Murphy, Brad

From: ANA MARIA MISIC [ammisic@wisc.edu]
Sent: Sunday, April 08, 2007 7:09 PM
To: Ethington, Ruth
Cc: Voss, James; Murphy, Brad; megan@mocomarket.com
Subject: Outdoor Eating - 804 Williamson St.

To whom it may concern:

I am a resident of the Livingston at 808 Williamson St., Unit 203. I am writing to support MOCO's use of the patio as a dining area. While I do not have legal or zoning expertise, my common sense observations show that the attached patio area belongs to MOCO. Since I moved in February 2006, I have not seen anyone eat, drink, smoke, socialize, sunbathe, barbeque, etc…. in the "common area". If this is a common area, then it is the most underutilized one I have ever seen.

I have spoken to Megan Ramey several times and have shopped in her store. It is a mellow little store, mainly selling organic food, with a limited selection of beer and wine (I only saw three types of wine and 4 types of beer on sale). It does not strike me as raucous or potentially raucous. Ms. Ramey seems to want to keep the residents happy, as we are some of her primary customers. I doubt that she will allow a disruptive atmosphere on the patio. I am very happy that her shop has moved here -- it is a valuable addition to our neighborhood.

When I moved into the Livingston, I was told that a legal firm would be occupying that space. They did not secure their finances for the purchase, so the commercial space went back on the market. I know that many of my neighbors were concerned that customers at MOCO may cause a noise disturbance, and I am sympathetic. However, firm employees, taking smoking and chatting breaks on their cell phones, probably would cause a similar "disturbance."

I respect my neighbors and am concerned about their noise complaints. I myself do not experience undue noise although my window faces Williamson Street and I am unfamiliar with the noise issues, if any, in the other condominiums. If the noise is as bad as they say it is, then Livingston Association should make some sound-proofing adjustments to the physical building. I am not convinced that declaring the patio area "common use" is the way to solve the noise problem.

Thank you very much for your time. Please do not hesitate to contact me if you have any questions or if I can be of further assistance.

Ana Misic

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Parks, Timothy

From: mjdudzik@uwalumni.com
Sent: Wednesday, April 04, 2007 9:32 PM
To: Parks, Timothy; Tucker, Matthew; Murphy, Brad
Cc: jolson@operationfreshstart.org
Subject: Opposition to Moco Market's Application for Outdoor Eating Area at804 Williamson Street, Plan Commission Agenda, April 9, 2007

Good Day -

I regret that, due to a prior commitment, I will be unable to attend the scheduled April 9th Planning Commission meeting tompersonally address this issue.

In brief, I oppose the change in designation of the current patio/courtyard area (so designated on the property map I was provided as part of my purchase agreement [Declaration of Condominium]) held as a "Common Element", available to all residents, into a private outdoor eating area monopolized by one owner as a "Limited Common Element" not so identified in the above original condo document.

The developer now, and after the fact, conveniently wishes to alter the extant agreement by filing an erstwhile "Correction Affidavit" to effect such change. It is not a correction. The area in question is clearly identified as patio/courtyard in our Declaration of Condominium, i.e., a Common Element, and at the same time is not identified as a limited Common Element in that document.

That was not the deal. That is not what I bought.

Such use will result in diminished access by the residents of the building - who will be further subjected to unacceptably increased noise levels due to intensified non-resident usage (it's a virtual concrete, hard-surface canyon - very loud).

I'd note further that Moco Market's new website prominently features a Wisconsin State Journal article proclaiming its in-building accessibility to customer's dogs (they received a variance for that) - a proposal which condo owners subsequently voted to oppose (the article is still featured - so, how do we stop the dogs from coming?).

I can not tell you how disagreeable the current amount of unpicked up dog feces is, or how annoying it is to listen to dog fights (twice this past week), or how discouraging it is to see the front-of-building's grass, all dead due to dog urine - without the "market visiting" dogs. So, why feature the "bring your dog" article when you know the residents have voted to disallow same?

That ain't the deal, either.

I request and urge that you do not permit such change in function of this Common area.

Sincerely,

Mark Dudzik
808 Williamson, No. 301
Madison, WI 53703

phone: 608.251.1940

Parks, Timothy

From: David Bridgeford [dbridgeford@mac.com]
Sent: Monday, April 02, 2007 2:48 AM
To: Murphy, Brad; Parks, Timothy; Tucker, Matthew
Subject: Opposition to Moco Market's Application for an alteration to an approved and recorded PUD-SIP, Plan Commission Agenda, April 9, 2007

Dear Mr. Murphy, Mr. Parks and Mr. Tucker,

I am in opposition to Moco Market's Application for an alteration to an approved and recorded Planned Unit Development (Plan Commission Agenda, April 9, 2007). I own one of the condominiums at the property in question, which is known as The Livingston and I submit this opposition on my behalf. The application should be denied since the courtyard/patio which is the subject of the application is owned in common by all the Unit Owners. Further, the location of the proposed use would cause a reduction in property values and significant disturbances to a number of homeowners. I would appreciate it if you would forward my opposition to the Plan Commission members for their review prior to the Plan Commission meeting of April 9, 2007.

On August 26, 2006 Megan Ramey, (owner of Moco Market, the Applicant) came before our condominium association and presented a plan to purchase one of the two commercial spaces at the condominiums at 800, 802, 804 and 808 Williamson Street. She represented to those present that the Developer of The Livingston planned to be an investor in her business. The Livingston has 36 residential and 2 commercial units. The other commercial unit is owned by an advertising agency. There was no objection to her business or purchase of the Unit at 804 Williamson Street. However, there was significant concern over her proposal to use the courtyard/patio adjacent to her unit for an outdoor commercial eating and drinking area. The courtyard/patio is about 10 feet wide and 45 feet deep 4 stories high and is surrounded by 9 residential owners who have patios and/or windows on the courtyard. The courtyard/patio is adjacent to a condominium walkway and is accessible to anyone from this sidewalk or the exits from 802 or the exits of the commercial space. This long, narrow space has dramatically poor acoustics due to the hard brick and cement surfaces.

Some unit owners at the meeting reported that normal conversations on the courtyard/patio could be heard word for word through closed windows, three stories up. There was one report by a homeowner that she could hear a homeless person on the courtyard/patio pee into a bag through closed windows three stories up. I also talked at the meeting about how conversations on the courtyard/patio sound like they are taking place right outside your window. (I live on the third floor and both my windows are on this courtyard/patio.) About 75% of the homeowners at The Livingston do not have windows or patios on this courtyard and some expressed interest in having the space sold promptly. There was also discussion about whether the City would or would not approve the use of the courtyard/patio for an outdoor commercial eating and drinking area. Additionally, there was some confusion over whether the courtyard/patio was part of the property of the commercial space or was owned in common. (I assumed at the time that the courtyard/patio was a limited common element for the exclusive use of the commercial space owner. It would have made no sense for Megan, or anyone else, to propose having exclusive use over a courtyard/patio which belonged to all the Unit Owners.) The members present took an informal and anonymous vote and approximately 40 percent of the members present were opposed to the use of the courtyard/patio for an outdoor commercial eating and drinking area.

Despite significant objections from the homeowners and doubt over whether the City would approve

the use of the courtyard/patio for an outdoor commercial eating and drinking area, the Applicant purchased the property in December, 2006. No attempt was made by the Applicant to alter the approved and recorded PUD-SIP prior to her purchase.

On February 21, 2007, the Applicant appeared before the ALRC to get a class B combination liquor and beer license to cover both the interior of her unit and the courtyard/patio. The application for the interior was approved, but the application for the courtyard/patio was denied based on concerns that the Plan Commission had not approved the use of the courtyard/patio for an outdoor commercial eating and drinking area and the disturbance that would result to many of the owners at The Livingston.

The Applicant now comes to the Plan Commission seeking an alteration of the approved and recorded PUD-SIP. The application should be denied since the Declaration and Plat of the Livingston Condominiums which were recorded January 11, 2006 by the Developer (Livingston Properties) provide that the courtyard/patio in question is a common element which is available for the use and enjoyment of all unit owners. This is consistent with the fact that about 40% of the Unit Owners do not have individual patios or balconies. I discovered the fact that the courtyard/patio is a common element only recently while researching the Application. Both my deed and my title insurance policy incorporate the Declaration and Plat by reference. My deed specifically includes an undivided percentage interest in all the common elements. The Declaration provides that "none of the real estate which is part of the Common Elements may be abandoned, subdivided, encumbered, sold, or transferred except by amendment of this Declaration." Section 703.09 of the Wisconsin Code provides that a recorded condominium declaration may only be amended with the written consent of two thirds of the total number of unit owners. That section also provides that written consent of a unit owner is not effective unless it is approved in writing by the first mortgagee of the unit. Finally, that section provides that any proper amendment to the Declaration is not effective until it is recorded. Section 703.11 (5) provides the exact same procedure for amending a condominium plat.

Although a document was sent to the Unit Owners in August of 2006 giving the Unit Owners a choice to vote to allow the buyer of the commercial space to use the courtyard/patio for the use of its patrons, only 15 of the unit owners voted to approve this action. This is well short of the 25 unit owners required by Section 703.09 of the Wisconsin Code.

On December 21, 2006 the Developer conveyed Unit 804 to the Applicant. There is no mention of the courtyard/patio in the deed. At the same time, the Developer signed a document which purports to change the courtyard/patio from a common element to a limited common element which would give exclusive use of the courtyard/patio to the Applicant. This document was recorded as a "Correction Affidavit." I discovered this document doing a property search. In this document, the Developer states that the courtyard/patio on the condominium plat "should have been identified on the Plat as a limited common element appurtenant to Unit 804." This document was signed and recorded after the Developer had sold the other 37 condominium units. I received no notice of this recorded document from the Developer or anyone else.

I advised the Livingston Board of Directors of my discovery in writing on March 29, 2007. The following day I received an "official response" from the President of the Board of Directors that she had consulted with the other Board members. She stated that the Board's position that Moco Market was entitled to exclusive use of the courtyard/patio for an outdoor eating and drinking area remained unchanged. The Condominium Association's belief that a "majority of owners" or the Board of Directors can give exclusive use of a common element to Moco Market is completely unsupportable by any legal authority.

Although the Developer states in the Correction Affidavit that not identifying the courtyard/patio as a limited common element was an error, it is worth noting that the site plans recorded with the approved

PUD-SIP show the space as a "Plaza." To me, use of the word "Plaza" means space available for the use of all Unit Owners. In addition, I received a floor plan which included the first floor from the realtor for the Developer when I picked out my parking space. This document identifies the space in question as a "Courtyard." Again, this designation implies space available for the use of all Unit Owners. The Plan Commission should also consider the site plans submitted with the Livingston Railroad Corridor PUD-SIP application on August 23, 2006 by the same Developer. In these plans, the space in question is shown to be a "Plaza." There is no record of the Developer applying to the City for any alteration of the approved and recorded PUD-SIP at any point in the process.

Even if not identifying the courtyard/patio as a limited common element were an error, It is clear that the Developer and the Applicant have failed to comply with the requirements of sections 703.09 and 703.11(5) regarding amending a declaration or plat. The recorded "Correction Affidavit" has no legal significance. Although Section 236.295 of the Wisconsin Code does provide a way to correct errors on a plat or certified survey map, the section is intended to cover only scrivener's errors. Section 236.295 cannot be used to alter title or ownership in any way. In addition, Section 236.02(2m) provides that a correction instrument may only be drafted by a "licensed land surveyor." Here, the correction instrument was signed by Scott Lewis, the president of Livingston Properties. Finally, Section 703.09 (d) requires the text of the Condominium Declaration to contain a description of the limited common elements and the unit to which the use of each is restricted. Although the text of the Declaration describes the limited common elements in paragraph 9, there is no mention of the courtyard/patio in question. Is this another mistake? (The Declaration was drafted by the Developer's attorney.) And there has been no amendment to the original Declaration. Accordingly, the space in question is a common element and the Plan Commission cannot give exclusive use of the courtyard/patio to the Applicant.

Finally, and most importantly, even if the Condominium Association were to legally amend the Declaration and Plat giving exclusive use of the courtyard/patio to the Applicant, it is clear that the Commission would still have an obligation to deny the application. Outdoor commercial eating and drinking is of such unique and varying characteristics, that under the Madison Zoning Code, it is not classified as a permitted use in any particular district. The Zoning Code requires the Plan Commission to consider the impact of the proposed use on the neighbors and the need for this use at the particular location. Clearly, the proximity of the proposed use to several residential owners and the echo chamber acoustics of the courtyard/patio could cause a reduction in the property values of the affected owners. Also, several owners have expressed concern about diminished enjoyment of their property. There are also security, safety and legal liability issues to consider.

In addition, there has been no showing by the Applicant in her letter of intent of the need for an outdoor commercial eating and drinking area in the space. According to Scott Lewis' PUD-SIP submission for the Livingston Railroad Corridor which is directly to the north of The Livingston there are 21 restaurants and 3 coffee shops within a 4-block area. Many of those restaurants have outdoor dining in more suitable spaces. I can think of no other outdoor commercial eating and drinking area in Madison which presents such an obvious conflict between diners and property owners. Under these circumstances, the Zoning Code requires the Commission to deny the application for an outdoor commercial eating and drinking area.

With the approval of the PUD-SIP for both The Livingston on Williamson Street and the Livingston Railroad Corridor on Livingston Street, the Plan Commission has changed the area from 32 units per acre under C2 zoning to around 90 units per acre. With these changes in density comes a responsibility to insure that residents and owners are not intruded on in ways which can easily be avoided. For the forgoing reasons, the Plan Commission should deny the application.

Respectfully submitted,

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David Bridgeford
808 Williamson St., Unit 309

To all of those concerned:

Based on the email messages I have received expressing opposition to the Moco Market's application for an alteration to the PUDSIP for an outdoor eating area, I have requested the the City Attorney's office provide the Plan Commission with some advice on how to handle this matter. Below is the recommendation from Assistant City Attorney James Voss which essentially recommends that this matter be referred at Monday's Plan Commission meeting, pending receipt of additional legal opinions from the applicant which convincingly addresses the legal issues raised by the objecting property owners. The fundamental issue is whether the applicant can legally submit the application for the alteration to the PUDSIP.

While this item is on the agenda and will stay on the agenda, since the agenda is already posted, we will be recommending that no action be taken on this item other than to refer it based on the recommendation from the City Attorney's Office.

Brad Murphy
Planning Division Director
Dept. of Planning & Community & Economic Development
PO Box 2985 Madison WI 53701-2985

-----Original Message-----
From: Voss, James
Sent: Thursday, April 05, 2007 12:02 PM
To: Murphy, Brad
Subject: RE: Opposition to Moco Market's Application for Outdoor Eating Area at804 Williamson Street, Plan Commission Agenda, April 9, 2007

Brad,

In a typical recorded private covenant or use restriction scenario, I believe that the City may not be legally responsible for enforcement of the private restriction as an element of a zoning approval application. However, in this case, it appears that there is a legitimate controversy over whether the courtyard space is a true undivided common area or a limited common area over which the applicant has controlling rights. This goes to the fundamental jurisdictional question of whether the applicant can legally submit the application over the space in question. The residential condo owners' procedural objections have drawn this jurisdictional question into issue.

Therefore, we suggest that the matter be referred for a reasonable period of time, and that the applicant should be required to provide either: a) an independent legal opinion of title which convincingly answers all of the key legal questions raised by the objecting property owners; or b) a court order or declaratory judgment which resolves the controversy. Of course, the latter would be preferable, because, preliminarily, it appears that the objecting property owners can rather easily obtain an opposing legal opinion that would refute any that could be supplied by the applicant. Nevertheless, we will keep an open mind on the matter, until the legal opinion(s), if any, are submitted.

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