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Date: February 22, 2023
To: Plan Commission, Common Council
From: Ben Zellers, AICP, CNU-A
Re: Odana Area Plan – Implementation of Proactive Rezoning and Official Mapping Recommendations

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Note: this memo is slightly revised from the version provided to TPPB and BPW to integrate edits recommended by those Committees to official mapping in University Research Park and the accompanying change to proactive rezoning Area #__. The proactive rezoning area numbering has also been revised to match the Plan Commission agenda.

Background

The Odana Area Plan (OAP) was approved by the Common Council on September 21, 2021. The recommendations in the Plan included the following:

- "Work to proactively rezone properties called out on Map 3" – Land Use & Zoning Recommendation #3 on page 16 (Map 3 is on page 15).
- "Officially map future public street connections called out on Map 4 and reserve sufficient public right-of-way to implement the planned street network" – Transportation Recommendation #7 on page 18 (Map 4 is on page 17).

The Legistar items listed in the following section implement those recommendations. A summary map is attached. Other elements of the OAP that are particularly relevant to proactive rezoning are Map 1: Future Land Use (page 13), and Map 6: Maximum Building Height (page 27).

Proactive rezoning and official mapping were discussed with property owners and the public as part of the planning process. Postcards were sent to residents, businesses and property owners in June 2020, at the beginning of the planning process, to inform them of the process and opportunities to participate and provide feedback. As the plan was drafted, official mapping and proactive rezoning were included in draft recommendations. A postcard was sent to all property owners in late May of 2021 to inform them that the Plan Commission would be discussing proactive rezoning and official mapping in the Odana Area at its June 7, 2021 meeting. Three different proactive rezoning scenarios were presented for Plan Commission discussion and feedback. The Commission directed staff to move forward with a hybrid of scenarios #2 and #3, which was incorporated in to the June 22, 2021 draft introduced at the Common Council on July 6, 2021. The proactive rezoning and official map recommendations were reviewed by Transportation Policy and Planning Board on August 16, 2021, Plan Commission on August 23, 2021, and approved by the Common Council without change on September 21, 2021.

Official mapping for planned streets has been used by the City for decades. However, it is only recently, as part of the Oscar Mayer Special Area Plan adoption process, that it was joined with proactive rezoning as a plan implementation tool. Official mapping and proactive rezoning were used to implement the Oscar Mayer Special Area Plan shortly after an Amazon warehouse was proposed for Milwaukee Street. The package delivery use was not consistent with the future land use for the parcel from the recently approved Milwaukee Street Special Area Plan, but couldn't be denied since it was a permitted use in the IL zoning district. Given the Council's interest in proactive rezoning as a result of the Amazon proposal and the proactive rezoning process that was required as part of the Oscar Mayer Special Area Plan approval, Planning Division staff felt it was appropriate to integrate official mapping and proactive rezoning discussions within future planning efforts like the OAP. Integration into the planning process itself ensures that planned land use aligns with zoning and that land for planned street connections is reserved while allowing stakeholders an opportunity to engage on those topics earlier in the process.

Official Mapping

Implementation of the OAP's official mapping recommendations are split into two Legistar items. Official Mapping is a planning effort that is enumerated by state statute to enable implementation of city plans. Former Assistant City Attorney John Strange prepared a memo summarizing Official Mapping as it exists under Wisconsin Statutes and Madison General Ordinances. That memo is attached for reference.

Research Park Area Official Mapping (PC Agenda Item #5, Legistar #75510)

The OAP includes several planned streets in Research Park, but official mapping of streets is limited to extending Charmany Drive to Genomic Drive and extending Genomic Drive directly north to Mineral Point Road to break up the large block between Oakwood Village and Research Park. The Charmany extension was originally shown in the Odana Area Plan to head southwest to Genomic. University Research Park provided comments to staff after introduction that requested an extension directly west to Genomic, which they state will better facilitate future infill development. Staff supports the proposal, and the sponsoring Alders are supportive as well. A revised map and revised description have been provided under the Legistar file.

The mapped Genomic connection will provide an alternative to accessing Mineral Point Road for future development of the existing vacant land immediately to the east, as well as for existing and planned development in Oakwood Village to the west.

West Towne Area Official Mapping (PC Agenda Item #6, Legistar #75535)

More future streets are proposed for official mapping in the West Towne area. The officially mapped streets combine with the planned streets to create a grid, which establishes a framework for future redevelopment to generate a cohesive end result as widely varied property ownership opts to pursue redevelopment on their own timelines. While the Research Park official mapping focuses on adding primary connections, the West Towne Area officially maps more streets to allow varied land owners to use the mapped streets as front lot lines, opening up otherwise landlocked parcels to redevelopment even if adjacent parcels continue to be used for low-density retail. The gaps in the officially mapped corridors are to avoid existing building footprints, which will allow reinvestment without additional steps that are necessary when a building permit is applied for in an officially mapped area. The mapped network is already being implemented with the approval of

the redevelopment of the Zor Shrine parcel, which has reserved future right-of-way to connect east towards the big box stores that line the western edge of the Mall.

Proactive Rezoning

Most proposed proactive rezonings are to Regional Mixed-Use (RMX), which is the City's most permissive and intense district outside of Downtown. The vast majority of uses would continue to be allowed as they are now. RMX does require a minimum two-story building height, but that is already implemented for all areas in the chart below except for #13 via the recently adopted Transit-Oriented Development (TOD) Overlay Zoning District. The Plan Commission started discussing formulation of TOD Overlay shortly after the OAP was recommended for approval. The main impact the recently approved TOD Overlay will have on proactive rezoning is allowing eight story buildings in RMX areas by right, where five story buildings would otherwise be allowed in RMX outside of the TOD overlay. CC-T-zoned parcels are allowed a maximum height of five stories as a permitted use in TOD instead of four. There are two instances of the maximum height allowed in TOD Overlay RMX conflicting with maximum recommended heights shown in the OAP; those are noted in the chart and narrative below. A summary of current zoning and OAP-proposed proactive rezoning is provided in the following chart.

Proactive Rezoning Area		Legistar #	Current Zoning	OAP Proposed Zoning	OAP Land Use	OAP Max. Recommended Bldg. Height (floors)	General Existing Uses
Map Label	PC #						
1	7	75517	PD, SR-V2, CC	RMX	CMU	5	Offices, strip retail, banking, convenience store, apartments
2	8	75519	CC	RMX	CMU, RMU	5 (CMU) 8/12 (RMU)	Retail (West Towne Mall, big box stores, strip retail), restaurants
3	9	75520	CC, SE	RMX, CC-T	RMU	8/12	Retail, office, banking, restaurants
4	10	75521	MXC, CC-T	RMX, CC-T, SE	RMU, CMU, E	12 (RMU) 12/5 (CC-T) 5 (E)	Undeveloped
5	11	75524	SE	RMX	RMU, CMU, E	12 (RMU) 5 (CMU)* 5 (E)*	Offices
6	12	75527	SE	RMX	RMU, CMU	12 (RMU) 5 (CMU)**	Offices, West Transfer Point
7~	13~	75528	CC	RMX	RMU	8/12	Retail

* Area #5 CMU and E property west of Whitney Way would be allowed up to eight stories by right under RMX zoning, per the adopted TOD overlay.
** The sliver of CMU along the eastern edge of Area #6 would be allowed up to eight stories by right under RMX zoning, per the adopted TOD overlay.
~ This is the only area outside of the TOD Overlay Zoning District.

Area #1 (PC agenda item #7, Legistar #75517)

This area of mixed zoning has a variety of uses, as noted above. What is somewhat unique about this area is the inclusion of several Planned Development (PD) districts, which each have their own zoning text. Those PDs often reference pre-2013 zoning districts, and have fairly standard landscaping, signage, and building design language. The office, residential, and retail uses fit within

RMX, with the exception of the PD for the convenience store/gas station, which would become a legal nonconforming use.

Area #2 (PC agenda item #8, Legistar #75519)
This area includes West Towne Mall and the adjacent outlots and large format retail stores. Other than "Telecommunications Center" and "Package Delivery Service," all permitted Retail Sales and Service uses are the same between the current CC zoning and proposed RMX zoning. The auto repair at 7105 Mineral Point Road would become a legal nonconforming use.

Area #3 (PC agenda item #9, Legistar #75520)
This area includes retail, restaurant, and office uses. Parcels west of Yellowstone Drive are proposed for RMX zoning, and parcels east are proposed for CC-T zoning. The car wash at 414 Grand Canyon Drive would become a legal nonconforming use under the proposed RMX zoning.

Area #4 (PC agenda item #10, Legistar #75521)
This area includes undeveloped property just west of University Research Park (URP), most of which is zoned MXC, though there is a parcel at the northwest corner zoned CC-T. MXC requires an approved master plan before development can occur, similar to the Campus Institutional district, creating additional work and uncertainty in the development process. As a result, it is sparsely used; the recently approved Illumina project rezoned from MXC to SE, and this is the only remaining area of the city where MXC is mapped. The proposed rezoning uses RMX along Mineral Point Road, CC-T in the middle and SE along the south edge. The gradient allows for the most intensive mix of uses along the Mineral Point BRT corridor, while matching current zoning for the southern part of the area.

Note that the official mapping of streets in URP has a slight impact on the zoning boundary in this area; if the Commission proceeds with the revised official mapping for URP staff recommends also proceeding with the revised rezoning description for this area, which is slightly edited to better align with the revised official mapping.

Area #5 (PC agenda item #11, Legistar #75524)
This area covers URP office development, again rezoning property along the Mineral Point BRT corridor to RMX. As noted in the summary chart above, the OAP recommends proactive rezoning to RMX for property between Whitney Way and Science Drive. It should be noted that this area is recommended for a five story maximum height in the OAP, but TOD Overlay district would allow up to an eight story building as a permitted use under RMX zoning.

Area #6 (PC agenda item #12, Legistar #75527)
This area covers URP office development between Tokay Boulevard and Science Drive, including the West Transfer Point (which will no longer be used when the Metro Network Redesign is implemented this summer). The possibility of the transfer points disappearing was contemplated as part of the development of the OAP, and proactive rezoning to RMX was deemed to be appropriate due to the presence of BRT at Mineral Point and Whitney Way less than a half-mile away and the traditional bus service that continues on Whitney and Tokay. A sliver of property recommended for rezoning to RMX along the eastern edge of the area falls under the recommended five story maximum building height in the OAP, but would be allowed up to eight stories as a permitted use under TOD overlay zoning.

Area #7 (PC agenda item #13, Legistar #75528)
This area covers retail to the southwest of the Whitney Way and Tokay Boulevard intersection, including the long-vacant former Copps grocery store and vacant former Jiffy Lube.

Timeline

The timeline for implementation of OAP recommended proactive rezoning and official mapping is summarized below. The official mapping was referred to the TPPB and BPW; proactive rezoning **and** official mapping was referred to the Plan Commission. The TPPB and BPW recommended approval of the official mapping with the realignment of the Charmany Drive official mapping as requested by URP.

Date	Body	Action
1/17/23	Common Council	Introduction – Official Mapping and Proactive Rezoning
2/6/23	TPPB	Recommendation on Official Mapping
2/8/23	BPW	Recommendation on Official Mapping
2/27/23	Plan Commission	Public Hearing on Official Mapping and Proactive Rezoning; Recommendation to Council
3/7/23	Common Council	Public Hearing on Official Mapping and Proactive Rezoning; Consider Approval

Attachments:

1. Odana Area Plan Existing Zoning map
2. Odana Area Plan Proactive Rezoning map (also showing planned streets).
3. Area #1 & #2 Odana Area Plan Proactive Rezoning air photo map
4. Area #3 & #4 Odana Area Plan Proactive Rezoning air photo map
5. Area #5, #6, & #7 Odana Area Plan Proactive Rezoning air photo map
6. Official Mapping Memo from former Assistant City Attorney John Strange

Odana Area Plan Existing Zoning

Proactive Rezoning Area (#)

0 1,000 2,000 Feet

N

Source: City of Madison Planning Division

OLD SAUK RD
N GAMMON RD
HIGH POINT RD
JUNCTION RD
COLONY DR
N YELLOWSTONE DR
BLUE RIDGE PKWY
INNER DR
S YELLOWSTONE DR
OLD MIDDLETON RD
SHEBOYGAN AVE
N WHITNEY WAY
N ROSA RD
REGENT ST
S WHITNEY WAY
SOUTH HILL DR
S WESTFIELD RD
TREE LN
RANDOLPH DR
S GAMMON RD
OFFSHORE DR
ISLAND DR
MINERAL POINT RD
GRAND CANYON DR
COMMERCE DR
D'ONOFRIO DR
ODANA RD
S ROSA RD
RESEARCH PARK BLVD
SCIENCE DR
TOKAY BLVD
S HIGH POINT RD
WATTS RD
STRUCK ST
RAYOVAC DR
S SEGOE RD
ODAND RD
KOTTKE DR

SR-C1 SR-C2 SR-C3 SR-V1 SR-V2 TR-C2 TR-C4 TR-P TR-U1 TR-U2 NMX CN CI PR MXC CC CC-T SE TSS TE PD A 1 2 3 4 5 6 7

Odana Area Plan Proactive Rezoning

Proactive Rezoning Area (#)

Planned Street Connection for Official Mapping

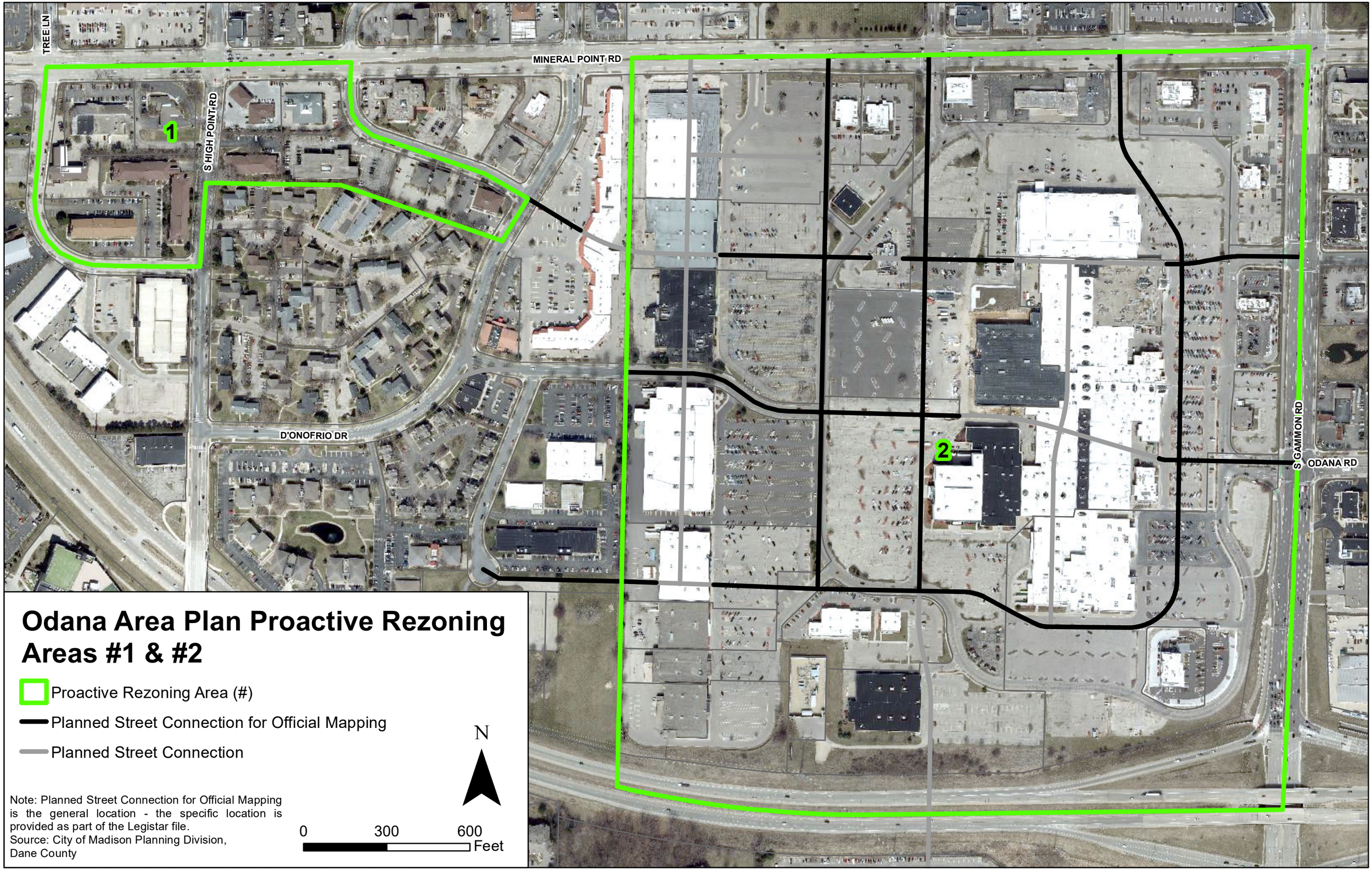
Planned Street Connection

Note: proactive rezone in black text; existing zoning in red text.
Source: City of Madison Planning Division

N

0 1,000 2,000 Feet

SR-V2 PD OLD SAUK RD SR-C3 PD TR-P SE NMX SR-C1
OLD MIDDLETON RD SR-V2
SHEBOYGAN AVE
TR-C4 SR-C2 PD
N WHITNEY WAY
SR-C1 N YELLOWSTONE DR BLUE RIDGE PKWY CN
SR-C3 TR-C2 N ROSA RD CN
COLONY DR REGENT ST
INNER DR
JUNCTION RD PD PD SR-V2 CI
S WESTFIELD RD CC-T S YELLOWSTONE DR CN
S WHITNEY WAY SR-C1
TREE LN SR-V2 RANDOLPH DR S GAMMON RD SE SR-C3 GRAND CANYON DR ISLAND DR SOUTH HILL DR
SR-V1 SR-V2 PR
CC-T NMX CC-T CN CC-T SR-C3
PD MINERAL POINT RD
COMMERCE DR 1 RMX 2 RMX 3 RMX CC-T CN PD 4 RMX 5 RMX TSS TE
Proposed Charmany Drive official mapping realignment.
CC D'ONOFRIO DR PD SE TR-U2 ODANA RD CC-T CC MXC SE S ROSA RD SE
CC SR-V2 CN S HIGH POINT RD A TR-U1 6 RMX SCIENCE DR
TOKAY BLVD
PD PD WATTS RD RAYOVAC DR SE CC 7 PD SR-V1 S SEGOE RD
CC SR-C3 SR-C1
ODAND RD
SR-C1 CN KOTTKE DR PD S TRUCK ST CC-T SR-V2 SR-V1 CN PR
SR-V2 SE



Odana Area Plan Proactive Rezoning Areas #1 & #2

Proactive Rezoning Area (#)

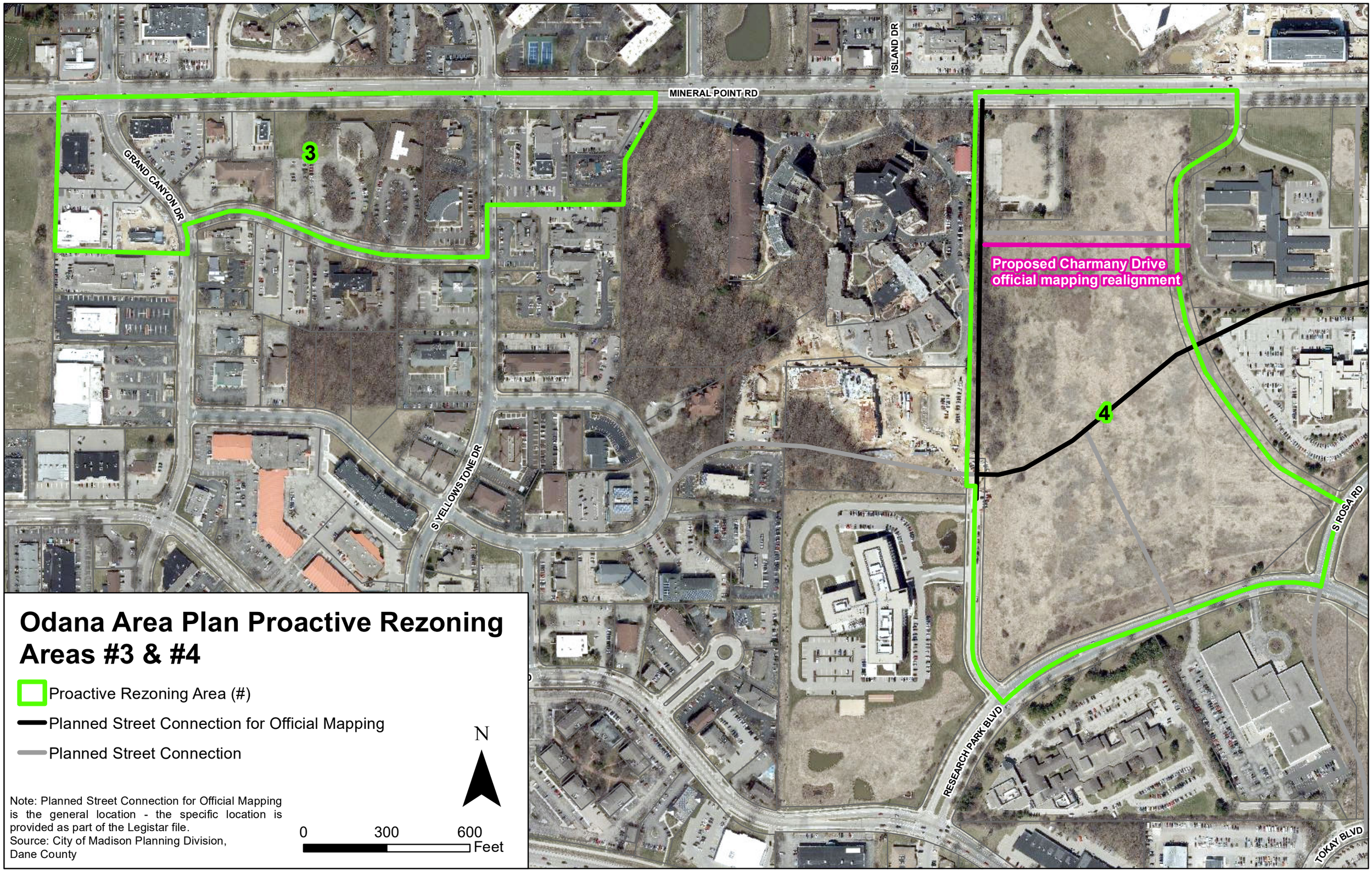
Planned Street Connection for Official Mapping

Planned Street Connection

N

0 300 600 Feet

Note: Planned Street Connection for Official Mapping is the general location - the specific location is provided as part of the Legistar file.
Source: City of Madison Planning Division, Dane County



Odana Area Plan Proactive Rezoning Areas #3 & #4

Proactive Rezoning Area (#)

Planned Street Connection for Official Mapping

Planned Street Connection

N

0 300 600 Feet

Note: Planned Street Connection for Official Mapping is the general location - the specific location is provided as part of the Legistar file.
Source: City of Madison Planning Division, Dane County

Odana Area Plan Proactive Rezoning Areas #5, #6, #7

Proactive Rezoning Area (#)

Planned Street Connection for Official Mapping

Planned Street Connection

Note: Planned Street Connection for Official Mapping is the general location - the specific location is provided as part of the Legistar file.
Source: City of Madison Planning Division, Dane County

N

0 300 600 Feet

WHITNEY WAY
MINERAL POINT RD
S ROSA RD
RESEARCH PARK BLVD
SCIENCE DR
TOKAY BLVD
S SEGOE RD
5
5
6
7

CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, CCB
266-4511

MEMORANDUM

TO: The Plan Commission

FROM: John Strange, Assistant City Attorney

DATE: November 20, 2020

RE: Official Mapping under Wis. Stat. § 62.23(6) and M.G.O. § 16.25(6) and Legislative File No. 61589

I. Introduction

Legislative File No. 61589 is a Resolution to amend Madison's Official Map. The Resolution is part of an effort to more fully implement the Milwaukee Street Special Area Plan. In general, Madison amends its Official Map relatively infrequently and, to my knowledge, has not used the Official Map as a tool to implement local area plans. Historically, Madison has used its Official Map primarily as an engineering tool to reserve lands for road widening and major roadway connections, such as the future Sprecher Road connection between Cottage Grove and East Buckeye. Yet, as discussed more fully below, one of the purposes of Official Maps in Wisconsin is to serve as a planning tool for the implementation of city plans, including local area plans. Thus, the purpose of this Memorandum is to address some of the basic questions our office has recently received about the purpose and mechanics of the Official Map in light of Legislative Item 61589: What is it? Where did it come from? How does it work? And what does it mean for the City and property owners?

II. Background and History of Official Mapping.

The Official Map is not the map showing the City's political boundaries. Nor is it the map showing the City's zoning districts. Instead, **t**he Official Map under Wis. Stat. § 62.23(6) and M.G.O. § 16.25(6) reserves and depicts land the city intends to use in the future for specific public uses: streets, highways, historic districts, parkways, parks, playgrounds, railroad rights-of-way, public transit facilities, and public transit facilities. Importantly, a local government can reserve land on an Official Map *regardless* of whether it actually owns the land at the time of mapping, subject, of course, to eventually acquiring the land through purchase or condemnation before turning it into one of the listed public uses.

Official mapping is not a uniquely Madison thing. As described in the 1996 Official Mapping Guide prepared by the Southeastern Wisconsin Regional Planning Commission, "the concept and actual use of the official map in the United States dates back to Colonial times, when the proprietary founders of well-planned Colonial cities, such as Philadelphia, Annapolis, and Williamsburg, caused plans for these cities to be prepared and the necessary streets and public commons preserved for public use by prohibition of the construction of buildings, fences, and other structures in the dedicated areas."[1] Modern official mapping statutes began in New York in 1926, followed by Maryland, Michigan, Minnesota, New Hampshire, Utah, and Wisconsin, which adopted its Official Map statute in 1941. The constitutionality of Wisconsin's Official Map statute was confirmed by the Wisconsin Supreme Court in *Miller v. Manders*, 2 Wis. 2d 365 (1957). Thus, the official map is one of the oldest and most established public plan implementation devices in Wisconsin and across the country.[2]

III. Wisconsin's Official Mapping Enabling Legislation and Madison's Official Map.

In addition to being one of the oldest plan implementation devices, it is probably also one of the least known. Wisconsin's Official Map statute is found in Wis. Stat. § 62.23(6), which provides, in part:

> "(b) The council of any city may by ordinance or resolution establish an official map of the city or any part thereof showing the *streets, highways, historic districts, parkways, parks and playgrounds* laid out, adopted and established by law. The city may also include the location of *railroad rights-of-way, waterways and public transit facilities* on its map…. The map is conclusive with respect to the location and width of streets, highways, waterways and parkways, and the location and extend of railroad rights-of-way, public transit facilities, parks and playgrounds shown on the map. The official map is declared to be established to conserve and promote the public health, safety, convenience or general welfare. The ordinance or resolution shall require the city clerk at once to record with the registrar of deeds of the county or counties in which the city is situated a certificate showing that the city has established an official map."[3]

This provision enables the City to establish an Official Map to reserve land for the specific public uses listed in the statute. Madison's Official Map Ordinance, which largely adopts the language of the state statute, is found in the City's general planning ordinance, M.G.O. § 16.25.

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[1] Official Map Guide, Southeastern Wisconsin Regional Planning Council, p. 3 (June 1996) found at http://www.sewrpc.org/SEWRPCFiles/Publications/pg/pg-02_official_mapping_guide.pdf. The 1996 Official Map Guide is likely the most comprehensive description of Wisconsin's Official Map statute available.

[2] *Id*. at v.

[3] Wis. Stat. § 62.23(6)(b) (2019).

In addition to providing the authority to establish an Official Map, Wis. Stat. § 62.23(6)(c) and M.G.O. § 16.25(6) provide that the City can *amend* its Official map. Amendments to the Official Map require Plan Commission review and a public hearing preceded by class 2 notice in an official newspaper, which means two insertions in the newspaper, with one being at least one week before the hearing. Madison's ordinance repeats this language and additionally provides in M.G.O. 16.25(6)(d) that the City provide notice to property owners within 300 feet of the nearest exterior line of the area proposed for official mapping.

Thus, the legislative authority allowing cities to have an Official Map has long been established and the process for creating and amending the Official Map is similar to other planning related legislative processes (i.e., enactment of an ordinance or resolution). As noted and discussed more fully in Tim Parks' Staff Report regarding this Legislative item, Madison established its Official Map in August 1966. Madison's current Official Map can be found on the City website.[4]

IV. What the Official Map Means to Cities and Property Owners.

Most questions about the Official Map relate to what it means for cities and property owners.

1. What the Official Map means for cities.

As the Official Map Guide explains, the primary function and impact of the Official Map for cities is twofold:

> "The primary function of the official map is to implement the community's plan of streets and highways in a manner similar to that in which the zoning ordinance and map should implement the community's land use plan. *The official map permits the community to protect the beds of future streets, as well as the beds of partially or wholly developed streets which are to be widened, by essentially prohibiting construction of new buildings in such beds. The possible monetary savings which can accrue to the community from such protection of street rights-of-way are large, but the fact that an official map assures the integrity of the community's long-range plan of streets and highways is even more important*."[5]

In analyzing the Official Map statute as part of a 1983 amendment, the Legislative Reference Bureau noted that:

> "[t]he map serves as notice of the city's intention to develop in certain areas. After a proposed improvement is placed on the map, any person who builds

[4] https://cityofmadison.maps.arcgis.com/apps/webappviewer/index.html?id=1734bfa1086e4037adbd6882e28a6e61

[5] Official Map Guide, Southeastern Wisconsin Regional Planning Council, p. 6 (June 1996)(emphasis added). See fn. 1 for link to document.

> in the path of the improvement without a building permit is not entitled to compensation for damage caused in the course of constructing the [public] improvement."

Other related Official Map functions include ensuring the implementation of a city's master plan showing streets and parkways and locating and recording "all existing street lines that constitute the boundaries of the public's property,…thereby…stabiliz[ing] the location of real property boundary lines, both private and public."[6] Certainly, there are other planning tools that can and have been used to accomplish some of these goals, but the Official Map can be particularly effective in implementing city plans:

> "The official map is particularly effective as a street and highway plan implementation device. Although other plan implementation devices such as building setback requirements in zoning ordinances, special building setback line ordinances along major streets, building setback lines on recorded subdivision plats, and private deed restrictions can all be used to reserve land for the future widening of existing streets, none of these devices can be readily applied to proposed future streets and highways. Subdivision control ordinances can be used to protect future streets and highways, but can do so only indirectly and cannot be used to prevent the erection of buildings in the beds of future streets when the erection of such buildings takes place without platted land division. The official map is the only arterial street and highway system plan implementation device that operates on an area wide basis in advance of land development and can thereby effectively assure the integrated development of the street and highway system."[7]

The Official Map Guide also notes how this applies to detailed neighborhood plans:

> "if the local community has carefully prepared detailed neighborhood unit development plans, and intelligent plat review by planning bodies is all but impossible without such plans, the collector and land-access streets and the neighborhood park and parkway sites shown on such plans can be delineated and placed on the official map. Such mapping will help to overcome difficult problems of disjointed land ownership patterns and assure the development of integrated neighborhood units in a manner not possible through subdivision control alone."[8]

The degree to which Madison and other cities should use the Official Map versus other planning tools to reserve land for future public uses and, more broadly, to proactively implement neighborhood area plans is a question of policy for each city to determine.

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[6] *Official Map Guide* p. *6*
[7] *Id.* p. 6.
[8] *Id.* p. 8.

2. What the Official Map means for Property Owners.

The major impact of the Official Map on property owners relates to whether a property owner can construct buildings within an officially mapped area and/or be compensated for the removal of a building that lies within reserved lands on the official map. The state statute speaks directly to this in sub. (6)(e):

> "*No permit may be issued* to construct or enlarge any building within the limits of any street, highway, waterway, railroad right-of-way, public transit facility or parkway, shown or laid out on the map except as provided in this section…*Any person desiring to construct or enlarge a building within the limits* of a street, highway, waterway, railroad right-of-way, public transit facility or parkway shown on the official map…*shall apply to the authorized official of the city for a building permit*. *Unless an application is made, and the building permit granted or not denied within 30 days, the person is not entitled to compensation for damage to the building* in the course of construction of the street, highway, railroad right-of way, public transit facility or parkway."[9]

Thus, under this provision, the City will not issue a building permit to construct or enlarge a building in an area that is officially mapped. If someone were to construct or enlarge a building without a permit, even a minor building or addition, they would not be entitled to compensation for the removal of that building or addition.

That said, property owners can appeal the denial of a permit and the Zoning Board of Appeals has some discretion to grant the permit and allow construction of a building in the officially mapped area:

> "if the land within the mapped street…*is not yielding a fair return*, the board of appeals in any municipality which has established such a board having power to make variances or exceptions in zoning regulations may, by the vote of the majority of its members, grant a permit for a building or addition in the path of the street…*which will as little as practicable increase the cost of opening the street…or tend to cause a change in the official map.* The board *may impose reasonable requirements* as a condition of granting the permit to promote the health, convenience, safety or general welfare of the community. The board *shall refuse a permit where the applicant will not be substantially affected by not constructing the addition or by placing the building outside the mapped street…*"[10]

Under this provision, the ZBA can grant a building permit in order to allow "a fair return" as long as the proposed building "will as little as practicable increase the cost" of the public improvement identified on the official map. In doing so, the ZBA can attach conditions or requirements that would balance these considerations. The statute provides

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[9] Wis. Stat. § 62.23(e)(emphasis added).
[10] *Id.*

little guidance on how a board would determine “fair return” or make this decision. There is similarly little guidance in case law. However, the ZBA would likely hear the positions of the property owner and the City and then evaluate whether anything could be done to allow the construction of the building with minimal additional cost to the City. In the event of an appeal to the ZBA, our office would need to provide further advice and guidance to the ZBA on the concepts of “fair return” and “little as practicable” costs.

Although curiously drafted, the last sentence of the same provision provides further discretion to the ZBA to grant a permit. It appears to give the Board the authority to grant a permit even if the cost to the city is more than a little, if the Board determines that denying the permit would “substantially affect” the property owner. Although there is similarly little guidance on what “substantially affect” means, this clause is likely important to preserving the constitutionality of the official mapping statute, or a specific official map, because it would prevent a city from placing reservations on a lot or parcel that would remove all reasonable use of that property. As the Official Map Guide noted:

> “It should be emphasized, however, that the courts have consistently reserved the right to determine the constitutionality of any particular official map as it might apply to a particular property in order to safeguard the rights of the property owner. Cases in which a particular map has been held invalid as applied to a specific parcel of land have generally included situations where a particular property owner, under the application of the map, would have lost all right to the use of a single lot or parcel which was located entirely within an officially mapped street right-of-way.”

As with the phrase “fair return” our office would need to provide the ZBA with further guidance on the phrase “substantially affect.” Perhaps more importantly, the City will need to continue being judicious about not proposing an official mapping that would remove all use of a person’s property. I would expect that thoughtful collaboration between the Planning Division, Engineering Department, and Office of the City Attorney would avoid this result.

One final observation regarding the words of the statute that may be important to property owners is that it applies only to “buildings” or “additions”. In my opinion, that means a property owner would <u>not</u> be prohibited from, for example, using officially mapped land for surface parking or erecting a sign because neither would be considered a building. This rationale may apply to other non-building uses as well. As a result, the City would likely have to grant a permit where applicable and/or compensate owners for the eventual removal of these structures or areas even if they exist in an officially mapped area. This makes sense in the context of the statute because the cost of removing a surface parking area or sign would be relatively “little” when compared to the cost of a building or building addition.

Taken as a whole, the statute requires that the city building inspector deny building permits for proposed construction of buildings within the officially mapped area. It allows property owners to appeal that decision to the Zoning Board of Appeals, which has limited

discretion to grant the permit. If the city eventually grants a permit, it will be responsible for the cost of removing the building if and when it acquires the property for the future use. If the city does not grant the permit and the property owner builds anyway, such as building a minor shed or building, the property owner is not entitled the value of the building or addition the city may eventually have to remove. In any event, when creating an official map, the City must be careful not to do so in a way that would remove all reasonable use of the property.

V. Conclusion

Legislative item 61589, amending the City's Official Map, uses the official map as a tool to implement the Milwaukee Street Special Area Plan. As described above, the Official Map is a planning tool that is available for such implementation. If Madison decides to use the Official Map as a way to more proactively implement special neighborhood plans, this Memorandum addresses some of the basic questions our office routinely receives about the Official Map and that may arise during and after the official mapping process.