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October 3, 2008

Mr. Rocky Marcoux
Commissioner
Department of City Development
809 Building – 2nd Floor

Attention: Ms. Vanessa Koster, Asst. Planning Director

Re: Validity of Form of Protest Petitions and of Proposed
Conditions on Approval of Change of Zoning From
RM7 to DPD-1550 North Prospect Avenue

Dear Commissioner Marcoux:

On September 26, 2008, you requested the opinion of this office as to the validity of the form of a protest petition that has been filed with respect to the property located at 1550 North Prospect Avenue (the "Property"). This protest petition objects to a proposed change of zoning of the Property from RM7 (high-density multi-family residential use) to DPD (detailed plan development) as specified by a proposed ordinance establishing new § 295-907(2)(c).0128, Common Council File No. 080543, and an attached document entitled "Goll Mansion Residential District—Detailed Plan Project Description and Owner's Statement of Intent (the "Statement")." For your convenience, we have attached copies of these documents to this letter. We are pleased to respond to this request, as set forth in Part I of this opinion.

Subsequently, you have inquired by e-mail dated September 30, 2008 as to whether three specified conditions may be appended to any approval by the Common Council of the proposed change in zoning, to-wit: (1) the posting of cash or a bond by the developer to guarantee performance; (2) a commitment on the part of the developer to undertake construction in a particular order or sequence; and (3) a commitment by the developer to comply with a contract that it has

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entered into with a third party. We are please to respond to this request, as set forth in Part II of this opinion.

I – Validity of the Form of the Protest Petitions

The issue encompassed by this inquiry is quite specific and is limited to consideration of whether the particular form of the protest petitions filed by the objectors to this change in zoning fits within the description of a “protest petition” as that term is described in the pertinent governing state statute and city ordinance establishing the protest petition process. Your request indicates that other aspects of the protest petitions filed with respect to the Property are not within the scope of your current inquiry, and are currently being reviewed by the Department of City Development. Accordingly, this opinion will confine itself to an analysis of the single issue posed by your inquiry of September 26, 2008.

According to the materials that we have reviewed, we believe that the focus of your inquiry concerns the following two related issues: (1) whether these protest petitions are directed at a modification of the zoning regulations pertaining to the “use” of the Property, consistent with the text of the petitions themselves; and (2) whether such a modification of zoning regulations pertaining to “use” is a necessary requisite of a valid form of protest petition in accordance with the pertinent state statute and city ordinance. In other words, the issue of concern is whether the change of zoning designation in this instance from RM7 to DPD constitutes a proper subject for a valid protest petition. We will address these issues in turn.

The protest petitions at issue utilize a uniform text followed by the signatures of the protestors, a “Verification of Circulator,” and a form of notarization. Your inquiry focuses upon the introductory text of each of these protest petitions, which reads as follows:

Protest Petition

Section 62.23(7)(d)2m.a.

1550 North Prospect Avenue

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The undersigned, being the owners of 20% or more of the area of land immediately adjacent extending 100 feet from the property known as 1550 North Prospect Avenue, in the City of Milwaukee, under Section 62.23(7)(d)2m.a. of the Wisconsin Statutes, protest the rezoning of 1550 North Prospect Avenue, and formally demand that any amendment to, change in, or modification of, the zoning regulations currently governing use of the subject property shall not become effective except by the favorable vote of three-fourths of the members of the Common Council voting on the proposed change.

This language contains two separate clauses. The first clause protests the overall "rezoning" of the Property. The second clause demands that a three-fourths affirmative vote of the Common Council become necessary to effectuate any alteration of "the zoning regulations currently governing use of the subject property." Thus, the first clause does not refer to a change of "use" regulation while the second clause does.

It has been contended that the change of zoning implicated in this case does not affect the "use" of the Property, nor does it effectuate an alteration or change in the zoning "use" regulations applicable to the Property. This much is true. The "use" regulations applicable to the Property at present are those prevailing under the provisions of the City of Milwaukee Zoning Code ("Code"), ch. 295, Milwaukee Code of Ordinances ("MCO") as applicable to the RM7 zoning district. See §§ 295-501-3-c and 295-503-1, MCO (entitled "Residential Districts Use Table," zoning district column entitled "RM3-RM7"). The same regulations will continue to apply even if the change of zoning classification to DPD becomes effective. This much is acknowledged by the attached Statement at Section 1, p. 2 thereof, which states in pertinent part as follows:

1. Uses. Permitted uses at the Site under this DPD proposal will remain consistent with the permitted uses under the RM-7 high-density multi-family residential district in effect on the date of this Statement. Specifically, multi-family dwellings and accessory uses, including parking, lobby, concierge, fitness center, guest suites,

parlors/meeting rooms and small private ballroom shall be permitted. . . .

The proposed change to DPD zoning would impose certain specific requirements upon future development of the Property in accordance with the submitted Statement. These requirements pertain to specified elements, including space between structures, setbacks, screening, open space, circulation/parking/loading, landscaping, lighting, utilities and signs/sign illumination. (Statement at pp. 2-5). This scheme is directly consistent with applicable state statutes and city ordinances pertaining to planned development districts and the content of detailed plan submissions, *see* Wis. Stat. § 62.23(7)(b); §§ 295-907-2-c and c-1 through c-13, MCO. They do not, however, implicate a change in the underlying zoning “use” regulations applicable to the Property, which continue to be those generally applicable to all properties located within an RM7 zoning district as described by the Code.

The second issue to be discussed is whether this conclusion is determinative of the validity of the form of these protest petitions; specifically, whether it renders them invalid *ab initio*. We believe that it does not do so. Our opinion is based upon the text of the enabling statute establishing the protest petition process, Wis. Stat. § 62.23(7)(d)2m.a., which states as follows:

2m.a. In case of a protest against an amendment proposed under subd. 2, duly signed and acknowledged by the owners of 20 percent or more either of the areas of the land included in such proposed amendment, or by the owners of 20 percent or more of the area of the land immediately adjacent extending 100 feet therefrom, or by the owners of 20 percent or more of the land directly opposite thereto extending 100 feet from the street frontage of such opposite land, such amendment shall not become effective except by the favorable vote of three-fourths of the members of the council voting on the proposed change.

Section 295-307-5, MCO contains virtually identical language, and is entitled “Protest of Map Amendment.” This title is consistent with the Code’s description of the method by which planned development districts are established,

specifically, § 295-907-2-d, which states that: "Creation of the planned development district shall be by amendment to the zoning map, pursuant to s. 295-307." This is certainly an accurate description of the creation of a planned development district in a practical sense. A planned development district is a form of "special district" established under subch. 9 of the Code, §§ 295-901 through 295-909, MCO. The establishment of a new special district of this type covering the site of the Property is precisely the object of proposed new § 295-907(2)(c).0128 in conjunction with the specific terms set forth in the Statement. If this ordinance is enacted, the zoning map will accordingly be amended to reflect a new DPD district at the site of the Property, supplanting its former RM7 designation. Such constitutes a zoning map amendment irrespective of whether any changes in underlying "use" regulations is implicated.

In our opinion, this fact is sufficient to establish the validity of the form of protest petitions utilized in this instance. A careful examination of the text of Wis. Stat. § 62.23(7)(d)2m.a. indicates that all that is required of a valid form of protest petition is that it be directed "against an amendment proposed under subd. 2" (*i.e.*, Wis. Stat. § 62.23(7)(d)2.). The latter provision is directed at any amendment "to an existing zoning ordinance." An amendment to the City's zoning map is certainly an amendment to the City's "existing zoning ordinances." This much is acknowledged by §§ 295-307-5 and 295-907-2-d, MCO, discussed above, which defines the creation of a detailed planned development district as one form of zoning map amendment. It is further confirmed by the form of the attached proposed ordinance creating new § 295-907(2)(c).0128, which on its face is the precise form of document utilized by the Common Council for the purpose of amending the City's zoning ordinances to implement a "change in zoning."

Admittedly, the form of protest petition utilized by the objectors to the proposed "change in zoning" affecting the Property is a bit confusing and might have been drafted with greater precision. The second clause thereof does explicitly refer to an "amendment to, change in, or modification of, zoning regulations currently governing use of the subject property" which, as discussed above, is not implicated by the proposed ordinance changing the zoning status of the Property from RM7 to DPD. The first clause of the form, however, more globally refers to a protest against "the rezoning of 1550 North Prospect Avenue," a phrase that encompasses the zoning map amendment that the proponents of the proposed

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ordinance creating new § 295-907(2)(c).0128, MCO seek to effectuate and implement.

II – Validity of the Three Proposed Conditions to Common Council Approval of the Change in Zoning from RM7 to DPD

Your second inquiry concerns whether three specified conditions may be appended as requisites to approval of the pending application for a change in the Property's zoning status from RM7 to DPD. These three conditions involving tying such approval to fulfillment of three commitments on the part of the developer of the project encompassed by the Statement, to-wit: provision of security to guarantee performance of the developer's obligations in the form of a cash payment or performance bond, a commitment by the developer to develop the Property in accordance with a specified order or sequence, and a commitment by the developer to comply with a contract that he has entered into with a third party. In our opinion, the Common Council does not possess the authority to lawfully require that the developer comply with these measures as a precondition of approval of its application for a change in the Property's zoning status.

Essentially, the developer's pending application seeks to create a planned development district encompassing the site of the property. The establishment of such districts is authorized by Wis. Stat. § 62.23(7)(b) and §295-907, MCO. The latter ordinance specifies not only the procedure by which such districts may be established, but also the scope of the subject matter that might be encompassed within a lawful general planned development ("GPD"), and detailed planned development ("DPD") submission or approval. Of course, this project involves the submission and consideration of a DPD application.

Section 295-907-2-d, MCO contains a very detailed enumeration of the types of information that a developer must provide as part of an application for approval of a DPD planned development district. To our knowledge, the Statement was prepared in accordance with these requirements. The types of information required to be provided in the developer's submission, while extensive (particularly with respect to the physical features of the proposed planned development) do not encompass or even suggest reference to any of the three

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specified conditions within the scope of your inquiry, or, for that matter, any issue pertaining to a developer's obligation to fulfill commitments unrelated to those matters set forth in the DPD submission.

The remainder of § 295-907, MCO further substantiates this conclusion. Thus, the standards by which both the City Plan Commission and the Common Council must review a DPD submission, as set forth by §§ 295-907-2-e and e-1 through e-5 and 295-907-3-g are quite specific, and make no reference or suggestion to any of the matters addressed by the three specified conditions constituting the subject of your inquiry. Similarly, §§ 295-907-3-a through 3-n, which set forth the standards that every planned development located within the City must meet, are both very specific and do not in any way refer to or suggest the involvement of any of the types of conditions exemplified by the three conditions constituting the subject of your inquiry. Thus, we conclude that tying fulfillment of those three conditions to approval of the developer's DPD application and submission in this instance would not be lawful, and would exceed the scope of authority accorded to both the City Plan Commission and to the Common Council in conjunction with review of applications for DPD zoning status. The only matters lawfully encompassed within the process of such review are those enumerated within the text of § 295-907, MCO; all other items would be deemed *ultra vires*. See Vol. 3, Rathkopf's The Law of Zoning and Planning (2005 ed.) §§ 60:9, 60:11.

Of course, this conclusion does not preclude a developer or other applicant for DPD zoning status from voluntarily offering to undertake commitments to perform matters that are beyond the scope of § 295-907, MCO in order to promote City Plan Commission and Common Council approval of the application. If an applicant thereby ventures beyond the basic requirements of § 295-907, MCO, and once its undertakings and representations are reasonably relied upon, the City in conjunction with review and approval of a DPD application, adherence to those additional undertakings and representations may be enforceable in a court of law on a case-by-case basis. Our conclusions herein are strictly limited to the issue of whether the City may require adherence to such additional undertakings and representations as a precondition of approval of a DPD application, and we conclude that the answer to this query is "no."

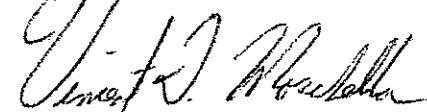
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In conclusion, it is the opinion of this office that: (1) the form of protest petition utilized in conjunction with the proposed rezoning of the Property from RM7 to DPD sufficiently complies with applicable requirements imposed by state statute (Wis. Stat. § 62.23(7)(d)2m.a.) and city ordinance (§ 295-307-5, MCO) and that it implicates a subject that is proper for a valid protest petition; and (2) the Common Council may not lawfully impose the three subject conditions pertaining to provision of a performance bond or cash by the developer and fulfillment of specified commitments by the developer as a requisite to its approval of the change of zoning of the Property from RM7 to DPD. If you have any further questions concerning this matter, please contact this office for further guidance.

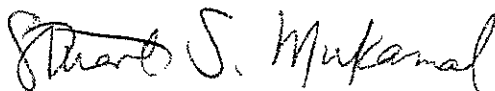
Very truly yours,



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SSM:lmb
enclosures
c: Ronald D. Leonhardt, City Clerk
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