focused upon proposed new §§ 318-5-1 and 318-5-2, Milwaukee Code of Ordinances ("MCO"). Proposed new § 318-5-1 entitled "Greater Downtown Area" imposes certain requirements upon all "housing developments" within the "greater downtown area"[1] Specifically, a developer of housing within the defined area "shall be required to establish no less than 10% of the housing units in the housing development as affordable housing or pay an in-lieu fee of $125,000 per required affordable unit." These requirements are commonly denoted as "inclusionary zoning" requirements. Proposed § 318-5-2 entitled "Financial Assistance" requires that any developer receiving "direct financial assistance"[2] from the City "shall be required to establish no less than 20% of the housing units in the housing development as affordable housing or pay an in-lieu fee of $125,000 per required affordable unit. This also constitutes an "inclusionary zoning" requirement.

[1] The terms "housing development" and "greater downtown area" are defined, respectively, in proposed §§ 318-3-14 and 318-3-13, MCO.

[2] The term "direct financial assistance" is defined in proposed § 318-3-11.

We respectfully call your attention to Wis. Stat. § 66.1015, which reads as follows:

> **66.1015 Municipal rent control prohibited.**
>
> (1) No city, village, town or county may regulate the amount of rent or fees charged for the use of a residential rental dwelling unit.
>
> (2) This section does not prohibit a city, village, town, county or housing authority or the Wisconsin Housing and Economic Development Authority from doing any of the following:
>
> a. Entering into a rental agreement which regulates rent or fees charged for the use of a residential rental dwelling unit it owns or operates.
>
> b. Entering into an agreement with a private person who regulates rent or fees charged for a residential rental dwelling unit.

In *Apartment Association of South Central Wisconsin, Inc. v. City of Madison ("AASCW")*, 2006 WI App 192, 296 Wis. 2d 173, 722 N.W.2d 614, the Wisconsin Court of Appeals ruled that this statute preempted and rendered unenforceable an inclusionary zoning ordinance adopted by the City of Madison. In reaching this conclusion, the Court carefully distinguished voluntary agreements between municipalities and housing providers from regulatory measures requiring compliance with inclusionary zoning requirements as a condition of obtaining zoning approvals. The Court concluded that the former were lawful and not preempted by Wis. Stat. § 66.1015, while the latter were prohibited and preempted by that statute. *AASCW, supra*, ¶ ¶ 22, 24, 26-27, 35.

File No. 170938 contains both types of provisions. Proposed § 318-5-1, in our opinion, is a regulatory measure preempted by Wis. Stat. § 66.1015 and thus illegal and unenforceable. By contrast, proposed § 318-5-2 is, in large part, legal and enforceable since it is best construed as the imposition of conditions upon an agreement between the City and a developer by which the latter receives consideration in the form of "direct financial assistance" from the City.

The exception is with respect to the application of proposed § 318-5-2 to existing buildings under proposed § 318-7-2. In our opinion, § 318-7-2 would be illegal and unenforceable if applied to existing buildings unless **new** (*i.e.*, (post-enactment) "direct financial assistance" is extended by the City to the developer pursuant to a new agreement. Past assistance, without more, cannot suffice to bring such an existing building under the auspices of the requirements of proposed § 318-5-2 because, under these circumstances, there would be a development agreement already in place, and, additionally that building would enjoy legal nonconforming status and the rights appurtenant to that status. Imposition of new conditions upon an existing building, absent more, would be contrary to applicable law affecting nonconforming uses.

Please contact this office if you have any further questions.

Very truly yours,

GRANT F. LANGLEY
City Attorney

STUART S. MUKAMAL
Assistant City Attorney

GREGG C. HAGOPIAN
Assistant City Attorney

SSM:lmb
1050-2017-2314:244899