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June 20, 2012

Ms. Martha L. Brown  
Deputy Commissioner  
Department of City Development  
809 North Broadway, 2<sup>nd</sup> Floor  
Milwaukee, WI 53202-3617

Re: Issuance of Demolition Permit for 300-318 West Juneau Avenue

Dear Ms. Brown:

In your letter dated June 13, 2012 to the City Attorney's Office you posed three questions and requested a formal opinion in response to those questions. The questions relate to the issuance of a demolition permit for property located at 300-318 West Juneau Avenue (the "Sydney Hih Complex"). Your questions and our responses are as follows:

1. **MCO Ch. 320-21-13, which describes the process of interim historic designation, limits the Department of City Development Commissioner's authority to issue a demolition permit during the process of interim designation. However, MCO Ch. 320-21-16 limits the application of all other portions of Ch. 320 when "the order of any governmental agency" has been issued "for the purpose of remedying emergency conditions determined to be dangerous to life, health or property." A letter from Department of Neighborhood Services Commissioner Art Dahlberg to the owner of property 300-318 W. Juneau Avenue, dated June 11, 2012, indicates that "the evaluation of the structure showed that the building met the criteria of an emergency raze." Specifically with reference to that property, which received interim historic designation on June 7, 2012, please clarify whether the raze order issued for the property on April 19, 2012, affects the Commissioner's authority to issue a demolition permit.**

MCO 320-21-16 is somewhat of an escape hatch for dilapidated and dangerous buildings from the requirements of the historic preservation ordinance. It reads as follows:

**CERTAIN CHANGES NOT PROHIBITED.** Nothing contained in this section [MCO 320-21] shall prohibit the making of any change of any exterior or architectural feature on a *designated* historic site, historic structure or in a historic district pursuant to the order of any governmental

agency . . . for the purpose of remedying emergency conditions determined to be dangerous to life, health, or property. (emphasis added)

This subsection of the municipal code basically states that nothing in MCO 320-21, which is the City's historic preservation ordinance, prohibits the making of any change – which would include demolition – to a structure *designated* as historic if that change is done pursuant to the order of a government agency to remedy emergency conditions at the property. With regard to the Sydney Hih Complex, prior to the Historic Preservation Commission (“HPC”) approving interim historic designation for the structure on June 7, 2012, the Sydney Hih Complex was not a “designated” historic structure. Therefore, prior to June 7, 2012, MCO 320-21-16 did not apply to the Sydney Hih Complex.

As noted in your question, another subsection of the historic preservation ordinance, MCO 320-21-13, describes the process for interim designation and includes a requirement that demolition permits be withheld as the building is going through the interim designation process. MCO 320-21-13-c reads, in part, as follows:

Demolition Permit Withheld. The commissioner of city development shall not issue a permit for the demolition of the subject structure until the conclusion of the hearing and the entry of the interim designation decision provided for in par. a and the exhaustion of either the appeal to the common council described in par. d, or the expiration of the time for taking an appeal.

The purpose of this subsection of the ordinance is to protect a potentially historic building from demolition while the HPC takes the time to determine whether it is worthy of interim designation. However, once a structure that is subject to an order of a government agency requiring remedy of an emergency condition – such as a raze order – is “designated” as historic, whether it be a final or interim designation, nothing else in the historic preservation ordinance applies to that structure pursuant to MCO 320-21-16. All portions of the historic preservation ordinance, including MCO 320-21-13-c, are superseded by MCO 320-21-16 due to the emergency condition at the property determined to be dangerous to life, health or property.

With regard to the Sydney Hih Complex, there is no question as to whether emergency conditions determined to be dangerous to life, health or property exist. An “emergency condition” is one that requires immediate or urgent action (*See* “emergency.” *Merriam-Webster.com*. 2012. <http://www.merriam-webster.com> (June 20, 2012)). A raze order giving the property owner 20 days to raze the Sydney Hih Complex was issued on April 19, 2012. One could conclude that the issuance of the raze order alone is sufficient evidence of the emergency condition required by MCO 320-21-16. However, with regard to the Sydney Hih Complex, there is even greater evidence of the existence of emergency conditions.

According to the June 11, 2012, letter of Commissioner Art Dahlberg (a copy of which is attached), evaluation of the Sydney Hih Complex showed that “the building met the criteria of an emergency raze” pursuant to MCO 218-4.5 even though the raze order was not issued as an emergency raze order. The three criteria Commissioner Dahlberg is required to consider for an emergency raze order under MCO 218-4.5-2-b are as follows: (1) whether the structure is unstable, (2) the proximity of the structure to adjoining properties and public right-of-way and (3) whether the cost to repair the structure exceeds 100% of the structure’s value. If the third criteria is met, it is “presumed that the structure is unsafe and poses *imminent* risk to the health, safety or welfare of the public” pursuant to MCO 318-4.5-2-b-3 (emphasis added). According to his letter of June 11, 2012, Commissioner Dahlberg found that all three criteria were met. His letter states that several areas of the Sydney Hih Complex have a “high enough collapse potential as to restrict personnel from entering those areas,” that pedestrian overhead protection has been installed around the building in an “attempt to mitigate risks that the structure poses to pedestrians,” and he found that the cost to repair the Sydney Hih Complex is estimated at 139% of the structure’s value. Clearly, Commissioner Dahlberg’s findings show that the Sydney Hih Complex qualified for an emergency raze order and has emergency conditions determined to be dangerous to life, health and property.

Because the Sydney Hih Complex is the subject of a raze order issued for the purpose of remedying emergency conditions determined by Commissioner Dahlberg to be dangerous to life, health or property and because the Sydney Hih Complex was designated as historic on an interim basis by the HPC, MCO 320-21-16 now applies to the Sydney Hih Complex and the provisions of MCO 320-21-13-c requiring the demolition permit to be withheld no longer apply to the Sydney Hih Complex. Therefore, the demolition permit for the Sydney Hih Complex can now be issued.

**2. The owner of property at 300-318 W. Juneau Avenue has filed an appeal of the interim historic designation with the Common Council. If the Council upholds the interim designation, does the Commissioner have the authority to issue a demolition permit during the 180-day period of interim designation? If the Commissioner has such authority, is the building owner required to follow the Certificate of Appropriateness procedure described in MCO 320-21-11?**

As stated in the response to your first question above, the demolition permit can be issued now regardless of the appeal process pending with the Common Council pursuant to MCO 320-21-16. Even if the Common Council overturns the interim designation making MCO 320-21-16 no longer applicable to the Sydney Hih Complex since it would not be “designated,” the demolition permit could be issued pursuant to MCO 320-21-13-f which states, “If the common council reverses a decision on interim designation, the commissioner of city development may then issue any permits duly applied for pursuant to s. 200-26-1.” Regardless of the outcome of the appeal and even if the property owner

had not filed an appeal, the demolition permit can be issued immediately pursuant to MCO 320-21-16.

Regardless of when and under what authority the demolition permit is issued, the owner of the Sydney Hih Complex is not required to follow the certificate of appropriateness procedure described in MCO 320-21-11. As stated earlier, due to the raze order and the emergency conditions found at the Sydney Hih Complex, MCO 320-21-16 supersedes all other provisions of MCO 320-21 including the certificate of appropriateness requirements in MCO 320-21-11. If the Common Council overturns the interim designation on the Sydney Hih Complex, and a demolition permit is issued pursuant to MCO 320-21-13-f, the property owner still does not need to follow the certificate of appropriateness procedure because the building would no longer have any type of historic designation and would not fall under the provisions of MCO 320-21 at all.

**3. MCO Ch. 200-26-5 discusses requirements related to application for a demolition permit. The section requires publication of information about the application, aldermanic notification, and a 16-day waiting period before the permit may be issued. MCO Ch. 200-26-5-c exempts buildings subject to a raze order from these requirements. Within the same code section, MCO Ch. 200-26-5-d exempts buildings that are *not* locally designated as historic properties from these requirements, and Ch. 200-26-5-e exempts properties determined not to be *eligible* for historic designation from these requirements. However, Ch. 200-26-5-e specifically *excludes* buildings aged 50 and older from exemption. Are all buildings subject to a raze order, including locally-designated historic buildings and buildings aged 50 and older, exempt from the requirements of Ch. 200-26-5?**

MCO 200-26-5 requires various types of notifications when an application for a demolition permit is received. That section also lists several exemptions to the notice requirements. The exemptions are found in subsections a – e of MCO 200-25-5. The exemptions are independent of each other, meaning that if the criteria of at least one of the exemptions listed are met, the notice requirements do not apply. Subsection MCO 200-25-5-c states, “Structures for which an order has been issued for razing or rehabilitation in accordance with s. 218-4, or those which are in a condition that would constitute the basis on which an order under s. 218-4 would be issued.” With regard to the Sydney Hih Complex, a raze order in accordance with section 218-4 was issued on April 19, 2012, and that alone is enough to exempt the Sydney Hih Complex from the notice requirements that are typically followed when the City receives an application for a demolition permit.

While the outcome of the appeal process by the Common Council may result in the Sydney Hih Complex not being designated as historic, which would perhaps implicate the exemptions found in subsection d or e of MCO 200-26-5, the existence of the raze

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order on the property is enough to exempt the Sydney Hih Complex from the notice requirements pursuant to MCO 200-26-5-c.

If you need further clarification on any of these issues, please feel free to contact our office.

Very truly yours,



GRANT F. LANGLEY  
City Attorney



MARY L. SCHANNING  
Assistant City Attorney

Encl.  
MLS/ml:182053  
1050-2012-1490



Department of Neighborhood Services  
Inspectional services for health, safety and neighborhood improvement

Art Dahlberg  
Commissioner  
Thomas G. Mishefske  
Operations Manager

June 11, 2012

Friebert, Finerty & St. John, S.C.  
Two Plaza East, Suite 1250  
330 East Kilbourn Avenue  
Milwaukee, WI. 53202

Re: 300-318 W. Juneau Avenue

Dear Mr. Randall:

This letter is in response to your letter dated June 11, 2012 in which you inquired about the thresholds that the Department of Neighborhood Services (DNS) used when the raze order dated April 19, 2012 was issued for the above referenced property.

As stated in your letter there are several cost of repair to assessed value ratios referenced in the Milwaukee Code of Ordinances (MCO) section 218. First, section 218-4(2b) identifies a ratio of 50% or more of cost to repair a property so it could be occupied versus the assessed value is deemed unreasonable and thus the MCO presumes such a property to be a public nuisance. Second, section 66.0413(3)2d defines the threshold for a historic property to be presumed a public nuisance to be 85% repair costs versus assessed value. Third, MCO section 218-4.5 establishes that emergency raze orders may be issued when the property represents an imminent risk to the health, safety and welfare of the public. Subsection b-3 states that when the cost of repairing the structure exceeds 100% of the structures value, it shall be presumed that the structure is unsafe and poses an imminent risk to the health, safety and welfare of the public.

In terms of the referenced address, DNS estimated the repair costs at \$360,000 while the adjusted assessed value is \$258,982.78. This results in the cost of repairs being 139 % of the assessed value. The order that was issued on April 19<sup>th</sup> deemed it a public nuisance since the repair costs exceeded 50% of the assessed value. The order did not reference the 85% threshold since at the time of writing of the order the property did not carry a historic designation. As described above the repair estimate did exceed the 85% threshold for a historic building to be presumed a public nuisance. While the order was not written as an emergency raze order under MCO 218-4.5, the evaluation of the structure showed that the building met

the criteria of an emergency raze. Specifically the MCO 218-4.5(2b) directs the commissioner of DNS to consider the following when making the determination if the emergency raze provisions applies:

- b1) The extent that the building is unstable. *As demonstrated in my letter to Sigma Engineering on June 4<sup>th</sup>, DNS has deemed several areas as having a high enough collapse potential as to restrict personnel from entering those areas.*
- b2) The proximity of the structure to adjoining properties and the public right-of-way. *The structure is immediately adjacent to public sidewalks on its south and east exposures. Pedestrian overhead protection has been provided on those exposures in an attempt to mitigate risks that the structure poses to pedestrians.*
- b3) The cost of repairing the structure. *If the cost of repairing the structure exceeds 100% of the structure's value, it shall be presumed that the structure is unsafe and poses an imminent risk to the health, safety, and welfare of the public. As mentioned earlier the cost to repair has been estimated at 139 % of the structures value.*

While the order was not issued under MCO 218-4.5, the condition of the building and its proximity to the public right-of-way met all the criteria to issue an emergency raze order under MCO 218-4.5. It was issued under MCO 218-4 since DNS was not seeking relief from the Department of Natural Resources from specific asbestos abatement requirements that are applied to non-emergency razes.

I hope this letter answers the questions you raised in your letter. If you need further information do not hesitate to contact me at 414-286-2543.

Sincerely,



Art Dahlberg  
Commissioner

C: City Atty. Greg Hagopian