

City Attorney's Office

To: Mayor Emily McFarland and Common Council Members

From: Steven T. Chesebro

Date: August 15, 2024

Subject: Informed Consent for Communications of Legal Counsel and Other Updates to Watertown Ordinance Section 136-11

Background

The American Bar Association Ethics and Professional Responsibility Committee has published an opinion that the use of professional listservs without obtaining informed consent could result in a violation of a City Attorney's ethical obligations as the Attorney's client may be readily identifiable. Based on the ABA opinion, input of State Bar of Wisconsin staff as well as other municipal attorneys, I request that the Common Council consider providing its informed consent to allow the City Attorney to communicate information related to its representation of the City to other attorneys when such communication benefits the City and does not disadvantage the City's legal position. In preparing the amendment to Section 136-11 to provide the informed consent, four other changes are proposed. These are each areas included in in other community codes which would provide clarification and could benefit the City. The second amendment creates a clear process for addressing public nuisance and filing of lawsuits on behalf of the City. The third amendment addresses authority to settle claims on behalf of the City. The fourth amendment requires the City Attorney to notify the Mayor and Common Council of relevant matters of law. The fifth amendment authorizes the City Attorney to assist or advise other municipalities provided that doing so does not conflict with the duties and obligations owed to the City of Watertown.

Attached is a proposed draft amendment to Section 136-11 Responsibilities of Attorney. First the proposed ordinance creates Section 136-11(B) to address the informed consent topic. It has long been a common practice for attorneys, as well as municipal attorneys throughout Wisconsin, to engage in communications with other attorneys who have expertise in specific legal matters. This collaboration may take the form of questions posted on a listserv sponsored by the League of Municipalities or the State Bar of Wisconsin, presentations or conversations at various conferences or meetings, or one-on-one conversations with individual attorneys who may have encountered similar legal issues or may be involved in litigation similar to matters being handled by the City Attorney.

Granting this informed consent would assist the City Attorney by allowing them to continue collaborating with and benefiting from the experience and expertise of other attorneys. It also would protect the City Attorney from potential complaints filed with the Office of Lawyer Regulation alleging that they have violated one of our rules of professional conduct. The informed consent established by the ordinance amendment may be revisited and/or revoked at any time.

The proposed ordinance creates Section 136-11(C) to address public nuisance lawsuits. Currently when public nuisance exists which are not cured after a citation is issued, a meeting is held with Building Safety and Zoning, the City Attorney and the Mayor's office to discuss the details of that building and whether to proceed with prosecution through Circuit Court or what other options may be available. This may result in following up with a committee for additional advice or recommendations. With the creation of Section C, a memo would be provided to the Mayor and all City Council Members should a situation arise where the City Attorney believes a nuisance action should be filed in court. The Mayor or any alderperson would then be able to request the matter be added as a closed session matter to the next City Council Agenda should additional information be desired. If no request is made the City Attorney would be authorized to proceed with filing the nuisance action. This would provide additional information to elected officials regarding public nuisances and what is being done to address them. It also clearly designates a process should it be needed for authorizing filing a public nuisance claim on behalf of the City.

The proposed ordinance creates Section 136-11(D) to address the City's process for settling claims. Currently any claims against the City are scheduled on the Finance Committee agenda and then the Common Council Agenda for settlement approval. This delays negotiations and settlement of some matters by typically at least 3 weeks and sometimes longer. Finance Committee has recently approved modifying this policy to have staff assist in resolving some claims and reporting back to the Finance Committee at least quarterly on the outcomes of those claims. The proposed language would permit the City Attorney to negotiate any claim which results in the City receiving or paying up to \$5,000. It should be noted that this may permit the City Attorney to negotiate settlements for substantially more than \$5,000 if covered by insurance and would only result in the City paying a \$5,000 deductible. The City Attorney is obligated to report any settled matters to the Finance Committee within 30 days of entering into a settlement agreement.

The fourth amendment provides a clear directive to the City Attorney to notify the Common Council and Mayor regarding relevant legal matters. This could be a change in the law, someone's misstatement of relevant laws, or providing updates regarding legal claims against the City.

The fifth amendment while not directly benefiting the City, does build good will among other communities in Wisconsin which then are more likely to assist and help the City should it be needed in the future. Given that it would be minor assistance to other communities and would not interfere with the duties of the City Attorney, the potential benefit would likely exceed the cost.

Budget Goal

Modernizes City Code and policies.

Financial Impact

Informed Consent Amendment: Saves \$3,000 - \$5,000 per year in consulting fees, potentially more in providing notice to avoid claims or address other pending topics in the legal community.

Public Nuisance Lawsuits Amendment: No Financial Impact as Council will be given a chance to approve or deny the filing of lawsuits. The section will simplify and clarify the process for initiating a lawsuit on behalf of the City.

Settlement Authority Amendment: No Financial Impact as discretion used to settle cases will be the same recommendation previously provided. May reduce time to resolve case resulting in quicker payment to residents or receipt of settlement funds. If abused by future City Attorney, Finance Committee would be made aware of and could address excessive settlements.

Recommendation

Approve Ordinance to amend Section 136-11 as presented.