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August 17, 2006

Alderman Michael D'Amato, Chair
Zoning, Neighborhoods and Development Committee
Room 205 – City Hall

Re: CCFN 050633 (Creation of the Brewers Hill/Harambee
Neighborhood Conservation Overlay Zone)

Dear Alderman D'Amato:

This letter will respond to your request of August 8, 2006 for the opinion of this office concerning several questions pertaining to the above-referenced file, which is currently pending before the Zoning, Neighborhoods and Development Committee. Specifically, you have posed three questions to us, which we will proceed to answer in turn.

Question No. 1:

Is limiting residential use of RT4-zoned properties in a neighborhood conservation overlay zone to single-family and 2-family structures permissible? Section 295-1003-3-b would seem to say it is. Should this be accomplished through a straight zoning change rather than an overlay zone?

Response to Question No. 1:

The proper response to this inquiry is premised upon §§ 295-1001 and 295-1003-1, Milwaukee Code of Ordinances (“MCO”), which set forth (respectively) the general purposes of overlay zones established under subch. 10 of the City of Milwaukee Zoning Code (“Code”), §§ 295-1001 through 295-1017, MCO, and the purposes underlying the establishment of “neighborhood conservation overlay zones” (“NC zones”) pursuant to § 295-1003, MCO. For ease of reference, we quote these provisions in full.

295-1001. Overlay Zone Purposes. Overlay zones are intended to identify areas of the city that have unique qualities requiring special

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treatment or locations where special approaches to development may be warranted. Overlay zone designations are intended to protect these areas from incompatible development or to establish development standards which will insure [sic] that new developments will not adversely affect surrounding areas. Overlay zones may add new standards over and above those of any base or underlying zoning district except a planned development district. They may also alter the standards of any base zoning district except a planned development district.

295-1003. Neighborhood Conservation Overlay Zone (NC). 1. PURPOSE. The neighborhood conservation overlay zone is intended to provide a vehicle to initiate and implement programs for the revitalization or conservation of older areas or districts possessing distinctive features, identity, or character worthy of retention and enhancement. A neighborhood conservation overlay zone takes effect through adoption of a neighborhood conservation plan and a set of guidelines that will facilitate maintenance and protection of the neighborhood character and the development of vacant or underused lots. Incompatible mixes of uses will be reduced or prohibited by adding limitations to the list of permitted, limited and special uses of the base district.

One of the expressed purposes underlying overlay zones generally and NC zones in particular is the promulgation of standards that may vary from those set forth in the otherwise-applicable "base" or "underlying" zoning district(s) within which the affected overlay zone is located. Thus, the last sentence of § 295-1001, MCO states that overlay zone requirements "may . . . alter the standards of any base zoning district except a planned development district." Similarly, § 295-1003-1, MCO, last sentence, states that an objective of an NC zone is the reduction or elimination of incompatible mixes of uses "by adding limitations to the list of permitted, limited and special uses of the base district." We believe that the limitation encompassed by this question fits these purposes and would therefore be lawful.

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Your inquiry is specifically addressed to a proposed limitation of newly constructed residential buildings within RT4 zoning districts to single family and two-family structures. The Code currently specifies that such structures are permitted uses in an RT4 zoning district, and that a "multi-family dwelling" (*i.e.*, one containing more than two residential units) is a limited use within such a zoning district. § 295-503-1, MCO, "Residential Districts Use Table." The applicable "limited use standard" is set forth in § 295-503-2-b-2, MCO, which states that: "In the RT4 district, not more than four dwelling units shall be permitted in a single building. If this standard is not met, a multi-family dwelling is a prohibited use." Thus, reading these provisions together, a single residential building within the RT4 zoning district may contain up to four dwelling units. The proposed amendment for the Brewers Hill/Harambee Neighborhood Conversation Overlay Zone would effectively render inapplicable the "limited use" standard set forth in § 295-503-2-b-2, MCO within the boundaries of that zone and thus render any new construction of what the Code defines as a "multi-family dwelling" as a prohibited use within the affected area.

Obviously, such a change could be accomplished through conventional rezoning, *i.e.*, a change in the zoning classification of "multi-family dwellings" from a limited use to a prohibited use in RT4 zoning districts. The apparent problem with this approach would be that such a change would apply to all RT4 zoning districts located throughout the City, and not simply to those located within the boundaries of the Brewers Hill/Harambee Neighborhood Conservation Overlay Zone.

We are mindful of the fact that incorporation of changes of this type into ordinances providing for the creation of overlay zones and specifying development and design standards for such zones might give rise to administrative problems. One of these problems would be an undermining of the reliability of the various "Use Tables" located throughout the Code, given that the appropriate use classification for any particular use category in each of the City's various zoning districts would not necessarily be revealed by a careful examination of those Tables; reference to any applicable overlay zone resolutions and development/design standards not appearing in the Code would additionally be required. Another is the risk that such revisions via the overlay zone process might risk characterization as actual or *de facto* spot zoning in some instances,

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which is not *per se* illegal in Wisconsin, but which is subject to heightened judicial scrutiny. *See, e.g., Bell v. City of Elkhorn*, 122 Wis. 2d 558, 364 N.W.2d 114 (1985); *Step Now Citizens Group v. Town of Utica Planning & Zoning Committee*, 2003 WI App 109, 264 Wis. 2d 662, 663 N.W.2d 833. Nonetheless, as a purely legal matter, we cannot conclude that it would be impermissible to incorporate within the neighborhood conservation plan and development/design standards for the Brewers Hill/Harambee Neighborhood Conservation Overlay Zone a limitation on the residential use of RT4-zoned properties within that zoned area to single family and two-family structures, on the basis of the text of §§ 295-1001 and 295-1003-1, MCO, discussed above.

Question No. 2:

This change only applies to new construction in the Harambee neighborhood and new construction, expansion and exterior renovation in the Brewers Hill neighborhood. Are there any legal concerns with the large number of legal, non-conforming dwellings there will be in these areas? Should this be accomplished through a straight zoning change rather than an overlay zone? Can overlay districts be specifically applied only to new construction, rather than existing dwellings?

Response to Question No. 2:

We understand that if the revision set forth in Question No. 1, above, is limited in its application to new construction in the Harambee neighborhood and new construction, expansion and exterior renovation in the Brewers Hill neighborhood, a likely result will be the creation of a large number of legal, non-conforming dwellings in these areas. This follows from the fact that these are older neighborhoods located in the central part of the City of Milwaukee, which contain a large number of older, existing dwellings.

Our response to this inquiry is parallel to that made in response to Question No. 1. While certainly this objective may be accomplished through conventional rezoning, such would have the effect of extending the revision to all RT4 zoning districts located throughout the City. Instead, what is apparently desired is a limitation of the application of this revision to those properties classified as RT4

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within the boundaries of the Brewers Hill/Harambee Neighborhood Conservation Overlay Zone, and not to RT4 properties located outside that area. So long as unlawful actual or *de facto* spot zoning does not result, we believe that such a revision may lawfully be accomplished through the neighborhood conservation plan or the development/design standards approved as part of that plan, which effectuate the creation of the Brewers Hill/Harambee Neighborhood Conservation Overlay Zone.

We caution that the creation of such a large number of legal, non-conforming dwellings may cause administrative problems, not the least of which would be the potential creation of a significant volume of disputes and cases before the Board of Zoning Appeals concerning the legal status of particular properties within this category. Nonetheless, such considerations do not render the use of a neighborhood conservation plan or associated development/design standards as unlawful mechanisms for implementing a revision of this type, in light of the language of §§ 295-1001 and 295-1003-1, MCO, discussed above.

Question No. 3:

If existing properties are sold, is it correct that these properties do not need to conform with the standards? Is this legal? If existing properties are razed or destroyed by fire, would they then be considered “new construction” if rebuilt?

Response to Question No. 3:

The proper response to this inquiry would be made with reference to the provisions of the Code governing the status of legal, non-conforming structures, § 295-415, MCO. The sale of a legal, non-conforming property, standing alone does not affect its status as a legal, non-conforming property. Such properties need not conform with the development/design standards otherwise applicable to parcels within the Brewers Hill/Harambee Neighborhood Conservation Overlay Zone, so long as the requirements set forth by § 295-415, MCO are met. Similarly, ordinary repair and maintenance may be made to “non-conforming special uses” and to “non-conforming structures,” §§ 295-415-2-a-3 and 4-a, MCO.

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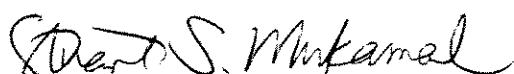
On the other hand, the Code limits the amount that may be expended to restore a deteriorated or damaged legal, non-conforming use, whether a "non-conforming special use," "non-conforming prohibited use occupying a structure," or "non-conforming structure." Generally, this limitation is expressed either in terms of a "reconstruction ratio" (specifying that the costs of restoration may not exceed 50% of the costs of duplicating the entire pre-existing structure) or as a straight limitation of 50% of the assessed value of the affected property. Expenditures in excess of those maximums is prohibited. Thus, if a legal, non-conforming structure is razed or destroyed by fire, it may not be rebuilt in reliance upon maintenance of its legal, non-conforming status if the costs of rebuilding would exceed those maximum limits (as they inevitably would), a rebuilt structure would therefore be considered "new construction" subject to the requirements applicable to all new construction within the Brewers Hill/Harambee Neighborhood Conservation Overlay Zone. See for a general discussion of this topic, *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 31-39, 498 N.W.2d 842, 850-853 (1983); *Hillis v. Village of Fox Point Board of Appeals*, 2005 WI App 106, 281 Wis. 2d 147, 699 N.W.2d 636.

If you have any further questions concerning this matter, please contact this office for guidance.

Very truly yours,



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