

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

**MEMORANDUM**

TO: Board of Parks Commissioners  
Common Council

FROM: Doran Viste, Assistant City Attorney

DATE: January 24, 2012

RE: Park property at 5203 Harbor Court (Lot 9 of Block One Spring Harbor)

This past summer, Mr. Jon Grefsheim, the owner of 5209 Harbor Court (Lot 10 of Block One of Spring Harbor, outlined in green on the attached map), filed a Notice of Claim with the City alleging that he has established adverse possession over the City's park property at 5203 Harbor Court (Lot 9 of Block One Spring Harbor, outlined in red on the attached map). After gathering the City's records regarding this property and discussing the matter further with Mr. Grefsheim's attorney, as well as receiving communications from the original grantor and speaking with the grantor's son/legal guardian, the City Attorney's Office has reached a settlement of all potential claims regarding this property that we believe is in the City's best interest. As detailed in this memo, this settlement would involve the City deeding the property back to the grantor who would then deed the property to Mr. Grefsheim, and would settle the potential adverse possession claim as well as the potential claim for reversion. Accordingly, for the reasons set forth in this memo, the City Attorney's Office is recommending approval of the resolution that would authorize Real Estate Services to execute a deed granting Lot 9 to Constance Dougherty based upon the City's failure to meet the conditions of the dedication.

History of the Acquisition and the Parcel

5203 Harbor Court (Lot 9) is a small street end open space at the end of Harbor Court where the street meets Spring Harbor (see Block One Spring Harbor plat attached). The lot itself is a small irregular shaped lot containing about 1500 square feet measuring about 50 feet deep, with 20 feet of frontage on Harbor Court and 36 feet of lake frontage. Adjacent to the lot on its eastern boundary is Lot 9 ½ (outlined in blue on the attached map), which is now City right-of-way, and on the western boundary line is Lot 10 (5209 Harbor Court). Lot 10 was acquired by Jon Grefsheim in 1976. Lot 9 is not buildable and would only have apparent value to either Mr. Grefsheim (who could expand his current property onto Lot 9 while still meeting zoning requirements), someone looking for water access, or as a neighborhood open space.

Prior to 1974, it is believed that Harold and Constance Dougherty used Lot 9 for lake access. On November 21, 1974 they deeded Lot 9 to the City by dedication, with the express condition that the "dedication is made for park purposes and in case said real estate should cease to be used for park purposes that the same is to revert to the



grantor or his heirs." (See attached warranty deed, Doc. No. 1414999.) It appears, from reviewing City records, that the City's intent at the time of acquisition was to beautify this court end to make it more usable by the neighborhood.

#### City Actions Toward and Current Status of Lot 9

In reviewing the City's records (or more accurately, the lack of records) pertaining to Lot 9, it appears that the City has done *nothing* regarding this property since its acquisition 37 years ago. At some point after the initial acquisition, the City removed a fence around the lot, but other than that it does not appear that the Parks Department/Division has had any active role with the land. Indeed, the only records that could be found regarding this property pertain to an August 15, 1984 Board of Parks Commissioners meeting on whether Mr. Grefsheim could keep some temporary fencing he had placed around some sapling trees on Lot 9 to protect them while they were established. At that time, some neighbors expressed, ironically, a concern that his private actions on that land would lead to adverse possession, while other neighbors and the Alder were in support of the private beautification efforts. In a memo prepared at the time of the 1984 hearing, Assistant Park Superintendent Forrest Bradley noted in his communication to the area Alder that

Some years ago this small outlot was deeded to the City. Being one of those small, out-of-the-way "parks", it was not high on the City's maintenance list. Several neighbors living nearby adopted the responsibility for mowing and picking up this area. Some evergreens have even been planted at private expense in an attempt to beautify this area.

The Board of Parks Supervisors approved the temporary placement of the fence for one year following a hearing on the matter, but this deadline was never enforced and no further action was ever taken by the City toward Lot 9. Indeed, the fence in question likely remains on the property, and today the entire surface of Lot 9 is covered in dense shrubbery, trees and vegetation and is no longer usable in its current condition as park open space (see attached pictures showing the current status of Lot 9). Hence, the record would support Mr. Grefsheim's claim that, over the last 35 years, he has planted and maintained all of the vegetation on Lot 9 and has openly treated this property as his own, with the City conducting no activities on or toward the property.

#### Claim of Adverse Possession

As noted above, Mr. Grefsheim has made a claim of adverse possession of Lot 9 based upon his 35 plus years of actions on the Lot. To meet a showing of adverse possession, he would need to establish that for 20 consecutive years (beginning no earlier than May 20, 1980 or later than April 28, 1998) he had exclusive, uninterrupted, continuous and hostile (adverse) use of the Lot, and that such use was open and notorious. Given the City's complete lack of attention to this parcel, and with no City records existing since 1984, I think that Mr. Grefsheim would likely be able to meet his showing of adverse possession. The City's only defense would be that the City permitted and acquiesced to this use as evidenced by the 1984 Board of Parks



Commissioners meeting, but that argument is thin as the Board only approved the fencing in question for one year and did not specifically address the extent of the private use that was already ongoing at the time. Hence, I think it is unlikely that the City would be able to show consent to the use and therefore if an adverse possession claim is filed in court it is likely that the City will lose Lot 9 to Mr. Grefsheim.

#### Reversionary Clause

As noted above, at the time the parcel was dedicated to the City, the City accepted the parcel with the restriction that it be used only for park purposes. Because of this restriction, and because the property was dedicated instead of purchased, the City cannot either allow the continued private use of Lot 9 by Mr. Grefsheim without violating the terms of the dedication, nor can the City sell, lease or otherwise dispose of Lot 9 to Mr. Grefsheim. Instead, as a result of the current and long standing use of Lot 9 by Mr. Grefsheim, Constance Dougherty and her heirs have a legal right to either sue the City for specific performance of the terms of the deed (require park use only, and therefore force Mr. Grefsheim to remove his encroachments) or sue the City to have the property deeded back to her under the reversionary clause. Based upon my review of the record here, I think that if she were to do either that the City would lose on the merits given our complete neglect of the property since its acquisition. While the City could ask Mrs. Dougherty to lift or waive the park restriction in the deed so that we could lease or otherwise allow Mr. Grefsheim to use the property, even if we were to do that his adverse possession claim would still stand and we would still likely lose the property to him on that argument. Hence, the restrictive covenant and the reversionary clause create a problem for the City in finding a way to settle Mr. Grefsheim's adverse possession claim in a way that would otherwise benefit the City.

#### Proposed Settlement

Due to the issues involved with both Mr. Grefsheim and Mrs. Dougherty, it is the City Attorney's Office's opinion that the best solution to this issue is to deed the property to Mrs. Dougherty and then allow her to dispose of the property to Mr. Grefsheim. The benefits of this settlement are that it will significantly reduce the City's costs as Mr. Grefsheim's attorney has already worked out a deal with Mrs. Dougherty and therefore there will be no need for the City to defend itself in court in litigation that the City is likely to lose, and any recording fees will be paid for by Mr. Grefsheim. (See attached letter from Atty. Christopher to Mrs. Dougherty.) In addition, because we will be losing the property not due to adverse possession but rather for failure to satisfy the restrictive covenant, this transfer will not set bad precedent for the City—although it should keep the City mindful of its enforceable obligations. Indeed, one could say that after 37 years of non-use that we are merely upholding our end of the original agreement that we entered into in 1974. Finally, this parcel has not been needed by Parks since it was acquired (as shown by the lack of attention to the parcel) and it remains too small to be of any value to the Parks Division and too out of the way to conduct regular maintenance activities. By entering into this settlement, this parcel can be returned to the tax rolls and will be assembled into a more usable piece of property.

In summary, for the reasons set forth in this Memo, the City Attorney's Office is asking for support of the resolution which would allow Real Estate Services to execute a deed granting Lot 9 to Constance Dougherty based upon the City's failure to meet the conditions of the dedication.



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Doran Viste

Encl.







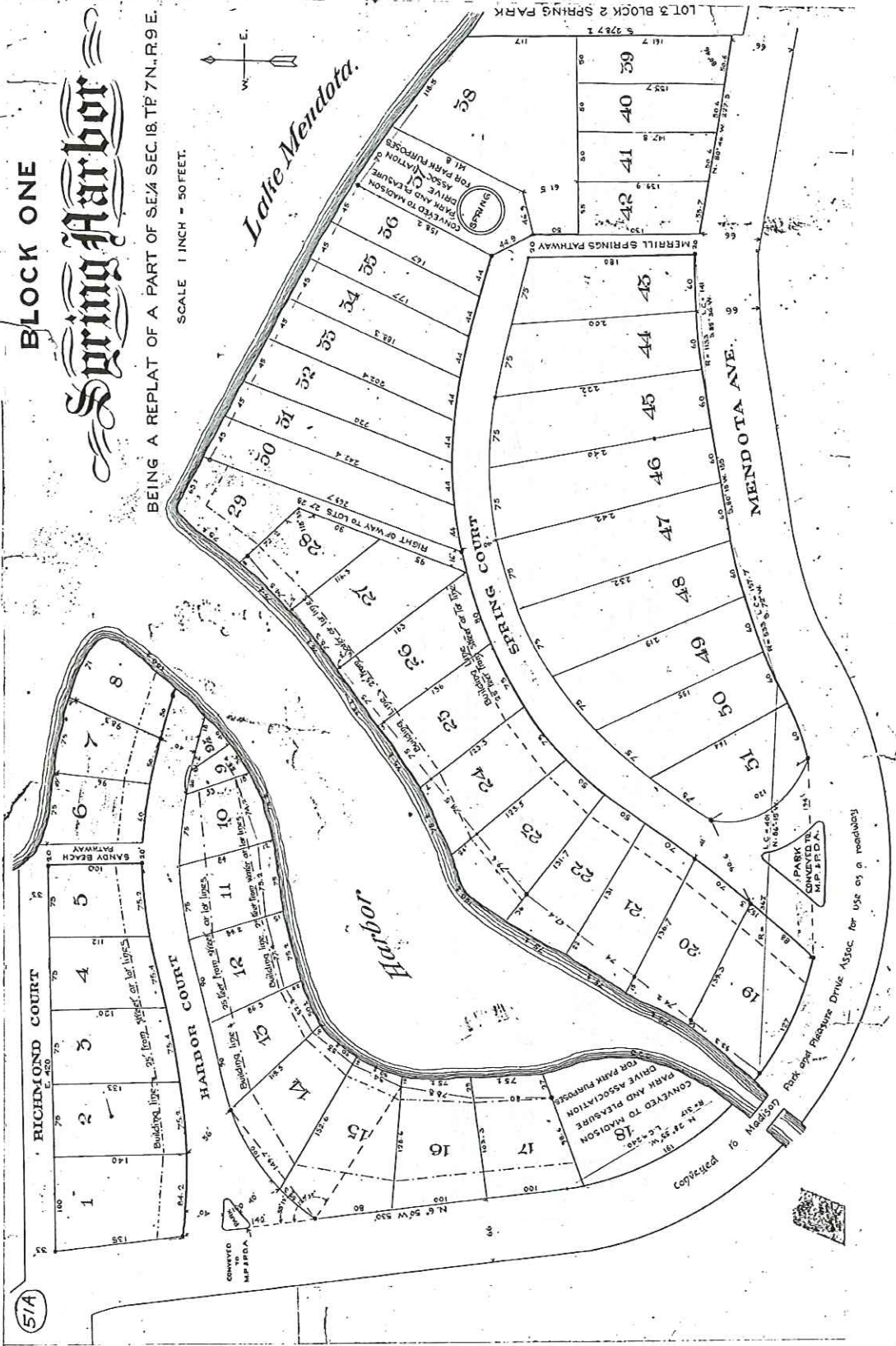
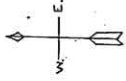
506247

# BLOCK ONE

# Spring Harbor

BEING A REPLAT OF A PART OF SE 1/4 SEC. 18, T. 7 N., R. 9 E.

SCALE 1 INCH = 50 FEET.



DOCUMENT NO.

1-114999

STATE BAR OF WISCONSIN - FORM 2  
WARRANTY DEED  
THIS SPACE RESERVED FOR RECORDING DATA

Office of Register of Deeds } ss  
Dane County, Wisconsin

Received for Record Nov. 27  
1974 at 10:45 o'clock A.M.

BY THIS DEED, Harold Dougherty and Constance Dougherty

Grantor conveys and warrants to City of Madison, a municipal corporation

and recorded in vol. 544  
of Records on page 145

Harold R. Hill  
Register

for a valuable consideration One Dollar (\$1.00)

RETURN TO  
Real Estate Division  
City of Madison  
Rm 409

the following described real estate in Dane County, State of Wisconsin:

Tax Key # \_\_\_\_\_  
This is not homestead property.

DEDICATION FOR PARK PURPOSES

Lot 9, Block 1, Spring Harbor Addition, City of Madison, Dane County Wisconsin.

Said dedication is made for park purposes and in case said real estate should cease to be used for park purposes that the same is to revert to the grantor or his heirs.

FEE  
# 2  
EXEMPT

Exception to warranties:

Executed at Madison, Wisconsin this 21 day of November, 19 74

SIGNED AND SEALED IN PRESENCE OF

Mary Ann Baer  
Mary Ann Baer  
Alice Hogan  
Alice Hogan

Harold Dougherty (SEAL)  
Harold Dougherty  
Constance Dougherty (SEAL)  
Constance Dougherty  
(SEAL)  
(SEAL)

Signatures of \_\_\_\_\_

authenticated this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_.

Title: Member State Bar of Wisconsin or Other Party  
Authorized under Sec. 706.06 viz. \_\_\_\_\_

STATE OF WISCONSIN

Dane County, } ss.

Personally came before me, this 21 day of November, 1974,  
the above named Harold Dougherty and Constance Dougherty

to me known to be the person \_\_\_\_\_ who executed the foregoing instrument and acknowledged the same.

This instrument was drafted by  
Real Estate Division  
City of Madison

Mary Ann Baer  
Mary Ann Baer  
Notary Public Dane County, Wis.  
My Commission (Expires) (Is) 6-22-75  
Notary Public  
State of Wisconsin  
MARY ANN BAER

The use of witnesses is optional.

Names of persons signing in any capacity should be typed or printed below their signatures.

VOL. 544 PAGE 145

FURNISHED BY



PAGE 14999 NOV 22 74















608-252-9365

Please respond to: Capitol Square Office  
Direct line: 608-252-9365  
Email: mrc@dewittross.com

December 29, 2011

Constance Dougherty  
[REDACTED]  
[REDACTED]

RE: 5203 Harbor Court  
Madison, Wisconsin

Dear Mrs. Dougherty:

I received a telephone message from your son on December 27, 2011, indicating that you are in agreement to the terms of the offer I proposed to you. Once the City Council approves the resolution authorizing it to deed the above property to you, I will draft all of the necessary documents for you to sign to deed the property to Jon G. Grefsheim. I understand that the City approval should be finalized by March 1, 2012.

However, in the meantime, before I send you the formal real estate documents to sign, I want to summarize what has been orally agreed to among the City, you and by Mr. Grefsheim:

1. Upon City Council approval, the City will deed the above property to you. I understand from your son that the deed should be made out to you as a single person. I suggest that the deed be sent to my attention since you will not have to sign that deed, but it does have to be recorded.
2. Once the recording is completed, I will prepare a deed for you to sign, transferring the property to Jon G. Grefsheim. Along with that deed, will be a cashier's check made payable to you in the amount of [REDACTED]. That check should not be cashed until I receive the signed deed.
3. I want to minimize any inconvenience for you, so I will make sure that it is not necessary for you to come to my office in Madison to accomplish this. To ensure that, I will be in touch with the title company which we will retain and they will make all necessary arrangements.
4. As a result of these transactions, Mr. Grefsheim will pay for all legal expenses, including any recording fees, taxes, or assessments to be paid so that you will incur no financial liability whatsoever in this entire matter.



Constance Dougherty  
December 29, 2011  
Page 2

Please review the above terms and feel free to have your son or you contact me with any questions. If the above terms are acceptable to you, I would appreciate it if you would please sign and date one of the original letters enclosed where indicated below and return it to me in the enclosed pre-paid envelope. You should also retain the other original letter for your records.

My client and I appreciate your cooperation in this matter.

Sincerely,

DeWitt Ross & Stevens s.c.



Michael R. Christopher

MRC:dso  
Enclosures

cc: Michael Dougherty (w/out encls.)  
Assistant City Attorney Doran Viste (w/out encls.)  
Jon Grefsheim (w/out encls.)

The terms of this letter are understood and agreed.

  
\_\_\_\_\_  
Constance Dougherty

1-4-2012  
(Date)