Joiner, Ricketts, Andrews & Henry, LLP

The Honorable Carl Goldfield
President, New Haven Board of Aldermen
Office of Legislative Services
165 Church Street
New Haven, Connecticut 06510

The Honorable Justin Elicker
Chairman, City Services and Environmental Policy Committee
Office of Legislative Services
165 Church Street
New Haven, Connecticut 06510

Dear Sirs:

Thank you for your letter of October 20, 2011, asking this firm for our legal opinion regarding several questions presented by the road closure provisions of the 1990 Agreement between the City of New Haven and Yale University.

FACTUAL BACKGROUND

The 1990 Agreement grows out of a recognition by both parties that the City of New Haven and Yale University are mutually dependent. As the Agreement stated, the relationship of Yale University and the City of New Haven has extended over almost three centuries. Each depends and draws upon the strength of the other. New Haven by virtue of its size, location, and richly diverse population provides a setting in which Yale has been able to grow as a university dedicated to educational excellence. (1990 Agreement, p. 1, last ¶.)

Recognizing this mutual dependency, the parties entered into a memorandum of understanding, and held extensive public hearings to determine the best course of action for both parties. These proceedings resulted in a broad contractual agreement in October 1990, envisioning "a new era of partnership, friendship and cooperation," based on the "mutually perceived benefits"

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that arise out of "cultivating the spirit of partnership for the long term future." (1990 Agreement, p. 1-2.)

The Agreement has two basic parts: (1) the street closing section, specifying the streets to be closed, and the financial consideration for these closings; and (2) provisions specifying various nonfinancial accommodations to the City for the closing. The central feature of this Agreement was the City's agreement to allow Yale to develop its New Haven campus by excluding vehicular traffic from New Haven's public streets in the Wall Street-High Street area. By closing these streets to traffic and making the area into a safe public walkway, the City allowed the University to make major improvements and provide a university-style environment for a central part of its campus. Yale fully paid for these improvements, reimbursed the City for its expenses in the project, and paid the City 1.1 million dollars for the closing of the streets.

The parties also intended to benefit the City. In consideration of City's decision to close the streets, Yale made a number of commitments to the City:

a. The University agreed to "explore the long-term vehicular parking needs of the general public, the University, and the Broadway merchants" (1990 Agreement, p. 4, ¶ 2.)

b. It agreed to cooperate with the City in efforts "to revitalize the neighborhood and the central business district in close proximity to Yale's campus and real property in the City." The agreement specifically included

1. "development of a downtown retail mall,"

2. "mixed use development of the Ninth Square," and

3. "continued development of the Science Park Development Corporation,"

including its impact on neighborhood development."

(1990 Agreement, p. 4, ¶ 2.)

c. To cooperate with the City in the development of an Urban Investment and Economic Development Working Group ('UIED Working Group'). The purpose of this Group was "to establish ways and means of ensuring that investment and economic development opportunities are maximized." The 1990 Agreement specified that the UIED Group would include a designee of the Mayor, a designee of the President of the Board of Aldermen, and designees of Yale. (1990 Agreement, p. 4, ¶ 3.)

d. The 1990 Agreement specified that the University reaffirmed its commitment for principles of the New Haven Development Initiative, including a commitment to invest approximately $50 million in economic development projects in the City of New Haven over a ten-year period. More specifically, to allow the City to keep track of the urban investments, the University agreed to provide annual reports on the status of such investments, starting in January 1991 and continuing annually thereafter. (1990 Agreement, p. 4, ¶ 4.)

e. As further consideration of the City's willingness to close its City streets, the University agreed to cooperate in the development of a Cultural Enrichment, Educational, and Social Outreach Working Group ('CEESO Working Group'). The purpose of this group was to establish ways and means of ensuring that cultural enrichment, educational, and social outreach opportunities are maximized. The 1990 Agreement specified that the UIED Group would include a designee of the Mayor, a designee of the President of the Board of Aldermen, and designees of Yale. (1990 Agreement, p. 4, ¶ 3.) Like the UIED Group, the membership of the CEESO Group was also to

include a designee of the Mayor, a designee of the President of the Board of Aldermen, and designees of Yale. (1990 Agreement, p. 4, ¶ 3.)

f. Finally, the 1990 Agreement provided the University agreed to cooperate in the development of a Neighborhood Relations Working Group to improve relations between the University, which has extensive real estate holdings in the area, and its neighbors. The 1990 Agreement specified that the UIED Group would include a designee of the Mayor, aldermen representing the wards adjacent to the central campus, and designees of Yale. (1990 Agreement, p. 5, ¶ 2.)

Taken together, the accommodation provisions and the road closure provisions of the 1990 Agreement provided an enlightened "game plan" to leverage the assets of the City and the University into a win-win procedure in the manner envisioned by the Agreement. (Cf. 1990 Agreement, p. 2, ¶¶ 1-2.)

Based on these commitments, the Board of Aldermen and Yale recognized the Agreement's potential for a "new era of partnership, friendship, and cooperation" based on the "mutually perceived benefits" that arise out of "cultivating the spirit of partnership for the long term future" (1990 Agreement, p. 1-2.) and approved the agreement. A copy of the order of approval is attached as Exhibit 1.

The initial performance of the Agreement went well. Yale paid for the expense of the street closing project and the $1.1 million to the City. Although the Wall Street-High Street area remains technically public streets, it has now been transformed into an elegant pedestrian area that fits well into the campus environment of Yale University.

Unfortunately, while the parties performed the street closing portions of the Agreement, the accommodation portions were never performed. It is unclear with whom the fault lies, but the following obligations were not met:

a. The UIED Working Group never went into effect. There was no concerted effort to establish ways and means of ensuring that investment and economic development opportunities are maximized.

b. The parties' commitment to work together in the New Haven Development Initiative went largely unquantified. The annual reports on the status of such investments were never provided.

c. Because the CEESO Working Group was never established, the cultural enrichment, educational, and social outreach opportunities never developed.

d. Similarly, the Neighborhood Relations Working Group was never established to improve relations between the University, the biggest real estate owner in the area, and its tenants, its commercial lessees, and its neighbors.

It is difficult to determine who, if anyone, was at fault for these failures.

THE NEW HAVEN CHARTER

All the actions occurred within the legal context of the Charter of the City of New Haven and its provisions. The Charter gives the Board of Aldermen the exclusive power over the streets and highways of the city. Section 45 makes this very clear.

The board of aldermen shall have sole authority over all streets

> **and highways, including sole authority to lay out, make or order new highways and streets and to discontinue the same.** No person shall open, within the limits of said city, any public or private way, except under the provisions of an order of said board of aldermen. Said board of aldermen is hereby authorized to order, lay out, construct, repair and alter public squares, parks, streets, highways, sewers, gutters, drains, bridges and walks, except as herein otherwise provided, when and where, in the opinion of said board, the public good shall so require, and to order the paving, macadamizing or other improvement of any street, alley or highway within said city. ... The department of public works and the department of parks shall execute all orders of the board of aldermen with reference to the matters referred to in this section. ...

New Haven Charter § 45. (Emphasis supplied.)

Under this provision it is the determination of the Board of Aldermen, and only the Board of Aldermen, that has the authority to close the streets in the Wall Street–High Street area, and to determine the terms and conditions of the closing. While there is little case law from Connecticut interpreting such a clause, similar clauses have been given broad construction in other jurisdictions.

For example, in *Ungerer v. Smith*, 765 F.2d 264 (1st Cir. 1985), the mayor of Pittsfield, Massachusetts had attempted to contract for the construction of a shopping center. The city's charter had specified that the city council had the "exclusive authority and power" over such matters. Answering the defendants' argument that the construction of a shopping mall was not the construction of a street or highway, the First Circuit held that street and highway construction was an "essential part of the mall undertaking," the city council, not the mayor, had the authority to enter into the agreement.

While the New Haven Charter confers the "sole authority" of streets and highways to the Board of Aldermen, it also requires the mayor, to enforce the 1990 Agreement. Section 12(d)

imposes on the mayor the duty to enforce city contacts. It provides

> It shall be the duty of the mayor ... [t]o see that all contracts and agreements with the city are faithfully kept and performed;...

New Haven Charter § 12(d).

In short, the Mayor has no authority to enter into a street-highway contract, and he cannot modify or alter such a contract. Notwithstanding this limitation on his authority, once such a contract has been entered into, the Mayor has a duty to enforce it.

QUESTIONS PRESENTED

With this background, you, as members of the Board of Aldermen have requested our legal opinion regarding the 1990 Agreement. This request specifically makes four inquiries:

1. What are Yale's obligations as part of the 1990 agreement?

2. How will the obligations of each of the parties under the 1990 agreement be impacted if the City chooses not to renew the closing of the streets to general vehicular traffic?

3. In this context of this agreement what does the phrase "mutually acceptable manner" mean?

4. What recourse does the Board of Aldermen have if the City of New Haven's administration does not follow the policies established by the Board generally, and specifically as a result of not forming working groups as required the Board generally, and specifically as part of the 1990 agreement between the City and Yale and not carrying out a 2003 order regarding assessment of Yale properties?

Let us consider each of these questions.

RESPONSES TO QUESTIONS PRESENTED

1. Yale's Obligations Under the 1990 Agreement.

In agreeing to the 1990 Agreement, Yale accepted substantial obligations set forth in detail above. Yale satisfied all of its obligations under the road-closing portion of the 1990 Agreement. Further, the nonmonetary obligations of the accommodation provisions were not specific enough to be enforced. It is fundamental that for a contract to be enforceable it must be of sufficient explicitness so that a court can perceive what are the respective obligations of the parties. *Soar v. National Football League Players' Ass'n,* 550 F.2d 1287, 1289-1290 (1st Cir. 1977). See also *Meaney v. Connecticut Hospital Ass'n.*, 250 Conn. 500, 520 (Conn. 1999). In the present matter, the accommodation provisions of the 1990 Agreement, i.e., the working groups, and their functions, are provided for, but only at a conceptual level. However, the current contract fails to explicitly state any detailed descriptions of the working groups' purpose or provide direction as to how they will function. Because the contract is not sufficiently explicit that a court can perceive the respective obligations of the parties, it is too indefinite to be enforced.

2. The Potential Impact of Reopening the Public Streets on the Parties' Obligations.

The 1990 Agreement virtually acknowledges the City has the authority to reopen the streets; there will be no adverse legal impact to the City if it decides to exercise this power.

The only restriction imposed by the language of the Agreement is that the "manner" should be "mutually agreed" upon by the City and the University and that it should be "fair to both sides.". As you will see however, these clauses have not been broadly construed. It is very doubtful the courts will enforce them here. At most, the City may have to obtain Yale's input as to the manner of

reopening the streets.

3. The Meaning of the Phrase "Mutually Acceptable Manner."

The 1990 Agreement provides that

> In the event that the City determines that the streets shall be reopened to vehicular traffic, the City and Yale shall arrange for such reopening in a mutually acceptable manner which is fair to both sides.

This clause cannot be used to hinder the City from exercising its power to reopen the streets. That would be illogical. At most, the clause simply means that the parties shall attempt to resolve the manner-of-reopening issue so that, if the reopenings occur, they can be carried out in a manner that is fair to both sides.

"The intent of the parties as expressed in a contract is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. ... [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and ... the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. ... Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity. *Severns v. Kulas*, 2011 Conn. Super. Lexis 956 (Hartford J.D., Apr. 15, 2011)

In the current matter, the City would at most be obligated to negotiate, in good faith, with the University regarding the manner in which the streets would be reopened. If the parties could not agree, the City could move forward with the reopening. A court is not likely to intervene; the

clause is likely to be regarded as an agreement to agree. At most, the "mutually agreeable" language might be construed to obligate the City to negotiate in good faith. The agreement provides no recourse to the University if the parties fail to agree.

4. The Board's Recourse if the Mayor Does Not Follow Board Policies Regarding the Working Groups.

The final question is somewhat broad. It asks —

> What recourse does the Board of Aldermen have if the City of New Haven's administration does not follow the policies established by the Board generally, and specifically as a result of not forming working groups required by the 1990 agreement between the City and Yale and not carrying out a 2003 order regarding assessment of Yale properties?

While this question is framed too broadly to be responded to without a great deal of additional research, it can be answered as to the working group issue very succinctly.

The 1990 Agreement was a contract involving the closing of city streets. As such, it was subject to the "sole authority" of the Board of Aldermen. New Haven Charter § 45. Because the working groups were "an essential part of the undertaking," the Board of Aldermen's approval was required. *Ungerer v. Smith*, 765 F.2d 264, 266 (1st Cir. 1985).

Because the Agreement was within the sole authority of the Board of Aldermen, the Mayor cannot now change or modify it. To the contrary, it is his duty under Charter § 12(d) to see that the 1990 Agreement is "faithfully kept and performed." He does not have the power to make a new contract by eliminating portions of the contract actually entered into. In the event that the Mayor refuses to act on its behalf, the Board of Alderman could seek a writ of mandamus in the courts.

Mandamus neither gives nor defines rights which one does not already have. It commands

the performance of a duty. It acts upon the request of one who has a complete and immediate legal right; it cannot and does not act upon a doubtful and contested right. *Boyko v. Weiss*, 147 Conn. 183, 186. The writ of mandamus is an extraordinary remedy to be applied only under exceptional conditions and is not to be extended beyond its well-established limits. *Chatfield Co. v. Reeves*, 87 Conn. 63, 64; *Lahiff v. St. Joseph's Total Abstinence & Benevolent Soc.*, 76 Conn. 648, 651. The essential conditions for the issuance of the writ to enforce the performance of a ministerial duty are: (1) The party against whom the writ is sought must be under an obligation imposed by law to perform some such duty, i.e., a duty in respect to the performance of which he may not exercise any discretion; (2) the party applying for the writ has a clear legal right to have the duty performed; and (3) there is no other sufficient remedy.

Under New Haven's Charter, the Board, and only the Board, has the authority to make this contract. (Charter § 45)

The Charter imposes a duty on the Mayor to see that City contracts are faithfully performed. If the Mayor refuses to perform his duties with respect to City contracts, the court can issue a mandamus requiring him to comply.

CONCLUSIONS

In conclusion, the Board of Aldermen has the "sole authority" to negotiate pertaining to streets and highways. Consequently, the Board of Alderman has the complete authority to make the 1990 Agreement. It also has the complete authority to address the street reopenings currently at issue.

The Mayor has a duty to enforce the 1990 Agreement. He cannot pick and choose which provisions he wants to enforce. He has a duty to enforce the entire agreement. Whatever the Board decides and however it decides to proceed, the Mayor has a duty to enforce any resulting contract.

Thank you for this referral. We look forward to assisting you if you need any further work on this matter

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