PLANNED DEVELOPMENT DISTRICT NO.37 (THE ROCK SPORTS COMPLEX) AMENDMENT

PROTEST PETITION CORRESPONDENCE

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Via Email MFleming@murphydesmond.com

Attorney Matthew J. Fleming
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re: Ballpark Commons Rezoning

Dear Attorney Fleming:

This letter is in response to your March 18, 2016 correspondence and our subsequent telephone discussions regarding our respective research and thoughts as to the proper method of calculating the areas of potential protest petitions. Wis. Stat. § 62.23(7)(d)2m.a. provides:

> In case of a protest against an amendment proposed under subd. 2., duly signed and acknowledged by the owners of 20% or more either of the areas of the land included in such proposed amendment, or by the owners of 20% or more of the area of the land immediately adjacent extending 100 feet therefrom, or by the owners of 20% or more of the land directly opposite thereto extending 100 feet from the street frontage of such opposite land, such amendment shall not become effective except *by the favorable vote of three-fourths of the members of the council voting on the proposed change*. [emphasis ours]

§15-9.0209 of the City of Franklin Unified Development Ordinance, entitled "Protest", provides:

> In the event of a protest against such district change or amendment to the regulations of this Ordinance, duly signed and acknowledged by the owners of 20% or more either of the areas of the land included in such proposed amendment, or by the owners of 20% or more of the area of the land immediately adjacent extending 100 feet therefrom, or by the owners of 20% of more of the land directly opposite thereto extending 100 feet from the street

> frontage of such opposite land, such change or amendment shall not become effective except by the *favorable vote of three-fourths (3/4) of the full Common Council membership.* No application for a zoning amendment pertaining to specific lands which describes the property to be subject to such proposed zoning amendment so as to create a "buffer zone", which buffer zone is found by the Common Council to have been created to avoid the effect of a protest petition and which buffer zone proposal is not supported by a substantial land use reason or a reasonable zoning practice purpose, shall be approved. The burden of proof with regard to the findings to be made by the Common Council hereunder shall be upon the applicant. [emphasis ours]

Pursuant to Wis. Stat. § 62.23(7)(am), providing in part that "[t]his subsection and any ordinance, resolution or regulation enacted or adopted under this section, shall be liberally construed in favor of the city and as minimum requirements adopted for the purposes stated", the local ordinance provision requiring a "favorable vote of three-fourths (3/4) of the full Common Council membership" standard applies.

"It is true that sec. 62.23(7)(d), Stats., is designed to protect adjacent landowners from zonings changes, and the statutes have extended a great deal of protection to such persons." *Prescher v. City of Wauwatosa*, 34 Wis. 2d 421, 429, 149 N.W.2d 541, 545 (1967).

> Thus, it becomes crucial whether or not the plaintiffs' protest was valid. Plaintiffs argue that their property borders on the whole zoning district, in which district the *zoning of an area of land is being changed.* They contend that the area of land around the entire district, rather than around the *area located within the district which is directly affected by the rezoning*, should be determinative for purposes of calculating the 20 percent protest. They conclude that under this reasoning their protest should be valid.
>
> The plain language of the statute negatives the plaintiffs' contention. Sec. 62.23(7)(d), Stats., provides for *three categories of protesters* sufficient to invoke the three-fourths majority.
>
> '* * * In case of a protest against such change, duly signed and acknowledged by the owners of 20% or more either of the areas of the land included in such proposed change, or by the owners of 20% or more of the area of the land immediately adjacent extending 100 feet therefrom, or by the owners of 20% or more of the land directly opposite thereto extending 100 feet from the street frontage of such opposite land, such amendment shall not become effective except by the favorable vote of three-fourths of the members of the council.' (Emphasis added.)
>
> The reference of owners of land immediately adjacent is to the *area of land 'included in such proposed change.'* In other words, only landowners adjacent to the *land where the proposed change is to be made* are to be considered in determining whether the 20 percent requirement is met. The concept of protest advanced by plaintiffs is not sanctioned by the language of the statute.
>
> Furthermore, from a policy standpoint, the protest statute should not embrace this district concept. The purpose of sec. 62.23(7)(c), Stats., was to permit protest by

> landowners directly affected by zoning changes. Landowners whose property borders on land to be rezoned are directly affected because their land value and enjoyment of their property decreases. People on the periphery of areas to be rezoned are not so directly affected. Further, if the concept of 'adjacent to the zoning district' were adopted, it would be harder to meet protest requirements because the area of land would be greater and the interest of the landowners in protesting would be less.
> Protest statutes similar to sec. 62.23(7)(d) of the Wisconsin statutes are common to several states and the district theory of plaintiffs has always been rejected. In *Hoelzer v. Incorp. Village of New Hyde Park* a general change affecting the entire town was involved. The court stated that if the zoning change was specific, i.e., affecting a particular area of land, then the eligibility for protest would apply only to landowners adjacent to land directly affected. Similarly, in *Parsons v. Town of Wethersfiled,* the court construed the term 'immediately adjacent' to mean directly abutting the land proposed to be rezoned. The trial court's conclusion that the plaintiffs were not eligible protesters is well warranted and the plaintiffs' protest is invalid. *Id.* at 430-32. [footnotes omitted] [emphasis ours]

During our telephone discussion last week when I indicated my research review status and that with regard to your reference to my previously stated position that the entire area subject to the proposed planned development district amendment was the proper area to be considered in the determination of the "three categories" of potential protest petitions, my thoughts had not changed, I mentioned the *Ballenger v. Door County* case with regard to one of your stated points during our discussion. I reviewed your discussion of same provided later that day. My point was that the *Ballenger* Court decided that even where you had physically separated by distance lands with their zoning being amended to allow for a ferry terminal use, the Court did not support the protest petition of abutting property owners of only one of the areas subject to the amendment, even though that area apparently was the singular area where it was known that the proposed ferry terminal use would occur.

> Ballenger also argues that the ordinance is invalid because it required three-fourths of the board to vote for passage. Ballenger bases this argument on sec. 59.97(5)(e) 5, Stats., which provides that a three-fourths vote by the board is required for passage when a protest petition is submitted. A protest petition requires the signatures of fifty percent of the owners of the *area affected by the amendment* or by fifty percent of property owners abutting the area. It is undisputed that the Ballenger petitions were signed only by owners abutting the C–2 zone of the proposed Northport facility.
> We conclude that the protest petitions were invalid because they were signed by less than fifty percent of the property owners abutting the C–2 zones affected by the ordinance. There are several C–2 zones in Door County. The statute states that the signatures of fifty percent of the property owners of *all abutting land* is required.[8] *Ballenger v. Door County*, 131 Wis. 2d 422, 432, 388 N.W.2d 624, 629-30 (Ct. App. 1986). [emphasis ours]
> [8]The parties also raise the issue whether § 59.97(5)(e) 5 requires 50% of the abutting property owners' signatures of all C–2 zones or only the C–2 zones

bordering the lake. Because of the facts of this case, however, we decline to address this issue. *See* note 3. *Id.* at 432.

[3]The record indicates that there are more than 30 C–2 zones in Door County. At least six of those zones abut the Lake Michigan shoreline. *Id.* at 426.

While the Wisconsin Courts have recognized the legislated protest petition rights afforded to "protect adjacent landowners from zonings changes", the Courts have also recognized the "use of 'buffer zones'" by an "applicant for a zoning change".

Statutory Area of Permissible Protest.

Appellants argue that the 100-foot boundary line prescribed by sec. 62.23(7) (d), Stats., should be construed as extending 100 feet from the outermost limits of the land owned by the party seeking a zoning change, rather than from the land for which the zoning is sought. Realizing the need for extra diligence in the amending of zoning regulations, the legislature has set forth in sec. 62.23(7)(d), Stats., a procedure whereby certain specified landowners may protest the enactment of zoning chances. In part it provides:

'. . . In case, however, of a protest against such change, duly signed and acknowledged by the owners of 20% or more either of the areas of the land included in such proposed change, or by the owners of 20% or more of the area of the land immediately adjacent extending 100 feet therefrom, or by the owners of 20% or more of the land directly opposite thereto extending 100 feet from the street frontage of such opposite land, such amendment shall not become effective except by the favorable vote of three-fourths of the members of the council.'

The above provision was construed in the case of *Prescher v. Wauwatosa* (1967), 34 Wis.2d 421, 149 N.W.2d 541, where this court held that only landowners adjacent to the land where the proposed change is to be made, and not those adjacent to the borders of a whole zoning district in which a specific area is being rezoned, are to be considered as valid protesters under the statute. The court set forth the policy considerations which precluded the statute from embracing the 'district concept' there argued for:

'. . . The purpose of sec. 62.23(7)(d), Stats., was to permit protest by landowners directly affected by zoning changes. Landowners whose property borders on land to be rezoned are directly affected because their land value and enjoyment of their property decreases. People on the periphery of areas to be rezoned are not so directly affected . . .' *Prescher v. Wauwatosa*, supra, at page 431, 149 N.W.2d at page 546. (Emphasis supplied.)

Here, CAM had on the south and west left a strip 150-foot wide zoned completely consistent with the areas bordering it, namely, single family residential housing.

Protest statutes similar to sec. 62.23(7)(d) of the Wisconsin statutes are common to several states and the 'district concept' has always been rejected. In North Carolina the 'district concept' was rejected in the following cases: *Penny v. Durham* (1959), 249 N.C. 596, 107 S.E.2d 72; *Armstrong v. McInnis* (1965), 264 N.C. 616, 142 S.E.2d 670; and *Heaton v. Charlotte* (1971), 277 N.C. 506, 178 S.E.2d 352. In each case the developer sought rezoning of a large tract of land from single family residential to commercial and/or multi-family residential. In

each case the developer insulated his request for change by leaving a 'buffer area' of from 100 to 150 feet between the area to be rezoned and the surrounding community. In each case the North Carolina court in construing their statute rejected the protesters' contentions. The court in *Heaton v. Charlotte*, supra, at page 527, 178 S.E.2d at page 365, quoted from 1 Rathkopf, *The Law of Zoning and Planning* (3d ed. 1969), ch. 28, sec. 28-(11), where it stated that:

'. . . (W)here an applicant for a zoning change seeks to avoid the necessity of a larger than majority vote by creating a buffer zone of 100 feet between that portion of his property sought to be rezoned and the lands of adjacent property owners, such action is valid and avoids the requirement of such larger vote.'

The use of 'buffer zones' has also been sustained by the New York courts. In *Miner v. Yonkers* (1959), 19 Wisc.2d 321, 189 N.Y.S.2d 762, aff'd. 9 A.D.2d 907, 195 N.Y.S.2d 242, a 200-foot space was left between an area rezoned for department store purposes, and the remainder of the district was devoted to multi-family residential uses.

The trial court's conclusion that the 150-foot strip on the west and south sides of the tract, which remained zoned RS-2, does legally eliminate the right of property owners adjacent to the outside boundaries of the whole property from being legal protesters under sec. 62.23(7)(d), Stats., is correct. *Rodgers v. Village of Menomonee Falls*, 55 Wis. 2d 563, 568-70, 201 N.W.2d 29, 32-33 (1972).

As set forth above in Franklin Unified Development Ordinance §15-9.0209, no "buffer zone" within a zoning amendment application "created to avoid the effect of a protest petition and which buffer zone proposal is not supported by a substantial land use reason or a reasonable zoning practice purpose, shall be approved." The Franklin Department of City Development Planning Manager has reviewed the foregoing 'issues'. He has concluded that the proposed mixed-use planned development district amendment is a singular proposal under all of the questions and circumstances existing and raised. He has also concluded that the proposed mixed-use planned development district amendment is "supported by a substantial land use reason[s] or [and] a reasonable zoning practice purpose".

We have considered the application of your proposed potentially essentially every existing zoning district subject to change within an amendment area is in effect a separate protest petition area. I understand that the Wisconsin Courts have not exactly on point addressed the question before us and that the question ultimately is or would be perhaps one of first impression. Upon a read of the State Statutes and case law, I read "against *an amendment*", "the areas of the land included *in such proposed amendment*", "*therefrom*", "*opposite thereto*", "*such amendment*", the "*zoning of an area of land is being changed*", the "*area located within the district which is directly affected by the rezoning*", the "*area affected by the amendment*", and, including but not limited to the "*three categories*". The terms are all singulars except for the "three categories" to be applied to the singular amendment area. We have considered hypotheticals, and absent the rezoning of parcels of the same zoning district, there would be multiple categories of potential protest areas instead of "three categories" based upon one "amendment" or "change". One may imagine, especially in mixed-use planned development district application areas, where a necessary for the development 'doughnut hole' area rezoning protest could essentially deny the

application for and where the application supports a substantial land use reason and reasonable zoning practice purpose interwoven land use area in its entirety.

I note your comment that "[w]hile the rezonings related to the Ballpark Commons do not exhibit the same degree of noncontiguity or cover as much total territory as those considered in *208 E. 30th St. Corp.* and *Stamford Ridgeway Associates*," and question that if that application of the protest petition areas regulations were to be applied, where do you draw the line? What about residential zoning and commercial zoning existing in an area proposed to be rezoned to institutional? Two categories of the three categories? What about an existing mixed-use planned development district area in part being rezoned to a different type of mixed-use planned development district? Under the Unified Development Ordinance, what if single-family residential districts R-1, R-2, R-4 and R-6 properties are all proposed to be rezoned to a singular new district? Are these all separate protest petition "categories" multiplied times "three"? The concern with regard to the proposed general rule is that ambiguity and subjectivity and potential arbitrary results would follow, contrary to equal treatment and administration of the law.

> A statute may provide a standard for measuring the percentage of protests against a zoning change, and if a statute provides a *single standard* for such a purpose, courts *cannot create varying standards of measurements* even to meet conditions not foreseen by the legislature. 8A McQuillin Mun. Corp. § 25:268 (3d ed.) [footnotes omitted] [emphasis ours]
>
> Where the statute specifies that a protest petition must be signed by property owners adjacent to or within 100 feet of the property for which rezoning is sought, distance is measured from the boundary of the *area to be reclassified*, not from the boundary of the person seeking the zone change. 1 Am. Law. Zoning § 8:32 (5th ed.) [footnote omitted] [emphasis ours]
>
> Both types of provisions, but especially consent provisions, have been criticized for producing rather extreme results. The exclusionary implications of permitting a small group of local owners to block a zoning amendment are obvious. The use of such provisions may be more appropriate in regard to special permit and variance requests, since a proposed use would be permitted at any rate only under certain conditions. However, consent provisions are increasingly of dubious validity, particularly where such provisions are used beyond the context of allowing the waiver of an already established and specific development standard. 3 Rathkopf's *The Law of Zoning and Planning* § 43:1 (4th ed.) [footnote omitted] [emphasis ours]
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> Many state enabling acts permit the filing of protest petitions by property owners living within a prescribed distance *of the tract to be rezoned* by a proposed amendment. 3 Rathkopf's *The Law of Zoning and Planning §* 43:2 (4th ed.)
>
> Procedural requirements imposed by statute or ordinance on protest petitions generally are considered mandatory and must be followed by municipalities.

3 Rathkopf's *The Law of Zoning and Planning* § 43:3 (4th ed.)

I sent your letter regarding the above matter to Daniel M. Olson, Assistant Legal Counsel, League of Wisconsin Municipalities, without input from me as to my thoughts on the subject. I also later sent your email discussing the *Ballenger* case. Attorney Olson opined that the entire proposed mixed-use planned development district area is the singular area upon which any potential protest petitions filings should be calculated and considered.

Cordially,

Jesse A. Wesolowski
City Attorney
City of Franklin

cc: Daniel M. Olson
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18 March 2016

VIA EMAIL jweslaw@aol.com

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Re: Ballpark Commons Rezoning

Dear Jesse:

As we have discussed, I am representing the Stone Hedge Homeowners Association and Hawthorne Neighbors regarding the Ballpark Commons Development. An issue has arisen regarding the proper definition of the area being rezoned for purposes of analyzing a protest petition. Justin Szalanski has informed me that you have taken the position that the relevant parcel to be rezoned is the entire Ballpark Commons development area. Thus, the ownership of lands to be considered for evaluating any protest petitions filed includes all property surrounding the entire development area. I am writing to urge you to recognize that rather than the entire development, the property within the separate zoning districts should be considered separately.

It is my understanding that there are really only two areas being rezoned. There is an area currently zoned B-1 that is north of Rawson Ave and southeast of Crystal Ridge Rd and Loomis Rd being rezoned to PDD No.37. Separately, an area south of Rawson Ave and west of Old Loomis Rd is being rezoned from R-3E is also being rezoned to PDD No. 37. In my opinion, the area south of Rawson Ave must be considered separately from the area north of Rawson Ave.

No Wisconsin cases of which I am aware address this particular question. The Supreme Court in ***Prescher v. City of Wauwatosa***, 34 Wis. 2d 421, 431, 149 N.W.2d 541 (1967) has recognized that "[t]he purpose of sec. 62.23(7)(c), Stats., was to permit protest by landowners directly affected by zoning changes" and that "[p]eople on the periphery of areas to be rezoned are not so directly affected." Thus, the area to be included in "such proposed" change is not the entire zoning district, but only the lands subject to zoning change. ***Id.*** at 431. The court's conclusion was further bolstered by the observation that "if the concept of 'adjacent to the zoning district' were adopted, it would be harder to meet protest

requirements because the area of land would be greater and the interest of the landowners in protesting would be less." ***Id.*** at 431.

Other jurisdictions have applied this same rationale, however, to hold that discrete sites subject to rezoning should be considered separately for purposes of analyzing the sufficiency of a protest petition to force a majority vote. For instance, in ***208 E. 30th St. Corp. v. Town of North Salem***, 88 A.D.2d 281, 286-87,452 N.Y.S.2d 902, 905-06 (N.Y. Sup.Ct. App. Div. 2nd Dept. 1982) the court held that in the rezoning of 8 separate discrete sites, each site should be considered separately rather than all sites as a whole even though the amendments "were part of one comprehensive scheme and [the adopting ordinance] contained no severability clause." The court further held:

> There is no one rule as to how to delineate the boundaries of the respective sections with respect to which a multi-section zoning change must be deemed separately enacted. But the boundaries between sections must be reflected in the original or amended zoning ordinance itself. ***Id.*** at 287.

As to the argument that the owners of 20% of all the lands affected by all 8 amendments should be necessary for a protest to force a super-majority vote the court reasoned:

> Such a holding would enable a municipal agency to insure passage of a highly objectionable zoning amendment by simply combining it with another large, unobjectionable amendment. A statute must not be construed in a manner that would permit its purpose to be defeated.

Similarly, the Supreme Court of Connecticut relied upon the same reasoning to hold that the area of land to be considered for purposes of filling a zoning protest petition "should not be determined by how many separate zoning changes are combined into one application." ***Stamford Ridgeway Associates v. Board of Representatives of City of Stamford***, 241 Conn. 407, 429, 572 A.2d 951, 964 (Conn. 1990). The court cited the following language from Special Counsel to the Board with approval:

> The rights of a group of dissatisfied property owners to appeal their zone change to the Board of Representatives should not be determined by the extent to which owners of property in other areas are satisfied by their own zone changes, particularly since these other zone changes may involve different zone classifications or may be located a considerable distance away. Stated another way, the ability to petition the Board of Representatives should not be determined by how many separate zone changes are combined into one application...It also could not have been the intent of the legislature to allow objectors to one zone change to be able to affect property owners in another distant area, by filing a protest petition including twenty percent of the land involved in both zone changes. If all of the amendments were considered together in determining the twenty percent requirement, the board of

representatives could be burdened with reviewing zone changes in areas where both the Zoning Board and the property owners in the zone were completely satisfied with that zoning amendment.

While the rezonings relating to the Ballpark Commons development do not exhibit the same degree of noncontiguity or cover nearly as much total territory as those considered in ***208 E. 30th St. Corp.*** and ***Stamford Ridgeway Associates,*** the principles of those cases apply with equal force.

The rezoning of the current B-1 area, proposed for rezoning to PDD No. 37, does not involve nearly as significant change in the allowable uses in this area as does the rezoning affecting the area currently zoned R-3E. North of Rawson Rd., that which zoned for commercial uses will continue to be open for commercial uses as well as some residential uses. The R-3E area, in contrast, will go from large-lot "estate" single-family residential development to multi-family and commercial uses. These very different impacts necessarily suggest a different analysis would and should be applied to each of these areas.

Further, the rezoning of these two areas will impact neighbors of these lands very differently. The folks living in the Stone Hedge neighborhood are much more directly impacted by changes to the R-3E zoned lands than by changes to the lands zoned B-1. Those concerned only with changes to the R-3E zoned lands should not have their protests bound to or controlled by the feelings and opinions of those more directly impacted by the changes to the B-1 zoned lands. Presumably the owners of land in the B-1 and B-2 areas across 76th Street largely have no objection to the proposed changes to the B-1 zoned lands. Why should their satisfaction or lack of concern impact the ability of the Stone Hedge neighbors to protest changes to lands in their immediate neighborhood undergoing a very different zoning change?

For these reasons, I believe that the rezoning of the R-3E lands must be considered as a separate rezoning from the rezoning of the B-1 or any other lands. Please let me know if you'd like to discuss this issue further. Once you have had the opportunity to consider these points, I would appreciate it if you would let me know if your position is changed.

Thanks for your consideration.

Sincerely,

Matthew J. Fleming

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