

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

MEMORANDUM

TO: The Plan Commission

FROM: John Strange, Assistant City Attorney

DATE: November 20, 2020

RE: Official Mapping under Wis. Stat. § 62.23(6) and M.G.O. § 16.25(6) and Legislative File No. 61589

I. Introduction

Legislative File No. 61589 is a Resolution to amend Madison's Official Map. The Resolution is part of an effort to more fully implement the Milwaukee Street Special Area Plan. In general, Madison amends its Official Map relatively infrequently and, to my knowledge, has not used the Official Map as a tool to implement local area plans. Historically, Madison has used its Official Map primarily as an engineering tool to reserve lands for road widening and major roadway connections, such as the future Sprecher Road connection between Cottage Grove and East Buckeye. Yet, as discussed more fully below, one of the purposes of Official Maps in Wisconsin is to serve as a planning tool for the implementation of city plans, including local area plans. Thus, the purpose of this Memorandum is to address some of the basic questions our office has recently received about the purpose and mechanics of the Official Map in light of Legislative Item 61589: What is it? Where did it come from? How does it work? And what does it mean for the City and property owners?

II. Background and History of Official Mapping.

The Official Map is not the map showing the City's political boundaries. Nor is it the map showing the City's zoning districts. Instead, the Official Map under Wis. Stat. § 62.23(6) and M.G.O. § 16.25(6) reserves and depicts land the city intends to use in the future for specific public uses: streets, highways, historic districts, parkways, parks, playgrounds, railroad rights-of-way, public transit facilities, and public transit facilities. Importantly, a local government can reserve land on an Official Map *regardless* of whether it actually owns the land at the time of mapping, subject, of course, to eventually acquiring the land through purchase or condemnation before turning it into one of the listed public uses.

Official mapping is not a uniquely Madison thing. As described in the 1996 Official Mapping Guide prepared by the Southeastern Wisconsin Regional Planning Commission, “the concept and actual use of the official map in the United States dates back to Colonial times, when the proprietary founders of well-planned Colonial cities, such as Philadelphia, Annapolis, and Williamsburg, caused plans for these cities to be prepared and the necessary streets and public commons preserved for public use by prohibition of the construction of buildings, fences, and other structures in the dedicated areas.”¹ Modern official mapping statutes began in New York in 1926, followed by Maryland, Michigan, Minnesota, New Hampshire, Utah, and Wisconsin, which adopted its Official Map statute in 1941. The constitutionality of Wisconsin’s Official Map statute was confirmed by the Wisconsin Supreme Court in *Miller v. Manders*, 2 Wis. 2d 365 (1957). Thus, the official map is one of the oldest and most established public plan implementation devices in Wisconsin and across the country.²

III. Wisconsin’s Official Mapping Enabling Legislation and Madison’s Official Map.

In addition to being one of the oldest plan implementation devices, it is probably also one of the least known. Wisconsin’s Official Map statute is found in Wis. Stat. § 62.23(6), which provides, in part:

“(b) The council of any city may by ordinance or resolution establish an official map of the city or any part thereof showing the *streets, highways, historic districts, parkways, parks and playgrounds* laid out, adopted and established by law. The city may also include the location of *railroad rights-of-way, waterways and public transit facilities* on its map.... The map is conclusive with respect to the location and width of streets, highways, waterways and parkways, and the location and extend of railroad rights-of-way, public transit facilities, parks and playgrounds shown on the map. The official map is declared to be established to conserve and promote the public health, safety, convenience or general welfare. The ordinance or resolution shall require the city clerk at once to record with the registrar of deeds of the county or counties in which the city is situated a certificate showing that the city has established an official map.”³

This provision enables the City to establish an Official Map to reserve land for the specific public uses listed in the statute. Madison’s Official Map Ordinance, which largely adopts the language of the state statute, is found in the City’s general planning ordinance, M.G.O. § 16.25.

¹ Official Map Guide, Southeastern Wisconsin Regional Planning Council, p. 3 (June 1996) found at http://www.sewrpc.org/SEWRPCFiles/Publications/pg/pg-02_official_mapping_guide.pdf. The 1996 Official Map Guide is likely the most comprehensive description of Wisconsin’s Official Map statute available.

² *Id.* at v.

³ Wis. Stat. § 62.23(6)(b) (2019).

In addition to providing the authority to establish an Official Map, Wis. Stat. § 62.23(6)(c) and M.G.O. § 16.25(6) provide that the City can *amend* its Official map. Amendments to the Official Map require Plan Commission review and a public hearing preceded by class 2 notice in an official newspaper, which means two insertions in the newspaper, with one being at least one week before the hearing. Madison’s ordinance repeats this language and additionally provides in M.G.O. 16.25(6)(d) that the City provide notice to property owners within 300 feet of the nearest exterior line of the area proposed for official mapping.

Thus, the legislative authority allowing cities to have an Official Map has long been established and the process for creating and amending the Official Map is similar to other planning related legislative processes (i.e., enactment of an ordinance or resolution). As noted and discussed more fully in Tim Parks’ Staff Report regarding this Legislative item, Madison established its Official Map in August 1966. Madison’s current Official Map can be found on the City website.⁴

IV. What the Official Map Means to Cities and Property Owners.

Most questions about the Official Map relate to what it means for cities and property owners.

1. What the Official Map means for cities.

As the Official Map Guide explains, the primary function and impact of the Official Map for cities is twofold:

“The primary function of the official map is to implement the community’s plan of streets and highways in a manner similar to that in which the zoning ordinance and map should implement the community’s land use plan. The official map permits the community to protect the beds of future streets, as well as the beds of partially or wholly developed streets which are to be widened, by essentially prohibiting construction of new buildings in such beds. The possible monetary savings which can accrue to the community from such protection of street rights-of-way are large, but the fact that an official map assures the integrity of the community’s long-range plan of streets and highways is even more important.”⁵

In analyzing the Official Map statute as part of a 1983 amendment, the Legislative Reference Bureau noted that:

“[t]he map serves as notice of the city’s intention to develop in certain areas. After a proposed improvement is placed on the map, any person who builds

⁴<https://cityofmadison.maps.arcgis.com/apps/webappviewer/index.html?id=1734bfa1086e4037adbd6882e28a6e61>

⁵ Official Map Guide, Southeastern Wisconsin Regional Planning Council, p. 6 (June 1996)(emphasis added). See fn. 1 for link to document.

in the path of the improvement without a building permit is not entitled to compensation for damage caused in the course of constructing the [public] improvement.”

Other related Official Map functions include ensuring the implementation of a city’s master plan showing streets and parkways and locating and recording “all existing street lines that constitute the boundaries of the public’s property, ...thereby...stabiliz[ing] the location of real property boundary lines, both private and public.”⁶ Certainly, there are other planning tools that can and have been used to accomplish some of these goals, but the Official Map can be particularly effective in implementing city plans:

“The official map is particularly effective as a street and highway plan implementation device. Although other plan implementation devices such as building setback requirements in zoning ordinances, special building setback line ordinances along major streets, building setback lines on recorded subdivision plats, and private deed restrictions can all be used to reserve land for the future widening of existing streets, none of these devices can be readily applied to proposed future streets and highways. Subdivision control ordinances can be used to protect future streets and highways, but can do so only indirectly and cannot be used to prevent the erection of buildings in the beds of future streets when the erection of such buildings takes place without platted land division. The official map is the only arterial street and highway system plan implementation device that operates on an area wide basis in advance of land development and can thereby effectively assure the integrated development of the street and highway system.”⁷

The Official Map Guide also notes how this applies to detailed neighborhood plans:

“if the local community has carefully prepared detailed neighborhood unit development plans, and intelligent plat review by planning bodies is all but impossible without such plans, the collector and land-access streets and the neighborhood park and parkway sites shown on such plans can be delineated and placed on the official map. Such mapping will help to overcome difficult problems of disjointed land ownership patterns and assure the development of integrated neighborhood units in a manner not possible through subdivision control alone.”⁸

The degree to which Madison and other cities should use the Official Map versus other planning tools to reserve land for future public uses and, more broadly, to proactively implement neighborhood area plans is a question of policy for each city to determine.

⁶ *Official Map Guide* p. 6

⁷ *Id.* p. 6.

⁸ *Id.* p. 8.

2. What the Official Map means for Property Owners.

The major impact of the Official Map on property owners relates to whether a property owner can construct buildings within an officially mapped area and/or be compensated for the removal of a building that lies within reserved lands on the official map. The state statute speaks directly to this in sub. (6)(e):

“No permit may be issued to construct or enlarge any building within the limits of any street, highway, waterway, railroad right-of-way, public transit facility or parkway, shown or laid out on the map except as provided in this section...Any person desiring to construct or enlarge a building within the limits of a street, highway, waterway, railroad right-of-way, public transit facility or parkway shown on the official map...shall apply to the authorized official of the city for a building permit. Unless an application is made, and the building permit granted or not denied within 30 days, the person is not entitled to compensation for damage to the building in the course of construction of the street, highway, railroad right-of way, public transit facility or parkway.”⁹

Thus, under this provision, the City will not issue a building permit to construct or enlarge a building in an area that is officially mapped. If someone were to construct or enlarge a building without a permit, even a minor building or addition, they would not be entitled to compensation for the removal of that building or addition.

That said, property owners can appeal the denial of a permit and the Zoning Board of Appeals has some discretion to grant the permit and allow construction of a building in the officially mapped area:

“if the land within the mapped street...is not yielding a fair return, the board of appeals in any municipality which has established such a board having power to make variances or exceptions in zoning regulations may, by the vote of the majority of its members, grant a permit for a building or addition in the path of the street...which will as little as practicable increase the cost of opening the street...or tend to cause a change in the official map. The board may impose reasonable requirements as a condition of granting the permit to promote the health, convenience, safety or general welfare of the community. The board shall refuse a permit where the applicant will not be substantially affected by not constructing the addition or by placing the building outside the mapped street...”¹⁰

Under this provision, the ZBA can grant a building permit in order to allow “a fair return” as long as the proposed building “will as little as practicable increase the cost” of the public improvement identified on the official map. In doing so, the ZBA can attach conditions or requirements that would balance these considerations. The statute provides

⁹ Wis. Stat. § 62.23(e)(emphasis added).

¹⁰ *Id.*

little guidance on how a board would determine “fair return” or make this decision. There is similarly little guidance in case law. However, the ZBA would likely hear the positions of the property owner and the City and then evaluate whether anything could be done to allow the construction of the building with minimal additional cost to the City. In the event of an appeal to the ZBA, our office would need to provide further advice and guidance to the ZBA on the concepts of “fair return” and “little as practicable” costs.

Although curiously drafted, the last sentence of the same provision provides further discretion to the ZBA to grant a permit. It appears to give the Board the authority to grant a permit even if the cost to the city is more than a little, if the Board determines that denying the permit would “substantially affect” the property owner. Although there is similarly little guidance on what “substantially affect” means, this clause is likely important to preserving the constitutionality of the official mapping statute, or a specific official map, because it would prevent a city from placing reservations on a lot or parcel that would remove all reasonable use of that property. As the Official Map Guide noted:

“It should be emphasized, however, that the courts have consistently reserved the right to determine the constitutionality of any particular official map as it might apply to a particular property in order to safeguard the rights of the property owner. Cases in which a particular map has been held invalid as applied to a specific parcel of land have generally included situations where a particular property owner, under the application of the map, would have lost all right to the use of a single lot or parcel which was located entirely within an officially mapped street right-of-way.”

As with the phrase “fair return” our office would need to provide the ZBA with further guidance on the phrase “substantially affect.” Perhaps more importantly, the City will need to continue being judicious about not proposing an official mapping that would remove all use of a person’s property. I would expect that thoughtful collaboration between the Planning Division, Engineering Department, and Office of the City Attorney would avoid this result.

One final observation regarding the words of the statute that may be important to property owners is that it applies only to “buildings” or “additions”. In my opinion, that means a property owner would not be prohibited from, for example, using officially mapped land for surface parking or erecting a sign because neither would be considered a building. This rationale may apply to other non-building uses as well. As a result, the City would likely have to grant a permit where applicable and/or compensate owners for the eventual removal of these structures or areas even if they exist in an officially mapped area. This makes sense in the context of the statute because the cost of removing a surface parking area or sign would be relatively “little” when compared to the cost of a building or building addition.

Taken as a whole, the statute requires that the city building inspector deny building permits for proposed construction of buildings within the officially mapped area. It allows property owners to appeal that decision to the Zoning Board of Appeals, which has limited

discretion to grant the permit. If the city eventually grants a permit, it will be responsible for the cost of removing the building if and when it acquires the property for the future use. If the city does not grant the permit and the property owner builds anyway, such as building a minor shed or building, the property owner is not entitled the value of the building or addition the city may eventually have to remove. In any event, when creating an official map, the City must be careful not to do so in a way that would remove all reasonable use of the property.

V. Conclusion

Legislative item 61589, amending the City's Official Map, uses the official map as a tool to implement the Milwaukee Street Special Area Plan. As described above, the Official Map is a planning tool that is available for such implementation. If Madison decides to use the Official Map as a way to more proactively implement special neighborhood plans, this Memorandum addresses some of the basic questions our office routinely receives about the Official Map and that may arise during and after the official mapping process.