

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

MEMORANDUM

TO: Kevin Briski

FROM: Doran Viste, Assistant City Attorney

DATE: June 6, 2013

RE: Pontoon Porch Business Plan and Proposed Permit Agreement

You asked me for my input regarding Pontoon Porch's "Business Plan and Proposed Permit Agreement" that was submitted to you earlier this week. In this plan, Pontoon Porch (PP) has requested "an annual permit to load and unload guests from the Olin Park piers."

This proposal really amounts to two requests: a request to grant a parks vending permit under MGO 8.17 to allow PP to sell services (in this case a large-party boat rental) at the Olin Park boat launch, and a request for the City to enter into an agreement with PP to allow for the use of the Olin Park boat launch to load and unload passengers.

Looking first at the vending permit issue, under MGO 8.17, the first step in this process is for the party seeking to obtain an annual parks vending permit to submit an application for a parks vending permit on forms supplied by the Parks Division, at least thirty days before the date the applicant intends to begin vending. It warrants noting that this condition *was not complied with* as PP did not submit a formal vending application to your Division. Hence, under the ordinance, there is not a parks vending permit application from PP before you to consider at this time.

Regardless, even assuming that PP had actually filed a permit application as required, the Board of Parks Commissioners has delegated the authority to review initial applications for parks vending permits to the Parks Division. Under Subsection 8.17(3), in reviewing these applications the Parks Division may grant a parks vending permit only for those transactions which:

- (a) Are customarily associated with public use and enjoyment of parks and park properties;
- (b) Are in furtherance of public use and enjoyment of the park; or
- (c) Are incidental to an appropriate recreational or cultural use of said properties.

It is not clear, from my understanding of the facts involved and other agreements the City has, whether PP falls under these requirements for the issuance of a parks vending permit.

The only arguably similar boat rental agreement the City has is with Betty Lou Cruises. However, to the best of my knowledge Betty Lou Cruises does not sell its services at Olin Park. It is assumed that such transactions occur off of City property. Indeed, Betty Lou has its own private pier close to Law Park, and rarely uses its agreement with the City to load and unload passengers at Olin Park. If it was discovered that Betty Lou is in fact selling its services at Olin

Park, it has agreed that it will comply with City ordinances and seek any necessary permits. To date it has not done so. As such, it is a safe assumption that Betty Lou does not sell services at Olin Park. PP, on the other hand, has been known to conduct exchanges of payment at the Olin Park boat launch. PP, in fact, through its owner/operator Joe Shulla, acknowledged this by pleading guilty to two counts of vending in parks without a permit arising from his actions last year at the Olin Park boat launch. This use of City property distinguishes PP from Betty Lou. In addition, other boat rental related agreements the City has entered into are significantly different than the one proposed by PP. Specifically, the boat rental agreements and vending permits covering the ongoing operations at Vilas Park, Brittingham Beach and Warner Park involve single boat rentals (paddle boats, kayaks, canoes, etc.) and provide additional services to park users (lessons, supervised swimming areas, concessions, grounds maintenance). Moreover, the agreements by pier companies to store their equipment at noted park piers are also different in scope since those merely address after hours storage, and no actual selling of services from the park property. Given this, I don't think that the Parks Division can conclude that PP's proposed use of the Olin Park boat launch is "customarily associated with public use and enjoyment of parks and parks properties." Indeed, it appears that there is no history at all of such a use in the City parks, except for that actually done by PP contrary to City ordinances in 2012.

Additionally, it may be difficult to find that allowing PP to conduct its business at Olin Park is in furtherance of the public's use and enjoyment of the park. PP's entire plan is to use the park merely to load and unload passengers so that PP may take them out on the lake. PP's customers only use and enjoy the park to the extent they park there and walk across park property to board the pontoon. This use differs significantly from the other boat rentals offered at City parks which rent boats that utilize the parkland shore and facilities as part of their designated use. Indeed, the services being sold by PP have nothing to do with Olin Park, except to the extent that Olin Park has access and sufficient parking to accommodate PP's customers. These services could be offered at any other property, public or private, on Lake Monona, with no detrimental effect on PP's customers. As such, I think that it would be a stretch to conclude that this proposed use is in furtherance of the public's use and enjoyment of the park.

Finally, it would likewise be difficult to conclude that the selling of PP's services are "incidental to an appropriate recreational use" of the Olin Park boat launch. If PP was actually launching boats from the boat launch as part of its business model, its use would be incidental to an appropriate recreational use. But PP's pontoon is permanently in the water and is seeking to use the boat launch for a purpose not otherwise allowed by ordinance, or practice. As such, I think that this condition is also difficult to show.

Looking at these three considerations required by ordinance, I think that it even if you overlook PP's failure to file an application as required, PP cannot meet the requirements for the granting of an annual parks vending permit that would allow it to sell its services at the Olin Park boat launch.

However, PP's inability to obtain a parks vending permit does not mean that it cannot gain permission to use the Olin Park boat launch or piers for its business. It just means that it can't sell its services at the City park (i.e., money cannot exchange hands while the pontoon is parked on City property).

Therefore, the real issue before you is whether the Parks Division feels that the City should enter into an agreement with PP to allow it to use the City's Olin Park piers/boat launches to operate its business. As you know, MGO 8.188, as amended by ORD-13-00082, Legistar ID # [29978](#) (effective May 30, 2013), expressly prohibits any person from anchoring or mooring any watercraft within 25 yards of the Olin Park boat launch sites or piers except temporarily for the purposes of launching or removing a boat from the water, *or subject to a valid agreement entered into with the City of Madison*. The Madison Municipal Court has already found that PP's actions of using the Olin Park boat launch are in violation of this ordinance. Hence, the only way that PP may use either the Olin Park boat launch or other piers is through a valid agreement with the City of Madison.

The Board of Parks Commissioners (BPC) has the statutory authority to determine how the City's parkland is used. The Common Council (CC) has the authority to allow the City to enter into contracts. Therefore, in order to enter into a valid agreement with the City of Madison, both the BPC and the CC must approve of the requested use. These bodies may defer to staff judgment, but, unless such authority has been expressly delegated to staff, final approval rests with them.

Given the background here, I think it would be appropriate for you to consider the submitted business plan and for your Division to make a recommendation based upon this plan (either recommend the plan as proposed, recommend the plan as amended, or reject the plan). I think you should then submit the proposal along with your Division's recommendation to the BPC for consideration, asking the BPC to make a determination whether it will preliminarily approve of the requested use of Parks property, either as proposed or as amended. If the BPC expresses that it is unwilling to grant such an agreement to PP, there is nothing further that can be done at this time. While PP could follow up on such a rejection by formally applying for a parks vending permit, even if such a permit were approved, that would still not give PP permission to use the boat launch—that would still have to come through a separate agreement with the City, that would again need the Board's approval. Alternatively, if the Board expresses an interest in approving PP's plan (either as proposed or as adopted), then that would give PP and staff sufficient direction to proceed with drafting an agreement and preparing an authorizing resolution for the Council and Board to formally consider.

Doran Viste

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Encl.

8.17 VENDING IN PUBLIC PARKS.

- (1) It shall be unlawful for any person, without having applied for and obtained a parks vending permit under this section, to set up any refreshment, concession or other vending stand, to display any foods, beverages, goods or information regarding services or lessons; or to sell any foods, beverages, goods, services or lessons:
- (a) In or upon any park, playground, recreation area, bathing beach or athletic field owned or operated by the City of Madison; provided, however, that vending in Elizabeth Link Peace Park shall be regulated under Section 9.13(6) of the Madison General Ordinances and not under this section; or
 - (b) Upon any street, alley, sidewalk, public square or pleasure drive located upon or adjacent to any park, playground, recreation area, bathing beach or athletic field owned or operated by the City of Madison.
- (2) (a) Application for all parks vending permits, except Olbrich Gardens Special Event Vending Permits, shall be made to the Superintendent of Parks or designee on forms supplied by the Parks Division. Such forms shall include the name and address of the person or organization seeking such privilege and the date or dates of the proposed activity, and any other information as may be required by the Superintendent of Parks or designee.
- (b) A reasonable fee for each class of parks vending permit for nonprofit and all other vendors shall be set by the Park Commission and may be adjusted by the Commission from time to time. The fee shall be paid to the City Treasurer. For purposes of vending permit fees under this section, a nonprofit vendor is any individual or group who has obtained a designation as a tax-exempt entity, contributions to which are tax deductible, pursuant to 26 U.S.C. Sec. 501(c)(3). A nonprofit group may obtain one permit for all persons conducting vending activities for the group. All other vendors shall apply for and obtain a permit for each person vending, except for special event permits under sec. 8.17(2)(b)4., below.
- Parks vending permits shall be of four (4) classes:
1. Annual Permit. An annual permit shall be issued on the fifteenth (15th) day of April each year, or thereafter when applied for and shall expire on the fourteenth (14th) day of April following issuance. Applicant for annual permit under this paragraph shall be made at least thirty (30) days prior to the date the applicant intends to begin vending. (Am. by Ord. 12,731, 12-14-00; Ord. 13,225, 1-25-03)
 2. Daily Permit. A daily permit shall set forth the exact date(s) of operation and shall be valid only for the date(s) stated therein. (Am. by Ord. 12,731, 12-14-00; Ord. 13,225, 1-25-03)
 3. Olbrich Gardens Special Event Vending Permit. A special event vending permit for Olbrich Botanical Gardens shall set forth the exact date(s) on which such business shall be carried on and shall be valid only during the dates specified. The procedures for application and issuance of a permit under this paragraph shall be determined by the Executive Director of the Olbrich Botanical Gardens, or designee. (Am. by Ord. 13,225, 1-25-03)
 4. Special Event Vending Permit. Special event sponsors may purchase a vending permit for up to seven (7) vendors for the duration of a special event. Any additional vendors must apply for and obtain a daily or annual permit as provided elsewhere in this section. The special event permit shall set forth the exact dates and times of the event, the names of the vendor(s) under the permit, and shall only be valid for those vendor(s) and the dates and times specified. The event sponsor shall have adequate liability insurance in force as required by Sec. 8.17(2)(c) of these ordinances.

- (c) Every permittee under this section shall have and maintain adequate general liability insurance including products liability coverage with minimum limits of one million dollars (\$1,000,000) in the aggregate naming the City, its officers, employees and agents as additional insureds, and shall agree to indemnify, defend, and hold the City, its employees and agents harmless against all claims, liability, loss, damage, or expense incurred by the City as the result of any injury to or death of any person or damage to property caused by or resulting from the activities of the permittee. For a permit to be issued, every applicant for a parks vending permit shall provide not less than three (3) business days prior to the effective date of the permit, a Certificate of Insurance, on a form acceptable to the City, evidencing this coverage. Said insurance shall indemnify and defend the City, its officers, employees and agents against all claims, liability, loss, damages or expenses, whether caused by or contributed to by the negligence of the City, its officers, employees or agents. Said insurance shall provide that the City receive written notice thirty (30) days prior to any cancellation, nonrenewal or material change in the policy.
- (d) Every permittee who intends to vend food or beverages shall also make application for a Food and Drink license or an Itinerant Restaurant license and shall have approval of the Health Department prior to the issuance of the vending permit.
- (3) The Park Commission may review applications for parks vending permits and may delegate the authority to review initial applications and renewals for parks vending permits to a designee of the Parks Division. The Park Commission or authorized designee may grant a parks vending permit only for those transactions which:
 - (a) Are customarily associated with public use and enjoyment of parks and park properties;
 - (b) Are in furtherance of public use and enjoyment of the park; or
 - (c) Are incidental to an appropriate recreational or cultural use of said properties.
- (4) After review of the application under the criteria set forth above, and any other criteria or guidelines established by the Commission, the Commission may grant or deny the permit. If the designee of the Parks Division reviews an application, s/he may issue the permit or recommend denial to the Park Commission based upon the criteria set forth subsection (3) or any other criteria or guidelines established by the Commission. The designee shall place the matter of the application and recommended denial on the agenda for the next available Commission meeting and notify the applicant of the time and place for the meeting. The Commission may grant or deny the permit and shall consider the recommendation of the designee of the Parks Division and the criteria found herein. If a permit is denied, the Commission shall state the reasons in writing and provide the written determination to the applicant within ten (10) days of the determination.
- (5) An appeal from the decision of the Park Commission or designee to grant or deny a parks vending permit may be taken to the Common Council by any person aggrieved by the decision. Such appeal shall be taken by filing with the City Clerk within ten (10) days of the written determination a Notice of Appeal specifying the grounds therefor in respect to the decision of the Park Commission or designee. The Common Council shall fix a reasonable time for the hearing of the appeal and give public notice thereof as well as due notice to the parties in interest, and decide the same within a reasonable time. The decision of the Common Council shall be a final administrative decision for purposes of judicial review. Any person aggrieved by the decision of the Common Council may, within thirty (30) days, commence an action seeking the remedy available by certiorari.

- (6) Recreation programs sponsored or conducted by the Madison Metropolitan School District are exempt from the provisions of this section.
- (7) A permit issued under this section shall be conspicuously displayed on the vending stand or site at all times and shall contain the information as may be required elsewhere in this section, or by the Park Commission or authorized designee.
- (8) Any person violating the provisions of this section shall be subject to a forfeiture of not less than fifty dollars (\$50) nor more than five hundred dollars (\$500) for each offense. Each day or portion thereof that a violation exists or continues shall be considered a separate offense.

8.188 ANCHORING AND MOORING OF WATERCRAFT REGULATED.

- (1) No person shall anchor or moor any watercraft within twenty-five (25) yards of any boat launch or pier in any of the following places except temporarily for the purpose of launching or removal of a boat from the waters and while the watercraft is attended by a person capable of moving the watercraft in case of an emergency or to avoid the obstruction of traffic:
 - (a) The launch sites at Marshall Park, Warner Park, Tenney Park, Olin Park, Law Park and Olbrich Park.
 - (b) The piers at Marshall Park, Warner Park, Tenney Park, Olin Park, Law Park, Olbrich Park and James Madison Park.
- (2) This section does not apply to any person whose use of the above noted launch sites or piers is consistent with a valid agreement entered into with the City of Madison.
- (3) Any person who shall violate any provision of this section shall be subject to a forfeiture of not less than twenty dollars (\$20) nor more than one hundred dollars (\$100) for the first offense and, not less than forty dollars (\$40) nor more than two hundred dollars (\$200) for the second offense within a year and not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) for the third or subsequent conviction within a year.