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February 13, 2008

**Hand Delivered**

To the Honorable Common Council  
Of the City of Milwaukee  
Room 205 – City Hall

Ald. Michael S. D'Amato, Chairman and  
Members of the Zoning Neighborhood  
and Development Committee  
Room 205 – City Hall  
200 East Wells Street  
Milwaukee, WI 53202

Re: Special Meeting of the ZND on February 14, 2008  
File No. 071365

Ladies and Gentlemen:

Please see the attached memorandum for filing on behalf of DAPL, LLC regarding the referenced file. Thank you.

Very truly yours,



Thomas B. Burke

**Enclosures**

cc: (via e-mail)  
Ald. Willie C. Wade  
Ald. Michael J. Murphy  
Ald. Ashanti Hamilton  
Ald. Robert J. Bauman  
Gregg Hagopian, Esq.  
Vanessa Koster

## MEMORANDUM

TO: Zoning, Neighborhoods and Development Committee ("ZND")

FROM: Thomas B. Burke, counsel for DAPL, LLC

RE: Common Council File No. **071365**  
Resolution to Ratify and Reaffirm Prior Approval of Minor Modification

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Dear Mr. Chairman and Committee Members:

I am one of the lawyers for DAPL, LLC, the owner and developer of the mixed-use retail and parking garage at 2574-2590 North Downer Avenue (the "DAPL Project").

The question before the ZND Committee at its special meeting on February 14, 2008 is consideration of the referenced file to *ratify* and *reaffirm* the identical prior common council action taken last November permitting certain minor modifications to the DAPL Project.

While the common council may ratify and reaffirm its identical prior action, DAPL respectfully suggests that the common council is without authority to *reconsider* its prior actions concerning the DAPL Project because the common council unanimously rejected reconsideration on the date the minor modifications were approved and the same action may not be reconsidered more than once.

DAPL also respectfully suggests that the common council is without authority to *rescind* its prior action. According to the Supreme Court of Wisconsin, DAPL has a vested right to develop its property according to the requirements of the current zoning approved by the common council.<sup>1</sup> Under Wisconsin law, that zoning is presumed valid.<sup>2</sup> Therefore, DAPL's rights remain *unless* and *until* the current zoning is held invalid by a court.

A party challenging the validity of zoning faces a steep, uphill battle. To date, Atty. Kovac and his co-plaintiffs have been unsuccessful in their attempt to invalidate the current zoning for the DAPL Project. In fact, the circuit judge's order *denying* their motion for the temporary injunction evidences that the plaintiffs' attempt to invalidate the zoning and permits for the DAPL Project will likely *not* succeed on its merits. Ignoring the heavy presumption in favor of the validity of zoning under Wisconsin law and the circuit judge's denial of their motion, the lawyer for Atty. Kovac and his co-plaintiffs states that DAPL has no vested rights because, *in his opinion*, both the building permit was issued improperly, and the underlying zoning are invalid. What this lawyer conveniently fails to mention is that unless and until Atty. Kovac and his co-plaintiffs are successful in court, a result that looks highly improbable at this point, the zoning and the permit remain valid and DAPL's rights remain vested. Therefore, the common council is without authority to rescind its prior action because to do so would violate DAPL's current and vested property interest in its permit.

Finally, each of the modifications referenced above (which has brought us back here today) was undertaken to assuage the neighbors after DAPL's principal, Joel Lee, met with one of the neighbors, Atty. Peter Kovac, at the Mayor's request. Atty. Peter Kovac and his co-plaintiffs successfully extracted certain modifications to the DAPL Project design from the City and DAPL, and, are now are using these modifications as a basis upon which to sue both the City and DAPL. Their tactics are akin to a child who murders his parents and then pleads for mercy because he is an orphan.

A more detailed discussion of DAPL's position is set forth in the attached memo. Thank you for your consideration of these materials.

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<sup>1</sup> *Lake Bluff Partners v. South Milwaukee*, 197 Wis.2d 157 (1995).

<sup>2</sup> See Wis. Stat. §62.23(7) (the validity of any ordinance, resolution or regulation enacted or adopted under this section, shall be liberally construed in favor of the City); see also *Step Now Citizens v. Planning and Zoning*, 264 Wis. 2d 662, 663 N.W.2d 833 (Ct. App. 2003).

## I. BACKGROUND

DAPL, LLC ("DAPL") is the owner and developer of the mixed-use retail and parking garage (the "Project") at 2574-2590 North Downer Avenue (the "Real Property"). Prior to the City of Milwaukee ("City") approving the sale of this Real Property to DAPL, the Real Property was zoned Local Business (LB-2). That zoning permitted the construction of a mixed-use retail and parking garage as is currently being constructed by DAPL.

*The City* nevertheless required that DAPL's Real Property be included within a General Planned Development ("GPD") covering certain projects proposed along Downer Avenue so that the City could control the entire development of the area as a whole instead of an a project by project basis. The GPD was properly approved and subsequently a Detailed Planned Development (the "DPD") was properly approved when the design details for the Project were produced. The DPD permitted the construction of the Project on the Real Property along its entire eastern lot line on Bellevue Avenue with underground parking and an entry ramp at its eastern lot line on Bellevue Avenue.

During the approval process for this Project, neighbors of the Real Property, led by Attorney Peter Kovac, objected, primarily because: (1) they wanted more "green space" on the lot line between Attorney Kovac's property and DAPL's Real Property, (2) they wanted to save a tree on the northeast portion of DAPL's Real Property located within the "green space", (3) there was concern that the excavation of the underground parking would disturb the foundation of Attorney Kovac's house, and (4) they wanted to move the entry ramp to parking structure away from the eastern lot line of the Real Property. In addition, Attorney Kovac proposed an exchange of a piece of the Real Property (i.e., the portion of the "green space" with the tree on it) for a portion of Attorney Kovac's backyard.

After adoption of the DPD, Attorney Kovac prevailed upon the Mayor to intervene (see the affidavit, a copy of which is attached hereto as Exhibit 1). My client did what the Mayor asked of him and sat down with Attorney Kovac. In a letter to my client dated June 22, 2007, a copy of which is attached hereto as Exhibit 2, Attorney Kovac told my client that:

If the tree next to our house is saved, you will get a substantial public relations benefit. Local, state, and national preservation agencies are unanimously opposed to the loss of the green space buffer zone with the majestic tree at its center. If you agree to save the tree, you will be a hero to those groups - and to us.

DAPL responded on June 25, 2007 in writing to Attorney Kovac's request by rejecting the exchange of real property proposed. See Exhibit 3. However, DAPL, at Attorney Kovac's request, agreed to make the following minor modifications to its original plan, all to appease Attorney Kovac and the other complaining neighbors: (1) creation of additional "green space" as a buffer zone between the Real Property and Attorney Kovac's property, (2) the tree in this newly created "green space" was saved, (3) all of the underground parking was eliminated to protect potential issues with Attorney Kovac's foundation, and (4) the entry ramp to the parking structure was moved to the west away from the lot line with Attorney Kovac's property. The DPD with these minor modifications requested by Attorney Kovac is the plan being constructed (the "Plan"). Far from the City and DAPL being his heroes for saving the tree and increasing his "green space", Atty. Peter Kovac and his co-plaintiffs successfully extracted these modifications to the DAPL Project design from the City and DAPL, and, are now are using them as a basis upon which to sue both the City and DAPL.

In May 2007, the Historic Preservation Commission (“HPC”) conditionally approved the Plan and this project. The HPC formed a subcommittee to finalize certain design details regarding the Project limited to certain aesthetic items: (a) color, texture and type of exterior cladding material, (b) street level storefront glazing design, (c) signage, and (d) snow removal chute if visible from street. According to the meeting minutes, this subcommittee was “empowered to make the final approval on behalf of the entire commission.” After four meetings of the HPC subcommittee, a final Certificate of Appropriateness (“COA”) for the project was issued on June 29, 2007 that mandated “[a]ll work be done according to the attached drawings.” On January 28, 2008, the entire HPC, in open session, ratified all of the subcommittee’s prior actions in approving the project and in issuing its COA.

On November 9, 2007, the Common Council approved, by resolution, a minor modification to the DPD, to permit the minor modifications sought by Attorney Kovac (the DPD with the minor modifications, the “current DPD”).

## II. DAPL’s POSITION

DAPL commenced construction of its parking structure in good faith. To date, DAPL has expended in excess of three million dollars (\$3,000,000) to build this project in accordance with the applicable zoning and its building permit. DAPL has done whatever the City has asked of it, including, at substantial expense, appeasing Attorney Kovac. Construction is ongoing to meet an August 15, 2008 contractual deadline with the City to complete the parking structure.

Testimony in the lawsuit entitled *McCarthy et. al v. City of Milwaukee* indicates that the four HPC subcommittee meetings held prior to the issuance of DAPL’s COA may be improper under the Wisconsin Open Meetings Law. However, the January 28, 2008 special meeting of the entire HPC properly approved any prior actions taken at the subcommittee meetings that may have violated the Wisconsin Open Meetings Law. Attorney Kovac and his co-plaintiffs have nevertheless filed a complaint against the HPC and presumably its subcommittee members for holding such meetings.

According to the Supreme Court of Wisconsin, the right to develop a property according to the requirements of a zoning ordinance vests after the property owner merely *submits* a proper application for a building permit. *Lake Bluff Partners v. South Milwaukee*, 197 Wis.2d 157 (1995). Furthermore, Although merely applying for a building permit is enough to secure this vested interest, here, DAPL has not only applied for a building permit - it has obtained one; and, not only has DAPL commenced construction of its project and made significant expenditures to date (in excess of three million dollars (\$3,000,000)) – it has in fact nearly completed construction. DAPL has a vested, legal right in and to all of the prior actions taken affecting its property, including the GPD, the current DPD and its building permit.

While Attorney Kovac and his co-plaintiffs boldly assert that they believe they will ultimately prevail in having the zoning of DAPL’s Real Property held invalid, unless and until they are successful, the law in Wisconsin is clear - zoning is presumed valid until proven otherwise. *See Wis. Stat. §62.23(7)* (the validity of any ordinance, resolution or regulation enacted or adopted under this section, shall be liberally construed in favor of the City); *see also Step Now Citizens v. Planning and Zoning*, 264 Wis. 2d 662, 663 N.W.2d 833 (Ct. App. 2003). A party opposing the validity of zoning faces a steep, uphill battle to invalidate it. Under Wisconsin law, there is a very heavy presumption against any challenge to zoning; and, therefore, the invalidity of zoning must be clearly demonstrated by the party challenging it. *Id.*

Attached as Exhibit 4, is a copy of the circuit judge's order *denying* the motion for the temporary injunction sought by Attorney Kovac and his co-plaintiffs seeking to invalidate the current zoning and building permit for the Project. This judicial order effectively evidences that the plaintiffs' attempt to invalidate the zoning and permits for this Project will likely *not* succeed on its merits.

### III. CONCLUSION

In *McCarthy et. al v. City of Milwaukee*, concern was raised about whether complete information regarding the four HPC subcommittee meetings were provided to ZND when, on November 6, 2007, ZND approved the current DPD because those four meetings may be improper under the Wisconsin Open Meetings Law. As a result, all information regarding those meetings has now been provided to ZND and what is before ZND today is to *ratify and reaffirm* its prior action approving the minor modification that the ZND previously passed on November 6, 2007 and that was previously passed by the Common Council on November 9, 2007 (and the reconsideration of such passage was rejected by the Common Council) based on the entirety information provided. The law is clear that the action before ZND today may not lawfully be (a) reconsidered because the same action cannot be reconsidered more than once (and it has already been reconsidered); or (b) rescinded because to do so would violate DAPL, LLC's vested zoning rights. *The Municipality February 2008, page 45; and Robert's Rules of Order*. See attached as Exhibit 5.

\* \* \* \*

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

DAWN McCARTHY,  
2589 North Lake Drive  
Milwaukee, Wisconsin, 53211  
And

Case No. 2007-CV-014155

PETER and THEA KOVAC  
2623 East Bellevue Place  
Milwaukee, Wisconsin 53211

**COPY**

And

DONNA NEAL  
2624 East Bellevue Place  
Milwaukee, Wisconsin 53211

Plaintiffs,

v.

CITY OF MILWAUKEE,  
a Municipal Corporation  
200 East Wells Street  
Milwaukee, Wisconsin 53202

Defendant.

CIVIL DIVISION			
14	NOV - 9	2007	94
JOHN BARRETT Clerk of Circuit Court			

**BROOKE VANDEBERG AFFIDAVIT**

STATE OF WISCONSIN    )  
  )ss.  
MILWAUKEE COUNTY    )

Now comes Brooke VandeBerg, and states and swears as follows:

1. I am an adult resident of the State of Wisconsin, City of Milwaukee, employed by the City. I work in the Office of Mayor Tom Barrett as a Staff Assistant handling constituent relations.

2. Plaintiff Peter Kovac ("Kovac") came to the Mayor's Office on a number of occasions asking the Mayor to intervene in a land transaction involving the City's sale of 2574-2590 N. Downer (the "Property") to DAPL, LLC ("DAPL").

3. Kovac did not want the property sold or improved.

4. About ten times, Kovac showed up at the Mayor's Office, unannounced, and without any scheduled meeting, wanting to talk about the Property. On one occasion he had a pre-scheduled meeting.

5. Kovac would on occasion show up at the Mayor's public appearances wanting to talk about the property.

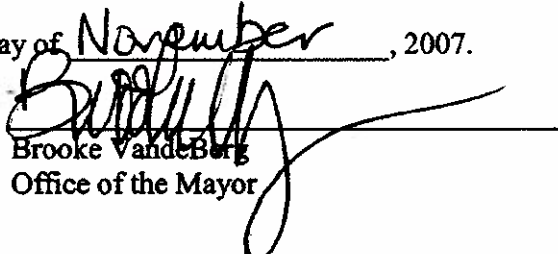
6. Kovac asked the Mayor to veto the detailed plan development. Once the plan was approved, Kovac asked the Mayor to alter the approved plan.

7. The Mayor did attempt to appease Kovac by inquiring of the developer on Kovac's behalf as to whether DAPL's improvements could be altered.

8. The Mayor's Office, and I personally, understand that DAPL's improvements were altered and that the reason they were was in an effort to appease Kovac.

9. The other plaintiffs also contacted the Mayor's office to voice their opposition to DAPL's improvements.

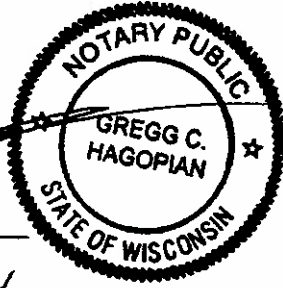
Dated at Milwaukee, Wisconsin this 5 day of November, 2007.

  
\_\_\_\_\_  
Brooke Vandenberg  
Office of the Mayor

**ADDRESS**

Mayor's Office  
City Hall, 2<sup>nd</sup> Floor  
200 East Wells Street  
Milwaukee, WI 53202

Subscribed and sworn to before me  
this 5 day of NOVEMBER, 2007.



  
\_\_\_\_\_  
NOTARY PUBLIC, State of Wisconsin  
My Commission Expires: permanently

125440



**Peter & Thea Kovac**

2623 East Belleview Place  
Milwaukee, Wisconsin 53211

**EXHIBIT 2**

June 22, 2007

Joel Lee  
Van Buren Management  
788 North Jefferson  
Milwaukee, Wisconsin 53202

Re: Downer and Belleview Parking Structure

Dear Joel Lee,

I very much appreciate your willingness to discuss the placement and design of the proposed Downer and Belleview Parking structure with my wife and myself. Your open minded attitude and spirit of cooperation are refreshing. Thank you.

While I have not seen any plans yet, I have heard that the proposed redesign of the structure involves placement of a portion of the structure in part of our backyard. Most importantly, I have heard that the small triangular space to the west of our house will be given to us in exchange for the part of our backyard needed for the parking structure.

We would be required to deed the needed portion of our backyard to the City. The City would then sell you that land and most of the city owned land at Downer and Belleview. The City would deed the triangular green space (including the tree and its root ball) to us.

We would then do whatever needs to be done to expedite any necessary approvals (including zoning changes) by the City Plan Commission, the Historic Preservation Commission, and the Common Council. We would also agree not to file a lawsuit on the basis that the City has failed to engage in good faith negotiations with the State Historical Society as mandated by state law.

You should know that we first offered this trade of a portion of our backyard for the side yard and tree several months ago. We are pleased that this offer is now being seriously considered.

If the tree next to our house is saved, you will get a substantial public relations benefit. Local, state, and national preservation agencies are unanimously opposed to the loss of the green space buffer zone with the majestic tree at its center. If you agree to save the tree, you will be a hero to those groups - and to us.

Thanks again for your cooperation.

Sincerely,



Peter J. Kovac

# Van Buren Management, Inc.

788 North Jefferson Street, Suite 800 • Milwaukee, WI 53202  
Phone: 414-224-5070 • Fax: 414-224-8208

June 25, 2007

EXHIBIT 3

## VIA ELECTRONIC MAIL

Mr. Peter & Mrs. Thea Kovac  
2623 East Belleview Place  
Milwaukee, Wisconsin 53211  
(608) 225-9700 (telephone)  
(414) 225-9070 (facsimile)

Re: Your Letter Dated June 22, 2007

Dear Mr. and Mrs. Kovac:

This letter responds to your letter dated June 22, 2007. We remain willing to discuss with you an arrangement to attempt to address your concerns regarding our project. However, the proposed arrangement described in your letter is not accurate, is not acceptable and does not in any way represent the arrangement I will discuss with you at our meeting tomorrow.

I do not know from whom you received the above misinformation, but it is not accurate and I wanted to clarify this in advance of our meeting so that you do not come to the meeting with any preconceived misconceptions.

I look forward to meeting with you tomorrow.

Very truly yours,

  
Joel S. Lee

cc: Boris Gokhman

DAWN McCARTHY,  
2589 North Lake Drive  
Milwaukee, Wisconsin, 53211  
And

Case No. 2007-CV-014155

PETER and THEA KOVAC  
2623 East Bellevue Place  
Milwaukee, Wisconsin 53211

EXHIBIT 4

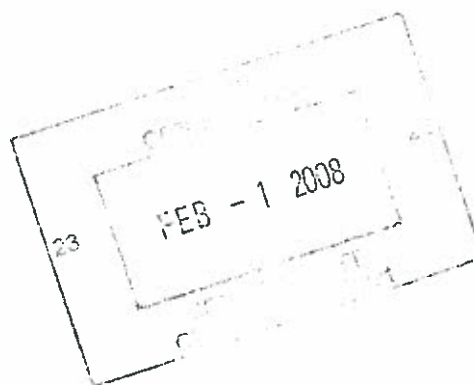
And

DONNA NEAL  
2624 East Bellevue Place  
Milwaukee, Wisconsin 53211

Plaintiffs,

v.

CITY OF MILWAUKEE,  
a Municipal Corporation  
200 East Wells Street  
Milwaukee, Wisconsin 53202



And

DAPL, LLC

Defendants.

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**ORDER DENYING TEMPORARY INJUNCTION**

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WHEREAS, on October 31, 2007, plaintiffs in this case filed a Motion for Temporary Injunction; and

WHEREAS, hearings on plaintiffs' Motion for Temporary Injunction were held before the Court, the Honorable Judge Lamelas presiding on Wednesday, January 9, 2008, on Friday, January 11, 2008, and on Wednesday, January 16, 2008; and

WHEREAS, the Court made rulings from the bench;

NOW, THEREFORE, the Court's rulings from the bench made on January 16, 2008 are hereby incorporated herein, and they included a denial of the plaintiffs' Motion for Temporary Injunction.

SO ORDERED.

Dated this 1 day of Feb., 2008.

BY THE COURT:

/S/ELSA C. LAMELAS

Honorable Elsa C. Lamelas  
Circuit Court Judge, Branch 23

GCH:ms  
1053-2007-2845:127971

# AND A MOTION TO RESCIND

Generally speaking, the basic differences between reconsideration and rescission are as follows.

## MOTIONS TO RECONSIDER

A motion to reconsider may be made to reconsider: a main motion; an affirmative vote to "postpone indefinitely;" amendment; referral to committee before the committee begins consideration of the referred matter; postponement to a specific time; the unexecuted portion of a decision to limit or extend debate; closing debate (previous question) before voting on the main question; and setting an adjourned meeting. A successful motion to reconsider brings back for further consideration the matter previously acted upon. According to *Robert's Rules*, reconsideration is not available where the original motion created a contractual relationship, and reconsideration might result in reversal of the earlier decision and violate the rights of the other party.

A strict application of *Robert's Rules* requires that a motion to reconsider be made on the same day the vote on the original motion was taken. However, a motion to reconsider, once made, can be debated and voted on at a later date. In addition, many municipalities have adopted rules that allow a motion to reconsider to be made at the next meeting. *Robert's Rules* does not limit the time for reconsideration when the matter is at committee level.

A motion to reconsider must typically be made by a member of the city council or village board who voted with the prevailing side; that is, a member who voted "yes" if the original motion passed or "no" if the motion failed. A

member who was either absent for the vote on the original motion or abstained from voting is precluded from making a motion to reconsider the original motion. However, if the motion to reconsider is at the committee level, it may be made by anyone who did not vote on the losing side, including persons who were absent for or abstained from the vote on the original motion.

## MOTIONS TO RESCIND

A motion to rescind may only be made to rescind a main motion — *i.e.*, a motion to adopt an ordinance, resolution, order or other legislative act of the body. Unlike a motion to reconsider, a motion to rescind does not bring a matter back for further consideration or debate if adopted. Instead, a successful motion to rescind simply nullifies the prior action.

For this reason, a motion to rescind is not in order; if something has been done in response to the original motion that cannot be undone; if the original motion created a contract and the contracting party has been notified; if a resignation has been acted on and the person has been officially notified; a person has been appointed to or expelled from a position and they have been officially notified; or the action would result in the violation of a vested right. \*

Unlike a motion for reconsideration, a motion to rescind is not subject to any specific time limits, and may be made by any member of the body regardless of how that member voted on the original motion.

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MOTION TO

RECONSIDER, A

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