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March 15, 2016

James Owczarski, City Clerk
City Hall
200 E. Wells Street, Room 205
Milwaukee, WI 53202

Via E-mail and First Class Mail
jowcza@milwaukee.gov

Re: Upcoming Vacant School Buildings Resolution (File #151702)

Dear Mr. Owczarski:

We are writing to address certain legal issues regarding the pending resolution relating to "education operators" under the new surplus school buildings state statute. The resolution is scheduled to be considered by the Zoning, Neighborhoods, & Development Committee on March 22, 2016 and by the full Common Council on March 29, 2016. We request that you add this letter to the file. In addition, if appropriate, pass on a copy to each member of the Common Council in advance of the upcoming March 22nd committee meeting, but we are also sending an electronic copy of the letter to each member of the Common Council.

The Wisconsin state legislature created Wis. Stat. §119.61 last year, which mandates a process for requiring the sale of unused and underutilized school buildings in Milwaukee to education operators of private and charter schools. The statute required the Milwaukee Public School District ("MPS") to create an inventory of the buildings owned by the City of Milwaukee and that MPS operates. MPS created the inventory in August, 2015. The statute creates certain criteria to determine which of those buildings is surplus or underutilized, and as a result, eligible for sale under the statute to private and charter school education operators.

The City has been engaged in the process of implementing the statute since the second half of last year. As part of that process the City has received letters of interest ("LOIs") from seven different individuals or entities: (1) Penfield Montessori Academy, (2) Pilgrim Rest Missionary Baptist Church, (3) Risen Savior Lutheran School (our client), (4) Right Step, Inc., (5) Rocketship Education Wisconsin, Inc., (6) Mr. Zhoucai Fan, and (7) MPS Superintendent Darienne Driver.

One of the issues scheduled to be decided by the Common Council at its March 29th meeting is which of these seven individuals or entities is an "education operator" within the meaning of §119.61. That is important because, according to state law, only "education operators may purchase an eligible building." Wis. Stat. §119.61(4)(a).

**Based on the wording of the statute, and its intent, it is clear that the first five entities listed above are "education operators" and the last two - Mr. Fan and Superintendent Driver - are not. Therefore, Mr. Fan and Superintendent Driver cannot purchase or obtain unused or underutilized school buildings under the surplus properties law.**

Wis. Stat. §119.61(1)(a) defines education operator as follows:

> "Education operator" means any of the following:
>
> 1. The operator of a charter school established under s. 118.40 (2r) or (2x).
> 2. The operator of a private school.
> 3. The operator of a charter school established under s. 118.40 (2) or (2m) that is not an instrumentality of the school district, as determined under s. 118.40 (7).
> 4. An individual or group that is pursuing a contract with an entity under s. 118.40 (2r) (b) or the director under s. 118.40 (2x) to operate a school as a charter school.
> 5. A person that is pursuing a contract with the board under s. 118.40 (2m) to operate a school as a charter school that is not an instrumentality of the school district.
> 6. An entity or organization that has entered into a written agreement with any of the operators identified in subds. 1. to 4. to purchase or lease a building within which the operator identified in subds. 1. to 4. will operate a school.

**Superintendent Driver is not an "education operator."**

Superintendent Driver submitted two LOIs; one for all eligible school buildings, and one for eleven specifically identified buildings. Yet, Superintendent Driver does not meet any of the six subparts of §119.61(1)(a). She does not operate a private or non-instrumentality charter school and she has not entered into a written agreement with a private or charter school to purchase or lease one of the eligible buildings. Thus, she cannot acquire any buildings under §119.61.

That neither the Superintendent nor MPS was included within the definition of "education operator" makes sense. The intent of the statute was to remove unused and underutilized school buildings from the control of MPS. It would not make sense to allow MPS or the Superintendent to retain control of these properties by attempting to acquire them in lieu of the "education operators" expressly defined in the statute. Nor would it make sense to allow MPS to delay or frustrate the purchase of an eligible building by an education operator by asserting that MPS is a competitive bidder under §119.61(4)(d). We understand the City Attorney's Office issued an opinion consistent with this conclusion to Martha Brown, the Deputy Commissioner of the Department of City Development on August 27, 2015.

**Mr. Fan is not an "education operator."**

Mr. Fan has submitted LOIs for nine different buildings. In each case, he says he is an investor and investors' representative, and the proposed use of the property is an English as a Second

Language School for international university students. The LOIs submitted by Mr. Fan make it clear that he is not an "education operator." Mr. Fan, and the other unnamed investors, do not meet any of the six subparts of §119.61(1)(a).

Mr. Fan contends in his LOI that he and the other investors qualify under the "private school" category in the statute, but that is not true on the face of the LOIs he submitted. Mr. Fan and the other unnamed investors are not, themselves, a "private school." Nor do they assert that the LOIs are submitted on behalf of a school (private or otherwise). The LOIs are submitted on behalf of a group of investors and not on behalf of a school.

Mr. Fan might assert that instead of the private school category, he and the other unnamed investors qualify under §119.61(1)(a)6, i.e. as "*an entity or organization that has entered into a written agreement with any of the operators identified in subds. 1. to 4. to purchase or lease a building within which the operator identified in subds. 1. to 4. will operate a school.*" But any such assertion would fail for two reasons; (1) Mr. Fan has not asserted that he has entered into such a written agreement with the proposed English as a Second Language School "ESL School"), and (2) even if he already had an agreement with the ESL School, such a school would not qualify as a "private school" under the statute.

With respect to the first of these two points, it must be noted that to qualify under §119.61(1)(a)6 the entity submitting the LOI must already have a written agreement with a school that qualifies under subsections 1 through 4. It cannot be a proposed future transaction. The language of the statute says that to qualify, the entity must already have such a written agreement, not that it intends to enter into one in the future. This is important to effectuate the intent of the statute because it eliminates speculators. The statute is not intended to benefit land speculators, who might or might not later sell or lease the building to a school, but to benefit the categories of schools listed in the statute. Mr. Fan and the other unnamed investors are the former and not the latter.

In addition, an ESL School for foreign university students would not qualify as a private school under Wisconsin law. A "private school" is defined in Wis. Stats. §115.001(3r) as "*an institution with a private educational program that meets all of the criteria under s.118.165 (1) or is determined to be a private school by the state superintendent under s.118.167.*" The criteria under §118.165(1) include providing a "sequentially progressive curriculum of fundamental instruction in reading, language arts, mathematics, social studies, science and health." An ESL School for university students does not meet this requirement. Nor does Mr. Fan assert that the proposed ESL School has been determined by the state superintendent to be a private school.

Again, this result under the statute makes perfect sense in light of the legislative intent. The statute was intended to make unused and underutilized K-12 school buildings available to operators of private and charter K-12 schools. Reading §119.61(1)(a)2 in that context means that a "private school" was intended to refer to a school that operates within the K-12 (or some part

of K-12) context. We understand that the City Attorney's office has issued an opinion to the Common Council on March 8, 2016 consistent with this conclusion.

**The effect of Superintendent Driver and Mr. Fan not being education operators.**

Because Superintendent Driver and Mr. Fan are not education operators, there is only one valid LOI from an education operator for four buildings (Fletcher, Wisconsin Ave. School, Central Del Nino and Phillis Wheatley). **The education operators who submitted those LOIs have immediate rights to negotiate with the City for the sale of those buildings under §119.61(4)(c).**

With respect to three other buildings (37th Street School, Frederick Douglas, and Carleton), there are still LOIs from more than one education operator and **the City has the immediate obligation to commence the process in §119.61(4)(d) to select the most suitable buyer for those buildings.**

The time constraints on the City under §119.61(4)(c) and (4)(d) are currently running. Unless the education operators involved consent to delays, the City could incur financial liability for failing to meet the timing requirements in the statute.

We would like to make sure that the language and intent of the statute are fully implemented. That means that (1) the Common Council ought to conclude that Superintendent Driver and Mr. Fan are not education operators, and (2) the City should promptly take the steps to comply with Wis. Stats. §119.61(4)(c) and (4)(d). Any other result would lead to a high probability of conflict and litigation.

Very Truly Yours,

CJ Szafir
Vice President for Policy and Deputy Counsel

Brian McGrath
Senior Counsel
WISCONSIN INSTITUTE FOR LAW & LIBERTY

cc: Members of the Milwaukee Common Council