

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

Date: March 15, 2011

**MEMORANDUM**

TO: Mayor Dave Cieslewicz  
All Alders

FROM: Michael P. May  
City Attorney

RE: Resolution to Authorize Legal Proceedings on Budget Repair Bill;  
Legistar No. 21697

On the Common Council agenda tonight is a resolution authorizing the City Attorney to commence or join in legal proceedings challenging the legality of the Budget Repair Bill. This memorandum is to give you some basic information on the options my office is considering.

Because of the nature of the potential proceedings, this will be succinct and will not discuss strategy in any detail, nor will I discuss such strategy in open session tonight.

Based on my initial examination, the legal theories available to the City are essentially three: violation of the Open Meetings Law, violation of Art. VIII, sec. 8 of the Wisconsin Constitution, and violation of the rules of the Wisconsin Legislature. These theories are discussed briefly below. The resolution is broad enough to authorize the City Attorney to challenge the law on other legal theories should they appear viable.

Open Meetings Law.

The Committee on Conference that approved the final form of the Budget Repair Bill, (Sub. Am. 1 to AB-11, hereafter the "BRB"), did not provide 24 hours notice of its meeting. Such notice is generally required under the Open Meetings Law. While a 2 hour notice is allowed in the event of some emergency, there does not appear to be any basis for invoking that provision, nor is it clear that even two hours notice was given.

The Open Meetings Law does allow the Legislature to adopt rules that may be inconsistent with the Law, and the rules take precedence. Wis. Stat. Sec. 19.87. However, the only rule that has been cited, Senate Rule 93, changes the place of posting notice but not the other requirements under the Open Meetings Law. There are also issues as to whether the meeting was open to the public, and whether the notice

contained sufficient description of what was to be taken up. In my opinion, the meeting was in violation of the Open Meetings Law.

Procedurally, the Law requires that a verified complaint be filed with the District Attorney or Attorney General. We filed such a complaint last week, signed by the Mayor. A number of other such complaints were filed. It is now up to the District Attorney or Attorney General to decide if they will pursue an action for violation of the law. If either of them pursues an action, there is nothing more for the City to do. If they do not pursue an action within 20 days, then the complainant may commence an action.

The resolution would authorize us to pursue such an action if the District Attorney and Attorney General do not.

I should note that in addition to allowing for forfeitures from those who violate the Open Meetings Law, the Law allows a court to void action taken. The action taken is not automatically void, but is "voidable" by a court. The Law also allows the court to grant other legal or equitable relief, including injunctive relief.

#### Violation of Art. VIII, Sec. 8 of the Wisconsin Constitution.

This is the Constitutional provision that requires a 3/5 quorum for fiscal bills, as defined in the Constitution. Based upon what I have reviewed, the final bill did include fiscal items as defined therein, and was approved by the Senate without having the necessary quorum.

Enforcement of this provision would require a separate lawsuit from the Open Meetings legal claim, or joining a suit (such as that started by Dane County) that raised the issue. My office is researching the issues of how to bring such an action, and who may bring such an action. Once we are comfortable with those legal matters, it is our intention to challenge the BRB on this basis. The resolution would authorize this court action.

#### Violation of Rules of the Legislature.

It appears that a number of the rules of the Legislature may have been ignored in the rush to pass this bill. We are researching whether the City may enforce these rules and ask that the BRB be declared void based on these violations.

#### Other Procedure.

The resolution authorizes us to bring actions in the name of the City, or elected officials or employees. This is because issues of standing may require that an action be brought in the name of an individual. Any such action, however, must relate to injuries to the City. We could not, for example, bring an action asserting rights belonging to unions or union members. Our hope is to file any appropriate actions promptly after authorization of the Council, although I am unable to specify an exact date.