

1 STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
2 BRANCH #23

3 DAWN MCCARTHY and
4 PETER and THEA KOVAC
5 and DONNA NEAL,

6 Plaintiffs,

7 vs.

Case No. 07CV14155

8 CITY OF MILWAUKEE,
9 and DAPL, LLC,

COPY

10 Defendants.

11 January 16, 2008

12 EXCERPT OF PROCEEDINGS (DECISION) BEFORE THE
13 HONORABLE ELSA C. LAMELAS
14 CIRCUIT JUDGE, BR. 23, PRESIDING

15 A P P E A R A N C E S:

16 Law Offices of Joseph R. Cincotta, LLC by
17 JOSEPH R. CINCOTTA
18 Attorney-at-Law
19 757 North Broadway, Suite 300
20 Milwaukee, Wisconsin 53202
21 appeared on behalf the Plaintiffs.

22 GRANT F. LANGLEY, City Attorney by
23 GREGG C. HAGOPIAN
24 Attorney-at-Law
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200 East Wells Street
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appeared on behalf of the City of Milwaukee.

THOMAS B. BURKE
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appeared on behalf of DAPL, LLC.

1 MICHAEL BEST & FRIEDRICH, LLP by
ALAN MARCUVITZ
2 Attorney-at-Law
100 East Wisconsin Avenue, Suite 3300
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appeared on (by phone) behalf of DAPL, LLC.

4 Carol A. Brathol - Court Reporter

5 EXCERPT OF PROCEEDINGS

6 THE COURT: All right. Let's go back on the
7 record.

8 The record will reflect that Mr. Marcuvitz is
9 not here. He had other commitments this afternoon but
10 wanted to hear what I had to say by phone.

11 Counsel for the parties are otherwise here.

12 Let me begin by commenting on what I commented
13 on in chambers after the hearing last week, and that was
14 my comment that the litigants had referred to the
15 plaintiffs as the neighbors, and I know that there is case
16 authority where persons in that position are referred to
17 as neighbors. But I do want to note that Mr. Kovac
18 testified that he's not only a neighbor but a property
19 owner.

20 I don't recall any testimony regarding the other
21 plaintiffs, whether they are indeed owners or not; but
22 Mr. Cincotta mentioned that today during his remarks. No
23 one spoke up against it. And so I assume that the other
24 plaintiffs have property rights as well.

25 I bring this up because the right to property is

1 enshrined in the 5th Amendment's takings clause and made
2 applicable to the states through the 14th, and while this
3 is plainly not a takings case, the actions of the city
4 implicate the property interests of the plaintiffs as well
5 as their interests in statutory rights independent of
6 their status as property owners.

7 And I mean by this rights such as the statutory
8 right to notice and the public's, the public's right to
9 transparent government, which is part and parcel of due
10 process.

11 Mr. Kovac testified that he has lived on the
12 property in question since the 1970s. His interest in the
13 Downer Avenue development is readily understood. Concern
14 and interest in one's home is consistent with our culture
15 and values and with the Anglo-American concept of one's
16 home as one's castle.

17 In Pennsylvania Coal versus Mahon, M-a-h-o-n, I
18 think, a case that was not cited to me I don't think by
19 the parties, found at 260 U.S. 393, a United States
20 Supreme Court case from 1922, no lesser figure than Oliver
21 Wendell Holmes instructed:

22 "This is the case of a single private house. No
23 doubt there is a public interest even in this, as there is
24 in every purchase and sale and in all that happens within
25 the commonwealth."

1 I'm not sure if Justice Holmes was speaking
2 tongue in cheek, but I think that there is wisdom there.

3 DAPL and the city did not wholly disregard these
4 values. The mayor intervened, and Joel Lee attempted some
5 accommodation. That's how the footprint of the parking
6 lot was changed.

7 But other aspects of the city's handling of the
8 development of the formerly city-owned parking lot at
9 issue here raises serious questions about the transparency
10 of the process and the failure to comply with state law.

11 The development of this parcel affected not only
12 a single private house, but a state historic district.

13 Our state recognizes the value of historic
14 properties, which include listed individual properties as
15 well as a district, this district. The city concedes that
16 the Kovac residence is designated by the state as a
17 historic property though the parcel being developed is
18 not.

19 Pursuant to statute the City of Milwaukee was
20 required at the "earliest stage of planning" to determine
21 if the proposed development would affect the Kovac and
22 other property in that historic district as well as the
23 district, itself.

24 Wisconsin Statute 66.111 -- did I say four
25 ones?

1 MR. CINCOTTA: One more.

2 THE COURT: One more -- 66.1111 Subsection (4)
3 states:

4 In the earliest stage of planning any action
5 related to the following, a political subdivision shall
6 determine if its proposed action will affect any historic
7 property which is a listed property, as defined under
8 44.31 Subsection (4), or which is on the list of locally
9 designated historic places under 44.45.

10 While the city concedes that the Kovac home is
11 an historic property, it contends that it was not required
12 to notify the state. There is no merit to that
13 contention.

14 It is plain from the record before me that the
15 plan to develop the parcel in question was from inception
16 one that would affect the Kovac property. Earlier today I
17 stated, I think, that the parking lot would tower over the
18 Kovac property. "Tower" is probably the wrong word in
19 that it implies a verticality absent from the design that
20 I have examined and the photographs of the construction.

21 But I cannot imagine how any rational person,
22 much less municipal officials presumably more skilled in
23 this area than ordinary people, could fail to note that
24 the scale, the height, the character, and the proximity of
25 the proposed parking structure would affect the Kovac

1 property, a red brick colonial, and the historic district.

2 The genesis of the DAPL design or the DAPL plan
3 is murky at least to me, and that -- there may be many
4 innocent explanations for that since the focus of the
5 hearings before me were not intended to flesh that out.
6 But as I understand it, one year or so before the city
7 entered into its relationship with DAPL there was a
8 request for proposals to develop the property.

9 For reasons that were not explained in the
10 context of the hearings before me, the various submissions
11 were rejected by the city. Some time later the city
12 entered into a contractual relationship with DAPL that
13 provided for the development of a four-story parking
14 structure so high and so close to the Kovac property that
15 it prompted the concerns we have been discussing during
16 the course of these hearings.

17 Given these circumstances, Sections 66.1111 and
18 44.42 of the Wisconsin Statutes required good-faith
19 negotiation between the city and the State Historic
20 Preservation Officer.

21 This did not take place.

22 Not only did the city fail to notify the State
23 Historical Society, even after Mr. Chip Brown, the Third,
24 wrote to the city, advising the city of its obligation
25 under state law, the city ignored the letter.

1 A time line submitted by the city as Exhibit 28
2 was prepared by one of its witnesses, Vanessa Koster. She
3 testified, I believe, that the city received a letter in
4 May, 2007 from Mr. Brown indicating no need for
5 negotiation.

6 If indeed that was her testimony and I did not
7 mishear it, that claim is not supported by the record.
8 Mr. Brown testified that he did not write such a letter
9 until November, and my review of the letters submitted as
10 exhibits is consistent with that. Mr. Brown's springtime
11 letters asserted the State Historical Society's right to
12 engage in negotiation with the city.

13 The State Historical Society has no authority to
14 litigate on its own. According to Mr. Brown, it must, if
15 it wishes, turn to the Attorney General's office for help
16 with respect to that. Should the Historical Society do
17 this -- by "do this" I mean turn to the Attorney General's
18 Office for litigation -- I imagine that the request would
19 be analyzed much as Mr. Marcuvitz analyzed the statute
20 today questioning by what authority to and to accomplish
21 what.

22 Given these circumstances, it is no surprise
23 that there is little litigation, if any, on behalf of the
24 State Historical Society.

25 While I agree with Mr. Marcuvitz that the

1 statute grants the society no enforcement authority, I am
2 troubled and discouraged that the city simply ignored what
3 is nevertheless its statutory obligation to protect
4 historic districts, properties, and the public trust. Our
5 state's largest city is where we should turn to for civic
6 lessons in statutory compliance, not noncompliance.

7 The city has also contended that there is no
8 private cause of action here, and this is where I probably
9 disagree, but this is a very tenuous area.

10 62.23 Subsection (7) does provide that any
11 adjacent or neighboring property owner who would be
12 specially damaged by a violation of this section may in
13 addition to other remedies institute appropriate action or
14 proceedings to prevent such unlawful erection
15 construction, reconstruction, alteration, conversion,
16 maintenance or sue to restrain, correct, or abate such
17 violation, to prevent the occupancy of said building,
18 structure, or land, or to prevent any illegal act,
19 conduct, business, or use in such or about such premises.

20 62.38 Subsection -- 62.23 Subsection (8)
21 contains similar language, which I will not quote here.

22 Plaintiff's first cause of action is that the
23 city failed to engage in good-faith negotiation with the
24 state regarding the development of the parcel in
25 question.

1 From the record before me I find that the city
2 did fail to engage in good-faith negotiation with the
3 State Historic Society. The question in my mind is
4 whether the language of 62.23 is applicable, and if it is
5 applicable, what remedy is afforded.

6 It appears to me that the language of 62.23 with
7 respect to private causes of action reaches that section,
8 meaning 62.23. Even if 62.23 were interpreted to reach
9 the negotiation requirement, as plaintiffs urge me to
10 conclude, it seems simply too much of a stretch to find in
11 this complex statutory interplay an enforcement authority
12 denied to the State Historical Society, the state agency
13 entrusted with the duty to negotiate.

14 My difficulty in granting the injunctive relief
15 sought by plaintiffs with respect to the first cause of
16 action is also premised on the testimony of Mr. Brown that
17 the plan under construction is satisfactory to the State
18 Historic Society.

19 Mr. Brown testified that after being advised of
20 the changes to the original plan and seeing the
21 accommodations made by the developer, many or most of his
22 concerns were met. I, therefore, cannot find that on the
23 record before me that the absence of good-faith
24 negotiations ultimately damaged the plaintiffs.

25 Mr. Cincotta argues that if the city and the

1 Historic Society had negotiated during the period in
2 question, Mr. Brown would have been more attentive to the
3 height of the parking structure.

4 In order to grant injunctive relief I'm required
5 to determine the likelihood to succeed on the merits. I
6 cannot find that the record before me supports the
7 contention that if there had been negotiation with
8 Mr. Brown's -- with Mr. Brown the ultimate position of the
9 Historical Society would have differed from that reflected
10 in his November letter.

11 I am mindful of the letter that was submitted to
12 me today written by January 16th. It's a letter to which
13 DAPL and the city strongly objected. I did read it, and I
14 did consider it even though technically the evidentiary
15 phase was closed.

16 And even though Mr. Brown now opines differently
17 in that letter, there is nothing in that letter that
18 ultimately changes my mind with respect to the notion that
19 what the ultimate outcome would have been had there been
20 negotiation is simply too difficult to determine; and I
21 cannot determine that, that there is a likelihood of one
22 outcome over another.

23 The second cause of action is somewhat more
24 complex, though the standing issue is clearer.

25 It's based on the plaintiffs' contention that

1 the city violated the state notice requirements for zoning
2 changes, that's sort of the umbrella for that cause of
3 action; and part of it are irregularities and a lack of
4 transparency with respect to how this development was
5 handled.

6 The development of the parcel requires a
7 rezoning first to a GPD, a General Plan Development, as
8 all of you instructed me during the course of the
9 hearings, and then later a DPD, a Detailed Plan
10 Development. On this much the parties agree.

11 The GPD was approved I believe by the Common
12 Council on February 27th of 2007. There is no contention
13 that the meeting was improperly noticed. The original
14 GPD, unreviewed by the State Historical Society, permitted
15 a 60' height and had virtually no setback from the Kovac
16 home, or a very limited setback from the Kovac home.

17 The DPD, I believe, was later approved on May
18 30th. That meeting was also properly noticed.

19 Part of plaintiffs' claim is that changes made
20 to accommodate Mr. Kovac on a later date are not a minor
21 modification and required a second DPD with the full
22 notice requirements of zoning or rezoning.

23 This contention is governed by Herdeman versus
24 the City of Muskego, which is cited at 116 Wis. 2nd 687.
25 That case holds that:

1 "Whether a second hearing is necessary will
2 depend upon the nature and extent of the posthearing
3 revision. Thus, where a proposed amendment to permit the
4 construction of apartments was altered to require a 50
5 foot buffer, the change was not so material as to require
6 new notice and hearing."

7 The case also directs inquiry into whether the
8 "fundamental character of the proposal remains unchanged"
9 and whether new rights are created.

10 In Herdeman the appellate court found no new
11 notice was required because the amendment did not change
12 different landowners nor did it affect the same landowners
13 in a different way. In other words, further notice would
14 have resulted only in delay.

15 The changes approved as minor modifications in
16 the second DPD do not appear to change the fundamental
17 character of the proposal, to affect different landowners,
18 or to affect the same landowners in a different way. To
19 the extent that the changes affect the landowners, the
20 effect is much the same, though somewhat ameliorated.

21 But the representations made to the Zoning and
22 Neighborhood Commission regarding the Historic
23 Preservation Subcommittee are disturbing.

24 I have considered that public bodies most likely
25 would not be shocked to discover that not all persons who

1 come before them are truthful. I imagine that they, like
2 judges, have discovered that some persons who come before
3 them are less than truthful.

4 The problem here has to do with the fact that
5 the information regarding the position of the Historic
6 Preservation Subcommittee came from a city staff person
7 whose word presumably the Zoning and Neighborhood
8 Commission was entitled to rely on and did rely on.

9 The apparent misinformation standing alone might
10 not suffice to undermine the action of the Zoning and
11 Neighborhood Commission. My concern is that it appears
12 related to a desire to control or perhaps silence the
13 Historic Preservation Subcommittee.

14 First, in connection with a motion to quash the
15 plaintiffs' subpoena of commissioners of the city, the
16 city's Historic Preservation Subcommittee, this is a
17 motion which was never resolved because ultimately the
18 plaintiffs rested without calling those witnesses.

19 The city contended that it is impermissible to
20 inquire as to the commissioners' thought processes.

21 However, plaintiffs stated that they were not
22 truly seeking thought processes, but rather access to
23 information regarding what had transpired at certain
24 meetings.

25 These were subcommittee meetings that were

1 closed to the public for no apparent reason and which at
2 first blush appear to be violations of the Open Meetings
3 Law.

4 Once again, that is not an issue before me; and,
5 therefore, I make no final, reach no final conclusions.
6 But my reading of the statute and my understanding of the
7 record as it appears before me has revealed no apparent
8 reason to justify the closing of those meetings; no
9 subsection of the statute seems immediately apparent.

10 While the city contended that the commissioners
11 are not conversant with the requirements of the Open
12 Meetings Law, it turned out that one of the commissioners
13 had raised that very question with city staff and that the
14 concern apparently went unanswered.

15 Ordinarily we expect the governmental entity in
16 question to provide this sort of information, regarding
17 the law, to lay people appointed to serve the community in
18 commissions such as the historic, the city's Historical
19 Preservation Committee, and forgive me if I'm misstating
20 the name of the committee. I think you know what I'm
21 talking about.

22 I learned that there was no response to the
23 commissioner who raised the question. I also learned
24 during the course of the hearing that the city attorney's
25 office has an expert in the area. And yet the city

1 permitted closed meetings to go forward, thereby
2 frustrating Mr. Kovac's access to information.

3 Not only did the city conduct these meetings in
4 closed session, it then took it upon itself to record
5 meetings incompletely. When one of the commissioners
6 objected over the omission of certain material covered
7 during one of these meetings and attempted to supplement
8 the record, the request was ignored. City staff did not
9 trouble itself to inform the commissioner that the record
10 would not be supplemented.

11 The explanation given for this conduct is that
12 the subcommittee had been discussing matters outside of
13 its jurisdiction. It is a matter so fundamental that I am
14 amazed to have to reference it that the purpose of minutes
15 is to record. If minutes were scrubbed by staff to
16 include only those matters deemed appropriate by the
17 writer, there would be no value to minutes at all.

18 Isn't that what they do in totalitarian states?

19 So, with respect to the subcommittee, the public
20 was denied access at the time of the meetings, the record
21 was manipulated, and the city sought to suppress the
22 testimony of those who might have clarified just what
23 transpired.

24 The city then sought to have the Zoning and
25 Neighborhood Commission believe that the modifications to

1 the DPD were the work of the Historical Society
2 Subcommittee, or at least that's one of the
3 interpretations to be given to the transcript which I
4 think is Exhibit 14.

5 This course of conduct seems extraordinary, so
6 extraordinary that it raises questions about the manner in
7 which Milwaukee made the decisions at issue here.

8 I am concerned that the Zoning and Neighborhood
9 Commission was deprived of accurate information. Whether
10 or not the subcommittee was acting outside of its
11 jurisdiction, the fact is that it appears that the Zoning
12 and Neighborhood Commission was misinformed regarding the
13 commission's subcommittee, the Historic Preservation
14 Subcommittee's position.

15 Now, Mr. Marcuvitz indicated that DAPL would
16 welcome an open meeting of the Historic Preservation
17 Committee in full. The matter of the Open Meetings Law is
18 not before me for decision.

19 It is not anything that at this point the
20 plaintiffs have asserted. They haven't followed the
21 procedure set forth by statute. And the city, which would
22 be the one that might be able to take a position on that,
23 has not chosen to do so. And so I am not ordering that
24 the Historic Preservation Committee nor the Historic
25 Preservation Subcommittee meet. I think I would be

1 stepping outside of my authority with respect to that.

2 But I am strongly encouraging that such meetings
3 take place, a meeting of the Historic Preservation
4 Subcommittee, which was entrusted with certain
5 determinations, and then the Historic Preservation
6 Commission, so that what appears to have taken place in
7 private and without any apparent justification can be
8 remedied as much as such a remedy can take place.

9 Once again, that is not one of my orders. It
10 just seems to me that given the record that was developed
11 it probably would not be an unwise way to go.

12 I am concerned, as I have stated, about the
13 Zoning and Neighborhood Commission's decision with respect
14 to the DPD modification of November of 2007. I do agree
15 with the notion that it appears to me this was a minor
16 modification. However, there is language in Herdeman that
17 speaks to what, what would be accomplished other than
18 delay.

19 I believe that the best way to resolve this is
20 to present the Zoning and Neighborhood Commission with
21 accurate information regarding the position of the Zoning
22 and Neighborhood Subcommittee and the -- of the, of the
23 Historic Preservation Subcommittee.

24 The public -- the Zoning and Neighborhood
25 Commission should and must be presented with the minutes

1 of the Historic Preservation Subcommittee meetings
2 including the corrections by Ms. McSweeney. There must be
3 a meeting of the Zoning and Neighborhood Commission at
4 which it is presented or before which it is presented with
5 the correct position of the Historic Preservation
6 Subcommittee, and the best way to do that is by minutes
7 including the corrections of Ms. McSweeney.

8 Given what has transpired, the public and
9 members of the Historic Preservation Committee should be
10 afforded the opportunity to speak. The Zoning and
11 Neighborhood Commission should be informed of the fact
12 that there was a violation of the negotiation requirements
13 with the state and that the meetings of the Historic
14 Preservation Subcommittee meeting may have been in
15 violation of the Open Meetings Law or appear to have been
16 in violation of the Open Meetings Law.

17 I leave it at this point to the Zoning and
18 Neighborhood Commission to determine initially what is its
19 best course of action once it is presented with correct
20 information.

21 I make no other order at this point. I have
22 considered voiding that vote, but I am mindful that this
23 is another branch of government and that the violation
24 that appears to have taken place is one of
25 misinformation. And so I think that is the best way to

1 address and, not rectify, because I don't, I don't really
2 know that what has transpired here can truly be rectified,
3 but what can come closest to rectifying certain mistakes
4 that have taken place.

5 I want to close with another quote from Holmes,
6 and it's from the same case that I cited earlier. It is
7 this:

8 "We are in danger of forgetting that a strong
9 public desire to improve the public condition is not
10 enough to warrant achieving the desire by a shorter cut
11 than the constitutional way of paying for the change."

12 I understand that the city had a strong desire
13 to develop Downer Avenue and that in its mind the
14 development would improve the public condition. But it,
15 the city, should bear in mind that its failure to
16 negotiate with the state and to deprive -- and to provide
17 the public with access to information discussed at
18 meetings does seem to reflect an inclination to the
19 shorter cut.

20 So I am not granting the relief sought by the
21 plaintiffs, but this does not bring this litigation to a
22 conclusion. I just simply cannot conclude at this point
23 that there is a likelihood to prevail on the merits.

24 I am not certain whether or not the plaintiffs
25 will pursue a violation under the Open Meetings Law, which

1 requires, of course, turning first to the attorney general
2 or to the district attorney's office, or whether the
3 plaintiffs will pursue a permanent injunction.

4 My decision here today does not foreclose either
5 of those options since it is conceivable that the
6 development of the record will clarify some of these
7 areas.

8 Mr. Cincotta, do you have any idea of how the
9 plaintiffs wish to proceed?

10 MR. CINCOTTA: Thank you, Your Honor, yes.

11 We need to at this point proceed with this
12 case. We -- I know Your Honor has, is out of town, but we
13 have a desire to schedule the case for normal litigation
14 including amending the complaint; and our intention is to
15 add, if we are allowed to, the open meetings claim as well
16 as conduct discovery to further learn of the facts.

17 So that's our general idea. If there's an
18 opportunity to quickly schedule and take up some smaller
19 issues, that might be best handled after the hearing; but
20 that is our intention.

21 THE COURT: I am back on Tuesday. So this is --
22 I'm gone for only a very short period of time. If you
23 think a scheduling conference would be appropriate to come
24 up with a game plan, we could do that.

25 MR. CINCOTTA: Yes.

1 THE COURT: Yes?

2 MR. CINCOTTA: Yes, I think so.

3 THE COURT: Okay, all right.

4 May I have the book, Joe.

5 THE CLERK: Oh, sure. Sorry.

6 THE COURT: That's okay.

7 MR. MARCUVITZ: Judge, can you hear me?

8 THE COURT: Yes, I can.

9 MR. MARCUVITZ: I endorse the idea of an early
10 scheduling conference.

11 THE COURT: Okay. Let's see.

12 How is Friday, February 1st at 9 o'clock?

13 MR. MARCUVITZ: At what time, Your Honor?

14 THE COURT: At 9:00.

15 MR. CINCOTTA: For the plaintiffs that's fine,
16 Your Honor.

17 MR. MARCUVITZ: That's fine for me, Your Honor.

18 THE COURT: Mr. Burke is okay.

19 Mr. Hagopian, is it okay with you?

20 MR. HAGOPIAN: Yes, it is, Your Honor.

21 THE COURT: All right. Then I will see you on
22 Friday, February 1st, at 9 A.M. for a scheduling
23 conference.

24 MR. CINCOTTA: Your Honor, one quick thing,
25 actually two items if I may. There are pleadings out that

1 have not been answered; and can we address that at
2 scheduling conference and hold off on that, or can you --
3 I don't want to ask you to do anything to order them to
4 answer, and there's a counterclaim against us that we
5 don't want to answer until they've answered. But I don't
6 want to dicker about that now. I'm happy to wait until
7 then to decide that.

8 THE COURT: Is there outstanding discovery; is
9 that the problem?

10 MR. CINCOTTA: No. We have an amended complaint
11 that is yet to be answered, and yet there has been a
12 counterclaim filed against us that they're probably going
13 to expect an answer to, so I don't think I should have to
14 answer that until they answer the amended complaint.

15 MR. BURKE: I guess our position is as far as
16 the counterclaim is concerned if they want additional time
17 to answer the counterclaim rather than the 20 days that's
18 in the statute, that's fine.

19 MR. CINCOTTA: I want them to answer first.

20 MR. BURKE: We have two motions outstanding. We
21 had our motion to dismiss, and the city had its motion to
22 dismiss under 802.06; and that's the reason, Your Honor,
23 that we didn't answer.

24 THE COURT: Okay. Do you want me to --

25 MR. BURKE: Now, we certainly could file an

1 answer. I mean, we certainly could file an answer because
2 basically it would incorporate the same, you know, failure
3 to state a claim upon which relief can be granted and
4 presumably the same things would be in the city's answer
5 and their motion to dismiss for all of the same reasons
6 they have in their motion.

7 So then presumably there would be time to answer
8 the counterclaim after that, and I understand. But, I
9 mean, in these litigations I've always taken the position
10 that since it's likely to go on much longer than the
11 periods in which to answer, and we really know pretty much
12 what the answers are likely to be, that's not a problem.

13 MR. MARCUVITZ: Your Honor, if I may?

14 THE COURT: Yes.

15 MR. MARCUVITZ: My suggestion is, we now have
16 the court's ruling, we all need to drop back and revisit
17 our positions. I would counsel doing nothing to
18 exacerbate the matter until or unless we come to that
19 conclusion as a result of the forthcoming scheduling
20 conference.

21 I'd like to suggest avoiding any further
22 pleadings, any discovery. Let's see what we can do
23 between now and the 1st, and then we can report on to the
24 court on the 1st. And if the court then wants to set the
25 time for responsive pleadings, we can certainly work on a

1 shorter schedule.

2 MR. CINCOTTA: Can we stay the counterclaim
3 then, too?

4 MR. MARCUVITZ: That would include everything.

5 THE COURT: I'm not going to stay discovery, I
6 don't want to stay discovery; but I will grant additional
7 time to file answers.

8 If I'm interpreting Mr. Cincotta correctly, he
9 will file yet another, or will seek to file yet another
10 complaint. He's already filed two, but I'm sure he's
11 going to ask me --

12 MR. CINCOTTA: Correct.

13 THE COURT: -- to file yet another one. And so
14 it seems wasteful to require defendants to answer an
15 amended complaint when there may very well yet be a second
16 amended complaint, and the same thing goes for the
17 counterclaim.

18 So with respect to answers to complaints and
19 counterclaims, why don't I say that the need to do that is
20 being held in abeyance; and we'll figure that out when we
21 get to together on February 1st, but that discovery is not
22 stayed.

23 MR. BURKE: That's good.

24 MR. CINCOTTA: And just to confirm, you're not
25 telling them to stop building at this time?

1 THE COURT: I am sorry if I did not make that
2 sufficiently clear.

3 I am not saying that they will, that they must
4 stop building.

5 However, I think everybody understands that if
6 it turns out that the plaintiffs are able to prove their
7 case, the developers will have a real problem here.

8 You know, I don't know how doable some of what's
9 been discussed in terms of three stories and that sort of
10 thing such as is suggested in Mr. Brown's letter, I have
11 no idea how doable that is; but the construction proceeds
12 with this cloud over it.

13 MR. CINCOTTA: Correct. The order, however, is
14 for a meeting to occur.

15 THE COURT: Yes. The meeting -- I think that
16 the correct place to begin is with that Zoning and
17 Neighborhood Commission meeting, that they be informed
18 along the lines that I have stated, and see what they
19 say. I think that's a piece of information that I'd like
20 to have.

21 MR. CINCOTTA: Well, okay. I guess I -- given
22 the context --

23 MR. MARCUVITZ: Could you ask Mr. Burke to call
24 me when court is recessed so that I can pick up where we
25 left off?

1 THE COURT: He can hear you, Mr. Marcuvitz.

2 MR. MARCUVITZ: Thank you very much.

3 MR. CINCOTTA: Given the context, I would ask
4 for some guidance on the parameters of this meeting,
5 notice to be provided, and when it will be.

6 THE COURT: Well, whatever notice is ordinarily
7 given. I don't know what notice is -- I presume that
8 there's notice that's given.

9 MR. CINCOTTA: Something of an issue in the
10 case. They can just put it on the web site, or they can
11 mail things, or they can publish it. There's a number of
12 ways to give notice.

13 THE COURT: Well, Mr. Hagopian, what is the most
14 notice that can be given for such a meeting ordinarily if
15 there's some flexibility there?

16 MR. HAGOPIAN: We would, we would be happy to
17 provide direct notice to Mr. Cincotta so he can inform his
18 plaintiffs. Otherwise the city's position as I understand
19 embraced by the court is that Z and D was meeting on a
20 minor modification basis; and I was hearing that the court
21 was inclined to agree that it was a minor modification, so
22 that a normal Class 2 notice is not required.

23 And so what we would do then is, you know, treat
24 that as a normal meeting of the Zoning and Neighborhood
25 Development Committee of the Common Council.

1 But I would go the extra step of telling
2 Mr. Cincotta pursuant to court order the Common Council
3 Zoning and Neighborhood Development Committee is meeting
4 on such and such a date, you are hereby afforded notice.

5 THE COURT: If it were a zoning, if it were not
6 a minor modification, how much notice would there be; and
7 how would it be provided?

8 MR. HAGOPIAN: That would be a Class 2 notice
9 then.

10 MR. CINCOTTA: And the public gets to speak at
11 that meeting.

12 THE COURT: And that's one of the things that
13 I've said.

14 I do want, in order to rectify what transpired
15 here, for them, for them to hear from the public even if
16 that's a little unusual.

17 So would there be any kind of problem with
18 giving more notice than the minimum that's required,
19 Mr. Hagopian?

20 Why not just notice it like a regular notice?
21 It doesn't affect the decision of whether it's a minor
22 modification or not. That's governed by, Herdeman, not by
23 what you give as notice.

24 So why don't we do it that way. Make sure that
25 the public is able to speak. Make sure that the committee

1 and subcommittee meetings minutes are provided including
2 the corrections, that there be information provided
3 regarding the irregularities that I've noted. If you want
4 to read to them what I just said, that'd be fine, too.
5 But just so that that branch of government is given
6 information that I don't believe it was given earlier; and
7 then it can take what action it deems to be appropriate,
8 and we'll take it from there. Okay?

9 All right. See you on February 1st.

10 MR. CINCOTTA: Thank you.

11 MR. BURKE: Thank you.

12 MR. HAGOPIAN: Thank you.

13 THE COURT: You're welcome.

14 (End of proceedings on January 16, 2008.)

15 STATE OF WISCONSIN)
16) SS
MILWAUKEE COUNTY)

17 I, Carol A. Brathol, Official Reporter, do
18 hereby certify that I reported the foregoing transcript of
19 proceedings; that the same is true and correct as
20 reflected by my original machine shorthand notes taken at
21 said time and place before the Honorable Elsa C. Lamelas,
22 Circuit Judge, presiding.

23 Dated at Milwaukee, Wisconsin, this 17th
24 day of January, 2008. Carol A. Brathol

25 Carol A. Brathol, RDR
Registered Diplomate Reporter