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MEMORANDUM

TO: Mayor Satya Rhodes-Conway and Alders

FROM: City Attorney Michael Haas

DATE: March 1, 2021

RE: Madison Police Department Report on use of Tear Gas

Item 31 on the Council agenda (Legistar file 63561) is listed as "Report: Madison Police Department on Tear Gas Usage & Alternatives (As requested by RES-20-00707, Legislative File No. 61265)." When this item was considered by the Public Safety Review Committee, it recommended that the Council place the report on file and also ban the use of tear gas by the Madison Police Department (MPD). Since then, several Alders have asked me whether the issue of banning tear gas is properly before the Council when it considers the MPD report. I believe that decision is not properly before the Council for its March 2, 2021 meeting but that the Council can subsequently introduce a resolution or ordinance to consider that topic again. This memorandum explains my legal analysis.

The original agenda item related to the use of tear gas was Legistar file 61265 which resulted in passage of a substitute resolution. The substitute removed references to prohibiting the use of tear gas from the original resolution and directed MPD to complete a study regarding MPD's historical use of tear gas and de-escalation alternatives. The resolution did not direct MPD to develop policy recommendations except to include recommendations from the Quattrone Center which of course have not been completed yet. The final clause of the resolution states that upon receiving MPD's study, the Council will review findings and "use this information to determine whether to ban tear gas and if so, will determine an appropriate timeline."

The agenda item for the MPD report is listed as Legistar file 63561 and the report did not make any policy recommendations. Therefore it appears that it is a solitary report to be treated under MGO 2.27. The Council can adopt or accept the report or place the report on file. None of those actions alone would result in a change to MPD's use of tear gas.

March 2, 2021

Page 2

The PSRC's motion included a statement that the Committee rejected the report and a recommendation to ban tear gas, which are both separate actions from the recommendation to place the report on file. The recommendation to ban tear gas is also separate from the contents of the MPD report. The item that was listed on the PSRC agenda and is on the Council agenda is simply listed as the MPD Report. The agenda item as listed does not provide public notice of the Council's consideration of banning tear gas. Also, there is presently no proposed ordinance or resolution regarding the use of tear gas.

That is why I have advised the Alders who have inquired that I do not think banning tear gas is an action that can be enacted by the Council under the current agenda item and without a separate resolution or ordinance. Of course, the Council may certainly revisit issues related to tear gas and introduce new legislation in the future. For example, there may be additional information to consider when the Quattrone Center report is issued. In fact, Alder Harrington-McKinney's motion at PSRC noted that the Quattrone Center report would be subsequently available to allow the Council to further consider the use of tear gas.

Based on public comments expressed at the CCEC meeting last week, some members of the public appear to expect that Council action on the MPD report may also result in banning tear gas, without separate legislation. While those comments would be relevant to the general issue if offered at the Council meeting, I wanted to outline my legal opinion so that there may be common expectations regarding the status of this matter.

Please feel free to let me know if you have any questions or wish to discuss this information in advance of or at the Council meeting.