

October 31, 2005

Mr. Jim Owczarski, Council Records Manager
Office of the City Clerk
City Hall, Room 205

Re: Calculating 60-day Time Period Under MCO §119-5-4-d

Dear Mr. Owczarski:

By letter dated October 25, 2005, you asked when the 60-day limit under MCO §119-5-4-d should commence for purposes of Common Council File No. 050232:

- (a) the date of introduction of that file as a title only, **June 14, 2005**, with the title “Substitute Resolution Approving the Final Plan of Park East on the Westside of Milwaukee River Located West of the Milwaukee River Generally North of West Juneau Avenue, in the 4th and 6th Aldermanic Districts”; or
- (b) the date on which the file was filled by insertion into it of the legal description and the actual, final subdivision plat map, **October 6, 2005**, in anticipation of a hearing before ZND on October 11, 2005.

The answer is “b” above, October 6, 2005.

We have assumed that the subdivision plat itself complies with the technical requirements of MCO Ch. 119 and Wis. Stat. Ch. 236. (E.g., MCO §§ 119-6, 119-9, 119-10 and 119-

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11 requirements, etc.). See, also, Wis. Stat. Ch. 236 – including Wis. Stat. § 236.13 (1)(a) and (b) (approval of preliminary and final plats must comply with Wis. Stat. Ch. 236 and municipal ordinances) and § 236.45 (local subdivision regulation).

MCO § 119-4, entitled “Application” provides, in sub (1), that no submittal of a final subdivision plat originated by a private subdivider shall be recommended for approval until the filing fee has been provided by the subdivider. And, § 119-4-2 requires all subdivision plats (preliminary and final) to be submitted to the Department of City Development (“DCD”) for processing and coordination of technical reviews.

Vanessa Koster informed us that the particular subdivision plat at issue was submitted by the City, that the owners of the land at issue are the City, Milwaukee County, and Riverfront, LLC, and that, since the subdivider has been viewed as the City, no filing fee under MCO § 119-4-1 was submitted, required, or expected.

MCO § 119-5, entitled “Procedures” deals with the approval process for preliminary and final certified survey maps (“CSM’s”) and subdivision plats.

MCO § 119-5-3, entitled “Preliminary Plats,” provides, in sub (a), that, upon completion of review and processing by DCD of a preliminary subdivision plat, the plat shall be scheduled for consideration by the City Plan Commission (“CPC”). The CPC must approve, conditionally approve, or disapprove the preliminary plat within 90 days after filing of the preliminary plat unless the time is extended by agreement with the subdivider. An indication of the CPC’s action must be affixed on the face of the preliminary plat. Time of filing of the preliminary plat is construed “as being the time the preliminary plat is received by the [CPC] at the first meeting of the [CPC] following submission.”

MCO § 119-5-3-b says that the CPC must forward a report to the subdivider stating its action of approval, conditions of approval, or the reasons for disapproval. See, also, Wis. Stat. § 236.11 (1)(a).

According to Ms. Koster, the preliminary plat was “filed” for purposes of § 119-5-3 on December 21, 2004, the CPC approved the preliminary plat on January 18, 2005, and January 18, 2005 was the date affixed on the face of the preliminary plat. Thus, the CPC approval was within the 90-day period required in MCO § 119-5-3.

The date of the CPC’s report regarding approval of the preliminary plat was January 28, 2005. Under MCO § 119-5-3-b, a subdivider may appeal to the CPC the CPC’s approval, conditions of approval, or disapproval of a preliminary plat “within 30 days of the date” of the CPC’s report. Since the CPC did approve, however, there was no appeal in this

instance. (See Wis. Stat. § 236.13 (5) where the ability to appeal, as would be expected, is limited to “an objection to a plat or a failure to approve a plat”).

MCO § 119-5-4 deals with final plats. Sec. 119-5-4-a provides that “[f]inal plats shall be submitted to [DCD] within 6 months following the date of the report on the preliminary plat by the [CPC], otherwise the approval of the preliminary plat shall become null and void.”

Again, the date of the CPC report was January 28, 2005. Per Ms. Koster, the final plat was submitted to DCD on May 15, 2005, which is within the 6-month period of § 119-5-4.

MCO § 119-5-4-b provides that “[f]inal plats shall be considered in the same manner as preliminary plats except that, after review by the city engineer, commissioner of public works and city treasurer, the [CPC] shall prepare a report thereon and forward its recommendation to the council for consideration.”

Given MCO § 119-5-4-b’s “same manner” reference, we believe that, consistent with § 119-5-3-a, the CPC must act on final plats within 90 days after CPC receives the final plat at its first meeting following submission.

Ms. Koster indicates that this 90-day requirement was met. Per Ms. Koster, the CPC met on August 15, 2005 to consider the actual final plat that had been timely submitted on May 15, 2005 to DCD within § 119-5-4’s 6-month period. While, technically, there are 92 days between May 15 and August 15, 2005, take note that the 90th day would have been Saturday, August 13, 2005 (and, generally speaking, under Wis. Stat. § 999.001 (4)(c), the time would be extended to Monday, August, 15, 2005), and the 90-day period would commence to run, not from the date the final plat was submitted to DCD, but from the date the final plat was received by the CPC at its first meeting following submission. Hence, the 90-day period would have been met.

Ms. Koster informed us that, on August 15, 2005, the CPC recommended Council approval of the final plat, and that, consistent with past DCD and CPC practice, nothing was then affixed to the final plat, and nothing was sent to the subdivider (there was no CPC report). It was explained that the CPC’s customary practice after recommending approval of a final plat is to wait for Council approval, to, after approval, record the final plat in the Register of Deeds Office, and on a copy of the final plat, to then insert the recording data, and to distribute copies to the subdivider. If the CPC would recommend disapproval or conditions of approval to the final plat, it was explained that the CPC would issue a report to the subdivider. We believe that, given the “same manner” reference in § 119-5-4-b, it would be better practice for the CPC to issue a report

concerning its recommendation on final plats and to send the report to the subdivider one way or another, including when the CPC recommends approval of a final plat, but that the failure of the CPC to do so in the case of approvals does not jeopardize the plat. See and compare Wis. Stat. § 236.11 (1)(a) which only requires written notice of conditions of approval or of rejection of preliminary plats, with MCO § 119-5-3-b (CPC must forward to subdivider a report “stating its action of approval, conditions of approval or the reasons for disapproval” of a preliminary plat) and § 119-5-4-b (CPC must prepare a report on the final plat and forward its recommendation to the Council for consideration).

About two months *prior to* the CPC recommending approval of the final plat, DCD had requested introduction of a “title-only” resolution for approval of the final plat, and the same was introduced as Common Council File Number 050232 on June 14, 2005.

Again, on August 15, the CPC recommended approval of the final plat.

On October 3, 2005, the Council file had sponsors added, and also the CPC sent its letter to the Council evidencing its recommendation of approval.

On October 6, 2005, File No. 050232 was filled by insertion into it of the actual final plat that the CPC had reviewed. MCO § 119-5 does not contain a deadline with respect to the CPC getting final plats to the Council after the CPC has acted on them under § 119-5-4. (But, See, Wis. Stat. § 236.11 (1)(b): if final plat is not submitted within 24 months after the last required approval of the preliminary plat, any approving authority may refuse to approve the final plat.) So, while there was a delay between the August 15 CPC action and the October 6 filling of the file, there is no local-ordinance deadline applicable,¹ and take note that the Council was on recess in August.

Per MCO § 119-5-4-c, “Council action shall take place within 60 days after filing unless the time had been extended by agreement with the applicant. If the council fails to act within 60 days and the time has not been extended by agreement, the plat shall be deemed approved and, upon demand, a certificate to that effect shall be made on the face of the plat by the city clerk.” See, also, Wis. Stat. § 236.10 (1)(a) (governing body of municipality must approve final plat in order for it to be recorded), § 236.10 (3) (governing body may delegate approval authority to plan commission), and § 236.11 (2) (“the body or bodies having authority to approve plats shall approve or reject the final

¹ Per Wis. Stat. §236.11(1)(b), “[i]f the final plat conforms substantially to the preliminary plat as approved, including any conditions of that approval, and to local plans and ordinances adopted as authorized by law, it is entitled to approval. If the final plat is not submitted within 24 months after the last required approval of the preliminary plat, any approving authority may refuse to approve the final plat.” And, regarding conditions that may be imposed, see Wis. Stat. §236.13(3): “[n]o approving authority or agency having the power to approve or to object to plats shall condition approval upon compliance with, or base an objection upon, any requirement other than those specified in this section.”

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plat within 60 days of its submission...If the approving authority fails to act within 60 days and the time has not been extended by agreement and if no unsatisfied objections have been filed within that period, the plat shall be deemed approved...” (emphasis added).

MCO § 119-5-4-d provides that “[t]ime of filing shall be construed as being the time the final plat is introduced into the council” (emphasis added).

It is clear from the plain language of § 119-5-4-c and d (as supported by the plain language of Wis. Stat. § 236.11 (2)), that there must be an actual final plat introduced or submitted to the council. A title-only resolution does not suffice.

Thus, we opine that the 60-day-time period in MCO § 119-5-4-c should, for purposes of the final plat at issue and § 119-5-4-d (and Wis. Stat. § 236.11 (2)), begin running on October 6, 2005. That is when the actual final plat was first submitted to the Council. The Council would then have 60 days from October 6 to act, failing which, the final plat would be deemed approved under MCO § 119-5-4-c and Wis. Stat. § 236.11 (2).

Please call if you have questions or comments.

Very truly yours,

GRANT F. LANGLEY
City Attorney

GREGG C. HAGOPIAN
Assistant City Attorney

GCH/ms:98277
cc: ZND Committee Members
Vanessa Koster
1055-2005-2938