

TO: Village of Elm Grove Plan Commission

FROM: von Briesen & Roper, s.c.
By: Hector de la Mora & Christopher T. Koehnke

DATE: July 27, 2021

RE: Creation of Rs-3 or Rs-4 Zoned Parcel as an Alternative to Original Church Unlimited's Comprehensive Plan Amendment and Rezoning Request to Rs-1

On June 8, 2021, Church Unlimited submitted a “conceptual” request seeking a Comprehensive Plan amendment and rezoning, permitting it to split off a 25,000 square foot portion of its property located at 14625 Watertown Plank Road. The purpose would be to create a new Rs-1 parcel with a minimum of 25,000 square feet in area and not less than 125 feet in width at the front building line¹ for single family residential use.

The Plan Commission requested that our office research whether “spot zoning” would result if the Village were to approve the creation and rezoning of a lot that would have the reduced area and width requirements of Rs-3 (minimum of 20,000 square feet in area and not less than 90 feet in width at the front building line), or Rs-4 (minimum of 15,000 square feet in area and not be less than 90 feet in width at the front building line) as a possible alternative to the initial request of the church to create a larger lot with Rs-1 zoning.

Such Rs-3 or Rs-4 lot would be located at the northwest corner of the current Institutional zoned church parcel abutting Watertown Plank Road on its north side, abutting an Rs-1 home lot on its west side and abutting the remaining Institutional land of the church on its south and east side. Such Rs-3 or Rs-4 lot would not touch or be across the street from any lot that isn't zoned Rs-1.

This memo addresses the question of whether rezoning to Rs-3 or Rs-4 would amount to spot zoning.

A copy of the village zoning map is attached to provide a frame of reference.

1. Spot Zoning.

¹ **FRONT BUILDING LINE** A line parallel to the street right-of-way line at any story level of the building's primary facade and representing the minimum distance which all or any part of the building is set back from said right-of-way line.

Spot zoning is defined as “the practice whereby a single lot or area is granted privileges which are not granted or extended to other land in the vicinity in the same use district.” *Cushman v. City of Racine*, 39 Wis. 2d 303, 306–07, 159 N.W.2d 67, 69 (1968).

Spot zoning is not illegal *per se* in Wisconsin, but “[s]pot zoning to be accomplished through rezoning should only be indulged in where it is in the public interest and not solely for the benefit of the property owner who requests rezoning, absent any showing that a refusal to rezone will in effect confiscate his property by depriving him of all beneficial use thereof. *Id.* at 309.

The factors to be weighed in considering the validity and reasonableness of rezoning are several. *See Heaney v. City of Oshkosh*, 47 Wis.2d 303, 310, 177 N.W.2d 74. The pertinent inquiries go to whether the rezoning is consistent with long-range planning and based upon considerations which affect the whole community. *Id.* The nature and character of the parcel, the use of the surrounding land and the overall scheme or zoning plan are also relevant. *Id.*; *see also Ballenger v. Door County*, 131 Wis.2d 422, 427, 388 N.W.2d 624 (Ct. App. 1987). Finally, the interests of public health, morals and safety must also be considered, as well as the promotion of public welfare, convenience and general prosperity. *State ex rel. Am. Oil Co. v. Bessent*, 27 Wis.2d 537, 544, 135 N.W.2d 317 (1965); *see also Ballenger*, 131 Wis.2d at 427, 388 N.W.2d 624.

The concept of public welfare is broad and inclusive and embraces in comprehensive zoning the orderliness of community growth, land value and aesthetic objectives. *Am. Oil Co.*, 27 Wis.2d at 545, 135 N.W.2d 317.

2. Basis for Church Unlimited’s Request.

In its original request for rezoning, Church Unlimited stated that granting its rezoning request will “support the general welfare of the community by adding the property back to the local tax base and is also in keeping with good zoning.”[emphasis added]. However, Church Unlimited provides no additional information in support of the underlined portion of this assertion.

3. It is Difficult to Show that Rezoning to Rs-3 or Rs-4 Does Not Constitute the Granting of Privileges Not Granted to Other Lots in the Same Use District.

If the Rs-3 or Rs-4 alternative were to be implemented, it would insert a lot with a reduced minimum width among all the homes fronting on Watertown Plank Road.

Secondly, it would insert a lot that is 20% or 26% smaller than all the lots of homes abutting Watertown Plank Road.

Thirdly, it would be creating an Rs-3 or Rs-4 lot that is neither immediately across the street from or touching another Rs-3 or Rs-4 lot.

Fourthly, since no drawing² exists which shows in writing the front, side and rear set back distances or easements for the existing home (previously used as a parsonage) within an Rs-3 or Rs-4 size lot, it is not possible to know whether a rezoned lot would satisfy all of the applicable setback requirements. This might create potential non-conforming issues which perhaps explains why the applicant initially only submitted a request for Rs-1 rezoning.

Fifth, there would also be a lesser real estate property tax gain with either an Rs-3 or Rs-4 rezoning if that aspect is factored in as a benefit toward the public's interest.

Given the definition of "Spot Zoning" as stated at the beginning of this memorandum:

"Spot zoning" is defined as "the practice whereby a single lot or area is granted privileges which are not granted or extended to other land in the vicinity in the same use district."

, it is difficult to identify and quantify attributes that show that the creation of a lot in this setting and rezoning it to Rs-3 or Rs-4 "...is in the public interest and not solely for the benefit of the property owner who requests rezoning..."

Please let us know if there are any questions or if you wish to discuss this matter further.

² Correspondence from Atty. Schmuki received July 26, 2021 contained a revised proposed CSM that did not show written set back distances of the existing house or the location and extent of easements affecting the new proposed lot No. 1.