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October 16, 2020

Via Email

Madison Plan Commission
c/o Heather Stouder, Director
City of Madison Planning Division
Madison Municipal Building, Suite 017
215 Martin Luther King Jr. Blvd.
Madison, WI 53703
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RE: 1937-1949 Winnebago Street and 316 Russell Street

Dear Plan Commission Members and Ms. Stouder:

I represent the applicant in the above matter, M&M Real Estate Investments, LLC. The following comments are in response to a letter received by the Commission from neighbors of the project, Lynn Wimer and Fritz Hastreiter (the "Objecting Neighbors"), who oppose the project. I understand that the Commission received a copy of a letter written by their attorney, Christa Westerberg, dated September 14, 2020, and addressed to my client (the "Westerberg Letter").

Factual Background

The above properties (the "Properties") are the subject of a proposed redevelopment project (the "Project"). This letter and the Westerberg Letter concern an easement created in 1901 and recorded in the office of the Dane County, Wisconsin Register of Deeds as Document # 238754 (the "Easement"). A controversy has arisen over a claim by certain neighbors that the Project's use of the Easement violates its terms.

The Easement provides that “the alley thus formed ... shall be for the mutual use and benefit of the parties of this contract, their heirs, administrators and assigns . . .” and runs with the land. The Easement is 12 feet wide in total. That part of 316 Russell Street which is subject to the Easement extends 6 feet into 316’s easterly lot line. The remainder of the 12 foot wide Easement from Russell Street to the southerly boundary of 316 Russell Street is located on the property having a street address of 320 Russell Street.

The Objecting Neighbors own 1933 Winnebago Street, which is located south of the project. The Objecting Neighbors use the Easement for access to their property. The Objecting Neighbors also lease parking to third parties who are not residents of 1933, who also use the Easement.

KCPV LLC owns 1927 Winnebago Street. This building is a commercial building which houses the Mint Mark Restaurant. The Mint Mark Restaurant uses the Easement for ingress, egress and trash removal.

Neither KCPV LLC or the owner of 320 Russell Street object to the Project.

Description of Objections

As indicated above the Objecting Neighbors have objections to the Project which center on the use of the Easement by the Project after construction is complete. The Westerberg Letter objects on the grounds that:

- The Project would significantly increase the use of the Easement by reason of increased traffic, including use for deliveries and trash pickup.
- The use of the Easement by the Project would create safety issues for other users and pedestrians because of increased congestion.
- Ms. Wimer and Mr. Hastreiter would be inconvenienced by the increased use of the Easement due to the increased density the Project presents.
- Access during construction is also a concern.

Legal Background

An easement is an interest in land owned by another. The land which benefits from the easement is called the Dominant Estate. The land that is subject to the easement is called the Servient Estate. In this situation, 1933 Winnebago Street is the Dominant Estate, while 316 and 320 Russell are each a servient estate.

I do not think it is the role of the Plan commission to interpret the easement, but some clarification of the law is needed in response to the Westerberg Letter. To that end I will look at some, but not all, of the cases cited in the Westerberg letter.

Generally speaking, Wisconsin law does not permit the Dominant Estate (1933 Winnebago Street) to increase the burden on the Servient Estate (316 and 320 Russell Street). And also generally speaking, Wisconsin law does not prohibit the Servient Estate from making any other use of the land subject to the easement provided such use is reasonable and not excessive or improper, and does not prevent the Dominant Estate from making use of the easement for the purposes intended.

The cases cited in the Westerberg Letter focus on whether the Dominant Estate improperly increased the burden on the Servient Estate, and thus forfeited the right to use the easement in question for such purposes.

In Grygiel v Monches Fish & Game Club, the Wisconsin Supreme Court was asked to determine if the use of an access easement providing access to a shooting club could be properly used by its members to access lands adjoining the shooting club which lands were not a part of the Dominant Estate. This is a case where the Dominant Estate was accused of increasing the burden on the Servient Estate. The Court determined that such an increase in use was contrary to the easement in question. Not our situation.

The case of Gojmerac v Mahn, decided by the Wisconsin Court of Appeals in 2001, considered the issue of whether additional subdivision lots which were not a part of the Dominant Estate could make use of an access easement over the Servient Estate. The Court ruled that since they were not a part of the Dominant Estate they did not have rights to use the easement in question. Not our situation.

In the 1956 case of Vieth v Dorsch, the Wisconsin Supreme Court did state that, as quoted in the Westerberg Letter, "a drastic increase in use beyond that contemplated when the easement was granted" by the Dominant Estate may work a forfeiture of the easement, but in the same breath found that the substantial abuses of the easement by the Dominant Estate (ruts in the driveway, litter, prolonged parking, damage to an adjacent garage) all did not result in a forfeiture of the easement.

Nothing in the Easement itself prohibits the Servient Estate from making use of the land subject to the Easement for the purposes of the Project. The Project will not prevent the Easement from being used by the Objecting Neighbors in the same manner as it is currently being used.

Response to Objections

The crux of the Objecting Neighbor's objection is that occasionally they may have to drive past another vehicle entering the Project, or wait for another vehicle exiting the Project. It should be noted that the Project itself is located entirely to the North of 1933 Winnebago. Not one vehicle, bike or pedestrian using the driveway to access the Project will pass by 1933 Winnebago or travel on to the 1933 property.

More importantly, the drive area serving the Project will be significantly widened. The Project driveway will be 20 feet, including the 6 feet which is subject to the Easement located on 316 Russell and 4 feet subject to the Easement on 320 Russell. The Project is adding a total of 10 feet to the drive area adjacent to the Project. Ample room will exist for all users, and contrary to their fears, the Objecting Neighbors will likely find ingress and egress for themselves and their renters to be better and safer than before.

To illustrate this, the project architects have prepared a plan showing the drive area before and after construction is complete. The plans are attached. It shows that there is ample room for cars and service vehicles to enter and exit without creating the traffic jam which the Objecting Neighbors fear. In fact, we would argue, access by the Objecting Neighbors and their parking tenants is much improved

This additional drive area, and sound construction practices, will allow for continuous ingress and egress during construction, thereby addressing the Objecting Neighbors' concerns over access during construction.

The Objecting Neighbors also expressed safety concerns for pedestrians who might use the existing Easement. All properties have alternative pedestrian access to a public street other than over the Easement. But just as the increased width of the drive area makes it safer for vehicles, it also makes it safer for pedestrians who might choose this route of travel.

The Objecting Neighbors noted that the Easement might be used by the Project for deliveries and trash removal. But this is no different a use of the Easement than currently, as The Mint Mark makes use of the driveway for both deliveries and trash removal, and in order to do so, must travel over land owned by 1933, 316 and 320. Again, the Project's occupants and visitors have no need to go on to lands owned by 1933.

Conclusion

The City requires access to the Project to be taken off of Russell Street. That makes total sense. The Developer recognizes that while a 12 foot access easement may have been adequate in 1901, it does not serve current needs. The Project accommodates

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this by increasing the access drive to the Project to 20 feet, creating ample room for all users including the Objecting Neighbors and their tenants. In light of those circumstances the use of the Easement is not being substantially changed or diminished and all parties can use the Easement for the same purposes and with the same utility as it was previously used. The Project's widening of the drive area adjoining the Easement more than adequately addresses the concerns of the Objecting Neighbors.

Thank you for your consideration.

Sincerely,

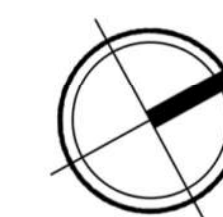
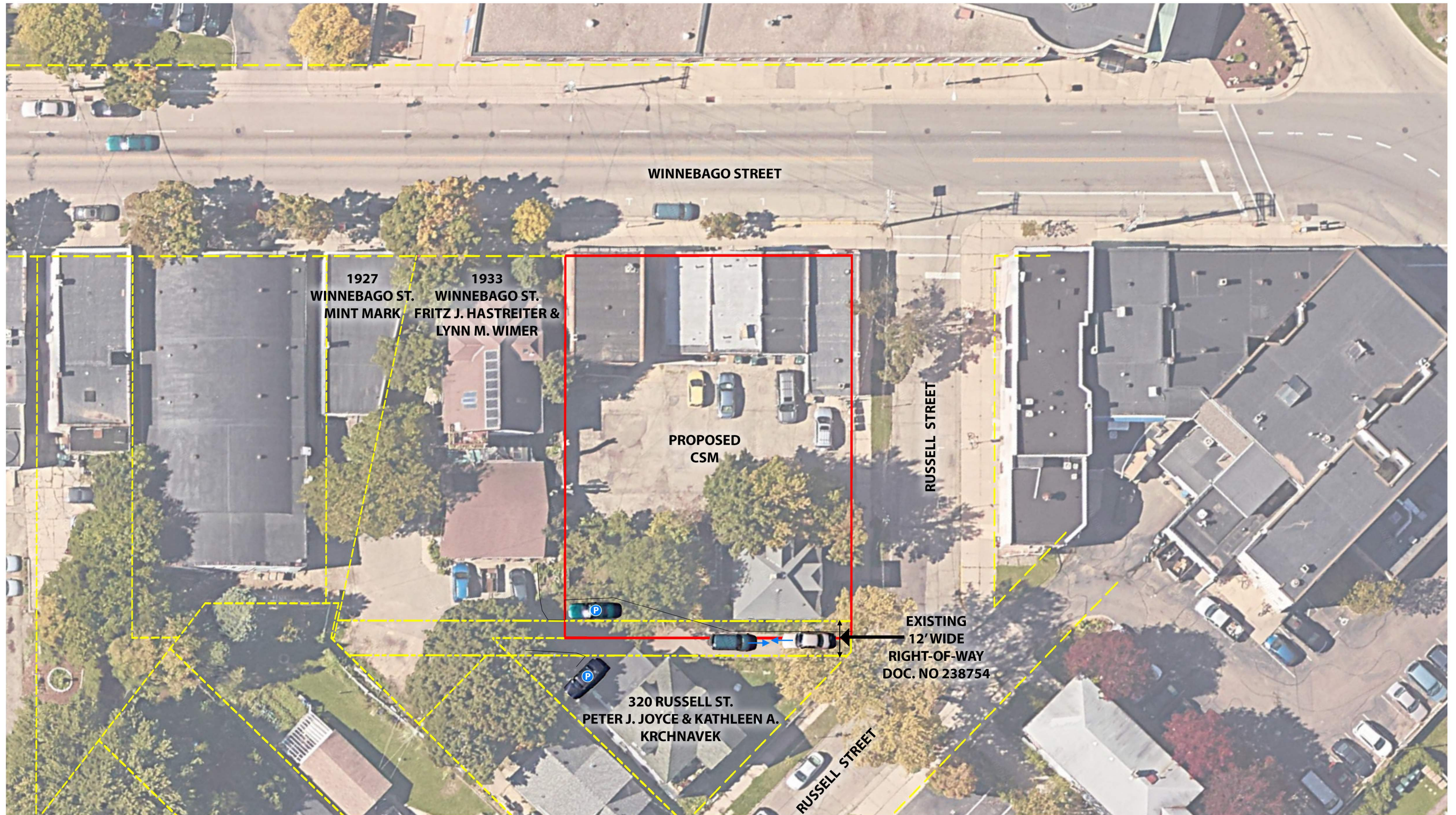
Mohs Widder Paradise LLC

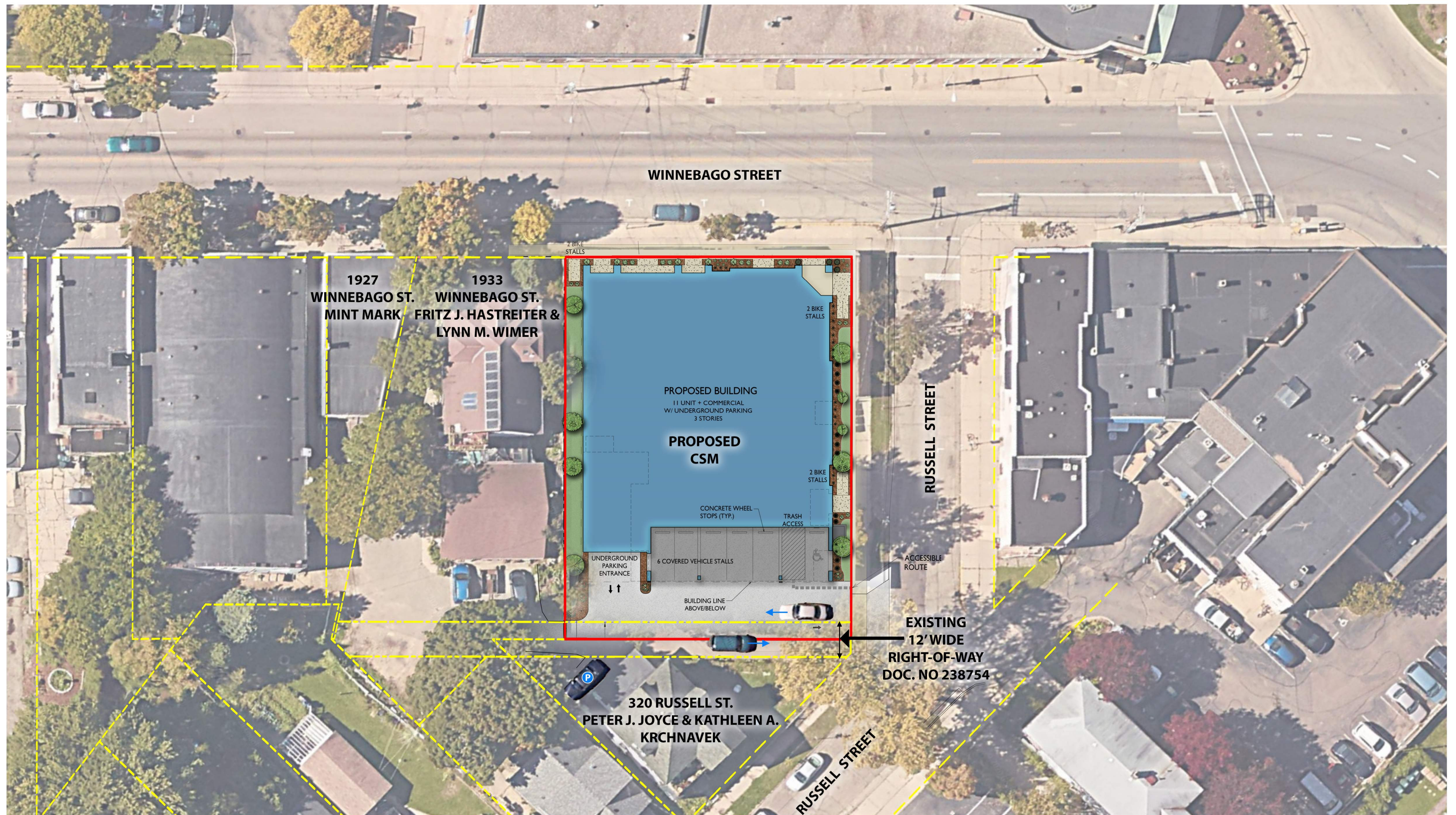
Gregory J Paradise

Gregory J. Paradise

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Cc: Mark Jorgensen w/encl via email





Proposed Site Plan
1937-1949 Winnebago St. & 316 Russell St
Madison, WI
October 19, 2020

