

..Fiscal Note

Based on the negotiated term sheet initially presented to the Common Council on November 4, 2010, this resolution authorizes the City to take ownership of the Overture Center facility from Overture Development Corporation (ODC) before December 30, 2010 and enter into a Lease and Operating Agreement with 201 State Foundation, Inc. (210 State) to operate the facility beginning on July 1, 2012. At the time it takes ownership of the facility, the City would enter into a condominium arrangement with the Madison Museum of Contemporary Art, allowing MMOCA to assume full responsibility for ownership and operation of the space it currently occupies in the Overture facility.

Building ownership and the proposed operating agreement would commit the City to a number of financial and budgetary obligations that do not exist today. The expected budgetary impacts of these agreement provisions are summarized in a separate table attached to the Legistar file (Budget Impacts - 2010 Overture Agreement), and are described below.

Summary

Taken together, the provisions of the proposed Lease and Operating Agreement between the City and 201 State would result in no significant change in the City's required budget for Overture operations in 2011. Although the City would take ownership of the facility by January 1, 2011, any additional costs would be chargeable to MCAD and the City's net cost for Overture would remain at the present level of just under \$1,300,000. In 2012, however, the payoff of accrued employee leave liabilities and the addition of insurance and maintenance costs not fully reimbursed by 201 State would increase the City's required budget for Overture operations to an estimated \$2,143,000 for one year. In 2013, the annual City operating budget requirement would fall to roughly \$1,600,000. But with the gradual addition of debt service costs arising from future capital investments in the facility, the City's annual operating budget for Overture would grow to an average of slightly more than \$2,000,000 per year during the next 15 years, with additional adjustments for inflation.

Past and Current Practice

Presently, the City makes an annual subsidy payment in support of Overture operations to the Madison Cultural Arts District (MCAD), the governmental entity charged with operating the Overture Center since 2001. This subsidy is offset by an annual payment in lieu of taxes (PILOT) intended to compensate for the property taxes foregone as a result of MCAD's tax exempt status. The amounts of the subsidy and PILOT were established in the Operation and Cooperation Agreement entered into by the City and MCAD in 2001, with adjustments for inflation and the removal of property from the tax roll as the Overture Center facility developed. In 2009 the gross City subsidy stood at \$1,795,873 and the PILOT returned by MCAD was \$498,400, resulting in a net City budget impact of \$1,297,473. The original 2001 operating agreement created a contractual obligation for the City to continue its annual subsidy as long as MCAD received a comparable level of operating support from investments established for that purpose or from other private contributions. Although the demise of the debt structure related to Overture's construction has left MCAD short of this fundraising threshold, the City has continued to budget for and provide an operating subsidy at the same net amount of \$1,297,473 in its adopted 2010 and proposed 2011 budgets.

Proposed Subsidy

Under the proposed Lease and Operating Agreement, the City would again become contractually obligated to provide an annual subsidy to Overture's new operating entity beginning in 2012. The initial gross subsidy would be \$1,908,400. This would be offset by a rent payment from 201 State of \$498,400, an amount identical to the PILOT payment presently

recognized from MCAD. The resulting net subsidy of \$1,410,000 is approximately \$113,000 higher than the net annual subsidy provided by the City today. As in the past, the City subsidy would be conditioned upon 201 State's ability to raise a comparable level of outside grants and private fundraising support.

The new agreement would also require the City to provide appropriate building insurance coverage beginning on January 1, 2011 and to continue to perform custodial and maintenance functions. These costs would be partially reimbursed by 201 State during the term of the lease.

Insurance

Under the current arrangement, all building related insurance is the responsibility of MCAD. Preliminary quotations suggest that the insurance costs incurred by the City as a result of becoming the building owner would be about \$100,000 per year. In 2011, this cost would be fully chargeable to MCAD, and approximately \$85,000 of this total would be reimbursed by 201 State in 2012 and subsequent years.

Maintenance Costs

The City would be responsible for providing all daily custodial services and long term building maintenance at the Overture Center following the transition to 201 State as operator of the facility in 2012, retaining City employees and supervision of these functions. In addition to the wages and benefits of custodial and maintenance staff, the City would become responsible for maintenance agreements and other service costs associated with this maintenance function. Assuming continuation of the current custodial and maintenance staffing level, and assuming that the additional cost of ongoing maintenance agreements and ancillary services is \$150,000 per year, the City will incur maintenance expenses totaling \$993,000 beginning in 2012, with the annual reimbursement from 201 State limited to \$818,800.

Accrued Liabilities

Another budgetary impact of the proposed agreement is the disposition of accumulated Overture employee leave balances and other liabilities presently on the books of MCAD. If MCAD was financially stable and the current structure could continue uninterrupted, such liabilities would remain the responsibility of MCAD and would be charged to Overture operations in the normal course of business in future years. But as MCAD ceases to be a viable entity, a series of decisions must be made regarding the allocation of responsibility for its remaining liabilities including unfunded prior pension costs, accrued sick leave, and accrued compensatory time and vacation time of current Overture employees. The proposed agreement defines a process for payout of these liabilities and assigns responsibility for the associated costs between the City and 201 State. In total, an estimated \$915,000 would be paid out to employees by the City, with 201 State reimbursing for approximately \$250,000 of that cost. Most of these City payouts would occur during the 2012 transition year, although 201 State's reimbursement would be scheduled at \$25,000 per year over a 10 year period.

It should be noted that the City is presently attempting to resolve a dispute with individual stagehands employed by the City regarding past contributions to the Wisconsin Retirement Fund. The dispute involves employees who have worked at the Madison Civic Center, Monona Terrace and the Overture Center. A portion of any cost associated with that resolution would, under the current operating structure, be chargeable to Overture operations. The proposed agreement specifies that any liability for this dispute rests with the City and not with MCAD or 201 State.

The proposed agreement then specifies that, any other accrued deficit of MCAD shall be the responsibility of MCAD or 201 State and not the City.

Capital Maintenance and Replacement

The proposed agreement also allocates responsibility for the long term capital maintenance and replacement investments that will be needed to preserve the Overture Center facility into the future, based on standards set by the system manufacturers or otherwise established in the industry. Generally speaking, these are the types of replacements and improvements that the City budgets for and finances in the Capital budget and finances with general obligation borrowing. The City would be responsible for the facility and its structural components while 201 State would be responsible for theatrical, technical and performance related systems. The specific allocation of responsibilities and the anticipated maintenance and replacement schedules are incorporated into the agreement. Based on the best available data, the capital cost assigned to 201 State over the next 15 years totals roughly \$9,100,000 while the cost related to the City's portion totals about \$7,800,000. The first City capital expenditures of roughly \$380,000 would occur in 2012, with the associated debt service affecting the operating budget in 2013. Assuming that the City would budget and borrow for these facility investments in the same manner as other such projects, the City's average annual outlay for these projects would be just over \$520,000 per year during the next 15 years. The annual debt service would grow from \$57,000 in 2013 to \$816,000 in 2025, averaging \$413,000 per year during the 15 year period.

..Title

Accepting a deed from Overture Development Corporation for the Overture Center located at 201 State Street; authorizing the Mayor and City Clerk to execute a Lease and Operating Agreement with 201 State Foundation, Inc., or its successor; authorizing the formation of a condominium at the Overture Center; and authorizing the Mayor and City Clerk to execute such other documents that may be deemed necessary by the City Attorney to implement the transaction

..Body

[PREAMBLE

In June of 2001, Overture Development Corporation ("ODC") began construction of the Overture Center for the Performing Arts (the "Center"), located at 201 State Street (the "Property"). ODC financed the construction and operation of the Center through a combination of private donations, bond proceeds and private lending. The City and ODC entered into an Option Agreement under which the City has the right to purchase the Center for one dollar when the debt for the Center has been paid. ODC owns the Center and leases it to the Madison Cultural Arts District ("MCAD"), which operates and manages the Center using City employees. The City and MCAD entered into an Operations and Management Agreement under which the City provides an annual subsidy to MCAD for the operation and management of the Center. In 2005 ODC's private lenders (the "Lenders") agreed to refinance the existing ODC debt on the Center. As a part of this refinancing, the City agreed to provide limited and conditional credit support.

In 2009, the investment fund created to support the operations of the Center was dissolved, and the Lenders holding a \$40 million mortgage on the Property have since provided notices of events of default to ODC, and sought repayment of various obligations of ODC. In June of 2010, ODC, MCAD, 201 State Foundation and the Lenders entered into a Forbearance Agreement, under which the Lenders agreed to forbear in the further exercise of their rights and remedies to collect from the parties the aggregate amount then owed of approximately \$29 million. The Lenders agree to forbear in the debt collection until December 30, 2010. The forbearance is conditioned upon several events occurring, including payment by the ODC parties to the

Lenders of an Initial Payment and a Final Payment. The ODC parties have conditioned their Final Payment to the Lenders upon the Common Council agreeing to take title to the Property and to provide continuing financial assistance to the Center's operations and maintenance. Upon payment of the Initial and Final Payments by ODC to the Lenders, the Lenders will release their liens on the Property and consider the Overture obligations to be fully paid.

Representatives of the City, ODC, MCAD and 201 State have undertaken discussions and negotiations relating to the future ownership, operation, maintenance, staffing and long-term capital needs of the Center.

NOW, THEREFORE, BE IT RESOLVED:

1. Acceptance of Deed. The Common Council approves of the acceptance of a warranty deed for the Property from Overture Development Corporation, conditioned upon the following:

- a) The Property shall be conveyed on or before December 30, 2010, free and clear of all liens and encumbrances, except for standard exceptions. The Lenders shall provide a Satisfaction of Mortgage and releases of all other liens and encumbrances prior to or simultaneous with closing. The conveyance shall be subject to an existing Deed Restriction which prohibits the renaming of the Center and certain areas within the Center.
- b) The City shall have received executed originals of those documents listed below in Sections 2 and 3 .

2. Lease and Operating Agreement. The Common Council authorizes the Mayor and City Clerk to execute a Lease and Operating Agreement with 201 State Foundation, Inc., or its successor, to include the following terms set forth in the Term Sheet attached to this resolution as Exhibit A. The final form of the Lease and Operating Agreement shall be subject to approval by the City Attorney. As part of the terms set forth in the Term Sheet, the City will:

- a. The City acknowledges and concurs that it will comply with recorded deed restrictions (Dane County Register of Deeds Doc. #4123838) placing restrictions on the naming of the Center itself or identifying areas within Overture Center for the Arts and agrees not to seek an amendment to such deed restrictions at any time in the future; and
- b. The City agrees, upon receipt of title to Overture, to provide for certain long-term capital maintenance needs of Overture; and
- c. The Mayor and City staff are authorized and directed to negotiate and execute an agreement with 201 State Foundation, Inc., or its successor or designee, to operate and manage Overture consistent with the Term Sheet attached to this Resolution; and
- d. Subject to further action by the Council and Mayor in conjunction with the City's annual budget approvals, the City commits to a level of annual funding for the operational activities of Overture of at least \$1.41 million per year, adjusted for inflation, exclusive of any capital replacement and improvement costs. This is net of any PILOT or rent payment by 201 State Foundation, Inc.

3. Condominium Agreement. The City consents to the creation of two condominium units at the Overture facility. One unit is to be conveyed to the Madison Museum of Contemporary Art. The second unit, which shall be conveyed to the City, is to be the balance of the building. The declaration shall assign common areas and allocate utility and other costs. A condominium association consisting of MMOCA and the City as members shall be created. The Mayor and City Clerk are authorized to sign such documents as may be necessary to accomplish the creation of the condominium and the association and any such documents are subject to approval by the City Attorney.

EXHIBIT A
TERM SHEET FOR CITY-201 STATE LEASE AND OPERATING AGREEMENT

[STILL UNDER NEGOTIATION]

EXHIBIT B
TERM SHEET FOR CREATION OF CONDOMINIUMS

[STILL UNDER NEGOTIATION]