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August 23, 2017

VIA MESSENGER

Honorable Clare L. Fiorenza
Circuit Court Judge, Branch 3
Milwaukee County Courthouse
901 North 9th Street, Room 500
Milwaukee, WI 53233

Re: ***Woodspring Suites Milwaukee Airport, LLC v. James R. Owczarski***
Case No. 2017-CV-006238; filing Defendant's Reply Brief

Dear Judge Fiorenza:

Per the Stipulation and Order in this case regarding the briefing schedule, enclosed for filing please find an original and one copy of the City's Reply Brief Supporting its Motions.

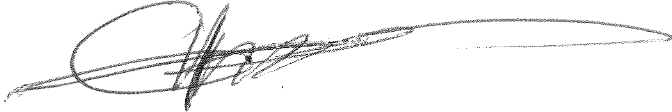
Please file-stamp the enclosures, keep the original for the Court's file, and return the copy to the messenger for return to me.

I am providing a copy of the document to the plaintiff's attorney, Andy Skwierawski.

I am also sending a copy of this letter to Judge Sosnay because the City's motions include a motion to consolidate the above case with the certiorari case pending before him, Case No. 2017-CV-006239, and to dismiss those cases.

Please call if you have questions or comments. Thank you very much.

Very truly yours,



GREGG C. HAGOPIAN
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GCH:lmc

Enclosures

c: Judge William Sosnay (via messenger w/enc.) (2017-CV-006239)
M. Andrew Skwierawski, plaintiff's attorney (via e-mail w/enc.)
Todd Farris, plaintiff's attorney (via e-mail w/enc.)
Brian Randall, plaintiff's attorney (via e-mail w/enc.)
Chris Moiler, plaintiff's attorney (via e-mail w/enc.)
Cameron Smith, DOT's attorney (via e-mail w/enc.)
Vanessa Koster (via e-mail w/enc.)
Kyle Gast (via e-mail w/enc.)
Yance Marti (via e-mail w/enc.)
James Owczarski (via e-mail w/enc)
Alderman Terry Witkowski (via e-mail w/enc.)
Bill Fuchs (via e-mail w/enc.)
Linda Beckham (via e-mail w/enc.)

1055-2017-1556:242062

STATE OF WISCONSIN	CIRCUIT COURT	MILWAUKEE COUNTY

WOODSPRING SUITES MILWAUKEE AIRPORT LLC

Plaintiff,

v.

Case No.: 2017-CV-006238
Code: 30952

JAMES R. OWCZARSKI, as City Clerk of
the City of Milwaukee

Defendant

CITY'S REPLY BRIEF

This is Defendant's reply brief regarding its motions to consolidate, dismiss and quash. As in its initial brief, Defendant refers to Plaintiff as "**Hotel,**" to the City of Milwaukee as "**City**," to the Wisconsin Department of Transportation as "**DOT**," and to the Hotel's certified survey maps ("**CSM's**") as **CSM No. 1, CSM No. 2** and **CSM No. 3.** Each of the CSM's is attached to the Hagopian Affidavit submitted with Defendant's initial brief ("**DIB**"). The City remains entitled to consolidation, dismissal of Hotel's two complaints, and quashing of any Hotel attempt at mandamus. Per Defendant's initial brief:

CSM No. 1 dated Nov. 7, 2016	November 18, 2016	November 18, 2016: Hotel "submits" CSM No. 1 to DCD under MCO 119-4-2 along with the Hotel's and DOT's CSM Application. Hotel signs "time-extension agreement" extending statutory deadlines for CSM approval.	CSM No. 1 is defective (violates state statutes and local ordinances). DIB-10.
	Feb. 16, 2017		90-day date that would otherwise be applicable under 236.34 (1m)(f) for automatic approval of CSM No. 1 **(1) if** Hotel didn't sign time-extension agreement, and **(2) if** Council failed to take any action.

CSM No. 2 dated March 17, 2017	March 21, 2017	Hotel does not assert Feb. 16, 2017 statutory-time passage. Instead, Hotel operates under its time-extension agreement by "submitting" on March 21, 2017 to DCD under MCO 119-4-2 its CSM No. 2 as a correction instrument.	CSM No. 2 is defective (violates state statutes and local ordinances). DIB-10-11.
	June 13, 2017		Common Council, through its ZND Committee, "takes action" under 236.34 (1m)(f) and informs Hotel of defect in CSM No. 2 (need to show W. Barnard Ave. extended[1]).
CSM No. 3 dated June 14, 2017	June 15, 2017	Hotel fails to "submit" CSM No. 3 to DCD as MCO 119-4-2 requires, and instead Hotel "tenders" it to the City Clerk on June 15, 2017.	CSM No. 3 not properly "submitted" under MCO 119-4-2, violates Wis. Stat. 236.13 (1)(b) and 236.45. Not properly before the Council. DIB-12-13.
	June 19, 2017		90-day date that would otherwise be applicable under 236.34 (1m)(f) for automatic approval of CSM No. 2 **(1) if** Hotel didn't sign time-extension agreement, and **(2) if** Council failed to take any action.
	Sept. 13, 2017		90-day date that would otherwise be applicable under 236.34 (1m)(f) for automatic approval of CSM No. 3 **(1) if** Hotel didn't sign time-extension agreement, and **(2) if** Council failed to take any action, and **(3) if** CSM No. 3 were properly before the Council (if it would have been properly "submitted" to DCD under MCO 199-4-2).

I. HOTEL SIGNED TIME-EXTENSION AGREEMENT MOOTING 90 DAYS AND PREVENTING MANDAMUS. Wis. Stat. 236.34 (1m)(f) provides:

> "Within 90 days of submitting[2] a [CSM] for approval, the approving authority…shall ***take action to*** approve, approve conditionally, or reject the [CSM] and shall state in writing any conditions of approval or reasons for rejection, ***unless the time is extended***

[1] Hotel admits this. See Hotel Mandamus Complaint, para. 26-28.

[2] MCO 1119-4-2 requires "submission" to the City's DCD. Per Wis. Stat. 236.45 (2)(b), the City's MCO Ch. 119 must be liberally construed in the City's favor. Per Wis. Stat. 236.13 (1) (a) and (b), subdividers must comply with Wis. Stat. Ch. 236 and MCO Ch. 119.

by agreement with the subdivider. Failure of the approving body…to act within the 90 days, ***or any extension of that period,*** constitutes an approval of the [CSM] 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.***" Emphasis added.

The Hotel cannot ignore the above bolded language in 236.34 (1m)(f). The Hotel cannot dispute that it signed a time-extension agreement in its CSM Application[3]. While that time-extension agreement references Wis. Stat. 236.11 (2)(a) applicable to final subdivision plats instead of 236.34 (1m)(f) applicable to CSM's, **(a)** subdivision plats and CSM's are both land divisions, and both must comply with Wis. Stat. Ch. 236 and MCO Ch. 119[4], **(b)** Hotel agrees 236.34 (1m)(f) applies, and **(c)** Hotel is suing for mandamus under 236.34 (1m)(f) trying to invoke the 90-day time limit therein and trying to avoid its signed time-extension agreement.

Wis. Stat. 236.34 (1m)(f) (90-day time limit for CSM's), and 236.11 (1)(a) (90-day time limit for preliminary plats), and 236.11 (2)(a) (60-day time limit for final plats), all contain the exact same statutory phrase that the legislature knowingly inserted to escape mandamus and the consequence of the time limits not being met, to wit: "***unless the time is extended by agreement with the subdivider.***"

Because the Hotel did sign the time-extension agreement in the CSM Application which 236.34 (1m)(f) expressly allows, that agreement made the 90-day period in 236.34 (1m)(f) within which Milwaukee's Common Council had to "take action to approve, approve conditionally, or reject" the Hotel's CSM moot and irrelevant. That time-extension agreement prevents the Hotel's mandamus action, it prevents the Hotel from invoking any 90-day or 60-day limit, and it prevents this Court from ordering the Clerk to certify approval of any CSM – especially CSM

[3] The CSM Application, containing the Hotel-signed time-extension agreement is at Hagopian Affidavit, Ex. A, page A-1.

[4] Wis. Stat. 236.34 (1)(am) (CSM is used to divide land into 4 or fewer parcels). Wis. Stat. 236.13 (1)(a) and (b), land divisions must comply with Wis. Stat. Ch. 236 and local land division ordinances (MCO Ch. 119). *State ex. Rel. Columbie Corporation v. Town Board of Town of Pacific,* 92 Wis.2d 767 (Ct. App. 1979) and *Wood v. City of Madison,* 2003 WI 24 (common council may reject any land division that does not comply with Wis. Stat. Ch. 236 or MCO Ch. 119).

No. 2 as Hotel wants since CSM No. 2 violates Wis. Stat. Ch. 236 and MCO Ch. 119 making the Council well within its rights to not approve CSM No. 2[5].

At the Hotel's response brief ("**HRB**"), the Hotel struggles to argue away the irrefutable fact that it signed the time-extension agreement. HRB-8-10. It selects several words at the end of the agreement to try to argue that, under those select words, it only agreed to time extension to allow the Council "to review and approve" its CSM. That is, the Hotel strains in vain to say it didn't allow more time for the Council to reject or to impose conditions on approval. HRB-9. That Hotel argument ignores the other words in the time-extension agreement that are just as important, and that cannot be ignored in interpreting the agreement:

> "If the approving authority fails to act within [the time period] ***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 "As the subdivider, ***I grant the City of Milwaukee an extension to this requirement and time extension..."***

Clearly, when all the words in the agreement are given effect (as they must be), and when all those words are read in the context of all the words that are in Wis. Stat. 236.34 (1m)(f) (which expressly allows time-extension agreements to allow more time to "***take action to*** approve, approve conditionally, or reject the [CSM]"), the Hotel's arguments based on strained interpretation and only some of the words in the agreement and only some of the words in the statute fail.

At HRB-9, the Hotel also cites Wis. Stat. 236.45 (2)(ac) (no ordinance may modify in a more restrictive way time limits or deadlines or other provisions of Ch. 236 that protect subdividers) in a futile attempt to get out from under its signed time-extension agreement. The Hotel's 236.45 (2)(ac) argument fails, however, because **(1)** the Hotel doesn't cite any local ordinance that violates 236.45 (2)(ac), and **(2)** the language of 236.34 (1m)(f) itself expressly

[5] See footnote above.

allows time-extension agreements. The City isn't violating 236.45 (2)(ac) or any Ch. 236 provision. Time-extension agreements are allowed by 236.34 (1m)(f).

Because the Hotel agreed to time extension, that agreement delayed statutory periods for taking action to approve, to approve conditionally or to reject land division, and the Hotel cannot invoke 236.34 (1m)(f)'s statutory deadline in an effort to get mandamus and Court order requiring certification of any CSM not finally acted upon within the statutory deadline.

II. BECAUSE THE HOTEL DID SIGN THE TIME-EXTENSION AGREEMENT, THE PARTIES HAD EXTRA TIME TO CONSIDER CORRECTIVE CSM'S. The Hotel does not quarrel with (and thus admits[6]) the City's footnotes 4 and 17 that explain that – absent a time-extension agreement - an original CSM (CSM No. 1) and every correction instrument "submitted" to DCD under MCO 119-4-2 (CSM No. 2), starts anew the 90-day clock under 236.34 (1m)(f). Thus, CSM No. 1, "submitted[7]" to DCD on November 18, 2016, would have had a 90-day end period of February 16, 2017. But the Hotel's time-extension agreement in the CSM Application rendered that, *and any*, 90-day period moot - including that February 16, 2017 deadline. The Hotel agrees because it never mentions this February deadline. In turn, the time extension gave the Hotel and the City the months extra for the Hotel to fix CSM No. 1 and to "submit[8]" on March 21, 2017 its correction instrument, i.e. CSM No. 2[9]. The Hotel selectively ignores the time-extension agreement. It takes advantage of the agreement to allow it the extra

[6] "Arguments not refuted are deemed admitted." *In re Termination of Parental Rights to Genesis M.*, 2005 WI App 57, ¶ 13, 280 Wis. 2d 396, 694 N.W.2d 458, petition for review denied, 2005 WI 134. "An opponent's argument not refuted is deemed admitted." *Welch v. City of Appleton*, 2003 WI App 133, 265 Wis. 2d 688, 666 N.W.2d 511, fn 6, petiton for review denied, 2003 I 140. *Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 108-109, 279 N.W. 2d 493, 499 (Ct. App. 1979).

[7] MCO 119-4-2, CSM's and correction instruments must be "submitted" to DCD. Wis. Stat. 236.34 (1m)(f), absent a time-extension agreement, the 90-day period begins to run "Within 90 days of submitting" a CSM.

[8] See footnote above.

[9] See HRB-10 where the Hotel admitted that it worked for months with the City to make revisions to CSM No. 1 in an effort to satisfy requirements of MCO Ch. 119. The only reason the Hotel had months to make revisions to correct ordinance violations associated with CSM No.1 is because the Hotel signed the time-extension agreement.

time after February 16, 2017 to submit CSM No. 2, but it wants to ignore the agreement when dealing with CSM No. 2. It cannot do that[10].

The Hotel uses the March 21, 2017 CSM No. 2 "submittal" date as the start date for the 90-days under 236.34 (1m)(f) in order to calculate a 90-day end period of June 19, 2017[11]. Again, that ignores the Hotel's open-ended time-extension agreement that continued in place making *any* 90-day period moot. And the Hotel tries to ignore that it was well aware of defects in CSM No. 2 and that it attempted to tender a CSM No. 3 to the City on June 15, 2017 to correct CSM No. 2.

III. TECHNICAL DEFECTS. Notice what the Hotel does. At HRB-2, 6, it admits that after submitting CSM No. 1 on November 18, 2016, the Hotel, the City and the surveyor took "four months" to "work through the unique technical issues presented by the [CSM No. 1][12]." At HRB-10, the Hotel indicated it understood the importance of ensuring that any final CSM would need to meet "all of the technical requirements" of MCO Ch. 119. Then, at HRB-8,12, it tries to explain away a "purported technical defect" with CSM No. 2 (complete failure to show W. Barnard Avenue extended, and failure, as result, to show proper south borders and boundaries, and failure to accurately depict the map and describe the Offer Land[13]) as "immaterial." The Hotel knew CSM No. 2 was defective, and that's why the Hotel tendered the CSM No. 3 on June 15, 2017, without regard to any 90-day clock under 236.34 (1m)(f), and still under the time-extension agreement of the CSM Application.

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[10] See, also, *Lozoff, infra,* 55 Wis.2d 64, 71-72, where the Court respected the subdivider's agreed-upon extension of the statutory period to January 4, 1971, and where the Court would not restart the statutory clock where the subdivider tendered a second revised plat in February 1971, after the expiration of the January 4, agreed-upon, extended deadline. Courts and subdividers must respect time-extension agreements.

[11] HRB-6.

[12] See DIB-7 listing defects in CSM No. 1 and its violations of Wis. Stat. Ch. 236 and MCO Ch. 119.

[13] See statute and ordinance violations regarding CSM No. 2 at DIB-11, 12.

Violations of statutes and ordinances are not "immaterial." The Hotel's defective CSM's should not be approved and should not be recorded in the register of deeds office. CSM No. 1 and No. 2, which fail to show W. Barnard Avenue extended, violate Wis. Stat. Ch. 236 and MCO Ch. 119 (DIB-7, 10-12) so their contents are false, a sham and frivolous. Per Wis. Stat. 706.13 and 943.60, *slander of title*, any person who records, or causes another to record, with the register of deeds a document where the person knows or should have known that the contents of the instrument "are false, a sham or frivolous," is guilty of a Class H felony and "is liable in tort to any person interested in the property whose title is thereby impaired, for punitive damages of $1,000 plus any actual damages caused by the...recording." See also Wis. Stat. 236.34 (1)(cm) prohibiting any CSM from altering W. Barnard Avenue (dedicated right-of-way). The Court should not order the approval (or recording) of any CSM that violates law and impairs the City's rights and title to W. Barnard Avenue.

IV. CONSOLIDATION IS APPROPRIATE. In the Hotel's response brief, the Hotel admits: that the Court has discretion to consolidate; that Wis. Stat. 805.05 permits consolidation when the two cases could have been brought as a single action under Wis. Stat. 803.04; and that the test for joining claims in an 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'" (HRB-11).

Incredulously, at HRB-3, the Hotel tells this Court that "There are no common questions of fact or law in the two proceedings." That is simply not true.

At HRB-12 the Hotel admits that there is "overlap in historical background facts" between the two cases[14]. A casual look at the Hotel's two Complaints starkly shows that they share many

[14] This case and the Judge Sosnay certiorari case, 2017-CV-006239.

common facts and allegations. The Hotel does not dispute (and thus admits[15]) that in both cases (DIB-15-17):

- The Hotel asks for the same relief – for the City's record to be tendered to the Court and for the Court to review the record regarding the Hotel's desire to gain approval of a CSM[16].
- The very same CSM's are at issue. The Hotel does not dispute that CSM No. 1 should not be approved, it attempts to gain approval of CSM No. 2, and it glosses over the fact that it tendered CSM No. 3 in an effort to cure CSM No. 2's failure to show W. Barnard Avenue extended.
- The very same Offer to Purchase between the Hotel and the DOT is at issue.
- The very same land division law in Wis. Stat. Ch. 236 and MCO 119 is at issue.
- The very same CSM Application and the very same "time-extension agreement" are at issue.

In deciding to consolidate, the Court does not have to find exact overlap of law and fact in both cases. However, there is huge overlap here. That the requested relief in one case is labeled mandamus and that the requested relief in another is labeled certiorari is not decisive. These cases should be consolidated for all the above, undisputed, bullet-point reasons. There is no need to litigate these CSM's before two different Judges. DIB-15-17.

V. *BARG* SUPPORTS CONSOLIDATION AND DISMISSAL. The Hotel relies on *James L. Callan, Inc. v. Barg as Clerk of City of Franklin,* 3 Wis.2d 488 (WI S. Ct. 1958). *Barg* supports the City, not the Hotel.

While *Barg* dealt with final subdivision plat approval and the 60-day statutory period under 236.11 (2), as opposed to CSM approval and the 90-day statutory period under 236.34 (1m)(f), as explained above, both statutes allow for time-extension agreements to avoid the statutory deadlines.

In *Barg,* the Court granted mandamus to the subdivider ordering the Village Clerk to certify approval of the plat because, in *Barg* (unlike the facts in the case at hand): **(1)** the Village Board

[15] See footnote 6 above.
[16] Mandamus Complaint, Wherefore Clause B. Certiorari Complaint, Wherefore Clause B.

took no action within the 60 days (in our case, in contrast, the Council's ZND Committee acted within the 90 days and told the Hotel of the problems with its CSM No. 2), and **(2)** the subdivider in *Barg* (unlike the Hotel here) did not extend the statutory deadline by agreement. The *Barg* Court said that "there is simply no ruling at all on the part of the common council...," there was "inaction" by the Council that rendered 236.13 (5) certiorari appeal from any Council action and any judicial review impossible under certiorari. The Court determined that under those facts (no time-extension agreement and no Council action within the deadline), mandamus and Court-ordered plat approval was appropriate. Again, the facts here are different than in *Barg.*

In the situation at hand, **(1)** there is a time-extension agreement preventing mandamus and Court-ordered clerk approval, and **(2)** the Council through its ZND Committee did act, in any event, before the 90 days, informing the Hotel of defects in CSM No. 2 needing correction[17], and **(3)** the Hotel failed to follow that cure opportunity.

Barg's discussion of certiorari and mandamus as possible alternatives for judicial review of a subdivider not gaining approval of land division also supports consolidation and reveals the impropriety of the Hotel's having commenced two actions.

Moreover, in *Barg*:

- The Court recognized that time-extension agreements extend the statutory deadline and prevent mandamus (3 Wis.2d 488, 492). ***In our case, there is a time-extension agreement so the 90-day statutory deadline is irrelevant.***
- The Court recognized that an unsatisfied objection to a subdivision plat filed within the statutory deadline (or the deadline as extended by time-extension agreement) prevents mandamus (*id.*). ***In our case, the Council (ZND) noted an unsatisfied objection to CSM No. 2 (failure to show W. Barnard Ave. extended), that the Hotel knew about, prior to the irrelevant 90-days.***
- Mandamus requires the presumption "in the absence of evidence to the contrary" that the subdivision plat complies with municipal ordinances (3 Wis.2d 488, 491-493 and Wis.

[17] This Council ZND action and notice were later followed up by full Council action in File 170030 and by the City Attorney's June 29, 2017 letter to the Hotel regarding defects and how to cure (Mandamus Complaint, Ex. E).

Stat. 236.11 (2) requiring plats to comply with ordinances); the Court noted that the subdivider in *Barg* made plat "modifications" to cure "all exceptions noted" (3Wis.2d 488, 491), and the decision is silent as to whether the plat in *Barg* did violate municipal ordinances. ***In our case, there is evidence and agreement that CSM No. 2 (due to its failure to show W. Barnard Ave. extended) does not comply with MCO Ch. 119. See Hotel admission at CC-11 and Ex. E, and Hotel's CSM No. 3 tendered in an effort to correct that defect and ordinance violation.***

- The Court held that a Wis. Stat. 236.13 (5) certiorari appeal by an aggrieved subdivider lies when the municipality takes "some affirmative action" by the Common Council "which informs the platter of what he must meet when he takes an appeal" by 236.13 (5) certiorari so that the Court can review the Council's action under the certiorari standards. 3 Wis.2d 488, 493-494. ***In our case, the Council (ZND) took affirmative action prior to the irrelevant 90 days, informing the Hotel of the defect in CSM No. 2, and the Hotel knew what it had to do to correct the defect. Iindeed the Hotel tendered CSM No. 3 within the 90 days to show W. Barnard Ave. extended.***

VI. *LOZOFF* AND *KW* SUPPORT DISMISSAL. Hotel also relies on *Lozoff v. Bd. Of Trustees of Village of Hartland,* 55 WIs.2d 64, 197 N.W.2d 798 (Ct. App. 1972)[18]. *Lozoff* supports the City, not the Hotel.

Lozoff was a 236.13 (5) certiorari case (not a mandamus case) to review the Village's failure to approve a preliminary plat within the number of days that the subdivider had agreed to extend the statutory deadline to under 236.11 (1)(a)[19], and where the only action the Village took within that extended time period was to "table consideration" of the plat, and where the Village had not let the subdivider know prior to the expiration of that extended time period about the defects (statutory and ordinance violations) in the plat. While the Village ultimately did vote later (after the agreed-upon extended time period) to reject the subdivider's plat, during the applicable, agreed-to, time period, the Village's only action was tabling consideration. The Court in *Lozoff* said that there "is the presumption, *in the absence of evidence to the contrary*, that..."

[18] At 55 Wis.2d 64,69, the Lozoff Court noted that the Village contended that it would be unconstitutional if the Court held 236.11 (2) as requiring approval of a preliminary plat that violated municipal ordinances. This too was raised in *Barg*. The Court in *Barg* recognized that per Wis. Stat. 236.11 (2), subdivision of land must comply with municipal ordinances, as the City argued in its initial brief. The Court, constitutionally, must respect separation of powers and require compliance with valid laws, and not allow slander of the City's right, title and interest in W. Barnard Ave.

[19] In *Lozoff,* the subdivider extended the 236.11 (2) then 40-day deadline (that statute was later changed and currently provides for a 60-day deadline) by one day from January 3, 1971 to January 4, 1971. 55 Wis.2d 64, 66-67.

the Common Council will discharge its duties within the statutory time period (or within agreed upon extensions of that time period) to review land divisions and to notify subdividers of defects (violations of ordinance and statutes), and that when the Council fails to approve or reject within the statutory period (and within any agreed extension of that period), and when "there were no unsatisfied objections…within that period," the Court may order approval of the plat. 55 Wis.2d 64, 69. The Court said that "some definite action must be taken by the municipality" within the statutory period (and agreed upon extensions), and that "Merely tabling consideration of the plat is not such definite action" as is required. Id at 70. The Court held that "The record discloses no objection to the alleged lack of detail in the plat…" and "If the village objected to technical deficiencies in the plat it should have noted that objection prior to the expiration of…" the statutory deadline and any agreed upon extension of that deadline.

Lozoff supports the City. In the case at hand, the Hotel did agree to time extension which must be respected. But even without that time extension, within the 90 days from the Hotel's submission of CSM No. 2, the Council did far more than "table consideration" of the Hotel's CSM. The Council, through its ZND Committee, took action, letting the Hotel know (providing actual notice[20] to the Hotel) about its disapproval of CSM No. 2 and letting the Hotel know the reason why (i.e, the objection, the failure to show W. Barnard Avenue extended). The Hotel admits this[21] and that's why the Hotel, also before the expiration of the 90-days from its submission of CSM No. 2, tendered CSM No. 3 in an effort to correct that known defect.

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[20] At 55 Wis.2d 64, 70, the Court in *Lozoff* found that, in that case, the Village had not provided the subdivider with any "written statement" "or notice of rejection" within the agreed upon extended time period so that the subdivider in that case didn't have "the opportunity to cure any objections to the plat." In the case at hand, the Hotel had actual notice and opportunity to cure before the 90 days. Indeed, the Hotel tendered CSM No. 3 before the 90 days.

[21] Certiorari Complaint, Ex. E, the Hotel lawyer's June 15, 2017 letter to the Clerk, stating that the Council's ZND Committee on June 13, 2017, "voted to recommend that the matter be placed on file. The reason offered by Committee for the recommendation was that the CSM is inaccurate because Lot 2 of the proposed CSM does not show a small strip of West Barnard Avenue that is in the City's records as being public right-of-way…" The Hotel lawyer's letter goes on to say that it appeared that the City "changed its mind about vacating" that right-of-way, and

Regarding standing and the absence of necessary party DOT in this case (the owner of the Offer Land), while the Court in *Lozoff* did rule that subdivider Emanuel Lozoff had standing to bring the certiorari action as an "aggrieved person" under 236.13 (5) because he held an option to buy the property to develop it, there was no showing in the *Lozoff* case about the terms of the option to purchase. Here, however, the City explained that the Offer between the Hotel and the DOT (paragraph 5.c., DIB-2, Hagopian Affidavit) requires the DOT to sign petitions, and the DOT in this case did not sign the demand letter to the Clerk or any of the Complaints that the Hotel filed, so standing remains an issue and a hurdle.

Barg (S. Ct. 1958) and *Lozoff* (Ct. App. 1972) support the City. They also predate *Columbia* (Ct. App. 1979) and *Wood* (WI Supr. Ct. 2003) (City may reject plat that does not comply with Wis. Stat. Ch. 236 and MCO Ch. 119). Wis. Stat. 236.13 (1). See, also, *KW Holdings LLC v. Town of Windsor and its Town Board,* 2003 WI App 9. In *KW,* a subdivider certiorari appeal under 236.13 (5), the Court recognized validity of, and respected, the subdivider time-extension agreement (para. 3), respected the Town's ability to include conditions to plat approval (such as ordinance compliance) (para. 12, 18, 20, 23, 24), and understood that the Town had provided notice to the subdivider of what must be done for plat approval (i.e. opportunity to cure objections to, and defects in, the plat) (para. 13).

VII. FAILURE TO RESPOND TO CERTIORARI ARGUMENTS. At HRB-fn 1, the Hotel says it "addresses the City's arguments regarding the mandamus action and consolidation" and that the Hotel will respond to the City's certiorari arguments if the Court grants consolidation. The Hotel's failure to respond should be deemed admission of City's arguments regarding certiorari. See footnote 6.

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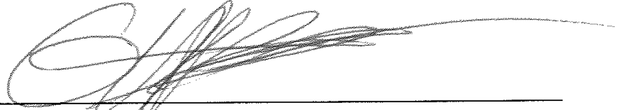
the Hotel tendered CSM No. 3 in an effort to correct for CSM No. 2's defect by showing West Barnard Avenue extended.

VIII. WIS. STAT. 893.80. The Hotel's reliance upon *Elkhorn Area School District v. East Troy Community School District,* 127 Wis.2d 25, 377 N.W.2d 627 (Ct. App. 1985) is misplaced. That is a property-tax case under Wis. Stat. 74.78, not a land division or CSM case. Moreover, the Court in *Elkhorn* ruled that "Mandamus actions also will not be allowed when there is another adequate remedy at law." In its initial brief, the City explained that the Hotel does have an adequate remedy at law. The Hotel can properly "submit" under MCO 11-4-2 to DCD, a CSM that complies with Wis. Stat. Ch. 236 and MCO Ch. 119, thereby addressing the known defects in CSM No. 2, and allowing the Council to properly consider a lawful CSM. If the Hotel is still aggrieved by a denial or conditions by the Council, then there will be ripeness, and if the Hotel satisfies standing, the Hotel can appeal by certiorari under Wis. Stat. 236.13 (5). *Barg, Lozoff, KW.*

IX. CONCLUSION. The City is entitled to consolidation, dismissal of Hotel's Complaints, and quashing of mandamus attempt. The Hotel signed the time-extension agreement mooting mandamus and Court-ordered CSM approval. The Council has no duty to approve a CSM that violates Wis. Stat. Ch. 236 or MCO Ch. 119. The Council, through its ZND, even within the irrelevant 90-days (irrelevant due to the time-extension agreement) provided actual notice to Hotel of defects in CSM No. 2, allowing it notice and opportunity to cure. The Hotel lacks ripeness, and failed to avail itself of cure and adequate remedy at law, failed to name proper parties, failed to have the DOT sign the Complaints per the Offer (no standing), waived rights and is estopped.

Dated August 23, 2017 and signed in Milwaukee, Wisconsin.

CITY OF MILWAUKEE



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