STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

FRANKLIN COMMUNITY ADVOCATES, INC.,
WOODLAKE VILLAGE HOMEOWNERS ASSOCIATION
CHAD and KARYN ZOLECKI, JEFF and DANELLE KENNEY,
RYAN and RACHEL RINGWELSKI,
STEVE VALLEE and COLLEEN DOMASK
NICK POPLAR, TOM and ALICE BENNING
MIKE and JOANNE ZOLECKI, DEAN REIN
ERIC and MICHELLE BALCEROWSKI
MELINDA HAMDAN

Case No. 20-CV-7031

Honorable Hannah Dugan

Plaintiffs,

v.

CITY OF FRANKLIN,

Defendant,

And

STRAUSS BRANDS, LLC,

Intervening Defendant.

BRIEF IN SUPPORT OF SUMMARY JUDGMENT AND SANCTIONS

Plaintiffs have moved the Court for Summary Judgment against the City of Franklin and Strauss Brands and for an order voiding the Special Use Permit approved unilaterally by the City Council on March 1, 2022. This matter also seeks sanctions due to the waste of time and costs incurred as a result of the City continuing this litigation even when it was aware that the applicant, Strauss Brands, had pulled out of the project. The following discussion is provided in support of this motion.

I. Summary.

As the Court is aware, this matter involves a Special Use Permit ("SUP") that was initially denied to Strauss in October 2020. That was then subsequently be overturned two weeks later during a reconsideration hearing on November 2, 2020 that approved the SUP in favor of

the property owner and Defendant, Strauss Brands. Plaintiffs timely filed this court action and made several claims against the SUP including that it did not satisfy the requirements of the City's ordinances. Claims were also made that there was a lack of due process during the initial proceedings at the City.

Extensive briefing was undertaken by the parties. Based on these filings and the record in the case on November 16, 2021 the Court ordered the case remanded to the City for new hearings on the SUP. The Court's Order was memorialized in a written order initially entered on November 30, 2021 and as amended on January 25, 2022.

To comply with the Court's order the City scheduled a hearing in front of the Plan Commission for February 17, 2022. Due to the confusion that was caused by the Mayor of the City making statements to the media, Plaintiffs grew concerned that the hearings would not be new *de novo* hearings but would be limited in scope. Plaintiffs filed a motion with the Court to clarify the nature of the hearing that were to take place on remand. *See Doc. No. 198.* The Court heard that motion on February 15, 2022 and confirmed the nature of the proceedings below was to be de novo and a new hearing on the SUP and not to be based on the existing administrative record. *See Record at February 15, 2022 hearing.*

The parties went forward after the February 15th Court hearing and continued their preparation for the upcoming Plan Commission hearing. Plaintiff and its counsel spent considerable time before the hearing on February 15th and thereafter preparing to present facts and information to both the Plan Commission and the Common Council at the new hearings on remand. Plaintiffs through their individual members and undersigned counsel were prepared to address the merits of the proposed SUP as well as the due process concerns that had been created during the first round of hearings.

Unfortunately, while Plaintiffs and their counsel were working urgently to prepare for the February 17th Plan Commission hearing, it is apparent that the City and Strauss were not. That is because Strauss failed to appear at the February 17th hearing. Strauss pulled out and gave up its request for the SUP. While it seems highly likely that the City knew ahead of time about Strauss' plan to withdraw its' request, the City did not inform undersigned or the individual plaintiffs or their members. Undersigned emailed counsel for Strauss Brands who failed to confirm that Strauss would be at the February 17th hearing, and in what has now become the norm for months, failed to even respond to the question. *See Affidavit of Counsel at Exhibit 10; Emails with Counsel for Strauss*. Then, at the hearing on February 17th the Planning Manager for the City, Heath Eddy, read aloud a letter from Strauss. The entire letter is quoted below.

> "We appreciate the continued support of the mayor and members of City Council. We are very proud of our expansion proposal; however, we have heard the voices of our fellow Franklin community residents. Strauss is currently evaluating alternative paths to expand our production capacity. As part of these efforts, we are exploring a sale of the land on Loomis Road that was originally purchased to construct the greenfield facility. In doing so, we ask that the City give us time and work with us to find the right occupant for the land."

A copy of that letter is filed in the record as Exhibit S. *See Record at Doc. No. 215.*

Strauss' decision to pull out and withdraw was obviously welcomed by the Plaintiffs. Unfortunately, Plaintiffs had spent a large amount of time and costs including legal fees and expert consulting fees in preparation for the February 17th hearing. Still, as the project was being withdrawn by the property owner, Plaintiffs and its many members were initially quite happy to hear the Planning Manager read the Strauss withdrawal letter.

Unfortunately, the relief of not having to face the building of a Slaughterhouse in their community soon became confusion, and then *extreme frustration*, when the City decided to go forward with the Plan Commission hearing and to continue to review and ultimately recommend

approval of a Special Use Permit for Strauss Brands and the subject property. *See Affidavit of Counsel at Exhibit 11; Minutes of February 17, 2022 Plan Commission meeting*. They did so even though Strauss, as applicant, had withdrawn its request and no one from Strauss was at the hearing or sought to speak and appear on behalf of the applicant.

In taking this action the City in effect became the applicant and the decision-maker at the same time. This was and is a completely untenable position putting the City in an irreconcilable conflict of interest. As the record shows, the City was and is acting as the proponent for the project and also as the regulatory body. These objections were made at the February 17th hearing but were ignored. The City required everyone to spend several hours making public comments against a project that was no longer going to be built. This type of adverse conduct by the City goes to the heart of the Plaintiffs' case.

The City has always been the driver of this project and its required SUP. The public comments and other actions made by City officials strongly suggests that the decision for this development was made behind the scenes long before any public approval process. It appears to have been based on the individual desire of the Mayor and his allies in the private business community without any input from experts or citizens. There was no little or attempt to genuinely honor or follow the rules, and the taxpayers due rights process was completely ignored. Given the current state of affairs it seems clear that the initial SUP meetings in 2020 were simple theatrics meant to go through the motions. The Court recognized some significant concerns in the process and ordered de novo hearings. However, rather than honor that order of the Court the process was further degraded to an out and out farce when the City went forward with public hearings without an applicant.

The City even explained its justification for going forward with the February 17th hearing (and later March 1st Common Council hearing) as being based in part on this Court's Order. That was and is an affront to the Court. The Court ordered that new hearings take place with an actual applicant and that proper due process be provided to all parties. Instead the City insisted that the SUP be reviewed and on its own behalf even though there was no property owner/applicant seeking the permit. This rendered any sort of due process completely illusory and made the failures of due process that had occurred in the first round of hearings appear quaint in comparison to the actions the City took on remand. To claim that it had to take these actions – conduct a hearing on a SUP without an applicant - because the Court made them do it, was a further outrage. The Court was not ordering an improper hearing on a moot issue.

II. Conflict and lack of Due Process.

The circumstances that occurred below created a conflict of interest for the City and exacerbated the lack of due process. How was the City Plan Commission and City Council going to be able to neutrally consider denying the SUP when, due to the absence of an applicant, the City's own staff began advocating for the SUP in the strongest of terms. The City became the *defacto* applicant and regulator at the same time.

As noted, objections to this process were made at the February 17th hearing but were ignored. Plaintiffs by undersigned thereafter filed its objections in writing ahead of the March 1st Common Council meeting, and also appeared at the March 1st hearing to explain that without an applicant the matter was moot. *See Affidavit of Counsel at Exhibit 12, Objection Letter By FCA.* This was again ignored and, as was inevitable, the City Council approved the SUP by a vote of 4-3 at its March 1, 2022 meeting along the exact same voting lines as the reconsideration

meeting almost 16 months earlier. To add to the absurdity, in an article published on April 8, 2022, the Mayor was quoted in the Milwaukee Journal Sentinel:

> "Olson said he'd spoken with Strauss CEO Randy Strauss and there was a '0.0% chance they're going to build.' "

See Affidavit of Counsel at Exhibit 13.

This is a frustrating situation to say the least. Plaintiffs have scrambled to raise funds to pursue this legal challenge. This included retaining an expert firm in the field of evaluating how large industrial developments directly affect local property valuations. *See Affidavit of Counsel at Exhibit 4, Cohn Reznick preliminary report.* The final study is being compiled right now, and the final price tag should fall somewhere between $23k-$25k.

It should be noted that the City should have required Strauss to provide a genuine valuation study. And failing that, the City should have paid for and obtained their own property impact study. They did not, nor did Strauss. Instead, Alder Hanneman prepared her own "economic study." This 8 page thesis does not contain really any underlying supporting data for its conclusions. *See Doc. No. 172*. More importantly it does not actually address the key issue, which is the devaluation of surrounding property values and the impact on the use and enjoyment of those properties, including those owned by the Plaintiffs. However, in order to be able to refute Alder Hanneman's thesis, FCA was required to obtain an accurate, unbiased, legitimate third party study. Plaintiffs urgently retained their expert and raised funds in anticipation of a substantive hearing where it would respond and refute the applicant's likely assertions of no loss in property values. That of course did not occur when Strauss did not participate in the remand hearings.

It is also worth highlighting that Strauss Brands had previously sought to submit Alder Hanneman's thesis as their own "economic study" but they failed even to do that properly.

First, Strauss did not prepare and file its own study as part of the initial review of the SUP, which culminated with the reconsideration 4-3 vote on November 20, 2020. *See Initial Admin. Record as submitted by the City.* [1] What it appears Strauss did later in the case with the City's assistance was to essentially put their own cover page over Alder Hanneman's thesis, and then enter that as part of the proceedings to complete the record after the fact. *See Doc. No. 171.* The Court will recall that it granted Plaintiffs' motion to complete the record and ordered that the Hanneman economic study and the police incident report be included in the record. *See Doc. No. 175, Order to Complete the Record.* When the City finally submitted the documents to the record it included a new document that appears to be an economic study prepared by Strauss. *See Doc No. 171.*

This was improper as the Court's November 29, 2021 Order addressed only submitting the Hanneman study that had been discussed at the initial hearings. Why was the City, obviously with Strauss's knowledge, trying to essentially sneak further material into the record? The Court remanded the case soon thereafter and so this action by the City has remained unexamined until now but it appears to be a simple flouting of the Court's order.

III. Applicable Law.

A. The controversy over the Special Use Permit is moot because the applicant has withdrawn its application.

This case is or more accurately *was* about whether Strauss Brands should be granted a Special Use Permit. The SUP is required before Strauss is entitled to construct its slaughterhouse facility. A "Special Use Permit" is the same as a "Conditional Use Permit" and allows the use of private property that is not permitted as of right as long as

[1] The administrative record submitted by the City is at Doc Nos. 61-101. Undersigned's review does not show the document submitted by the City that is an economic study by Strauss.

the proposed use/development/building meets the requirements of the applicable local ordinance and other site specific conditions. State statutes define SUPs and CUPs and establish certain requirements for local review and granting or denying them.

> *Conditional use permits.*
>
> 1. In this paragraph:
>
> a. "Conditional use" means a use allowed under a conditional use permit, special exception, or other special zoning permission issued by a city, but does not include a variance.
> b. "Substantial evidence" means facts and information, other than merely personal preferences or speculation, directly pertaining to the requirements and conditions an applicant must meet to obtain a conditional use permit and that reasonable persons would accept in support of a conclusion.
>
> 2. a. If an ***applicant*** for a conditional use permit meets or agrees to meet all of the requirements and conditions specified in the city ordinance or those imposed by the city zoning board, the ***city shall grant*** the conditional use permit. Any condition imposed must be related to the purpose of the ordinance and be based on substantial evidence.
>
> b. The requirements and conditions described under subd. 2. a. must be reasonable and, to the extent practicable, measurable and may include conditions such as the permit's duration, transfer, or renewal. The ***applicant must demonstrate*** that the application and all requirements and conditions established by the city relating to the conditional use are or shall be satisfied, both of which must be supported by substantial evidence. The city's decision to approve or deny the permit must be supported by substantial evidence.

See Wis. Stats. § 62.23(7)(de)

As shown above, a SUP is sought by an ***applicant.*** The City ***grants*** the SUP ***if*** requirements are satisfied. As further made clear, the ***applicant must demonstrate*** that the application and all requirements … shall be satisfied.

As described above, the "applicant" here was Strauss Brands. Strauss made public its withdrawal of its application through a letter provided to the City ahead of the February 17th Plan Commission hearing. *See Doc. No. 215 Exhibit S.* There was thus no "applicant" and therefore

no permit to review or deny or grant. The matter is moot and became moot when Strauss decided to withdraw, which as discussed below may well have been several months before the February 17th letter was read by City Staff.

B. The City cannot be an applicant and a regulator at the same time.

Once the matter became moot the City, acting as regulator of the City and steward of its property, should have dismissed the matter and moved on to other matters. Instead, the City through the Plan Commission and later the Common Council, stepped into the shoes of Strauss and acted as the "applicant" and the "regulator" regarding the SUP. This created an irreconcilable conflict for the City. This is manifest on the face of it. The City cannot be a proponent or advocate and the judge/regulator at the same time. There is limited case law addressing this type of situation because it simply does not occur in normal circumstances. However, the Courts have made clear that city officials who vouch for an applicant create a conflict of interest in that they are acting on behalf of that applicant or in their favor, rather than as a neutral decision-maker. That renders the process void for lack of due process due to the risk of bias. *See Keene v. Dane County Board of Supervisors*, 269 Wis.2d 488, (Ct.App.2003). The Court of Appeals in that case explained:

> ¶ 14 To act in accordance with law, a decisionmaker must comport with the "common law concepts of due process and fair play." *Marris v. City of Cedarburg,* 176 Wis.2d 14, 24, 498 N.W.2d 842 (1993). A decisionmaker violates due process and fair play by harboring bias, or an impermissibly high risk of bias, or prejudging the facts or the application of the law …¶ 15 [County Board Member] Hamre became an advocate for P & D when P & D submitted his letter as part of its permit application. He cannot be both an advocate and an impartial decisionmaker on this issue. In the letter, Hamre proclaimed P & D "has always stood out above the rest in their efforts and success in being a good corporate citizen and caretaker of the land." Hamre's "close and personal view" promotes P & D's good track record and recommends them as a good business to operate a gravel pit in the community. This advocacy surpasses merely forming an opinion about a subject and overcomes the presumption of integrity and honesty. We conclude the letter evidences an impermissibly high risk of bias.

Keene, 269 Wis.2d at 498.

What happened in this case, as the record already reflects and the greater record will show, is far beyond a single Board member vouching for an applicant as is *Keene*. Here, the City and its staff argued against Plaintiffs' objections as if they were advocating for the project instead of regulating it. They could not avoid stepping into the shoes of the applicant because there was no applicant at the hearing – Strauss pulled out.

C. The City has acted contrary to the rules of civil procedure and sanctions are warranted.

It would be one thing if the City was genuinely surprised by Strauss' withdrawal revealed by its letter on February 17, 2022. However, it has become apparent that the City and certainly Strauss knew that Strauss was not going forward for months. During the litigation, FCA's Executive Director Dave Sorensen was included in communications with Insight Equity, the private equity firm that owns Strauss. In October of 2021, Mr. Sorensen and Robert Grillo, founder and President of Slaughter Free Cities, both attempted to contact Victor Vescovo, founder of Insight Equity. Mr. Grillo eventually got through and Mr. Vescovo informed him that all final decision making would come from the current President of Insight Equity Ted Beneski. Upon subsequent emails with Mr. Beneski, on November 1, 2021 he confirmed the following:

> "Our strategy has changed. We're not planning to build a slaughterhouse there, or anywhere else for that matter."

See Affidavit of Counsel at Exhibit 14.

Based on this and other information, FCA wanted to determine what the true facts were and undersigned counsel emailed to counsel for Strauss. Strauss rebuffed these questions. *See Affidavit of Counsel at Exhibit 15*. Based on this approach by Strauss at the time, there was no practical way to pursue the issue and undersigned and FCA were thus compelled to continue the

litigation. The next step in the case was the November 16th hearing. At that hearing the Court remanded the case. Substantial time was required by undersigned in preparing for the November 16th hearing and the several filings and proceedings related thereto.

Then after the November 16th remand hearing, extensive time was required to address the nature of the remand orders, the completion of the record, the motion for reconsideration and motion for leave to appeal. Also a motion to clarify the scope of the order was required based on the Mayor's media statements. FCA also had to prepare for the substantive hearings. As noted above this included attorney time but also retaining an expert on devaluation caused by the proposed slaughterhouse.

None of this expense and time would have been necessary had Strauss and the City revealed and confirmed what the equity ownership indicated in its November 1, 2021 email, which was that the project was not going forward. Plaintiffs and the Court have been left to scramble and spend significant time and money on a moot project.

Plaintiffs believe the conduct of the City and Strauss warrants an order reimbursing Plaintiffs for their costs and expenses incurred in this matter.

As noted in the rules of Civil Procedure, Wis. Stats, 801.01(2) provides as follows:

> "Chapters 801 to 847 shall be construed, administered and employed by the Court and the parties to secure the just, speedy and inexpensive determination of every action and proceeding.

See Wis. Stats. § 801.01(2)

In addition, Wis. Stats. § 802.05(2) prohibits filing of papers or advocating without a good faith basis. The Court is empowered to address these actions:

> **(3) Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that sub. (2) has been violated, the court may impose an appropriate sanction upon the attorneys, law firms, or parties that have violated sub. (2) or are responsible for the violation …

See Wis. Stats. § 802.05(3).

The legislature has also adopted Wis. Stats. §895.045 which provides as follows:

> (1) A party or a party's attorney may be liable for costs and fees under this section for commencing, using, or continuing an action, special proceeding, counterclaim, defense, cross complaint, or appeal to which any of the following applies:
>
> (a) The action, special proceeding, counterclaim, defense, cross complaint, or appeal was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense, cross complaint, or appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

See Wis. Stats. § 895.045.

And Wis. Stats. §802.10 allows the Court to govern its proceedings including imposing a sanction when appropriate for egregious actions by a party or counsel that are not a proper use of the Courts or the process. *See e.g. Parker v. Wisconsin Compensation Fund*, 317 Wis.2d 460 (Ct.App.2009).

D. Plaintiffs reserve all right to pursue merits.

Given that Strauss has withdrawn the project and the need for the SUP, Plaintiffs do not believe that this matter can be litigated on the supposed merits of the proposed slaughterhouse and whether it satisfies the substantive criteria in the ordinances. However, should the Court allow for that issue to be decided, Plaintiffs request that they be allowed to submit further briefing regarding the merits of those claims.

IV. Conclusion.

For the reasons above Plaintiffs request that the Court enter an order finding and determining that the SUP granted to the subject property and Strauss is void due to the lack of an applicant for the same and otherwise for a lack of due process.

Further, award as a sanction actual costs and fees to Plaintiff starting on the date when Strauss decided to no longer pursue the project and the City was aware of that plan. That is at the latest November 1, 2021. In the alternative, Plaintiffs seek discovery on this issue.

Dated this 18th day of April, 2022

Electronically Signed by Joseph R. Cincotta

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