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

Plaintiffs,

v.

CITY OF FRANKLIN,

Defendant,

And

STRAUSS BRANDS, LLC,

Intervening Defendant.

Case No. 20-CV-7031

Honorable Hannah Dugan

BRIEF IN SUPPORT OF PLAINTIFFS' CLAIM FOR REVERSAL OF GRANT OF SPECIAL USE PERMIT

Plaintiffs Franklin Community Advocates and the remaining individual plaintiffs as named above ("FCA") provide the following brief in support of their claims against the City and seeking to reverse the City's approval and granting of a conditional use permit allowing for construction of a meat processing/slaughterhouse in the Franklin/Loomis Business Park.

I. Summary of the case.

This matter involves the City of Franklin violating its own rules and state statute in order to facilitate the development of a new 152,035 S.F. slaughterhouse on otherwise unspoiled agricultural lands, and wetlands, in the far southwestern corner of the City of Franklin. The City, mostly through the impetus and actions of the Mayor along with Defendant Strauss Brands has

been quietly laying the groundwork for the development and construction of a new slaughterhouse in Franklin, for the past three (3) years. As the existing record reveals, most of this activity was carried on behind the scenes, and out of the public eye. The public aspects of this matter, which took place in the fall of 2020, were part of a much larger scheme to facilitate Strauss' development of their giant new slaughterhouse. However, the public was not privy to the behind-the-scenes- machinations of the Mayor and others. In addition, signaling the fix was basically in, the Mayor's public statements showed not only strong support for Strauss, but a willingness to manipulate facts and data and make unsupported claims on Strauss' behalf. Furthermore, Mayor Olson, denied and disparaged the many requests for factual studies, third party data, and a public referendum, that would show anything more than just personal opinion, to support an unwanted industrial development, in the most unlikely of areas.

Despite this, the public and the many plaintiffs involved in this matter, who overwhelmingly objected to the slaughterhouse proposal, believed that they had a chance to make their voices heard, by testifying at the public hearings, regarding the failure of the project to satisfy City zoning and other ordinances. Amazingly, it worked – at least initially. The project required approval of a Special Use Permit ("SUP"). The Common Council voted 4-2 ***against*** approval of the SUP at its hearing on October 20, 2020. *See Cert. Record at pp. 990-992; Minutes of October 20, 2020 Common Council Meeting.* Citizens and many plaintiffs were happy, and indeed relieved, that the basic idea of seeking redress of grievance for governmental overreach, with regards to putting the profits of a few over the needs of the many, apparently still worked. However, the City, and in particular the Mayor, had other ideas.

It is apparent that for several days after the October 20 hearing, Alder Shari Hanneman was in fact satisfied with her "No" vote on the Strauss SUP. Hanneman had voted against the

project at the October 20th meeting and explained in a direct text, with a concerned Franklin citizen, the following day that she had made "the right vote" in voting against the project. *See Affidavit of D. Sorensen at Exhibit U-1*

Even by the 2nd day after her vote, Alder Hanneman seemed confident in her choice, as she stated to the Mayor via an email, "In review of the plan commission's recommendation and site approval, I think the ball was dropped….One commissioner admitted to 'not having time' to review the documents, another with several questions was dismissed as hyperbole- without any review or answers to his questions...and the City Engineer, by virtue of his job is biased to vote in support of his boss." *See Aff. of Sorensen at Exhibit U-2*

However, internal communications, obtained through open records, show that the powers that be were still intending on getting the project approved, as demonstrated by the comments from Callie Berg, Franklin's Director of Economic Development. Only three days after the "NO" vote on the SUP, she states, "I don't think it's dead but I can't talk about it. Sit tight for just a little bit…"to Tracy Luber at the Wisconsin Economic Development Corporation. *See Aff. of D. Sorensen at Exhibit V*

Unsurprisingly, a special meeting was scheduled 10 days later, and took place on Monday November 2, 2020, where the top item on the agenda was the reconsideration of the Strauss SUP. It is impossible for this item to have been included in the agenda without planning and concerted action between Alder Hanneman and the Mayor. Public comment took place at the November 2, 2020 meeting, even though many objecting citizens were precluded from exercising their free speech rights, because the City insisted that anyone who wanted to speak had to appear in person. This was during the height of the pandemic.

After the public comment period, Alder Hanneman made a motion to reconsider the denial of the SUP. The SUP had been voted down 4-2 at the October 20, 2020 meeting. Alder Hanneman voted against the SUP at that meeting, which under the rules, allowed her to make a motion for reconsideration. Her motion, orchestrated by the Mayor, was made, the day before the presidential election, and in the midst of a pandemic. The vote was then taken again, and this time Alder Hanneman switched her vote to "YES". This resulted in a 3-3 tie, which empowered the Mayor to cast the deciding "Yes" vote. The SUP was approved, and this matter was timely commenced soon thereafter.

II. Applicable law.

A. The Certiorari Standard does not immunize bias decision-making.

Plaintiffs' claims are discussed below in more detail but what is not in dispute is that either the slaughterhouse is totally prohibited on the site or it required the Applicant, Strauss Brands, to apply for and obtain a Special Use Permit. Strauss made that application and as described herein the SUP was approved on reconsideration on November 2, 2020. Plaintiffs are challenging that November 2, 2020 approval.

Plaintiffs are fully authorized and have standing to seek review of that determination. *See Wis. Stats. § 62.23(7)(f)(1-2) and Franklin Unified Development Ordinance § 15-2.0213 and § 15-9.0501.* They have done so through the filing of their complaint and amended complaint. The typical review by a Circuit Court of the grant or denial of a SUP is under the 4 prong certiorari standard. That standard is ***not*** a rubber stamp but requires the Court to evaluate the facts of record and determine the following regarding the decision below:

> (1) whether the Board kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in

question.

Ottman v. Town of Primrose, 332 Wis.2d 3, 28 (2011)

The factual record in this type of review is primarily established at the proceedings within the administrative agency or municipal level. However, in cases where the issue of bias is raised, the caselaw makes clear that the Circuit Court has the authority to consider the entire record on the issue of bias or an impermissibly high risk of bias. The Supreme Court in *Marris v City of Cedarburg* established the need for due process and the standard for avoiding bias in land use decision-making. In *Marris*, the Court found that describing a citizens legal positon as a loophole in need of closing and also suggesting that the Board "get her" because she was acting like a then infamous celebrity developer Leona Helmsley showed an impermissibly high risk of bias. *Marris v. City of Cedarburg*, 176 Wis.2d 14, 29-30 (1993).

In a more recent Court of Appeals decision, the Court discussed the Supreme Court's decision in *Marris* and another key decision, *Thorp v. Town of Lebanon*. The Court of Appeals explained the concerns raised by bias in individualized land use decisions:

> Neither *Marris* nor *Thorp* squarely addresses the type of due process violation claimed in this case in which the alleged deprivation is not evidenced in the record before the Committee. Yet, both cases recognize the fundamental public policy favoring fair and impartial tribunals at the local level. *Marris* stands for the proposition that the lack of an impartial tribunal invokes procedural due process concerns:
>
> ....
>
> [Z]oning decisions implicate important private and public interests; they significantly affect individual property ownership rights as well as community interests in the use and enjoyment of land. Furthermore, zoning decisions are especially vulnerable to problems of bias and conflicts of interest because of the localized nature of the decisions, the fact that members of zoning boards are drawn from the immediate geographical area, and the adjudicative, legislative and political nature of the zoning process. Since biases may distort judgment, impartial decision-makers are needed to ensure both sound fact-finding and rational

> decision-making as well as to ensure public confidence in the decision-making process. … *Marris,* 176 Wis.2d at 25–26, 498 N.W.2d 842 (footnotes omitted). *Thorp* directs that the applicable remedy for deprivation of procedural due process is certiorari review of the decision-making body. *Thorp,* 235 Wis.2d 610, 612 N.W.2d 59, 2000 WI 60 at ¶¶ 54–55 ….
>
> Thus, although we reject the neighbors' overbroad interpretation of these cases, we agree with the general proposition that they assert, which is that the public policy of promoting confidence in impartial tribunals may justify expansion of the certiorari record where evidence outside of that record demonstrates procedural unfairness. However, before a circuit court may authorize expansion, the party alleging bias must make a prima facie showing of wrongdoing. In *Marris,* for example, the letter documenting the chairperson's prejudicial remarks would, in our view, constitute a prima facie showing of bias.

Sills v. Walworth County Land Management Committee, 254 Wis.2d 558, 564-65 (Ct.App.2002).

Another decision from the Court of Appeals confirms that Plaintiffs who object to adverse land use determinations that could negatively impact them are entitled to due process to have the review and approval of those determinations be free from bias in favor of the controversial project. In *Keene v. Dane County Board of Supervisors*, 269 Wis.2d 488 (Ct.App 2003), a sitting County Supervisor signed a letter vouching for the character of an applicant seeking a conditional use permit to develop a gravel pit. The Supervisor also made statements to the media regarding his vote in favor of the gravel pit:

> There are some operators I wouldn't support, but I've worked with Payne & Dolan before .... I'm sorry for the people who will live close to it, but I can't change my mind on voting for the pit.

Keene v. Dane County Board of Supervisors, 269 Wis.2d at 492.

The Court of Appeals found that the expression by the Supervisor in a letter showed an impermissibly high risk of bias. In doing so the Court of Appeals confirmed the due process requirements for conditional use permits:

> 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. *Id.* at 25, 498 N.W.2d 842 (citation omitted). The Wisconsin Supreme Court applied this rule in *Marris,* where a board member made several prejudicial statements about a permit applicant, including that he wanted "to get [the applicant] on the Leona Helmsley rule." *Id.* at 28–30, 498 N.W.2d 842. Those remarks overcame the presumption of honesty and integrity that would ordinarily lie. *Id.* at 30, 498 N.W.2d 842. Accordingly, the court vacated the board's decision because the bias violated due process.
>
> [Supervisor] 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, at 499.

As described in the Amended Complaint and exhibits and discussed below, the facts already known in this matter, including those learned through open records requests but that have been kept from the Court, more than satisfy the standard to show that the approval of the SUP was predetermined and infected with a bias in favor of approval despite massive public objections and material problems with the proposal and the site.

III. Plaintiff's Claims.

A. Claim 1 - Failure of Due Process due to impermissibly high risk of bias.

Decisions on individual permit applications are not legislative determinations. They are instead individualized decisions that are adjudicative in nature. Review and approval of such permits must proceed in accordance with due process. In particular so as not to infringe on the due process rights of applicants for local permits and also affected private property owners. *See Marris v. City of Cedarburg*, 176 Wis.2d 14 (1993).

The conduct of City officials including the Mayor strongly show a strong pre-determined bias by the Mayor and others in favor of the Strauss project and the SUP/CUP. This public and predetermined position in favor of the SUP/CUP created an impermissibly high risk of bias – indeed an express bias - under the doctrine established in *Marris v. City of Cedarburg*, 176 Wis.2d 14 (1993). Because of that, approval of the Strauss SUP at the November 2, 2020 meeting was not undertaken in accordance with the statutory and constitutional requirements of the due process clauses of the state and federal constitutions.

The bias of the Mayor manifested itself in multiple ways over a lengthy period leading up to the November 2nd tie-breaking vote:

1. Over a year ago the Mayor stated to the Milwaukee Business Journal in September 2019 that, "I know we have a deal. We have a signed agreement with Strauss." *See Document Nos. 53 and 54, Exhibits R and S.*

2. More recently the Mayor stated his belief that the applicant was a "good corporate citizen." However, the Mayor knew when he made those statements that Strauss' existing operation in Franklin had recently settled an OSHA enforcement action for $260,000, had been issued one recent citation by MMSD and had faced employee lawsuits.

3. At the October 20th meeting the Mayor explained that he had researched police incidents at the existing Strauss facility and stated that there had only been 8 incidents. However, a review of the actual public records indicates in excess of 100 incidents over the past 6 years. *See Doc No. 16, Record at Exhibit D.*

4. The Mayor also knew, or should have known, that in 2015 Strauss failed to follow the City's required plan regarding expansion of their parking lot at their existing facility.

According to the City, Strauss "impacted conservation easement areas on the property including wetland setbacks."

5. Strauss' current facility is the largest water user in the City of Franklin. At the presentation on October 20th representatives of Strauss presented a slide show that showed their "Current Levels (Avg)" for several contaminants were well above the MMSD limits pertaining to Biological Oxygen Demand (BOD) and Total Suspended Solids (TSS) and Fats, Oils, Grease (FOG/HEM). *See Cert. Record at pp. 1390-1393.*

6. There continues to be inconsistencies between Strauss' words and actions. On Strauss' website, they state, "Our commitment to the welfare of our animals extends throughout the processing phase. Working with renowned animal-welfare advocate Dr. Temple Grandin and Dr. Kurt Vogel, University of Wisconsin-River Falls, we have implemented even higher standards of care in our facility. These improvements minimize stress, increase comfort and improve the safe handling of our calves. Together, we are making a difference."

7. However, per the USDA, on November 23, 2020, the Federal Food Safety and Inspection Service issued Strauss's existing facility a "Notice of Suspension." According to the FSIS, the NOS was issued as a result of violations of 9 CFR § 500.3 including, "handling or slaughtering animals inhumanely such as occurred at your establishment on November 23, 2020." This included insufficiently stunning a lamb and then cutting its throat before it was unconscious. The inspector noted that the animal was deemed conscious and also that the circumstances indicated an egregious violation of applicable regulations. *See Doc No. 17, Exhibit E.*

8. Despite this history, the Mayor has continued to describe Strauss in a highly favorable light and further that approving the project, which will be 4 times the size of the

current facility and be located on land above two water sheds, adjacent to wetlands, and wooded areas was "just common sense" and a "done deal." *Affidavit of D. Sorensen at ¶ 19.*

9. The Mayor went beyond making public comments favorable to Strauss and in fact consistently acted more like a lobbyist for Strauss in public discussions according to multiple Franklin residents.

10. In the lead up to the initial Common Council meeting of October 20, 2020, the Mayor made statements or agreed with statements that disparaged citizens who had expressed their objection to the Strauss facility. *See Doc. No. 19, Exhibit G.*

11. In an email response to an open records request seeking information about the project including the Mayor's own communications about the project the Mayor stated:

> As is standard practice, legally required documents are located on the city servers. As for personal communications, Mr. Swendrowski may go Fisch.

See Doc. No. 18, Record at Exhibit F

12. The Mayor's use of the term "Fisch" was not a mistake but suggested a reference to Kevin Fischer, who had posted several very hostile comments against objectors. *Id.*

13. These statements occurred in advance of or during the meetings of October 20, 2020 and the later meeting on November 2, 2020.

14. Mr. Rivera was a lead spokesperson for objectors and is a member of FCA. He was also the target of the vitriolic statements from others known to be aligned with the Mayor and posted on a publicly accessible Franklin Community Forum internet message board. These include suggesting that Mr. Rivera or other objectors be physically harmed stating, "I would love to take some COVID aggression on someone you got my bail money." *See Doc. No. 19, Record at Exhibit G at p. 1.* The Mayor is shown sharing this post. *Id.*

15. In another post, the Mayor discusses with another citizen regarding Mr. Rivera and problems with Mr. Rivera potentially organizing objection to the Strauss project "with Wilhelm's help." Wilhelm is alderwomen Kristen Wilhelm. *See Doc. No. 19, Exhibit G*

16. Another posting includes the Mayor discussing a September 2020 protest that took place outside the Mayor's home. The discussion includes the Mayor explaining that if people want to protest at Alderwoman Wilhelm's home that it would be "fine by him." And that "When the group wants to picket her I'll ask FPD to stand down." *See Doc. No. 19, Exhibit G at p. 2-3.*

17. In another exchange with one of the individual plaintiffs, Mr. Benning, the Mayor criticizes Mr. Benning's wife referring to their comments and objections about the proposed project as a "load of crap." *See Doc. No. 19, Exhibit G at p. 6.*

18. Subsequent to the filing of the Amended Complaint in this matter, FCA has obtained documents pursuant to an open records request and otherwise. These documents reveal even more examples of the Mayor's mission to force the approval of the SUP for the Slaughterhouse. These include as follows:

a. Multiple emails from the City Assistant Engineer around Bear's continued failure to follow the minimum requirements to make the new Strauss property compliant with zoning ordinances, and MMSD and DNR requirements.

See Affidavit of D. Sorensen at Exhibits W1 and W-2

b. Multiple emails from Strauss, and an email from the Franklin Fire Chief, questioning the viability of this location for the development of a large slaughter-house.

See Affidavit of D. Sorensen at Exhibits X-1 to X-3

c. Email from the Town of Norway officials/commissions, whose watershed is below the proposed Strauss slaughterhouse, expressing grave concerns over how their water quality and overall quality of life may be impacted by the location of this slaughterhouse.

See Affidavit of D. Sorensen at Exhibits Y.

d. Email from assistant city engineer saying Strauss is known to DNR for multiple violations, therefore neither organization will "be cutting them any breaks" at their new facility.

See Affidavit of D. Sorensen at Exhibit Z.

e. Email from Callie Berg, where Mayor Olson is copied, saying she spoke with Strauss to address a neighbor's noise complaint regarding idling trucks at their facility. This directly contradicts what Mayor Olson has claimed, when stating on multiple occasions that Strauss has never had a single complaint made against them.

See Affidavit of D. Sorensen at Exhibit AA

19. In one email, the Mayor contacts SR Mills directly (the President of Bear Development which owns the overall business park), who sold the land to Strauss for $2.1M. The Mayor suggests, they get together and plan out a "strategy for the Plan Commission and Common Council meetings coming up for the special use and site plans…" The Mayor then asks, "SR, could you coordinate please?"

See Affidavit of D. Sorensen at Exhibit BB.

It is obvious that there was contact between the Mayor and Alder Hanneman after her vote against the project. The record was apparently sanitized of those emails between the Mayor and Alder Hanneman occurring between October 20 and November 2nd

In addition, while FCA has been unable to obtain full response on its open records requests, a former employee and official of the City has provided facts regarding the City and the Mayor's standard practice on predetermining the outcome on projects such as that of Strauss. *See Affidavit of Sarah Herr filed herewith.* [1] The Mayor's directives to City Engineering staff

[1] The facts provided by Ms. Herr are obviously material to the claims in the matter including the claim that the approval of the Strauss SUP had been predetermined in particular by the Mayor, who ultimately cast the deciding

regarding Plan Commission meetings, was that they were "required to attend," and "instructed how to vote," with nor regard to their "professional opinion, or lack of knowledge on a particular item." *Affidavit of S. Herr at ¶ 3-5.* This occurred regarding the Strauss project and in particular the Special Use Permit (SUP) that Strauss needed in order to build its facility. *Affidavit of S. Herr at ¶ 6.* "When the Agenda was cut and dry with no controversial items, the Engineering seat on the PC was permitted to be vacant so long as a quorum could be reached. When controversial items were on the Agenda and the Engineering vote was possibly required to pass an item, either the City Engineer or I was required to attend. This is what occurred prior to the Strauss SUP. The week prior to the PC meeting the City Engineer requested me to cover the meeting, as he had approved vacation for that time. I also had approved vacation during this same period, so I told him I could not. Mayor Olson then revoked my boss' vacation, to make sure someone was present to steer the desired outcome." *Affidavit of S. Herr at ¶ 6.*

"The Mayor and City Engineer made it clear to all staff that the Strauss project needed to be approved. This was despite numerous issues with the proposed site, some of which remained outstanding at the time when my employment with the City ended." *Affidavit of S. Herr at ¶ 8.*

Given the facts in the record, it is clear that the entire process was biased and there is no doubt that the Mayor had predetermined his vote. He vouched for Strauss on multiple occasions and acted essentially as a lobbyist in favor of the project. And he took steps behind the scenes to ensure a favorable outcome for the project with both the Plan Commission and the City Council.

As discussed above, the case of *Keene v. Dane County Board of Supervisors* does not allow an official who is to vote on a Special Use Permit to "vouch" for and express support for

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vote. These facts should be in the record and FCA by undersigned requests that they be included and considered or that the Court allow proper discovery on the issues raised by the affidavit.

an applicants in advance of deliberation and voting on the issue. Here, the Mayor's actions and conduct in this case overwhelming demonstrates an impermissibly high risk of bias and indeed an actual practice and intent to vote to approve the SUP notwithstanding any problems with the project even if the City's own engineering staff believed there were concerns. This bias voids the November 2nd vote by the Mayor. And in turn means that the initial 4-2 denial of the SUP becomes the official position of the City.

B. Claim 2 - Lack of substantial evidence.

The City's Ordinances as set forth at Ord. § 15-3.0701 prohibit the decision-making body of the City to approve a Special Use Permit unless the proposed use satisfies the following requirements:

> No special use permit shall be recommended or granted pursuant to this Ordinance unless the applicant shall establish the following:
>
> 2… The proposed use and development will not have a substantial or undue adverse or detrimental effect upon or endanger adjacent property, the character of the area, or the public health, safety, morals, comfort, and general welfare and not substantially diminish and impair property values within the community or neighborhood.

City ordinances and Wis. Stats. § 62.23(7)(de) require that the applicant for a special use permit/conditional use permit demonstrate through substantial evidence that it satisfies all applicable requirements prior to being granted a special use permit/conditional use permit.

The information and facts provided by Strauss asserting that it satisfied the requirements within Ord. § 15-3.0701(2) were inaccurate in part and/or incomplete. In particular the assertions that the proposed facility would not have a substantial and undue adverse and detrimental effect, and cause a substantial diminution of the values of surrounding private properties were inaccurate and incomplete.

As shown on the record, Strauss' application contained very limited factual support. Strauss failed to supply the following:

- A study on the potential effect to air quality. Although they touted an untested ozone system that they intend to employ to mitigate smells, they failed to state what the actual reduction would be, and what the potential for noxious odor could be, since virtually the entire city of Franklin is downwind from their new site. *See Affidavit of D. Sorensen at Exhibits CC*
- A study on noise pollution. Strauss has stated they intend to bring 250-500 head of cattle in each day between the hours of Midnight and 6:00am, to an area of town which only has limited residential development. How this could not have an effect on the neighboring homes is unimaginable, yet no one in Franklin government has even questioned this as to its appropriateness. *See Affidavit of D. Sorensen at Exhibits DD*
- A study regarding potential damage to the two watersheds located beneath the Strauss property. The property straddles both the Great Lakes Watershed, as well as the Mississippi River Basin Watershed. The water table is so high at this point, that this land would not allow for homes with basements to be built. But the waste from 500 head of cattle slaughtered daily, will have no effect on this sensitive Eco area, even though Strauss is known to both the MMSD and DNR for past violations. *See Affidavit of D. Sorensen at Exhibit EE*
- A study attempting to quantify the effect that a giant slaughterhouse would have on the value of residential property within 2 miles of this large industrial site. Since nowhere else in this country does a co-located upscale subdivision/slaughterhouse development exist, residents were rightly concerned over what effect this development would have on

their property values. Numerous studies do exist, which show that Slaughterhouses do lower property values, but these types of developments are only in either very rural areas, or large (often economically depressed) industrial areas. *See Affidavit of D. Sorensen at Exhibit FF.*

- A viable economic impact study. Strauss failed to provide one, however one of the Alderman, a self labeled "economist," took it upon herself to attempt to create one. It was essentially limited in scope, used faulty data provided directly by Strauss (not an independent 3rd party), and never addressed the most pressing issue, which is the total tax benefit to the citizen's of Franklin. Based on the current value of "new build" Franklin homes, the taxable value of a 30 acre subdivision would far exceed the value committed to by Strauss in their contract for the slaughterhouse. In addition, the city would not be on the hook for a multi-million dollar TIF, as the developer would have paid for the creation of the infrastructure.

Due to the lack of substantial evidence and/or the inaccuracy of the information provided by Strauss, and because the project will have a substantial and undue adverse effect on nearby properties and the character of the area, and will substantially diminish and impair property values of nearby properties within the neighborhood, approval of the SUP/CUP was contrary to law and lacked sufficient evidence, and the Court may and should therefore declare the CUP void.

C. Third Claim - Interference with adjacent developments.

The City's Ordinances as set forth at Ord. § 15-3.0701 prohibit the decision-making body of the City to approve a Special Use Permit unless the proposed use satisfies the following requirements.

> No special use permit shall be recommended or granted pursuant to this Ordinance unless the applicant shall establish the following:
>
> 3. No Interference with Surrounding Development. The proposed use and development will be constructed, arranged, and operated so as not to dominate the immediate vicinity or to interfere with the use and development of neighboring property in accordance with the applicable zoning district regulations.

City ordinances and Wis. Stats. § 62.23(7)(de) require that the applicant for a Special Use Permit/Conditional Use Permit demonstrate through substantial evidence that it satisfies all applicable requirements prior to being granted a Special Use Permit/Conditional Use Permit. The information and facts provided by Strauss in particular those showing the proposed site plan, orientation, location and size of the proposed facility and the plan for further expansion of the buildings to eventually cover over 3 acres of land do not provide substantial evidence that the proposed use will not dominate the immediate vicinity or interfere with the use and development of the neighboring property, just the opposite.

The proposed site plan, orientation, location and size of the proposed facility and the plan for further expansion of the buildings will eventually cover over 3 acres of land. The development use and operation of an industrial meat packing facility adjacent to a previously planned residential subdivision is shown on Exhibit B. *See Doc. No. 14, Record at Exhibit B.*

Due to the lack of substantial evidence and indeed the demonstration by substantial evidence that the use and operation of the proposed facility will dominate and interfere with the adjacent properties, approval of the SUP/CUP was contrary to law and lacked sufficient evidence, and the Court may and should therefore declare the CUP void.

D. Fourth Claim - Contrary to applicable zoning.

The City and the applicant have asserted that the Strauss property that is the subject of the SUP/CUP application is zoned M-1. However, according to public records, the Strauss parcel is zoned R-1 Residential as shown in Exhibit C. *See Doc. No. 15, Record at Exhibit C.* Under Franklin zoning code (known as the "UDO") there is no dispute that a meat packing facility is not a permitted or a special use in the R-1 residential district.

As a result, approval of the SUP was contrary to law and should therefore be declared void.

E. Fifth Claim - Inconsistent with Comprehensive Plan.

Wis. Stats. § 66.1001(3) provides that rezoning of lands to uses that are inconsistent with a municipality's comprehensive plan is prohibited:

> Except as provided in sub. (3m), beginning on January 1, 2010, if a local governmental unit enacts or amends any of the following ordinances, the ordinance shall be consistent with that local governmental unit's comprehensive plan: **…**
>
> (g) Official mapping ordinances enacted or amended under s. 62.23(6)
> …
>
> (k) City or village zoning ordinances enacted or amended under s. 62.23(7).

To be considered "consistent" under Wis. Stats. 66.1001(3), an amended zoning ordinance or amended official map must not contradict the objectives, goals, and policies contained in the comprehensive plan. The City Comprehensive Plan designates the area covering the Strauss parcel and the surrounding properties as "Areas of Natural Resource Features and also Business Park."

The uses that are appropriate for these areas *according to the City's Comprehensive Plan* including among other requirements that new development:

> Protect all Open Lands. The only development allowed in the Open Lands are compatible park, outdoor recreation, open space, trail, and stormwater management facilities as approved by the City, in accord with all existing regulations. Surrounding development shall not create a significant adverse impact upon the visual connections to the natural resource features or to the sustainability of the protected landscape. Surrounding development shall not increase erosion or untreated stormwater runoff of surrounding lands.

Business Park uses according to the Comprehensive Plan are intended for limited intensity uses, intended to provide an aesthetically pleasing environment, and a unified design and ownership which exceed 20 acres in size.

Plaintiff's Claims include that the property has not been properly rezoned. As described above, because of that the Strauss project is not permitted at all in the R-1 zoning. However, even if the City can demonstrate that the subject property was rezoned to "M-1 Light Industrial" doing so is and would be inconsistent with the City's Comprehensive Plan for these area in the Southwest portion of the City. Due to the inconsistency of a rezoning to M-1, any such rezoning would be contrary to state statute as provided in Wis. Stats. § 66.1001(3) and as a result such rezoning should be declared void and other relief be granted as the Court determines is appropriate.

F. Sixth Claim - Violation of Open Meetings Law.

There is no dispute that the meeting of November 2, 2020 was a public meeting covered by the requirements of Wisconsin's Open Meetings Law. The Open Meetings Law requires that meetings such as and including the November 2, 2020 Franklin City Council meeting be held in Open Session. *See* Wis. Stats §19.83.

"Open session" means a meeting which is held in a place "reasonably accessible to members of the public and open to all citizens at all times. In the case of a state governmental body, it means a meeting which is held in a building and room thereof which enables access by persons with functional limitations, as defined in s. 101.13(1)." *See* Wis. Stats. § 19.82(3).

There is no dispute that the City prohibited citizens who attended the November 2, 2020 meeting by Zoom were prohibited from speaking at the meeting to express their objection. Several citizens have prepared declaration showing that they were prevented due to health reasons from attending the meeting. *See Declarations filed herewith.* This was improper and inadequate under the open meetings law. It was further improper under applicable State health orders in effect at the time of the November 2, 2020 Common Council Meeting. . *See State DHS Emergency Order No. 3, October 6, 2020 limiting public gatherings between October 6 and November 8, 2020.*

Indeed, City officials realized that requiring in-person attendance was not appropriate. This is shown by previous comments made days earlier by a City official regarding large group gatherings, as well as declarations made by numerous citizens, some of the plaintiffs, and the Franklin Fire Chief. *See Affidavit of D. Sorensen at Exhibits GG-1 and GG-2.*

The November 2, 2020 meeting was not held in Open Session as required by Wis. Stats. § 19.82(3). The November 2, 2020 meeting therefore violated the requirements and policy of the Open Meetings Law. As a result, and pursuant to Wis. Stats. § 19.97 the Court may and should declare as void the actions taken at the November 2, 2020 City Council meeting, and specifically the approval of the SUP/CUP approved by a vote of 4-3.

G. Seventh Claim - Invalidity of Motion for Reconsideration.

City ordinance only allows for a motion for reconsideration to be in order if raised at the next regular meeting of the City Council. The approval of the SUP/CUP is based on a 4-3 vote at the meeting of November 2, 2020. The ability to take a re-vote on the SUP/CUP was due to an underlying motion for reconsideration being made at the November 2, 2020 meeting.

In the absence of the motion for reconsideration, the denial of SUP/CUP would not have been reversed and the result of the October 20, 2020 meeting would have remained the position of the City. However, motions for reconsideration are only properly in order at 'regular meetings" of the City Council. The City Council meeting of Monday November 2, 2020 was a meeting of the Committee of the Whole of the Common Council not a regular meeting of the legislative body pursuant to Ord. § 19-2(C).

The Motion for Reconsideration taken up by the Council on November 2, 2020 was not properly in order and as result the vote on both the motion to reconsider and the motion to approve are and should be declared void.

Conclusion.

For the reasons described above, the SUP, which was approved and granted to Intervenor should be reversed and declared void by the Court.

Dated this 16th day of July, 2021

Electronically Signed by Joseph R. Cincotta

Joseph R. Cincotta
State Bar No. 1023024
Attorney for Plaintiff

P.O. Address:
400 East Wisconsin Avenue - Suite 205
Milwaukee, WI 53202
414-416-1291 jrc4@chorus.net