

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

MEMORANDUM

TO: Board of Parks Commissioners
Common Council

FROM: Doran Viste, Assistant City Attorney

DATE: August 16, 2013

RE: Peace Park Boundary Adjustment Resolution (Legislative File ID # 31309)

In 2011, City staff was approached by representatives of James Shapiro, the current owner of 422-440 State Street (the "Shapiro Properties")¹, regarding a title defect that was discovered in the rear portion of Peace Park bordering his properties. Mr. Shapiro also raised some adverse possession claims regarding this portion of park land arising from the City's placement of fences in this area and long existing private encroachments. City Staff has internally discussed these legal issues, and, during comprehensive negotiations with Mr. Shapiro, has come to a tentative agreement about a land exchange between the City and Mr. Shapiro that would settle all claims against the City pertaining to Peace Park and formally resolve any and all boundary issues along the back of Peace Park. As part of this settlement, the City would also be disposing of surplus property that is no longer needed as part of Peace Park. File 31309 grants staff the authority to enter into any and all documents necessary to accomplish this land exchange. The purpose of this memo is to explain the legal issues at stake, and the reasons why this settlement concept, as shown on attached Exhibit A, is in the City's best interests.

The History of the Peace Park Property

The land making up Elizabeth Link Peace Park ("Peace Park") was acquired by the City in 1979 from the Voight Investment Company for \$177,225.39.² There were no conditions placed on this acquisition of property and the City is free to use and dispose of this property as it sees fit. The land itself has been developed as an urban park named after Elizabeth (Lisa) Link, a local peace activist. In 2010 the City completed a \$1.1 million redevelopment of the park, including the addition of a visitor's center along State Street, a tiered amphitheater, and new fencing and landscaping along the perimeter of the park. Attached to this memo as Exhibit B is a 2010 boundary survey of Peace Park prepared by the Parks Division.

¹ Mr. Shapiro owns 422, 428 and 440 State Street in his individual capacity, and owns 434 State Street through an entity he controls named 432 State LLC. However, for the purposes of these issues, all the properties from 422-440 State Street will be referred to as the "Shapiro Properties."

² See documents 1612848 and 1618249.

Surplus Property

Along the northeastern boundary of Peace Park, 4.5 feet of the City's property (Area F on Exhibit A) is encumbered by half of a 9 foot wide shared driveway with the property located at 225 W. Gilman St. The City has a shared driveway easement with this property owner, with both parties being equally responsible for the maintenance, repair and replacement of this driveway.³ In addition to leading to the parking area behind 225 W. Gilman St., the driveway leads to a small City owned parking area behind the property located at 422 State Street that was used by City Parks Division staff before the Peace Park redevelopment (Area E2 on Exhibit A). However, since that redevelopment, this parking area and the driveway itself, along with a small strip of land in between the newly constructed fence and the driveway surface (Area E1 on Exhibit A), have been entirely cut off from the rest of Peace Park and no longer have any utility for the City. In fact, due to the condition of the driveway, this portion of the Peace Park property (that is the portion of the property located outside of the Peace Park fence line and made up of Areas E1, E2 and F on Exhibit A) is merely a financial liability for the City. In looking at this property, City staff has determined that it is surplus to the City's needs. Indeed, given the size and shape of this parcel, it appears that the only three parcels that may benefit from the land are 428 State Street, 422 State Street, and 225 W. Gilman Street.

The Shapiro Properties

The four properties making up the Shapiro Properties (422, 428, 434 and 440 State Street) are all mixed-use commercial properties with street level retail uses and apartment dwelling units or retail uses located above street level. These properties have historically had different ownership, but over the last several years the properties have been assembled into a single ownership by James Shapiro. The lot lines of these four properties form the eastern and southeastern boundaries of Peace Park as shown on Exhibit B. The properties located at 422-434 State Street are essentially built right up to the property line, and there are several long existing encroachments onto the City's property (specifically window and fixed air conditioner units) in this area. The property located at 440 State Street is not constructed right up to the property line. However, this property has a retaining wall located adjacent to its northern wall, along with a below grade emergency exit door. As identified in the boundary survey, portions of this retaining wall are on City property. Moreover, at some point prior to the Peace Park redevelopment, the City placed a fence around this retaining wall, including an exit gate serving the emergency exit door. Portions of this fence and gate were constructed on the 440 State Street property, and portions of this fence were constructed on the Peace Park property, effectively cutting off sections of the park. During the park redevelopment, the original fence was taken down and a new one was built that still either was placed on the 440 State Street property or that cut off portions of the park.

³ See docs. 222003, 681240 and 681241.

Title Conflict

In 2011, it was discovered during Mr. Shapiro's assembly of the Shapiro Properties, that there is a conflict in the title to a small portion of land located behind 440 State Street. It appears that both the City and Mr. Shapiro can claim legal title to a 26 square foot area shown on attached Exhibit A as areas B and C. A review of the title work shows that due to an error dating back at least 50 years, both the City and Mr. Shapiro have a claim of legal title over this area due to conflicting legal descriptions of the properties involved. It is not clear when or how this error first occurred, but such a determination is irrelevant since both parties claim title by long-existing color of title. However, seeing as portions of the retaining wall mentioned above and the 440 State Street building itself are located within this area, the City's claim to title may be more difficult to establish should Mr. Shapiro actually bring a claim to perfect his title over this disputed property.

Adverse Possession Issues

During discussions with Mr. Shapiro relating to the title conflict, he raised a claim of adverse possession with the City.⁴ It does appear that, based upon a review of the encroachments at Peace Park adjacent to the Shapiro Properties, his claim has merit and that the City is at risk of losing title to portions of the Park.

Adverse possession law has changed throughout the years, but, generally, to meet a showing of adverse possession under Wis. Stat. Sec. 893.29, a person claiming adverse possession of property against the City must be able to establish that for 20 consecutive years he had exclusive, uninterrupted, continuous and hostile (adverse) use of the land, and that such use was open and notorious.⁵ As a result, if Mr. Shapiro can prove that his retaining wall and other encroachments have been present on the Peace Park property for at least 20 years starting no later than 1993, then the City may be at risk of losing some portions of Peace Park to adverse possession.

Of particular concern relating to Peace Park is the fence that the City constructed along the back portion of 440 State Street as both the original fence line, and the newly reconstructed fence line, cut off portions of the Peace Park property, essentially treating that land as if it were a part of 440 State Street. Indeed, by trying to protect the rear of that building from Park users, the City may have inadvertently created an adverse possession claim by the owner of 440 State Street. Moreover, by doing nothing about this fence line or the retaining wall partially present on City property over the last 20 plus years, the City may face a difficult time defending its title to portions of Peace Park.

⁴ Mr. Shapiro has not yet filed suit on his adverse possession claim, and such a claim does not require that he file a Notice of Claim with the City. However, while this claim has not yet been made in court, it was made to the Parks Division, the Office of Real Estate Services and the Office of the City Attorney, and the City acknowledges that this claim was made.

⁵ The adverse possession law applicable to municipalities, Wis. Stat. Sec. 893.29, has changed several times over the last 80 years. Prior to May 20, 1980, the statutory period was 40-years. Since April 28, 1998, the 20-year period must also be accompanied by the requirement of a continuously maintained and mutually agreed upon fence line. In determining if these statutory periods and requirements have been met, changes in the law are prospective only. Regarding Peace Park, since the City obtained title to the Park in 1979 and developed it shortly thereafter, and the encroachments involved have likely existed since around that time at the latest, the easiest way to look at whether there is a potential adverse possession claim here is to apply the 20-year period without the fence requirement.

Sight Line and Safety Concerns

With the redevelopment of Peace Park, a new visitor's center was constructed on the western side of the park facing State Street. This visitor's center has two sets of windows (a police department office window on the northeastern wall and a Parks Division/BID Office window on the eastern wall) that look out over the park, as well as a staff door on the northeast corner of the building. These vantage points provide significantly more opportunities for visual security over the Peace Park grounds than existed prior to the redevelopment of the park. Indeed, prior to the redevelopment of the park, the portion of Peace Park located adjacent to the Shapiro Properties was a largely dark and overgrown area that was not utilized by the general public nor deemed particularly safe by the community. The redeveloped park opened up this area for greater public use, which has been accomplished.

As is visible on Exhibit B, 440 State Street has an odd shaped boundary with Peace Park, including triangular piece of land that juts out from its northwestern corner into the park area. This land is currently occupied in part by the City fence and gate, but also by the retaining wall and emergency exit staircase associated with 440 State Street. A concern raised by staff during discussions over the Peace Park boundary issues was the effect that any future redevelopment of 440 State Street would have on the existing sight lines from the Visitor's Center into the southeastern portion of Peace Park. Except through the application of the zoning code, the City would be unable to stop Mr. Shapiro, or his successors, from reconstructing 440 State Street out to the property line, including into this triangular shaped piece of land. As is apparent in looking at Exhibit C, a sight line and land exchange map, if the building were extended out to the property line (point 74 on Exhibit C), the sight lines from the Visitor's Center would be significantly altered. In fact, the City would lose the ability to see almost one third of the park from the Visitor's Center. In addition, such an action would change the feel of the park itself, making the southeastern portion of the park again feel cut off from the redeveloped park.

For these reasons, City staff has determined that protecting the current sight lines from the visitor's center into the southeastern portion of the park and better defining the Peace Park boundary is an important interest that should be pursued in any land exchange with Mr. Shapiro.

Land Exchange Proposal

Given the reasons set forth above (the existing conflict in title, the surplus property, the existing encroachments, the adverse possession claims, and the City's interest in protecting the existing sight lines in the park and better defining the Peace Park boundary) staff have reached a tentative agreement with Mr. Shapiro that would resolve all pending claims against the City relating to the Peace Park boundary through a land exchange accompanied by the execution of a new CSM for Peace Park and the Shapiro Properties and the execution of encroachment agreements between the parties. In addition to establishing a clear boundary between Peace Park and the Shapiro Properties, this land exchange proposal would protect the City's sight lines in the park,

address all remaining encroachments, and remove the City of its responsibility over the shared driveway and parking lot. The proposal is as follows:

- City Purchase: Shapiro shall convey by quit claim deed the areas identified in Exhibit A as Area A and B for an amount of Five Thousand Eight Hundred and Fifty Dollars (\$ 5,885.00) as calculated as follows:
 - 84 sq ft (Area A) plus 6 sq ft (Area B) = 90 sq ft
 - 90 sq ft x \$ 65 = \$ 5,850
- Shapiro Purchase: City shall convey by quit claim deed the areas identified in Exhibit A as Areas C, D, E1, E2 and F for an amount of Seventy Two Thousand Three Hundred and Forty Five Dollars (\$ 72,345.00) including all related improvements located thereon and all appurtenances thereto as calculated as follows:
 - 20 sq ft (Area C) plus 303 sq ft (Area D) plus 530 sq ft (Area E2) = 853 sq ft
 - 853 sq ft x \$65 = \$ 55,445
 - 342 sq ft (Area E1) plus 597 sq ft (Area F) = 939 sq ft
 - 939 sq ft x \$18= \$ 16,900 (rounded)
- Net Payment to City: At closing City shall receive payment of Sixty Six Thousand Four Hundred Ninety Five and no/100 Dollars (\$66,495). This amount represents the Shapiro purchase amount of \$ 72,345 less the City Purchase amount of \$ 5,850.
- Additional details of the land exchange can be found in the March 19, 2013 Letter of Intent attached to the resolution.

It should be noted that, during negotiations, the Office of Real Estate Services and Mr. Shapiro both obtained an appraisal of the Peace Park land covered by this tentative agreement. It is staff's opinion that the prices tentatively agreed to represent a fair compromise between the parties as to the value of the land being exchanged as part of this proposal, especially in light of the title related issues facing the City over portions of these lands.

In addition, it should be noted that it is the Office of the City Attorney's opinion that the exchange of the surplus property (Areas E1, E2 and F) as part of this agreement is not subject to the surplus property disposal procedures set forth in MGO 8.075. Because there are pending claims made against the City by Mr. Shapiro relating to the Peace Park property, the inclusion of these portions of Peace Park into this exchange with Mr. Shapiro is part of the settlement of the pending claims. Indeed, absent the inclusion of this property, it is questionable whether the City would have been able to reach this tentative agreement.

Conclusion

The land making up Peace Park has had ongoing title related issues since before the City even acquired this land and made it into an urban park in 1979. With the recent redevelopment of this Park and the construction of a visitor's center, City residents and visitors alike have benefited greatly from this unique urban space. However, due to long standing issues, the City is faced with legitimate claims to title over portions of Peace Park, along with the possibility of future redevelopment that would alter the public's use of the space. In addition, the City is looking at forthcoming financial liability over a driveway and parking lot that it no longer has any use for. To resolve these claims against the City and firmly establish a logical, and enforceable, Peace Park boundary, City staff has proposed that the City engage in the land exchange agreement with Mr. Shapiro set forth above. It is the City staff's opinion that this land exchange is in the City's best interests and that, while the land area making up Peace Park will be reduced, the Park itself will only be strengthened as a result.

Doran Viste

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Encl.

EXHIBIT A

Land Exchange Concept

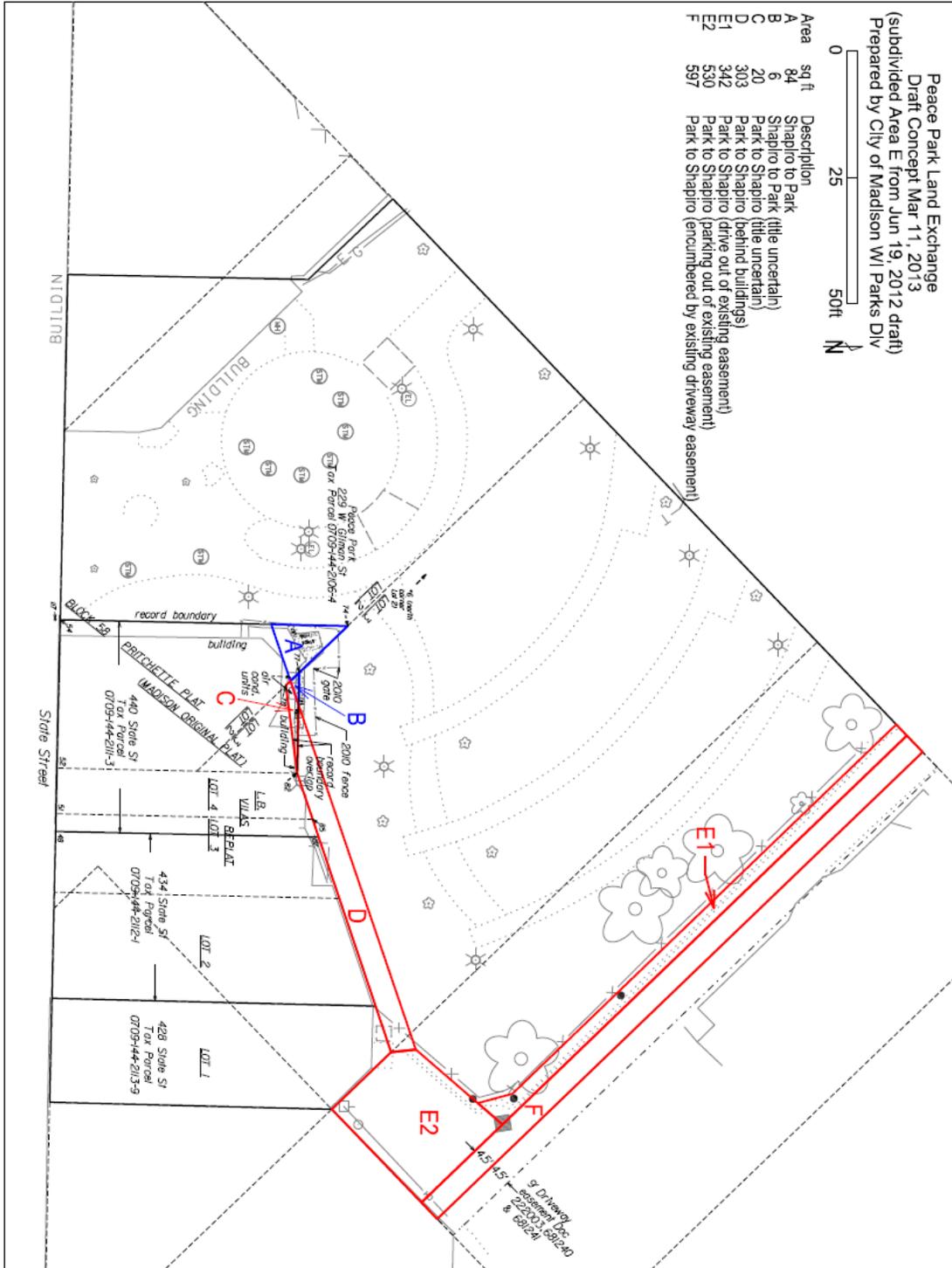


EXHIBIT C

Sight Lines and Land Exchange Map

