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June 28, 2011

To the Honorable, Common Council
of the City of Milwaukee
Room 205 – City Hall

Re: Resolution authorizing Settlement of the Claim of Michael, Best &
Friedrich for Attorneys Fees in *Metropolitan Associates v. City*

Dear Council Members:

We respectfully request introduction and recommend adoption of the attached resolution authorizing the settlement of this claim arising out of the case of *Metropolitan Associates v. City*. The reasons for this recommendation follow.

In 2001, the Wisconsin Supreme Court decided the case of *Nankin v. Shorewood* holding that a trial de novo in the Circuit Court under WI Stat. 74.37 was an available remedy for Milwaukee County taxpayers to appeal their property tax assessments. In this type of appeal, the prior decision of the Board of Review is irrelevant. Unlike a traditional certiorari appeal, the Circuit Court of Milwaukee County could for the first time hear all of the evidence and make its own decision as to the fair market value of a property without giving deference to the prior work of both the Assessor and the Board. This procedure is far more costly than a traditional certiorari action to this office and the Assessor's office in terms of the time and effort necessary to prepare for a full court trial. The results have also been less predictable, as the usual presumption in favor of the assessment's validity is now to be given little weight by the Circuit Court in the wake of *Nankin*.

In early 2008, in an attempt to ameliorate the holding of *Nankin*, the Assessor's office, acting through the Intergovernmental Relations Division with the help of this office, proposed to the Common Council legislation that would amend WI Stats. 74.37 and 70.47 to replace trial de novo with an enhanced certiorari procedure. The proposed legislation would give both the City and an appealing taxpayer enhanced rights before the Board of Review, while limiting Circuit Court review to a procedure more akin to traditional certiorari rather than to a trial de novo. The Council authorized IRD to pursue this legislation. It passed by 95-2 in the Assembly and 32-1 in the Senate. It was signed by Governor Doyle. Shortly thereafter, the Council adopted the enhanced procedures that it authorized.

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Metropolitan Associates, an owner of many large apartment complexes in the City, filed suit against the City challenging the constitutionality of the new legislation through its law firm of Michael Best & Friedrich. It alleged that the equal protection problems that the Supreme Court found in *Nankin* had not been solved by the new legislation. The Attorney General declined our request to defend the statute, thereby placing the duty upon this office to defend the statute and the City's ordinance. On January 20, 2009, Circuit Court Judge Jean DiMotto agreed with the plaintiff and found the new statute unconstitutional. The City appealed and in September 2009 the Court of Appeals unanimously sided with the City in upholding the new statute in an opinion by Judge Ralph Adam Fine. The plaintiff then petitioned the Supreme Court to take the case, which it did in December 2009. After two separate oral arguments in that court in 2010, the court decided on March 25, 2011, that the new statute was unconstitutional. The court's decision was 4-3 against the City. It was authored by Justice Michael Gableman. We have reviewed that decision and have determined that the only appeal possible, to the United States Supreme Court, was not viable as the Wisconsin Supreme Court's decision was based primarily upon Wisconsin law.

The lawsuit against the City challenging the constitutionality of the statute and the City's ordinance adopting its provisions was brought as a civil rights action alleging that the plaintiff was deprived of its equal protection rights under 42 USC 1983. As such, if the plaintiff were to prevail, which it has here, then the defendant City would be liable to the plaintiff for its attorneys fees under 42 USC 1988. Michael Best & Friedrich has now submitted the enclosed statement for about \$300,000 in attorney fees to the City. We have carefully reviewed this statement in two aspects: the City's liability for the fees and the amount of the fees.

In regard to the question of the City's liability for the fees, in addition to our own research, we have also consulted with Professor Sheldon Nahmod of IIT Kent Law School in Chicago, who is the author of a widely used treatise on this subject.

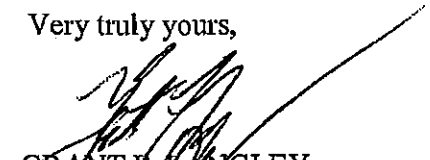
In regard to the amount of the fees that the City is liable for, we have carefully reviewed the attached invoice in light of our long prior experience with attorney fee claims and our knowledge of the details of this long and difficult litigation. The claimant has agreed to accept a compromised amount of \$250,000.

We could attempt to litigate the City's ultimate liability for these fees in the Circuit Court. However, for the reasons stated above, it is our recommendation that this amount be paid in full by the City in order to avoid the likelihood of the City's liability for the substantial additional cost of plaintiff's litigating the fees issues. We ask that you approve this payment at your earliest possible convenience and have attached an appropriate resolution for introduction and referral to the Judiciary & Legislation Committee. We


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also ask that the Committee schedule a closed session to discuss this litigation matter with us.

Very truly yours,



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Enc.

c: Mayor Tom Barrett
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