

ROBERT J. STEININGER

Attorney At Law

929 N. Aston St., #1202

South Milwaukee, WI 53172

E-Mail: 74362.1651@compuserve.com

Phone: (414) 762-4565

Fax: (414) 727-0266

February 23, 2003

Ald. Johnson - Odom
200 E. Wells Street
Milwaukee, WI, 53202

Via Fax to (414) 286-3456

Re: Ordinance relating to the First Amendment to the Detailed Planned
Development (DPD) known as Kilbourn Tower.

Dear Ald. Johnson - Odom:

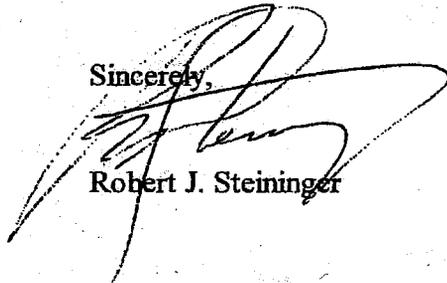
We have received Agenda Hearing Notices regarding the above described ordinance.

In view of the fact that there have been three (3) attempts to legitimize sale of City land necessary for private development of Kilbourn Tower, the final being a sweeping ordinance which would provide the City with *carte blanche* authority to dispose of its realty, some detail as to which of these attempts is to figure in the hearing on 2/25/03 would be appreciated.

If it is the most recent attempt that is being heard, please make the enclosed excerpts (pp. 20-30) from the pending action challenging the City's authority to sell the land to the Kilbourn Tower developers, a part of the record of that hearing.

Please also note that the City construction effort in the proposed Kilbourn Tower neighborhood appears to be an imprudent expenditure of City funds given the City's questionable authority in this attempted sale.

Sincerely,



Robert J. Steininger

cc: Edwin P. Wiley

penalties; and in legal contemplation it has no existence." *State Ex. Rel. Kleist v. Donald*, 164 Wis. 545, 160 N.W. 1067, 1070 (1917).

A plaintiff contesting the constitutionality of an ordinance can either assert a "facial" challenge that the ordinance is unconstitutional as written, or an "as applied" challenge that the ordinance is unconstitutional as applied to the specific facts of the case. *State v. Joseph E.G.*, 240 Wis. 2d 481, 486, 623 N.W.2d 137 (Ct. App. 2000). Under either method, the plaintiff must prove that the ordinance is unconstitutional beyond a reasonable doubt. *Wisconsin Retired Teachers Ass'n, Inc. v. Employee Trust Funds Bd.*, 207 Wis.2d 1, 18, 558 N.W.2d 83 (1997). It is a well recognized rule of construction that all words appearing in the Constitution must be given their "plain, natural, and usual signification and import" and that "the courts are not at liberty to disregard the plain meaning of the words of a constitution in order to search for some other conjectured intent." *Payne v. City of Racine, et. al.*, 217 Wis. 550, 259 N.W. 437, 439 (1935).

B. Section 304-49-17 of the Milwaukee Ordinances Is Facially Unconstitutional As Written Under Article XI, Section 3a of the Constitution.

Article XI, Section 3a of the Constitution governs the acquisition and conveyance of municipal property. Article XI, Section 3a states, in pertinent part:

The state or any of its counties, cities, towns or villages may acquire by gift, dedication, purchase, or condemnation lands for establishing, laying out, widening, enlarging, extending, and maintaining memorial grounds, streets, highways, squares, parkways, boulevards, parks, playgrounds, sites for public buildings, and reservations in and about and along and leading to any or all of the same; *and after the establishment, layout, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate, so as to protect such public works and improvements, and their environs, and to preserve the view, appearance, light, air, and usefulness of such public works. . . .*

Wis. Const. Art. XI, § 3a (emphasis added).

Article XI, Section 3a allows a municipality to acquire private property for purposes of constructing public works – such as a streets, highways and boulevards – and provides for the conveyance of any “remnant” parcels that were acquired by the municipality, but that were not needed for the actual construction of the public works. *See Cutts v. Dept. of Public Welfare*, 1 Wis. 2d 408, 415, 84 N.W.2d 102, 105 (1957). However, the provision is clear that any such conveyance of these “remnant” parcels must contain reservations concerning the future use and occupation of such real estate to protect the public works for which the property was acquired. *Id.*, see also *State ex. rel. Evjue v. Seyberth*, 9 Wis. 2d 274, 281, 101 N.W.2d 118 (1960) (recognizing that Article XI, Section 3a imposes a requirement that the “view, appearance, light, air and usefulness” of a public work be preserved on conveyance). Thus, for example, adjacent vacant land may be necessary to provide a “buffer” for the public works to further the purpose of the public works or to provide room for expansion of the public works.

Article XI, Section 3a was created as an amendment to the Constitution in November 1912. *State ex. rel. Hamman v. Levitan*, 200 Wis. 271, 228 N.W.2d 140, 142 (1929). The legislative history to the amendment suggests that it was created, in part, to address the state’s concerns about the acquisition and disposal of “excess condemnation”. *See Wis. Stat. Ann. Article XI, § 3a*, pps. 112-113 (1930).¹⁶ Prior to the amendment in 1912, Wisconsin law prohibited a municipality from conveying publically-owned property to a private person for an exclusive private use. *See Lakeside Lumber Co. v. Jacobs*, 134 Wis. 188, 114 N.W. 446, 447 (1908) (prohibiting the municipality from granting a private easement across public property).

¹⁶ A copy of the 1930 version of the Wisconsin Statutes Annotated is attached to this brief in the Table of Wisconsin Authorities.

As such, municipalities did not have the authority to acquire excess parcels needed to protect or preserve a public work, or the power to convey those remnant parcels to a third party for a non-public use.

Article XI, Section 3a resolved the uncertainty about “remnant” parcels by, in part, creating a narrow exception to the public purpose doctrine as it related to “excess condemnation”. After passing the amendment, municipalities were authorized to convey remnant parcels of land acquired in a condemnation for a public use, but which ended up as being in excess to what was needed for the construction of a public works project. However, a municipality in such instance is required to place restrictions on the future use and occupation of the remnant parcel property to protect and preserve the public use for which the whole property was acquired. Thus, the legislature added the language that such conveyances must include *“reservations concerning the future use and occupation of such real estate, so as to protect such public works and improvements, and their environs, and to preserve the view, appearance, light, air, and usefulness of such public works.”* Wis. Const. Art. XI, § 3a.

Section 304-49-17 of the Milwaukee Ordinances, however, gives the City unlimited authority to convey all City-owned property – including remnant parcels – by simply declaring that the property is “surplus,” without providing any restrictions for the preservation of the public works for which the property was initially acquired. This unlimited authority is not allowed under the plain language of Article XI, Section 3a of the Constitution, and Section 304-49-17 of the Milwaukee Ordinances is facially unconstitutional as a matter of law.¹⁷ Therefore,

¹⁷ The new ordinance is also contrary to sound public policy. The new ordinance effectively repeals the bidding procedures under Sections 304-49 and 308-23 of the Milwaukee Ordinances. See Milwaukee Ordinances § 304-49-17. Both of those sections require the City to engage in a particular bidding process when selling City-owned “surplus” or “remnant” property. The bidding process

Section 304-49-17 of the Milwaukee Ordinances is invalid and grants no authority to the City to convey this public property to Fiduciary. *See Waisman v. Wagner*, 227 Wis. 418, 421, 278 N.W. 418 (1938) ("Agreements that are beyond the power of a City to make are void.").

C. The City's Conveyance of the Property to Fiduciary is Unconstitutional As Applied Under Article XI, Section 3a.

Even if the ordinance could be narrowly construed to save it from a facial challenge, the City's adoption and approval of File No. 20968 in designating the Property as "surplus" property and approving the conveyance of the Property to Fiduciary under Section 304-49-17 of the Milwaukee Ordinances violates Article XI, Section 3a of the Constitution. As mentioned above, the City is not authorized to convey City-owned "remnant" property without providing some protection for the public purpose for which the property was acquired.

There is no question that the vacant land is a "remnant" parcel subject to the restrictions of Article XI, Section 3a. Resolution 51231-j, the resolution by which the City resolved to acquire the Property for purposes of widening Kilbourn Avenue, expressly designated the vacant land as a "*remnant*" parcel. (Stuart Aff., Ex. 6, p. 4). Indeed, one of the public purposes of acquiring the land and widening Kilbourn Avenue was creation of a broad vista of open space encompassing the lakefront as planned by Olmstead and Nolen decades ago. The vacant land and right turn by-pass foster this public purpose by preserving the view, light and air, and preventing obstructions to view as motorists approach the intersection from the west or south. Accordingly, to be consistent with Article XI, Section 3a, the City cannot convey the vacant land to a private party without providing for the protection of the view, light and air which

ensures that the City is getting adequate consideration for the property and provides essential checks and balances that protect against the possibility of discrimination, bias, favoritism, and nepotism among City officials in conveying public property to a private party.

were provided by this widened intersection, and the traffic safety concerns addressed by the by-pass. There is absolutely no alternative protection for the street or the vista provided in Fiduciary's plans for the Property; only the obliteration of the right turn by-pass and the vacant land by a behemoth.

After recognizing the limitation imposed by the constitutional amendment, the City attempted to circumvent its requirements to protect the right turn by-pass by vacating the street and then designating it and the vacant land as "surplus" property. The City contends that the vacant land is no longer subject to the provisions of Article XI, Section 3a because the City removed the public work for which the vacant land was purchased. The opinion letter from the City's Attorney's Office states:

However, in the matter at hand, the *vacation* of right turn bypass removes this matter from the sec. 3a provisions. In essence, the vacation removes the original public work and there remains no need to protect it. In other words, the purpose for which the northerly portion of the parcel was acquired has been removed by the vacation process and that portion of the property is now released from the encumbrance of the right turn bypass.

(Stuart Aff. Ex. 32) (emphasis added).

This obvious charade cannot avoid the impact of the constitutional provision. If it works here, municipalities can now render Article XI, Section 3a a toothless tiger by the simple expedient of declaring a public work – which is still in active public use and performs a vital public function – as "surplus."

Moreover, there is no legitimate basis for the City's vacation of the right turn by-pass or the declaration that parcel is "surplus" to the needs of the public. The one and only reason offered by the City to support its conclusion on how a fully-functional and continuously-used street that has been in existence for sixty-one (61) years can possibly be declared "surplus"

is the City's own self-serving, conclusory statement that right turn by-pass and adjacent land has "no possible municipal use". (Stuart Aff., Ex. 16). This is preposterous on its face and cannot provide a sufficient basis to declare public property as "surplus" under the Milwaukee Ordinances. See, e.g., *City of Cincinnati v. Vester*, 281 U.S. 439, 50 S.Ct. 360 (1930) (holding mere designation of property as "excess condemnation" without further explanation or support from the City was unconstitutional).¹⁸

Contrary to the City's belief, it cannot remove the constitutional restrictions relating to sale of the vacant land as a "remnant" parcel by eliminating the right turn by-pass. The vacant land was purchased as part of the overall widening project of Kilbourn Avenue, not just for construction of the right turn by-pass. Even if the City removes the right turn by-pass, the vacant land would still be "excess" condemnation to the remaining portion of Kilbourn Avenue, and therefore still be subject to the requirements of Article XI, 3a to the Constitution.

Furthermore, the vacant land itself serves to carry out part of the public purpose in widening the street to make it a magnificent boulevard from the County Courthouse grounds to the lakefront, with an ever-widening vista as travelers approach from the west on Kilbourn Avenue. Declaring the vacant land as "surplus" without public use means that Olmstead and his supporters at City Hall were mistaken many decades ago when the City's living environs were thought to be enhanced by this widening project. For the current Common Council to ignore this public purpose is presumptuous, arbitrary, and in open disregard of Article XI, Section 3a.

¹⁸ The *Vester* decision was cited in the 1930 edition of the Wisconsin Statutes Annotated relating to Article XI, Section 3a and provides valuable insights on the historical purpose of the amendment.

Moreover, the fallacy of the City's statement is self-evident. If, as the City contends, the right turn by-pass has "no possible municipal use", then why has the City continued to use and maintain the by-pass and landscape the vacant land (through the use of *public funds*, at the *public's expense*) for the past sixty-one (61) years? Why also did the City expend public resources to create the right turn by-pass in the first place? Furthermore, how can a continuously used street on the intersection of two of the City's main avenues be classified as having no possible municipal use, particularly at a time when the downtown population of residents and vehicles is increasing rapidly *as a result of the City's own planning*.

The right turn by-pass and vacant land cannot now be suddenly deemed worthless simply because the City wants to allow a private developer to build a high-rise development on the Property. Clearly, the City's actions in conveying the vacant land and right turn by-pass under new Ordinance 304-49-17 violate Article XI, Section 3a of the Constitution and must be declared invalid as a matter of law.

II. THE CONVEYANCE OF THE PROPERTY VIOLATES THE PUBLIC PURPOSE DOCTRINE.

The City's conveyance of the Property to Fiduciary and Kilbourn Tower, LLC is also unconstitutional under the Public Purpose Doctrine. In Wisconsin, all public expenditures and resources must be used only for public purposes. *Jackson v. Benson*, 218 Wis. 2d 835, 896, 578 N.W.2d 602, 628 (1998). The doctrine is clear that "[a]n expenditure of public funds for other than a public purpose would be abhorrent to the constitution of Wisconsin". *Id.* The Public Purpose Doctrine, although not recited in any specific clause in the state constitution, is a well-established constitutional tenant. *Libertarian Party of Wis. v. State of Wisconsin*, 199 Wis. 2d 790, 807, 546 N.W.2d 424, 432 (1996). The question in determining whether an expenditure

violates the doctrine is whether the expenditure serves a clear public purpose. *Millers Nat'l Ins. Co. v. City of Milwaukee*, 184 Wis. 2d 155, 175-76, 256 N.W.2d 139 (1998). A court must conclude that the doctrine has been violated if it is "clear and palpable" that the expenditure confers no benefit to the public. *Jackson*, 218 Wis. 2d at 896.

To sustain a public purpose, "*the benefit to the public must be direct and not merely indirect or remote.*" *Hopper v. City of Madison*, 79 Wis. 2d 120, 129, 256 N.W.2d 139, 143 (1977) (emphasis added). For the public purpose to be met, "the subject matter of the appropriation must be a public necessity, convenience or welfare." *Id.*

There is no public purpose served by the City's conveyance of the Property to Fiduciary and Kilbourn Tower, LLC for purposes of constructing the Kilbourn Tower. Transfers of municipally-owned property for the exclusive benefit of a private developer, without a direct public benefit, are considered constitutionally abhorrent. *Rath v. Two Rivers Community Hospital, Inc.*, 160 Wis. 2d 853, 862, 467 N.W.2d 150 (Ct. App. 1991). There is little question that the conveyance of the Property only promotes the interests of Fiduciary as a private developer, with no clear direct benefit to the public. Fiduciary is not only obtaining the benefit of the vacant land and the right turn by-pass, but it is also, incredibly, getting the benefit of additional subterranean space under Kilbourn Avenue. Once the Kilbourn Tower is constructed, all profits generated by the high-rise building will go to Fiduciary, and not to the public. Accordingly, there is no direct benefit derived to the public from the conveyance of the Property to Fiduciary and the conveyance violates the Public Purpose Doctrine.

In fact, the public only stands to lose from the conveyance of the Property to Fiduciary. Despite the fact that traffic will increase due to the addition of permanent residents on this heavily traveled corner, the long-standing right turn by-pass will be eliminated. Even more

onerous will be the parking of moving vans, delivery trucks, waste haulers and garbage trucks on the now narrower eastbound lane of Kilbourn Avenue so close to an intersection. Not only will the street be narrower, but the view at the corner will be more obstructed as vehicles approach from the south or west. The plans submitted by New Land Enterprises, and now by Fiduciary and Kilbourn Tower, LLC, fail to provide any alternate traffic pathway to mitigate these substantial detriments to public safety at this intersection.

Moreover, the public purpose of creating a broad vista through the airspace over the turning lane and the adjacent vacant land, as envisioned by planners and public servants of past generations, will be obliterated. How ironic after the community has contributed more than \$100,000,000 to a world-class enlargement of the Milwaukee Art Museum, a treasure for public enjoyment and a draw for tourists contributing dollars to the local economy, that one of the grand views of this area of the lakefront will be obstructed. Once again, there is no substitute in these plans for the loss of this public purpose or the view, light and air at this corner. Only the developers and their purchasers will be utilizing this air space in the future. These conveyances are solely for the benefit of a private developer and constitute a violation of the Public Purpose Doctrine. *See Village of Suring v. Suring State Bank*, 189 Wis. 400, 207 N.W. 944, 945-946 (1926).

The conveyance to New Land Enterprises, and now Fiduciary and Kilbourn Tower, LLC, also violates the Public Purpose Doctrine by expending the City's time, money and resources for the sole benefit of those private developers. Since the City decided to convey the Property for private development two and one half years (2 ½) ago, the City has (1) designated the Property as blighted under Section 66.1333(2m)(bm), Wis. Stat.; (2) vacated the right-turn by-pass on two separate occasions; (3) declared the Property as "special use" or "special

purpose” surplus property under Section 304-49-2-a and Section 304-49-3 of the Milwaukee Ordinances; (4) defended the City’s actions in this lawsuit (including an appeal to the Wisconsin Court of Appeals); (5) drafted and adopted Section 304-49-17 of the Milwaukee Ordinances to purportedly give the City unfettered discretion to sell all City-owned property; (6) rescinded the “blighted” designation; and (7) designated the property as “surplus” under the newly-enacted ordinance. Each of these municipal actions involved the expenditure of time, money and resources that the City could have allocated toward a different public function.

The City made these public expenditures without obtaining any compensation whatsoever from New Land Enterprises, Fiduciary or Kilbourn Tower, LLC. The City returned the entire \$90,000 deposit that New Land Enterprises had paid under the Option; thereby effectively gifting New Land Enterprises an option to purchase the Property for nearly two (2) years, and the City’s time, money and efforts to convey the Property. Similarly, to date, it does not appear that Fiduciary or Kilbourn Tower, LLC has paid any money for its right to purchase or develop the Property. The allocation of these expenditures and contract rights without any compensation constitutes a violation of the Public Purpose Doctrine.

Moreover, even if the City could show some direct benefit to the public from the conveyance of the Property to Fiduciary, the transaction lacks sufficient control and regulation to ensure the alleged public benefit is realized. A municipality cannot allocate public resources toward a private institution for an alleged public purpose without providing reasonable regulations to ensure the public interests will be realized. *See American Legion 1941 Convention Corp. of Milwaukee v. Smith*, 235 Wis. 443, 293 N.W. 161, 171 (1940). Here, the City has no assurance that Kilbourn Tower, LLC, Fiduciary’s shell company for the development, will actually develop the Kilbourn Tower on the Property after the conveyance. Indeed, there is no

evidence that Fiduciary has completely secured financing for the project (without contingencies) or that Fiduciary has sold enough units to start construction on the project. Furthermore, there is nothing in the transaction with Fiduciary that would ensure the developer builds the Kilbourn Tower on the site as proposed. Fiduciary could simply leave the Property vacant, or sell the Property to some other developer in the future for its own profit; in which case no public benefit would be derived from the conveyance of the Property to Fiduciary. As such, the City's conveyance to Fiduciary is an unconstitutional violation of the Public Purpose Doctrine for failing to include appropriate restrictions to ensure that the alleged public benefits derived from the Kilbourn Tower are actually realized.¹⁹

CONCLUSION

For all the above reasons, the Plaintiffs respectfully request that this Court grant their motion for summary judgment.

¹⁹ In *Rath v. Two Rivers Community Hospital, Inc.*, a case involving the conveyance of public lands for the operation of a health care facility, the Court of Appeals stated:

Expending public funds to assure adequate health care services is within the public interest. *However, a private entity subsequently using the property for a direct benefit to a private industry with only a remote benefit to the public would render the transfer abhorrent to the Wisconsin Constitution.*

Rath, 160 Wis. 2d at 862 (emphasis added). The Court of Appeals held that the conveyance of the municipal lands did not violate the Public Purpose Doctrine because the municipality had included deed restrictions which ensured that title to the property would revert back to the municipality if the property ceased to be used as a health care facility. *Rath*, 160 Wis. 2d at 862-863. No such restrictions are included in the City's deal with Fiduciary.