

Elmer, Linda

From: dawnhmcc@aol.com
Sent: Thursday, February 14, 2008 6:10 AM
To: Elmer, Linda; planadmin
Cc: mmurphy@milwaukee.gov; Wade, Willie; Hamilton, Ashanti; Bauman, Robert; D'Amato, Michael
Subject: File #071365 ZND Hearing Feb 14 2008

To the Honorable Members of the Zoning Neighborhood and Development Committee:

I wish to express my objection to File #071365.

The attached letters, sent earlier this week to Attorney Hagopian, contain important information for your consideration.

Sincerely,
Dawn McCarthy
2589 N. Lake Drive
Milwaukee, WI 53211

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LAW OFFICES OF JOSEPH R. CINCOTTA

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February 11, 2008

VIA MESSENGER AND EMAIL

Attorney Greg Hagopian
City Attorneys Office
200 East Wells Street
Milwaukee, WI 53202

Re: *McCarthy et al v City of Milwaukee and DAPL LLC, 07-CV-14155*. Downer Avenue Development Project - GPD No. 060705; DPD No. 071365 Reconsideration of Parking Ramp DPD

Dear Attorney Hagopian:

Regarding the above-referenced file number, this file apparently raises the issue of the re-zoning at the parking ramp property (2574-2590 Downer Ave.). The notice of this issue has been substantially different than is the typical practice of the City. Specifically, it appears that the subject matter (i.e. design plans and narrative) of the resolution was not posted and available on the City's Website until quite recently. Can you explain why this is so?

In addition, it appears that the resolution in No. 071365 would contemplate either an affirmation or a rejection of the zoning described in the resolution, both at the CPC/ZND level and the Common Council. A rejection would further confirm that the permits and certificates being operated under at the site are void. It would seem appropriate for the City to halt construction while the subject matter of this resolution is taken up, and on behalf of my clients, we would request that the City consider imposing such a stay.

Also, I believe you and your office concur that if it is determined that the rezoning or Certificate of Appropriateness are declared void by the Court, or by the City itself, the City and perhaps the Court could, among other things, order the building razed or modified. Statements have been made at public meetings suggesting that the elected and other officials reviewing the parking ramp DPD, including the pending resolution in file No. 071365, are constrained or even precluded from voting *against* the existing design because of the ongoing construction and the threat of a lawsuit by the developer. My understanding of the City's zoning code and applicable Wisconsin Supreme Court rulings is that such a lawsuit would not be successful unless the private property owner has obtained vested rights in its preferred development. It is our position that no vested rights have attached to the permits or certificates previously issued by the City DCD. Because

of that, the City is fully empowered to reject the rezoning within No.071365, should it determine that there have been mistakes made and violations of proper procedures or otherwise. MCO §295-309(3) and (5) would appear to make the rezoning void, in such a case. This power was confirmed in the recent decision in *Village of Hobart v. Brown County*, 281 Wis.2d 628, 641 (2005). In that case the Supreme Court ruled that:

Erroneous acts of municipal officials do not afford a basis to estop the municipality from enforcing its ordinances enacted pursuant to the police power. ...In other words, citizens have a right to rely upon city officials not having acted in violation of the ordinance, and, when such officials do so act, their acts should not afford a basis for estopping the city from later enforcing the ordinance."

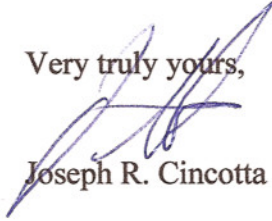
Given this, it would seem inappropriate for a perceived threat of litigation by the developer to be the basis for a vote to approve a rezoning that allows for the developer's preferred design and the construction that has already taken place. Obviously it would be extraordinarily bad public policy if the mere *threat* of a lawsuit was used as a basis for approving any ordinance, one way or the other. Of course if what is being contemplated is against some other existing law or ordinance, that is obviously relevant. But the mere threat would not seem a proper consideration.

In addition, regarding the suggestions made that the current design was modified to appease and even satisfy the objections of one or more of the adjoining property owners, that is not accurate, as you know. Indeed the testimony of the developer's partner, DAPL, LLC, is that the current design was pursued by the developer, even though DAPL was aware that the adjoining property owner did not concur or agree that it was satisfactory to mitigate the severe impacts on his property and home. No one from the City staff worked with or seriously considered my clients objections and certainly did not work with them "up to the very day that permits were issued to try to make the building as accommodating as possible," as has been stated. It also appears that the concerns of other adjoining property owners were also dismissed or not genuinely considered, contrary to statements made by City staff.

Finally, I want you to be aware that the structure is now standing five stories high. In place of a snow chute, what is more appropriately characterized as a "snow-dump" has been installed. This is simply a cut out portion of the top deck wall that will allow snow to be plowed over and dumped off the fifth floor roof deck. Given the orientation of the opening, the snow will fall onto what remains of the tree, and in all likelihood directly on the neighboring property in large volumes. The situation appears to be an obvious danger and public safety issue. Further, contrary to the suggestions of the architect involved, there does not appear to be any way for a truck to receive the dumped snow, which apparently will simply be left to accumulate where it is dumped.

Please include this correspondence in the above-referenced file. I also look forward to any response regarding the City's position on the applicable law pertinent to this matter.

Very truly yours,

A handwritten signature in blue ink, appearing to read "J. Cincotta", is written over the typed name below.

Joseph R. Cincotta

Cc: Attorney Alan Marcuvitz (via email)
Attorney Tom Burke (via email)
Attorney Jeffrey Aiken (via email)

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February 13, 2008

VIA MESSENGER AND EMAIL

Attorney Greg Hagopian
City Attorneys Office
200 East Wells Street
Milwaukee, WI 53202

**Re: *McCarthy et al v City of Milwaukee and DAPL LLC, 07-CV-14155; Downer Avenue Development Project - GPD No. 060705; DPD No. 071365 Reconsideration of Parking Ramp*
DPD**

Dear Attorney Hagopian:

As a supplement to my correspondence of February 11, 2008, please include the following information and objections for consideration by ZND and the Common Council at any upcoming hearings on the above-referenced file.

1. The design in the DPD and existing construction of the parking ramp violate MCO §295-907(3)(f) and (h). Those subsections provide:

Every planned development shall meet the following standards:

295-907(3)(f). Screening. Residential uses shall be screened from existing or proposed businesses or industrial uses on or adjacent to the site. Screening shall consist of decorative walls, fences, berms, hedges, shrubs, trees or combinations thereof appropriate to the surrounding neighborhood.

295-907(3)(h) Circulation, Parking and Loading. Traffic circulation facilities shall be planned and installed consistent with the comprehensive plan. Adequate access for pedestrians and public and private vehicles shall be provided. Parking and loading facilities shall be located near the uses they support and shall be adequately screened and landscaped in a manner which meets or exceeds the requirements of this chapter. ...

2. The City and specifically the Department of City Development (DCD) failed to negotiate with the State Historic Preservation Officer as required by state statute. This failure has continued since the introduction of file No. 701365 and its precursors. The failure to negotiate was caused by the actions of DCD staff that either knew or should have known that negotiation was required. In Plaintiffs' view, the State's November 2007 correspondence does not cure this violation.

3. The City, through its stand alone agency, the DCD, appears to have made a contractual commitment requiring it to enact the zoning within this DPD, and other DPDs located within GPD No. 060705, in effect guaranteeing that the zoning will be amended and building permits issued so as to allow the developer to build the development that it prefers. This is not allowed under Wis. Stats. §62.23(7) and applicable law. The police power of a governmental body can not be contracted away. See *State ex rel. Zupancic v. Schimenz*, 46 Wis.2d 22, 28 (1970).

4. Inaccurate information has been provided to the ZND and has formed the basis for the previous decisions regarding the substance of the DPD, including that: 1) the status of negotiations with the State of Wisconsin Historic Preservation Officer were that the State was planning to close its file on the matter as of May 14, 2007 or shortly thereafter, 2) that the developer had no ability to alter the footprint and overall design of the parking ramp, 3) that certain neighboring property owners were satisfied and had approved of the proposed design, and 4) that city officials and staff and the developer had worked to accommodate the neighbors up to the day the permits for construction were issued in an effort to be as accommodating as possible.

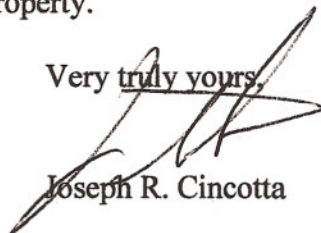
Further, please note that it appears that based on the testimony of representatives of DAPL, LLC, the currently proposed design, including no-basement an adjusted footprint and fewer parking spaces, was pursued unilaterally and not based on any agreement between DAPL and the adjacent property owner.

5. The Certificate of Appropriateness issued to the developer is a separate matter and not controlled or dependent on whether this DPD is approved or denied, however it is under challenge.

6. The structure as currently constructed contains a snow dump cut-out located on the fifth level of the parking ramp. The snow dump is an obvious safety hazard to the adjacent property and the public. Even if the DPD is approved, this part of the structure should be modified.

As noted in my earlier submittal, and pertinent to preserving any and all remedies of the Plaintiffs, applicable ordinances and court decisions appear to empower the City, including the ZND, to reject the DPD as proposed in the above-referenced file despite the ongoing construction at the property.

Very truly yours,



Joseph R. Cincotta

Cc: Attorney Alan Marcuvitz (via email)
Attorney Tom Burke (via email)
Attorney Jeffrey Aiken (via email)