

# HUSCH BLACKWELL

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July 21, 2021

## VIA E-MAIL

Matthew Mikolajewski  
Director, City of Madison Economic Development Committee  
City of Madison Department of Planning, Community & Economic Development  
215 Martin Luther King, Jr. Blvd, 3rd Floor  
Madison, WI 53703  
[mmikolajewski@cityofmadison.com](mailto:mmikolajewski@cityofmadison.com)

Re: Materials for Consideration of Odana Area Plan

Dear Mr. Mikolajewski:

I am writing on behalf of my client, Madison Joint Venture, LLC, an affiliate of CBL & Associates Properties, Inc. (jointly referred to herein as “CBL”), owner and operator of the West Towne Mall. The purpose of this letter is to address the proposed Odana Area Plan (“Plan”), which is on the agenda for tonight’s meeting of the Economic Development Committee.

Included with this letter is a separate letter we recently transmitted to the City Attorney’s Office on July 6, 2021, regarding the Plan. The July 6 letter explains why CBL contends that adopting the Plan—and specifically, the Official Map amendments proposed therein—amounts to an unlawful taking of CBL’s property. Because the July 6 letter details the significant legal consequences that flow from adopting the Plan, we believe it should be included among the discussion materials for tonight’s meeting.

I will be in attendance at tonight’s Economic Development Committee meeting and available to answer any questions.

Regards,

HUSCH BLACKWELL LLP



Eric M. McLeod

Enc.

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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](mailto: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

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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

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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 Chelton 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

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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.*; *Chelton 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. *Chelton 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.*

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## **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



**From:** jhirsch@chorus.net <jhirsch@chorus.net>

**Sent:** Tuesday, July 6, 2021 11:07 AM

**To:** Mayor <Mayor@cityofmadison.com>; All Alders <allalders@cityofmadison.com>

**Subject:** #118 Odana Area Plan

Caution: This email was sent from an external source. Avoid unknown links and attachments.

Mayor and Alders:

*#118 66098 Adopting the Odana Area Plan as a supplement to the Comprehensive Plan and directing staff to implement the recommendations contained in the plan.*

I am surprised that this item is listed as a Resolution for adoption. The information provided at the public meetings stated that the plans would be "introduced" at the July 6, 2021 CC meeting and then "considered for adoption" in September 2021.

I want to express some of my concerns with the Odana Area Plan. While it is evident that the planners have spent a considerable amount of time on the plans, much of what is shown is not supported by many of the comments that were brought forth during the resident engagement process. Many of the proposals do not align with the Culture and Character of the adjacent neighborhoods.

- The proposed 8- to 12-story **building heights** is in contrast to the forms and mass of other structures in the area.
- While much of the area is in close proximity to schools, the proposed **housing** appears to support small apartments. This is contrary to what is considered family-friendly housing. The "missing middle" is still missing.
- The **open and natural spaces** which are currently evident throughout the site are being eliminated as the density of the structures increases.
- The planned **street network** adds an extraordinary amount of impervious surface to the area. An amount that is estimated at 2 miles in the West Towne area alone.

I ask that you carefully review these plans and consider how many of the features will adversely affect the residents who are currently living, working and playing in and near the Odana Area.

Thank you.

Janet Hirsch  
Madison Resident  
(One block north of Mineral Point Road.)



July 12, 2021

Sent By E-mail

bzellers@cityofmadison.com

dmcauliffe@cityofmadison.com

City of Madison

Attn: Mr. Dan McAuliffe and Mr. Ben Zellers

Madison Municipal Building, Suite 017 (Lower Level)

215 Martin Luther King Jr. Blvd.

Madison, WI 53703

Dear Dan and Ben: Re: Odana Area Plan recommendations

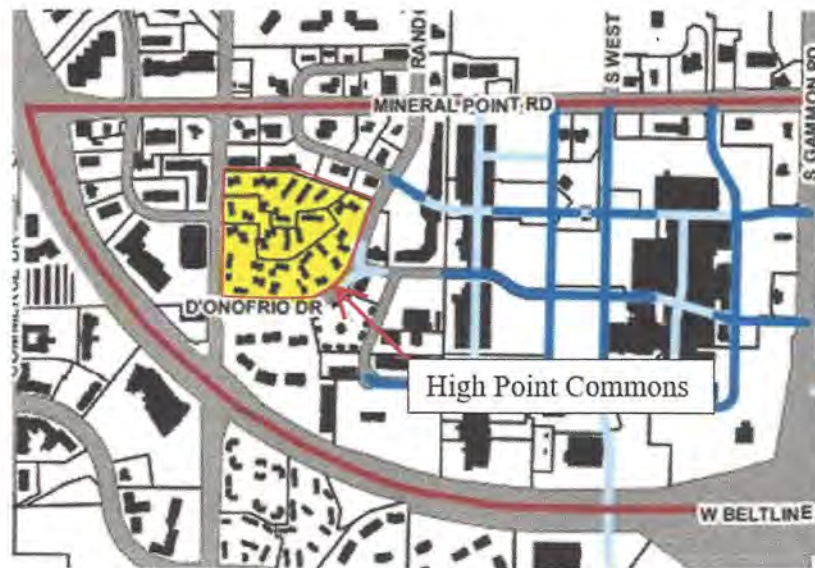
My wife (Cathy Fagen) and I are the owners of Orosz-Fagen Properties and take great pride in our 35+ year history of improving Madison neighborhoods through the development and management of multi-family housing. One of the properties that we own is called "High Point Commons" at 477 S. High Point Rd, Madison, WI. High Point Commons has a large 15-acre footprint currently containing 28 buildings and 288 housing units. We understand that High Point Commons is included in the current planning area for the Odana Area Plan.

We also understand that to date there has been no (or very limited) public input regarding recommendations for our property or the properties surrounding our property. With that in mind, and to promote the creation of more housing units and denser residential housing development in this area, please accept this letter as our recommendation to allow building heights of at least twelve (12) stories at High Point Commons. Please find the rationale for our recommendation below.

We purchased High Point Commons seven years ago and have subsequently embarked on a multi-million dollar renovation of the property. Our recent investment has transformed High Point Commons into a highly desirable residential neighborhood scoring high for both walkability and public transit access. While we are very happy with the significant improvements we have made to our property, the City's proactive planning and drafting of the Odana Area Plan has highlighted for us the current lack of density at High Point Commons (see draft plan image depicting lack of density at High Point Commons on following page) and prompted us to consider the potential for redeveloping and expanding High Point Commons further.



Plan Illustration showing existing lack of density and location of High Point Commons:

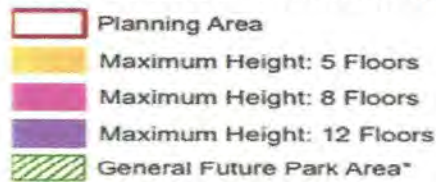


As you'll note by the draft plan depiction above, High Point Commons is not located by single-family residential development or other uses that would be adversely impacted by taller buildings and a denser development. Rather, High Point Commons is immediately adjacent to commercial development and bounded by the West Beltline and Mineral Point Road. The property also has a large amount of frontage and excellent direct egress and ingress on both D'Onofrio Drive and High Point Road.

Given the 15-acre size of High Point Commons and its high-trafficked commercially zoned surroundings, we believe there is tremendous potential for redeveloping High Point Commons into a significantly denser residential housing development with housing unit increases from the current 288 to between 1,500 and 2,000 total housing units. While we are excited by a potentially denser residential redevelopment, the current draft plan's height recommendation of five stories (shown on the following page) would preclude a denser redevelopment of the site and encourage the existing development and density to remain.

Preliminary Odana Area Plan Height Recommendations:

**Map 6: DRAFT Maximum Building Height**



In addition to the opportunity to increase densities, the portion of the Odana Area Plan shown above, should not recommend height caps that place the middle portion (or residentially zoned properties, including High Point Commons) in a valley between commercially zoned properties. Instead, this entire area has the topography and transit corridors in place to promote more dense residential development to support the surrounding commercial uses.

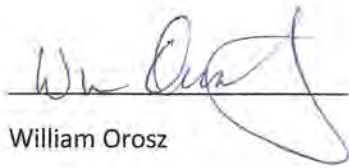
To conclude our input, we urge City committees and City staff to reevaluate the preliminary height recommendations generally for the Odana Area Plan and support much denser development throughout. With respect to High Point Commons specifically, we encourage a height recommendation of at least twelve stories and note the following in support of our recommendation: (i) the current lack of public input to date for this area of the plan, (ii) the existing and recommended uses of the surrounding properties included their highly trafficked commercial corridor borders, and (iii) the large 15-acre footprint of High Point Commons and its current lack of density.

If Madison truly wants to encourage infill development, setting a height recommendation for High Point Commons of at least twelve stories is an exciting and easy way to allow many more residents to enjoy

the expansive views afforded by the area's natural topographic high point. We welcome opportunities to discuss our ideas further and hope to partner with the City on implementing final recommendations for the Odana Area Plan.

Thank you for considering our input.

Sincerely,



William Orosz



Catherine Fagen

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