LAW OFFICES OF JOSEPH R. CINCOTTA
757 North Broadway - Suite 300
Milwaukee, Wisconsin 53202
Telephone: 414-416-1291 Email: jrc4@chorus.net

February 11, 2008

VIA MESSENGER AND EMAIL

Attorney Greg Hagopian
City Attorneys Office
200 East Wells Street
Milwaukee, WI 53202

Re: *McCarthy et al v City of Milwaukee and DAPL LLC*, 07-CV-14155.Downer Avenue Development Project - GPD No. 060705; DPD No. 071365 Reconsideration of Parking Ramp DPD

Dear Attorney Hagopian:

Regarding the above-referenced file number, this file apparently raises the issue of the re-zoning at the parking ramp property (2574-2590 Downer Ave.). The notice of this issue has been substantially different than is the typical practice of the City. Specifically, it appears that the subject matter (i.e. design plans and narrative) of the resolution was not posted and available on the City's Website until quite recently. Can you explain why this is so?

In addition, it appears that the resolution in No. 071365 would contemplate either an affirmation or a rejection of the zoning described in the resolution, both at the CPC/ZND level and the Common Council. A rejection would further confirm that the permits and certificates being operated under at the site are void. It would seem appropriate for the City to halt construction while the subject matter of this resolution is taken up, and on behalf of my clients, we would request that the City consider imposing such a stay.

Also, I believe you and your office concur that if it is determined that the rezoning or Certificate of Appropriateness are declared void by the Court, or by the City itself, the City and perhaps the Court could, among other things, order the building razed or modified. Statements have been made at public meetings suggesting that the elected and other officials reviewing the parking ramp DPD, including the pending resolution in file No. 071365, are constrained or even precluded from voting *against* the existing design because of the ongoing construction and the threat of a lawsuit by the developer. My understanding of the City's zoning code and applicable Wisconsin Supreme Court rulings is that such a lawsuit would not be successful unless the private property owner has obtained vested rights in its preferred development. It is our position that no vested rights have attached to the permits or certificates previously issued by the City DCD. Because

of that, the City is fully empowered to reject the rezoning within No.071365, should it determine that there have been mistakes made and violations of proper procedures or otherwise. MCO §295-309(3) and (5) would appear to make the rezoning void, in such a case. This power was confirmed in the recent decision in *Village of Hobart v. Brown County*, 281 Wis.2d 628, 641 (2005). In that case the Supreme Court ruled that:

> *Erroneous acts of municipal officials do not afford a basis to estop the municipality from enforcing its ordinances enacted pursuant to the police power. ...In other words, citizens have a right to rely upon city officials not having acted in violation of the ordinance, and, when such officials do so act, their acts should not afford a basis for estopping the city from later enforcing the ordinance."*

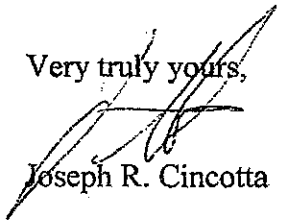
Given this, it would seem inappropriate for a perceived threat of litigation by the developer to be the basis for a vote to approve a rezoning that allows for the developer's preferred design and the construction that has already taken place. Obviously it would be extraordinarily bad public policy if the mere *threat* of a lawsuit was used as a basis for approving any ordinance, one way or the other. Of course if what is being contemplated is against some other existing law or ordinance, that is obviously relevant. But the mere threat would not seem a proper consideration.

In addition, regarding the suggestions made that the current design was modified to appease and even satisfy the objections of one or more of the adjoining property owners, that is not accurate, as you know. Indeed the testimony of the developer's partner, DAPL, LLC, is that the current design was pursued by the developer, even though DAPL was aware that the adjoining property owner did not concur or agree that it was satisfactory to mitigate the severe impacts on his property and home. No one from the City staff worked with or seriously considered my clients objections and certainly did not work with them "up to the very day that permits were issued to try to make the building as accommodating as possible," as has been stated. It also appears that the concerns of other adjoining property owners were also dismissed or not genuinely considered, contrary to statements made by City staff.

Finally, I want you to be aware that the structure is now standing five stories high. In place of a snow chute, what is more appropriately characterized as a "snow-dump" has been installed. This is simply a cut out portion of the top deck wall that will allow snow to be plowed over and dumped off the fifth floor roof deck. Given the orientation of the opening, the snow will fall onto what remains of the tree, and in all likelihood directly on the neighboring property in large volumes. The situation appears to be an obvious danger and public safety issue. Further, contrary to the suggestions of the architect involved, there does not appear to be any way for a truck to receive the dumped snow, which apparently will simply be left to accumulate where it is dumped.

Please include this correspondence in the above-referenced file. I also look forward to any response regarding the City's position on the applicable law pertinent to this matter.

Very truly yours,



Joseph R. Cincotta

Cc: Attorney Alan Marcuvitz (via email)
Attorney Tom Burke (via email)
Attorney Jeffrey Aiken (via email)

LAW OFFICES OF JOSEPH R. CINCOTTA
757 North Broadway - Suite 300
Milwaukee, Wisconsin 53202
Telephone: 414-416-1291 Email: jrc4@chorus.net

February 13, 2008

VIA MESSENGER AND EMAIL

Attorney Greg Hagopian
City Attorneys Office
200 East Wells Street
Milwaukee, WI 53202

Re: ***McCarthy et al v City of Milwaukee and DAPL LLC*, 07-CV-14155; Downer Avenue Development Project - GPD No. 060705; DPD No. 071365 Reconsideration of Parking Ramp DPD**

Dear Attorney Hagopian:

As a supplement to my correspondence of February 11, 2008, please include the following information and objections for consideration by ZND and the Common Council at any upcoming hearings on the above-referenced file.

1. The design in the DPD and existing construction of the parking ramp violate MCO §295-907(3)(f) and (h). Those subsections provide:

> Every planned development shall meet the following standards:
>
> 295-907(3)(f). Screening. Residential uses shall be screened from existing or proposed businesses or industrial uses on or adjacent to the site. Screening shall consist of decorative walls, fences, berms, hedges, shrubs, trees or combinations thereof appropriate to the surrounding neighborhood.
>
> 295-907(3)(h) Circulation, Parking and Loading. Traffic circulation facilities shall be planned and installed consistent with the comprehensive plan. Adequate access for pedestrians and public and private vehicles shall be provided. Parking and loading facilities shall be located near the uses they support and shall be adequately screened and landscaped in a manner which meets or exceeds the requirements of this chapter. ...

2. The City and specifically the Department of City Development (DCD) failed to negotiate with the State Historic Preservation Officer as required by state statute. This failure has continued since the introduction of file No. 701365 and its precursors. The failure to negotiate was caused by the actions of DCD staff that either knew or should have known that negotiation was required. In Plaintiffs' view, the State's November 2007 correspondence does not cure this violation.

3. The City, through its stand alone agency, the DCD, appears to have made a contractual commitment requiring it to enact the zoning within this DPD, and other DPDs located within GPD No. 060705, in effect guaranteeing that the zoning will be amended and building permits issued so as to allow the developer to build the development that it prefers. This is not allowed under Wis. Stats. §62.23(7) and applicable law. The police power of a governmental body can not be contracted away. *See State ex rel. Zupancic v. Schimenz*, 46 Wis.2d 22, 28 (1970).

4. Inaccurate information has been provided to the ZND and has formed the basis for the previous decisions regarding the substance of the DPD, including that: 1) the status of negotiations with the State of Wisconsin Historic Preservation Officer were that the State was planning to close its file on the matter as of May 14, 2007 or shortly thereafter, 2) that the developer had no ability to alter the footprint and overall design of the parking ramp, 3) that certain neighboring property owners were satisfied and had approved of the proposed design, and 4) that city officials and staff and the developer had worked to accommodate the neighbors up to the day the permits for construction were issued in an effort to be as accommodating as possible.

Further, please note that it appears that based on the testimony of representatives of DAPL, LLC, the currently proposed design, including no-basement an adjusted footprint and fewer parking spaces, was pursued unilaterally and not based on any agreement between DAPL and the adjacent property owner.

5. The Certificate of Appropriateness issued to the developer is a separate matter and not controlled or dependent on whether this DPD is approved or denied, however it is under challenge.

6. The structure as currently constructed contains a snow dump cut-out located on the fifth level of the parking ramp. The snow dump is an obvious safety hazard to the adjacent property and the public. Even if the DPD is approved, this part of the structure should be modified.

As noted in my earlier submittal, and pertinent to preserving any and all remedies of the Plaintiffs, applicable ordinances and court decisions appear to empower the City, including the ZND, to reject the DPD as proposed in the above-referenced file despite the ongoing construction at the property.

Very truly yours,

Joseph R. Cincotta

Cc: Attorney Alan Marcuvitz (via email)
Attorney Tom Burke (via email)
Attorney Jeffrey Aiken (via email)

Thomas B. Burke

Attorney at Law
788 North Jefferson Street
Milwaukee, Wisconsin 53202
(414) 224-5060

Fax: (414) 224-8208

February 13, 2008

Hand Delivered

To the Honorable Common Council
Of the City of Milwaukee
Room 205 – City Hall

Ald. Michael S. D'Amato, Chairman and
Members of the Zoning Neighborhood
and Development Committee
Room 205 – City Hall
200 East Wells Street
Milwaukee, WI 53202

Re: Special Meeting of the ZND on February 14, 2008
File No. 071365

Ladies and Gentlemen:

Please see the attached memorandum for filing on behalf of DAPL, LLC regarding the referenced file. Thank you.

Very truly yours,

Thomas B. Burke

Thomas B. Burke

Enclosures

cc: (via e-mail)
Ald. Willie C. Wade
Ald. Michael J. Murphy
Ald. Ashanti Hamilton
Ald. Robert J. Bauman
Gregg Hagopian, Esq.
Vanessa Koster

MEMORANDUM

TO: Zoning, Neighborhoods and Development Committee ("ZND")

FROM: Thomas B. Burke, counsel for DAPL, LLC

RE: Common Council File No. **071365**
Resolution to Ratify and Reaffirm Prior Approval of Minor Modification

---

Dear Mr. Chairman and Committee Members:

I am one of the lawyers for DAPL, LLC, the owner and developer of the mixed-use retail and parking garage at 2574-2590 North Downer Avenue (the "DAPL Project").

The question before the ZND Committee at its special meeting on February 14, 2008 is consideration of the referenced file to *ratify* and *reaffirm* the identical prior common council action taken last November permitting certain minor modifications to the DAPL Project.

While the common council may ratify and reaffirm its identical prior action, DAPL respectfully suggests that the common council is without authority to *reconsider* its prior actions concerning the DAPL Project because the common council unanimously rejected reconsideration on the date the minor modifications were approved and the same action may not be reconsidered more than once.

DAPL also respectfully suggests that the common council is without authority to *rescind* its prior action. According to the Supreme Court of Wisconsin, DAPL has a vested right to develop its property according to the requirements of the current zoning approved by the common council.[1] Under Wisconsin law, that zoning is presumed valid.[2] Therefore, DAPL's rights remain *unless* and *until* the current zoning is held invalid by a court.

A party challenging the validity of zoning faces a steep, uphill battle. To date, Atty. Kovac and his co-plaintiffs have been unsuccessful in their attempt to invalidate the current zoning for the DAPL Project. In fact, the circuit judge's order ***denying*** their motion for the temporary injunction evidences that the plaintiffs' attempt to invalidate the zoning and permits for the DAPL Project will likely ***not*** succeed on its merits. Ignoring the heavy presumption in favor of the validity of zoning under Wisconsin law and the circuit judge's denial of their motion, the lawyer for Atty. Kovac and his co-plaintiffs states that DAPL has no vested rights because, *in his opinion*, both the building permit was issued improperly, and the underlying zoning are invalid. What this lawyer conveniently fails to mention is that unless and until Atty. Kovac and his co-plaintiffs are successful in court, a result that looks highly improbable at this point, the zoning and the permit remain valid and DAPL's rights remain vested. Therefore, the common council is without authority to rescind its prior action because to do so would violate DAPL's current and vested property interest in its permit.

Finally, each of the modifications referenced above (which has brought us back here today) was undertaken to assuage the neighbors after DAPL's principal, Joel Lee, met with one of the neighbors, Atty. Peter Kovac, at the Mayor's request. Atty. Peter Kovac and his co-plaintiffs successfully extracted certain modifications to the DAPL Project design from the City and DAPL, and, are now are using these modifications as a basis upon which to sue both the City and DAPL. Their tactics are akin to a child who murders his parents and than pleads for mercy because he is an orphan.

A more detailed discussion of DAPL's position is set forth in the attached memo. Thank you for your consideration of these materials.

---

[1] *Lake Bluff Partners v. South Milwaukee*, 197 Wis.2d 157 (1995).

[2] *See Wis. Stat.* §62.23(7) (the validity of any ordinance, resolution or regulation enacted or adopted under this section, shall be liberally construed in favor of the City); *see also Step Now Citizens v. Planning and Zoning*, 264 Wis. 2d 662, 663 N.W.2d 833 (Ct. App. 2003).

I. BACKGROUND

DAPL, LLC ("DAPL") is the owner and developer of the mixed-use retail and parking garage (the "Project") at 2574-2590 North Downer Avenue (the "Real Property"). Prior to the City of Milwaukee ("City") approving the sale of this Real Property to DAPL, the Real Property was zoned Local Business (LB-2). That zoning permitted the construction of a mixed-use retail and parking garage as is currently being constructed by DAPL.

The City nevertheless required that DAPL's Real Property be included within a General Planned Development ("GPD") covering certain projects proposed along Downer Avenue so that the City could control the entire development of the area as a whole instead of an a project by project basis. The GPD was properly approved and subsequently a Detailed Planned Development (the "DPD") was properly approved when the design details for the Project were produced. The DPD permitted the construction of the Project on the Real Property along its entire eastern lot line on Belleview Avenue with underground parking and an entry ramp at its eastern lot line on Belleview Avenue.

During the approval process for this Project, neighbors of the Real Property, led by Attorney Peter Kovac, objected, primarily because: (1) they wanted more "green space" on the lot line between Attorney Kovac's property and DAPL's Real Property, (2) they wanted to save a tree on the northeast portion of DAPL's Real Property located within the "green space", (3) there was concern that the excavation of the underground parking would disturb the foundation of Attorney Kovac's house, and (4) they wanted to move the entry ramp to parking structure away from the eastern lot line of the Real Property. In addition, Attorney Kovac proposed an exchange of a piece of the Real Property (i.e., the portion of the "green space" with the tree on it) for a portion of Attorney Kovac's backyard.

After adoption of the DPD, Attorney Kovac prevailed upon the Mayor to intervene (see the affidavit, a copy of which is attached hereto as **Exhibit 1**). My client did what the Mayor asked of him and sat down with Attorney Kovac. In a letter to my client dated June 22, 2007, a copy of which is attached hereto as **Exhibit 2**, Attorney Kovac told my client that:

> If the tree next to our house is saved, you will get a substantial public relations benefit. Local, state, and national preservation agencies are unanimously opposed to the loss of the green space buffer zone with the majestic tree at its center. If you agree to save the tree, you will be a hero to those groups - and to us.

DAPL responded on June 25, 2007 in writing to Attorney Kovac's request by rejecting the exchange of real property proposed. See **Exhibit 3**. However, DAPL, at Attorney Kovac's request, agreed to make the following minor modifications to its original plan, all to appease Attorney Kovac and the other complaining neighbors: (1) creation of addtional "green space" as a buffer zone between the Real Property and Attorney Kovac's property, (2) the tree in this newly created "green space" was saved, (3) all of the underground parking was eliminated to protect potential issues with Attorney Kovac's foundation, and (4) the entry ramp to the parking structure was moved to the west away from the lot line with Attorney Kovac's property. The DPD with these minor modifications requested by Attorney Kovac is the plan being constructed (the "Plan"). Far from the City and DAPL being his heroes for saving the tree and increasing his "green space", Atty. Peter Kovac and his co-plaintiffs successfully extracted these modifications to the DAPL Project design from the City and DAPL, and, are now are using them as a basis upon which to sue both the City and DAPL.

In May 2007, the Historic Preservation Commission ("HPC") conditionally approved the Plan and this project. The HPC formed a subcommittee to finalize certain design details regarding the Project limited to certain aesthetic items: (a) color, texture and type of exterior cladding material, (b) street level storefront glazing design, (c) signage, and (d) snow removal chute if visible from street. According to the meeting minutes, this subcommittee was "empowered to make the final approval on behalf of the entire commission." After four meetings of the HPC subcommittee, a final Certificate of Appropriateness ("COA") for the project was issued on June 29, 2007 that mandated "[a]ll work be done according to the attached drawings." On January 28, 2008, the entire HPC, in open session, ratified all of the subcommittee's prior actions in approving the project and in issuing its COA.

On November 9, 2007, the Common Council approved, by resolution, a minor modification to the DPD, to permit the minor modifications sought by Attorney Kovac (the DPD with the minor modifications, the "current DPD").

II. DAPL's POSITION

DAPL commenced construction of its parking structure in good faith. To date, DAPL has expended in excess of three million dollars ($3,000,000) to build this project in accordance with the applicable zoning and its building permit. DAPL has done whatever the City has asked of it, including, at substantial expense, appeasing Attorney Kovac. Construction is ongoing to meet an August 15, 2008 contractual deadline with the City to complete the parking structure.

Testimony in the lawsuit entitled *McCarthy et. al v. City of Milwaukee* indicates that the four HPC subcommittee meetings held prior to the issuance of DAPL's COA may be improper under the Wisconsin Open Meetings Law. However, the January 28, 2008 special meeting of the entire HPC properly approved any prior actions taken at the subcommittee meetings that may have violated the Wisconsin Open Meetings Law. Attorney Kovac and his co-plaintiffs have nevertheless filed a complaint against the HPC and presumably its subcommittee members for holding such meetings.

According to the Supreme Court of Wisconsin, the right to develop a property according to the requirements of a zoning ordinance vests after the property owner merely *submits* a proper application for a building permit. *Lake Bluff Partners v. South Milwaukee*, 197 Wis.2d 157 (1995). Furthermore, Although merely applying for a building permit is enough to secure this vested interest, here, DAPL has not only applied for a building permit - it has obtained one; and, not only has DAPL commenced construction of its project and made significant expenditures to date (in excess of ***three million dollars*** ($3,000,000)) – it has in fact nearly completed construction. DAPL has a vested, legal right in and to all of the prior actions taken affecting its property, including the GPD, the current DPD and its building permit.

While Attorney Kovac and his co-plaintiffs boldly assert that they believe they will ultimately prevail in having the zoning of DAPL's Real Property held invalid, unless and until they are successful, the law in Wisconsin is clear - zoning is presumed valid until proven otherwise. *See Wis. Stat.* §62.23(7) (the validity of any ordinance, resolution or regulation enacted or adopted under this section, shall be liberally construed in favor of the City); *see also Step Now Citizens v. Planning and Zoning*, 264 Wis. 2d 662, 663 N.W.2d 833 (Ct. App. 2003). A party opposing the validity of zoning faces a steep, uphill battle to invalidate it. Under Wisconsin law, there is a very heavy presumption against any challenge to zoning; and, therefore, the invalidity of zoning must be clearly demonstrated by the party challenging it. *Id.*

Attached as **Exhibit 4**, is a copy of the circuit judge's order ***denying*** the motion for the temporary injunction sought by Attorney Kovac and his co-plaintiffs seeking to invalidate the current zoning and building permit for the Project. This judicial order effectively evidences that the plaintiffs' attempt to invalidate the zoning and permits for this Project will likely ***not*** succeed on its merits.

III. CONCLUSION

In *McCarthy et. al v. City of Milwaukee*, concern was raised about whether complete information regarding the four HPC subcommittee meetings were provided to ZND when, on November 6, 2007, ZND approved the current DPD because those four meetings may be improper under the Wisconsin Open Meetings Law. As a result, all information regarding those meetings has now been provided to ZND and what is before ZND today is to *ratify and reaffirm* its prior action approving the minor modification that the ZND previously passed on November 6, 2007 and that was previously passed by the Common Council on November 9, 2007 (and the reconsideration of such passage was rejected by the Common Council) based on the entirety information provided. The law is clear that the action before ZND today may not lawfully be (a) reconsidered because the same action cannot be reconsidered more than once (and it has already been reconsidered); or (b) rescinded because to do so would violate DAPL, LLC's vested zoning rights. *The Municipality February 2008, page 45; and Robert's Rules of Order.* See attached as **Exhibit 5**.

* * * *

EXHIBIT 1

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DAWN McCARTHY,
2589 North Lake Drive
Milwaukee, Wisconsin, 53211
And

PETER and THEA KOVAC
2623 East Belleview Place
Milwaukee, Wisconsin 53211

And

DONNA NEAL
2624 East Belleview Place
Milwaukee, Wisconsin 53211

Plaintiffs,

v.

CITY OF MILWAUKEE,
a Municipal Corporation
200 East Wells Street
Milwaukee, Wisconsin 53202

Defendant.

Case No. 2007-CV-014155

COPY

CIVIL DIVISION
14 NOV - 9 2007 14
JOHN BARRETT
Clerk of Circuit Court

BROOKE VANDEBERG AFFIDAVIT

STATE OF WISCONSIN)
)ss.
MILWAUKEE COUNTY)

Now comes Brooke VandeBerg, and states and swears as follows:

1. I am an adult resident of the State of Wisconsin, City of Milwaukee, employed by the City. I work in the Office of Mayor Tom Barrett as a Staff Assistant handling constituent relations.

2. Plaintiff Peter Kovac ("Kovac") came to the Mayor's Office on a number of occasions asking the Mayor to intervene in a land transaction involving the City's sale of 2574-2590 N. Dqwner (the "Property") to DAPL, LLC ("DAPL").

3. Kovac did not want the property sold or improved.

4. About ten times, Kovac showed up at the Mayor's Office, unannounced, and without any scheduled meeting, wanting to talk about the Property. On one occasion he had a pre-scheduled meeting.

5. Kovac would on occasion show up at the Mayor's public appearances wanting to talk about the property.

6. Kovac asked the Mayor to veto the detailed plan development. Once the plan was approved, Kovac asked the Mayor to alter the approved plan.

7. The Mayor did attempt to appease Kovac by inquiring of the developer on Kovac's behalf as to whether DAPL's improvements could be altered.

8. The Mayor's Office, and I personally, understand that DAPL's improvements were altered and that the reason they were was in an effort to appease Kovac.

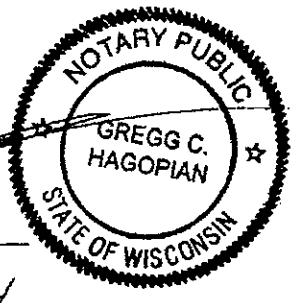
9. The other plaintiffs also contacted the Mayor's office to voice their opposition to DAPL's improvements.

Dated at Milwaukee, Wisconsin this 5 day of November, 2007.

Brooke VandeBerg
Office of the Mayor

ADDRESS
Mayor's Office
City Hall, 2nd Floor
200 East Wells Street
Milwaukee, WI 53202

Subscribed and sworn to before me
this 5 day of NOVEMBER, 2007.



NOTARY PUBLIC, State of Wisconsin
My Commission Expires: permanent

125440

Peter & Thea Kovac
2623 East Belleview Place
Milwaukee, Wisconsin 53211

EXHIBIT 2

June 22, 2007

Joel Lee
Van Buren Management
788 North Jefferson
Milwaukee, Wisconsin 53202

Re: Downer and Belleview Parking Structure

Dear Joel Lee,

I very much appreciate your willingness to discuss the placement and design of the proposed Downer and Belleview Parking structure with my wife and myself. Your open minded attitude and spirit of cooperation are refreshing. Thank you.

While I have not seen any plans yet, I have heard that the proposed redesign of the structure involves placement of a portion of the structure in part of our backyard. Most importantly, I have heard that the small triangular space to the west of our house will be given to us in exchange for the part of our backyard needed for the parking structure.

We would be required to deed the needed portion of our backyard to the City. The City would then sell you that land and most of the city owned land at Downer and Belleview. The City would deed the triangular green space (including the tree and its root ball) to us.

We would then do whatever needs to be done to expedite any necessary approvals (including zoning changes) by the City Plan Commission, the Historic Preservation Commission, and the Common Council. We would also agree not to file a lawsuit on the basis that the City has failed to engage in good faith negotiations with the State Historical Society as mandated by state law.

You should know that we first offered this trade of a portion of our backyard for the side yard and tree several months ago. We are pleased that this offer is now being seriously considered.

If the tree next to our house is saved, you will get a substantial public relations benefit. Local, state, and national preservation agencies are unanimously opposed to the loss of the green space buffer zone with the majestic tree at its center. If you agree to save the tree, you will be a hero to those groups - and to us.

Thanks again for your cooperation.

Sincerely,

Peter J. Kovac

Van Buren Management, Inc.

788 North Jefferson Street, Suite 800 • Milwaukee, WI 53202
Phone: 414-224-5070 • Fax: 414-224-8208

June 25, 2007

EXHIBIT 3

VIA ELECTRONIC MAIL

Mr. Peter & Mrs. Thea Kovac
2623 East Belleview Place
Milwaukee, Wisconsin 53211
(608) 225-9700 (telephone)
(414) 225-9070 (facsimile)

Re: *Your Letter Dated June 22, 2007*

Dear Mr. and Mrs. Kovac:

This letter responds to your letter dated June 22, 2007. We remain willing to discuss with you an arrangement to attempt to address your concerns regarding our project. However, the proposed arrangement described in your letter is not accurate, is not acceptable and does not in any way represent the arrangement I will discuss with you at our meeting tomorrow.

I do not know from whom you received the above misinformation, but it is not accurate and I wanted to clarify this in advance of our meeting so that you do not come to the meeting with any preconceived misconceptions.

I look forward to meeting with you tomorrow.

Very truly yours,

Joel S. Lee

cc: Boris Gokhman

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

DAWN McCARTHY,
2589 North Lake Drive
Milwaukee, Wisconsin, 53211
And

PETER and THEA KOVAC
2623 East Belleview Place
Milwaukee, Wisconsin 53211

And

DONNA NEAL
2624 East Belleview Place
Milwaukee, Wisconsin 53211

Plaintiffs,

v.

CITY OF MILWAUKEE,
a Municipal Corporation
200 East Wells Street
Milwaukee, Wisconsin 53202

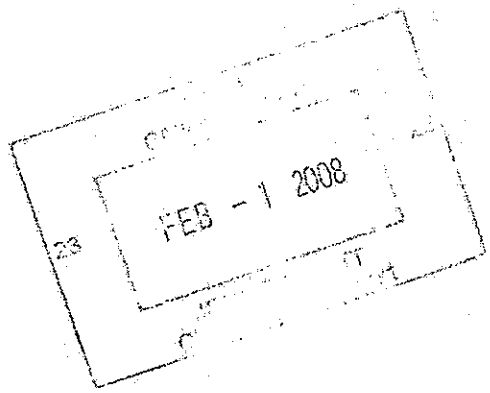
And

DAPL, LLC

Defendants.

Case No. 2007-CV-014155

EXHIBIT 4



ORDER DENYING TEMPORARY INJUNCTION

WHEREAS, on October 31, 2007, plaintiffs in this case filed a Motion for Temporary Injunction; and

WHEREAS, hearings on plaintiffs' Motion for Temporary Injunction were held before the Court, the Honorable Judge Lamelas presiding on Wednesday, January 9, 2008, on Friday, January 11, 2008, and on Wednesday, January 16, 2008; and

WHEREAS, the Court made rulings from the bench;

NOW, THEREFORE, the Court's rulings from the bench made on January 16, 2008 are hereby incorporated herein, and they included a denial of the plaintiffs' Motion for Temporary Injunction.

SO ORDERED.

Dated this 1 day of Feb., 2008.

BY THE COURT:

/S/ELSA C. LAMELAS

Honorable Elsa C. Lamelas
Circuit Court Judge, Branch 23

GCH:ms
1053-2007-2845:127971

EXHIBIT 5

and a Motion to Rescind

Generally speaking, the basic differences between reconsideration and rescission are as follows.

Motions to Reconsider

A motion to reconsider may be made to reconsider: a main motion; an affirmative vote to "postpone indefinitely;" amendment; referral to committee before the committee begins consideration of the referred matter; postponement to a specific time; the unexecuted portion of a decision to limit or extend debate; closing debate (previous question) before voting on the main question; and setting an adjourned meeting. A successful motion to reconsider brings back for further consideration the matter previously acted upon. According to *Robert's Rules*, reconsideration is not available where the original motion created a contractual relationship, and reconsideration might result in reversal of the earlier decision and violate the rights of the other party.

A strict application of *Robert's Rules* requires that a motion to reconsider be made on the same day the vote on the original motion was taken. However, a motion to reconsider, once made, can be debated and voted on at a later date. In addition, many municipalities have adopted rules that allow a motion to reconsider to be made at the next meeting. *Robert's Rules* does not limit the time for reconsideration when the matter is at committee level.

A motion to reconsider must typically be made by a member of the city council or village board who voted with the prevailing side; that is, a member who voted "yes" if the original motion passed or "no" if the motion failed. A member who was either absent for the vote on the original motion or abstained from voting is precluded from making a motion to reconsider the original motion. However, if the motion to reconsider is at the committee level, it may be made by anyone who did not vote on the losing side, including persons who were absent for or abstained from the vote on the original motion.

Motions to Rescind

A motion to rescind may only be made to rescind a main motion — *i.e.*, a motion to adopt an ordinance, resolution, order or other legislative act of the body. Unlike a motion to reconsider, a motion to rescind does not bring a matter back for further consideration or debate if adopted. Instead, a successful motion to rescind simply nullifies the prior action. For this reason, a motion to rescind is not in order if something has been done in response to the original motion that cannot be undone; if the original motion created a contract and the contracting party has been notified; if a resignation has been acted on and the person has been officially notified; a person has been appointed to or expelled from a position and they have been officially notified; or the action would result in the violation of a vested right.

Unlike a motion for reconsideration, a motion to rescind is not subject to any specific time limits, and may be made by any member of the body regardless of how that member voted on the original motion.

"Unlike a motion to reconsider, a motion to rescind does not bring a matter back for further consideration or debate if adopted."