

CITY OF MILWAUKEE

Form CA-43

GRANT F. LANGLEY
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Assistant City Attorneys

October 17, 2005

To the Honorable Committee on
Zoning, Neighborhoods & Development
Room 205 – City Hall
200 East Wells Street
Milwaukee, WI 53202

Re: Common Council File No. 050590; Tara Vista Estates

Dear Committee Members:

We understand that the Zoning, Neighborhoods & Development Committee (“ZND”) of the Common Council, at its October 11, 2005 hearing, requested an opinion from our office with respect to the final subdivision plat for Tara Vista Estates.

Our office previously issued a May 24, 2005 opinion concerning the preliminary subdivision plat for Tara Vista Estates. A copy of that opinion (document 93436) is attached.

In our May 24 2005 opinion, we noted that the Council, by Resolution File No. 041484 (adopted March 16, 2005), waived the sidewalk requirements of MCO § 113-12.5 for Tara Vista Estates. That ordinance, and MCO § 119-12-1-c, allow the Council the right to waive sidewalks. We also noted that the Council, by Resolution File No. 041783 (adopted May 3, 2005), approved an Out-of-Program Agreement that specifically indicated that no sidewalks would be constructed. We opined that it would be very difficult to legally defend a refusal by the City Plan Commission to approve the preliminary plat for the subdivision due to the absence of sidewalks when the Council already waived the sidewalk requirement.

Nothing under the Americans with Disabilities Act (ADA) of 1990 requires that sidewalks be put in residential subdivisions. See 42 U.S.C. § 12101 *et seq.*; 28 C.F.R. Part 35.

Given the Council’s past waiver of sidewalks (File 041484 and File 041783), it would be foreseeable for the developer to sue the City if the Council were to now attempt to reverse the previously granted waiver or to refuse to approve the final plat solely because of the sidewalk issue. And, we believe that such a lawsuit could very well subject the City to liability. See, for example, the reference in our May 24 opinion to Wis. Stat. § 236.13 (5) – the Court shall direct

that the plat be approved if it finds that the action of the approving authority or objecting agency is arbitrary, unreasonable or discriminatory. Had the Council never waived sidewalks in the past files, our response would be different.

Very truly yours,



GRANT F. LANGLEY
City Attorney



GREGG C. HAGOPIAN
Assistant City Attorney



MARYNELL REGAN
Assistant City Attorney

Enclosure

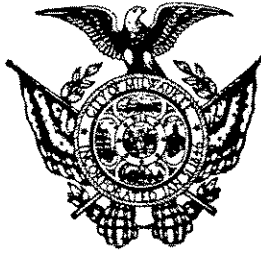
c: Alderman Robert W. Puente
Mr. Jeffrey Polenske, City Engineer
Mr. John Hyslop
Ms. Vanessa Koster

1033-2005-2743/97835

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ELOISA DE LEÓN
ADAM STEPHENS

Assistant City Attorneys

May 24, 2005

Rocky Marcoux, Commissioner
Department of City Development
809 North Broadway
Milwaukee, WI 53202

Re: Preliminary Plat - Tara Vista Estates; Council's Sidewalk Authority

Dear Commissioner Marcoux:

Milwaukee Code of Ordinances ("MCO") § 113-12.5 provides as follows:

"Concrete sidewalks shall be installed on both sides of any street whenever said street is improved by installing permanent pavement, curb and gutter; provided, however, that the common council may waive or defer this requirement."

Backus Milwaukee, LLC ("Backus") is developing Tara Vista Estates - a single-family subdivision between West Brown Deer Road and Dretzka Park at North 116th Street.

The Common Council adopted Resolution File No. 041484 on **March 16, 2005** waiving the sidewalk requirements of MCO § 113-12.5 for Tara Vista Estates. Again, the express terms of § 113-12.5 allow the Council the right to waive sidewalks.

The Common Council adopted Resolution File No. 041783 on **May 3, 2005** approving an Out of Program Agreement for Tara Vista Estates whereby Backus will design and install public improvements (including paving improvements [streets], storm and sanitary sewer improvements, and water improvements) at the subdivision at no cost to the City. The Out of Program Agreement, at page 5, para. 8 says "No sidewalks will be constructed." Thus, the Council reaffirmed its waiver of the sidewalks.

In a letter dated May 17, 2005, you indicated that the City Plan Commission ("CPC") on **May 9, 2005**, recommended that the Preliminary Subdivision Plat for Tara Vista Estates be placed on file since there was no provision in it for sidewalks as required by MCO § 119-12 (1)(c).

Rocky Marcoux, Commissioner

May 24, 2005

Page 2

MCO § 119-12 (1) provides that the subdivider of a residential subdivision plat must enter into an agreement with the city to guarantee installation "of the following facilities *required by the common council and the commissioner of public works...*" (emphasis added). And, subsection (c) of § 119-12(1) lists:

"Concrete sidewalks along both sides of every street in a residentially zoned area...; provided, however, that *the common council* may waive or defer any or all of these requirements." (Emphasis added).

See, also, Wis. Stat. § 236.13 (2) (regarding the Common Council's authority to require a subdivider to make and install improvements), MCO § 119-12-2 (adequacy of facilities as may be required under MCO § 119-12 are subject to approval of the Commissioner of Public Works and the Common Council) and MCO § 119-10-2-h (the form of Common Council Resolution required with respect to Final Subdivision Plats).

You asked for our opinion concerning the above.

Our quotations to MCO § 113-12.5 and § 119-12(1) and (1)(c) above clearly indicate that the Council has power to waive sidewalks.

It strikes us as odd that the CPC would list MCO § 119-12 (1)(c) as its reason for placing on file the Preliminary Plat for Tara Vista Estates when that ordinance (as well as § 113-12.5) clearly allows the Council to waive the sidewalk requirement and, in fact, the Council has waived sidewalks for this subdivision.

MCO § 119-5-3-b requires the CPC to forward a report to the subdivider (Backus) stating the CPC's "reasons for disapproval" of a Preliminary Plat (see also Wis. Stat. § 236.11 (1)(a)), and it allows Backus to appeal directly to the CPC by request made within 30 days of the date of the CPC's report. See the CPC report, attached hereto as **Exhibit A**.

One would assume that, under the circumstances, and to avoid the possible waiver of rights, Backus would appeal to the CPC under MCO § 119-5-3-b. See, also, Wis. Stat. § 236.13 (5). And, it would be very difficult to defend CPC's reason for not approving. So long as Backus's Preliminary Plat *otherwise* meets the requirements of MCO Ch. 119 and Wis. Stat. Ch. 236 (including MCO § 119-6 - requirements for Preliminary Plats), it should be approved by the CPC, and the CPC should recognize and respect: (a) the Council's authority to waive sidewalk requirements; and (b) the Council's waiver as reflected in File No.'s 041484 and 041783.¹

¹ See, also, Wis. Stat. § 236.13 (5) (the court shall direct that the plat be approved if it finds that the action of the approving authority or objecting agency is arbitrary, unreasonable or discriminatory).

Rocky Marcoux, Commissioner
May 24, 2005
Page 3

This opinion does not relate to the CPC's authority under MCO § 119-11-2-b-2 to require certain crosswalks or pedestrian ways - which authority, in any event, would still need to be harmonized with the Council's authority to waive sidewalks. And, Wis. Stat. § 236.13 (4)², we believe, would not apply since, as Wis. Stat. § 236.10 (3) and MCO § 320-15 and § 119-2-2, recognize, the CPC is "a planning committee or commission of the approving governing body" as opposed to being a competing governing body or agency.

Very truly yours,



GRANT F. LANGLEY
City Attorney



GREGG C. HAGOPIAN
Assistant City Attorney

GCH/ml:93436

c: City Plan Commission
Vanessa Koster

1050-2005-1427

² Wis. Stat. § 236.13(4) provides: "Where more than one governing body or other agency has authority to approve or to object to a plat and the requirements of such bodies or agencies are conflicting, the plat shall comply with the most restrictive requirements."

EXHIBIT A

May 17, 2005

Jeff Harrop
Bacchus Golf & Development, LLC
8176 Basil Court
Neenah, WI 549

Re: Preliminary plat of Tara Vista Estates

Dear Mr. Harrop:

On May 9, 2005, the City Plan Commission recommended that this preliminary plat be placed on file since the proposed subdivision does not provide sidewalks, as required by Chp. 119-12 (1)(c). The subdivider has 30 business days after the date of this letter to appeal the decision made by City Plan Commission.

Sincerely,

Rocky Marcoux
Executive Secretary
City Plan Commission

Enclosure

cc: Jeff Polenske, City Engineer
Tom Miller, DPW
Marcia Lindholm, DPW
File

EX A



Department of City Development

Housing Authority
Redevelopment Authority
City Plan Commission
Historic Preservation Commission
NIDC

Rocky Marcoux
Commissioner

Martha L. Brown
Deputy Commissioner

May 17, 2005

Grant F. Langley
City Attorney
City Hall, Room 800
City of Milwaukee

CITY ATTORNEY
MAY 18 11:11:04
CITY OF MILWAUKEE

RE: Preliminary Plat known as Tara Vista Estates

Dear Mr. Langley:

The Department of City Development is requesting a City Attorney's opinion relative to subdivision procedures per State Statutes Chp. 236 and Milwaukee Code of Ordinances, Subdivision Regulations, Chp. 119. We are also requesting an opinion on Council approval of Resolution File No's. 041484 and 041783, prior to City Plan Commission recommendation on a preliminary subdivision plat, and whether or not those approvals are valid.

On May 9, 2005, the City Plan Commission recommended that the preliminary plat known as Tara Vista Estates (see attached), generally located South of West Brown Deer Road and West of North 114th Street, be placed on file since the proposed subdivision does not provide sidewalks, as required by Chp. 119-12 (1)(c). The sidewalks were previously waived via Common Council File No. 041484. On May 3, 2005, Common Council also recommended approval for File No. 041783, being an out of program agreement, which references the resolution waiving the sidewalks in this subdivision.

City of Milwaukee Chp. 119-5(1)(b). allows the subdivider to request an appeal of preliminary plat directly to the Commission. We are requesting an opinion as soon as possible since the owner of the property has 30 days to appeal City Plan Commission's recommendation on the preliminary plat. If an appeal is not approved by the City Plan Commission can the subdivider submit a final plat that does not provide sidewalks.

Sincerely,

Rocky Marcoux
Commissioner

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GFL 5/18/05		
TO: Hagopian		
pan 5/18/05		
(IF LESS THAN 15)		
15	30	90 NA
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RVS:
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Attachment

cc: Jeff Polenske, City Engineer
Tom Miller, DPW
Marcia Lindholm, DPW

1050-2005-1427