

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

Date: January 28, 2013

MEMORANDUM

TO: Board of Estimates

FROM: Michael P. May
City Attorney

RE: Proposed Affordable Housing Loan related to Care Net Pregnancy Center, Legistar No. 28644, BOE Agenda Item 9.

This item is on the BOE agenda for today, and I was asked by Council President Bidar-Sielaff to provide some legal guidance for the BOE and the Council. We became aware of this issue last week. This memorandum contains our initial guidance. There may be legal issues or concerns that we have not examined.

Background.

The description of the Care Net funding proposal in this memo is taken from the substitute resolution or the staff evaluation, which is an attachment in Legistar.

The proposal is to lend up to \$550,000 from the Affordable Housing Trust Fund (AHTF) and other housing funds, including federal HUD funds under the HOME program, to Care Net Pregnancy Center of Dane County (Care Net) to support construction of affordable housing on the east side of Madison. In order to support sec. 42 federal tax credits, the housing would be owned by a separate LLC to be created by Care Net. Presumably, the loan would actually be to the LLC, not to Care Net. The sec. 42 tax credits must be approved by WHEDA. The new development would be known as Eagle Harbor, and would have 36 units, of which 30 units would have income targets at or below 60% of the average median income (AMI). The proposal does not include funding for Care Net's pregnancy related services.

Care Net is a religious based non-profit organization. It provides pregnancy counseling and related services, but explicitly does not provide counseling for or referrals for abortion services.

The staff memorandum on the affordable housing proposal states in part (pages 1-2):

Care Net (as owner), Kothe Real Estate Partners (as developer), and Meridian Group (as property management) have indicated there will be no requirements of tenants related to religious affiliation in any of the units. Care Net will establish a separate LLC as required for WHEDA tax credit projects. The affordable

housing development will be affirmatively marketed to the general population based on income-eligibility regardless of gender, familial status or any protected class. The six supportive housing units will be offered to people at risk of homelessness. Care Net submitted a letter affirming that their religious affiliation will not have an impact or influence on the tenants or management of this housing development.

Staff recommended approval of the project, noting federal requirements that faith-based organizations may not engage in religious activities in projects funded with federal funds, and must separate such activities to non-funded locations. Funding for Care Net is contingent upon its agreement to follow the federal regulations.

The CDBG Committee did not make a recommendation at its meeting on January 17, 2013. A motion to approve the staff recommendation failed, 2-5. A variety of concerns were voiced at the meeting, from concern that Care Net would not separate its faith-based activities from the affordable housing project, to concerns that Care Net had provided inaccurate information about the risks of abortion to its clients. Letters from citizens raised these concerns and concerns that such funding would violate the separation of church and state.

Funding Affordable Housing Sponsored by Faith-based Organizations.

Federal regulations provide that religious or faith-based organizations are eligible to receive HOME funds like any other entity, and bar the City from discriminating against such organizations. 24 CFR sec. 92.257 provides in part:

(a) Organizations that are religious or faith-based are eligible, on the same basis as any other organization, to participate in the HOME program. Neither the Federal government nor a State or local government receiving funds under HOME programs shall discriminate against an organization on the basis of the organization's religious character or affiliation.

(b) Organizations that are directly funded under the HOME program may not engage in inherently religious activities, such as worship, religious instruction, or proselytization, as part of the assistance funded under this part. If an organization conducts such activities, the activities must be offered separately, in time or location, from the assistance funded under this part, and participation must be voluntary for the beneficiaries of the assistance provided.

Similar rules apply in other areas of federal housing assistance, see 24 CFR sec. 570.200(j) and 24 CFR sec. 572.405.

The federal regulations grew out of a policy determination by the federal government to expand the eligibility for housing assistance to religious and faith-based organizations, so long as the religious aspects of the operation were kept separate from the housing operations.

The City has funded religious-based organizations for housing projects, including the Society of St. Vincent de Paul, YMCA, YWCA, Lutheran Social Services and the Quakers.

I conclude that, based on the requirements of the federal regulations, funding the affordable housing through an LLC established by Care Net is not barred by the Establishment Clause of the First Amendment. It simply does not entail the entanglement of the State with religion that is the key component of the test, in this case, under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under *Lemon*, a law or policy violates the Establishment Clause if (1) it lacks a secular purpose, (2) it has a primary effect of advancing religion, or (3) it results in an excessive entanglement between government and religion. The funding of affordable housing by religious-based organizations, with the requirement of separation of the religious programs from the housing programs, seems more closely to resemble the funding approved in *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995), or, closer to home, the Seventh Circuit Court of Appeals decision in *Badger Catholic Fund v. Walsh*, 620 F. 3d 775 (7th Cir. 2010), *cert denied* ___ U.S. ___, 131 S. Ct. 1604 (2011). Both of these cases involved the application of the public forum doctrine to government subsidies, and the funding of affordable housing does not fit that parameter, but the analysis of whether such funding violates the Establishment Clause is applicable here. The funding of the affordable housing proposal falls within these principles, and I conclude it does not violate the Establishment Clause.

In related First Amendment contexts, the U.S. Supreme Court has endorsed the remedy of the separation of operations that are fundable with tax dollars from those that may not be so fundable. For example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld federal regulations that conditioned certain health funding on the entity not providing abortions or abortion-related counseling. The law provided, as do the housing regulations at issue here, that the entity could receive funding if it separated the abortion-related services from other, fundable health services. The Supreme Court found this ability to separate functions to be important.

If such funding is not a violation of the Establishment Clause, and otherwise furthers the City's affordable housing goals, as staff has stated, then we must examine if any of the other proffered reasons to deny funding are appropriate.

Examination of Suggested Reasons for Denial of Funding.

I must state that it is difficult to determine the basis on which the CDBG Committee determined not to support the application. I have attempted to discern possible reasons from my review of the draft minutes and other items in the record.

A. Developer Will Not Comply. Some of the materials suggest that, in fact, Care Net will not abide by the required separation of its faith-based activities and the affordable housing project. There is at least some basis for this in that initial documents provided by Care Net indicated the housing project was an "extension" of its other services and, at least on the face of it, appeared to only be intended for women who completed the

Care Net program and gave birth to their child. However, Care Net has since made it clear that it will abide by the separation requirements. There will be a separate manager of the housing project (Meridian Group), which will be open to any eligible persons. In this regard, the project seems similar to many others in Madison, where there are issues with the initial proposal, but conditions or assurances are obtained from the developer to assure compliance with City requirements. The City could make its requirements more explicit (e.g., that the separation applies to the entire housing project, including any day care component, that a failure to abide by these restrictions is an event of default, requiring that the entire loan be repaid immediately, or that funds for the housing project not support Care Net's other operations during the life of the loan), but I think it would be unusual for the City to determine that a developer's assurances are disingenuous, insincere, or outright lies -- at least absent evidence of a similar failure by the applicant in the past. Presumably, there might be situations where an applicant has a bad track record with other City projects, or projects in other cities, but I am not aware of any evidence that this developer will not do what it has promised, or will not abide by conditions on the project.

B. Care Net Has Provided or Provides Inaccurate Health Care Information. A second rationale for denying funding appears to be that Care Net provides or has provided inaccurate information about the risks of abortion. It is not clear to me if this claim is made about the Dane County chapter, about other chapters, or about the national organization with which Care Net is associated. Assuming these charges are accurate -- and Care Net has vigorously stated they are not accurate with respect to its operations in Dane County -- it also is not clear to me how this assertion relates to the provision of affordable housing. Perhaps this assertion of deceptive practices is meant to support the claim that Care Net will not in fact follow the guidelines for separation of faith-based operations and the affordable housing project, or perhaps it is simply a statement that the City should not fund an affordable housing project for an agency that allegedly gave out false information.

I suppose it is possible to view this issue almost as a consumer protection type of argument for denial of affordable housing funding, that is, the City does not want to assist any entity with a record of preying on innocent consumers. In appropriate circumstances, this might support a denial of funding. But to my knowledge, this has never been a stated test for affordable housing funding, no inquiry was made by staff into this issue, and it is not clear to me what sort of evidence has been brought forth in this case to support such a finding, or what sort of evidence would be sufficient in any case. I do not think this has been part of our affordable housing inquiries.

Finally, I must caution the Council about going down a road where inaccurate or misleading information by a developer means a denial of City funding. This will require some sort of hearing on the nature of the claimed falsehoods. And the Council must ask whether any developer can be found who does not have some record of inconsistencies or inaccuracies in the past.

C. Care Net's Abortion Policies Are Contrary to the City's Policies. An underlying and perhaps unstated rationale for denial of housing funding is that the parent organization supports policies regarding abortion with which the Common Council disagrees. I would have serious legal concerns about this policy, concerns that would require much more research and consideration. The City has never stated this as a policy for affordable housing. While cases such as *Rust v. Sullivan, supra*, and its progeny such as *National Endowment for The Arts v. Finley*, 524 U.S. 569 (1998), *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001), and *Ysura v. Pocatello Educational Assoc.*, 555 U.S. 353 (2009), all support some ability of the government to condition subsidies on support of government policies, these cases entail significant First Amendment issues.

Moreover, such a policy would have to be evaluated in light of sec. 20.9275 (2), Wis. Stats., which prohibits the City from expending funds for abortion services or counseling.

D. Other Reasons. There is some indication that members may have been concerned about the terms of the AHTF loan for this project, including the number of years to payback (16 years v. the usual 10 years) or the interest rate (2.3% v. 2.75%), or the ability of Care Net to end up profiting from the project once the loan is paid and the separation conditions are no longer in place. These concerns do not appear to have been significant. These issues appear to be more directly related to the operation of the housing project, and if the City applies the same standards to entities that are not faith-based, they might support a decision not to fund the project, or at least to require the applicant to abide by the City's standard terms.

Conclusion.

Care Net meets the City's requirements for an affordable housing loan, and staff recommended approval. The City may not discriminate based on the religious affiliation of Care Net, but must require strict separation of any religious based services and the housing services offered. The most significant other reasons that I have reviewed for refusing the funding do not appear to be related to the housing program, and while some of them might provide support for the denial of funding in appropriate cases, I had difficulty determining the factual basis to apply them on the available information.

CC: All Alders
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