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VIA EMAIL (allalders@cityofmadison.com)

City of Madison Common Council
210 Martin L. King Jr Blvd # 417
Madison, WI 53703

Re: Letter Brief of Leo Ritter & Co. Regarding Appeal of Plan Commission Action in the Matter of 3630 Milwaukee Street, Legistar File No. 58787

Dear City of Madison Common Council,

On March 17, 2020, the Common Council will consider Leo Ritter & Co., LLC's appeal of the city Plan Commission's decision on January 27, 2020 to not approve plans to construct a driveway, surface parking, and stormwater management facility at 3630 Milwaukee Street. This letter brief supplements the appeal filed on February 5, 2020. It addresses only the legal issues the Common Council must consider in reaching its decision.

The surface-level question in this matter is whether to allow a parking lot to be constructed on the 3630 Parcel. But the deeper issue is whether the City of Madison will deny the 3630 Parcel owners' constitutionally protected property rights.

Summary of Position.

The 3630 Parcel and the adjoining parcel at 3650 Milwaukee Street are zoned Industrial-Limited ("IL"). There is no dispute that the proposed use of these properties—as a distribution facility with accessory parking—is a permitted use under IL zoning. Property owners have a vested right to use of their property in manners permitted by the zoning ordinance. Put differently, where there is a permitted use under zoning, the City may not deny that use because the City disagrees with the appropriateness of the use proposed. A proper reading of the Demolition Ordinance (MGO § 28.185) recognizes the primacy of the zoning ordinance.

The Plan Commission, however, did not give the Demolition Ordinance its proper construction. Instead, the Plan Commission allowed the 2018 Comprehensive and Milwaukee Street Special Area Plans to trump the zoning ordinance, and denied the proposed use.

If the Common Council agrees with the Plan Commission and denies the proposed use because the proposed use does not implement the *future objectives* for use of the 3630 Parcel, its decision will not only be contrary to law, it may deprive property owners of their vested property rights. Such a decision is reviewable by the courts (both state and federal), and will jeopardize the validity of and future use of the Demolition Ordinance. Moreover, it may expose the City to

significant financial liability to compensate property owners for the deprivation of their rights, including the costs and attorney's fees necessary to vindicate those rights.

The Common Council should allow the proposed use.

Procedural and Factual Background

In 2018, the City granted a demolition permit allowing the removal of a dilapidated building from the 3630 Parcel. At the time of the demolition, no future use was planned. As part of the demolition permit's issuance, a restrictive covenant was signed that required the standards of approval contained in the Demolition Ordinance to be applied "prior to the construction of a new building on the property."

A proposed site plan for use of the 3630 and 3650 Parcels was submitted to Planning Division Staff late last year.¹ The plan for the 3630 Parcel—currently undeveloped after the demolition of the previous building—is to construct a driveway, surface parking and part of a stormwater management facility. This surface parking will support the reuse of an industrial building on the 3650 Parcel as a package distribution facility. This proposed use is consistent with the historical uses of these two parcels. Since 1963, the two parcels have been subject to a recorded easement agreement granting the two parcels a mutual right of ingress and egress for shared parking and coordinated pedestrian and vehicular access rights.

These properties have been zoned in a manner that permits light industrial uses. The 3630 Parcel is currently zoned IL (Industrial-Limited District), as is the 3650 Parcel. Prior to their IL zoning designations in a 2013 amendment to the zoning ordinance, the 3630 Parcel (and 3650 Parcel) were zoned C3L, which permitted wholesale and warehousing operations.

The 2018 Comprehensive Plan and the 2018 Milwaukee Street Special Area Plan—both adopted *after* the 2018 demolition permit was approved—recommend Community Mixed-Use and Medium Residential as potential future land uses of the subject property.

In a January 27, 2020 Planning Division Staff Report prepared for the Plan Commission, staff recommended that the Plan Commission approve the proposed site plan for the 3630 Parcel without conditions (other than conducting a public hearing). (Legistar File 58787 at S1, 6.) Staff reasoned that "a zoning map amendment would be required to implement the land use recommendations for the [3630 Parcel] in the Comprehensive Plan and the Milwaukee Street Special Area Plan." (Id. at 5.) Staff further noted that the 3630 Parcel's size and shape augured for its development in conjunction with the 3650 Parcel or another neighboring property. (Id.) Last, staff noted that the proposed use of the 3630 Parcel was "consistent with the normal and orderly development and improvement of surrounding properties in a manner consistent with

¹ No building is being proposed on the property, the applicants have reserved their rights with regard to the plan commission's jurisdiction to approve or not approve the proposed plan under the Demolition Ordinance. *See Appeal of Plan Commission Action at 2.* Moreover, a restrictive covenant may not serve as grounds for refusing to grant a permit or otherwise make a zoning determination. *See Sill v. Walworth County Land Management Committee*, 2002 WI App. 111, ¶¶ 25-33, 254 Wis. 2d 537.

existing and historic zoning,” (id.), and that the Milwaukee Street Special Area Plan acknowledged that reuse of the 3650 Parcel as a warehouse and distribution facility was possible. (Id. at 4.)

On January 27, 2020, the Plan Commission held a public hearing and, notwithstanding the Planning Division’s positive recommendation, voted to disapprove the proposed use for the 3630 Parcel.

Legal Issues

I. Zoning and Permitted Uses

Courts have long recognized zoning to be proper legislative function. *State ex rel. Carter v. Harper*, 182 Wis. 148 (1923). The Wisconsin legislature has expressly granted cities such as Madison the power to zone. *See* Wis. Stat. § 62.23(7)(am). Through the grant of the zoning power, cities may “divide the city into districts ... as may be deemed best suited,” and may provide uniform regulations per each district type regarding the use of land, the erection of buildings, and so forth. *Id.* at 62.23(7)(b).

In general, “zoning ordinances provide landowners with permitted uses, which allow a landowner to use his or her land” in the manner permitted in a district “as of right.” *Town of Rhine v. Bizzell*, 2008 WI 76, ¶ 19, 311 Wis. 2d 1. So long as a proposed use is consistent with the parameters established by a zoning ordinance for the district (e.g., building setbacks, height, etc.), a property owner may not be denied the right to put the property to the permitted use because of its use. This is not to say that a city cannot require, for example, a building permit as a prerequisite to erecting a building that would fulfill a property’s permitted use. But that permit may not be denied because of the use to which that building will be put.

Districts may also contain conditional uses, which allow an owner the opportunity to put the property to the conditioned use when certain standards or conditions are met. *Id.* at ¶ 21; *see also* Wis. Stat. § 62.23 (7)(de). In contrast with use-as-a-right permitted uses, cities may deny conditional use permits where these conditions and standards are not met.

While courts have long recognized the powers of municipalities to enact zoning regulations, zoning is a special subset of the city’s police powers that “runs the risk of unduly infringing on individuals’ property rights.” *Zweifelhofer v. Town of Cooks Valley*, 2012 WI 7, ¶ 7, 338 Wis. 2d 488. For this reason, zoning ordinances may only be enacted (and amended) in conformity with heightened procedural requirements. *Compare* Wis. Stat. § 62.23(7)(d) (prescribing detailed procedural requirements for enacting zoning ordinances) *with* Wis. Stat. 62.11 (prescribing limited procedural requirements for Common Council action). If an ordinance is an exercise of the zoning power but does not go through Wis. Stat. § 62.23(7)(d)’s processes, it is invalid. *Heitman v. City of Mauston Common Council*, 226 Wis.2d 542, 554 (1999) (“[A]ny change in zoning enacted without following the procedures mandated by the legislature would be void.”)

Comprehensive plans (and neighborhood plans) are important parts of the zoning process. “The purpose of a comprehensive plan is to provide an orderly method of land use regulations for

the community.” *Bell v. City of Elkhorn*, 122 Wis. 558, 566-67 (Ct. App. 1985). But comprehensive plans (such as master plans adopted pursuant to Wis. Stat. § 62.23(3), which can include a series of neighborhood plans) are guides for future development that lack the force of regulation, even when they are adopted by ordinance. Wis. Stat. §§ 66.1001(1)(a); 66.1001(2m); *see also* MGO § 28.003 (explaining that the Madison Comprehensive Plan establishes goals, objectives and strategies, but is not itself a regulation, only that regulations adopted pursuant to zoning ordinance should be consistent with then existing plan).

Thus, to have the force of regulation, an ordinance establishing the proper use of land must be enacted according to the procedural requirements of Wis. Stat. § 62.23(7)(d).

II. The Demolition Ordinance

As noted above, the proposed site plan for the 3630 Parcel is currently being reviewed by the City as a result of a restrictive covenant that incorporates the Demolition Ordinance’s approval standards by reference. The Demolition Ordinance’s approval standards for post-demolition uses of a property contain two criteria, one mandatory and one non-mandatory. For the first criteria, the Ordinance provides that demolition permits shall be approved if “the Plan Commission finds that ... the proposed use [is] compatible with ... the intent and purpose expressed in the zoning code for the zoning district in which the property is located.” MGO, § 28.185(7)(b)2. The second criteria is not stated as a finding to be made by the Commission. Rather, it is an aspirational statement that “the proposed use *should be* compatible with adopted neighborhood plans [and] the Comprehensive plans.”

That this second requirement is a non-mandatory criteria is not only plain from the text, but clear from the legislative history. In 2007, the Common Council introduced a proposal that would eventually amend the Demolition Ordinance. The initial draft of the proposed amendment included language that would have made *both* of the review criteria at issue in this case mandatory. The initial draft provided that “the proposed future use **must** be consistent with adopted neighborhood plans, the City's Comprehensive Plan, and with the character, massing, and density of the neighborhood.” *See* Legistar File No. 06956, 06956-First Version.pdf (available at <https://madison.legistar.com/View.ashx?M=F&ID=1754503&GUID=3E71757A-5AEB-4593-A080-8F3A5796ACCC>)(emphasis added).

The initial draft, however, was never enacted. Instead, the Common Council amended the initial proposal to remove that mandatory language and replace it with the aspirational language currently contained in the ordinance. *See* Legistar File No. 0695, Action By Common Council on March 18, 2008 (striking “must” and replacing with “should,” and striking other language); *see also* Legislation Text, File # 06956, v3, comparing substitute amendment to bill as introduced and then-current law (available at <https://madison.legistar.com/ViewReport.ashx?M=R&N=Text&GID=205&ID=1097659&GUID=837E41F8-0D8A-4A39-87A3-6737A8D7059E&Title=Legislation+Text>).

Indeed, any other interpretation of the Demolition Ordinance would give comprehensive and neighborhood plans the force and effect of regulation. This the city may not do. Its own ordinances state that such plans establish goals and strategies, but are not regulations. MGO,

§ 28.003. State law further prevents such plans from having regulatory effect. Wis. Stat. §§ 66.1001(1)(a); 66.1001(2m).

And if comprehensive or neighborhood plans *were* to have regulatory effect – as the Plan Commission apparently gave them – they would be invalid because they were not promulgated pursuant to procedural requirements of Wis. Stat. § 62.23(7)(d). This law governs how municipalities *must* enact zoning ordinances. *Heitman*, 226 Wis.2d at 554 (“[A]ny change in zoning enacted without following the procedures mandated by the legislature would be void.”) And it is clear that if comprehensive plans and neighborhood plans are imbued with regulatory effect, they effect zoning. This is because comprehensive plans and neighborhood plans have all the attributes of a zoning ordinance. They (1) divide geographic areas into multiple zones or districts; (2) allow certain uses by landowners within established districts or zones; (3) aim to control where a use takes place, as opposed to how that use takes place; (4) classify uses in general terms and the attempt to comprehensively address all possible uses in a geographic area; (5) make forward-looking determination about what uses will be permitted, as opposed to case-by-case, ad hoc determinations; and (6) permit for existing uses to continue despite their failure to conform to the plan. *See Zweifelhofer*, 2007 WI 7, ¶¶ 35-43.

That the Plan Commission simply believed it was applying the Demolition Ordinance to incorporate the Comprehensive Plan and the neighborhood plan is of no moment. Even if the Demolition Ordinance had been promulgated pursuant to Wis. Stat. § 62.23(7)(d), its regulation of land use depends on ever-changing comprehensive plans and neighborhood plans that are not enacted through Section 62.23(7)(d)’s statutory process. But this process must be used whenever a zoning ordinance is adopted *or* amended. And here, neither the 2018 Comprehensive Plan nor the Milwaukee Street Special Area Plan were in place when the Demolition Ordinance was enacted.

Consider an analogy. A city may adopt an ordinance requiring building permits to be obtained prior to erecting a building. And that ordinance may specify a procedure for doing so. Such an ordinance may be adopted through the city’s general police powers, and without the need to go through the processes required by Wis. Stat. 62.23(7)(d). But that ordinance may *not* provide that a building permit will only be issued if the proposed use is consistent with the comprehensive plan and any applicable neighborhood plan, because such a provision would elevate plans to the same status as zoning regulations and would eliminate uses as of right. Were it otherwise, the use distinctions acknowledged in *Town of Rhine* and the procedural requirements of Wis. Stat. § 62.23(7)(d) would have no meaning. The Plan Commission’s interpretation of Demolition Ordinance is directly analogous. If the Common Council thinks this is what the Demolition Ordinance requires, then the Demolition Ordinance, at least as applied to this case, is no more valid than a building permit ordinance that substantively regulates land use by incorporating future land use recommendations that are not contained in a properly enacted zoning ordinance.

The Plan Commission’s interpretation and application of the Demolition Ordinance is improper for another, related reason. That is because the land use prescribed for the 3630 Parcel by the zoning code (IL) is inherently in conflict with the use of the Parcel provided by the Milwaukee Street Special Area Plan and the Comprehensive Plan. IL-permitted activities are not permitted in residential zoned areas, and *visa versa*. There will therefore *always* be a conflict

between the first and second criteria of the Demolition Ordinance (as applied to the 3630 Parcel). And that means the property can *never* be developed, unless and until the zoning code, Comprehensive Plan, and neighborhood plan are amended to be reconciled with one another. Put differently, the 3630 Parcel would be deprived of all or substantially all of its beneficial use – conditions that constitute a taking under Wisconsin law and federal law. *See, e.g., E-L Enterprises, Inc. v. Milwaukee Metro Sewerage Dist.*, 2010 WI 58, ¶ 22, 326 Wis.2d 82; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992).

In sum, the Demolition Ordinance does not require compatibility with comprehensive or neighborhood plans to permit future post-demolition uses that are consistent with the zoning code. Any contrary interpretation converts planning documents into regulations. Such a regulation would be invalid under state law, and if applied, constitutes a taking.

III. Properly Applying the Demolition Ordinance to the 3630 Parcel

As for the first review criteria, there is no dispute that the proposed use is a permitted use under the zoning code. Therefore, the proposed use is compatible with the intent and purpose expressed in the zoning code for the zoning district in which the property is located.

As for the second criteria, it “should” be considered but it must not be given dispositive weight for the reasons stated above. At any rate, staff was correct when it observed that the Milwaukee Street Area plan in fact allowed for the reuse of the 3650 Parcel and that the proposed use of the 3630 Parcel was appropriate. We add that the neighborhood plan (when seen as a planning document), acknowledges the prospect that these parcels will be used in a manner consistent with their historic usage. According to the Milwaukee Street Special Area Plan:

“3630 Milwaukee Street [] is zoned IL (industrial limited), which allows light industrial uses ... Long viewed as a prime candidate for redevelopment, the now-vacant former Swiss Colony warehouse (3650 Milwaukee Street) is owned by the Leo Ritter Trust. The 15 acre parcel contains a 200,000 square foot industrial building which is being marketed for lease to new tenants. The property is zoned IL and could be occupied by any permitted use in that category.”

In sum, the site plan proposal meets the Demolition Ordinance’s mandatory standard (*i.e.* the proposal is consistent with the IL zoning district). Because it is a permitted use, that reason alone is enough for the Common Council to approve the proposal. In addition, the proposal is not incompatible with the adopted neighborhood plan, and thus has the additional benefit of meeting the Demolition Ordinance’s advisory standard.

IV. Common Council’s Exposure

Should the Common Council affirm the Plan Commission’s denial, the Council’s decision will be subject to review in state court. State courts will interpret the meaning of the Demolition Ordinance as a question of law, *Zweifelhofer*, 2007 WI 7, ¶ 20, meaning that courts do not provide

deference to the Common Council or Plan Commission's interpretation. Judicial review of the Common Council decision applying the Demolition Ordinance places the Common Council between the proverbial rock and hard place. Either the court will find the Demolition Ordinance does not give Comprehensive and neighborhood plans regulatory effect and do not trump zoning, or it will find that the Demolition Ordinance's language gives planning documents regulatory zoning effect, but will then be compelled to strike that portion of the Ordinance down as invalid on its face or as applied. In either circumstance, judicial review will vacate and/or modify any City Council decision that denies the proposed use.

And should the Council's decision deprive the 3630 Parcel of its beneficial use, it will have effected a "taking." Both federal and state law require the City to pay just compensation for such a taking. *See* U.S. Const. Amend. V; Wis. Const. Art. 1, § 13. Takings cases may be brought in state court or directly in federal court. *See E-L Enterprises, Inc.*, 2010 WI 58, ¶¶ 37-38, 326 Wis. 2d 82 (property owner may bring inverse condemnation action directly under the Constitution or under Wis. Stat. § 32.10); *Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2162, 2172-73 (2019) (property owner may bring inverse condemnation action under 28 U.S.C. § 1983). If a property owner prevails in such an action, the property owner is not only awarded just compensation, but may also recover attorney's fees. *See* Wis. Stat § 32.38(3); 28 U.S.C. § 1988.

The Common Council should avoid this exposure, apply the Demolition Ordinance in the way it was written and intended, and permit the use of the 3630 parcel as contemplated by the site plan and as a matter of right by virtue of the 3630 parcel's IL zoning designation.

Respectfully,

BELL GIFTQS ST. JOHN LLC

A handwritten signature in black ink, appearing to read "Kevin St. John", is written over the typed name below.

Kevin St. John

cc: Attorney John Strange (by email to jstrange@cityofmadison.com)
Attorney Angela Black (by email)
Attorney Dan O'Callaghan (by email)