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**City of Racine, Wisconsin
Common Council**

AGENDA BRIEFING MEMORADUM

COMMITTEE: Finance and Personnel

LEGISLATION ITEM #: 0139-18

AGENDA DATE: February 26, 2018

DEPARTMENT: City Attorney's Office

Prepared By: Nhu Tran

Reviewed By: Scott Letteney

SUBJECT: Communication from the City Attorney submitting the claim of Luis Cabrera for consideration.

EXECUTIVE SUMMARY:

Luis Cabrera filed a claim with the city requesting \$639.54 worth of damages to his vehicle as a result of a tree branch falling onto the vehicle during the night of December 5, 2017. Here, there was no prior notice of the defect in the tree, which turned out to be internal decay and hollow. As such, the city did not have a ministerial duty to repair and is immune from liability. For this reason, it is the recommendation of the City Attorney's Office that this claim be denied.

BACKGROUND & ANALYSIS:

The city is immune from liability for Mr. Cabrera's alleged damages pursuant to Wis. Stat. § 893.80. In short, state law confers broad immunity from suits on municipalities for acts that are considered "discretionary" in nature. A discretionary act is one that requires an exercise of judgment when applying rules to the facts. In the case of maintaining trees, the task of deciding which trees need pruning, maintenance or removal and when such actions should be taken are all discretionary acts requiring judgment on the part of the arborist. Given the discretionary nature of these acts, the city cannot be held liable for failing to prune or remove before its fall.

In some cases, the city could be held liable if it was given notice of a defect and its failure to remedy such defect was unreasonable. Here, there is no evidence that the city knew of the defect in the tree. Inspection of this particular tree was conducted as part of the annual summer inspection in August of 2017 and it was

31 not marked for removal at that time. Subsequent to the fall, it was determined that the branch fell due to a
32 combination of high winds and internal decay and a hollow. According to the City Forester, many trees
33 can exist for decades with hollow portions and can be nearly as strong as a solid. The problem in this
34 case was really the internal decay, which is much harder to identify. Such decay is nearly impossible to
35 identify without some sort of external sign (there was none here) or through the use of advanced
36 inspection techniques and tools (the city does not use any of these). Since the annual inspection revealed
37 no such defects and the city did not have prior notice/complaints of any defect, it did not have a
38 ministerial duty to repair.

39 For these reasons, the city is immune from liability and the claim should be denied.

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41 **BUDGETARY IMPACT:**

42 None

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44 **OPTIONS/ALTERNATIVES:**

45 Pay the claim.

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47 **RECOMMENDED ACTION:**

48 Deny the claim.

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50 **ATTACHMENT(S):**