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To: City Finance Director David Schmiedicke

From: Assistant City Attorney Doran Viste

Date: April 7, 2014

Re: Parkland Impact Fee Appeal by DSI Real Estate Group, Inc. (841 Jupiter Dr.)

David,

The Superintendent of Parks Kevin Briski forwarded you a letter dated March 24, 2014 regarding an appeal of park impact fees for 841 Jupiter Drive, consistent with his obligation under Madison General Ordinance Section 20.12(3)(a). The Parks Division determination was that the appeal should be denied. In his letter to you, he indicated that there was an attachment from the City Attorney's Office in response to the appeal. While I provided verbal advice to staff regarding the appeal, due to my recent vacation, I was unable to provide a written response prior to this letter being submitted to you. Hence, please consider this memo the Office of the City Attorney's written response to the appeal.

Background

On February 20, 2014, DSI Real Estate Group, Inc.'s (DSI) filed an appeal of the parkland impact fees associated with its proposal to construct an apartment project at 841 Jupiter Drive that contains 82 multi-family dwelling units. The Parks Division determined that the parkland impact fees for the proposed project should be $147,518. DSI is arguing that the parkland impact fees should be $32,144, or $115,374 less than the Park Division's determination. DSI's argument is based upon a conclusion that the fair market value of unimproved lands that would have been required for dedication is $0.56 / ft^2. City staff are of the opinion that the fair market value of unimproved lands that would have been required for dedication exceeds the current maximum land value under the impact fee, meaning that the current maximum land value of $2.57 / ft^2 applies. Hence, the issue in this appeal is what does the parkland impact fee ordinance mean when it says that the fee shall be based upon "the fair market value of

unimproved lands that would have been required for dedication."

Parkland Impact Fee History

The Parkland Impact Fee (the "Impact Fee") was created by the Common Council on August 2, 2006 by ORD-06-00091 (Legistar File ID No. 03961) in response to 2005 Wis. Act. 477's change in state laws regarding fees in lieu of park land dedications as a condition of development approval. In creating this Impact Fee, the City followed the statutory requirements of Wis. Stat. Sec. 66.0617, including preparing a public facility needs assessment supporting the impact fee (the August 6, 2002 Needs Assessment for Park Development and Development Impact Fees, hereinafter the "Needs Assessment"). This Impact Fee works in combination with the park and open space land dedication requirements of MGO Sec. 16.23(8)(f) to ensure that developers either provide the City with the required park and open space lands, or fees in lieu of the required land dedication, or some combination thereof. The Impact Fee is set forth in Madison General Ordinances Section 20.08(6) and reads as follows:

(6) Parkland Impact Fee.

(a) In response to new and future development and population generating demands for new City parks, the Common Council hereby establishes a Parkland Impact Fee city-wide as the complementary mechanism to equitably require all new developments to dedicate land for necessary parks and open spaces under Section 16.23(8)(f), Madison General Ordinances, pay a Parkland Impact Fee in lieu of dedication for public acquisition of parkland, or a combination of both. Except for developments submitted to the City for approval prior to June 14, 2006, and after May 10, 2008, each new development within the corporate limits of the City shall be required to comply with both the parkland dedication requirements of Sec. 16.23(8)(f), Madison General Ordinances and this subsection. For purposes of the Parkland Impact Fee imposed under this subsection, a Park Needs Assessment has been prepared on a city-wide basis.

(b) Calculation of the Impact Fee.

1. The amount of the Parkland Impact Fee to be imposed by land dedication, fees in lieu of dedication or a combination of both shall be calculated based on the type and number of dwelling units estimated to be generated by the property at the time of development. The required land dedication and authorized credits to meet community park and open space needs shall be as provided in Section 16.23(8)(f), Madison General Ordinances.
2. In the event that dedication thereunder would result in sites too small to be usable, or if the Comprehensive Plan calls for such public sites or open spaces to be located elsewhere, or if such sites would not otherwise be suitable as determined by the Plan Commission, after recommendation of the Park

> Commission, a payment of a Parkland Impact Fee in lieu of land dedication shall be required for each parcel proposed for development. The amount of such fee in lieu of dedication shall be based on the fair market value of unimproved lands that would have been required for dedication, less any authorized credits, as determined in paragraph 1 above. The Parkland Impact Fee in lieu of dedication shall be limited to a maximum land value of one dollar seventy-four cents ($1.74) per square foot in 2006, and adjusted higher by five percent (5%) on January 1 of each year until collected.

(Emphasis added.)

The required land dedication under Sec. 16.23(8)(f)4. for a proposed multi-family dwelling unit is 700 ft^2 of land. This dedication amount is further supported in Section II.A.2. of the Needs Assessment. Regarding the fee in lieu of dedication, the Needs Assessment states as follows at Section II.A.3.:

> Fees in lieu of dedication. The current city ordinance provides that a fee in lieu of land dedication may be taken when land dedication is not appropriate. The per-unit fee is a flat fee for all developments, and is based on the estimated value of the square footage of dedication required, using values for land prior to subdivision at the periphery of the city. It is recommended that the fee system be changed to a fee based on the actual value of the land that would have been required for dedication, with a maximum fee to limit the expense for infill projects where land is very expensive. (Emphasis added.)

Analysis

In this matter, there is no dispute that DSI intends to create 82 multi-family dwelling units at 841 Jupiter Drive and that there will be no corresponding land dedication of park and open space to the City, nor any credits for private open space. This development therefore would otherwise require 57,400 ft^2, or about 1.32 acres, of land to satisfy the City's park and open space needs, which is actually greater than the lot size where the development will occur (54,467 ft^2). As a land dedication is not feasible, the fee in lieu of dedication is applicable, which fee is to be collected through the Impact Fee.

The Parkland Impact Fee "shall be based on the fair market value of unimproved lands that would have been required for dedication". The term "unimproved lands" is not defined in the ordinances or State statutes. This term could mean raw, unplatted farm land without any City services, or it could mean the underlying value of subdivided and fully serviced land in the City. Unfortunately, the ordinance, on its face, is not clear. However, equating "unimproved lands" with raw, unplatted farm land (which only exists on the City's periphery) would be counter to the intent behind the Impact Fee and the dedication requirements of Section 16.23(8)(f). Indeed, the intent behind the Impact Fee was clearly stated in the Needs Assessment, and that intent was to change the fee

system from one that used "values for land prior to subdivision at the periphery of the city" to one that would be based upon the "actual value of the land that would have been required for dedication, with a maximum fee to limit the expense for infill projects where land is very expensive." It therefore makes sense to read the whole fee clause together, rather than in fragments. That is, the City is not seeking to base the Impact Fee upon the fair market value of just "unimproved lands", but rather is seeking to base the Impact Fee upon "the fair market value of unimproved lands that would have been required for dedication".

It is accordingly the Office of the City Attorney's opinion that, consistent with the legislative intent and the dedication requirements in Section 16.23(8)(f), in determining the "fair market value of unimproved lands that would have been required for dedication" that the City attempt to discern the underlying land value at the development site. Similar to how the City Assessor determines property values for tax purposes, different values can attach to the land and the improvements thereon. Land in the City that is subdivided and able to be served by sewer and water is much more valuable than land outside the City that is not subdivided and lacks any City services. By statute and ordinance, the Impact Fee must be able to account for differences in locations throughout the City if it is to recover the actual costs of the land that would otherwise be required for public park and open space based upon the proposed development. Hence, if the City is provided with comparable appraisals that support a different land value, and those appraisals are determined to be reasonable, City staff should adjust the impact fee accordingly.

Looking at DSI's submission to the City, they have argued that the comparable land values to determine the underlying land value at the development site should be based upon a large parcel approximately 2000 feet north of the proposed development and another bank-owned parcel approximately 2.25 miles northeast of the proposed development. No formal appraisal detailing the underlying land value at the development site was submitted to the City. Both parcels upon which DSI is basing its valuation determination are unplatted and neither are currently served by City services (indeed, the property farther away does not even have sewer or water within 1200 feet of the property). These parcels are in effect raw land at the periphery of the City. They are not reasonably comparable to the underlying development site, which is a platted site in Grandview Commons, surrounded by public streets, and with sewer and water readily available. Accordingly, as noted by the Office of Real Estate Services, these properties should not be used as a basis to determine the fair market value of unimproved lands that would have been required for dedication as they are not comparable. Moreover, using these land values as a basis for the Impact Fee would be contrary to the legislative intent behind the impact fee as these properties are clearly "land prior to subdivision at the periphery of the city."

Given this interpretation, and with no other appraisal information available, the maximum Impact Fee of \$2.57 / ft^2 should apply. The last sale of the property that makes up this development was for \$471,500 in March, 2007, at which time all public improvements had already been put in. This amounted to a purchase price of the land of \$4.17 / ft^2. The assessed value of the property that makes up this development is

currently $670,800, which amounts to a value of $5.93 / ft^2. Hence, with the information the City has available to it, it does not appear that the current fair market value of the underlying land is less than the maximum Impact Fee amount set by ordinance ($2.57 / ft^2). As such, the appeal should be denied and the Impact Fee of $147,518 should apply to this proposed development.

Conclusion

The appeal should be denied as the City has not been presented with any information that establishes that the fair market value of unimproved lands that would have been required for dedication is less than the maximum fee amount of $2.57 / ft^2.

Doran Viste
Assistant City Attorney

cc. Kevin Briski
Don Marx
Rob Phillips
Kay Rutledge