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2 December 2020

Hon. Tyisha Walker-Myers
President, New Haven Board of Alders
City Hall
165 Church Street
New Haven, CT 06510

Re: Disclosure, Accountability and Compliance Ordinance

Dear President Walker and Members of the Board of Alders:

The Disclosure, Accountability and Compliance Ordinance will be considered by the Board of Alders as a second reading on its next regular meeting scheduled on December 7, 2020. This letter is offered for your consideration in order to facilitate the deliberations, bolster the legislative history and to answer questions raised by (1) the Corporation Counsel (attached hereto as **Schedules A-1 and A-2**); and (2) counsel to the Trustees of the City Employees' Retirement Fund ("CERF") and the Policemen and Firemen's Pension Fund ("P+F Fund") of the City of New Haven (attached hereto as **Schedules B-1 and B-2**). I will also try to explain some minor changes to the ordinance that are included in a substitute amendment recommended for approval at your December 7th meeting (attached hereto as **Schedule C**).

The Purpose of the Ordinance: The purpose of the ordinance is set out clearly in the opening paragraph. First, *the ordinance requires disclosure* by the Mayor or his or her designees or other City officials and agencies to the leadership of the Board of Alders (the "Review Committee") of the following agreements (whether written or oral) related to the terms and conditions of employment and any benefits related thereto, including, but not limited to retirement or pension enhancements, for classified and unclassified personnel:

- Agreements
- Letters of understanding
- Memoranda of understanding
- Side letters

Disclosure is required whether or not such agreements require approval by any other public agency of the city under the charter, special acts or ordinances of the city.

Second, there is a *compliance requirement*. The ordinance is designed to reinforce the obligation of city officials to submit any agreements (for action or consultation) to the appropriate public agency in cases where the Charter, Special Acts or Ordinances of the City require the approval or other action on such agreements by the Board of Alders, the Litigation Settlement Committee or other city boards or agencies.

The ordinance recognizes the authority granted to the Mayor, as chief executive officer of the city under C.G.S. §7-474(a), as the representative for the purposes of negotiating agreement; however, clarifies that the authority to negotiate does not confer the

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Steven G. Mednick

Attorney

ability to enter a final binding agreement, if other legal requirements are required by local law. In other words, the ordinance recognizes that the Municipal Employee Relations Act ("MERA") does not grant the Mayor, as chief executive officer, or any other agency of the City an unlimited authority to unilaterally resolve all matters. Thus, if there are other legal, statutory or local Charter or ordinance requirements that implicate the actions of another approving entity the Mayor needs to obtain the require approvals. By way of example, MERA does not confer upon the Mayor the authority to obligate the City to multi-year funding of a settlement without the approval of the Board of Alders or to settle a claim in excess of \$5,000 (or, in such greater amount as approved by the Alders) without approval of the Litigation Settlement Committee.

Why is this ordinance necessary? Over the course of time in the exercise of authority granted under MERA, Mayors, through the Labor Relations Division, have negotiated collective bargaining agreements ("CBA"). Of course, MERA also includes a role in the approval of the CBA by the Board of Alders. As you are aware, a CBA is a contract reached as a result of negotiations between representatives of a union and the employer, where the negotiating parties seek to meet the interests of both sides. The contents of CBA include a number of items that are designed to facilitate the relationship of the employees and employers. CBAs cover an array of issues:

- Wages.
- Working hours and conditions
- Employee benefits.
- Grievance and arbitration procedures
- Limitations on strikes.
- Rights and responsibilities of the union and management

This ordinance addresses issues that flow from the processes which flow from the CBA and are governed by law: grievances and unfair labor practice claims. In particular the ordinance seeks disclosure of the memoranda of understanding, letters of understanding, side letters and the like that flow from these processes. The genesis of the "disclosure component" of the ordinance is founded on the concern expressed by Alders that side agreements have been have entered into by past Administrations without the knowledge of other officials who have administrative, fiduciary, fiscal or legislative responsibilities for the subject matter of the agreement.

A good example of this problem is the aftermath of a 2006 agreement of a prior administration to award what was later deemed to be an inappropriate or illegal pension enhancement to certain union officials. The agreement was never disclosed to the administrator or trustees of the Policemen and Firemen's Fund ("P+F Fund") until twelve years later when a retiring union officer sought to obtain the benefit as part of his retirement benefit package. As the record demonstrates the P+F Fund trustees rejected the terms of the agreement. If this agreement was disclosed in 2006 by, perhaps, consulting with the Plan Administrator this issue may have been tackled at an earlier stage, avoiding the legal issues the Administration and Board of Alders now face in court fourteen years later.

Steven G. Mednick

Attorney

The 2006 agreement also triggered the “compliance component” of the proposed ordinance. As the ordinance unequivocally affirms, the Mayor has authority to negotiate. Yet, as we now know, the 2006 agreement was negotiated without the involvement of the affected city official, agency or board, as neither the Administrator nor the trustees of the P+F Fund were consulted. Again, if they had been consulted in real time would the City have avoided the current legal morass? No one knows for certain and we cannot correct the record of the past; however, it is fair to speculate that the current circumstance may have been avoided and this legislation will, if complied with, prevent history from repeating itself.

This one incident, standing alone, illustrates the need for this ordinance. Apparently New Haven has a prolific tradition of side agreements and this ordinance seeks to take these deals out of the shadows for appropriate public scrutiny and, also, to ensure that the appropriate public officials can carry out their prescribed administrative functions and to make certain that all decision-makers have been included in decisions which fall within their jurisdiction.

The mechanics of the ordinance.

How does the ordinance work? First of all there is a legislative finding in proposed §2-61(b):

- As the chief executive officer of the city the Mayor has the requisite authority to negotiate on behalf of the city, including but not limited to the authority granted under C.G.S. §7-474(a); and,
- Yet, the authority to negotiate “does not confer the authority to enter a final binding agreement, in the event the actions of another public agency are required to effectuate such agreement.”

In other words, the authority granted to the Mayor is not absolute or in derogation of the legal responsibilities and authority conferred to other agencies in the City, including the Board of Alders.

Second, the new ordinance defines, in §2-61(a)(1), “action or approval of a public agency” as “...actions or approvals required by the general statutes or the charter, special acts or the ordinances of the city” these include, but are not limited to:

- Transfers of funds or other required approvals by the Board of Alders;
- Approval of a settlement by the Litigation Settlement Committee¹; or

¹ Article VI, Sec.4.C Litigation Settlement Committee .There shall be a litigation settlement committee consisting of the Mayor, the Controller, the coordinator for administration appointed by the Mayor, or their designees, two (2) members of the Financial Review and Audit Commission who shall not be of the same political party, elected by their fellow commissioners, and two (2) members of the finance committee of the Board of Alders, who shall not be of the same political party, elected by their fellow Alders. Neither the

Steven G. Mednick

Attorney

- Determinations, decisions, settlements or interpretations pertaining to the administration of pension funds by the appropriate agency or board².

Third, the new ordinance defines, in §2-61(a) (2), written or oral “agreements” as “...not be limited to contracts, memoranda of understanding, letters of understanding, side letters and the like.”

Fourth, §2-61(a) (3) defines “disclosing official or agency” or “submitting official as “any designee of the mayor, officer, employee, department, board, commission or agency, as defined in ord. §1-2(15) of this code, including but not limited to, agencies or boards charged with the management and administration of municipal employee pension funds³.

What is required under the ordinance?

Disclosure. As stated in the introduction to this letter the core underpinning of this ordinance is disclosure of agreements that have heretofore been concealed by successive administrations. Thus, under §2-61(c) the Mayor and any other Disclosing Official or Agency” are required to:

“... report and disclose to the president, majority and minority leaders (or the third officer, as may be required by the charter) of the Board of Alders (the “Review Committee”) all Agreements, as defined in §2-61(a), above, including but not limited the terms and conditions of employment and any benefits, retirement or pension enhancements for classified and unclassified personnel whether or not they require approval by any other public agency of the City under the General Statutes or the Charter, Special Acts or Ordinances of the City.”

The disclosure is subject to the following requirements:

- The terms of any oral agreement shall be reduced to writing by the Disclosing Official or Agency, as defined herein.
- Agreements pertaining to confidential matters or the privacy rights of individuals as required or permitted by federal or state law may be redacted in order to protect the identity of the employee entitled to the protections afforded by law.

Corporation Counsel, nor any deputy or assistant Corporation Counsel, may enter into a settlement on behalf of the City of any matter in litigation, the result of which would bind the City to make a payment in excess of five thousand dollars, or such greater amount as the Board of Alders may approve from time to time, unless said settlement has been approved by the litigation settlement committee.

² Drafting Note: The new language was in response to an issue raised by Pension Counsel in order to more accurately reflect the types of actions taken by pension boards.

³ Drafting Note: The term “agencies or boards charged with the management and administration of (municipal employee pension funds)” replaced the prior language to clarify that the entity is responsible for reporting as opposed to the individual trustees as asserted by Pension Counsel. Admittedly the criticism was picayune and somewhat off-base since it was never the intent to have individual members of boards and commission assuming the obligation to “disclose;” however, it never hurts to clarify.

Steven G. Mednick

Attorney

- Disclosure shall be made within thirty-six (36) hours of the completion of said agreement.
- Decisions for further public disclosure, including continuing compliance with confidential provisions therein, is within the discretion of the Review Committee.

Compliance. Section 2-61(d) of the proposed ordinance provides: “in the event the Agreement...requires the action or approval of another public agency for any reason whatsoever the Mayor and any Submitting Official or Agency shall submit said Agreement to the appropriate public agency for such action in accordance with all legal requirements.” These requests shall include, unless not deemed necessary by the review committee: (1) any actuarial cost benefit impact studies; and, (2) an opinion from the corporation counsel addressing the legal issues involved in the agreement, including, but not limited to the potential of averting litigation and the likelihood of a judicial or administrative award.

The ordinance also amended three existing provisions of the code. First, there is current code §2-152(b). Upon obtaining the mayor's written consent, and the litigation settlement committee's approval, the corporation counsel shall have the authority to settle, adjust or compromise any appeal, action or suit brought by or against the city, or to which the city is a party, including but not limited to administrative proceedings and grievances required by law or contract or any determinations, decisions, settlements or interpretations by the Mayor or any officer, employee, department, board, commission or agency, as defined in Ord. §1-2(15) of this Code⁴.”

Second is an amendment of Art. XIII of the Special Laws, §273(1) which clarifies that the reserve fund may be utilized for §278 settlements. Finally, Art. XIII of the Special Laws, §278 is amended to make certain that prior to utilization of the reserve funds all agreements will have been reviewed and acted upon by the Litigation Settlement Committee and by “such other entities whose approval is required by law.”

Issues Raised by the Corporation Counsel and Pension Counsel.

A number of issues have been raised by various parties, some of which have addressed and rectified in the Substitute Amendment.

1. **MERA “already sets forth the respective roles of the Mayor/Labor Relations and the Alders and passing a resolution that is contrary to the existing law will lead to uncertainty and confusion⁵.”** In the legislative finding set forth in proposed §2-61(b), the proposed ordinance makes it explicitly clear that the Mayor is granted authority under C.G.S. §7-474(a) to negotiate on behalf of the City. The proposed ordinance cannot

⁴ Drafting Note: The changes (“decisions, settlements or interpretations”) in the Substitute Amendment reflect a refinement and clarity of the language in order to pick up administrative actions and decision of entities such as the various city pension fund trustees. The specific reference to municipal employee pension funds is deleted since it is clear that they fall within the definition of a board, commission or agency of the City of New Haven.

⁵ Source: Email from Corporation Counsel, dated November 9, 2020.

Steven G. Mednick

Attorney

and does not negate or obviate such legal authority. On the other hand, there is no citation of any law or judicial decision that would question the authority of the legislative body of the municipality to adopt an ordinance that, plainly and simply, requires disclosure of the agreements and compliance with approval protocols set forth under law. To my knowledge there is no provision of MERA or any CBA that this ordinance would interfere with or violate. Thus, the notion of “uncertainty” or “confusion” does not appear to pertain.

2. “Further, the proposed approval process for labor settlements inserts a layer of resolution not among the options included under the collective bargaining agreements, which are already subject to Board approval after negotiation⁶.” Again, the proposed ordinance does not implicate the collective bargaining process or seek to undermine any processes established in our CBAs. The Mayor negotiates the agreements and proposes a final agreement to the Board of Alders. Nothing changes in that regard. This ordinance is designed to address the side agreements arrived at under the aegis of the provisions CBA resulting from, for example, a grievance, an interpretive dispute or unfair labor practice, inter alia. In the first instance these agreements should be disclosed and, where other approvals are required under law, including the Charter or ordinances, these agreement should be subjected to such approvals. MERA, in general, and C.G.S. §7-474(a), in particular, does not confer upon the Mayor the authority to unilaterally enter a final binding agreement in the event the action or approval of another public agency is required to effectuate such agreement. The proposed ordinance does not create or augment the authority of any approving body agency or official. Whatever authority that exists prior to the adoption of the ordinance will remain intact thereafter. Thus, the proposed ordinance does not add a “layer of resolution” that doesn’t already exist, it simply codifies a requirement to comply with currently existing legal obligations.

3. “Corporation Counsel and the Office of Labor Relations have concerns that this additional required approval will result in sanctions by the state labor regulatory authorities. If disputes arising from this legislation come before the Board of Labor Relations the City will need to spend attorney's time and/or outside counsel fees, and may be exposed to liability⁷.” As in the earlier criticisms, this general assertion does not cite any instance where the State Board of Labor Relations (“SBLR”) sanctioned a municipality for complying with the provisions of a local Charter or ordinance. The Corporation Counsel’s contention might be germane if state law or a CBA contained a provision that altered the Charter or ordinance. There has been no contention that a provision of any CBA exists that would alter our charter or inhibit the ability of this City to require disclosure and compliance as set forth in the proposed ordinance. Again, the ordinance does not create any new approval functions or any provision that would abridge any authority conferred upon the Mayor by a CBA. Moreover, as stated above, any party who challenges either the “disclosure” or “compliance” provisions of the ordinance would have to demonstrate how these provision conflicted with the law or any particular provision of a CBA.

⁶ Source: Email from Corporation Counsel, dated November 9, 2020.

⁷ Source: Email from Corporation Counsel, dated November 9, 2020.

Steven G. Mednick

Attorney

As an additional safeguard to protect the rights of employees, the ordinance provides for redaction of "...confidential matters or the privacy rights of individuals as required or permitted by federal or state law may be redacted in order to protect the identity of the employee entitled to the protections afforded by law" [proposed §2-61(c)] and does not add any approval requirements other than those which the Mayor is already obligated to comply with unless specifically negated by a provision of a CBA.

It should also be observed that there is clear case-law, rooted in an SBLR case, that stands for the proposition that if a party is conducting business with a municipality they need to be aware or noticed of the extent "...of the powers of municipal officers and agents with whom they contract." This proposed ordinance simply codifies the current "powers" and adds a disclosure requirement. In this respect, the ordinance is consistent with current standards.

In the last analysis I can't predict whether anyone will dispute or challenge the ordinance. One thing I can tell you is that anyone can sue or threaten to sue; yet, as a law professor of mine used to say "the question remains, can they win?" As a general proposition, without some more demonstrable fact to support or validate a potential legal challenge, I would advise that a legislative body should not refrain from the exercise of its legislative functions. In my view, at this juncture, there is simply an undocumented assertion that a disgruntled party may seek sanctions which would require the defense of legislative authority. On the basis of my past experience I will attest to the fact that defending the authority of the Board Alders to adopt an ordinance is well within the purview and capabilities of the outstanding attorneys in Office of the Corporation Counsel.

4. "As to disclosure, there is no need to legislate to require disclosure, because the documents in the proposed ordinance would be available to the Board upon request without need for the ordinance. We do not know of any instance under the current administration when requested materials have not been provided to the Board." The Corporation Counsel has graciously offered to disclose the documents proposed under the ordinance and has stated that there is no instance in which the current administration has failed to provide requested documents to the Alders. With regard to the issue of the actions of the current Administration I can repeat my testimony to the Legislation Committee: to my knowledge, this ordinance was not motivated by the actions of the current administration. The genesis of this ordinance is the failure of a prior Administration to disclose the 2006 agreement in a timely manner. The result was the P+F Fund and its administrators were blind-sided and not aware of the agreement until twelve years after it was agreed to. The controversy around that agreement and many others that have been negotiated thereafter form the basis for the decision to draft this ordinance. In fact, it should be pointed out that it was Mayor Elicker who disclosed the 2006 and later related agreements to the leaders of the Board of Alders.

As to the Corporation Counsel's amiable agreement to disclose, it should be stated simply and succinctly, that in absence of an across-the-board disclosure requirement the Alders and members of the public would have no idea what agreements were in the pipeline. The Alders cannot conduct be expected to conduct business on the basis of rumors or

Steven G. Mednick

Attorney

whispers in the hallway about what side agreements are being made. That is the basis for the disclosure requirement and the need for this ordinance.

5. Requirement of Disclosure of Agreements by the Trustees to the Board of Alders.

A. Alders have authority to regulate pension benefits to be paid to the Executive Management and Confidential Employees; however, does not authority to require disclosure of Agreements by CERF⁸. Pension Counsel concedes that the Board of Alders possesses the "...authority to enact ordinances that regulate the pension benefits to be paid to Executive Management and Confidential Employees under Conn. Gen. Stat. §§7-148(b)(5)(A) and 7-450." I agree, although I would point out that the proposed ordinance does not seek to address the issue of pension benefits; but rather the exercise of legislative authority over the procedures to be followed by city officials and other city entities.

Counsel then proceeds to assert that

"...the obligations of the Trustees with *respect to pension benefits to be paid to other City employees* are governed by the collective bargaining agreements entered into under MERA, Conn. Gen. Stat. §7-467 et seq., the Connecticut Fiduciary Powers Act, Conn. Gen. Stat. §45a-199 et seq., IRS regulations regarding qualified plans, and other relevant state statutes, such as the nonalienability of pension funds statute (Conn. Gen. Stat. §52-321a)" (emphasis added).

Again, I agree with this assertion; although I once again want to point out that the proposed ordinance does not address in any way, shape or form "pension benefits to be paid" and does not abrogate any explicit or implicit provision of MERA, the Connecticut Fiduciary Powers Act, IRS regulations or any other state law governing the decision-making process of any board of trustees.

I do vehemently disagree with Pension Counsel's blunt and categorical assertion, as follows:

"The Board of Alders does not have the authority to require the Trustees of CERF (or the Trustees of the Policemen and Firemen's Fund) to make reports to it about Agreements, as is being proposed the Ordinance."

That is it, the full extent of the declaration, sort and sweet and to the point⁹. Yet, if you review the original letter, Pension Counsel did not cite any statute or case-law to support this proposition...just a conclusion.

⁸ Source: Letter from Pension Counsel, November 18, 2020.

⁹ Please note that following a telephone conversation on November 30th where I sought to understand the position of counsel she made a further argument regarding the status of pension boards as independent entities, which I will discuss later in this letter.

Steven G. Mednick

Attorney

Pension Counsel fails to state how a “disclosure” requirement would exceed the legislative authority of the Board of Alders to adopt such this particular ordinance and doesn’t believe that the pension boards should be covered by the ordinance. As discussed, the proposed ordinance also requires other city officials to “comply” with law by submitting pertinent matters to entities like the pension board and their administrators. One would think that such entities would be interested receiving such information in lieu of the City making decisions or entering into agreements that could impact on the fiduciary responsibilities which Pension Counsel has aggressively asserted in her correspondence and discussions. In the context of the 2006 agreement and the subsequent actions of the P+F Fund over a decade later, I would have expected that this ordinance would be greeted with open arms by the pension boards. Yet, there is no legal basis for their opposition, only a tactical decision to defend their turf, which this ordinance does not encroach on in any way.

In the last analysis, the proposed ordinance is consistent with the express grant of authority and the specific delineation of “powers” as set forth in C.G.S. §7-148(b) and (c), respectively. Moreover, under the Charter of the City of New Haven the Board of Alders is the legislative body of the City (Charter Article IV, Sec. 1.A) and, as such, possesses

the authority to exercise “all powers conferred upon said City except as otherwise provided” with the approval of the Mayor or over the Mayor’s veto (Charter Article IV, Sec. 1.A (1)) and the “power to carry into effect and operation, by appropriate Ordinances with the approval of the Mayor, or over said Mayor’s veto as provided in this Charter, all powers of the City as provided in this Charter” (Charter Article IV, Sec. 1.A (2)).

The legislative authority includes the responsibility for adopting ordinances (Charter Article IV, Section 3), subject to the Mayors approval or disapproval (Charter Article III Sec. 2.B (2) (e)).

B. A Burdensome Requirement¹⁰. Pension Counsel further argues that the disclosure requirement is “...unduly burdensome for the seven trustees of each Fund and is unnecessary, because assumably officials of the City who have made such Agreements will have reported such Agreements to the Board of Alders (within the required 36 hours of making the Agreements) long before the Trustees, who meet once each month, have knowledge of the Agreements.” I am not certain what the quote language actually means; however, to allay any concerns the Substitute Amendment modifies the definition of “Disclosing Official or Agency” or “Submitting Official or Agency” in order make it clear who is required to disclose; see, proposed ordinance §2-61(a)(3) .

There was never any expectation that the individual members of any board or commission would carry the burden of disclosure for Agreements that they approve or

¹⁰ Source: Letter from Pension Counsel, November 18, 2020.

Steven G. Mednick

Attorney

ratify; or that they would be responsible for the Agreements of other parties. Pension Counsel is correct that if a side agreement negotiated by another party is submitted to the Pension Board, it is the duty of the party that negotiated the Agreement to disclose. If the ordinance is working as it should the Disclosing Officials would “disclose” to the Review Committee and would, then “comply” with any approval or review obligations by submitting to the appropriate body or official.

6. Assumptions Regarding Acceptance of Modifications to the Pension Plans and Enhancements of Pension Benefits¹¹. I agree with Pension Counsel’s observation on proposed ordinance §2-61(a) (1) regarding the issue of pension modification and have made appropriate changes in the Substitute Amendment. In her letter, counsel asserts that the

“...provisions of the pension plans are set forth in the collective bargaining agreements and the Executive Management and Confidential Employees’ Manual, which the Trustees must follow, and the Trustees do not approve modifications of the pension plans. Additionally, both Funds have adopted policies stating that enhancements of pension funds will not be paid.”

That may be so but it makes no difference with respect to this analysis¹². On the other hand, it is true that a pension boards could make determinations, decisions or interpretations of policies that resolve issues or provide a basis for instruction to its professional staff and consultants. If enacted during a meeting, such action would be reflected in the minutes and need not be submitted to the Review Committee. However, in the event the board were to enter an agreement with a third party, as a result of a grievance or unfair labor practice allegation, that agreement would be subject to disclosure, even if ratified at a public meeting.

7. Corporation Counsel's Authority to Settle Cases Involving Determinations by the Pension Trustees. It was not the intent of the ordinance to open a can of worms on the respective authority of the City and the pension board to settle its cases. Accordingly, I am recommending deletion of the language that specifically references the trustees. This amendment does not concede the issue of appropriate jurisdiction between the corporation counsel and the pension boards, which, I believe, is better left to the Corporation Counsel and the departments, boards, commissions and agencies of the City of New Haven.

8. An Assertion of Pension Board Independence: They are not City Departments. In a follow-up discussion to the objections raised by Pension Counsel on behalf of CERF and subsequently joined by the P&F Fund. The following additional assertions were advances:

- The Pension Boards “...are independent entities and not City departments and therefore the Ordinance should not apply to them¹³;

¹¹ Source: Letter from Pension Counsel, November 18, 2020.

¹² Note: While I cannot vouch for the statement on the inclusion of pension plans in the CBAs.

¹³ Source: Email from Pension Counsel, November 30, 2020 @ 4:55 PM.

Steven G. Mednick

Attorney

- The “Special Acts provide that the Retirement Board shall be the ‘trustees’ of the fund. There is no mention of the Boards being City departments¹⁴.”

Counsel also provided a series of cases and copies of the applicable trust documents in order to advance her position, all of which I read.

First things first, a review of some relevant provisions of the Charter is in order:

- “Board” or “Commission” means “all Boards, agencies, Commissions, authorities or like entities of the City, whether elected or appointed” (see, Article I, §4.B);
- “Departments” mean “any major functional or administrative division of the City, including any subordinate offices, divisions, institutions, agencies, bureaus or other descriptions serving such purpose *as may be set forth in the budget of the City*. When used within the section establishing or describing the duties of the particular Department or its related Board or Commission, the term ‘Department’ shall apply exclusively to the functional division referred to in that section” (See, Article I, §4.I);
- “Pensions and pension boards shall be governed by the General statutes and Ordinances” notwithstanding “Anything herein to the contrary” (See, Article XI, §1).

Furthermore, it is useful to note that the P+F Fund is derived from Special Act 1957 No. 531 and was eventually consolidated by an ordinance approved by the Board of Alders dated May 29, 1990. Under Article XI, Division 2 of the Code of Ordinances the “pension board” is responsible for the following:

- “management and administration of the pension plan” (§201);
- Operating as “trustees of said fund” (§201);
- Submitting annually to the mayor....a schedule of its estimated expenses necessary to carry out the purpose of the funds and the mayor shall include said estimate in the estimates to be submitted to the board of aldermen in accordance with charter requirements relative to annual estimates and appropriations for the city of New Haven” (§202)

Similarly, the CERF which was originally established on “January 1, 1938 under provisions of the City Charter to provide service and disability pensions, as well as death benefits, to eligible employees of the City of New Haven. The Fund is administered by a retirement board consisting of seven members” and the administration is conducted by

¹⁴ Source: Email from Pension Counsel, November 30, 2020 @ 3:35 PM.

Steven G. Mednick

Attorney

employees of the Department of Finance¹⁵. The retirement board is established and its powers, as administrator, are set forth in Article IX Division 1, §123 of the Code of Ordinances. Moreover, the treasurer of the City is the treasurer of the fund (§122) and the board, like the P+F Fund, makes annual submissions for appropriations “necessary for the administration of the plans” (§123). The Board is obligated to “...invest and reinvest all of said fund in accordance with the provisions of the general statutes governing trust funds” (§123).

At this point in the review it is hard to draw a conclusion that the pension boards are “not City departments¹⁶.” This conclusion is further bolstered by the terms used in the Bylaws of the P+F Fund where it describes the pension board as the administrator of the Plan and the manager of the investment of the fund “in accordance with applicable federal, State and local laws and regulations¹⁷.” Likewise when CERF Trustees adopted the “Amended and Restated Investment Objectives and Guidelines” on April 18, 2018 they did so “in keeping with the fiduciary requirements under existing federal, state and local laws.”

I do agree with Pension Counsel's analysis of the sanctity of Board decision-making autonomy, pursuant to the two trust agreement governing their protocols¹⁸. Nevertheless, there is nothing in the Special Acts, the ordinances amendments thereto that would create an assertion that the pension commissions are anything but city entities that remain subject to the lawful and authorized ordinances and regulations of the City of New Haven.

Following a review and analysis of the cases provided to me by Pension Counsel my opinion remains the same: the Board of Alders has the authority to request disclosure of agreements by pension boards of the City of New Haven.

In short, Pension Counsel advances the notion that the trustees are “independent” of the City, meaning they are not boards of the City of New Haven. I found no authority for such a proposition in the cases provided to me. In one case advanced by Pension Counsel to support that proposition, the Supreme Court concluded that a “pension board is a *distinct entity* which was not made a party to the agreement (a CBA) and could not, therefore, have agreed to grant it powers to an arbitrator” (emphasis added) who derived his powers from the CBA¹⁹. Again, the proposed ordinance does not seek to control or encroach upon the

¹⁵ Source: Annual Report of the City Employees' Retirement Fund FY 2010-2011.

¹⁶ Pension Counsel used the term “department” when “board or “commission” was a more apt description.

¹⁷ Source: See, Section 1 of the Bylaws of the Pension Board of the City of New Haven Policemen & Firemen's Pension Fund established and adopted: May 17, 2018

¹⁸ Source: Trust Agreements between the (1) City of New Haven and the Pension Board of the Policemen and Firemen's Pension Fund, dated January 1993; and (2) City of New Haven and the Retirement Board of the City of New Haven Retirement Fund, dated July 1, 2003.

¹⁹ **Sullivan et al v. City of New Haven**, 376 A.2d 399, 404 (1976): “It is impossible to say that the substantive provisions of the pension plans were made part of the agreement (CBA) or that the parties signified their willingness to submit pension disputes to arbitration” Id., at 404. Likewise, in **Beauregard v. City of Norwalk**, 1998 WL 552662 (1998) the Superior Court found that the board of education could not usurp the functions of the pension board when the board was established by charter with the “responsibility for the pension plan with the town thus removing the sole and exclusive control over pension benefits from the board of education.” A similar conclusion was reached by the Superior Court in **Simonds v. Pension Board of the Town of Plainfield**, 2001 WL 811189 (2001). In fact, in **Simonds**, the court, fn 1, cited C.G.S. 7-148(c) (5) (A) which gives municipalities the power to “provide for an establish pension systems

Steven G. Mednick

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fiduciary functions. The ordinance simply requires the boards to submit side agreements, if any, to the Review Committee (the "disclosure" function) and requires other officials to recognize the functions of the boards when making side-agreements that would fall within the purview of the respective pension boards (the "compliance" function). Finally, it is fair to say that the notion of a "distinct entity" addressed by the court was not a declaration that the board was an entity apart from the City; but rather, that the pension board was not a party to the CBA and not within the ambit of an arbitration requirement in that case. The case-law does not advance an argument of board independence.

The irony in the opposition of the pension boards is that proposed ordinance was, in fact, designed to avoid the kind of problem the P+F Fund faced when the 2006 agreement was placed in its lap twelve years after it was negotiated. I suppose the lesson learned is that you never know whether a drowning victim will catch the life-line. I hope that the changes in the proposed ordinance will persuade the boards that there is no desire to weaken or encroach upon their fiduciary responsibilities, only an imperative to expose side agreements to an appropriate level of public scrutiny.

In conclusion, the proposed ordinance is well within the scope of the authority and powers of the Board of Alders under the General Statutes of the State of Connecticut and the Charter of the City of New Haven.

Respectfully submitted,

Steven G. Mednick

SGM: oho

cc: Corporation Counsel Pat King
Attorney Carolyn Kone

for the officers and employees of the municipality." Furthermore, in **Town of Clinton v. United Public Service Employees Association et al**, 2007 WL 1470451 (2007) the Superior Court cited **Sullivan** for the proposition that the "mere mention of the pension plan" in a collective bargaining agreement "does not constitute incorporation of the pension plan, the pension plan is a distinct entity, and the agreement fails to incorporate the pension plan verbatim." Again, the reference to a "distinct entity" does not confer an independent status on the pension board as distinct from the town but rather acknowledges that its functions were not usurped by the CBA. The final case cited by Pension Counsel, **City of Milford and Local 1566, Council 4, AFSCME, AFL-CIO and Richard Dowd** (Connecticut State Board of Labor Relations Case No. MPP-20,150 (1999) stands for the proposition that the pension board is an "autonomous agency" upon which an arbitration had "no authority to direct the City to tell the Pension Board what to do." I agree. The City of New Haven has no authority to direct the decisions of the pension board as a fiduciary; however, there is no law that stands for the proposition that the pension boards are not subject to the charter, ordinances and regulations of the City that govern the subject matter of the proposed ordinance: disclosure and compliance.

Steven G. Mednick
Attorney

SCHEDULE A-1

From: Patricia King
Sent: Monday, November 9, 2020 12:04 PM
To: Steve Mednick <SMednick01@snet.net>
Cc: Sean Matteson <SMatteson@newhavenct.gov>
Subject: Proposed Ordinance

Good afternoon Steve:
Please see comments to the proposed ordinance below:

The Municipal Employees Relations Act (MERA) already sets forth the respective roles of the Mayor/Labor Relations and the Alders and passing a resolution that is contrary to the existing law will lead to uncertainty and confusion. Further, the proposed approval process for labor settlements inserts a layer of resolution not among the options included under the collective bargaining agreements, which are already subject to Board approval after negotiation. Corporation Counsel and the Office of Labor Relations have concerns that this additional required approval will result in sanctions by the state labor regulatory authorities. If disputes arising from this legislation come before the Board of Labor Relations the City will need to spend attorney's time and/or outside counsel fees, and may be exposed to liability.

As to disclosure, there is no need to legislate to require disclosure, because the documents in the proposed ordinance would be available to the Board upon request without need for the ordinance. We do not know of any instance under the current administration when requested materials have not been provided to the Board.

Best,
Pat

Patricia King
Corporation Counsel
Office of the Corporation Counsel
City of New Haven
165 Church Street-4th Floor
New Haven, CT 06510
Tel: 203-946-7951
Cell: 203-668-9282
Fax: 203-946-7942
pkings@newhavenct.gov

Steven G. Mednick
Attorney

SCHEDULE A-2

More

City's lawyer pushes back on proposed disclosure ordinance

By Mary E. O'Leary

NEW HAVEN — This could be the end of the surprise side agreements with labor.

An ordinance that clearly lays out the fiscal role of the Board of Alders is out of committee and on its way to the full board for a vote, although corporation counsel has raised concerns it may cause some confusion with labor bargaining rules as laid out in state statutes.

Attorney Steven Mednick said he amended his original proposal based on some concerns of Corporation Counsel Patricia King, but he generally pushed back that there was any conflict between the proposal and the Municipal Employees Relation Act, which details the collective bargaining process.

The ordinance is labeled the Disclosure, Accountability and Compliance act. It makes clear that the mayor,

as the chief executive officer, is the person with the power to negotiate contracts, or he or she can delegate that, most likely to their labor relations director.

The main point is to require disclosure to the Board of Alders of all written and oral agreements, covering such things as memorandums of understanding and side letters, mainly in the labor realm, but not limited to that.

He said the information will be shared with the aldermanic president, the majority leader and the minority or third officer in matters that require confidentiality.

Mednick said the executive has the authority to negotiate a contract, but not to enter a final bargaining agreement. He or she cannot sign off on a multi-year contract, which comes back to the board.

The attorney said the board should be informed of the terms and conditions of employment and pension enhancements. He

said it does not necessarily mean that there's a role for the board in every instance, beyond the leadership reviewing and possibly discussing an agreement to the board.

He wants disclosure within 30 days after the completion of an agreement.

King said the Municipal Employees Relations Act already sets forth the respective roles of the mayor, labor relations and the alders and passing a resolution that is contrary to the existing law will lead to uncertainty and confusion.

The corporation counsel said "the proposed approval process for labor settlements inserts a layer of resolution not among the options included under the collective bargaining agreement, which are already subject to board approval after negotiation."

King said her office and the Office of Labor Relations have concerns that this additional

required approval will result in sanctions by the state labor regulatory authorities.

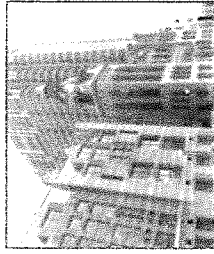
"If disputes arising from this legislation come before the Board of Labor Relations the city will need to spend attorney's time and/or outside counsel fees, and may be exposed to liability," King wrote.

"As to disclosure, there is no need to legislate to require disclosure, because the documents in

the proposed ordinance would be available to the board upon request without need for the ordinance. We do not know of any instance under the current administration when requested materials have not been provided to the board," King said.

Mednick agreed that there were not necessarily talking about Mayor Justin Elicker.

The proposed ordinance and a lawsuit filed by the board against Elicker came out of a dispute in which he paid for a settlement



New Haven City Hall

that was reached by his predecessor, Mayor Tomi Harry. He has said he would not have agreed to the settlement, but felt he had to cover the cost as a city obligation.

In the settlement, retired Fire Department Battalion Chief Frank Ricci's pension was enhanced, which the Pension Board would not approve. The multi-year agreement was covered by a \$326,689 annuity approved by Elicker. The alders wanted because it was not put out to bid and it was more than \$200,000 it was within their purview to vote on.

marioleary@newhaverregister.com; 203-641-2577

Clinical trial specialist at Yale warns against holding large holiday gatherings

By Verónica Del Valle

The decision placed further restrictions on private gatherings, both indoors and outside, in the warmer months, the state encouraged people to keep indoor gatherings below 25 people and outdoor

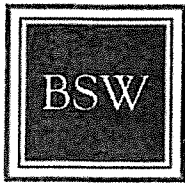
both live in Washington, DC, on Wednesday to have a serious discussion about what the holiday might look like.

"When you're in your bedroom, you don't have to worry about wearing a



Steven G. Mednick
Attorney

SCHEDULE B-1



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November 18, 2020

Attorney Steven Mednick (via email smednick@snet.net and first class mail)
152 Temple Street
New Haven, CT 06510

Re: Ordinance Re – Disclosure, Accountability and Compliance

Dear Attorney Mednick:

I have reviewed the proposed Ordinance Re-Disclosure, Accountability and Compliance (the "Ordinance") with the Trustees of the City of New Haven City Employees' Retirement Fund ("CERF") and the Pension Administrator, and, while they are appreciative of the efforts being made to promote transparency with respect to settlements with employees that involve CERF, they are concerned about the possible abrogation of their authority which could result from the enactment of the Ordinance as presently drafted. Enclosed please find a redlined version of the Ordinance with the requested changes.¹

There are three areas of concern with respect to the Ordinance as follows:

1. Requirement of Disclosure of Agreements by the Trustees to the Board of Alders

Although the Board of Alders does have authority to enact ordinances that regulate the pension benefits to be paid to Executive Management and Confidential Employees under Conn. Gen. Stat. §§ 7-148(b)(5)(A) and 7-450, the obligations of the Trustees with respect to pension benefits to be paid to other City employees are governed by the collective bargaining agreements entered into under MERA, Conn. Gen. Stat. § 7-467 *et seq.*, the Connecticut Fiduciary Powers Act, Conn. Gen. Stat. 45a-199 *et seq.*, IRS regulations regarding qualified plans, and other relevant state statutes, such as the nonalienability of pension funds statute (Conn. Gen. Stat. § 52-321a). The Board of Alders does not have the authority to require the Trustees of CERF (or the

¹ I understand that there have been revisions to the Ordinance but do not believe that any of the changes address the concerns outlined in this letter.



Brenner, Saltzman & Wallman LLP

Trustees of the Policemen and Firemen's Fund) to make reports to it about Agreements, as is being proposed the Ordinance. Moreover, such requirement is unduly burdensome for the seven trustees of each Fund and is unnecessary, because assumably officials of the City who have made such Agreements will have reported such Agreements to the Board of Alders (within the required 36 hours of making the Agreements) long before the Trustees, who meet once each month, have knowledge of the Agreements.

2. Assumptions Regarding Acceptance of Modifications to the Pension Plans and Enhancements of Pension Benefits

Section 1(a) defines "Action or Approval of a Public Agency" to include the "acceptance of proposed modifications of or enhancement of pension funds by the respective fiduciaries." However, the Trustees do not accept "proposed modifications of or enhancements of pension funds." The provisions of the pension plans are set forth in the collective bargaining agreements and the Executive Management and Confidential Employees' Manual, which the Trustees must follow, and the Trustees do not approve modifications of the pension plans. Additionally, both Funds have adopted policies stating that enhancements of pension funds will not be paid. Accordingly, this provision should be eliminated.

3. Corporation Counsel's Authority to Settle Cases Involving Determinations by the Pension Trustees

Section 2 authorizes the Corporation Counsel to settle cases in which the City is a party which involve determinations by the Trustees. Determinations by the Trustees include decisions that an employee is not disabled, is no longer disabled, is not entitled to service connected disability benefits as well as calculations of benefits, determinations of overpayments and repayment arrangements, and investment decisions, etc. The Corporation Counsel should not be empowered to settle claims arising out of these determinations as such decisions are in the sole purview of the Trustees, and this language should be eliminated.

Thank you for your attention to these concerns, and please share this letter with the Board of Alders.

Very truly yours,

A handwritten signature in cursive script that reads "Carolyn W. Kone".

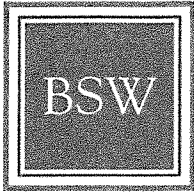
Carolyn W. Kone

Enclosure

cc: Albert Lucas
CERF Trustees
Leanna Ambersley

Steven G. Mednick
Attorney

SCHEDULE B-2



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Jill Rendeiro

November 30, 2020

Attorney Steven Mednick (via email smednick@snet.net and first class mail)
152 Temple Street
New Haven, CT 06510

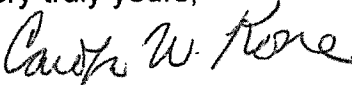
Re: Ordinance Re – Disclosure, Accountability and Compliance

Dear Attorney Mednick:

At its meeting on November 25, 2020, the Trustees of the Policemen and Firemen's Pension Fund voted to join in the letter that I sent to you on behalf of Trustees of the City Employees' Retirement Fund on November 18, 2020 regarding your proposed Ordinance Re-Disclosure, Accountability and Compliance (the "Ordinance"), as revised. A copy of my November 18, 2020 letter is attached to this letter.

Thank you for your attention to these concerns, and please share this letter with the Board of Alders.

Very truly yours,


Carolyn W. Kone

Enclosure

cc: Albert Lucas
P&F Trustees
Leanna Ambersley

Steven G. Mednick
Attorney

SCHEDULE C

Legislative Reform: Disclosure, Accountability and Compliance

Outline of the Ordinance Re – Disclosure, Accountability and Compliance

Purpose: To require the disclosure to the Board of Alders of all written and oral “side agreements” including but not limited to agreements, memoranda of understanding, letters of understanding, side letters and the like negotiated by the Mayor or his or her designees or other City officials or agencies related to the terms and conditions of employment and any benefits related thereto, including, but not limited to retirement or pension enhancements, for classified and unclassified personnel whether or not they require approval by any other public agency of the City under the Charter, Special Acts or Ordinances of the City. Moreover, the ordinance also requires submission (for action or consultation) to the appropriate public agency in cases where the Charter, Special Acts or Ordinances of the City require the approval or other action on such agreements, by, for example, the Board of Alders, Litigation Settlement Committee as well as agencies or boards charged with the management and administration of municipal employee pension funds. The ordinance recognizes the authority under granted to the chief executive officer of the City under C.G.S. §7-474(a) as the representative for the purposes of negotiating agreements; however, clarifies that the authority to negotiate does not confer the authority to enter a final binding agreement, if other legal requirements are required by local law

ORDINANCE RE – DISCLOSURE, ACCOUNTABILITY AND COMPLIANCE WITH LOCAL APPROVAL PROCEDURES

1. Chapter 2, Art. III, Division 1 of the New Haven Code of Ordinances is amended by adding Section 2-61, as follows:

(a) **Agreement Defined.** As used in this section the term

(1) “Action or Approval of a Public Agency” shall mean actions or approvals required by the General Statutes or the Charter, Special Acts or the Ordinances of the City, including, but not limited to transfers of funds or other required approvals by the Board of Alders; approval of a settlement by the Litigation Settlement Committee; or, determinations, decisions, settlements or interpretations pertaining to the administration of pension funds by the appropriate agency or board.

(2) “Agreement(s)”, whether in writing or oral shall include but not be limited to contracts, memoranda of understanding, letters of understanding, side letters and the like.

(3) “Disclosing Official or Agency” or “Submitting Official or Agency” shall include any designee of the Mayor, officer, employee, department, board, commission or agency, as defined in Ord. §1-2(15) of this Code, including but

not limited to, agencies or boards charged with the management and administration of municipal employee pension funds.

(b) **Legislative Finding.** The authority of the Mayor as the chief executive officer of the City to negotiate on behalf of the City, including but not limited to the authority granted under C.G.S. §7-474(a), does not confer the authority to enter a final binding agreement, in the event the action or approval of another public agency is required to effectuate such agreement. Moreover, in accord with the provisions of Ord. §1-2(15) of this Code: "Whenever the title of an officer, employee, department, board, commission or agency is given, it shall be construed to refer to an officer, employee, department, board, commission or agency of the City of New Haven."

(c) **Disclosure.** The Mayor and any other Disclosing Official or Agency shall report and disclose to the President, Majority and Minority Leaders (or, the third officer, as may be required by the Charter) of the Board of Alders (the "Review Committee") all Agreements, as defined in Sec. 2-61(a), above, including but not limited the terms and conditions of employment and any benefits, retirement or pension enhancements for classified and unclassified personnel whether or not they require approval by any other public agency of the City under the General Statutes or the Charter, Special Acts or Ordinances of the City. The terms of any oral agreement shall be reduced to writing by the Disclosing Official or Agency, as defined herein. Agreements pertaining to confidential matters or the privacy rights of individuals as required or permitted by federal or state law may be redacted in order to protect the identity of the employee entitled to the protections afforded by law. Said disclosure shall be made within thirty-six (36) hours of the completion of said agreement. Decisions for further public disclosure, including continuing compliance with confidential provisions therein, is within the discretion of the Review Committee.

(d) **Compliance.** In the event any Agreement, as defined in Sec. 2-61(a), above, requires the Action or Approval of another Public Agency for any reason whatsoever, the Mayor and any Submitting Official or Agency shall submit said Agreement to the appropriate public agency for such action in accordance with all legal requirements. All requests shall include, unless not deemed necessary by the Review Committee: (1) any actuarial cost benefit impact studies; and, (2) an opinion from the Corporation Counsel addressing the legal issues involved in the agreement, including, but not limited to the potential of averting litigation and the likelihood of a judicial or administrative award.

2. Chapter 2, Art. III, Division 4 of the New Haven Code of Ordinances is amended by modifying Section 2-152(b), as follows:

Upon obtaining the mayor's written consent, and the litigation settlement committee's approval, the corporation counsel shall have the authority to settle, adjust or compromise any appeal, action or suit brought by or against the city, or to which the city is a party, including but not limited to administrative proceedings and grievances required by law or contract or any determinations, decisions, settlements or

interpretations by the Mayor or any officer, employee, department, board, commission or agency, as defined in Ord. §1-2(15) of this Code.

3. Title II – Special Laws, Art. XIII, of the New Haven Code of Ordinances is amended by modifying Section 273(1), as follows:

There shall be established in the city of New Haven a reserve fund for the city's self-insurance plan, the purpose of which shall be to equitably provide for the payment of claims against the city arising out of its compensation and public liability, including settlements as set forth in section 278.

4. Title II – Special Laws, Art. XIII, of the New Haven Code of Ordinances is amended by modifying Section 278, as follows:

Said fund shall be used pursuant to section 279 hereinafter for the payment of any judgment, compromise, adjustment, award, or settlement under a voluntary agreement of compensation, including but not limited to workers' compensation agreements, memoranda of understanding, memoranda of agreement, letter of agreement, that may be entered into between the city of New Haven and a claimant and approved by the litigation settlement committee and such other entities whose approval is required by law, pertaining to (a) a claim causing compensable injury and which arose in and is chargeable to a year preceding the year of withdrawal; (b) any judgment, compromise, adjustment, award, or settlement that may be entered into between the city of New Haven and a claimant which is based upon the city's public liability responsibility and under a claim which arose and is chargeable to a year preceding the withdrawal; (c) the payment of compensation or public liability claims within the current year aggregating in damages an amount greater than remains in the general fund appropriations for such purposes; or (d) for legal services, when such services shall be provided by persons other than the corporation counsel and his assistants and when such services shall be obtained pursuant to the charter and ordinances, and expert witness services engaged by the city, upon the recommendation of the corporation counsel which the litigation settlement committee may deem an emergency or a necessity involved in the efficient and expeditious carrying out of the city's self-insurance plan.

SUBSTITUTED

12/07/14