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September 14, 2017

Ald. Robert Bauman
4th Aldermanic District
Room 205 – City Hall

Re: Legality of Contract Between the City and a Property Owner Requiring Compliance with Small Business Enterprise ("SBE") and Resident Preference Program ("RPP") Participation Percentages as a Condition of Detailed Planned Development ("DPD") Approval

Dear Ald. Bauman:

This letter will respond to your request for an opinion of this office pertaining to the legality of memorializing in a development agreement or other contract between the applicant for a zoning change and the City of Milwaukee, representations regarding SBE and RPP participation percentages made by the applicant for a zoning change in an effort to induce the City of Milwaukee to approve the requested zoning change. While your request specifically addresses the applicant for zoning change for a proposed development at 1550 North Prospect Avenue, this opinion applies City-wide.

Your request recognizes that the Milwaukee Code of Ordinances ("MCO") Chapter 355, requiring compliance with SBE and RPP[1] participation levels, does not apply to the project at 1550 North Prospect because the project is not receiving any direct financial assistance as defined in MCO 355-1-2[2]. As an alternative, your request suggests that as

[1] MCO 355-7 establishes 40% as the presumed appropriate level of participation by unemployed and underemployed residents of the City in projects receiving direct financial assistance. MCO 355-13-4 requires a developer of any project receiving direct financial assistance from the city to utilize SBE contractors for 25% of construction expenditures, 25% of the purchase of goods and services, and 18% of professional services.

[2] MCO 355-1-2 defines direct financial assistance as "the value of below-market land sales, any direct subsidies to developers and city expenditures for private improvements, with a combined value of $1million or more, as determined by the commissioner of the department, targeted specifically to a project. It includes the value of tax increment financing and below-market-rate loans provide by the city."

part of the zoning change process, the City and the developer enter an agreement which requires the developer to meet the SBE and RPP participation goals which the developer promised to meet voluntarily in both oral and written statements to City officials. Furthermore, the agreement would result in the imposition of financial penalties if the developer failed to meet these targets.

In short, such an arrangement would be invalid. Any agreement between a zoning authority and the applicant for a change in zoning in exchange for the approval of the rezoning of a particular parcel is unenforceable. This is the case regardless of whether the requested change is zoning is under the City's base zoning code, or through the planned development process.

In 1970, the Wisconsin Supreme Court held "a contract made by a zoning authority to zone or rezone or not to zone is illegal and the ordinance is void because a municipality may not surrender its governmental powers and functions or thus inhibit the exercise of its police or legislative powers." *State ex. rel. Zupancic v. Schimenz*, 46 Wis. 2d 22, 28, 174 N.W.2d 533 (1970). In *Zupancic*, a developer sought a zoning change in the City of Milwaukee from "neighborhood shopping" to "local business" in order to allow for the development of a bowling alley. Adjacent homeowners opposed the zoning change to "local business" but did not oppose the construction of a bowling alley. After negotiation between the developer and homeowners a deed restriction was placed on the parcel that, although the parcel was zoned local business, the only local business use permitted was that of a bowling alley. The agreement between the private parties allowed the City of Milwaukee to enforce the parties' agreement via injunction.

The court upheld the agreement because it was between private parties. The City was not a party to it, and was not obligated to undertake any action or to issue any approval as a consequence of it. It further stated that:

> [W]e hold that when a city itself makes an agreement with a landowner to rezone, the contract is invalid; this is contract zoning. However, when the agreement is made by others than the city to conform the property in a way or manner which makes it acceptable for the requested rezoning and the city is not committed to rezone, it is not contract zoning in the true sense and does not vitiate the zoning if it is otherwise valid.

Zupancic, 46 Wis.2d at 30.

The insertion of mandatory SBE and/or RPP provisions into an agreement between the City of Milwaukee and a developer as a component of the DPD process would squarely fit into the parameters of illegal contract zoning as described above, in *Zupancic*.

Following the holding in *Zupancic*, this office opined that the following are prohibited: (1) an agreement between the City and an applicant for a zoning change to maintain the larger lot size required under prior zoning but allow the construction of multi-family housing under the proposed new zoning; (2) an agreement between the City and an applicant for a change from residential to local business for the construction of a convenience store provided the building is set back further than required by the local business zoning; and (3) the City's participation in the creation of the "voluntary" deed restrictions approved by *Zupancic*.[3] As such, the proposed agreement regarding SBE and RPP participation would clearly be illegal in a code based zoning scenario as illegal contract zoning.

While *Zupancic* and our office's prior opinions applying the *Zupancic* decision all dealt with requests for zoning changes involving code based zoning, the proposed agreement regarding SBE and RPP participation is equally problematic in a DPD scenario. While it is true that DPD zoning is contract zoning, it is a species of contract zoning that has (1) been explicitly blessed by the legislature (via the enabling authority of Wis. Stat. § 62.23(7)(b)) and (2) been implemented by the City within a specific regulatory structure (through MCO 295-907). As such, DPD zoning is an exception to the *Zupancic* case's general ban on contract zoning. This is not to say, however, that DPD zoning would permit the inclusion of SBE and RPP requirements within the agreed upon DPD zoning.

MCO 295-907 sets forth in detail the proper subjects for a DPD agreement. A review of these subjects shows they are limited to land use items, *see e.g.* MCO 295-907-1 (setting forth the purposes of the City's planned development scheme as flexibility in development, promotion of creativity, and encouragement of development compatible with surroundings and consistent with the comprehensive plan); MCO 295-907-3 (setting forth the requirements for approval of a DPD including standards regarding use, design standards, density, spaces between structures, setbacks, screening, open spaces, traffic, landscaping, lighting, and utilities and signage). The subjects are limited to land use items, because they must also comply with enabling authority of Wis. Stat. § 62.23(7) which grants the City the power to use zoning to regulate land use. SBE and RPP participation requirements are not related to land use, and therefore the inclusion of such requirements (or the inclusion of any other non-land use related subject) in a DPD zoning agreement is, in our opinion, illegal.[4]

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[3] Copies of these prior opinions are attached for your review.

[4] In communications to this office following your initial opinion request, you mentioned a City of Chicago ordinance requiring developers to include affordable housing units in residential development projects if the project meets certain criteria. This Chicago ordinance is fundamentally different than the proposal discussed in this opinion because (1) the validity of the Chicago ordinance is a question of Illinois law; and (2) the Chicago ordinance involves a regulation related to the use of the land, i.e. encouraging the development of affordable housing in the City of Chicago.

Zoning, whether code based or the limited scope of contract zoning permitted by the DPD process, is intended to regulate land use through the imposition of use-based restrictions. It would be improper to expand the scope of zoning to impose regulations unrelated to the use of the property. To do so in a code based scenario would clearly violate *Zupancic*'s prohibition on contract zoning in such circumstances, and to do so in the DPD context would be to exceed the limited blessing of contract zoning enabled by Wis. Stat. § 62.23(7)(b) and codified in MCO 295-907.

For the reasons set forth above, it is our opinion that it would be illegal for the City to enter an agreement between the City and a landowner that requires the landowner to meet certain SBE and RPP participation goals in the development of a parcel following, or as a condition to, the City's approval of the landowner's requested zoning change.

Please contact this office if you have any further questions concerning this matter.

Very truly yours,

GRANT F. LANGLEY
City Attorney

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Assistant City Attorney

c: Rocky Marcoux, DCD Commissioner
Ald. James Bohl, 5th Aldermanic District
Jim Owczarski, City Clerk

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