CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, CCB
266-4511

February 11, 2000

OPINION 2000-002

TO: Bradley J. Murphy, AICP, Planning Unit Director, and
Members of the City of Madison Plan Commission

FROM: Eunice Gibson, City Attorney

SUBJECT: **Colony Heights Replat**

The Plan Commission has requested a legal opinion on certain issues related to a proposed preliminary plat of a replat known as "Colony Heights." The first question concerned the shape and configuration of the proposed Lots 2 and 3. Lot 3 is a "flag lot" with a 50-foot wide access off of Parkside Drive and Lot 2 is proposed with a 30-foot wide strip wrapping around the north side of Lot 3. Both lots comply with the minimum lot size and dimension requirements of our Land Subdivision Regulation ordinance and Zoning Code.

The principal concern is whether the shape and configuration of Lots 2 and 3 meet four of the design standards governing the layout of lots in the subdivision ordinance, Madison General Ordinances ("MGO") §§ 16.23(8)(d)1., 4., 7. and 11.

The eleventh design standard states that "[d]epth and width of properties reserved or laid out for commercial or industrial use shall be adequate to provide for the off-street service and parking facilities required by the type of use and development contemplated." Staff finds that the lots being created are adequately sized and have adequate access. I concur and find that the standard is not violated.

The seventh design standard states that "[e]xcessive depth in relation to width shall be avoided and a proportion of two to one (2 to 1) shall be **normally considered** as a desirable ratio." (Emphasis supplied). Considering the overall non-standard shape of the existing property to be subdivided which was already partially developed, the surrounding lots and surrounding area, Planning staff does not find the proposal of a flag lot to be unusual. I concur. What is considered normal in a grid-like development pattern and what is normal when the major streets in the area are constructed on a roughly 45 degree bias are two different matters entirely. While the standard proportion may be desirable, it may not be possible in all cases and should be interpreted to provide guidance rather than be mandatory. In light of the given surroundings and patterns of development, I do not find the standard to be violated.

The fourth enumerated design standard requires in material part that "side lot lines shall be **as nearly as possible at right angles** to straight street lines." (Emphasis supplied). Opponents of this plat have alleged the failure of the proposed lots to adhere to the right angle standard. However, the side lot lines of all three lots of the proposed replat start out as perpendicular or at right angles to Parkside Drive, and, except for the 30-foot wide strip of Lot 2 which for this particular standard I consider to be insignificant, only the interior lot line between Lots 2 and 3 runs at a 45 degree angle to the Parkside Drive, even though it is basically perpendicular to East Washington Avenue. Given the unusual shape of the property to be replatted, as well as the surrounding lots and surrounding area, planning staff has concluded that this is not unusual. I concur and do not find the standard to be violated.

The first enumerated design standard states in material part that "[t]he size, shape and orientation of the lots shall be appropriate for the location of the subdivision and for the type of development and use contemplated." Without a rezoning before you and with the exception of the 30-foot wide strip of Lot 2, I would agree with Planning staff that given the size and shape of these lots and surrounding lots, a wide range of uses within the C3 Zoning District can be accommodated. Although I cannot find the standard to be clearly violated, I am troubled enough about the reasons for the shape created by the 30-foot strip of Lot 2 to conclude that it would not be inappropriate for the Plan Commission to recommend approval of the replat conditioned upon the incorporation of the said 30-foot strip into Lot 3. This would unquestionably achieve a more regular shape for both Lot 2 and Lot 3.

Recognizing that, even if this change were made to the proposal, the future owner of Lot 3 may lawfully sell the said 30-foot strip back to the future owner of Lot 2 without any regulatory approval from the City, one might question why the Plan Commission or Common Council would even bother to refuse to approve it in the first place. The simple answer would be to attempt to more closely adhere to the design standards for subdivision approval and not be a party to a disregard of them in order to achieve other goals. However, if it were not for other concerns about the proposed development, I would be inclined to conclude that this standard is not clearly violated, even with the proposed 30-foot strip on Lot 2.

The proposed development for Lot 3 of the proposed replat is an adult entertainment tavern which, in the C3 Commercial District, must also obtain conditional approval under § 28.09(4)(d)4., Zoning Code. Opponents of the proposed replat have asserted that it conflicts with the applicable portion of the City's adopted Master Plan--specifically the East Town-Burke Heights Development Plan which they allege recommends that the property be used for office purposes. However, the cited reference to the ET-BHDP refers to "proposed office/industrial uses on the south side of Lien Road." Since an adult entertainment tavern is specifically allowed as a conditional use in the C3 and M1 Districts, along with a wide assortment of other commercial and industrial-type uses, I find that there is no conflict whatsoever between the proposed replat, its intended final use and the City's adopted Master Plan.

Nevertheless, this proposed adult entertainment tavern will require further approval for

either a new or transferred Class B liquor license. Madison's Alcoholic Beverages Regulated Ordinances, contain a public safety requirement that reads:

> "View From Sidewalk Required. All premises for which a Class B license shall have been issued shall be so arranged as to furnish a clear view from the sidewalk, and no curtains, pictures, signs and other obstructions which interfere with such clear view shall be maintained. The provisions of this paragraph, however, shall not apply to bona fide clubs, hotels and restaurants." MGO § 38.06(3).

Given the existing commercial development on Parkside Drive, I cannot on the facts before me conclude that the site of a proposed adult entertainment tavern on the proposed Lot 3 will be able to be viewed clearly from Parkside Drive. If, on the basis of a more thorough investigation, one could arguably conclude that this "flag-shaped" Lot 3 would not be an appropriate location for the type of development and use contemplated, as required by MGO § 38.06(3), it may also be inappropriate within the meaning of design standard one, MGO § 16.23(8)(d)1.

The final issue raised with regard to the proposed use is that MGO § 28.09(4)(d)4. prohibits an adult entertainment tavern from locating within five hundred feet of a number of enumerated uses, including "any tavern". MGO § 28.03(2) defines "tavern" as "any place in which fermented malt beverages or intoxicating liquors are sold for consumption on the premises." There may have been efforts by the applicant to draw the boundaries of Lot 3 to be at least 500 feet from the lot owned by the American Legion on Lien Road because of the presence of a tavern there. However, it must also be recognized that the immediately adjacent Holiday Inn (former Ramada Inn) contains a restaurant and separate bar. Both sell alcoholic beverages for on-premise consumption. Although the Holiday Inn bar in operation is somewhat more like an accessory use to the hotel and not what one usually thinks of as a stand-alone tavern, the above-quoted Zoning Code definition of "tavern" and the conditional use restriction make no such distinctions.

One can reasonably conclude that by using such a broad definition of tavern for purposes of restricting the location of adult entertainment taverns under the conditional use process, the Common Council intended to prevent their location within 500 feet of "any place in which fermented malt beverages or intoxicating liquors are sold for consumption on the premises." It does not matter what the percentage of food sales is to liquor, or that an arguably "accessory" tavern doesn't even have its own business identification sign out front. If any bar has a Class B liquor license, no adult entertainment tavern can be located within 500 feet of it. I conclude that the Holiday Inn parcel which includes a "tavern" on the premises, within the meaning of that term as used in MGO § 28.09(4)(d)4., is well within 500 feet of the proposed Lot 3 of the Colony Heights replat.

In conclusion, I am of the opinion that, if it so desires, the Plan Commission could properly require that or condition approval of the replat upon the 30-foot strip in proposed Lot 2

being included in Lot 3, so that both of those lots are more regularly shaped, and in conformance with a more stringent reading of the design standards for lots, set forth in MGO §§ 16.23(8)(d)1. & 4. In the event that the applicants continue to pursue development of said Lot 3 as the site for an adult entertainment tavern, with future applications for conditional approval and for a Class B liquor license, the applicants will then also have to satisfy the further location and siting restrictions of MGO §§ 28.09(4)(d)4. and 38.06(3), respectively.

Eunice Gibson
City Attorney

CAPTION: MGO § 16.23(8)(d)1., 4., 7. & 11 design standards governing layout of lots in a proposed plat interpreted; and Zoning Code definition of "tavern" discussed with regard to siting of an adult entertainment tavern as a conditional use in the C3 District, under MGO § 28.09(4)(d)4.

EG:JMV
cc: Mayor
City Clerk
Attorney Ronald M. Trachtenberg (via Facsimile)
Attorney Henry A. Gempeler (via Facsimile)
Attorney Harvey L. Temkin (via Facsimile)
Attorney Helen Hellenbrand (via Facsimile)