

Resolution No. 2019-01

RESOLUTION TO SEEK CONTINUED PAYMENT OF LEGAL FEES ARISING FROM LITIGATION COMMENCED BY THE CITY OF WAUKESHA AGAINST ITS BOARD OF REVIEW, TO SEEK BUDGET AMENDMENTS AS NECESSARY, AND TO AUTHORIZE SPECIAL COUNSEL TO SEEK COURT SANCTIONS IN THE EVENT THE CITY FAILS TO PAY FOR COSTS ARISING IN THE LITIGATION COMMENCED BY THE CITY AGAINST ITS BOARD

WHEREAS, on or about August 10, 2018, the City of Waukesha ("City") commenced an action in Waukesha County Circuit Court, naming the City of Waukesha Board of Review ("Board") as Respondent, to challenge a decision of the Board (the "Litigation"); and

WHEREAS, the City Attorney's statutory duties include the duty to represent the Board, by Wisconsin Statutes Section 62.09(12)(a) and other laws, but the City Attorney cannot represent both the Petitioner City and the Respondent Board in the Litigation, so the City appointed special counsel to represent the Board in the Litigation as allowed by Wisconsin Statutes Section 62.09(12)(g); and

WHEREAS, on or about September 12, 2018, the City retained Municipal Law & Litigation Group, SC, by Attorney Eric J. Larson ("Special Counsel"), to represent the Board in the Litigation, by a retainer agreement that empowers Special Counsel to represent the Board "through all appeal and remand proceedings"; and

WHEREAS, on or about October 9, 2018, by duly adopted motion, the Board directed its Special Counsel to vigorously defend the Board in the Litigation; and

WHEREAS, on or about June 26, 2019, by duly adopted motion, the Board directed its Special Counsel to file an appeal with the Wisconsin Court of Appeals; and

WHEREAS, the Board is aware that its Special Counsel has repeatedly over the course of more than a full year sought to end the accruing costs of the Litigation by encouraging settlement discussions, but the City has brazenly, repeatedly refused to participate in such discussions, so the Litigation has continued with substantial ongoing costs; and

WHEREAS, the Board is aware that for a full year the monthly invoices of its Special Counsel were paid by the City as the Litigation progressed, with no involvement from the Board in budgeting for the cost, processing the invoices, or making the payment; but now the Board is informed that Special Counsel invoices for August and September, 2019, are outstanding and unpaid, and the City has responded that it has not budgeted the funds necessary to make the payments; and

WHEREAS, the Board is not an officer, department, nor budgetary authority of the City, and therefore is not empowered by Section 4.01 of the City Code to make budget requests; and the Board also has limited statutory powers by Wisconsin Statutes Section 70.46, et seq., and limited powers by City ordinance Section 3.03, and does not have the power to budget, nor the power to oversee a budget, nor the power to make payments; and the Board does not have, and never has had, a budget of its own, and in particular the 2019 adopted budget of the City, though it is some 270 pages in length, includes no "Board of Review" appropriations; and

WHEREAS, whatever mechanisms in the City have allowed the City's expenditures for the City's Litigation to be paid to date, including the expense of Special Counsel prior to the recent delinquencies, must continue for so long as the City of Waukesha chooses to continue to challenge the decision of its Board of Review; and

WHEREAS, the City's refusal to pay the Board's Special Counsel seeks to thwart justice, intentionally or not, as it could prevent the Board from defending itself against the Litigation commenced by the City; and

WHEREAS, even if the Court would allow the Board's Special Counsel to withdraw from representing the Board for non-payment, such withdrawal would not end the Litigation, but would result in the City Attorney having

an unresolved conflict of interest, as he would be legally obligated to represent both the City and the Board, which are adverse parties in the Litigation; so Special Counsel for the Board is not only advisable, it is required, for the City to maintain this action; and

WHEREAS, in response to the City Attorney's and City Clerk/Treasurer's request, Special Counsel has provided sufficient cost and fee estimates for the City to budget for the Litigation, by a Memorandum dated September 4, 2019; and

WHEREAS, the Board does not believe it is empowered by law to seek a budget amendment, nor does the Board believe the City is empowered by law to refuse to budget or pay for the expenses of the Litigation, but the Board is now compelled under duress to adopt the following resolution.

NOW, THEREFORE, BE IT HEREBY RESOLVED, by the Board of Review for the City of Waukesha, that the City Attorney, the City Administrator, the City Clerk/Treasurer, the City Finance Director, the City Finance Committee, the City Council, and any other City of Waukesha official or entity having authority, are hereby directed to promptly pay Special Counsel for all outstanding invoices arising in this Litigation.

BE IT FURTHER RESOLVED, that City Attorney, the City Administrator, the City Clerk/Treasurer, the City Finance Director, the City Finance Committee, the City Council, and any other City of Waukesha official or entity having authority, are hereby directed to budget appropriately, and amend budgets as necessary to make the foregoing payment of all past due invoices, and to make such further payment for Special Counsel as may be required as this matter proceeds; specifically, this direction includes budgeting the full amount of fees estimated by Special Counsel in a Memorandum dated September 4, 2019, plus an additional \$15,000 for the costs of litigating the dispute created by the City's current attempt to deny the Board legal representation; recognizing that these are estimated fees and costs and actual fees and costs will need to be paid as they arise, and recognizing further that this budget must be carried forward year to year until the litigation is finally concluded.

BE IT FURTHER RESOLVED, that in the event Special Counsel does not receive payment in full for all past due invoices within two weeks of the date of this Resolution, Special Counsel is authorized and directed to file a Motion for Sanctions with the Court, seeking all available remedies.

Dated this _____ day of _____, 2019

BY THE 2018 CITY OF WAUKESHA BOARD OF REVIEW

Sherry Larson, Chair

Attest:

Gina Kozlik
Board of Review Secretary