

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

Date: February 22, 2012

MEMORANDUM

TO: Plan Commission

FROM: Katherine C. Noonan, Asst. City Attorney

RE: 202 and 206 Brooks St.

The Regent Street – South Campus Neighborhood Plan recommends University academic/research uses for 202 and 206 Brooks Street. The current use is residential, and an application for a denser residential use is before the Plan Commission. For several reasons, it would be problematic for the Plan Commission to reject the submitted PUD application on the basis that the proposed use is residential rather than a University academic/research use.

First of all, it is extremely unlikely that the private owners would be able to develop what is essentially a public use (University academic/research). It also is unlikely that the plan contemplated any entity other than the University developing the site for a University academic/research use since the neighborhood plan noted that the University's Campus Master Plan indicated an expansion of the Educational Services Building for this site. The result of this disconnect between private ownership and the recommended use that almost certainly would be public is that it leaves the current private owners without the ability to improve their property other than to fix up the existing six residential units or to redevelop the properties within the parameters of the existing zoning on the property.

There is an additional reason why denial of the requested rezoning based on future use recommendations in the neighborhood would be problematic. As recently as 2010, a PUD application for housing was approved on a site on Spring Street with the same neighborhood plan future land use recommendation. Although each project is different, and the evaluation of the standards is unique to each application, there should be some consistency in how the guidelines of the neighborhood plan are implemented.

That is not to say that the project on Brooks Street should be approved simply because of the Spring Street approval. The Staff report notes additional issues with the design of the Brook Street project that may impact the outcome of the Plan Commission's consideration. It would be more appropriate for the Commission to focus its consideration on those issues as well as the general PUD standards rather than the future land use recommendation of the neighborhood plan.

The above is not an opinion on the validity of the inverse condemnation allegation Mr. Trachtenberg makes. Inverse condemnation, and takings law in general, are complex issues and there is a large body of case law addressing their legal subtleties. Furthermore, the burden of proving a statutory or constitutional violation is

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difficult to meet. Nevertheless, this application raises concerns about the appropriate level of land use regulation when public and private interests are involved as they are at this site.



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20 February 2012

Chair and Members
 Plan Commission
 c/o Mr. Bradley J. Murphy
 Planning Director
 Dept. of Planning and Development
 City of Madison
 215 Martin Luther King Jr. Blvd.
 Madison WI 53703

Re: Joseph D. McCormick/JD McCormick Company, LLC/JDM Properties LLC
 and Dennis Catterson
 202 and 206 N. Brooks Street, Madison Wisconsin

Dear Chair and Members of the City of Madison Plan Commission:

We are the attorneys for Joseph D. McCormick/JD McCormick Company, LLC/JDM Properties LLC and Dennis Catterson, the owners of 202 and 206 N. Brooks Street. Those two properties comprise a total of six residential units assessed at a combined \$902,300.00 including a combined approximately \$125,000.00 in land value. My clients have applied for a demolition permit and for PUD zoning to demolish the two existing structures and to build a unified five story 14 residential unit apartment building, which according to the PDD application is a new investment of \$2,500,000.00, which would result in a value of approximately \$2,625,000.00.

There are two issues before the Plan Commission. The first and primary issue is whether the PDD application can or should be approved in light of the use constraints of the Regent Street-South Campus Neighborhood Plan. The second and secondary issue is whether the PDD application should be approved in light of a certain architectural recommendation in the Regent Street-South Campus Neighborhood Plan.

As to the first issue, as noted by Plan staff, the City Comprehensive Plan identifies the subject site and the surrounding area for uses related to the University of Wisconsin campus, identifying such uses to include student, faculty and employee housing. Plan staff correctly states that the subject proposed residential development can be found to be consistent with the land use recommendation of the Campus designation in the City Comprehensive Plan. Plan Staff also notes the proposed use is consistent with surrounding development.

Notwithstanding conformity with the City Comprehensive Plan, Plan staff argues that the subject is inconsistent with the land use recommendations of the 2008 Regent Street-South Campus Neighborhood Plan, hereinafter "Neighborhood Plan". That plan designates the subject site as "academic/research", referencing the University of Wisconsin's 2005 Campus Master Plan which identifies the site for the future construction of the Educational Services Building. Effectively, there is only one real future owner and developer of such an "academic/research" facility, the University of Wisconsin -Madison.

In a letter dated January 5, 2012 from Gary A. Brown, Director of Campus Planning and Landscape Architecture, University of Wisconsin-Madison, the University of Wisconsin has objected to the PUD before the City as "inconsistent" with the Neighborhood Plan (the proposed project is not an "academic/research" facility). While Mr. Brown notes that the University of Wisconsin had an option on the subject site, it let that option lapse in 2006 because of the lack of land acquisition funds. Mr. Brown notes that this site is suggested for the future expansion of the School of Education's Teachers Education and Educational Science facilities and that the School of Education has begun discussing its future options for expansion and a review of funding scenarios. No timetable nor likelihood is provided by Mr. Brown. The University of Wisconsin has no legal claim to the subject site by way of any current option nor has it attempted to negotiate one.

As noted by Plan staff, 1208-1214 Spring Street is a site within the Neighborhood Plan that was also restricted to "academic/research" uses. But as to that site, Mr. Brown noted that the University of Wisconsin did not plan to acquire the site and effectively waived any objection to the proposed residential development (and developed) for that site. In other words, the sanctity of the Neighborhood Plan and its delineated uses is subject to enforcement or waiver by the University of Wisconsin and the University of Wisconsin, through the City, has effectively reserved private property for government acquisition and redevelopment, denying the right of redevelopment to the private property owner.

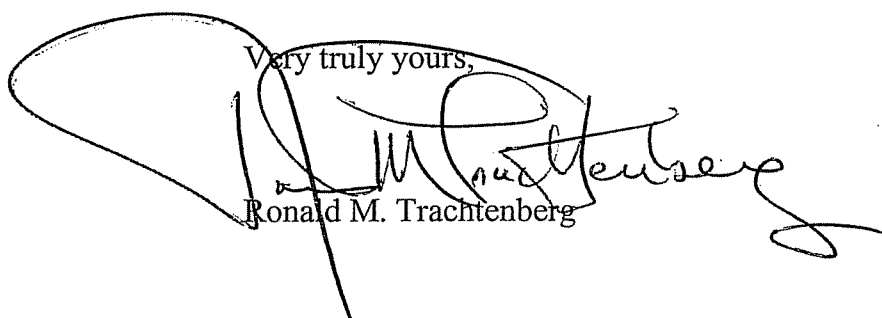
What is essentially happening is that the University of Wisconsin, a government entity, is attempting to use the City, a government entity, and its neighborhood planning process, to reserve for itself, the University of Wisconsin, the future right to redevelop the subject site, not allowing the private land owner the full potential use of the site and without compensation to that landowner. In other words, the University of Wisconsin is requesting that the City inversely condemn the subject parcel at the sole risk and expense of the City for the sole benefit and without cost to the University of Wisconsin. Reservation of development rights by a government authority for use by another government authority is among the classical definitions of inverse condemnation.

If the University of Wisconsin wants to acquire the subject site, the University can attempt to negotiate an option to purchase the property, either in the present state or in a redeveloped state, or condemn the subject site now or later.

Plan staff has recommended that the PDD application and related demolition application be placed on file pending an indefinite review of and potential amendment to the Neighborhood Plan. However, at best that action would be a temporary taking under inverse condemnation laying the City, and potentially only the City, open to substantial damages and actual and necessary attorney's fees. By approving the rezoning of 1208-1214 Spring Street, the City has acknowledged that it can approve a rezoning that is not strictly consistent with the use requirements of the Neighborhood Plan.

The second issue is one of design. While Plan staff notes that the proposed structure is generally consistent with the bulk requirement of the Neighborhood Plan, the Neighborhood Plan recommends certain specified step-backs along the street facades which the proposed structure is not in strict compliance with. Plan staff also notes that the Urban Design Commission has given the proposed structure initial approval. We believe that the Plan Commission should give all due deference to the Urban Design Commission on that point.

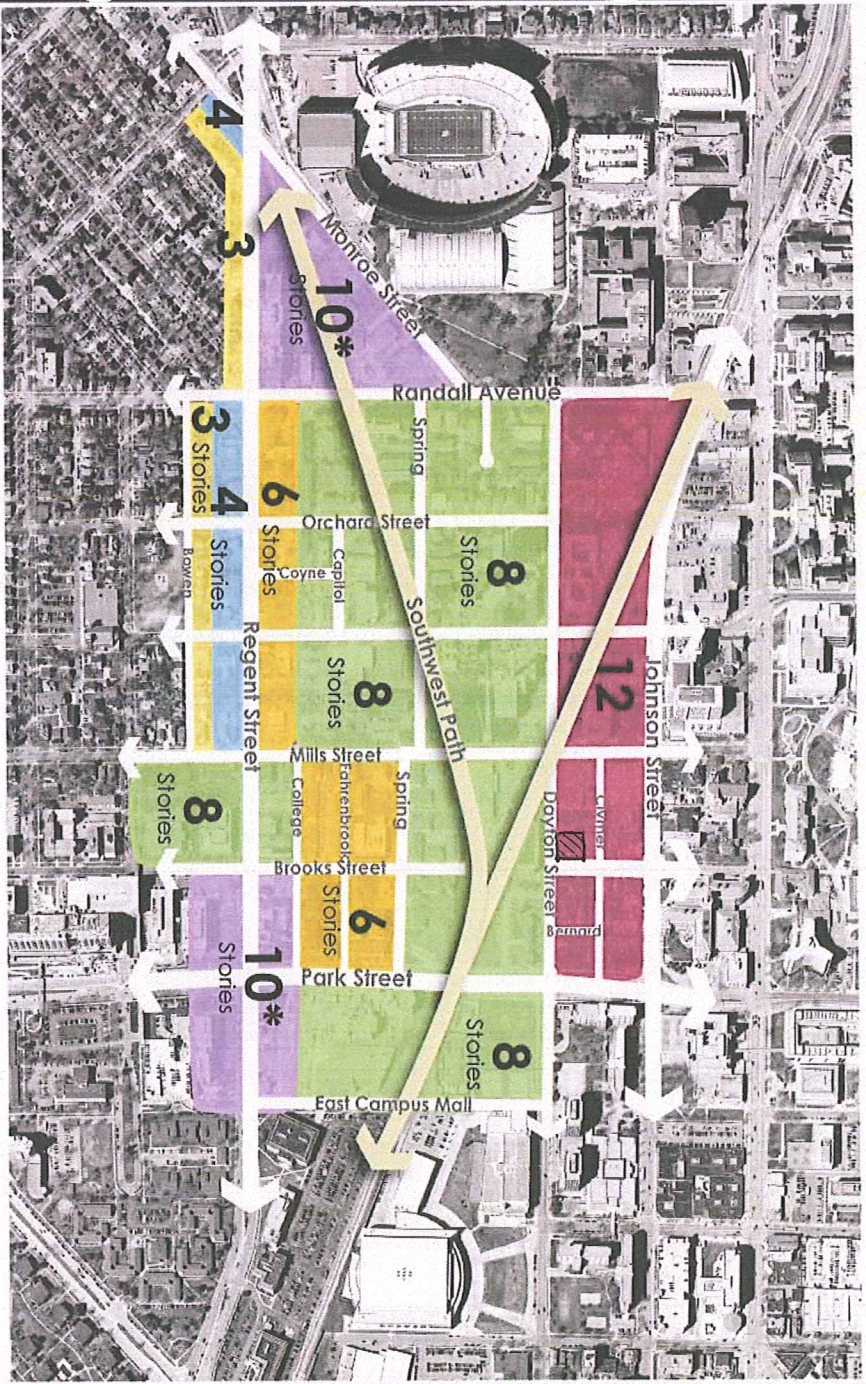
We respectfully request that the Plan Commission forward this project, both the PDD and the requested demolition, on to the City Council with a favorable recommendation. Any action to place this project on file, with or without prejudice, will constitute a taking, an inverse condemnation, laying the City open to damages and actual and necessary attorney's fees.

Very truly yours,

Ronald M. Trachtenberg

RMT:srp
25904.120459
Plan Commission lt
Enclosures

cc: Mr. Joseph D. McCormick HAND DELIVERED
Mr. Dennis M. Catterson HAND DELIVERED

Map 4.4
Maximum Building Heights
 Regent Street
 South Campus
 August 2007



Key

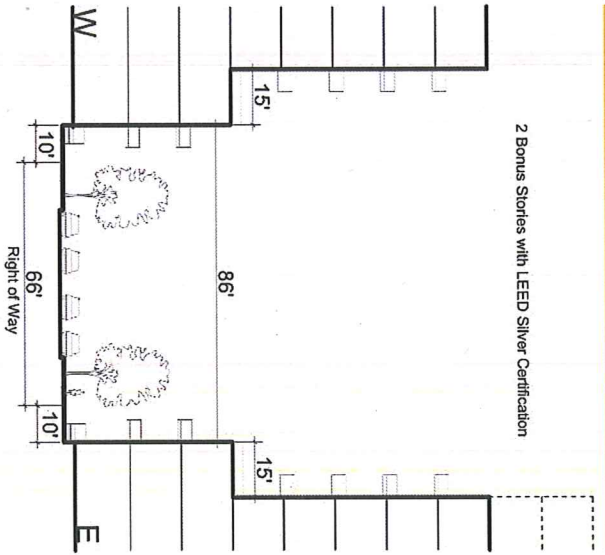
- 3 Stories/ 46 Feet
- 4 Stories/ 60 Feet
- 6 Stories/ 88 Feet
- 8 Stories/ 116 Feet
- 10 Stories/ 144 Feet
- 12 Stories/ 172 Feet
- * Includes two 'bonus' stories for LEED Silver Certification

Maximum building heights were determined based on a first floor height of 18' and upper floor heights of 14'. Although different floor heights are permissible, buildings may not exceed the indicated maximum number of stories or height in feet (whichever is less) indicated on this map.

The 10-story maximum height areas shown on this map at the Park St./ Regent St. intersection and in the triangle formed by Regent Street, Monroe Street, and Randall Avenue include two 'bonus' stories above the maximum height of 8 stories for environmentally-friendly development. See plan document for further details on requirements for bonus stories.

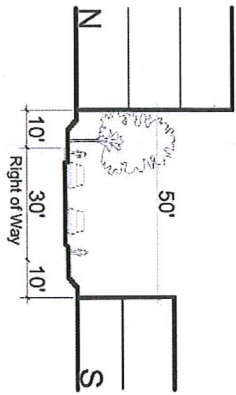


2 Bonus Stories with LEED Silver Certification



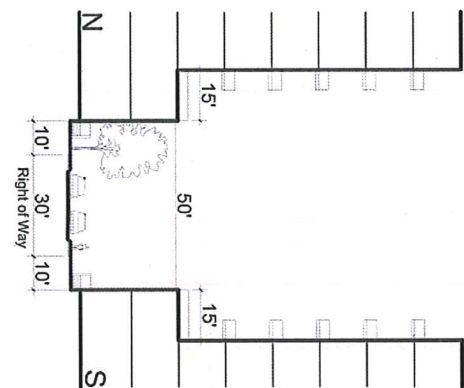
→ **6: Brooks Street**

- Maximum Stories:** West side: 8
East side: 10 (Regent to College, upon meeting LEED requirements for 2 bonus stories)
- Maximum Building Height:** West side: 116 feet
East side: 144 feet (Regent to College, upon meeting LEED requirements for 2 bonus stories)
- Minimum Stories:** 3
- Building Stepback:** 15 feet, above the 3rd floor
- Building Setback:** 10 feet



7: Bowen Court

- Maximum Stories:** North side: 3
- Maximum Building Height:** North side: 60 feet
- Minimum Stories:** 2
- Building Setback:** 10 feet



8: Capitol Court

- Maximum Stories:** 8
- Maximum Building Height:** 116 feet
- Minimum Stories:** 3
- Building Stepback:** 15 feet, above the 2nd floor
- Building Setback:** 10 feet



Regent Street
South Campus

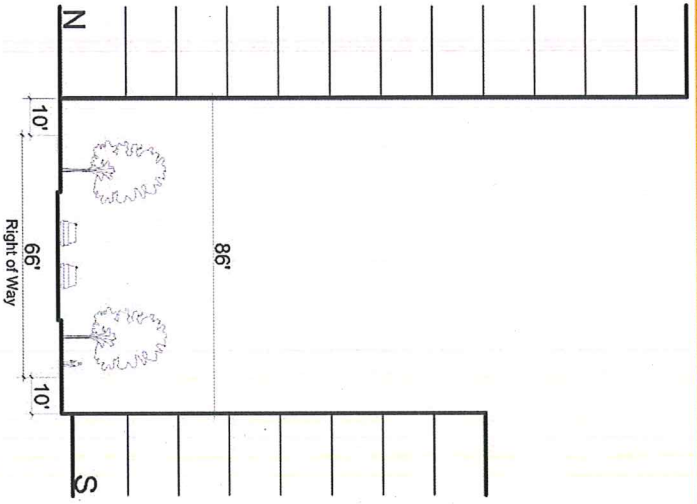
Urban Design

URBAN DESIGN
RECOMMENDATIONS
SUMMARY

Goal: Ensure that future development promotes the overall vision for the neighborhood and its sub areas.

Recommendations:

- Require that all new development conform to all requirements of the Overall Building Design Guidelines, Special Design Guideline Districts, and Cross Sections described in this chapter.



12: Dayton Street

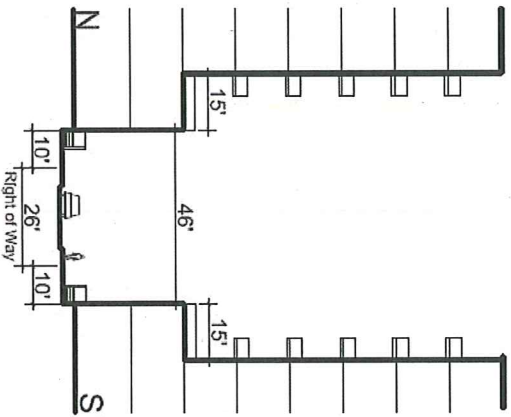
Maximum Stories: North side: 12
South side: 8

Maximum Building Height: North side: 172 feet
South side: 116 feet

Minimum Stories: 3

Building Stepback: None required

Building Setback: 10 feet



13: Randall Court

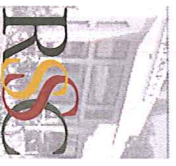
Maximum Stories: 8

Maximum Building Height: 116 feet

Minimum Stories: 3

Building Stepback: 15 feet, above the 2nd floor

Building Setback: 10 feet



Regent Street
South Campus