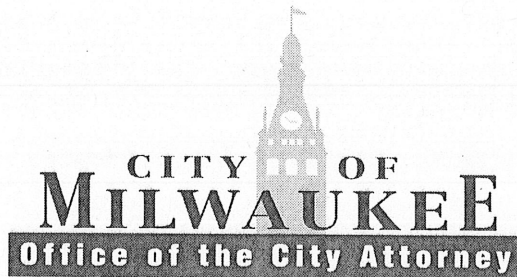


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March 20, 2023

VIA EMAIL

Alderman Scott Spiker
13th Aldermanic District
City Hall, Room 205

Re: Opinion Request Relating to Authority to Retain Outside Counsel

Dear Alderman Spiker:

By letter dated March 14, 2023, you requested a legal opinion on the following question: "Under city ordinance 304-23, is the City Attorney or anyone else permitted to retain outside counsel without the authorization of the Common Council?" In your letter, you clarified that your specific question is whether the City Attorney (or anyone else) is permitted to retain a specific outside counsel without explicit authorization from the Common Council to retain that attorney or firm.

The City Attorney, and only the City Attorney, may retain outside counsel, and then, only with authorization from the Common Council. It is the opinion of this office, however, that MCO § 304-23 does not require that the Common Council must first authorize the specific outside counsel selected by the City Attorney. MCO § 304-23 is ambiguous. In light of this ambiguity, longstanding Common Council practice indicates that the Common Council has not interpreted the ordinance to require prior authorization of the selection of the specific attorney or firm.

MCO § 304-23 provides:

304-23. Outside Attorney or Law Firm. No attorney or law firm outside of the city attorney's permanent staff shall be retained by or on behalf of the city without first obtaining authorization therefor from the common council. Every such engagement shall be pursuant to a written agreement, the terms of which shall include a covenant prohibiting such outside attorney from undertaking representation of any person in connection with any claim, proceeding, lawsuit or other matter against the city during the period in which such outside attorney or law firm is engaged by or on behalf of the city.



We begin our analysis by applying accepted rules of statutory construction, which are the same for both statutes and ordinances. *Milwaukee Dist. Council 48 v. Milwaukee County*, 2019 WI 24, ¶ 11, 385 Wis. 2d 748. “[S]tatutory interpretation ‘begins with the language of the statute.’” *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633. Context and the “structure of the statute in which the operative language appears” are also important in determining meaning. *Id.* at ¶ 46. “Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Id.* “If [the court’s] focus on the statute’s language yields a plain, clear meaning, then there is no ambiguity, and the statute is applied according to its plain terms.” *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 20, 309 Wis. 2d 541. An ordinance is ambiguous, however, if it is “capable of being understood by reasonably well-informed persons in two or more senses.” *Kalal*, 2004 WI 58, ¶ 47.

Applying these principles here, MCO § 304-23 is ambiguous, largely owing to its use of the passive voice and the word “therefor,” an adverb meaning “for that.” See *The American Heritage Dictionary of the English Language*, <https://www.ahdictionary.com/word/search.html?q=therefor> (accessed March 19, 2023). One could interpret MCO § 304-23 to require prior authorization of the attorney or firm selected by the City Attorney; i.e., that “therefor” refers to authorization for retention of the particular attorney or firm. Alternatively, a “reasonably well-informed person” could also interpret the ordinance as requiring prior authorization to retain outside counsel without explicit prior authorization to retain a specific attorney or firm; i.e., that “therefor” refers to authorization for retaining outside counsel for a particular matter.

Based on our review of relevant Common Council legislation, the Common Council adopted the latter interpretation. “[L]ong and uninterrupted practice under an ambiguous statute is good evidence of its construction.” *State ex rel. B’nai B’rith Found. of U.S. v. Walworth Cnty. Bd. of Adjustment*, 59 Wis. 2d 296, 305 (1973).

The first example of this construction of the ordinance is demonstrated in the Common Council’s practice of authorizing the City Attorney’s retention of outside counsel and expenditure of funds under the Outside Counsel/Expert Witness special purpose account. Wis. Stat. § 65.06(6)(b) provides (emphasis added):

(b) The common council at any time after the adoption of the budget may, by resolution adopted by a majority vote of the members thereof direct the proper officers of any department to expend such sum or sums of money as are specially appropriated out of any specific fund under its control for any of the several purposes enumerated therein. *The adoption of such resolution shall be the authority for such department to proceed and expend such specified sum for the purpose as directed therein.*

Pursuant to § 65.06(6)(b), the Common Council each year adopts a resolution providing the necessary authorization for departments to expend special purpose account funds and to “enter into necessary contracts for the purposes listed.” *See e.g.*, Resolution No. 220717 and Ex. A to Resolution No. 220717, governing expenditure of the 2023 SPAs. As the Budget Office explained in a letter accompanying Resolution No. 200996, governing expenditure of the 2021 SPAs:

Exhibit A identifies the departments that have expenditure authority for each account. Some accounts are identified as requiring a resolution before expenditures are authorized. Expenditures from these accounts will not be authorized until a subsequent resolution is adopted.

Prior to 2003, the annual SPA resolution specified that the Outside Counsel/Expert Witness SPA required a subsequent resolution before expenditure. With adoption of Resolution No. 030083, in 2003, the Common Council placed the Outside Counsel/Expert Witness SPA under the City Attorney’s authority. In the City Attorney’s April 14, 2003 request (attached to CCFN 030083), the City Attorney explained the need for this authority:

This fund is used by the City Attorney’s Office to retain outside counsel and hire expert witnesses. *The process of doing this by resolution has proven to be very time consuming, costly, and has created delays in hiring outside counsel and expert witnesses.* Changing the expenditure authority to be designated City Attorney would expedite the process and be consistent with other Special Purpose Accounts assigned to our office. (emphasis added)

Accordingly, the Common Council adopted Resolution No. 030083, which contained the following “Resolved” clauses:

Resolved, That Exhibit A to Common Council File No. 020586 be amended to place the expenditure authority for the Outside Counsel/Expert Witness Fund under the authority of the City Attorney; and, be it

Further Resolved, That the City Attorney advise the Judiciary and Legislation Committee in writing within 48 hours of the hiring of any outside counsel; that the City Attorney advise the Judiciary and Legislation Committee in writing within 48 hours of the retention of any expert whose compensation is anticipated to exceed \$10,000; and that the City Attorney submit a written report to the Judiciary and Legislation Committee every other meeting of expenditures from the Outside

Counsel/Expert Witness Fund Special Purpose Account. (emphasis added).

The Common Council employed this practice between 2003 and 2020 to authorize the City Attorney to retain outside counsel without prior authorization of the selection of the particular attorney or firm. A resolution cannot trump an ordinance, therefore, MCO § 304-23 and the annual SPA resolutions must, and can be, reconciled. Through the annual SPA resolutions, the Common Council provided the prior authorization necessary for the City Attorney to retain outside counsel. Under this longstanding legislative practice, the Common Council clearly did not interpret MCO § 304-23 to require prior Common Council approval of the specific outside counsel retained by the City Attorney.¹

Interpreting MCO § 304-23 to require prior authorization of the specific attorney or firm would necessitate a finding that the Common Council and the City Attorney consistently violated MCO § 304-23 over nearly 20 years. That is not a reasonable interpretation of the ordinance. *Kalal*, ¶ 46 (“statutory language is interpreted...reasonably, to avoid absurd or unreasonable results.”). Instead, this longstanding legislative practice supports the conclusion that MCO § 304-23 does not require prior Common Council authorization to retain a specific attorney or firm.

In addition, we have found an example where the Common Council authorized the City Attorney to retain outside counsel in a particular matter without explicitly authorizing the selected attorney or firm. By Common Council Resolution No. 151309, adopted January 19, 2016, the Common Council authorized the City Attorney to join the City as a plaintiff in the liquid aluminum sulfate bid rigging and price fixing class action lawsuit “of his selection” and authorized the City Attorney to “select and retain outside counsel to represent the City of Milwaukee in such lawsuit.”

We are aware of two other resolutions that did authorize the City Attorney to retain specific outside counsel in class action litigation. By Resolution No. 190458, adopted July 30, 2019, and relating to opioid litigation, the Common Council authorized the City Attorney to “enter into a contingent fee agreement with outside counsel and file suit as the City Attorney determines to be in the best interests of the City of Milwaukee.” That same resolution declared “the selection of outside counsel for these purposes by the City Attorney is subject to the approval of the Common Council, with the understanding that the Common Council is particularly interested in minority participation.” In turn, by Resolution No. 190817, the Common Council approved the City Attorney’s selection of

¹ By Resolution No. 211949, adopted April 19, 2022, the Common Council took back control over expenditures from the 2022 Outside Counsel/Expert Witness SPA for the remainder of 2022, by amending Resolution No. 210811 to require that “all appropriations from the Office of the City Attorney’s Outside Counsel / Expert Witness Special Purpose Account shall be reported to and approved by the Common Council prior to expenditure.” This action pertained to expenditures and applied to the 2022 SPA only. See Resolution No. 220717.

Alderman Scott Spiker

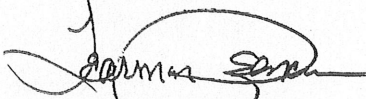
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Napoli Shkolnik as outside counsel and authorized the City Attorney to execute a contract consistent with the resolution.

Finally, by Resolution No. 200884, adopted November 4, 2020, the Common Council authorized the City Attorney to retain two firms recommended by the City Attorney to represent the City in a class action lawsuit related to vaping. In both the opioid and vaping class actions, the Common Council authorized the City Attorney to retain the outside counsel firms selected by the City Attorney but this does not mean that prior Common Council approval to retain the specific firms was required by MCO § 304-23.

Very truly yours,



TEARMAN SPENCER
City Attorney



ROBIN A. PEDERSON
Deputy City Attorney



THOMAS D. MILLER
Assistant City Attorney

c: James Owczarski, City Clerk

1033-2023-460:284392