

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

MEMORANDUM

TO: Mayor Soglin; All Alders; Board of Estimates

FROM: Doran Viste, Assistant City Attorney

DATE: June 10, 2013

RE: Legistar File # 30563, Resolution Authorizing the Settlement of Hawk Ridge Properties, L.L.C. v. City of Madison (13 CV 117)

Mayor Soglin and all Alders:

The City is currently involved in litigation involving the City's exercise of its eminent domain powers on November 29, 2012 at the property located at 8108 Mineral Point Rd. (tax ID tax parcel ID no. 251-0708-224-0208-1, hereinafter referred to as the "Parcel"), in Ald. Skidmore's district. As a result of the condemnation process, the City paid Hawk Ridge Properties L.L.C. (the "Owner") \$100,830 to acquire a portion of the Parcel. After a review of the evidence in the case, including information recently provided to the City by the Owner relating to the actual costs that will be incurred to put the Owner's property back in the position it was in prior to the taking, the City Attorney, the City Engineer and the Office of Real Estate Services all believe that it is in the City's best interest to settle this litigation at this time and recommend adoption of Legistar File # 30563, a resolution approving the payment of \$116,886.16 from existing accounts to the Owner to settle this matter. The purpose of this memo is to explain why staff believe that this settlement is in the City's best interest.

Summary of the Taking

The underlying case, Hawk Ridge Properties, L.L.C. v. City of Madison (Dane County Circuit Court Case 13 CV 117), is a just compensation eminent domain case that arose from the City's need to take a portion of the Parcel as part of the Mineral Point Road / CTH S & South Junction Road / CTH M public improvement project ("Project"). The Parcel is occupied by a single retail establishment, the Trek Store, and is part of a larger retail development anchored by Target. The Parcel has frontage along Mineral Point Rd. on the south, is adjacent to a City owned storm water parcel on the east, takes access off of a shared driveway owned by Target on the west, and has the Target property to its immediate north.

As part of the Project, it was necessary for the City to acquire 2,178 square feet of the parcel along the Mineral Point Rd. frontage, along with 871 square feet on the remaining Parcel for temporary use during construction. The condemned land contained 13 parking stalls that served the retail needs of the Parcel, along with landscaping and other improvements (curbs, concrete, and striping).¹ All utility in these parking stalls will be taken by the City once work on the Project commences, leaving the Parcel with only 35 parking stalls following the condemnation.

The City and the Owner reached a negotiated agreement during the condemnation process which resulted in the City paying the Owner \$100,830 on November 29, 2012 to acquire a portion of the Parcel, which figure broke down as follows:

Land Interests and Improvements Taken by the City	\$63,830
Cost to Cure	\$37,000
Payment to Owner	\$100,830

Replacement of the Parking Stalls is Compensatory

The Parcel, being part of a larger retail development, is subject to both deed restrictions and an operation and easement agreement with Target relating to the provision of adequate retail parking on the Parcel. Under these deed restrictions and easement conditions, the Parcel is required to provide 48 parking stalls to serve its development. Under the terms of the easement, in the event a portion of the Parcel is condemned (as occurred here) the Parcel's owner is required to "use its *best efforts* (including using proceeds from the condemnation award or settlement) to restore and/or substitute ground level parking spaces" to comply with the recorded parking requirements, unless compliance with these conditions is not possible (emphasis added). Hence, as a direct result of the City's taking, the Owner will be required to take action to replace the condemned 13 parking stalls, if possible. In this case, the replacement of all of the taken parking stalls is possible by a reconfiguration of the parking area and landscaping. In fact, the Owner has recently received City approval for a reconfigured lot that would fully replace the 13 condemned parking stalls (see attached parking lot site plan). Therefore, because replacement of the parking stalls is possible and the Owner is required to replace them, as part of the determination of just compensation for the taking, the City is required to pay the Owner the cost to replace the lost parking stalls (the "Cost to Cure").

Cost to Cure Estimates

When going through the condemnation process, the City attempted to determine the Cost to Cure associated with the taking. The City did this by internally drafting a sketch of a reconfigured parking lot that would replace the taken parking stalls, and then

¹ There is no dispute by the City and Owner as to the value of the land interests and improvements actually taken by the City. This figure, \$63,830, may be broken down as follows: fee acquisition (\$50,100), temporary limited easement for construction purposes (\$1,610), site improvements taken (\$10,520) and landscaping taken (\$1,600).

getting a bid on the work necessary to implement this draft plan. Following this approach, the City's estimate of the Cost to Cure as of October 12, 2012 was \$36,539. However, the City has recently been provided actual Cost to Cure bids from the Owner based upon the recently approved alteration to the specific implementation plan for the Parcel. These bids show a total estimated cost to the Owner of \$125,772.32 to fully restore the parking stalls to the Parcel, or \$89,233.32 more than the City's estimates. In looking at these figures, City Engineering concluded that the bids were reasonable. While there is some question whether the entire parking lot needs to be resurfaced, the differences can be explained in large part because the City's estimates did not include engineering and design related costs, nor did they actually incorporate the lighting and landscaping costs associated with the ultimate approved plan. The Cost to Cures can be broken down as follows:

Component	City Estimate	Owner Estimate	Difference
Resurfacing	\$31,774.00	\$77,963.00	\$46,189.00
Lighting	\$1,780.00	\$12,225.00	\$10,445.00
Landscaping	\$2,985.00	\$11,787.93	\$8,802.93
Engineering and Design	\$0.00	\$8,500.00	\$8,500.00
Supervision	\$0.00	\$15,296.39	\$15,296.39
Total	\$36,539.00	\$125,772.32	\$89,233.32

Risk of Litigation

In condemnation cases where just compensation is being disputed, the condemnor must pay all the litigation costs of the condemnee if the ultimate judgment of the jury is found to be at least 15% greater than the compensation paid to the condemnee. Courts are required by law to order any litigation costs that are reasonable, with "reasonable" being a term given great leeway. In fact, as a way to ensure a check on the exercise of eminent domain, it is not uncommon to have ultimate judgments in just compensation cases where the litigation costs far exceed the amount of the taking itself.

In this case, if the jury were to find that the City should have paid the Owner more than \$115,955, the City would have to pay the Owner's entire litigation costs (legal fees, expert fees, document preparation, etc.). To date, even though no trial work has begun, the Owner reports that he has already incurred over \$25,000 in legal costs. It is not unforeseeable that if this case goes to trial to determine just compensation that litigation costs will fall somewhere in the \$100,000-\$150,000 range, and that the court would find these costs to be reasonable. These costs are a great concern if the City anticipates a finding of just compensation over the 15% level.

Here, even if a reasonable jury finds that the City's resurfacing estimate is more accurate than the Owner's estimate, it is likely that the same jury would also find that the City's estimate failed to provide for project engineering, design and supervision costs, along with adequate landscaping and lighting pursuant to the approved plan for the parking lot. These additional costs (reasonably estimated to be around an additional \$25,000 to the City's Cost to Cure) would be greater than \$15,125, which means that it

is very likely that not only will the award itself be increased in this case, but the City will be exposed to paying the Owner's litigation costs as well. The combined effect would likely be, even taking these facts in the light most favorable to the City, an additional payment to the Owner of at least \$125,000 (\$25,000 for the additional Cost to Cure, and \$100,000 for litigation costs) if this case goes to trial. If the jury finds fully in favor of the Owner, and litigation costs fall on the high end of the anticipated range, the City could be looking at making an additional payment following jury trial of almost \$240,000 (\$89,000 for the additional Cost to Cure and \$150,000 for litigation costs).

Settlement Proposal

Following a review of the bid documents and the approved parking lot plan recently provided to the City by the Owner, the City Attorney, the City Engineer and the Office of Real Estate Services all feel that the City is likely to face a finding of just compensation at jury trial that exceeds the original payment to the Owner by more than 15%. Moreover, it appears that the bid documents forwarded to the City are reasonable. Accordingly, the City and the Owner have reached a tentative settlement agreement that would resolve this matter by paying the Owner the Owner's full Cost to Cure, along with litigation costs incurred to date. While this settlement calls for an additional payment to the Owner of \$116,886.16, most of this figure will be used to restore the 13 parking stalls that the City took, as required of the Owner by his easement agreement with Target. Hence, this settlement not only protects the City against the likelihood of a judgment of at least \$125,000, but it fully makes the Owner whole as a result of the City's taking. The settlement, and likely trial scenarios, break down as follows:

	Settlement	Jury Trial-In Favor of City	Jury Trial-In Favor of Owner
Land Interests and Improvements Taken by the City	\$63,830.00	\$63,830.00	\$63,830.00
Cost to Cure	\$125,772.32	\$62,000.00	\$125,772.32
Legal Fees	\$28,113.84	\$100,000.00	\$150,000.00
Total Payment	\$217,716.16	\$225,830.00	\$339,602.32
Net Payment to Hawk Ridge	\$116,886.16	\$125,000.00	\$238,772.32

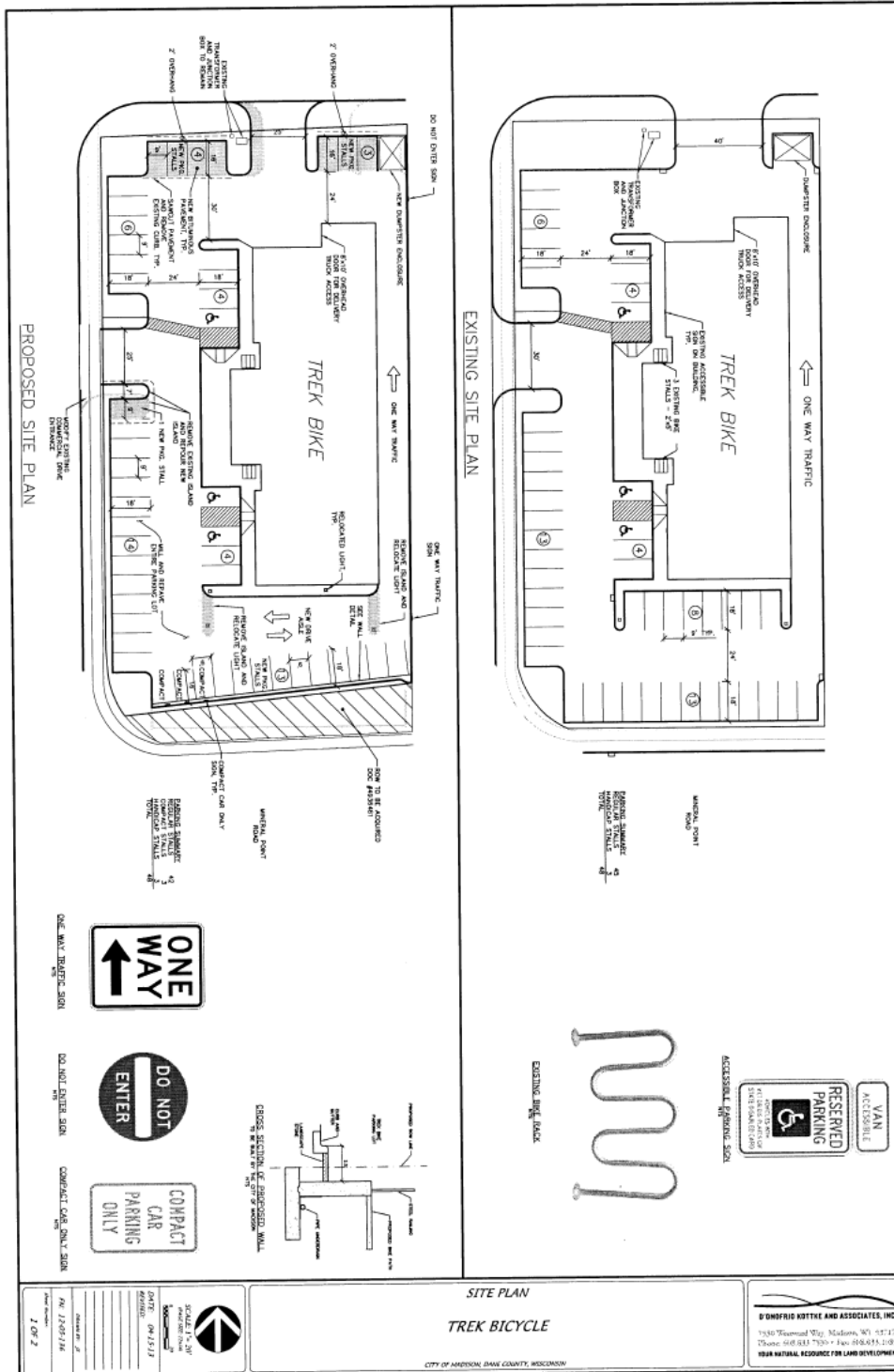
Conclusion

Based upon the foregoing, it is the City Attorney's recommendation that the Board of Estimates recommend approval of this resolution, and that the Common Council adopt the authorizing resolution to settle this case. As noted above, the City Engineer and the Office of Real Estate Services recommend approval of the settlement as well.



Doran Viste
Assistant City Attorney

Parking Lot Site Plan



VAN ACCOMMODATE
RESERVED PARKING
ACCESSIBLE GENERAL SIGN



SITE PLAN
TREK BICYCLE

D'ONFRIO KOTIWE AND ASSOCIATES, INC.
1550 Westwood Way, Madison, WI 53717
Phone: 608.833.7330 • Fax: 608.833.1089
YOUR NATURAL RESOURCE FOR LAND DEVELOPMENT

DATE: 08/15/14
DRAWN BY: [Signature]
SCALE: AS SHOWN
SHEET NO. 1 OF 2

CITY OF MADISON, DANE COUNTY, WISCONSIN