MICHAEL BEST
& FRIEDRICH LLP

Michael Best & Friedrich LLP
Attorneys at Law
100 East Wisconsin Avenue
Suite 3300
Milwaukee, WI 53202-4108
Phone 414.271.6560
Fax 414.277.0656

Andrea H. Roschke
Direct 414.225.4924
Email ahroschke@michaelbest.com

VIA HAND DELIVERY

January 30, 2006

Alderman Willie C. Wade
City of Milwaukee
Common Council
Zoning and Development Committee
200 E. Wells Street
Milwaukee, WI 53202

Re: File No. 051111 and 051110

Dear Alderman Wade:

Enclosed please find a copy of correspondence provided late last week to the Zoning and Development Committee.

Very truly yours,

MICHAEL BEST & FRIEDRICH LLP

Andrea Roschke

AHM:im

cc: Linda Elmer, Zoning & Development Committee Clerk (via hand delivery)

Enclosure

MICHAEL BEST
& FRIEDRICH LLP

Michael Best & Friedrich LLP
Attorneys at Law
100 East Wisconsin Avenue
Suite 3300
Milwaukee, WI 53202-4108
Phone 414.271.6560
Fax 414.277.0656

Alan H. Marcuvitz
Direct 414.225.4927
Email ahmarcuvitz@michaelbest.com

VIA HAND DELIVERY

January 26, 2006

Alderman Michael D'Amato, Chairperson
City of Milwaukee
Common Council
Zoning and Development Committee
200 E. Wells Street
Milwaukee, WI 53202

Re: File No. 051111 and 051110

Dear Chairperson D'Amato and Members of City of Milwaukee Zoning and Development Committee:

On January 31, 2006, your Committee is scheduled to consider an amendment to the General Planned Development and change in the zoning to Detailed Planned Development at Park Place to allow for the construction of a Comfort Inn Hotel in Sub-area A. Our clients own the existing Hilton Garden Inn located in Sub-area B of Park Place.

Our clients appeared at the City of Milwaukee Plan Commission meeting on January 9, 2006 to object to the rezoning. The Plan Commission, nonetheless, unanimously voted to recommend in favor of the proposed rezoning.

Our clients believe that the only hotel site which should be allowed at Park Place is in Sub-area B. The attached correspondence dated June 14, 1999 from the City of Milwaukee Department of City Development relates that in 1999 there was a comprehensive review of the entire Park Place project. This effort culminated in the removal of one hotel from a proposed GPD amendment and the demapping of an approved hotel and shift of 50,000 sq. ft. of floor area in order to zone Sub-area B as the single hotel site. In reliance on these actions, our clients developed the existing Hilton Garden Inn in Sub-area B.

We believe the City must give considerable weight to our client's objection to the proposed rezoning. In the context of planned unit development, our client's objection deserves serious consideration.

Planned unit development zoning is authorized by sec. 66.23(7)(b), Stats., as follows:

> (b) Districts. For any and all of said purposes the council may divide the city into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this section; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of

> buildings, structures or land. All such regulations shall be uniform for each class or kind of buildings and for the use of land throughout each district, but the regulations in one district may differ from those in other districts. *The council may with the consent of the owners establish special districts, to be called planned development districts*, with regulations in each, which in addition to those provided in par. (c), will over a period of time tend to promote the maximum benefit from coordinated area site planning, diversified location of structures and mixed compatible uses. Such regulations shall provide for a safe and efficient system for pedestrian and vehicular traffic, attractive recreation and landscaped open spaces, economic design and location of public and private utilities and community facilities and insure adequate standards of construction and planning. Such regulations may also provide for the development of the land in such districts with one or more principal structures and related accessory uses, and in such districts the regulations need not be uniform.

(Emphasis added). This law was added to the statutes in 1969 by Ch. 481 Laws 1969.

Unlike traditional zoning, planned unit development zoning cannot be unilaterally imposed on property. The statute specifically requires "the consent of the owners" to establish a planned unit development. "By its nature, a planned unit development must be sought by the property owner, and cannot be imposed over the owner's objection." 5 Ziegler, Rathkopf's The Law of Zoning and Planning, section 88:4 (4th ed.).

Planned unit development zoning was developed to address the "demonstrated shortcomings of orthodox zoning regulations." 2 Anderson, American Law of Zoning, section 11.12 (4th ed.). One of the main shortcomings of traditional zoning is the inability to lock in a single agreed upon use as permitted. Generally, zoning regulations allow a variety of permitted uses in any given zoning classification. Thus, any one of a number of permitted uses may be allowed as a matter of right in a given district. Planned unit development zoning can be utilized to lock into a single specified use.

The problem is best illustrated in the Wisconsin Supreme Court decision in State ex rel. Zupancic v. Schimenz, 46 Wis.2d 22, 174 N.W.2d 533 (1970). In Zupancic, the developers of a shopping mall wanted to rezone a small parcel of land to local business district for the development of a bowling alley. The local business zoning district also allowed for other uses to which area neighbors objected. This conflict was resolved by the developer's recording of a declaration of restrictions that the only local business use to be allowed on this small parcel would be a bowling alley. No other uses would be allowed. A few years later, a third party proposed to develop a car wash on this small parcel still zoned local business district. Litigation ensued regarding the legality of the declaration of restrictions as illegal contract zoning. In the course of discussing the legality of contract zoning, the Supreme Court advised that the flexibility needed to narrow permitted uses could better be achieved through "the use of floating

zones or overlay districts in zoning ordinances." Id. at 34. Planned unit developments are a species of floating zones or overlay districts.

Bilateral "negotiations" are recognized as an important component of planned unit development zoning. Rathkopf, section 88:1. "The very essence of this type of zoning [planned unit development] is that this envisages a 'negotiated' approach to land use control, resulting in an approved plan of development." Krasnowiecki, Abolish Zoning, 31 Syracuse L. Rev. 719 (1980) p. 741.

In the instant case, our clients were party to the bilateral negotiations resulting in limiting the single hotel site at Park Place to Sub-area B. Our clients relied on the outcome of these bilateral negotiations and have developed a hotel in Sub-area B, which approval includes the potential for additional hotel rooms.

In recognition of these bilateral negotiations, our client's objection must be given significant weight. In Frankland v. City of Lake Oswego, 8 OR. App. 224, 493 P. 2d 163 (1972), aff'd 267 OR. 452, 517 P. 2d 1042 (1973), the court recognized the right of adjoining property owners (not owners within the planned unit development district) to claim damages for the construction of buildings not in compliance with the planned unit development ordinance. The Appellate Court chastised the prior proceedings "indicat[ing] that little, if any, consideration was given to the Arrowwood property owners [plaintiffs] or the comprehensive zoning which had long covered the entire area and upon which they had a *right to rely*." (Emphasis added). Id. at 171.

In a situation where the plaintiffs were owners of property located within the planned unit development district, the court in In re Approval of Request for Amendment to Frawley Planned Unit Development, 2002 SD 2, 638 N.W.2d 552 (2002), stated that, "[d]evelopers should not be able to substantially alter plans already in existence, nor should they be able to develop the property in a piecemeal fashion that adversely affects prior purchasers." Id. at 556. The Ohio Supreme Court in Gray v. Trustees, Monclova Township, 38 Ohio St. 2d 310, 313 N.E.2d 366, 369 (1974), recognized the "reasonable expectations" of persons who purchase property in a planned unit development.

These principles were recognized by the Supreme Court of Washington in Estate of Friedman v. Pierce County, 112 Wash.2d 68, 768 P. 2d 462 (1989):

> Accordingly, one acquiring land within a PUD must be aware that the land is subject to controls consistent with the entire PUD. Thus, not only the original developer, but anyone acquiring land within the PUD at a later time should not expect that land use decisions will be made considering only a particular parcel within the PUD.

Id. at 469.

MICHAEL BEST
& FRIEDRICH LLP

In sum, our clients' objection is particularly relevant because of their status as parties to the bilateral negotiations for the existing GPD. Moreover, they have actually constructed a hotel in reliance on the provisions of the existing GPD. Their rights are significantly affected by the proposed rezoning.

As a consequence of the legal nature of our clients' objection, we respectfully request that this matter be referred to the City Attorney's office for advice and counsel regarding the propriety of the proposed rezoning.

Very truly yours,

MICHAEL BEST & FRIEDRICH LLP

Alan H. Marcuvitz

AHM:im

Enclosure

cc: Ald. Ashanti Hamilton
Ald. Robert Bauman
Ald. Michael Murphy
Ald. Jim Bohl

T:\clienta\045183\0003\A1444267.1

City of Milwaukee

Department of City Development

Housing Authority
Redevelopment Authority
City Plan Commission
Historic Preservation Commission

Julie A. Penman
Commissioner

Michal A. Dawson
Deputy Commissioner

June 14, 1999

To the Honorable Common Council
Zoning, Neighborhoods and
Development Committee
City of Milwaukee

Dear Committee Members:

Attached is File No. 981706, being an ordinance approving the 9th amendment to the General Planned Development known as Park Place, generally located north or West Good Hope Road and west of North 107th Street, in the 15th Aldermanic District.

This ordinance will allow a hotel complex with a sit-down restaurant to be located in the central portion of the project rather than at either of two previously considered locations in the southern portion of the site. A 13-story hotel was approved in 1985 for a site between two high-rise office buildings but was never constructed. Another 3-story hotel was proposed in early 1998 for the northwest corner of West Good Hope Road and North 107th Street but was held while the developer attempted to negotiate for additional floor area with the seller. The 9th amendment also adds specific sign standards and internal pedestrian access to the planned development.

The Park Place planned development was originally approved in 1981, and has received 7 amendments since that time. The original developer, Trammel Crow, is no longer the owner of any land or buildings within the project. As a result there is no central coordinator or review body to make sure that certain elements of the project, such as signage, access to water bodies and circulation, are incorporated within each building site.

Because of this situation and the fact that recent market forces have been suggesting changes to the location of commercial uses in the southern half of the project, the commission delayed consideration of this proposed hotel complex and sit-down restaurant until the entire project could be restudied and appropriate amendments to the planned development made. Staff's analysis suggested that the hotel site should be shifted to a more centrally located site and that other approved or proposed hotels should be removed from further consideration. As a result of this recommendation, the proponent of the 1998 hotel proposal has removed the hotel from his proposed amendment to the GPD and the owner of the unbuilt hotel site has also agreed to support the removal (demapping) of the approved hotel and a shift of 50,000 square feet of floor area from the old hotel site to the new hotel site.

A public hearing was held on April 26, 1999 at which time some concerns were about the shift in hotel location were made. Subsequently a neighborhood meeting was held where the majority of participants supported the amendment. The Department of Public Works has also reviewed the proposal and do not object provided no additional building floor area is created by the amendment.

Since the proposal is consistent with city plans for the area, the City Plan Commission at its regular meeting on June 7, 1999 recommended approval of the attached ordinance conditioned on the DPD for the approved hotel being eliminated, that no additional building floor area is created by this amendment, that new guidelines for signage be added to the GPD and that language to improve pedestrian circulation within the project be added to the GPD. All conditions have now been met

Sincerely,

Julie A. Penman
Executive Secretary
City Plan Commission of Milwaukee

Attachment

cc: Ald. Nardelli
Tom Kelly
Jeff Hurtado