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January 23, 2024

Alderwoman Larresa Taylor
Common Council
200 E Wells St., Rm. 205
Milwaukee, WI 53202

RE: Federal Immigration Facility Proposed at 11925 W. Lake Park Drive

Dear Alderwoman Taylor:

You requested guidance and clarity on the City of Milwaukee's options to enforce local regulations on a proposed use of a property in the city by the federal government for what is expected to be an immigration facility. We will begin by providing an overview of the law and then look at possible steps that the City could take with regard to this proposed project.

I. Applicable Federal Law is 40 U.S. Code §3312:

A local government's ability to enforce its zoning, historic preservation, building and other codes on federal facilities is controlled and limited by 40 U.S. Code § 3312. This federal law states that the federal government need only comply with nationally recognized building codes and, as you will see, overrides local and state laws related to zoning and building codes. The City of Milwaukee does not have a legislative or legal path to stop construction or alteration of a building or a building use when done by a federal agency, regardless of whether the property is owned or leased by the federal government.

Federal law requires that federal agencies constructing or altering buildings for their use, the building "shall be constructed or altered, to the maximum extent feasible *as determined by the Administrator or the head of the federal agency, in compliance with one of the nationally recognized model building codes* and with other applicable nationally recognized codes, including electrical codes, fire and life safety codes, and plumbing codes, *as the Administrator decides is appropriate*. In carrying out this subsection, the Administrator or the head of the federal agency shall use the latest edition of the nationally recognized codes." 40 U.S. Code §3312(b) (emphasis added). As you can see from the language of

the Code itself, there is great discretion given to the leaders in federal agencies with regard to the extent such nationally recognized building codes need to be complied with for federal uses. While the City of Milwaukee and State of Wisconsin building codes are based on these nationally recognized codes, there are some differences.

Federal law also requires the federal agency constructing or altering the building to "consider" local zoning, historic preservation, and other similar laws. It does not require the federal agency to follow such local laws or the usual processes for approval under these laws. The federal law states:

> (c) ZONING LAWS.—Each building constructed or altered by the Administration or any other federal agency shall be constructed or altered *only after consideration of all requirements (except procedural requirements)* of the following laws of a State or a political subdivision of a State, which would apply to the building if it were not a building constructed or altered by a federal agency:
>
> (1) Zoning laws.
> (2) Laws relating to landscaping, open space, minimum distance of a building from the property line, maximum height of a building, historic preservation, esthetic qualities of a building, and other similar laws.

40 U.S. Code §3312(c) (emphasis added). The federal code does not define what "consideration" means. However, it does provide some guidance on the "cooperation" that a federal agency should undertake with state and local officials in order to comply with the above quoted subsections (b) and (c). It states:

> **(d) COOPERATION WITH STATE AND LOCAL OFFICIALS.—**
>
> **(1) STATE AND LOCAL GOVERNMENT CONSULTATION, REVIEW, AND INSPECTIONS.**—To meet the requirements of subsections (b) and (c), the Administrator or the head of the federal agency authorized to construct or alter the building—
>
> **(A)** in preparing plans for the building, *shall consult with appropriate officials of the State or political subdivision of a State*, or both, in which the building will be located;

> **(B)** *on request shall submit the plans in a timely manner to the officials for review* by the officials for a reasonable period of time *not exceeding 30 days*; and
>
> **(C)** *shall permit inspection by the officials during construction or alteration* of the building, in accordance with the customary schedule of inspections for construction or alteration of buildings in the locality, if the officials provide to the Administrator or the head of the federal agency—
>
> **(i)** A copy of the schedule before construction of the building is begun; and
>
> **(ii)** Reasonable notice of their intention to conduct any inspection before conducting the inspection.
>
> **(2) LIMITATION ON RESPONSIBILITIES.**—this section does not impose an obligation on any State or political subdivision to take any action under paragraph (1).

40 U.S. Code §3312(d) (emphasis added).

We understand that there have been meetings with the City's Department of City Development (DCD), Department of Neighborhood Services (DNS) and you, as the alderperson who represents the district, regarding the proposed immigration office project as part of the federal government's effort to "consult" with local officials and "consider" the local requirements. It is our understanding that documents were provided to DCD and DNS in the federal government's efforts to comply with this section and that DNS is currently reviewing building plans. However, as described below, City departments do not have any authority to make the federal government comply with our building, zoning, or other code requirements and the project is able to move forward with or without the approvals of DNS.

The level of input, inspection and recommendations that DNS puts forth to a federal agency is a policy decision rather than a legal one, as the federal law does not required the City to take any actions at all (see subsection (d)(2) quoted above). However, federal law does allow local authorities to provide recommendations to the federal government to such projects – the recommendations are just that though, they are recommendations that the federal government should give "due consideration" to, but are not required to follow. (See 40 U.S. Code §3312(e)). Again, the extent that the federal agency follows or

takes the recommendations of local officials is up to the discretion of the head of the federal agency considering them.

II. What Actions Can the City Take:

While subsection (d) of 40 U.S. Code §3312 may provide an avenue to apply some limited political pressure and minimally delay the project by requiring copies of building plans to the City, any such delay is limited to the 30 days that federal law allows the City to review such plans. It is our understanding that some plans were provided to DNS already in mid-December so the 30-day review period allowed under federal law is likely already nearly expired.

As suggested above, the City, as a political subdivision of the State, could also take measures to slow down the project by making recommendations to the federal government about their project. Section 40 U.S. Code §3312(e), states, with emphasis added:

> (e) STATE AND LOCAL GOVERNMENT RECOMMENDATIONS.—Appropriate officials of a State or political subdivision of a State may make recommendations to the Administrator or the head of the federal agency authorized to construct or alter a building concerning measures necessary to meet the requirements of subsections (b) and (c). *The officials also may make recommendations to the Administrator or the head of the federal agency* concerning measures which should be taken in the construction or alteration of the building to take into account local conditions. *The Administrator or the head of the agency shall give due consideration to the recommendations.*

The City could formalize recommendations to the federal agency. While the recommendations would not bind the federal agency in any way, the agency is required under subsection (e) to give "due consideration to the recommendation" of the state or local government. Again, this may present an opportunity to elevate the concerns of residents and local elected officials, and possibly engage our Congressional delegation, to apply political pressure on the federal agency to adopt the City's recommendations.

The federal code is clear though that even if the federal agency fails to give "due consideration" and fails to comply with the recommendations of the City, the federal government would not be subject to any legislative or legal action seeking

to block the construction or alternation of a property. Subsection (f) of 40 U.S. Code §3312 is a clear prohibition against any such action and states:

> (f) EFFECT OF NONCOMPLIANCE.—
> An action may not be brought against the Federal Government and a fine or penalty may not be imposed against the Government for failure to meet the requirements of subsection (b), (c), or (d) or for failure to carry out any recommendation under subsection (e).

This means that even if we were to argue that the federal government did not give proper consultation and consideration to any recommendation of the City, we would not have an action against the federal government. Please also note that subsection (g) of 40 U.S. Code §3312 does not allow the City to charge the federal government for any plan review, building permits or inspections done by the City for this project.

As discussed above, what constitutes "consideration" by the federal government is not defined. This may present an opportunity for elected officials, especially our federal delegation, to ask questions and seek answers on the degree to which consideration was actually given by the federal agency. However, those questions would be asked without any kind of enforcement mechanism – nor, does it seem, would the federal government be required to answer without some pressure at the federal level.

We believe that the proposed project is occurring in a building that is or will be leased, not owned, by the federal government. If DCD and DNS have not already received written confirmation that a federal agency is proposing this project for federal use, they should seek that. It is our understanding that meetings and correspondence regarding this project so far have been with the property owner and perhaps a lobbyist working with the property owner and/or federal agency, but not with representatives of any federal agency directly. In order to confirm that the project is exempt from local zoning, building, and other codes, we should make sure there is some evidence confirming that the proposed project is for a federal agency. A copy of a lease with a federal agency for the property or a letter from the federal agency on their letterhead confirming the project is for a federal use would suffice.

Because the proposed project is happening in a property that is leased to a federal agency rather than owned by a federal agency, there is a provision of state law that may be helpful in delaying the project a bit. The Wisconsin Administrative Code, in section SPS 361.02, states that while minimum standards to protect

health, safety and welfare in places of employment do not apply to properties exempted by federal law, the property owner is required to record on title any steps necessary to comply with chapters SPS 361 to 366 of the Wisconsin Administrative Code in the event that the leased space is converted to a non-federal use in the future. (See SPS 361.02(3)(d), Wis. Admin. Code). This requirement would be something for the State's Department of Safety and Professional Services to pursue, rather than something the City could pursue directly. City officials could certainly engage our state delegation to request that the State pursue action under this administrative code section. However, it appears that something has already been recorded on title in an attempt to comply with this administrative code requirement. Whether what was recorded is sufficient is something for the State to determine.

CONCLUSION

40 U.S. Code §3312 strips state and local governments of their zoning, building code and other regulatory powers when the construction or alteration of a building is sought by a federal agency. While lacking a legislative or legal action against the federal government, the City, acting through its departments, may elect to formalize recommendations and seek consideration of those recommendations as allowed by 40 U.S. Code §3312(e). The City may also wish to engage the Wisconsin Department of Safety and Professional Services as well as the City's State and Congressional legislative delegation to apply political pressure for adequate input and oversight where they can on this proposed project.

Very truly yours,

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ECG/MLS/cjj
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Michael Mazmanian, DNS
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