



Office of the Comptroller  
November 2, 2009

W. Martin Morics, C.P.A.  
Comptroller

Michael J. Daun  
Deputy Comptroller

John M. Egan, C.P.A.  
Special Deputy Comptroller

Craig D. Kammholz  
Special Deputy Comptroller

Members of the Zoning, Neighborhoods  
& Development Committee  
Common Council, City of Milwaukee  
City Hall, Room 205  
Milwaukee, WI 53202

RE: File 090687 The Moderne Project

Committee Members:

At your meeting of October 27<sup>th</sup>, you requested that our Office review and comment on two issues related to this apartments/retail/parking and condominium Project:

1. Your Committee's intent to secure the equity partners' personal guarantees of the City loan(s).

2. Default provisions in the affected Project loans as raised in our October 23<sup>rd</sup> letter Regarding point #1), we have received a copy of an email to Alderman Bauman dated October 30<sup>th</sup>, indicating that it is the intent of DCD to include language in the City Loan term sheet that "Personal guarantees shall be secured by a first lien on assets with a combined fair market value, as determined by independent appraisal, of not less than \$3,350,000." As of mid morning today, we have not received any new documentation for the File related to this statement.

Regarding #2), the default provisions, our concern lies in the business impact of various default outcomes on the City's interests, namely, success of the overall Project, repayment of City loans for the project and the achievement of the targeted tax increments. Because the default provisions are mainly a matter of legal terms as negotiated between the Developer, Developer's lender and City legal counsel, we requested that the City Attorney describe the City's right to foreclosure of the condominium component – its primary financial interest under a series of five different default "scenarios". See Attachment #1. The City Attorney has provided a response to this request, clearly describing the City's foreclosure rights under each default scenario<sup>1</sup>. See Attachment #2.

After a careful review of the City Attorney's response and a follow-up discussion with that Office, we conclude that:

- 1) The City Attorney will negotiate the City loan agreements based on terms that will clearly preserve the City's unilateral right to foreclose on the condominium component to the extent provided by law.<sup>2</sup> This directly addresses the concern noted in our October 23<sup>rd</sup> letter regarding the conditions under which the City would likely be able to foreclose.
- 2) Should the Developer default on the City loan(s) while the Senior (HUD guaranteed) loan continues to perform, the City might not foreclose on the condo units because that could mean that the apartment/parking/retail component would also be in default. This dilemma results from the intended matching cross default provisions of the City loans and the Senior (HUD

<sup>1</sup> The City Attorney points out that since these loan agreements have yet to be negotiated, its observations are necessarily based on the Loan Term Sheet as currently drafted and its expectation of the result of these negotiations based on various prior City loan transactions.

<sup>2</sup> The only noted exceptions to execution of this unilateral right occur as the result of Developer bankruptcy and undefined third party suits that might have to be resolved by the courts.

guaranteed) loan. Should the City choose not to foreclose on the condo units in spite of loan default, this in turn would probably lead to a change in City loan repayment terms and an extension of loan term. Thus we confirm our concern in our October 23<sup>rd</sup> letter that "...should condo sales not proceed as planned and default on a City loan occurs, the City's financial exposure could extend...far beyond the projected 2013-2014 final loan repayment date."

In its response to default scenarios #1, #2 and #3, the City Attorney indicates that the City as first mortgage holder will retain its unilateral right to foreclose on the condominium component upon default on either the City loans or the Senior (HUD guaranteed) loan. The Default scenario #4 relates to a Developer bankruptcy. The City Attorney states that while Developer bankruptcy would constitute a default, "...the bankruptcy court will have the power to enjoin the Redevelopment Authority's ability to proceed with a foreclosure action." This is unavoidable once a bankruptcy action has commenced. Default scenario #5 involves the impact on the City of Milwaukee resulting from legal action taken against the Developer by the general contractor, prospective condo purchasers or others. In this situation, the City Attorney holds that "... we would not expect such legal disputes to limit the ability of the Redevelopment Authority to initiate a foreclosure action on the condominium units...". The result of such a foreclosure action by the City would no doubt depend upon the specific facts and competing interests involved. Thus in both Scenarios #4 and #5, if the City initiated a foreclosure action, delays could be encountered.

In the event of a default on the City loan(s) while the Senior (HUD guaranteed) loan is still performing, the City of Milwaukee would face a dilemma. While the City would have a unilateral right to initiate foreclosure on the condominium component, the cross default provisions would also give the Senior lender/HUD as guarantor the ability to foreclose on its loan and therefore place the entire Project including the apartments/parking/retail component in foreclosure. This would not likely be in the interest of the Project or the City of Milwaukee since the economic value of the Project and the property tax increments produced are mainly dependent on the apartment/parking retail component. As a result, a default on the City loan(s) would likely lead to a "workout" agreement with the Developer where City loan terms would be renegotiated to allow the Developer to retain title to the condominium units and continue to repay the City, albeit on terms more generous to the Developer. Such a workout agreement would likely include extending the term of the City loan(s).

Should you have questions about this letter, please contact my Office immediately.

Sincerely,

A handwritten signature in black ink that reads "Michael J. Daun". The signature is written in a cursive style with a large, looped "D" at the end.

W. Martin Morics  
Comptroller

Mayor Barrett, Commissioner Marcoux, Allison Rozek, Lori Lutzka  
Mjd/11-02-09

### Moderne Default Scenarios

As a follow up to our conversation yesterday, we are providing the following scenarios for your legal analysis. For each of the following scenarios, please describe the City of Milwaukee's right to foreclose related to its primary security interest - the condominium units - assuming that the City has disbursed the full amount of both the Completion and Mezzanine loans to the Developer. As applicable, please indicate where the City's foreclosure rights depend upon or are potentially restricted by actions or lack of action of other parties such as the Developer, Senior Lender, HUD or the courts. Also, please indicate for each scenario below how and when the City of Milwaukee would be noticed or become aware of the existence of the default event.

**Scenario #1:**

There is a Developer default on the Senior Loan.

1A consecutive Loan non-payments

1B technical Loan default (required debt coverage ratio, etc.).

**Scenario #2:**

Project completion and a Certificate of Occupancy is not secured by June 1, 2012.

**Scenario #3:**

There is a Developer default on either the Completion or Mezzanine Loan

3A the City of Milwaukee has not received full loan repayment on Completion and Mezzanine Loans after 48 months following the initial disbursement of City Loan funds.

3B consecutive Completion or Mezzanine Loan non-payments assuming available funds

3C technical Completion or Mezzanine Loan default (required debt coverage ratio, etc.).

**NOTE:** Under these Scenarios, please indicate if HUD, the Senior Lender or the courts can in any way impair the City's ability to unilaterally foreclose on the condominium component.

**Scenario #4**

The Developer files for or is party to a Chapter 7 or Chapter 11 bankruptcy during or following Project completion.

**Scenario #5**

Legal action is taken by third parties (examples: general contractor, prospective owners with deposits in Developer's possession) against the Developer

4A Prior to Project completion and issuance of a Certificate of Occupancy

4B Following Project completion and issuance of a Certificate of Occupancy.

**GRANT F. LANGLEY**  
City Attorney

**RUDOLPH M. KONRAD**  
**LINDA ULISS BURKE**  
**VINCENT D. MOSCHELLA**  
Deputy City Attorneys



ATTACHMENT 2

COMPTROLLER

2009 OCT 30 AM 10:30

THOMAS O. GARTNER  
BRUCE D. SCHRIMPF  
SUSAN D. BICKERT  
STUART S. MUKAMAL  
THOMAS J. BEAMISH  
MAURITA F. HOUREN  
JOHN J. HEINEN  
DAVID J. STANOSZ  
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DANIELLE M. BERGNER  
Assistant City Attorneys

October 29, 2009

Mr. Michael Daun  
Office of the Comptroller  
200 East Wells St, Room 404  
Milwaukee, WI 53202

Re: Moderne Default Scenarios

Dear Mr. Daun:

We are writing in response to your October 29, 2009 email message forwarding Moderne Default Scenarios in the form attached to this letter for our review and analysis. These Default Scenarios relate to the proposed Mezzanine and Completion loans to the Moderne Project ("Project") currently pending before the Common Council under Common Council Resolution File No. 090687.

As a preface to our comments and analysis, we should note that we have not had an opportunity to meet with counsel for Milwaukee Moderne, LLC ("Developer") to prepare actual documentation for the proposed Mezzanine and Completion loans for the Project. This is customarily the case prior to Common Council approval of a term sheet. Accordingly, the comments and analysis which we will be able to provide will address the manner in which such issues are customarily resolved in documentation which this office has prepared for various prior loan transactions. In addition, we should note that the Milwaukee Economic Development Corporation ("MEDC") will be servicing these loans on behalf of the Redevelopment Authority and that we anticipate working together with counsel retained by MEDC in the negotiation and finalization of transaction documents for the Project.

Our commentary and analysis with respect to your scenarios will be in reference to our expectations for the Project as summarized in the term sheet currently contained in the Common Council file, which is also attached to this letter. It is also our understanding that the principals of Developer have agreed to provide pledges of additional real property with a current assessed value of approximately \$3,350,000 as security for the personal guarantees referenced in the term sheet and that the Department of City Development will be submitting an amended term sheet to reflect that change.

That commentary and analysis is as follows:

***Scenario #1:***

***There is a Developer default on the Senior Loan.***

1A consecutive Loan non-payments

1B technical Loan default (required debt coverage ratio, etc.)

The analysis for your Scenarios 1A and 1B is the same inasmuch as we do not anticipate that there will be a distinction in the Senior Loan documentation between a payment and a technical default. We will include language in the loan agreements for the Mezzanine and Completion loans making an event of default on the Senior Loan an event of default on those loans as well.

Initially, with respect to notice, we anticipate that our documentation will require Developer to provide formal notice to the Redevelopment Authority of events of default under the Senior Loan. While we may request that the lender under the Senior Loan also provide notice to the Redevelopment Authority of such events, we cannot assure that it will agree to such a request.

The Senior Loan is to be secured by the apartment portion of the Project and the Mezzanine and Completion loans proposed to be originated by the Redevelopment Authority will be separately secured by 14 condominium units. Those condominium units will not be pledged as security for the Senior Loan and will be subject to a first mortgage in favor of the Redevelopment Authority. We anticipate no restrictions on the ability of the Redevelopment Authority to foreclose in the event of a default under its documentation caused by an event of default on the Senior Loan and would not concede a request for such a restriction on the part of the lender. Accordingly, there will not be a limitation on the Redevelopment Authority's right to foreclose under Scenario No. 1.

***Scenario #2:***

***Project completion and a Certificate of Occupancy is not secured by June 1, 2012.***

The term sheet anticipates a customary development agreement between the Developer, the City and the Redevelopment Authority. It also requires commencement of the Project by June 1, 2010 and completion within 24 months of commencement. The development agreement will reference this schedule and will make failure to complete the Project as required an event of default. Just as a default under the Senior Loan documentation will be referenced as a default in the loan agreements for the Mezzanine and Completion loans, a default under the development agreement will likewise constitute an event of default. Failure to secure a Certificate of Occupancy as required will thus constitute an event of default and will entitle the Redevelopment Authority to proceed with a foreclosure action.

We note that we anticipate the inclusion of customary language in the development agreement which will allow later completion of certain Project elements, such as landscaping, and also that we anticipate that the interiors of individual condominium units will not be completed prior to issuance of a Certificate of Occupancy for the Project but rather upon initial sale of those units.

***Scenario #3:***

***There is a Developer default on either the Completion or Mezzanine Loan***

3A the City of Milwaukee has not received full loan repayment on Completion and Mezzanine Loans after 48 months following the initial disbursement of City Loan funds.

3B consecutive Completion or Mezzanine Loan non-payments assuming available funds

3C technical Completion or Mezzanine Loan default (required debt coverage ratio, etc.).

Scenario #3 also addresses both payment and technical defaults and again the analysis under all three scenarios is the same. A default under the Completion or Mezzanine loan agreement will allow the Redevelopment Authority to proceed with a foreclosure action. Neither the senior lender nor HUD will have the ability to impair the Redevelopment's ability to unilaterally initiate such a foreclosure action. As set forth in the analysis for your Scenario #4 and as a general matter, federal and state courts do have the power to limit the Redevelopment Authority's ability to proceed with foreclosure through issuance of injunctive relief or otherwise.

***Scenario #4***

***The Developer files for or is party to a Chapter 7 or Chapter 11 bankruptcy during or following Project completion.***

In the event that the Developer were to file for bankruptcy, while such a filing would certainly constitute a default under the Mezzanine and Completion loan agreements, the bankruptcy court will have the power to enjoin the Redevelopment Authority's ability to proceed with a foreclosure action.

***Scenario #5***

***Legal action is taken by third parties (examples: general contractor, prospective owners with deposits in Developer's possession) against the Developer***

4A Prior to Project completion and issuance of a Certificate of Occupancy

4B Following Project completion and issuance of a Certificate of Occupancy.

Mr. Michael Daum  
October 29, 2009  
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We anticipate that the Redevelopment Authority loan documentation will include collateral assignments of construction and other contracts as well as various rights and obligations of the Developer to the Redevelopment Authority. While the potential for legal action by third parties against the Developer is virtually limitless, we would not expect such legal disputes to limit the ability of the Redevelopment Authority to initiate a foreclosure action on the condominium units located within the Project. It may be that in some instances an action involving something such as a contractor's lien may require payments to be made to third parties but the Redevelopment Authority would continue to have a first mortgage applicable to the condominium units which provide the security for the Mezzanine and Completion loans.

Based upon discussions which we have had in meetings since the Zoning Neighborhoods & Development Committee meeting we trust that your concerns with respect to default issues have been addressed by those meetings and this letter. We will be present at the special meeting of the Zoning Neighborhoods & Development Committee on November 3, 2009 to address any additional questions which your office or members of the Committee may raise.

Very truly yours,



for GRANT F. LANGLEY  
City Attorney



THOMAS O. GARTNER  
Assistant City Attorney



DANIELLE M. BERGNER  
Assistant City Attorney

TOG/ml:151437  
Enclosure

c: Members of the Zoning Neighborhoods & Development Committee  
Ronald D. Leonhardt, City Clerk  
W. Martin Morics, Comptroller  
Craig Kammholz, Deputy Comptroller

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