

CITY OF MADISON
CITY ATTORNEY'S OFFICE

Room 401, CCB

266-4511

MEMORANDUM

TO: Madison Common Council
FROM: John Strange, Assistant City Attorney
DATE: March 11, 2020
RE: Legistar Item # 59493 (Common Council Appeal); 58787 (Plan Commission Demolition Review)

Leo J. Ritter & Co. L.L.C. (“Ritter”) appeals the Plan Commission decision denying demolition approval for a proposed use at 3630 Milwaukee Street (“3630”).¹ The purpose of this Memorandum is to provide background information, clarify the issue on appeal, and highlight a legal issue Ritter may raise if the Common Council upholds the Plan Commission decision.

BACKGROUND FACTS

In September 2018, the Plan Commission granted demolition approval pursuant to M.G.O. § 28.185 to Leo J. Duren (“Duren”) to demolish a building located on 3630. At the time, Duren proposed no future use of 3630. So, as a condition of demolition approval, the Plan Commission required Duren to execute a restrictive covenant requiring the Plan Commission to approve any future use on 3630.² In 2019, Ritter, acting as Duren’s successor³ under the restrictive covenant, requested Plan Commission approval to construct a driveway, surface parking, and stormwater management facility on 3630 in order to service an “Amazon Hub” package distribution facility to be located on the neighboring property, 3650 Milwaukee Street (“3650”), which Ritter already owns outright. Ritter’s proposal for 3630 is detailed in the Planning Division Staff Report of January 27, 2020.

Both 3630 and 3650 are zoned Industrial-Limited (IL). As detailed in the Planning Division Staff Report, the proposed uses at 3630 (accessory parking facility to a permitted use) and 3650 (distribution facility) are permitted uses in the IL District. Both 3630 and 3650 are also within the boundaries of the Milwaukee Street Special Area Plan (“Plan”),

¹ <https://madison.legistar.com/View.ashx?M=F&ID=8056356&GUID=636620DC-F967-4539-8B22-9049670BE593> (Ritter’s appeal).

² <https://madison.legistar.com/View.ashx?M=F&ID=8028282&GUID=BC699634-26DC-4A85-92F5-B602AB1936BB> (restrictive covenant).

³ Ritter has an option to purchase 3630 from Duren, but does not currently own the property.

which was adopted by the Common Council on December 4, 2018 to provide detailed land use, development and transportation recommendations for the Milwaukee Street corridor between Fair Oaks Avenue and US Highway 51 Stoughton Road. As noted in the Planning Division Staff Report, the proposed use at 3630 is not consistent with the Plan, which recommends Community Mixed-Use and Residential development uses as part of a larger corridor of mixed-use development for both 3630 and 3650.

The Plan Commission considered whether Ritter's proposal for 3630 met the standards contained in M.G.O. § 28.185 (listed below). The Planning Division Staff Report recommended approval of the proposed use, stating that while the proposal is not consistent with the Plan, the "package delivery services (proposed for the sites) are permitted uses in the IL Zoning District, and the use of the subject site may be found to be consistent with the normal and orderly development and improvement of surrounding properties" and thus meet the standards. The Plan Commission disagreed with Staff, denying the approval and finding that the proposed use of the site was not compatible with the Plan and did not represent normal and orderly development under the standards.

COMMON COUNCIL APPEAL STANDARD

M.G.O. § 28.185(5)(d)8. states that the action of the Plan Commission shall be upheld on appeal unless it is reversed or modified by a favorable vote of two-thirds (2/3) of the members of the Common Council.

DEMOLITION STANDARDS

As noted above, the restrictive covenant states that when considering a proposed future use, the Plan Commission is to apply the approval standards contained in M.G.O. § 28.185. The relevant portions state:

“(7) Approval Standards .

Applications for demolition or removal permits shall not be approved, except as provided in (6) above, unless the following standards are met:

(a) Applications With a Proposed Future Use .

1. The Zoning Administrator issues a zoning certificate for the proposed use of the property. For the purpose of this subdivision, a zoning certificate shall mean a certification in writing that the proposed use of the property would be in compliance with the provisions of the Zoning Code.
 - a. If the Zoning Administrator finds that the proposed use of the property is not in compliance with the provisions of the Zoning Code, the applicant for a demolition or removal permit may apply for a map or text amendment pursuant to Sec. 28.182 or for a conditional use permit pursuant to Sec. 28.183 for the proposed use. All of the provisions of Secs. 28.182 and 28.183 shall apply to said applications, except that the time limit for commencement of the conditional use, pursuant to Sec. 28.183(9), shall be eighteen (18) months instead of twelve (12) months.
 - b. If after the procedures provided in Paragraph 1.a. are followed, the proposed use of the property would be in compliance with the provisions of the Zoning Code, the Zoning Administrator shall grant zoning approval for the proposed use, pursuant to Sec. 28.202(3).

2. The Plan Commission finds that both the requested demolition or removal and the proposed use are compatible with the purpose of this section and the intent and purpose expressed in the Zoning Code for the zoning district in which the property is located. Furthermore, the proposed use should be compatible with adopted neighborhood plans, the Comprehensive Plan or with any applicable neighborhood conservation district requirements. When making this finding the Commission shall consider and may give decisive weight to any relevant facts, including but not limited to:
 - a. The effects the proposed demolition or removal and proposed use of the subject property would have on the normal and orderly development and improvement of surrounding properties.
 - b. The reasonableness of efforts to relocate the building, including but not limited to the costs of relocation, the impact on city terrace trees, and the structural soundness of the building; and
 - c. The limits that the location of the building would place on efforts to relocate it, and the availability of affordable housing...”

M.G.O. § 28.185(7)(a).

The Planning Division Staff Report analysis and the Plan Commission decision analyzed the facts in light of the two key standards listed above: 1. Compliance with the Zoning Code; and 2. Compatibility with adopted neighborhood plans. In considering these standards, the Common Council may consider, among other things, information heard during this appeal, Ritter’s Appeal document, minutes from the Plan Commission hearing⁴, statements made during the Plan Commission hearing, and the Planning Division’s Staff Report. Council Members are encouraged to read the Planning Division Staff Report⁵ and review the broadcast of the Plan Commission hearing.⁶

It is beyond the scope of this memorandum to suggest an analysis. That role lies with the Common Council on this appeal. However, we will be available to answer any questions the Council may have in applying the facts to these standards.

POSSIBLE LEGAL ISSUE RAISED BY THE APPEAL

Ritter’s appeal raises a legal issue that may become relevant if the Common Council upholds the decision of the Plan Commission. Therefore, this section of the Memorandum will briefly highlight that issue for the Common Council.

Any decision of the Common Council is subject to Certiorari review by the Circuit Court. Courts conducting this kind review consider, among other things, whether the board or body followed the procedures set out in applicable statutes and ordinances, or whether the board or body misapplied a specific theory of law. See *Ziervogal v. Washington County Bd. of Adjustment*, 2004 WI 23, ¶ 39, 269 Wis. 2d 549 (holding that a Washington County ordinance conflicted with Wisconsin Supreme Court law).

⁴ <https://madison.legistar.com/View.ashx?M=M&ID=724477&GUID=6244BFBF-B431-450E-9998-6D0E8ECC6BA6> (item 15).

⁵ <https://madison.legistar.com/View.ashx?M=F&ID=8028015&GUID=9CBC87D7-4B0D-449F-B0D2-51D80A146D3D>

⁶ <https://media.cityofmadison.com/Mediasite/Showcase/madison-city-channel/Presentation/c66e037fec4c469fbd2396e450dec79c1d> (starting at 03:59).

Ritter's appeal raises no procedural issues. However, in paragraph (1) of the Overview, Ritter claims that the "proposed use of the 3630 Parcel is a 'permitted use' under applicable zoning...[and that] permitted uses are a matter of right that cannot be lawfully denied under Wisconsin law." Thus, if the Common Council upholds the Plan Commission decision, the issue Ritter may raise in an appeal to the Circuit Court is whether the City can use its demolition ordinance to deny an otherwise permitted use.

Like other cities in Wisconsin, Madison's zoning code governs land use through a mix of permitted and conditional uses. Madison's Zoning Code defines a Permitted Use as one "which may be lawfully established in a particular district or districts, provided it conforms with all requirements and regulations of the district in which such use is located." M.G.O. § 28.211 (2019). The Wisconsin Supreme Court has recognized that "permitted uses...allow a landowner to use his or her land...as of right... and that rights of ownership and use of property have long been recognized by this state and constitutionally protected." *Town of Rhine vs. Bizzell*, 2008 WI 76, ¶ 19 (finding that a zoning district containing no permitted uses is unconstitutional). Ritter will likely use these principles to argue that the City cannot use the second standard of the demolition ordinance to deny a permitted use, and that doing so creates an illegal "no permitted use" parcel similar to the "no permitted use" district in *Town of Rhine*.

Given the recent trend of Wisconsin Courts and the state legislature toward a stronger protection of property rights, we take this issue seriously and raise it so that the Common Council can ask questions at the upcoming hearing, if necessary. We also point out that Ritter's case is distinguishable in several respects from the circumstances in the *Town of Rhine* case and that, therefore, the City would have counterarguments if such a claim is made against the City. We will not go into those counterarguments in detail in this Memorandum given the risk of litigation, but will be available to answer questions if necessary.

CONCLUSION

On this appeal, the Common Council should consider the evidence related to Ritter's proposed future use at 3630. If the Common Council upholds the Plan Commission's decision, the City can expect an appeal in which Ritter argues the City violated its property rights by using the demolition ordinance to deny an otherwise permitted use. As such, our office is flagging this possible legal risk to the Council for consideration and further questions as may be appropriate.