

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

Date: March 4, 2022

MEMORANDUM

TO: Heather Stouder & Plan Commission

FROM: ACA Kate Smith

RE: Rezoning of 702 Ruskin, Madison

You requested a memo on whether the rezoning of 702 Ruskin, Madison WI (Legistar File No. 69538) from IL (Industrial Limited) to CN (Conservancy) and CC-T (Commercial Corridor - Transitional) would constitute a “taking” of property rights.

Regulatory takings occur when the government severely restricts a property owner’s use of their land through zoning regulations. Generally, Wisconsin law holds that a regulatory taking occurs when a regulation denies a property owner of all, or substantially all, beneficial use of their property.

DISCUSSION

A. Background

On February 1, 2022, Alder Syed Abbas introduced the ordinance “Creating Section 28.022-00552 of the Madison General Ordinances to change the zoning of property located at 702 Ruskin Street, 12th Aldermanic District, from IL (Industrial-Limited) District to CC-T (Commercial Corridor-Transitional) District; and creating Section 28.002-00553 of the Madison General Ordinances to change the zoning of property located at 702 Ruskin Street, 12th Aldermanic District, from IL (Industrial-Limited) District to CN (Conservancy) District” (Legistar File No. 69538) at Common Council. The rezoning was referred to the Plan Commission, who will take up this item at their meeting on March 7, 2022.

Currently, the property located at 702 Ruskin Street is zoned IL (Industrial Limited) and does have active allowable uses. The proposed rezoning would change the property zoning to a split between CC-T (Commercial Corridor-Transitional) and CN (Conservancy). In 2020, the Oscar Mayer Special Area Plan (“OSMAP”) was completed and adopted as a supplement to the Comprehensive Plan (2018) and recommended the area to be parks and open space. The portion of the property proposed to be rezoned to CN is consistent with the adopted plan. The current active uses would become legal non-conforming uses.

B. Takings Analysis

Takings are classified into two basic types: physical takings and regulatory takings. This situation does not pose a physical takings issue because the city is not physically taking any property. Instead, the ordinance proposes a recommendation that could be implemented through zoning regulations. Thus, if a taking were to occur, it would be a regulatory taking.

A regulatory taking occurs if a legally imposed restriction deprives the landowner of “all or substantially all practical uses of a property.” *R.W. Docks*, 2001 WI 73, ¶ 15, 244 Wis. 2d 497. *See also Zealy v. City of Waukesha*, 201 Wis. 2d 365 (1996); *Just v. Marinette County*, 56 Wis. 2d 7 (1972). To prevail on a regulatory taking claim, the plaintiff must establish that a lawful restriction has been imposed such that the plaintiff “has been permanently prevented from using its property *in any way*.” *Madison Landfills, Inc. v. Dane County*, 183 Wis. 2d 282, 291 (1994)(emphasis added). Even when a plaintiff fails to establish their property has been rendered useless, courts nevertheless consider whether the regulation has “gone too far”. In doing so, courts consider the economic impact of the regulation and whether it interferes with any distinct investment-backed expectations. *See Zealy*, 201 Wis. 2d at 374 (citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)).

In *Zealy*, the Supreme Court ruled that an ordinance rezoning 8.2 acres of Zealy’s 10.4-acre parcel of land from residential use to conservancy did not deprive Zealy of all or substantially all use of Zealy’s land:

“The landowners argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a [regulatory] taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.”

The Court further noted that under the conservancy zoning the land could still be used for its historical use, farming, and when viewed as a whole, Zealy’s entire parcel retained a combination of residential, commercial, and agricultural uses. *See Zealy*, 201 Wis. 2d at 379-380.

Other cases have similarly ruled that the ultimate test is whether rezoned property remains useful in some way. In *Madison Landfills*, the appellant claimed that its investment in a landfill site constituted a property interest that it was deprived of when the property was rezoned to prohibit use of the property as a landfill. In denying the landowner’s claim, the court noted that the property could still be used for something other than a landfill, and that the appellant had no property interest in a right to a landfill permit. *Madison Landfills*, 183 Wis. 2d at 291.

C. Nonconforming Use Analysis

M.G.O. § 28.211 defines “Nonconforming Use” as “any principal use of land or building which does not comply with all the regulations for this ordinance or of any amendment hereto governing use for the zoning district in which such use is located.” When a use is no longer allowed, the existing use becomes non-conforming and the law of nonconforming uses works to eventually eliminate it.

What does it mean to work to eventual elimination? The law, both at the state and local level, is trying to eventually eliminate nonconforming uses through limitations imposed on the current owner or user. A person with a legal or equitable interest in the property may continue the nonconforming use that was legal at the time the property was rezoned, but with limitations as outlined in MGO Sec. 28.191. In general, the lawful nonconforming use of a building, structure or land may be continued provided that (1) the cumulative structural repairs or alterations do not exceed 50% of the total assessed value of the building or structure; (2) the nonconforming use is not extended or expanded; (3) the building or structure does not become and remain vacant for a continuous period of twelve months; and (4) the nonconforming use of the land does not cease for a continuous period of twelve months.

D. Conclusion

Rezoning 702 Ruskin from IL to CC-T and CN would not deprive the owner of all uses of the land, a metric courts use in their analysis to determine if a taking occurred. If rezoned, both CN and CC-T would create legal nonconforming uses for the current active uses. The owner would be able to continue their legal nonconforming use provided it not violate the limitations in MGO Sec. 28.191. In addition, the owner could sell and the legal nonconforming use could continue under new ownership if it is confined to the current use.

Alternatively, the current and future owners could convert uses to be consistent with the new rezoning if it passes. It is worth bringing to the attention of the Commission that uses in CN are available but extremely limited. Attached is the chart of permitted and conditional uses for a CN district (Appendix A). CC-T allows significantly more uses that are still consistent with the OSMAP recommendations.

Nonetheless, the issue of lawful nonconforming uses is a significant policy decision. Rezoning 702 Ruskin from IL to CC-T and CN will have a major impact on current and potential uses. While CN is consistent with the OSMAP recommendation, it limits future uses much more than CC-T. I think it would be unlikely a court would find the rezoning to either CN or CC-T to be a taking since neither would deprive the owner of all land uses, but the takings analysis is more clearly in favor of the City for a CC-T rezoning since many more use options exist.

APPENDIX A

28.091 SPECIAL DISTRICT USES.

- (a) "P" means permitted in the districts where designated.
- (b) "C" means allowed as conditional uses in the districts where designated, in compliance with all applicable standards.
- (c) "P/C" means permitted or conditional, depending on specific requirements in Supplemental Regulations, Subchapter 28J.
- (g) "CN" means Conservancy District.

Table 28G-1.

	U Z
Agricultural and Resource Uses	
Agriculture - Animal husbandry	C
Agriculture - Cultivation	C
Agriculture - Intensive	
Animal boarding facility, kennel, animal shelter	
Clear cutting	C
Community garden	C
Equestrian center/riding, boarding stable	
Keeping of honeybees	P
Market garden	C
Selective cutting of timber	P
Civic and Institutional Uses	
Botanic gardens	
Civic auditorium complex	
Community center	
Community Event	P/C
Correctional facility	
Land and water preserves	P
Library/museum	
Parks and playgrounds	P
Public safety or service facilities	C
Reuse of public schools, municipal buildings, or places of worship	P/C
Schools, arts, technical or trade	
Schools, public and private	
Training facilities, military or public safety	

Zoos	
Residential - Family Living	
Single-family detached dwelling	
Residential - Group Living	
Housing cooperative	
Mission camp	
Limited Production, Processing and Storage	
Artisan workshop	
Recycling collection center, drop-off station	
Public Utility and Public Service Uses	
Class 2 Collocations	P
Electric power production and/or heating and cooling plant	
Electric substations	C
Heating and/or cooling plant	C
Gas regulator stations, mixing and gate stations	C
Radio Broadcast Service Facility	P
Railroad right-of-way	C
Sewerage system lift stations	C
Telecommunications towers, Class Collocations, and transmission equipment buildings	P
Water pumping stations, water reservoirs	C
Transportation Uses	
Airport runways, hangars and related facilities	
Airport terminal and related facilities	
Transit stop or station	P
Medical Facilities	
Veterinary clinic	
Retail Sales and Services	
Animal day care	
Animal grooming facility	
ATM	
Farmers' market	
Free-standing vending	
Garden center	
Greenhouse, nursery	

Mobile grocery store	P
Food and Beverages	
Brewpub	
Incidental Alcohol Sales	
Nightclub	
Restaurant	
Restaurant-nightclub	
Restaurant-tavern	
Tavern	
Commercial Recreation, Entertainment and Lodging	
Art Center	
Bed and breakfast establishment	
Golf course	
Lodge, private club, reception hall	
Outdoor recreation	C
Stadiums, auditoriums, arenas	
Tourist rooming house	
Automobile Services	
Auto rental	
Electric Vehicle Charging Facility	
Parking and Storage Facilities	
Parking facility, private	
Parking facility, public	
Parking lot (surface) exceeding maximum parking	C
Accessory Uses and Structures	
Accessory building or structure	P
Accessory dwelling unit	
Accessory retail alcohol sales	
Caretaker's dwelling	C
Catering	
Coffee shop, tea house	
Composting	P
Day care home, family	
Emergency electric generator	C
General retail	
Health/sports club	
Home occupation	
Hotel, inn, motel, hostel	
Keeping of chickens	P

On-site agricultural retail, farm stand	C
Outdoor cooking operation	P/C
Outdoor eating area associated with food & beverage establishment	
Outdoor recreation	C
Outdoor sales events	
Outdoor storage	P/C
Parking facility, public	P
Portable shelter mission	P
Portable storage units	
Professional office, general office	
Temporary off-street parking	C
Solar energy systems	P
Storage of trucks and heavy equipment	P/C
Wind energy systems	C