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VIA E-MAIL

City of Madison Common Council
Mayor Satya Rhodes-Conway, Mayor

Re: Appeal of Plan Commission Approval; Legistar ID 63304
Conditional Use Permit for 4606 Hammersley Road

Dear Common Council Members and Honorable Mayor Rhodes-Conway:

We write on behalf of the development team in response to an appeal of the Plan Commission's unanimous approval of a conditional use permit ("CUP") for a new three-story, mixed-use building located at 4604 Hammersley Road in Alder Henak's district. City ordinance requires the approval be upheld unless a supermajority of the Common Council finds fault with the Plan Commission's decision, in which case the CUP may be reversed or modified. Because there is no basis for overturning the Plan Commission's unanimous approval in this case, we respectfully request you reject the appeal.

The Plan Commission Acted Properly

The Plan Commission carefully reviewed the application, followed all applicable procedures, listened to the testimony that was presented at the public hearing, applied the appropriate review criteria, and made a reasoned decision that was supported by substantial evidence. While the individuals who filed the appeal are free to disagree with the Plan Commission's decision, there's simply no basis to claim the Plan Commission "cut corners," "prejudged the facts," or "pushed the project through." Such claims are a disservice to the time and careful consideration that City staff and the Plan Commission devoted to reviewing this project.

Throughout the application review process, the development team worked with neighborhood residents and City staff to develop a desirable project that is consistent with the City's Comprehensive Plan and complies with applicable zoning regulations. The resulting project accommodates a number of concerns that were raised during the neighborhood engagement process. The Plan Commission unanimously approved the project, finding it met all applicable CUP standards, and the developer has agreed to meet all conditions of approval recommended by City staff and imposed by the Plan Commission. Because the Plan Commission properly reviewed and approved the CUP, the appeal must be rejected.

The Approval is Supported by Substantial Evidence

The Plan Commission's unanimous approval was based on "substantial evidence,"¹ which included the CUP application materials (consisting of a detailed site plan, architectural plans, 3D renderings, a detailed narrative description of the project, and a traffic study), the Plan Commission Staff Report, and additional information

¹State law governing conditional use permits requires decisions be based on "substantial evidence," which is defined as "facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion." Wis. Stat. § 62.23(7)(de)1.b In confirming that "substantial evidence" is the appropriate standard for deciding conditional use permits, the Wisconsin Supreme Court explained that "[s]ubstantial evidence is evidence of such convincing power that reasonable persons could reach the same decision as the local government entity, *even if there is substantial evidence to support the opposite decision*" (emphasis added). *AllEnergy Corp. v. Trempealeau County Environmental & Land Use Committee*, 2017 WI 52, ¶75.

provided by the applicant, the project team, Alder Henak and neighborhood residents.² Despite what the appellants suggest, the record before the Plan Commission was extensive and provides the “substantial evidence” necessary to support approval of the CUP.

The Plan Commission Listened to the Neighbors’ Concerns

A review of the November 23, 2020 public hearing reveals the Plan Commission listened to the testimony presented by neighbors, then reviewed and discussed the record prior to reaching a decision.³ After listening to the public testimony and reviewing the record, Commissioner Cantrell made a motion to approve the CUP, having found all of the applicable standards had been satisfied.⁴ He then gave a reasoned explanation in support of his motion.⁵ Before the Plan Commission voted on the motion, Alder Henak acknowledged the thorough review that had been completed by City staff:⁶

“[City staff] did a big lift on the traffic study and really reviewed the engineering work from the developer⁷ and so I wanted to say thank you to [staff who] worked through a number of neighborhood meetings and a lot of comment from residents. The big things that we heard from residents are things that we heard today: the size, the number of units, a number of residents wanting to see a 24-unit or lower facility ...”

Alder Henak went on to commend the development team for their work in responding to the neighbors’ concerns:⁸

“I felt that they really listened to the concerns of residents and gave a good faith effort in meeting some of those requests. Absolutely not to the extent that many residents would have liked but there were quite a few residents that did say that we felt heard and we appreciated the concessions or the changes or alterations that were made.”

Finally, Alder Henak acknowledged the many neighbors who contributed to the substantial evidence that was generated during the application review process:⁹

“So, I just wanted to acknowledge those individuals as well as a big thank you to the residents who as you can see by Maya, Mara and the others who spoke tonight, really put a lot into the documentation that they sent in and put a lot of analysis and thought into what they were hearing from their neighbors as well. So, thank you very much to them.”¹⁰

² See generally, City of Madison Legistar File # 62600.

³ Plan Commission: Meeting of November 23, 2020, 5:55:00-6:38:15, available at: <https://www.youtube.com/watch?v=F2Sj1aVOpq8&list=PLtVeFm0KqnJfOx9MXHbvdOy27MHAY4giJ&index=12>

⁴ *Id.* at 6:32:00.

⁵ *Id.* at 6:32:30.

⁶ *Id.* at 6:34:05.

⁷ See Legistar File #62600, Letter of Intent, dated Oct. 7, 2020 (“Virtual neighborhood meetings were held on August 10, 2020 and September 23, 2020 and was attended by Alder Zachary Henak. Adjustments have been made to address community concerns around privacy, parking access, and shade. *A traffic study was also prepared by KL Engineering after the August 10th neighborhood meeting and both a representative from KL Engineering and City Traffic Engineering attended the September 23rd neighborhood meeting and answered a number of neighbor’s questions.*” (Emphasis added.)

⁸ Nov. 23, 2020 Plan Commission meeting video at 6:36:50.

⁹ *Id.* at 6:37:20.

¹⁰ *Id.* at 6:37:20.

After taking all of this into account, the Plan Commission voted unanimously to approve the CUP.

There is No Basis for the Appeal

The appeal broadly claims that the Plan Commission reached a prejudged decision not based on “specific findings of fact,”¹¹ but based on the developer’s personal preferences and the City’s need for housing, all while ignoring evidence submitted by the neighbors and other residents.¹² The information summarized above indicates otherwise. The appeal claims, without supporting evidence, that the Plan Commission did not adequately consider or, in some instances, did not consider at all, evidence submitted by the neighbors and other residents. A review of the record indicates this is not the case.

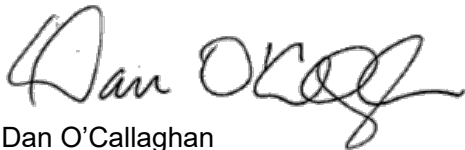
Under Wisconsin law, the Plan Commission has discretion when weighing competing evidence.¹³ In the situation at hand, the Plan Commission listened to the evidence, exercised its judgment, and reached a reasoned decision based on the applicable law. Not everyone will agree with the Plan Commission’s decision – but that doesn’t mean the Plan Commission acted improperly. To the contrary, on appeal, the Plan Commission’s decision is entitled to a presumption of correctness.¹⁴ The party challenging the decision bears the burden to overcome the presumption that the determination is correct.¹⁵ In the situation at hand, the appellants have failed to carry their burden.

The Appeal Must be Denied

An appeal under MGO 28.183(5)(b) is not a “do-over.” It is not an opportunity for another kick at the can. City ordinance compels that the Plan Commission’s decision be upheld unless a super-majority of the Common Council finds fault with the Plan Commission’s decision. As summarized above, the Plan Commission acted properly. Because there is no basis for overturning the Plan Commission’s unanimous approval, we respectfully request you reject the appeal.

Very truly yours,

CARLSON BLACK O'CALLAGHAN & BATTENBERG LLP



Dan O'Callaghan



Angie Black

¹¹ The appellants seem to suggest the Plan Commission is required to provide a detailed, point-by-point response to each piece of evidence presented and to provide a detailed legal analysis in support of its decision. This is not the case. *See Keene v. Dane County Board of Supervisors*, 2004 WI App, ¶ 11 (“A detailed or explicit explanation of the local government’s reasoning is not necessary. The decision need only contain enough information for the reviewing court to discern the basis of the local government’s decision.”). *See also Oneida Seven Generations Corp. v. City of Green Bay*, 2015 WI 50. (“A written decision is not required as long as the local government’s reasoning is clear from the transcript of the proceedings.”)

¹² City of Madison Legistar File # 63304, Appeal filed December 3, 2020, pp. 2-4.

¹³ *See Delta Biological Res., Inc. v. Bd. of Zoning Appeals*, 160 Wis.2d 905, 915, 467 N.W.2d 164 (Ct. App. 1991).

¹⁴ Wisconsin courts have repeatedly stated that there is a presumption of correctness and validity to a municipality’s decision on certiorari review. *Ottman v. Town of Primrose*, 2011 WI 18, ¶48, 332 Wis. 2d 3, 796 N.W.2d 411.

¹⁵ *Id.* ¶48.