

GRANT F. LANGLEY
City Attorney

RUDOLPH M. KONRAD
LINDA ULISS BURKE
VINCENT D. MOSCHELLA
Deputy City Attorneys



THOMAS O. GARTNER
SUSAN D. BICKERT
STUART S. MUKAMAL
THOMAS J. BEAMISH
MAURITA F. HOUREN
JOHN J. HEINEN
SUSAN E. LAPPEN
JAN A. SMOKOWICZ
PATRICIA A. FRICKER
HEIDI WICK SPOERL
KURT A. BEHLING
GREGG C. HAGOPIAN
ELLEN H. TANGEN
MELANIE R. SWANK
JAY A. UNORA
DONALD L. SCHRIEFER
EDWARD M. EHRlich
LEONARD A. TOKUS
MIRIAM R. HORWITZ
MARYNELL REGAN
G. O'SULLIVAN-CROWLEY
KATHRYN Z. BLOCK
ELOISA DE LEÓN
ADAM B. STEPHENS
KEVIN P. SULLIVAN
BETH CONRADSON CLEARY
THOMAS D. MILLER
JARELY M. RUIZ
ROBIN A. PEDERSON
DANIELLE M. BERGNER
CHRISTINE M. QUINN
Assistant City Attorneys

June 6, 2011

Alderman James Witkowiak, Chair and
Members of the Zoning Neighborhoods
and Development Corporation

Re: Common Council File No. 101472
A Substitute Ordinance Relating to the Change in Zoning from Detailed Planned
Development to Institutional, to Allow for University-related Uses, on Land
Located on the South Side of East Newport Avenue, West of North Maryland
Avenue, in the Third Aldermanic District

Dear Gentlemen:

The University of Wisconsin-Milwaukee ("UWM") recently acquired the former Columbia St. Mary's Hospital complex, which is known as UWM's Northwest Quadrant. UWM has applied for a change in zoning for the Northwest Quadrant from Detailed Planned Development to Institutional in order to expressly provide for university-related uses. The Northwest Quadrant is located on the south side of East Newport Avenue, west of North Avenue, adjacent to the main UWM campus in the third aldermanic district.

During the Zoning Neighborhoods and Development Committee hearing relating to the above-captioned file on May 17, 2011, we were asked to provide a legal opinion addressing the extent to which the City of Milwaukee zoning code controls the use of the Northwest Quadrant as well as the construction of new facilities and the renovation and reconstruction of existing facilities on that site.

The current zoning for the Northwest Quadrant is Detailed Planned Development tailored precisely to the former hospital and clinic uses undertaken by Columbia St. Mary's. The pending application for rezoning to Institutional is consistent with the present zoning for the balance of the UWM campus, all of which is zoned Institutional.

OFFICE OF THE CITY ATTORNEY

In an opinion directed to Alderman Michael S. D'Amato on November 3, 2005 we addressed both a Cooperative Agreement between Columbia Hospital and a neighborhood association which was executed contemporaneously with the approval of the current Detailed Planned Development zoning and the overall zoning status of the Columbia Hospital complex. A copy of that legal opinion is attached as Attachment "A."

Our 2005 opinion focused primarily on potential uses of the hospital complex after vacation by Columbia St. Mary's and distinguished between the application of our zoning code to uses undertaken in privately-owned facilities and facilities owned and operated by the State of Wisconsin. In our 2005 opinion we discussed future uses of the Columbia Hospital campus and concluded that:

" . . . any change in use from the specific uses addressed by the general and detailed planned development zoning for the campus would require Common Council zoning approval, with one exception. A purchaser of the campus could continue to operate a health care facility consistent with the existing zoning, but a change to different private uses would require amendments to the current planned development zoning. For example, privately operated educational uses or dormitories can only be undertaken with a change to the current zoning for the Columbia Hospital campus. The one exception relates to uses undertaken by the State of Wisconsin, in the event that the Columbia Hospital campus were to be purchased by the State of Wisconsin and operated by the State as part of the University of Wisconsin-Milwaukee campus, city zoning approvals would not be required."

Given the slightly different context of that opinion we did not address the application of the City's zoning code to the construction of new facilities or the renovation and reconstruction of existing facilities on the Northwest Quadrant.

Section 13.48(13), Stats., addresses the construction of State of Wisconsin facilities and indicates that:

" . . . every building, structure or facility that is **constructed** for the benefit of or use of the state . . . shall be in compliance with all applicable state laws, rules, codes and regulations but the **construction** is not subject to the ordinances or regulations of the municipality in which the **construction** takes place except zoning . . ." (emphasis added) (Attachment "B" is a copy of Section 13.48(13), Stats.).

The focus of Section 13.48(13) is upon the construction of new state buildings or facilities and requires applicable municipal zoning regulations to be considered, however, no reference is made to the ultimate use or changes in use of either existing or completed State facilities. That focus is confirmed by language in the State of Wisconsin Building Commission Policy and Procedures Manual on page 8 under Section II.G. which reiterates that construction of state facilities is not subject to municipal ordinances or regulations other than zoning and land use related requirements (Attachment "C").

Although we have not been able to identify any State of Wisconsin case law which is precisely on point with respect to the issues to be addressed in this opinion, we have been able to identify Wisconsin Attorney General opinions which address the manner in which Section 13.48(13), Stats. should be construed. A June 30, 1993 opinion of the Attorney General (81 Wis. Op. Atty. Gen. 56, 1993 WL 364341 (Wis. A.G.)) addressed the issue of whether the construction of facilities to provide public access to navigable lakes and streams by the Wisconsin Department of Natural Resources is subject to local zoning requirements. While that opinion determined that such construction was not subject to local zoning for unrelated reasons, it did discuss the history and construction of Section 13.48, Stats.

"To the extent that it confers power upon a municipality and removes power from the state, the statute is in derogation of the common law and is therefore subject to a strict construction. See *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis.2d 56, 307 N.W.2d 256 (1981). Statutes are not to be extended so as to impose any duty beyond that imposed by the common law unless the statute clearly and beyond any reasonable doubt expresses such a purpose by language that is clear, unambiguous and peremptory. *Grube v. Moths*, 56 Wis.2d 424, 437, 202 N.W.2d 261 (1972). This rule of strict construction has its strongest force when the state would be included in a law to its detriment so as to restrain or diminish any of the state's sovereign rights or interests. *Wis. Vet. Home v. Div. Nurs. Forfeit. Appeals*, 104 Wis.2d 106, 310 N.W.2d 646 (Ct. App. 1981).

We have also identified an earlier opinion of the Attorney General dated October 19, 1978 (67 Wis. Op. Atty. Gen. 251, 1978 WL 34028 (Wis. A.G.)) which addressed the issue of whether the State is subject to local governmental zoning regulations when remodeling a newly-acquired or leased facility. In that opinion, which also discussed the manner in which Section 13.48(13), Stats., should be construed, the Attorney General concluded that ". . . the word "construction," employed in Section 13.48(13), is generic and applies equally to new construction, remodeling, reconstruction, or the construction of an addition."

The problem with that opinion is that because it is hypothetical in nature, it does not provide sufficient detail to clarify what actions might constitute either "remodeling" or "reconstruction." Thus, it provides very little guidance as to the practical application of the City's zoning code to remodeling, reconstruction or additions on either the Northwest quadrant or the larger UWM campus. At this time we express no opinion as to the review of remodeling, reconstruction or addition projects undertaken by UWM for zoning compliance because we do not have sufficient facts to express anything other than the broad type of hypothetical opinion provided by the Attorney General.

We have checked with the Department of City Development with respect to their procedures for new construction projects undertaken by UWM. According to the Development Center, UWM buildings are exempt from the City's normal Plan Review process. They are subject to zoning and infrastructure requirements and thus while plans are submitted, they are reviewed only for compliance with zoning requirements and then routed through the Department of Public Works for review of sewer/water connections.

Planning staff in the Department of City Development were able to identify only two cases where zoning relief involving UWM was considered by the Board of Zoning Appeals. The first involved a 1999 height variance granted to UWM to build the fourth tower at the Sandburg Hall Dormitory. The second was a 1987 height variance granted to allow the erection of a fence for a parking lot. We are not aware of additional renovation or remodeling projects where a review for zoning compliance has been undertaken by the City or where relief was required.

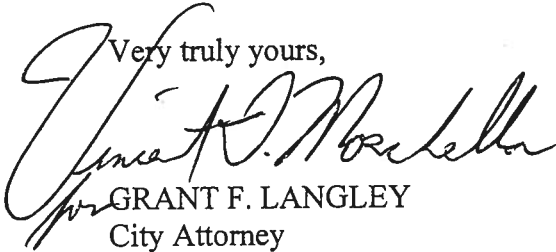
Our opinion has not changed since November of 2005, however, it is narrowly limited to the use of the Northwest Quadrant as it currently exists by UWM for university purposes and remains that such uses are not subject to the City's zoning code. Clearly, pursuant to Section 13.48(13)(a), Stats., the new construction of facilities by UWM on the Northwest Quadrant is subject to the City's zoning code and should continue to be reviewed by the City for compliance. As noted above, we express no opinion as to the application of the City's zoning code to remodeling, reconstruction or addition projects on the Northwest Quadrant because sufficient facts to identify the nature of such projects are not available.

We reached this conclusion because we concur with the opinion of the Attorney General that Section 13.48(13), Stats. should be strictly construed. New construction projects

Alderman James Witkowiak, Chair and
Members of ZND
June 6, 2011
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undertaken by UWM must be reviewed for zoning compliance. The change in use of existing buildings or the initial use of newly-acquired buildings is not encompassed by the language set forth in the statute.

Very truly yours,



GRANT F. LANGLEY
City Attorney



THOMAS O. GARTNER
Assistant City Attorney

TOG/ml:169968
Enclosure

c: Ronald D. Leonhardt, City Clerk
President Hines
Alderman Nik Kovac
Vanessa Koster, DCD
Robin van Harpen, Director and Senior University Legal Counsel
Office of Legal Affairs
University of Wisconsin – Milwaukee
P.O. Box 313
Milwaukee, WI 53201

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CITY OF MILWAUKEE

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GRANT F. LAROLEY
 City Clerk

RUDOLPH M. KONRAD
 PATRICK B. McDONNELL
 LINDA WISS BUEKE
 Deputy City Attorneys



OFFICE OF CITY ATTORNEY
 800 CITY HALL
 200 EAST WELLS STREET
 MILWAUKEE, WISCONSIN 53202-3551
 TELEPHONE (414) 288-2501
 TDD (414) 288-2025
 FAX (414) 288-8550

November 3, 2005

Alderman Michael S. D'Amato
 3rd Aldermanic District
 City Hall, Room 205

THOMAS O. OARTNER
 BRUCE D. SCHRIMPF
 ROXANE L. CRAWFORD
 SUSAN D. BICKERT
 HAZEL MOSLEY
 STUART S. MUKAMAL
 THOMAS J. BEAMISH
 MAURITA F. HOUWEN
 JOHN J. HEINEN
 MICHAEL G. TOBIN
 DAVID J. STANOSZ
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 MIRIAM R. HORWITZ
 MARYNELL REGAN
 S. O'BULLIVAN-CROWLEY
 KATHRYN M. ZALEWSKI
 MEGAN T. CRUMP
 ELOISA DE LEÓN
 ADAM STEPHENS
 KEVIN R. BULLMAN

Assistant City Attorneys

Re: Cooperative Agreement by and between Columbia Hospital, Inc. and Mariner
 Neighborhood Association Ltd.
 Common Council File Nos. 901133 & 901134

Dear Alderman D'Amato:

We have received your October 18, 2005 Memorandum transmitting a copy of the Cooperative Agreement by and between Columbia Hospital, Inc. and Mariner Neighborhood Association Ltd dated as of July 2, 1991, (the "Agreement"). In that Memorandum, we were asked to provide a legal opinion addressing the following three questions:

1. What is the overriding enforcement mechanism available to Columbia or MNA with regard to a violation of the restrictive covenants contained in the agreement? Who has ultimate jurisdiction in the case of a dispute?
2. Considering that this document is part of file numbers 901133 & 901134, are the uses defined in the agreement a part of the actual zoning for the site? That is to say, does a change in use from health care facility to educational institution or dormitory require a zoning change?
3. If the agreement is attached to the zoning file does the City of Milwaukee have the right or obligation to enforce any violation of the agreement as if it were a violation of the zoning code?

Initially, the enforcement of the Agreement and the specific restrictive covenants addressed in the Agreement is restricted to Columbia, MNA and their permitted assigns under the terms of the Agreement. In the event of a dispute between Columbia and MNA or any property owner subject to one of the restrictive covenants addressed in the Agreement, we anticipate that the parties to the dispute would initiate litigation to resolve those issues. We likewise anticipate that the "ultimate jurisdiction" over such a dispute would lie with the courts.

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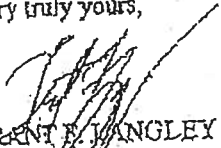
Alderman Michael S. D'Amato
November 3, 2005
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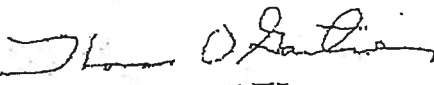
The second question relates to the status of the Agreement relative to the Common Council files which rezoned the Columbia Hospital campus and the impact of current zoning on future uses. Although the Agreement was referenced in the Common Council zoning files, it does not constitute part of the actual zoning for the Columbia Hospital campus. Notwithstanding that fact, any change in use from the specific uses addressed by the general and detailed planned development zoning for the campus would require Common Council zoning approval, with one exception. A purchaser of the campus could continue to operate a health care facility consistent with the existing zoning, but a change to different private uses would require amendments to the current planned development zoning. For example, privately operated educational uses or dormitories can only be undertaken with a change to the current zoning for the Columbia Hospital campus. The one exception relates to uses undertaken by the State of Wisconsin, in the event that the Columbia Hospital campus were to be purchased by the State of Wisconsin and operated by the State as part of the University of Wisconsin-Milwaukee campus, city zoning approvals would not be required.

Finally, the City of Milwaukee has neither the right nor the obligation to enforce in violation of the Agreement as if it were a violation of the zoning code or otherwise. The Agreement itself clearly restricts enforcement of its terms to the parties and permitted assigns. Significantly, the Agreement is also subject to termination in the event that the Columbia Hospital campus is sold at a future date.

In the event that you have any comments or questions with respect to either the status of the Columbia Hospital campus or the City's ability to regulate future uses of that campus, please contact Assistant City Attorney Thomas O. Gartner.

Very truly yours,


GRANT E. HANGLEY
City Attorney


THOMAS O. GARTNER
Assistant City Attorney

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1033-2005-2884

4. Build-operate-lease or transfer agreements by the department of transportation for transportation projects under s. 84.01 (30).

5. Contracts for construction of any building, structure or facility for the state fair park board involving a cost of not more than \$250,000.

(11) EXCEPTIONS. Nothing in this section prohibits the use of past policies and existing statutory authority to borrow funds for the construction of buildings.

(12) PRIVATELY OWNED OR OPERATED FACILITIES. (a) Except as provided in par. (b), no state board, agency, officer, department, commission or body corporate which has authority to permit a privately owned or operated facility to be constructed on state-owned land may permit a facility that would be privately owned or operated to be constructed on state-owned land without prior approval of the building commission.

(b) This subsection does not apply to any of the following:

1. A facility constructed by or for corporations having condemnation authority under s. 32.02 (3) to (10) and (13) for purposes for which the corporation would have condemnation authority.

2. A facility constructed by or for the state fair park board, if the cost of constructing the facility does not exceed the amount specified in sub. (3).

3. A facility constructed pursuant to a build-operate-lease or transfer agreement under s. 84.01 (30).

4. A facility constructed by or for the Fox River Navigational System Authority.

(13) APPLICATION OF LAWS, RULES, CODES, ORDINANCES AND REGULATIONS. (a) Except as provided in par. (b) or (c), every building, structure or facility that is constructed for the benefit of or use of the state, any state agency, board, commission or department, the University of Wisconsin Hospitals and Clinics Authority, the Fox River Navigational System Authority, the Wisconsin Quality Home Care Authority, or any local professional baseball park district created under subch. III of ch. 229 if the construction is undertaken by the department of administration on behalf of the district, shall be in compliance with all applicable state laws, rules, codes and regulations but the construction is not subject to the ordinances or regulations of the municipality in which the construction takes place except zoning, including without limitation because of enumeration ordinances or regulations relating to materials used, permits, supervision of construction or installation, payment of permit fees, or other restrictions.

(b) Every building, structure or facility that is constructed at state fair park shall be in compliance with all applicable state laws, rules and codes but is not subject to zoning or any other ordinances or regulations of the municipality in which the park is located.

(c) No construction undertaken by the state for the purpose of renovation of the state capitol building is subject to any state law, rule, code or regulation, or any zoning ordinance or regulation of the city of Madison, governing such construction.

(14) SALE OR LEASE OF LANDS. (a) In this subsection, "agency" has the meaning given for "state agency" in s. 20.001 (1), except that during the period beginning on October 27, 2007, and ending on June 30, 2009, and the period beginning on July 1, 2009, the term does not include the Board of Regents of the University of Wisconsin System.

(am) Subject to par. (d), the building commission shall have the authority to sell or lease all or any part of a state-owned building or structure or state-owned land, including farmland, where such authority is not otherwise provided to an agency by law, and may transfer land under its jurisdiction among agencies.

(b) Subject to par. (d), the building commission shall sell or lease on the basis of either public bids, with the building commis-

sion reserving the right to reject any or all bids in the best of the state, or negotiated prices. Buildings, structures as mentioned in this subsection shall be subject to general property taxes levied by those taxing bodies within whose area they are used for commercial purposes, and shall be subject to assessments for public improvements in the same manner as privately owned buildings, structures, and shall be subject to the same extent as privately owned buildings, structures, and subject to approval of the building commission required under s. 66.0703 (6).

(c) If there is any outstanding public debt used to finance the acquisition of a building, structure or land or the construction of a building or structure that is sold or leased under par. (b), the building commission shall deposit a sufficient amount of the proceeds from the sale or lease of the building, structure or land in the bond security and redemption fund under s. 18.09 to pay the principal and pay the interest on the debt, and any proceeds upon refunding any of that debt. Except as provided in s. 51.06 (6), if there is no such debt outstanding, or, if the proceeds exceed the amount required to repay that principal and that interest and premium, the building commission shall use the net proceeds or remaining net proceeds in the budgetization fund.

(d) 1. In this paragraph, "surplus land" means land under the jurisdiction of the commission and allocated for use by an agency, but unused and not needed for the agency's operation or included in the agency's plan for construction or development.

2. Biennially, beginning on January 1, 1984, each agency having surplus land shall submit to the building commission and the joint committee on finance an inventory containing the location, description and fair market value of each parcel of surplus land.

3. Except as provided in subd. 4., the commission shall, beginning January 1, 1984, submit to the joint committee on finance an inventory of surplus land containing the following information for each parcel:

a. The location, description and fair market value.

b. Whether the commission intends to sell or transfer the parcel from one agency to another agency.

c. If the commission intends to transfer use of the parcel from one agency to another agency, whether transfer of the parcel is critical or desirable.

4. If the commission proposes to sell or transfer a parcel of surplus land having a fair market value of at least \$20,000, the commission shall notify the joint committee on finance of its proposed action. If the cochairpersons of the committee do not notify the commission that the committee has scheduled a meeting for the purpose of reviewing the proposed transfer within 14 working days after the date of the commission's notification, the parcel may be sold or transferred by the commission. If, within 14 working days after the date of the commission's notification, the cochairpersons of the committee notify the commission that the committee has scheduled a meeting for the purpose of reviewing the proposed sale or transfer of the parcel, the parcel may be sold or transferred under this subdivision only upon approval of the committee. This subdivision does not apply to surplus land that is authorized to be sold under s. 66.0703 (6).

(e) If the state office building located at 3319 West E Highway in Dane County is sold by the state, the building commission shall ensure that the transferee pays \$476,228 from the proceeds of the sale to the Wisconsin Public Broadcasting Foundation, if the foundation exists at the time of the sale.

(15) ACQUISITION OF LEASEHOLD INTERESTS. Subject to the requirements of s. 20.924 (1) (i), the building commission shall have the authority to acquire leasehold interests in state-owned buildings where such authority is not otherwise provided to an agency by law.

STATE OF WISCONSIN BUILDING COMMISSION

POLICY AND PROCEDURES MANUAL

STAFF:

Department of Administration
Division of State Facilities

Updated: March 2010

**BUILDING COMMISSION
POLICY AND PROCEDURES MANUAL**

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INTRODUCTION

The State of Wisconsin Building Commission is charged with the responsibility of overseeing the planning, improvement and major maintenance and renovation of state facilities and the supervision of all matters relating to the contracting of public debt.

In recognition of the complexity of its responsibilities, the Building Commission has adopted the concept of maintaining a policy and procedures manual to improve its overall management of the building program and debt financing.

This manual contains the general practices and operating policies of the Building Commission and delineates the duties it has delegated to the Commission Secretary. The manual is intended to serve as a general guide to assist the various state agencies and officials involved with state building program implementation. It will be updated as necessary to reflect new or modified policies adopted by the Commission. In exceptional cases specific actions of the Commission may conflict with these general policies. In these cases, the more specific actions recorded in the official minutes shall govern.

II. GENERAL POLICIES

G. Local Zoning Cooperation

In the development of long-range plans, state agencies shall consider the need for compatibility of state development with local land use related zoning and land use plans unless specific exceptions are granted by statute or by the affected municipality. However the construction is not subject to ordinances or regulations of the municipality related to materials used, permits, supervision of construction or installation, payment of permit fees or other restrictions. (For related statutory reference, see s. 13.48(13), Wis. Stats.)

H. Project Delegation to Agencies

Whenever the Department of Administration delegates project work to a state agency, such agency receiving the delegation shall be responsible for complying with state statutes and with Building Commission policies and procedures, design standards and administrative guidelines established by the Division of State Facilities. (For related statutory reference, see s. 16.855(1), Wis. Stats.)

I. Location of State Office Facilities

1. Except where such selection is incompatible with agency program objectives, the process for the construction, acquisition or rental of office space to meet the needs of state agencies shall give first consideration to central city locations, including areas recommended by local officials.
2. Except where client access would be demonstrably restricted, consolidation and co-location of state offices in a single facility or proximate facilities will be given first consideration.
3. The process for the acquisition and/or construction of state office facilities shall include consideration of the impact of the site on improving the social, economic, environmental and cultural conditions of the communities in urban areas; on enhancing and supporting the revitalization objectives, employment and economic base of cities; on the availability of parking and mass transit; and on accessibility to the public.
4. Consideration of the advantages and disadvantages of state ownership as opposed to state leasing shall be done on a case-by-case basis.
5. The policies of agency consolidation and central city location will be most actively pursued in those cities where the state uses more than 20,000 square feet of office space. In cities or jurisdictions where there is less than 20,000 square feet of office space, the policies will be considered during the process of review and approval of space requests and lease renewals.
6. The process of meeting state office space needs shall also include consideration of:
 - (a) Compatibility of the location with local and regional development and environmental objectives.
 - (b) Recommendations of local officials.
 - (c) Commitment of local government resources and services.
 - (d) Availability of adequate public and client access through public transportation and parking.