



## Staff Report

To: Legislative & Licensing Committee  
Plan Commission

From: Julie Aquavia, Assistant City Attorney

Date: April 18, 2023

Meetings: Legislative and Licensing May 2, 2023  
Plan Commission May 8, 2023

Topic: Repeal of Wetland Impact fee and dedication requirements found in Titles 15, 16, and 17

### Summary

As you may recall the City repealed the bikeway impact fee and the parks and recreational trail impact fee because they were, respectively, not in compliance with the statutory standards and had acquired all the areas identified in the needs analysis. The information supplied to you supporting the request for that action also indicated that there were issues with the wetland impact fee as well. (Memo 2/24/22 to Plan Commission and Legislative and Licensing, which included 11/10/21 memo).

After additional review it is my legal conclusion that the Common Council must repeal the wetland impact fee because it was never supported by the proper standards required by statute. Currently, fee collection is suspended based on my November 2021 directive to staff. The dedication requirement must also be repealed because the dedication requirement does not meet the requirements set by the U.S. Supreme Court for exacting land from property owners.

### Explanation

#### *A. Service standard*

An impact fee must be supported by a needs analysis. Quantifying the needs "...shall be based on explicitly identified service areas and service standards". Wis. Stat. Sec. 66.55(4)(a)2., 1993 Wis. Act 305, now Wis. Stat. Sec. 66.0617(4)(a)2., *emphasis provided*. "Service standard" is defined as

(h) “Service standard” means a certain quantity or quality of public facilities relative to a certain number of persons, parcels of land or other appropriate measure, as specified by the municipality.

Sec. 66.0617(1), Stats. This definition is the same as when the statute was created.<sup>1</sup>

For example, the City’s *Public Facilities Needs Assessment for Parks and Recreational Trails, Wetland Preservation and Bikeways*, November 1995 states a park service standard is “5 acres of community park per 1,000 residents” based on the National Recreation & Park Association’s *Recreation, Park & Open Space Standards & Guidelines* (1983).” (See p. 8). Although the Assessment has a section titled “service standard” for wetlands, it contains no standard for determining how much land is required to meet the needs of new development.

The Needs Assessment refers to a “1990 Wetland Preservation Plan” (starting at p. 25). A copy of which was included in the Assessment as Appendix B. The Assessment further states, as noted above, that the “service standard” is established in a “technical documentation” which is described as “Technical memorandum, March 14, 1991 Southeastern Wisconsin Regional Plan Commission, SEWRPC File CA-702-103, p.1 and 2.” (see Assessment, footnote 19, p. 26). (design year 2010). However, the technical memorandum simply provides the rate of dedication or fee in lieu of dedication based on a revised ultimate build out – it does not state a service standard, that is a quantity related to some other measurement as required by the statutory definition.

An ordinance passed in noncompliance with the empowering statute is invalid. *Laskaris v. City of Wisconsin Dells, Inc.*, 131 Wis. 2d 525, 531, 389 N.W.2d 67, 70 (Ct. App. 1986), citing *State ex rel. Ryan v. Pietrzykowski*, 42 Wis.2d 457, 463, 167 N.W.2d 242, 245 (1969). Without a service standard the ordinance does not comply with its authorizing statute and is thus invalid. Park, Planning and Legal staff met in June 2021 and determined that it is not cost effective to create a defensible serve standard or to redo the facilities analysis for wetlands and therefore no action would be taken at this time to pursue a replacement fee requirement.

## B. Nexus and proportionality

Anytime the government requires a property owner to give up or dedicate land as a condition for governmental approval, there must be a rational basis for the requirement and the amount required must be proportional to the needs or impact created by the development. In *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987), the U.S. Supreme Court directed that an “essential nexus” (rational basis) must exist between the legitimate interest stated by the governmental unit as the reason for the condition and the permit condition being imposed. In *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), the Court refined the *Nollan* “essential nexus” requirement, holding there must also exist a “rough proportionality” between the permit condition and the projected impact created by the development. Further, *Dolan* requires that the City make some “individualized determination” that the permit condition is “related both in nature and extent to the impact of the proposed development.” *Id.*

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<sup>1</sup> 1993 Wis. Act 305 - 66.55(1) (h) “Service standard” means a certain quantity or quality of public facilities relative to a certain number of persons, parcels of land or other appropriate measure, as specified by the political subdivision.

The City's dedication requirement at §16.16.010 of the Brookfield Municipal Code does not, nor in its previous version (before updates in 2021 and 2022), provide for an individual determination as to the essential nexus or the proportionality of the wetland dedication and therefore does not comply with U.S. Supreme Court decisions. Even if it did, without a service standard or the establishment of some way to measure the impact of a development on wetlands, the City would not be able to comply with the *Nollan/Dolan* standard.

### Summary

Based on the above reasons, the wetland impact fee and wetland dedication requirements do not comply with the law and should be repealed. It is my understanding that Director of Parks, Recreation and Forestry Kelliher would like to continue acquiring wetlands for the City. He may continue to do so with arm's length real estate transactions and through voluntary donations. If the Common Council decides to establish a new wetland impact fee, based upon the standards set forth in the statutes, the City Attorney's Office will assist Director Kelliher in preparing a new impact fee ordinance.

### Miscellaneous information:

- ◆ Changes to §16.16.010 regarding subdivision requirements require a public hearing preceded by a Class 2 notice (repealing the impact fee requirements does not).
- ◆ Changes to all 3 Titles will be combined in one ordinance, after the public hearing, when held after affirmative recommendations from the committees.

### **Request:**

- ◆ A Legislative and Licensing Committee recommendation to Common Council to repeal §15.28.010 and amend and renumber §15.28.020 as proposed below.
- ◆ A Plan Commission recommendation to Common Council to amend §16.16.010 and repeal §17.100.100 as proposed below.
- ◆ That the Mayor authorize consideration by the Common Council on the same night as the public hearing, per Reso. 10302-22, when it is scheduled.

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#### **16.16.010 Public sites and open space.**

A. In the design of plats or certified survey maps, ~~due consideration shall~~ protection from development must be given to ~~the reservation of wetlands as defined in Title 14; drainageways; environmental corridors; conservancy areas; and open spaces; and other public purposes from development.~~ All wetlands must be determined by a certified wetland delineator, reviewed and approved by the city, and shown within a plat or certified survey map shall be placed in an outlet described in §16.12.020 or 16.12.040 Wetlands, if identified and designated for such purpose in the comprehensive plan, a neighborhood plan, the parks and open space plan, or official map, shall be included in the plat or certified survey map and reserved for such purposes through dedication as an outlet or easement at the rate set forth in subsection (B) of this section or pay the fee as set forth in Chapter 15.28.

#### **B. Dedication Rates.**

1. ~~Repealed by Ord. 2787-22.\*~~

2. ~~Wetlands. The dedication rate is one acre for each eight proposed or potential dwelling units in residential subdivisions, and at the rate of one acre for each 185,000 square feet of nonresidential lot area, or fraction thereof, in nonresidential developments.~~

#### **15.28.010 Wetland dedication and impact fees.**

A. ~~Purpose. In accordance with the City park and open space plan, it is the policy of the City to acquire and preserve significant wetland areas in part, to provide for the acquisition of 348 acres of privately owned wetlands to contribute towards open space preservation and for community-wide stormwater management purposes.~~

B. ~~Intent. Dedication and impact fees are intended to allocate financial burdens of providing public facilities fairly between existing City residents and owners of existing land and property improvements within the City on the one hand and developers and owners of new land developments on the other, and to comply with Section 66.0617, Wisconsin Statutes, on municipal impact fees. The Common Council of the City has determined that it is fair and equitable for new development in the City to make a contribution toward the cost of acquiring and preserving wetlands in the City.~~

C. ~~The following documents are on file at the City Clerk's office and document City compliance with the procedural requirements of the Wisconsin Statutes:~~

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~~1.—“City of Brookfield, Public Facilities Needs Assessment For Parks and Recreational Trails and Wetland Preservations, November, 1996” prepared by the City Department of Community Development;~~

~~2.— Public hearing notices for January 7, 1997, and March 4, 1997;~~

~~3.— Minutes of January 7, 1997, and March 4, 1997, Common Council public hearings.~~

~~D.—Dedication or Fees. Whether a land division or new construction occurs determines whether dedication or a fee is required.~~

~~1.—Dedication of Site. A wetland located within the primary environmental corridor or that is five acres or more in area designated on the official map, City's comprehensive plan, neighborhood unit development plan, or other comprehensive plan component that is encompassed, all or in part, within a tract of land to be subdivided shall be made a part of the plat as an outlet and shall be dedicated to the public by the subdivider at the rate of one acre for each eight proposed or potential dwelling units in residential subdivisions and at the rate of one acre for each 185,000 square feet of nonresidential lot area, or fraction thereof, in nonresidential subdivision. Should the amount of wetland available to be dedicated not meet this rate, then the developer or property owner shall pay the impact fee set forth in subsection (D)(2) of this section to cover the amount of discrepancy.~~

~~2.— Fees in Lieu of Dedication.~~

~~a.— If the subdivision, subject property, or certified survey map does not encompass a wetland or if the City Plan Commission does not require wetlands to be shown as an outlet in the subdivision or certified survey map or if there is no land division but new construction or redevelopment the impact fee for the acquisition of wetlands is \$96.00 for each proposed dwelling unit and \$4.19 for each 1,000 square feet of lot area, or fraction thereof, in nonresidential developments.~~

~~b.— If the building permit is for an addition to a previously constructed building, the basis for the one-time fee shall be the area of the addition divided by the floor area ratio for the district in which the building is located. The result, expressed in thousands of square feet, shall be used to calculate the fee specified. For example, a 30,000-square-foot nonresidential building addition in a zoning district with a floor area ratio of 0.30 requires a 100,000-square-foot lot.~~

~~c.— If the total amount of impact fees due for a development will be more than \$75,000, a developer may defer payment of the impact fees for a period of four years from the date of the~~

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~~issuance of the building permit or until six months before the municipality incurs the costs to construct, expand, or improve the public facilities related to the development for which the fee was imposed, whichever is earlier. If the developer elects to defer payment under this subsection, the developer shall maintain in force a bond or irrevocable letter of credit in the amount of the unpaid fees executed in the name of the municipality. A developer may not defer payment of impact fees for projects that have been previously approved.~~

~~15.28.020~~ 3.04.060 Impact fee administration. (Title 3 contains City's Finance regulations)

~~A. At the time that the municipality collects an impact fee, it shall provide to the developer from which it received the fee an accounting of how the fee will be spent.~~

~~BA.~~ 4. Revenues collected as impact fees shall be placed by the City Treasurer in separate, segregated interest-bearing accounts and shall be accounted for separately from other funds of the City. Impact fee revenues and interest earned on impact fee revenues may be expended on a first-in, first-out basis by the City only for the capital costs as defined at Wis. Stats. §66.0617(1)(a) for which the impact fees were imposed.

~~2. Fees that are held by the City and not used within the eight-years after they are collected time period specified by Section 66.0617(9), Wisconsin Statutes, to pay the indicated capital costs shall~~ must be refunded to the property owner of record at the time of refund plus interest.

~~CB.~~ Appeals.

1. Appeals may be brought by developers, as defined in Section 66.0617(1)(b), Wisconsin Statutes, or property owners as provided herein. The only questions that are appealable pursuant to Section 66.0617(10), Wisconsin Statutes, are the:

a. ~~The~~ fee amount;

b. fee collection; and

~~bc.~~ ~~The~~ fee use.

2. The Common Council shall hear the appeal. A written notice of appeal and appeal fee, in the same amount specified in Section 2.08.080(E)(2) must be filed with the City Clerk. The appeal fee is nonrefundable and failure to submit the fee shall cause the appeal to be dismissed. Appeals must be filed within 30 days of the date of payment of the impact fee by the appellant or use by the City.

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**~~17.100.100 Wetland preservation impact fees.~~**

~~Any property in the City for which wetlands have not been dedicated in accordance with Section 16.16.010, and for which a building permit for new construction or an addition has been applied for, shall pay a one-time wetland preservation fee upon issuance of a building permit as set forth in Section 15.28.010.~~