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CIRCUIT COURT
DANE COUNTY, WI
2024CV002103

BY THE COURT:

DATE SIGNED: June 3, 2025

Electronically signed by Rhonda L. Lanford
Circuit Court Judge

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 16

JEFFREY L. WESTERN, et al.,

Plaintiffs,

v. Case No. 2024-CV-2103

CITY OF MADISON,

Defendant.

DECISION AND ORDER
REMANDING THIS MATTER TO THE CITY OF MADISON

INTRODUCTION

Jeffrey Western, Kathy Western, Paul Umbeck, and Mary Umbeck (together, "Western") seek certiorari review of a zoning decision of the City of Madison ("the City") that, effectively, authorized construction of high-density residential building in a low-density neighborhood.

The Court remands that decision for further proceedings because Western meets his burden to show the City proceeded on an incorrect theory of law when it failed to consider the factors required by the City of Madison Comprehensive Plan. The City's failure to do so was unlawful because every Wisconsin city and village must make zoning decisions "consistent with that local

governmental unit's comprehensive plan." Wis. Stat. § 66.1001(3)(k).

As a result, the Court concludes the City's June 18, 2024, decision to approve an application to rezone the properties located at 6610 and 6706 Old Sauk Road proceeded on an incorrect theory of law. That decision must be set aside and this matter is remanded to the City of Madison Common Council for further proceedings consistent with this decision.

I. BACKGROUND

On April 4, 2024, Stone House Development filed an application with the City to rezone two properties at 6610 and 6706 Old Sauk Road to allow construction of a 138-unit apartment building. R. 559-66. Specifically, the rezoning petition asked the City to change those addresses from the "suburban residential," or "SR," zone to "traditional residential-urban 2," or "TR-U2," zone. According to its application, Stone House's planned apartment building will have a density of 36.6 dwelling units per acre. R. 574. This figure—the number of dwelling units per acre—is the lynchpin in the parties' disagreement about whether the rezoning unlawfully conflicts with the general rules contained in the City's comprehensive plan.

At this point, before any further explanation of Stone House's application and the City's decision, it is helpful to take a moment to summarize the legal framework underpinning zoning decisions and city planning. Every Wisconsin city must create a comprehensive plan. Wis. Stat. § 66.1001. A plan must contain basic information about how the city will function, including the "overall objectives, policies, goals and programs of the local governmental unit to guide the future development and redevelopment of the local governmental unit …." Wis. Stat. § 66.1001(2)(a). Relevant here, plans must also contain specific information about housing, § 66.1001(2)(b), transportation, § 66.1001(2)(c), natural resources, § 66.1001(2)(e). These plans are not a hollow instrument—whenever a city changes its zoning ordinances, then it must do so "consistent with

that local governmental unit's comprehensive plan." Wis. Stat. § 66.1001(3)(k); *see also* MGO § 28.003 (The City's ordinances echo this requirement).[1]

The City's plan designates 6610 and 6706 Old Sauk Road—the proposed development area—as "LMR," or "Low-Medium Residential." R. 568. The LMR designation means that, ordinarily, the City should limit housing density to "small multifamily buildings" up to 30.0 dwelling units per acre. R. 571. The plan also says the 30.0 dwelling units per acre limit can be exceeded, up to a limit of 70.0 units per acre, but only under special circumstances: the plan allows extra dwelling units only after consideration of factors like: (1) "relationships between proposed buildings and their surroundings …," (2) "natural features," and (3) "access to urban services, transit, arterial streets, parks and amenities." R. 572-73. In this way, the comprehensive plan reflects the City's policy choice to sometimes authorize dense housing in LMR zones, but only after the City has contemplated how the dense housing will fit into the neighborhood, especially with regard to natural features and access to infrastructure.

The City can effectuate the policy choices expressed in its plan by amending or enacting zoning ordinances. *See generally* MGO ch. 28 (the City's procedures for re-zoning). Here, as noted, Stone House asked the City to re-zone two properties from the "SR", or "suburban residential" zone to the TR-U2, or "traditional residential-urban 2" zone. Although kind of zone could potentially exist inside of the plan's LMR area, re-zoning was necessary here because Stone House's proposed 138-unit apartment building would, of course, house multiple families. Multi-

[1] Although neither party has asked, the Court takes notice of the City of Madison's General Ordinances. Wis. Stat. §§ 902.01(3) ("A judge or court may take judicial notice, whether requested or not.") and 902.03(1) ("The courts of this state … shall take judicial notice of … municipal ordinances in those counties in which the particular court has jurisdiction …."). A copy of the relevant ordinance chapter is online at https://library.municode.com/wi/madison/codes/code_of_ordinances?nodeId=COORMAWIVOIICH20--31_CH28ZOCOOR_SUBCHAPTER_28AINPR_28.002INPU (visited May 1, 2025).

family dwellings are forbidden within the SR zone but are permitted by the TR-U2 zone. MGO § 28.032.

To summarize, cities must make zoning decisions consistent with their plan. Wis. Stat. § 66.1001(3)(k). The City's plan contains a list of factors to consider when increasing the density of dwelling units in an LMR area. R. 571. So, in considering whether to grant Stone House's application for re-zoning within the LMR area, the City had to consider that list of factors.

With these basic rules for city planning in hand, the Court returns to Stone House's application process. On June 10, 2024, the City's plan commission held a public meeting to discuss Stone House's application to re-zone property. *See* MGO § 28.182 (requiring the plan commission to submit recommendations to the City). Several residents testified that the high-density project would not fit into the neighborhood, among other reasons, because the large footprint caused by the proposed development could worsen flooding in the area. To illustrate with a few examples, Jeffrey Western told the commission: "A major concern is flooding of our home and property. We have a double sump pump that runs when we significantly have rains [sic] … What we are experience [sic] is water flowing underground, hydrostatic pressure from the proposed development." R. 460-61. John Norman, another local resident with an apparent background in soil science, testified that Stone House's proposed changes to stormwater runoff were "experimental and must be built and tested before the rest of the project started." R. 466. Norman asked the commission to "defer action on this zoning change … until the above issues [scientific analysis of the soil] can be adequately addressed." R. 467. Even Stone House's stormwater engineer acknowledged that the area was "sensitive to storm water." R. 453.

Near the end of the hearing, Plan Commissioner Solheim spoke at length concerning the requirement "that zoning map amendments must be consistent with our comprehensive plan." R.

491. Commissioner Solheim meticulously analyzed why she believed this particular zoning amendment satisfied the requirements in the comprehensive plan, then moved to forward the re-zoning amendment to the City's common council for approval. R. 490. The motion passed by unanimous vote. R. 493.[2]

Eight days after the plan commission meeting, on June 18, 2024, the City of Madison Common Council[3] took up the commission's recommendation. R. 537 et seq. The council began with a discussion of stormwater concerns but did not get very far, probably because the council's attorney advised them "the storm water drainage issue is not relevant …." R. 541. Notably, the council did not discuss whether these kinds of stormwater concerns were the kind of "natural feature" contemplated by the city's plan. Later during the hearing, Kevin Firchow—a city planner, not a member of the council—brought up the topic of Stone House's dwelling unit density. R. 542-43. The council immediately redirected the discussion and appears to have been uninterested in Firchow's attempt to bring up the factors set forth in the plan. R. 544-45. Ultimately, the council never discussed the Plan Commission's analysis of the factors set forth in the comprehensive plan and never independently engaged in its own analysis of the plan's factors, either. The council nevertheless approved the re-zoning proposal with a vote of 15-4. R. 558.

On July 12, 2024, Western filed a summons and complaint alleging the City's zoning decision was unlawful. Dkt. 2.[4] On October 17, 2024, the Court signed a joint proposed scheduling

[2] Commissioner Solheim also moved to grant a conditional use permit for that re-zoned property. R. 491-2. Western does not challenge the City's decision on the conditional use permit, so the Court discusses it no further.

[3] This decision interchangeably refers to the City and its common council because, by ordinance, the City empowers the council to make decisions about zoning amendments. MGO § 28.182(1).

[4] Western labelled his papers as a "summons" and a "petition." The filing of a summons and petition is not one of the ways to commence a civil action in Wisconsin. *State ex rel. Kurtzweil v. Sawyer Cnty.*, 2023 WI App 43, ¶23, 409 Wis. 2d 77, 995 N.W.2d 286. The City appears to have ignored Western's labels, construed the documents as a summons and a complaint, and then filed an answer. Dkt. 6. The Court also construes Western's papers as a summons

order that required the City to file the record of its decision by November 27, 2024. Dkt. 9. The City then filed part of the record, dkt. 10, and Western supplemented the record on December 26, 2024, dkt. 11. Nobody objected to this supplementary procedure and, in any event, the parties do not dispute any of the basic facts of record.[5]

II. LEGAL STANDARD

A final decision of any political subdivision "may be reviewed only by an action for certiorari as provided under this section." Wis. Stat. § 781.10(2)(a). "Certiorari is a mechanism by which a court may test the validity of a decision …." *Ottman v. Town of Primrose*, 2011 WI 18, ¶34, 332 Wis. 2d 3, 796 N.W.2d 411. A certiorari court "reviews the record compiled ... and does not take any additional evidence on the merits of the decision." *Id.*, ¶35 (citing *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson Cnty. Bd. of Adjustment*, 131 Wis. 2d 101, 119, 388 N.W.2d 593 (1986)). Certiorari review is limited to four questions:

> (1) whether the [decisionmaker] kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.

Id. (citations omitted). In undertaking certiorari review, "Wisconsin courts have repeatedly stated that … there is a presumption of correctness and validity to a municipality's decision." *Id.*, ¶48 (collecting cases). As a result, "the petitioner bears the burden to overcome the presumption of correctness." *Id.*, ¶50.

Not all erroneous decisions must be reversed. Instead, "[a]fter review, a certiorari court has

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and complaint.

[5] *But see* Wis. Stat. §§ 781.10(2)(d)2. ("The court may supplement the record on review only upon motion of a party for good cause.") and 781.10(2)(d)4. ("The court shall decide the action under this paragraph upon the return made by the political subdivision ….").

three options—affirm, reverse, or remand for further proceedings consistent with the court's decision." *Hartland Sportsmen's Club, Inc. v. City of Delafield,* 2020 WI App 44, ¶12, 393 Wis. 2d 496, 947 N.W.2d 214. Remand, rather than reversal, "is appropriate where (1) the defect in the proceedings is one that can be cured, but (2) supplementation of the record *by the government decision maker* with new evidence or to assert new grounds is not permitted." *Id.*, ¶14 (emphasis in original).

III. DISCUSSION

A. Western has standing because he anticipates a direct injury—flooding to his home—as a result of the City's re-zoning decision.

Before turning to Western's arguments for why the City's decision was unlawful, the Court must first determine whether Western has standing. The City argues Western does not have standing "pursuant to Wis. Stat. § 781.10(2) …." City Resp. Br., dkt. 13:4. The City interprets that section to require a plaintiff demonstrate "actual damages or will imminently sustain actual damages that are personal … and distinct from damages that impact the public generally." *Id.* at 5.

The City appears to argue that § 781.10(2) creates a new test for standing. However, the City does not explain why that new test would depart in some way from Wisconsin's common law test for standing. This would have been important for understanding the standing requirements under § 781.10(2) because "[i]t is axiomatic that a statute does not abrogate a rule of common law unless the abrogation is clearly expressed …." *Fuchsgruber v. Custom Accessories, Inc.*, 2001 WI 81, ¶25, 244 Wis. 2d 758, 628 N.W.2d 833.

For present purposes, it is enough to say that nothing in § 781.10(2) clearly expresses the legislature's intent to abrogate Wisconsin's common law standing doctrine. On the contrary, the

statute essentially mirrors the common law standard.[6] Under that standard, the Wisconsin Supreme Court has determined standing by asking three questions:

> (1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law as a "personal stake" in the controversy);
>
> (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and
>
> (3) whether judicial policy calls for protecting the interest of the party whose standing is challenged

Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, 2011 WI 36, ¶40, 333 Wis. 2d 402, 797 N.W.2d 789 (notes omitted); *see Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559 (1992) (federal courts apply a similar test).[7] Simply put, "the essence of the determination of standing is … a personal interest in the controversy." *Id.*, ¶5.

To show Western has no personal interest in the rezoning of a nearby lot, the City begins with the proposition that zoning amendments cannot cause direct injuries because zoning amendments are legislation. City Resp. Br., dkt. 13:6. The City contends other acts must follow

[6] There is perhaps one difference between standing as traditionally understood in Wisconsin and standing as described in § 781.10(2). Our supreme court has sometimes said "standing in Wisconsin is not a matter of jurisdiction, but of sound judicial policy." *McConkey v. Van Hollen*, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855. Judicial policy is not mentioned in the text of § 781.10. Nobody develops an argument about standing based on judicial policy.

[7] Justice Scalia explains federal courts' three part test as follows:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical,
>
> Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.
>
> Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61 (formatting supplied, internal citations, quotations, alterations, and ellipses omitted); *accord FEC v. Cruz,* 596 U.S. __, 142 S. Ct. 1638, 1646 (2022).

that legislation for Western to suffer injury, including for example, the City must also grant a permit before Stone House can construct its planned building. *Id.* This may all be true. But the problem with the City's argument is that nobody disputes what effect this particular legislation will have—re-zoning is the first step in the chain of events that, according to Western, ends in a flooded basement. Western points to evidence to prove that chain of events is not speculation but an anticipated harm that follows from the re-zoning.

The City next relies on *St. Croix Scenic Coalition v. Vill. of Osceola*, 2024 WI App 73, 414 Wis. 2d 549, 15 N.W.3d 917. There, some plaintiffs challenged a proposed development based on a "'belie[f]' that the proposed development will decrease their property values if completed, and many expressed concerns that the project will negatively impact their enjoyment of their properties." *Id.*, ¶22. Another plaintiff offered "speculative concerns that a 'potential landslide' could occur." *Id.*, ¶27. The City compares these two groups of plaintiffs in *St. Croix Scenic Coalition* to Western and concludes, as best the Court can tell, that Western lacks standing for the same reasons.

The Court disagrees. Our supreme court "has frequently held that the law of standing in Wisconsin should not be construed narrowly or restrictively." *Fox v. DHSS*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983). To prove his standing, all Western had to do was show a "trifling interest." *Id.* Western is not like the speculating plaintiffs in *St. Croix Scenic Coalition* because he points to facts in the record that show he anticipates a personal injury as a result of the zoning decision he challenges. Specifically, Western says his house will be more likely to flood with stormwater as a result of Stone House's decision to turn a mostly-grass-covered property into a mostly-concrete property. Other courts have found standing under analogous circumstances. For example, in *Vill. of Elk Grove Vill. v. Evans*, a group of neighbors had standing to challenge the proposed

construction of a large radio tower because they:

> [S]ubmitted an affidavit which explains that Elk Grove is flood-prone … and that the construction of the radio tower, by plopping down a huge slab of concrete near the creek and thus limiting the creek's drainage area, will increase the risk of flooding.

997 F.2d 328, 332 (7th Cir. 1993). The same is true here—Western has pointed to evidence in the record that his home "is flood-prone" and that "plopping down a huge slab of concrete … will increase the risk of flooding" and, so, Western has standing.

B. The City proceeded on an incorrect theory of law by failing to consider the factors in its comprehensive plan.

1. The record shows the City did not consider its plan.

To show the City's decision should be reversed, Western primarily relies on the transcript of a meeting of the common council. Western contends that transcript proves the City did not meaningfully discuss any of the factors the City required itself to consider in its comprehensive plan. In other words, the transcript shows the council did not meaningfully discuss the relationship between the proposed building and its surrounding area, did not meaningfully discuss nearby natural features, and did not discuss access to urban infrastructure like streets and parks. Western thus concludes the City proceeded on an incorrect theory of law when it approved Stone House's re-zoning application, despite never engaging in the kind of discussion required by § 66.1001(3)(k) and the comprehensive plan.

The City does not dispute that it was required to consider its plan or that its plan required it consider a certain set of factors. City Resp. Br., dkt. 13:11. Indeed, the City agrees it was required to:

> [C]onsider the relationships between proposed buildings and their surroundings, natural features, lot and block characteristics, and access to

> urban services, transit, arterial streets, parks and amenities to determine if the context is appropriate for increased residential density.

Id. (citing R. 571). The City's sole argument is that it did consider these factors during its June 18, 2024, council meeting and, to show this, the City focuses on three statements made by various City officers.

First, the City points to comments made during the plan commission and/or by the plan commission's staff. *Id.* at 12-13 (citing Comm'r Solheim's analysis at R. 490 and a "Staff Report" at R. 579-90). The City's citations to these comments is not helpful, however, because the City empowers its common council to make decisions about zoning amendments. MGO § 28.182(1). Whether or not some other person analyzed the requirements of the plan, the City does not explain why that analysis might substitute for the council's analysis, or lack thereof. In any event, the record does not support the proposition that the council was aware of the plan commission's analysis, let alone that the council relied on that analysis to satisfy the requirements of its plan.

Second, the City highlights this comment by Alder Rummel about the Stone House project: "at 37 dwelling units per acre, and I think it's a good infill for that area. It's sprawling because it's not tall." City Resp. Br., dkt. 13:14 (quoting R. 552). But whether or not Stone House's proposed development would be "a good infill" does not matter. As noted, the City does not dispute that its plan required it to:

> [C]onsider the relationships between proposed buildings and their surroundings, natural features, lot and block characteristics, and access to urban services, transit, arterial streets, parks and amenities to determine if the context is appropriate for increased residential density.

City Resp. Br., dkt. 13:11. (citing R. 571). To the extent "good infill" could be construed as a commentary on any of these factors, it still does not help because Alder Rummel did not continue to provide any reasons for the comment. "Without such statement of reasoning, it is impossible for

the circuit court to meaningfully review a board's decision ….” *Lamar Cent. Outdoor, Inc. v. Bd. of Zoning App. of City of Milwaukee*, 2005 WI 117, ¶32, 284 Wis. 2d 1, 700 N.W.2d 87 (emphasis in original).

The third and final source in the record on which the City relies to show it engaged in the analysis required by its plan is very long statement from Alder John Guequierre. *Id.* at 18-19 (quoting R. 550-51). The City entirely reproduces this statement in its brief but this is unhelpful because the City does not explain what parts of Alder Guequierre's statement support the proposition that he, or perhaps some other member of the council, engaged in the process of reasoning required by the plan. Courts “cannot serve as both advocate and judge.” *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). The Court cannot meaningfully discuss Alder Guiqueirre's statement in the absence of any supporting argument from the City.

In any event, the Court did carefully examine the entire transcript of the City Council meeting. Alder Guiquerre, like some other alders, chose to focus his remarks on whether nearby residents had an opportunity to heard and whether the Stone House project would be profitable. *See, e.g.*, R. 550-51 (“We got to knock $1 million to $1.5 million out of the price ….”); *ibid.* (“regardless of what we decide here, the neighborhood residents did get heard.”). Those remarks do not show the council applied the correct legal standard to its zoning decision because neither “the price of land” nor “the opportunity of residents to be heard” are relevant factors under the City's plan. Once again, the City chose to create a plan that focused only on these factors:

> [C]onsider the relationships between proposed buildings and their surroundings, natural features, lot and block characteristics, and access to urban services, transit, arterial streets, parks and amenities to determine if the context is appropriate for increased residential density.

City Resp. Br., dkt. 13:11. (citing R. 571).

In sum, Western meets his burden to show the City proceeded on an incorrect theory of law by showing the city council never considered the factors it was supposed to consider according to its plan. The City's attempt to show otherwise by focusing on selected comments by non-members of the council, or by Alders Rummel and Guiequerre, does not help its cause. If anything, those comments show the council preferred to base its decision on the cost of the land and/or the community's opportunity to speak. The Court expresses no opinion about the wisdom of the City's decision—what matters for purposes of this certiorari review is that § 66.1001(3)(k) and MGO § 28.003 required the City to make its decision "consistent with" a specific set of factors outlined in the city's plan. The record shows the City did not do so.

2. Reversal is not appropriate because the City's error may be cured on remand.

All that remains to decide is the remedy. In his briefing, Western suggests the Court "overturn" the council's decision. Western Br., dkt. 12:15. At oral argument, Western went one step further and asked the Court to reverse the City's decision, thereby requiring Stone House to start its application process all over again. Western does not cite authority to support either remedy and, as noted, remand to the lower tribunal is the better option when "the defect in the proceedings is one that can be cured …." *Hartland Sportsmen's Club*, 2020 WI App 44, ¶14. The defect in these proceedings is a failure of the City to apply the correct legal standard. Because the City can cure that defect by making its zoning decision "consistent with" its plan, remand is the appropriate remedy.[8] On remand, the City may not supplement the record with new evidence. *Id.*

[8] In addition to an incorrect theory of law, Western also argued that the City's decision should be remanded because it was arbitrary for multiple reasons. Most significantly, Western focused on the City's failure to discuss "evidence regarding stormwater management and flooding issues." Western Br., dkt. 12:13. Having already remanded this matter to proceed on a correct theory of law, the Court need not express an opinion about whether remand might have been appropriate for other reasons.

In conclusion, this matter must be remanded to the city council because Western meets his burden to show the City failed to proceed on a correct theory of law. Specifically, § 66.1001(3)(k) and MGO § 28.003 required the City to make zoning decisions consistent with its plan but the record shows the City made this particular zoning decision based on other, immaterial factors. Essentially, this Court had no record to review that showed the city considered its plan. On remand, the Court expresses no opinion about whether Stone House's application for re-zoning should or should not be granted; what matters is that the City, through its council, "must engage in fact-finding and then make a decision based on the application of those facts to the ordinance." *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 26, 498 N.W.2d 842 (1993). Once it makes a decision, then the council must "express, on the record, its reasoning *why* an application does or does not meet the statutory criteria." *Lamar Cent. Outdoor*, 2005 WI 117, ¶32 (emphasis in original).

ORDER

For the reasons stated,

IT IS ORDERED that the City of Madison's June 18, 2024, decision to approve an application to rezone the properties located at 6610 and 6706 Old Sauk Road is set aside and this matter is remanded to the City of Madison Common Council for further proceedings consistent with this decision.

This is a final order for purpose of appeal.