CITY OF MILWAUKEE

Form CA-43

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April 8, 2005

Teodros W. Medhin, Ph.D.
Chair, Zoning Code Technical Committee
Room B-11, City Hall

Re: Common Council File No. 041663 (A Substitute Ordinance Relating to Voting Requirements for Changing the Zoning for Parcels Zoned Industrial)

Dear Dr. Medhin:

This letter will respond to your request of April 6, 2005 for the opinion of this office as to the legality and enforceability of the above-referenced proposed ordinance. This proposed ordinance would impose a "supermajority" requirement for the adoption of any zoning amendments or changes affecting parcels of land comprising an area of three acres of more and presently zoned for industrial use (zoning classifications IO, IL, IM, or IH). The "supermajority" requirement at issue would specifically require a favorable vote of at least two-thirds of the members of the Common Council voting on any proposed zoning amendment or change affecting such parcels before the amendment or change may become effective. It is our opinion that this particular proposed ordinance is legal and enforceable. The basis for this conclusion follows.

The primary concern with respect to the adoption of a "supermajority" requirement for passage of a zoning ordinance arises with respect to whether such a requirement might be pre-empted by state statute, most particularly, Wis. Stat. §§ 62.23(7)(d)2., 2m.a., and 2m.b. These constitute the statutory provisions governing the procedure for amendments to existing zoning ordinances and zoning maps, including or description of those circumstances wherein the Legislature has itself chosen to impose "supermajority" requirements for their adoption. These provisions read as follows:

> 2. The council may adopt amendments to an existing zoning ordinance after first submitting the proposed amendments to the city plan commission, board of public land commissioners or plan committee for recommendation and report and after

> providing the notices as required in subd. 1.b. of the proposed amendments and hearings thereon. In any city which is not located in whole or in part in a county with a population of 500,000 or more, if the proposed amendment would make any change in an airport affected area, as defined in sub. (6)(am)1.b., the council shall mail a copy of such notice to the owner or operator of the airport bordered by the airport affected area. A hearing shall be held on the proposed amendments by, at the council's option, the council, the plan commission, the board of public land commissioners or the plan committee. If the council does not receive recommendations and a report from the plan commission, board of public land commissioners or plan committee within 60 days of submitting the proposed amendments, the council may hold hearings without first receiving the recommendations and report.
>
> 2m. a. In case of a protest against an amendment proposed under subd. 2., duly signed and acknowledged by the owners of 20% or more either of the areas of the land included in such proposed amendment, or by the owners of 20% or more of the area of the land immediately adjacent extending 100 feet therefrom, or by the owners of 20% or more of the land directly opposite thereto extending 100 feet from the street frontage of such opposite land, such amendment shall not become effective except by the favorable vote of three-fourths of the members of the council voting on the proposed change
>
> b. In any city which is not located in whole or in part in a county with a population of 500,000 or more, if a proposed amendment under subd. 2. would make any change in an airport affected area, as defined under sub. (6)(am)1.b. and the owner or operator of the airport bordered by the airport affected area protests against the amendment, the amendment shall not become effective except by the favorable vote of two-thirds of the members of the council voting on the proposed change.

Thus, the Legislature has specified two circumstances under which more than a simple majority vote is necessary for adoption of a proposed zoning amendment or change, as follows: (a) if a valid protest petition has been filed against the proposed amendment or change, which requires a three-quarters (75%) of voting members of the council (Wis. Stat. § 62.23(7)(d)2m.a.); and (b) if the proposed amendment or change affects an "airport affected area" located within a city which itself is located outside of Milwaukee County (Wis. Stat. § 62.23(7)(d)2m.b.). The question thus arises as to whether the Legislature thereby intended to exclude all other zoning "supermajority" requirements, including those that might be enacted by local units of government, under the well-established rule of statutory interpretation known as "*expressio unius est exclusio alterius*." We conclude that this was not the intention of the Legislature, and

that locally adopted "supermajority" requirements applicable to proposed zoning amendments or changes are thereby not precluded.

This principle of statutory interpretation was succinctly summarized by the Wisconsin Supreme Court in *State v. Delaney*, 2003 WI 9 ¶ 22, 259 Wis. 2d 77, 88, 658 N.W.2d 416, 421, as follows:

> Under the well-established canon of *expressio unius est exclusio alterius* (the expression of one thing excludes another), where the legislature specifically enumerates certain exceptions to a statute, we conclude, based on that rule, that the legislature intended to exclude any other exception. *State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974).

See also, Jadair, Inc. v. United States Fire Insurance Company, 209 Wis. 2d 187, 202, 562 N.W.2d 401, 407 (1997); *Georgina G. v. Terry M.*, 184 Wis. 2d 492, 512, 516 N.W.2d 678, 683-684 (1994); *Perra v. Menomonee Mutual Insurance Company*, 2000 WI App 215 ¶ 12, 239 Wis. 2d 26, 34, 619 N.W.2d 123, 127. This doctrine, however, may only be applied where there is some evidence that the Legislature intended its application in the particular context under consideration. *Hathaway v. Joint School District No. 1, City of Green Bay*, 116 Wis. 2d 388, 401, 342 N.W.2d 682, 689 (1984); *Columbia Hospital Association v. City of Milwaukee*, 35 Wis. 2d 660, 669, 151 N.W.2d 750, 754 (1967); *Pritchard v. Madison Metropolitan School District*, 2001 WI App 62 ¶ 13, 242 Wis. 2d 301, 312, 625 N.W.2d 613, 618.

In our view, the latter element is not present in this case. In contrast to other circumstances where the courts have seen fit to apply the canon of "*expressio unius est exclusio alterius,*" the two "supermajority" provisions embodies in Wis. Stat §§ 62.23(7)(d)2m.a. and 2m.b., discussed above, are not expressed in terms of exceptions to a legislatively mandated overall rule, *i.e.*, one mandating a simple-majority standard for approval of all other forms of zoning amendments or changes. Indeed, no such simple-majority standard for approval of zoning amendments or changes is expressed or even suggested by Wis. Stat. § 62.23(7)(d)2. or by any other statutory provision. Thus, the two statutory "supermajority" provisions cited above cannot be fairly construed as exceptions to a statutory rule, because the statutes prescribe no rule.

This conclusion is supported by two additional sources. First, consideration must be given to the provisions of § 4-06 of the Milwaukee City Charter, which prescribes the procedure for passage and publication of City ordinances, and which states as follows:

> 4-06. Ordinances; Passage and Publication. 1. All ordinances, rules, regulations, resolutions and by-laws shall be passed by an affirmative vote of a majority of the members of the common council at the time of the vote **except when otherwise**

> **specifically provided**. No ordinance shall be passed, no appropriation shall be made, and no act, regulation, resolution or order which may create a debt or liability against the city or charge upon any fund thereof shall be adopted without a vote in its favor of a majority of the members of the common council at the time of the vote, which vote shall be taken by the ayes and noes and entered among the proceedings of the council.

Thus, the Charter provides that the "default" standard for passage of ordinances by the Common Council shall be by simple majority "except when otherwise specifically provided." Thus, the adoption of "supermajority" requirements for the passage of particular ordinances is specifically contemplated by the Charter. We do not perceive any intent on the part of the Legislature to pre-empt or limit the authority of the Common Council to exercise its prerogative to adopt "supermajority" voting requirements in reliance upon this provision of the Charter, as applied to the type of zoning amendment or change contemplated by the proposed ordinance.

Finally, we would refer to the decision of the Wisconsin Supreme Court in *Vaicelunas v. Fechner*, 7 Wis. 2d 14, 95 N.W.2d 786 (1959). In that case, the Court upheld an ordinance adopted by the City of Kenosha requiring the favorable vote of three-fourths of the members of the Kenosha Common Council for the passage of any zoning ordinance that had previously been disapproved by the Kenosha City Plan Commission. The Court specifically held that this requirement did not conflict with a state statute (Wis. Stat. § 64.07(3) (Stats. 1957)), which provided that a majority vote of all members of a common council shall be necessary to adopt any ordinance or resolution, holding that the term "majority" as used in that statute constituted only a minimum and did not preclude the Kenosha Common Council from requiring a larger majority vote under selected circumstances. 7 Wis. 2d at 16-17, 95 N.W.2d at 878. As of the date of rendition of the decision in *Vaicelunas v. Fechner*, *supra*, (April 7, 1959), one of the two current "supermajority" provisions embodied in current statutory law was in effect—specifically, the three-fourths majority requirement applicable to adoptions of zoning amendments or changes following the filing of valid "protest petitions" (currently, Wis. Stat. § 62.23(7)(d)2m.a., formerly a part of Wis. Stat. § 62.23(7)(d) (Stats. 1957). We therefore believe that the *Vaicelunas* decision remains good law and applicable to the situation at hand.

Consequently, we believe that this particular "supermajority" requirement applicable to zoning amendments or changes affecting parcels of three acres or greater in area and located within the types of industrial zoning classifications enumerated by the proposed

ordinance in question is not precluded by state law and is therefore legal and enforceable. If you require further guidance concerning this matter, please contact this office.

Very truly yours,

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SSM:lmb
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