
WOODSPRING SUITES MILWAUKEE
AIRPORT LLC, a Kansas limited liability company

Case No. 17-CV-6238

Plaintiff,

v.

JAMES R. OWCZARSKI, in his official capacity as
City Clerk of the City of Milwaukee,

Defendant.

**PLAINTIFF'S BRIEF IN OPPOSITION TO THE DEFENDANT CITY CLERK'S
MOTIONS TO DISMISS AND CONSOLIDATE**

Plaintiff, WoodSpring Suites Milwaukee Airport LLC ("WoodSpring"), by its attorneys, Friebert, Finerty & St. John, S.C., hereby submits this Brief in Opposition to the motions filed by the Defendant City Clerk to dismiss WoodSpring's Complaint seeking the remedy available by Mandamus and to consolidate this case with the certiorari proceeding assigned to Judge Sosnay.¹

INTRODUCTION

Wis. Stat. § 236.34(1m)(f) requires that "action to approve, approve conditionally, or reject the certified survey map" be taken by an approving authority within 90 days. It is undisputed that the Common Council's rejection of the Certified Survey Map ("CSM") at issue occurred more than 90 days after its submission. It is further undisputed that the City denied WoodSpring's request that pursuant to Wis. Stat. § 236.34(1m)(f) the City Clerk certify that the CSM is deemed

¹ The City also included in its motion papers a motion to dismiss the certiorari proceeding presently before Judge Sosnay. This motion is of questionable merit due to the well-established right to certiorari review of municipal decisions. Additionally, the motion is premature and contrary to this Court's August 4, 2017 Briefing Stipulation and Order setting forth the briefing schedule on two motions to be filed by the City Clerk, a motion to dismiss the case at bar and a motion to consolidate. This brief addresses the City's arguments regarding the mandamus action and consolidation, but if the Court does grant the motion to consolidate, WoodSpring will respond to the motion to dismiss the certiorari proceeding as directed by the Court.

approved. These undisputed facts compel denial of the motion to dismiss and issuance of a mandamus order directing the City Clerk to comply with his clear duty under the statute.

The City's consolidation motion should also be denied. The cases involve different types of proceedings, distinct legal issues and separate material facts. Consolidation is not appropriate.

BACKGROUND

This case arises out of WoodSpring's efforts to develop a WoodSpring Suites extended-stay hotel on property it contracted to purchase from the Wisconsin Department of Transportation ("WisDOT") at 1701 Layton Avenue in Milwaukee. WoodSpring's hotel is a permitted use in the City's zoning for the property. Under the City's Subdivision ordinance, Chapter 119, before WoodSpring could acquire the property and obtain building permits, it is required to obtain approval of a CSM. WoodSpring submitted a draft CSM to the City in November, 2016. Over the next few months, stakeholders including City staff, the Office of the City Attorney, the land surveyor retained by WoodSpring, and representatives of WisDOT and WoodSpring collaborated to discuss and work through the unique technical issues presented by the WoodSpring CSM. *See Complaint*, ¶¶ 7-9.² Despite these efforts and the recommendation for approval by City staff, the Common Council ultimately rejected the CSM 91 days after it was submitted for approval.

WoodSpring filed two separate and distinct proceedings as a result of the City's failure to approve WoodSpring's CSM. This mandamus proceeding is premised on Wis. Stat. § 236.34(1m)(f) which provides that if a CSM is not rejected and a statement of reasons provided within 90 days of submission, the CSM is deemed approved and upon demand "a certificate to that effect shall be made on the face of the map by the clerk of the authority that has failed to act." The Defendant City Clerk's motion to dismiss this mandamus proceeding concedes that the City's

² While on a motion to dismiss the facts pleaded and all reasonable inferences must be taken as true, *State ex rel. Griffin v. Litscher*, 2003 WI App. 60, ¶ 6, 261 Wis. 2d 694, 659 N.W.2d 455, the record amply supports these allegations.

Common Council did not reject WoodSpring's CSM and did not provide WoodSpring with a statement of reasons for the rejection within 90 days of submission. Instead, the City raises a number of "defenses" that purportedly defeat WoodSpring's request for a mandamus remedy directing the City Clerk to add the required certificate of approval to WoodSpring's CSM.

The second case seeks certiorari review and is assigned to Judge Sosnay (Case No. 17-CV-6239). The complaint in that case alleges that WoodSpring's CSM was eventually rejected for pretextual reasons to accommodate Alderman Terry Witkowski's opposition to WoodSpring's hotel project. The certiorari complaint presents a detailed factual background that will require the reviewing court to consider the factual circumstances leading up to the Common Council's untimely rejection of the CSM and the reasons now offered by the City for that decision. There are no common questions of fact or law in the two proceedings. The defendants are different. Mandamus is a summary proceeding, certiorari is not. Finally, while Wis. Stat. § 801.02(5) authorizes the use of a complaint to seek the remedy available by a petition for writ of mandamus, Wis. Stat. Ch. 783 suggests that only a claim for damages can be joined in a mandamus proceeding. Thus, WoodSpring filed separate complaints seeking the remedy available by writ of mandamus and the remedy available by certiorari. While there might be some modest efficiency to counsel for the parties in consolidating the two proceedings, WoodSpring does not believe that consolidation is proper.

RESPONSE TO MOTION TO DISMISS MANDAMUS PROCEEDING

A motion to dismiss a complaint seeking a remedy available by writ of mandamus is subject to the general rules of a motion to dismiss a complaint. Wis. Stat. § 783.01; *State ex rel. James L. Callahan, Inc. v. Barg*, 3 Wis. 2d 488, 490-91, 89 N.W.2d 267 (1958). The facts pleaded and all reasonable inferences from those facts must be taken as true and the proceeding dismissed "only

when it is quite clear that under no conditions can plaintiff recover.” *State ex rel. Griffin v. Litscher*, 2003 WI App. 60, ¶ 6, 261 Wis. 2d 694, 659 N.W.2d 455.

ARGUMENT

I. WOODSPRING’S COMPLAINT SUFFICIENTLY ALLEGES THE RIGHT TO A WRIT OF MANDAMUS DIRECTING THE CITY CLERK TO CERTIFY THAT THE CSM IS APPROVED.

Mandamus is the proper remedy for compelling a public officer to perform a duty which he/she is legally bound to perform. *Karow v. Milwaukee County Civil Serv. Comm.*, 82 Wis. 2d 565, 568 n.2, 263 N.W.2d 214 (1978). There are four prerequisites to the granting of the remedy available by writ of mandamus:

- (1) a clear legal right;
- (2) a positive and plain duty;
- (3) substantial damages; and
- (4) no other adequate remedy at law.

Pasko v. City of Milwaukee, 2002 WI 33, ¶ 24, 252 Wis. 2d 1, 643 N.W.2d 72 (citation omitted).

WoodSpring meets each of these elements. Wis. Stat. § 236.34(1m)(f) provides as follows:

Within 90 days of submitting a certified survey map for approval, the approving authority, or its agent authorized to approve certified survey maps, shall take action to approve, approve conditionally, or reject the certified survey map and shall state in writing any conditions of approval or reasons for rejection, unless the time is extended by agreement with the subdivider. Failure of the approving authority or its agent to act within the 90 days, or any extension of that period, constitutes an approval of the certified survey map and, upon demand, a certificate to that effect shall be made on the face of the map by the clerk of the authority that has failed to act.

The Wisconsin Supreme Court has held that the timelines in Chapter 236 for municipalities to act on land division documents are clear and unequivocal — the final authority of the municipality must reject the document within the stated time frame and failure to do so constitutes an approval.

In *State ex. rel. Lozoff v. Board of Trustees of the Village of Hartland*, 55 Wis. 2d 64, 70, 197 N.W.2d 798 (1972), an applicant sought certiorari review of the Village of Hartland’s rejection of

his preliminary plat. The trial court held that the Village's failure to act within 40 days of the plat's submission constituted approval thereof. The Wisconsin Supreme Court affirmed. *Id.* at 72.

The City here offers similar arguments to those made in *Lozoff*, and the result should be the same. For instance, the Village argued that constructive approval was not appropriate since the plat allegedly violated the official village map and did not meet technical requirements with respect to the village code details to be shown on the plat. The Court unequivocally rejected that argument. *Id.* at 69-70.

Similarly, in *State ex rel. James L. Callan, Inc. v. Barg*, 3 Wis. 2d 488, 492, 89 N.W.2d 267 (1958), the failure of the Franklin City Council to reject a final plat and to provide a statement of reasons for the rejection within 60 days of submission was held to constitute an approval of the final plat. The Court in *Barg* found:

Under sec. 236.11(2) it is a duty of the Common Council to act upon a final plat either to approve or reject it, within sixty days of its submission. The performance of such duty clearly involves examination of the plat to determine whether or not it complies with municipal requirements. We must assume, for the purposes of this decision on the motion to quash, that if there was any noncompliance, the Common Council would have rejected the plat within the time set by the statute and had advised the petitioner thereof, as required by sec. 236.11(2). There is a presumption, in the absence of evidence to the contrary, that public officers have properly discharged their duties of their office.

Id. at 492 (citation omitted).

Section 236.11(2) referenced in *Barg* is similar to § 236.34(1m)(f) and the principles apply with equal force in this proceeding. Thus, the claim that a land division document violates a local ordinance is not a defense to a proceeding to enforce the time limits in Wis. Stat. Chapter 236 for action by the governing authority. *Lozoff*, 55 Wis. 2d at 68-69; *Barg*, 3 Wis. 2d at 491-493. *Barg* confirms that mandamus is an appropriate remedy to order the local clerk to add his/her certificate of approval to a land division document that was not rejected within the statutory time frame.

Barg, 3 Wis. 2d at 492 (“what is required of the clerk is simply the ministerial act of certification, and mandamus lies to compel such act.”).

WoodSpring’s Complaint alleges that after four months of collaborative work with the City’s staff revising WoodSpring’s draft CSM which had been provided on November 18, 2016, WoodSpring submitted its final signed CSM on March 21, 2017. *See Complaint*, ¶ 9. An email confirming the submission of the final CSM to the City on March 21, 2017 is attached to the Complaint as Exhibit C. The Complaint further alleges that under Wis. Stat. § 236.34(1m)(f), the Milwaukee Common Council had until June 19, 2017 to reject the CSM and provide WoodSpring with a statement of reasons for the rejection. Absent that, the CSM would be deemed approved as a matter of law under the statute if the Common Council failed to so act by June 19, 2017. *See Complaint*, ¶¶ 11-12. The Complaint also alleges that the Common Council failed to reject WoodSpring’s CSM by this deadline and that the City Clerk declined WoodSpring’s demand that he add his certificate of approval to WoodSpring’s CSM as required by Wis. Stat. § 236.34(1m)(f). *See Complaint*, ¶¶ 12-16. Finally, the Complaint alleges that WoodSpring has and will incur substantial damages if approval of the CSM is further delayed. *See Complaint*, ¶ 20.c.

The allegations in the Complaint are supported by the text of Wis. Stat. § 236.34(1m)(f) and Wisconsin Supreme Court’s precedent which firmly establishes that WoodSpring’s Complaint sufficiently alleges WoodSpring’s right to the remedy available by writ of mandamus.

II. NONE OF THE DEFENSES OFFERED BY THE CITY CLERK OVERCOME ESTABLISHED STATUTORY REQUIREMENTS.

While not disputing that the allegations in WoodSpring’s Complaint sufficiently allege that the City failed to comply with the 90-day timeline in Wis. Stat. § 236.34(1m)(f), the City’s brief offers a number of claimed defenses that it argues support dismissal. These are addressed below.

A. WoodSpring Has Standing.

The City Clerk argues that WoodSpring does not have standing to bring this proceeding and that WisDOT, as the owner of the property, is the proper plaintiff. WoodSpring's Complaint alleges that in January, 2016 it entered into a Real Estate Sale and Purchase Contract with WisDOT for the property and that, among other provisions, the purchase contract includes a contingency for WoodSpring to obtain all required permits and approvals from the City and for WisDOT to cooperate with and affirmatively assist WoodSpring in obtaining such approvals at WoodSpring's expense. *See Complaint*, ¶ 4. The original application submitted with the draft CSM on November 18, 2016 was signed by Stephanie Knebel, a representative of WoodSpring. *See Complaint*, Exhibit A. In *Lozoff, supra*, the Village made a similar argument and it was rejected: "The holder of an option to purchase property for development has sufficient standing to be aggrieved by a municipality's rejection of a plat submitted by him." *Lozoff*, 55 Wis. 2d at 71 (citation omitted). WoodSpring has standing under its contract and the case law to bring this action and is the proper plaintiff.

B. The Alleged Technical "Defect" In The CSM Is Insufficient To Defeat WoodSpring's Right To Mandamus Under Wis. Stat. § 236.34(1m)(f).

The City Clerk seems to argue that an alleged technical defect in the CSM defeats WoodSpring's right to the remedy of mandamus under Wis. Stat. § 236.34(1m)(f). The City cites two decisions, *Columbia Corp.* and *Wood*, that do not address a rejection outside of the required timeline. Furthermore, as noted, the Wisconsin Supreme Court has firmly rejected this line of argument:

Therefore, the failure of the village to take action within the forty-day period resulted in constructive approval of the preliminary plat, whether or not the plat did not meet the technical requirements ordinance.

Lozoff, supra, 55 Wis. 2d at 69-70; *Barg, supra*, 3 Wis. 2d at 491-92.

Moreover, under Wis. Stat. § 236.34(1)(cm), a CSM cannot alter a previous dedication. A record showing a dedicated-but-never-built strip of West Barnard Avenue was found in the initial draft review, and the dedication was left off the final CSM at the City's direction. Under the statute, approval of the CSM still leaves the dedication intact. WoodSpring also gave the City the opportunity to approve a second CSM showing the strip of unimproved street right-of-way. The City chose instead to reject the original CSM. As a matter of law, then, the purported technical defect is immaterial to the 90-day limit.³

C. WoodSpring Did Not Extend The 90-Day Period In Wis. Stat. § 236.34(1m)(f).

The City next suggests that WoodSpring agreed as part of its CSM application to extend the time within which the City's Common Council could reject WoodSpring's final CSM. The City relies on the following language in its form CSM application:

AGREEMENT FOR EXTENSION OF TIME

Chp. 236.11(2) The body or bodies having authority to approve plats shall approve or reject the final plat within 60 days of its submission, unless the time is extended by agreement with the subdivider. When the approving authority is a municipality and determines to approve the plat, it shall give at least 10 days' prior written notice of its intention to the clerk of any municipality whose boundaries are within 1,000 feet of any portion of such proposed plat but failure to give such notice shall not invalidate any such plat. If a plat is rejected, the reasons therefor shall be stated in the minutes of the meeting and a copy thereof or a written statement of the reasons supplied the subdivider. If the approving authority fails to act within 60 days and the time has not been extended by agreement and if no unsatisfied objections have been filed within that period, the plat shall be deemed approved, and, upon demand, a certificate to that effect shall be made on the face of the plat by the clerk of the authority which has failed to act. As the subdivider, I grant the City of Milwaukee an extension to this

³ The City's argument also casually ignores the facts behind the Barnard Street vacation issue. While this extensive background has no relevance to the mandamus claim, the facts as alleged in the certiorari proceeding demonstrate that this issue is a red herring. After WoodSpring and its surveyor were directed by City staff to leave an old, dedicated-but-never-built strip of West Barnard Avenue off of the CSM, Alderman Witkowski claimed at a meeting of the City's Zoning, Neighborhoods & Development Committee on June 12, 2017 (84 days after the final CSM had been submitted to the City) that this was a technical defect in WoodSpring's CSM. *See Certiorari Complaint*, ¶ 27. WoodSpring strongly disputes the suggestion that this was a technical defect and in any event gave the City the opportunity to approve a CSM showing this strip of old street right-of-way that had never been built. *Id.*, ¶ 30. The City went ahead and rejected the original CSM anyway.

requirement and time extension, if necessary, in order for the attached Final Plat to be reviewed and approved by the City.

See Complaint, Exhibit A (emphasis added).

There are several fatal flaws with the City's extension argument. First, the plain language of the "Agreement for Extension of Time" does not extend the time within which the City can reject WoodSpring's CSM. The language indicates clearly and unequivocally that WoodSpring would only be agreeing to an extension if needed for WoodSpring's CSM "to be reviewed and approved by the City." (Emphasis added). The inclusion of "and approved" after "reviewed" negates any argument that by signing the form application WoodSpring was agreeing to extend the time within which the City could reject WoodSpring's CSM or somehow forego its statutory rights.

The plain language also specifically refers to the 60-day time period for final action on a final subdivision plat set forth in Wis. Stat. § 236.11(2). There is no mention of the 90-day period in § 236.34(1m)(f) for a CSM.

Perhaps more importantly, the purported "agreement" in the application is not authorized by the City's Subdivision Ordinance, Chapter 119, Ordinances. And, WoodSpring submits that even if the extension language had been authorized by City ordinance, conditioning an application for approval of a final CSM on the waiver of the statutory right granted by Wis. Stat. § 236.34(1m)(f) would violate the delegation of authority to the City in Wis. Stat. § 236.45(2)(ac) to enact an ordinance governing CSMs. Section 236.45(2)(ac) provides:

To accomplish the purposes listed in sub. (1), any municipality, town or county that has established a planning agency may enact ordinances governing the subdivision or other division of land that are more restrictive than the provisions of this chapter, except that no ordinance may modify in a more restrictive way time limits, deadlines, notice requirements, or other provisions of this chapter that provide protections for a subdivider.

(emphasis added). The City has no authority to modify the time limit in § 236.34(1m)(f). It cannot do it by an application document that is not authorized. Thus, the Agreement for Extension of

Time language in the City's application form cannot be interpreted as extending the time for the City to reject a CSM.

D. WoodSpring Did Not Waive Its Right To Seek Enforcement Of The 90-Day Deadline In Wis. Stat. § 236.34(1m)(f).

The City seems to suggest that WoodSpring somehow waived its right to seek enforcement of Wis. Stat. § 236.34(1m)(f) by not complaining over a period of "seven months" about how long the approval process was taking. The City offers no case law in support of this argument and it is based upon jumbled facts outside of those alleged in the mandamus complaint.

WoodSpring's mandamus Complaint alleges that it submitted a draft CSM to the City on November 18, 2016. The draft CSM was not signed and was not complete in other respects. *See Complaint*, Exhibit B. As is customary with the City of Milwaukee, over the ensuing months, City staff and representatives of WoodSpring worked cooperatively to revise the CSM so that when it was put in final form and executed, it met all of the technical requirements of Milwaukee's Subdivision Ordinance, Chapter 119, Ordinances. *See Complaint*, ¶¶ 7-9. WoodSpring submitted its *final* signed CSM to the City on March 21, 2017. WoodSpring did not by words or conduct waive its right to seek enforcement of Wis. Stat. § 236.34(1m)(f).

E. None Of The City Attorney's "Other Dismissal Reasons" Have Any Merit.

The City argues, with no case law to support it, that WoodSpring could start the CSM approval process all over which amounts to an adequate remedy at law and therefore WoodSpring has failed to exhaust its administrative remedies. The Common Council is the final authority, and it failed to act. It defies logic to suggest that the remedy for this inaction is another application rather than the remedy specified by statute. The law is clear. WoodSpring is entitled under Wis. Stat. § 236.34(1m)(f) to have the City Clerk directed to add his certificate of approval to WoodSpring's CSM. *See Barg, supra*.

Finally, the City suggests that WoodSpring should have filed a Notice of Claim under Wis. Stat. §§ 893.80(1)(a) and (b) and waited for disallowance of its claim prior to seeking relief by way of mandamus. While WoodSpring does not believe that mandamus is subject to this statute, *see, e.g., Elkhorn Area School Dist. v. East Troy Community School Dist.*, 127 Wis. 2d 25, 31-32, 377 N.W.2d 627 (1985), the circumstances giving rise to WoodSpring's claim under Wis. Stat. § 236.34(1m)(f) and the relief it requested are fully set forth in WoodSpring's June 27, 2017 letter to the City Clerk. *See Complaint*, Exhibit D. The City promptly issued a denial. *See Complaint*, Exhibit E.

RESPONSE TO MOTION TO CONSOLIDATE

THE COURT SHOULD NOT CONSOLIDATE THE MANDAMUS AND CERTIORARI PROCEEDINGS.

The City seeks consolidation of this proceeding and the certiorari proceeding before Judge Sosnay. The City argues with little explanation that the two proceedings involve the same law and facts, and then proceeds to argue the merits of both claims. The issues presented in the two proceedings are separate and consolidation is not appropriate.

Section 805.05 of the Wisconsin Statutes permits consolidation of actions that could have been brought as a single action under Wis. Stat. § 803.04. The test for joining claims in a single action under § 803.04 is whether the claims are "in respect of or aris[e] out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to these persons will arise in the action." Wis. Stat. § 803.04. The goals of consolidation are convenience, expedition, economy, elimination of unnecessary costs or delay, and avoidance of prejudice. *Fire Ins. Exchange v. Basten*, 202 Wis. 2d 74, 95, 549 N.W.2d 690 (1995). The decision whether to consolidate is a discretionary one. *Id.*

The issue presented in the mandamus action is whether the City Clerk is required to add his certificate of approval to WoodSpring's CSM since the Common Council did not act by

June 19, 2017, the deadline to reject WoodSpring's CSM under Wis. Stat. § 236.34(1m)(f). This is a question of law separate from, and not addressed in, the certiorari action. The certiorari action requests a review of the entire record to determine whether the City acted arbitrarily in later attempting to reject the CSM. The legal questions presented are distinct. While there is some overlap in historical background facts, the material facts in the two proceedings are different. Moreover, as noted above, the anticipated defense in the certiorari proceeding that WoodSpring's CSM was not approved because it contained a technical defect (not showing the dedicated but unimproved strip of West Barnard Avenue as had been agreed upon with City staff) is irrelevant in the mandamus proceeding.

Finally, Wis. Stat. § 783.04 indicates that only a claim for damages can be joined in a proceeding requesting a mandamus remedy. In *Corrao v. Mortier*, 7 Wis. 2d 494, 96 N.W.2d 494 (1959), the Wisconsin Supreme Court observed that in the absence of the statutory authorization to include a claim for damages in a mandamus, "the successful plaintiff in a mandamus proceeding would be obligated to institute a separate action for damages." There is no statutory authorization to include a request for certiorari review in a mandamus proceeding. Thus, the motion to consolidate the certiorari proceeding with WoodSpring's mandamus proceeding should be denied.


CONCLUSION

The City failed to reject WoodSpring's CSM within 90 days of its submission as required by Wis. Stat. § 236.34(1m)(f). WoodSpring properly requested the City Clerk to add his certificate of approval to WoodSpring's CSM as provided for in the statute. The City Clerk failed to do so. Mandamus is the proper remedy to direct the City Clerk to add his certificate of approval to the CSM. *See Barg, supra*.

In addition, for the reasons stated, WoodSpring does not believe that consolidation is appropriate.

Dated at Milwaukee, Wisconsin, this 11th day of August, 2017.

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