OFFICE OF THE CITY ATTORNEY

To: City of Madison Plan Commission

From: John Strange, Assistant City Attorney

Re: Legistar 56839 - Master Plans in the Campus Institutional (CI) District

Date: November 11, 2019

The Planning Division's October 28, 2019 Staff Report regarding Edgewood High School of the Sacred Heart's ("Edgewood") request to repeal its master plan discusses the voluntary nature of master plans in the Campus Institutional (CI) District:

> … a campus master plan is a voluntary framework that institutions previously zoned CI like Edgewood could pursue to guide the uses and development of their property instead of pursuing conditional use approvals. Likewise, staff believes that is also possible for an institution to ask to no longer be governed by an approved master plan, or to not pursue re-approval of their master plan after the ten-year effective period of those plans expires. In this case, if the repeal request is approved by the Common Council, the Edgewood campus will be subject to the provisions in Section 28.097 of the Zoning Code and be put on the same footing as other CI Institutions without campus master plans. That would also be the case if Edgewood chose not to seek re-approval of their master plan after the current plan expires on November 6, 2025 (ten years after final staff approval of the 2014 plan).

Edgewood is making this request in order to revert to its original CI-District Zoning (CI-District without a master plan) and thus be on equal footing with the city's public high schools, which are all currently zoned CI-District without a master plan. In anticipation of questions from the Plan Commission and Common Council, the purpose of this Memorandum is to briefly expand on the point that CI-District Institutions may ask to repeal a voluntary master plan.

M.G.O. § 28.097(2)(a) in the CI-District Ordinance requires master plans for "institutions created after the effective date of this ordinance." For institutions created before the effective date of the CI-District Ordinance, master plans are "encouraged" but not required. *See* M.G.O. § 28.097(1)(c). So, when the City adopted the CI-District in 2013 it made the policy decision to give institutions created before 2013 the option of having a master plan or not. Nothing in the ordinance suggests that choosing to have a master plan destroys the voluntary nature of master plans in the CI District.

By way of analogy, consider a property owner who applies to the City in order to be rezoned into a Planned Development District. Nothing requires property owners to apply for a Planned Development. Rather, property owners voluntarily choose to seek this type of zoning. Once a planned development is approved, the owner must begin construction within five (5) years of that approval. If they do not, then the approval is no longer effective. However, the City cannot force the property owner to construct the Planned Development. Similarly, nothing would prevent the property owner from

approaching the City before the Planned Development approval expires – perhaps having decided not to construct the Planned Development – about being rezoned back into the old zoning.

In a similar way, Edgewood was never required to have a master plan. In January 2013, Edgewood was rezoned to the CI District without a master plan. In 2014, it chose to submit a master plan, which was approved by the City pursuant to a zoning map amendment. Like the planned development property owner, nothing in the CI-District Ordinance or Edgewood's master plan suggests that Edgewood must maintain a master plan it was never required to have. To interpret otherwise would be to interpret the master plan more akin to an agreement or covenant between the City and Edgewood with a 10-year term. It is not. The Zoning Code does not facilitate agreements or covenants. Instead, it creates a framework for land use that is based on permitted, conditional, and approved uses, like the voluntary master plan framework in this case.

Edgewood, however, still must go through a process to repeal its voluntary master plan. In fact, it must go through the same zoning map amendment process to repeal its master plan that it did when it asked that the master plan be approved. Thus, in my opinion, the true issue for the Plan Commission is not whether the master plan is voluntary, but whether Edgewood's request to repeal its voluntary master plan satisfies the standard for text or map amendments contained in M.G.O. § 28.182(6):

> "Text amendments or map amendments are legislative decisions of the Common Council that shall be based on public health, safety and welfare, shall be consistent with the Comprehensive Plan, and shall comply with Wisconsin and federal law."

The Planning Division's Staff Report concluded that Edgewood's request meets this standard. One thing that the Plan Division's Report did not specifically point out is that this same standard applied in January 2013 when the City zoned Edgewood into the CI-District without a master plan. At that time, the Common Council would have had to find that zoning Edgewood into the CI-District without a master plan satisfied this standard. If the Common Council ultimately decides to deny Edgewood's request to repeal its voluntary master plan, it will need to explain how this standard was met in 2013 but is not met now, especially in light of the recent ordinance (Ordinance 19-00069 (ID 56981)) it enacted that now requires conditional use approval for primary and secondary uses occurring outside of enclosed buildings for all CI District Institutions without a campus master plan. The Plan Commission should consider this same question as it makes its recommendation to the Common Council.

For your convenience, I've also attached the previously submitted memorandum from the Boardman Clark law firm regarding how the Common Council's action on this issue could impact Edgewood's pending religious discrimination lawsuit.

Cc: City of Madison Common Council

Enc: Memorandum from Boardman Clark law firm

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MEMORANDUM

TO: City Attorney Michael P. May
Assistant City Attorney John W. Strange

FROM: Barry J. Blonien
Kate Harrell

DATE: October 4, 2019

RE: *Analysis of Repeal of Edgewood's Master Plan for City Council*

You asked us to evaluate how repeal of Edgewood's Master Plan would potentially affect the lawsuit. We believe that the City would strengthen its position in the litigation by repealing Edgewood's Master Plan. In particular, if Edgewood's Master Plan is repealed, then the City's interpretation of the Master Plan to prohibit "athletic contests" would no longer be an issue.

Whether Edgewood's Master Plan is operative or repealed matters to this litigation because Edgewood predicates many of its claims on the City's interpretation of the Master Plan to prohibit "athletic contests." There would not be a live controversy over that interpretation if the Master Plan is repealed. Three related concepts—standing, mootness, and ripeness—are critical to understand how repeal of the Master Plan likely alters the landscape for this case. All three principles stem from the constitutional restriction that federal courts may hear only "cases" or "controversies" and may not issue advisory opinions.[1]

The "irreducible constitutional minimum" requirements for standing are that a plaintiff show an injury-in-fact allegedly caused by the defendant's wrongful conduct and some remedy that will redress the alleged injury.[2] Mootness occurs "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome," that is, "when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'"[3] And ripeness, which generally requires a final

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[1] *See* U.S. Const. art. III, § 2.

[2] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)

[3] *Trinity 83 Dev., LLC v. Colfin Midwest Funding, LLC*, 917 F.3d 599, 601–02 (7th Cir. 2019).

decision before pursuing a claim, "is predicated on the central perception that courts should not render decisions absent a genuine need to resolve a real dispute."[4]

Repeal of Edgewood's Master Plan would likely moot many of Edgewood's claims, including its appeal of the ZBA decision. When "an event occurs while a case is pending . . . that makes it impossible for the court to grant any effectual relief," the case should be dismissed as moot.[5] As the Seventh Circuit recently explained, "[i]n order to avoid mootness, there must be a live controversy in which the parties can obtain some relief from the court."[6] If there is no Master Plan, then there is no reason for a court to rule on its interpretation. It seems that there would no longer be any basis for the Court to grant declaratory or prospective relief if the Master Plan is repealed, thus significantly narrowing the issues for litigation as there would no longer be a live controversy surrounding the bulk of Edgewood's existing claims.

It is our opinion that repeal of Edgewood's Master Plan would put the City of Madison in a stronger position in the litigation. There will be far fewer live issues for Edgewood to pursue if the City repealed Edgewood's Master Plan.

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[4] *Wisconsin Central, Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir. 2008) (internal quotations and citations omitted).

[5] *Pakovich v. Verizon LTD Plan*, 653 F.3d 488, 492 (7th Cir. 2011). *See also, e.g.*, *St. John's United Church of Christ v. Chicago*, 502 F.3d 616, 626 (7th Cir. 2007) ("'[W]hen the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome,' the case is (or the claims are) moot and must be dismissed for lack of jurisdiction.").

[6] *Auto Driveaway Franchise Sys., LLC v. Auto Driveaway Richmond, LLC*, Case No. 18-3402, Slip Op. at 5 (June 28, 2019).