

CITY OF WAUKESHA
ADMINISTRATIVE REVIEW APPEALS BOARD

In the Matter of the Appeal of

The County of Waukesha

of the

June 1, 2016 Decision of the City of
Waukesha Landmarks Commission Rejecting
the County's Petition to Rescind the Local
Landmark Designation for the Former Moor
Mud Baths/Grandview Health Resort (Former
Waukesha County Health and Human
Services Building) Located at 500 Riverview
Avenue

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before the City of Waukesha Administrative Review Appeals Board for a hearing pursuant to section 2.11(1)(b) of the Waukesha Municipal Code on November 30, 2016 at 4:00 p.m. and continued on December 6, 2016 at 3:30 p.m.; and the Petitioner, Waukesha County, having appearing by Waukesha County Corporation Counsel by Atty. Erik G. Weidig; and the Respondent, City of Waukesha Landmarks Commission having appeared by Cramer, Multhauf & Hammes, LLP by Atty. Timothy J. Andringa; and the Petitioner and Respondent having presented testimony of witnesses and presented documentary evidence and having argued the facts and law before the Board; and the Board having reviewed the audio and visual recording of the June 1, 2016 Landmarks Commission hearing; and otherwise being fully advised of the premise of the matter; now, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. The Landmarks Commission is a municipally created commission governed by ch. 28 of the Wisconsin Municipal Code ("Landmark Code").
2. Waukesha County purchased the Moor Mud Baths/Grandview Health Resort/Former Waukesha County Health and Human Services Buildings ("Property") in the 1970s. The Property, including the whole golf course with clubhouse, is listed on the National Register of Historic Places and the State Register of Historic Places.
3. The City of Waukesha designated the Property a historic landmark in 2001.

4. Allison Bussler, Director of Public Works for Waukesha County, caused to be filed on May 9, 2016, Waukesha County's Petition with the Landmarks Commission ("Petition") to rescind the landmark designation for the Property pursuant to Waukesha Municipal Ordinance 28.05(4). The Petition identifies the property in question as the "former Health and Human Service Building."
5. The Landmarks Commission hearing of June 1, 2016 relating to the Petition filed by the County respecting the Property lasted approximately 1-1/2 hours. The County's presentation in support of its Petition included statements made by Allison Bussler, a PowerPoint presentation by Ms. Bussler, and a statement made by Dale Shaver. Statements at the hearing were also made by City of Waukesha Office of Community Development Planner Jeff Fortin orally and through a PowerPoint Presentation as well as by Mary Emery on behalf of the Waukesha Preservation Alliance. Prior to the hearing, Mary Emery also submitted letters on behalf of the Preservation Alliance. Other citizens also commented at the June 1, 2016 Landmarks Commission hearing, some in support of the Petition and some against it.
6. The decision of the Landmarks Commission of June 1, 2016 was the result of a motion made by Attorney Jennifer Wall, Landmarks Commission member, after she stated she did not believe the County had made a "good faith effort" to sell the Property. The motion made and passed by the Landmarks Commission of June 1, 2016, was that the County had not demonstrated in the first instance to the Commission that the landmark designation was prohibiting the County from finding a buyer willing to preserve the landmark.
7. The County's presentation to the Landmarks Commission of June 1, 2016, as expounded upon during the Board hearing of November 30, 2016 and December 6, 2016, did not directly allege that the designation of the Property as a landmark was prohibiting the County from finding a buyer of the Property willing to maintain the landmark designation.
8. On or about January 9, 2014, Waukesha County passed a Resolution authorizing the sale and relocation or demolition of the Property.
9. The County retained Judson & Associates ("Judson") on or about April 4, 2014, for purposes of attempting to market the Property to prospective buyers.
 - a. Judson marketed the Property for approximately two months. It mass-mailed a flyer to 850 different companies in varying fields, including multi-family dwelling ownership. Follow-up phone calls were made. An Information Sheet was prepared which purported to give additional information about the terms sought by the County.
 - b. Judson's marketing information was confusing; it referenced both a "Lease" and the "Potential to acquire the building and relocate," which suggested buying the

Property was an option. While the Judson materials suggested the option to purchase the property, the terms set forth in the materials did not suggest that the County was interested in selling the Property.

- c. The portion of the marketing materials referencing a “lease” indicated that the County was offering a 5-year lease for a total cost of \$100,000 which had to be paid up-front. It also indicated the lessee would have to rezone the property and bring the building up to code, all at the lessee’s expense. Mr. Fortin described these terms to the Landmarks Commission at its June 1, 2016 hearing.
- d. The marketing materials also stated that the lessee would be required to “create parking with the 120,000 building footprint.” (This Board assumes Judson intended to state, “120,000 *square foot* building footprint.”) An attached map contained a box stating “Area Allowed For Required Parking Lot” which pointed to a section of the standing building known as the East Wing (see Exhibit A, attached to this decision and incorporated by reference).
- e. Witnesses from the County confirmed these lease terms during their testimony at the hearings conducted by this Board on November 30, 2016 and December 6, 2016.
- f. Judson received two inquiries based on the flyers—one from Ted Matkom of the Gorman Company; and one from John Bork of the Alexander Company. Neither party agreed to the County’s terms. Judson stated in a letter to the County dated June 23, 2014 which was discussed at the June 1, 2016 Landmark Commission hearing that Gorman made a counter-offer which was rejected and Bork lost interest “due to the length of the lease term being proposed by County.”
- g. The Board finds no reasonable lessee would accept the terms set forth in the Judson materials because the terms place an immense monetary burden to renovate the building to a useable condition on the lease and then give the lessee a mere five years to try to recoup the entire expenditure.
- h. The fact that full rental payment of \$100,000 was required at the start of the lease and that the lessee would have to demolish part of the building and construct new parking also constitutes evidence that the terms of this initial offer were sufficiently onerous that they would dissuade reasonable lessees from offering to lease it.
- i. The Board also finds the period within which Judson attempted to market the property—two months—further evidence of a lack of an honest, good faith, bona-fide interest in finding a buyer. Although the County stated that the two-month period was required by the City’s Landmarks Code, the only provision in the Code with a two-month time limit takes effect after a petition to rescind is accepted; at that point the Landmarks Commission must work with the property owner to find a buyer for a period of not more than two months. Wauk. Mun. Ord.

§28.05(4)(b). Nothing in the Code puts a two-month-limit on the property owner's duty to make good faith attempts to sell the Property to someone willing to preserve it as a landmark before filing a petition to rescind.

- j. It is evidence of a good faith attempt to find a buyer that Judson mailed flyers to 850 potential customers and conducted follow-up phone calls; however, these facts alone are not sufficient to overcome the issues described above, which convince this Board that the attempt to sell or lease the Property which took place in 2014 did not constitute a good faith attempt to find and attract a buyer willing to preserve the Property as a landmark.

10. On or about February 16, 2015, the County passed a Resolution authorizing a Request for Proposals ("RFP") for the sale of the Property.

- a. This Board gives greater weight to the County's attempts to sell the Property in 2015 because the 2014 attempt seemingly constituted more of an attempt to lease the property instead of selling it. However, this Board gives some weight to the 2014 attempt as it did reference an opportunity to "acquire" the Property, and the manner in which it was conducted is part of the totality of the circumstances lending support to the conclusion that the County did not make reasonable, good faith efforts to find someone willing to preserve the Property as a landmark.
- b. The February 16, 2015 Resolution stated "the RFP or listing shall address any access issues, road issues, easement issues, and utility issues and address any related payment within reason by the County."
- c. The Resolution also required the RFP or listing to run for two months or "standard County practice." Witnesses for both parties testified that the RFP was open for responses for a period of slightly more than two months. The Landmarks Commission was aware of this limitation because it was stated in the County's Power Point presentation to the Commission. As stated above, the Board finds this period of time to market the Property too short to constitute an attempt in good faith to find and attract a buyer willing to preserve the landmark.

11. On or about April 2, 2015, The Nicholson Group, LLC., appraised the value of the Property at \$1.3 million. Copies of this appraisal were provided to the Landmarks Commission for its June 1, 2016 hearing and the appraisal was considered by the Commission.

- a. The appraisal by its own language includes "extraordinary assumptions" and "hypothetical conditions," including the assumption that no environmental contamination exists, including asbestos or lead paint. It also assumes the East Wing has already been demolished and all subsequent cleanup is complete. The appraisal states the County instructed it to make those assumptions. The appraisal for \$1.3 million was for 2.5 acres of land.

- b. The Board finds this appraisal constitutes additional evidence that the County did not make a good faith attempt to find and attract a buyer willing to maintain the Property as a landmark. Based on the letter to the County from Environmental Management Consulting, Inc., dated October 8, 2015, the Property contains asbestos and removal would cost more than \$1.2 million; the price of encapsulation is not known. It is likely the Property contains lead paint. The East Wing has not been demolished. As a Landmark Commission member stated during the Commission's June 1, 2016 hearing, the appraisal does not indicate the actual fair market value of the Property and therefore only serves to misinform prospective buyers.

12. The RFP to sell the Property was issued on or about May 4, 2015.

- a. Whereas the 2014 attempt to sell or lease the Property suggested that the buyer could demolish the East Wing of the building and use the area for parking (see Exhibit A, attached), the 2015 RFP expressly stated the County intended to use all existing parking spaces surrounding the building, and all spaces that may be created after the East Wing was demolished. The RFP stated that if the developer needed parking spaces, "an alternate plan must be proposed." Exhibit "D" of the RFP was a topographical overview of the Property with a red line indicating the area to be sold. Contrary to the RFP's express language, the area shown on Exhibit "D" includes a small number of parking spaces adjacent to the building (see Exhibit B, attached to this decision and incorporated by reference). Exhibit D outlined approximately 2.2 acres of land to be sold.
- b. The Board considers the County's description of parking in its RFP confusing, contradictory and evidence of a lack of good faith. Prospective buyers would be strongly disinclined to make a proposal when the RFP states the purchaser cannot use any of the parking spaces surrounding the building and instead must propose an "alternate plan" which somehow would still make it possible for the County to retain the same number of parking spaces. Any prospective buyer will need sufficient parking to utilize the Property. The Board gives considerable weight to this evidence.
- c. The RFP also indicated that "Developer will be required to address access issues to the Property," and that such issues could be resolved by "extending Prospect Avenue from the west to the Property, the City establishing a street to the Property, or purchasing an easement from County to provide access." It also stated the County may consider selling additional land for purposes of building a new street or private driveway.

13. Gorman and Company, Inc., through its agent Ted Matkom, offered a Proposal in response to the RFP offering \$400,000 and estimated the cost to renovate the Property to be \$11 million.

- a. The Proposal stated Gorman was “confident that we can achieve at least a one parking space to one apartment ratio by utilizing spaces surrounding the property that are currently unused by the County for parking space.” The Proposal also stated Gorman was confident it could work out a mutually agreeable plan for access with the County.
- b. The County responded by asking Gorman follow-up questions. It asked for a detailed plan for access with drawings for lighting, signage and signals. It asked for renderings showing the precise location of parking spaces. It asked for elevation renderings.
- c. Ted Matkom testified at the hearing in this matter. Matkom has 10 years of experience in the real estate field, all relating to rehabilitating challenged properties for Gorman and Company. He has overseen more than 15 renovations of historic properties similar to the Property and in the past year alone supplied 50 Proposals in response to RFP’s. The Board gives considerable weight to Matkom’s testimony due to his expertise in renovating similar historic properties and in responding to RFP’s from governmental entities.
- d. Matkom testified that the RFP made him think “are you kidding? There’s no parking available.” Matkom stated that he had encountered RFP’s in the past that left the entire question of how to provide parking up to the buyer, but not in situations like this one where every neighboring piece of land is owned by the seller; he couldn’t go to a different owner and try to buy other parking. Matkom stated the RFP overall was unreasonable.
- e. Even with his reservations, Matkom submitted a Proposal in response to the RFP. During the RFP process, he asked the County to indicate what it desired regarding access. He also stated he would conform to what the County wanted as far as look of the overall campus, and that detailed elevation renderings and building drawings were not necessary because the Property would have to be kept in its current elevation and design to comply with the Landmarks Code.
- f. Matkom admitted that his Proposal was not an “A” effort on his part, but that the reason for the lesser effort was because it seemed clear to him based on the RFP’s terms and the County’s attempt to sell/lease in 2014, that the County was not genuinely interested in selling the Property.

14. The County ultimately rejected Gorman’s Proposal.

- a. In a memo to the County Board dated August 5, 2015, the RFP Committee stated that Gorman had not sufficiently addressed access to the Property and had not addressed parking sufficiently. The Committee also noted that Gorman failed to provide sufficient information on “campus fit” because nothing showed how the building would “fit into the County’s campus and the surrounding neighborhood.” It also stated it was “unclear as to exactly what Respondent wanted in terms of

parcel of land surrounding the building... [because] Respondent indicated it would depend on what the County wanted to do with respect to parking, access, etc.”

- b. It is clear to this Board there was never sufficient meeting of the minds between Gorman and the County to allow the Board to conclude the County found a “buyer” for the Property consistent with the requirement in Wauk. Mun. Ord. §28.05(4).
- c. The manner in which the Property was offered and the manner in which Gorman’s Proposal was rejected supports the conclusion that the County did not make reasonable attempts in good faith to find and attract a buyer willing to preserve the Property as a landmark. Gorman wanted to know what the County wanted as far as access was concerned and inquired into the cost of an easement over the existing entrance to the Property. The County could have easily estimated the cost of maintenance to that entrance because it’s presently paying that cost. Instead it rejected the Proposal without providing information that would allow Gorman to suggest an estimated maintenance fee.
- d. Rejecting the Proposal based on “campus fit” also supports the conclusion that the County wanted to avoid a sale. The Property is a landmark, and therefore can only be renovated in a manner which maintains its historic appearance. This is not a situation where a developer could construct something completely out of bounds with respect to color, size or shape compared to adjacent buildings.

Conclusions of Law

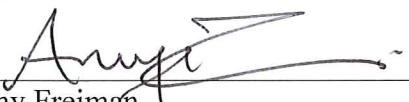
1. The Board must interpret the ordinance at issue, Wauk. Mun. Ord. §28.05(4), as a whole without rendering any portion of the ordinance superfluous. Madison Metropolitan School District v. Evers, 357 Wis.2d 550, 855 N.W.2d 458 ¶28 (Ct. App. 2014).
2. The ordinance provision in its entirety reads “Any person listed as the owner of record of a landmark site at the time of its designation, who can demonstrate to the Commission that by virtue of such designation the owner is unable to find a buyer willing to preserve such landmark or landmark site, even though he has made reasonable attempts in good faith to find and attract such a buyer, may petition the Commission for a rescission of the designation.” Wauk. Mun. Ord. §28.05(4).
3. The County has the burden of proof and must show, to a reasonable certainty by the greater weight or clear preponderance of the evidence, that the requirements for accepting a petition to rescind the Property’s historic designation set forth in Wauk. Mun. Ord. §28.05(4) have been met. See Reinke v. Personnel Bd., 53 Wis.2d 123, 191 N.W.2d 833 (1971).

- a. The Board concludes the County has this burden because it is the party asserting the affirmative of the issue as to whether the Landmarks Commission should accept its petition. See 2 Am. Jur. Administrative Law §354; Boynton Cab Co. v. Giese et al., 237 Wis.2d 237, 296 N.W.2d 630 (1941).
 - b. The Board also concludes the County has this burden because it is the party desiring change. State v. McFarren, 62 Wis.2d 492, 215 N.W.2d 459 (1974).
 - c. The Board further concludes that, irrespective of which party has the burden of proof during the hearing, all due process requirements have been satisfied in that the parties were afforded the full opportunity to present evidence, including rebuttal evidence; to be represented by an attorney; and to cross examine the other party's witnesses; and the hearing afforded the parties a constitutionally sufficient and fair procedure to review the Landmarks Commission's determination.
4. This Board concludes the County was the owner of record of the landmark at the time of its designation.
5. The ultimate question before this Board is not whether the County followed standard RFP procedures or complied with its own internal procedures when attempting to find and attract a buyer willing to preserve the Property as a landmark; the County could follow its internal procedures to the letter yet still not meet the condition required to petition the Landmarks Commission set forth in Wauk. Mun. Ord. §28.05(4).
6. This Board is not tasked with opining whether the Property should be a landmark; our role in this matter is only to decide whether to affirm, reverse or modify the Landmark Commission's decision to reject the County's petition.
7. Wauk. Mun. Ord. §28.05(4) establishes an evidentiary standard that must be met in order to submit a petition for rescission. At a bare minimum, for the Landmarks Commission to lawfully accept a petition, an owner must show sufficient good faith attempts to find and attract a buyer willing to preserve the landmark so that the Commission may infer that the designation was the reason the owner could not find a buyer willing to preserve the landmark.
8. The County has not demonstrated a reasonable certainty by the greater weight or clear preponderance of the evidence that it met the minimum threshold requirement that it engage in reasonable attempts in good faith to find and attract a buyer willing to preserve the Property as a landmark. Since the County failed to meet this threshold requirement, the Board need not determine whether the evidence shows that by virtue of the landmark designation, the County was unable to find a buyer willing to preserve the Property as a landmark.
9. As further explained in the Findings of Fact section of this decision, the primary factors the Board relies upon to conclude the County did not make reasonable attempts in good faith to find and attract a buyer willing to preserve the Property as a landmark include:

first requiring lease terms so onerous that they would dissuade reasonable lessees from making an offer; then commissioning an appraisal that intentionally ignored obvious matters that affect the Property's fair market value; then offering the Property for sale with terms so confusing and contradictory—especially with respect to parking and access—that prospective buyers would be strongly disinclined to make an offer.

10. The fact that the County only solicited Proposals for two months also strongly supports the conclusion that good faith attempts were not made. This was a complicated sale requiring considerable effort on the part of prospective buyers to make an intelligent, well-informed offer, especially since the County expected the buyer to come up with its own solutions for parking and access.
11. Although the Board relies upon testimony offered at its hearing held on November 30, 2016 and December 6, 2016 in making its decision that was not offered before the Landmarks Commission, if it relied solely on evidence offered at the June 1, 2016 Landmarks Commission meeting it would still conclude the County failed to demonstrate reasonable attempts in good faith to find and attract a buyer willing to preserve the Property as a landmark. At the June 1, 2016 Landmarks Commission hearing, the Commission reviewed the Nicholson appraisal and commented on its deficiencies. Alison Bussler gave a presentation which included the fact that the County only solicited Proposals for two months. Jeff Fortin's presentation included a description of the parking and access terms set forth in the RFP and discussed how confusing and onerous they were. Although the County successfully convinced this Board that not all of Fortin's criticisms of the RFP were accurate, his criticisms regarding parking and access accurately described roadblocks the County created which only served to dissuade prospective buyers from making a Proposal.
12. The Board may "affirm, reverse or modify the determination which is the subject of the appeal." Wauk. Mun. Ord. §2.11(3)(b). The Board hereby affirms the June 1, 2016 Landmarks Commission decision rejecting Waukesha County's petition to rescind the landmarks designation of the Former Moor Mud Baths/Grandview Health Resort.

Executed this 14th day of February, 2017, by the Administrative Review Appeals Board.



Amy Freiman

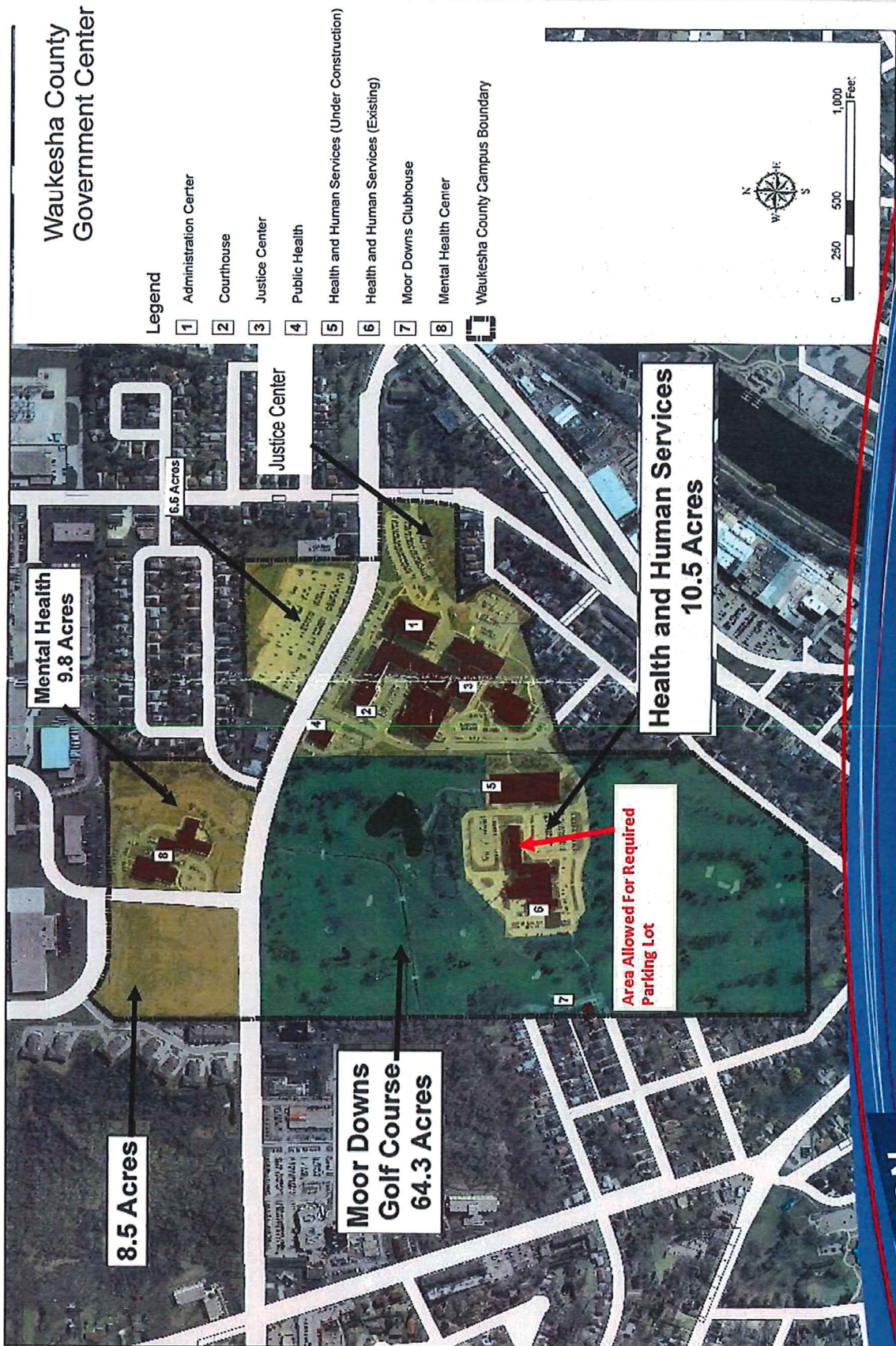


Richard Hanson



Michelle Stoeck

EXHIBIT A



JUDSON
and associates s.c.

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EXHIBIT B

*Exhibit D – HHS Topo View
Waukesha County
Former Health & Human Services Building
Proposed Sale Area
Approximately 2.2 acres*

