

The YouTube channel “City of Franklin WI” will be live streaming the Common Council meeting so that the public will be able to view and listen to the meeting.

<https://www.youtube.com/c/CityofFranklinWIGov>

CITY OF FRANKLIN
COMMON COUNCIL MEETING
FRANKLIN CITY HALL – COMMON COUNCIL CHAMBERS
9229 WEST LOOMIS ROAD, FRANKLIN, WISCONSIN
AGENDA*
TUESDAY, AUGUST 16, 2022, AT 6:30 P.M.

- A. Call to Order and Roll Call.
- B.
 - 1. Citizen Comment Period.
 - 2. Mayoral Announcement: A Proclamation Declaring September 2022 as Prostate Cancer Awareness Month in the City of Franklin.
- C. Approval of Minutes: Regular Common Council Meeting of August 2, 2022.
- D. Hearings.
- E. Organizational Business.
- F. Letters and Petitions.
- G. Reports and Recommendations:
 - 1. A Resolution Conditionally Approving a Land Combination for Parcel 1 (Tax Key No. 886-9989-003) and Outlot 1 of Certified Survey Map No. 6022 (8857 West St. Martins Road) (Jose D. Sandoval, Applicant).
 - 2. A Resolution to Amend Resolution Nos. 79-1562, 83-2091, 85-2581, 2009-6579, 2012-6812, 2014-7007 and 2017-7280 Imposing Conditions and Restrictions for the Approval of a Special Use for the Gazebo Park Apartment Complex Property Located at Approximately 6300-6346 South 35th Street to Allow for Expansion of Two Detached Garages Within the Apartment Complex (GPark LLC, Applicant).
 - 3. City of Franklin’s Community Development Block Grant Program Projects for 2023.
 - 4. A Resolution to “Certify a Non-Traditional Project Administration and Delivery for the 116th Trail (Wisconsin Department of Transportation Project ID 2976-00-02/72” for a Trail Project along S. 116th Street from W. Mayers Drive to W. Ryan Road and Muskego Corporate Limits.
 - 5. A Resolution to Execute S. 116TH Street Trail Project Change Orders to GRAEF-USA, INC. for Change Order No. 2 for \$70,000 to Prepare Construction Mitigation & Air Compliance (CMAQ) Plans with Permitting, and Change Order No. 3 for \$30,000 to prepare a St. Martin of Tours Trail Alternative Alignment.
 - 6. Hawthorne Neighborhood Pavement and Utilities Survey.

Common Council Meeting Agenda

August 16, 2022

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7. A Resolution for Acceptance of a Storm Water Facilities Maintenance Agreement and a Storm Water Management Access Easement for Victory of the Lamb, Inc., 11120 W. Loomis Road, TKN 889-9989-000.
8. A Resolution for Acceptance of a Storm Water Facilities Maintenance Agreement and a Storm Water Management Access Easement for 7543 S. North Cape Road, TKN 797-9946-000.
9. A Resolution to Engage Milwaukee County to Negotiate on Use of its Land for a Stormwater Retention Basin Serving Parts of Corporate Park.
10. CGI Digital Production Renewal Agreement for Web Site Video Tours Supported by Community Business Advertising.
11. Consideration of a City Facebook Page.
12. Franklin 2022 and 2023 Paper Shredding Events
13. Emergency Vehicle Pre-Emption Equipment, a System Allowing Emergency Vehicles to Control Signal Lights when Responding as an Emergency Vehicle, at W. Forest Home Avenue (CTH OO) and W. St. Martins Road.
14. Temporary Street Closure (Schlueter Parkway and S Legend Drive) Request in Conjunction with the August 26, 2022 Outdoor Movie.
15. BPC County Land, LLC v. City of Franklin, Milwaukee County Circuit Court Case Nos. 2019CV008963 and 2021CV005581. The Common Council may enter closed session pursuant to Wis. Stat. § 19.85(1)(g), to confer with legal counsel for the Common Council who is rendering advice concerning strategy to be adopted by the body with respect to the subject litigation, and to re-enter open session at the same place thereafter to act on such matters discussed therein as it deems appropriate.
16. Tax Incremental District No. 6 Mixed-Use Industrial, Commercial, Retail, Single-Family Residential and Open Space Uses (of an approximate 164-acre site generally located north and south of West Loomis Road, south of West Ryan Road, west of South 112th Street, east of South 124th Street, and north of West Oakwood Road) Project Development Agreement (Bear Development, LLC; Loomis and Ryan, Inc. Developers). The Common Council may enter closed session pursuant to Wis. Stat. § 19.85(1)(e), to deliberate upon a Potential Amendment to Tax Incremental District No. 6 Mixed-Use Industrial, Commercial, Retail, Single-Family Residential and Open Space Uses Project Development Agreement, the negotiation of Agreement terms and the investing of public funds in relation thereto, for competitive and bargaining reasons, and to reenter open session at the same place thereafter to act on such matters discussed therein as it deems appropriate.
17. Potential Acquisition of Property for Public Park Recommendations Purposes in the General Southwest Area of the City of Franklin. The Common Council may enter closed session pursuant to Wis. Stat. §19.85(1)(e), to consider the potential acquisition of properties intended to be used for public park purposes in the general southwest area of the City and to re-enter open session at the same place thereafter to act on such matters discussed therein as it deems appropriate.

H. Licenses and Permits.

Miscellaneous Licenses from License Committee Meeting of August 16, 2022.

- I. Bills.
Request for Approval of Vouchers and Payroll.
- J. Adjournment.

*Supporting documentation and details of these agenda items are available at City Hall during normal business hours

[Note Upon reasonable notice, efforts will be made to accommodate the needs of disabled individuals through appropriate aids and services For additional information, contact the City Clerk's office at (414) 425-7500]

REMINDERS:

August 18	Plan Commission Meeting	7:00 p.m.
September 5	City Hall Closed-Labor Day	
September 6	Common Council Meeting	6:30 p.m.
September 8	Plan Commission Meeting	7:00 p.m.
September 20	Common Council Meeting	6:30 p.m.
September 22	Plan Commission Meeting	7:00 p.m.

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B.2.

City of Franklin Proclamation

A PROCLAMATION DECLARING SEPTEMBER 2022 AS PROSTATE CANCER AWARENESS MONTH IN THE CITY OF FRANKLIN.

WHEREAS, Prostate Cancer has stricken approximately 268,000 American men already in 2022 with more than 13,000 in the State of Wisconsin, and

WHEREAS, Prostate Cancer is the most common form of cancer and the second leading cause of death for men; and

WHEREAS, Prostate Cancer is diagnosed in 1 in 7 men, and risk dramatically increases in men over the age of 65, obese men, black men and men who have relatives who have had the cancer; and

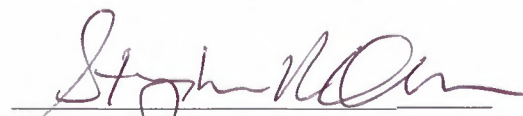
WHEREAS, Prostate Cancer is nearly 100% survivable when diagnosed in the very early stages, although survivability drops to 28% when the cancer is found outside the gland, and Prostate Cancer, particularly in early stages, exhibits no symptoms but screening for Prostate Cancer is painless and effective; and

WHEREAS, men whom you know may either have the disease or had the disease and go through life without notice, and funding for research for better screening and treatment lags other cancers; and

WHEREAS, Prostate Cancer at all stages impact the health and relationship of couples, families and entire communities.

NOW, THEREFORE, BE IT PROCLAIMED, that I, Stephen R. Olson, Mayor, of the City of Franklin, Wisconsin, on behalf of all of the Citizens of Franklin, the elected officials and the staff of City government, hereby proclaim September, 2022 as Prostate Cancer Awareness Month in the City of Franklin and encourage all men to talk with their doctors about prostate cancer and those men over 50 be screened for the disease.

Presented to the City of Franklin Common Council this 11th day of August, 2022.


Stephen R. Olson, Mayor

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CITY OF FRANKLIN
COMMON COUNCIL MEETING
AUGUST 2, 2022
MINUTES

- | | | |
|--|------|---|
| ROLL CALL | A. | The regular meeting of the Franklin Common Council was held on August 2, 2022, and was called to order at 6:30 p.m. by Mayor Olson in the Franklin City Hall Council Chambers, 9229 W. Loomis Road, Franklin, Wisconsin. On roll call, the following were present: Alderman Ed Holpfer, Alderwoman Michelle Eichmann, Alderwoman Kristen Wilhelm, Alderwoman Hanneman, Alderman Barber, and Alderman John R. Nelson. Also in attendance were Dir. of Administration Peggy Steeno, City Engineer Glen Morrow, City Attorney Jesse A. Wesolowski, and City Clerk Sandra Wesolowski. |
| CITIZEN COMMENT | B. | Citizen comment period was opened at 6:31 p.m. and was closed at 6:34 p.m. |
| MINUTES
JULY 19, 2022 | C. | Alderman Barber moved to approve the minutes of the regular Common Council meeting of July 19, 2022, as presented and corrected in Item G.12. Seconded by Alderman Holpfer. All voted Aye; motion carried. |
| RES. 2022-7885
DEVELOPMENT
AGREEMENT
SEASONS AT FRANKLIN
APARTMENTS | G.1. | Alderwoman Hanneman moved to adopt Resolution No. 2022-7885, A RESOLUTION AUTHORIZING CERTAIN OFFICIALS TO EXECUTE A DEVELOPMENT AGREEMENT WITH THE DEVELOPER OF SEASONS AT FRANKLIN APARTMENTS, 9801 S. 27TH STREET (TKN 902-9965-006) AND 9605 S. 29TH STREET (TKN 902-9966-001), subject to potential changes to the Agreement, with the final form and content to be approved by the City Engineer and the City Attorney. Seconded by Alderwoman Wilhelm. All voted Aye; motion carried. |
| RES. 2022-7886
EASEMENTS
SEASONS AT FRANKLIN
APARTMENTS | G.2. | Alderwoman Hanneman moved to adopt Resolution No. 2022-7886, A RESOLUTION FOR ACCEPTANCE OF EASEMENTS FOR SANITARY SEWER AND WATER MAIN FOR THE SEASONS AT FRANKLIN APARTMENTS, 9801 S. 27TH STREET (TKN 902-9965-006) AND 9605 S. 29TH STREET (TKN 902-9966-001). Seconded by Alderwoman Wilhelm. All voted Aye; motion carried. |
| RES. 2022-7887
CONSERVATION
EASEMENT FROM
FIDUCIARY REAL
ESTATE DEV., INC.
9801 S. 27TH ST. AND
9605 S. 29TH ST. | G.3. | Alderwoman Hanneman moved to adopt Resolution No. 2022-7887, A RESOLUTION AUTHORIZING CERTAIN OFFICIALS TO ACCEPT A CONSERVATION EASEMENT FROM FIDUCIARY REAL ESTATE DEVELOPMENT, INC., FOR AND AS PART OF THE REVIEW AND APPROVAL OF A NATURAL RESOURCE FEATURES SPECIAL EXCEPTION FOR PROPERTY LOCATED AT 9801 S. 27TH STREET AND 9605 S. 29TH STREET (FIDUCIARY REAL ESTATE DEVELOPMENT, INC., |

APPLICANT). Seconded by Alderwoman Eichmann. All voted Aye; motion carried.

- | | | |
|---|------|---|
| DEPT. OF CITY DEVELOPMENT OPERATIONS | G.4. | Alderman Barber moved to accept and place on file the update on the on-going operations in the Department of City Development. Seconded by Alderman Holpfer. All voted Aye; motion carried. |
| HAWTHORNE NEIGHBORHOOD PAVEMENT AND UTILITIES | G.5. | Alderman Nelson moved to table to the August 16, 2022, Common Council meeting a survey for pavement and utilities for the properties within the Hawthorne neighborhood. Seconded by Alderman Barber. All voted Aye; motion carried. |
| PURCHASE TWO PLOW TRUCKS | G.6. | Alderwoman Wilhelm moved to authorize the Department of Public Works to purchase two plow trucks with reprioritized funding as detailed on the Council Action Sheet included in the information packet for this meeting. Seconded by Alderman Nelson. All voted Aye; motion carried. |
| ORD. 2022-2516 AMEND 2022 ANNUAL BUDGET FOR PURCHASE OF TWO PLOW TRUCKS | G.7. | Alderman Barber moved to adopt Ordinance No. 2022-2516, AN ORDINANCE TO AMEND ORDINANCE NO. 2021-2486, AN ORDINANCE ADOPTING THE 2022 ANNUAL BUDGET FOR THE EQUIPMENT REPLACEMENT FUND TO TRANSFER \$93,178.00 OF CAPITAL OUTLAY FUNDS TO THE EQUIPMENT REPLACEMENT FUND. Seconded by Alderman Holpfer. On roll call, all voted Aye. Motion carried. |
| CODE OF CONDUCT COMMON COUNCIL RULES | G.8. | Alderwoman Wilhelm moved to accept the document City of Franklin Code of Conduct for elected and Appointed Officials and the Rules of the Common Council, per the red-line versions included in the information packet for this meeting. Seconded by Alderwoman Eichmann. All voted Aye; motion carried. |
| CDBG PROJECTS FOR 2023 | G.9. | Alderman Barber moved to authorize the Director of Administration to submit Letters of Support for the Eras Senior Network, Inc. Faith in Action Milwaukee County Program for \$5,000 and Oak Creek Salvation Army, Homelessness Program for \$3,000; to submit a project application for Senior Health-Related Educational Programming for \$5,000; and to submit a project application for a Franklin Home Repair Grant Program, administered directly through Milwaukee County, for \$42,000, by the deadline date of August 26, 2022. Seconded by Alderwoman Eichmann. All voted Aye; motion carried. |
| LICENSE COMM. RECOMMENDATIONS | H. | Alderwoman Hanneman moved to approve the following licenses:
Grant Extraordinary Entertainment & Special Event license to Luxe Golf Bays, Grand Opening Fireworks Display, Paul Cimoch, 7065 S Ballpark Dr, on Friday, August 19, 2022, pursuant to the terms and conditions in the application; |

Grant 2022-2023 Operators' licenses to Catherine Erwin, Gloria Grabarczyk, Kenneth Keefer, William Lynch, Jena Obarski, Lindsay Safranek, Susan Sinda, Jeffrey Tarkowski, Stacey Williamson, Patricia Greer;

Hold 2022-2023 Operator's license application for Hanna Wallace for appearance and clarification of background check;

Grant 2022-2023 Day Care license to Cadence Education LLC, d/b/a Kids Connection of Rawson, 3130 W Rawson Ave, Tanya Graser, Manager, subject to compliance with all inspections;

Grant Temporary Class B Beer and Wine license to Franklin Lioness Club, St. Martin's Labor Day Fair, Gloria Grabarczyk, 9/4/2022 through 9/5/2022;

Grant Temporary Class B Beer license to Knights of Columbus, St. Martin's Labor Day Fair, Kenneth Keefer, 9/4/2022 through 9/5/2022; and

Grant Temporary Entertainment & Amusement and Amendment to Public Grant (new date of Movie Night) to Franklin Health Department, Volition, Outdoor Movie Night, Ellen Henry, 8/26/2022, at 9229 W Loomis Rd/8030 S Legend Dr.

Seconded by Alderwoman Wilhelm. All voted Aye; motion carried.

VOUCHERS AND
PAYROLL

- I. Alderman Barber moved to approve City vouchers with an ending date of August 1, 2022, in the amount of \$958,020.34; Property Tax temporary investments with an ending date of August 1, 2022, in the amount of \$8,000,000.00; payroll dated July 29, 2022, in the amount of \$461,887.86 and payments of the various payroll deductions in the amount of \$432,761.81, plus City matching payments; and estimated payroll dated August 12, 2022, in the amount of \$410,000.00 and payments of the various payroll deductions in the amount of \$218,000, plus City matching payments. Seconded by Alderwoman Eichmann. On roll call, all voted Aye. Motion carried.

CLOSED SESSION
*FF&E, LLC v. FRANKLIN
BOARD OF REVIEW*

- G.10. Alderwoman Eichmann moved to enter closed session at 7:02 p.m. pursuant to Wis. Stat. § 19.85(1)(g), to confer with legal counsel for the Common Council who is rendering advice concerning strategy to be adopted by the body with respect to *FF&E, LLC v City of Franklin Board of Review*, Milwaukee County Circuit Case No. 20-CV-6955, and to reenter open session at the same place thereafter to act on such matters discussed therein as it deems appropriate. Seconded by Alderman Holpfer. On roll call, all voted Aye. Motion carried.

The Common Council reentered open session at 7:35 p.m.

CLOSED SESSION
TID 6

- G.11. Alderman Holpfer moved to enter closed session at 7:37 p.m. pursuant to Wis. Stat. § 19.85(1)(e), to deliberate upon a Potential Amendment to Tax Incremental District No. 6 Mixed-Use Industrial, Commercial, Retail, Single-Family Residential and Open Space Uses Project Development Agreement, the negotiation of Agreement terms and the investing of public funds in relation thereto, for competitive and bargaining reasons, and to reenter open session at the same place thereafter to act on such matters discussed therein as it deems appropriate. Seconded by Alderman Nelson. On roll call, all voted Aye. Motion carried.

Upon reentering open session at 8:19 p.m., Alderman Nelson moved to proceed as discussed in closed session. Seconded by Alderman Barber. All voted Aye; motion carried.

CLOSED SESSION
POTENTIAL
ACQUISITION OF
PROPERTIES

- G.12. Alderman Holpfer moved to enter closed session at 8:20 p.m. pursuant to Wis. Stat. § 19.85(1)(e), to consider the potential acquisition of properties intended to be used for public park purposes in the general southwest area of the City, and to reenter open session at the same place thereafter to act on such matters discussed therein as it deems appropriate. Seconded by Alderwoman Eichmann. On roll call, all voted Aye. Motion carried.

Upon reentering open session at 8:47 p.m., Alderman Holpfer moved to direct staff to proceed as discussed in closed session. Seconded by Alderwoman Wilhelm. All voted Aye; motion carried.

ADJOURNMENT

- J. Alderman Barber moved to adjourn the regular meeting of the Common Council at 8:48 p.m. Seconded by Alderwoman Eichmann. All voted Aye; motion carried.

<p style="text-align: center;">APPROVAL</p> <p style="text-align: center;"><i>Slu</i></p>	<p style="text-align: center;">REQUEST FOR COUNCIL ACTION</p>	<p style="text-align: center;">MEETING DATE</p> <p style="text-align: center;">08/16/2022</p>
<p style="text-align: center;">REPORTS & RECOMMENDATIONS</p>	<p style="text-align: center;">A RESOLUTION CONDITIONALLY APPROVING A LAND COMBINATION FOR PARCEL 1 (TAX KEY NO. 886-9989-003) AND OUTLOT 1 OF CERTIFIED SURVEY MAP NO. 6022 (8857 WEST ST. MARTINS ROAD) (JOSE D. SANDOVAL, APPLICANT)</p>	<p style="text-align: center;">ITEM NUMBER</p> <p style="text-align: center;">G.1.</p>
<p>On August 4, 2022, the Plan Commission carried a motion to recommend approval of a resolution conditionally approving a Land Combination for Parcel 1 (TKN 886-9989-003) Outlot 1 of Certified Survey Map NO. 6022 (8857 W. ST. Martins Rd.) On voice vote, all voted 'aye'; motion carried. (6-0-0).</p> <p style="text-align: center;">COUNCIL ACTION REQUESTED</p> <p>A motion to adopt Resolution No. 2022-_____, a resolution conditionally approving a Land Combination for Parcel 1 (TKN 886-9989-003) Outlot 1 of Certified Survey Map NO. 6022 (8857 W. ST. Martins Rd.) (JOSE D. SANDOVAL, APPLICANT)</p>		

Department of City Development: MX

RESOLUTION NO. 2022-_____

A RESOLUTION CONDITIONALLY APPROVING A LAND
COMBINATION FOR PARCEL 1 (TAX KEY NO. 886-9989-003)
AND OUTLOT 1 OF CERTIFIED SURVEY MAP NO. 6022
(8857 WEST ST. MARTINS ROAD)
(JOSE D. SANDOVAL, APPLICANT)

WHEREAS, the City of Franklin, Wisconsin, having received an application for approval of a proposed land combination for Jose D. Sandoval to unify a parcel of land (1.19 acres) and an adjoining outlot (3.53 acres) located at 8857 West St. Martins Road (Parcel 1 of Certified Survey Map No. 6022 bearing Tax Key No. 886-9989-003), more particularly described as follows:

Part of the SW 1/4 of the SW 1/4 of Section 21, Township 5 North, Range 21 East, in the City of Franklin, Milwaukee County, Wisconsin; and

WHEREAS, the Plan Commission having reviewed such application and recommended approval thereof and the Common Council having reviewed such application and Plan Commission recommendation and the Common Council having determined that such proposed land combination is appropriate for approval pursuant to law upon certain conditions, all pursuant to §15-9.0312 of the Unified Development Ordinance, Land Combination Permits.

NOW, THEREFORE, BE IT RESOLVED, by the Mayor and Common Council of the City of Franklin, Wisconsin, that the proposed land combination for Jose D. Sandoval, as submitted by Jose D. Sandoval, as described above, be and the same is hereby approved, subject to the following conditions:

1. Jose D. Sandoval, successors and assigns shall pay to the City of Franklin the amount of all development compliance, inspection and review fees incurred by the City of Franklin, including fees of consults to the City of Franklin, for the Jose D. Sandoval land combination project, within 30 days of invoice for same. Any violation of this provision shall be a violation of the Unified Development Ordinance, and subject to §15-9.0502 thereof and §1-19 of the Municipal Code, the general penalties and remedies provisions, as amended from time to time.
2. The approval granted hereunder is conditional upon Jose D. Sandoval and the land combination project for the property located at 8857 West St. Martins Road: (i) being in compliance with all applicable governmental laws, statutes, rules, codes, orders and ordinances; and (ii) obtaining all other governmental approvals, permits, licenses and

JOSE D. SANDOVAL – LAND COMBINATION

RESOLUTION NO. 2022- _____

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the like, required for and applicable to the project to be developed and as presented for this approval.

Introduced at a regular meeting of the Common Council of the City of Franklin this _____ day of _____, 2022.

Passed and adopted at a regular meeting of the Common Council of the City of Franklin this _____ day of _____, 2022.

APPROVED:

Stephen R. Olson, Mayor

ATTEST:

Sandra L. Wesolowski, City Clerk

AYES _____ NOES _____ ABSENT _____



CITY OF FRANKLIN
REPORT TO THE PLAN COMMISSION

Item D.2.

Meeting of August 4, 2022

Land Combination

RECOMMENDATION: City Development staff recommends approval of this land combination for 8857 W. St. Martins Rd.

Table with 2 columns: Field Name and Value. Fields include Project Name, Project Address, Property Owner, Applicant, Agent, Zoning, Use of Surrounding Properties, Comprehensive Plan, Applicant Action Requested, and Planner.

Pursuant to §15-9.0312.B, of the Unified Development Ordinance, the application for the Land Combination Permit shall be considered "relative to City staff recommendations, the lot area and other dimensional requirements of the zoning district(s) within which the parcels are located, the City of Franklin Comprehensive Master Plan and the planned land use for each of the parcels, present use of the parcels and proposed use of the parcels for the purpose to ensure that upon combination, such properties shall comply with the purposes and provisions of this Ordinance."

Analysis:

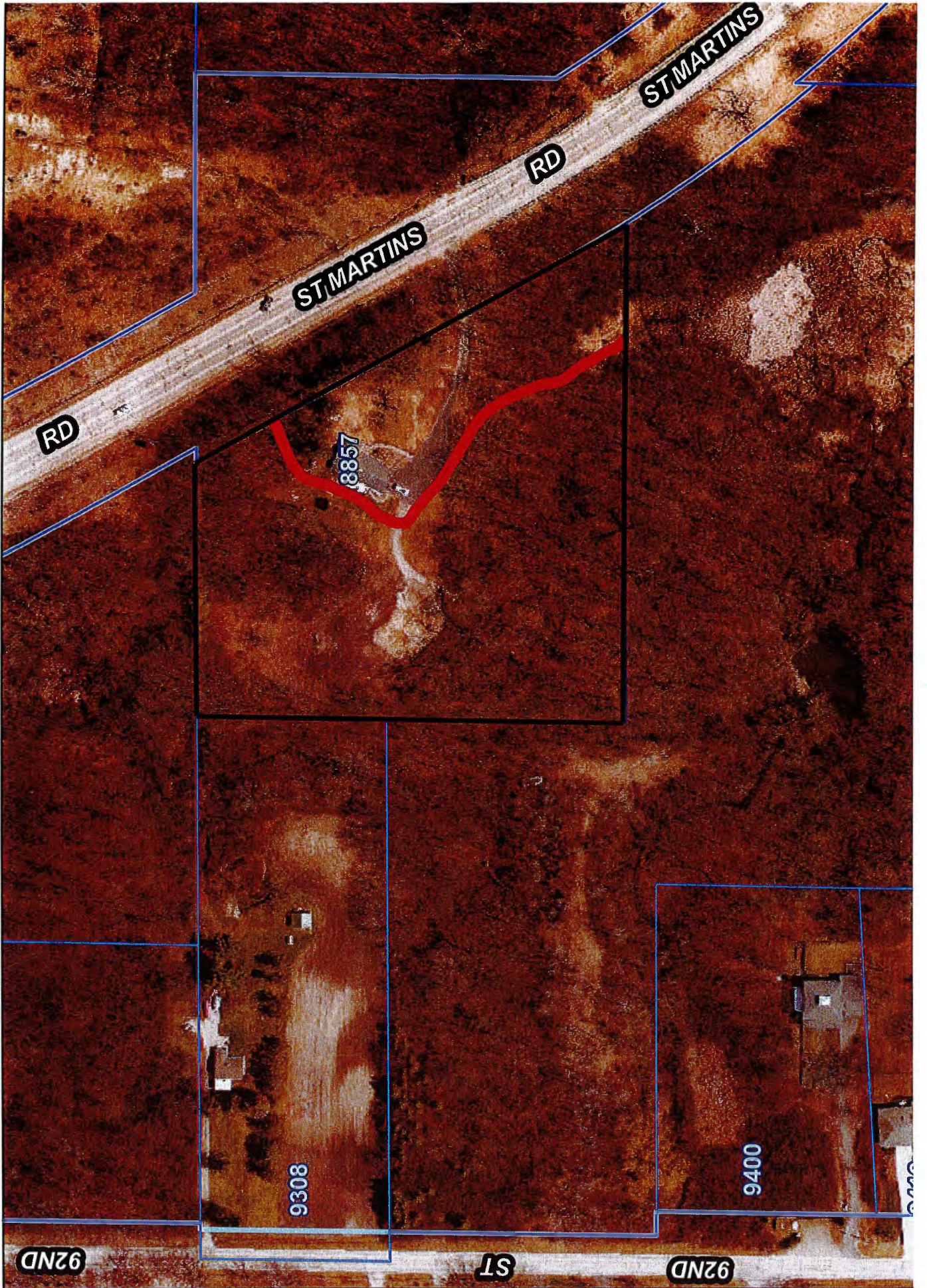
The subject properties are located at 8857 W. St. Martins Rd. (TKN 886 9989 003); they share an address and tax key number. One lot contains a house, and the other is an outlot that was created by a previous land division in anticipation of a road that was never constructed. The applicant would like to complete the process of re-combining the lots to remove the internal lot line and related setbacks.

This land combination otherwise complies with the current zoning of the subject properties, and is consistent with the City of Franklin Comprehensive Master Plan designation.

Staff recommendation:

City Development staff recommends approval of this land combination.

City of Franklin



Land Combination 8857 West St. Martins Road

From Gregg Blando (greggblando@sbcglobal.net)
To mecks@franklinwi.gov
Cc: miangelauto@icloud.com; greggblando@sbcglobal.net; golsen@franklinwi.gov
Date Friday, July 22, 2022 at 01:44 PM CDT

Dear Associate Planner Ecks,

On June 17, 1994 the previous owners of the subject premises petitioned the City of Franklin to split their single lot of 4.72 acres into Parcel 1 consisting of 1.19 acres (with existing single family dwelling) and Outlot 1 consisting of 3.53 acres (vacant land). See attached Certified Survey Map 6022 by Survey Associates Inc. dated 8-25-94 for reference. The CSM 6022 Document was subsequently approved by Mayor Frederick F. Klimetz and the Franklin Common Council September 26, 1994. This Map Document was recorded by the Milwaukee County Register's Office October 4, 1994.

The purpose of this land division was to develop the vacant outlot at a later date. The aforementioned outlot development never took place and the current owner Jose Sandoval's desire is to recombine Parcel 1 & Outlot 1 into a single lot as originally created. For reference regarding this request please see attached Certified Survey by C3E Geomatics dated July 15, 2022.

Therefore, application to City of Franklin Planning Commission for a land combination on the subject premises was made by Mr. Sandoval's Agent Gregg Blando on March 21, 2022. City of Franklin Planning sent a letter response to Mr. Sandoval July 13, 2022.

The following is owner/agent response to Planning Staff Comments:

1. The proposed combined lot meets the standards of the zoning classification(s) per Staff review
2. There is no development taking place in the FW Floodway District.
3. There are no changes to the existing building at this time on the subject premises.
4. The land combination request meets the requirements of City of Franklin UDO-15-5.0106.I per Staff review.

On behalf of Jose Sandoval, I Gregg Blando as owner's Agent, submit the aforementioned narrative and will attend the 7pm City Plan Commission on August 4, 2022. If Staff has any further questions or comments regarding this matter, please call me at your earliest convenience.

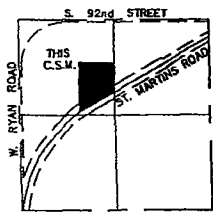
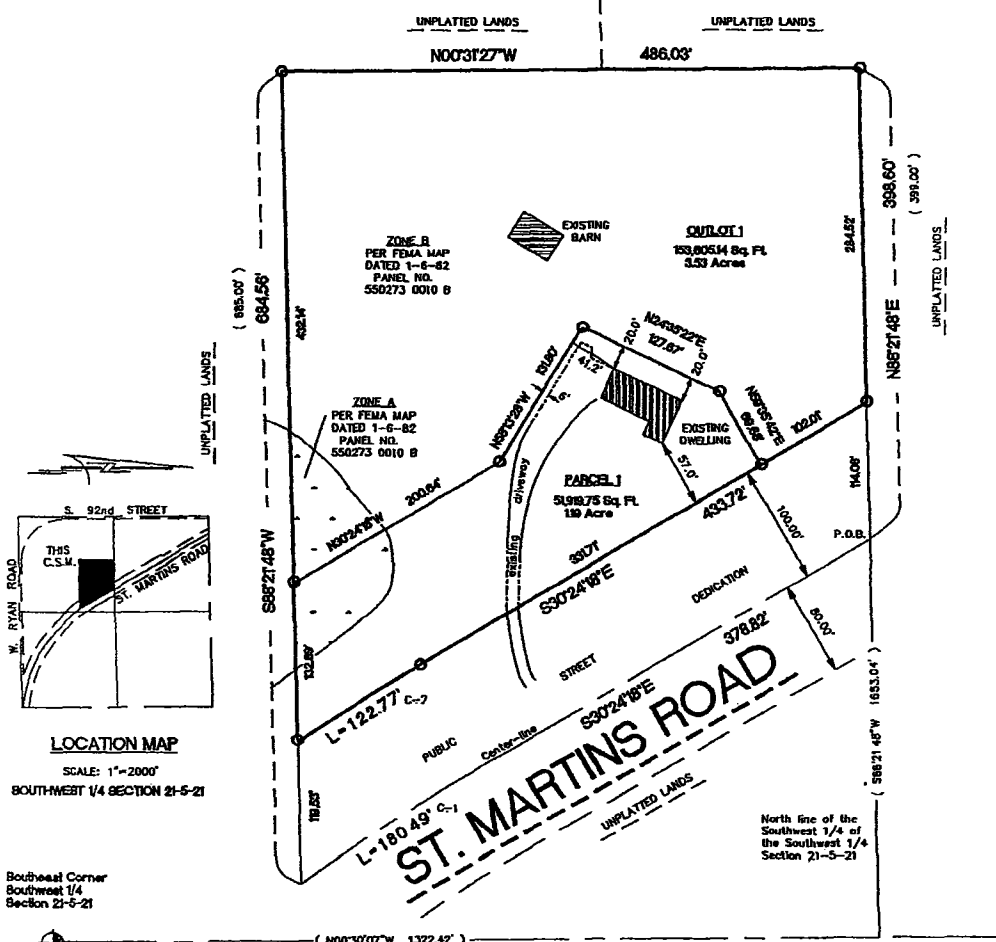
Sincerely,

Gregg Blando

SCA 7 RE D
6460' 14'

CERTIFIED SURVEY MAP NO. 6022

PART OF THE SOUTHWEST 1/4 OF THE SOUTHWEST 1/4 OF SECTION 21, TOWNSHIP 5 NORTH,
RANGE 21 EAST, CITY OF FRANKLIN, MILWAUKEE COUNTY, WISCONSIN.

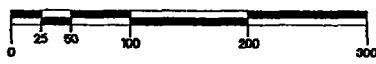


LOCATION MAP
SCALE: 1"=2000'
SOUTHWEST 1/4 SECTION 21-5-21

Southeast Corner
Southwest 1/4
Section 21-5-21

324.324.37
2,530,743.14
EL. 760.84
6" X 6" CONCRETE
MONUMENT

East line of the Southwest 1/4 Section 21-5-21
N00°30'07"W 1322.42'



SCALE: 1"=120'

○ DENOTES 1" X 24" SET IRON PIPE WEIGHING NOT LESS THAN 113 LBS./LIN. FOOT

ALL BEARINGS ARE REFERENCED TO THE EAST LINE OF THE SOUTHWEST 1/4 OF SECTION 21-5-21, WHICH IS ASSUMED TO BEAR N00°30'07"W WISCONSIN STATE PLANE COORDINATE SYSTEM, SOUTH ZONE

() DENOTES RECORDED DIMENSION

SURVEYING ASSOCIATES, INC.
2554 N. 100th STREET
WAUWATOSA, WI 53226
PH-414-257-2212
FAX-414-257-2443

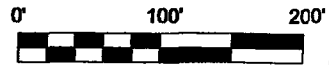
CURVE DATA

CURVE	RADIUS	CHORD	BEARING	DELTA
C-1	1910.08'	180.42'	S33°06'43"E	05°24'50.3"
C-2	2018.08'	122.75'	S32°09'17"E	03°29'58"

FREDERICK W. SHELBSKI
S114
MIL. FREE
1
FREDERICK W. SHELBSKI S-1154

REVISED 8-25-94

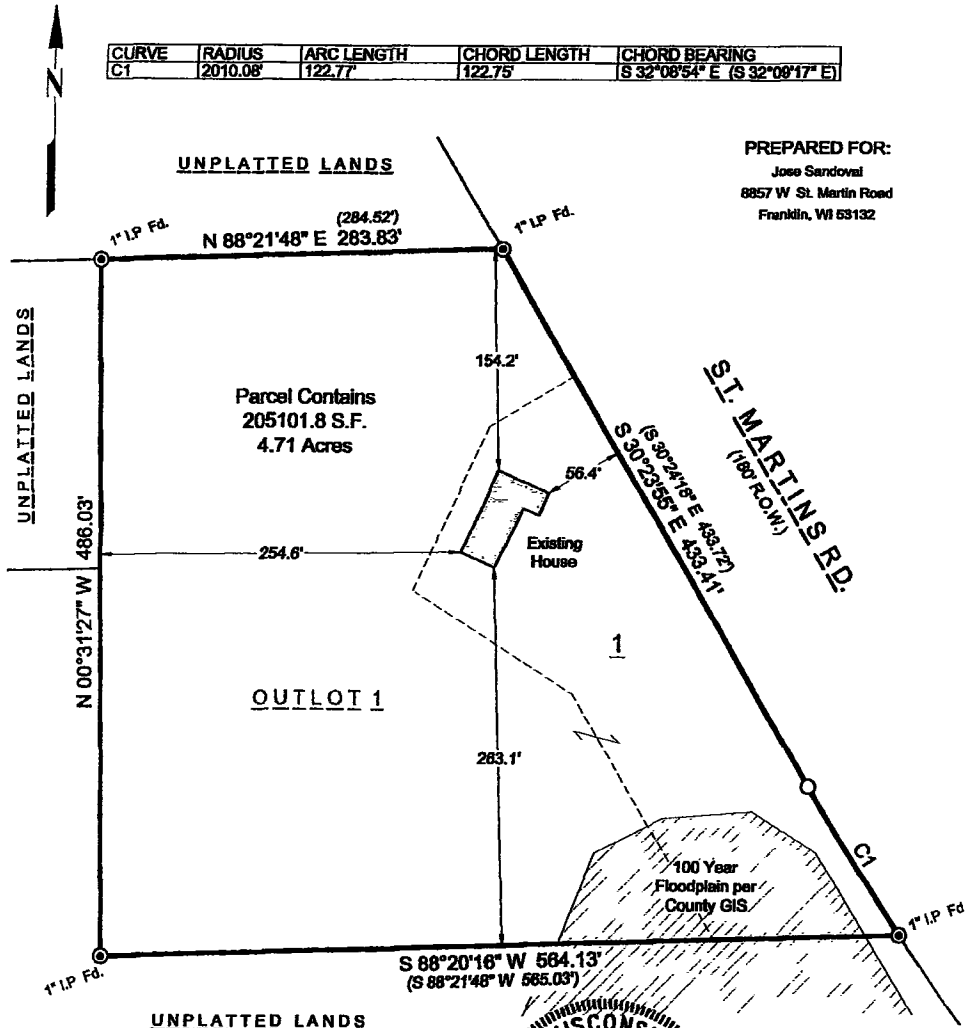
Plat of Survey



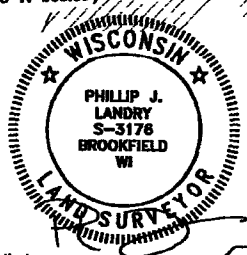
Property Description: Document No. xxx
 PARCEL 1 OF CERTIFIED SURVEY MAP NO. 6022, RECORDED IN THE OFFICE OF REGISTER OF DEEDS FOR MILWAUKEE COUNTY, WISCONSIN ON OCTOBER 4, 1994, REEL 3387. IMAGES 457 TO 459 INCLUSIVE, AS DOCUMENT NO. 7009637, PART OF THE SOUTHWEST 1/4 OF THE SOUTHWEST 1/4 OF SECTION 21, TOWNSHIP 5 NORTH, RANGE 21 EAST, CITY OF FRANKLIN, MILWAUKEE COUNTY, WISCONSIN. AND OUTLOT 1 OF CERTIFIED SURVEY MAP NO. 6022., RECORDED IN THE OFFICE OF REGISTER OF DEEDS FROM MILWAUKEE COUNTY, WISCONSIN ON OCTOBER 4, 1994, REEL 3387, IMAGES 457 TO 459 INCLUSIVE, AS DOCUMENT NO. 7009637, PART OF THE SOUTHWEST 1/4 OF THE SOUTHWEST 1/4 OF SECTION 21, TOWNSHIP 5 NORTH, RANGE 21 EAST, CITY OF FRANKLIN, MILWAUKEE COUNTY, WISCONSIN

BEARINGS ARE REFERENCED TO THE EAST LINE OF THE SW 1/4 SEC. 21-5-21 BEARS S 00°30'07" E

CURVE	RADIUS	ARC LENGTH	CHORD LENGTH	CHORD BEARING
C1	2010.08'	122.77'	122.75'	S 32°08'54" E (S 32°09'17" E)



PREPARED FOR:
 Jose Sandoval
 8857 W St. Martin Road
 Franklin, WI 53132



SURVEYOR'S CERTIFICATE

I hereby certify that we surveyed the property described above and that the map is a true representation thereof and shows the size and location of the property, its exterior boundaries. Said survey meets the minimum standards for property surveys of the Wisconsin Administrative Code (A-E7) and the map hereon is correct to the best of my knowledge and belief. This Survey is solely for the use of the present owners of the property at the date below



260 Regency Court • Lower Level
 Brookfield, WI 53045 • (262) 312-1034
 c3geomatix.com

Dated this 15th Day of July, 2021. Phillip J. Landry S-3176

Job# 21417

<p>APPROVAL</p> <p><i>JW</i></p>	<p>REQUEST FOR COUNCIL ACTION</p>	<p>MEETING DATE</p> <p>08/16/22</p>
<p>REPORTS & RECOMMENDATIONS</p>	<p>A RESOLUTION TO AMEND RESOLUTION NOS. 79-1562, 83-2091, 85-2581, 2009-6579, 2012-6812, 2014-7007 AND 2017-7280 IMPOSING CONDITIONS AND RESTRICTIONS FOR THE APPROVAL OF A SPECIAL USE FOR THE GAZEBO PARK APARTMENT COMPLEX PROPERTY LOCATED AT APPROXIMATELY 6300-6346 SOUTH 35TH STREET TO ALLOW FOR EXPANSION OF TWO DETACHED GARAGES WITHIN THE APARTMENT COMPLEX</p> <p>(GPARK LLC, APPLICANT)</p>	<p>ITEM NUMBER</p> <p>G.2.</p>
<p>At its August 4, 2022, regular meeting, the Plan Commission carried a motion to recommend approval of this Special Use resolution, the vote was 6-0-0, six voted 'aye', no 'noes', no absents.</p> <p style="text-align: center;">COUNCIL ACTION REQUESTED</p> <p>A motion to adopt Resolution 2022-_____, to amend Resolution Nos. 79-1562, 83-2091, 85-2581, 2009-6579, 2012-6812, 2014-7007 and 2017-7280 imposing conditions and restrictions for the approval of a Special Use for the Gazebo Park apartment complex property located at approximately 6300-6346 South 35th Street to allow for expansion of two detached garages within the apartment complex.</p>		



CITY OF FRANKLIN
REPORT TO THE PLAN COMMISSION

Item C.1.

Meeting of August 4, 2022

SPECIAL USE AMENDMENT

RECOMMENDATION: City Development Staff recommends approval of this special use amendment, subject to conditions set forth in the attached draft resolution.

Property Owner:	GPark LLC
Applicant:	GPark LLC
Property Address/Tax Key Number:	6300-6346 S. 35th Street / 719 9990 004
Aldermanic District:	District 3
Agent:	Chester Daxe
Zoning District:	R-8 Multiple-Family Residence District
Use of Surrounding Properties:	East: Two-family residential South and west: Multi-family residential North: Residential (City of Greenfield)
Special Use Proposal:	Expansion of two accessory buildings at the Gazebo Park apartment complex
Staff Planner:	Régulo Martínez-Montilva, AICP, Principal Planner

Special Use Amendment application received on June 6, 2022, to expand two accessory buildings at the Gazebo Park apartment complex: a 4-car garage to be expanded by 400 square feet to a 6-car garage and another 4-car garage by 600 square feet to a 7-car garage. The overall parking of this apartment complex would increase from 48 to 50 parking spaces. The proposed additions would match the existing building materials: vinyl siding, shutters and shingles. Previous Special Use amendments for accessory buildings on this site include resolutions 2009-6579, 2012-6812, 2014-7007 and 2017-7280.

The development, known as Gazebo Park, was approved in 1983 via Resolution 83-2091. A 2 ½ car detached garage was approved in 1985 via Resolution No. 85-2581 for the storage of maintenance materials. The property owner received approval of a 20-foot by 32-foot six-inch 3 ½-car garage in 2009 via Resolution No. 2009-6579 and a 20-foot by 42-foot 4 ½-car garage in 2012 via Resolution No. 2012-6812. Resolution No. 2014-7007 allowed for construction of a 4-car detached garage, and Resolution No. 2017-7280 for construction of 5-car detached garage.

Per Resolution No. 83-2091, 2 parking spaces are required per each efficiency, one bedroom and two bedroom units and 2.5 parking spaces are required for each three or more bedroom unit. The applicant has indicated that a total of forty-eight parking spaces are required. The total number of parking spaces will increase from 48 to 50 parking spaces. Staff is unaware of any parking issues on the site.

The proposed garage expansions meet all R-8 District Development Standards. Note that the R-8 District Special Use Option for multi-family attached dwellings units with more than two dwelling units per structure requires a minimum Open Space Ratio (OSR) of 0.35. OSR is the number derived by dividing the open space of the site by the base site area, and includes natural resource features. Per previous 2017 staff report, the estimated greenspace was approximately 34,500 square feet. The site has an area of approximately 96,267 square feet, resulting in an OSR of about 0.36. With the proposed garage expansion, the greenspace would be reduced by 400 square feet and the resulting OSR of 0.354 would remain in compliance.

The applicant has illustrated double LED floodlights on the building elevations facing the parking lot and one side elevation of the garages. Staff finds that these spotlights will not cause any adverse impacts to the adjacent properties. The applicant is not proposing any new landscaping.

STAFF RECOMMENDATION

City Development staff recommends approval of this Special Use amendment application, subject to the conditions set forth in the attached resolution.

RESOLUTION NO. 2022-_____

A RESOLUTION TO AMEND RESOLUTION NOS. 79-1562, 83-2091, 85-2581, 2009-6579, 2012-6812, 2014-7007 AND 2017-7280 IMPOSING CONDITIONS AND RESTRICTIONS FOR THE APPROVAL OF A SPECIAL USE FOR THE GAZEBO PARK APARTMENT COMPLEX PROPERTY LOCATED AT APPROXIMATELY 6300-6346 SOUTH 35TH STREET TO ALLOW FOR EXPANSION OF TWO DETACHED GARAGES WITHIN THE APARTMENT COMPLEX
(GPARK LLC, APPLICANT)

WHEREAS, GPark LLC having petitioned the City of Franklin for the approval of an amendment to Resolution Nos. 79-1562, 83-2091, 85-2581, 2009-6579, 2012-6812, 2014-7007 and 2017-7280, conditionally approving a Special Use to allow for the construction, location and operation of a multiple family housing development upon property located at approximately 6300-6346 South 35th Street, such property being zoned R-8 Multiple-Family Residence District, more particularly described as follows:

Parcel One (1) of Certified Survey Map No. 4438, recorded on March 13, 1984, on Reel 1620, Image 105, as Document No. 5699798, being a redivision of Parcels One (1), Two (2) and Three (3) of Certified Survey Map No. 3755, being a part of the Northwest One-quarter (1/4) of the Northeast One-quarter (1/4) of Section One (1), Township Five (5) North, Range Twenty-one (21) East, in the City of Franklin, Milwaukee County, Wisconsin; Tax Key Number: 714-9990-004; and

WHEREAS, such proposed amendment being for the purpose of expanding two detached garages within the Gazebo Park apartment complex, the 4-car garage to be expanded by 400 square feet to a 6-car garage, and another 4-car garage to be expanded by 600 square feet, to a 7-car garage (the overall parking within this apartment complex would increase from 48 to 50 parking spaces); and

WHEREAS, such petition having been duly referred to the Plan Commission of the City of Franklin for a public hearing, pursuant to the requirements of §15-9.0103D. of the Unified Development Ordinance, and a public hearing having been held before the Plan Commission on the 4th day of August, 2022, and the Plan Commission thereafter having determined to recommend that the proposed amendment to Special Use be approved, subject to certain conditions, and the Plan Commission further finding that the proposed amendment to Special Use upon such conditions, pursuant to §15-3.0701 of the Unified Development Ordinance, will be in harmony with the purposes of the Unified Development Ordinance and the Comprehensive Master Plan; that it will not have an undue adverse impact upon adjoining property; that it will not interfere with the development of neighboring property; that it will be served adequately by essential public facilities and services; that it will not

GPARK LLC – AMENDMENT TO SPECIAL USE
RESOLUTION NO. 2022-_____
Page 2

cause undue traffic congestion; and that it will not result in damage to property of significant importance to nature, history or the like; and

WHEREAS, the Common Council having received such Plan Commission recommendations and also having found that the proposed amendment to Special Use, subject to conditions, meets the standards set forth under §15-3.0701 of the Unified Development Ordinance.

NOW, THEREFORE, BE IT RESOLVED, by the Mayor and Common Council of the City of Franklin, Wisconsin, that the petition of GPark LLC for the approval of an amendment to Special Use for the property particularly described in the preamble to this Resolution, be and the same is hereby approved, subject to the following conditions and restrictions:

1. That this amendment to Special Use is approved only for the use of the subject property by GPark LLC, successors and assigns, for the Gazebo Park Apartments detached garages expansion, which shall be developed in substantial compliance with and constructed, operated and maintained by GPark LLC, pursuant to those plans City file-stamped June 6, 2022 and annexed hereto and incorporated herein as Exhibit A.
2. GPark LLC, successors and assigns, shall pay to the City of Franklin the amount of all development compliance, inspection and review fees incurred by the City of Franklin, including fees of consultants to the City of Franklin, for the Gazebo Park Apartments detached garages expansion project, within 30 days of invoice for same. Any violation of this provision shall be a violation of the Unified Development Ordinance, and subject to §15-9.0502 thereof and §1-19 of the Municipal Code, the general penalties and remedies provisions, as amended from time to time.
3. The approval granted hereunder is conditional upon GPark LLC and the Gazebo Park Apartments detached garages expansion project for the property located at approximately 6300-6346 South 35th Street: (i) being in compliance with all applicable governmental laws, statutes, rules, codes, orders and ordinances; and (ii) obtaining all other governmental approvals, permits, licenses and the like, required for and applicable to the project to be developed and as presented for this approval.

BE IT FURTHER RESOLVED, that in the event GPark LLC, successors or assigns, or any owner of the subject property, does not comply with one or any of the conditions and restrictions of this amendment to Special Use Resolution, following a ten (10) day notice to cure, and failure to comply within such time period, the Common Council, upon notice and hearing, may revoke the additional Special Use permission granted under this Resolution.

GPARK LLC – AMENDMENT TO SPECIAL USE
RESOLUTION NO. 2022-_____

Page 3

BE IT FURTHER RESOLVED, that any violation of any term, condition or restriction of this Resolution is hereby deemed to be, and therefore shall be, a violation of the Unified Development Ordinance, and pursuant to §15-9.0502 thereof and §1-19 of the Municipal Code, the penalty for such violation shall be a forfeiture of no more than \$2,500.00, or such other maximum amount and together with such other costs and terms as may be specified therein from time to time. Each day that such violation continues shall be a separate violation. Failure of the City to enforce any such violation shall not be a waiver of that or any other violation.

BE IT FURTHER RESOLVED, that this Resolution shall be construed to be an amendment to such Special Use Permit as is contemplated by §15-9.0103 of the Unified Development Ordinance, and that all of the terms and conditions of Resolution Nos. 79-1562, 83-2091, 85-2581, 2009-6579, 2012-6812, 2014-7007 and 2017-7280, not specifically and expressly amended by or in direct conflict with this Resolution, shall remain in full force and effect.

BE IT FURTHER RESOLVED, pursuant to §15-9.0103G. of the Unified Development Ordinance, that the Special Use permission granted under this Resolution shall be null and void upon the expiration of one year from the date of adoption of this Resolution, unless the Special Use has been established by way of completion of the detached garages expansion

BE IT FINALLY RESOLVED, that the City Clerk be and is hereby directed to obtain the recording of a certified copy of this Resolution in the Office of the Register of Deeds for Milwaukee County, Wisconsin.

Introduced at a regular meeting of the Common Council of the City of Franklin this _____ day of _____, 2022.

Passed and adopted at a regular meeting of the Common Council of the City of Franklin this _____ day of _____, 2022.

APPROVED:

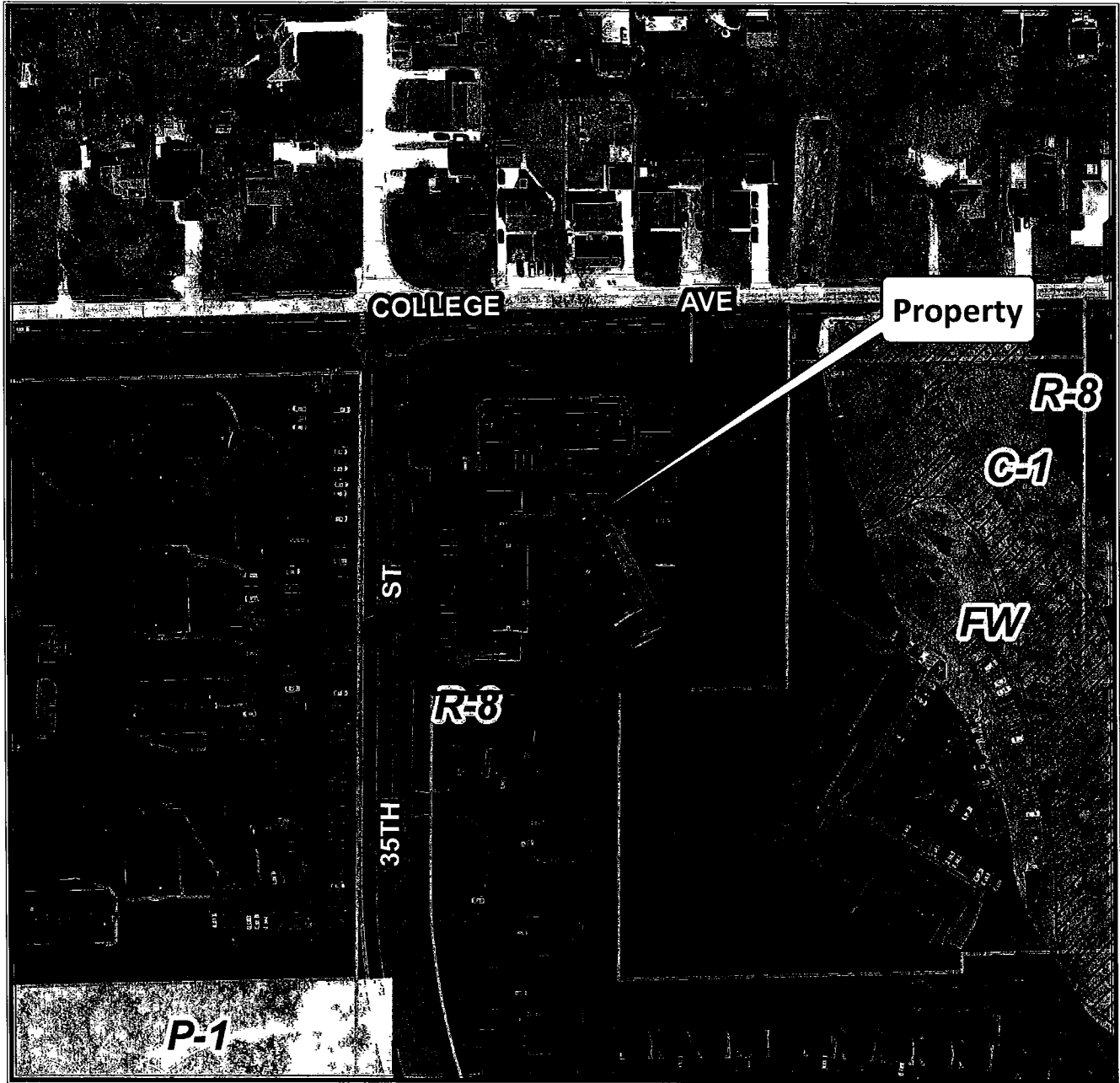
Stephen R. Olson, Mayor

ATTEST:

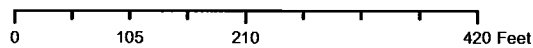
Sandra L. Wesolowski, City Clerk

AYES _____ NOES _____ ABSENT _____

6300-6346 S. 35th Street
TKN: 714 9990 004

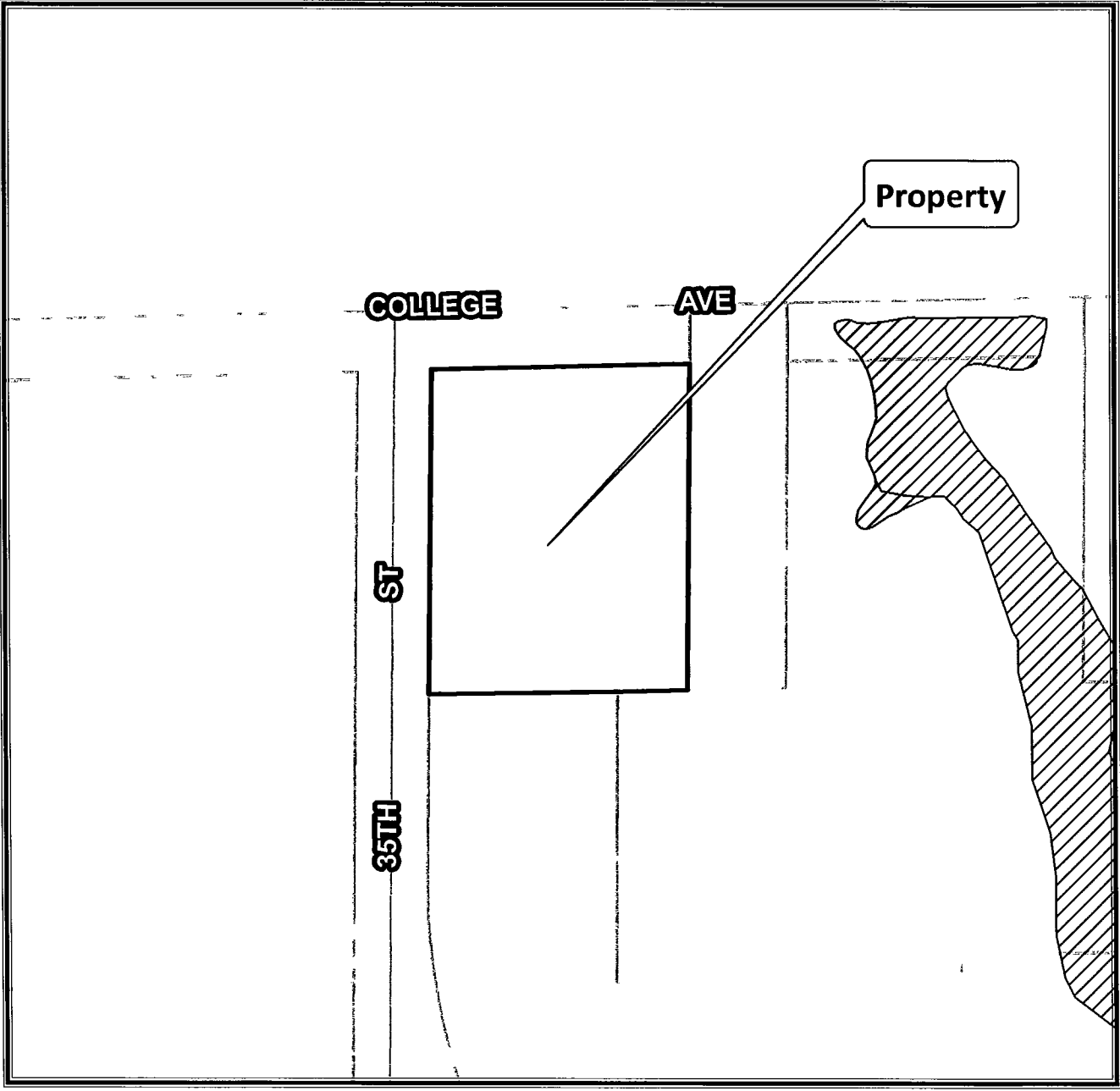


Planning Department
(414) 425-4024

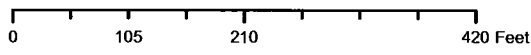


This map shows the approximate relative location of property boundaries but was not prepared by a professional land surveyor. This map is provided for informational purposes only and may not be sufficient or appropriate for legal, engineering, or surveying purposes.

6300-6346 S. 35th Street
TKN: 714 9990 004



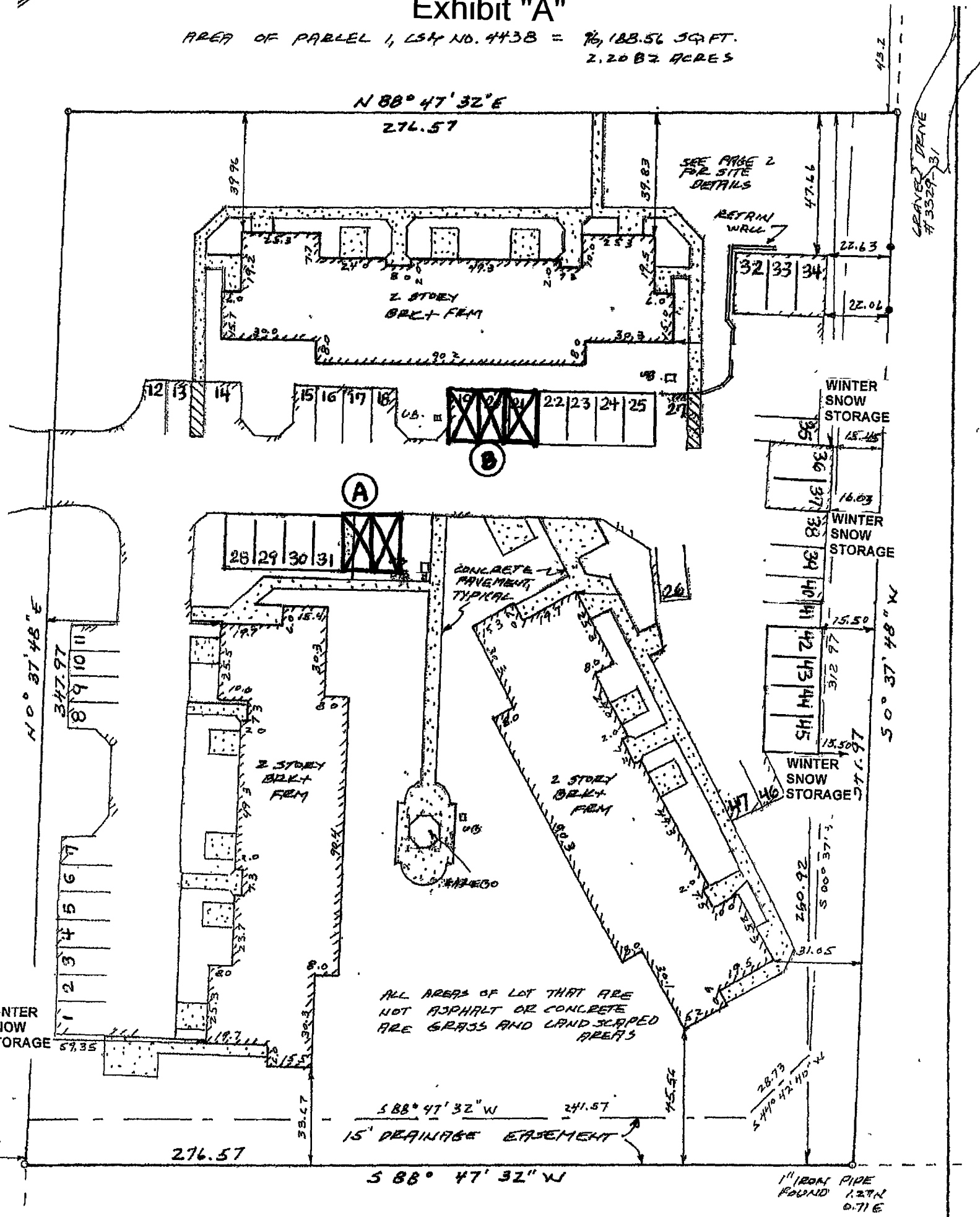
Planning Department
(414) 425-4024



*This map shows the approximate relative location of property boundaries but was not prepared by a professional land surveyor
This map is provided for informational purposes only
and may not be sufficient or appropriate for legal engineering or surveying purposes*

Exhibit "A"

AREA OF PARCEL 1, LSA NO. 4438 = 76,188.56 SQ. FT.
2.2082 ACRES



N 0° 37' 48" E

WINTER STORAGE

88

N 88° 47' 32" E
276.57

SEE PAGE 2 FOR SITE DETAILS

RETAIN WALL

(A)

(B)

CONCRETE PAVEMENT TYPICAL

2 STORY BRK+FRM

2 STORY BRK+FRM

ALL AREAS OF LOT THAT ARE NOT ASPHALT OR CONCRETE ARE GRASS AND LANDSCAPED AREAS

S 88° 47' 32" W 241.57
15' DRAINAGE EASEMENT

S 88° 47' 32" W

1" IRON PIPE FOUND 1.27N 0.71E

MEMORANDUM

Date: June 27, 2022
To: Chester Daxe, GPark, LLC
From: Department of City Development
Régulo Martínez-Montilva, AICP, Principal Planner
RE: Application for Special Use amendment – Gazebo Park, expansion of 2 detached garages
6300-6346 S. 35th Street, Franklin WI-53132

Staff comments are as follows for the Special Use amendment application received on June 6, 2022:

City Development Department comments

1. City Development Department staff has no comments regarding this Special Use amendment.

Engineering Department comments

2. *I have no comments on the Special Use Amendment. Please, kindly have the applicant use the attached plat survey and show the proposed garage extension for building permit purposes*

Fire Department comments

3. *Follow all relevant WI DSPS and IBC code requirements for fire protection systems for given occupancy, use, and construction types*
4. *Fire Extinguisher placement as per NFPA 10*
5. *At no time may any Hazardous, Combustible, or Flammable Materials exceed allowable quantities*

Inspection Services Department comments

6. *Structures shall be designed and constructed in accordance with the Wisconsin Commercial Building Code Building separation distance requirements in the code will apply*
7. *Project will require separate Building and Electrical Permits (if wiring is involved)*

Police Department comments

8. *The PD has no comment regarding this request*

Planning Department
 9229 West Loomis Road
 Franklin, Wisconsin 53132
 (414) 425-4024
franklinwi.gov



APPLICATION DATE: 04-20-2022

STAMP DATE: Franklin only

JUN 06 2022

City Development

COMMON COUNCIL REVIEW APPLICATION

PROJECT INFORMATION [print legibly]

APPLICANT [FULL LEGAL NAMES]	APPLICANT IS REPRESENTED BY [CONTACT PERSON]
NAME: Chester Daxe	NAME: Chester Daxe
COMPANY: GPark LLC	COMPANY: GPark LLC
MAILING ADDRESS: 79 Ashbourne Rd	MAILING ADDRESS: 79 Ashbourne Rd
CITY/STATE: Columbus, OH ZIP: 43209	CITY/STATE: Columbus, OH ZIP: 43209
PHONE: 414-629-7704	PHONE: 414-629-7704
EMAIL ADDRESS: chdaxe@yahoo.com	EMAIL ADDRESS: chdaxe@yahoo.com

PROJECT PROPERTY INFORMATION

PROPERTY ADDRESS: 6300-6346 S 35th St	TAX KEY NUMBER: 714 9990 004
PROPERTY OWNER: GPark LLC	PHONE: 414-629-7704
MAILING ADDRESS: 79 Ashbourne Rd	EMAIL ADDRESS: chdaxe@yahoo.com
CITY/STATE: Columbus, OH ZIP: 43209	DATE OF COMPLETION: office use only

APPLICATION TYPE

Please check the application type that you are applying for

- Concept Review
 Comprehensive Master Plan Amendment
 Planned Development District
 Rezoning
 Special Use / Special Use Amendment
 Unified Development Ordinance Text Amendment

Most requests require Plan Commission review and Common Council approval
 Applicant is responsible for providing Plan Commission resubmittal materials up to 12 copies pending staff request and comments.

SIGNATURES

The applicant and property owner(s) hereby certify that: (1) all statements and other information submitted as part of this application are true and correct to the best of applicant's and property owner(s)' knowledge; (2) the applicant and property owner(s) has/have read and understand all information in this application; and (3) the applicant and property owner(s) agree that any approvals based on representations made by them in this Application and its submittal, and any subsequently issued building permits or other type of permits, may be revoked without notice if there is a breach of such representation(s) or any condition(s) of approval. By execution of this application, the property owner(s) authorize the City of Franklin and/or its agents to enter upon the subject property(ies) between the hours of 7:00 a.m. and 7:00 p.m. daily for the purpose of inspection while the application is under review. The property owner(s) grant this authorization even if the property has been posted against trespassing pursuant to Wis Stat §943.13.

(The applicant's signature must be from a Managing Member if the business is an LLC, or from the President or Vice President if the business is a corporation. A signed applicant's authorization letter may be provided in lieu of the applicant's signature below, and a signed property owner's authorization letter may be provided in lieu of the property owner's signature[s] below. If more than one, all of the owners of the property must sign this Application).

- I, the applicant, certify that I have read the following page detailing the requirements for plan commission and common council approval and submittals and understand that incomplete applications and submittals cannot be reviewed.

PROPERTY OWNER'S SIGNATURE 	APPLICANT SIGNATURE
NAME & TITLE: Chester Daxe, Member DATE: 04-20-2022	NAME & TITLE: Chester Daxe, Member DATE: 04-20-2022
PROPERTY OWNER SIGNATURE	APPLICANT REPRESENTATIVE SIGNATURE
NAME & TITLE: DATE:	NAME & TITLE: DATE:

RESPONSE TO THE GENERAL STANDARDS

6-1-2022

A. General standards.

1. Ordinance and Comprehensive Master Plan Purposes and Intent.

The proposal meets the R-8 standards and the development is consistent with multi-Family residential use. The property consists of three 8-family buildings built in 1984 Along with a 2-car garage built in 1986 and a 3 ½-car garage built in 2010 and a 4 ¼-car garage built in 2012 and a 4-car garage built in 2014 and another 4-car garage built in 2017 on 2.2 acres. The site is 96,238 square feet while the three residential buildings cover 14,994 square feet.

2. No Undue Adverse Impact.

There is no impact on neighboring properties as the proposed garage additions are completely surrounded by the existing 8-family buildings and garages and do not border a neighboring property or the streets. We propose to replace 400 square feet of grass with the extension of garage (A) and 600 square feet of blacktop parking with the extension of garage (B). The total number of parking spaces is increased by two.

3. No Interference with Surrounding Development.

See above #2 answer.

4. Adequate Public Facilities.

The standard is not applicable as there is no need for public facilities or services other than police and fire protection.

5. No traffic Congestion.

The proposed five indoor parking spaces simply provide convenience for the existing tenants and do not bring additional vehicles onto the property.

6. No Destruction of Significant Features.

The existing paved parking area and the existing grass area is proposed to be replaced with indoor parking with no other changes whatsoever.

7. Compliance with Standards.

The proposed garage extensions are compliant with R-8 standards.

B. Special Standards for Specified Special Uses.

N/A

C. Considerations.

1. Public Benefit.

N/A

2. Alternative Locations

N/A

3. Mitigation of Adverse Impacts.

N/A

4. Establishment of Precedents of Incompatible Uses in the Surrounding Area.

N/A

Name of Property: GAZEBO PARK

Owner of property: GPARK LLC
79 Ashbourne Rd
Bexley, OH 43209

PROJECT NARRATIVE 6-1-2022
6300-6346 S 35th St, Franklin WI 53132

The project consists of two additions to two existing garages. 4-car garage (A) would be expanded by an additional 400 square feet to a 6-car garage and 4-car garage (B) would be expanded by an additional 600 square feet to a 7-car garage. The locations have been drawn on the property survey. There would be a net increase of two parking spaces from the present total of 48 parking spaces to 50 parking spaces.

There would be no change from the existing total of six outside ADA parking spaces which are designated by ADA signs. There are also two indoor ADA parking spaces. The total number of ADA parking spaces is eight. No additional ADA parking spaces are proposed.

No other changes of any type are contemplated for the existing buildings or features of the property, other than restoring the asphalt paving approach to the newly enlarged garages.

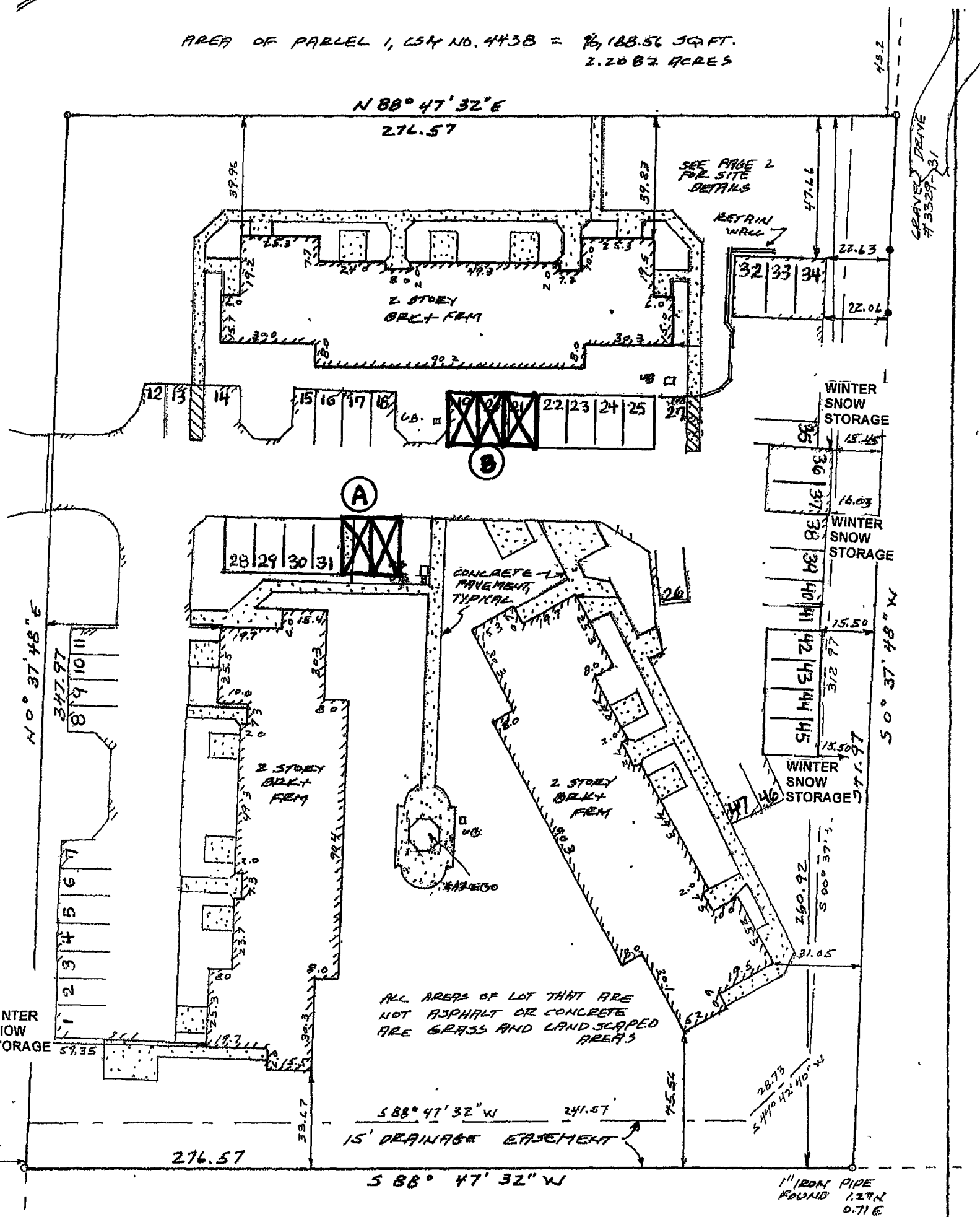
The proposed changes would in terms of architectural character resemble the existing garage buildings on the property.

No landscaping areas would be added. The lawn areas bordering the new garages will be restored up to the new garages. The amount of green space to be eliminated measures 20' by 20'.

The garage floor elevation shall be specified by the building inspector.

No additional keys will be supplied, as the master keys in the Knox box will cover the existing garage service doors.

AREA OF PARCEL 1, LSA NO. 4438 = 76,188.56 SQ. FT.
2.2082 ACRES



N 88° 47' 32" E
276.57

SEE PAGE 2
FOR SITE
DETAILS

RETAIN
WALL

(A)

(B)

N 0° 37' 48" E

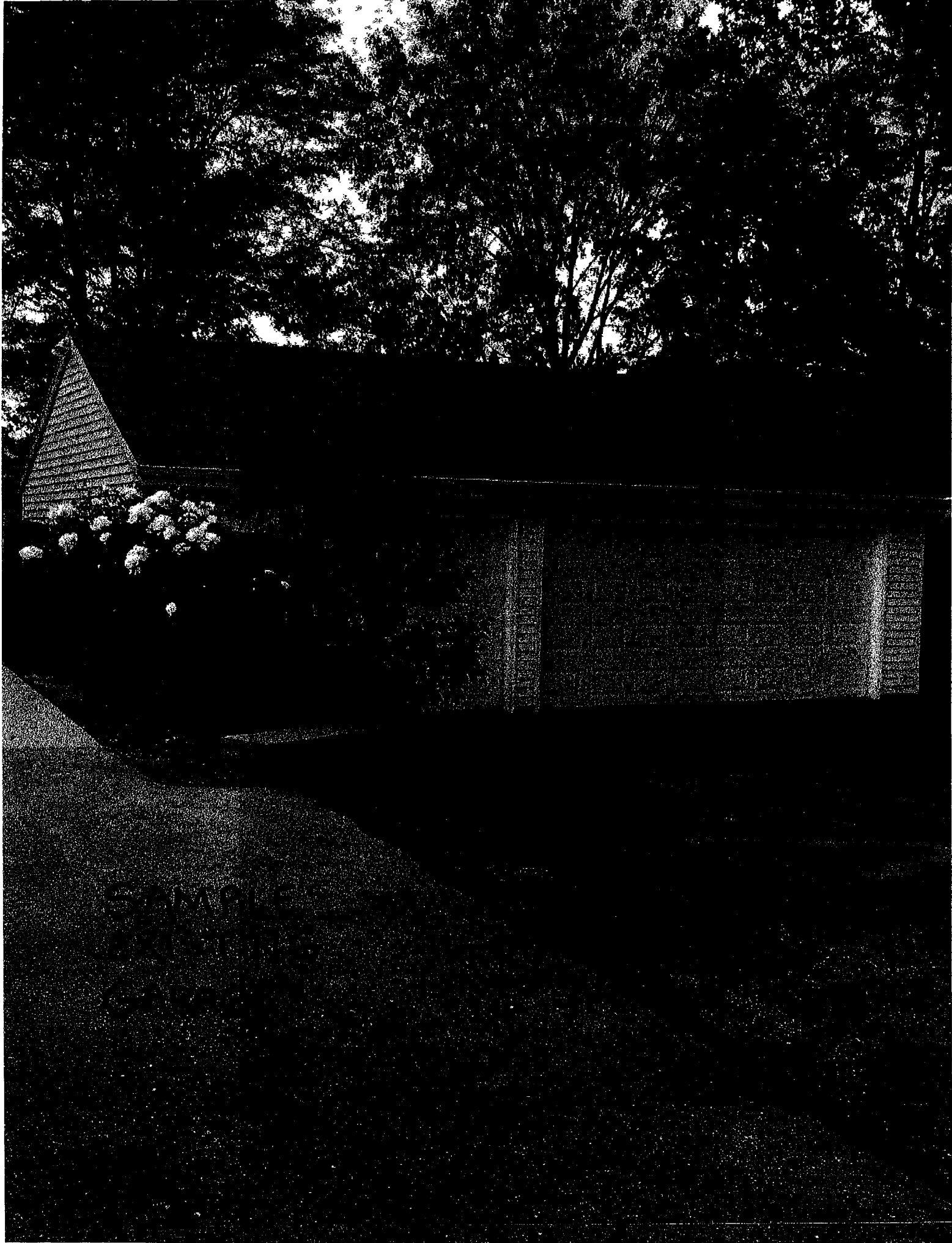
N 50° 37' 48" W

ALL AREAS OF LOT THAT ARE
NOT ASPHALT OR CONCRETE
ARE GRASS AND LAND SCAPED
AREAS

S 88° 47' 32" W 276.57
15' DRAINAGE EASEMENT

S 88° 47' 32" W

1" IRON PIPE
FOUND 1.27' W
0.71 E



6300-6346 S. 35th St, Franklin
Scale: 1/4" = 1'-0"

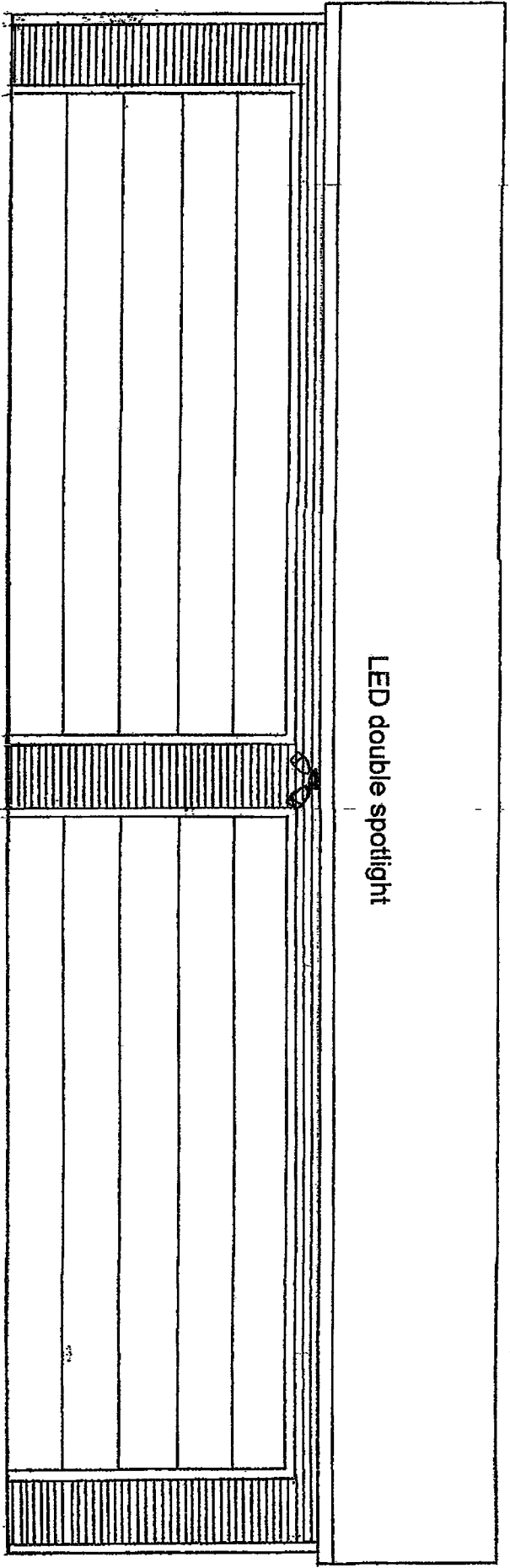
Name of property: GAZEBO PARK

Owner of property: GPark LLC
~~6500 S. 27th St, Suite 0-1170~~
Oak Creek, WI 53154

SAMPLE OF EXISTING

The proposed vinyl siding, shutters & roofing shingles are exact matches to the existing materials.

LED double spotlight



Both garage doors & the passage door are colonial style stamped metal with integrated panels, that match the existing doors.

One double spotlight will be mounted on the eave, ABOVE the overhead doors.

Building height: 13'-0" or 1.3 stories

DOUBLE GARAGE DOOR ELEVATION

6300-6346 S. 35th St, Franklin
Scale: 1/4" = 1'-0"

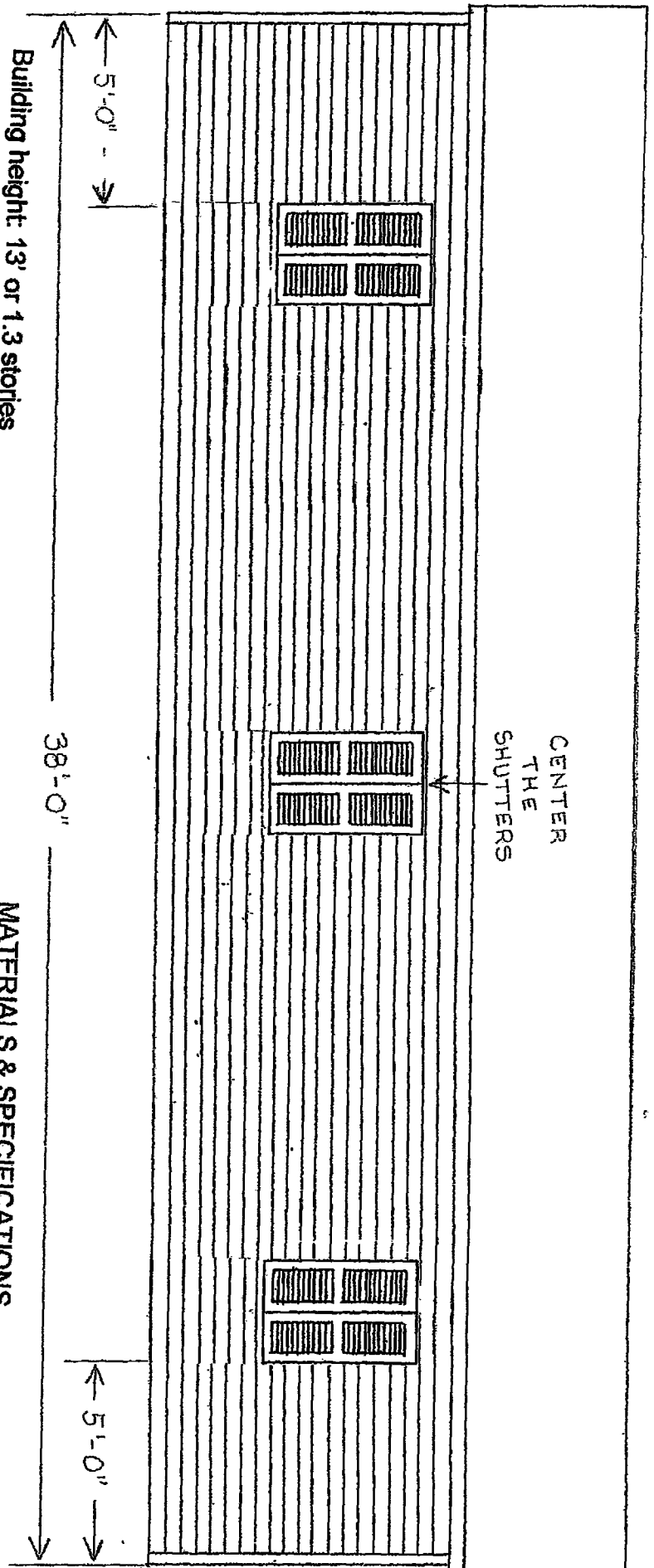
Name of property
GAZEBO PARK

SAMPLE OF EXISTING

Owner of property:
GPark LLC

~~6509 Q. 27th St. Suite 9-1176
Oak Creek, WI 53091~~

NORTH ELEVATION



MATERIALS & SPECIFICATIONS

- Gable roof with 6/12 pitch trusses 2' O.C
- Roof shingles by: Oakridge in "driftwood" color (30 year)
- Siding, solid vinyl by: Royal in "beige" color, double 4" lap
- (Siding & roofing are exact match for existing buildings)
- Eaves & gable trim & door frames to be white
- 2x4 wall framing material
- 0" gable & 12" eave overhangs
- 7/16" OSB wall sheathing
- 7/16" OSB roof sheathing

6300-6346 S. 35th St, Franklin

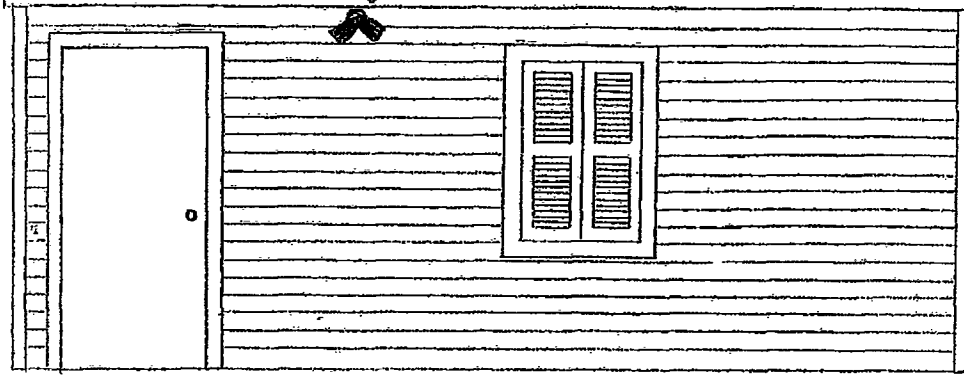
Name of property: GAZEBO PARK

Scale: 1/4" = 1'-0"

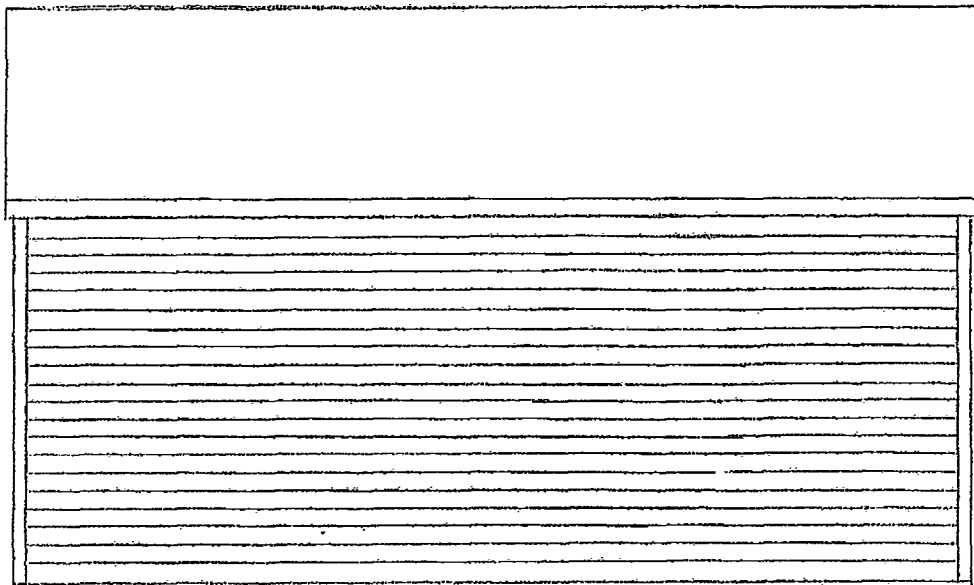
SAMPLE OF EXISTING

The proposed vinyl siding, shutters & roofing shingles are exact matches to the existing materials.

Double LED floodlight



WEST ELEVATION



EAST ELEVATION

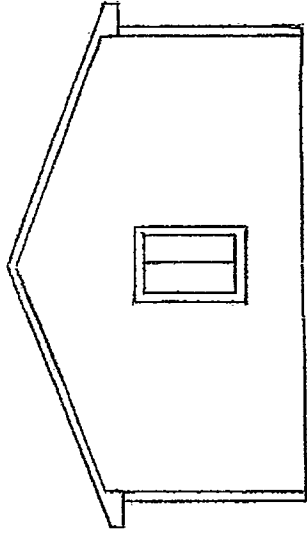
Owner of property: GPark LLC
6500 G. 27th St, Suite 9 #178

***EXAMPLE**

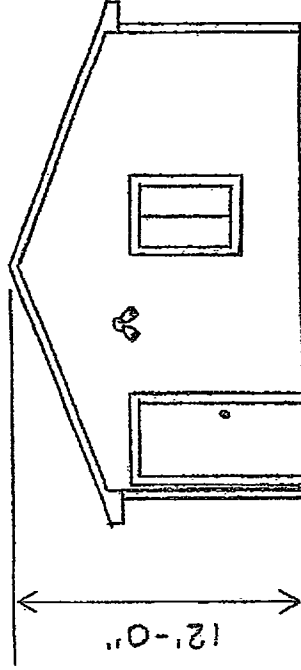
MATERIALS & SPECIFICATIONS

- Gable roof with 6/12 pitch, Trusses 2' O.C.
- Roof Shingles by: Oakridge in "driftwood" color (30 year)
- Siding, solid vinyl by: Royal in "beige" color, double 4" lap
- Siding & roofing are exact match to three existing newer garages
- Shutters & Colonial style overhead doors also match existing
- Eaves & gable trim & door frames to be white
- 2x4 wall framing material
- 0" gable overhang & 12" eave overhang
- 7/16" OSB wall sheathing & 7/16" OSB roof sheathing

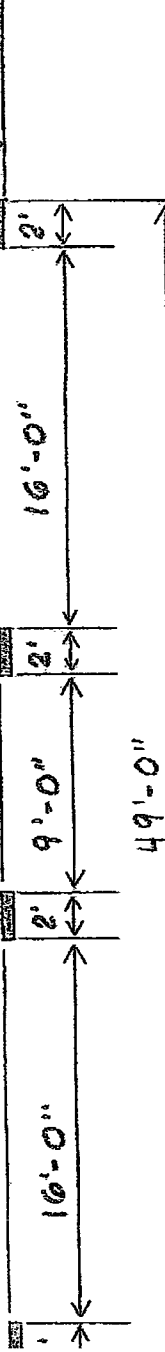
Scale: 1/8" = 1'-0"



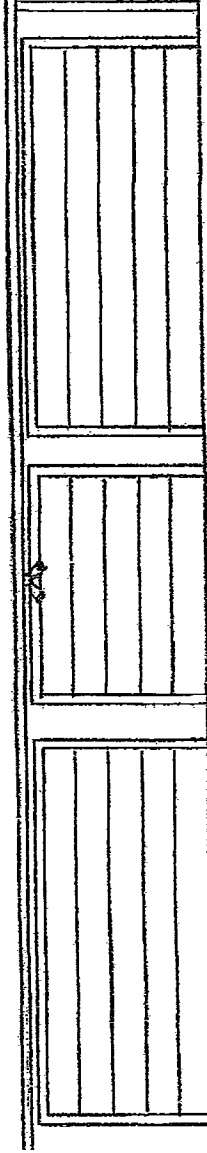
Double LED floodlight



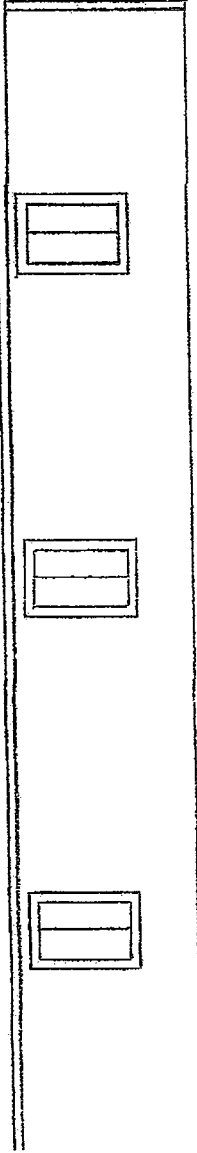
GARAGE EXTENSIONS WILL MATCH EXISTING FORMS, MATERIALS & DETAILS



Double LED floodlight



The shutter bottom height should align with existing shutter heights.
Center shutter pairs on each of the overhead doors.



GAZEBO PARK
6300-6346 S. 35th ST, FRANKLIN
 Owned by: GParik LLC
 6508 S. 27th St, Suite 9 #176
 Oak Creek, WI 53154

APPROVAL <i>slw</i>	REQUEST FOR COUNCIL ACTION	MEETING DATE 8/16/2022
REPORTS & RECOMMENDATIONS	City of Franklin's Community Development Block Grant Program Projects for 2023	ITEM NUMBER G.3.

The City of Franklin's Community Development Block Grant (CDBG) Program projects for 2023 were discussed at the August 2, 2022 Common Council Meeting; the 8/2/2022 Council Action Sheet is attached for your reference. At that meeting, the Council approved a motion authorizing the Director of Administration to submit Letters of Support for the Eras Senior Network, Inc. Faith in Action Milwaukee County Program for \$5,000 and Oak Creek Salvation Army – Homelessness Program for \$3,000; to submit a project application for Senior Health-Related Educational Programming for \$5,000; and to submit a project application for a Franklin Home Repair Grant Program, administered directly through Milwaukee County, for \$42,000, by the deadline date of August 26, 2022.

After a training session and further discussions with Milwaukee County regarding CDBG funding, it was noted that approximately \$80,000 is being used in 2022 for the Franklin Home Repair Program. Since the need for this home repair grant program for income eligible Franklin residents has grown substantially, staff is requesting approval to submit an application for the Home Repair Grant Program for 2023 in the amount of \$65,000 rather than the \$42,000 that was originally requested and approved by the Common Council.

Therefore, staff recommends completing and submitting final 2023 Milwaukee County CDBG applications by the deadline date of August 26, 2022 for the following City of Franklin projects and amounts:

2023 Recommended Franklin CDBG Applications:	Amount:
Senior Health-Related Educational Programming (Health Department)	\$5,000
Eras Senior Network Faith in Action Milwaukee Co. Program (Letter of Support-\$5,000)	5,000
Oak Creek Salvation Army – Homelessness (Letter of Support-\$3,000)	3,000
<i>Franklin Home Repair Grant Program</i>	<u>65,000</u>
Total 2023 Franklin Application Submittal	\$78,000

COUNCIL ACTION REQUESTED

Motion to authorize the Director of Administration to submit Letters of Support for the Eras Senior Network, Inc. Faith in Action Milwaukee County Program for \$5,000 and Oak Creek Salvation Army – Homelessness Program for \$3,000; to submit a project application for Senior Health-Related Educational Programming for \$5,000; and to submit a project application for a Franklin Home Repair Grant Program, administered directly through Milwaukee County, for \$65,000, by the deadline date of August 26, 2022.

APPROVAL	REQUEST FOR COUNCIL ACTION	MEETING DATE 8/2/2022
REPORTS & RECOMMENDATIONS	City of Franklin's Community Development Block Grant Program Projects for 2023	ITEM NUMBER

Per Milwaukee County, the timeline for the 2023 Community Development Block Grant (CDBG) applications is as follows:

July 25-August 2, 2022: 2023 CDBG Training Sessions for Applicants with one training being required per applicant. This requirement has already been met by Department of Administration staff.

July 29, 2022: 2023 CDBG application available online.

August 26, 2022: CDBG applications due to Milwaukee County Housing by 4 p.m.

December 2022: This is the timeframe tentatively set forth in which 2023 applications are presented to the Milwaukee County Committee on Community, Environment and Economic Development.

2022 CDBG PROJECT ALLOCATIONS

For its 2022 CDBG allocations, the City of Franklin issued a letter of support in the amount of \$5,000 to Eras Senior Network, Inc. for their Faith in Action Milwaukee County Program; a letter of support in the amount of \$3,000 to Oak Creek Salvation Army for its Homelessness Program; applied and received notice of award in the amount of \$5,000 for the Senior Community Health Educational Program (Health Department); and applied and received notice of award in the amount of \$42,000 for the 2022 Franklin Home Repair Grant Program.

2023 CDBG APPLICATION IDEAS

As a refresher, the Milwaukee County CDBG program has tightened their program parameters to ensure that no more than 15% of project dollars go towards Public Service projects, social service type programs, not involving construction per the federal requirements. Per federal law, the focus of the CDBG program is for construction related projects. Note that the County considers those projects that receive a letter of support as using a portion of Franklin's allocation.

The size of Franklin's allocation limits its reasonable application for major construction projects, which is the primary intent of the Federal CDBG program. Efforts to generate public input and ideas in recent years have not been very successful largely in part to the limitations of the funds in relation to Franklin's demographic makeup. Our current allocation strategy supports beneficial services and can be very helpful in maintaining a small portion of the City's older housing stock through the Franklin Home Repair Grant Program, while targeting CDBG-eligible participants.

For 2023, staff recommends continuing to fund the current Public Service Projects as follows: (1) The Senior Health-Related Educational Programming by the Franklin Health Department in the amount of \$5,000; (2) the letter of support for the Oak Creek Salvation Army – Homelessness Program in the amount of \$3,000; and (3) the letter of support for the Eras Senior Network Faith in Action Milwaukee County Program in the amount of \$5,000. If the Common Council agrees, the City will forward letters of support to Eras Senior Network, Inc. and the Oak Creek Salvation Army, and those agencies will then proceed to prepare and submit the necessary 2023 application to Milwaukee County. Both agencies have confirmed that they will again be applying for 2023 Milwaukee County CDBG funding and greatly thank the City for their continued support for their

crucial programs. Note that it is possible that the County could reduce the total of available funds for Franklin Public Service projects to approximately \$7,500-\$9,000, which is 15% of a typical allocation between \$50,000-\$60,000.

Also for 2023, staff recommends that the City once again apply for funding towards a “Franklin Home Repair Grant Program” as it had applied for and was awarded funding for the years 2018 through 2022. The current 3-year Cooperation Agreement with the County includes language that allows a community to submit proposed projects for funding “and/or have all or some of its allotment for that year applied to the Home Repair Program”. The Milwaukee County Home Repair Program is administered directly through Milwaukee County and provides grants to low-income owner-occupants of single-family homes to make necessary repairs to their homes. Typical repairs include making accessibility accommodations, repairing electrical systems, water/sewer service, and/or porches; replacing roofs, siding, trim, and/or windows. The application for the Home Repair Grant Program is set up to help as many income-eligible, single-family homeowners in Franklin as possible – with grants being up to one-half the project cost, no greater than \$10,000. This \$10,000 amount is flexible and can be modified, increased or decreased) by Milwaukee County depending on how many income-eligible applications are received and the amount of the repairs.

The Franklin Home Repair Grant Program has been doing fairly well. Per Milwaukee County, after 6 home repair projects are completed this summer, each receiving \$10,000 from the Franklin Home Repair Grant, approximately \$3,000 will be remaining from the total 2018-2021 Franklin Home Repair Grant Funds. Applications for use of the 2022 Franklin Home Repair Grant funding of \$42,000 are not able to be processed until the funds are received from HUD, which should be within the next couple of months if approved. Once funding is received, applications can then be processed using the 2022 Franklin Home Repair Grant funds.

Staff recommends completing and submitting final 2023 Milwaukee County CDBG applications by the deadline date of August 26, 2022 for the following City of Franklin projects and amounts:

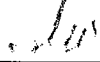
2023 Recommended Franklin CDBG Applications:	Amount:
Senior Health-Related Educational Programming (Health Department)	\$5,000
Eras Senior Network Faith in Action Milwaukee Co. Program (Letter of Support-\$5,000)	5,000
Oak Creek Salvation Army – Homelessness (Letter of Support-\$3,000)	3,000
Franklin Home Repair Grant Program (Remaining amount)	<u>42,000</u>
Total 2023 Franklin Application Submittal	\$55,000

NOTE: A public hearing by the City of Franklin is not required as the Milwaukee County Board schedules/holds a public hearing on all project recommendations.

COUNCIL ACTION REQUESTED

Motion to authorize the Director of Administration to submit Letters of Support for the Eras Senior Network, Inc. Faith in Action Milwaukee County Program for \$5,000 and Oak Creek Salvation Army – Homelessness Program for \$3,000; to submit a project application for Senior Health-Related Educational Programming for \$5,000; and to submit a project application for a Franklin Home Repair Grant Program, administered directly through Milwaukee County, for \$42,000, by the deadline date of August 26, 2022.

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APPROVAL 	REQUEST FOR COUNCIL ACTION	MTG. DATE August 16, 2022
Reports & Recommendations	A Resolution to “Certify a Non-Traditional Project Administration and Delivery for the 116th Trail (Wisconsin Department of Transportation Project ID 2976-00-02/72” for a Trail Project along S. 116th Street from W. Mayers Drive to W. Ryan Road and Muskego Corporate Limits	ITEM NO. G.4.

BACKGROUND

A Congestion Mitigation and Air Quality Improvement (CMAQ) Program grant has been awarded to the City of Franklin by the Wisconsin Department of Transportation (WisDOT) in the amount of \$832,000. This trail segment is located on the WE Energies property (former interurban railroad) along S. 116th Street from St. Martin of Tours Church to the Muskego Corporate limits. Common Council authorized the State/Municipal Financial Agreement on June 7, 2022.

Among other items to meet the requirements for the WisDOT and CMAQ, the City is required to provide a Certification for Non-Traditional Project Administration and Delivery. Essentially, this project is not a typical WisDOT project where WisDOT personnel run the project from start to finish. The sponsoring local government agency (City of Franklin) must certify that the project will be run to follow all applicable guidelines.

The City Engineer / Director of Public Works has completed the needed training provided by WisDOT to successfully complete the project.

ANALYSIS

This certification must be approved for the project to continue. Any suggestions for edits are welcome before the certification is submitted. Note that GRAEF-USA, Inc. is providing design efforts with local monies and construction administration (inspection) will be a yet to be selected consultant procured using the Procurement Policy adopted on 4/20/2021 and enclosed with the certification.

FISCAL NOTE

As noted in the June 7, 2022 Council Action- \$832,000 is 80% of the WisDOT portion of the project. The agreement identified \$223,000 of Franklin costs to include 20% of construction and \$15,000 for a design review fee. These Franklin costs were estimated to be \$223,000. These costs do not include the design costs already incurred of approximately \$135,000 and an anticipated change order found elsewhere on the agenda of \$70,000.

The local funds (estimated \$223,00 + \$135,000 + \$70,000 = \$428,000) of this capital improvement (Fund 46-0551-5833) project are eligible for 62% reimbursement from the accumulated park impact fees (estimated to be \$265,360).

RECOMMENDATION

Authorize Resolution 2022-____ a resolution to “Certify a Non-Traditional Project Administration and Delivery for the 116th Trail (Wisconsin Department of Transportation Project ID 2976-00-02/72” for a Trail Project along S. 116th Street from W. Mayers Drive to W. Ryan Road and Muskego Corporate Limits, subject to any technical corrections.

STATE OF WISCONSIN: CITY OF FRANKLIN: MILWAUKEE COUNTY

RESOLUTION NO. 2022 - _____

A RESOLUTION TO “CERTIFY A NON-TRADITIONAL PROJECT ADMINISTRATION AND DELIVERY FOR THE 116TH TRAIL (WISCONSIN DEPARTMENT OF TRANSPORTATION PROJECT ID 2976-00-02/72” FOR A TRAIL PROJECT ALONG S. 116TH STREET FROM W. MAYERS DRIVE TO W. RYAN ROAD AND MUSKEGO CORPORATE LIMITS

WHEREAS, A Congestion Mitigation and Air Quality Improvement (CMAQ) Program grant has been awarded to the City of Franklin by the Wisconsin Department of Transportation (WisDOT) in the amount of \$832,000; and

WHEREAS, Resolution 2022-7867 authorized a State/Municipal Financial Agreement with WisDOT for this project; and

WHEREAS, a stipulation of the grant is that Franklin provide the non-traditional project administration and delivery throughout the project; and

WHEREAS, Glen E. Morrow, PE, City Engineer / Director of Public Works is a licensed professional engineer employed by the City of Franklin and has completed the requirements to perform the role of a “Person of Responsible Charge.”

NOW, THEREFORE, BE IT RESOLVED by the Mayor and Common Council of the City of Franklin, that a “Certification for a Non-Traditional Project Administration and Delivery for the 116th Trail” be signed and submitted by all applicable City representatives to proceed with a trail project along S. 116th Street from w. Mayers Drive to W. Ryan Road and Muskego Corporate limits.

Introduced at a regular meeting of the Common Council of the City of Franklin this _____ day of _____, 2022 by Alderman _____.

Passed and adopted at a regular meeting of the Common Council of the City of Franklin this _____ day of _____, 2022.

APPROVED:

Stephen R. Olson, Mayor

ATTEST:

Sandra L. Wesolowski, City Clerk

AYES _____ NOES _____ ABSENT _____

CERTIFICATION FOR NON-TRADITIONAL PROJECT ADMINISTRATION AND DELIVERY

SPONSOR INFORMATION

Name of Government Agency City of Franklin Located in Milwaukee County

State Agency Wisconsin DOT Other _____ WisDOT Region SE

Project I.D. & Description: 2976-00-02/72 116th Trail

Sponsors Primary Point of Contact: Glen E. Morrow, PE

Name		
City Engineer	<u>9229 W. Loomis Road, Franklin, WI 53132</u>	
Title	Address	
<u>414-425-7510</u>	<u>414-425-3106</u>	<u>gmorrow@franklinwi.gov</u>
Phone	Fax	Email

Sponsors Second Point of Contact: Tyler Beinlich, PE

Name		
Assistant City Engineer	<u>9229 W. Loomis Road, Franklin, WI 53132</u>	
Title	Address	
<u>414-425-7510</u>	<u>414-425-3106</u>	<u>tbeinlich@franklinwi.gov</u>
Phone	Fax	Email

**Any changes to the points of contacts, Person designated as Responsible Charge, or information contained within the completed Certification at any time during the project may require the Certification to be updated and resubmitted.*

***It is requested the Certification form be completed and submitted to the region Local Program Project Manager (LPPM) within thirty (30) days of completing certification training for new sponsors or concurrently with State Municipal Agreement (SMA) for repeat sponsors.*

SPONSOR'S CHOICE OF PROJECT ADMINISTRATION AND DELIVERY MODEL:

The Sponsor has been selected to benefit from the use of Federal Funds for the construction of a Non-Traditional Transportation project to be administered through a Local Letting Process. By accepting the use of Federal Funding, the Sponsor acknowledges that they understand the applicable Federal and State requirements and accepts accountability to complete these requirements. Moreover, to attain Certification the Sponsor must explain the role, if any, that consultants will perform. However, even if using consultant support the Sponsor remains responsible for ensuring adherence to the Sponsor's Guide to Non-Traditional Transportation Project Implementation. **Note – whether performed by Sponsor Staff or by a Consultant, Federal funds cannot be used to pay for Administration Function costs described in this document. They are the sole responsibility of the Sponsor.**

CERTIFICATION FOR NON-TRADITIONAL PROJECT ADMINISTRATION AND DELIVERY

DEFINITIONS

Administration: Overall management and implementation of the approved project to ensure compliance with all applicable state and federal regulations as explained and described in the Sponsor's Guide; required for project costs to be eligible for Federal reimbursement. The Sponsor is 100% responsible for all costs associated with administration; some activities may be performed by a consultant.

Oversight: The act of ensuring that the construction project is delivered consistent with federal and State Laws, Regulations and Policies. Oversight activities include review and approval actions pertaining to design, plans, specifications, estimates, right of way certification statements, contract awards, inspections and final acceptance.

Engineering/Inspection: All efforts/activities required to complete the four project phases: Design, Real Estate Acquisition, Letting and Construction

Responsible Charge – Assignment and Duties: Each Sponsor of a federally funded project must designate one or more individuals who are public employees, who are accountable for the project, and therefore who are tasked with being "in responsible charge" of the project. The individual in Responsible Charge is not required to be an engineer, and the duties may be assigned to more than one individual. Per the FHWA August 4, 2011 Memorandum on this subject the individual(s) in Responsible Charge should be expected to be able to perform the following duties and functions:

- Administer inherently governmental project activities, including those dealing with cost, time, adherence to contract requirements, construction quality and scope of Federal-aid projects;
- Maintain familiarity of day to day project operations, including project safety issues;
- Make or participate in decisions about changed conditions or scope changes that require change orders or supplemental agreements;
- Visit and review the project on a frequency that is commensurate with the magnitude and complexity of the project;
- Review financial processes, transactions and documentation to ensure that safeguards are in place to minimize fraud, waste, and abuse;
- Direct project staff, agency or consultant, to carry out project administration and contract oversight, including proper documentation; and
- Stay aware of the qualifications, assignments and on-the-job performance of the agency and consultant staff at all stages of the project.

CERTIFICATION FOR NON-TRADITIONAL PROJECT ADMINISTRATION AND DELIVERY

Check the Project Delivery Model Option that the Sponsor will utilize to administer and deliver this Non-Traditional Project:

1. The Sponsor is adequately staffed to administer a Locally Let Construction Project, and will also perform their own Project Design and Construction Oversight (*this option requires a Professional Engineer on Staff*).
2. The Sponsor is adequately staffed to administer a Locally Let Construction Project, but will utilize Consultants to perform Project Design and/or Construction Oversight. (*Requires Professional Engineer contracted for Project Design*)
3. The Sponsor will retain a unique consultant for Project Administration and will utilize other consultant(s) for Project Design and/or Construction Oversight. (*Requires Professional Engineer contracted for Project Design*)
4. The Sponsor will utilize a single Consultant for Administrative tasks and to perform Project Design and/or Construction Oversight. **This option is only available if 100% Sponsor funded for all consultant services.** (*Requires Professional Engineer contracted*)

QUALIFICATION BASED SELECTION

If Federal funding is planned to be utilized for Consultant Services, the Sponsor states that the Consultant will be selected based on the procedures set forth by WisDOT and FHWA for selection and approval process defined in WisDOT Facilities Development Manual (FDM) Chapter 8-5-20 and 23 CFR 172. Further, the Sponsor states that the use of the Consultant is in compliance with FDM Chapter 8-5-55 regarding Conflict of Interest in the role of a Consultant providing management services to a Sponsor. Typically, **Compliance with WisDOT procedures for consultant selection is required to be eligible for Federal Funding.**

If a Sponsor has or will select a consultant for Options 2 or 3 explain your Selection Process:

100% local funding for design service (GRAEF-USA, Inc) but TBD Consulting firm for Construction Services will be selected using Qualification Based Process organized by Glen Morrow- Person in Responsible Charge in compliance with the attached "Procurement Policy for the City of Franklin" adopted April 20, 2021.

CERTIFICATION FOR NON-TRADITIONAL PROJECT ADMINISTRATION AND DELIVERY

ADMINISTRATION BY SPONSOR

(Complete for _____ Option 1 or X Option 2)

Name and Title of Person in Responsible Charge: Glen E. Morrow, PE (No. 4521-6)
(Option 1 requires a Professional Engineer on sponsor staff - List Licenses or Credentials)

Has the Sponsor signed and returned the Sponsor's Guide Acknowledge Form?

X Yes 06/16/2022 Date _____ No

Has this Sponsor successfully completed WisDOT Non-Traditional Project Training?

X Yes 06/16/2022 Date _____ No

Does the Sponsor have a Public Works or Engineering Staff?

X Yes _____ No

Attach an Organization Chart with titles of responsible persons.

See Attached Organization Chart that includes names of individuals and their titles limited to the personnel that will be working on this project.

List up to five similar projects this Sponsor has Administered/Let. (List WisDOT projects first)

ID/Description	Year	Cost	WisDOT Reference
None			

CERTIFICATION FOR NON-TRADITIONAL PROJECT ADMINISTRATION AND DELIVERY

ADMINISTRATION BY CONSULTANT- Not Applicable

(Complete for _____ Option 3 or _____ Option 4)

Selected or Anticipated Consulting Firm: _____

Name and Title of Primary Consultant Rep: _____

Name and Title of Person in Responsible Charge: _____

(Must be an employee of the Sponsor)

Is Firm on WisDOT Roster of Eligible Engineering Consultants? _____ Yes _____ No

Has this firm attended WisDOT Non-Traditional Project Training? _____ Yes _____ No

List up to five similar Projects this Firm has Administered/Let: (List WisDOT projects first)

ID/Description	Year	Cost	WisDOT Reference
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Briefly describe the firm's qualifications pertaining to Administering this Project:

CERTIFICATION FOR NON-TRADITIONAL PROJECT ADMINISTRATION AND DELIVERY

APPROVING AUTHORITY

The Sponsor must have an official approving authority for all WisDOT delegated project approvals. This Authority (e.g., Executive, Department Head or Policy Body) must officially approve each project step for which it is the approving authority, as identified in this certification.

Please check the appropriate description of the approval Authority or completion of the task. If no choices apply, please describe the Sponsor's process.

ADMINISTRATIVE FUNCTIONS

The cost associated with the following Administration Functions are Federally Ineligible *unless otherwise noted*. Therefore they are 100% the responsibility of the Sponsor.

Project Application:

Includes the preparation and submittal of project application, including completing a cost estimate.

Drafted by: Glen Morrow Sponsor Staff _____ Consultant/Name _____

Approved by:

<u>X</u>	Director of Public Works / City Engineer / Commissioner / Other	<u>Glen E. Morrow</u>
<u>X</u>	Mayor/Executive/ President / Chairperson / Other	<u>Stephen R. Olson</u>
<u>X</u>	Resolution passed by legislative body	<u>Common Council</u>
_____	Committee	_____
_____	Other	_____

Approval of State Municipal Agreement/Project Agreement:

Includes the coordination between Sponsor and WisDOT, internal reviews and subsequent approval by sponsor of the agreement

<u>X</u>	City Engineer/ Director of Public Works	<u>Glen E. Morrow</u>
<u>X</u>	Mayor	<u>Stephen R. Olson</u>
<u>X</u>	Resolution passed by legislative body	<u>Common Council</u>
<u>X</u>	City Clerk- Sandra L. Wesolowski	_____
<u>X</u>	Director of Administration- Peggy Steeno	_____
<u>X</u>	City Attorney- Jesse A. Wesolowski	_____
<u>X</u>	Director of Finance- Denise Gilbert	_____

CERTIFICATION FOR NON-TRADITIONAL PROJECT ADMINISTRATION AND DELIVERY

CERTIFICATION FOR NON-TRADITIONAL PROJECT ADMINISTRATION AND DELIVERY

Design and/or Construction Consultant Selection:

Includes all functions required for consultant selection and ultimate consultant contract. Functions include the preparation of RFP, solicitation, evaluation and selection and contract negotiations and execution. If federal funds will be utilized for consultant services, the Sponsor should be familiar with the selection process outline in the FDM as well as WisDOT's Conflict of Interest Policy.

Solicitation Procedure:

<input checked="" type="checkbox"/> Advertisement	<input type="checkbox"/> WisDOT Solicitation
<input type="checkbox"/> Sponsor's Current List	<input type="checkbox"/> Small Purchase Procedures (Only if <\$200,000, See FDM 8-5-10)
<input type="checkbox"/> Other	

Basis of Selection:

<input checked="" type="checkbox"/> Evaluation	<input checked="" type="checkbox"/> Interview Shortlist
--	---

Selection approved by:

<input checked="" type="checkbox"/> Director of Public Works / City Engineer / Commissioner / Other	<u>Glen E. Morrow</u>
<input type="checkbox"/> Mayor/Executive/ President / Chairperson / Other	<u>Stephen R. Olson</u>
<input checked="" type="checkbox"/> Resolution passed by legislative body	<u>Common Council</u>
<input checked="" type="checkbox"/> Committee	<u>Board of Public Works</u>
<input type="checkbox"/> Other	<u>_____</u>

General Design Reviews: (e.g. Permits, Design Study Report, R/W Plat, PS&E etc...): *Sponsors internal review of general design documents to ensure the design is in accordance of sponsor's expectations. Also referred to as sponsor's quality control/assurance.*

<input checked="" type="checkbox"/> Director of Public Works / City Engineer / Commissioner / Other	<u>Glen E. Morrow</u>
<input type="checkbox"/> Mayor/Executive/ President / Chairperson / Other	<u>_____</u>
<input type="checkbox"/> Resolution passed by legislative body	<u>_____</u>
<input type="checkbox"/> Committee	<u>_____</u>
<input checked="" type="checkbox"/> Other	<u>Tyler A. Beinlich</u>

CERTIFICATION FOR NON-TRADITIONAL PROJECT ADMINISTRATION AND DELIVERY

Real Estate Acquisition approval in accordance with the Uniform Relocation and Real Estate Acquisition Act:

Assumes real estate is not state or federally funded. If funded, some real estate functions may be reimbursable. Answer all questions even if real estate is not anticipated

The Sponsors, by accepting Federal funding in any phase of a project, is agreeing to follow Federal, State and local laws that govern public project and program activities. Public Law 91-646, The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, or commonly called the Uniform Act, is the primary law for acquisition and relocation activities on Federal or federally assisted projects and programs. Wisconsin State Statute 32 – Eminent Domain must also be followed when using Federal or State dollars. The FHWA has an agreement in place with WisDOT that states WisDOT will oversee local programs and projects to ensure compliance.

Is Real Estate Acquisition Anticipated? _____ Yes X No

If Yes, Relocation Order and R/W Plat Approved by:

_____ Director of Public Works / City Engineer / Commissioner / Other _____
_____ Mayor/Executive/ President / Chairperson / Other _____
_____ Resolution passed by legislative body _____
_____ Committee _____
_____ Other _____

Who will acquire Real Estate? _____ Sponsor _____ Other, describe: _____

WisDOT Certification is required for anyone acquiring real estate. See <https://wisconsin.gov/Pages/doing-business/local-gov/astnce-pgms/aid/lpa-re-info.aspx> for more information pertaining to real estate acquisitions

CERTIFICATION FOR NON-TRADITIONAL PROJECT ADMINISTRATION AND DELIVERY

Bid Advertisement:

*Includes the placement and cost associated with placing the advertisement and obtaining an Affidavit of Publication
Drafting and placement of the bid advertisement can be considered part of design engineering services*

Drafted by: _____ Sponsor Staff Consultant (Design)
 Advertisement Placed by: Sponsor Staff _____ Consultant (Design)

- Advertisement must be placed a minimum three weeks prior to Bid Opening Publications:
South NOW

Approved by:

Director of Public Works / City Engineer / Commissioner / Other Glen E. Morrow
 _____ Mayor/Executive/ President / Chairperson / Other _____
 _____ Resolution passed by legislative body _____
 _____ Committee _____
 _____ Other _____

Acceptance, Opening and Approval of Bids, Award of Contract:

*Includes the accepting, opening, reviewing, evaluating, and approving of contractors' bids, and awarding of Contract
Reviewing and evaluation of contractors' bids may be considered part of design engineering services*

Bids Received by: Sponsor _____
 Bids Opened by: Sponsor _____ Consultant (Administrative/Design)
 Bids Evaluated by: Sponsor Consultant (Administrative/Design)

Low Bid Accepted by:

_____ Director of Public Works / City Engineer / Commissioner / Other _____
 _____ Mayor/Executive/ President / Chairperson / Other _____
 Resolution passed by legislative body Common Council
 _____ Committee _____
 _____ Other _____

CERTIFICATION FOR NON-TRADITIONAL PROJECT ADMINISTRATION AND DELIVERY

Execution of Contract:

Includes the execution of the contract between the sponsor and contractor.

Contract to Be Signed By:

<u> X </u> Mayor	<u>Stephen R. Olson</u>
<u> X </u> Resolution passed by legislative body	<u>Common Council</u>
<u> X </u> City Clerk- Sandra L. Wesolowski	_____
<u> X </u> Director of Administration- Peggy Steeno	_____
<u> X </u> City Attorney- Jesse A. Wesolowski	_____
<u> X </u> Director of Finance- Denise Gilbert	_____

Contractor Payments:

Includes the sponsor issuing the payment to the contractor for work performed The creation of the pay estimate, including determining quantities and total cost is considered a construction oversight duty

Payment Approved by:

<u> X </u> Director of Public Works / City Engineer / Commissioner / Other	<u>Glen E. Morrow</u>
<u> X </u> Mayor/Executive/ President / Chairperson / Other	<u>Stephen R. Olson</u>
<u> X </u> Resolution passed by legislative body	<u>Common Council</u>
_____ Committee	_____
_____ Other	_____

Final Records Retention:

Records Retained by: X Sponsor

Address where Records will be stored:

9229 W. Loomis Road- Franklin, WI 53132

Records must be available for review by FHWA and WisDOT as requested

CERTIFICATION FOR NON-TRADITIONAL PROJECT ADMINISTRATION AND DELIVERY

Equal Employment Opportunity (Title VI), DBE, and Prevailing Wages (Davis-Bacon)

May include obtaining copy of contractor's EEO policy, assessing DBE work, explain process for ensuring up-to-date Federal prevailing wages in the contract

Describe the Sponsor's policies in ensuring the contractor complies with the following:
See attached "Procurement Policy for the City of Franklin" adopted April 20, 2021.

Title VI of the Civil Rights Act of 1964

<https://www.fhwa.dot.gov/civilrights/programs/tvi.cfm>

<https://wisconsin.gov/Pages/doing-bus/civil-rights/titlevi-ada/default.aspx>

Disadvantaged Business Enterprise (DBE)

<https://www.fhwa.dot.gov/civilrights/programs/dbess.cfm>

<https://wisconsin.gov/Pages/doing-bus/civil-rights/dbe/default.aspx>

Davis Bacon Prevailing Wage Rates (when applicable to the project)

<https://www.fhwa.dot.gov/construction/cqit/dbacon.cfm>

<https://wdolhome.sam.gov/>

Approval for Changed Conditions, Increased/Decreased Quantities:

Includes the review and approval of contract change orders at the sponsor's level. Consultant in this section refers to the administrative consultant.

Evaluation and Recommendation: Sponsor Consultant (administrative)

Approval by:

<input checked="" type="checkbox"/>	Director of Public Works / City Engineer / Commissioner / Other	Glen E. Morrow
<input type="checkbox"/>	Mayor/Executive/ President / Chairperson / Other	
<input checked="" type="checkbox"/>	Resolution passed by legislative body	Common Council
<input type="checkbox"/>	Committee	
<input type="checkbox"/>	Other	

CERTIFICATION FOR NON-TRADITIONAL PROJECT ADMINISTRATION AND DELIVERY

Local Force Account:

Does the Sponsor desire to request permission to perform any project work through a Local Force Account?

_____ Yes X _____ No

If yes, the Sponsor acknowledges that they have read and understand the pertinent sections of the FDM and CMM relating to LFAs and understand the limitations associated with the use of LFAs.

_____ Sponsor's Initial

Cost Effectiveness Finding Drafted: _____ Sponsor _____ Consultant (design)

Approved by:

_____ Director of Public Works / City Engineer / Commissioner / Other _____
_____ Mayor/Executive/ President / Chairperson / Other _____
_____ Resolution passed by legislative body _____
_____ Committee _____
_____ Other _____

Federal Aid Billings: *(Includes the preparation and submittal of reimbursement requests Consultant refers to the administrative consultant.)*

Invoices Prepared by: Title City Engineer, Director of Public Works
X _____ Sponsor X _____ Consultant (administrative)

Costs Reviewed and approved for submittal by:

X _____ Director of Public Works / City Engineer / Commissioner / Other Glen E. Morrow
_____ Mayor/Executive/ President / Chairperson / Other _____
_____ Resolution passed by legislative body _____
_____ Committee _____
X _____ Other Denise Gilbert

CERTIFICATION FOR NON-TRADITIONAL PROJECT ADMINISTRATION AND DELIVERY

DESIGN ENGINEERING

Will Federal Funding be utilized for Design Costs? _____ Yes X No

Indicate whether these tasks will be performed by the Sponsor (S) or a Consultant (C) or N/A

- | | |
|--|--------------------------------------|
| <u> S </u> Update of Project Application | <u> C </u> Environmental Clearance |
| <u> C </u> Design Study Report (if required) | <u> C </u> Utility Coordination |
| <u> C </u> Relocation Order, R/W Plat | <u> C </u> Plans Development |
| <u> C </u> Draft Bid Advertisement | <u> C </u> PS&E Preparation |

CONSTRUCTION OVERSIGHT

Will Federal Funding be utilized for Construction Oversight? X Yes _____ No

Indicate whether these tasks will be performed by the Sponsor (S) or Consultant(C) or N/A
See Sponsor’s Guide, Section 10

- | | |
|--|---|
| <u> C </u> Construction Staking | <u> C </u> Materials Testing and Inspection |
| <u> C </u> Materials Documentation | <u> C </u> Daily Diary |
| <u> C </u> Measurement of Quantities | <u> C </u> Estimates for Payment |
| <u> C </u> Time Charges | <u> C </u> Change Orders |
| <u> C </u> Final Acceptance | <u> C </u> Maintenance of Records |
| <u> C </u> Collect Contractor Payrolls | <u> C </u> Conduct field Interviews |

CERTIFICATION FOR NON-TRADITIONAL PROJECT ADMINISTRATION AND DELIVERY

ON BEHALF OF THE SPONSOR

Signature _____ Date _____
Glen E. Morrow, PE, City Engineer, Director of Public Works
Title

Signature _____ Date _____
Mayor Stephen R. Olson
Title

Signature _____ Date _____
Sandra L. Wesolowski, City Clerk
Title

Signature _____ Date _____
Peggy Steeno, Director of Administration
Title

Signature _____ Date _____
Sandra L. Wesolowski, City Clerk
Title

Signature _____ Date _____
Denise Gilbert, Director of Finance
Title

Signature _____ Date _____
Approved as to form- Jesse A. Wesolowski, City Attorney
Title

CONSULTANT ADMINISTRATION ON BEHALF OF SPONSOR

Not Applicable

CERTIFICATION FOR NON-TRADITIONAL PROJECT ADMINISTRATION AND DELIVERY

ACCEPTED BY WISDOT

Signature

Date

Title



Organization Chart

with Titles of Responsible Persons concerning
116th Street Trail Project

Stephen R. Olson
Mayor

Signatory

Common Council

Peggy Steeno, CPA, MBA
Director of Administration

Signatory

Sandra L. Wesolowski
City Clerk

Signatory

Jesse A. Wesolowski
City Attorney

Signatory

Glen E. Morrow, PE
City Engineer, Director
of Public Works

Person of
Responsible
Charge

Mary Beth Pettit, PE

Consultant

Denise Gilbert
Director of Finance

Signatory

Kevin Schlueter
Street Superintendent

Tyler A. Beinlich, PE
Assistant City Engineer

20+ DPW/Parks Staff

Ronnie Asuncion - Tech IV
Ali Alqayyim - Tech IV
Bradley Dolan - Tech III
Kyle Baker - Tech I
Debbie Bitz - Admin
Jacqueline Ziolkowski - Admin

<p style="text-align: center;">APPROVAL</p> <p style="text-align: center;"><i>Slw</i></p>	<p style="text-align: center;">REQUEST FOR COUNCIL ACTION</p>	<p style="text-align: center;">MEETING DATE</p> <p style="text-align: center;">4/20/2021</p>
<p style="text-align: center;">REPORTS & RECOMMENDATIONS</p>	<p style="text-align: center;">Approve Procurement Policy for the City of Franklin</p>	<p style="text-align: center;">ITEM NUMBER</p> <p style="text-align: center;">G.6.</p>

While the City of Franklin has a number of procedures built around procurement/purchasing, as well as proper accounting and internal controls in place, there is not a formal policy regarding the same. This is a problem when receiving and using Federal grants as the federal government is extremely formal and extremely strict with its requirements surrounding procurement/purchasing with Federal funds.

The attached policy was drafted as a policy guide for the City of Franklin to follow and use while spending Federal funds.

Please note that this policy is an interim measure only as staff has already started down the path of creating a comprehensive Procurement/Purchasing Policy that covers all state and local rules that are in place and must be followed, as well as utilizing best practices in the procurement/purchasing arena. A draft Procurement/Purchasing Policy will be presented to the Common Council in the coming months for discussion and consideration.

Due to some ongoing Federal projects, it is imperative for the Common Council to consider approval of this policy in the very near future. In fact, existing grant dollars are at risk of being lost if this policy is not in place.

Therefore, staff is requesting approval of this Policy as an interim measure to secure federal funding and keep the City of Franklin in compliance with current and future grant awards.

COMMON COUNCIL ACTION REQUESTED

Motion to approve the attached Procurement Policy for the City of Franklin.

City of Franklin
Procurement/Purchasing Policy
Dated 4/20/2021

Any Purchases that utilize federal funds shall be made in compliance with the Code of Federal Regulations (CFR) Title 2 Parts 200.318 to 200.326 and this Procurement/Purchasing Policy.

General Procurement Standards (2 CFR Part 200.318)

- a) Procurements by the City of Franklin, when utilizing federal funds, shall conform to applicable Federal law and the standards identified in this policy
- b) The City of Franklin shall maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchases.
- c) No employee, officer, or agent of the City of Franklin may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the City of Franklin may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. Any Employee determined to be in violation of this section, could be subject to discipline action up to and including termination. Any Elected Official determined to be in violation of this section, could be subject to sanctions, prosecution, and or removal from their position.
- d) The City of Franklin will consider consolidating or legally separating procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach
- e) The City of Franklin, to the extent possible, shall utilize state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services
- f) The City of Franklin, to the extent possible, shall utilize federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.
- g) The City of Franklin, to the extent possible, shall utilize value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost
- h) The City of Franklin, to the extent possible, shall award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. See also §200.213 Suspension and debarment
- i) The City of Franklin, to the extent possible, shall maintain records sufficient to detail the history of procurement. These records will include but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price

- j) The City of Franklin, to the extent possible, shall utilize a time and materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and materials type contracts are defined as a contract whose cost to the City of Franklin is the sum of:
- 1) The actual cost of materials, and
 - 2) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.
- k) The City of Franklin, to the extent possible, shall be responsible, in accordance with prudent administrative practices and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims.

Competition (2 CFR Part 200.319)

- a) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. To ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:
- 1) Placing unreasonable requirements on firms for them to qualify to do business,
 - 2) Requiring unnecessary experience and excessive bonding,
 - 3) Noncompetitive pricing practices between firms or between affiliated companies,
 - 4) Noncompetitive contracts to consultants that are on retainer contracts;
 - 5) Organizational conflicts of interest;
 - 6) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; and
 - 7) Any arbitrary action in the procurement process
- b) The City of Franklin shall conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.
- c) The City of Franklin ensures that all solicitations.
- 1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equivalent" description may be used as a means to define the

performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and

- 2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals
- d) The City of Franklin shall ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the City of Franklin shall not preclude potential bidders from qualifying during the solicitation period

Methods of Procurement to be Followed (2 CFR Part 200.320)

The City of Franklin will use one of the following methods of procurement when purchasing items with federal funds

- a) Procurement by Micro-Purchases - Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold of \$10,000. To the extent practicable, the City of Franklin shall distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations.
- b) Procurement by small purchase procedures - Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold of \$250,000. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.
- c) Procurement by sealed bids/formal advertising. Bids are publicly solicited, and a firm fixed price contract, lump sum or unit price, is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply
 - 1) For sealed bidding to be feasible, the following conditions should be present.
 - i A complete, adequate, and realistic specification or purchase description is available;
 - ii Two or more responsible bidders are willing and able to compete effectively for the business; and
 - iii The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally based on price
 - 2) If sealed bids are used, the following requirements apply
 - i Bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments, the invitation for bids must be publicly advertised;
 - ii The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services for the bidder to properly respond,
 - iii All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly,

- iv A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of, and
 - v. Any or all bids may be rejected if there is a sound documented reason
- d) Procurement by competitive proposals The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:
- 1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical;
 - 2) Proposals must be solicited from an adequate number of qualified sources,
 - 3) The City of Franklin must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;
 - 4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered, and
 - 5) The City of Franklin may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated, and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort
- e) Procurement by noncompetitive proposals Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:
- 1) The item is available only from a single source;
 - 2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
 - 3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the City of Franklin, or
 - 4) After solicitation of several sources, competition is determined inadequate

Contracting with Small and Minority Businesses, Women's Business Enterprises, and Labor Surplus Area Firms (2 CFR Part 200.321)

- a) The City of Franklin shall take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible

b) **Affirmative steps must include**

- 1) **Placing qualified small and minority businesses and women's business enterprises on solicitation lists,**
- 2) **Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;**
- 3) **Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises,**
- 4) **Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;**
- 5) **Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce, and**
- 6) **Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.**

Contract Cost and Price (2 CFR Part 200.323)

- a) **The City of Franklin shall perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold of \$250,000, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the City of Franklin shall make independent estimates before receiving bids or proposals**
- b) **The City of Franklin shall negotiate profit as a separate element of the price for each contract in which there is no price competition and, in all cases, where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.**
- c) **Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred, or cost estimates included in negotiated prices would be allowable for the City of Franklin**
- d) **The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used**

Federal Awarding Agency or Pass-Through Entity Review (2 CFR Part 200.324)

- a) **The City of Franklin shall make available, upon request of the Federal awarding agency or pass-through entity, technical specifications on proposed procurements where the Federal awarding agency or pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review generally will take place prior to the time the specification is incorporated into a solicitation document**

- b) The City of Franklin shall make available upon request, for the Federal awarding agency or pass-through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when
- 1) The City of Franklin's procurement procedures or operation fails to comply with the procurement standards in this part,
 - 2) The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;
 - 3) The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a "brand name" product;
 - 4) The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or
 - 5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.
- c) The City of Franklin is exempt from the pre-procurement review in paragraph (b) of this section if the Federal awarding agency or pass-through entity determines that its procurement systems comply with the standards of this part.
- 1) The City of Franklin may request that its procurement system be reviewed by the Federal awarding agency or pass-through entity to determine whether its system meets these standards for its system to be certified. Generally, these reviews must occur where there is continuous high-dollar funding, and third-party contracts are awarded on a regular basis;
 - 2) The City of Franklin may self-certify its procurement system. Such self-certification must not limit the Federal awarding agency's right to survey the system. Under a self-certification procedure, the Federal awarding agency may rely on written assurances from the City of Franklin that it is complying with these standards. The City of Franklin must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review.

Bonding Requirements (2 CFR Part 200.325)

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the City of Franklin provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows.

- a) A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.
- b) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

- c) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

Contract Provisions 2 CFR Part 200.326)

All City of Franklin contracts utilizing federal funds must contain the applicable provisions described in Appendix II to Part 200-Contract Provisions for non-Federal Entity Contracts Under Federal Awards.

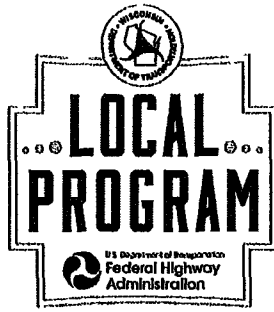
Appendix II to Part 200-Contract Provisions for the City of Franklin Contracts Under Federal Awards

In addition to other provisions required by the Federal agency or non-Federal entity, all contracts made by the City of Franklin under the Federal award must contain provisions covering the following, as applicable.

- A. Contracts for more than the Simplified Acquisition Threshold currently set at \$250,000, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate
- B. All contracts in excess of \$10,000 must address termination for cause and for convenience by the City of Franklin including how it will be affected and the basis for settlement
- C. Equal Employment Opportunity. Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of "federally assisted construction contract" in 41 CFR Part 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp, p 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity" and implementing regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity Department of Labor."
- D. Davis-Bacon Act, as amended (40 U.S.C 3141-3148) When required by Federal program legislation, all prime construction contracts in excess of \$2,000 awarded by the City of Franklin must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction"). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The City of Franklin must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The City of Franklin shall report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland "Anti-Kickback" Act (40 U.S.C 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States") The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The City of Franklin must report all suspected or reported violations to the Federal awarding agency
- E. Contract Work Hours and Safety Standards Act (40 U.S.C 3701-3708). Where applicable, all contracts awarded by the City of Franklin in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence

- F Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of "funding agreement" under 37 CFR §401.2(a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that "funding agreement," the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency.
- G Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended-Contracts and subgrants of amounts in excess of \$150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA)
- H Debarment and Suspension (Executive Orders 12549 and 12689)- A contract award (see 2 CFR 180.220) must not be made to parties listed on the government wide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), "Debarment and Suspension." SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.
- I Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)-Contractors that apply or bid for an award exceeding \$100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from each tier up to the non-Federal award.
- J See §200.322 Procurement of recovered materials if applicable.

(§200.322 Procurement of recovered materials A Non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000, procuring solid waste management services in a manner that maximizes energy and resource recovery, and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines)



Wisconsin Department of Transportation

SPONSOR'S GUIDE ACKNOWLEDGEMENT FORM

The State/Municipal Agreement will not be processed until this acceptance is returned along with your certification.

Topics of Emphasis of the Sponsor's Guide include:

- Federal and State Laws and Regulations pertaining to Federal Aid Transportation Projects
- The definition of Non-Traditional Transportation Projects
- Consequences of non-compliance with Federal and State Laws and Regulations including denial of Reimbursement or payback of Federal funding
- Certification requirements to be met by the Sponsor to administer Locally Let Projects utilizing Federal Funding
- Project Delivery Procedures and Documentation Requirements
- Financial Record Keeping Requirements and the procedure for Reimbursement

As a representative of the Local Project Agency (Sponsor), I have received and read the Sponsors Guide, completed the on-line training program, and agree to meet the requirements of the "Sponsor's Guide to Non-Traditional Transportation Project Implementation".

Glen E. Morrow

June 16, 2022

Signature

Date

Glen E. Morrow, PE

Name

City Engineer, Director of Public Works

Title

9229 W. Loomis Road- Franklin, WI 53132

Address

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gmorrow@franklinwi.gov

Email

glen morrow

Has successfully completed

Non-Traditional Transportation Project - Welcome

Date of Completion 6/16/2022

Training Hours 0 Hours 0 Minutes

Professional Development Hours



*This training course was provided by: DOT DTSD
Technical Training*

glen morrow

Has successfully completed

Non-Traditional Transportation Project - Overview

Date of Completion 6/16/2022

Training Hours: 0 Hours 0 Minutes

Professional Development Hours



*This training course was provided by: DOT DTSD
Technical Training*

glen morrow

Has successfully completed

Non-Traditional Transportation Project - Roles & Responsibilities

Date of Completion 6/16/2022

Training Hours 0 Hours 0 Minutes

Professional Development Hours



*This training course was provided by: DOT DTSD
Technical Training*

glen morrow

Has successfully completed

Non-Traditional Transportation Project - Federal Expectations

Date of Completion 6/16/2022

Training Hours 0 Hours 0 Minutes

Professional Development Hours



*This training course was provided by: DOT DTSD
Technical Training*

glen morrow

Has successfully completed

Non-Traditional Transportation Project - Labor Compliance

Date of Completion 6/16/2022

Training Hours 0 Hours 0 Minutes

Professional Development Hours



*This training course was provided by: DOT DTSD
Technical Training*

glen morrow

Has successfully completed

Non-Traditional Transportation Project - Programming

Date of Completion 6/16/2022

Training Hours 0 Hours 0 Minutes

Professional Development Hours



*This training course was provided by: DOT DTSD
Technical Training*

glen morrow

Has successfully completed

Non-Traditional Transportation Project - Design Services

Date of Completion 6/16/2022

Training Hours 0 Hours 0 Minutes

Professional Development Hours



*This training course was provided by: DOT DTSD
Technical Training*

glen morrow

Has successfully completed

Non-Traditional Transportation Project - Environmental Process

Date of Completion 6/16/2022

Training Hours 0 Hours 0 Minutes

Professional Development Hours



*This training course was provided by DOT DTSD
Technical Training*

glen morrow

Has successfully completed

Non-Traditional Transportation Project - Right-of-Way

Date of Completion 6/16/2022

Training Hours: 0 Hours 0 Minutes

Professional Development Hours



*This training course was provided by: DOT DTSD
Technical Training*

glen morrow

Has successfully completed

Non-Traditional Transportation Project - Project Design Delivery & Schedule

Date of Completion 6/16/2022

Training Hours 0 Hours 0 Minutes

Professional Development Hours



*This training course was provided by: DOT DTSD
Technical Training*

glen morrow

Has successfully completed

Non-Traditional Transportation Project - Contract Letting

Date of Completion 6/16/2022

Training Hours: 0 Hours 0 Minutes

Professional Development Hours



*This training course was provided by: DOT DTSD
Technical Training*

glen morrow

Has successfully completed

Non-Traditional Transportation Project - Reimbursement

Date of Completion 6/16/2022

Training Hours 0 Hours 0 Minutes

Professional Development Hours



*This training course was provided by: DOT DTSD
Technical Training*

glen morrow

Has successfully completed

Non-Traditional Transportation Project - Certification & Acknowledgement


Date of Completion 6/16/2022

Training Hours 0 Hours 0 Minutes

Professional Development Hours



*This training course was provided by DOT DTSD
Technical Training*

APPROVAL 	REQUEST FOR COUNCIL ACTION	MTG. DATE August 16, 2022
Reports & Recommendations	<p style="text-align: center;">Resolution to Execute S. 116TH Street Trail Project Change Orders to GRAEF-USA, INC. for</p> <p style="text-align: center;">Change Order No. 2 for \$70,000 to Prepare Construction Mitigation & Air Compliance (CMAQ) Plans with Permitting, and</p> <p style="text-align: center;">Change Order No. 3 for \$30,000 to prepare a St. Martin of Tours Trail Alternative Alignment</p>	ITEM NO. <p style="text-align: center;">G.5.</p>

BACKGROUND

On August 4, 2020, GRAEF-USA, Inc. was awarded a contract to design the “S. 116th Street Trail” project. This project has morphed into two design tasks with the second task now known as the “St. Martin of Tours Trail” project. Change Order No. 1 was issued on July 20, 2021 because the project was going well and it was anticipated that the project would be completed under budget by at least \$15,000 and the funding was needed for another trail project. There was no change in scope involved with Change Order No. 1.

ANALYSIS

Today, the 116th Street portion of the trail project was awarded a Construction Mitigation & Air Compliance (CMAQ) grant and the environmental permitting has taken much more effort than anticipated. Change Order No. 2 includes efforts to prepare Phase 2 plans involving various environmental documentation with preparation of construction documents in compliance with Wisconsin Department of Transportation (WisDOT) requirements.

Change Order No. 3 involves the non-CMAQ portion of the trail though the property of St. Martin of Tours. On July 7, 2022, Common Council discussed a change in routing and the approved motion was to “*direct GRAEF to proceed with field work and return to Common Council with a scope change order.*” This change order includes efforts to prepare an alternative alignment along the southern and western boundaries of the Church property, and create plans suitable for a Franklin (non WisDOT) construction project.

The phases of the projects are very closely related so one could consider them one project. However, the CMAQ portion should be kept separate from the St. Martin of Tours section for WisDOT record keeping purposes. Note that neither of the change orders will include construction services.

OPTIONS

Approve or Deny the Change Orders

FISCAL NOTE

Attached are the Change Orders No. 2 and No. from GRAEF for \$70,000 and \$30,000 respectively. The summary of the project costs for project (Fund 46-0551-5833.5125) are as follows:

\$150,000.00	Original Contract Fee
(\$ 15,000.00)	Change Order No. 1 (reduction in fee)
\$70,000.00	Change Order No. 2 (CMAQ)
\$30,000.00	Change Order No. 3 (St. Martin of Tours)
\$235,000.00	New contract price after these Change Orders

The construction of the trail is in the 2022 Budget Fund 46 for \$810,285- that amount will be carried into the 2023 budget. The \$100,000 of change orders were not anticipated in the 2022 budget. Staff recommends that Council authorize the use of \$100,000 from the 2022 funds for the construction that will not occur this year. Specifically, these change orders will be 62% impact (\$62,000) and 38% City funds (\$32,000). The construction funds will be rebudgeted in 2023.

Note that GRAEF is expected to be about \$30,000 less than the approved \$57,000 fee for the Ryan Creek Bicycle Pedestrian Trail Master Plan (Fund 46-0321-5216.5140). This will be discussed at a future meeting.

RECOMMENDATION

Authorize Resolution 2022-____ a resolution to execute S. 116th Street Trail Project change orders to GRAEF-USA, INC. for change Order No. 2 for \$70,000 to prepare Construction Mitigation & Air Compliance (CMAQ) plans with permitting, and Change Order No. 3 for \$30,000 to prepare a St. Martin of Tours trail alternative alignment.

Engineering: GEM

STATE OF WISCONSIN: CITY OF FRANKLIN: MILWAUKEE COUNTY

RESOLUTION NO. 2022 - _____

A RESOLUTION TO EXECUTE S. 116TH STREET TRAIL PROJECT CHANGE ORDERS TO GRAEF-USA, INC. FOR

CHANGE ORDER NO. 2 FOR \$70,000 TO PREPARE CONSTRUCTION MITIGATION & AIR COMPLIANCE (CMAQ) PLANS WITH PERMITTING, AND

CHANGE ORDER NO. 3 FOR \$30,000 TO PREPARE A ST. MARTIN OF TOURS TRAIL ALTERNATIVE ALIGNMENT

WHEREAS, GRAEF-USA, Inc. was awarded an engineering contract to provide design services for the "S. 116th Street Trail" project; and

WHEREAS, the S. 116th Street Trail has been separated in tow related, yet separate projects; and

WHEREAS, the southern portion of the project along S. 116th Street was awarded a Construction Mitigation & Air Compliance (CMAQ) grant that involves particular efforts to comply with requirements set forth by the Wisconsin Department of Transportation; and

WHEREAS, the northern portion of the project requires a significant revision to the route through and around the St. Martin of Tours Church; and

NOW, THEREFORE, BE IT RESOLVED by the Mayor and Common Council of the City of Franklin, that GRAEF-USA, Inc. be issued Change Order No. 2 for \$70,000 to prepare construction mitigation & air compliance (CMAQ) plans with permitting for the southern portion of the project, and

BE IT FURTHER RESOLVED that GRAEF-USA, Inc. be issued Change Order No. 3 for \$30,000 to prepare a St. Martin of Tours trail alternative alignment

Introduced at a regular meeting of the Common Council of the City of Franklin this _____ day of _____, 2022 by Alderman _____.

Passed and adopted at a regular meeting of the Common Council of the City of Franklin this _____ day of _____, 2022.

APPROVED:

Stephen R. Olson, Mayor

ATTEST:

Sandra L. Wesolowski, City Clerk

AYES _____ NOES _____ ABSENT _____



The Avenue
275 West Wisconsin Avenue Suite 300
Milwaukee WI 53203
414 / 259 1500
414 / 259 0037 fax
www.graef-usa.com

create it formulate / innovate

August 9, 2022

Mr. Glen E. Morrow, PE
Deputy Director of Public Works / City Engineer
City Engineer / Director of Public Works / Utility Manager
City of Franklin
9229 W. Loomis Rd.
Franklin, WI 53132

SUBJECT: S. 116th Street Trail, Amendment No. 2
(WisDOT CMAQ Project I.D. 2976-00-02/72)

Dear Mr. Morrow

We are very pleased to provide you with this proposal to amend our professional services. When accepted, this proposal will amend our Agreement dated August 9, 2020.

This proposal is for S. 116th Street Trail (Project). This proposal is subject to the Terms and Conditions per the original agreement. It is our understanding that the nature of the Project is approximately 2.5 miles of trail design that would extend from W. Loomis Road / Waukesha County line vicinity along the WE Energies easement (Inner Urban Rail corridor) northeast to S. 116th Street and up the west side of S. 116th Street in the WE Energies easement to the St. Martins area and connect to the current paved trail.

For this Project, GRAEF proposed to provide the following additional Basic Services

Preparation of Phase 2 Plans for Congestion Mitigation & Air Quality Program (CMAQ) Compliance

- Environmental Documentation in accordance with the WisDOT Facilities Development Manual (FDM)
 - Native American Tribal Notifications
 - Section 106 (arch and historical surveys) Preparation of required documentation for archaeological and historical review for the 104th Avenue corridor. The project may qualify for screening but if not, archaeological and historical surveys will be conducted and submitted for review. If further documentation (Determination of Eligibilities or a Determination of No Adverse Effect) are necessary, it will be considered EXTRA WORK.
 - The CONSULTANT shall document a Categorical Exclusion (CEC) for the PROJECT as specified in the MANUAL and Chapter TRANS 400, Wisconsin Administrative Code. The appropriate number of copies shall be furnished to the DEPARTMENT for approval. The documentation will include a Categorical Exclusion Checklist (CEC) with appropriate attachments including a project description with a project location map, existing, proposed typical sections and project plans to describe the scope of the project, a project purpose and need statement and copies of correspondence.
- Preparation of a Design Study Report in accordance with the FDM
- Preparation of the 60% & 90% Transportation Management Plan to address the construction crossing at Ryan Road

- Coordination with WisDOT to complete plans and documentation in accordance with state requirements for CMAQ projects.
 - Complete the Non-Traditional Project Implementation Checklists for local CMAQ projects in compliance with the Non-Traditional Sponsor's Guide. Checklist assistance will include the completion of the following documents
 1. Preliminary Engineering Checklist (Sponsor-3.docx)
 2. Initial Site Reconnaissance Checklist (Sponsor-4.docx)
 3. Parcel Reconnaissance Checklist (Sponsor-5.docx)
 4. Right-of-Way (R/W) & Real Estate (R/E) Checklist (Sponsor-6.docx)
 5. Local Project Utility Coordination Task List (Sponsor-7.docx)
 6. Project Proposal Certificate (Sponsor-8.docx)
 7. Construction Bid Letting Checklist (Sponsor-9.docx)
 8. Local Let Project Contract Document Checklist (Sponsor-10.docx)
 9. Request to Advertise - Local Let Project (Sponsor-11.docx)
 10. Request to Award – Local Let Project (Sponsor-12.docx)
 - The City of Franklin in conjunction with the Wisconsin Department of Transportation SE Region staff will complete the following checklists.
 11. Non-Traditional Transportation Project Development Timeline and Milestones (Sponsor-1.docx)
 12. WisDOT Wage EEO Interview Form (Sponsor-2.docx)
 - All other sponsor forms will be completed by the City of the Construction Consultant for the project.

116th Street Phase 1 & Phase 2 Permitting

- Preparation of permits and final concurrence from agencies for the project. Permits to include a Water Resources Application for Project Permits (WRAPP), Wetland Permit and Chapter 30 permit as required.
- Work related to this effort includes
 - Submittal of exemption requests for artificial wetlands
 - Preparation of pre-application check-list and supporting items, including alternative analysis to include.
 - Review of additional alternative through Bear Subdivision
 - Review of identifying ways to minimize impacts of trail alignment along WE Energies' easement by reducing slopes and path width
 - Desk top review and identification of wetlands along the alternative routes of study.
 - Coordination meetings



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GRAEF will endeavor to perform the proposed additional Basic Services in accordance with the following schedule.

WDNR Permitting Complete	October 2022
Environmental Documentation	Spring 2023
75% Plans (Ready for Utilities)	Fall 2023
90% Plans	November 2023
Final Plans	December 2023
Advertisement for use by Client	January 2024
Let/Award	Spring 2024

GRAEF can provide the following Additional Services for additional compensation as detailed below

- Construction Management & Documentation of CMAQ Compliance construction documentation forms.
- Public Involvement Meeting

It is our understanding that you will provide the following services, items and/or information:

- Completed (Signed) easement documentation for WE Energies to be used in permitting applications
- Certification of City Staff for CMAQ projects through WisDOT training program

You agree to compensate GRAEF for all additional Basic Services noted above on an hourly rate and direct expense basis to an estimated additional maximum fee of \$205,000.00. The breakdown of additional services includes.

Preparation of Phase 2 Plans for CMAQ Compliance	\$50,000
116th Street Phase 1 & Phase 2 Permitting	\$20,000
Total	\$70,000

You agree to compensate GRAEF for any Additional Services with an additional fee to be negotiated at a later date.



... to think ... to innovate

To accept this proposal for additional Basic Services, please sign and date and return one copy to us. Upon receipt of an executed copy, GRAEF will commence work on the additional Basic Services for the Project.

Please call us at 414-266-9175 if you have any questions regarding this proposal.

Sincerely,

Graef-USA Inc.

Mary Beth Pettit, P.E.
Vice President, Project Manager

X:\ML\2020\20200291\Project Management\Contracts\AmendmnetNo2\ReDRAFT Amendment 2 & 3\116thStreet_Proposal Amendment Letter for Additional Services_AmendmentNo2.docx



The Avenue
275 West Wisconsin Avenue Suite 300
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414 / 259 1500
414 / 259 0037 fax
www.graef-usa.com

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August 9, 2022

Mr. Glen E. Morrow, PE
Deputy Director of Public Works / City Engineer
City Engineer / Director of Public Works / Utility Manager
City of Franklin
9229 W. Loomis Rd.
Franklin, WI 53132

SUBJECT S. 116th Street Trail, Amendment No. 3
 St. Martin of Tours Trail Alignment

Dear Mr. Morrow

We are very pleased to provide you with this proposal to amend our professional services. When accepted, this proposal will amend our Agreement dated August 9, 2020.

This proposal is for S. 116th Street Trail (Project). This proposal is subject to the Terms and Conditions per the original agreement. It is our understanding that the nature of the additional work is approximately 0.5 miles of trail design that would head west from the S 116th Street Trail around the back of St. Martin of Tours to connect to the City of Franklin Hike & Bike Path.

For this Project, GRAEF proposes to provide the following Basic Services.

116th Street Phase 1 – Alternative Alignment (0.5 miles)

Survey

- Perform topographic and utility survey along the 0.5 mile trail corridor needed for study of the revised alignment for the trail
 - Description of ground surfaces (concrete, bituminous asphalt, grass, etc.)
 - Spot elevations on an approximate 25' grid including break lines to accurately generate 1-foot contour intervals
 - Existing ground contours
 - Datum for elevations
 - All existing utilities including overhead and underground, hydrants and valves for sanitary, storm, gas, water, electric and telephone with utility size and type
 - Benchmarks and control points (location and description)
 - GRAEF will contact Diggers Hotline service to have underground utilities marked on the surface for our survey crew to locate. All utility markings provided by this service will be included in the drawings. GRAEF will show additional utility locations based on system mapping provided by the utilities and the Client.
 - Field Investigation
-



Real Estate Acquisition

- GRAEF shall prepare an updated easement exhibit for the St Martin of Tours property to reflect the revised alignment.

Environmental Resources

- Office Review
- Field Investigation
- Wetland Report

30% Design Plan Development

- Plans will include title sheet, typical sections, alignments, 40' scale plan and profile sheets with slope intercepts, and cross sections
- Plan details will include geometric layout
- RIW & Utility analysis.
- GRAEF shall prepare a 30% construction cost estimate.

60% Design Plan Development

- Plans will include title sheet; general notes, project overview, typical sections, alignments, 40' scale plan details, 40' scale plan and profiles sheets with slope intercepts; and cross sections.
- GRAEF shall prepare a 60% construction cost estimate.

90% Design Plan Development

- Plans will include title sheet, general notes, typical sections; construction details using WisDOT details), alignment plans with control point information, 40' scale plan details, ADA compliant curb ramp details, 40' scale plan and profiles sheets with slope intercepts, traffic control, detour plans, erosion control, signing; marking; earthwork summary, and cross sections.
- Traffic control/construction staging plans will be prepared for two alternatives.
- Plans to allow s. 116th Street to remain open to traffic during construction.
- GRAEF shall prepare a 90% construction cost estimate.
- GRAEF shall conduct bi-weekly conference calls with the city to review design progress. (December (2))
- GRAEF will attend a 75% review meeting with the client.
- GRAEF will attend on utility coordination meeting for the project. Meeting to be organized by GRAEF

Bidding Documents & Permits

- GRAEF shall update all bidding documents to reflect the revised alignment.

GRAEF can provide the following Additional Services for additional compensation as detailed below

- Construction Management
- Public Involvement Meeting



It is our understanding that you will provide the following services, items and/or information:

- Completed (Signed) easement documentation for WE Energies to be used in permitting applications.

You agree to compensate GRAEF for all additional Basic Services noted above on an hourly rate and direct expense basis to an estimated additional maximum fee of \$235,000.00. The breakdown of additional services includes

St. Martin of Tours Realignment Study & Design	\$30,000
--	----------

You agree to compensate GRAEF for any Additional Services with an additional fee to be negotiated at a later date.

To accept this proposal for additional Basic Services, please sign and date and return one copy to us. Upon receipt of an executed copy, GRAEF will commence work on the additional Basic Services for the Project.

Please call us at 414-266-9175 if you have any questions regarding this proposal.

Sincerely,

Graef-USA Inc.

Mary Beth Pettit, P.E.
Vice President, Project Manager

CHANGE ORDER
CITY OF FRANKLIN
DEPARTMENT OF ENGINEERING

Change Order No: 02

Dated: August 16, 2022

PROJECT NAME S. 116th Street Trail

PROJECT LOCATION S. 116th Street and W. Ryan Road, not-including St. Martin of Tours Church

CONTRACTOR: GRAEF-USA, Inc.

Nature of the Changes: efforts to prepare Phase 2 plans involving various environmental documentation with preparation of construction documents in compliance with Wisconsin Department of Transportation (WisDOT) requirements. Scope is specifically outlined in GRAEF's letter to Glen Morrow dated August 9, 2022 regarding S. 116th Street Trail, Amendment No. 2.

These changes result in the following adjustment of Contract Price and Contract Time: (CITY CONTRACT ONLY)

Original Contract Price \$150,000.00

Contract price prior to this Change Order \$135,000.00

Net **INCREASE** resulting from this Change Order \$70,000.00

Current contract price including this Change Order \$205,000.00

Net (Increase/Decrease) in time resulting from this Change Order Increase 0 calendar days

The above changes are Approved by:

Mayor

City Clerk

Contractor:

By: Stephen R. Olson

By: Sandra L. Wesolowski

By: _____

Date: _____

Date: _____

Date: _____

Director of Finance & Treasurer

City Attorney

By: Denise Gilbert

By: Jesse A. Wesolowski

Date: _____

Date: _____

CHANGE ORDER
CITY OF FRANKLIN
DEPARTMENT OF ENGINEERING

Change Order No: 03

Dated: August 16, 2022

PROJECT NAME S. 116th Street Trail

PROJECT LOCATION S. 116th Street and W. Ryan Road, St. Martin of Tours Church Property

CONTRACTOR: GRAEF-USA, Inc.

Nature of the Changes: efforts to prepare an alternative alignment along the southern and western boundaries of the Church property, and create plans suitable for a Franklin (non WisDOT) construction project. Scope is specifically outlined in GRAEF's letter to Glen Morrow dated August 9, 2022 regarding S. 116th Street Trail, Amendment No. 3.

These changes result in the following adjustment of Contract Price and Contract Time: (CITY CONTRACT ONLY)

Original Contract Price \$150,000.00

Contract price prior to this Change Order \$205,000.00

Net **INCREASE** resulting from this Change Order \$30,000.00

Current contract price including this Change Order \$235,000.00

Net (Increase/Decrease) in time resulting from this Change Order Increase 0 calendar days

The above changes are Approved by:

Mayor

City Clerk

Contractor:

By: Stephen R. Olson

By: Sandra L. Wesolowski

By: _____

Date: _____

Date: _____

Date: _____

Director of Finance & Treasurer


City Attorney

By: Denise Gilbert

By: Jesse A. Wesolowski

Date: _____

Date: _____

APPROVAL 	REQUEST FOR COUNCIL ACTION	MTG. DATE August 16, 2022
Reports & Recommendations	Hawthorne Neighborhood Pavement and Utilities Survey	ITEM NO. G.6.

BACKGROUND

On August 2, 2022, Common Council moved to table “a survey for pavement and utilities for the properties within the Hawthorne neighborhood.” [Item G.5] The desire was to see a draft version of the survey before it is sent.

ANALYSIS

The lot widths vary from 75 feet to 528 feet. 100 feet is the minimum assessable lot distance. The average width is about 180 feet.

The current rates for residential sewer and water are \$163.56/foot and \$133.82/foot respectively. A total of \$10,000 for services per lot was assumed.

The range of assessments would be:

<u>Width of Lot</u>	<u>Total Assessment</u>	<u>Annual Payment</u>
(Minimum of) 100'	\$39,738	\$4,739
(Largest Lot) 528'	\$167,016	\$19,921
(Average) 180'	\$63,528	\$7,577

OPTIONS

- A. Direct Staff to prepare preliminary utility designs with construction costs, projected assessments, survey the properties within the Hawthorne neighborhood and return to Common Council for a discussion when completed. or
- B. Direct Staff to plan for a near-future repaving project as the roads are compared to other roads in the Local Road and Street Program and return to Common Council with a resolution to place a moratorium on any utility discussions in the next twenty-five years. or
- C. Direct Staff to plan for a utility project in the next five years with a corresponding paving project. or
- D. Other direction to Staff.

FISCAL NOTE

The direction concerning this item will have ramifications on future capital improvement projects. The preliminary road repaving estimate for this neighborhood is about \$400,000.

RECOMMENDATION

At the direction of the Common Council.

DRAFT LETTER FOR CONSIDERATION AND DISCUSSION

August 17, 2022

Use name/address from property records

RE: Road/Utility Survey for (address)

Dear Hawthorne Neighborhood Property Owner,

The Franklin Common Council has directed me to survey your neighborhood. Your responses will be forwarded to them to consider in a decision related to repaving your roads and installing water/sanitary utilities. There are many factors to consider in their decision and your opinion will be valued.

I am sure you have noticed that the streets in your neighborhood need repair and widening. However, we periodically receive requests from your neighborhood to consider installation of water and sewer utilities. So, the City would prefer to not spend a significant amount of money on a road project, then shortly thereafter tear up the new pavement for a utility project. If a road project is completed without adding utilities, it will be a long time before the City can feasibly install utilities.

We have not done any design efforts yet on the utilities, but I have made some estimates on special assessments that could be levied to pay for the utilities. The Common Council noted that such a utility project would be both water and sewer. The municipal code spells out how I calculate a special assessment and it appears that the special assessments would range from \$39,738 to \$167,016, mostly depending on the width of your parcel. The City has historically offered 12-year financing @ 6% APR that would be billed with your taxes. Those annual payments would range from \$4,740 for the lots 100-feet or small and up to \$19,920 for the lot that is 528-feet wide. You also have the option to finance from other sources. A detailed analysis for each property would be conducted if the decision is made to proceed with a utility project. Also note that there are up to 10-year deferment options for those that choose to not connect to the water utility from the beginning.

Please return this survey in the enclosed self-addressed-stamped-envelope or at the Engineering office in the lower level of City Hall- 9229 W Loomis Road by **Friday September 9, 2022.**


Please Check one box

- I am in favor of providing water/sewer utilities to the Hawthorne Neighborhood in the near future
- I am NOT in favor of providing water/sewer utilities to the Hawthorne Neighborhood for at least 25-30 years.

Comments, if any

Sincerely,

Glen E. Morrow, PE- City Engineer

APPROVAL 	REQUEST FOR COUNCIL ACTION	MTG. DATE August 16, 2022
Reports & Recommendations	A Resolution for Acceptance of a Storm Water Facilities Maintenance Agreement and a Storm Water Management Access Easement for Victory of the Lamb, Inc., 11120 W. Loomis Road, TKN 889-9989-000	ITEM NO. G.7.

BACKGROUND

The City of Franklin, Milwaukee Metropolitan Sewerage District (MMSD), and Wisconsin Department of Natural resources (WDNR) require storm water management facilities for any developments which meet thresholds as defined in their individual ordinances and rules. These facilities as designed may be for quantity and/or quality control. In the City of Franklin these are typically wet ponds, biofiltration basins, and/or permeable pavers, although other best management practices (BMPs) are also available. As a MMSD customer and designated by the WDNR as a Municipal Separate Storm Sewer System, the City's Ordinance is written to not only include City quantity requirements, but also MMSD quantity requirements, and WDNR quantity and quality requirements. The facilities within private developments are involved in those credits. Therefore, ongoing maintenance of private facilities is imperative.

It is the responsibility of the development owner, or a subdivision homeowners association, to maintain the storm water facilities in perpetuity per a prescribed maintenance agreement. The access easement allows for the City the right of entry in and across the easement area to access the storm water management facilities, and, if needed to inspect, maintain, or repair the facilities.

ANALYSIS

It is recommended that the Common Council authorize the Mayor and City Clerk to sign said the storm water facilities maintenance agreement and the storm water management access easement, and have them recorded with the Register of Deeds for Milwaukee County.

FISCAL NOTE

All costs associated with storm water facilities maintenance are to be paid by the development owner or homeowners association as stated in the individual agreement.

RECOMMENDATION

Motion to adopt Resolution No. 2022- _____ a resolution for acceptance of a storm water facilities maintenance agreement and a storm water management access easement for Victory of the Lamb, Inc., 11120 W. Loomis Road, TKN 889-9989-000.

STATE OF WISCONSIN : CITY OF FRANKLIN : MILWAUKEE COUNTY

RESOLUTION NO. 2022 -

A RESOLUTION FOR ACCEPTANCE OF A
STORM WATER FACILITIES MAINTENANCE AGREEMENT AND A
STORM WATER MANAGEMENT ACCESS EASEMENT
FOR VICTORY OF THE LAMB, INC.,
11120 W. LOOMIS ROAD, TKN 889-9989-000

WHEREAS, storm water facilities are required to meet quantity and quality standards;
and

WHEREAS, a maintenance agreement is developed and executed to ensure effective
maintenance and operation of private storm water facilities in perpetuity; and

WHEREAS, an access easement is necessary to allow the City right of entry in and across
the easement area to access the storm water management facilities.

NOW, THEREFORE BE IT RESOLVED by the Mayor and Common Council of the City
of Franklin that it would be in the best interest of the City to accept such Storm Water Facilities
Maintenance Agreement and Storm Water Management Access Easement, and, therefore, the
Mayor and City Clerk are hereby authorized and directed to execute them on behalf of the City.

BE IT FURTHER RESOLVED, that the City Clerk is directed to record said maintenance
agreement and access easement with the Register of Deeds for Milwaukee County.

Introduced at a regular meeting of the Common Council of the City of Franklin the
_____ day of _____, 2022, by Alderman _____.

PASSED AND ADOPTED by the Common Council of the City of Franklin on the
_____ day of _____, 2022.

APPROVED:

Stephen R. Olson, Mayor

ATTEST:

Sandra L. Wesolowski, City Clerk

AYES _____ NOES _____ ABSENT _____

**STORM WATER FACILITIES
MAINTENANCE AGREEMENT**

VICTORY OF THE LAMB
11120 W. Loomis Road
Tax Key: 889-9989-000

This AGREEMENT, made and entered into this 12th day of January, 2022, by and between Victory of the Lamb, Inc., hereinafter called the "Owner", and the City of Franklin, hereinafter called the "City".

WITNESSETH:

WHEREAS, the Owner is the owner of the following described lands situated in the City of Franklin, County of Milwaukee, State of Wisconsin, to-wit:

That part of the East 1/2 of the SE 1/4 of Section 19, in Township 5 North, Range 21 East, City of Franklin, Milwaukee County, Wisconsin, bounded and described as follows: Commencing at a point on the North line of the SE 1/4 of Section 19 which point is 661.57 feet West of the NE corner of said SE 1/4; thence continuing West on said North line 661.57 feet to a point; thence South on the North and South 1/8 line 1535.25 feet to a point in the center line of Loomis Road; thence North 41° 55' East along the center line 163.03 feet to a point; thence North 40° 56' East along the said center line 838.70 feet to a point; thence North 765.80 feet to the point of beginning; excepting therefrom those lands conveyed to the State of Wisconsin Department of Transportation by Warranty Deed recorded January 15, 1997 in Reel 3968, Image 1134 as document No. 7314748.

Hereinafter called the "Property".

WHEREAS, the Owner is developing the Property; and

WHEREAS, the Site Plan known as Victory of the Lamb, hereinafter called the "Plan", which is expressly made a part hereof, as approved or to be approved by the City, provides for on-site Storm Water Facilities within the confines of the Property as shown on the plan attached hereto as Exhibit "B" and more particularly described on Exhibit "C"; and

WHEREAS, the City and the Owner, its successors and assigns ("successors and assigns" meaning to include any homeowners' association and all owners of the property or any portion thereof), including any homeowners association, agree that the health, safety, and welfare of the residents of the City of Franklin, require that on-site Storm Water Facilities as defined in Section 15-8.0600 Unified Development Ordinance of the City of Franklin be constructed and maintained on the Property; and

WHEREAS, the City requires that on-site storm water management practices as shown on the Plan be constructed and adequately maintained by the Owner, its successors and assigns.

NOW, THEREFORE, in consideration of the foregoing premises, the mutual covenants contained herein, and the following terms and conditions, the parties hereto agree as follows:

1. The on-site storm water facilities shall be constructed by Owner in accordance with the plans and specifications which are identified as part of the storm water management plan dated 10/19/2021 and erosion control plan dated 9/7/2021 approved by the City Engineer and submitted as part of the as-built drawings approved by the City Engineer. Fountains and/or aerators shall not be installed in any ponds without prior written approval from the City Engineer

2. The Owner, its successors and assigns, shall comply with the ordinances and regulations which require that the Storm Water Facilities shall be regularly inspected and maintained as often as conditions may require, but in any event, at least once each year. The Standard Operation and Maintenance Report attached to this agreement as Exhibit "A" and by this reference made a part hereof shall be used for the purpose of the regular inspections of the Storm Water Facilities. The Owner, its successors and assigns, shall keep the Operation and Maintenance Reports from past inspections, as well as a log of maintenance activity indicating the date and type of maintenance completed of the Storm Water Facilities. The purpose of the inspections is to assure safe and proper functioning of the facilities. The inspections shall cover all storm water facilities, including but not limited to open swales (ditches), storm sewers, manholes, inlets, berms, outlet structures, pond areas and access roads. Deficiencies shall be noted in the Operation and Maintenance Report. The Reports and maintenance log shall be made available to the City for review.
3. The Owner, its successors and assigns, hereby grant permission to the City, its authorized agents and employees, to enter upon the Property and to inspect the Storm Water Facilities, whenever the City deems necessary. The purpose of inspection is to provide periodic review by City staff, to investigate reported deficiencies and/or to respond to citizen complaints. The City shall provide the Owner, its successors and assigns, copies of the inspection findings and a directive to commence with the repairs if necessary. Corrective actions shall be taken within a reasonable time frame as established by the City Engineer.
4. The Owner, its successors and assigns, shall adequately maintain the Storm Water Facilities, including but not limited to all pipes and channels built to convey storm water to the facility, as well as all structures, improvements, and vegetation provided to control the quantity and quality of the storm water. Adequate maintenance is herein defined as keeping the Storm Water Facilities in good working condition so that these storm water facilities are performing their design functions and are in accordance with the Stormwater Basin Maintenance Standards as detailed in Section 15.8.0600 of the City of Franklin Unified Development Ordinance, and Section 13.12 (2) of the Milwaukee Metropolitan Sewerage District (MMSD) rules, and by this reference made a part hereof.
5. If the Owner, its successors and assigns fails to maintain the Storm Water Facilities in good working condition acceptable to the City and does not perform the required corrective actions in a time as established by the City Engineer in written notice, the City may:
 - a) Issue a citation to the Owner, its successors and assigns. Such failure constitutes a violation of Section 15.8.0600 of the Unified Development Ordinance of the City of Franklin. The penalty for such violation of Section 15.8.0600 shall be not less than \$100 nor more than \$2500 for each offense, together with the costs of prosecution. Each day that the violation exists shall constitute a separate offense, and
 - b) Perform the corrective actions identified in the inspection report and assess the Owner, its successors and assigns, for the cost of such work. The cost of such work shall be specially charged against the Property pursuant to Wisconsin Statutes Section 66.0627. If the facilities are located on an outlot owned collectively by a homeowners association, the City may specially charge each member of the homeowners association according to the ownership interest in the facilities located on the property. This provision shall not be construed to allow the City to erect any structure of permanent nature on the land of the Owner outside of the easement for the Storm Water Facilities. It is expressly understood and agreed that the City is

under no obligation to routinely maintain or repair said storm water management practices and in no event shall this Agreement be construed to impose any such obligation on the City.

6. In the event the City, pursuant to this Agreement and applicable easements performs work of an emergency nature, or expends any funds in performance of said work for labor, use of equipment, supplies, materials, and the like, the Owner, its successors and assigns, shall reimburse the City upon demand, within thirty (30) days of receipt thereof for all actual costs incurred by the City hereunder.
7. This Agreement imposes no liability of any kind whatsoever on the City and the Owner agrees to indemnify and hold the City harmless from any liability in the event the Storm Water Facilities fail to operate properly.
8. This Agreement shall be attached as an exhibit to any document which creates a homeowners association that is responsible for maintenance of the Storm Water Facilities and shall be recorded at the Milwaukee County Register of Deeds, and shall constitute a covenant running with the land, and shall be binding on the Owner, its administrators, executors, assigns, heirs and any other successors in interest, including any homeowners association and all owners of the property or any portion thereof. The owner shall provide the City with a copy of any document which creates a homeowners association that is responsible for the Storm Water Facilities.
9. The owner, its successors and assigns, is prohibited from building structures, installing play equipment, installing plants, changing grades or performing any function that inhibits care and maintenance of any Storm Water Facilities.
10. The owner, its successor and assigns shall maintain, at all times, an individual(s) who will serve as a contact person(s).

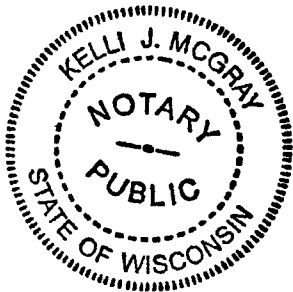
IN WITNESS WHEREOF, the City and Owner have set forth their hands and seals, effective the date first above written.

SEALED IN PRESENCE OF:

By: Victory of the Lamb, Owner
Name: Jim Vogel
Title: President

STATE OF WISCONSIN)ss.
Waukesha COUNTY)

Personally came before me this 12th day of January, 2022 the above named James Vogel, Inc., to me known to be the person who executed the foregoing instrument and acknowledged the same in the capacity indicated.



Kelli J. McGray
Notary Public, Waukesha County, WI
My commission expires: 10/11/2022

CITY OF FRANKLIN

By: _____ (Seal)
Name: Stephen R. Olson
Title: Mayor

COUNTERSIGNED:

By: _____ (Seal)
Name: Sandra L. Wesolowski
Title: City Clerk

STATE OF WISCONSIN)ss.
MILWAUKEE COUNTY)

Personally came before me this _____ day of _____, 20____, the above named Stephen R. Olson, Mayor and Sandra L. Wesolowski, City Clerk, of the above named municipal corporation, City of Franklin, to me known to be such Mayor and City Clerk of said municipal corporation, and acknowledged that they had executed the foregoing instrument as such officers as the Deed of said municipal corporation by its authority and pursuant to the Resolution File No. _____, adopted by its Common Council on this _____ day of _____, 20____.

Notary Public, Milwaukee County, WI
My commission expires: _____

This instrument was drafted by the City Engineer for the City of Franklin.

Form approved: _____
Jesse A. Wesolowski, City Attorney

EXHIBIT "A"

**OPERATION AND MAINTENANCE INSPECTION REPORT
STORMWATER MANAGEMENT PONDS
City of Franklin**

Name of Development _____

Responsible Party Name _____ Address _____

Telephone No. _____ Fax No. _____ E-mail _____

Inspector Name _____ Address _____

Telephone No. _____ Fax No. _____ E-mail _____

Basin Location General Address _____ Section No. _____

Normal Pool Yes No

Items inspected (Pond components)	Checked (Yes/No/NA)	Maintenance Needed (Yes/No/NA)	Remarks
1. Embankment and Emergency spillway			
1. Vegetation and ground cover adequate			
2. Embankment erosion			
3. Animal burrows			
4. Unauthorized plantings			
5. Cracking, bulging, or sliding of dam			
1. Upstream face			
2. Downstream face			
3. At or beyond toe			
Upstream			
Downstream			
4. Emergency spillway			
6. Pond, toe & chimney drains functioning			
7. Seeps/leaks on downstream face			
8. Slope protection or riprap failures			
9. Emergency spillway clear of debris			
10. Other (specify)			
2. Riser and principal spillway			
Type: Reinforced concrete _____			
Corrugated metal pipe _____			
PVC/HDPE _____			
Masonry _____			
1. Low flow orifice obstructed			
2. Primary outlet structure			
1. Debris removal necessary			
2. Corrosion control			
3. Trash rack maintenance			
1. Debris removal necessary			
2. Corrosion control			
3. Pond bottom			
Sediment or debris buildup in low flow			
Pilot channel or bottom (estimate depth)			

EXHIBIT B:

DEPICTION OF FACILITIES

UNPLATTED LANDS

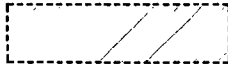
N89°26'37"W E 1/4 CORNER
661.46' SEC. 19-5-21
N LINE SE 1/4 SEC/19-5-21

UNPLATTED LANDS

UNPLATTED LANDS

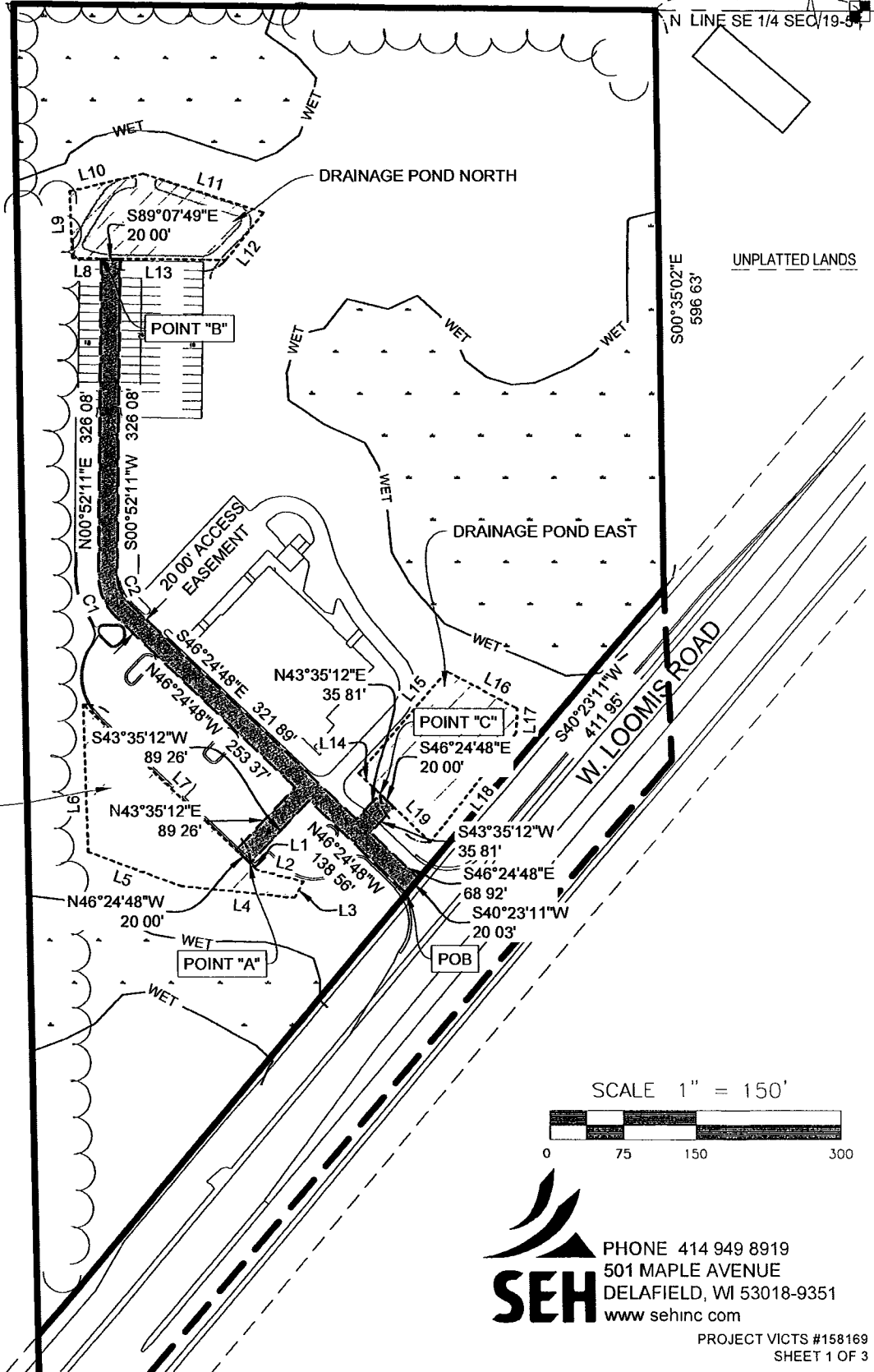
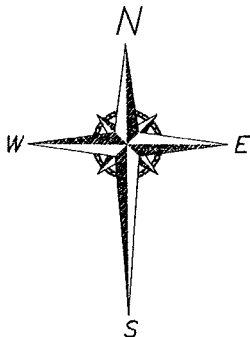


ACCESS
EASEMENT



DRAINAGE
POND
EASEMENT

DRAINAGE POND
SOUTHWEST



SCALE 1" = 150'



PHONE 414 949 8919
501 MAPLE AVENUE
DELAFIELD, WI 53018-9351
www.sehinc.com

PROJECT VICTS #158169
SHEET 1 OF 3

EXHIBIT "C"

LEGAL DESCRIPTION OF AREA

That part of the East ½ of the SE ¼ of Section 19, in Township 5 North, Range 21 East, City of Franklin, Milwaukee County, Wisconsin, bounded and described as follows: Commencing at a point on the North line of the SE ¼ of Section 19 which point is 661.57 feet West of the NE corner of said SE ¼; thence continuing West on said North line 661.57 feet to a point; thence South on the North and South 1/8 line 1535.25 feet to a point in the center line of Loomis Road; thence North 41° 55' East along the center line 163.03 feet to a point; thence North 40° 56' East along the said center line 838.70 feet to a point; thence North 765.80 feet to the point of beginning; excepting therefrom those lands conveyed to the State of Wisconsin Department of Transportation by Warranty Deed recorded January 15, 1997 in Reel 3968, Image 1134 as document No. 7314748.

STORM WATER MANAGEMENT ACCESS EASEMENT

VICTORY OF THE LAMB
11120 W. Loomis Road
Tax Key No. 889-9989-000

THIS EASEMENT is made by and between **Victory of Lamb Inc.** a religious organization and the CITY OF FRANKLIN, a municipal corporation of the State of Wisconsin, hereinafter referred to as "City," collectively referred to as "Grantees," and Victory of the Lamb, Inc., a Wisconsin Corporation, as owner (including successors and assign's of the City as may become applicable including the heirs, executors, administrators, successors and assigns of above owner(s) as may be or may become applicable), hereinafter called "Grantor," (if more than one grantor is listed above, said language herein referring thereto shall be interpreted in the plural and refer jointly and severally to such grantors).

WITNESSETH

WHEREAS, Grantor is the owner and holder of record Title to certain real property described on Exhibit "A" which is attached hereto and incorporated herein (the Property); and

WHEREAS, the City desires to acquire a non-exclusive easement with the right of entry in and across a portion of the property as the same is more particularly hereinafter described, with the right to build and construct and/or operate, maintain, repair, enlarge, reconstruct, relocate and inspect as may be or may become applicable the following facilities and appurtenances thereto, hereinafter collectively called the "Facilities," in, upon and across said portion of the Property: a storm water management basin as shown on the plan attached hereto as Exhibit "B."; and

NOW, THEREFORE, in consideration of the grant of the easement hereinafter described, the initial installation and maintenance of the Facilities by the Grantor, and the Grantees, and the payment of One Dollar (\$1.00) and other valuable considerations to the Grantor, the receipt whereof is hereby acknowledged, said Grantor, being the owner and person interested in the land hereinafter described, does hereby grant unto the City a perpetual, non-exclusive easement on that part of the Northeast ¼ and Southeast 1/4 of Section 19, Township Five (5) North, Range Twenty-one(21) East, in the City of Franklin, Milwaukee County, Wisconsin, more particularly described on Exhibit C attached hereto (the "Easement Area").

1. That said Facilities shall be maintained and kept in good order and condition by the Association, at the sole cost and expense of the Association. The City, at its sole discretion, may assume the rights of the Association to maintain the Facilities
2. That in and during whatever construction, reconstruction, enlargement or repair work is or becomes necessary in constructing and/or maintaining of said Facilities, so much of the surface or subsurface of the Easement Area on the Property as may be disturbed will, at the expense of the Association, be replaced in substantially the same condition as it was prior to such disturbance. The City, at its sole discretion, may assume the rights of the Association to construct, reconstruct, enlarge, repair, or do whatever is necessary in constructing and/or maintaining such Facilities. However, the Grantees shall indemnify and save harmless the Grantor from and against any loss, damage, claim, cost, injury or liability resulting from negligence or willful acts or omissions on the part of the Grantees, its agents or employees in connection with said work involved in constructing and/or maintaining of said Facilities; provided that if the above loss, claim, cost, damage, injury or liability results from the joint negligence of parties hereto, then the liability therefore shall be borne by them in proportion to their respective degree of negligence; provided further, however, that these provisions are subject to the legal defenses available under law which the Grantees or Grantor are entitled to raise, excepting the defense of so-called "sovereign immunity"
3. That no structure may be placed within the limits of the Easement Area by the Grantor, except that improvement such as walks, pavements for driveways, parking lot surfacing and landscape planting may be constructed or placed within the Easement Area
4. In connection with the construction by the Grantor of any structure or building abutting said Easement Area, the Grantor will assume all liability for any damage to the Facilities in the above described Easement Area. The Grantor will also save and keep the Grantees clear and harmless from any claims for personal injuries or property damage caused by any negligence or willful acts or omissions of the Grantor or persons acting on behalf of the

"In Progress 4/3/2017"

Grantor, arising out of the construction by the Grantor of any structure or building abutting the said Easement Area, and shall reimburse the Grantees for the full amount of such loss or damage.

5. The Grantor shall be responsible for the routine maintenance of land on which the easement is located.
6. The Facilities shall be accessible for maintenance by the Association at all times. The owner shall submit plans for approval to the City Engineer for any underground installation within the Easement Area, which approval shall not be unreasonably withheld, conditioned or delayed.
7. That the Grantor shall submit plans for all surface alterations of plus or minus 1 foot or greater within the limits of said Easement Area. Said alterations shall be made only with the approval of the City Engineer of the City of Franklin, which approval shall not be unreasonably withheld, conditioned or delayed.
8. The Grantees and Grantor shall each use, and take reasonable measures to cause their employees, officers, customers, agents, contractors and assigns to use, the Easement Area in a reasonable manner and so as not to obstruct or otherwise use the Easement Area in a manner that would unreasonably interfere with the use thereof by the other party hereto or its employees, officers, customers, agents, contractors and assigns.
9. The Grantees and Grantor each hereby waives all rights of subrogation that either has or may hereafter have against the other for any damage to the Easement Area or any other real or personal property or to persons covered by such party's insurance, but only to the extent of the waiving party's insurance coverage; provided, however, that the foregoing waivers shall not invalidate any policy of insurance now or hereafter issued, it being hereby agreed that such a waiver shall not apply in any case which would result in the invalidation of any such policy of insurance and that each party shall notify the other if such party's insurance would be so invalidated.
10. Either party hereto may enforce this easement by appropriate action, and should it prevail in such litigation, that party shall be entitled to recover, as part of its costs, reasonable attorneys' fees.
11. This easement may not be modified or amended, except by a writing executed and delivered by the Grantees and Grantor or their respective successors and assigns.
12. No waiver of, acquiescence in, or consent to any breach of any term, covenant, or condition hereof shall be construed as, or constitute, a waiver of, acquiescence in, or consent to any other, further, or succeeding breach of the same or any other term, covenant, or condition.
13. If any term or provision of this easement shall, to any extent, be invalid or unenforceable under applicable law, then the remaining terms and provisions of this easement shall not be affected thereby, and each such remaining term and provision shall be valid and enforceable to the fullest extent permitted by applicable law.
14. This easement shall be construed and enforced in accordance with the internal laws of the State of Wisconsin.
15. Upon completion of use of the Easement Area for the specific use as a storm water management access by the City, the easement shall be terminated by recording a release in recordable form with directions for delivery of same to Grantor at his last address given pursuant hereto, whereupon all rights, duties and liabilities created shall terminate.

IN WITNESS WHEREOF, the Grantor has hereunto set its hand and seals this

ON THIS DATE OF: March 25, 2022

Victory of Lamb LLC
Company Name

By:  (Seal)

Name & Title: Jim Vogel, President

MORTGAGE HOLDER CONSENT

The undersigned, WELS Church Extension Fund, Inc., a Wisconsin non-stock corporation ("Mortgagee"), as Mortgagee under that certain Mortgage encumbering the protected property and recorded in the Office of the Register of Deeds for Milwaukee County, Wisconsin, on June 22, 2015, as Document No. 10472562, hereby consents to the execution of the foregoing easement and its addition as an encumbrance title to the Property.

IN WITNESS WHEREOF, Mortgagee has caused these presents to be signed by its duly authorized officer, and its corporate seal to be hereunto affixed, as of the day and year first above written.

WELS Church Extension Fund, Inc
a Wisconsin non-stock corporation

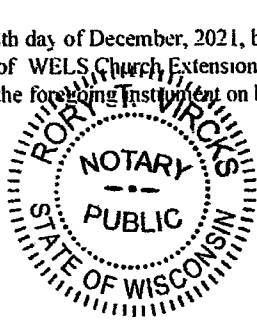
By: Brian E. Roser

Name: Brian E. Roser

Title: Assistant Executive Director

STATE OF WISCONSIN)
)ss
COUNTY OF WAUKESHA)

On this, the 28th day of December, 2021, before me, the undersigned, personally appeared Brian E. Roser, as Assistant Executive Director of WELS Church Extension Fund, Inc., a Wisconsin non-stock corporation, and acknowledged that he executed the foregoing instrument on behalf of said corporation, by its authority and for the purposes therein contained.



Name: Wayne J. [Signature]

Notary Public, State of Wisconsin

My commission expires 10/04/2024

EXHIBIT A
LEGAL DESCRIPTION OF PROPERTY

Parcel A: (Vacant Land)

That part of the East 1/2 of the Southeast 1/4 of Section 19, in Township 5 North, Range 21 East, Town of Franklin, Milwaukee County, Wisconsin, bounded and described as follows: Commencing at a point on the North line of the Southeast 1/4 of Section 19 which point is 661.57 feet West of the Northeast corner of said Southeast 1/4; Thence continuing West on said North line 661.57 feet to a point, thence South on the North and South 1/8 line 1535.25 feet to a point in the center line of the Loomis Road; thence North 41° 55' East along said center line 163.03 feet to a point, thence North 40° 56' East along said center line 638.70 feet to a point; thence North 765.80 feet to the place of beginning.

Excepting therefrom those lands conveyed to the State of Wisconsin, Department of Transportation by Warranty Deed recorded January 15, 1997 in Reel 3968, Image 1134, as Document No. 7314748.

Tax Parcel No: 889-9989-000

Address: 11120 W Loomis Road, Franklin, Wisconsin 53132

EXHIBIT B: DEPICTION OF EASEMENT

UNPLATTED LANDS

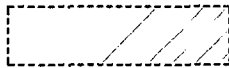
E 1/4 CORNER
N89°26'37"W 661.46'
SEC 19-5-21
N LINE SE 1/4 SEC 19-5-21

UNPLATTED LANDS

UNPLATTED LANDS

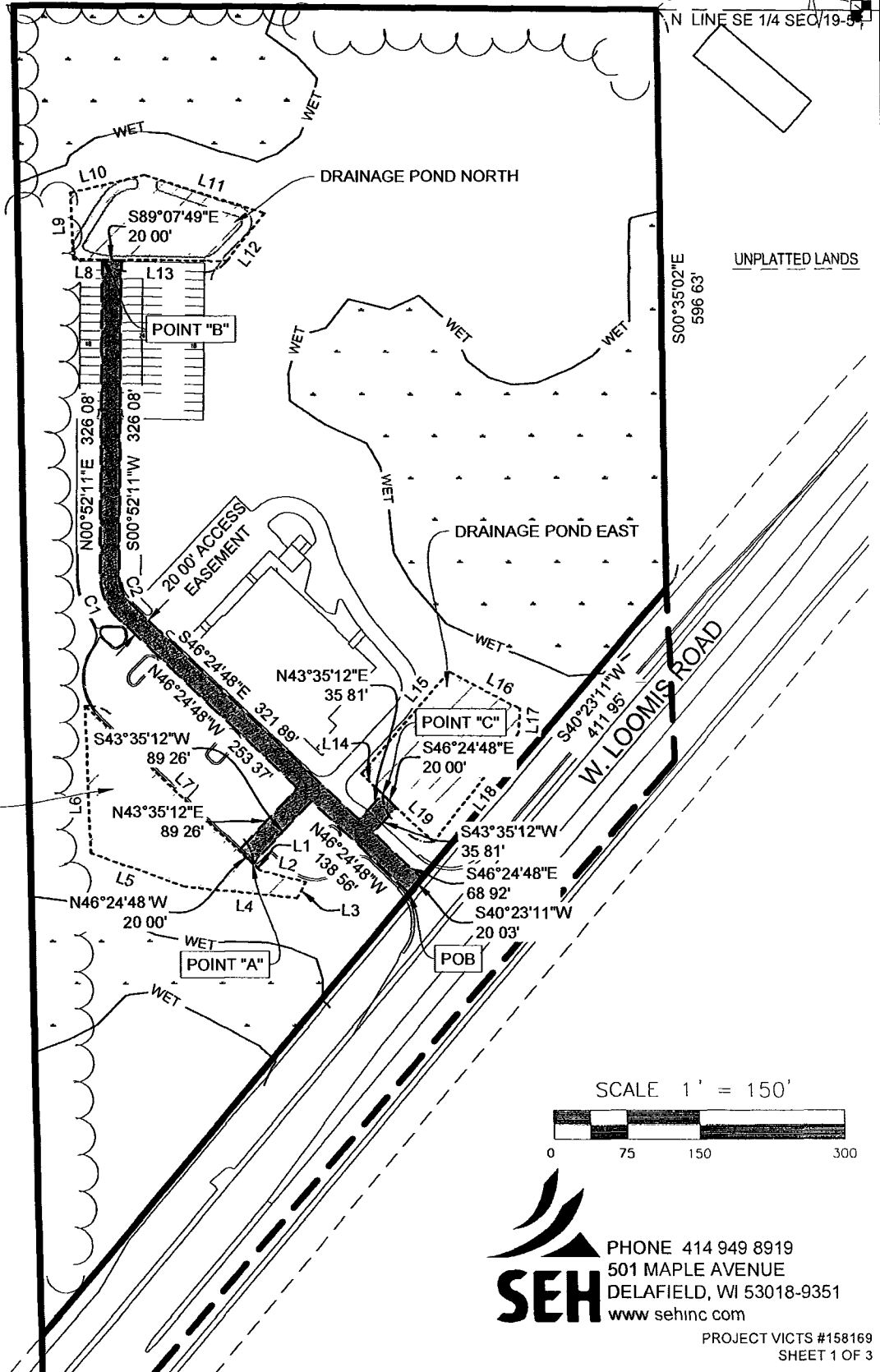
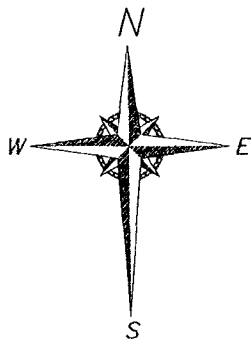


ACCESS
EASEMENT



DRAINAGE POND
EASEMENT

DRAINAGE POND
SOUTHWEST



SCALE 1' = 150'



PHONE 414 949 8919
501 MAPLE AVENUE
DELAFIELD, WI 53018-9351
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PROJECT VICTS #158169
SHEET 1 OF 3

EXHIBIT B:

DEPICTION OF EASMENT

CURVE TABLE

CURVE #	RADIUS	DELTA	ARC DIST	CHORD DIST	CHORD BEARING	TAN BEARING 1	TAN BEARING 2
C1	60 00'	47°16'59"	49 51'	48 12'	N22°46'19"W	N46°24'48"W	N00°52'11"E
C2	40 00'	47°16'59"	33 01'	32 08'	S22°46'19"E	S00°52'11"W	S46°24'48"E

LINE TABLE

SEGMENT	LENGTH	DIRECTION
L1	9 20'	S46°24'48"E
L2	49 56'	N75°43'23"W
L3	18 54'	S27°49'09"W
L4	117.86'	N84°11'34"W
L5	102 32'	N70°11'58"W
L6	151 57'	N01°28'55"W
L7	236 63'	S46°24'48"E
L8	29 32'	N89°07'49"W
L9	68 60'	N02°07'10"W
L10	78 19'	N76°33'22"E
L11	130 70'	S72°08'37"E
L12	62 97'	S38°49'41"W
L13	129 13'	N89°07'49"W
L14	30 21'	N46°24'48"W
L15	139 74'	N41°09'07"E
L16	82 01'	S62°15'00"E
L17	25 39'	S03°29'31"W
L18	143 13'	S38°29'25"W
L19	71 82'	S46°24'48"E



PHONE 414.949.8919
501 MAPLE AVENUE
DELAFIELD, WI 53018-9351
www.sehinc.com

EXHIBIT C:

LEGAL DESCRIPTION OF EASEMENT

Access Easement

Part of the Northeast 1/4 and Southeast 1/4 of Section 19, Town 5 North, Range 21 East, City of Franklin, Milwaukee County, Wisconsin bounded and described as follows

Commencing at the East 1/4 corner of Section 19, thence North 89°26'37" West along the North line of the Southeast 1/4 of said Section 19 a distance of 661.46 feet, thence South 00°35'02" East, 596.63 feet to the Northerly line of W Loomis Road, thence South 40°23'11" West along said Northerly line, 411.95 feet to the point of beginning of the lands to be described, thence North 46°24'48" West, 138.56 feet; thence South 43°35'12" West, 89.26 feet to a point to be known as Point "A", thence North 46°24'48" West, 20.00 feet, thence North 43°35'12" East, 89.26 feet; thence North 46°24'48" West, 253.37 feet, thence Northwesterly 49.51 feet along the arc of a curve to the right, whose radius is 60.00 feet and whose chord bears North 22°46'19" West, 48.12 feet;

thence North 0°52'11" East, 326.08 feet to a point to be known as Point "B", thence South 89°07'49" East, 20.00 feet; thence South 00°52'11" West, 326.08 feet; thence Southeasterly 33.01 feet along the arc of a curve to the left, whose radius is 40.00 feet and whose chord bears South 22°46'19" East, 32.08 feet, thence South 46°24'48" East, 321.89 feet, thence North 43°35'12" East, 35.81 feet to a point to be known as Point "C", thence South 46°24'48" East, 20.00 feet, thence South 43°35'12" West, 35.81 feet; thence South 46°24'48" East, 68.92 feet to the Northerly line of W Loomis Road, thence South 40°23'11" West along said Northerly line, 20.03 feet to the point of beginning

Contains 18,076 square feet

Drainage Pond Easement-Southwest

Part of the Northeast 1/4 and Southeast 1/4 of Section 19, Town 5 North, Range 21 East, City of Franklin, Milwaukee County, Wisconsin bounded and described as follows

Beginning at aforesaid Point "A", thence South 46°24'48" East 9.20 feet, thence South 75°43'23" East, 49.56 feet; thence South 27°49'09" West, 18.54 feet, thence North 84°11'34" West, 117.86 feet, thence North 70°11'58" West, 102.32 feet, thence North 01°28'55" West, 151.57 feet, thence South 46°24'48" East, 236.63 feet to the point of beginning

Contains 17,200 square feet

Drainage Pond Easement-North

Part of the Northeast 1/4 and Southeast 1/4 of Section 19, Town 5 North, Range 21 East, City of Franklin, Milwaukee County, Wisconsin bounded and described as follows

Beginning at aforesaid Point "B", thence North 89°07'49" West, 29.32 feet, thence North 02°07'10" West, 68.60 feet, thence North 76°33'22" East, 78.19 feet; thence South 72°08'37" East, 130.70 feet; thence South 38°49'41" West, 62.97 feet; thence North 89°07'49" West, 129.13 feet to the point of beginning

Contains 13,431 square feet

Drainage Pond Easement-East

Part of the Northeast 1/4 and Southeast 1/4 of Section 19, Town 5 North, Range 21 East, City of Franklin, Milwaukee County, Wisconsin bounded and described as follows

Beginning at aforesaid Point "C", thence North 46°24'48" West, 30.21 feet; thence North 41°09'07" East, 139.74 feet, thence South 62°15'00" East, 82.01 feet; thence South 03°29'31" West, 25.39 feet, thence South 38°29'25" West, 143.13 feet, thence North 46°24'48" West, 71.82 feet to the point of beginning

Contains 14,880 square feet



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www.sehinc.com

PROJECT VICTS #158169
SHEET 3 OF 3

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APPROVAL 	REQUEST FOR COUNCIL ACTION	MTG. DATE August 16, 2022
Reports & Recommendations	A Resolution for Acceptance of a Storm Water Facilities Maintenance Agreement and a Storm Water Management Access Easement for 7543 S. North Cape Road, TKN 797-9946-000	ITEM NO. G.8.

BACKGROUND

The City of Franklin, Milwaukee Metropolitan Sewerage District (MMSD), and Wisconsin Department of Natural resources (WDNR) require storm water management facilities for any developments which meet thresholds as defined in their individual ordinances and rules. These facilities as designed may be for quantity and/or quality control. In the City of Franklin these are typically wet ponds, biofiltration basins, and/or permeable pavers, although other best management practices (BMPs) are also available. As a MMSD customer and designated by the WDNR as a Municipal Separate Storm Sewer System, the City's Ordinance is written to not only include City quantity requirements, but also MMSD quantity requirements, and WDNR quantity and quality requirements. The facilities within private developments are involved in those credits. Therefore, ongoing maintenance of private facilities is imperative.

It is the responsibility of the development owner, or a subdivision homeowners association, to maintain the storm water facilities in perpetuity per a prescribed maintenance agreement. The access easement allows for the City the right of entry in and across the easement area to access the storm water management facilities, and, if needed to inspect, maintain, or repair the facilities.

ANALYSIS

It is recommended that the Common Council authorize the Mayor and City Clerk to sign said the storm water facilities maintenance agreement and the storm water management access easement, and have them recorded with the Register of Deeds for Milwaukee County.

FISCAL NOTE

All costs associated with storm water facilities maintenance are to be paid by the development owner or homeowners association as stated in the individual agreement.

RECOMMENDATION

Motion to adopt Resolution No. 2022- _____ a resolution for acceptance of a storm water facilities maintenance agreement and a storm water management access easement for 7543 S. North Cape Road, TKN 797-9946-000.

Engineering: TAB

STATE OF WISCONSIN : CITY OF FRANKLIN : MILWAUKEE COUNTY

RESOLUTION NO. 2022 -

A RESOLUTION FOR ACCEPTANCE OF A
STORM WATER FACILITIES MAINTENANCE AGREEMENT AND A
STORM WATER MANAGEMENT ACCESS EASEMENT
FOR 7543 S. NORTH CAPE ROAD, TKN 797-9946-000

WHEREAS, storm water facilities are required to meet quantity and quality standards;
and

WHEREAS, a maintenance agreement is developed and executed to ensure effective
maintenance and operation of private storm water facilities in perpetuity; and

WHEREAS, an access easement is necessary to allow the City right of entry in and across
the easement area to access the storm water management facilities.

NOW, THEREFORE BE IT RESOLVED by the Mayor and Common Council of the City
of Franklin that it would be in the best interest of the City to accept such Storm Water Facilities
Maintenance Agreement and Storm Water Management Access Easement, and, therefore, the
Mayor and City Clerk are hereby authorized and directed to execute them on behalf of the City.

BE IT FURTHER RESOLVED, that the City Clerk is directed to record said maintenance
agreement and access easement with the Register of Deeds for Milwaukee County.

Introduced at a regular meeting of the Common Council of the City of Franklin the
_____ day of _____, 2022, by Alderman _____.

PASSED AND ADOPTED by the Common Council of the City of Franklin on the
_____ day of _____, 2022.

APPROVED:

Stephen R. Olson, Mayor

ATTEST:

Sandra L. Wesolowski, City Clerk

AYES _____ NOES _____ ABSENT _____

**STORM WATER FACILITIES
MAINTENANCE AGREEMENT**

Andrew & Megyn Baer
7543 South North Cape Road, Franklin, WI
Parcel #: 7979946000

This AGREEMENT, made and entered into this 17TH day of MAY, 2022, by and between Andrew & Megyn Baer, hereinafter called the "Owner", and the City of Franklin, hereinafter called the "City".

WITNESSETH:

WHEREAS, the Owner is the owner of the following described lands situated in the City of Franklin, County of Milwaukee, State of Wisconsin, to-wit:

That part of the Southwest ¼ of Section 7, Township 5 North, Range 21 East, bounded and described as follows: Beginning at the Northwest corner of said ¼ section; thence South on the West line of said ¼ section 7.22 chains; thence East 23.67 chains more or less to the middle of the Milwaukee Road; thence northeasterly along the middle of said road to its intersection with the middle line of the Harrisburgh Road; thence northwesterly along the middle of said last named road to the North line of said ¼ section; thence West along North line of said ¼ section to the place of beginning; which said premises are also described as follows, to-wit: Beginning at the center of Section 7, in Township 5 North, Range 21 East and thence running South on the ¼ line 7 chains and 17 links; thence South 87 ½ degrees East 24 chains and 22 links to the center of highway; thence North 19 degrees East in the center of Highway, 5 chains and 74 links; thence North 43 degrees West 2 chains and 98 links to the East and West ¼ line; thence North 88 ½ degrees West on the ¼ line 24 chains and 5 links to the place of beginning. Said land being in the City of Franklin, County of Milwaukee, State of Wisconsin.

Hereinafter called the "Property".

WHEREAS, the Owner is developing the Property; and

WHEREAS, the Site Plan known as 7543 South North Cape Road hereinafter called the "Plan", which is expressly made a part hereof, as approved or to be approved by the city, provides for on-site Storm Water Facilities within the confines of the Property as shown on the plan attached hereto as Exhibit "B" and more particularly described on Exhibit "C"; and

WHEREAS, the City and the Owner, its successors and assigns ("successors and assigns" meaning to include any homeowners' association and all owners of the property or any portion thereof), including any homeowners association, agree that the health, safety, and welfare of the residents of the City of Franklin, require that on-site Storm Water Facilities as defined in Section 15-8.0600 Unified Development Ordinance of the City of Franklin be constructed and maintained on the Property, and

WHEREAS, the City requires that on-site storm water management practices as shown on the Plan be constructed and adequately maintained by the Owner, its successors and assigns.

NOW, THEREFORE, in consideration of the foregoing premises, the mutual covenants contained herein, and the following terms and conditions, the parties hereto agree as follows:

1. The on-site storm water facilities shall be constructed by the Owner in accordance with the plans and specifications which are identified as part of the storm water management plan dated 4/27/2022 and erosion control plan dated 5/3/2022 approved by the City Engineer and submitted as part of the as-built drawings approved by the City Engineer. Fountains and/or aerators shall not be installed in any ponds without prior written approval from the City Engineer.
2. The Owner, its successors and assigns, shall comply with the ordinances and regulations which require that the Storm Water Facilities shall be regularly inspected and maintained as often as conditions may require, but in any event, at least once each year. The Standard Operation and Maintenance Report attached to this agreement as Exhibit "A" and by this reference made a part hereof shall be used for the purpose of the regular inspections of the Storm Water Facilities. The Owners, its successors and assigns, shall keep the Operation and Maintenance Reports from past inspections, as well as a log of maintenance activity indicating the date and type of maintenance completed of the Storm Water Facilities. The purpose of the inspections is to assure safe and proper functioning of the facilities. The inspections shall cover all storm water facilities, including but not limited to open swales (ditches), storm sewers, manholes, inlets, berms, outlet structures, pond areas and access roads. Deficiencies shall be noted in the Operation and Maintenance Report. The Reports and maintenance log shall be made available to the City for review.
3. The Owner, its successors and assigns, hereby grant permission to the City, its authorized agents and employees, to enter upon the Property and to inspect the Storm Water Facilities, whenever the City deems necessary. The purpose of inspection is to provide periodic review by City staff, to investigate reported deficiencies and/or to respond to citizen complaints. The City shall provide the Owner, its successors and assigns, copies of the inspection findings and a directive to commence with the repairs if necessary. Corrective actions shall be taken within a reasonable time frame as established by the City Engineer.
4. The Owner, its successors and assigns, shall adequately maintain the Storm Water Facilities, including but not limited to all pipes and channels built to convey storm water to the facility, as well as all structures, improvements, and vegetation provided to control the quantity and quality of the storm water. Adequate maintenance is herein defined as keeping the Storm Water Facilities in good working condition so that these storm water facilities are performing their design functions and are in accordance with the Stormwater Basin Maintenance Standards as detailed in Section 15.8.0600 of the City of Franklin Unified Development Ordinance, and Section 13.12 (2) of the Milwaukee Metropolitan Sewerage District (MMSD) rules, and by this reference made a part hereof.
5. If the Owner, its successors and assigns fails to maintain the Storm Water Facilities in good working condition acceptable to the City and does not perform the required corrective actions in a time as established by the City Engineer in written notice, the City may.
 - a) Issue a citation to the Owner, its successors and assigns. Such failure constitutes a violation of Section 15.8.0600 of the Unified Development Ordinance of the City of Franklin. The penalty for such violation of Section 15.8.0600 shall be not less than \$100 nor more than \$2500 for each offense, together with the costs of prosecution. Each day that the violation exists shall constitute a separate offense, and
 - b) Perform the corrective actions identified in the inspection report and assess the Owner, its successors and assigns, for the cost of such work. The cost of such work

shall be specially charged against the Property pursuant to Wisconsin Statutes Section 66.0627. If the facilities are located on an outlot owned collectively by a homeowners association, the City may specially charge each member of the homeowners association according to the ownership interest in the facilities located on the property. This provision shall not be construed to allow the City to erect any structure of permanent nature on the land of the Owner outside of the easement for the Storm Water Facilities. It is expressly understood and agreed that the City is under no obligation to routinely maintain or repair said storm water management practices and in no event shall this Agreement be construed to impose any such obligation on the City.

6. In the event the City, pursuant to this Agreement and applicable easements performs work of an emergency nature, or expends any funds in performance of said work for labor, use of equipment, supplies, materials, and the like, the Owner, its successors and assigns, shall reimburse the City upon demand, within thirty (30) days of receipt thereof for all actual costs incurred by the City hereunder.
7. This Agreement imposes no liability of any kind whatsoever on the City and the Owner agrees to indemnify and hold the City harmless from any liability in the event the Storm Water Facilities fail to operate properly.
8. This Agreement shall be attached as an exhibit to any document which creates a homeowners association that is responsible for maintenance of the Storm Water Facilities and shall be recorded at the Milwaukee County Register of Deeds, and shall constitute a covenant running with the land, and shall be binding on the Owner, its administrators, executors, assigns, heirs and any other successors in interest, including any homeowners association and all owners of the property or any portion thereof. The owner shall provide the City with a copy of any document which creates a homeowners association that is responsible for the Storm Water Facilities.
9. The owner, its successors and assigns, is prohibited from building structures, installing play equipment, installing plants, changing grades or performing any function that inhibits care and maintenance of any Storm Water Facilities.
- 10 The owner, its successor and assigns shall maintain, at all times, an individual(s) who will serve as a contact person(s)

IN WITNESS WHEREOF, the City and Owner have set forth their hands and seals, effective the date first above written.

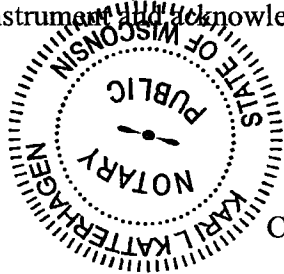
SEALED IN PRESENCE OF:

[Signature], Owner

By: Andrew Baer
Name:

STATE OF WISCONSIN)ss.
RACINE COUNTY)

Personally came before me this 17th day of May, 2022, the above named Andrew Baer, Inc., to me known to be the person who executed the foregoing instrument and acknowledged the same in the capacity indicated.



[Signature]
Notary Public, RACINE County, WI
My commission expires: 10/7/2025

CITY OF FRANKLIN

By: _____ (Seal)
Name: Stephen R. Olson
Title: Mayor

COUNTERSIGNED.

By: _____ (Seal)
Name: Sandra L. Wesolowski
Title: City Clerk

STATE OF WISCONSIN)ss.
MILWAUKEE COUNTY)

Personally came before me this _____ day of _____, 20____, the above named Stephen R. Olson, Mayor and Sandra L. Wesolowski, City Clerk, of the above named municipal corporation, City of Franklin, to me known to be such Mayor and City Clerk of said municipal corporation, and acknowledged that they had executed the foregoing instrument as such officers as the Deed of said municipal corporation by its authority and pursuant to the Resolution File No _____, adopted by its Common Council on this _____ day of _____, 20____.

Notary Public, Milwaukee County, WI
My commission expires _____

This instrument was drafted by the City Engineer for the City of Franklin
Form approved: _____

Jesse A. Wesolowski, City Attorney

EXHIBIT "A"

**OPERATION AND MAINTENANCE INSPECTION REPORT
STORMWATER MANAGEMENT PONDS
City of Franklin**

Name of Development 7543 South North Cape Road

Responsible Party Name Andrew & Megyn Baer Address _____

Telephone No. _____ Fax No _____ E-mail _____

Inspector Name _____ Address _____

Telephone No. _____ Fax No. _____ E-mail _____

Basin Location General Address _____ Section No. _____

Normal Pool Yes No

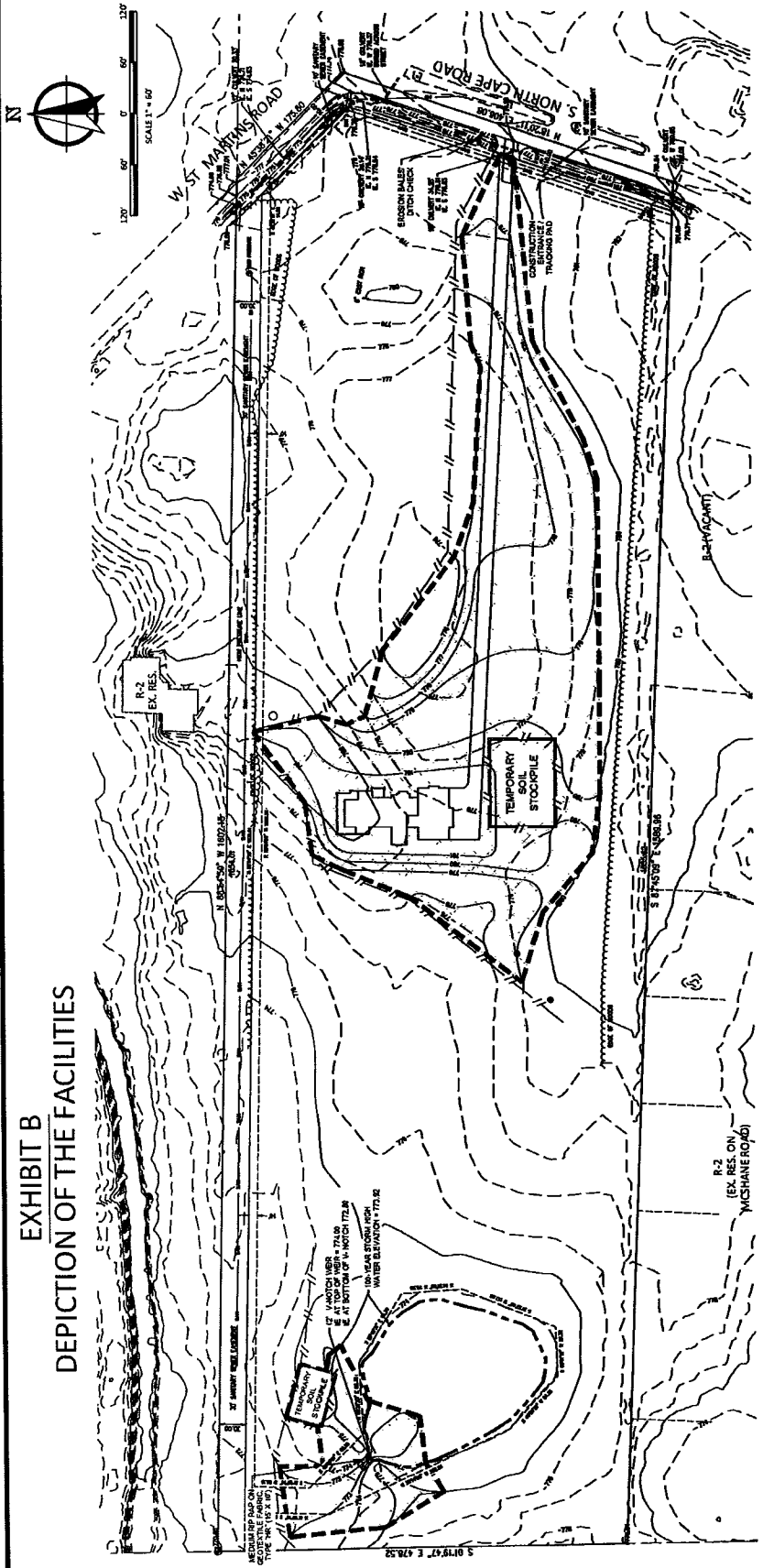
Items inspected (Pond components)	Checked (Yes/No/NA)	Maintenance Needed (Yes/No/NA)	Remarks
1 Embankment and Emergency spillway			
1 Vegetation and ground cover adequate			
2 Embankment erosion			
3 Animal burrows			
4 Unauthorized plantings			
5 Cracking, bulging, or sliding of dam			
1 Upstream face			
2 Downstream face			
3 At or beyond toe			
Upstream			
Downstream			
4 Emergency spillway			
6 Pond, toe & chimney drains functioning			
7 Seeps/leaks on downstream face			
8 Slope protection or riprap failures			
9 Emergency spillway clear of debris			
10 Other (specify)			
2 Riser and principal spillway			
Type Reinforced concrete _____			
Corrugated metal pipe _____			
PVC/HDPE _____			
Masonry _____			
1 Low flow orifice obstructed			
2 Primary outlet structure			
1 Debris removal necessary			
2 Corrosion control			
3 Trash rack maintenance			
1 Debris removal necessary			
2 Corrosion control			
3 Pond bottom			
Sediment or debris buildup in low flow			
Pilot channel or bottom (estimate depth)			

nielsen madsen + barber
 CIVIL ENGINEERS AND LAND SURVEYORS
 1458 Horizon Blvd Suite 200 Racine WI 53405
 Tel: (262)634-5588 Website: www.nmbc.net

BOWER DESIGN & CONSTRUCTION
 FOR
7543 SOUTH NORTH CAPE ROAD
 SITE GRADING & EROSION CONTROL PLAN
 CITY OF FRANKLIN, MILWAUKEE COUNTY WISCONSIN

NO.	DATE	DESCRIPTION
1	5/3/2022	ISSUE FOR APPROVAL
2		
3		
4		
5		
6		
7		
8		
9		
10		

C-4
 SHEET
 2022.0033.01
 DATE: 5-3-2022
 CHECKED: JMM
 DATE: 5-3-2022
 DRAWN: JMM
 DATE: 5-3-2022
 PROJECT: 7543 SOUTH NORTH CAPE ROAD



- NOTES**
- LOT SIZE = 798,111 SQ. FT. OR 18.327 AC
 - HOUSE = 3,444 SQ. FT.
 - POORCH = 826 SQ. FT.
 - DRIVEWAY = 13,991 SQ. FT.
 - AREA = 20,680 SQ. FT.
 - ESTIMATED % USE OF TOTAL LOT AREA = 2.6%
 - TOP OF FOUNDATION = 733.00
 - GARAGE FLOOR ELEV. = 781.67
 - PROPOSED ROAD GRADE = 781.83
 - PROPOSED DRIVEWAY SLOPE = 0.38%
- GRADING LEGEND**
- EXISTING CONTOURS
 - - - PROPOSED CONTOURS
 - EROSION MAT TYPE 1, CLASS B
 - MEDIUM RIP RAP ON GEOTEXTILE FABRIC, TYPE "HR"
 - SILT FENCE
 - EROSION BALES/DITCH CHECK
 - DISTURBED AREAS (150,083 S.F. = 4,364 AC)
 - 100-YEAR STORM HIGH
 - WATER ELEVATION = 773.92

UTILITY NOTE

EXISTING UTILITIES ARE SHOWN ON INFORMATIONAL PURPOSE ONLY AND NOT TO BE CONSIDERED AS A BASIS FOR DESIGN OR CONSTRUCTION. THE LOCATION, SIZE AND ELEVATION OF UNDERGROUND UTILITIES IS THE OWNER'S RESPONSIBILITY FOR PROPOSED UTILITY LOCATIONS. THE UTILITIES SHOWN ON THIS PLAN ARE THE PROPERTY OF THE CITY OF FRANKLIN. CALL '800' BEFORE YOU DIG TO AVOID DAMAGE TO ANY UTILITIES.

EXHIBIT B
DEPICTION OF THE FACILITIES

EXHIBIT "C"

LEGAL DESCRIPTION OF AREA

STORM WATER MANAGEMENT EASEMENT

That part of the Southwest 1/4 of Section 7, Township 5 North, Range 21 East of the Fourth Principal Meridian, bounded and described as follows: Commence at the Northwest corner of the Southwest 1/4 of said Section; thence S01°19'47"E 30.03 feet along the West line of the Southwest 1/4 of said Section; thence S88°54'50"E 45.00 feet parallel to the North line of the Southwest 1/4 of said Section to the point of beginning of this description; continue thence S88°54'50"E 1539.61 feet parallel to the North line of the Southwest 1/4 of said Section to the West line of W. St. Martins Road; thence S45°38'21"E 14.59 feet along the West line of said W. St. Martins Road; thence N88°54'50"W 1520.23 feet parallel to the North line of the Southwest 1/4 of said Section; thence S01°05'10"W 65.19 feet; thence S45°00'01"E 89.19 feet; thence N86°36'23"E 82.33 feet; thence S57°49'31"E 94.70 feet; thence S04°25'58"E 70.20 feet; thence S21°33'45"W 117.66 feet; thence S88°01'12"W 57.32 feet; thence N46°58'26"W 84.25 feet; thence N25°14'00"W 232.56 feet; thence N01°05'10"E 97.92 feet parallel to the West line of the Southwest 1/4 of said Section to the point of beginning. Said land being in the City of Franklin, County of Milwaukee, and State of Wisconsin. Containing 1 339 acres.

STORM WATER MANAGEMENT ACCESS EASEMENT

Andrew & Megyn Baer
7543 South North Cape Road, Franklin, WI
Parcel #: 7979946000

THIS EASEMENT is made by and between Andrew & Megyn Baer and the CITY OF FRANKLIN, a municipal corporation of the State of Wisconsin, hereinafter referred to as "City," collectively referred to as "Grantees," and Andrew & Megyn Baer, as owner (including successors and assigns of the City as may become applicable including the heirs, executors, administrators, successors and assigns of above owner(s) as may be or may become applicable), hereinafter called "Grantor," (if more than one grantor is listed above, said language herein referring thereto shall be interpreted in the plural and refer jointly and severally to such grantors)

WITNESSETH

WHEREAS, Grantor is the owner and holder of record Title to certain real property described on Exhibit "A" which is attached hereto and incorporated herein (the Property); and

WHEREAS, the City desires to acquire a non-exclusive easement with the right of entry in and across a portion of the property as the same is more particularly hereinafter described, with the right to build and construct and/or operate, maintain, repair, enlarge, reconstruct, relocate and inspect as may be or may become applicable the following facilities and appurtenances thereto, hereinafter collectively called the "Facilities," in, upon and across said portion of the Property a storm water management basin as shown on the plan attached hereto as Exhibit "B."; and

NOW, THEREFORE, in consideration of the grant of the easement hereinafter described, the initial installation and maintenance of the Facilities by the Grantor, and the Grantees, and the payment of One Dollar (\$1.00) and other valuable considerations to the Grantor, the receipt whereof is hereby acknowledged, said Grantor, being the owner and person interested in the land hereinafter described, does hereby grant unto the City a perpetual, non-exclusive easement on that part of the Southwest 1/4 of Section (7), Township Five (5) North, Range Twenty-one(21) East, in the City of Franklin, Milwaukee County, Wisconsin, more particularly described on Exhibit C attached hereto (the "Easement Area")

- 1 That said Facilities shall be maintained and kept in good order and condition by the owner, at the sole cost and expense of the owner. The City, at its sole discretion, may assume the rights of the owner to maintain the Facilities
- 2 That in and during whatever construction, reconstruction, enlargement or repair work is or becomes necessary in constructing and/or maintaining of said Facilities, so much of the surface or subsurface of the Easement Area on the Property as may be disturbed will, at the expense of the owner, be replaced in substantially the same condition as it was prior to such disturbance. The City, at its sole discretion, may assume the rights of the owner to construct, reconstruct, enlarge, repair, or do whatever is necessary in constructing and/or maintaining such Facilities. However, the Grantees shall indemnify and save harmless the Grantor from and against any loss, damage, claim, cost, injury or liability resulting from negligence or willful acts or omissions on the part of the Grantees, its agents or employees in connection with said work involved in constructing and/or maintaining of said Facilities; provided that if the above loss, claim, cost, damage, injury or liability results from the joint negligence of parties hereto, then the liability therefore shall be borne by them in proportion to their respective degree of negligence, provided further, however, that these provisions are subject to the legal defenses available under law which the Grantees or Grantor are entitled to raise, excepting the defense of so-called "sovereign immunity."
- 3 That no structure may be placed within the limits of the Easement Area by the Grantor, except that improvement such as walks, pavements for driveways, parking lot surfacing and landscape planting may be constructed or placed within the Easement Area
- 4 In connection with the construction by the Grantor of any structure or building abutting said Easement Area, the Grantor will assume all liability for any damage to the Facilities in the above described Easement Area. The Grantor will also save and keep the Grantees clear and harmless from any claims for personal injuries or property damage caused by any negligence or willful acts or omissions of the Grantor or persons acting on behalf of the

- Grantor, arising out of the construction by the Grantor of any structure or building abutting the said Easement Area, and shall reimburse the Grantees for the full amount of such loss or damage
- 5 The Grantor shall be responsible for the routine maintenance of land on which the easement is located.
 - 6 The Facilities shall be accessible for maintenance by the Association at all times. The owner shall submit plans for approval to the City Engineer for any underground installation within the Easement Area, which approval shall not be unreasonably withheld, conditioned or delayed
 - 7 That the Grantor shall submit plans for all surface alterations of plus or minus 1 foot or greater within the limits of said Easement Area. Said alterations shall be made only with the approval of the City Engineer of the City of Franklin, which approval shall not be unreasonably withheld, conditioned or delayed.
 - 8 The Grantees and Grantor shall each use, and take reasonable measures to cause their employees, officers, customers, agents, contractors and assigns to use, the Easement Area in a reasonable manner and so as not to obstruct or otherwise use the Easement Area in a manner that would unreasonably interfere with the use thereof by the other party hereto or its employees, officers, customers, agents, contractors and assigns.
 - 9 The Grantees and Grantor each hereby waives all rights of subrogation that either has or may hereafter have against the other for any damage to the Easement Area or any other real or personal property or to persons covered by such party's insurance, but only to the extent of the waiving party's insurance coverage; provided, however, that the foregoing waivers shall not invalidate any policy of insurance now or hereafter issued, it being hereby agreed that such a waiver shall not apply in any case which would result in the invalidation of any such policy of insurance and that each party shall notify the other if such party's insurance would be so invalidated.
 - 10 Either party hereto may enforce this easement by appropriate action, and should it prevail in such litigation, that party shall be entitled to recover, as part of its costs, reasonable attorneys' fees
 - 11 This easement may not be modified or amended, except by a writing executed and delivered by the Grantees and Grantor or their respective successors and assigns
 - 12 No waiver of, acquiescence in, or consent to any breach of any term, covenant, or condition hereof shall be construed as, or constitute, a waiver of, acquiescence in, or consent to any other, further, or succeeding breach of the same or any other term, covenant, or condition.
 - 13 If any term or provision of this easement shall, to any extent, be invalid or unenforceable under applicable law, then the remaining terms and provisions of this easement shall not be affected thereby, and each such remaining term and provision shall be valid and enforceable to the fullest extent permitted by applicable law.
 - 14 This easement shall be construed and enforced in accordance with the internal laws of the State of Wisconsin.
 - 15 Upon completion of use of the Easement Area for the specific use as a storm water management access by the City, the easement shall be terminated by recording a release in recordable form with directions for delivery of same to Grantor at his last address given pursuant hereto, whereupon all rights, duties and liabilities created shall terminate.

IN WITNESS WHEREOF, the Grantor has hereunto set its hand and seals this

ON THIS DATE OF: MAY 17TH, 2022

N/A -
Company Name

By: [Signature] (Seal)

Name & Title. ANDREW BAER / OWNER

STATE OF Wisconsin
COUNTY OF Racine ss

Before me personally appeared on the 17th day of May, A.D. 20 22.

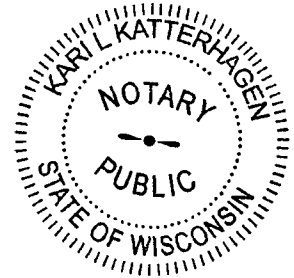
Andrew Baer Secretary or Name printed
President or Name printed
to me known to be the person(s) who executed the foregoing EASEMENT and acknowledged the same as the voluntary act and deed of said corporation.

[Signature]
Notary Public
My commission expires 10/7/2025

CITY OF FRANKLIN

By: _____
Stephen R Olson, Mayor

By: _____
Sandra L. Wesolowski, City Clerk



STATE OF WISCONSIN)
ss
COUNTY OF MILWAUKEE)

On this _____ day of _____ A D. 20 _____ before me personally appeared Stephen R Olson and Sandra L. Wesolowski who being by me duly sworn, did say that they are respectively the Mayor and City Clerk of the City of Franklin, and that the seal affixed to said instrument is the corporate seal of said municipal corporation, and acknowledged that they executed the foregoing assignment as such officers as the deed of said municipal corporation by its authority, and pursuant to resolution file No. _____ adopted by its Common Council on _____, 20 ____.

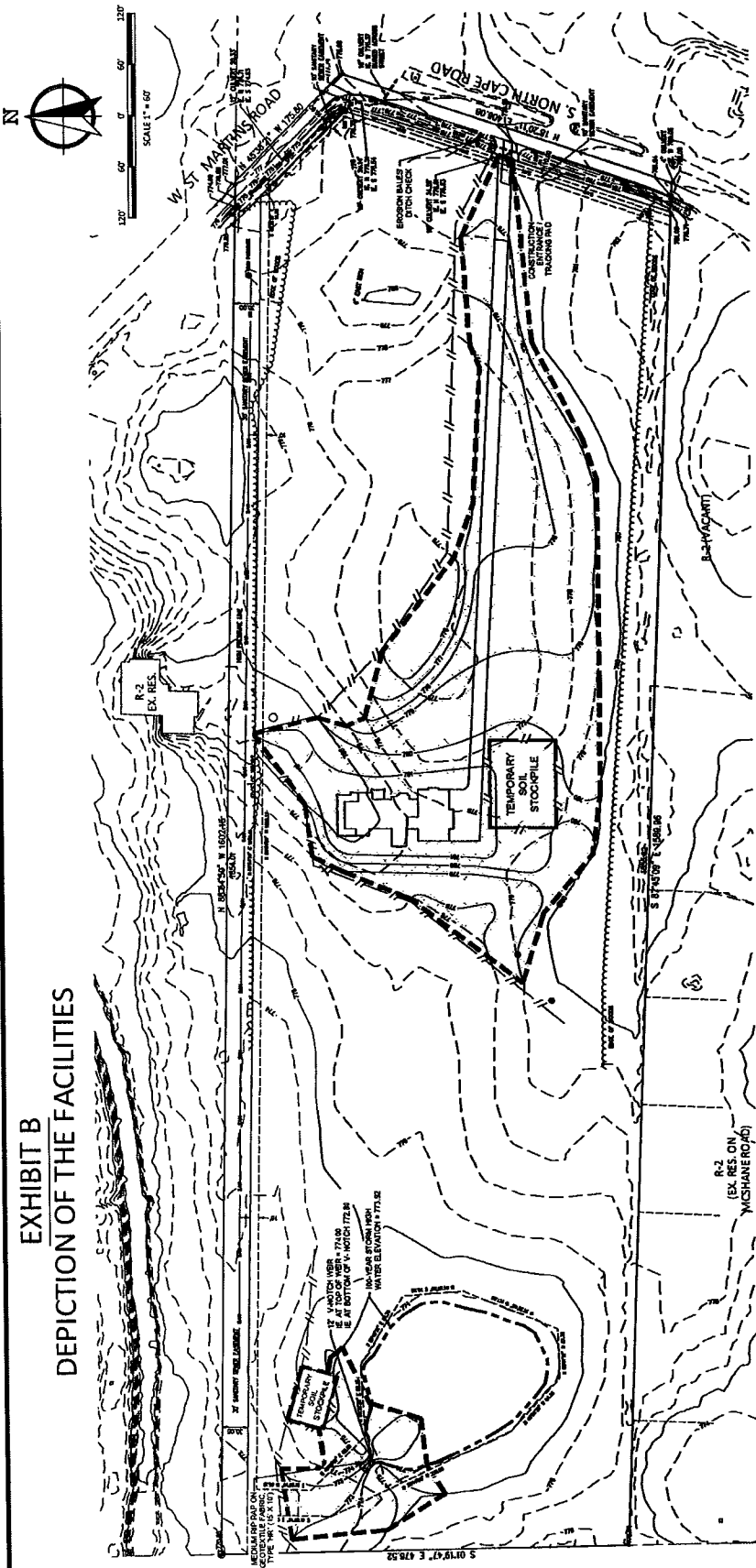
Notary Public, Milwaukee County, Wisconsin
My commission expires _____

Exhibit A

(Description of the Property)

That part of the Southwest $\frac{1}{4}$ of Section 7, Township 5 North, Range 21 East, bounded and described as follows: Beginning at the Northwest corner of said $\frac{1}{4}$ section; thence South on the West line of said $\frac{1}{4}$ section 7.22 chains; thence East 23.67 chains more or less to the middle of the Milwaukee Road; thence northeasterly along the middle of said road to its intersection with the middle line of the Harrisburgh Road; thence northwesterly along the middle of said last named road to the North line of said $\frac{1}{4}$ section; thence West along North line of said $\frac{1}{4}$ section to the place of beginning; which said premises are also described as follows, to-wit: Beginning at the center of Section 7, in Township 5 North, Range 21 East and thence running South on the $\frac{1}{4}$ line 7 chains and 17 links; thence South $87\frac{1}{2}$ degrees East 24 chains and 22 links to the center of highway; thence North 19 degrees East in the center of Highway, 5 chains and 74 links; thence North 43 degrees West 2 chains and 98 links to the East and West $\frac{1}{4}$ line; thence North $88\frac{1}{2}$ degrees West on the $\frac{1}{4}$ line 24 chains and 5 links to the place of beginning. Said land being in the City of Franklin, County of Milwaukee, State of Wisconsin.

EXHIBIT B DEPICTION OF THE FACILITIES



- NOTES**
- LOT SIZE = 796,111 SQ. FT. OR 18.332 AC
 - PROPOSED GARAGE = 2,178 SQ. FT.
 - PORCH = 865 SQ. FT.
 - DRIVWAY = 13,892 SQ. FT.
 - ESTIMATED % USE OF TOTAL LOT AREA = 2.6%
 - TOP OF FOUNDATION = 782.00
 - GARAGE FLOOR ELEV = 781.67
 - PROPOSED YARD GRADE = 781.35
 - PROPOSED DRIVEWAY SLOPE = 0.26%

- GRADING LEGEND**
- EXISTING CONTOURS
 - PROPOSED CONTOURS
 - EROSION MAT TYPE 1, CLASS B
 - MEDIUM RIP RAP ON GEOTEXTILE FABRIC, TYPE "HR"
 - SILTY FENCE
 - EROSION BALES/DITCH CHECK
 - DISTURBED AREAS (190,083 S.F. = 4.364 AC)
 - 100-YEAR STORM HIGH WATER ELEVATION = 773.92

UTILITY NOTE

EXISTING UTILITIES ARE SHOWN FOR INFORMATIONAL PURPOSES ONLY AND ARE NOT TO BE USED FOR CONSTRUCTION. THE CONTRACTOR SHALL BE RESPONSIBLE FOR VERIFYING THE TYPE, LOCATION, SIZE AND ELEVATION OF UTILITIES. ANY UTILITIES FOUND TO BE DIFFERENT FROM THE INFORMATION PROVIDED HEREON SHALL BE REPORTED TO THE ENGINEER IMMEDIATELY. THE CONTRACTOR SHALL CALL "DIGUERT HOTLINE" PRIOR TO ANY CONSTRUCTION.

www.DigAlertHotline.com
Call @ 1-800-244-8511

nielsen madsen + barber
CIVIL ENGINEERS AND LAND SURVEYORS
1458 Horizon Blvd Suite 200 Racine WI 53106
Tel: (262) 934-5588 Website: www.nmbc.net

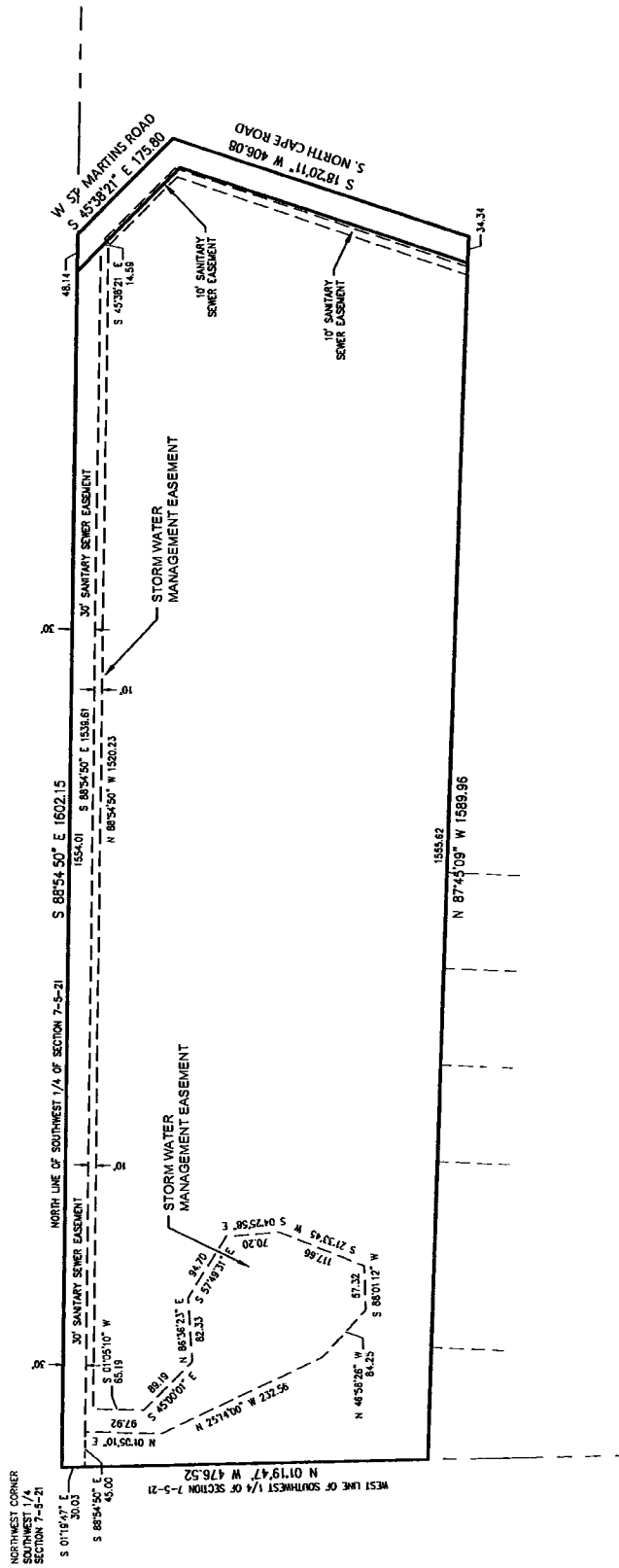
BOWER DESIGN & CONSTRUCTION
FOR
7543 SOUTH NORTH CAPE ROAD
SITE GRADING & EROSION CONTROL PLAN
CITY OF FRANKLIN, MILWAUKEE COUNTY WISCONSIN

NO.	DATE	DESCRIPTION
1	03/23/22	ISSUE FOR APPROVAL: 5-3-2022

PER L.A.S. NO. 1000000
DATE: 03/23/22
CREATED: JMM
DATE: 03/23/22
2022.0033.01
SHEET
C-4

EXHIBIT C MAP AND DESCRIPTION OF EASEMENT AREA

STORM WATER MANAGEMENT EASEMENT
That part of the Southwest 1/4 of Section 7, Township 5 North, Range 21 East of the Fourth Principal Meridian, bounded and described as follows: Commence at the Northwest corner of the Southwest 1/4 of said Section, thence S01°19'47"E 30.03 feet along the West line of the Southwest 1/4 of said Section, thence S88°54'50"E 45.00 feet parallel to the North line of the Southwest 1/4 of said Section to the point of beginning of this description, continue thence S88°54'50"E 1539.61 feet parallel to the North line of the Southwest 1/4 of said Section to the West line of W. St. Martins Road, thence N88°54'50"W 1520.23 feet parallel to the North line of the Southwest 1/4 of said Section, thence N88°54'50"W 65.19 feet, thence S45°00'01"E 89.19 feet, thence N86°36'23"E 82.33 feet, thence S57°49'31"E 94.70 feet, thence S04°25'58"E 70.20 feet, thence S21°33'45"W 117.66 feet, thence S88°01'12"W 57.32 feet, thence N46°58'26"W 84.25 feet, thence N25°14'00"W 232.56 feet, thence N01°05'10"E 97.92 feet parallel to the West line of the Southwest 1/4 of said Section to the point of beginning. Said land being in the City of Franklin, County of Milwaukee, and State of Wisconsin. Containing 1.339 acres



NOTE

BEARING BASE GRID NORTH, WISCONSIN
COORDINATE SYSTEM, SOUTH ZONE
BASED UPON NAD 1983 / 2011

Nielsen Madsen + Barber
CIVIL ENGINEERS AND LAND SURVEYORS
1458 Horizon Blvd Suite 200 Racine WI 53406
Tele (262)634 5588 Website www.nmbisc.net



DRAWN 5-3-2022 BY SCB
SCALE 1" = 150'
SHEET 1 OF 1 SHEETS
JOB NO 2022.0033.01

APPROVAL <i>Slw</i>	REQUEST FOR COUNCIL ACTION	MEETING DATE August 16, 2022
REPORTS & RECOMMENDATIONS	A RESOLUTION TO ENGAGE MILWAUKEE COUNTY TO NEGOTIATE ON USE OF ITS LAND FOR A STORMWATER RETENTION BASIN SERVING PARTS OF CORPORATE PARK	ITEM NUMBER G.9.

Franklin Tax Increment Finance District (TID) 8 has been established to precipitate industrial and commercial development in Franklin Corporate Park. It is a substantial component of Milwaukee County economic growth, possessing 521 commercial and industrial acres, an I-94 & Elm Road interchange, \$136 million of constructing and planned development, generating over 1,000 good jobs. Infrastructure improvements are being made through TID 8 to support this development including street, water, sewer, electric and stormwater systems.

To facilitate development and infrastructure improvements along W. Elm Road a stormwater retention basin needs to be constructed. To maximize investment on the developing Wangard project its stormwater retention basin needs to be relocated and could be incorporated in to the W. Elm Rd. basin.

Adjacent Milwaukee County lands to the west of Wangard and W. Elm Rd. are unused, undevelopable and could accommodate the new stormwater retention basin. Map 2 shows all planned infrastructure, including the proposed basin. Alternative sites have been examined and would cost Milwaukee County \$32.3 planned development and subsequent annual revenues of \$134,590.

The City of Franklin would assume all costs to operate a stormwater retention basin, so no costs accrue to Milwaukee County. The land can be lent to the City for this use. By participating this project and employing idle land Milwaukee County will protect and maximize future revenues.

This request is subsequent to Resolution No. 2021-7731 authorizing feasibility analysis, preliminary design and for the Mayor and staff to continue discussions with Milwaukee County on acquisition.

COUNCIL ACTION REQUESTED

A motion to adopt Resolution 2022 _____ authorizing certain officials to engage Milwaukee County and pursue negotiations for participation of County land (from Tax Key parcel 950-9998-001) in establishing a stormwater retention basin for TID 8.

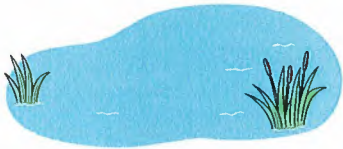
FRANKLIN CORPORATE PARK ELM ROAD STORM WATER BASIN

Proposal for Milwaukee County Partnership

A small land contribution from Milwaukee County for a stormwater retention basin will maximize the long-term economic value of this development



FRANKLIN CORPORATE PARK = 521 ACRES
> \$136 Million investment
>1,000 Living wage jobs



ASK: 10 Acre easement to locate stormwater basin



Proposed & Current Corporate Park Projects = \$587,000 annual revenue to Milwaukee County*



With Alternative Stormwater Basin Location = Loss of \$31.3M of available development and \$134,590 annual revenue to Milwaukee County*

*at TID close



PROPOSAL
MILWAUKEE COUNTY PARTICIPATION
ELM ROAD STORM WATER RETENTION BASIN
FRANKLIN CORPORATE PARK, FRANKLIN, WI

EXECUTIVE SUMMARY

Franklin Corporate Park is a substantial component of Milwaukee County economic growth, possessing 521 commercial and industrial acres, an I-94 & Elm Road interchange, \$136 million of constructing and planned development, generating over 1,000 good jobs. Infrastructure improvements are being made through Tax increment District (TID) 8 to support this development including street, water, sewer, electric and stormwater systems.

To facilitate development and infrastructure improvements along W. Elm Road a stormwater management basin needs to be constructed. To maximize investment on the developing Wangard project its stormwater basin needs to be relocated and could be incorporated in to the W. Elm Rd. basin.

Adjacent Milwaukee County lands to the west of Wangard and W. Elm Rd. are unused, undevelopable and could accommodate the new stormwater basin. Map 2 shows all planned infrastructure, including the proposed basin. Alternative sites have been examined and would cost Milwaukee County \$32.3 million planned development and subsequent annual revenues of \$134,590.

The City of Franklin would assume all costs to operate a stormwater retention basin, so no costs accrue to Milwaukee County. The land can be lent to the City for this use. By participating in this project and employing idle land Milwaukee County will protect and maximize future revenues.

INTRODUCTION
FRANKLIN CORPORATE PARK

The Franklin Corporate Park is 521 acres in southeast Franklin City. It is served by the new Elm Road Interchange on I-94, providing a unique opportunity to increase Milwaukee County and City commercial property tax and employment bases.

Over \$136 million of prime development is under construction, pending, or planned in Corporate Park, with more than 1,000 good paying jobs committed or expected.

Improvements include Elm Road and Hickory Street, stormwater management facilities, water, sewer and traffic control construction, signage and streetscaping. Investments in improvements to South 27th Street, intersections and environmental features are also included in the project plan.

Investment in relocating high power transmission lines is being made to maximize the value and amount of developable land in the Park.

Reconstruction of Elm Road is critical to development of the whole business park and a stormwater management basin is required to support it and all sites directly served. Wangard Development plans for an additional 90,000 square feet of space that depends on moving the existing stormwater basin on their site to a Milwaukee County owned site being proposed in this document.



This proposal for County land participation builds on the partnership in Tax Incremental Financing between Milwaukee County and the other taxing jurisdictions of the Franklin Corporate Park.

COUNTY INTEREST

Milwaukee County will benefit from the increased assessed valuation generated as the resulting development and closure of TID district 8. The County is calculated to receive an additional \$587,000 annually from this project, after TID 8 is closed. Investment and job creation in Corporate Park and TID 8 are currently meeting projections and the proposed stormwater retention basin will facilitate planned and ongoing projects and continuing growth. Action now is needed from Milwaukee County to employ a currently idle resource to complete development in Corporate Park within TID 8 finance timeframes and maximize the County's return on its participation. Expediently seizing development opportunities for this area will provide County and City residents lower tax rates and good job opportunities.

Currently parcel 950-9998-001 (see MAP 2) generates no property tax revenue as a County-owned property. The parcel contains primarily woodland and wetland reserve areas and is otherwise undevelopable.

TAX INCREMENTAL FINANCING, FRANKLIN AND MILWAUKEE COUNTY

Tax Incremental Financing is based on the use of new taxes generated by new growth to pay for the costs to cause the new growth. Simply put, Growth pays for Growth. TIF's require that all the property taxing entities contribute this new tax revenue to debt payment so that the total increment can be put back on the tax rolls (the benefit) as quickly as possible. These taxing jurisdictions continue to receive the tax revenue from the district on the "base" value of the properties when the district is created thereby not penalizing anyone for the creation of the district.

Tax Incremental Financing (TIF) is the only tool available to Class 2 and Class 3 cities to finance economic development projects. Wisconsin Statute 66.1105 specifies all criteria that must be met to form a district, how a district is to be managed and all other terms of the financing plan. By definition, new incremental taxes generated within the district are used to pay off debts incurred as outlined in the approved project plan. Cities are the administrative and financial responsible parties for TIF districts. TIF's take advantage of the taxing power of all underlying taxing jurisdictions levying property taxes on the district.

In order of highest to lowest levy's in this district; Oak Creek-Franklin Schools (40.95%), City of Franklin (23.86%), Milwaukee County (22.12%), Milwaukee Metropolitan Sewerage District (7.61%) and Milwaukee Area Technical College (5.47%). As is apparent by this list, there are five business and financing partners in this TID. TABLEs 2 and 3 shows estimated tax increment generated on current and planned investments through the life of TID 8.

As mentioned, TIF's are available generally only to Cities and Villages in the state and under certain circumstances, Towns may use the tool. Counties may not use the tool outside of a municipal TID.

Because TID's are the tool for cities, villages and in some cases towns, they are the responsible partners for the administration of these districts and the "developer" of the project requiring investment of administrative, financial, legal and staff time and engineering and construction management in many cases. The financial



burden rests on the municipality and has impacts in many cases on bonding capabilities, yet the beneficiaries are all of the taxing entities (in this case, four others).

In this specific TID, the City is also contributing its' assets to the benefit of the district by donating exiting roadways to be expanded (less expensive than building new roads), engineering, legal, financial and administrative staff whose costs cannot be recovered from the TIF.

Map 1 illustrates Corporate Park's complete development layout concept, planned commercial projects and those under construction. These projects will generate enough revenue during TID 8's 20-year life to pay for infrastructure improvements. There are an estimated 17 years remaining for TID 8 and investment is on track to meet revenue generation needs.

REQUEST

The re-construction and widening of the City of Franklin owned Elm Road to become the main entrance and roadway requires a stormwater management basin. Wangard Development plans for an additional 90,000 square feet of space that depends on moving the existing stormwater basin on their site to the proposed site. The city has analyzed several different locations to locate this stormwater basin including parcels on Elm Road, Hickory Street and a Milwaukee County Parks parcel (Tax Key # 950-9998-001, see attached Map 2). The analysis considered cost to build, effectiveness and cost (engineering, construction, maintenance and land acquisition cost and opportunity cost).

The stormwater basin is most effectively located on the Milwaukee County Parks parcel (Tax Key # 950-9998-001) just west of the park and is part of the Root River corridor. The primary alternate parcel is located on Hickory Street (owned by Biller Development), fronts the street and would occupy approximately 5 acres of developable land. Using this site for a stormwater retention basin would cost Milwaukee County and the other taxing jurisdictions not only the price of the land but also the probable tax revenue (forever) from the development of the land (Elm Rd costs even more).

Also, redevelopment drainage off Elm Rd will have to be on development sites, more expensive, delayed and possibly resulting in a poor entrance to Corporate Park. If momentum is stalled due to this lack of quality access then, Biller's remaining lots on Hickory St. may not develop in the life of TID 8.

The following TABLE 1 highlights the lost value and revenue to the county if this site is used.

The Milwaukee County 2021 tax rate is \$4.3/m



TABLE 1

Parcel	Gross Acres	Acquisition Cost (est.)	Development Value (est.)	County Tax Value Loss (est.)
Milwaukee County	101 acres	\$0	\$0	\$0
W. Elm Rd.	<20 acres	Approx. \$500,000	\$12,000,000	\$51,600 annual \$500,000 one time
Hickory St.	5 acres	Approx. \$600,000	\$5,000,000	\$21,500 annual \$600,000 one time
Wangard	3.16 acres	-	\$6,300,000	\$27,000 annual
Remaining Biller's (Hickory St.)	-	-	\$20,000,000	\$86,000
Lost revenue opportunity				\$134,590 annually

From TABLE 1 we see the following results for constructing on the shaded Hickory St. (Biller) alternative:

- Wangard’s additional 90,000 square feet would not be built, resulting in \$6.3 million lost investment and \$27,000 lost annual county revenue, upon TID closure;
- The Hickory St. (Biller) site would not be commercially developed, resulting in \$5 million lost investment and \$21,500 lost annual county revenue, upon TID closure (more if W. Elm Rd. site is used);
- Remaining Biller (Hickory St.) development;
- A total of \$134,590 is lost annual county revenue, upon TID closure.

Additionally, TID 8 loses \$233,910 of annual infrastructure development revenues and spends in \$600,000 Biller land acquisition cost. Lots south of Biller’s development on Hickory St. will not develop as fast and maybe not during TID 8’s life.

The City of Franklin respectfully requests Milwaukee County contribute or grant an easement from parcel 950-9998-001 as the site for the retention basin of approximately 10 acres.

Milwaukee County would play an active role in facilitating economic development in the City of Franklin and the County, as well as permanently increasing its commercial property tax revenues.

The City of Franklin would assume any operating costs for the retention basin.

By employing an idle resource, at no cost to the county, the risk of losing future revenue is minimized.

Map 2 delineates infrastructure improvements to be executed in Corporate Park, including the proposed stormwater retention basin and County land project. Appendix 1 is a feasibility study, conducted by the City of Franklin to demonstrate the viability of our request.



SUMMARY

The Franklin Corporate Park presents an opportunity for Milwaukee County to support and ensure increased tax base and job creation.

The City of Franklin has made significant effort and investment in this opportunity through planning, engineering and creation of Tax Increment District 8 to finance infrastructure and development, including drainage for land and street construction (Elm Road and Hickory Street).





Milwaukee County can facilitate Corporate Park infrastructure development by using some of its land adjacent to the Park for a stormwater retention basin, which will have no expense to the County.

Milwaukee County can maximize its return on participation, and TID 8 financial effectiveness, by acting expeditiously to establish the stormwater retention basin.

Milwaukee County and citizens will enjoy increased job opportunities and tax base because of its participation in this project.

MAP 1

LEGEND

-  TID B
-  PROPOSED STREET
-  FUTURE STREETS (CONCEPTUAL)
-  LOT LINES



0 500 1000

SCALE IN FEET

0 1/8 1/4

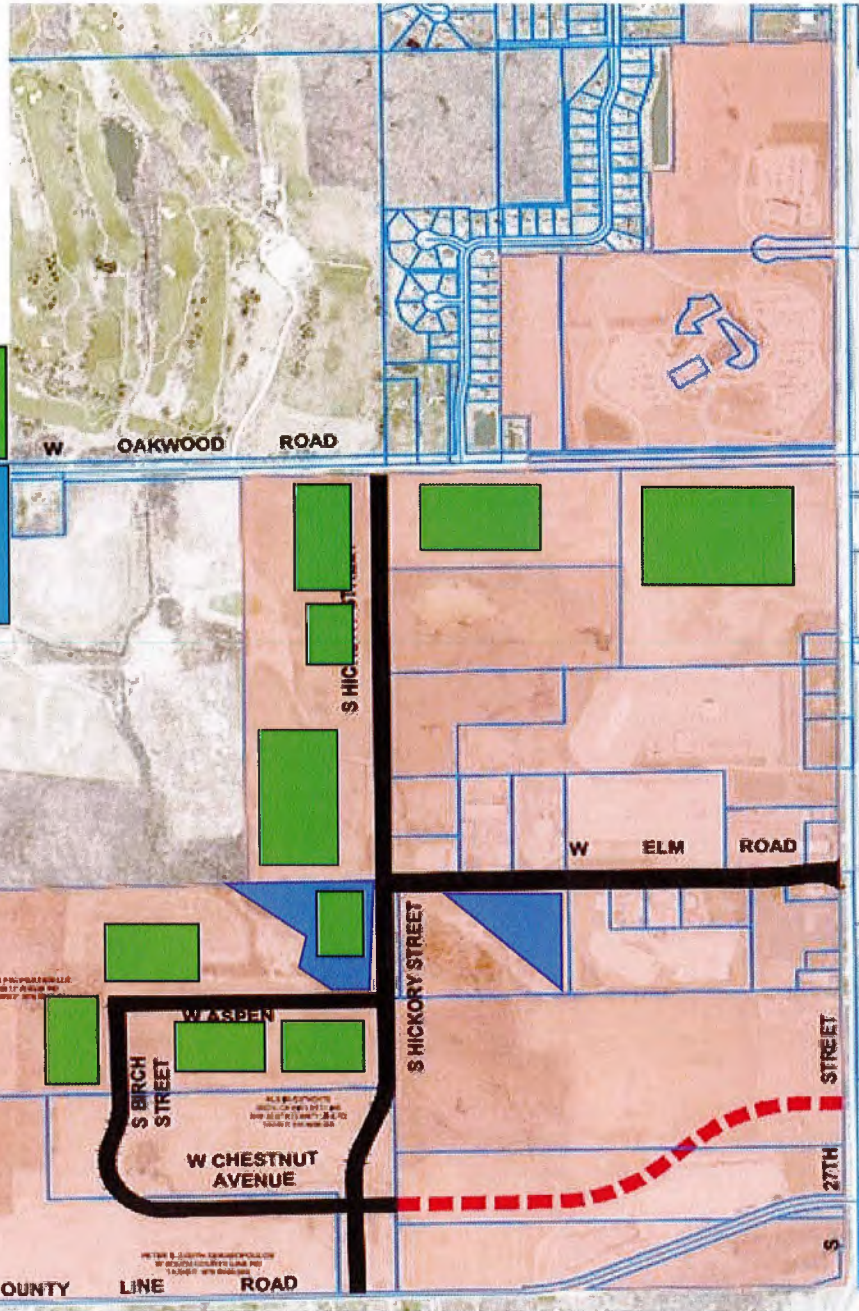
SCALE IN MILES

CORPORATE PARK



BUILDINGS UNDER CONSTRUCTION OR PLANNED FOR DEVELOPMENT (not to scale, or precise location)

Alternate, costly, stormwater management basins on developable land (not to scale or precise location)

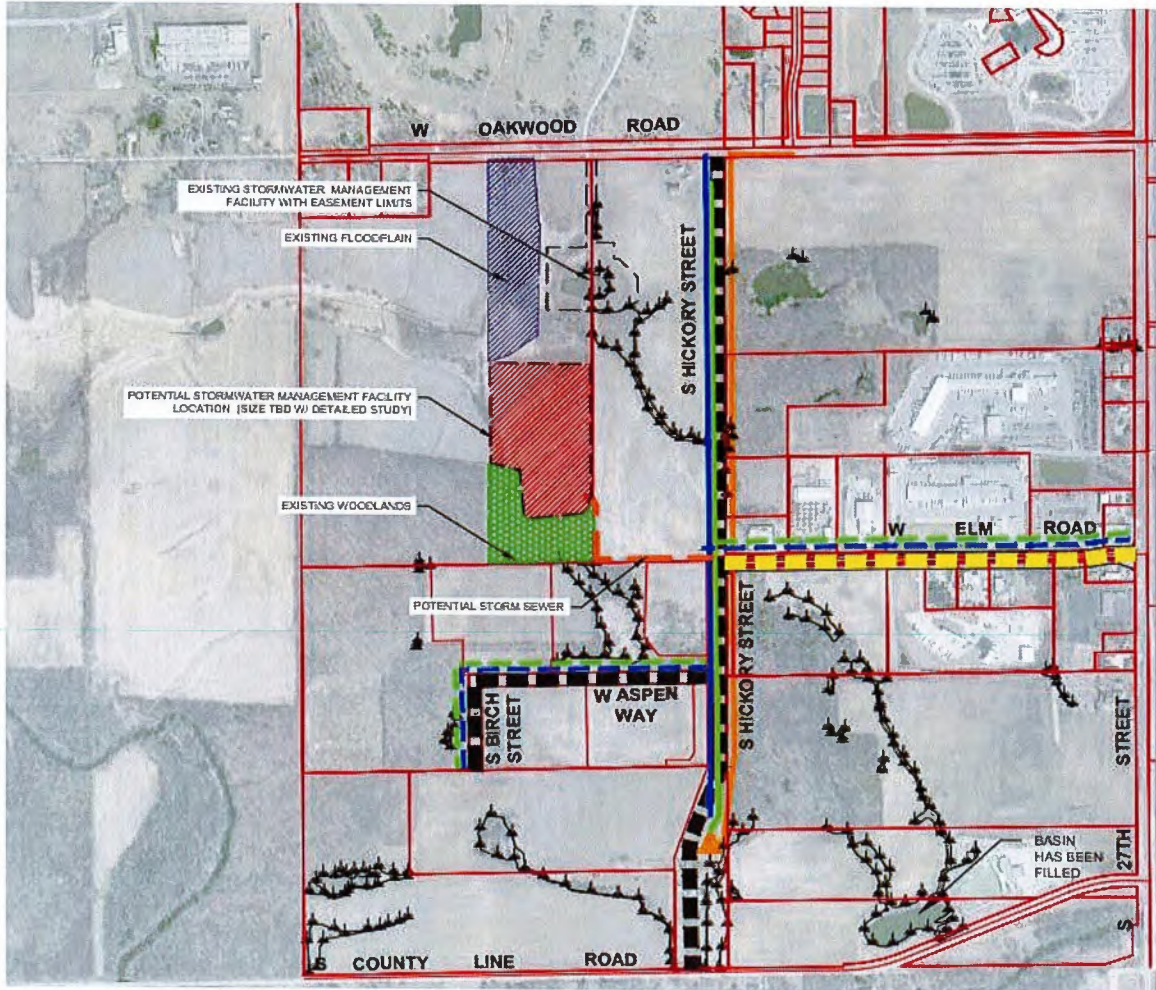


MAP 2











FRANKLIN CORPORATE PARK

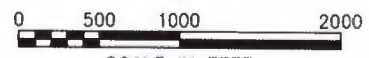
INTERIOR STREET AND UTILITY LAYOUT

CITY OF FRANKLIN
MILWAUKEE COUNTY, WISCONSIN

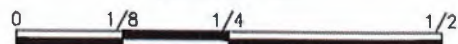


LEGEND

-  PROPOSED WATER MAIN
-  PROPOSED SANITARY SEWER
-  PROPOSED STORM SEWER
-  EXISTING WATER MAIN
-  EXISTING SANITARY SEWER
-  EXISTING SANITARY FORCE MAIN
-  EXISTING SEWAGE PUMPING STATION
-  PROPOSED NEW STREET
-  EXISTING STREET TO BE RECONSTRUCTED
-  DELINEATED WETLANDS (NOT COMPLETE)



SCALE IN FEET



SCALE IN MILES



TABLE 2

City of Franklin, WI									
TAX INCREMENT DISTRICT (TID) 8 Investment & Increment Generation									
Milwaukee County Revenues - Post TID Closure									
DEVELOPMENT INVESTMENT									
PROJECT	Wangard	Wangard	HSA	Saputo	Billier				
Acres	42.96		17.45						
Bldg Sq Ft	235,000	300,000	271,780	310,485	650,000				
CONSTRUCTION YEAR	Actual Total	Plan Investment	Plan Investment Running Total	Projects Investment Running Total					
2021	12,000,000	25,000,000	25,000,000	12,000,000					
2022	77,500,000	13,650,035	38,650,035	89,500,000					
2023	18,000,000	16,650,035	55,300,070	107,500,000					
2024	-	13,650,035	68,950,105	107,500,000					
2025	4,000,000	12,870,033	81,820,138	111,500,000					
2026	25,000,000	11,700,030	93,520,168	136,500,000					
2027	-	11,700,030	105,220,198	136,500,000					
2028	-	11,700,030	116,920,228	136,500,000					
2029	-	11,700,030	128,620,258	136,500,000					
2030	-	-	-	136,500,000					
2031	-	-	-	136,500,000					
2032	-	-	-	136,500,000					
2033	-	-	-	136,500,000					
2034	-	-	-	136,500,000					
2035	-	-	-	136,500,000					
2036	-	-	-	136,500,000					
2037	-	-	-	136,500,000					
2038	-	-	-	136,500,000					
2039	-	-	-	136,500,000					
Increment Generation	12,000,000	22,000,000	17,500,000	60,000,000	25,000,000	128,620,258			
							INCREMENT GENERATION		
							586,950		
							PREMANENT ANNUAL MILWAUKEE COUNTY REVENUE (0.43% X ttd incrmnt)		
							553,067		

TABLE 3

TID 8 Current Project Investment 8-5-22

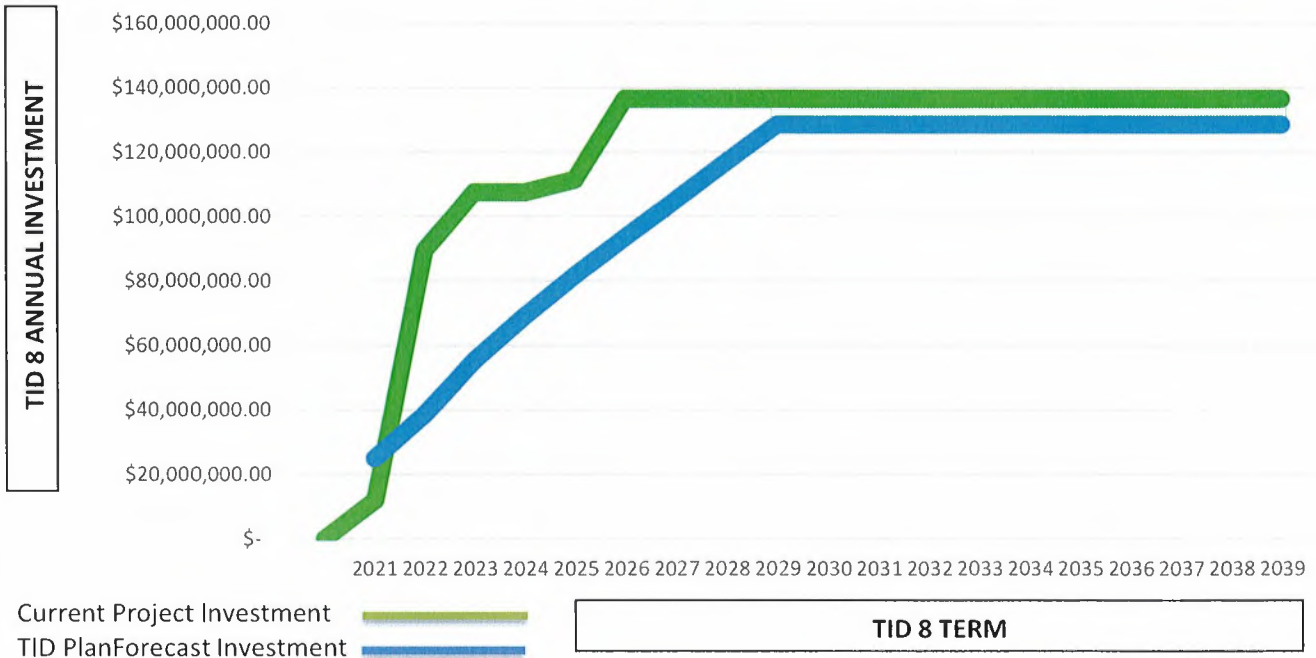
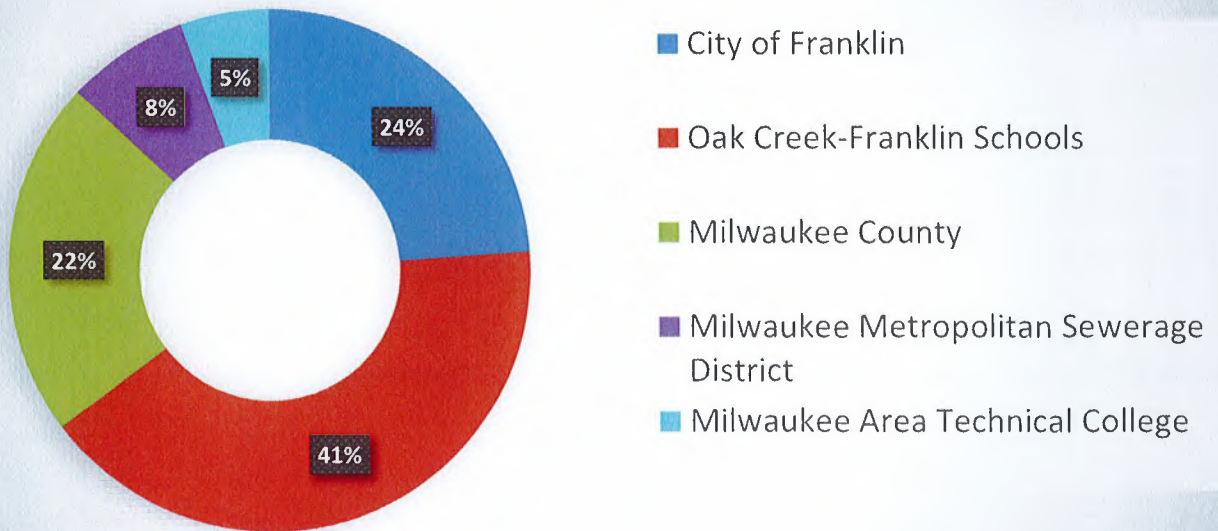


TABLE 4

TAXING DISTRICT REVENUE SHARES



August 6, 2021

Mr. Glen E. Morrow P. E.
City Engineer/Director of Public Works
City of Franklin
9229 West Loomis Road
Franklin, WI 53132

Re: Franklin Corporate Park
Alternate Storm Water Management Facility Feasibility Analysis

Dear Mr. Morrow:

We have completed the feasibility analysis in accordance with Amendment 3 of Task Order 5 for the Franklin Corporate Park. The purpose of the analysis was to determine if it is feasible to construct an alternative storm water management facility located on property currently owned by Milwaukee County Parks. Below is a summary of our findings:

1. Topographic Survey: A topographic survey using drone technology was conducted of the Study Area identified in the task order amendment.
 - a. The survey included collection of data points to develop a topographic surface of the Study Area.
 - b. The survey also included obtaining a high-resolution orthographic image of the Study Area.
 - c. The data points, surface and orthographic image were used to develop exhibits for other tasks within the analysis including a preparation of a preliminary grading plan for multiple alternatives of a wet detention basin to manage storm water runoff from the Elm Road corridor, the Hickory Street corridor north of Elm Road and environs.
2. Wetland Delineation: A wetland investigation and delineation was conducted across the Study Area by R/M staff. The investigation identified some wetlands exist within the Study Area. R/M prepared a report entitled "Franklin Corporate Park Stormwater Site Wetland Delineation Report" dated June 17, 2021. The report includes copies of exhibits showing the location and extent of the delineated wetlands. Wetlands identified in the Study Area are not anticipated to be impacted by the proposed storm water management facility. A copy of the report was previously provided to the City of Franklin.
3. Environmental Screening: An environmental screening investigation was conducted across the Study Area by R/M staff. The investigation identified several environmental resources are associated with the Study Area. R/M prepared a report entitled "Preliminary Environmental Screening" dated August 3, 2021. The report includes an executive summary outlining recommended next steps if a storm water management facility is further pursued within the Study Area. Based on the information available at the time of the screening, it appears that it would be

Mr. Glen E. Morrow, P.E.

Re: Franklin Corporate Park - Alternate Storm Water Management Facility Feasibility Analysis

August 6, 2021

Page 2

feasible to construct a storm water management facility within the Study Area. A copy of the report was provided to the City of Franklin under separate cover.

4. Hydrologic Calculations: We calculated peak flow rates and runoff volumes from existing and proposed conditions from the Elm Road corridor, the S. Hickory Street corridor and other areas within the Franklin Corporate Park that could be tributary to the proposed alternate storm water management facility on the County parcel.
 - a. Preliminary results of the calculations were discussed with City staff during a meeting held at our office on July 2, 2021.
 - b. During the meeting it was determined that it would be cost prohibitive to convey storm water runoff from all possible tributary areas to the proposed storm water management facility on the County's parcel. Therefore, it was decided that a smaller service area for the proposed storm water management facility on the County's parcel would be identified.
 - c. The smaller potential service area was limited to runoff from the Elm Road corridor and the S. Hickory Street corridor.
 - d. The larger potential service area was limited to runoff from the Elm Road corridor, the S. Hickory Street corridor and most of the Wendt Family Trust parcel according to the development plan that is currently proposed. The remaining area of the Wendt Family Trust parcel may become tributary to the proposed storm water basin on the County's parcel if the grading and internal storm sewers/swales are modified. However, if the development plan cannot be modified to make the remaining area tributary to the basin on the County's parcel, then the remainder of the Wendt Family Trust parcel will have to have its own separate storm water management facility.

5. Storm Sewer Routing: Our analysis included a review of preliminary storm sewer routes that will collect storm water runoff from the Elm Road and S Hickory Street corridors.
 - a. The analysis found that it will be possible to serve all of the S Hickory Street corridor and the west part of the Elm Road corridor with gravity flow storm sewer.
 - b. Exhibits 1 and 2 attached to this letter show the preliminary routes and pipe sizes needed to serve the larger and smaller service areas identified above.
 - c. An easement will be needed for storm sewer routed from the storm water management facility on the County's parcel across the Wendt Family Trust parcel for both alternatives.
 - d. There are 2 culvert/storm sewer crossings that were already planned to be installed under S Hickory Street that will be necessary to convey runoff from lands east of S Hickory Street across the Wendt Family Trust parcel and ultimately to the Root River. Storm sewer extending north in Hickory Street will be constructed beneath one of these culvert crossings. Elevations of the northerly culvert crossing under S Hickory Street restrict the size of the storm sewer serving the S Hickory Street corridor.

Mr. Glen E. Morrow, P.E.

Re: Franklin Corporate Park - Alternate Storm Water Management Facility Feasibility Analysis

August 6, 2021

Page 3

6. Hydraulic Modeling and Preliminary Pond Design: We have evaluated the potential of placing a wet storm water detention pond on the parcel owned by Milwaukee County. Exhibits 1 and 2 attached to this letter depict two wet detention pond alternatives that would adequately serve the larger and smaller service areas identified above.
 - a. The modeling shows that it is feasible to manage storm water runoff from the west part of the Elm Road corridor and all of the S Hickory Street corridor between Elm Road and Oakwood Road.
 - b. The modeling also shows that it is feasible to manage storm water runoff from most, if not all, of the development currently proposed on the Wendt Family Trust parcel.

7. Cost Estimates: The analysis included preparation of two preliminary cost estimates for the two wet pond alternatives identified above.
 - a. The estimates include earthwork quantities, outlet structures and piping as well as restoration of the disturbed areas around the wet pond facility.
 - b. The estimates also include costs for storm sewers needed to convey runoff from the Service Area.
 - c. The cost estimate for the larger service area alternative assumes the currently proposed development on the Wendt Family Trust parcel will include their own internal storm sewers which will connect to the City's storm sewer system within the easement on the Wendt Family Trust parcel. The assumption means that storm sewer from the Wendt Family Trust parcel would not connect to the City's storm sewer along S Hickory Street. Therefore, we have assumed that size and costs of storm sewer within the Elm Road and S Hickory Street corridors will not change regardless of which alternative is chosen.
 - d. The cost of the culvert systems crossing under S Hickory Street are not included in the attached cost estimates.

8. 2006 Geotechnical Investigation:
 - a. PSI prepared a geotechnical data report entitled "Supplemental Report for Geotechnical Engineering Services for the Proposed Sanitary Sewer and Detention Pond Project, Oakwood Road, Franklin, Wisconsin" dated December 21, 2006. A copy of the report was previously provided to the City of Franklin.
 - b. The PSI investigation included 4 soil borings located within the footprint of the pond located south of Oakwood Drive and west of Hickory Street. This pond was constructed to manage runoff from the widening improvements to Oakwood Road in 2007.
 - c. Borings extended 25 feet to depths ranging from elevation 670 to 678.
 - d. In general, soils encountered were lean clay with what is believed to be perched groundwater at depths of 4 to 9 feet which corresponds to elevations of 686 to 698. No bedrock was encountered in these borings.

Mr. Glen E. Morrow, P.E.

Re: Franklin Corporate Park - Alternate Storm Water Management Facility Feasibility Analysis

August 6, 2021

Page 4

- e. It is noted that the clay identified in the borings in the vicinity of the bottom of the basin was determined to be suitable for limiting infiltration and therefore a pond liner was not necessary.
9. 2018 Geotechnical Investigation: This feasibility analysis did not include a geotechnical investigation.
 - a. Terracon prepared a geotechnical data report entitled “Geotechnical Engineering Report – Phase 1, Franklin Business Park Phase 1, Franklin, Wisconsin dated December 14, 2018. A copy of the report was previously provided to the City of Franklin.
 - b. The Terracon investigation included several soil borings taken on the Wendt Family Trust parcel east of and adjacent to the Milwaukee County parcel. Borings 3, 5 and 8 from this investigation are close to the proposed stormwater management facility on the County’s parcel. The logs for these borings do not indicate the presence of groundwater at depths similar to the proposed pond bottom. However, ground water is present at other borings and may be anticipated at the proposed pond location. In addition, none of the borings in the report prepared by Terracon indicate the presence of bed rock.
 10. Future Geotechnical Investigation: We recommend the City of Franklin commission a geotechnical investigation within the vicinity of the proposed stormwater facility to determine soil conditions, depth to ground water and identify possible subsurface impediments such as bedrock.

Based on the information currently available it would be feasible to construct a storm water management facility on the parcel currently owned by Milwaukee County Parks to serve the Elm Road corridor and the S Hickory Street corridor north of Elm Road. It would also be feasible for the facility to serve most of the development on the Wendt Family Trust parcel as currently proposed. The feasibility determined in this analysis is preliminary and is subject to additional investigations and detailed designs. The feasibility is also subject to the City acquiring the property and obtaining all applicable permits and approvals.

Mr. Glen E. Morrow, P.E.
Re: Franklin Corporate Park - Alternate Storm Water Management Facility Feasibility Analysis
August 6, 2021
Page 5

Please contact our office with any questions regarding this matter. Thank you for allowing us to be of service to the City of Franklin.

Respectfully,

RUEKERT & MIELKE, INC.

A handwritten signature in blue ink, appearing to read "Anthony D. Petersen".

Anthony D. Petersen, P.E. (WI, IA)
Senior Project Manager
apetersen@ruekert-mielke.com

ADP:adp
Enclosures

cc: Calli Berg, CEcD, EDFP, City of Franklin
Christopher M. Genellie, P.E., Ruekert & Mielke, Inc.

ESTIMATED CONSTRUCTION COST

Project Name: Franklin Corporate Park

Alternate Storm Water Management Facility on Milwaukee County Parcel

Client Name: City of Franklin

Project # 58-10013.203

Date Modified: 8/6/2021

Item No.	Description	Unit	Quantity	Unit Price	Total
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Larger Service Area (Including Elm Road Corridor, S. Hickory Street Corridor and Development on the Wendt Family Trust Parcel)

1	Silt Fence	L.F.	1,300	\$ 2.00	\$ 2,600.00
2	Grading- Pond Construction	C.Y.	51,000	\$ 10.00	\$ 510,000.00
3	Excess soil -(Haul off)	C.Y.	39,500	\$ 15.00	\$ 592,500.00
4	Erosion Mat, Class 1, Type A (If Required)	S.Y.	20,250	\$ 4.00	\$ 81,000.00
5	Clearing, Grubbing and Tree Removal	L.S.	1	\$ 15,000.00	\$ 15,000.00
6	Storm Sewer, 12-Inch RCP CL V w/ Granular Backfill	L.F.	390	\$ 75.00	\$ 29,250.00
7	Storm Sewer, 15-Inch RCP CL V w/ Granular Backfill	L.F.	468	\$ 85.00	\$ 39,780.00
8	Storm Sewer, 18-Inch RCP CL IV w/ Granular Backfill	L.F.	370	\$ 95.00	\$ 35,150.00
9	Storm Sewer, 24-Inch RCP CL IV w/ Granular Backfill	L.F.	382	\$ 120.00	\$ 45,840.00
10	Storm Sewer, 30-Inch RCP CL IV w/ Granular Backfill	L.F.	906	\$ 135.00	\$ 122,310.00
11	Storm Sewer, 36-Inch RCP CL IV w/ Granular Backfill	L.F.	450	\$ 158.00	\$ 71,100.00
12	Storm Sewer, 42-Inch RCP CL III w/ Granular Backfill	L.F.	825	\$ 180.00	\$ 148,500.00
13	Storm Sewer, 48-Inch RCP CL III w/ Granular Backfill	L.F.	582	\$ 240.00	\$ 139,680.00
14	Storm Sewer, 66-Inch RCP CL III w/ Granular Backfill	L.F.	965	\$ 350.00	\$ 337,750.00
15	Flared End Section, 66-Inch RCP CL III	Ea.	1	\$ 5,000.00	\$ 5,000.00
16	Storm Manhole, 48-Inch	V.F.	58	\$ 250.00	\$ 14,500.00
17	Storm Manhole, 60-Inch	V.F.	38	\$ 300.00	\$ 11,400.00
18	Storm Manhole, 72-Inch	V.F.	128	\$ 350.00	\$ 44,800.00
19	Storm Manhole, 96-Inch	V.F.	54	\$ 500.00	\$ 27,000.00
20	Storm Manhole, 108-Inch	V.F.	18	\$ 750.00	\$ 13,500.00
21	Storm Manhole, 120-Inch	V.F.	19	\$ 1,200.00	\$ 22,800.00
22	Heavy Rip Rap Over Geotextile Fabric- Spillway/st swr outfall	Ton	500	\$ 75.00	\$ 37,500.00
23	Pond outfall Structure	L.S.	1	\$ 10,000.00	\$ 10,000.00

Subtotal Construction = \$ 2,356,960.00

Notes/Assumptions

- Storm water facility on County parcel includes management of storm water runoff from Wendt Family Trust parcel development.
- Estimates assume storm sewer in Hickory and Elm are identical to smaller Service Area alternative
- Does not include catch basins or leads within Hickory and Elm.
- Restoration of Elm and Hickory are not included.
- Restoration of Wendt Family Trust Parcel is not included.
- Property acquisition costs are not included.
- Assumes runoff from development on the Wendt Family Trust parcel to storm sewer in easement and not to storm sewer in Hickory.
- Storm sewers are sized to convey 100-year storm event from larger Service Area identified during the meeting on 7/02/21 and shown on exhibits.
- Existing storm water management facilities for existing development along Elm Road remain in service.
- Redevelopment of property along Elm Road will require site specific SWMP.
- Runoff from properties outside of drainage area identified in exhibits is not included.
- Runoff from properties outside of drainage area identified in exhibits would require site specific SWMP.

ESTIMATED CONSTRUCTION COST

Project Name: Franklin Corporate Park
Alternate Storm Water Management Facility on Milwaukee County Parcel

Client Name: City of Franklin

Project # 58-10013.203

Date Modified: 8/6/2021

Item No.	Description	Unit	Quantity	Unit Price	Total
Smaller Service Area (Including Elm Road Corridor and S. Hickory Street Corridor)					
1	Silt Fence	L.F.	1,000	\$ 2.00	\$ 2,000.00
2	Grading- Pond Construction	C.Y.	29,000	\$ 10.00	\$ 290,000.00
3	Excess soil -(Haul off)	C.Y.	17,290	\$ 15.00	\$ 259,350.00
4	Erosion Mat, Class I, Type A (If Required)	S.Y.	14,500	\$ 4.00	\$ 58,000.00
5	Clearing, Grubbing and Tree Removal	L.S.	1	\$ 10,000.00	\$ 10,000.00
6	Storm Sewer, 12-Inch RCP CL V w/ Granular Backfill	L.F.	390	\$ 75.00	\$ 29,250.00
7	Storm Sewer, 15-Inch RCP CL V w/ Granular Backfill	L.F.	468	\$ 85.00	\$ 39,780.00
8	Storm Sewer, 18-Inch RCP CL IV w/ Granular Backfill	L.F.	370	\$ 95.00	\$ 35,150.00
9	Storm Sewer, 24-Inch RCP CL IV w/ Granular Backfill	L.F.	382	\$ 120.00	\$ 45,840.00
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12	Storm Sewer, 42-Inch RCP CL III w/ Granular Backfill	L.F.	825	\$ 180.00	\$ 148,500.00
13	Storm Sewer, 48-Inch RCP CL III w/ Granular Backfill	L.F.	1,615	\$ 240.00	\$ 387,600.00
14	Flared End Section, 48-Inch RCP CL III	Ea.	1	\$ 3,000.00	\$ 3,000.00
15	Storm Manhole, 48-Inch	V.F.	58	\$ 250.00	\$ 14,500.00
16	Storm Manhole, 60-Inch	V.F.	38	\$ 300.00	\$ 11,400.00
17	Storm Manhole, 72-Inch	V.F.	128	\$ 350.00	\$ 44,800.00
18	Storm Manhole, 96-Inch	V.F.	14	\$ 500.00	\$ 7,000.00
19	Storm Manhole, 108-Inch	V.F.	18	\$ 750.00	\$ 13,500.00
20	Heavy Rip Rap Over Geotextile Fabric- Spillway/st swr outfall	Ton	500	\$ 75.00	\$ 37,500.00
21	Pond outfall Structure	L.S.	1	\$ 10,000.00	\$ 10,000.00

Subtotal Construction = \$1,640,580.00

Notes/Assumptions

- Storm water facility on County parcel does NOT include management of storm water runoff from Wendt Family Trust parcel development.
- Estimates assume storm sewer in Hickory and Elm are identical to larger Service Area alternative
- Does not include catch basins or leads within Hickory and Elm.
- Restoration of Elm and Hickory are not included.
- Restoration of Wendt Family Trust Parcel is not included.
- Property acquisition costs are not included.
- Storm sewers are sized to convey 100-year storm event from smaller Service Area identified during the meeting on 7/02/21 and shown on exhibits.
- Existing storm water management facilities for existing development along Elm Road remain in service.
- Redevelopment of property along Elm Road will require site specific SWMP.
- Runoff from properties outside of Service Area identified in exhibits is not included.
- Runoff from properties outside of Service Area identified in exhibits would require site specific SWMP.

APPROVAL <i>slw</i>	REQUEST FOR COUNCIL ACTION	MEETING DATE August 16, 2022
REPORTS & RECOMMENDATIONS	CGI Digital Production Renewal Agreement for Web Site Video Tours Supported by Community Business Advertising	ITEM NUMBER G.10.

The City of Franklin is invited to renew its agreement with CGI Digital (Communications) to update its agreement for production of a Community Video Program for Franklin. This feature is posted on the front page of Franklin’s website ([City Of Franklin \(franklinwi.gov\)](http://CityOfFranklin(franklinwi.gov))) as Video Tours and will continue as such.

The Franklin Video Tours will focus on Quality of Life, Economic Development, Tourism Attractions, Workforce Development and a Welcome Message from the Mayor. CGI is affiliated with the League of Wisconsin Municipalities. Other communities that have participated in the Community Video Program include: St. George, UT; Cody, WY; Mount Vernon, Ohio; Idaho Falls, ID and Rochester, NY.

There is no cost to the City for Franklin to be featured. CGI generates revenue through third-party advertisements, targeting businesses in the Franklin area. Should we move forward, these businesses will receive an Invitation Letter with an opportunity to be featured in the Community Video Program by way of a sponsorship ad (sample letter attached). This keeps advertising specific to Franklin and its infrastructure development and growth.

CGI Digital partners with communities to create complementary video content. CGI’s community video program gives cities the opportunity to showcase their city while attracting new residents and businesses.

COUNCIL ACTION REQUESTED

Motion to approve the CGI Franklin Community Video Program contract for website Video Tours, which will be supported through Franklin Area Business Advertising sold by CGI Digital.



DATE

Dear valued business owner:

We are pleased to announce our continued partnership with CGI Digital (CGI) to coordinate and produce a series of educational videos highlighting all we have to offer to residents, visitors and businesses. CGI works in partnership with the League of Wisconsin Municipalities, the National League of Cities and the United States Conference of Mayors to provide tools that showcase and promote municipalities nationwide.

With a highly visible interface on our official website homepage (www.franklinwi.gov) our Video Tour will allow viewers to learn more about area attractions, quality of life, economic development and so much more.

Recruiting and retaining a skilled workforce is an essential part of our city's vitality. This program will provide our business community with digital solutions to streamline your recruitment efforts and strengthen your online presence. In addition, the Video Tour on our website will backlink to CGI's www.elocallink.tv which hosts the videos, providing increased exposure for all participants.

We encourage you to consider being a part of this initiative. To learn more about sponsorship opportunities or to request an appointment please email Vice President, Brandon Bartz, at brandonb@cgicompany.com.

Thank you for being a part of what makes Franklin a great place to live, learn, work and play.

Sincerely,

A handwritten signature in black ink that reads "John D. Regetz". The signature is written in a cursive style with a large, sweeping initial "J".

John Regetz, Director
Economic Development



Name: John Regetz
Title: Economic Development Director
Address: 9229 W. Loomis Road
City, State, Zip: Franklin, WI 53132
Phone number: (414)427-7566
Email: jregetz@franklinwi.gov
Website: www.franklinwi.gov

This Agreement is between CGI Communications, Inc. D/B/A CGI Digital ("CGI") and the City of Franklin (the "City") and shall remain in effect from the date it is signed by both parties until the third anniversary of the date that the completed and approved Community Video Program is made available for viewer access on different devices via a link on the www.franklinwi.gov homepage, including any alternate versions of that homepage

During the term of this Agreement, CGI shall.

- Produce up to five videos with subject matter that may include but is not limited to Welcome Education Healthy Living Homes / Real Estate or Community Organizations
Provide script writing and video content consultation
Send a videographer to City locations to shoot footage for the videos
Reserve the right to use still images and photos for video production
Provide all aspects of video production and editing from raw footage to final video including professional voiceovers and background music
Provide our patented OneClick™ Technology and encode all videos into multiple streaming digital formats to play on all computer systems browsers, and Internet connection speeds recognized player formats include WindowsMedia™ and QuickTime™
Store and stream all videos on CGI's dedicated server
Afford businesses the opportunity to purchase various digital media products and services from CGI and its affiliates
Feature business sponsors around the perimeter of video panels
Be solely responsible for sponsorship fulfillment including all related aspects of marketing, production, printing and distribution
Facilitate viewer access of the Community Video Program from City website including any alternate versions of City's homepage for different devices by providing HTML source code for a graphic link to be prominently displayed on the www.franklinwi.gov website homepage as follows Coming Soon graphic link designed to coordinate with existing website color theme to be provided within 10 business days of execution of this Agreement Community Video Program graphic link to be provided to replace the Coming Soon link upon completion and approval of videos
Grant to City a license to use CGI's Line of Code to link to and/or stream the videos
Own copyrights of the master Community Video Program
Assume all costs for the Community Video Program

During the term of this Agreement, the City shall

- Provide a letter of introduction for the program on City's letterhead
Assist with the content and script for the Community Video Program
Provide notice of any changes revisions requests or modifications to final video content within 30 days of its receipt
Grant CGI the right to use City's name in connection with the preparation production and marketing of the Community Video Program
Display the Coming Soon graphic link prominently on the www.franklinwi.gov homepage within 10 business days of receipt of HTML source code
Display the Community Video Program link prominently on its www.franklinwi.gov homepage including any alternate versions of your home page for viewer access on different devices for the entire term of this Agreement
Ensure that this Agreement remains valid and in force until the agreed upon expiration date regardless of change in administration
Grant full and exclusive streaming video rights for CGI and its subsidiaries affiliates, successors and assigns to stream all video content produced by CGI for the Community Video Program
Agree that the City will not knowingly submit any photograph, video or other content that infringes on any third party's copyright, trademark or other intellectual property privacy or publicity right for use in any video or other display comprising this program Submissions should be received by CGI by the agreed-upon primary filming date

This Agreement constitutes the entire Agreement of the parties and supersedes any and all prior communications, understandings and Agreements, whether oral or written No modification or claimed waiver of any provision shall be valid except by written amendment signed by the parties herein City warrants that it is a tax exempt entity The undersigned, have read and understand the above information and have full authority to sign this Agreement

Franklin, WI

CGI Communications, Inc D/B/A CGI Digital

Signature

[Handwritten signature of Nicole Rongo]

Name (printed) John Regetz

Name (printed) Nicole Rongo

Title

Title Vice President, Government Relations & Strategic Partnerships

Date

Date 6/28/22



130 East Main Street, 5th Floor
Rochester, NY 14604

Phone 800 398 3029
cgidigital.com

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<p style="text-align: center;">APPROVAL</p> <p style="text-align: center;"><i>Slw</i></p>	<p style="text-align: center;">REQUEST FOR COUNCIL ACTION</p>	<p style="text-align: center;">MEETING DATE</p> <p style="text-align: center;">8/16/2022</p>
<p style="text-align: center;">REPORTS & RECOMMENDATIONS</p>	<p style="text-align: center;">Consideration of a City Facebook Page</p>	<p style="text-align: center;">ITEM NUMBER</p> <p style="text-align: center;">G.11.</p>

The following motion took place at the June 21, 2022 Common Council Meeting:

"Alderwoman Wilhelm moved that the subject matter of a City Facebook page be listed as a separate Common Council agenda item within the next two months. Seconded by Alderwoman Eichmann. All voted Aye, motion carried "

For the Council's information, attached to this item is a presentation titled, "THE FIRST AMENDMENT & GOVERNMENT USE OF SOCIAL MEDIA", including the accompanying PowerPoint slides, which was recently presented by Maria Davis, Assistant Legal Counsel, League of Wisconsin Municipalities (LWM). Also attached is a presentation by Kenosha City Attorney Ed Antaramian which was delivered at the 2016 LWM Municipal Attorneys Institute.

Attorney Antaramian's presentation ended with the following stated conclusion:

Social media in general, and Facebook in particular, are inexpensive and effective ways of communicating with citizens. For that reason, Facebook is used by municipal governments, state agencies, and federal agencies.

Nonetheless, the decision by the legislative body of the municipality to create a Facebook page should not be made without consideration of the potential pitfalls. The purpose of this article is not to suggest municipalities eschew this effective means of communication. Rather, this article advocates for full consideration prior to making the determination to create a page. Full consideration should be made with the input of a team composed of a person knowledgeable in the nuances of the medium under consideration, a person who is knowledgeable in the existing policies of the municipality (e.g., for human resources and brand use), a lawyer knowledgeable in the legal considerations exemplified in this article, an information technology expert to address capture and retention issues, and a decision-maker from administration to determine relative risk and ascribe relative priority to policy creation.

Moreover, it is hoped that once a decision to create a page has been made, further consideration will be made by the municipality with regard to the management of the page. The municipality should have a plan in the form of written policy identifying how the page be managed. The municipality should identify a person who is knowledgeable in the municipality's written policy to manage the page, and to make continuously available to that manager someone of the legal staff to assist in the execution of the policy

As noted throughout the presentations, the City should be aware that the creation and maintenance of a City Facebook Page, including a detailed policy on the same, is not easy or to be taken lightly. Rather, it will take a substantial amount of oversight, training, monitoring, and documentation, as well as carry with it substantial responsibility and legal liability.

COUNCIL ACTION REQUESTED

As Council deems appropriate.

THE FIRST AMENDMENT & GOVERNMENT USE OF SOCIAL MEDIA

2022 Municipal Attorneys Institute

Maria Davis, Assistant Legal Counsel
League of Wisconsin Municipalities

I. Introduction.

- a. This presentation largely focuses on when individual government officials' social media pages are subject to the First Amendment. There is limited caselaw in this area. This outline provides a summary of the most recent applicable caselaw, takeaways from the relevant cases, and tips for government officials who wish to operate a social media account while in office.

II. 1st Amendment: Forum Analysis and Judicial Scrutiny.

- a. Government ability to regulate or restrict protected speech depends, in part, on where that speech is occurring. Government property can be classified into three basic types of forums:
 - i. Traditional public forum.
 1. “Defined by the objective characteristics of the property, such as whether, ‘by long tradition or by government fiat,’ the property has been ‘devoted to assembly and debate.’” *Arkansas Educ. Television Com’n v. Forbes*, 523 U.S. 666, 667 (1998).
 2. Examples of a traditional public forum include, but are not limited to, public streets, parks, sidewalks, etc.
 - ii. Designated public forum.
 1. A designated public forum is a place that is not traditionally open for expressive activity, but that the government has opened for expressive activity. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).
 2. Limited public forum.
 - a. A limited public forum is a type of designated forum where the government reserves the forum for certain groups or discussion of certain topics. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 201 (2015).
 - b. Note: There is ambiguity in the caselaw regarding whether a limited public forum is a subset of designated public forums or non-public forums. *DeBoer v. Village of Oak Park*, 267 F.3d 558, 566-67 (7th Cir. 2001).

- iii. Non-public forum.
 - 1. Non-public forums are all other types of government, or private, property that have not been opened to expressive activity.
- b. Regulation of speech in traditional and designated public forums.
 - i. The government has a limited ability to regulate expressive activity in traditional and designated public forums. *Surita v. Hyde*, 665 F.3d 860, 870 (7th Cir. 2011).
 - 1. Any content-based regulation or restriction of speech must survive strict scrutiny – the government must show it is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that interest. *Id.* To be narrowly tailored, the regulation or restriction must be the least restrictive means of achieving the compelling governmental interest. *McMullen v. Coakley*, 573 U.S. 464, 478 (2014).
 - 2. Regulations subject to a strict scrutiny analysis rarely survive.
 - ii. Governments may enforce reasonable time, place, and manner restrictions on speech in traditional and designated public forums. *Surita*, 665 F.3d at 870.
 - 1. Such restrictions must be content neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Id.*
- c. Regulation of speech in limited public forums.
 - i. When the government establishes a limited public forum, it is not required to and does not allow individuals to engage in every type of speech. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).
 - ii. Content-based regulation of speech is permitted but must be viewpoint neutral and reasonable in light of the purpose served by the forum. *Id.*
 - iii. “The Government’s decision to restrict access to a non-public forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation.” *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985).
- d. Regulation of speech based on viewpoint is prohibited regardless of the forum type. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70 (2009). “The government may not discriminate against speech based on the ideas or opinions it conveys. *Iancu v. Brunetti*, 139 S.Ct. 2294, 2299 (2019).

III. Stating a claim against an individual under 42 U.S.C. § 1983.

- a. Plaintiff must show the alleged constitutional deprivation occurred because of action taken by defendant “under color of state law.” *Davison v. Randall*, 912 F.3d 666, 679 (4th Cir. 2019); *West v. Atkins*, 487 U.S. 42, 48 (1988).
- b. “The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power ‘possessed by virtue of state law and made possible

only because the wrongdoer is clothed with the authority of state law.” *Davison*, 912 F.3d at 679; *West*, 487 U.S. at 49.

- c. The § 1983 “color of law” prerequisite is synonymous with the “state-action” requirement applicable to Fourteenth Amendment claims and the analysis for each is the same. *Davison*, 912 F.3d at 679; *West*, 487 U.S. at 49. The conduct must be “fairly attributable to the state.” *Davison*, 912 F.3d at 679; *West*, 487 U.S. at 49.
- d. There is no defined test for when action is taken under the color of state law or is fairly attributable to the state. Courts must examine the totality of the circumstances to determine if the action bore a “sufficiently close nexus” with the state to be fairly treated as an action of the state itself. *Davison*, 912 F.3d at 679-80; *One Wisconsin Now v. Kremer*, 354 F. Supp. 3d 940, 950 (W.D. Wis. 2019).
- e. The Fourth Circuit has held that a defendant’s purportedly private actions bear a sufficiently close nexus when the defendant’s “actions are linked to events which arose out of [their] official status.” *Davison*, 912 F.3d at 680.
- f. When an official’s conduct “occurs in the course of performing an actual or apparent duty of [their] office,” it is more likely to be considered state action. *Id.*
- g. If the official’s challenged action was solely intended to suppress speech critical of their conduct, duties, or fitness for office, courts may find the action is fairly attributable to the state. *Id.*

IV. U.S. Supreme Court Cases

- a. *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017).
 - i. Case involved a North Carolina law that made it a felony for a registered sex offender to access a commercial social media site that allowed minors to hold accounts.
 - ii. “The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow. This case is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet. As a result, the Court must exercise extreme caution. . . .” *Packingham*, 137 S.Ct. at 1736.
 - iii. “Social media allows users to gain access to information and communicate with one another on any subject that might come to mind.” *Id.* at 1732.
 - iv. “These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to ‘become a town crier with a voice that resonates farther than it could from any soapbox.’” *Id.* at 1737.
 - v. “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is

cyberspace – the ‘vast democratic forums of the Internet’ in general and social media in particular.” *Id.* at 1735.

- vi. “Social media users employ these websites to engage in a wide array of protected First Amendment activity on topics ‘as diverse as human thought.’” *Id.* at 1735-36.
 - vii. “Foreclosing access to social media altogether thus prevents users from engaging in the legitimate exercise of First Amendment rights.” *Id.* at 1732.
- b. *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S.Ct. 1220 (2021).
- i. DOJ appeal of *Knight v. Trump* (retitled to *Biden v. Knight*), which is discussed below in Section V. Due to the administration change during appeal, the Supreme Court vacated the Second Circuit’s decision on the grounds the case was moot since President Biden had replaced Donald Trump in the office of President.
 - ii. Decision issued with no opinion. Justice Thomas authored a concurrence.

V. Federal Circuit Court Cases

- a. *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019).
- i. Background.
 - 1. Randall was the chair of the Loudon County Board of Supervisors in Virginia. Randall created a “Chair Phyliss J. Randall” Facebook *page* (as opposed to a personal profile) the day before she was sworn into office. Randall also had a personal profile and a campaign page. The chair page was designated as a “government official” page.
 - 2. Randall and chief of staff shared administrative control of page, but Randall almost exclusively controlled content. Statement on campaign page: “I really want to hear from ANY Loudon citizen on ANY issues, request, criticism, complement [sic] or just your thoughts. However, I really try to keep back and forth conversations (as opposed to one time information items such as road closures) on *my county Facebook page (Chair Phyliss J. Randall)* or County email (Phyliss.randall@loudon.gov).” *Davison*, 912 F.3d at 672.
 - 3. Randall’s posts were typically directed to “Loudon” and concerned numerous aspects of her official duties. Randall publicized the chair page in her official county chair newsletter. Essentially, the page had multiple official uses and few personal uses.
 - 4. Randall posted about the discussion at a town hall meeting concerning the school board. Davison, an outspoken resident, commented on that post. Neither Randall nor Davison could remember the precise comment; however, Randall characterized it as “accusations” regarding the school board members and their families’ conflicts of interest. She then decided the post was not something she wanted on the page and deleted the whole

thread, including her original post. Randall then banned Davison from the chair Facebook page but reversed that banning 12 hours later.

5. Davison brought a § 1983 action claiming Randall engaged in viewpoint discrimination and violated his First Amendment rights.

ii. Holding.

1. Fourth Circuit held that Randall's actions were taken under color of state law and the district court correctly found her liable in her personal capacity. The court also held Randall's chair page was a public forum, but did not address whether it was a traditional, designated, or limited public forum because Randall's actions constituted viewpoint discrimination which is prohibited in all forums.

iii. Section 1983 – Acting under color of state law.

1. Created and administered the chair Facebook page to further her duties as a municipal official.
2. Used the page as a “tool of governance.”
 - a. Provided information to the public about her (and the board's) official activities and solicited public input on policy issues.
 - b. Incorporated the trappings of her office into the page (title, government official page designation, listed official contact information, listed official email).
 - c. Posts were typically addressed to Loudon constituents.
 - d. Some posts were made on behalf of the board as a whole.
 - e. Requested that constituents use the page for conversing.
 - f. Posted content had a strong tendency of relating to her office.
3. Randall “clothed the Chair's Facebook Page in the power and prestige of her state office and created and administered the page to perform actual or apparent duties of her office.” *Id.* at 681.
4. Randall's banning of Davison was linked to events that rose out of her official status – the post that prompted Davison's comment was related to school board matters.
5. That the ban was suppression of speech critical of officials' conduct, duties, or fitness for office further reinforced that Randall acted under color of state law.

iv. Randall's “Chair” Facebook page was a public forum.

1. Court recognized that, while neither the U.S. Supreme Court nor other circuit courts have definitively addressed whether and when a social media page is

a public forum, the Supreme Court, in *Packingham*, analogized social media sites to public forums.

2. Aspects of Randall's page bore the trappings of a public forum:
 - a. Intentionally opened public comment section of page for public discourse.
 - b. Invited any citizen to post on any issue.
 - c. Public made numerous posts on matters of public concern in response.
3. The Facebook page was compatible with expressive activity.
4. Court rejected Randall's argument that the forum analysis shouldn't apply because (1) the page was a private website and not public property, and (2) the page in its entirety was government speech.
 - a. (1) Forum analysis is not restricted to government-owned property. The Supreme Court has recognized that forum analysis applies to private property dedicated to public use. Private property, whether tangible or intangible, may constitute a public forum when the government retains substantial control over the property under regulation or by contract. "Randall, acting under color of state law, retained and exercised significant control over the page." In particular, she had complete control over banning people from the page's interactive component. *Id.* at 683-84.
 - b. (2) There is a significant difference between an official's posts to their social media page and the public's comments and posts to that same page. "Comments and posts by users cannot be mistaken for Randall's own speech because they identify the posting or replying personal profile or Page, and thereby distinguish that user from Randall." The court distinguished this case from the government speech framework identified in *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), because Randall did not retain "final approval authority" over the interactive comment in the page since she expressly opened it for any user to post on any topic. *Davison*, 912 F.3d at 686.
5. The court did not determine whether the page was a designated or limited public forum because Randall's ban amounted to viewpoint discrimination.
- v. Court affirmed the district court properly dismissed the claim against Randall in her official capacity.

1. “Official capacity suits are treated as suits against the municipality.” *Id.* at 688.
 2. “Because municipal liability under Section 1983 does not amount to respondeat superior ... a municipality is subject to Section 1983 liability only when its policy or custom, whether made by its lawmakers or by those whose edicts or acts may be fairly said to represent official policy, inflicts the plaintiff’s injury.” *Id.* at 688-89.
 3. “[T]he touchstone inquiry is whether the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered.” *Id.* at 689.
 4. “Davison failed to put forward evidence establishing that Randall was a final municipal policymaker with regard to her banning of Davison from the Chair’s Facebook Page. On the contrary, record evidence establishes that the Loudoun Board retain authority to establish municipal policy with respect to social media pages, as it adopted a social media policy governing the County’s official social media pages.” *Id.* at 689.
- b. *Robinson v. Hunt Cnty.*, 921 F.3d 440 (5th Cir. 2019).
- i. Background.
 1. “The Hunt County Sheriff’s Office, led by Sheriff Randy Meeks, maintains a Facebook page. During the time period relevant to this litigation, the ‘About’ section of the HCSO Facebook page stated: ‘Welcome to the official Hunt County Sheriff’s Office Facebook page. We welcome your input and POSITIVE comments regarding the Hunt County Sheriff’s Office.’ The page description further stated: ‘The purpose of this site is to present matters of public interest within Hunt County, Texas. We encourage you to submit comments, but please note that this is NOT a public forum.’” *Robinson*, 921 F.3d at 445.
 2. In January 2017, the HCSO Facebook account posted a message regarding negative comments about the recent murder of a North Texas police officer.
 - a. “We find it suspicious that the day after a North Texas Police Officer is murdered we have received several anti police [sic] calls in the office as well as people trying to degrade or insult police officers on this page. ANY post filled with foul language, hate speech of all types and comments that are considered inappropriate will be removed and the user banned. There are a lot of families on this page and it is for everyone and therefore we monitor it extremely closely. Thank you for your understanding.” *Id.*

3. Robinson and other Facebook users posted comments criticizing the HCSO post. Robinson also made offensive comments about HCSO and the deceased police officer. HCSO deleted Robinson's posts and banned her from the page.
4. Robinson sued Hunt County, Sheriff Randy Meeks, and several HCSO employees alleging violations of her First and Fourteenth Amendment rights. Specifically, Robinson alleged the defendants engaged in viewpoint discrimination, retaliated against her based on protected speech, placed an impermissible prior restraint on her speech, and deleted her protected speech and banned her from the HCSO Facebook page without due process.
5. Robinson also alleged Hunt County had "an official policy or longstanding custom of removing and censoring unfavorable speech on the HCSO Facebook page, and that this policy was developed, ratified, and enforced by Sheriff Meeks or another defendant with final policymaking authority over law enforcement in Hunt County." *Id.* at 446.

ii. Holding.

1. Fifth Circuit affirmed the district court's dismissal of the claims against the individual defendants in their personal capacities based on qualified immunity as well as those against them in their official capacities because they duplicated the claims against the county.
2. Additionally, the court held Robinson had sufficiently stated a claim for municipal liability under 42 U.S.C. § 1983 and reversed the district court's dismissal of the claims against Hunt County.

iii. Claim against Hunt County.

1. To state a claim for municipal liability under § 1983, a plaintiff must allege (1) an official policy (or custom), of which (2) a policy maker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose moving force is that policy (or custom). Plaintiff must plead a constitutional violation as a threshold matter. *Id.* at 447.
2. Robinson alleged viewpoint discrimination and the court agreed. "Official censorship based on a state actor's subjective judgment that the content of protected speech is offensive or inappropriate is viewpoint discrimination." *Id.*
3. Robinson alleged the HCSO Facebook page was a public forum or a limited public forum. Hunt County did not offer a contrary argument. The court assumed, for the purposes of the case, that the page was a forum subject to the First Amendment. Whether the page was a public forum or limited public forum was immaterial since Robinson alleged viewpoint discrimination.

4. “The county can be responsible for actions of a final policy maker who has ‘the responsibility for making law or setting policy in any given area of a local government’s business.’” *Id.* at 448.
 - a. Robinson argued Sheriff Meeks had final policymaking authority over the Facebook page. Hunt County argued it was the Hunt County Commissioner’s Court.
 - b. Under Texas law, the county sheriff is the county’s final policymaker in the area of law enforcement. The court rejected the county’s argument that it had not delegated social media authority to Sheriff Meeks stating “[t]he sheriff’s authority over the HCSO Facebook page derives from his elected position, ‘not by virtue of delegation by the county’s governing body.’” *Id.* at 448-49.
 - c. Accordingly, the court determined Sheriff Meeks was the final policymaker regarding the Facebook page.
 5. For the county to be liable, the constitutional violation must still be directly attributable to the municipality through some sort of official action or endorsement. Isolated unconstitutional actions are rarely sufficient to trigger liability.
 6. Court determined that Robinson had sufficiently pleaded an official policy of viewpoint discrimination on the HCSO Facebook page.
 - a. HCSO’s original post about deleting negative comments constituted viewpoint discrimination.
 - b. The fact that the post was made in the HCSO’s name provided some level of official endorsement and provides a reasonable inference that the post can be fairly identified as an action of the government itself.
 - c. Robinson posted negative remarks; HCSO removed them as promised.
 - d. This was “sufficient to state a claim that HCSO’s policy was the moving force’ behind the violation of Robinson’s constitutional rights.” *Id.* at 449.
- c. *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019).
- i. Vacated by *Biden v. Knight* in April 2021.
 - ii. Background.
 1. Before he became President, Donald Trump created the @realDonaldTrump Twitter account and continued to tweet from that account during his time as President. Unless they were specifically blocked from the account, any member of the public could view the President’s tweets. In 2017, Trump

blocked several individuals from his Twitter account. The government conceded they were blocked due to their negative posts that criticized Trump and/or his policies.

2. The individuals, along with the Knight First Amendment Institute, brought suit claiming that the blocking violated their First Amendment rights.

iii. Holding.

1. Based on a litany of factors, the court concluded the account was being used as an official account when the blocking occurred.
2. “The First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise-open online dialogue because they expressed views with which the official disagrees.” *Knight*, 928 F.3d at 230.

- iv. The court rejected the government’s argument that the account was private property because it was created as a personal account and would remain a personal account when Trump was no longer in office.

1. That the Twitter account was a personal account when it was created and will revert to a personal account after leaving office does not prevent the account from being considered a public forum subject to the First Amendment. “Temporary control by the government can still be control for First Amendment purposes.” *Id.* at 235.

- v. The court rejected the argument that the account constituted government speech.

1. “The contents of retweets, replies, likes, and mentions are controlled by the user who generates them and not by the President, except to the extent he attempts to do so by blocking.” *Id.* at 239.
2. “[W]hile the President’s tweets can accurately be described as government speech, the retweets, replies, and likes of other users in response to his tweets are not government speech under any formulation.” *Id.*

- vi. The President used the account in his official capacity while in office.

1. President and White House staff presented the account as belonging to and operated by the President and described the President’s use of it as official.
2. Account was registered to “Donald J. Trump, ‘45th President of the United States of America, Washington, D.C.”
3. President and White House staff described the account as a method of communication between Trump, as President, and the people.
4. Trump used the account regularly “as a channel for communicating and interacting with the public about his administration” and to “announce ‘matters related to official government business.’” *Id.* at 235-36.

5. White House staff assisted with managing the account.
 6. “[S]ince he took office, the President has consistently used the Account as an important tool of governance and executive outreach.” *Id.* at 236.
- vii. The court determined the Twitter account was operated as a public forum while President Trump was in office.
1. “As a general matter, social media is entitled to the same First Amendment protections as other forms of media.” *Id.* at 237.
 2. “Opening an instrumentality of communication ‘for indiscriminate use by the general public’ creates a public forum.” *Id.*
 3. “The Account was intentionally opened for public discussion when the President, upon assuming office, repeatedly used the Account as an official vehicle for governance and made its interactive features accessible to the public without limitation.” *Id.*
- viii. Viewpoint discrimination by the government in a public forum violates the First Amendment.
1. “Once [the President] opens up the interactive features of his account to the public at large he is not entitled to censor selected users because they express views with which he disagrees.” *Id.* at 238.
 2. Potential workarounds available to the blocked users, such as creating new accounts, did not cure the constitutional violation. Moreover, such workarounds would still burden the users’ speech, which also violates the First Amendment.
- d. *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021).
- i. Background.
 1. Reisch created her Twitter account while campaigning to be elected as a Missouri state representative. Reisch won the election and continued using the account, tweeting about her work as a state representative and posting pictures of herself on the legislature floor or with other elected officials.
 2. Reisch tweeted about her appearance at an event where the Pledge of Allegiance was recited – “sad my opponent put her hands behind her back during the Pledge.” *Campbell*, 986 F.3d at 824. A different state representative replied and defended Reisch’s opponent. Campbell retweeted this activity to his personal page and later realized that Reisch had blocked him from her Twitter account.
 3. Campbell brought a § 1983 claim, alleging Reisch violated his First Amendment rights. The district court agreed with Campbell and Reisch appealed.

- ii. Holding.
 - 1. Eighth Circuit reversed the district court’s decision and held Reisch’s Twitter account was not used as an official account, was not a public forum, and was not subject to the First Amendment.
- iii. Reisch did not act under color of state law when she blocked Campbell from her Twitter account.
 - 1. Reisch argued she used the account for campaign purposes and the court agreed, stating she used it “overwhelmingly for campaign purposes.” *Id.* at 826.
 - 2. “We don’t intimate that the essential character of a Twitter account is fixed forever. But the mere fact of Reisch’s election did not magically alter the account’s character, nor did it evolve into something different.” *Id.*
 - 3. “The overall theme of Reisch’s tweets – that’s [sic] she’s the right person for the job – largely remained the same after her electoral victory.” *Id.*
 - 4. The court determined Reisch primarily used the account “to promote herself and position herself for more electoral success down the road – a conclusion supported by the campaign-related tweet that led to this litigation.” *Id.*
 - 5. The court acknowledged Reisch occasionally used the account to post updates on legislation, but stated such activity was consistent with Reisch using the account to tout her record and reveal her stance on political issues.
 - 6. “In sum, her post-election use of the account is too similar to her pre-election use to suggest that it had morphed into something altogether different.” *Id.*
- iv. The court distinguished Reisch’s account from those in *Davison* and *Knight v. Trump*.
 - 1. “[O]ccasional stray messages that might conceivably be characterized as conducting the public’s business are not enough to convert Reisch’s account into something different from its original incarnation.” *Id.* at 827.
 - 2. The court noted Reisch’s Twitter handle referring to the district she represented and a banner photo on her Twitter page showing her on the House floor could be considered trappings of an official account but could also be trappings of a personal account. “The *Trump* and *Davison* courts were not concerned with distinguishing an official page from a campaign page as we are, and so they do not offer much guidance for deciding this case.” *Id.*
- v. Dissent.
 - 1. Believed Reisch was acting under color of state law when she blocked Campbell and that she engaged in viewpoint discrimination.

2. “Reisch’s election to public office may not have ‘magically alter[ed]’ the character of her Twitter account, as the court notes, but it did change how she used the account and for what purpose.” *Id.* at 828.
 - a. Reisch stopped using her campaign hashtag and no longer solicited campaign donations.
 - b. Reisch started reporting on legislation and informing the public of her official activities.
 - c. Reisch also clothed the account in the trappings of her public office by setting her location to her state district, describing herself as a state representative, and using photos depicting her office.

VI. FEDERAL DISTRICT CASES – WISCONSIN

a. *One Wisconsin Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019).

i. Background.

1. One Wisconsin Now (OWN), an advocacy group, brought a § 1983 claim alleging State Representatives Jesse Kremer, John Nygren, and Robin Vos violated the First Amendment by blocking OWN from their respective Twitter accounts.
2. Kremer’s account – Kremer operated and/or oversaw the operation of his @RepJesseeKremer account. Account registered to “Rep. Jesse Kremer, Official account for Wisconsin State Representative Jesse Kremer (R-Kewaskum).” The account linked to Kremer’s official state legislative website. Kremer retained control over the account and its content. Kremer’s staff also posted content during work hours. Kremer used Twitter to “notify the public about his public listening sessions” and “topics such as legislation, upcoming legislative hearings, and government reports.” *One Wis. Now*, 354 F. Supp. 3d at 947.
3. Nygren’s account – Nygren operated and/or oversaw the operation of his @rep89 account. The account was registered to him in his official capacity and linked to his official state legislative page. Nygren primarily operated the page, but staff would also contribute during work hours. Nygren created the account “to communicate with his legislative constituents” and tweeted about policy and non-policy topics. He also used the account to notify the public about upcoming meetings. *Id.* at 948.
4. Vos’s account – Vos operated and/or oversaw the operation of his @repvos account. The account was registered to him in his official capacity but did not link back to his official state legislative page. There was disagreement over Vos’s then-current use of the account and who operated it. It was clear Vos

created the account for anyone to follow, regardless of whether they were a constituent and continued to use it to tweet about policy and non-policy matters. Vos also had an @SpeakerVos account, which did not block OWN.

5. Kremer claimed that he blocked OWN “to stop spamming, stop the posting of tweets unrelated to the topic of the original tweets he posted, and to stop tweets of an inappropriate and unprofessional nature.” Nygren claimed he blocked OWN due to crude comments on Wisconsin politics. Vos did not remember why he blocked OWN, but his staff indicated that profanity and vulgarity would be the only appropriate reason for blocking another user. Each representative had blocked other users as well but did not have an official policy on blocking. *Id.* at 948-49.
6. OWN argued the defendants engaged in unconstitutional content or viewpoint-based discrimination.

ii. Holding.

1. Each representative acted under the color of state law in creating and maintaining their accounts in their official capacities. The interactive portions of their Twitter accounts were designated public forums and they engaged in content-based discrimination when they blocked OWN.

iii. The defendants acted under color of state law.

1. The court rejected defendants’ argument that blocking OWN was not state action “because there is no Wisconsin law that specifically grants them the power to block Twitter users.” *One Wis. Now*, 354 F. Supp. 3d at 950. “The law does not and has never required that a state action be specifically authorized by statute before being subject to examination.” *Id.*
2. The court applied the *Davison* district court’s color of state law analysis but also referenced the Fourth Circuit’s *Davison* opinion, which was released days before the *One Wisconsin Now* opinion.
3. The court acknowledged that a few facts supported the argument that defendants created and operated their accounts as private action but far more supported the argument that it was action taken under color of state law.
4. Kremer and Nygren accounts.
 - a. The “accounts rel[ied] on the ‘power and prestige of ... state office’ and were ‘created and administered ... to perform actual or apparent duties of [their] offices.’” *Id.* at 951-52.

- b. Their “accounts [were] intertwined with their public responsibilities” as they were created while Kremer and Nygren were in office and were used to share legislative information. *Id.* at 952.
- c. Both accounts were maintained, in part, using government resources.
- d. Both accounts were “swathed in the trappings of their office.” *Id.*
 - i. Handle identified their office (Kremer/Nygren).
 - ii. Linked to official legislative page (Kremer/Nygren).
 - iii. Pictures relating to official capacity (Kremer/Nygren).
 - iv. Described as official account (Kremer).
 - v. Described account holder as state representative (Nygren).
 - vi. Registered in official title (Kremer).

5. Vos account.

- a. Court noted there was confusion in the record regarding whether Vos’s @repvos account was operated under color of state law, particularly because: (1) Vos also had the @SpeakerVos account and (2) there was a question whether government resources were used to operate the @repvos account.
- b. However, the account was “still sufficiently linked to public circumstances and swathed in the trappings of his office to constitute state action under a totality of the circumstances test.” *Id.*
 - i. Vos used the @repvos account for public purposes. He created the account “because he was a ‘minority member of the Joint Committee on Finance looking for additional ways to get [his] views out to the public’ and wanted ‘the opportunity to talk directly to the people.’” *Id.*
 - ii. The account was “heavily swathed” in the trappings of his office as it was registered to Vos in his official capacity and featured an image of uniformed individuals and an American flag.
 - iii. The function of his @repvos account was essentially the same as Kremer’s and Nygren’s – “to perform actual and apparent duties as state assemblyperson using the power and prestige of that office to communicate legislative matters and other issues with the public.” *Id.* at 953.

iv. The Twitter accounts were designated public forums.

1. “To determine whether a government has intentionally created a designated forum, courts examine (1) the ‘policy and practice of the government’ and (2) ‘the nature of the property and its compatibility with expressive activity.’” *Id.*
 2. The court rejected defendants’ argument that they did not create designated public forums because they did not have an official policy establishing them as designated public forums and that the accounts were simply intended to get information to their constituents.
 - a. “[T]hey have not taken any steps to limit access to their accounts to their constituents, nor have they limited access by the general public.” *Id.* at 954.
 - b. “If defendants truly had no intention to create a space for public interaction and discourse, they would not have created public Twitter accounts in the first place. Instead, they could simply broadcast their views, schedules and other information . . . through a *non-interactive* blog. Having opted to create a Twitter account, however, and benefit from its broad, public reach, defendants cannot now divorce themselves from its First Amendment implications and responsibilities as state actors.” *Id.*
 3. The court also rejected the private property and government speech arguments.
- v. The defendants’ blocking of OWN constituted impermissible content-based discrimination.
1. Because there was uncertainty regarding the defendants’ reasons for blocking OWN, the court declined to determine whether the blocking constituted viewpoint-based discrimination.
 2. The defendants “blocked [OWN] because of its prior speech or identity” and indicated they “[did] not approve of [OWN’s] liberal perspective.” *Id.* at 956.
 - a. Even though Vos stated he couldn’t recall his reason for blocking OWN, the court determined that the only reasonable inference is that Vos blocked OWN because of its prior activity on Vos’s Twitter page.
 - b. The court also stated defendants’ blocking of a handful of other accounts supported the conclusion that they blocked OWN for a particular reason.
- b. *Anderson v. Hansen*, 519 F. Supp. 3d 457 (E.D. Wis. 2021).
- i. Facts.
 1. Anderson attended a school district board meeting and made several controversial statements. Subsequently, the district banned Anderson from

- school property, deleted Anderson's comments from the districts recording of the meeting posted to its Youtube account, and deleted comments Anderson made on the District's Facebook page after the meeting.
2. Anderson brought a § 1983 action against the school district and school superintendent alleging they violated her First Amendment rights.
- ii. Removing Anderson's comments from the recording was not an unlawful regulation of speech.
 1. The video recording was not a forum open for private speech. *Anderson*, 519 F. Supp. 3d at 466.
 2. The district's "editing" of the recording before posting it was government speech. *Id.* at 466-67.
 - iii. Deleting Anderson's Facebook comments was an unlawful regulation of speech in a public forum.
 1. "[A] government official who uses their social media account for government business cannot block comments from those who express views with which the official disagrees." *Id.* at 468 (citing *Knight*, 928 F.3d at 238).
 2. Deleting the comments was not government speech.
 - a. "Perhaps if the District carefully controlled the comments on its Facebook page, then [it] could claim that its deletion of Anderson's comments was an act of government speech" because then the page's comment section would not have been a public forum and "the deletion could be viewed as the District's trying to preserve the message it was trying to convey when it created the post." *Id.* at 468-69.
 - b. However, the District did not place any limitations on who could post, or what they could post on, and it did not delete any posts other than Anderson's.
- c. *Pressley v. Ozaukee County*, 20-cv-1404-pp (E.D. Wis. Mar. 25, 2022).
 - i. Facts.
 1. Pressley filed a complaint on September 9, 2020, against Ozaukee County and John Doe, alleging someone had been deleting his posts on the Ozaukee County Sheriff's Facebook page.
 2. Various procedural motions were made, and Pressley filed a motion for leave to file an amended complaint to add three additional parties: (1) Chantel Engel, an office assistant who allegedly deleted Pressley's posts on the Facebook page, (2) Timothy Nelson, who allegedly had oversight of Engel

and responsibility for the Facebook page, and (3) Sheriff James Johnson, who allegedly had oversight of Nelson.

3. Pressley claims “Nelson and Johnson took control of the Facebook page after Engel left her employment with the county and that neither individual ‘unblocked’ [him]. He asserts that up until that point, Engel had made the decision to delete [his] posts and block his access.” *Pressley v. Ozaukee* at 3.
- ii. The court allowed Pressley to file an amended complaint, naming the three parties in their individual capacities but not in their official capacities, finding that would be redundant with the already pending claim against the County.

VII. FEDERAL DISTRICT CASES – WHERE NO CIRCUIT COURT OPINION

- a. *Lindke v. Freed*, 563 F. Supp. 3d 704 (E.D. Mich. 2021).
 - i. City Manager Freed’s blocking of Lindke from his personal Facebook account was not state action. The court distinguished Freed’s use of his social media account from the use in *Knight v. Trump*, likening it more to the use in *Campbell v. Reisch* and *Charudattan v. Darnell*.
- b. *Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018).
 - i. Court held Governor Bevin’s blocking of plaintiffs from his official Facebook and Twitter accounts was government speech.
- c. *Garnier v. O’Conner-Ratcliff*, 513 F. Supp. 3d 1229 (S.D. Cal. 2021).
 - i. School board members acted under color of state law when they deleted parents’ posts and blocked them from their social media accounts, which were designated public forums. The blocking was content-neutral and initially narrowly tailored, because it was due to the posts’ extremely repetitive nature. However, the duration of the blocking (almost three years) resulted in the action no longer being narrowly tailored.
- d. *Faison v. Jones*, 440 F. Supp. 3d 1123 (E.D. Cal. 2020).
 - i. Sheriff Jones’s page was a public forum and his blocking of Faison constituted state action and was likely motivated by viewpoint discrimination.
- e. *West v. Shea*, 500 F. Supp. 3d 1079 (C.D. Cal. 2020).
 - i. The court rejected Mayor Shea’s motion to dismiss after West challenged the mayor’s blocking of her from her public Facebook page. West sufficiently pleaded the page was a public forum, the mayor acted in an official capacity when blocking her, and that the act constituted viewpoint discrimination. The court did not decide the question of immunity at this stage of the case.
- f. *Buentello v. Boebert*, 545 F. Supp. 3d 912 (D. Col. 2021).
 - i. U.S. House Representative Boebert’s blocking of Buentello from her personal Twitter account, but not her official account, did not constitute state action.

- g. *Attwood v. Clemons*, 526 F. Supp. 3d 1152 (N.D. Fla. 2021).
 - i. State legislator, Clemons, blocked Attwood from his Twitter and Facebook accounts. The court found Clemons' accounts were designated public forums. For purposes of summary judgment, there was a genuine issue of material fact regarding whether the blocking constituted state action. Additionally, the record supported a reasonable inference that Clemons engaged in viewpoint discrimination when blocking Attwood from his accounts.
- h. *Charudattan v. Darnell*, 510 F. Supp. 3d 1101 (N.D. Fla. 2020).
 - i. Sheriff Darnell's blocking of Charudattan from her campaign Facebook page was not state action. Sheriff's and deputies' blocking of Charudattan from the official sheriff's office Facebook page, a limited public forum, in accordance with the page's content policy was viewpoint neutral and reasonable.

VIII. TAKEAWAYS FROM CASELAW

- a. Unclear how Seventh Circuit and U.S. Supreme Court will rule in these types of cases. In the meantime, we look to factors other courts have examined for guidance.
- b. In a § 1983 action, the court will look at whether the challenged action was taken "under color of state law." A totality of the circumstances test will be used to determine if there is a sufficient nexus between the challenged action and the defendant's official status.
- c. Factors a court will likely consider:
 - i. Did the official use the account in their official capacity?
 - ii. Was the page used for campaign purposes? If so, to what extent?
 - iii. What statements were made regarding the creation and purpose of the account? (Both verbal statements and statements written on the account page).
 - iv. Were official/government resources used to maintain the account – e.g., staff posting content, replying to comments, etc.?
 - v. Was the account being used as a "tool of governance"?
 - 1. Providing information to the public regarding official activities?
 - 2. Soliciting public input on policy issues?
 - 3. Did the account's content generally relate to the official's office?
 - 4. Was the content aimed at the official's constituents?
 - 5. Were trappings of the office incorporated into the page?
 - a. Who was the account registered to?
 - b. Did handle relate to official capacity?
 - c. What images were used?
 - d. Did the account's description point to the official's office?
 - e. Did the account link to other official pages?
 - f. Was official contact information listed on the account?

- vi. Did the challenged action relate to events that arose out of the individual's official status?
 - vii. Was the challenged action suppression of speech that was critical of the official's conduct, duties, or fitness for office? If yes, this may support the conclusion of acting under color of state law.
- d. Was the page a designated public forum or a limited public forum?
- i. In the absence of clear guidance from the U.S. Supreme Court regarding whether a social media page or account will be considered a traditional public forum, courts will likely look to determine whether an official created their account as a designated public forum or a limited public forum.
 - ii. Factors a court will likely consider:
 - 1. Was the page or account intentionally opened for public discourse?
 - 2. Were there any limitations placed on users, topics of conversation, etc.?
 - 3. Were comments/conversations solicited?
 - 4. Was there any indication the official retained control over comments or moderated them? (If government speech argument is raised).
 - iii. In the absence of clear evidence indicating a limited public forum was created, courts are likely to find an account was opened as a designated public forum.
- e. Qualified immunity under 42 U.S.C. § 1983?
- i. Interestingly, there was little discussion in the caselaw regarding qualified immunity in officials' individual capacities.
 - 1. In *Davison*, the Fourth Circuit upheld the district court's rejection of Randall's qualified immunity argument without discussion. *Davison*, 912 F.3d at 666.
 - 2. In *Robinson*, the Fifth Circuit upheld the district court's finding of qualified immunity without discussion. *Robinson*, 921 F.3d at 440.
- f. Official Capacity/Municipal liability under 42 U.S.C. § 1983.
- i. Was there an official policy or custom underlying the unconstitutional action?
 - ii. Did a final policymaker have actual or constructive knowledge of that policy or custom?
 - iii. Did the constitutional violation occur primarily as a result of that policy or custom?
- g. Some indication that Wisconsin district courts will follow the *Davison* approach. See *One Wis. Now*, 354 F. Supp. 3d at 949-51.

IX. TIPS?

- a. Officials should establish their social media accounts with intention.
 - i. What type of forum is desired?
 - 1. Designated public forum with no restrictions?

2. Limited public forum with restrictions?
 3. Non-public forum with no interaction – one-way communication only?
- b. If officials want their social media account to remain private, they need to ensure it is a non-public forum that is kept wholly separate from their official government role.
 - c. If officials want their social media account to function as a method of communicating with constituents, they should consider opening their account as a limited public forum and creating and enforcing a social media comments policy.
 - d. A social media comment policy:
 - i. May be content based so long as the restrictions are reasonable in light of the purpose served by the social media account (as a limited public forum).
 - ii. Must be viewpoint neutral.
 - iii. Must be administered in a consistent and nondiscriminatory fashion.
 - iv. Should outline what action, if any, will be taken for policy violations – e.g., deletion, blocking, etc. Consider only blocking individuals for repeated violations and only for a limited time.
 - e. Possible policy limitations.
 - i. Prohibiting unprotected speech.
 1. True threats.
 2. Fighting words.
 3. Incitement.
 4. Defamation.
 5. Fraud.
 6. Speech integral to criminal conduct.
 7. Child pornography.
 8. Note: Wis. Stat. § 66.0107(3) prohibits local regulation of obscenity.
 - ii. Limiting audience to constituents.
 - iii. Limiting comments to the subject matter of the original post.
 - iv. Prohibiting posts that contain links to third-party websites.
 - v. Prohibiting profanity. (Profanity is protected speech but arguably a permissible content-based regulation if truly viewpoint neutral.)
 - vi. May not prohibit discriminatory speech or hate speech as such a prohibition would be viewpoint based.
 - vii. Prohibiting solicitation or advertisement of commercial services.
 - f. Municipalities should also consider adopting a policy that makes it clear if and when individual officials are final policymakers in the context of social media (or any given area of the municipality's business).



The First Amendment & Government Use of Social Media

Maria Davis, Assistant Legal Counsel

2022 Municipal Attorneys Institute

Why Use Social Media?

Delaware.gov @delaware_gov
 @NJGov Maybe you skipped class to go to the shore and missed this, but Delaware was the FIRST state to ratify the Constitution on December 7, 1787.
 Delaware: #1 since 1787

New Jersey @NJGov
 230 years ago today, New Jersey became the FIRST state to ratify the Bill of Rights.
 New Jersey: #1 since 1789



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 Read 13 replies

Topeka Police @Topeka_Police
 Congrats to whoever from Shawnee County won the \$1 million prize in the lottery. All of our Officers showed up to work today, so we can rule them out.
 114 10:46 PM · Jan 3, 2019
 See Topeka Police's other Tweets

US Consumer Product Safety Commission @USCPC
 Cut the cheese, not yourself. #NationalCheeseDay



3700 Cheese-related ER visits in 2017
 Nearly 9 out of 10 injuries involved lacerations, cuts, or avulsions associated with knives, graters, sliders, or scissors when cutting cheese or opening packages of cheese products.

USCPSC CPSC.gov
 8:00 PM · Jun 4, 2018
 36 Reply Share
 Read 1 reply

New Jersey @NJGov · Sep 9, 2020
 Who let New Jersey have a Twitter



64 1K 8.5K

New Jersey @NJGov
 djeetyet?

New Jersey @NJGov
 did you eat
 didyoueat
 didyeat
 djeet
 jeet
 ?

12:14 PM · Feb 19, 2020
 1.7K Reply Share
 Read 64 replies

Presentation Overview



Primary Focus: When is an individual government official's social media account subject to the First Amendment?

Brief refresher:

- First Amendment: Forum Analysis and Judicial Scrutiny
- Stating a claim against an official under 42 U.S.C. § 1983.

Review of current caselaw.

Takeaways and Tips.

First Amendment Refresher

Forum Analysis – What type of forum did the speech occur in?

Traditional Public Forum: Property that, due to its characteristics, is compatible with expressive activity and has a long tradition and history of being used for public expression.

EX: streets, parks, and sidewalks

Designated Public Forum: Property not traditionally open for expressive activity but that the government has opened for public expression.

EX: public comment period at council meeting (with no restrictions)

First Amendment Refresher

Limited Public Forum: A type of designated public forum where the government has reserved the forum for certain groups or for discussion of specific topics.

EX: public comment period at council meeting (with restrictions)

Non-Public Forum: All other types of property (public or private) that have not been opened for public expression.

Forum Determines Level of Judicial Scrutiny

Traditional & Designated Public Forums

Content-based regulation of speech → Subject to strict scrutiny

- Must show regulation is necessary to serve a *compelling* government interest and is narrowly tailored to achieve that interest.
- Strict scrutiny = presumptively unconstitutional

Reasonable time, place, and manner restrictions are okay.

- Must be content neutral, narrowly tailored to serve a *significant* government interest, and leave open ample alternative channels of communication.

Forum Determines Level of Judicial Scrutiny

Limited Public Forums

Content-based regulation of speech → Permitted

- Must be viewpoint neutral and reasonable in light of the purpose served by the forum.

Regulation does not need to be the most reasonable or only reasonably limitation; simply must be reasonable.

- Low threshold?

Forum Determines Level of Judicial Scrutiny

**VIEWPOINT
DISCRIMINATION**

42 U.S.C. § 1983

Stating a claim against an official under § 1983

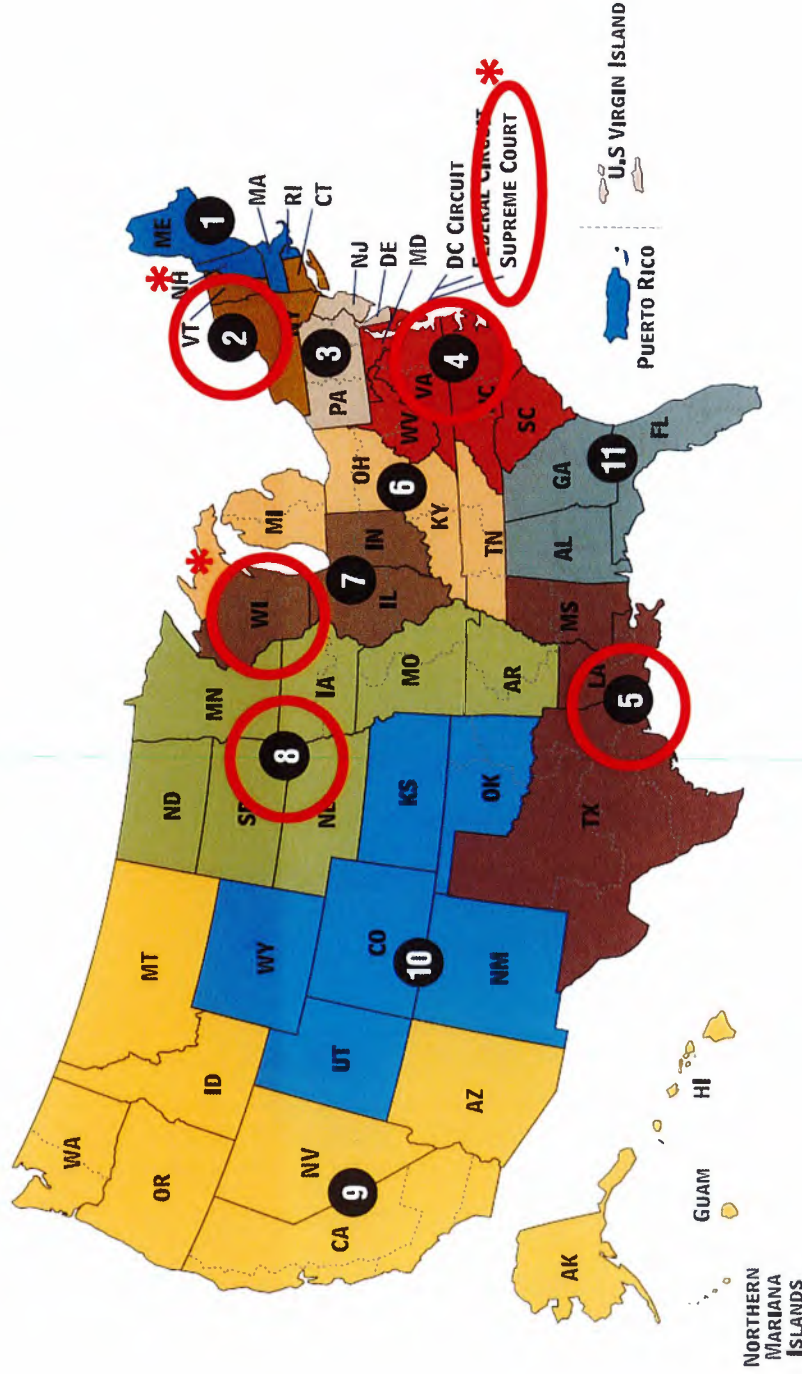
Plaintiff must show official acted “under color of state law.”

Section 1983 “color of law” prerequisite = “State action” requirement applicable to Fourteenth Amendment claims

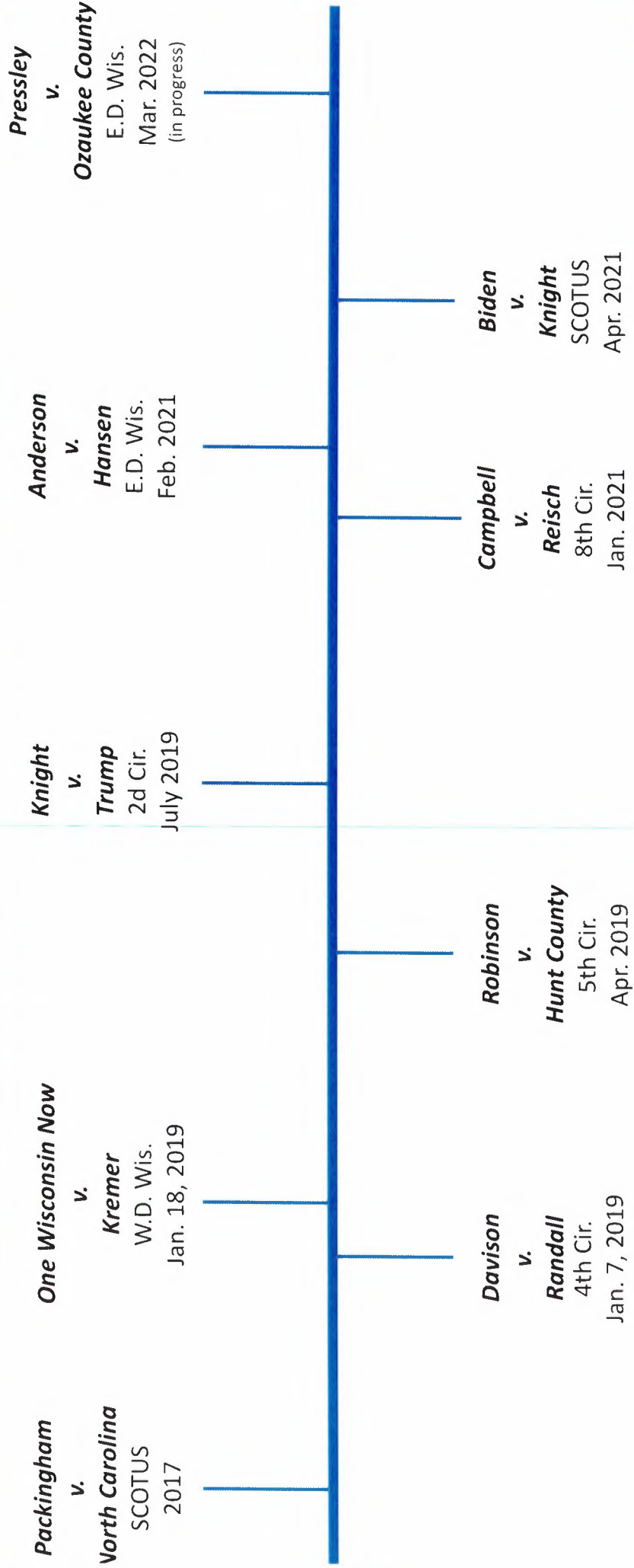
- Official’s conduct must be “fairly attributable to the state.”

No defined test. Courts will examine totality of the circumstances to determine if the action bore a “sufficiently close nexus” with the state.

Who Has Weighed In?



Timeline of Caselaw



Packingham v. North Carolina

“While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace – the ‘vast democratic forums of the Internet’ in general . . . and social media in particular.”

“These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to ‘become a town crier with a voice that resonates farther than it could from any soapbox.’”



137 S.Ct. 1730 (2017)

Dawison v. Randall

912 F.3d 666 (4th Cir. 2019)



Davison v. Randall

Randall acted “under color of state law.”

- She created and administered the Facebook page to further her duties as a municipal official.
- She used the page “as a tool of governance.”
- The banning was linked to events that arose out of her official duties.

Davison v. Randall

Randall’s “Chair” Facebook page was a public forum.

- Page bore the “trappings” of a public forum.
- The Facebook page was compatible with expressive activity.

Court rejected Randall’s arguments that:

- The page was a private website and not public property.
- The page in its entirety was government speech.

Davison v. Randall

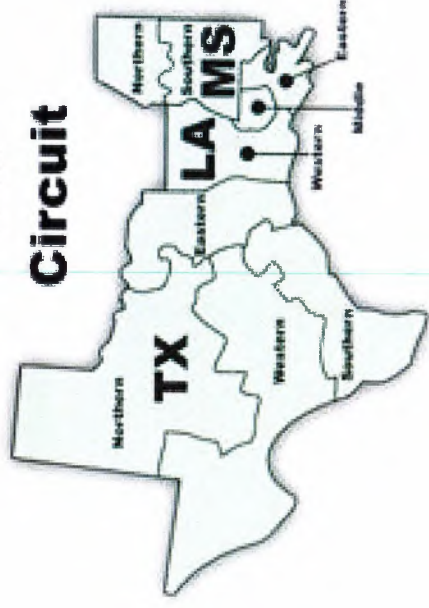
Randall was not liable in her official capacity.

- Official capacity suits treated as suits against the municipality.
- Municipality is only subject to Section 1983 liability when its custom or policy inflicts the plaintiff's injury.
- The question is whether the decisionmaker possesses final authority to establish municipal policy regarding the challenged action, which Randall did not.

Robinson v. Hunt County

921 F.3d 440 (5th Cir. 2019)

5th Circuit



Robinson v. Hunt County

Section 1983 claim against Hunt County

Plaintiff must allege:

- ✓ (1) An official policy or custom,
- ✓ (2) of which a policymaker can be charged with actual or constructive knowledge, and
- ✓ (3) a constitutional violation whose moving force is that policy or custom.

*Knight v. Trump**

928 F.3d 226 (2d Cir. 2019)



* Vacated by *Biden v. Knight* in April 2021.

Knight v. Trump



Official Account?



Public Forum?



Viewpoint discrimination?



Government Speech?



Private property?

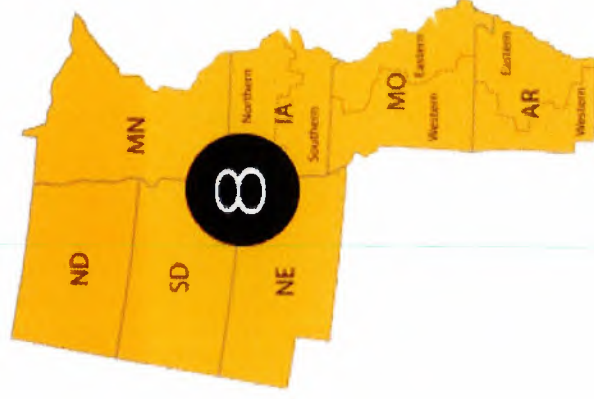
Biden v. Knight

141 S.Ct. 1220 (2021)



Campbell v. Reisch

986 F.3d 822 (8th Cir. 2021)



Campbell v. Reisch

Held: Reisch’s Twitter account was not used as an official account, was not a public forum, and was not subject to the First Amendment.

- Account used “overwhelmingly for campaign purposes.”
- Post-election use of the account was too similar to pre-election use of the account.

Campbell v. Reisch

Dissent: Reisch was acting under color of state law when she blocked Campbell and engaged in viewpoint discrimination.

Account use did change after election.

- Stopped using campaign hashtag and soliciting donations.
- Started reporting on legislation and informing public of her official activities.
- Clothed the page in the trappings of her office.

One Wisconsin Now v. Kremer

354 F. Supp. 3d 940 (W.D. Wis. 2019)



One Wisconsin Now v. Kremer



Under color of state law?



Designated public Forum?



Content-based discrimination?



Government Speech?



Private property?

Anderson v. Hansen

519 F. Supp. 3d 457 (E.D. Wis. 2021)



Pressley v. Ozaukee County

20-CV-1404-pp (E.D. Wis. Mar. 25, 2022)



Takeaways

Under color of state law analysis → Look at totality of circumstances

Courts will likely consider:

- Did the individual use the account in their official capacity?
- Was the page used for campaign purposes? If so, to what extent?
- What statements were made regarding the account's creation and purpose?
- Were government resources used to maintain the account?
- Was the account being used as a “tool of governance”?

Takeaways

Under color of state law analysis → Look at totality of circumstances

Factors indicating possible use as a “tool of governance”:

- Providing information to the public regarding official activities?
- Soliciting public input on policy issues?
- Does account’s content generally relate to the individual’s office?
- Is the content aimed at the individual’s constituents?
- Were the trappings of the office incorporated into the page?

Takeaways

Was the page a designated public forum or limited public forum?

Factors a court will likely consider:

- Was the page or account intentionally opened for public discourse?
- Were there any limitations placed on users, topics of conversation, etc.?
- Were comments/conversations solicited?

Takeaways

Will there be official capacity liability or municipal liability?

- Was there an official policy or custom underlying the unconstitutional action?
- Did a final policymaker have actual or constructive knowledge of that policy or custom?
- Did the constitutional violation occur primarily as a result of that policy or custom?

Tips

Officials should establish social media accounts with intention.

What type of forum is desired?

- Designated public forum with no restrictions?
- Limited public forum with restrictions?
- Non-public forum with no interaction (one-way communication)?

Tips

Social Media Comment Policy

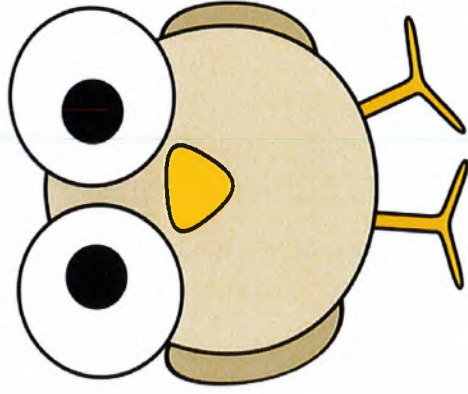
- May be content based so long as the restrictions are reasonable in light of the forum's purpose.
- Must be viewpoint neutral.
- Must be administered in a consistent and nondiscriminatory fashion.
- Should outline what action, if any, will be taken for policy violations – e.g., deletion, blocking, etc.

Tips

Possible Policy Limitations

- Prohibiting unprotected speech.
- Limiting audience to constituents.
- Limiting comments to the subject matter of original post.
- Prohibiting posts containing links to third-party websites.
- Prohibiting profanity. *
- May not prohibit discriminatory speech or hate speech – viewpoint based.
- Prohibiting solicitation or advertisement of commercial services.

Questions?



??

Social Media Pitfalls for Municipalities

Ed Antaramian,
City Attorney for the City of Kenosha



2016 Municipal Attorneys Institute
June 15, 2016
Stone Harbor Resort in Sturgeon Bay, WI

Social Media Pitfalls for Municipalities



Social Media

Concerns your municipality should have

Who are the decision makers

What decisions need to be made

What are the considerations for those decisions

2015 Pew Research data

66% of American adults use Facebook® and 17% use Twitter®

About 63% of Facebook users get news from it

Seventy percent of Facebook users use the service daily making communication through it happen in near real time

The considerations for a municipality center around three separate questions:

- (1) does your municipality want a social media presence?
- (2) if your municipality wants such a presence, what should you have in your terms of use?
- (3) if your municipality wants such a page, what considerations go into managing the page?

Who Makes the Decision?

Common Council/Village Board?

Mayor/President?

Administrator?

Department Head?

Other?

ISSUES
First Amendment
Laws Directed To Government
Liability
Contractual Considerations
Practical Considerations
Venue Vistas

FIRST AMENDMENT
Forum
Traditional Public Forum
Designated Public Forum
Limited Public Forum
Non-Public Forum

FIRST AMENDMENT
Exclusions?

Designated Public Forum

Facebook page is
open at all times,
has a very diverse audience,
has nearly unbounded capacity to receive posts, and
does not have a physical presence that would impact the repose of those who choose not participate,

The potential for legitimate time, place, and manner regulation is limited

FIRST AMENDMENT

Exclusions?
Political Correctness? Maybe

Fighting Words? Not likely!

Profanity? Not likely

Obscenity? Yes, but

Threats? Yes, but

Obscenity

Jenkins v Georgia 418 U S 153 157 (1974)

- Content is obscene if
 - average person
 - applying contemporary community standards
 - would find the content taken as a whole
 - appeals to the prurient interest the content depicts or describes sexual conduct in a patently offensive way and
 - the content wholly lacks literary artistic political or scientific value

Obscenity

Will You Know It When You See It?

Taken as a Whole Standard

"The notion of judging work as a whole is familiar in other media, but more difficult to define on the World Wide Web. It is unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites.

Ashcroft v. ACLU 535 U.S. 564 592-93(2002)(J. Kennedy concurring).

Obscenity

Will You Know It When You See It?

Average Person of Community Standard

Your Municipality?

Your Intended Target Audience?

The World?

First Amendment

Threats

A Cautionary Tale

Eloms v. United States,
575 U.S. ____ 135 S.Ct. 2001 (2015)

Bullying and Harassment

Pew Research Center - 2015

Harassment on the Internet through social media

24% had seen someone being physically threatened

19% reported seeing sexual harassment,

18% saw incidents of stalking,

Another quarter said they had witnessed someone being harassed for sustained periods of time online

Bullying and Harassment

Liability

If you take down a post is your municipality liable?

If you don't take down the post is your municipality liable?

Liability

Privacy – Publication of Private Facts

Wis Stat § 995 20

- (1) disclosure of facts concerning the plaintiff in a manner that would insure that the facts became public knowledge
- (2) the facts were private facts of the type that the plaintiff would not ordinarily disclose to other than family or close personal friends
- (3) the facts must be of a nature that would be considered to be sensitive to a person of ordinary sensibilities and
- (4) the defendant knew the public had no legitimate interest in knowing the facts or the defendant acted recklessly or unreasonably in deciding that there was a legitimate public interest in knowing the facts

Liability

Defamation

The Wisconsin Jury Instructions recognize three elements to a defamation action

- (1) the statement was false,
- (2) the statement is communicated by speech, conduct, or in writing to a person other than the person defamed, and
- (3) the communication is unprivileged and tends to harm one's reputation as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her

FTC "Guides Concerning the Use of Endorsements and Testimonials"

16 C.F.R. § 255.0-5

truth-in-advertising principles may apply to social media posts

applies to any business, organization, or person who uses the Internet to promote a product or service

The FTC has stated that that an employer should not be held liable if

- (1) the employer has a social media policy regulating the 'social media participation' of its employees and
- (2) such policy includes procedures establish procedures to monitor compliance with its social media policy and deal with employee non-compliance.

Liability

Right of Publicity

- (1) used plaintiff's identity,
- (2) appropriated plaintiff's name and likeness to defendant's advantage, commercial or otherwise,
- (3) lack of consent, and
- (4) injury

Liability

Copyright

Anyone who violates any of the exclusive rights of the copyright owner as provided by [provisions of the Act] is an infringer

As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity

Any State, and any such instrumentality officer or employee shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity

17 U.S.C. §501(a)

Copyright

Infringement

There are a large number of ways that a municipality could find that its Facebook page contained infringing material

A poster could have posted a photograph, a film clip, an audio file that directly infringed or

A poster could have posted a link to an online location containing infringing material

Copyright

Actual Attorney Fees

the average cost of a copyright infringement lawsuit with less than \$1,000,000 at issue through trial for the midwest region (excluding Chicago and Minneapolis which are typically more costly) is \$132,000

AIPLA Report of Economic Survey 2013

Copyright

Safe Harbor – From Damages

Requirements include

contact information for the entity in charge of the site be provided to viewers of the site

an effective notice-and-takedown procedure,

prompt action to remove content when a copyright owner provides notice that what has been posted is infringing

no knowledge that the material in question is infringing prior to the notice and

municipality can derive no financial benefit from the infringement

Trademark

Section 43 of the Lanham Act 15 U S C §1125

Infringement

False Designation of Origin

Dilution

Unfair Competition

Liability

A Cautionary Tale

Levitt, et al v Felton, 326362
(Michigan Court of Appeals, May 19,
2016) (unpublished)

Levitt, et al. v. Felton

Levitt was a lawyer and adjunct professor
 On Twitter as 'Todd Levitt@levittlaw'
 Felton was a student at the university
 Felton Created
 'Todd Levitt 2 0@levittlawyer'
 included a photo of Levitt and
 included a logo used by his law firm
 Felton did post
several tweets that the account was a parody
 a number with arguably damaging concepts

Venue

Be Prepared to Defend Anywhere in the Country

Government Responsibility

Public Records

Facebook posts made by the municipality or by
 citizens on a Facebook page that is maintained by
 the municipality are records which must be
 maintained

*See Wis Stat § 19 32(2) see also memo entitled Public Records on Social
 Networking Sites from Peter Gottlieb Board Chair for the Wisconsin Public
 Records Board to Agency Administrators dated October 27 2010*

Public Records

Issues

- (1) the maintenance under the record retention law requirements,
- (2) the retrieval obligation under the Public Records Law,
- (3) the format of retention and disclosure (e.g., maintaining a file size that includes metadata), and
- (4) the practical aspects of mass storage

Public Records

Can't Rely on FACEBOOK

The National Archives and Records Administration (NARA) issued guidance:
 Each agency is responsible for managing its records. Agencies should be aware that a social media provider could discontinue their service or delete information from an agency's account. In [such] situation, the agency is not relieved of its records management and possible capture obligations.

Capture is important for temporary records with long-term retentions or for permanent records. **These should be exported from the social media platform into an agency recordkeeping system**

Public Records

FACEBOOK Terms of Service

Facebook makes no representations in their Terms of Service that they will archive anything

To the Contrary, in Facebook term 18 10, they specifically reserve to themselves rights not granted

Public Records

Metadata Requires Massive Mass Storage

Metadata is data that describes other data.
It is typically hidden from the view of a casual observer of the text

Public Records

Metadata Requires Massive Mass Storage

It has been suggested that Wisconsin law implies that a requester has a statutory right to a record such as a social networking media post in its original format.

See *The Wisconsin Public Records and Open Meetings Handbook, fourth edition* edited by Melanie R. Swank, State Bar of Wisconsin, 2015 esp §10.11 see also, Comment, Wisconsin's Public-Records Law Preserving the Presumption of Complete Public Access in the Age of Electronic Records, Leanne Holcomb and James Isaac, 2008 Wisconsin Law Review 515-560

Open Meetings

Attorney General Compliance Guide

The phrase "convening of members" in Wis. Stat. § 19.82(2) is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together

Open Meetings

Courts are likely to consider such factors as the following

- (1) the number of participants involved in the communications
- (2) the number of communications regarding the subject,
- (3) the time frame within which the electronic communications occurred and
- (4) the extent of the conversation-like interactions reflected in the communications

Open Meetings

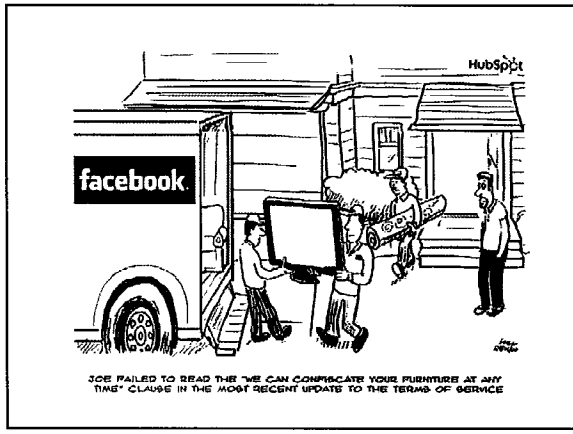
Remember *Badke*

Concerted Information Gathering Can Implicate the Open Meetings Law Even If No Action is Taken

When is a Private Page a Public Page?

Attorney General, Peckler-Dziki
Correspondence, I-06-09 (Dec 23, 2009) ("Making Salem Better" Google Group)

Candidate Page?



Terms of Service

<https://www.facebook.com/legal/terms>

(Merely a Gateway)

Terms of Service

Read Them!!!

'[A] federal agency or a federal employee signing up for the platform for official agency use, cannot merely click I accept' This is because there are about two dozen laws that apply to a federal agency's use of social media, and many of them are violated in boilerplate ToS agreements

Elizabeth Day Hochberg, Assistant General Counsel, General Services Administration, quoted in Landslide magazine

Terms of Service

Indemnification

15 2 If anyone brings a claim against us related to your actions, content or information on Facebook you will indemnify and hold us harmless from and against all damages, losses, and expenses of any kind (including reasonable legal fees and costs) related to such claim. Although we provide rules for user conduct we do not control or direct users' actions on Facebook and are not responsible for the content or information users transmit or share on Facebook We are not responsible for any offensive, inappropriate, obscene, unlawful or otherwise objectionable content or information you may encounter on Facebook We are not responsible for the conduct, whether online or offline, of any user of Facebook.

Terms of Service

Indemnification

Four Issues

Liability

§ 893 80 Damage Cap Waiver

§ 893 80 Notice Waiver

Signals Legislative Approval

Terms of Service

Venue

15 1 You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in the U S District Court for the Northern District of California or a state court located in San Mateo County and you agree to submit to the personal jurisdiction of such courts for the purpose of litigating all such claims. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions.

Terms of Service

Venue

Well-developed copyright and trademark caselaw

Google v Oracle (copyright fight over Android code)

Lenz v Universal Music Corp (Fair use in YouTube video takedown)

Pacific Century International Ltd v Does 1-101 (4 11-cv-02533-DMR) case (improper to sue bittorrent users from different swarms in the same copyright infringement lawsuit even if they all downloaded the same copyrighted material)

Terms of Service

No Third-Party Beneficiaries

18.1 If you are a resident of or have your principal place of business in the US or Canada, this Statement is an agreement between you and Facebook, Inc

18.9 This Statement does not confer any third party beneficiary rights

Terms of Service

No Third Party Beneficiaries

Unlike most contracts where this language is seen,

it is the nature of FACEBOOK that bilaterally-contracting parties all interact with each other!

Terms of Service

Release Use of Your Name and Profile
Commercially By Third Parties

9 1 **You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you.**

Terms of Service

Release Use of Your Name and Profile
Commercially By Third Parties

Probably intended to allow Facebook-compensated advertisers to advertise on your page

This could provide difficult concerns about sponsorship and endorsement

Should a community be properly concerned if a mayoral candidate buys up all of the advertising time associated with a municipal Facebook site for the two-week block prior to an election?

Terms of Service
Community Standards

"We may ask Page owners to associate their name and Facebook Profile with a Page that contains cruel and insensitive content even if that content does not violate our policies "

<https://www.facebook.com/communitystandards>

Policy Considerations

Overarching Policy

versus

Terms of Use

Policy

Content Considerations

Administrator,

Account Ownership

Training,

Regular Review (Policy and TOS)

Monitoring (Page),

Who is Authorized to Post (different than Monitor)

Takedowns

Employee Posting

Who Determines Policy?

Policy

Government Speech

Pleasant Grove City v Summum,
555 U S 460, 129 S Ct 1125 (2009)

Policy

Put Policy in Place

Train in Policy

Execute Policy

Accountability in Managers

Document – Training, Actions

Policy

Employee Posts

Protect for FTC Endorsements and Testimonials Rules,

but,

MUST Protect First Amendment Rights of Employees

Terms of Use

Copy FACEBOOK Terms?

Definition of Non-Protected Speech

Content Neutral Provisions (still viable in light of *Reed*)?

Illegal Yields Takedown?

Terms of Use (continued)

Topicality

Consider provisions from your library's CIPA Policy

Does your municipality
really
want a
FACEBOOK page?

Closing

Your Municipality Should

Make Certain the Legislative Body Is Fully Informed Before Making Its Decision

Have Clear Terms of Use With Limited Public Forum Considerations in Mind

Have Clear Policies

Train Monitors

Consistently Monitor

Document

SOCIAL MEDIA: LEGAL CONSIDERATIONS FOR WISCONSIN MUNICIPALITIES¹

by Edward R. Antaramian² and Daniel J. Balk, III³

INTRODUCTION

Social media are computer-mediated tools that allow people to create, share or exchange information, ideas, and pictures/videos in virtual communities and networks.⁴ “Social Media” comes in many different forms including blogs, business networks, enterprise social networks, forums, microblogs, photo sharing, products/services review, social bookmarking, social gaming, social networks, video sharing and virtual worlds.⁵ Examples of social networking media include FACEBOOK®, TWITTER®, LinkedIn®, YOUTUBE®, reddit®, and tumblr®.

According to 2015 Pew Research data, 66% of American adults use FACEBOOK® and 17% use TWITTER®. Of the Facebook⁶ and TWITTER users, about 63% of their users get news from the respective medium.⁷ Seventy percent of Facebook users use the service daily⁸ making communication through it happen in near real time. It is reasonable for municipalities to consider tapping into social networking media as an inexpensive way to reach a large portion of their adult constituents in an effective and expeditious manner.⁹ This potential tool, however, has detriments for municipalities that cannot be overlooked.

The focus of this article will be on considerations for a municipality contemplating a presence in social networking media. As Facebook has the largest presence of the social media, this article will explore social media, in general, through the context of Facebook.¹⁰

The considerations for a municipality center around three separate questions: (1) does your municipality want a social media presence; (2) if your municipality wants such a presence, what should you have in your terms of use; and (3) if your municipality wants such a page, what considerations go into managing the page? The consideration of these three questions implicates four, distinct avenues of examination: First Amendment, laws directed toward government (*e g* , Open Meetings, Public Records, record retention, ethics), liability (for defamation, copyright infringement, trademark infringement, statutory privacy; along with waivers, indemnification, and hold harmless provisions in

1 Disclaimer This article is intended to provide general, summarized information that is not to be construed or relied upon as legal advice. Because legal situations are fact-specific, municipal officers should consult with legal counsel regarding the community's specific legal needs with regard to social media.

2 Mr. Antaramian is the City Attorney for the City of Kenosha. He is a graduate of the Marquette University Law School.

3 Mr. Balk has completed his first year of study at the Marquette University Law School.

4 https://en.wikipedia.org/wiki/Social_media (accessed July 22, 2015).

5 *Id.*

6 FACEBOOK® is the registered trademark of Facebook, Inc. Having acknowledged this trademark position, for ease of the reader, herein “Facebook” will be used with the understanding that the rights of Facebook, Inc. to the mark are being honored.

7 <http://www.pewresearch.org/fact-tank/2015/07/14/5-key-takeaways-about-twitter-facebook-and-news-use/>

8 <http://www.pewinternet.org/2015/01/09/frequency-of-social-media-use-2/>

9 In announcing it was going to be on TWITTER as well as Facebook, Elections Division Administrator Nat Robinson of the Wisconsin Government Accountability Board said: “Social media like Facebook and Twitter are efficient, low-cost ways to reach voters and provide them with improved customer service.” <http://www.gab.wi.gov/node/2349>

10 While Facebook is the dominant social networking medium, others, such as reddit that provides for a form of community censorship, may be alternatives to consider.

Facebook's terms of service), and practical considerations (who from the municipality agrees to Facebook's terms of service, who monitors, how often is it monitored, who drafts the municipality's terms of use).

Often the decision to have a social media presence is made administratively, with a directive to an employee – and typically an employee chosen for facility in social media technique, but not necessarily for experience in government decision-making – to make it happen. Although the analogy may be harsh, such actions are akin to dumping a pile of wood before a carpenter without a plan and telling the carpenter to build a house to unexpressed expectations

What follows is intended to be a survey, not an exhaustive analysis, of applicable areas of law. Just identifying First Amendment jurisprudence would entail a multi-volume set. Rather, the intent is to provide the tools to carry out the discussion surrounding the creation and maintenance of the social media page. Then, perhaps, the employee tasked with executing the plan to create and maintain your social media presence can do so with a reasonable plan.

FIRST AMENDMENT

At one time, Facebook allowed the creation of accounts whereby the creator of the page had the option of allowing or prohibiting posts from other Facebook users. With the latter option of creating a type of one-way environment where the municipality controls the entirety of the message, First Amendment considerations are not a real issue. Modern Facebook policy eliminates the one-way option. First Amendment considerations now permeate the decisions of the municipality in the creation and maintenance of the page.

By administering an official Facebook page, the municipality creates a designated public forum

Although public forum analysis has not caught up to the developments in technology that have allowed Facebook to blossom into a widespread social media platform, the reasoning from past precedent indicates that a government Facebook page is a designated public forum.

The extent that government may control speech within a forum depends on what sort of forum it is. The United States Supreme Court has outlined the four types of fora government property may constitute depending on the character of the property.¹¹ The types of property are traditional public fora, designated public fora, limited public fora, and non public fora.¹²

Traditional public fora are places historically devoted to assembly and debate such as “streets and parks [which] have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹³ For government property to be considered a traditional public forum, the property must have a long standing history of usage for the free exchange of ideas¹⁴

11 *Perry Education Association v Perry Local Educators' Association*, 460 U S 37, 45, 103 S Ct 948, 74 L Ed 2d 794 (1983)

12 *Id.*, see also, *Cornelius v NAACP Legal Defense and Educ Fund, Inc*, 473 U S 788, 105 S Ct 3439, 87 L Ed 2d 567 (1985) for discussion about the limited public forum

13 *Int'l Soc'y for Krishna Consciousness, Inc v Lee*, 505 U S 672, 679, 112 S Ct 2701, 120 L Ed 2d 541 (1992) quoting *Hague v Comm. for Indus Org*, 307 U S 496, 307 U S 496, 83 L Ed 1423 (1939) See also *Frisby v Schultz*, 487 U S 474, 481 (1988) (holding a residential street is a public forum)

14 *International Society for Krishna Consciousness*, 505 U S at 679

Traditional public fora are largely confined to places with longstanding historical grounding as a place for expressive activity, thereby precluding many newer developments. For instance, in *International Society for Krishna Consciousness*, the Supreme Court held that airport terminals could not be traditional public fora because air travel and airport terminals “have only recently achieved their contemporary size and character.”¹⁵ Thus, the Court reasoned, airport terminals cannot be described as having been immemorially held in the public trust for expressive activity.¹⁶

Because the technology enabling social media is too new, and because municipal use of the media is even more recent and is evolving, it is unlikely that municipality-run social media, in general, and a municipality-run Facebook page, in particular, will be deemed by a court to be a traditional public forum. Analogous to the airport terminal considered in *International Society for Krishna Consciousness*, a municipality-run Facebook page, does not have an historical basis as a public forum. Truly, Facebook is newer to users today than airport terminals were to the Krishnas in 1992.

In limiting traditional public fora to only certain sorts of sidewalks, the Seventh Circuit showed that courts will be hesitant to apply the public-forum status in borderline cases.¹⁷

Given the lack of history as a traditional public forum, and the stated reluctance of the courts to find public-forum status in borderline cases, a municipality-administrated Facebook page may not be classified as a traditional public forum.

The second type of public forum is designated public forum. This type of forum is one which is not traditionally open to public discussion but the government intentionally opens it to the public for expressive activity.¹⁸ Whether government property constitutes a designated public forum or a non-public forum is largely dependent upon the government's intention and how exclusive or selective the forum is. Obvious examples of designated public fora include time allotted for citizen's comments during government meetings.¹⁹

A designated public forum restricted to acceptable subjects and speakers can become a “limited public forum”.²⁰

If the government, however, did not intend to open property to access by the general public for expressive activity, it is designated a “non-public forum.”²¹

15 *Id.* at 680

16 *Id.* See also, *Chicago Acorn v Metro Pier and Expo Auth* , 150 F 3d 695, 702 (7th Cir 1998) (holding the public sidewalks on Navy Pier in Chicago are not traditional public fora because the pier is a discrete entertainment center, and the sidewalks and streets within the discrete area that serve the purposes of this discrete entertainment center are not rights of way), *United States v Am Library Assoc , Inc* 539 U S 194, 205-06, 123 S Ct 2297, 156 L.Ed 2d 221 (2003) (holding Internet access is not a traditional public forum because the internet did not exist until quite recently and “[t]he doctrines surrounding traditional public forums may not be extended to situations where such history is lacking”)

17 See, *Chicago Acorn v Metro Pier and Expo Auth*.

18 *Surita v Hyde*, 665 F 3d 860, 869 (7th Cir 2011)(By allowing any member of the public to speak for up to three minutes on any subject a designated public fora was created)

19 *Id.*, *Bd. of Regents v Decker*, 355 Wis 2d 800, 850 N W 2d 112 (2014), *Theyerl v Manitowoc Cnty*, 41 F Supp 3d 737 (E D Wis 2014)

20 See, *Cornelius v NAACP Legal Defense and Educ Fund, Inc* , 473 U S 788 (1985)

21 *Ark. Educ Television Comm'n v Forbes*, 523 U S 666, 679, 118 S Ct 1633, 140 L Ed 2d 875 (1998), *Int'l Soc'y for Krishna Consciousness, Inc v Lee*, 505 U S 672 (1992), see also *United States v Am Library Assoc , Inc* , 539 U S 194, 206 (2003) (In excluding a candidate from a televised debate, a state agency operating the television station did not violate the candidate's Constitutional rights as even though the debate was a forum for political speech, “[a]

Because the municipality will open its page to the general public for dissemination of information, because a posting to a Facebook page affirmatively opens the door to comment from those who follow a page, and because the primary purpose of Facebook is to facilitate expressive activities within networks of connected people, in creating a municipal page, the municipality will undoubtedly be found to have intentionally opened a designated public forum.

With effort in creating and scrupulously maintaining restrictions regarding acceptable subjects and speakers, a municipality may be able to transform its page from a designated public forum into the more restricted “limited public forum”.²² Most cases examining limited public forum creation refer to a forum’s exclusivity, or a requirement to obtain permission to enter the forum, as an indication of limited status. Although the municipality will not be able to limit entry of speakers to the forum (as no permission is required to “like” a Facebook page), the municipality may draft a usage policy by which appropriate topics and manner of conversation are defined. As long as this usage policy is not struck down due to improperly infringing upon other constitutional rights, limiting the page to certain subjects will create a limited public forum.

Strict scrutiny is applied to content-specific restrictions in designated public fora, requiring the state to provide a compelling state interest and a narrowly tailored policy to achieve that end with the restriction.²³ Therefore, a municipality may only remove posts from a designated public forum that are comprised of either unprotected speech or non-topical posts based on a content in violation of a neutral usage policy.

Regulation that references content is presumed unconstitutional.²⁴ Content neutral restrictions of time, manner, and place in public fora are allowed when the government has a significant interest and the restriction is narrowly tailored to achieve that interest, and “ample alternative channels of communication” are left open.²⁵

Time, place, and manner restrictions vary greatly. Moreover, the justification for many time, place, and manner restrictions are in response to difficulties arising from a physical forum’s attributes such as scarcity of space and time to allocate to speakers or proximity to private residences.²⁶ Thus, the reasoning underpinning many cases examining content neutral regulations and restrictions would not apply for metaphysical fora such as a Facebook page.²⁷

Further still, some cases putting forth rules that do apply seem contradictory. For instance, 2005 case decided by the Seventh Circuit Court of Appeals found a time, place, or manner restriction is not content neutral if it is based on other people’s reactions to the *speech*.²⁸ Without overruling this

designated public forum is not created when the government allows selective access to speakers rather than general access for a class of speakers ”)

22 See, *Cornelius v NAACP Legal Defense and Educ Fund, Inc*

23 *Perry Education Ass’n*, 460 U S at 45, *Milestone v City of Monroe, Wis* , 665 F 3d 774, 783-84 (7th Cir 2011)

24 *Reed v Town of Gilbert, Ariz* , 135 S Ct 2218 (2015) (citing *R.A V v St Paul*, 505 U S 377, 112 S Ct 2538, 120 L Ed 2d 305 (1972)

25 *Perry Education Ass’n*, 460 U S at 45

26 See e g , *Ward v Rock Against Racism*, 491 U S 781, 109 S Ct 2746, 105 L Ed 2d 661 (1989)

27 See e g , *Reno v American Civil Liberties Union*, 521 U S 844, 870, 117 S Ct 2329, 138 L Ed 2d 874 (1997) (“Internet can hardly be considered a ‘scarce’ expressive commodity It provides relatively unlimited, low cost capacity for communication of all kinds ”)

28 *Ovadal v City of Madison, Wis* , 416 F 3d 531 (7th Cir 2005) In *Ovadal*, a Christian minister paraded signs and banners, which included controversial statements regarding homosexuality, on a bridge overpass of a major highway Numerous motorists called the police to complain of heavy congestion from other motorists slamming on their breaks in

precedent, that same court later upheld a restriction on the manner of speech based on the nature of the forum and the demographic of its audience.²⁹

Ultimately, as the Facebook page is open at all times, has a very diverse audience, has nearly unbounded capacity to receive posts, and does not have a physical presence that would impact the repose of those who choose not participate, the potential for legitimate time, place, and manner regulation is limited.

If, however, the municipality is successful in making the page not merely a designated public forum, but a limited public forum, the usage policy will simply need to be reasonable in light of the nature of the forum and viewpoint neutral.³⁰

The municipality may be able to remove some offensive, abusive, or profane language

Courts have also considered regulation of specific speech similar to content that may predictably end up on the municipality's Facebook page. First, some posts to the municipality's Facebook page will doubtless contain profanity. The controversy that surrounds even seemingly menial government matters arouses passionate debates among citizens, who may use profanity, especially when able to hide behind a computer screen rather than face their audience. The municipality will be unable to remove profanity generally, as it will often constitute protected speech.³¹ If speech posted to the page is, however, intended to incite a disturbance, the municipality may be able to remove it.³² Nonetheless, government cannot, under the guise of "fighting words," prohibit or favor certain speech "based on hostility—or favoritism—towards the underlying message expressed."³³

An attempt at limiting profanity or other abusive language may be included in the usage policy for the page. Such policies that regulate speech must, on their face, prohibit only unprotected speech.³⁴ But, cases construing governmental limitations on the words that one may use in speech activities, specifically regarding abusive language, have produced a body of case law that is difficult to navigate.³⁵ Among the variety of options available, the municipality may either adopt language taken from Facebook's terms of service or adopt the Wisconsin disorderly conduct statute as part of its policy. In the former instance, upon challenge the municipality could argue that it was merely enforcing

response to the signs. The court found the overpass constituted a traditional public forum. Noting that the speech very well may have caused some drivers to act recklessly, the court held that if the restriction on Ovadal's protest was part of a normal regulation against protesting during heavy traffic, the regulation may have been acceptable, otherwise it was a "heckler's veto" which is impermissibly content-based.

29 *Milestone v City of Monroe, Wis*, 665 F.3d 774, 784 (7th Cir. 2011). In *Milestone* an elderly woman was banned from a senior center for violating portions of "Code of Conduct" that prohibited "abusive, vulgar, or demeaning language" and required "patrons treat everyone with respect and courtesy." The court further held that establishing a "'positive,' 'dynamic,' and 'pleasant and upbeat,'" environment for the specific clientele of the senior center qualified as a significant governmental interest. *Id.* at 784.

30 *Rosenberger v Rector and Visitors of University of Virginia*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

31 See, *Cohen v California*, 403 U.S. 15, 21, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

32 See, *Chaplinsky v New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

33 *R.A.V. v City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992).

34 *Gooding v Wilson*, 405 U.S. 518, 519, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972).

35 Recognizing the need for public order, a Wisconsin disorderly conduct criminal statute disallowing "violent, abusive, indecent, profane, [or] boisterous" behavior was held constitutional in *State v Zwicker*, 41 Wis. 2d 497, 164 N.W.2d 512 (1969), but a statute that prohibited, "without provocation, use to or of another, and in his presence opprobrious words or abusive language, tending to cause a breach of the peace," was held unconstitutionally vague and overbroad in *Gooding v Wilson*, 405 U.S. 518, 519 (1972).

Facebook's corporate policy to which the poster had to comply. In the latter circumstance, the municipality would have the benefit of precedent, albeit dated.³⁶

Further caution must be exercised to assure that policy creates a non-specific ban that does not single out any type of offensive speech. For example, a municipal ordinance that prohibited fighting words with “racial, religious, or gender-specific symbols” was found to be impermissible view-point discrimination on its face.³⁷

Thus, before creating a Facebook presence, the municipality will have to consider its tolerance to have charged comments on its page respecting what are otherwise considered protected classes. Then municipality would need to be careful not to remove posts merely because they are offensive to certain demographics, whether protected classes or not.³⁸

The municipality will be able to remove obscene posts from the page

Beyond profanity, some people may attempt to publish text on the Facebook page which references sexual activity, or perhaps even depicts it in photographic form (Facebook allows users to respond to posts using pictures as well as text).

If the page has been created as a limited public forum and if sufficient policy has been created, material that is not clearly obscene, but nonetheless contains sexual content, may be able to be removed on the basis of their extra-topicality.

For a designated public forum page, however, the municipality will be able to remove only that material that is unprotected as obscene.³⁹ Content is obscene if the average person, applying contemporary community standards, would find the content, taken as a whole, appeals to the prurient interest, the content depicts or describes sexual conduct in a patently offensive way, and the content wholly lacks literary, artistic, political, or scientific value.⁴⁰

a. The Average Person and Contemporary Community Standards

The average person is embodied in the jury and the contemporary community standards that jury applies can vary in scope.⁴¹ Despite the Court's reassurance that varying jury verdicts will not abridge constitutional rights, the Court has ruled that the jury's power as trier of fact is not unlimited.⁴²

A municipality should exercise great caution in trying to define for itself what constitutes the community standard. In the first instance, it is uncertain what the community is for an Internet

36 Although *Zwicker* was decided before *Gooding*, it is unlikely to have been affected by it

37 *R.A.V. v. St. Paul*, 505 U.S. 377 (1992)

38 These statements are made with the recognition that Facebook has terms of service respecting these issues. But as noted herein, those rules are enforceable by Facebook – should Facebook refuse to enforce their rules (which is their reserved right), unless a limited public forum was successfully established, the municipality will be forced to defend its take-down decision under the higher standard of scrutiny

39 *Miller v. California*, 413 U.S. 15; 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (citing *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 130; 41 L.Ed.2d 1498 (1957)), Wis. Stat. § 944.21, *County of Kenosha v. C & S Management, Inc.*, 223 Wis.2d 373, 588 N.W.2d 236 (1999)

40 *Miller*, 413 U.S. at 24

41 *Jenkins v. Georgia*, 418 U.S. 153, 157, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974), see also *Miller*, at 26 n.9 (The mere fact that juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged.)

42 *Jenkins v. Georgia*, 418 U.S. 153 (1974) (reversing a jury verdict finding a movie to be obscene)

application directed toward a particular geographic community but available to everyone.⁴³ But even if the community is the target geographic community, and a jury applies the standards of that geographic community to find a work obscene, a higher court may nonetheless invalidate a verdict to protect the speech.

b. Taken as a Whole

Under general First Amendment analysis, material should be judged as a whole rather than merely examining an offensive portion of a work.⁴⁴ Recently, Justice Kennedy identified the difficulty of extending the doctrine to Internet applications: “The notion of judging work as a whole is familiar in other media, but more difficult to define on the World Wide Web. It is unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites.”⁴⁵ Courts will be faced with difficulty in applying the taken-as-a-whole requirement to Facebook. When deciding a case, the court will have various options on defining the “whole”, including: (1) the single post; (2) the entire collection of posts from a single user; (3) the thread to which the post is relevant to provide context for the post; or (4) the entirety of the page of all users on which the offensive post is added. Without guidance from the courts, municipal Facebook users will need to make common sense determinations, keeping the rights of the poster in mind.

c. Lacking Literary, Artistic, Political, or Scientific Value

Even if the municipality feels confident that a post on the Facebook page clearly appeals to the prurient interest and is patently offensive, according to the average person applying contemporary community standards, the municipality must still be cautious to remove content. The final element of obscenity, that a work, taken as a whole, lacks serious literary, artistic, political or scientific value, is not determined by the jury.⁴⁶ The United States Supreme Court reasoned that the First Amendment is meant to protect works that lack approval of the majority but nonetheless have value.⁴⁷ Thus, the Court held, the standard is not of the community’s values, but rather “whether a reasonable person would find such value in the material, taken as a whole.”⁴⁸

d. Civil liability for removing offensive content

If and when the municipality attempts to remove content it considers unprotected and offensive, the municipality may be open to civil liability. The Telecommunications Act of 1996 contains a provision that absolves users of an interactive computer service from liability for:

any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious,

43 *Miller*, at 32, see also, *Jenkins* at 157, *Hamling v United States*, 418 U S 87, 104, 94 S Ct 2887, 41 L Ed 2d 590 (1974) (holding jury instruction that community standard is defined as national standard was not reversible error) In *Reno*, the Court expressed concern that regulation of obscenity on the internet would impose a national, as opposed to local, contemporary community standard 521 U S , at 877-78, cf , *Sable Communications of California, Inc v FCC* , 492 U S 115, 124-25, 109 S Ct 2829, 106 L Ed 2d 93 (1989) (noting that federal obscenity statutes apply local community standards rather than national standard) Children may not, however, be included in the hypothetical community *Pinkus v United States*, 436 U S 293 (1978)

44 See, *Miller*

45 *Ashcroft v ACLU*, 535 U S 564, 592-93, 601, 122 S Ct 1700, 152 L Ed 2d 771 (2002) (J Kennedy, concurring)

46 *Pope v Illinois*, 481 U S 497, 500, 107 S Ct 1918, 95 L Ed 2d 439 (1987)

47 *Pope*, at 500

48 *Id* at 501 See also, *County of Kenosha v C & S Management, Inc* , 223 Wis 2d 373 (1999)

filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected⁴⁹

While the concept is helpful to municipal users of social networking media such as Facebook as a potential defense, it is unclear how broadly “good faith” will be construed to protect the municipality against First Amendment claims for takedowns of citizen posts.⁵⁰

PRIVACY

Another concern the municipality will face when operating a Facebook page is what duty or power will the municipality have to remove content due to privacy concerns of citizens.

Assume Restaurant is a fine-dining establishment in a community. Restaurant posts a photo of Alderperson on the municipality’s page with a caption suggesting Alderperson’s endorsement of Restaurant; both the use of the photo and the suggestion are without Alderperson’s permission. Citizen sees the Restaurant post and responds with a rant on Alderperson’s ineffectiveness. Using charged epithets, Citizen suggests Alderperson is homosexual (which is true, but was not generally known outside his immediate family) and that Alderperson has AIDS (which is not true). Alderperson requests both posts be taken down.

May the municipality remove the picture and/or the comment and/or the response? Must the municipality remove them? While there are a number of issues involved, including Alderperson’s right of publicity, possible defamation, and the inevitable First Amendment considerations, there is also the privacy interest of Alderperson to consider.

By statute, Wisconsin recognizes a civil cause of action for invasion of privacy.⁵¹ The statute identifies four separate classes of action that could give rise to a claim under the statute, one of the classes being publication of private facts.⁵² That latter cause of action has four elements: (1) the defendant made a disclosure of facts concerning the plaintiff in a manner that would insure that the facts became public knowledge; (2) the facts were private facts of the type that the plaintiff would not ordinarily disclose to other than family or close, personal friends; (3) the facts must be of a nature that would be considered to be sensitive to a person of ordinary sensibilities; and (4) the defendant knew the public had no legitimate interest in knowing the facts or the defendant acted recklessly or unreasonably in deciding that there was a legitimate public interest in knowing the facts.⁵³

The purpose of this discussion is not to opine on whether a jury would find liability in this hypothetical situation, but rather to make the municipality aware of the potential as it creates its page and its policies on use and maintenance of the page.

DEFAMATION

49 47 U.S.C. § 230(c)(2)(A)

50 There has been no binding authority found on the issue, but see, *Mainstream Loudoun v Board of Trustees of Loudoun County Library*, 2 F Supp 2d 783, esp 790 (E.D. Va. 1998) (noting “§ 230 was not enacted to insulate government regulation of Internet speech from judicial review”)

51 Wis Stat § 995.20, see also, Op Att Gen March 1, 1979

52 See, 2550 Wis JI-Civil (Invasion of Privacy Publication of a Private Matter Wis Stat § 995.20(2)(c), copyright Regents, University of Wisconsin) See also, *Zinda v Louisiana Pacific Corp*, 149 Wis 2d 913, 474 N.W.2d 913 (Ct App 1991)

53 2550 Wis JI-Civil

Consideration of action to take with regard to a potentially defamatory post implicates consideration of three competing interests: the First Amendment rights of the poster in aspects that are protected, the reputational rights of the person alleged to have been defamed, and the interest of the citizenry to avoid having to pay defense costs and damages for a defamation action against the municipality.

The Wisconsin Jury Instructions recognize three elements to a defamation action:

- (1) the statement was false,
- (2) the statement is communicated by speech, conduct, or in writing to a person other than the person defamed, and
- (3) the communication is unprivileged and tends to harm one's reputation as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her.⁵⁴

There are, of course, different standards for public-figure plaintiffs as opposed to non-public-figure plaintiffs.⁵⁵ The focus of this section, as with the article, is on the existence of the cause of action as well as the impact the existence has on the decisions the municipality makes with regard to a social networking media presence. Nuances of the individual causes of action is beyond the scope of this article.

Defamation is a viable cause of action against an entity broadcasting the falsehood. A non-public figure plaintiff must prove that the defendant publisher was negligent in publishing the libel in order to recover actual damages.⁵⁶

If a municipality has made the decision to have a social networking media presence, the exposure to this potential cause of action, perhaps more than the other considerations discussed herein militates toward a municipality having a designated person to regularly monitor posts. That monitor should be acting pursuant to a policy to catch and suppress defamation as soon as it is discerned. Moreover, the potential exposure also militates toward having an attorney at the ready to help navigate the channel between liability for First Amendment censorship and liability for defamation.

INTELLECTUAL PROPERTY – COPYRIGHT, TRADEMARK

Intellectual property liability exposure for an interactive Internet presence can come from a variety of bodies of law. These include copyright infringement, trademark infringement, trade dress infringement, unfair competition, right of publicity, and moral rights (such as the right of attribution). As with the larger article, this section does not presume to provide an exhaustive analysis of the law, but to raise the specter of potential liability for which consideration must be made.

Copyright Act

The Copyright Act provides for the protection of authors of works. The current Copyright Act⁵⁷ is actually a series of acts such as the Berne Convention Implementation Act of 1988, Piracy and

⁵⁴ 2500 Wis JI-Civil (Defamation Law Note for Trial Judges)

⁵⁵ *New York Times v Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), *Denny v Mertz* 106 Wis.2d 636, 318 N.W.2d 141 (1982)

⁵⁶ *Denny v Mertz*, 106 Wis.2d 636, 318 N.W.2d 141 (1982)

⁵⁷ 17 U.S.C. §101, *et seq*

Counterfeiting Amendments Act of 1982, the Copyright Remedy Clarification Act of 1990, the Digital Millennium Copyright Act of 1998, and the Satellite Home Viewer Improvement Act of 1999. Infringement is for:

Anyone who violates any of the exclusive rights of the copyright owner as provided by [provisions of the Act], is an infringer of the copyright or right of the author, as the case may be. . . . As used in this subsection, the term “anyone” includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.⁵⁸

The cause of action is brought in federal court as a federal question. Remedies include injunctive relief,⁵⁹ damages (including lost profits),⁶⁰ and actual costs and attorney fees.⁶¹

There are a large number of ways that a municipality could find that its Facebook page contained infringing material. A user could have posted a photograph, a film clip, an audio file that directly infringed, or could have posted a link to an online location containing infringing material.⁶²

Realizing that innocent providers of interactive Internet pages could find themselves infringing by post made to their sites, a safe harbor has been provided against money damages in the Digital Millennium Copyright Act.

The Digital Millennium Copyright Act implemented the World Intellectual Property Organization treaties. Included in the larger act was the “Online Copyright Infringement Liability Limitation Act,” which provided a safe harbor for Internet users against damages if its requirements are followed. The requirements include that contact information for the entity in charge of the site be provided to viewers of the site. It also requires establishment of an effective “notice-and-takedown” procedure, and prompt action to remove content when a copyright owner provides notice that what has been posted is infringing. Moreover, the municipality can have no knowledge that the material in question is infringing prior to the notice and the municipality can derive no financial benefit from the infringement.⁶³

58 17 U S C §501(a)

59 17 U S C §502

60 17 U S C. §503 Damages are actual or statutory, at the option of the plaintiff Statutory damages require no proof of damage, but is left to the discretion of the judge For non-willful infringement, the range is \$750 to \$30,000, for willful infringement, the range is up to \$150,000

61 17 U S C §504 These can be expensive, eclipsing actual damages From the AIPLA Report of Economic Survey 2013 (Prepared under the Law Practice Management Committee of the American Intellectual Property Law Association), the average cost of a copyright infringement lawsuit with less than \$1,000,000 at issue, through trial for the midwest region (excluding Chicago and Minneapolis, which are typically more costly) is \$132,000 (Report at page I-171)

62 See also the observation in footnote 87, that all citizen posts are subject to copyright protection The municipality's terms of use should consider the inclusion of a provision by which the poster gives the municipality license to reproduce posts in response to Public Records requests

63 17 U S C §512, especially (c) and (d) See also, *ALS Scan Inc v RemarQ Communities Inc*, 239 F 3d 619, 57 USPQ2d 1996 (4th Cir 2001)(“The DMCA was enacted both to preserve copyright enforcement on the Internet and to provide immunity to service providers from copyright infringement liability for ‘passive,’ ‘automatic’ actions in which a service provider’s system engages through a technological process initiated by another without the knowledge of the service provider This immunity, however, is not presumptive, but granted only to ‘innocent’ service providers who can prove they do not have actual or constructive knowledge of the infringement, as defined under any of the three

It bears reiteration that the safe harbor provision does not absolve the municipality of infringement, merely makes the innocent municipality safe from paying damages.

Trademark

Another area of intellectual property subject to consideration on the Facebook page is trademark law. At the federal level, the body of law is found in the Lanham Act.⁶⁴ Federal protection is afforded for marks used in interstate commerce. Proving interstate commerce is relatively easy since the advent of the Internet. For marks not protectable by the federal law, the Wisconsin counterpart will be at issue.⁶⁵

The Lanham Act protects trademark owners against infringement,⁶⁶ false designation of origin,⁶⁷ and dilution.⁶⁸ Infringement is the use of another's mark on the same goods (*e g*, selling basketball shoes with the Nike swoosh® without permission). False designation of origin is applying the mark to similar goods to suggest that they are from the same source (*e g*, applying the Nike-like swoosh to items similar in nature or related to what Nike sells, such as basketballs – if Nike were not already selling basketballs). Dilution is the lessening of the uniqueness of a famous mark (*e g*, selling motorcycles or similar goods that are very different than what Nike sells but with the Nike-like swoosh).

Posting of a trademark on the municipal page may invite a cease & desist letter. The good news is that the cease & desist letter is rarely followed by a lawsuit if immediate cessation occurs. Further good news is that the municipality will have an affirmative defense that the statute is inapplicable as the alleged illegal use was not used in commerce. The bad news is that the post may have First Amendment overtones giving the municipality pause on complying with a takedown. Further bad news is that the trademark lawsuit defenses are as expensive as copyright defenses.

BULLYING, HARASSMENT, AND WHEN IS A THREAT NOT A THREAT

The Pew Research Center conducts surveys on Internet use. In 2015, they surveyed harassment on the Internet through social media. The survey probed internet users on incidents of harassment that the respondents witnessed online. About a quarter (24%) said they had seen someone being physically threatened, 19% reported seeing sexual harassment, and 18% saw incidents of stalking.⁶⁹ Another quarter said they had witnessed someone being harassed for sustained periods of time online.⁷⁰

As with other First Amendment considerations, there is also a component of protection of the municipality from liability. Assume that a post is made on the municipal page that constitutes bullying of another citizen. A true threat is not discerned by the municipal employee monitoring the municipality's page. The subject of the bullying commits suicide leaving a note tying his personal

prongs of 17 U S C §512(c)(1) The DMCA's protection of an innocent service provider disappears at the moment the service provider loses its innocence, i.e., at the moment it becomes aware that a third party is using its system to infringe" 239 F 3d at 625)

64 15 U S C. Chapter 22

65 Wis Stat §132.01

66 15 U S C. §1114.

67 15 U S C §1125(a), this section is also frequently described as "Section 43(a) of the Lanham Act"

68 15 U S C §1125(c), this section is also frequently described as "Section 43(c) of the Lanham Act"

69 <http://www.pewresearch.org/fact-tank/2015/06/01/the-darkest-side-of-online-harassment-menacing-behavior/>

70 *Id.*

distress to the posts on the municipality's page. Aside from the moral and political outrage, it is foreseeable that the municipality will face a civil complaint from the decedent's estate.

Separate from the liability issue is the constitutional issue. The Constitution does not protect true threats.⁷¹ Such being the case, true threats can be taken down from a social media site without abridging the constitutional rights of the poster. What constitutes a “true” threat, however, may be as nebulous as what constitutes pornography. The recent decision in *Elonis v United States*⁷² may help illustrate the concern.

Elonis was convicted for making “any communication containing any threat... to injure the person of another” in violation of 18 U.S.C. § 875 (c). The basis for the conviction was Elonis's posting of alleged threats on his Facebook page. Although the abridgments of a Elonis's First Amendment rights were argued to the court, the conviction was overturned on other grounds. Nonetheless, the facts and discussion of the facts in that case illustrate the difficulty that municipalities will face in considering the quality of threats posted on their Facebook pages.

Elonis fancied himself a rap artist (although there was no evidence he ever attempted to perform professionally). In defense of the charge against him, he alleged he was exercising his First Amendment rights in a similar manner as other performers. To make this point, his brief includes a lengthy excerpt from lyrics or rap song in which a very well-compensated rapper imagines killing his ex-wife and dumping her body in a lake.⁷³

Elonis's lyrics included: “If I only knew then what I know now .. I would've smothered your ass with a pillow, dumped your body in the back seat, dropped you off in Toad Creek and made it look like a rape and murder.”⁷⁴ The lyrics also included: “There is only one way to argue but 1000 ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all little cuts.”⁷⁵

Moreover, the context of the Facebook posts included that: (a) he had reason to be angry with his wife, the target of the “threat”, who left him with his two children after seven years of marriage, (b) he took affirmative action to make certain she saw his posts, and (c) he posted a photograph on Facebook of himself holding a toy knife to a co-worker's throat at a park where he had worked, caused him to be fired by his employer.⁷⁶

71 *Elonis*, 135 S Ct. at 2016 (Justice Alito concurrence, citing *Virginia v Black*, 538 U S 343, 359 – 360 (2003), *R.A V v St Paul*, 505 U S 377, 388 (1992))

72 575 U S ____, 135 S Ct 2001 (2015)

73 135 S Ct at 2016

74 *Id.*

75 *Id.* An additional basis for the original indictment included a post on Facebook by Elonis that was a parody of a comedy skit about what is legal to say about killing the president from a series called “Whitest Kids U Know” “I am Tone Elonis Did you know that it's illegal for me to say I want to kill my wife? It is one of the only sentences that I am not allowed to say Now, it was okay for me to say it right then because I was just telling you that it's illegal for me to say that I want to kill my wife Um, but what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife But not illegal to say with a mortar launcher Because that's its own sentence I also found that it's incredibly illegal, extremely illegal to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because it has easy access to a getaway road and you have a clear line of sight through the sunroom Yet even more it illegal to show an illustrated diagram [diagram of the house] 135 S Ct at 2005

76 The firing resulted in another post “Moles! Didn't I tell y'all I had several? Y'all sayin' I had access to keys for all the f***in' gates That I have sinister plans for all my friends and must have taken home a couple Y'all think it's too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck, I'm still the main

The majority did not need to address the First Amendment argument of Elonis, reversing his conviction on failure of the prosecution to prove *scienter* as an element of the offense. While both Justice Alito in a concurring opinion and Justice Thomas in a dissenting opinion addressed the First Amendment argument, therein finding that Elonis's actions did constitute a threat, the majority did not find a violation of the federal statute for delivering a threat.

It will take a nuanced argument to find that a series of words that does not as a matter of law constitute the delivery of a threat for federal criminal law purposes, can somehow nonetheless constitute a true threat allowing for the removal of a post without abridging the poster's Constitutional Rights.

Absent that nuanced argument, the municipality will suffer at least the moral outrage of the public for allowing what is at least boorish comments, if the ultimate lawsuit is not brought.

PUBLIC RECORDS/ARCHIVE SPACE

For purposes of the Wisconsin Public Records Law, Facebook posts made by the municipality or by citizens on a Facebook page that is maintained by the municipality are records.⁷⁷ "Record" also includes records produced or maintained by Facebook pursuant to its user agreement with the municipality.⁷⁸

There are four considerations surrounding maintenance of the Facebook posts as public records: (1) the maintenance under the record retention law requirements; (2) the retrieval obligation under the Public Records Law, (3) the format of retention and disclosure (*e.g.*, maintaining a file size that includes metadata), and (4) the practical aspects of mass storage. Special aspects of these questions will be discussed in the two subsections that follow.

Retention

The National Archives and Records Administration (NARA) issued guidance to heads of all federal agencies on the maintenance by the agencies of social media records.⁷⁹ For federal purposes, if an agency uses the social media tool to convey official agency information, its content is a public record.⁸⁰ The NARA also notes:

Each agency is responsible for managing its records. At a minimum, these responsibilities include the ability to identify and retrieve Federal records that are being created and maintained on social media. Agencies should be aware that a social media provider could discontinue their service or delete information from an agency's account. Additionally, agencies may stop using a social media platform at any time. In either situation, the agency is not relieved

attraction. Whoever thought the Halloween Haunt could be so f***in' scary?" *Id.*

77 See, Wis. Stat. § 19.32(2)

78 See, Wis. Stat. § 19.36(3); see also *Wisconsin Public Records Law Wis. Stat. §§ 19.31-19.39, Compliance Outline*, Department of Justice, Attorney General J.B. Van Hollen (September 2012), section IV. A. 4.

79 NARA Bulletin 2014-04, Guidance on Managing Social Media Records (to Heads of Federal Agencies)(issued October 25, 2013, and expiring on October 31, 2016). It is available at <http://www.archives.gov/records-mgmt/bulletins/2014-02.html> (accessed July 22, 2015).

80 *Id.* at question 3.

of its records management and possible capture obligations.⁸¹

Capture is important for temporary records with long-term retentions or for permanent records. These should be exported from the social media platform into an agency recordkeeping system.⁸²

The same results are likely under Wisconsin Law for use by Wisconsin municipalities.

Under Wisconsin record retention law,⁸³ the record custodian must keep and preserve all property and things that are in the possession or control of the custodian in the course of his or her duties. This includes social media postings.⁸⁴

The threshold observation is that the records custodian for the Facebook posts cannot be a Facebook employee, but rather must be a municipal employee or officer.⁸⁵ The next observation is that Facebook provides some level of archiving by providing space on their servers for posts to be maintained on a page. But, as will be explored later herein, Facebook makes no assurances that it will continue to archive anything.⁸⁶

These observations lead to the conclusion that the municipality must rely on itself to archive and manage the archive of its Facebook pages and posts.⁸⁷

Metadata

Metadata is data that describes other data. It is typically hidden from the view of a casual observer of the text, but can be revealed to those who are technology-savvy. The information in metadata can include when the document was created, what revisions were made to text, who created the revisions, when a document was opened, and when it was printed.

Even those savvy with technology can miss implications of metadata. Adam Savage, co-host of the television show *Mythbusters*, posted on Twitter a photo taken with his iPhone® of his Toyota that was at the time parked in front of his home. Embedded in that post was metadata, including the geotag for his home. He revealed with that social media post of his car, the location of his home.⁸⁸

Geotagging is just one type of metadata automatically created and automatically associated with many digital applications.

81 *Id.* at question 8.

82 *Id.* at question 7.

83 Wis. Stat. §19.21(4)(b) (2013-2014). References herein to Wisconsin statutes are to this biennium.

84 See, Memo entitled “Public Records on Social Networking Sites” from Peter Gottlieb, Board Chair for the Wisconsin Public Records Board, to Agency Administrators, dated October 27, 2010.

85 Wis. Stat. §19.33(4).

86 See the Terms Of Service section below for a discussion of Facebook term 18.10.

87 Among the interesting anomalies that arises as Facebook policy meets the Wisconsin Public Records Law is the consideration of ownership of the posts. Paragraph 2 of Facebook terms of service states: “You [the poster] own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings.” <https://www.facebook.com/legal/terms>, accessed August 10, 2015. This is in keeping with federal copyright law. When applying the Public Record Law to a request for a Facebook page, a court will have to decide if all citizen posts must be redacted as copyrighted material. See definition of “record” in Wis. Stat. §19.32(2) (that exempts material protected by copyright from the definition) and 15 U.S.C. §§ 102, 106, and 201 (that material recorded in a tangible medium is subject to copyright protection that is owned by the author).

88 See, http://www.nytimes.com/2010/08/12/technology/personaltech/12basics.html?_r=0 (accessed August 10, 2015)

Metadata has at least two considerations for the municipality. First, there may be information in the metadata that should not be revealed. Using the geotagging as an example, the posting a photos of children on a municipality's social networking media page, could have compromised their security.⁸⁹

More pressingly, perhaps, is the application of the Public Records Law to the existence of metadata.

It has been suggested that Wisconsin law implies that a requester has a statutory right to a record such as a social networking media post in its original format.⁹⁰ No Wisconsin appellate court has considered the issue of whether a specifically-made request for a digital record with all metadata included and intact will require a records custodian to provide it.⁹¹

One set of commentators correlated metadata treatment of e-discovery rules to the Wisconsin Public Records Law:

In the context of e-discovery, federal courts have held that the electronic form of a document contains essential characteristics rendering a paper printout of electronic records inadequate. The new e-discovery rules ensure that litigants produce documents in the same form as “they are kept in the usual course of business.” This stance in the realm of civil litigation compliments Wisconsin statutes and common law, both of which generally oblige a records custodian to provide access to records in their original form.⁹²

The correlation (and the unanswered questions) must further be extended to the Record Retention Law.⁹³ Does the municipality's Facebook page need to be archived by the municipality with metadata associated with the citizen posts incorporated? Stated another way, will a pdf daily snapshot of a Facebook page be sufficient as an archive, or will the entire page need to be preserved in its native format with all metadata intact?⁹⁴

OPEN MEETINGS

It is undoubtedly the case that members of the governing body will want to actively monitor

89 It appears Facebook has established a policy of stripping geotags from new posts. Facebook continues to post other metadata. Other social media may not be as proactive on stripping geotags from their posts.

90 See *The Wisconsin Public Records and Open Meetings Handbook*, fourth edition, edited by Melanie R. Swank, State Bar of Wisconsin, 2015, esp. §10.11.

91 *Id.* at §10.10. Note that in *WIREData, Inc v Village of Sussex*, 2008 WI 69, 310 Wis.2d 397, 751 N.W.2d 736, 36 Media L. Rep. 2414, the Court was able to delay answering this question, finding that the request for an “electronic/digital” copy was satisfied by the data converted into a pdf file and then provided by the custodian.

92 Comment, *Wisconsin's Public-Records Law: Preserving the Presumption of Complete Public Access in the Age of Electronic Records*, Leanne Holcomb and James Isaac, 2008 Wisconsin Law Review 515, 560 (footnote cites omitted). See also, Wis. Stat. §§ 19.35(1)(c), (d), see also, 75 Op. Wis. Att’y Gen. 133, 145 (1986).

93 Wis. Stat. 19.21(4)(b).

94 One conference report observed: “Tools for preservation and collection of social media content are constantly evolving. Because each social media site is unique, the tools to preserve and collect content from one site may not work for others.” *The Sedona Conference® Primer on Social Media (Public Comment Version)*, October 2012, Part Two, section II, page 38 (footnotes omitted). While technical collection and preservation procedures are beyond the scope of this article, the importance of these technical issues cannot be ignored as the consideration for a social media presence is being made.

posts on the municipal Facebook page. This raises the specter that the Open Meetings Law will be violated.

The open meetings law requires that “all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law.”⁹⁵ The open meetings law explicitly provides that all of its provisions must be liberally construed to achieve its purposes ⁹⁶

A “meeting” is defined as: [T]he convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body.⁹⁷ The Wisconsin Supreme Court has held that a village board conducted a “meeting,” in violation of the Open Meetings Law, when a quorum of the board regularly attended the village plan commission meeting to merely listen to the matters unfolding at the plan commission meeting and did not actually discuss the matters among themselves.⁹⁸

The phrase “convening of members” in Wis. Stat. § 19.82(2) is not limited to situations in which members of a body are simultaneously gathered in the same location, but may also include other situations in which members are able to effectively communicate with each other and to exercise the authority vested in the body, even if they are not physically present together ⁹⁹

The Attorney General has considered the open meetings law in the context of the use of electronic communications. While particularly interested in email communication, the reasoning has direct application to social media. The Attorney General observes that:

Written communications transmitted by electronic means also may constitute a “convening of members.” Although no Wisconsin court has applied the open meetings law to these kinds of electronic communications, it is likely that the courts will try to determine whether the communications in question are more like an in-person discussion *e g*, a rapid back-and-forth exchange of viewpoints among multiple members. . . . In addressing these questions, courts are likely to consider such factors as the following: (1) the number of participants involved in the communications; (2) the number of communications regarding the subject; (3) the time frame within which the electronic communications occurred; and (4) the extent of the conversation-like interactions reflected in the communications.¹⁰⁰

Use of new communication technology and applications of the new technology, such as Facebook, makes it dangerously easy to violate the Open Meetings Law.¹⁰¹

95 Wis Stat. § 19 81(2)

96 Wis Stat § 19 81(4), *State ex rel Badke v Greendale Village Bd*, 173 Wis 2d 553, 570, 494 N W 2d 408 (1993)

97 Wis Stat § 19 82(2)

98 *State ex rel Badke v Greendale Village Bd*, 173 Wis 2d 553, 572-74, 494 N W 2d 408 (1993),

99 *Wisconsin Open Meetings Law A Compliance Guide* Department of Justice, Attorney General J B Van Hollen (August 2010), page 7

100 *Id.* at page 8

101 See, Daniel M Olson, *Balancing Technology and the Law Basics for Local Officials*, The Municipality magazine, Vol 110, No 6, June 2015, p 196 The article is geared toward ease of use of the portable hardware associated with the electronic applications

Assuming a governing board of thirteen who have all enrolled as “friends” for the municipal page, it is entirely possible that at any one time seven may be on Facebook reviewing posts on the municipal page. The possibility of a quorum “meeting” on the municipality's site increases for smaller governing boards and for smaller committees of the parent organization.

While a chance gathering does not rise to a violation of the law,¹⁰² given the ease of logging onto Facebook and logging off of Facebook, and of seeing who is posting in real time, such a defensive argument that the members constituting a quorum (or negative quorum in certain instances) of a body continuing to monitor the comments in the presence of each other for any length of time will probably fall flat before a court.

FACEBOOK TERMS OF SERVICE

Facebook has Terms of Service (TOS) to which users must agree. The gateway to the Facebook TOS is found at <https://www.facebook.com/legal/terms>. But that extensive list of conditions is merely a gateway with additional hyperlinks to additional terms under such designations as “community standards”. Users agree to all of these terms when signing up.

While most users have no choice but to accept the TOS as written, the federal government does not.¹⁰³ While a municipality may not have the clout of the federal government, the municipality must nonetheless review the TOS before agreeing to their terms by clicking “I accept”.

Several of the TOS provisions will be examined.

Indemnification

The TOS states:

15.2. If anyone brings a claim against us related to your actions, content or information on Facebook, you will **indemnify and hold us harmless** from and against all damages, losses, and expenses of any kind (including reasonable legal fees and costs) related to such claim. Although we provide rules for user conduct, we do not control or direct users' actions on Facebook and are not responsible for the content or information users transmit or share on Facebook. We are not responsible for any offensive, inappropriate, obscene, unlawful or otherwise objectionable content or information you may encounter on Facebook. We are not responsible for the conduct, whether online or offline, of any user of Facebook.

102 See, Wis Stat § 19 82(2)

103 See, Matthew P Hintz, *An Interview with Elizabeth Day Hochberg, Assistant General Counsel, General Services Administration*, in *Landslide* magazine, published by the American Bar Association (Intellectual Property Section), March/April 2014, page 9 (“[A] federal agency, or a federal employee signing up for the platform for official agency use, cannot merely click 'I accept' This is because there are about two dozen laws that apply to a federal agency's use of social media, and many of them are violated in boilerplate ToS agreements”) See also, <http://www.digitalgov.gov/resources/negotiated-terms-of-service-agreements/> (links to amendments made to standard TOS for many social media providers to accommodate the legal requirements of the federal government, one of the links is to a draft of the Facebook TOS amendments, the actual document of which purports to be confidential) (Accessed July 23, 2015)

(Emphasis added).

This term carries at least three onerous implications. The first, most explicit provisions are the dual agreements for the municipality to indemnify and hold Facebook harmless for claims.

The second is the arguable waiver of the \$50,000 liability cap for torts asserted against municipalities.¹⁰⁴ Assume the above-introduced hypothetical situation in which a person who felt harassed by a Facebook post on the municipality's page commits suicide. The estate of the decedent sues Facebook for \$2,000,000. It will indubitably be argued by Facebook that the municipality will pay for the defense of Facebook and for any judgment entered against Facebook (that is not subject to the municipality's tort-liability cap) with regard to that claim.

The third onerous implication is related to the waiver – effective loss of the notice provision.¹⁰⁵ Assume the hypothetical situation posited in the previous paragraph. Assume further that the estate provides no notice to the municipality, but sues Facebook within the three-year statute of limitation.¹⁰⁶ Although the estate of the decedent may have forfeited a direct action against the municipality, the municipality's wallet is still very exposed through the indemnification obligation.

Choice Of Venue

15.1. You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County, and you agree to submit to the personal jurisdiction of such courts for the purpose of litigating all such claims. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions.

Attorneys are typically concerned with choice of law and choice of venue provisions outside of Wisconsin for at least three reasons: (1) the forum outside of Wisconsin (and in this case, California) presents huge financial and logistical burdens, (2) the law of the other state is unknown to the local attorney (perhaps carefully having been chosen by the large corporation because of specific and unique laws that impair the municipality's position¹⁰⁷), and (3) there is a concern of local parties to a lawsuit having “home field” advantage in motions decided by local judges and verdicts made by local juries.

No Third-Party Beneficiaries

18.1 If you are a resident of or have your principal place of business in the US or Canada, this Statement is an agreement between you and Facebook, Inc.

18.9. This Statement does not confer any third party beneficiary rights.

As with many contracts, the TOS agreement is between the two contracting parties. In this

¹⁰⁴ Wis Stat. §893 80(3)

¹⁰⁵ Wis Stat §893 80(1d) (Subject to some substantial exceptions, failure of the injured party to give notice to the municipality of the circumstances giving rise to the claim within 120 days of the incurrence of the injury, is a bar to the claim)

¹⁰⁶ Wis Stat §893 54

¹⁰⁷ For example, potential loss of the municipality's protections under Wis Stat § 893 80

case, however, where various bilaterally-contracting parties all interact with each other, there are considerations not often found in the typical service contract to which a municipality may become a party.

Assume a post is made of potentially discriminatory, defamatory, or intellectual-property-infringing material on the municipality's page that could subject the municipality to a claim for liability. The municipality and the abusing poster each have signed their own TOS agreement. Each TOS agreement prohibits posts that are discriminatory, defamatory, or intellectual-property-infringing. The municipality, while considering what actions it will take with regard to its own First Amendment exposure and hoping for an easy resolution of its issue through action by Facebook, sends a note to Facebook complaining about the post. Facebook does not have to take action (see terms of 15.2. reproduced above). More importantly, by these provisions to which the municipality agreed, the municipality cannot force action by Facebook against the abusive poster.

Release Use of Your Name and Profile Commercially By Third Parties

9.1. You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you.

This may be intended to allow Facebook-compensated advertisers to advertise on your page. This could provide difficult concerns about sponsorship and endorsement. Should a community be properly concerned if a mayoral candidate buys up all of the advertising time associated with a municipal Facebook site for the two-week block prior to an election?

While this provision may be intended to allow Facebook-compensated advertising on a municipality's page, the actual words portend more ominous construction. The words of the agreement do not merely allow the vendor's advertising on your page, but that your name and/or profile picture with your content or information may be displayed on the vendor's page. Without control of how the message is being delivered, concerns about sponsorship and endorsement are legitimate.

Facebook Has No Obligation to Archive

18.10. We reserve all rights not expressly granted to you.

Nowhere in the TOS is an obligation that Facebook will archive for its users any posts. This provision 18.10. underscores that Facebook has no obligations, other than those they explicitly granted to the user (which are none).

How Does a Municipality Respond to a Takedown Demand From Facebook for Offensive But Protected Speech?

Linked to Facebook's denominated Terms of Service are other terms to which the user agree to abide. Another of these terms is "Community Standards". In Community Standards Facebook states the following: "We may ask Page owners to associate their name and Facebook Profile with a Page

that contains cruel and insensitive content, even if that content does not violate our policies.”¹⁰⁸

While the exact import of that language is subject to debate, it may be intended to mean that Facebook can at its discretion demand the municipal user take cruel and insensitive material down. Can a municipality accede to denying the Constitutional rights of a poster at the demand of another?

ELECTIONEERING AND OTHER ACTS OF DUBIOUS ILLEGALITY

It might be valuable to have a provision in a municipal page use policy a provision prohibiting posts that violate law. Such a provision is not a panacea.

Assume a candidate for local office offers on the municipal Facebook page to provide free rides to the polls to his constituents. Assume a person takes a photo of that person's completed Indiana ballot to show either support or disdain for Governor Walker's presidential aspirations and posts it on the municipality's Facebook page. Assume a photo of the state flag is posted with offensive political markings. Can the municipality through a Facebook-savvy, but otherwise unsophisticated monitor mechanistically take any of these down based on such a policy?

The offer of rides to the polls might be illegal as private use for candidacy of public property, but it is arguable that it is not.¹⁰⁹ The posting of a vote cast in Wisconsin would be illegal¹¹⁰ but is the posting to a “Wisconsin” site of an Indiana ballot illegal in Indiana, much less in Wisconsin? The desecration of the state flag is technically illegal¹¹¹ but a takedown pursuant to a blanket policy will likely be a violation of the First Amendment.¹¹²

INACCURACIES

A separate consideration must be made for inaccurate material posted. Assume that a citizen posts an incorrect date for an election, inaccurately identifies a state official as a local official, mistakenly attributes a comment to a wrong person, or unfairly paraphrases a statement made by an official. While the obvious remedy is a clarifying post, the policy questions to be answered are who determines what is inaccurate, and to what the municipality will post a clarification (as opposed to what the municipality will be leave to other posters to remedy).

REMEDIES – DISCLAIMERS, CORRECTIONS, TAKEDOWNS

The most effective remedy for a “bad” post is removal – if it can be done legally. As discussed above, there are many instances in which a municipality will have to suffer the post.

A less drastic option to removal is redaction. Municipal authorities are already familiar with this type of decision making in the context of Public Records responses. Although the concept is the same – to surgically remove offensive content – the factors involved are broader. Using the Restaurant/Alderman/Citizen scenario above, rather than removal of the entire rant post, surgically removing privacy-invading and defamatory portions of the post without affecting the ineffectiveness portion of the rant may work to create a more defensible position, if not avoiding the lawsuit in the first

108 <https://www.facebook.com/communitystandards> (accessed August 10, 2015)

109 Wis Stat. § 11 33(1)

110 Wis Stat § 12 13(1)(f)

111 Wis Stat § 946 06

112 *Spence v State of Washington*, 418 U S 405 (1974), *Koser v County of Pierce*, 834 F Supp 305 (WD Wis 1993)

instance.

The next way to address the post is through a remedial post. As discussed in the previous section, care has to be taken by the municipality in identifying what type of posts will receive response, who is able to craft the response, and what guidelines should be followed by the responder.

Finally, there is the ubiquitous disclaimer, that the municipality takes no responsibility for the posts of citizens. While such a statement may be worthwhile, its actual efficacy has not been tested.

WHO CAN AUTHORIZE THE CREATION OF A FACEBOOK PAGE?

To create a Facebook page, the municipality must approve the terms of service offered by Facebook. The ability to enter into such contracts flows from the implied authority given to the municipal government.¹¹³ As a general rule, only the governing body or an officer or employee authorized by the governing body may enter into contracts on behalf of the municipality.¹¹⁴

Such rules contemplate legislative action by the governing body to affirmatively approve the creation of the account with the concomitant approval of the terms of service. These rules do not contemplate an administrative determination that on a particular day, a municipal employee should create the municipality's Facebook account, blindly accepting the terms of service. Similarly, the rules do not contemplate individual departments creating Facebook accounts without the approval of the governing body, regardless of whether Facebook is an effective way of communicating with citizens.

CONCLUSION

Social media in general, and Facebook in particular, are inexpensive and effective ways of communicating with citizens. For that reason, Facebook is used by municipal governments, state agencies, and federal agencies.

Nonetheless, the decision by the legislative body of the municipality to create a Facebook page should not be made without consideration of the potential pitfalls. The purpose of this article is not to suggest municipalities eschew this effective means of communication. Rather, this article advocates for full consideration prior to making the determination to create a page. Full consideration should be made with the input of a team composed of: a person knowledgeable in the nuances of the medium under consideration, a person who is knowledgeable in the existing policies of the municipality (*e.g.*, for human resources and brand use), a lawyer knowledgeable in the legal considerations exemplified in this article, an information technology expert to address capture and retention issues, and a decision-maker from administration to determine relative risk and ascribe relative priority to policy creation.

Moreover, it is hoped that once a decision to create a page has been made, further consideration will be made by the municipality with regard to the management of the page. The municipality should have a plan in the form of written policy identifying how the page be managed. The municipality should identify a person who is knowledgeable in the municipality's written policy to manage the page, and to make continuously available to that manager someone of the legal staff to assist in the execution of the policy.

¹¹³ Wis Stat. § 61.34 (1) for villages and Wis Stat § 62.11 (5) for cities

¹¹⁴ See, *Kocinski v Home Ins Co*, 154 Wis 2d 21, 452 N W 2d 360 (1990), see also, Handbook for Wisconsin Municipal Officials, the League of Wisconsin Municipalities, Chapter XI, page 283 (2002)

STATE OF MICHIGAN
COURT OF APPEALS

TODD L. LEVITT and LEVITT LAW FIRM,
P.C.,

UNPUBLISHED
May 19, 2016

Plaintiffs-Appellants,

v

ZACHARY FELTON,

No. 326362
Isabella Circuit Court
LC No. 2014-011644-NZ

Defendant-Appellee.

Before BOONSTRA, P.J., and METER and BECKERING, JJ.

PER CURIAM.

In this dispute arising from a Twitter account, plaintiffs, Todd Levitt and Levitt Law Firm, P.C., appeal as of right the trial court's order granting summary disposition to defendant, Zachary Felton, pursuant to MCR 2.116(C)(10) (no genuine issues of material fact). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Todd Levitt is an attorney and a former adjunct professor at Central Michigan University (CMU). Allegedly, university students are a primary clientele of plaintiff law firm. Levitt was actively involved in marketing his law firm on various social media platforms, including Twitter. His since-deleted Twitter account represented that he was a "badass lawyer." In addition to promoting his law practice on Twitter, Levitt admittedly made several posts which referenced marijuana and alcohol use. For instance, he posted a tweet about serving alcohol in a class he taught at CMU, and in another, stated that "Mr. Jimmy Beam just confirmed a guest appearance in class next week." In other tweets, he reminisced about his days as a student at CMU, stating that he "tore it up" in the 1980s, and warning students not to "jump [while] drunk" in the elevators at a certain dormitory. He tweeted about being a guest bartender at a local bar and about throwing an end-of-semester party. He also referenced marijuana in several tweets; in one tweet he posted an ode to "mommy marijuana," who "always put me at ease." In addition, he tweeted that if marijuana were legal in Mount Pleasant, Michigan, the CMU "dorms would look like they were on fire."

In April 2014, Levitt, who identified himself on Twitter as “Todd Levitt@levittlaw,” noticed an unidentified individual had created an account, “Todd Levitt 2.0 @levittlawyer” that included a photograph of Levitt and a logo used by his law firm. Levitt later discovered, and defendant admitted as much, that defendant, a CMU student at the time, was responsible for the imposter Twitter account. Levitt alleged that defendant attempted to confuse Levitt’s Twitter followers by using his likeness and logo. He also alleged that defendant attacked his credibility as an attorney and as a professor by posting the following tweets to the imposter account:

1. “What’s the difference between the internet and my tweeted legal advice? A none They’re both 100% accurate!”
2. “Buying me a drink at Cabin Karaoke will get you extra [credit], but it’s not like that matters because you are guaranteed an A in syllabus.”
3. “Partying = Defense Clients[.] Defense Clients = Income[.] If I endorse partying, will my income grow? It’s like a Ponzi scheme for lawyers!”
4. “@twebbsays should either meet me at 4/20 in my satellite office or take a hiatus from the medical card” and “#inToddWeToke” and “4/20 = Pot smoking holiday[.] Possession of marijuana = Client[.] Client = Income[.] In the words of Snoop Dogg: smoke weed every day. #inToddWeToke[.]”

After allegedly enduring defendant’s harassment for two weeks, Levitt deleted his Twitter account to “prevent further damage to his reputation.” Levitt contended that during the two-week period, he received dozens of phone calls from clients, potential clients, and parents who were distressed that Levitt had exhibited the behaviors discussed in defendant’s tweets. According to plaintiffs, two potential clients also informed Levitt that they declined to hire him because they believed that defendant’s tweets were an accurate representation of his character. Levitt contended that he could not continue as an adjunct professor and has suffered loss of income. Plaintiffs’ theories of liability against defendant included claims of false light, intentional infliction of emotional distress, libel, tortious interference with business relations, defamation per se, business defamation, and unfair competition. Plaintiffs asked for the immediate termination of the “Todd Levitt 2.0 @levittlawyer” Twitter account in order to prevent future injuries to their reputation and business.

In answering the complaint, defendant admitted that he was responsible for the imposter account and characterized the account as a “parody.” He asserted that on April 15, 2014, he posted this tweet: “Remember Kiddoes, parody accounts are #badass and #lawful.” On April 16, 2014, he posted: “Word of the day for @twebbsays is satire. Three syllables. Once you get a grasp of the concept a lot of things will start making sense.” And on April 22, 2014, he tweeted the following disclaimer: “A gentle reminder to potential seekers of Todd Levitt: This is not him. This is a parody account. You can find the real Todd(ler)@levittlaw.”

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that the posts were constitutionally protected free speech. The trial court granted defendant’s motion for summary disposition and held that.

Defendant's Twitter account, Todd Levitt 2.0, is a parody account that is protected under the First Amendment of the United States Constitution. The [t]weets are meant to ridicule and satirize plaintiff's social media presence in a humorous way. However, whether defendant succeeded in creating a *humorous* parody is irrelevant for purposes of the First Amendment. It is clear that Todd Levitt 2.0 cannot reasonably be interpreted as anything other than a parody account. Therefore, it is protected speech under the First Amendment.

In reaching this holding, the court also reasoned that defendant's disclaimers were sufficient to put a reasonable person on notice that the tweets were not from Levitt

II. ANALYSIS

Plaintiffs argue that the court erred in granting summary disposition to defendant. An appellate court reviews de novo a circuit court's summary disposition ruling. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205; 815 NW2d 412 (2012).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph*, 491 Mich at 206. Summary disposition is proper if there is "no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). The court considering the motion "must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion." *Joseph*, 491 Mich at 206. All reasonable inferences are to be drawn in favor of the nonmovant. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010).

Plaintiffs' various claims are premised on the notion that the statements posted to the imposter Twitter account were defamatory. In resolving these claims, we must keep in mind that

[w]hen addressing defamation claims implicating First Amendment freedoms, appellate courts must make an independent examination of the records to ensure against forbidden intrusions into the field of free expression and to examine the statements and circumstances under which they were made to determine whether the statements are subject to First Amendment protection. [*Northland Wheels Roller Skating Ctr, Inc v Detroit Press, Inc*, 213 Mich App 317, 322; 539 NW2d 774 (1995).]

"A communication is defamatory if it tends to lower an individual's reputation in the community or deters third persons from associating or dealing with that individual." *New Franklin Enterprises v Sabo*, 192 Mich App 219, 221; 480 NW2d 326 (1991). However, "[t]he First Amendment protects statements that cannot be interpreted as stating actual facts about an individual from serving as the basis for a defamation action or similar claim under state law." *Ghanam v Does*, 303 Mich App 522, 545-546; 845 NW2d 128 (2014). "Such statements include the usual rhetorical hyperbole and imaginative expression often found in satires, parodies, and cartoons." *Id.* at 546, citing *Hustler Magazine, Inc v Falwell*, 485 US 46, 53-54; 108 S Ct 876; 99 L Ed 2d 41 (1998). The statements are protected if they, "although factual on their face, and provable as false, could not be interpreted by a reasonable listener or reader as stating actual

facts about the plaintiff” *Ireland v Edwards*, 230 Mich App 607, 617, 584 NW2d 632 (1998) Further, parodies and satire are protected even when they are intended to be highly offensive of the person criticized. *Ghanam*, 303 Mich App at 546. When evaluating allegedly defamatory statements, we consider whether a reasonable reader, viewing the statements in context, would understand the statements to be “rhetorical hyperbole.” *Id* (citation and quotation marks omitted).

When read in context, defendant’s tweets are a parody and cannot reasonably be interpreted as coming from Levitt, an attorney and college professor. The cited tweets ridicule and demean the legal profession, as well as Levitt’s status as an attorney and a college professor. In particular, some of the tweets encourage followers to commit alcohol and drug-related offenses in order to further Levitt’s business. As aptly stated by the trial court, “[i]t would be quite foolish for an attorney to outright state by way of self-promotion that he wants college students to drink and use illegal drugs so that he can increase his income by defending them in court.” Other tweets suggest that Levitt’s students can earn extra credit in his class by buying him a drink. Surely this statement cannot be interpreted as coming from a college professor. As noted by the trial court, when the challenged tweets are read in the context of Levitt’s own tweets, a reasonable person would see defendant’s tweets as attempting to ridicule and satirize Levitt’s tweets about alcohol and marijuana use. See *Ireland*, 230 Mich App at 618-619 (examining allegedly defamatory statements and concluding that they were “rhetorical hyperbole” because “any reasonable person hearing these remarks in context would have clearly understood what was intended.”)

Moreover, the idea that the tweets were a parody is soundly reinforced by several disclaimers posted to the imposter account stating that the account was indeed a parody. At the outset, the account itself was styled as “Todd Levitt 2.0,” which has come to be commonly accepted jargon for describing an upgrade of an original concept. Thus, “Todd Levitt 2.0” signals that the account was identifying itself as a superior or upgraded version of Levitt, which hints at the notion that it is a spoof. Further, defendant’s tweets expressly stated, on multiple occasions, that the account was intended as a parody. For instance, one tweet read that the account was “[a] badass parody of our favorite lawyer” Another gave a “gentle reminder to potential seekers of Todd Levitt. *This is not him This is a parody account* You can find the real Todd(ler) @levittlaw.” (Emphasis added). In light of these statements, a reasonable reader could not have interpreted the account as stating actual facts about Levitt.


Contrary to the suggestions made by plaintiffs on appeal, it does not take any factual determinations or fact-finding in order to conclude that the challenged tweets are not actionable “[A] court may decide as a matter of law whether a statement is actually capable of defamatory meaning” *Ireland*, 230 Mich App at 638. “Where no such meaning is possible, summary disposition is appropriate.” *Id* Because the statements at issue in this case could not reasonably

be interpreted as factual statements by or about Levitt, summary disposition in favor of defendant was appropriate.¹

Affirmed.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Jane M. Beckering

¹ Because all of plaintiffs' claims were premised on the allegedly defamatory statements, we conclude that the trial court properly dismissed all of the claims, notwithstanding the different labels placed on the claims. See *Ireland*, 230 Mich App at 624-625. Moreover, we reject plaintiffs' fleeting request on appeal that they should be given the opportunity to amend the complaint. Plaintiffs fail to specify how they could have amended the complaint, and we find their cursory request to be abandoned. See *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008).

APPROVAL 	REQUEST FOR COUNCIL ACTION	MTG. DATE August 16, 2022
Reports & Recommendations	Franklin 2022 and 2023 Shredding Events	ITEM NO. G.12.

BACKGROUND

On September 21, 2021, Common Council directed Staff to *execute a trial shredding event for City of Franklin residents on the last Saturday in April 2022 at the Franklin Library at a cost not to exceed \$2,000 with advertising for the event to use the City/Library web pages, flyers at City Hall and the Library, and the City/Library newsletters, and further to have staff provide the Common Council with an evaluation of the event in order to possibly schedule a second shredding event for the last week in September 2022 following the same guidelines.*

ANALYSIS

The event was held on a rainy Saturday, April 30, 2022. Sgt. Stephen Hintz and Street Superintendent Kevin Schlueter did the majority of the pre-planning and logistics and were present to ensure the smooth operation. Anticipating the turnout and other logistics, the event was moved from the Library to the City Hall back parking lot.

Stericycle Compliance Solutions- Shred IT Division was very helpful in supplying information for the Library to create a flier and in guidance conducting the event. One truck was ordered from 11:00 am to 3:00 pm (4 hours). The fliers restricted each car to 4-banker boxes. No Franklin-residencies were verified.

Unfortunately, there was no record kept of number of visitors nor amount collected. All witnesses and social media documented that the event was well attended. In fact, the line started well before 10:00 am and soon backed up along W. Loomis Road. The City Hall parking lot was opened at 10:35. Many of the early visitors were reportedly frustrated at the pace of the line. By 11:35 am, Staff was advised that the truck was half full (capacity about 7.5 tons of paper). With the obvious agitation of the public and the fear that the single truck would not last four hours, Stericycle assisted by bringing another truck at no charge and was in operation at 1:00 pm. The second truck greatly aided in the movement of the line. The Police noted that the shred line after the second truck arrived was “self-sufficient.”

It is estimated that 6 hours of police time was needed to facilitate the event with 24 hours (4 employees at 6 hours each) of DPW overtime. To facilitate the orderly movement of the line, the Police’s role was primarily traffic control and DPW staff carried the boxes from the vehicles to Stericycle’s truck. It was a busy day.

It is unknown if the event was well attended because it was a pent-up need as this service has never before been offered to Franklin Residents. It is also unknown if the event will be larger next time because more residents will hear about the event. Staff’s research indicates that when other communities provide shredding events, they usually offer the event 2-4 times per year. It might make sense to run a trial event one more time to see how it is received in the community.

Stericycle charged \$1,375 for one truck and DPW Overtime was estimated to be approximately \$1,060. The Police time was normal shift hours. Again, Stericycle was gracious and did not charge for the second truck.

If Franklin should decide to continue this event in the future, Sgt Hintz and Superintendent Schlueter have the following recommendations:

- Continue the limitation of 4-box/car maximum donation.
- Require that proof of Franklin residency be shown and have it presented prior to entering the City Hall parking lot.
- Order a minimum of two trucks.

OPTIONS

- A. No decision on future shredding events
- B. Instruct Staff to include one annual shredding event each year in the 2023 budget and beyond implemented with the recommended changes
- C. Instruct Staff to include two annual shredding events each year in the 2023 budget and beyond implemented with the recommended changes
- D. Other direction to Staff

FISCAL NOTE

The April 30, 2022 event cost more than the \$2,000 budget. To order two trucks and utilize the same staffing, approximately \$4,000 is needed for each event.

\$2,750 = 2 Trucks Shredding Trucks (\$1,375 x 2)

\$1,060 = DPW Overtime

\$3,810 Total Estimate – Say \$4,000

Note that the above costs do not include the costs for the many Police, Library, DPW, Clerk, and other department employees that worked during normal working hours in addition to their regular duties to organize and publicize the event.

The Solid Waste Fund (19) entered 2022 with a fund balance of \$437,000 but a projected operating deficit because of the Consumer Price Index (CPI) increase. The fund balance was a reasonable, if not conservative fund balance, as it is only between 2-3 months' worth of operating expenses. The projected deficit is over and above the \$5 cost increase included in the 2022 Budget.

It is unknown how much, but another expected increase in CPI will have a noticeable impact on the solid waste rates. This will need to be monitored closely to see how \$4,000 events will impact rates.

RECOMMENDATION

Direction at the will of the Common Council

Franklin Community **SHRED-IT** **EVENT**

Saturday, April 30: 11 am - 3 pm

**Franklin City Hall: Back Parking Lot
9229 West Loomis Road, Franklin WI**

**(Turn right at Legend Drive from eastbound Loomis Road
and follow the signs to enter the City Hall parking lot.)**

**Have some documents you need to shred? Join us
in the City Hall back parking lot for a community
paper shred event! All papers will be shredded on site.
*Limit of 4-banker boxes of material per car.***

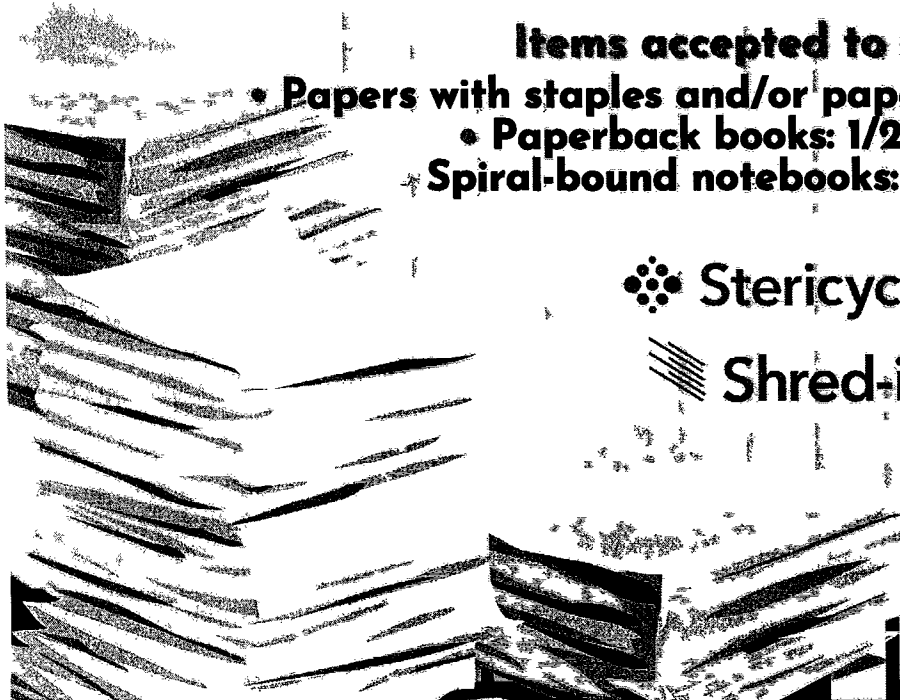
Items accepted to shred include:

- **Papers with staples and/or paperclips (NO BINDER CLIPS)**
- **Paperback books: 1/2-inch thick or less**
- **Spiral-bound notebooks: 1/2-inch thick or less**

 **Stericycle**

 **Shred-it®**

 **Franklin**
W I S C O N S I N



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APPROVAL <i>She</i>	REQUEST FOR COUNCIL ACTION	MTG. DATE August 16, 2022
Reports & Recommendations	Emergency Vehicle Pre-Emption Equipment at W. Forest Home Avenue (CTH OO) and W. St. Martins Road	ITEM NO. G.13.

BACKGROUND

Milwaukee County is doing a reconditioning project on W. Forest Home (CTH OO) in 2023. They have offered to add Emergency Vehicle Pre-emption (EVP) to signals at W. St. Martins Road for the benefit of the City. EVP equipment is already part of the intersections of W. Rawson Avenue (CTH BB) and W. Speedway Drive.

“Pre-emption Equipment” also known as “Emergency Vehicle Pre-emption” (EVP) per the US Department of Transportation- *“EVP systems are designed to give emergency response vehicles a green light on their approach to a signalized intersection while providing a red light to conflicting approaches. The most commonly reported benefits of using EVP include improved response time, improved safety, and cost savings. These benefits have been realized since the early deployments of EVP and have been documented since the 1970s ”*

ANALYSIS

Milwaukee County has offered to add the EVP to their contract if Franklin wishes to fully fund the cost from their contractor. It is estimated that these costs will total approximately \$35,000, depending on the actual bid price. This price includes some wiring and conduit work needed for the existing EVP equipment at W. Rawson Avenue and W. Speedway Drive.

If interested, Milwaukee County will draft an agreement that should be executed by the end of 2022. The construction would occur in 2023 and payment would likely be expected in early 2024.

Wisconsin DOT provides ongoing maintenance to the EVP equipment at no charge to the City. The county would charge maintenance to the City at their costs, when needed.

The Franklin Fire Department desires to have this EVP system at all signals in the City. Note that the City does not own or maintain any traffic signals.

OPTIONS

- A. Ask Milwaukee County to include EVP in their project and provide an agreement for consideration. Or
- B. Direct Milwaukee County to not include EVP in their project. No further action would be needed in this manner.

FISCAL NOTE

The City would include this \$35,000 cost in the Capital Improvement Fund. If the decision is made to not include EVP at W. St. Martins Road, a minimum of \$10,000 should still be budgeted for wiring and conduit work at the other intersections.

RECOMMENDED MOTION

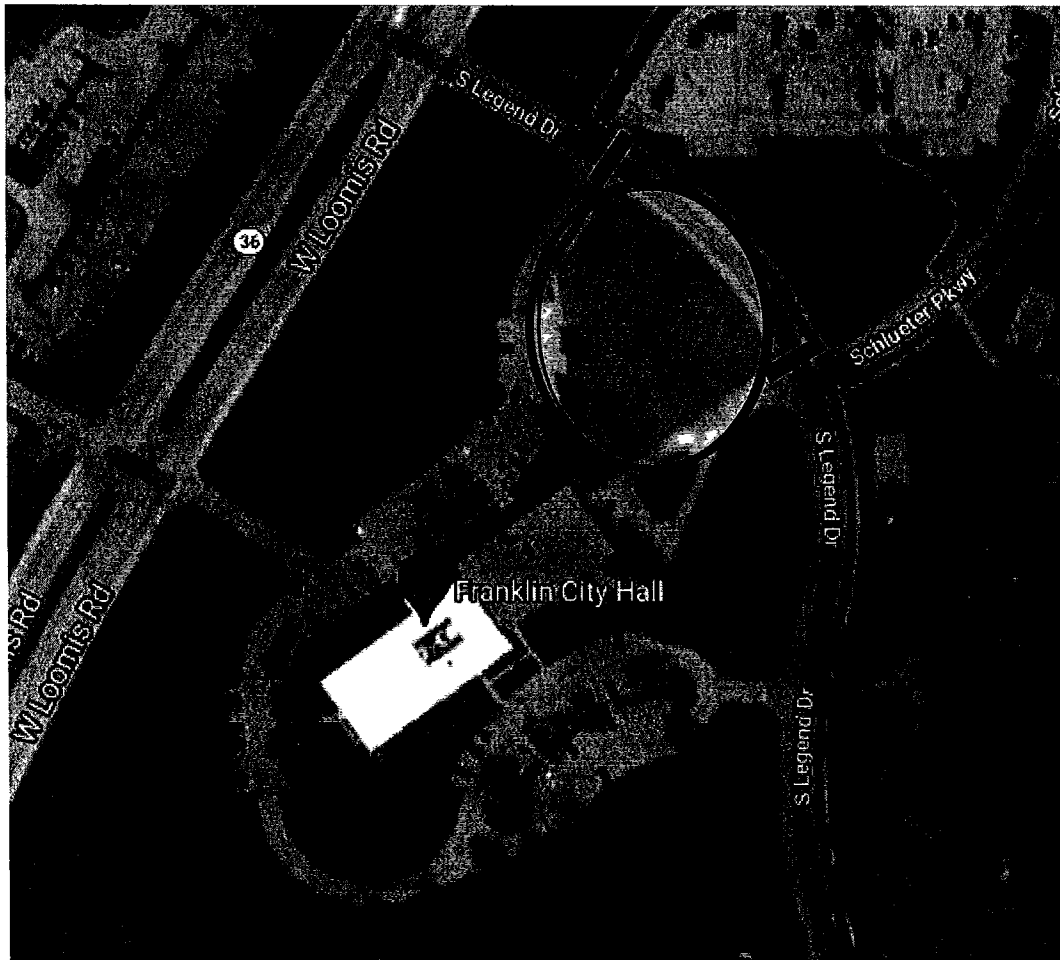
At the will of the Common Council

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APPROVAL <i>JW</i>	REQUEST FOR COUNCIL ACTION	MEETING DATE
Reports and Recommendations	Temporary Street Closure Request in conjunction with the August 26, 2022 Outdoor Movie	ITEM NUMBER G.14.

The City of Franklin Health Department with community partners is hosting the annual Franklin Outdoor Movie Night at City Hall on Friday, August 26th, 2022. Up to 200 families will attend. The event will be staged from the lower level of City Hall. For safety purposes the Police Department and the Department of Public Works have recommended street closures on S. Legend Dr. between the southern Franklin Public Library parking lot entrance and the lower level city parking lot. The Fire Department concurs with this recommendation. The Health Department recommends street closures from 5PM until 10:30PM on Friday, August 26th. The street closure application has been submitted to the City Clerk. Thank you for your consideration.



COUNCIL ACTION REQUESTED

Motion to approve street closures on S. Legend Dr. between the southern Franklin Public Library entrance and the City Hall parking garage entrance on Friday, August 26th, 2022 in conjunction with the City of Franklin sponsored Franklin Outdoor Movie Night.

E. Henry

CITY OF FRANKLIN
APPLICATION FOR TEMPORARY CLOSING OF STREET
OFFICE OF THE CITY CLERK
9229 W. LOOMIS RD.
FRANKLIN WI 53132
414-425-7500

Name Ellen Henry / Franklin Health Dept.
Address 9229 W Loomis Rd
Franklin, WI 53132
Phone 414-425-9101

Name of person or association applicant represents
Franklin Health Dept
Address 9229 W Loomis Rd
Franklin, WI 53132
Phone 414-425-9101 Email ehenry@franklinwi.gov

Nature and purpose of the obstruction or street closing
Outdoor Movie Night

Description of all parts of the road, street or highway is proposed to be obstructed or closed
Small portion of S. Legend Dr between Library + City Hall
Date and time of obstruction or closing 08/26/2022 ; 0500pm - 10:30pm

Estimated number of people proposed to attend 500

Cleanup plan Additional garbage cans and significant group of volunteers to clean/move barriers post-event

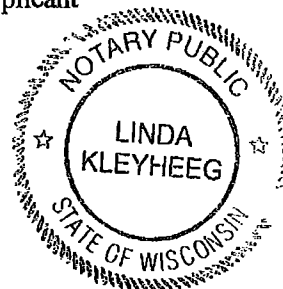
Provisions to allow ingress and egress of people or businesses denied access during the event
Small closure on S. Legend Dr. will allow for ingress / egress of people via Schluster Pkwy to Drexel Ave.

Permission received from additional jurisdiction DPW, Police, Fire
Date 07/29/2022

Subscribed and sworn to before me
29th
this 29th day of July, 2022

Linda Kleyheeg
Notary public, Milwaukee Co., Wisconsin
My Commission 1/24/2025

Ellen Henry
Applicant



<p>APPROVAL</p> <p><i>W/P</i></p>	<p>REQUEST FOR COUNCIL ACTION</p>	<p>MEETING DATE</p> <p>8/16/2022</p>
<p>REPORTS & RECOMMENDATIONS</p>	<p><i>BPC County Land, LLC v. City of Franklin, Milwaukee County Circuit Court Case Nos. 2019CV008963 and 2021CV005581. The Common Council may enter closed session pursuant to Wis. Stat. § 19.85(1)(g), to confer with legal counsel for the Common Council who is rendering advice concerning strategy to be adopted by the body with respect to the subject litigation, and to re-enter open session at the same place thereafter to act on such matters discussed therein as it deems appropriate</i></p>	<p>ITEM NUMBER</p> <p>G.15.</p>

COUNCIL ACTION REQUESTED

A motion to enter closed session pursuant to Wis. Stat. § 19.85(1)(g), to confer with legal counsel for the Common Council who is rendering advice concerning strategy to be adopted by the body with respect to the subject litigation, and to re-enter open session at the same place thereafter to act on such matters discussed therein as it deems appropriate.

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<p>APPROVAL</p> <p><i>JM</i></p>	<p>REQUEST FOR COUNCIL ACTION</p>	<p>MEETING DATE</p> <p>8/16/2022</p>
<p>REPORTS & RECOMMENDATIONS</p>	<p>Tax Incremental District No. 6 Mixed-Use Industrial, Commercial, Retail, Single-Family Residential and Open Space Uses (of an approximate 164-acre site generally located north and south of West Loomis Road, south of West Ryan Road, west of South 112th Street, east of South 124th Street, and north of West Oakwood Road) Project Development Agreement (Bear Development, LLC; Loomis and Ryan, Inc. Developers). The Common Council may enter closed session pursuant to Wis. Stat. § 19.85(l)(e), to deliberate upon a Potential Amendment to Tax Incremental District No. 6 Mixed-Use Industrial, Commercial, Retail, Single-Family Residential and Open Space Uses Project Development Agreement, the negotiation of Agreement terms and the investing of public funds in relation thereto, for competitive and bargaining reasons, and to reenter open session at the same place thereafter to act on such matters discussed therein as it deems appropriate</p>	<p>ITEM NUMBER</p> <p>G.16.</p>
<p style="text-align: center;">COUNCIL ACTION REQUESTED</p> <p>A motion to enter closed session pursuant to Wis. Stat. § 19.85(l)(e), to deliberate upon a Potential Amendment to Tax Incremental District No. 6 Mixed-Use Industrial, Commercial, Retail, Single-Family Residential and Open Space Uses Project Development Agreement, the negotiation of Agreement terms and the investing of public funds in relation thereto, for competitive and bargaining reasons, and to reenter open session at the same place thereafter to act on such matters discussed therein as it deems appropriate.</p>		

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<p>APPROVAL</p> <p><i>SM</i></p>	<p>REQUEST FOR COUNCIL ACTION</p>	<p>MEETING DATE</p> <p>8/16/2022</p>
<p>REPORTS & RECOMMENDATIONS</p>	<p>Potential Acquisition of Property for Public Park Recommendations Purposes in the General Southwest Area of the City of Franklin.</p> <p>The Common Council may enter closed session pursuant to Wis. Stats. §19.85(1)(e), to consider the potential acquisition of properties intended to be used for public park purposes in the general southwest area of the City and to re-enter open session at the same place thereafter to act on such matters discussed therein as it deems appropriate.</p>	<p>ITEM NUMBER</p> <p>G.17.</p>
<p style="text-align: center;">COUNCIL ACTION REQUESTED</p> <p>The Common Council may enter closed session pursuant to Wis. Stats. §19.85(1)(e), to consider the potential acquisition of properties intended to be used for public park purposes in the general southwest area of the City and to re-enter open session at the same place thereafter to act on such matters discussed therein as it deems appropriate.</p>		

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APPROVAL <i>Slw</i>	REQUEST FOR COUNCIL ACTION	MEETING DATE 08/16/2022
LICENSES AND PERMITS	MISCELLANEOUS LICENSES	ITEM NUMBER H.

See attached listing from meeting of August 16, 2022.

COUNCIL ACTION REQUESTED

As recommended by the License Committee.

APPROVAL <i>SKM</i>	REQUEST FOR COUNCIL ACTION	MEETING DATE 8/16/2022
Bills	Vouchers and Payroll Approval	ITEM NUMBER I

Attached are vouchers dated July 29, 2022 and August 2, 2022 through August 11, 2022, Nos 188989 through Nos 189150 in the amount of \$ 2,364,257 70 Also included in this listing are EFT's Nos 5040 through Nos 5054, Library vouchers totaling \$ 363 94, Water Utility vouchers totaling \$ 887,277 50 and Property Tax vouchers totaling \$ 366 22 Voided checks in the amount of (\$566 22) are separately listed and two EFT payments were voided in the amount of (\$27,208 93) but do not print on the disbursement report due to system limitations

Early release disbursements dated July 29, 2022 and August 2, 2022 through August 10, 2022 in the amount of \$ 400,946 38 are provided on a separate listing and are also included in the complete disbursement listing These payments have been released as authorized under Resolutions 2013-6920, 2015-7062 and 2022-7834

Attached is a list of property tax disbursements, Nos 17935 dated August 3, 2022 through August 11, 2022, in the amount of \$ 1,066 75 These payments have been released as authorized under Resolutions 2013-6920, 2015-7062 and 2022-7834

The net payroll dated August 12, 2022 is \$ 429,715 86, previously estimated at \$ 410,000 Payroll deductions dated August 12, 2022 are \$ 232,488 31, previously estimated at \$ 218,000

The estimated payroll for August 26, 2022 is \$ 430,000 with estimated deductions and matching payments of \$ 540,000

Approval to release payment via wire transfer to Bond Trust Services for debt service in the amount of \$ 689,867 50

Approval to release payment to Carlson Racine Roofing for roofing work at the Library and the Police Dept in the amount of \$41,280 00

The Library Board has not approved August 2022 vouchers for payment as of this writing Approval of the Library vouchers will be considered at the August 22, 2022 meeting Upon their approval, request is made to authorize the release of these payments not to exceed \$ 25,000 00

COUNCIL ACTION REQUESTED

Motion approving the following

- City vouchers with an ending date of August 11, 2022 in the amount of \$ 2,364,257 70 and
- Property Tax disbursements with an ending date of August 11, 2022 in the amount of \$ 1,066 75 and
- Payroll dated August 12, 2022 in the amount of \$ 429,715 86 and payments of the various payroll deductions in the amount of \$ 232,488 31, plus City matching payments and
- Estimated payroll dated August 26, 2022 in the amount of \$ 430,000 and payments of the various payroll deductions in the amount of \$ 540,000, plus City matching payments and
- Approval to release payment via wire transfer to Bond Trust Services in the amount of \$ 689,867 50 and
- Approval to release payment to Carlson Racine Roofing in the amount of \$ 41,280 00 and
- Approval to release Library vouchers not to exceed \$25,000 00

ROLL CALL VOTE NEEDED