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

Date: February 21, 2013

MEMORANDUM

TO: Mayor Paul Soglin
Members of the Common Council

FROM: Michael P. May, City Attorney

RE: Appeal of Conditional Use Permit for Care Net Center Apartments, Legistar No. 28957

The Common Council has a public hearing scheduled for February 26, 2013, on an appeal of the conditional use permit (CUP) granted by the Plan Commission on January 14, 2013, for the property at 1360 MacArthur Road (Legistar No. 28723). The proposed use is for the Eagle Harbor Apartments, associated with the Care Net Pregnancy Center of Dane County.

At its meeting on February 5, 2013, the Council placed on file without prejudice a request for City funding for the Eagle Harbor Apartments (Legistar No. 28644). The question of City funding is separate from the land use question now before the Council. I was asked to remind the Council of the standards on an appeal of a CUP.

1. A Two-thirds Vote Is Required to Change the Decision of the Plan Commission.

The Plan Commission voted to grant the CUP in this instance. Under sec. 28.12(11)(i), MGO, the decision of the Plan Commission is upheld unless 2/3 of all the members of the Council vote otherwise.[1] Thus, the CUP will be granted unless 14 members of the Council vote to overturn the Plan Commission action. The fourteen members of the Council also may "reverse or modify" the granting of the CUP.

2. The Standards to be Applied by the Council are those Standards in sec. 28.12(11)(g), MGO, that were raised in the appeal.

In determining whether the action of the Plan Commission should be upheld, the Council must apply the standards for granting a CUP contained in sec. 28.12(11)(g), MGO, of the 1966 Zoning Code under which the application was filed and approved. However, only the standards raised in the appeal are at issue.

1 All references are to the old zoning code. Pursuant to sec. 28.008, MGO, of the new code, all applications are processed using the code as it existed at the time of the filing of the application.

Here the appeal claims that the following standards were not met:

> Sec. 28.12(11)(g)1: That the establishment, maintenance or operation of the conditional use will not be detrimental to or endanger the public health, safety, or general welfare.
>
> Sec. 28.12(11)(g) 3: That the uses, values and enjoyment of other property in the neighborhood for purposes already established shall be in no foreseeable manner substantially impaired or diminished by the establishment, maintenance or operation of the conditional use.
>
> Sec. 28.12(11)(g) 5: That adequate utilities, access roads, drainage, parking supply, internal circulation improvements, including but not limited to vehicular, pedestrian, bicycle, public transit and other necessary site improvements have been or are being provided.
>
> Sec. 28.12(11)(g) 6: That measures, which may include transportation demand management (TDM) and participation in a transportation management association have been or will be taken to provide adequate ingress and egress, including all off-site improvements, so designed as to minimize traffic congestion and to ensure public safety and adequate traffic flow, both on-site and on the public streets.

These are the only standards the Council should consider, and only information relevant to these standards should be considered.

3. The Application May Invoke Protections under Federal Law.

Because the Applicant is at least in part a faith-based organization, it is possible that the protections of the federal Religious Land Use and Institutionalized Persons Act, 42 USC sec. 2200cc, et seq. (RLUIPA), may apply. RLUIPA protects the religious exercise by persons, including organizations, and generally prohibits the City from applying its land use powers in a way that "substantially burdens" the exercise of religion, or that treats a religious institution any differently than the City would treat a non-religious institution.

Cases under RLUIPA are legion. An illustrative recent case is *International Church of the Foursquare Gospel v. City of San Leandro,* 673 F. 3d 1059 (9th Cir. 2011). After the Church had purchased property in the City's industrial district for a new church building, it was told it needed a zoning change to build in that area. After much delay, the City adopted a general zoning change, but then found that the Church's application failed to meet the standards in its new ordinance. The City also denied a request for a CUP. The Church sued.

The federal District Court upheld the City's actions, but the Ninth Circuit Court of Appeals reversed the decision. The Ninth Circuit explicitly found that the City's action imposed a "substantial burden" on the Church's exercise of its religion and that the City had not shown such a burden was justified. Because it sent the case back for trial, the Court of Appeals did not rule on whether the City's actions also violated the equal treatment requirements in RLUIPA.

As in most such cases, the Church alleged that the City's actions also violated their constitutional rights under 42 USC sec. 1983, making the City liable for the opposing side's attorneys' fees.

I am enclosing with this memo a copy of a Statement of the US Department of Justice on the land use provisions of RLUIPA. A complete exposition of the many nuances of this law is not possible at this time, but I found the USDOJ explanation to be a useful summary.

Printed below is the full text of sec. 28.12(11)(i), MGO:

Appeal From Action By City Plan Commission. An appeal from the decision of the City Plan Commission may be taken to the Common Council by the applicant of the conditional use, by the Alderman of the district in which the use is located or by twenty percent (20%) or more of the property owners notified objecting to the establishment of such conditional use. Such appeal must specify the grounds thereof in respect to the findings of the City Plan Commission and must be filed with the Secretary of the Plan Commission within ten (10) days of the final action of the City Plan Commission. Final action may be either initial action on a conditional use or action following reconsideration of the said initial action under the Commission's rules of procedure. However, reconsideration shall only occur following written notification of intent to reconsider by a Commission member to the Commission Secretary no later than ten (10) days after said initial action. Thereupon, the notice requirements of Section 28.12(11)(f) shall be complied with before the Commission reconsiders such initial action, except that the notice by publication shall be a Class 1 Notice. The taking of an appeal prior to the third day after said initial action shall not preclude or invalidate reconsideration by the Commission as herein provided.

The Secretary of the Plan Commission or his/her designee shall transmit such appeal to the City Clerk who shall file such appeal with the Common Council. 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 action of the City Plan Commission shall be deemed just and equitable unless the Common Council, by a favorable vote of two-thirds (2/3) of the members of the Common Council, reverses or modifies the action of the City Plan Commission. Any person aggrieved by the decision of the Common Council or any alderperson, officer, department, board or bureau of the City, may, within thirty (30) days after the filing of the decision in the office of the City Clerk, commence an action seeking the remedy available by certiorari.

CC: Bill Fruhling
Maureen O'Brien