



February 4, 2019

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Historic Preservation Commission
City of Milwaukee
Zeidler Municipal Building
841 N. Broadway
Room B-1
Milwaukee, Wisconsin 53202

Re: Objection to Temporary Historic Designation Petition filed January 18, 2019 with respect to Property at 929 N. Water Street Owned by Milwaukee County and Leased to Marcus Center for the Performing Arts

To the Commission:

We represent Marcus Center for the Performing Arts (“**Marcus**”), the sole tenant of 929 N. Water Street (the “**Subject Property**”) pursuant to a Lease Agreement (the “**Lease**”) entered into with Milwaukee County (the “**County**”) and dated as of January 1, 2017.

Background

On January 24, 2019, the City Clerk transmitted to Marcus, by certified mail, a letter confirming the Historic Preservation Commission’s receipt of an application to designate some or all of the Subject Property as “temporary historic” (the “**Temporary Application**”). The Clerk provided a copy of the Temporary Application with its notice letter. Based on materials provided to Marcus and on file materials available in the City’s Legislative Research Center, the Temporary Application was initiated by telephone (“per call”) on “1/18/2019.” Moreover, notwithstanding any uncertainty about a phone filing, the Council file for the application was formally created on January 23, 2019: *See* <https://milwaukee.legistar.com/LegislationDetail.aspx?ID=3845131&GUID=EB474650-7C18-457C-8E22-A040937C301B&Options=ID|&Search=181568>.

While the City Clerk has not yet transmitted any notice or confirmation of this filing, it appears that the Historic Preservation Commission also received, after filing of Temporary Application, an application for permanent historic site designation as to some or all of the Subject Property (the “**Permanent Application**”). The Permanent Application was initialed by “CH” (senior planner Carmen Hatala) as having been received on “1/24/2019,” and the Council file for the application was formally created on January 24, 2019. *See* <https://milwaukee.legistar.com/LegislationDetail.aspx?ID=3846615&GUID=6E3CD069-8A81-4D11-BA90-914AAAB5A77F&Options=ID%7CText%7C&Search=Marcus+center>.



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Objections to the Commission's Hearing of the Temporary Application

In addition to the comment and other supporting evidence that it will present at the Commission's hearing on February 4, Marcus asserts that the Commission should dismiss the Temporary Application immediately, on three grounds: First, that notice of the application was not provided to a known owner of a portion of the Subject Property and/or to a known party owning real property located within 200 feet of the Subject Property; second, that the Temporary Application is deficient in failing to specify which element(s) of the property commonly known as 929 N. Water Street should be protected as an "historic structure" pursuant to the Temporary Application; and third, that the Commission does not have authority to hear the matter because, based on the evidence of the available public records, the Temporary Application failed to observe the ordinance requirements for competent filing.

1. The Temporary Application is Deficient in that the Notice of the Application was Not Provided to Business Improvement District No. 15, as Required by Ordinance. On October 6, 2006, Milwaukee County (acting through its agent, the Marcus Center) granted easement and ownership interests in parts of the Subject Property to Business Improvement District No. 15 ("**BID No. 15**"). The instrument granting these interests (the "**Riverwalk Agreement**") was recorded with the Milwaukee County Register of Deeds as Document Number 09315828—and, accordingly, the relevant interests of the County, Marcus, and BID No. 15 pursuant to that instrument are all matters of public record.

Under the Riverwalk Agreement, BID No. 15 is authorized to install certain defined "Improvements" upon identified areas of 929 N. Water Street. In addition, the Riverwalk Agreement decrees that BID No. 15 is the "sole owner of, and hold[s] title to the Improvements," and has both the right and the responsibility to "maintain, repair, replace, modify, alter and/or operate the Improvements." Riverwalk Agreement ¶ 3. Furthermore, "all rights of the BID" under the Riverwalk Agreement are "covenants running with the land, encumbering the [Subject] Property throughout the term of the [Riverwalk License] Agreement, and . . . binding upon and inur[ing] to the benefit of the parties thereto and their respective successors and assigns." *Id.* ¶ 13. Under Wisconsin law, rights that run with the land and that encumber title to such land are interests in real property. *See* WIS. STAT. § 840.01 ("interest in real property" includes estates in, powers of appointment under ch. 702 over, present and future rights to, title to, and interests in real property, including, without limitation by enumeration, security interests and liens on land, easements, profits, rights of appointees under powers of appointment, rights under covenants running with the land, powers of termination, and homestead rights"); *see also Prince Corp. v. Vandenberg*, 882 N.W.2d 371, 383 (Wis. 2016) (explaining that WIS. STAT. § 840.01 defines an "interest in real property" broadly); *Lone Pine Owners Ass'n v. Pellett*, 803 N.W.2d 867 (Wis. Ct. App. 2011) (stating that the "definition includes present and future rights to, title to, and interests in real property 'without limitation'"). Otherwise stated, BID No. 15 owns one or more real property interests in the parcel commonly described as 929 N. Water Street, the Subject Property under the Temporary Application.

Ordinances § 320-21-13-b requires that written "[n]otice as to the time, place and purpose of the hearing" on the Temporary Application "shall be sent at least 7 days prior to the hearing" (i) "by



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certified letter” to “[t]he owner of the subject property,” *Ordinances* § 320-21-13-b-2, and (ii) “by first class mail,” to “[a]ll persons or corporations who own property that is within 200 feet of the proposed designation” *Ordinances* § 320-21-13-b-4. Under the terms of the Riverwalk Agreement, BID No. 15 is the owner of real property rights in and upon 929 N. Water Street. Accordingly, *Ordinances* § 320-21-13-b requires that BID No. 15 must receive notice of the Temporary Application, either as “[t]he owner of the subject property” under *Ordinances* § 320-21-13-b-2 or—in any event, under *Ordinances* § 320-21-13-b-4—as a “person[] or corporation[] who own[s] property that is within 200 feet of the proposed designation.”

In this instance, the requisite notice to “[t]he owner of the subject property” was addressed to “Milwaukee County / Business Manager / Performing Arts Center” at 929 N. Water Street. Meanwhile, notice to owners of property within 200 feet of the Subject Property was sent to the parties listed on Attachment 2. BID No. 15 was neither sent, nor received, any notice of the Temporary Application. The notice requirement under *Ordinances* § 320-21 is jurisdictional. *See Adams v. Northland Equipment Co.*, 850 N.W.2d 272, 287 (Wis. 2014) (it is unconstitutional to deprive an individual of an interest in property without due process of law.); *see also Petition of Brandt*, 49 N.W.2d 903, 904 (Wis. 1952) (quoting *State ex rel. Zemlicka v. Baker*, 11 N.W.2d 364, 365 (Wis. 1946) (holding that highway commissioners’ order was void because failure to provide adequate notice to interested residents meant “commissioners had no jurisdiction to make the order”)).

Under these circumstances, a property owner who, as a condition of *Ordinances* § 320-21, must be provided notice of the Temporary Application and the Commission’s hearing on it was not provided the requisite notice.. Accordingly, the Commission has no authority under *Ordinances* § 320-21 to hear the Temporary Application, and the Temporary Application must at the very least be renoticed according to the expressed requirements of *Ordinances* § 320-21-13-b.

2. The Temporary Application is Deficient in Failing to Indicate with Specificity Which One or More Elements of the Property Commonly Known as 929 N. Water Street Should be Designated as an “Historic Structure, “as Defined in *Ordinances* § 320-21-3-h. Marcus occupies 106,532 acres (2.4433 acres) of land bounded by N. Water Street, E. Highland Avenue, the Milwaukee River, and E. Kilbourn Avenue. The portion of this land that lies north of E. State Street (commonly known as 130 E. State Street) is leased from the City of Milwaukee; the portion that lies south of E. State Street (commonly known as 929 N. Water Street) is leased from Milwaukee County. The two identified portions are connected by a pedestrian overpass generally considered to be an incident to the City’s demise of 130 E. State Street. Certain elements of 929 N. Water Street are also, as noted above, subject to real property interests of BID No. 15, which are governed by the Riverwalk Agreement.

Ordinances § 320-21-13 provides that “[a]ny resident of the city seeking to nominate a structure, site or geographic area for designation as a historic structure, historic site or historic district may also seek temporary designation of that structure, site or geographic area” as temporarily historic. Chapter 320 defines “Historic district,” “Historic site,” and “Historic structure,” respectively, as follows:

f. “**Historic district**” means a district which contains improvements
which:

- f-1. Have historical, architectural or cultural significance.
- f-2. Represent one or more periods or styles of architecture typical of one or more eras in the history of the city.
- f-3. Cause such area, by reason of such factors, to constitute a distinct section of the city.
- f-4. Has been designated as a historic district by the common council.

g. “**Historic site**” means one of the following:

- g-1. A real property on which a structure having historical significance is located.
- g-2. A real property on which there is no structure, but which itself is of historical significance that has substantial value in tracing the history of aboriginal man, or upon which a historic event has occurred.
- g-3. A real property that has been designated a historic site by the common council.

h. “**Historic structure**” means any improvement which has a special character or special historic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation and which has been designated as a historic structure by the common council.

The Temporary Application identifies the Subject Property as “929 N Water Street,” Presumably, then, the application is predicated on designation as an Historic site or as one or more Historic structures, but not on designation as an Historic district.

In determining whether the application seeks to protect (i) an Historic site or (ii) one or more Historic structures, however, the Temporary Application provides no guidance. The applicant provides a “Description of Structure” that is limited to a building of “3-5” stories and clad in “[s]tone.” The applicant also describes “Outstanding Features” by identifying the Subject Property’s significance as lying both in its “architecture” and “landscape architecture,” and by providing information on both an “iconic Milwaukee structure that was designed by Harry Weese and completed in 1969” and on “[Daniel] Kiley’s work on the Performing Arts Center” and on his “design of this Grove—concrete, gravel, and trees.”

In fact, the property at 929 N. Water Street includes a wide variety of permanent improvements in addition to the principal performance structure and the grove of horse chestnut trees. Some of these improvements were designed by Harry Weese or Daniel Kiley; others were not. Relevant site improvements include statuary, Riverwalk improvements, a significant outdoor performance structure (the Peck Pavilion), and prominent fixed elements of landscaping (including a fountain, planters, paved plazas, and light bollards).

If the applicant in its Temporary Application seeks to designate all 929 N. Water Street as an Historic site, all of these improvements must be accounted for—and, as a matter of due process, Marcus must have an opportunity to be heard on whether each of these elements (or

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whether all of them in their totality) evidence “[h]istoric, architectural and cultural significance” within the meaning of *Ordinances* § 320-21-3-e—which is the pertinent standard for determination by the Commission’s under *Ordinances* § 320-21-9-c. *See Estate of Derzon*, 908 N.W.2d 471, 483 (Wis. Ct. App. 2018).

If, on the other hand, the applicant in its Temporary Application actually seeks only to designate the Weese-designed principal performance structure and the Kiley-designed grove of horse chestnut trees, Marcus must be afforded an opportunity—again as a matter of due process—to present specific comment, evidence, and materials on the questions of (i) whether each of these specific elements constitutes an “Improvement” within the meaning of *Ordinances* § 320-21-9-c and (ii) whether such Improvements rise to the standard for determination by the Commission’s under *Ordinances* § 320-21-9-c. *See id.* (stating that due process requires the opportunity to be heard, which itself requires the opportunity to present relevant evidence).

Under the current circumstances, then, the applicant has failed to complete the Temporary Application in a fashion that identifies, with certainty, the Improvements to be designated. As a result, Marcus and the County are precluded from preparing a meaningful response to the Commission. Accordingly, the Temporary Application should be rejected and, if the applicant desires, revised and refiled in a form that satisfies the requirements of due process commensurate with the restrictions that would be imposed by granting the Temporary Application.

3. The Commission Does Not Have Authority under *Ordinances* § 320-21 to Hear the Temporary Application. City of Milwaukee Code of Ordinances § 320-21-13 imposes several jurisdictional requirements with respect to temporary designation as an historic structure. In this instance, the relevant requirement is as follows:

An application for temporary designation shall be filed with the city clerk’s office, on forms made available for this purpose, *either* [1] at the time of filing the application for permanent designation *or* [2] at anytime [*sic*] prior to the final decision by the commission on the application for permanent designation.

Ordinances § 320-21-13-a (emphasis added). The effect of this provision is clear: an application for temporary designation is competently filed *only* if it is filed either *at the same time as* or *after* an application for permanent designation. The instructions pages of the “forms made available” by the clerk’s office “for this purpose” (copy at Attachment 2) clearly restate this requirement, with emphasis: “A permanent designation form must already be on file or submitted simultaneously” as a condition to filing an application for temporary designation.

Date-stamped copies of the Temporary Application and the Permanent Application are not available in the public record. In this instance, materials provided to Marcus and file materials available in the City’s Legislative Research Center suggest, however, that the Temporary Application was initiated by telephone (“per call”) on “1/18/2019.” Even allowing for some uncertainty about the efficacy of a phone filing, the Council file for the application was formally created on January 23, 2019. By



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comparison, the Permanent Application was initialed by "CH" to confirm its receipt on "1/24/2019," and the Council file for the application was likewise formally created on January 24, 2019. In other words, the Permanent Application was *not* on file when the Temporary Application was submitted, *nor* was the Permanent Application submitted simultaneously with the Temporary Application. The requirement of the Permanent Application's prior or simultaneous filing is jurisdictional. *See State ex rel. Zemlicka v. Baker, supra* (holding in part that, where an administrative body fails to abide by the requirements fixed by the legislature, it deprives itself of jurisdiction to issue an order).

Under these circumstances, the Temporary Application fails to satisfy the threshold requirements of *Ordinances* § 320-21-13-a. Accordingly, the Commission has no authority under *Ordinances* § 320-21 to hear the Temporary Application, and the Temporary Application must be rejected and competently filed.

For all of the reasons enumerated in this letter, the Commission's hearing on the Temporary Application, now scheduled for 3:00 p.m. on February 4, should be immediately cancelled and, if desired by the applicant, necessary remedial measures to the Temporary Application should be undertaken.

Very truly yours,

A handwritten signature in blue ink that reads "Michael Ostermeyer/sma".

Michael J. Ostermeyer

MJO:jmk

cc: Mr. Paul Mathews, President and CEO, Marcus Center
Jerome Janzer, Esq., Chair, Marcus Center for the Performing Arts
Teig Whaley-Smith, Esq., Milwaukee County Department of Administration
Paul Kuglitsch, Esq., Milwaukee County Office of the Corporation Counsel
Mr. Scott Manske, Milwaukee County Office of the Comptroller
Ms. Stacie Callies, Westown Association (for Business Improvement District No. 15)

Attachment 1

OWNER NAME 1	OWNER NAME 2	OWNER NAME 3
AAP PROPERTIES	RETAIL UNIT LLC	
AAP PROPERTIES LLC		
BEVERLY HILLS PROPERTIES I	MODERN PRODUCTS INC	
MARCUS W LLC		
MILWAUKEE CENTER MGMT LLC		
MILWAUKEE COUNTY	%BUSINESS MANAGER	PERFORMING ARTS CENTER
ROJAHN & MALANEY CO		

Attachment 2

TEMPORARY HISTORIC DESIGNATION PETITION INSTRUCTIONS

Please type or print clearly.

To request a public hearing on temporary designation in accordance with Section 320-21 of the Milwaukee Code of Ordinances, it is necessary to complete the attached petition and return it to the staff of the Historic Preservation Commission. In general, the photographs, slides and documentation submitted with this petition are non-returnable. To file a petition, you must be the owner of the subject property, or a resident of the City of Milwaukee, or a City of Milwaukee Alderperson.

1. **Name of Property**
Provide the name by which the property is generally known, if any. Give the full address of the property including zip code.
2. **Name and Address of Owner**
Provide the name, address, and telephone number of the owner. If there are multiple owners of real interest, include all parties, using a separate sheet of paper, if necessary. Provide name, address, and telephone number of the applicant, if different from the owner.
3. **Attachments**
If possible, the petition should be accompanied by a minimum of one clear black-and-white (or color) original photograph at least 3 x 5 inches in size showing the principal exterior elevation of the building. It is advisable to provide additional photographs if the structure merits more extensive pictorial coverage or displays significant features on several elevations. Digital images on a disks or flashdrive are acceptable. To supplement your application, you may want to submit historical documentation as further evidence of why the structure is worthy of historic designation. A permanent designation form must already be on file or submitted simultaneously.
4. **Legal Property Description**
Provide the legal property description from the deed or tax assessor's records.
<http://assessments.milwaukee.gov/>
5. **Description of Structure**
Describe the structure's shape, building materials, and exterior features in paragraph form. Specify types and colors materials, the design or pattern of decorative ornament, and the arrangement of architectural elements. Also describe other features on the site such as outbuildings, decorative fences, sculpture, fountains, or landscape treatments that may add to the significance or historic character of the site. Briefly describe additions or alterations and non-historic features. Use continuation sheets, if necessary.
6. **Significance**
In a brief opening paragraph, enumerate the areas of significance checked above and explain specifically why the site is important in each of these categories. In subsequent paragraphs, and on continuation sheets, if necessary, detail the history of the site and the people or events that have contributed to its significance. You may want to attach photocopies of documentation to support and further amplify your research.