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January 13, 2011

Alderman Ashanti Hamilton
Chair, Committee on Judiciary
and Legislation of the
Common Council
Room 205 -- City Hall

Re: Common Council File No. 100915; In Rem Properties

Dear Chairman Hamilton:

The ordinance amendment proposed by this file is unconstitutional for several reasons, which we now explain.

Milwaukee Code of Ordinance sec. 304-50 provides for a process whereby the prior property owner can request the City to vacate an *in rem* judgment against a property if 13 specified conditions precedent have been satisfied. As presently written, MCO sec. 304-50-14 requires this office to petition the court to vacate an *in rem* judgment when the conditions have been met. The net result of this is that the *status quo ante* is restored. Most importantly for this analysis, all non-City liens against the property, such as mortgages, remain in place when this occurs.

The proposed ordinance would change subsection 14 dramatically. Upon the satisfaction of the 13 conditions precedent, it would require the Commissioner of City Development to deed the property back to the prior owner. This would convey the property back to the prior owner without any liens against it whatsoever. The ordinance would then become a tool to extinguish non-City debts secured by the property.

MCO sec. 50-3-2-b requires the City Attorney to approve all ordinances as to legality and enforceability. Because this proposed ordinance would be patently unconstitutional, we advise you of our opinion in advance of any Committee hearing on this proposal.

The law in this area was first set forth by Chief Justice John Marshall in *Sturges v. Crowninshield*, 17 U.S. 122 (1819). Bankruptcy is the legal process for the discharge of debts. Pursuant to Article I, Section 8, Clause 4 of the U.S. Constitution, Congress has the power to create uniform laws on bankruptcy. It has done so by creating Title 11 of the United States Code. Under the Supremacy Clause, Article VI, Clause 2 of the U.S.

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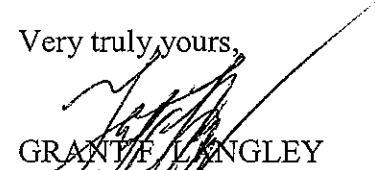
Constitution, when Congress preempts a field, states may only act in limited areas. 11 U.S.C. 522 allows states to exempt some property from execution to pay debts.


Article I, Section 17 of the Wisconsin Constitution requires the Legislature to adopt "wholesome laws" to protect a "reasonable amount" of a debtor's property from sale for the payment of debts. The Legislature has adopted Wis. Stat. § 815.18, which specifically enumerates property exempt from execution for payment of debts. By doing so, it too has preempted the field. Thus, the City has no Home Rule authority to act in this field under Article XI, Section 3 of the Wisconsin Constitution or Wis. Stat. § 66.0101(4).

Because the proposed ordinance would impinge upon the constitutional prerogatives of both Congress and the Wisconsin Legislature to determine which debts may or may not be discharged, it is unconstitutional.

In addition, Article I, Section 10, Clause 3 of the U.S. Constitution and Article I, Section 12 of the Wisconsin Constitution provide that Congress and the State, respectively, shall make no law impairing the obligation of contracts. By eliminating debt outside of the U.S. Bankruptcy Code and the Wisconsin exemption statute, the proposed ordinance would violate contractual obligations of mortgagees and other debt holders. Therefore, it is our duty to advise you that we would not be able to approve the legality and enforceability of this ordinance.

Very truly yours,


GRANT LINGLEY
City Attorney


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VDM:dms

c: Mayor Tom Barrett
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Rocky Marcoux
Wayne Whittow

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