

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

Date: November 29, 2010

MEMORANDUM

TO: Members of the Madison Common Council

FROM: Michael P. May, City Attorney

RE: Amendments to Overture Alternate Resolution, Legislative File No. 20248

Council President Mark Clear asked me to prepare a memo noting any legal issues with the proposed amendments to the Alternate Resolution related to Overture. Alders Bidar-Sielaff and Schmidt similarly asked for comment on legal issues on their proposed Alternate that would retain the Madison Cultural Arts District (MCAD) as owner and operator of Overture. I have combined those comments into this memorandum.

As noted below, most of the amendments raise policy, not legal, issues. However, absent a contract that spells out the default rights of the City and the operator of Overture, it is not clear what happens if the operator fails to meet the conditions specified in the resolution. As currently drafted, I read the Alternate Resolution as providing that the failure of Overture to satisfy any of these conditions would create additional reasons for the City to modify or eliminate its annual grant – which under the terms of the Alternate Resolution is already a discretionary act, since it is in all events subject to annual appropriation by the City.

Amendment 1.

This amendment proposes to change the existing option held by the City, which allows the City to purchase the Overture facility for one dollar once the debt is paid off. The City does not have the legal authority to change the terms of the option without the agreement of Overture Development Corporation (ODC) which granted the option. The City does not have the legal authority to unilaterally create a right of first refusal, but would have to obtain such a right from the new owner of the Overture facility. The City would have to negotiate such a right from the new owner, and could attempt to encourage negotiations by adding such a condition to the paragraph of the resolution on the conditions for future support of Overture.

The Madison Museum of Contemporary Art (MMoCA) also holds an option to purchase its portion of the Overture facility. The City also does not have the legal authority to unilaterally impact that option.

Amendments 2 and 3.

These amendments change the financial support for Overture and raise policy issues.

Amendment 4.

This amendment changes the conditions for future support of Overture and raises policy issues.

Amendment 5.

With the possible exception of the first and last RESOLVED clauses in this amendment, the amendment raises policy issues.

The first RESOLVED clause requires that benefit packages be equally available to all full-time employees, except as may be otherwise negotiated in union contracts. I do not read this amendment as requiring any specified level of benefits. To the extent this amendment simply requires non-discrimination in benefits pursuant to existing laws, it raises no legal issues. If it is attempting to require something different or more extensive than the existing body of law on non-discrimination in benefits, it may be preempted by federal or state law.

The final RESOLVED clause requires a contract between the City and the new owner with some specified provisions to be negotiated. I believe it would be a prudent and appropriate legal step to have a contract that specifies the terms on which the City is providing the \$2 million in support to Overture.

Amendment 6.

This amendment extends by one year, to December 31, 2012, the time during which the current operation with MCAD and City employees will continue. While there are legal issues that would need to be worked out in any such extension, they are not different that would exist under the date set out in the original Alternate Resolution. Thus, this amendment raises policy issues.

Amendment 7.

This amendment is similar to Amendment 6, except it extends the current operation to June 30, 2013. It also requires that a staffing plan be developed and approved by the Madison Common Council and provides that the period of current operations will extend by an additional 3 years if the plan is not so approved. The amendment also explicitly states that certain Madison ordinances apply to the new operator "according to their terms."

While legal issues will surely arise in the implementation of these provisions if adopted (e.g., what constitutes “financial recognition for benefits negotiated in good faith through the collective bargaining process”), the amendment essentially raises policy issues.

Amendment 8.

This amendment requires a contract to set standards for the new operator as a condition of future support from the City. As noted earlier, such a contract is legally prudent and appropriate.

Amendment 9.

This amendment sets further conditions, primarily related to an endowment fund, on the City’s future support of Overture. It raises policy issues.

Amendment 10.

This amendment gives the City auditing authority over the owner and operator of Overture and raises policy issues.

Amendment 11.

This amendment establishes certain conditions on the make-up of the governing board of the new operator. It raises policy issues.

Amendment 12.

This amendment appears to be intended to subject the new operator to the terms of the Wisconsin Open Meetings Law. As a private entity, this new operator would not be subject to the terms of the Law, but could opt to make itself subject to some, all, or similar open meeting rules. It is unclear how some of the provisions of the Law would apply to the new operator (e.g., if it has no public employees, can it go into closed session for performance valuation under sec. 19.85(1)(c), Stats., which on its face only applies to public employees?). Those sticky legal interpretation questions aside, the City probably has the legal authority to require the application of Open Meeting principles as a condition of financial support.

Amendment 13.

This amendment proposes conditions related to the resident companies and raises policy issues.

Amendment 14.

This amendment proposes the creation of a Community Input Committee to engage in a public process and make recommendations, to be acted upon by the Board of the new operator and to be subject to approval by the Madison Common Council. The

amendment raises policy issues. I have concluded that such a committee has enough public characteristics (50% membership appointed by the City, required by Council resolution, final recommendations subject to Council approval) that it likely would be subject to the Open Meetings Law.

Amendment 15.

This amendment requires certain representation on the governing Boards of the new operator, and requires a certain level of public openness in meetings of those Boards without subjecting them to all the requirements of the State's Open Meetings Law. It raises policy issues.

Amendments 16 -19.

Although the exact language of these amendments is not available, they relate to setting conditions related to community programs as a condition of the City grant, to the make-up of the governing Boards of the new operator, to acceptance of the capital needs projections prepared by the City and to acceptance of an annual audit by the City. These amendments raise policy issues.

Amendment 20.

Although the exact language of this amendment is not available, it appears to be intended to continue current retirement benefits for employees moving from City to private employment. As noted in my previous legal analysis, to the extent this is intended to keep private employees in the Wisconsin Retirement System (WRS), such a plan is contrary to state law. To the extent it would require the City to supplement its grant to Overture to in some way approximate the level of WRS benefits, or to require the new operator to do so, the amendment would create difficult issues in determining exactly how to calculate those benefits. The amendment also has significant fiscal implications, and raises other policy issues.

Amendment 21.

This Substitute Alternate proposes an interim situation in which the current operations remain until December 31, 2012, and a broad-based Madison Overture Commission is created to examine issues related to ownership, operation, staffing and financial support of Overture, to report back to the City by October 1, 2011. While this proposal primarily raises policy issues, there are legal questions regarding the status of the Overture facility in the interim. Without further agreement by the parties, payment of the amounts due under the Forbearance Agreement will trigger certain option rights which, if not exercised, will vest ownership in ODC. The City and MMoCA have certain options with limited times for the exercise of those options. Assuming the City's option is not exercised, ODC (and perhaps MMoCA and MCAD), as owner, would have certain rights. The conclusions and recommendations of the proposed Madison Overture Commission might or might not be consistent with the desires of the owner of the facility.

The Bidar-Sielaff/Schmidt Alternate.

This new proposal essentially proposes to retain MCAD as both the operator and the new owner of the Overture facility. To the extent I understand the resolution, it raises a number of legal issues:

1. I have questions regarding what is intended by some parts of the resolution and some possible suggested clarifications that I will discuss with the drafters separately from this memo.
2. This Alternate states that MCAD is to assume the employees of the Overture Center and to retain existing benefits. This would require a statutory change, as secs. 40.02(28) and (36), Wis. Stats., explicitly exclude MCAD from being an employer covered by WRS.
3. In addition, the employees of MCAD would lose other benefits of public employment. Although MCAD is an “employer” under sec. 111.02(7), Wis. Stats., making it subject to non-discrimination and other requirements of chapter 111, it explicitly is not a “municipal employer” under sec. 111.70(1)(j), Wis. Stats., meaning that its employees are not subject to the jurisdiction of the Wisconsin Employment Relations Commission for bargaining purposes and do not have the protections of the Wisconsin Municipal Employment Relations Act. The employees would presumably be subject to jurisdiction of the National Labor Relations Board like other non-public employees.
4. I was asked if something like this could be accomplished through an intergovernmental agreement with the City of Madison. Yes, it could, so long as the employees clearly remained employees of the City of Madison. This would allow the invocation of the loaned public employee law. It is the same as the current status under the Operation and Cooperation Agreement between the City and MCAD, which is an intergovernmental agreement pursuant to sec. 66.0301, Stats.
5. I was asked about the legislative history of the provisions cited above that exclude MCAD from the WRS and MERA. From the legislative history files that I was able to review today, I could find no clear explanation for these exclusions, other than to speculate that the Legislature intended that cultural arts district employees should not have the same rights as municipal employees. These exclusions were in the original bill as proposed (1999 AB 853) and continued in Assembly Substitute Amendment 1, which was approved by the Assembly and the Senate without further amendment. No amendments were proposed to remove these limitations. They remained in the legislation as adopted and signed by the Governor as 1999 Act 65 (effective April 26, 2000).

6. I was also asked about creation by the City of its own non-profit entity that might be able to take advantage of the loaned employee law and retain public benefits for the employees. The loaned employee law, sec. 230.047, Stats., makes specific mention of one public body loaning employees to another public body, and includes an “instrumentality” of the State as part of the definition of a local government, sec. 230.047(2)(a), Stats. Traditionally, an “instrumentality” of a public body is some separate organization, such as a private non-profit entity, that is totally controlled by the public body and used to carry out some or all of the governmental body’s public purposes. It is often an issue in tax law. The Legislature must have included the phrase in the loaned employee law to allow some greater flexibility beyond traditional governmental entities.

I have not examined this option in detail. The entity would have to be set up carefully to avoid issues with the IRS and to be certain it would be recognized by the State and federal governments as nothing more than an arm of the City of Madison, thus allowing it to qualify as an instrumentality that could utilize public employees. As a practical matter, the level of effective control that the City would have to exert over such an entity would raise questions as to why it was more effective than simply having the City itself undertake operational responsibilities.

CC: Mayor Dave Cieslewicz
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