

CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, CCB
266-4511

MEMORANDUM

TO: Mayor Cieslewicz; All Alders; Board of Estimates; Board of Public Works

FROM: Doran Viste, Assistant City Attorney

DATE: August 25, 2010

RE: Legistar File # 19699, Resolution Authorizing the Settlement of McDonald's Corp. v. City of Madison (08 CV 4210)

Mayor, Alders and Committee Members:

The City is currently involved in litigation involving the City's exercise of its eminent domain powers in 2006 at the McDonald's restaurant located at 3051 E. Washington Ave., in Ald. Palm's district. We recently reached a tentative settlement agreement with McDonald's, pending approval from the City Attorney, the City Engineer and the Common Council, that I think is in the City's best interest. Both City Attorney Michael May and City Engineer Rob Phillips have approved the settlement and recommend approval of this resolution. The resolution before the Committees and the Council, Legistar File # 19699, approves the settlement and authorizes the expenditure of funds from existing accounts. Because of the upcoming jury trial in this matter and the terms of the settlement agreement, this matter will be before the Board of Estimates on August 30, the Board of Public Works on September 1, and before the Common Council for adoption under suspension of the rules on September 7.

Summary of the Taking

The underlying case, McDonald's Corp. v. City of Madison (Dane County Circuit Court Case 08 CV 4210), is an eminent domain case that arose from the City's need to take access and temporary easement rights to the McDonald's restaurant at 3051 E. Washington Ave. to build the Starkweather Creek bicycle and pedestrian overpass immediately adjacent to the restaurant and Starkweather Creek. To complete this construction, the City had to close a portion of Clyde Gallagher Ave. and a portion of the E. Washington Ave. frontage road, resulting in changes in the access to the restaurant. Because of these changes, the internal circulation pattern of customers using the drive-thru was altered, the entrance and exit patterns to the property were changed, and a

severe decrease in visibility of the restaurant to outbound traffic occurred.¹ These changes are obvious to any customer approaching or using the restaurant's drive-thru window.

City's Appraisal and Award of Compensation

In 2006, the City's appraiser found that the change in access could be cured by reconfiguring the internal circulation pattern of the property. Based upon this conclusion, our appraisal found that the loss suffered by McDonald's was \$56,000, and an award of compensation (the basic award) was made to McDonald's in that amount in October, 2006. Prior to the issuance of the basic award, the City never received an appraisal from McDonald's indicating what loss they thought had occurred (the condemnee is not required to provide such an appraisal).

McDonald's Appraisal and Conclusions

In Sept. 2008, McDonald's filed an appeal of the amount of the basic award and in December 2009, McDonald's supplied the City with their own appraisal of the losses attributable to the City's taking of the access rights. McDonald's appraiser found that the losses should have been compensated at the amount of \$408,900, or \$352,900 more than we actually paid. This appraisal found that due to the reduction in visibility of the existing restaurant and the change in internal circulation patterns on the property, that the building's highest and best use was no longer as a fast-food restaurant, and the building is now only worth its wholesale/residual value. McDonald's also argued that the damages to the property could not be effectively cured by reconfiguring the internal circulation pattern. Obviously, this was information that the City did not have before it when it made its award in 2006, although our own appraiser has indicated that if the access issues couldn't be cured (as McDonald's has claimed) McDonald's would have suffered a loss of \$300,320.

Upcoming Trial Issues

Given the large gap between the two sides, this matter has been scheduled for a jury trial, which is set to begin on September 20. At trial, the sole issue will be what amount of compensation is due McDonald's for the City's taking of access rights and temporary easement rights. Of note in condemnation cases, if the jury finds that the amount of just compensation is \$64,400 or higher (15% greater than the basic award), then the City is required to pay all of McDonald's costs and expenses of the litigation, including "reasonable" attorney's fees. In condemnation cases, the courts have consistently held that attorney's fees in the amount of 1/3 of the new award will be found reasonable, which appears to be the amount that McDonald's has agreed to pay its counsel in this case. Moreover, the City will be required to pay statutory interest at the rate of 5% per

¹ Exhibit 1 to this Memo shows the access and internal circulation routes before the taking. Exhibit 2 shows the access and circulation routes after the taking. Exhibit 3 shows the obstructed view of the restaurant as a result of the taking and the construction of the pedestrian and bicycle bridge.

year on any new compensation awarded by the jury, which, given that nearly 4 years have passed since the basic award was issued, is a significant amount in this case.

Due to these factors, if the jury finds entirely for the City, the City will have to pay McDonald's an additional \$7,560 (our initial appraisal was updated recently resulting in a higher amount than the initial award). But, if the jury finds entirely for McDonald's, the City will have to pay McDonald's an additional \$574,640.

Settlement Scenarios²

Due to the complexity of the issues in this case, I think it is highly unlikely that the jury will find entirely for the City (Ex. 4, "City" column) or McDonald's (Ex. 4, "McDonald's" column), and instead will likely reach a compromise verdict. Given the range of outcomes, there is a significant risk that the City's liability to McDonald's at trial could end up being for over \$400,000, in addition to the additional expenses the City would itself incur in the litigation (such as expert fees and other litigation costs).

Mediation and Settlement Proposal

Given these numbers, the City Attorney's Office, the Office of Real Estate Services, and the City Engineering Division felt that mediation would be our best option for achieving an outcome beneficial to the City. On August 7, we participated in mediation in this case and came to an agreement with McDonald's to settle this matter for \$312,000 (Ex. 4, "Settlement" column). It is my belief that this is a fair settlement for both sides, and significantly reduces the City's likely exposure should this matter proceed to trial. While anything can happen at a jury trial, given the complexities of the legal issues in this case, the uniqueness of this property and the facts, I firmly believe that this settlement is in the City's best interest.

Conclusion

Based upon the foregoing, I am recommending that the Board of Estimates and the Board of Public Works recommend approval of this resolution, and that the Common Council pass the authorizing resolution to settle this case. As noted above, the City Attorney and City Engineer recommend approval of the settlement as well. Because the jury trial is currently set to begin September 20, the deadline for Common Council authorization of this agreement is September 9, which means that this agreement must be authorized at the September 7 meeting.



Doran Viste
Assistant City Attorney

² Exhibit 4 to this Memo details the various settlement and judgment scenarios in this case.

Exhibit 1: Before Condition

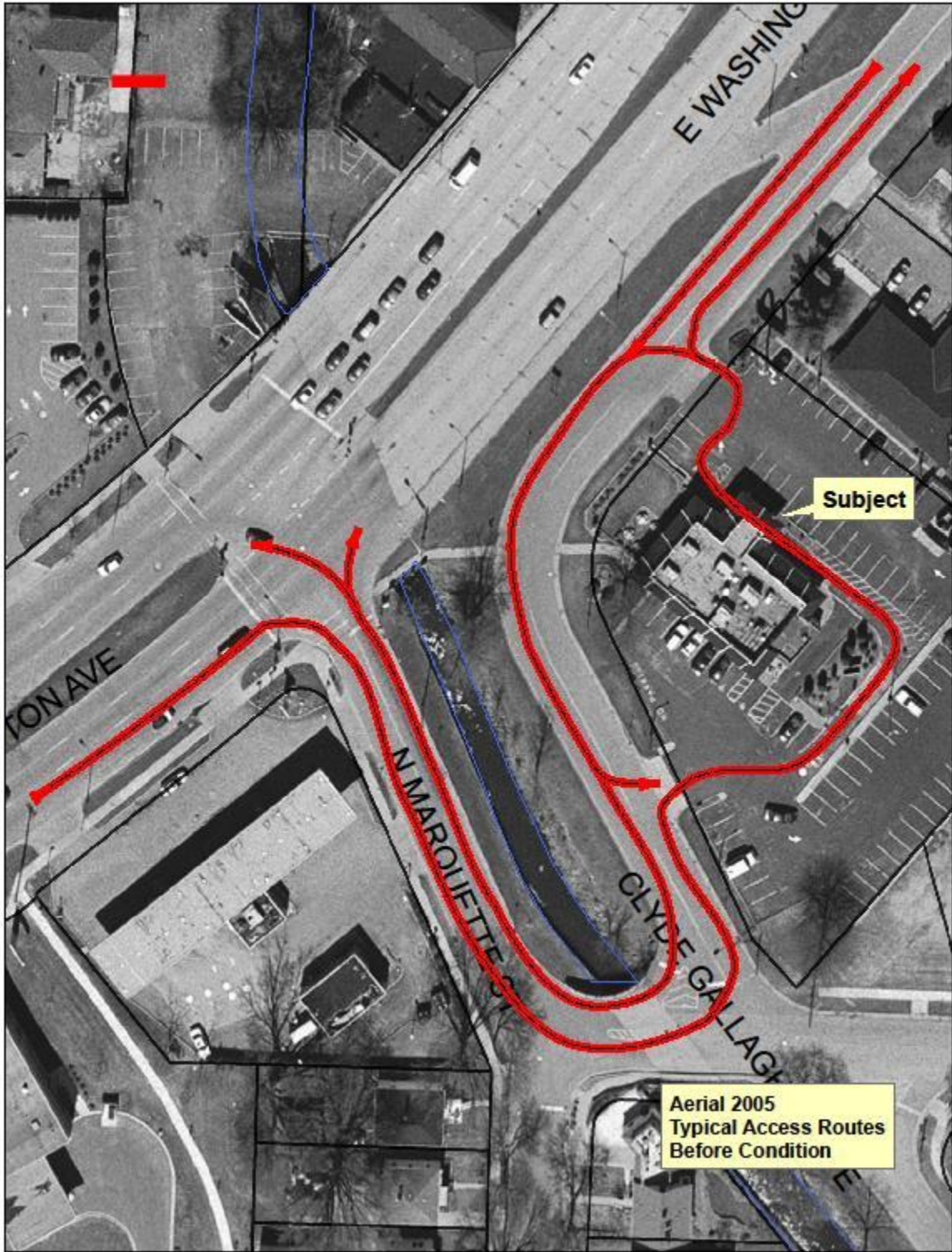


Exhibit 2: After Condition

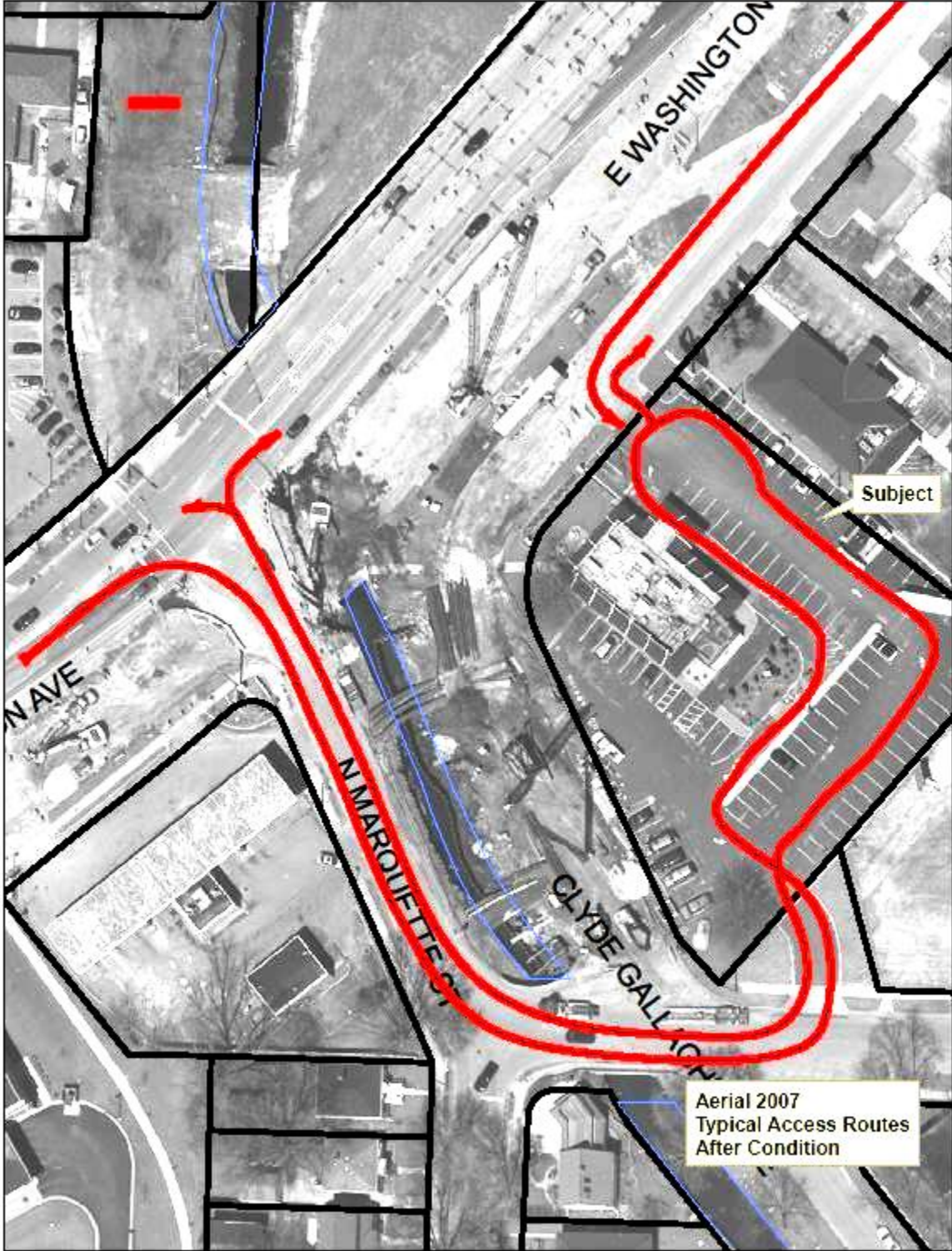


Exhibit 3: View of Restaurant from E. Washington Ave. outbound



Exhibit 4: Settlement Scenarios

	City ¹	City-Uncured ²	Mid-Point 1 ³	Mid-Point 2 ⁴	McDonald's ⁵	Settlement ⁶
Value of Taking	62,300	300,320	235,600	354,610	408,900	300,320
Basic Award	56,000	56,000	56,000	56,000	56,000	56,000
New Compensation	6,300	244,320	179,600	298,610	352,900	244,320
Statutory Interest (4 years at 5%)	1,260	48,864	35,920	59,722	70,580	48,864
New Award	7,560	293,184	215,520	358,332	423,480	293,184
Litigation Costs and Fees ⁷	0	107,728	81,840	129,444	151,160	18,816
Total City Payment⁸	7,560	400,912	297,360	487,776	574,640	312,000
<i>Total Savings from Settlement⁹</i>	<i>-304,440</i>	<i>88,912</i>	<i>-14,640</i>	<i>175,776</i>	<i>262,640</i>	<i>-</i>

Notes:

1. "City" is the valuation of the taking from John Rolling's updated appraisal of May 17, 2010, with the value as of Oct. 5, 2006.
2. "City-Uncured" is John Rolling's valuation of the taking if not cured, based on his May 17, 2010 updated appraisal.
3. "Mid-Point 1" is the halfway point between the City's appraisal (column 1) and McDonald's Appraisal (column 5).
4. "Mid-Point 2" is the halfway point between the City's uncured valuation (column 2) and McDonald's Appraisal (column 5).
5. "McDonald's" is the valuation of the taking from Scott MacWilliams Dec. 18, 2009 appraisal, with the value as of Oct. 6, 2006.
6. "Settlement" represents the corresponding figures agreed to during mediation by McDonald's and the City on August 9, 2010.
7. "Litigation Costs and Fees" is the amount the City will have to be pay in litigation costs and fees if the new award exceeds 15% of the basic award (\$64,400). This amount includes McDonald's estimated \$10,000 in chargeable costs in the litigation to date (appraisal, depositions, fees, etc.), and attorney's fees (based upon the presumed contingency fee of 1/3 of the new award).
8. "Total City Payment" is the additional amount the City would have to pay McDonald's under each scenario. It does not include additional expenses that may be incurred by the City in the event of continued litigation, such as expert fees and other litigation costs.
9. "Total Savings from Settlement" is the difference between the settlement amount and the City payment for each option.