

HUSCH BLACKWELL

Eric M. McLeod
Partner

33 East Main Street, Suite 300
Madison, WI 53703
Direct: 608.234.6056
Fax: 608.258.7138
Eric.McLeod@huschblackwell.com

February 24, 2023

VIA E-MAIL

Michael Haas, City Attorney
City Attorney's Office
210 Martin Luther King Jr., Blvd.
Room 401 City-County Building
Madison, WI 53703
E-Mail: mhaas@cityofmadison.com

Re: Odana Area Plan - Implementation of Proactive Rezoning and Official Mapping
Recommendations

Dear Mike,

We represent Madison Joint Venture, LLC, an affiliate of CBL & Associates Properties, Inc. (jointly referred to herein as "CBL") which owns and operates the West Towne Mall ("West Towne"). The purpose of this letter is to briefly address the proposal to officially map public street rights of way ("ROWs") directly upon CBL's West Towne property, which we understand will be considered by the City Plan Commission and Common Council on February 27 and February 28, 2023, respectively. We previously addressed this proposal in a letter dated July 6, 2021, to then Assistant City Attorney John Strange. In that letter we explained why the application of the mapping statute to developed commercial property constitutes a taking without compensation in violation of the Fifth Amendment to the U.S. Constitution. Rather than restate our position on that matter, I have enclosed a copy of our prior letter for your reference.

We would also like to address the practical implications associated with officially mapping the West Towne property. While the Planning Division's February 22, 2023 memo to the Plan Commission and Common Council states that "official mapping [was] discussed with property owners and the public as part of the planning process[.]" it should be made clear that such mapping was not proposed after consultation with CBL or in consideration of CBL's future development plans for the property. To the contrary, the official mapping, as proposed, is entirely inconsistent with CBL's ongoing development of the West Towne property. As the City is aware, West Towne is on the move and doing quite well. The popular department store Von Maur recently opened at West Towne and CBL has plans for further development to meet market

HUSCH BLACKWELL

February 24, 2023

Page 2

demands and give Madison residents greater options to shop and dine locally. Severely limiting the locations on the West Towne property where new development can occur will have a negative impact on CBL's ability meet local needs and will have a serious negative impact on West Towne's property value.

West Towne has been an important part of Madison for more than 50 years and CBL would like to work with the City to ensure West Towne is in the best position possible to continue to serve the needs of Madison residents for many years to come. Artificially imposing future ROWs on the property that do not correspond with future development plans will result in unintended consequences for this vibrant commercial area and will not serve the interests of Madison residents. We strongly encourage the City to remove the West Towne property from the official mapping proposal before the Common Council takes any further action on the matter. CBL would welcome the opportunity to work collaboratively with the City so it is not forced to protect its interests through legal action.

Sincerely,

HUSCH BLACKWELL LLP



Eric M. McLeod

kt

cc. Mayor Satya Rhodes-Conway (*via hand delivery*)
Council President Keith Furman (*via email*)
Plan Commission Chair (*via hand delivery*)

HUSCH BLACKWELL

Eric M. McLeod
Partner

33 E. Main Street, Suite 300
Madison, WI 53703
Direct: 608.234.6056
Fax: 608.258.7138
eric.mcleod@huschblackwell.com

July 6, 2021

John Strange
Assistant City Attorney
City of Madison Attorney's Office
210 MLK, Jr. Blvd., Rm 401
City-County Building
Madison, WI 53703
jstrange@cityofmadison.com

Re: Odana Area Plan Official Mapping Recommendation

Dear John:

As you know, we represent Madison Joint Venture, LLC, an affiliate of CBL & Associates Properties, Inc. (jointly referred to herein as "CBL") which owns and operates the West Towne Mall ("West Towne"). The City of Madison Planning Commission is presently considering the Odana Area Plan ("Plan") that covers portions of Madison's west side, including land owned by CBL and occupied by West Towne. One element of the Plan includes a recommendation to amend the City's Official Map pursuant to Wis. Stat. § 62.23(6) and M.G.O. § 16.25(6). This proposed amendment to the City's Official Map would place public street rights of way ("ROWs") directly upon CBL's West Towne property. Such an action by the City would constitute a taking of CBL's property without just compensation in violation of the Fifth Amendment to the U.S. Constitution. As such, CBL urges the Planning Commission to remove from the Plan its recommendation to amend the Official Map.

The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use without just compensation." Takings law is intended to preserve both practical and substantive property rights. As such, it recognizes that a taking does not require an actual, physical taking, but may also include any destruction, restriction or interruption of the common and necessary use and enjoyment of property in a lawful manner. Moreover, an actual, physical taking need not take the full interest in private property or a portion thereof in order to trigger the just compensation requirement. The Official Map recommendation contained in the Plan amounts a taking of CBL's property. By establishing ROWs on developed commercial property, the City would be acquiring a present interest in private property for future use as public road. Moreover, doing so

July 6, 2021
Page 2

deprives CBL of its property rights by prohibiting CBL from freely using and building upon its West Towne property as it deems necessary and appropriate in order to continue deriving economic benefit from that property.

The Official Map provided for by Wis. Stat. § 62.23(6) may, under different circumstances, be a legitimate tool for city planning. However, its intended purpose is to prescribe plans for vacant, undeveloped lands so as to put landowners on notice of where future buildings should or should not be constructed. That the statute does not contemplate being used to place streets around or through pre-existing structures on developed land is readily apparent. *See* Joseph C. Kucirek & J. H. Beuscher, *Wisconsin's Official Map Law: Its Current Popularity and Implications for Conveyancing and Planning*, 1957 Wis. L. Rev. 176 (1957). Courts will admonish a misuse of the mapping authority when it interferes with a landowner's current or contemplated use of the land, even where the map may otherwise be properly drafted pursuant to and in compliance with the statute. *See State ex rel. Miller v. Manders*, 2 Wis. 2d 365, 376, 86 N.W.2d 469 (1957). Case law in Wisconsin and other jurisdictions with similar mapping statutes illustrates that the Plan's recommendation would be such a misuse of that authority.

Finally, amending the Official Map in the manner recommended by the Plan reveals the City's intent to depress the value of property it seeks to later acquire through actual eminent domain proceedings. The ROWs recommended by the Plan are extensive: they surround and run right up to the existing mall footprint, thereby imposing severe limitations on future modifications or additions. The City need only wait until its restrictions on the property have sufficiently reduced its value such that it can commence eminent domain proceedings at the reduced price it desires. This would be a grave abuse of the City's land-use power and would be unequivocally unsanctionable. *See State v. Gurda*, 209 Wis. 63, 243 N.W. 317, 320 (1932).

The Proposed Official Map Amendment Constitutes a Taking

Private property ownership comes with a bundle of rights, including the rights to use, exclude, improve upon, and derive economic benefit from. *See, e.g., Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003 (1992); *Phillips v. Washington Legal Found.*, 524 U.S.156, 170 (1998); *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001). Accordingly, a taking does not require an actual, physical seizure but includes government action that sufficiently reduces the sticks left in the property owner's aggregate bundle. *See Andrus v. Allard*, 444 U.S. 51, 66.

Even though adoption of the Official Map amendment would not itself physically place streets through CBL's property, such action amounts to the present acquisition of an interest in that property. An actual, physical taking need not take the full interest in private property or a portion thereof in order to trigger the just compensation requirement. *Cedar Point Nursery v. Hassid*, 594 U.S. ____ (2021). While the actual construction of roads may not occur for many

July 6, 2021
Page 3

years to come, a portion of CBL's interest in the land subject to the ROWs established by the Official Map will most certainly be taken by the City upon its adoption.

CBL's interest in that land includes the right to use its property as it sees fit, subject to generally applicable land use laws. This includes the right to erect new structures and expand or otherwise improve its existing structures as CBL deems necessary to continue deriving economic benefit from its property. *See generally Lucas*, 505 U.S. 1003. The proposed Official Map amendment deprives CBL of these rights—not on the basis of generally applicable land use laws—but because the City has affirmatively defined ROWs on CBL's property for future public road construction. Moreover, even though CBL may retain possession of the property subject to the ROWs, that occupation is merely “permissive, at all times subject to the paramount rights of the public” and the only construction it can undertake would be pursued at its own hazard. *See Cheltenham Trust Co. v. Blankenburg*, 241 Pa. 394, 396.

CBL has also invested heavily in the success of West Towne and continues to make improvements to the property in order to serve the public and meet changing market demands. Those improvements necessarily include modifying the mall's physical structure and adding other structures on the property. For example, new construction is currently underway with the addition of a Von Maur upscale department store. The Official Map amendment would amount to serious interference with CBL's investment-backed expectations concerning the use of its property by depriving CBL of the ability to modify the mall's existing structure and to construct new buildings.

This use of official mapping is, as one court put it, “in reality, a taking of property by possibility, contingency, blockade and subterfuge, in violation of the clear mandate of our Constitution that property cannot be taken or injured or applied to public use without just compensation having been first made and secured.” *Miller v. City of Beaver Falls*, 368 Pa. 189, 193–94 (1951). Such actions deprive the owner of his property rights yet force him to sit idly by while the City takes as long as it wants to choose to condemn the property or to change its mind about condemnation entirely. *Id.* Consequently, these actions are unlawful takings for which municipalities owe just compensation to property owners.

Planning Streets Through Pre-existing Structures is an Abuse of the Official Map Statute

The Official Map statute provides a legitimate tool for planning out future developments over vacant lands so that land needed for future streets will be available to the municipality at bare land prices. *See Joseph C. Kucirek & J. H. Beuscher, Wisconsin's Official Map Law: Its Current Popularity and Implications for Conveyancing and Planning*, 1957 Wis. L. Rev. 176, 177 (1957). Mapping may also give direction and pattern to future community growth, such that property owners know the lines to which their potential future structures must conform. *Id.* But mapping through developed property with pre-existing structures that is actively used for

July 6, 2021

Page 4

ongoing commercial activity is plainly not what the statute contemplates and is at odds with any legitimate goals the statute seeks to accomplish.

Both Wisconsin courts and courts in jurisdictions with similar or identical mapping statutes recognize that even seemingly authorized uses of the mapping statute can still be unconstitutional takings when applied to a particular property. *See State ex rel. Miller v. Manders*, 2 Wis. 2d 365, 374–76, 86 N.W.2d 469 (1957) (citing *Rand v. City of New York*, 1956, 3 Misc.2d 769, 155 N.Y.S.2d 753, 755; *Roer Construction Corp. v. City of New Rochelle*, 207 Misc. 46, 136 N.Y.S.2d 414 (1954)). Takings have been found where, like here, official maps impede the landowner's ability to pursue a use in which he has already invested. *Roer*, 207 Misc. 46. This principle takes on an entirely new force when, as here, the landowner has not just taken steps to pursue that use but has actually *built* and *utilized* the property in question for that use for decades, as CBL has with West Towne. Such a situation undoubtedly calls the map's constitutionality into question. *See Agliata v. D'Agostina*, 124 N.Y. 2d 212.

Placing a street on an official map may not, under certain circumstances, constitute a taking. Courts have acknowledged that, “[a]s applied to the plotting of streets through unimproved land, or as to projected streets in sparsely settled urban communities, th[is] principle is sound.” *In re Sansom St. in City of Philadelphia*, 293 Pa. 483, 487, 143 A. 134, 135 (1928). However, that principle does not hold when a map imposes unique burdens like this one on an individual's property or use of the property. *See id.*; *Cheltenham Trust Co. v. Blankenburg*, 241 Pa. 394, 88 A. 664; *Miller v. City of Beaver Falls*, 368 Pa. 189, 193–94, 82 A.2d 34, 36 (1951). In that instance, the municipality has in fact appropriated the property by enacting the map designating the property for a future public purpose, and that appropriation to public use will continue as long as it is unrepealed. *Cheltenham Trust Co. v. Blankenburg*, 241 Pa. 394, 88 A. 664.

While CBL may be permitted to continue operating within its existing structures, the restrictions imposed by the proposed Official Map amendment will unquestionably deprive CBL of its ability to make lawful improvements, causing CBL to suffer losses that future eminent domain proceedings would not be able to account for. *See In re Sansom St. in City of Philadelphia*, 293 Pa. 483, 487, 143 A. 134, 135 (1928). Prohibiting CBL from making lawful changes will necessarily drive the property's value down. So beyond missing out on the future economic benefit it could continue to derive from the property by making structural adjustments, CBL would be forced to stand idly by while its property's value depreciates until the City decides to initiate eminent domain proceedings. That is a situation where the map necessarily constitutes a taking because those losses could not be accounted for in future condemnation proceedings. *See id.*

July 6, 2021
Page 5

The Odana Area Plan Would Illegally Depress the Value of Property Later to be Taken by Eminent Domain.

The Official Map proposal contained in the Plan cannot be justified as a legitimate exercise of the police power. It barely hides the City's obvious goal of impairing CBL's ability to maintain and improve the historic use of the West Towne property. The only explanation for the Official Map proposal is that it aims to impair West Towne's viability and suppress the property's value so that, in the future, the City would be able to condemn the property at an artificially reduced price. Using land use controls to reduce the value of property that the City later seeks to acquire through eminent domain is an illegitimate and unlawful exercise of the police power.

The Plan's officially mapped streets make little sense so long as the mall remains in place. They run right up to the mall's exterior and rely on the mall's removal to run continuously. As if this fact did not make the City's vision for the West Towne's fate obvious enough, the unofficially mapped streets do so—running directly through the mall itself. While unofficially mapped streets do not trigger the same statutory restrictions as officially mapped streets, their practical effect on landowners is no different. *See* Kucirek & Beuscher, *Wisconsin's Official Map Law*, at 179.

The Wisconsin Supreme Court is attuned to cities abusing land use tools to depress the value of property they later seek to condemn through proper eminent domain. *See State v. Gurda*, 209 Wis. 63, 243 N.W. 317 (1932). The City's barely veiled attempt to do so here is, in the Court's words, "utterly unreasonable, and cannot be sanctioned." *Id.* at 320.

Conclusion

We strongly encourage the Planning Commission to eliminate the Official Map recommendation contained in the Odana Area Plan. Such an amendment to the Official Map would constitute an unconstitutional taking of CBL's property and would be an invalid exercise of the police power. CBL would be forced to challenge that action in court.

Regards,

HUSCH BLACKWELL LLP



Eric M. McLeod