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June 10, 2021

By Email

Jim Owczarski, City Clerk
Members of the Common Council
Mayor Tom Barrett

Re: Common Council File No. 210232, Proposed Repeal of MCO 304-21

Dear City Clerk, Council Members, and Mayor Barrett:

I attended the June 7, 2021 Judiciary and Legislation Committee to offer input on several Common Council files, including 210223 (Council's hiring of a lawyer to represent the Council regarding Judge Kahn and the Couture matter), 210224 (funding for Judge Kahn's work regarding File 201573), and 210232 (possible repeal of MCO 304-21, City Attorney approval of contracts).

I urge you to not repeal or alter MCO 304-21 because it is important for the City Attorney to review *and approve* City contracts. MCO 304-21 has been law for 51 years¹. It reflects good public policy to protect the City's legal and financial well-being. At the Jud-Leg hearing, various Alderpersons acknowledged the obvious importance of City Attorney Office *review* of City contracts. Review, of course, is important. So too is City Attorney approval. Any corporation, for example, will want to have its legal department review and approve contracts. The City of Milwaukee municipal corporation should want the same.

Any Common Council, or individual aldermanic concern, about the Couture matter should not interfere with the wisdom of keeping the MCO 304-21 law intact.

The discussion that did take place at the June 7th Jud-Leg hearing tied together the Couture matter and ethics discussion as reason, in the Council's thinking, to repeal or alter MCO 304-21. But, there was no discussion or mention whatsoever at that Jud-Leg hearing about Wisconsin Constitution's Uniformity Clause. I distributed to all of you a March 22, 2021 memo from my office, entitled "Uniformity and the Anti-Displacement Fund" (i.e. about the law) indicating that

¹ Per the Municipal Research Library, Sec. 304-21 of the Milwaukee Code of Ordinances was originally created as Sec. 2-21 by Common Council file 70-1080, passed on October 27, 1970. It was renumbered to Sec. 304-21 by file 881930, passed on March 7, 1989. There have been no amendments to this section since its original creation.



“[r]equiring developers to donate money to the Anti-Displacement Fund violates the Uniformity Clause” (the law). Put simply, Section 13.4 of the Couture development agreement requiring Rick Barrett and/or Tan Lo to contribute \$100,000 to the Anti-Displacement Fund violates the law, the Uniformity Clause. Not losing sight of the law, even amidst political discussion, is reason to keep intact MCO 304-21. It affords important City Attorney review *and approval* of City contracts to make sure they are lawful. Doesn't the Common Council want to know, prior to approving a contract, that a provision that the Council might want to mandate in the contract violates the law (whether a state constitutional provision like the Uniformity Clause or another law)?

So, clearly, one reason to keep MCO 304-21 intact is that it allows the Common Council to obtain legal review and approval of contracts, and here I have raised, and I do raise, concern about illegality of the donation provision in Section 13.4 of the Couture contract.

I also raise another concern, ethics, which is also tied to transparency.

I remind the Common Council that the Mayor did not sign approval of Council File 201365. I **attach** a copy of the Mayor's March 2, 2021 email to the Common Council wherein he let the Council know that he would not sign approval of that file. The Mayor's email, as you can see, supports transparent process.

Transparency is important.

Various alderperson comments at the June 7 Jud-Leg hearing show misunderstanding. Some alderpersons (ignoring completely the Uniformity Clause, legal issue, that I raised) may think that my position is that the Council as a body, or individual alderpersons at a Council committee hearing, have no authority to approve or amend development agreements. That is not what I have said or am saying. I do, however, say: **(1)** that, given the Uniformity Clause (i.e. applicable law), the Council should not have approved a contract mandating the Couture developer to contribute to the Anti-Displacement Tax Fund (i.e. the donation requirement in Section 13.4 of the Couture contract is illegal); and **(2)** that alderpersons should act in a transparent, ethical, manner.

Again, I have not been raising concern about Common Council body behavior, or about aldermanic behavior at a Committee hearing or at a Council body meeting. My concern about ethics has been about apparently non-public, extracurricular, non-transparent, aldermanic behavior *outside of a Committee or Council meeting, outside of "public meetings laws" and public viewing, outside of earshot of fellow alderpersons and earshot of City DCD employees, away from witnesses, and away from Channel 25's cameras*. My concern is about that type of aldermanic behavior. And my concern is elevated further when the timing of that behavior, on the eve of a vote where a lot is at stake, is considered. It is elevated still further when that extracurricular, non-transparent, behavior includes an "ask" for a 6-figure donation from the developer that violates the Uniformity Clause.

Why wouldn't an alderperson just wait and ask the developer, "in daylight," in a transparent manner, at a Common Council Committee hearing? Or offer suggestion to DCD, the department

negotiating with the developer, and the department with responsibility under local law (along with my office) to negotiate development agreements²?

So let's be clear, individual aldermanic behavior making motions or asking questions at a duly convened public meeting under Wisconsin's "open meetings" law (i.e. at a Council Committee hearing or at a Common Council body meeting) is very different from an individual alderperson reaching out - in extracurricular, non-transparent fashion - to communicate directly with a developer, on the eve of an important vote (on the one yard line, with seconds left on the play clock), to request monetary contribution that violates Wisconsin Constitution's Uniformity Clause. Even if no personal gain accrues to the requesting alderperson who acts in that extracurricular, non-transparent, manner, MCO 303-5-3 does not require "personal gain" or "financial gain" like other sections of MCO 303-5 do. Why? Because the alderperson's vote or withholding of a vote itself is power that must be properly employed, and that should be employed in an open, transparent manner. Extracurricular, non-transparent, aldermanic activity, not "in the open," and that also happens to run afoul of the Uniformity Clause, raises concern. MCO 303-5-3 provides that "no official...may solicit...from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the official's vote," or the official's official actions. Moreover, MCO 303-5-5 provides that "[n]o official...may use...his or her position to influence or gain unlawful benefits...for...others." I reiterate the Uniformity Clause prohibitions and restrictions, and illegality of the City contractually mandating a contribution to the Anti-Displacement Tax Fund.

Transparency and ethical behavior remain important and a concern. An outsider peering in on the Couture matter might view extracurricular aldermanic activity, not conducted "in the open," but conducted close to, and *before*, a Common Council vote, seeking a 6-figure donation, as a developer shakedown. Any activity giving rise to those possible perceptions should be discouraged. And ensuring that the Common Council approves contracts that are lawful, without illegal or unconstitutional provisions in them, remains important and a concern. City Attorney review *and City Attorney approval* of City contracts are important.

Couture was not a situation where the Common Council pre-authorized individual alderpersons to reach out directly to the Couture principals, *outside of Council meetings*, to directly negotiate Section 13.4 of the Couture contract, or to negotiate alongside DCD, or to displace DCD as the City negotiator.

As City Attorney, I urged the Common Council President to take steps to remove the problematic, unconstitutional, donation requirement from Couture Contract Section 13.4. That did not happen. Now extra City funds, it appears, will be spent on the Common Council hiring a lawyer to represent it (210223) in the Judge Kahn briefing and on Judge Kahn's fees (210224 and 201573) - expenditures that could have been avoided had the unconstitutional donation requirement (that violates the Constitution's Uniformity Clause) simply been removed from the contract.


I urge the Common Council to not repeal, and to not alter, MCO 304-21. That ordinance is an excellent way for the City to protect itself and to ensure that contracts it enters into are legal.

² See my March 9, 2021 letter to the City Clerk in Council File 201365, and MCO 308-2, 308-1-3, 355-5-4, 355-7-2, Wis. Stat 62.09 (12)(a), and City Charter 3-03-1.



I also **attach** a copy of my March 16 email regarding MCO 304-21 (which is part of file 201365), and I ask the City Clerk to please include this letter, and the attachments, in all Legistar files pertaining to the Couture matter.

Very Truly Yours,



TEARMAN SPENCER
City Attorney

TS/dc