

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

Date: August 22, 2019

MEMORANDUM

TO: Members of the Plan Commission

FROM: Michael P. May, City Attorney
John Strange, Assistant City Attorney

RE: Edgewood Master Plan Repeal Ordinance, Legistar No. 56839

You have before you on August 26, 2019, Legistar No. 56839, an ordinance to repeal Edgewood's Master Plan. Edgewood sued the City in federal court on August 22, 2019, alleging that the City has violated Edgewood's religious rights under the federal Religious Land Use and Institutionalized Persons Act (RLUIPA). Edgewood included other claims in the lawsuit.

In terms of the RLUIPA claim, the City's best legal position would be if the Master Plan were repealed and no other changes in the CI District ordinances were adopted. Therefore, our office recommends approval of the repeal of the Master Plan.

We understand Edgewood previously proposed to amend its Master Plan (Legistar No. 53954). Edgewood's application was set to come before Plan Commission for a recommendation on February 26, 2019. Prior to the hearing, Edgewood informed the City it did not wish to proceed to the Plan Commission Hearing but also did not formally withdraw the application. Therefore, neither the Plan Commission nor the City has ever made a final decision on that item. You need not consider it on August 26.

Additionally, several alders are proposing changes to the CI District that would impact all of the entities in that CI District, that is, the Madison public high schools, the UW-Madison, Edgewood, parts of Madison College, and UW hospitals (Legistar No. 56981). At this point, it is difficult for our office to predict what impact, if any, approval of that ordinance might have on the pending lawsuit. We therefore do not take a legal position on those changes.

CC: Mayor Rhodes-Conway
All Alders
Tim Parks

10/14

Parks, Timothy

From: May, Michael
Sent: August 21, 2019 6:36 PM
To: 'MDLee@foley.com'
Cc: Strange, John; Nathan J. Wautier; KRist@foley.com; 'Noel Sterett'
Subject: RE: Edgewood ZBA Appeal

Matt:

Thank you for the email.

The Mayor agreed to sponsor the ordinance amendment to avoid a RLUIPA lawsuit. Edgewood filed the RLUIPA lawsuit. The Mayor's efforts failed. Under the circumstances, the Mayor will no longer sponsor the ordinance.

As we have explained, Edgewood has other methods to pursue repeal of the Master Plan if it so desires.

I disagree with the accuracy of many of your statements in the email, but nothing is served by engaging in a debate on that.

As to service of the complaint, we will accept service for all the City defendants when the FRCP rules requesting acceptance are followed. We do not have authority to accept service outside of those rules.



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From: MDLee@foley.com
Sent: Wednesday, August 21, 2019 1:55 PM
To: May, Michael
Cc: Strange, John ; Nathan J. Wautier ; KRist@foley.com; 'Noel Sterett'
Subject: Edgewood ZBA Appeal

Mike –

This will respond to your letter to Attorney Nathan Wautier dated August 20th, which I have attached.

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The premise of your letter is incorrect. The Mayor did not agree to sponsor the ordinance withdrawing Edgewood's Master Plan on the understanding that Edgewood would not file a federal lawsuit. Edgewood has been clear with your office and with the Mayor from the beginning that Edgewood would need to file the lawsuit within 30 days, notwithstanding the ongoing efforts to withdraw the Master Plan. The Mayor sponsored the Master Plan withdrawal ordinance because she understands that doing so is the best way for the City to avoid substantial exposure created by the Zoning Administrator's incorrect and discriminatory interpretation of Madison's zoning code. She also understands, and your office has confirmed in writing, that if the Master Plan withdrawal ordinance passes, it will place Edgewood on equal footing with the City's other public high schools, which is all Edgewood has been seeking throughout this entire process. (This is of course without consideration of Ald. Tag Evers' spot-zoning ordinance that is blatantly and obviously targeted at Edgewood, which if passed may very well give rise to additional claims by Edgewood against the City.)

It would be unfortunate if the Mayor decides to pull her sponsorship of the ordinance after Edgewood files the lawsuit. That would seem to put short-term political considerations over the long-term benefit to the City, and would fly in the face of the counsel and rationale that prompted the Mayor to sponsor (and prompted you to recommend) the withdrawal ordinance in the first place. This is especially true when the Mayor can simply say that she is aware of Edgewood's lawsuit, was informed by Edgewood that it planned to file its lawsuit in order to meet its statutory deadline for appealing the adverse Zoning Board of Appeals decision, and understands that Edgewood's strong preference is to have the Common Council approve the withdrawal of the Master Plan rather than litigate its claims to judgment, all of which are true statements.

You are also incorrect that "it would be very easy to simply appeal the state law issue to the Circuit Court in Dane County" and "refrain from any federal action for the time being." As you have been told multiple times, Edgewood cannot pursue that option without giving up rights or putting its claims at risk, and it is not willing to do so simply because the City prefers that Edgewood appeal the ZBA decision in state court. Edgewood is not going to spend time and resources providing you a list of "controlling legal authority" supporting its decision to file in federal rather than state court, nor will it list all of the options it examined and which you were briefed on at length during our meeting on August 13th. I note that your letter provides no such authority for the City's position. I suspect this is because, as you know, a federal court will defer to the first-filed state court action on any issues common to both lawsuits, and can do so whether the parties have stipulated otherwise or not (or could do so on the motion of third party intervenors, who would not be subject to a stipulation between Edgewood and the City). While the purported quotes from the second page of your letter are not accurate, it is entirely reasonable for Edgewood to file in federal court, where the RLUIPA case law and other precedent favorable to Edgewood will be binding on the trial court judge, instead of state court.

Edgewood is not filing the lawsuit as a threat, as a power play, or as a means of strong-arming public officials into supporting the Master Plan withdrawal ordinance. It is doing so to preserve its rights to secure equal treatment if the Master Plan withdrawal ordinance fails. If Edgewood could wait until the ordinance has received a final vote before deciding whether to file the lawsuit, it would do that. But Edgewood does not have that luxury, and therefore neither does the City. Indeed, if the City truly believed that it has not treated Edgewood differently than other CI-district schools, then it would have no real concern over the forum of Edgewood's lawsuit.

Edgewood will file the lawsuit this afternoon. The defendants will include the City, Zoning Administrator Tucker (in his official capacity), Director of Building Inspection Hank (in his official capacity), and the Zoning Board of Appeals. Please let me know if your office will accept service of the summons and complaint for all defendants. As a courtesy, Edgewood is willing to hold off on service for the time being while we see what happens with the withdrawal ordinance at the August 26th Plan Commission meeting.

Matt Lee

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