CITY OF MILWAUKEE
Office of the City Attorney

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MEMORANDUM

To: Chairman Michael Murphy and Members of the Zoning, Neighborhoods & Development Committee

From: Todd Farris and Tyler Helsel

Date: October 24, 2022

RE: File No: 220490—Questions regarding changes to the CSM and DPD following Plan Commission Review

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Background Facts

The Plan Commission held a public hearing on File No. 220490 relating to the Detailed Planned Development ("DPD) for the Live Nation concert venue at its September 26, 2022 meeting. The proposed DPD is located within the Arena Master Plan GPD created in 2016. At the hearing concerns were expressed, among others, about the future development of Lot 2 of the GPD which abuts Vel R. Phillips Avenue as well as the absence of interim treatments or enhanced wall designs for the concert venue's east façade. Following the hearing, the Plan Commission recommended conditional approval of the DPD.

In response to the concerns expressed at the Plan Commission meeting, the developer revised the project by adding Lot 2 of the GPD to the proposed concert venue DPD, moving the concert venue 37 feet to the east and adding window-like glazing materials to the east façade. Collectively these changes are referred to hereinafter as the "Revised Project."

On October 20, 2022, Attorney John Wirth submitted a Memorandum to various City officials arguing, among other things, that the CSM for the Revised Project and the Revised Project GPD must be referred to the Plan Commission for review and recommendation.

We have been asked to review Attorney Wirth's legal arguments and provide guidance to the Zoning, Neighborhoods & Development Committee.

Discussion

1. Plan Commission Review of the CSM for the Revised Project Not Required

Attorney Wirth argues that Wisconsin Statutes, Section 62.23(5), requires the CSM for the Revised Project to be referred to the Plan Commission. His implied contention is that a CSM is a "plat." Under Chapter 236 of the Wisconsin Statutes.

We disagree with Attorney Wirth. A CSM is not a plat under Chapter 236. A plat is defined in Section 236.02(8) as a map of a "subdivision". A subdivision is defined in Section 236.02(12)(am) as a division of land which creates 5 or more parcels of 1 ½ acres or more. The CSM for the Revised Project does not meet the definition of a plat under Chapter 236.

We also note that the City's CSM ordinance, 119-5, Milwaukee Code of Ordinances, does not require Plan Commission review of a proposed CSM. We understand that when a CSM proposes a public dedication, the CSM is referred to the Plan Commission for review. No dedications are proposed in the CSM for the Revised Project.

2. Plan Commission Review of the Revised Project is Required Only if the Common Council Determines that the Revised Project DPD Changes the Fundamental Character of the Original Proposal Reviewed by the Plan Commission, or Affects Nearby Property Owners in a New or Different Way than the Original Proposal

Attorney Wirth argues that the Revised Project DPD must be referred back to the Plan Commission because the changes reflected in the Revised Project are "substantial." The case of *Herdeman V. City of Muskego*, 116 Wis. 2d 687 (1983) is the leading case on this issue. The case involved a change the developer made to a rezoning request after Plan Commission review which created a new 180-foot buffer between the tract to be rezoned and neighboring properties. The Wisconsin Court of Appeals upheld a decision by the Muskego Common Council to not refer the amended rezoning back to the Plan Commission. The Court stated:

> Several treatises dealing with this issue have concluded that an amendment made to an original proposal must be substantial to require reactivation of the procedural process. If the initial notice is broad enough to encompass the proposed changes, an additional public hearing ordinarily will not be required. McQuillan, *Municipal Corporations* § 25.251 (3d ed. 1976). To require a new notice and public hearing for each proposed change, no matter how small, would heavily burden the legislative process. Rathkopf, *The Law of Zoning & Planning* § 10.05 (4th ed. 1975). Anderson, in his treatise, *American Law of Zoning 2d* § 4.15 at 211 (2d ed. 1976), states:
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> > One of the purposes of a public hearing is to inform the members of the municipal legislative body. Where changes are made due to testimony adduced at such hearing, it usually will not be necessary to hold a second hearing on the revised proposal. Whether a second hearing is necessary will depend upon the nature and extent of the posthearing revision. Thus, where a proposed amendment to permit

> the construction of apartments was altered to require a 50-foot buffer, the change was not so material as to require a new notice and hearing. [Footnote omitted.]
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> We are persuaded by the logic of these treatises and adopt the "substantial change" requirement.
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> The Muskego Planning Commission had already made its recommendation approving the rezoning of the land in question. Notice had been sent. The amendment simply decreased the amount of land that was going to be rezoned. The reduction in the size of the area to be rezoned in this case is not a substantial change in the proposed ordinance as originally advertised because the fundamental character of the proposal remained unchanged; no new rights were created.
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> It is also important to note that the amendment did not affect different landowners nor did it affect the same landowners in a different way. An additional public hearing could only have resulted in repetitive statements by the same parties. Nothing would have been accomplished by requiring another notice and public hearing, except delay.

Id. at 690-691(footnotes omitted). In a similar context the Wisconsin Supreme Court noted that

> No substantive difference exists between the original proposed zoning amendments, for which § 62.23(7)(d)2 notices were given, and the [changed] proposed zoning amendments that were adopted. The [changed] proposed zoning amendments affected the same people in the same manner as the proposed zoning amendments in the original files. A second § 62.23(7)(d)2 notice for a hearing before [a different] committee would provide the same people the opportunity to express the same views regarding the proposed zoning amendments.

See Oliveira v. City of Milwaukee, 242 Wis. 2d 1, 17-18 (2001).

We believe that under *Herdeman*, this office could successfully defend a decision by the Common Council not to refer the Revised Project DPD back to the Plan Commission. Reasonable arguments can be made that the Revised Project DPD is not a substantial change from the original proposal and does not change the fundamental nature of the development. Instead it addresses concerns expressed at the September 26, 2022 public hearing by moving the concert venue 37 feet to the east and adding glazing elements to the east façade. In addition, we have not been able to identify any neighboring property owners who will be newly impacted or impacted differently by the Revised Project DPD as compared to the original proposal.

Please let us know if you have additional questions or comments about this matter.