

**CITY OF MADISON  
OFFICE OF THE CITY ATTORNEY  
Room 401, CCB  
266-4511**

Date: November 29, 2012

**MEMORANDUM**

TO: Plan Commission

FROM: Michael P. May, City Attorney  
Maureen O'Brien, Assistant City Attorney

RE: Action Needed on Referral of Grandview Commons  
Legistar Items 28116 and 28117

On November 27, 2012, on the advice of the City Attorney, the Common Council referred these matters back to the Plan Commission because several specific findings are not in the record.

A few hours before the Council meeting on November 27, I and others received a letter from an attorney representing homeowners near the project, asserting that three required conditions under the City's big-box ordinance, sec. 33.24(4)(f), MGO, were not met and that no waiver had been granted by the Plan Commission. (See attached letter). Our office met with Planning Division staff just before the Council meeting. We concluded that the combined actions of the Urban Design Commission and Plan Commission likely showed that the bodies considered the standards for approval in making their recommendation to the Council and found that two of the standards in question could be satisfied based on the conditions of approval. However, the record was not clear if the Plan Commission specifically granted a waiver from the requirements of sec. 33.24(4)(f), MGO as it relates to the standard for wall projections or recesses.

Under sec. 33.24(4)(f)2.c, MGO, the Plan Commission may waive the relevant requirements if it finds "that unique or unusual circumstances warrant special consideration to achieve a superior design solution." While we could have interpreted the Commission's approval as an implicit waiver, we recommended referral to the Plan Commission to make the necessary findings and state its reasons on the record. Courts have become increasingly tough on zoning bodies that fail to make their findings and reasoning on the record.

On referral to the Plan Commission, the Commission should make clear on the record whether it finds that all the standards for approval have been satisfied, based on the review and findings by it and UDC, or whether it finds the standard for a waiver to have been satisfied for some or all of the standards, and if so, why. The Commission need not take up other matters already decided by it if it chooses not to.

November 29, 2012

Page 2

I understand this legal memorandum will be presented to the Commission along with a report from staff of the Planning Division.

CC: Steve Cover  
Brad Murphy  
Tim Parks  
Lauren Cnare  
Jill Johnson  
Anne Monks

Cullen  
Weston  
Pines  
& Bach

A Limited Liability  
Partnership

*Attorneys at Law*

122 West Washington Avenue  
Suite 900  
Madison, Wisconsin 53703  
(608) 251-0101  
(608) 251-2883 Fax  
www.cwpb.com

Lee Cullen  
Lester A. Pines  
Steven A. Bach  
Alison TenBruggencate  
Carol Grob  
Linda L. Harfst  
Jordan Loeb  
Tamara B. Packard

Elise Clancy Ruoho  
Susan M. Crawford  
Elisabeth S. Bach-Van Horn  
Jeffrey L. Vercauteren  
Sean P. Lynch

Of Counsel:  
Cheryl Rosen Weston  
Curt F. Pawlisch

November 27, 2012

**HAND DELIVERED**

City of Madison  
Common Council  
c/o Lisa Veldran, Administrative Assistant to Council  
210 Martin Luther King, Jr. Blvd., Room 201  
Madison, WI 53703

Dear Madison Common Council:

We represent several homeowners, identified below, who will live in close proximity to the 58,000 square foot grocery store proposed for the Grandview Commons Town Center, 3rd Aldermanic District, 6002 Cottage Grove Road. On November 19, 2012, the City Plan Commission approved recommending a rezoning of property from PUD(GDP) to PUD(SIP) based on a proposed specific implementation plan for the Grandview Commons Town Center which does not comply with Madison's Ordinance regulating Large Retail Developments. The below-identified homeowners request that the Council postpone any action on the proposed rezoning until changes are made to the SIP for the new development to bring the proposed building into compliance with Madison's Ordinance regulating Large Retail Developments.

Madison City Ordinance Section 33.24, establishing the Urban Design Commission, provides that it exists to assure the highest quality of design for all projects in the City including private projects, and to encourage and promote a high quality in the design of new buildings and developments so as to maintain and improve property values. MCO §33.24(2)(a) and (c). The powers and duties of the Urban Design Commission include applying the Ordinance sections applicable to Large Retail Developments. MCO §33.24(4).

Because of recent changes made to the City's zoning ordinance and the original Comprehensive Neighborhood Plan for the Grandview Commons Development, a 58,000 square foot grocery store – a Large Retail Development – is now highly likely to be constructed even though a 25,000 square foot store was originally planned, approved and counted on by many who bought homes in Grandview Commons. On top of significantly altering what was a thoughtful plan for right-sized commercial elements for Grandview Commons, today you are being asked not just to approve an oversized Large Retail Development, but to allow a “big box” that does not comply with the specific regulatory requirements for easing the impact a big box store has on a residential neighborhood.

On November 19, 2012, the Plan Commission approved the plan for the proposed Copps grocery store at Grandview Commons Town Center with the following elements which violate MCO §33.24(4)(f):

- Store facades exceeding 75 feet in length do not incorporate wall plan projections or recesses having a depth of at least 3% of the façade length and covering at least 20% of the façade.
- The proposed rooflines do not meet the requirements of MCO §33.24(4)(f)(5) for features such as varied height sections, parapets, gable roofs, hip roofs, dormers, and cornice treatments to accomplish concealment of roof top equipment and blend the large structure into the neighborhood.
- The plan fails to provide for the full containment of storage areas, trash collection, trash compaction, and, particularly, rooftop mechanical equipment for heating, ventilation and air conditioning, so as to shield these components from view and to fully contain the acoustic impact of this equipment. The noise levels for the HVAC, compaction and loading dock are estimated to reach 80-90 decibels and should be required to be enclosed including overhead containment.

No rational reason has been given by the Urban Design Commission or the Plan Commission to relieve new development at Grandview Commons Town Center of the requirements of MCO §33.24(4)(f). A section of the Large Retail Development Ordinance permits the Plan Commission to waive one or more requirements “if it determines that unique or unusual circumstances warrant special consideration to achieve a superior design solution.” However, neither Commission has indicated that a superior design will in any way be achieved if a proposed SIP is approved allowing a big box store without the required façade treatments, without the aesthetics-easing roofline features and without the required containment to attenuate noise impacts.

There is no rational basis to permit this proposed 58,000 square foot store to violate the Large Retail Development Ordinance and to allow such noncompliance would be arbitrary and unreasonable.

The below-identified Grandview Commons and Richmond Hill property owners and residents respectfully request that this Council postpone action on the proposed rezone of Grandview Commons Town Center from PUD(GDP) to PUD(SIP) and refer this matter to the City Attorney's Office for review of whether the proposed SIP complies with MCO §33.24(4)(f).

Thank you for your attention to this.

Very truly yours,

CULLEN WESTON PINES & BACH LLP



Carol Grob  
for:

Paul Reilly, 1218 Alexandria, Madison  
John Driscoll, 801 McLean, Madison  
Dean Matuszak, 738 McLean, Madison  
Barbara Davis, 729 Orion, Madison  
Denise DeMarb, 6010 Fredericksburg, Madison  
Bob Hogan, 6025 Sharpsburg, Madison  
Tara White, 637 Copernicus, Madison  
Rona Carr, 5932 Gemini, Madison  
Carrie Montgomery, 1205 McLean, Madison

cc: Mayor Paul Soglin  
Michael May, Esq.