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February 6, 2020

VIA HAND DELIVERY

Matthew Tucker, Zoning Administrator
City of Madison
215 N. Martin Luther King, Jr. Blvd.
Madison, WI 53703-3345

Re: Plan Commission action concerning 3630 Milwaukee Street; Legistar File No. 58787

Dear Mr. Tucker,

Enclosed is an appeal of the Plan Commission action in the above-referenced matter, filed on behalf of our client Leo Ritter & Co. pursuant to section 28.185(5)(d)4 of the City of Madison Code of Ordinances.

Please don't hesitate to contact me with any questions or concerns.

Very truly yours,

CARLSON BLACK O'CALLAGHAN & BATTENBERG LLP

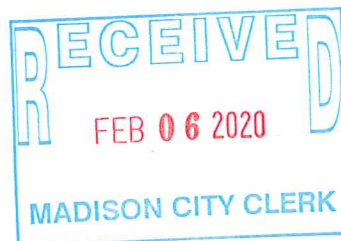


Daniel O'Callaghan
Partner

CITY OF MADISON

FEB - 6 2020

Planning & Community
& Economic Development



In the Matter of:
3630 Milwaukee Street, 15th Ald. Dist. –
Approval of final plans for a parking lot and
stormwater management on a site previously
approved for demolition of a commercial building

Legistar File No. 58787

APPEAL OF PLAN COMMISSION ACTION

Leo Ritter & Co., LLC (“Ritter”), through its counsel, Carlson Black O’Callaghan & Battenberg, LLP, hereby appeals the decision of the Plan Commission in the above referenced action to the City of Madison Common Council. Ritter respectfully requests that the City Council reverse the Plan Commission’s denial of the use of 3630 Milwaukee Street (the “3630 Parcel”) for parking, access drives and storm water management improvements that are accessory to a proposed package distribution facility located on the adjacent parcel at 3650 Milwaukee Street (the “3650 Parcel”).

OVERVIEW

In summary, and as explained further below, the Plan Commission’s denial should be reversed on appeal because:

- (1) The Plan Commission lacks discretion to deny a permitted use. The proposed use of the 3630 Parcel is a “permitted use” under applicable zoning. Permitted uses are a matter of right that cannot be lawfully denied under Wisconsin law.
- (2) Even if the Plan Commission possessed discretion to deny a permitted use, the Plan Commission misapplied the standards for exercising that discretion. Properly applied, the “approval standards” cited by the Plan Commission require approval of the proposed use.

a. The Plan Commission was required to determine whether the proposed use is compatible with the purpose of the demolition ordinance and “the intent and purpose expressed in the Zoning Code for the zoning district in which the property is located.” A permitted use is, by definition, compatible with the intent and purpose of the Zoning Code. While the Plan Commission made no express finding of compatibility with the Zoning Code (itself an error), the record is undisputed that the proposed use for the 3630 Parcel is a permitted use under the Zoning Code.

b. As a secondary consideration, the approval standards advise that the proposed use *should be compatible* with the comprehensive plan and adopted neighborhood plans (here, the Milwaukee Street Special Area Plan, adopted by the Common Council on December 4, 2018). The Plan Commission applied a standard that effectively required the proposed use to *implement* the future land use recommendations contained in the Milwaukee Street Special Area Plan. This is not the proper legal standard. Because the proposed use is compatible with express language contained in the Milwaukee Street Special Area Plan—which acknowledges that the subject property may continue to be used for light industrial purposes—the proposed use must be approved.

APPEAL

Following a public hearing that took place on January 27, 2020, the City of Madison Plan Commission voted to reject the proposed use of the 3630 Parcel based upon a finding that the proposed use is inconsistent with the Milwaukee Street Special Area Plan. In reaching its decision, the Plan Commission purported to apply the “approval standards” of section 28.185(7)(a)(2) of the City’s demolition ordinance. Ritter disagrees that the Plan Commission applied the correct standards and further reserves the right to challenge the Plan Commission’s jurisdiction over the proposed use under the demolition ordinance. Notwithstanding this reservation of rights, section 28.185(5)(d) of the City’s code of ordinances allows for an appeal to be filed with the Common Council. Accordingly, Ritter hereby files this appeal.

As grounds for the appeal, Ritter states as follows:

1. Ritter has a lawfully protected property interest in both the 3630 Parcel and the 3650 Parcel.

2. The 3630 Parcel and the 3650 Parcel are both zoned IL (Industrial–Limited).

3. The City’s stated purpose in creating the IL zoning district is as follows:

Statement of Purpose. This district provides for a mix of light manufacturing uses, offices, warehousing, flex-space, limited storage and warehousing, and limited retail and service uses that primarily serve the industrial uses, designed with adequate landscaping and screening, to ensure compatibility with adjoining uses. Industrial districts typically require relatively direct access to the regional highway system, and may require rail or air transportation service.

4. The proposed use of the subject property is consistent with the stated purpose of the IL zoning district.

5. The proposed use of the subject property is, as a matter of law, a permitted use in the IL zoning district.

6. When the Plan Commission approved a demolition permit in 2018, allowing the removal of the building that formerly existed on the 3630 Parcel, the Plan Commission determined that demolition of the old building and reuse of the property were compatible with the purpose of the City’s demolition ordinance, provided that the property owner recorded a restrictive covenant, which the owner did.

7. Ritter is not seeking any additional approval from the City to demolish any structures located on the 3630 Parcel, nor is Ritter seeking to construct any new buildings on the 3630 Parcel.

8. Ritter merely seeks a determination from the City that the proposed use of the 3630 Parcel—consisting of parking, access drives and storm water management improvements that are accessory to a proposed package distribution facility located on the adjacent 3650 Parcel—is a permitted use.

9. Because permitted uses are uses by right under Wisconsin law, if the proposed use is a permitted use, the City lacks discretion to deny that use. *Town of Rhine v. Bizzell*, 2008 WI 76, ¶ 19.

10. It is uncontested that the proposed use is a permitted use.

11. The City's Planning Division staff prepared a report acknowledging that a package distribution facility is a permitted use in the IL zoning district.

12. The Planning Division staff report concluded that "the use of the subject site as part of a cohesive development of the two parcels consistent with the IL zoning district may be found to consistent with the normal and orderly development and improvement of surrounding properties."

13. The Planning Division staff report concluded the proposed use of the 3630 Parcel "is permitted by the site's existing IL zoning" and recommended that the Plan Commission approve the proposed use, subject to input at the public hearing.

14. At the public hearing, the Plan Commission received testimony regarding the consistency of the proposed use with the future land uses envisioned by the Milwaukee Street Special Area Plan.

15. Although the Milwaukee Street Special Area Plan identifies several properties with "potential for change," including the subject property, the Common Council has so far taken no action to rezone the subject property in a way that would allow for lawful implementation of the future land use recommendations contained in the plan. Put simply, the Zoning Code currently *prohibits* the type of development that could implement the Milwaukee Street Special Area Plan's future land use recommendations.

16. Although the plan anticipates "potential for change" at the subject property, the plan also expressly acknowledges that the subject property may continue to be occupied by uses that are permitted in the IL district:

" 3630 Milwaukee Street [] is zoned IL (industrial limited), which allows light industrial uses ... Long viewed as a prime candidate for redevelopment, the now-

vacant former Swiss Colony warehouse (3650 Milwaukee Street) is owned by the Leo Ritter Trust. The 15 acre parcel contains a 200,000 square foot industrial building which is being marketed for lease to new tenants. **The property is zoned IL and could be occupied by any permitted use in that category.**”

17. In its consideration of the Milwaukee Street Special Area Plan, the Plan Commission was incorrectly focused on whether or not the proposed use *implemented* the recommendations for future land use changes that are discussed in the plan. That is not the applicable standard for determining whether the proposed use is permitted.

18. The “approval standard” the Plan Commission was purportedly applying, does not ask whether the proposed use *implements* the plan. Instead, the standard contained in Section 28.185(7)(a)(2) asks whether the proposed use is *compatible with*: (i) the intent and purpose expressed in the Zoning Code for the zoning district in which the property is located; and (ii) adopted plans.

19. Because the proposed use is permitted under the Zoning Code’s IL designation of the property, it is compatible with the intent and purpose expressed in the Zoning Code for the zoning district in which the property is located. The Plan Commission did not make an express finding on this mandatory factor. It was an error to fail to make a finding and it was an error not to affirmatively find that the proposed use is a permitted use compatible with the intent and purpose expressed in the Zoning Code.

20. Because the Milwaukee Street Special Area Plan contains an explicit acknowledgment that the subject property may continue to be used for light industrial purposes, the proposed use of the property as a package distribution facility (a permitted use in the IL zoning district), including accessory parking, access drives and stormwater management facilities, is indeed *compatible* with the Milwaukee Street Special Area Plan.

21. The Plan Commission made no detailed finding as to “compatibility.” Instead, the Plan Commission focused the majority of its deliberations on whether the proposed use “implemented” the Milwaukee Street Special Area Plan, ultimately concluding that it did not. The Plan Commission thus incorrectly applied the standard. it was an error not to affirmatively find that the proposed use is compatible with the Plan.

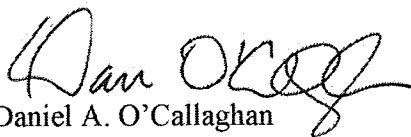
RELIEF REQUESTED

For the reasons set forth above, the Plan Commission erred when it denied the proposed use. Ritter respectfully requests that the Common Council reverse the action of the Plan Commission and find that the proposed use of the 3630 Parcel—for parking, access drives and storm water management improvements that are accessory to a proposed package distribution facility located on the adjacent 3650 Parcel—is a lawful and permitted use.

Dated February 5, 2020

Respectfully submitted,

CARLSON BLACK O'CALLAGHAN &
BATTENBERG LLP
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