



## Office of the City Attorney

Michael P. May, City Attorney

Room 401  
210 Martin Luther King, Jr. Boulevard  
Madison, Wisconsin 53703-3345  
(Phone) 608-266-4511  
(TTY/Textnet) 866-704-2340  
(Fax) 608-267-8715  
[attorney@cityofmadison.com](mailto:attorney@cityofmadison.com)

### ASSISTANT CITY ATTORNEYS

Roger A. Allen  
Steven C. Brist  
Carolyn S. Hogg  
Lana J. Mades  
Lara M. Mainella  
Katherine C. Noonan  
Maureen S. O'Brien

Marci A. Paulsen  
Adriana M. Peguero  
Jaime L. Staffaroni  
John W. Strange  
Doran E. Viste  
Anne P. Zellhoefer  
Jennifer A. Zilavy

LITIGATION ASSISTANT  
Patricia Gehler

November 29, 2010.

Ann Ustad Smith  
Michael, Best & Friedrich  
One S. Pinckney Street, Ste 700  
Madison WI 53703

RE: Overture Development Corporation/Overture Lenders: Release of Limited  
Guaranty of the City of Madison

Dear Attorney Smith:

I am writing to follow up on a series of letters we exchanged earlier this year, and your recent correspondence to me of October 29, 2010.

### Background.

On March 2, 2010, the City requested of your client, US Bank, NA, an accounting for all payments related to the \$27,700,000 Term Loan and \$2,500,000 Line of Credit Facility pursuant to the Credit Agreement, as amended and restated, by and among Overture Development Corporation (ODC), US Bank, and various other lenders (the Overture Lenders).

On March 18, 2010, we received a copy of a letter from the Overture Lenders to ODC providing a notice of default on Interest Rate Swap No. 20956A. On March 23, 2010, we received a copy of a letter from the Overture Lenders to ODC designating an early termination date for that Interest Rate Swap. Three days later, on March 26, 2010, we received a copy of a letter to ODC from the Overture Lenders indicating that the cost of early termination of the Interest Rate Swap was nearly two million dollars (\$1,993,991.54).

On that same date, March 26, 2010, I wrote to you taking issue with a statement in some of those notices that the City was responsible for any costs relating to the Swap Agreement. I asked that you provide me with any authority to the contrary. As of today's date, I have not received that from you, other than a brief statement in your

November 29, 2010.

Page 2

letter of April 8, 2010, stating that "we have a difference of opinion in this regard."

On April 8, 2010, you sent to the City information responsive to the City's request for an accounting for payments made on March 2, 2010.

Pursuant to the analysis set forth in my letter of March 26, 2010, (a copy of which is enclosed) the City is not responsible for any Swap payments. Moreover, the City never agreed to the November, 2008, amendment of the underlying Credit Agreement.

On October 29, 2010, you sent a letter to ODC, the Madison Cultural Arts District (MCAD) and to me on behalf of the City of Madison, providing a conditional notice of amounts due to the Overture Lenders from ODC. The notice is conditional in that, if payments are received by the Overture Lenders pursuant to the Forbearance Agreement entered into between the Overture Lenders and ODC, then no amounts are due. In that letter, you again state that the City has certain obligations to the Overture Lenders pursuant to the limited guaranty entered into by the City on December 1, 2005.

For the reasons set forth in this letter, the City has no obligations to the Overture Lenders.

Contract Modifications between Overture Lenders and Parties Other than the City.

The Line of Credit Support Agreement was entered into by the City on December 1, 2005, as part of the refinancing of the Overture debt. The Agreement constitutes a limited guaranty by the City for certain payments related to the Line of Credit Facility. The City's obligations nowhere mention payments related to the Swap Agreement.

On November 1, 2008, the Overture Lenders and ODC modified the underlying Credit Agreement by Amendment No. 1 (Amendment). This Amendment expanded the use of Line of Credit Advances to include payments on the Swap Agreements, and redefined the definition of debt service in respect to the Term Loans to include payments owed under the Swap Agreements.

The City was not a party to and did not consent to this Amendment to the Credit Agreement.

Subsequent to the Amendment, ODC, Mr. Frautschi and MCAD made payments to the Overture Lenders that were applied to amounts due under the Swap Agreements. These payments reduced the amounts that those guarantors would pay to the Overture Lenders to replenish the Line of Credit, increasing the likelihood and the amounts that the City might be required to pay on its limited guaranty.

On June 22, 2010, the Overture Lenders entered into the Forbearance Agreement with ODC, MCAD and 201 State Foundation, Inc. Under the Forbearance Agreement, payments were immediately made to the Overture Lenders by MCAD and 201 State, and possibly others. The amounts paid under the Forbearance Agreement further reduced the funds available to these entities to make payments on the Term Loan or to

replenish the Line of Credit to the Overture Lenders, increasing the likelihood and the amounts that the City might be required to pay on its limited guaranty.

The City was not a party to and did not consent to the Forbearance Agreement.

The Contract Modifications Release the City from its Limited Guaranty.

As a limited guarantor, the City is entitled to relief from its obligation because the Overture Lenders have made a material alteration in the obligation on which the guaranty was based, made after the City entered into the guaranty, and made without the consent of the City as guarantor. This action by the Lenders is to the detriment of the City, and therefore discharges the City from any and all obligations under its limited guaranty as to the Term Loan or the replenishment of the Line of Credit. This is a standard rule of the law of guaranty, *Restatement (3d) of Suretyship and Guaranty*, Sec. 37 et seq., which has been adopted in Wisconsin, see, e.g., *Lakeshore Commercial Finance v. Drobac*, 107 Wis. 2d 445, 319 N.W. 2d 839 (1982).

The Lenders modified the underlying obligation by entering into an Amendment No. 1 to Credit Agreement in November, 2008. The City was unaware of this amendment, did not consent to it, and made no similar agreement to modify its obligation. Subsequent to that amendment, the Lenders have applied payments made by Mr. Frautschi and payments made by Madison Cultural Arts District to the Swap fees. By our analysis of the materials you gave us, we believe approximately \$1.7 million in those Swap fees were either paid by Mr. Frautschi and MCAD or are claimed to be due by the Lenders, through March, 2010. These actions have increased the risk to the City, and injured the City in that its obligation under the limited guaranty would be greater due to the application of funds to the Swap fee payments rather than to replenish the Line of Credit.

On June 22, 2010, the Overture Lenders entered into a Forbearance Agreement with ODC and others. The City was not a party to this Agreement and did not consent to it. The Agreement itself recognizes that:

The City, however, has indicated that it disputes liability or obligation under the Line of Credit Support Agreement.

Forbearance Agreement, Recital W, page 5.

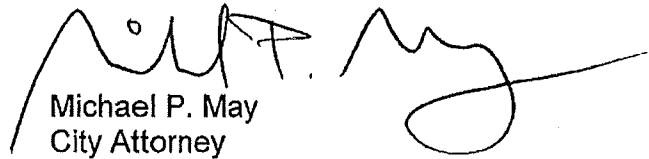
Under that Agreement, some or all of funds held by 201 State Foundation and MCAD, and perhaps others, were applied to outstanding debts due to the Overture Lenders. Under the limited guaranty entered into by the City, those funds were to have been used to replenish the Line of Credit. This action by the Overture Lenders also injured the City, and makes it more likely that the City's limited guaranty will be invoked

November 29, 2010

Page 4

Pursuant to the law related to guarantors, the Lenders' actions relieve the City of all obligations on its limited guaranty. In the event the Lenders were to attempt to enforce the City's obligations, we would raise this as a defense in any legal action.

Sincerely,



Michael P. May  
City Attorney

MPM:pah

cc: Mayor Dave Cieslewicz  
Janet Piraino  
Dean Brasser  
Jim Sweet