

# CITY OF MILWAUKEE

Form CA-43

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October 13, 2003

*Via Hand-Delivery*

The Honorable Common Council  
of the City of Milwaukee  
Room 205 – City Hall

**RE: “Notice of Breach Pursuant to Agreement for Sale Between the City of Milwaukee and Kilbourn Tower, LLC, Dated: March 23, 2003”; CC File Nos. 030436 and 030580**

Dear Council Members:

At the meeting of the Zoning Neighborhood Development Committee on October 7, 2003, this office presented its analysis on the issues raised in an October 1, 2003 letter to the City Clerk denominated “Notice of Breach Pursuant to Agreement for Sale Between the City of Milwaukee and Kilbourn Tower, LLC, Dated: March 23, 2003” (“Notice”). The Notice was placed in the above-referenced files as a communication related to the file subject matter. At the Zoning Neighborhood Development Committee, this office indicated that if requested, it would put its opinion in writing and have it available for all Council members before the October 14, 2003 meeting. The ZND Committee requested such written opinion and this then is that opinion.

The Notice can be best described as making allegations that the City, in exercising its usual approval of zoning changes (under powers delegated to it in 62.23(7), Stats. and in its zoning ordinance, Ch. 295, Milwaukee Code of Ordinances (“MCO”)), will violate implied promises in an “Agreement for Sale – City of Milwaukee and Kilbourn Tower, LLC, 923 East Kilbourn Avenue, Milwaukee, WI” (“Agreement for Sale”). This Agreement for Sale dealt with the conveyance of City-owned property at 923 East Kilbourn Avenue, Milwaukee, to Kilbourn Tower, LLC and it is this property which adjoins the property (University Club Tower site) that is the subject of the proposed zoning change in these Council files.

While not pointing to any express provision in the Agreement for Sale that was or could be violated, the Notice makes claim that if the City approves the detailed planned development

("DPD") zoning change for the University Club Tower, it would commit a breach of an implied promise to refrain from hindering or obstructing Kilbourn Tower's performance under the Agreement for Sale, thereby injuring Kilbourn Tower's right to receive the fruits of the contract. As foundation for this claim, the Notice cites to sec. 5(a) of the Agreement for Sale and the attached Exhibit D provisions requiring the development of the 923 East Kilbourn parcel, and claiming that those provisions would be impaired if the City acted to approve the proposed zoning change on the adjacent University Club Tower parcel. The Notice also goes further and demands that the City assure Kilbourn Tower, LLC that it will not permit University Club Tower to locate its high-rise development as proposed in the DPD.

Clearly, the Notice document does not, and cannot, point to any anticipatory breach by the City of an express obligation in the Agreement for Sale. The Agreement did not commit the City to any particular position with respect to zoning matters on adjacent parcels. Indeed, the only mention of "zoning" in the document occurs in Sec. 2(a). and makes the deed for the 923 East Kilbourn Avenue property subject to zoning for that parcel.<sup>1</sup> Therefore, while Sec. 5(a) is a requirement that the redeveloper construct a residential high-rise condominium on the 923 East Kilbourn Avenue parcel consisting of some 74 units, and together with Exhibit D describes in more detail the project, no reasonable reading of those provisions would evidence any implied promise on the City's part to surrender its discretion with respect to proposed zoning changes on adjacent parcels.

In addition, the Agreement for Sale required that Kilbourn Tower LLC have its construction financing in place before conveyance of the 923 East Kilbourn parcel (thereby assuring that the developer had the funds necessary to construct the project). Site conveyance was further conditioned on Kilbourn Tower obtaining the necessary subterranean and air rights leases necessary for the proposed development from the City and any other governmental approvals necessary to commence and complete the development. All construction financing contingencies, none of which relating to zoning on neighboring parcels, were satisfied by the developer, thereby evidencing the developer's full capability to undertake the project. The City also provided all requested additional assistance by approving the necessary subterranean and air rights leases and a street vacation.

In short, factually there is nothing that exhibits any lack of good faith and fair dealing or cooperation on the part of the City with Kilbourn Tower. The facts evidence an orderly progression toward closing and full cooperation by the City in addressing the conditions required to be accomplished before closing.

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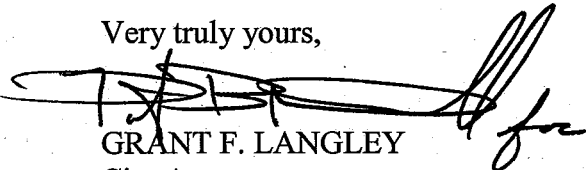
<sup>1</sup> Making the conveyance subject to the zoning for the property is a standard provision in real estate transactions.

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As noted above, the matter of zoning on the adjacent University Club Tower parcel was never addressed in the Agreement for Sale, nor in negotiations with Kilbourn Tower, LLC leading up to the Agreement for Sale<sup>2</sup>. However, had the developer attempted to interject that issue, this office would have strongly advised against inclusion of any such provision in an agreement. In *Zupancic v. Schimenz*, 46 Wis.2d 22, 28 (1970), the Wisconsin Supreme Court noted that "a contract made by a zoning authority to zone or rezone or not to zone is illegal and the ordinance is void because a municipality may not contract away its governmental powers and functions or thus inhibit the exercise of its police or legislative powers." While the *Zupancic* case dealt with allegations of contract zoning by the City of Milwaukee with the landowner who was seeking a zoning change for his land, it is clear that the case also stands for the proposition that the municipality may not covenant away its governmental powers and functions with respect to zoning. In the matter before us, the developer's suggestion that the Common Council impliedly had derogated its powers and functions with respect to zoning and implicitly agreed to a particular course of action with respect to zoning issues on the adjoining University Club Tower site, would have, in our opinion, resulted in illegal contract zoning. Such a strained interpretation of the City's "implied" obligations under the Agreement for Sale would be rejected by the courts.

Based on the foregoing analysis, it is our opinion that the City has not breached the Agreement for Sale, expressly or implicitly, and that the Common Council should exercise its usual review of proposed zoning changes and make its reasonable determination based on the contents of the file before it.

Very truly yours,



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<sup>2</sup> Even though at the time the Agreement for Sale was being negotiated, a high rise residential project had already been publicly proposed for the University Club site.