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June 6, 2006

**VIA HAND DELIVERY**

Alderman Robert Bauman  
Fourth Aldermanic District  
City Hall, Room 205

Re: Common Council File No. 050347/Penalty Clauses in Contracts

Dear Alderman Bauman:

As we discussed today, there is a resolution file (No. 050347) scheduled to be heard before the Public Works Committee on June 7, 2006. The resolution directs the Departments of Administration, Neighborhood Services, and City Development to include a "penalty clause" within all contracts for maintenance of City-owned lots. According to the resolution, contractors would be "penalized" for not providing regular, scheduled maintenance. The resolution is silent as to whether the "penalty" would be more or less than the damages actually sustained by the City due to non-performance.

Wisconsin law is clear that contracts may not contain "penalty clauses," and that such clauses void as against public policy, and are not enforceable. Violations of contracts are to be remedied by traditional contract remedies, primarily compensation for damages actually sustained. See, as examples, *Sheffield-King Milling Co. v. Jacobs*, 170 Wis. 389, 175 N.W. 796 (1920); *Pollack v. Calimag*, 157 Wis. 2d 222, 458 N.W.2d 591 (Ct. App. 1990).

We can work with the sponsor of this resolution and the appropriate departments to draft contract language to provide incentives for superior performance, liquidated damage clauses to reflect no more than the contemplated actual costs to


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the City for failure to perform, or both. However, "penalties," without determining the anticipated cost to the City, are not enforceable in Wisconsin contracts.

Very truly yours,



GRANT E. LANGLEY  
City Attorney



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Deputy City Attorney

LUB:wt:106347

c: Alderman Michael McGee  
Ronald Leonhardt, City Clerk

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