

WOODSPRING SUITES MILWAUKEE AIRPORT LLC

Plaintiff,

Case No.: 2017-CV-006238

Code: 30952

v.

JAMES R. OWCZARSKI, as City Clerk of
the City of Milwaukee

Defendant

**CITY'S BRIEF SUPPORTING CITY
MOTIONS TO CONSOLIDATE, DISMISS AND QUASH**

I. INTRODUCTION.

Plaintiff (the “Hotel”) filed two actions relating to the same facts and law – a *Writ of Certiorari* action against the City of Milwaukee (“City”) before Judge Sosnay (2017-CV-006239), and this *Writ of Mandamus* action against the City Clerk before Judge Fiorenza (2017-CV-006238). The crux of both the Hotel’s actions is the same. The Hotel is upset that the City did not approve a certified survey map (“CSM”) in Common Council File 170030 allowing the Wisconsin Department of Transportation (“DOT”) to split off from the DOT’s larger tract the Offer Land that the Hotel wants to buy.

Defendant will show it is entitled to have the actions consolidated and dismissed. The City lawfully acted by not approving the Hotel’s and DOT’s defective CSM’s, the Hotel is not entitled to the relief it seeks, and the DOT is a missing, necessary party.

Attached to the Hagopian Affidavit accompanying this brief are the Hotel’s and DOT’s CSM Application, CSM No. 1, CSM No. 2 and CSM No. 3 (which were all submitted to the Court as exhibits to the Hotel’s Complaints), the Offer to Purchase (“Offer”) between the DOT (as seller) and the Hotel (as buyer) for the land at issue, and Milwaukee Code of Ordinances (“MCO”) Ch. 119.

II. THE OFFER – HOTEL CANNOT SUE ON DOT’S BEHALF; DOT IS A NECESSARY, REAL PARTY IN INTEREST.

The Hotel is the buyer under the January 2016 Offer whereby the DOT agreed to sell to the Hotel an 11.7 acre *portion* of the much larger tract of freeway right-of-way lands that the DOT owns with an address of 1701 W. Layton Avenue. MC-4, 5¹. The portion the Hotel wants to buy is herein called the “Offer Land.”

For the DOT to legally split-off and divide the Offer Land from its larger tract, a CSM is required under Wis. Stat. Ch. 236 and MCO Ch. 119. MC-5-10.

Paragraph 5.b. of the Offer allows the Hotel, during its buyer-inspection period, to seek governmental approvals, including “legal description changes,” including City Common Council approval of the CSM for the land division. Paragraphs 5.a. and 5.c. require the DOT to cooperate with the Hotel, and 5.c. requires the DOT to sign “all applications/petitions/plats” so long as the Hotel bears DOT’s out-of-pocket expenses incidental thereto. CC-6. If the Hotel cannot obtain Council approval of the CSM, Offer paragraphs 5.b. and 9.d. give the Hotel the right to terminate the Offer – not the right to sue the City on DOT’s behalf.

The Hotel extended the inspection period under the Offer to March 3, 2017, and the DOT and Hotel amended the Offer twice to push back the closing date to August 30, 2017. MC-18. Hagopian Affidavit.

If the Hotel and DOT are unable to obtain Common Council approval of the CSM by the August 30th closing date, Offer paragraphs 9.f. and 13.e. allow the Hotel to extend the closing date at least 60 days beyond August 30 (i.e. *until at least October 30, 2017*) with even more time past October 30, 2017 (“...such additional time as may be reasonable...”) so long as the Hotel is using reasonable efforts to obtain Council approval of the CSM.

¹ MC-4, 5 means Mandamus Complaint, paragraphs 4 and 5. CC-6 means Certiorari Complaint, paragraph 6.

Consequently, the Hotel has a choice. It can terminate the Offer if it can't get Council approval of the CSM; or if it doesn't want to terminate, it can extend the closing date to provide the Hotel and DOT additional time to *properly* seek Council approval of a *proper* CSM meeting state and local law requirements. That would be a *reasonable* effort allowing the closing date to be extended. There was no need to sue.

The Offer does not allow the Hotel to sue on DOT's behalf to force approval of a defective CSM. Offer paragraph 5.c. requires DOT signature to petition government. The DOT did not sign any of the Complaints filed with the Court in this matter, and the DOT did not sign the Hotel's June 27, 2017 demand/petition to the City Clerk asking for certification of approval of a defective CSM. MC-Ex. D.

The DOT, as the owner of the Offer Land, owner under the CSM Application, and the "subdivider" under Wis. Stat. Ch. 236, and as the party required under the Offer to sign applications, petitions and plats, is the real, necessary party in interest in these cases and is missing. Wis. Stat. 803.01 (1) (reasonable time should be allowed after objection to allow real party in interest to join). Wis. Stat. 803.03 (4) (pleadings stating a claim for relief shall state the names known to the pleader of any person needed for just and complete adjudication that has not been joined and reasons therefore).

Actions must be prosecuted by the real party in interest - the one with the right to control and receive the fruits of the litigation. *Preston v. Iron County*, 105 Wis. 2d 346, 351, 314 N.W.2d 131 (Ct. App. 1981). This prevents multiplicity of suits, ensures the defendant can assert his defenses against the plaintiff, and that judgment will completely settle the claim, with no rights remaining in others. State Bar of Wisconsin, Wisconsin Civil Procedure Before Trial, § 4.9 (2007).

III. STATE AND LOCAL LAND-DIVISION LAW – COUNCIL MAY REJECT CSM'S THAT DON'T COMPLY WITH LAW.

Applicable land division law is at Wis. Stat. Ch. 236, entitled "Platting Lands and Recording and Vacating Plats" and at MCO Ch. 119, entitled "Subdivision Regulations."

Per Wis. Stat. 236.34 (1), a CSM is used to legally divide land into four or fewer parcels. Per 236.34 (1)(cm), a CSM cannot alter areas previously dedicated as public right-of-way (such as W. Barnard Avenue extended, discussed below). Per 236.34 (1m)(a), a surveyor must prepare a CSM with an accurate map drawing. Per 236.34 (1m)(d), the surveyor must attach a "Surveyor Certificate" to the CSM showing who the surveyor made the CSM for and providing an accurate legal description of the subject land, and attesting that the CSM properly shows all exterior boundaries of the land.

Per Wis. Stat. 236.10 (1)(a), the City of Milwaukee Common Council is the approving authority for CSM's. Per Wis. Stat. 236.13 (1)(a), approval of plats (land divisions) are conditioned upon compliance with Wis. Stat. Ch. 236.

Thus, under Wis. Stat. 236.13 (1)(a), if a CSM is submitted with known defects that violate Ch. 236, the Council may, and should, acting under its authority, reject (not approve) the CSM. *State ex Rel. Columbia Corporation v. Town Board of Town of Pacific*, 92 Wis.2d 767, 779, 266 N.W.2d 130 (Ct. App. 1979) (local units of government may reject subdivision when it "conflicts with an existing statutory requirement of ch. 236 or with an existing written ordinance²"). *Wood v. City of Madison*, 2003 WI 24, para. 51 and 48 ("There is no dispute that if a proposed plat is not in compliance with an existing statutory requirement or ordinance, plat approval authorities may properly reject it").

Wis. Stat. 236.34 (1m)(f) provides that, within 90 days of submitting a CSM for approval, the Council must "take action to approve, approve conditionally, or reject the

² The Hotel agrees. See CC-Ex. D, the Hotel lawyer's June 6, 2017 letter to Council ZND Committee Chair, Ald. Jim Bohl citing *Columbia* with approval.

[CSM]...” and give “reasons for rejection *unless the time is extended by agreement with the subdivider.*” That is, the Common Council just has to take action within that time period (the Council doesn’t have to complete the action by then), and in any event the 90-day period can be extended “by agreement with the subdivider.”

Here the DOT as subdivider and the Hotel agreed to extend time by signing an “**AGREEMENT FOR EXTENSION OF TIME**” on their CSM Application. MC and CC, Exhibit A. Hagopian Aff.

Wis. Stat. 236.34 (1m)(f) further provides that, *unless the 90-day period is extended by agreement* (as it was here), failure by the Council to act within the 90 days “or any extension of that period” constitutes approval of the CSM and “upon demand, a certificate to that effect shall be made on the face of the” CSM by the City Clerk of the “authority that failed to act.”

A provision analogous to 236.34 (1m)(f) is in 236.11 (2)(a) regarding “plats.” In 236.11 (2)(a) the period is 60 days (not 90), the subdivider can still agree to extend time, and if the Council fails to act within the 60 days “*and the time has not been extended by agreement*” then the plat shall be deemed approved and demand may be made of the City Clerk to put a certificate to that effect on the plat.

Under 236.34 (1m)(f) and 236.11 (2)(a), there can be no forced certification of approval of a CSM by the City Clerk where the day-periods have not expired because of subdivider agreement to extend those periods. Consequently, there can be no forced City Clerk certification here because the Hotel and DOT did agree to time extension. Consequently, the Hotel’s mandamus action must be dismissed. Regarding the Hotel’s certiorari action, the Council acted properly.

Wis. Stat. 236.45 is entitled “Local subdivision regulation.” Wis. Stat. 236.45 (2)(ac) allows the City of Milwaukee to enact land division ordinances “more restrictive than the

provisions of [Wis. Stat. Ch. 236]...” Wis. Stat. 236.45 (2)(am) allows City ordinances to provide “other surveying, monumenting, mapping and approving requirements for...” CSM’s and land divisions that differ from Ch. 236. Wis. Stat. 236.45 (2)(b) requires Section 236.45 and City ordinances adopted pursuant to Section 236.45 to “be liberally construed in favor of the municipality...”

The City’s ordinances for land division, MCO Ch. 119, are entitled to liberal construction in the City’s favor per Wis. Stat. 236.45 (2)(b).

Per MCO 119-3-1, CSM’s are used for land divisions creating four parcels or less. Since DOT is splitting off from its freeway lands the 11.7 acre Offer Land, and then further dividing the 11.7 acre Offer Land into two lots, Lot 1 (slightly under 3 acres) and Lot 2 (slightly over 8 acres), the DOT was required to obtain a CSM.

MCO 119-4-1 requires a CSM to be accompanied by an application fee. MCO 119-4-2 requires all CSM’s “and correction instruments” to be submitted to the Department of City Development (“DCD”) “for processing and coordination of technical reviews.”

MCO 119-4-2 is critical for a number of reasons: (i) it clearly establishes that CSM’s (and correction instruments) get submitted to DCD (not to the City Clerk and not directly to the Common Council) (under MCO 119-4-2, 119-8, 119-11-6 and 119-15, DCD coordinates interdepartmental review [DCD, DPW, MFD, MPD, City Engineer, City Treasurer] prior to Council consideration of CSM’s); (ii) it establishes that the submittal to DCD of a CSM Application and CSM is what would start the 90-day-time clock ticking under Wis. Stat. 236.34 (1m)(f) – unless the subdivider agreed to extend that time³; and (iii) it establishes that a correction instrument (a revised CSM) submitted to DCD would start a new 90-day-time

³ Under Wis. Stat. 236.34 (1m)(f) and 236.11 (2), the days are counted upon “submitting a [CSM] for approval” unless there has been an agreement by the subdivider to extend time. Here, DOT and the Hotel did agree to extend time.

clock ticking under Wis. Stat. 236.34 (1m)(f) – unless the subdivider agreed to extend that time⁴.

Like Wis. Stat. 236.34's technical requirements for CSM's, MCO 119-7 requires that all CSM's show a clear legal description of the land surveyed (119-7-4), exterior boundaries (119-7-9 and 14), the boundary lines of all public streets (119-7-9), the width and centerline and names of all streets (119-7-11 and 12 and 20), and the names of all abutting streets (119-7-21).

MCO 119-8 requires CSM's to have attached to it (among other things) a "Surveyor Certificate," an "Owner Certificate," and the "City Treasurer Certificate." Like Wis. Stat. Per 236.34 (1m)(d)'s requirement for a specific "Surveyor Certificate," MCO 119-8-2-a also requires a specific "Surveyor Certificate" to be attached to CSM's, providing an accurate legal description, identifying the landowner, attesting that the CSM properly shows all exterior boundaries, and that the surveyor complied with Wis. Stat. Ch. 236 and MCO 119.

MCO 119-8-1-b and 119-8-2-c require the "Owner Certificate" to identify the owner of the land. MCO 119-8-2-f requires the "Treasurer Certificate" to show that all taxes against the parcel have been paid.

MCO 119-16 prohibits issuance of permits and licenses for a lot that is part of a CSM that "has not been approved in accordance with..." MCO Ch. 119. MCO 119-17 allows the City to enforce compliance with MCO Ch. 119 including the levying of forfeitures and City suit for injunction.

And, again, Wis. Stat. 236.45 (2)(ac) allows MCO Ch. 119 to be more restrictive than Wis. Stat. Ch. 236, Wis. Stat. 236.45 (2)(am) allows MCO Ch. 119 to allow "other surveying,

⁴ In the cases at hand, CSM No. 1 was submitted to DCD under MCO 119-4-2 on November 18, 2016, so the Wis. Stat. 236.34 (1m)(f) 90-day clock would elapse on February 16, 2017 without a time-extension agreement. CSM No. 2 (a correction instrument CSM) was submitted to DCD on March 21, 2017, so the Wis. Stat. 236.34 (1m)(f) 90-day clock would elapse on June 19, 2017 without a time-extension agreement. CSM No. 3 was tendered to the City Clerk on June 15, 2017, so it was not "submitted" to DCD, it is not properly before the Council, and there is no 90-day clock running. Because the Hotel did sign the time-extension agreement in the CSM Application, here there is no 90-day clock at all.

monumenting, mapping and approving requirements for” CSM’s that differ from Wis. Stat. Ch. 236, and Wis. Stat. 236.45 (2)(b) requires Ch. 236 and MCO Ch. 119 to be liberally construed in the City’s favor.

As indicated, *Columbia* allows a City to reject a CSM or plat if it “conflicts with an existing statutory requirement of ch. 236 or with an existing written ordinance...” and *Wood* provides that “There is no dispute” that if a CSM does not comply with Wis. Stat. Ch. 236 or MCO Ch. 119, the Council “may properly reject” the CSM. See, also, Wis. Stat. 236.13 (1)(a), approval of plats (land divisions) are conditioned upon compliance with Wis. Stat. Ch. 236.

In light of the above, CSM’s must comply with Wis. Stat. Ch. 236 and MCO Ch. 119 to be entitled to Council approval.

Given Wis. Stat. 236.13 (1)(a), *Columbia* and *Wood*, the Court cannot compel City Clerk certification and approval of defective CSM’s that do not comply with state and local land-division law. That is especially true here where the Hotel’s basis for seeking compelled certification is passage of time, and where the Hotel and DOT agreed to time extension.

IV. CITY WEBSITE GAVE NOTICE THAT CSM APPROVALS TAKE TIME.

The City’s website and “Customer Information” sheet for CSM approvals provide notice that CSM approvals take “*approximately three months*” from the date of the owner’s submittal of a CSM Application to DCD (MCO 119-4-2) to the day a CSM is recorded with the Register of Deeds.

The City’s website and “Customer Information” sheet for street and right-of-way vacations provide notice that vacation approvals by the Common Council take “*at least 3 months...*” When CSM applications involve public right-of-way dedications and possible street vacations (as this one did), the CSM review process typically takes *longer than three*

months. Dedications and vacations require City Plan Commission review, more departmental review, and Common Council approval. MCO 119-5-1 and 308-28.

Because the CSM approval process can take longer than three months, the legislature in Wis. Stat. 236.34 (1m)(f) and 236.11 (2)(a) allows the subdivider to agree to extend the 90-day and 60-day time periods, and the City's CSM application form⁵ has the prominent "AGREEMENT FOR EXTENSION OF TIME" section: (i) to document the owner's time-extension agreement; (ii) to allow for adequate CSM processing and review time; and (iii) to prevent forced approval of a CSM as a matter of law under those statutes where review and approval take longer than 90 days⁶.

Because the Hotel and DOT did agree to time extension, the Hotel cannot invoke entitlement to forced City Clerk certification of approval after 90 days under 236.34 (1m)(f) or otherwise.

V. HOTEL AND DOT AGREE TO TIME EXTENSION, AND THEY SUBMIT THREE CSM'S, OVER SEVEN MONTHS, UNDER ONE CSM APPLICATION, WITHOUT COMPLAINING ABOUT TIME.

A. The Hotel's November 2016 CSM Application and Defective CSM No. 1. The Hotel filed a November 18, 2016 CSM Application with the City (Hagopian Affidavit, CC-Ex. A, MC-Ex. A) identifying DOT as owner of the Offer Land and the Hotel as the DOT's representative for purposes of the application. The Hotel, for itself and DOT, signed the "AGREEMENT FOR EXTENSION OF TIME" section of the CSM Application preventing forced City Clerk certification of CSM approval due to passage of the 90 or 60 days in Wis. Stat. 236.34 (1m)(f) and 236.11 (2)(a) and preventing the Hotel's mandamus suit where the Hotel asks for that.

⁵ Mandamus Complaint, Exhibit A and Certiorari Complaint, Exhibit A. Hagopian Affidavit.

⁶ See also MCO 119-5-4-c and 119-5-4-d and Mandamus Complaint, Exhibit D (Hotel lawyer's June 27, 2017 letter about the 60 day and 90 day periods).

Along with the CSM Application, the Hotel filed the November 7, 2016 CSM (“CSM No. 1”). Hagopian Affidavit. CSM No. 1 is defective. It violates Wis. Stat. Ch. 236 and MCO Ch. 119, so under Wis. Stat. 236.13 (1)(a), *Columbia* and *Wood*, the Council does not have to approve it. Per *Wood* “There is no dispute” the City may reject (not approve) CSM No. 1.

CSM No. 1: (a) wrongly identified the Hotel on the “Owner Certificate” as the owner of the Offer Land as opposed to the DOT⁷; (b) has a defective “Surveyor Certificate⁸” that incorrectly shows the Hotel as the landowner, that incorrectly states that it properly shows exterior boundaries, and that incorrectly states the CSM complies with Wis. Stat. Ch. 236 and MCO Ch. 119; (c) failed to recognize need for street dedications along the west and north borders of the Offer Land; (d) failed to show dedicated public right-of-way (W. Barnard Avenue extended⁹) and the proper south border of the Offer Land¹⁰ (the Hotel falsely presumed that W. Barnard Avenue extended within Lot 2 of the Offer Land would be vacated by the City); and (e) that contains an improper drawing and legal description of the Offer Land¹¹.

In both the Certiorari Complaint and Mandamus Complaint, the Hotel admitted that, after the Hotel filed the CSM Application and CSM No. 1, City department review took place, necessitating the surveyor to revise CSM No. 1 to address dedications and a number of “other unique technical issues.” The Hotel explained that in January and February 2017

⁷ MCO 119-8-1-b and MCO 119-8-2-c require the owner of the land being divided (DOT) to sign the CSM Owner’s Certificate.

⁸ Wis. Stat. 236.34 (1m)(d)1 requires a CSM to have an attached surveyor certificate, and that the surveyor attest to the person for whom the surveyor prepared the CSM, and that the legal description and boundaries of the parcel are correct. See also Wis. Stat. 236.34 (2)(b)2 (surveyor certificate is required). MCO Ch. 119 (enacted pursuant to Wis. Stat. 236.45, and entitled to liberal construction in favor of the City per 236.45 (2)(b)) also requires a surveyor certificate. MCO 119-8-1-a and 119-8-2-a require the surveyor certificate to identify the owner of the land, to attest that exterior boundaries are correct, and to attest compliance with Wis. Stat. Ch. 236 and MCO Ch. 119.

⁹ Wis. Stat. 236.34 (1)(cm) prohibits CSM’s from altering dedicated streets like W. Barnard Avenue extended. MCO 119-7 requires CSM’s to show all dedicated public streets. At CC-11, the Hotel admits that MCO Ch. 119 requires a CSM “to show streets, including dedicated right-of-ways, even if it had never been improved as a street.”

¹⁰ Wis. Stat. 236.34 (1m)(a) and (1m)(d) and MCO 119-7 require an accurate map drawing, showing accurate borders (external boundaries), an accurate legal description, and all dedicated streets.

¹¹ See prior footnote.

(three months after the Hotel submitted the CSM Application and CSM No. 1), conference calls and group emails took place among City departments, the Hotel, the DOT, the surveyor and the City Attorney's Office to try to work through issues associated with CSM No. 1's defects. MC-7, CC-13.

Neither the Hotel nor the DOT complained about length of time the CSM review process was taking. Having signed the "AGREEMENT FOR EXTENSION OF TIME," they couldn't assert that the CSM had been approved as a matter of law under 236.34 (1m)(f) or otherwise due to 90-day passage.

In early 2017, the Hotel continued working with the City to fine-tune the CSM.

B. Hotel submits defective CSM No. 2 to City departments in March 2017. As a result of the cooperative efforts between the City, the DOT, and the Hotel, on March 21, 2017¹², the Hotel submitted a revised CSM to DCD and DPW, "CSM No. 2," dated March 17, 2017¹³ (over four months after the Hotel's CSM Application). That is, the DOT and Hotel, acting under the time-extension agreement in their November 2016 CSM Application (allowed by Wis. Stat. 236.11 (2)(a) and 236.34 (1m)(f)), followed MCO 119-4-2 by submitting CSM No. 2 (a correction instrument) to DCD for department review.

CSM No. 2 corrected CSM No. 1: (a) to comply with MCO Ch. 119 by fixing the "Owner Certificate" and "Surveyor Certificate" to show the DOT as the owner of the Offer Land; and (b) to comply with MCO Ch. 119 to show needed street dedications along the north and west borders of the Offer Land.

However, CSM No. 2 remained defective and in violation of Wis. Stat. Ch. 236 and MCO Ch. 119 because (i) it failed to show W. Barnard Avenue extended¹⁴ (the Hotel

¹² Mandamus Complaint, Exhibit D, Hotel lawyer's June 27, 2017 letter.

¹³ Certiorari Complaint, Exhibit B and Mandamus Complaint, Exhibit B. Hagopian Affidavit.

¹⁴ This violates 236.34 (1)(cm) (CSM cannot alter dedicated street) and Wis. Stat. 236.34 (1m)(a) and (1m)(d) and MCO 119-7, all requiring an accurate map drawing, showing accurate borders (external boundaries), an accurate legal

continued to falsely presume that street within Lot 2 of the Offer Land would be vacated by the City); (ii) it failed to properly show the south border; (iii) it failed to properly describe and depict the Offer Land; (iv) it failed to show all dedicated streets; and (v) the "Surveyor Certificate" remained incorrect due to those defects.

Because CSM No. 2 violates Wis. Stat. Ch. 236 and MCO Ch. 119, under Wis. Stat. 236.13 (1)(a), *Columbia* and *Wood*, the Council does not have to approve it, and the Court cannot order the City Clerk to approve it under 236.34 (1m)(f) or otherwise, especially since the Hotel signed the time-extension agreement.

C. Hotel's June 15, 2017 tender of CSM No. 3 by wrong procedure violating MCO 119-4-2. Ultimately, the City chose not to vacate W. Barnard Avenue extended¹⁵. The Hotel admits that nothing requires the City to vacate that street¹⁶.

On June 15, 2017 (just 50 days ago, but about 7 months after the Hotel filed its CSM Application and CSM No. 1), the Hotel tendered yet another CSM¹⁷ ("CSM No. 3") (CC-Ex.E, Hagopian Affidavit) recognizing that W. Barnard Avenue extended was not going to be vacated and that the Common Council's Zoning, Neighborhoods & Development Committee ("ZND") determining CSM No. 2 to be "inaccurate" because it failed to show W. Barnard Avenue extended¹⁸.

Finally, it would appear that CSM No. 3 corrected Wis. Stat. 236 and MCO Ch. 119 violations to show: the proper south border of the Offer Land; W. Barnard Avenue extended

description, and all dedicated streets. At CC-11, the Hotel admits that MCO Ch. 119 requires a CSM "to show streets, including dedicated right-of-ways, even if it had never been improved as a street."

¹⁵ Common Council Resolution File No. 161477.

¹⁶ Certiorari Complaint, Exhibit E, Hotel lawyer's June 15, 2017 letter to City Clerk.

¹⁷ The Hotel agrees that, absent time-extension agreements, correction instrument CSM's start anew the 90-day clock because the Hotel started anew the 90-day clock on March 21, 2017 when it submitted CSM No. 2 to DCD under 119-4-2. Had the Hotel followed MCO 119-4-2 to properly submit CSM No. 3 to DCD on June 15, 2017 [it didn't], assuming away the Hotel's time-extension agreement [which cannot be assumed away], and assuming away that the Council acted on the CSM Application by not approving the CSM in File 170030 [which cannot be assumed away], the new 90-day period under 236.34 (1m)(f) for CSM No. 3 would expire on September 13, 2017.

¹⁸ Certiorari Complaint, Exhibit E, Hotel lawyer's June 15, 2017 letter to City Clerk.

(dedicated streets); proper exterior boundaries; a proper legal description and depiction of the Offer Land; and an acceptable "Surveyor Certificate," all as MCO Ch. 119 and Wis. Stat. Ch. 236 *substantively* require¹⁹. Compare the drawing of the Offer Land in CSM No. 2 to the drawing of the Offer Land in CSM No. 3. Hagopian Affidavit. You will see a dramatic difference in the south border and south boundary given the recognition of W. Barnard Avenue extended.

Procedurally, however, the Hotel violated MCO 119-4-2 requiring "all" CSM's "and correction instruments" to be submitted to DCD.

The Hotel knows how to properly "submit" CSM's and correction instruments under MCO 119-4-2. It complied with 119-4-2 by submitting CSM No. 1 and correction CSM No. 2 to DCD. It knew the importance and requirement of staff review prior to Council consideration. See MC-6-9 and CC-9-17, and CC-Ex. E²⁰. Yet, when it came to correction CSM No. 3, the Hotel did it wrong. It violated 119-4-2 by not "submitting" it to DCD and by instead tendering it to the Clerk. That meant CSM No. 3 by-passed pre-Council departmental review that MCO 119-4-2, 119-11-6 and 119-15 require. DCD and DPW never had the opportunity to coordinate inter-departmental processing and technical review of CSM No. 3. No one had the opportunity to obtain signature by the Treasurer on the "Treasurer Certificate" as MCO 119-8-1-d and 119-8-2-f require. So, CSM No. 3 remained defective and problematic, and it wasn't properly before the Council.

CSM No. 3 violated MCO Ch. 119 and wasn't properly before the Council. The Council was, and is, free to not approve it, and not consider it, under Wis. Stat. 236.13 (1)(a),

Columbia and Wood.

¹⁹ Since CSM No. 3 was not properly submitted to DCD as MCO 119-4-2 requires, there has been no departmental review of CSM No. 3 yet. The City reserves all rights regarding CSM No. 3, including technical review, should it be properly submitted in accordance with MCO Ch. 119.

²⁰ In CC-Ex. E, the Hotel lawyer's June 15, 2017 letter, the Hotel admits that a CSM ordinarily "is approved by the Common Council in due course after a detailed technical review by City staff of a preliminary map and the preparation and submission of a final CSM addressing all of staff's comments."

D. Hotel lawyer first complains about statutory time on June 27, 2017. In a June 27, 2017 letter to the City Clerk²¹ (7 months after the Hotel submitted its CSM Application), despite the facts explained above, and despite the Hotel having just tendered CSM No. 3, the Hotel first asserted Wis. Stat. 236.34 (1m)(f) entitlement to forced City Clerk certification of approval of legally-defective CSM No. 2. Per the Hotel, 90-days had elapsed on June 19, 2017 from its March 21, 2017 MCO 119-4-2 submittal of correction CSM No. 2 and the Council hadn't taken final action on it by June 19th.

But:

- the Hotel agreed to the time extension, making 90-day calculations, the June 19 date, and forced City Clerk certification of approval moot under 236.34 (1m)(f)
- CSM No. 2 is legally defective, and the Council has no duty to approve it under Wis. Stat. 236.13 (1)(a), *Columbia* and *Wood*
- the Hotel knew that the Council (by its ZND) did "take action" on CSM No. 2 on June 13 (before June 19) finding CSM No. 2 defective [CC-Ex. E, June 15, 2017 letter], and Wis. Stat. 236.34 (1m)(f) merely requires, absent a time-extension agreement, the Council "to take action" within the 90 days, not "to complete action."

In its June 27 letter, the Hotel also asserted it had the right under the Offer to petition the City and submit its demand for forced City Clerk certification on DOT's behalf. But, the Offer does not spell out that right, and the Offer requires the DOT to sign governmental petitions. Hagopian Affidavit. The DOT didn't sign the June 27 letter or the Hotel's Complaints.

E. The City Attorney's June 29, 2017 letter. The City Attorney responded with a June 29, 2017 letter²² explaining that (a) the DOT and Hotel agreed to the time extension in the CSM Application, (b) the Council did not fail to act, (c) the Hotel had actual and written

²¹ Mandamus Complaint, Exhibit D.

²² Mandamus Complaint, Exhibit E.

notice of Council reason for rejection of the Hotel's CSM's (CSM No. 1 and No. 2 were substantively defective²³, and CSM No. 3 had not been properly submitted, reviewed, or signed), and (d) that the Hotel could still pursue approval of a CSM by contacting DCD and complying with MCO Ch. 119. The DOT and Hotel are not aggrieved.

F. Hotel sues City in certiorari action and City Clerk in mandamus action.

Instead of pursuing CSM No. 3 approval as suggested by the City Attorney (in a way that complies with MCO Ch. 119), the Hotel sued by filing the two actions. The landowner, the DOT, did not sue. DOT is a missing, necessary party.

VI. CONSOLIDATE CASES TO LOWER CASE NUMBER.

Under Wis. Stat. 803.04 and Milwaukee County Circuit Court Rule 3.3.B.3, the certiorari case (2017-CV-006239, Judge Sosnay) should be consolidated with this lower-numbered mandamus case (2017-CV-006238, Judge Fiorenza).

The two cases (filed just seven days ago on July 28, 2017) arise out of the exact same occurrences. They involve the same law and same facts.

Over the course of seven months (November 2016 through June 2017), the Hotel, without complaining about Wis. Stat. 236.11 (2)(a) or 236.34 (1m)(f) 60-day or 90-day time periods or about delay, tried to gain City approval of CSM No. 1, No. 2 and No. 3. But, each of those CSM's is legally defective (the first two substantively, and the last procedurally). When the Council, acting within its rights under 236.13 (1)(a), *Columbia*, and *Wood*, would not approve the defective CSM's, the Hotel - worried about the August 30, 2017 closing date under its Offer with the DOT - sent the June 27, 2017 letter to the City Clerk asserting for the first time Wis. Stat. 236.34 (1m)(f) entitlement to CSM approval due to passage of 90 days from its submittal of flawed CSM No. 2. But, the Hotel's and DOT's agreement to extend

²³ In Mandamus Complaint, Exhibit E (the Hotel lawyer's June 15, 2017 letter), the Hotel already admitted it knew that there were problems with CSM No. 2 that the ZND Committee raised, and the Hotel thus tendered to the City Clerk CSM No. 3.

time, that Wis. Stat. 236.34 (1m)(f) expressly allows, prevents the Hotel's lawsuits and strained attempt for Court-ordered approval of CSM's that don't comply with land-division law.

In both actions, the Hotel, in its respective Complaint "wherefore" clauses, asks the Court to order the City to assemble and file with the Court the City's record regarding the CSM's, and for the Court to review the record²⁴. So the Hotel is asking for the same relief in both cases. These cases should be consolidated.

The standards of review in both cases (certiorari and mandamus) are similar. They both get at whether the City acted appropriately under applicable land-division law. The cases should never have been broken into two, they should not be before two judges, and they never should have been filed in the first place. The City is well within its rights to not approve defective CSM's, and the Hotel should have exhausted administrative remedies before suing by seeking proper review of CSM No. 3 as MCO 119-4-2 requires.

In addition to being entitled to consolidation under Wis. Stat. 803.04 and Local Rule 3.3.B.3, Wis. Stat. 783.05 also supports consolidation. A recovery under a Wis. Stat. Ch. 783 mandamus action bars any other action against the same party for the making of the same return.

Wis. Stat. 802.06 (2)(a)10 also supports consolidation. While the defendants are technically not the same in the two cases as 802.06 (2)(a)10 contemplates (another action pending between the same parties for the same cause), both cases ask for review of the same record by the Court, and both cases are directed at the City of Milwaukee not approving the CSM's submitted by the Hotel.

²⁴ Mandamus Complaint, "wherefore" clause B. Certiorari Complaint, "wherefore" clauses A and B.

It would be far more efficient from a time and cost perspective for all parties and the Court to consolidate. It would be unnecessarily burdensome, and unjust, to the Court and to the City to not consolidate.

VII. DISMISS CASES UNDER WIS. STAT. 236.13 (5). HOTEL CANNOT MEET THE CERTIORARI STANDARDS.

A. Improper defendants under 236.13 (5). Both cases must be dismissed under Wis. Stat. 236.13 (5), which provides:

“Any person aggrieved by an objection to a plat or a failure to approve a plat may appeal therefrom as provided in s. 62.23 (7)(e)10, 14 and 15, within 30 days of notification of the rejection of the plat. For the purposes of such appeal the term ‘board of appeals’ means an ‘approving authority.’ Where the failure to approve is based on an unsatisfied objection, the agency making the objection shall be made a party to the action. The court shall direct that the plat be approved if it finds that the action of the approving authority or objecting agency is arbitrary, unreasonable or discriminatory.”

Wis. Stat. 62.23 (7)(e)10 calls for commencement of the action by certiorari. Wis. Stat. 62.23 (7)(e)14 prohibits costs being imposed against the approving authority unless the Court finds it acted with gross negligence or in bad faith or with malice. Under Wis. Stat. 236.10 (1)(a), the Common Council is the approving authority for CSM’s. While 236.13 (5) uses the word “plat” as opposed to “certified survey map” (see Wis. Stat. 236.34 and the definitions of “plat” and “subdivision” respectively in Wis. Stat. 236.02 (8) and (12)), and while this case involves a CSM (as opposed to a plat of a subdivision), 236.13 (5) is instructive. These type cases are to be promptly brought against the Council (not the City, not the Clerk) within 30 days of notification of rejection. The City Attorney’s June 29, 2017 letter (MC-Ex. E) provided written notice of rejection. While the July 28th filing of the cases at issue is within the 30-day period, the Hotel named the wrong defendants under 236.13 (5). The Hotel sued the City itself as defendant in the certiorari case and the City

Clerk as defendant in the mandamus case, as opposed to the Common Council as the governing body and approving authority. Under 236.11 (5), the cases should be dismissed.

B. Hotel is not “aggrieved” under Wis. Stat. 236.13 (5); no standing. The Hotel’s cases must also be dismissed under Wis. Stat. 236.13 (5) because the Hotel lacks standing. It is not a “person aggrieved” as 236.13 (5) requires. The Hotel is not aggrieved because, as a matter of law (236.13 (1)(a), *Columbia, Wood*), no one is entitled to Council approval of a CSM that violates Wis. Stat. Ch. 236 and MCO Ch. 119. “There is no dispute” the City may reject (not approve) any CSM that does not comply with Wis. Stat. Ch. 236 or MCO Ch. 119. *Wood*.

C. Hotel cannot meet writ standards under 236.13 (5) and common law.

Wis. Stat. 236.13 (5) actions are brought by certiorari per Wis. Stat. 62.23 (7)(e)10.

See *Lake Delavan Property Company, LLC v. City of Delavan*, 2014 WI App 35, para. 4:

“A person aggrieved by the denial or failure to approve a plat may appeal by certiorari to the circuit court. Wis. Stat. 236.13 (5). If the circuit court finds that the action of the governing body in denying a plat was arbitrary, unreasonable, or discriminatory, the circuit court shall direct that the plat be approved. *Id.* On statutory certiorari review, **there is a presumption that the government body’s actions were correct and valid**²⁵. *Snyder v. Waukesha County Zoning Bd. Of Adjustment*, 74 Wis.2d 468, 476, 247 N.W.2d 98 (1976). ‘A reviewing court may not substitute its discretion for that of...the entity to which the legislature has committed these decisions.’ *State ex. Rel. Ziervogel v. Washington Cnty. Bd. Of Adjustment*, 2004 WI 23, p. 13, 269 Wis.2d 549, 676 N.W.2d 401...certiorari review is limited to whether (1) the governing body acted within its jurisdiction; (2) the governing body proceeded according to law; (3) the governing body acted in an arbitrary, oppressive, or unreasonable manner that represented its will and not its judgment; and (4) the order or determination was reasonable as based on the evidence.”

See, also, *Columbia*, where the aggrieved property owner brought a Wis. Stat. 236.13 (5) certiorari action to challenge the Town Board’s rejection of three land division plats that the owner submitted for approval.

²⁵ On certiorari review, municipal decisions are presumed to be correct and valid. *Lamar Central Outdoor v. Bd. Of Zoning Appeals for the City of Milwaukee*, 2005 WI 117, para. 16. This presumption is in addition to the liberal construction of MCO Ch. 119 that the City is entitled to under Wis. Stat. 236.45 (2)(b).

The Hotel's Complaints must be dismissed under the certiorari standards, and under Wis. Stat. 802.06 (2) and 236.13 (5) for failure to state a claim. The Hotel sued the wrong defendants, it lacks standing because it is not aggrieved, it agreed to a time extension, and it submitted legally defective CSM's that the Council has no duty to approve. The Hotel cannot meet the certiorari standards.

The Common Council acted within its jurisdiction, according to law, and not in an arbitrary, oppressive or unreasonable manner. The Council's failure to approve legally defective CSM's is reasonable based on the evidence.

The Hotel knows CSM No. 1 is defective, so it submitted CSM No. 2. The Hotel knows CSM No. 2 is defective, so just 50 days ago (June 15), it submitted CSM No. 3. The Hotel knows CSM No. 3 is procedurally defective because CSM's must be "submitted" to DCD for pre-Council departmental review. Yet, the Hotel violated MCO 119-4-2, 119-11-6, 119-15 by tendering CSM No. 3 to the Clerk by-passing departmental review and violating 119-8-1-d and 119-8-2-f by failing to obtain signature on the "Treasurer Certificate."

Each of CSM No. 1, No. 2 and No. 3 violates Wis. Stat. Ch. 236 and MCO Ch. 119. Under Wis. Stat. 236.13 (1)(a), *Columbia* and *Wood*, the Council does not have to approve them. And, the Court cannot order approval of a legally defective CSM.

Moreover, the Hotel's agreement to extend time prevents Court-ordered approval under 236.34 (1m)(f).

VIII. QUASH ATTEMPT AT MANDAMUS.

Wis. Stat. 236.45 (2)(b) requires liberal construction of MCO Ch. 119 in favor of the City. MCO 119 requires all CSM's to be submitted to DCD (not the Clerk), all CSM's to be reviewed by City departments prior to Council approval, all CSM's to properly show borders and boundaries, and to contain a proper legal description and an accurate map of the subject lands, and to show all streets and dedicated right-of-way, and to contain a

proper, signed "Surveyor Certificate," a proper, signed "Owner Affidavit" (identifying the correct owner), and a proper, signed "Treasurer Affidavit." Wis. Stat. 236.13 (1)(a), *Columbia* and *Wood* all allow the Council to not approve any CSM that doesn't comply with the law. There is no entitlement to mandamus here. The City acted within its rights.

Wis. Stat. 783.01 allows the City the right to quash an attempt at mandamus, which shall be viewed as a motion to dismiss the complaint under Wis. Stat. 802.06 (2).

"Mandamus is an extraordinary writ issued in the discretion of the circuit court to compel compliance with a plain legal duty." *Mount Horeb Cmty. Alert v. Village Bd. of Mt. Horeb*, 2003 WI 100, ¶ 9, 263 Wis. 2d 544, 665 N.W.2d 229. To obtain a writ of mandamus, a plaintiff must show that: (1) he or she has a clear, specific legal right that is free from substantial doubt; (2) the duty sought to be enforced is positive and plain; (3) substantial damage will result if the duty is not performed; and (4) there is no other adequate remedy at law. *Lake Bluff Housing Partners v. City of S. Milwaukee*, 197 Wis. 2d 157, 170, 540 N.W.2d 189 (1995). "It is an abuse of discretion to compel action through mandamus when the duty is not clear and unequivocal and requires the exercise of discretion." *Law Enforcement Standards Bd. v. Lyndon Station*, 101 Wis. 2d 472, 494, 305 N.W.2d 89 (1981). See, also, *Voces de la Frontera, Inc. v. Clarke*, 2017 WI 16.

Just as the Hotel cannot prevail under the certiorari standards, the Hotel cannot prevail under the mandamus standards. The Hotel fails to state a claim for which relief can be granted. Wis. Stat. 802.06 (2).

The Hotel has no clear, specific right to Council approval of a CSM that violates Wis. Stat. Ch. 236 and MCO Ch. 119. The opposite is true. The Council has no duty to approve any CSM that violates those laws. Wis. Stat. 236.13 (1)(a), *Columbia* and *Wood*. The Court would be violating Wis. Stat. 236.13 (1)(a), *Columbia* and *Wood* if the Court were to order

the Clerk or the Council to approve any of the defective CSM's tendered by the Hotel here (No. 1, 2, or 3).

There is no positive or plain duty to enforce. The Court would have: (i) to ignore the DOT's and Hotel's time-extension agreement in its CSM Application; (ii) to ignore Wis. Stat. 236.34 (1m)(f)'s recognition of time-extension agreements as an exception to the 90-day limit; and (iii) to ignore the Hotel's June 15 (50 days ago) attempt to tender CSM No. 3 to correct CSM No. 2's flaws, if the Court were to order the City Clerk here to certify approval of any of the CSM's tendered. The Court cannot do that.

No substantial damage or injury will occur to the Hotel if the Court rules in the Defendants' favor and dismisses the Hotel's cases. The Hotel's Offer with the DOT allows the Hotel choice – either (i) exercise the Hotel's rights under paragraphs 5.b. and 9.d. of the Offer to terminate the Offer and walk away from the deal if Council approval of a CSM for the Offer Land cannot be obtained or if the Hotel no longer wants to try, or (ii) exercise the Hotel's rights under Offer paragraphs 9.f. and 13.e to extend closing on the deal until at least October 31, 2017 (or beyond) to allow more time to proceed properly to gain lawful approval of a CSM such as CSM No. 3 (properly processed under MCO 119-4-2).

The Hotel is not entitled to mandamus.

It would be abuse of discretion, and a violation of 236.13 (1)(a), *Columbia* and *Wood*, to order approval of any defective CSM here. The DOT and Hotel should be made to honor their time-extension agreement and to honor the legal requirements for subdividing land under Wis. Stat. Ch. 236 and MCO Ch. 119.

IX. OTHER DISMISSAL REASONS.

The Hotel's cases should also be dismissed for other reasons under Wis. Stat. 802.06

(2).

In *Doe v. Archdiocese of Milwaukee*, 2005 WI 123, 700 N.W.2d 180, at ¶¶19-20, the Supreme Court provided the standard for granting motions to dismiss.

“A motion to dismiss for failure to state a claim ‘tests the legal sufficiency of the complaint.’ ... A reviewing court ‘accept[s] the facts pled as true for purposes of [its] review, [but is] not required to assume as true legal conclusions pled by the plaintiffs.’ ... Although the court must accept the facts pleaded as true, it cannot add facts in the process of liberally construing the complaint. ... Rather, ‘[i]t is the sufficiency of the facts *alleged* that control[s] the determination of whether a claim for relief’ is properly pled ...

The court should not draw unreasonable inferences from the pleadings. ... After liberally construing the complaint, a court should dismiss a plaintiff’s claims if it is ‘quite clear’ that there are no conditions under which that plaintiff could recover....” Internal citations omitted. *Doe* ¶¶19-20.

The Hotel’s two complaints, along with their exhibits, support dismissal. They show CSM No. 1 and No. 2 being substantively defective, and CSM No. 3 being procedurally defective, in violation of Wis. Stat. Ch. 236 and MCO Ch. 119. They also show:

A. Waiver, agreement, estoppel. The Hotel agreed to the time-extension in the CSM Application preventing a Court order forcing the City Clerk to certify approval of CSM’s due to any 236.34 (1m)(f) and 236.11 (2)(a) time limits. That time-extension agreement is also waiver of the right to seek a Court order forcing Clerk certification. The time-extension agreement also estops the Hotel.

Also, the Hotel’s tendering of CSM No. 3, its recognition of Council (ZND) articulated defect in CSM No. 2 (CC-Ex. E), and its admission (CC-11) that MCO Ch. 119 requires dedicated rights-of-way to be shown on CSM’s, amount to waiver, agreement, and estoppel, preventing the Hotel from seeking Court-ordered approval of defective CSM No. 2.

The Hotel’s tendering of CSM No. 3 on June 15, 2017 (just 50 days ago) also estops the Hotel from arguing delay and passage of any 60 or 90-day time limit in 236.34 (1m)(f) and 236.11 (2)(a).

B. Adequate remedy at law, failure to exhaust remedies, ripeness. CSM No. 1 and 2 are legally defective and not entitled to approval. CSM No. 3 was never properly submitted under MCO 119-4, and thus it too is not entitled to approval. The June 29, 2017 City Attorney letter (MC-Ex. E) explained to the Hotel and to the DOT the available legal remedy they have – to contact DCD and to properly process CSM No. 3 for approval in compliance with MCO Ch. 119, including 119-4. The Hotel failed to avail itself of, and failed to exhaust, that available remedy. Instead, it sued. The Hotel's suits are not ripe. If it wants approval of a lawful CSM, it should properly pursue that under MCO Ch. 119 before suing.

C. Failure to comply with Wis. Stat. 893.80. The Hotel is improperly proceeding under 236.11 (5), mandamus, and certiorari. It named the wrong defendants. It has no right under the Offer to sue on the DOT's behalf without DOT signature on the Complaints. It agreed to extend statutory time limits preventing any Court order forcing CSM approval. And, it has no right to a Court order forcing City approval of any CSM that violates Wis. Stat. Ch. 236 and MCO Ch. 119. The Hotel's suits were filed against government without right.

The Hotel should have complied with Wis. Stat. 893.80's notice of claim and claim requirements, and waited for disallowance of its claim, prior to suing. Wis. Stat. 893.80 (1d)(a), and (1d)(b) and (1g).

Wis. Stat. 893.80 (4) provides governmental immunity for suits brought against political corporations or its officials for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial function. Here, the City acted within its rights to deny illegal CSM's. Wis. Stat. 236.13 (1)(a), *Columbia, Wood*. The City's legislative determinations may not be set aside by a Court under Wisconsin law unless there is a finding of fraud or an act that exceeded the authority of the legislative body. *Tilly v. Mitchell Lewis, Co.*, 121 Wis. 1, 10-12, 98 N.W. 969 (1904).

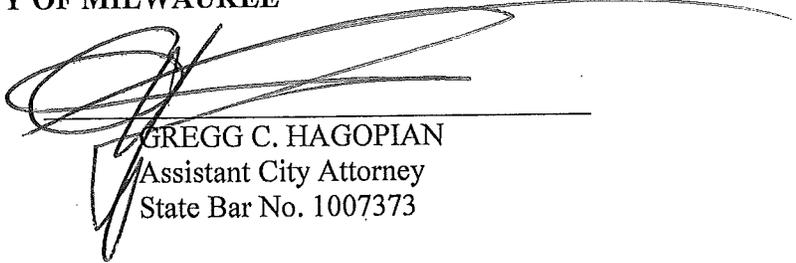
X. CONCLUSION.

For all the foregoing reasons, please consolidate, and dismiss, the Hotel's two lawsuits.

Dated August 4, 2017 and signed in Milwaukee, Wisconsin.

CITY OF MILWAUKEE

By:



GREGG C. HAGOPIAN
Assistant City Attorney
State Bar No. 1007373

ADDRESS

841 N. Broadway – 7th Floor
Milwaukee, WI 53202
(414) 286-2620 – Telephone
(414) 286-8550 – Facsimile
ghagop@milwaukee.gov

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