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City of Chicago

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Alderman Scott E. Waguespack
121 North LaSalle, Suite 300
Chicago, IL 60602

Dear Alderman Waguespack,

You requested that the City of Chicago Office of Inspector General (IGO) provide an expert's opinion on the following matters:

1. What, if any, aspects of the proposed Chicago Infrastructure Trust (CIT or Trust) would be within the IGO's jurisdiction?
2. Whether the Freedom of Information Act (FOIA) and the Open Meetings Act would apply in any way to the CIT.

As an initial matter and significant caveat, please note that the proposed ordinance and any related proposed executive orders as may be contemplated provide limited detail on actual operations and structure of the CIT. City Council testimony and public statements from the administration do not provide significant clarity.

Set forth below are my opinions, based upon the experience and research of my senior staff, a plain reading of the relevant law, and the experience of dealing with similar entities. The lack of reliable information presents at least two significant dangers.

First, the actual operations of the CIT could differ significantly from the assumptions we are making in giving these opinions, making those opinions moot.

Second, the administration could challenge some or all of the conclusions reached below regarding the IGO's jurisdiction. While jurisdictional challenges usually are resolved by courts, this administration has flatly asserted that the IGO has no legal authority to ask the court to resolve questions of jurisdiction related to the City. (*See Ferguson v. Patton*, No. 112488, Ill. Sup. Ct.). The serious implications of that approach cannot be overstated – if the administration believes that the IGO does not have jurisdiction over some or all aspects of the CIT, the administration would deny the IGO even the ability to have that decision reviewed by a court of law.

Therefore, while I believe that the opinions expressed below regarding the IGO's jurisdiction over the CIT are strongly grounded in the plain language of the relevant ordinances and other controlling authorities, the best practice and the only basis for public confidence respecting

oversight jurisdiction would be to write these provisions into the CIT ordinance directly. Moreover, the legislative record should include, in explicit terms, the Administration's position respecting the IGO's interpretation of its jurisdiction in relation to the CIT. Without these safeguards, there is no way to ensure that the IGO will be able to exercise any level of oversight over the CIT any plain language and precedents notwithstanding.

The efficacy and scope of oversight should be presently addressed; leaving these questions unanswered and jurisdictions undefined will only lead to legal disagreement and conflict down the road that will undermine public confidence in the integrity of this potentially beneficial program. As the leader of an office that is sure to run headlong into these legal hurdles, I am hopeful the City Council is able to clarify these matters before acting on the proposed legislation.

Subject to the significant concerns set forth above, my opinion is that most aspects of the CIT, as currently proposed and generally understood, would fall within the IGO's jurisdiction for a variety of reasons, including, but not limited to, the following:

- The CIT is not a separate, stand-alone unit of government; it is a City-chartered and managed not for profit entity, therefore making the CIT a City "program", over which the IGO is given a broad grant of general jurisdiction under MCC § 2-56-030 (c).
- City employees may be overseeing the CIT in an *ex officio* capacity.
- CIT board members will be Mayoral appointees.
- City funds will be used as seed and start-up money for CIT.

Additionally, I believe the IGO would have specific jurisdiction over these aspects of the CIT, should they occur:

- City-controlled funds (including private or public grants to the City, Tax Increment Financing (TIF) or similar special purpose funds) are used for CIT operations or projects;
- CIT enters into contracts (including intergovernmental agreements) with the City;
- CIT uses the City's bonding authority, or otherwise relies on the financial resources (including creditworthiness) to fund operations or projects;
- City employees or other resources (including office space) be detailed to or otherwise used by the Trust.

That said, we have several serious concerns about the CIT as proposed.

It is important to note that even under the broadest interpretation of the IGO's jurisdiction, the CIT would operate under significantly less scrutiny and transparency than City departments. Among the oversight and regulatory provisions that do not appear to apply to the CIT are the City Personnel Rules, the Ethics Ordinance, and *Shakman* decrees. Therefore, while the IGO may have jurisdiction to investigate or otherwise review aspects of the CIT, there appear to be no standards of conduct or performance against which to measure the CIT or hold it accountable.¹ And, in contrast to the City's and IGO's recent and notable efforts to make public as much data

¹ Although not publically confirmed to our knowledge, the CIT clearly envisions having employees to manage its operations.

regarding City operations as possible, there is no similar provision for CIT to be equally open to public scrutiny.

In addition, Trust projects in Sister Agencies may be beyond IGO jurisdiction. Therefore, a category of projects may exist for which oversight would be uncertain. The City's Sister Agencies, a series of government entities tasked with providing services to Chicago businesses and residents, have significantly varied levels of oversight in place to protect that agency's resources and Chicago taxpayers from unscrupulous vendors and employees – from robust to none. Sometimes, as is the case with the CPS, oversight is independent and effective. Other times, as is the case with the PBC, the Sister Agency board purports to contract out oversight duties and in no appreciable way functions as a standalone, independent oversight body.² In other cases, such as with the Chicago Park District, independent oversight does not exist in any form.

In an analogous situation, the PBC – the majority of whose board is appointed by the Mayor – refused to provide records to the IGO related to PBC contracts funded by sister agencies. I believe, just as our jurisdiction extends to City projects, that the Chicago Public School Inspector General would be able to investigate Trust-CPS projects. However, because of the restrictions placed on my office as to sharing information (*see* MCC 2-56-110), the City IGO would be unable to share relevant information with the CPS IG.

These legal strictures on the ability of oversight entities to cooperate, share leads, or cooperate on administrative investigations with one another allows for gross gaps in oversight, especially since Chicago government services are so intertwined. For instance, vendors may fraudulently sell their wares or services to one Sister Agency and be debarred, yet maintain other contracts with other Sister Agencies. Additionally, public employees who abuse their station may be terminated from one government body only to land in a similar role in another – despite their prior work history.

You also requested my expert opinion on whether FOIA and the Open Meetings Act (OMA) would apply in any way to the Trust. Unfortunately, I am unable to give you a definitive answer. As currently written, it is unclear to what extent FOIA and OMA would apply. In order for these laws to apply, the proposed legislation would have to indicate that all documents created and used by the Trust would be public records. However, even if these definitions were to be included in the proposal, there are multiple exemptions from each that would apply to a broad swath of Trust work.

The Trust's responsibilities under FOIA and the OMA could be strengthened by stating more explicitly in the proposed legislation that, based on the City's Home Rule Authority, the City is declaring the Trust is a public body for purposes of FOIA and OMA and is therefore subject to both. Then, the Illinois Attorney General's office would settle disputes over whether the Trust has complied with these laws.

² In fact, instead of following up on our findings of poor MWBE participation in PBC contracting, their contracted IG tried to refute our work, after having earlier tried to block our access to related documents. When the contract IG was created, it specifically excluded access to materials claimed to be Attorney-Client privileged, thus making the position even less effective than even a part-time IG would indicate.

I hope this analysis, offered on the basis of limited information, a cloudy and disputed public record helps clarify and inform your work. We stand by to provide more detailed analysis on this and other issues as needed and requested. I remind you that my office is a City resource; you, and your colleagues on the City Council, can make similar requests on other issues in advance of City Council consideration.

Please contact me with any questions or concerns regarding these recommendations or observations.

Very respectfully,

A handwritten signature in blue ink, appearing to read 'JM', with a long horizontal flourish extending to the right.

Joseph M. Ferguson
Inspector General
City of Chicago