

CITY OF MILWAUKEE

Form CA-43

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August 26, 2002

Finance & Personnel Committee
of the Common Council
City Hall, Room 205

Re: BID #21 - Participation in the Employees' Retirement System
File No. 020668

Dear Members:

Returned herewith is Common Council Resolution File No. 020668 being a resolution relating to Business Improvement District No. 21 participation in the Milwaukee Employees Retirement System. The file was referred to the City Attorney for a review of the facts.

The resolution requests the Annuity and Pension Board of the Milwaukee Employees Retirement System to authorize and direct its actuary to prepare an estimate of the cost of Business Improvement District (BID) No. 21 participation in the MERS and request the City Attorney to opine on the legality and enforceability of the designation of BID No. 21 as a City Agency for purposes of participation in the Milwaukee Employees Retirement System.

The City of Milwaukee Employees Retirement System is a qualified plan under Section 401(a) of the Internal Revenue Code (IRC) and a governmental plan within the meaning of Section 414(d) IRC. Section 414(d) IRC provides that a governmental plan mean a plan established and maintained for its employees by the government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of the foregoing.

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It is important that the Milwaukee Employees Retirement System retain its status as a governmental plan because this status exempts the Employees Retirement System from many of the limitations applicable to 401(a) qualified retirement trusts generally.

Section 66.1109, Stats., authorizes the creation of Business Improvement Districts by municipalities. In order to create a Business Improvement District and adopt its operating plan, an owner of real property used for commercial purposes and located in the proposed Business Improvement District must petition a municipality for creation of the district: the planning commission must designate the Business Improvement District and adopt its proposed initial operating plans; the owners of property to be assessed under the proposed initial operating plan having a valuation equal to more than 40% of the valuation of all property to assessed under the Proposed Initial Operating plan must not have filed a petition protesting the proposed district or the operating plan; and the local legislative body must have voted to adopt the proposed initial operating plan.

Under the law, the Mayor appoints members to the Business Improvement District board to implement the operating plan. Board members are confirmed by the Common Council and appointed to staggered terms designated by the Common Council. A majority of the board members must own or occupy real property in the district.

The Business Improvement District board must annually consider and make changes to the operating plan which shall then be approved by the local legislative body. If the local legislative body disapproves of the operating plan, the board shall consider and make changes to the operating plan and must continue to submit the plan until the legislative body's approval is obtained.

All special assessments received from a Business Improvement District or all other appropriations by a municipality for the benefit of the Business Improvement District are placed in a segregated account in the municipal treasury. Disbursements from the account may be made only to reimburse the

municipality for appropriations other than special assessments to pay the cost of audits or for the purpose of implementing the operating plan.

Revenue ruling 89-49, discussed the issue of whether a volunteer fire company should be considered a governmental plan. The ruling held that the plan would not be considered a governmental plan merely because the organization had a relationship with a governmental unit or some clause on a governmental power. One of the most important factors to be considered in determining whether an organization is an agency or instrumentality is the degree of control that the government has over the organization's everyday operations. Other factors include whether there is specific legislation creating the organization, the source of funds for the organization, the manner in which the organization's trustees or operating board are selected and whether the applicable governmental unit considers the employees of the organization to be employees of applicable governmental unit. The ruling held that the volunteer fire company did not constitute a governmental plan because the degree of control which the municipality exerted over the fire company's everyday operation was minimal, there was no specific legislation which affiliated the fire company with the governmental entity, and the board of trustees which controlled the basic operations of the fire company was elected by volunteer fire fighters. Finally, it was observed that the governmental entity had not treated the fire company's employees as employees as a state or political subdivision.

The facts and circumstances surrounding a Business Improvement District are different. There is specific legislation authorizing the creation of Business Improvement Districts. The enabling legislation authorizes the use of municipal funds for the organization. The board members are selected by the Mayor and confirmed by the Common Council. However, the City has not treated the Business Improvement District employees as employees of the City.

Although it would appear that a good case can be made for including Business Improvement District employees in the Employees Retirement System without jeopardizing its status as a governmental plan, prudence would dictate that a private letter ruling be sought from the IRS prior to implementing the change. Accordingly we would recommend that an amendment to the Charter to include the Bid Districts as an agency under the Employees Retirement Act be

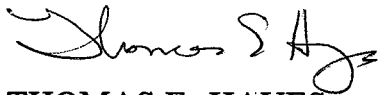
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conditioned upon the Employees Retirement System obtaining a favorable ruling from the IRC.

Very truly yours,



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TEH:mll

c: Ms. Anne Bahr, ERS
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