



PUBLIC NOTICE & AGENDA
BELOIT BOARD OF APPEALS
First Floor Conference Room - 100 State Street, Beloit, WI 53511
5:00 PM
Wednesday, April 6, 2022

MEMBERS OF THE PUBLIC OR THE MEDIA MAY LISTEN TO THE OPEN SESSION PORTION OF THIS AGENDA BY CALLING (408) 650-3123 AND USING ACCESS CODE 700-829-917. ALL PARTICIPANTS' PHONES WILL BE MUTED. ATTENDANCE IN PERSON WILL BE LIMITED.

1. CALL TO ORDER AND ROLL CALL

2. BUSINESS ITEMS

- 2.a. Discussion and possible action on Motion to Stay Further Construction of Medical Facility at 2102 Freeman Pkwy filed by Beloit Health System and Nommo Donald. The Board of Appeals may adjourn into Closed Session pursuant to section 19.85(1)(a), Wis. Stats. to deliberate concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before this body.

[Appellants' Motion to Stay Further Construction](#)

[City of Beloit's Opposition to Motion to Stay Further Construction](#)

[City of Beloit's Proposed Findings, Conclusions, and Order re: Motion to Stay Further Construction](#)

[Ortholllinois' Proposed Findings, Conclusions, and Order re: Motion to Stay Further Construction](#)

- 2.b. Discussion and possible action on Motion to Stay Proceedings on April 12, 2022 filed by Beloit Health System and Nommo Donald. The Board of Appeals may adjourn into Closed Session pursuant to section 19.85(1)(a), Wis. Stats. to deliberate concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before this body.

[Appellants' Motion to Stay Proceedings on April 12, 2022](#)

- 2.c. Discussion of Procedures for Upcoming April 12, 2022 Board of Appeals Meeting.

3. ADJOURNMENT

** Please note that, upon reasonable notice, at least 24 hours in advance, efforts will be made to accommodate the needs of disabled individuals through appropriate aids and services. For additional information to request this service, please contact the City Clerk's Office at 364-6680, 100 State Street, Beloit, WI 53511.

STATE OF WISCONSIN
CITY OF BELOIT
BELOIT BOARD OF APPEALS

Appeal of Administrative Decision filed by Beloit Health System and Nommo Donald of the Director of Planning & Building Services/Zoning Officer's January 14, 2022 Architectural Review Certificate and Certificate of Zoning Compliance for the Property Located at 2102 Freeman Parkway.

FILE NO. BOA 2022-01

NOTICE OF MOTION AND MOTION TO STAY FURTHER CONSTRUCTION
ON THE PROPERTY LOCATED AT 2102 FREEMAN PARKWAY PENDING A
FINAL DECISION OF THE BELOIT BOARD OF APPEALS

Appellants Beloit Health System and Nommo Donald hereby move the Beloit Board of Appeals, pursuant to Wisconsin Statute §§ 62.23(7)(e)5 and 62.23(7)(e)8, and City of Beloit Ordinance, Chapter 19, § 2-1004, for an Order staying further construction on the property at 2102 Freeman Parkway, Beloit, Wisconsin, pending a decision by the Board of Appeals on the merits of this appeal.

The grounds for this motion are as follows:

1. On January 14, 2022, the Beloit Director of Planning and Building Services (hereafter “Zoning Officer”) issued an Architectural Review Certificate and Certificate of Zoning Compliance to Rockford Orthopedic Associates, Ltd. d/b/a OrthoIllinois (hereafter “OrthoIllinois”) for the construction of a medical facility on the property at 2102 Freeman Parkway in the City of Beloit (hereafter the “Decision”).

2. On February 14, 2022, Appellants Beloit Health System and Nommo Donald (hereafter the “Appellants”) appealed the Decision of the Zoning Officer to the Beloit Board of Appeals pursuant to Wisconsin Statute § 62.23(7)(e)5 and City of Beloit Ordinance, Chapter 19,

§ 2-1004. Pursuant to the appeal, the Appellants seek an order by the Board of Appeals reversing the Decision of the Zoning Officer on the grounds that the Zoning Officer’s Decision does not further, and in fact contradicts, the objectives, goals, and policies set forth in the City of Beloit’s Comprehensive Plan, which plan intends for the property at 2102 Freeman Parkway (hereafter the “Property”) to be developed for mixed residential developments consistent with those allowed in the City’s R-3 and R-4 multi-family zoning districts and with PUD zoning. *See* WIS. STAT. § 66.1001(1)(am); *see also* Lakeland Area Property Owners Association U.A. v. Oneida County, 2021 WI App 19, 396 Wis. 2d 622, 957 N.W.2d 605. An additional ground for the Board of Appeals to reverse the Zoning Officer’s Decision is that it is ambiguous and inconsistent with the information contained in the application of OrthoIllinois and does not support a reasoned, good faith decision of the Zoning Officer of the requirements of City of Beloit Zoning Ordinance No. 3719. *See* Appeal of City of Beloit’s Director of Planning and Building Services Division’s Construction of Sections 6.1.6 and 11.2 of the Zoning Code; Appeal Brought Pursuant to Section 2-1000, Appeals of Administrative Decisions: Zoning Officer.

3. The Appellants’ appeal was timely filed with the Board of Appeals pursuant to Wisconsin Statute § 62.23(7)(e)4 and City of Beloit Ordinance, Chapter 19, § 2-1002.

4. Wisconsin Statute § 62.23(7)(e)5 and City of Beloit Ordinance, Chapter 19, § 2-1004 both provide that an appeal to the Board of Appeals stays all proceedings in furtherance of the action appealed from unless the municipal officer from whom the appeal is taken certifies to the Board of Appeals that a stay would cause imminent peril to life and property. Specifically, the Wisconsin Statute and the Beloit Ordinance state as follows:

Wisconsin Statute § 62.23(7)(e)5:

An appeal shall stay all legal proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of appeals after the notice

of appeal shall have been filed with the officer, that by reason of facts stated in the certificate a stay would, in the officer's opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by a court of record on application, on notice to the officer from whom the appeal is taken, and on due cause shown.

City of Beloit Ordinance, Chapter 19, § 2-1004:

EFFECT OF FILING. *The filing of a complete notice of appeal stays all proceedings* in furtherance of the decision appealed unless the official whose decision is being appealed certifies to the Board of Appeals, after the appeal is filed, that, because of facts stated in the certification, a stay would cause immediate peril to life or property. In such case, proceedings shall not be stayed other than by a restraining order, which may be granted by the Board of Appeals, or by a court of record.

5. The Zoning Officer has not certified to the Board of Appeals that a stay would cause imminent peril to life or property. As such, the clear purpose of Wisconsin Statute § 62.23(7)(e)5 and City of Beloit Ordinance, Chapter 19, § 2-1004, is to preserve the status quo and to suspend the legal effect of Zoning Officer's approval pending a determination by the Board of Appeals of the Decision. In this case, by virtue of the stay provisions in the statute and the ordinance, the legal effect of the Decision is stayed, meaning that any action (or in this case further construction) on the property which would otherwise require a permit or other approval by the Zoning Officer under the City's ordinances is impermissible and constitutes a violation of law.

6. No Wisconsin Court has directly addressed the effect of the stay language referenced in Wisconsin Statute § 62.23(7)(e)5. However, a decision of the Supreme of New York, which considered statutory language virtually identical to that contained in the Wisconsin Statute and City of Beloit Ordinance, is instructive. In Blum v. O'Connor, 6 Misc. 2d 641, 163 N.Y.S.2d 516 (Sup. 1957), several neighboring landowners appealed the decision of a zoning officer to issue a building permit for a swimming pool. After reviewing the language in the New York statute applicable to the Board of Appeals, the New York Court held as follows:

As I interpret this section as applicable here, it is meant that the *status quo* is to be maintained pending the appeal. In this instance, I interpret that to mean that pending the determination of the appeal the issuance of the building permit by respondent is stayed and nothing else.

Blum, 163 N.Y.S.2d at 517-18. The Supreme Court of New York further held in the event construction of the pool continued and the zoning officer failed or refused to institute the proper proceedings to enforce the effect of the stayed permit, the landowners' proper remedy was to move the Board of Appeals for an Order under an alternative New York statute that is similar to Wisconsin Statute § 62.23(7)(e)8. Blum, 163 N.Y.S.2d at 518. Wisconsin Statute § 62.23(7)(e)8 states as follows:

In exercising the above mentioned powers such board may, in conformity with the provisions of such section, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from, and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken, and may issue or direct the issue of a permit.

Wisconsin Statute § 62.23(7)(e)8.

7. In State ex rel. Cities Oil Co. v. Bd. of Appeals, 21 Wis. 2d 516, 124 N.W.2d 809 (Wis. 1963), the Wisconsin Supreme Court considered whether a landowner who made expenditures of money in reliance upon a building permit that was appealed to the board of appeals acquired vested rights in the permit sufficient to preclude the board of appeals from revoking the permit. The Wisconsin Supreme Court held that because the building permit was issued by the building inspector based on an unreasonable and erroneous interpretation of the city's ordinances, the landowner did not acquire vested rights in the permit. Id. at 530-31. The Court further held that the landowner was not damaged by any expenditures it made between the date the appeal to the board of appeals was filed and the date of the board's decision revoking the permit because "[o]nce the [landowners] received notice of this appeal and the claim that the permit violated the

zoning ordinance, they thereafter proceeded at their peril in incurring expenditures in reliance on the permit.” Id.

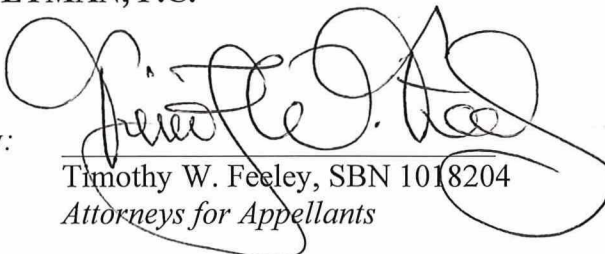
8. Pursuant to Wisconsin Statute §§ 62.23(7)(e)5 and 62.23(7)(e)8, and City of Beloit Ordinance, Chapter 19, § 2-1004, the Appellants’ appeal to the Board of Appeals of the issuance of the Architecture Review Certificate and the Certificate of Zoning Compliance on February 14, 2022, operates as a stay on the legality of the permit, such that any action or further construction in reliance upon the approval is stayed pending a final decision by the Board of Appeals unless such action would not require a permit or other approval under the City’s Ordinances. Appellants therefore seek an immediate Order by the Board of Appeals either implementing the stay on further construction as set forth in Wisconsin Statute §§ 62.23(7)(e)5 and 62.23(7)(e)8, and City of Beloit Ordinance, Chapter 19, § 2-1004, or, alternatively, the issuance of an Order under Wisconsin Statute §§ 62.23(7)(e)8 requiring the Zoning Officer to institute the proper action to enforce the negated effect of the stayed permit in the event he fails or refuses to do so on his own.

Dated this 22nd day of March, 2022.

**HALL, RENDER, KILLIAN, HEATH
& LYMAN, P.C.**

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**BEFORE THE CITY OF БЕЛОIT
BOARD OF ZONING APPEALS**

In the matter of the appeal of:

BELOIT HEALTH SYSTEM
1969 West Hart Road
Beloit, WI 53511;

and

NOMMO DONALD
2885 East Deer Path Court
Beloit, WI 53511

Regarding the property located at:

2102 Freeman Parkway
Beloit, WI 53511
Tax Parcel No. 22031650

**CITY OF БЕЛОIT’S OPPOSITION TO MOTION TO
STAY FURTHER CONSTRUCTION**

In a motion filed on March 22, 2022, BHS requested that the Board order OrthoIllinois to stop construction at the development site, at least until this appeal is resolved. The Board should deny the motion because it does not have statutory authority to issue the kind of stay order that BHS requests, and BHS identifies no legal authority to the contrary.

Section 62.23(7)(e)5., with which Ordinance ch. 19, §2-1004, substantially overlaps, details when a stay occurs and who can order one:

An appeal shall stay all legal proceedings in furtherance of the action appealed from, unless the officer from whom the appeal is taken certifies to the board of appeals after the notice of appeal shall have been filed with the officer, that by reason of facts stated in the certificate a stay would, in the officer's opinion, cause imminent peril to life or property. In such case proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by a court of record on application, on notice to the officer from whom the appeal is taken, and on due cause shown.

This provision can be broken down into three main parts. First, the default rule is that an appeal “stay[s] all legal proceedings.” Second, that default rule does *not* apply when the relevant official “certifies” to the Board that a stay would “cause imminent peril to life or property.” When the official does so, “proceedings shall *not* be stayed.” Third, either the Board or a court can override the official’s certification upon “due cause” and enter a “restraining order” re-imposing a stay. In other words, the default is that an appeal causes a stay; an official can override that default and *lift* the stay by showing imminent peril; and the Board or a court can likewise override that official and *re-impose* a stay.

This statute therefore allows the Board itself to issue stay orders in only one narrow circumstance: where an official has lifted the stay by certifying that it would cause imminent peril, the Board can disagree and grant a restraining order re-imposing the stay. Put differently, the statute empowers the Board to order a stay only when, upon a showing of “due cause,” it desires to override a zoning officer’s certification of imminent peril. When, however, a zoning officer has *not* certified to the Board that a stay would cause imminent peril—and that has not happened here—nothing in the statute grants the Board any power to issue orders staying ongoing construction (or anything else, for that matter).

Because Ordinance ch. 19, § 2-1004 has the substantially the same language and structure,¹ this same analysis applies to the Board’s power under that provision, too. Just like Wis. Stat. § 62.23(7)(e)5., the ordinance also does not empower the Board to grant stays under these circumstances, where no certification of imminent peril has been made.

The only arguably relevant authority BHS cites (an out-of-state trial court decision from 65 years ago) simply underscores how it has asked the wrong entity for a stay. In *Blum v. O’Connor*, 163 N.Y.S.2d 516 (N.Y. Sup. Ct. 1957), landowners were unhappy about a building permit issued by a town. They therefore asked a *state court*, not a municipal board of appeals, to enjoin the permit’s issuance under a statute similar to section 62.23(7)(e)5. Like here, the zoning officer in *Blum* had not filed a “certificate” of imminent peril, *id.*, and so that zoning board also had no power to order a stay. This case therefore shows that zoning boards are the wrong entities to ask for a stay, as BHS has done.

And even if the Board could order a stay here, it can only stay “proceedings” under Wis. Stat. § 62.23(7)(e)5. and Ordinance ch. 19, § 2-1004. Black’s Law Dictionary defines a “proceeding” as “express[ing] the business done in courts” or “[a]ny procedural means for seeking redress from a tribunal or agency.” *Proceeding*, Black’s Law Dictionary

¹ The ordinance reads: “The filing of a complete notice of appeal stays all proceedings in furtherance of the decision appealed unless the official whose decision is being appealed certifies to the Board of Appeals, after the appeal is filed, that, because of facts stated in the certification, a stay would cause immediate peril to life or property. In such case, proceedings shall not be stayed other than by a restraining order, which may be granted by the Board of Appeals, or by a court of record.”

(11th ed. 2019). BHS has not pointed to any such ongoing “proceeding” that could be stayed; it identifies only ongoing construction pursuant to an already-issued building permit. And even if OrthoIllinois’ building permit was issued through a “proceeding,” that proceeding has since ended and there is nothing ongoing to stay. If the statute and ordinance had instead meant to pause construction pursuant to existing permits, they would have said so expressly—but they did not. There is therefore no basis to order a construction halt, even if the Board had the power to do so.

BHS’s motion for a stay should therefore be denied for all these reasons.

Dated: April 1, 2022.

STAFFORD ROSENBAUM LLP

By: /s/ Colin T. Roth

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BEFORE THE CITY OF БЕЛОIT BOARD OF ZONING APPEALS

In the matter of the appeal of:

BELOIT HEALTH SYSTEM
1969 West Hart Road
Beloit, WI 53511;

and

NOMMO DONALD
2885 East Deer Path Court
Beloit, WI 53511

Regarding the property located at:

2102 Freeman Parkway
Beloit, WI 53511
Tax Parcel No. 22031650

**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
REGARDING MOTION TO STAY FURTHER CONSTRUCTION**

Findings of Fact

1. On March 22, 2022, the appellants moved the Board to stay further construction at the Property.
2. No “proceedings” relating to this appeal, as that term is used under Wis. Stat. § 62.23(7)(e)5. and ch. 19, § 2-1004 of the City zoning ordinance, are pending or ongoing.
3. The City officer from whom this appeal was taken has not certified that a default stay under Wis. Stat. § 62.23(7)(e)5. and ch. 19, § 2-1004 of the City zoning ordinance should be lifted, as required prior to Board action to impose a stay.
4. The appellants have not shown due cause as to why a stay of further construction on the Property should be issued. The Board determines that there is not due cause to issue such a stay.

Conclusions of Law

1. No “proceedings” relating to this appeal, as that term is used under Wis. Stat. § 62.23(7)(e)5. and ch. 19, § 2-1004 of the City zoning ordinance, are pending or ongoing. In this context, “proceeding” refers to business done in courts or procedural means for seeking redress from a tribunal or agency. Because no such proceedings are ongoing, there is no default stay that arises as a matter of law related to the ongoing construction of the Project. Objections to this conclusion may only be raised in circuit court by writ of mandamus, not by seeking a stay order from the Board.
2. Even if there are “proceedings” of the type described in the previous paragraph to be stayed in this matter, the Board only has the legal authority to issue a stay in one, narrow circumstance under Section 62.23(7)(e)5. and ch. 19, §2-1004 of the City zoning ordinance. The Board may only do so if and after the appropriate city officer has taken action to lift that preexisting stay. In that and only that circumstance, and subject to conditions, the Board may then act to override the City officer and reinstate the preexisting stay. That circumstance has not occurred, and therefore the Board has no authority to issue a stay.
3. Even if the Board had authority to issue a stay of further construction on the Property, because the appellants have not shown due cause as to why a stay should be issued, and the Board has not otherwise been informed of such due cause, a stay cannot be issued.

Proposed Order

1. The motion to stay further construction on the Property is denied.

**CITY OF BELOIT
ZONING BOARD OF APPEALS**

In re: Appeal of Administrative Decision
By Beloit Health Systems and
Nommo Donald

File No. 2022-01

**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF
APPLICANT ROCKFORD ORTHOPEDIC ASSOCIATES, LTD. D/B/A
ORTHOILLINOIS**

The Applicant, Rockford Orthopedic Associates, Ltd., doing business as OrthoIllinois, by its attorneys, Dillon & Grube LLC, respectfully submits the following Proposed Findings of Fact, Conclusions of Law, and Order for the consideration of the Beloit Zoning Board of Appeals (ZBOA) in this matter.

Background on OrthoIllinois (OI).

1. Applicant, Rockford Orthopedic Associates, Ltd., does business under the trade name OrthoIllinois, and is referred to as “OI” in this submission.

2. OI was founded in 1967 in Rockford, Illinois. Today OI is a nationally renowned bone and joint provider delivering university-quality care to its patients. OI currently operates its medical practice at five clinics in Illinois that are located in Algonquin, Elgin, McHenry, and two locations in Rockford. OI has also been operating an Ambulatory Surgery Center (“ASC”) in Rockford for over 17 years that is accredited by the Accreditation Association for Ambulatory Health Care, and OI has initiated the process to open a second ASC in Elgin.

3. A primary metric used to evaluate an ASC’s safety record is the number of patients who must be transferred from the ASC to a trauma center because of surgical complications. On that metric, OI’s safety record is phenomenal: OI performed over 4,000 procedures annually from 2016 to 2020, and OI transferred only 8 patients annually, for an average transfer rate of 1 transfer out of every 500 procedures. This low transfer rate is a testament to the high-quality care OI provides. OI’s Rockford ASC has been a model of safety and efficiency.

Background on Ambulatory Surgery Centers or “ASCs”

4. ASCs are modern healthcare facilities that focus on providing same-day surgical care, including diagnostic and preventive procedures. ASCs have transformed the outpatient surgery experience for Americans over the last 40 years by offering them a convenient alternative to hospital-based procedures with a strong record of excellent patient outcomes. It is because ASCs deliver such good outcomes that Medicare has increased the number of procedures ASCs may perform from 200 procedures in 1982 to

over 2,400 procedures in 2004. It is for the same reason that the number of ASCs nationwide grew from just 1,000 in 1998 to over 5,000 in 2010.

5. Just as ASCs are not new to the nation, they are not new to the State of Wisconsin, either. According to records maintained by the Wisconsin Department of Health Services, 87 ASCs are operating in Wisconsin today (as of June 2021). Those ASCs are dispersed around the state but are generally located in areas of significant population, as there are 22 ASCs in Milwaukee County, 11 in Waukesha County, 6 in Dane County, 6 in Kenosha County, 6 in Outagamie County, 5 in Winnebago County, 3 in Brown County, 3 in Washington County, and 2 in Racine County.

6. ASCs are also operating in northern Illinois. For example, there are 4 ASCs operating in Winnebago County today, including Beloit Health System's ASC in Roscoe, Illinois.

Because BHS objected to OI's attempt to develop an ASC on Gateway Boulevard on the grounds that an ASC constituted a "hospital use," OI abandoned its efforts to develop an ASC on Gateway Boulevard and redirected its efforts to locating property in Beloit that was already zoned to allow "hospital" uses as a permitted use.

7. In 2020, OI decided the next natural step in growing its practice would be to open a new ASC in southern Wisconsin, where OI plans to provide a narrow range of orthopedic surgical procedures purely on an outpatient basis.

8. After considering several locations for its Wisconsin ASC, OI decided Beloit would be the ideal place for the Wisconsin ASC because 1) Beloit is closest to OI's existing operations in Illinois and 2) Beloit has a reputation of being a community that welcomes new economic development of the sort OI's facility would create.

9. OI has always anticipated that its Beloit ASC would include a few attached-but-separate overnight stay rooms because OI anticipates many of its Beloit patients could be traveling long distances to Beloit from the areas where OI has other facilities in Illinois and may wish to make use of an overnight stay room for the sake of convenience.

10. To be clear, no patient admitted to OI's ASC will ever stay in the ASC for more than 24 hours. Instead, each patient will be discharged from the ASC within 24 hours of admission. To the extent that OI patients make use of the overnight stay rooms the night before a surgery, they will not be admitted until the day of the surgery. To the extent that OI patients make use of the overnight stay rooms after a procedure, the patients will always be discharged from the ASC, first, and then move to an overnight stay room in a completely separate area of OI's facility.

11. In the fall of 2020, OI first proposed to build its Wisconsin ASC at a location on Gateway Boulevard that was zoned for M-2 uses.

12. After OI submitted its 2020 proposal to City staff, OI engaged in collaborative consultations with the City's Planning and Building Services team about OI's

proposal. To the extent that those consultations related to compliance with the zoning ordinance, City staff advised OI that because ASCs were not a defined use in the zoning ordinance as it existed at the time, City staff was required to perform a similar use interpretation to determine where OI's proposed ASC could be located. City staff further advised OI that 1) City staff felt the proposed use most closely resembled a medical clinic or office use as those terms are used in the ordinance, and 2) the City would therefore require OI to seek a conditional use permit (CUP) if OI moved forward with its proposal to develop an ASC on the Gateway Boulevard property, as the M-2 zoning for the Gateway Boulevard property only allowed office uses as a conditional use.

13. OI followed the direction OI received from City Staff by applying for a CUP to develop an ASC on the Gateway Boulevard property on October 20, 2020. See BHS 2021 ZBOA Appeal at Bates 28 **(OI Exhibit 2 at OI 022)**. (“[OI’s] action to submit an application for the proposed use was directed by the City of Beloit Planning and Building Services Division”).

14. The Plan Commission conducted a virtual meeting regarding OI's application for a CUP to develop an ASC at the Gateway Boulevard property on November 18, 2020. During the meeting, the Plan Commission received extensive objections to the proposal from the Beloit Health System (“BHS”). See BHS 2021 ZBOA Appeal at Bates 28-31 **(OI Exhibit 2 at OI 022-024)**. (BHS' summary of BHS' objections made to the Plan Commission regarding OI's proposal). During the meeting, “Tim Feeley, attorney for Beloit Health System, explained that an ambulatory surgery center is not listed in the use table and that they must compare this use to what is in the use table, and that a hospital is the use that is most similar to this use.” See Minutes of Plan Commission Meeting of November 18, 2020 **(OI Exhibit 1 at OI 001-009)**. After the Plan Commission considered BHS' objections, the Plan Commission deadlocked on OI's requested CUP and therefore did not approve it. See Minutes of Plan Commission Meeting of November 18, 2020, at page 8) **(OI Exhibit 1 at OI 008)**.

15. After the Plan Commission did not approve OI's requested CUP, OI withdrew its application for a CUP allowing it to operate an ASC on Gateway Boulevard as an office use. OI then asked City staff to perform a similar use analysis as BHS had argued City staff was required to do. The Zoning Officer performed that analysis and concluded a similar use interpretation could not be made. Upon concluding OI's proposed ASC would constitute a new or unlisted use under the zoning ordinance, the Zoning Officer determined OI's proposed ASC would be a permitted use at the Gateway Boulevard property due to its M-2 zoning. See Ordinance Section 6.1.6 **(OI Exhibit 16 at OI 695-697)**. (“In the event that a similar use interpretation cannot be made, the proposed use shall be allowed as a conditional use in the M-1 district or as a permitted use in the M-2 district”).

16. BHS challenged the Zoning Officer's conclusion that OI's would be a permitted use on the Gateway Boulevard property by filing an appeal with this ZBOA. See BHS ZBOA 2021 Appeal. **(OI Exhibit 2)**. In that appeal, BHS advanced several arguments relevant to this matter. Specifically, BHS argued:

a. Because OI's proposed ASC was not a new or unlisted use, and instead was a "hospital" use as the term was then defined in the ordinance, the Zoning Officer acted arbitrarily by deciding otherwise. See BHS ZBOA 2021 appeal at Bates 33-37 **(OI Exhibit 2 at OI 27-31)** ("had the Zoning Officer actually applied the Similar Use Interpretation Criteria and Compared [OI's] proposed use to the Use Category for 'hospitals,' he would have concluded that the proposed use was a hospital use").

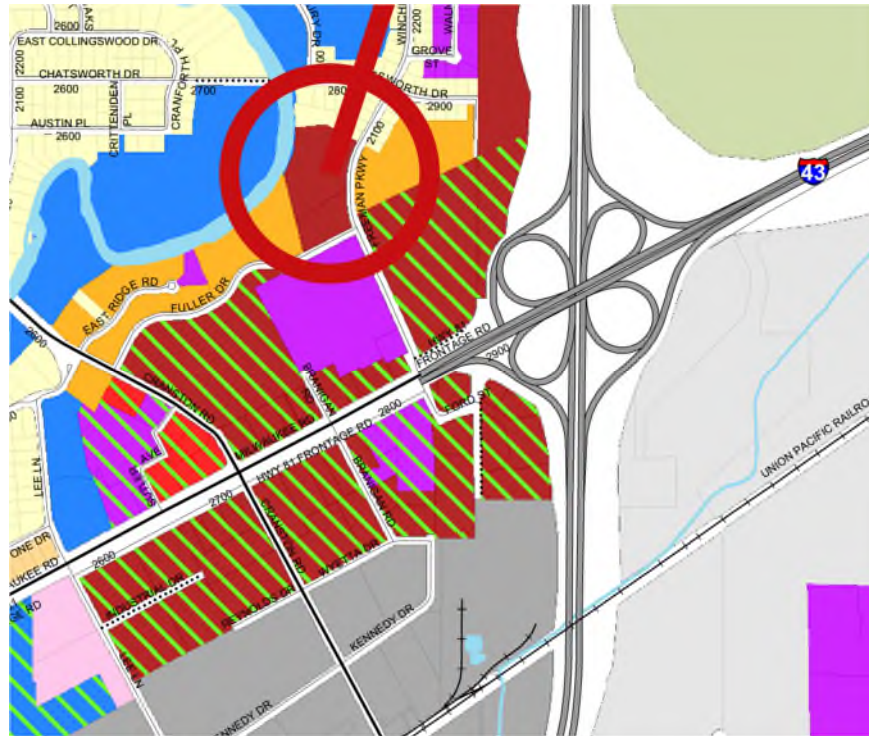
b. Because "Orthollinois' proposed use . . . contained two principal uses: an ambulatory surgery center and a hotel for patients to stay overnight," the Zoning Officer had "disregarded the requirements of the ordinance that a hotel use can only be permitted in the M-2 district by a CUP." See BHS ZBOA 2021 appeal at Bates 38 **(OI Exhibit 2 at OI 32)**.

c. "[H]ad the Zoning Officer actually applied the Similar Use Interpretation Criteria and Compared [OI's] proposed use to the Use Category for 'hospitals,' he would have concluded that the proposed use was a hospital use." See BHS ZBOA appeal at Bates 35 **(OI Exhibit 2 at OI 29)**.

17. The ZBOA scheduled a contested case hearing regarding BHS' appeal for March 9, 2021. Before that contested case hearing occurred, however, OI decided to abandon its efforts to develop an ASC at the Gateway Boulevard location and therefore withdrew its application. OI's decision to withdraw its application was informed by OI's observation that BHS apparently intended to oppose OI's development of an ASC in Beloit by any means necessary – including by trying to intimidate City staff and embroiling the City and OI in contentious litigation for as long as BHS possibly could. OI determined that rather than waste everyone's time and resources fighting over zoning issues relating to the Gateway Boulevard property, the better approach would be for OI to search for alternate properties in Beloit that were already zoned to allow hospital uses as a permitted use as a matter of right, with OI's idea being that if OI could find such a parcel, it would satisfy BHS' objections and BHS could not possibly be heard to object that OI's proposed use would violate the zoning ordinance.

The zoning and use history of the 2000 and 2102 Freeman Parkway properties at issue (the "OI Property") shows the OI Property has always been zoned for C-3 uses.

18. On May 12, 2021, OI entered into an agreement under which OI agreed to purchase the two subject parcels in these proceedings, a/k/a the "OI Property." The OI Property is identified on the City of Beloit Zoning Map as of August 23, 2021, set forth at **OI Exhibit 4 (OI 76)**; a close-up excerpt of the map is below; OI's two parcels are circled in red.



19. The OI Property is the former location of the well-known Manor Restaurant. For details about the historic uses of the OI property’s historic use, please **OI Exhibits 13 and 14 (OI 670-676)**, which are incorporated by reference as though fully set forth herein.

20. It is undisputed the OI Property is currently zoned for C-3 uses. See the City of Beloit Zoning Map as of August 23, 2021, set forth at **OI Exhibit 4 (OI 76)**; see also BHS’ Board of Appeals Application Form, page 1 (acknowledging the “present zoning” of the OI Property is “C-3”).

21. Because the list of zoning text and map amendments set forth in Appendix A to the ordinance does not show the OI Property has been rezoned since the zoning ordinance was first adopted, it appears the OI Property has always been zoned for C-3 uses throughout the entire existence of the City’s zoning ordinance.

With the enactment of City Ordinance No. 2719 effective September 29, 2021, the City Council determined that ASCs are permitted medical facility uses in the C-3 District.

22. In the wake of BHS’ objections to OI’s efforts to develop an ASC on Gateway Boulevard, City staff initiated a review of the zoning ordinance so that the City Council could determine the zoning districts in which ASC uses should be allowed in the City. As City staff’s report to the Council explains:

In 2020, the Planning and Building Services Division received a request to develop an ambulatory surgery center in the City of Beloit. The existing

zoning ordinance does not explicitly address ambulatory surgery centers which caused a great deal of confusion and litigation. The City has an obligation to provide for such a use within the city, and the governing body must decide in which zoning districts such uses should be allowed.

When staff was reviewing this matter, staff found that in addition to the lack of a definition for ambulatory surgery centers, the city's existing zoning ordinance did not adequately address other medical facility uses, including, but not limited to, hospice facilities and skilled nursing facilities. Therefore, a comprehensive update was prepared that staff believes better addresses all medical facility uses in the city.

See Community Development Department Report to City Council dated September 7, 2021 (**OI Exhibit 6 at OI 088-089**).

23. On September 3, 2021, OI submitted written commentary to the City Council regarding the proposed amendment to the zoning ordinance. See **OI Exhibit 5 at OI 077-087**). In relevant part, OI's submission to the Council noted

There is no factual basis for BHS to argue the proposed amendment was written to favor OI because OI is already under contract to acquire land that will allow OI to develop an ASC in Beloit even if no amendments to the ordinance are made. OI is under contract to acquire land in Beloit that is zoned for C-3 uses and allows "hospital" uses as permitted uses. As a result, there can be no argument that the proposed amendment has been designed to favor OI. If the Council decides to amend the ordinance as proposed by the Plan Commission, then OI will be pleased to proceed with its anticipated development under the ordinance as amended. On the other hand, if the Council decides not to amend the ordinance as proposed by the Plan Commission, then OI will be pleased to proceed with its anticipated development of its Beloit ASC under the ordinance as it exists today. The delay in OI's efforts to resume its development efforts in Beloit was caused by OI's search for other suitable property and other issues, and had nothing to do with this proposed zoning change whatsoever.

Because OI's targeted property will allow OI to develop a Beloit ASC regardless of whether the ordinance is modified, any claim by a BHS objector that the proposed amendment was drafted as an act of favoritism for OI's benefit is simply untrue, and it unfairly and improperly impugns the professional integrity of City personnel who have devoted time to this issue. The need for the ordinance to be amended was made painfully apparent by BHS' vehement objections to OI's initial proposal and subsequent litigation behavior. It is not "favoritism" for City staff to recommend changes to the ordinance when such uncertainties arise, it is exactly what the language of the ordinance requires City staff to do. And, given the scope of the changes City staff has proposed, it is obvious the changes affect more than ASCs and are not intended to favor any medical

use over another. City staff has done their jobs in a straightforward and by-the-book fashion, and the decision of the BHS objectors to malign City staff for their recommendations only goes to reveal the intensity with which BHS wishes to maintain its monopoly here in Beloit.

24. After the Plan Commission recommended the City Council approve City staff's proposal to amend the zoning ordinance as noted above, the City Council received public comment on the proposed amendment during the Councils' regular meeting on September 7, 2021. See City Council Minutes of 9/7/2021 (**OI Exhibit 7 at OI 207-215**). During that meeting, BHS' Attorney Timothy W. Feeley objected to the proposed amendment on the grounds that the proposed amendment was contrary to the City's comprehensive plan. More specifically, Mr. Feeley stated:

Final point. I would say, we understand, and **I don't think it's any secret**, um, with respect to any of you, **that now we're looking at the old Manor Restaurant property on Freeman Parkway at Fuller Road**. You all probably remember, maybe 7-8 years ago when the statutes were revised and you had to develop a comprehensive plan that included a future zoning map. You probably spent thousands of dollars in doing that exercise, and having public hearings. **The property that Orthollinois is currently looking at is slated on your comprehensive plan and on your future land use map as a residential development. That property is vacant now**. Why would you want to go against your comprehensive plan without going through the public hearing process which would be required by the statute and take steps now that are directed only to assist with the development there that's inconsistent with your comprehensive plan, that just doesn't seem to make any sense. You know, you think about that layout, you got Menard's, you got Fuller Road, and then you have townhomes, townhomes, townhomes, townhouses, and then single family residence. That's why you placed on your land use map that that was going to be a residential use. **This development that we all seem to be working for, or at least that's the intent, would be inconsistent with that. And I ask you to consider that as well.**

See Youtube Video of Proceedings at <https://www.youtube.com/watch?v=KLMGNIjOaQY&list=PLrLKzQ3PZwsfCuXpokF7TG6eFremppBhRe&index=12> (emphasis added).

25. On September 20, 2021, the City Council passed Ordinance No. 3719, thereby implicitly rejecting Mr. Feeley's contention that amending the ordinance to allow ASC uses of the OI Property would be inconsistent with the City's comprehensive plan. **CITY 465-470.**

There is a sensible explanation for why the submissions OI made to the City regarding the proposed ASC initially referenced “nursing” uses and later omitted them.

26. Before the Council amended the zoning ordinance as noted above, starting in early September 2021, OI began submitting various applications for the City’s review regarding OI’s proposed development of an ASC on the OI Property. See **CITY 009 et seq.**

27. After the City received OI’s early September 2021 applications noted above, City staff informed OI that City staff would not deem OI’s applications to be complete or proceed to consider them until OI also submitted an application for a building permit. OI ultimately submitted an application for a building permit on September 29, 2021, the same day Ordinance No. 3719 became effective. See **CITY 37.**

28. When OI first began submitting the above-noted applications to the City to develop an ASC on the OI Property in early September 2021, OI planned to develop an ASC with overnight stay rooms as noted above, and to seek licensing of the overnight stay rooms as a skilled nursing facility through the State of Wisconsin.

29. Because OI initially planned to license the overnight stay rooms as a skilled nursing facility, OI’s initial permit applications submitted to the City in early September 2021 reference “nursing” uses. For example, the initial submissions indicate the proposed use would consist of “a new Nursing Home attached to a new Ambulatory Surgery Center.” See **CITY 9.** The initial submissions also indicate “This project consists of a new one story 26,571 gross total square foot orthopedic Ambulatory Surgery Center . . . The 20,426 square foot ASC will consist of four operating rooms, twelve pre-post recovery rooms, four PACU recovery bays, sterile core, sterile processing department and support space. The remainder of the space is a six (6) room patient care / nursing suite where patients may choose overnight accommodations.” See **CITY 10.**

30. Consistent with OI’s plan to seek licensing of the overnight stay rooms as a skilled nursing facility, OI submitted plans for approval to the Wisconsin Department of Health Services (DHS) on September 14, 2021. On October 25, 2021, however, the DHS wrote to OI to advise OI that “In Wisconsin , nursing home bed [sic] are regulated. Currently all nursing home bed [sic] are assigned and no new beds are available. . . . If the nursing suite [referenced in OI’s submission to DHS] is part of the ASC, the building is not a Hospital, Nursing Home, or CBRF and [DHS] does not have the authority to review the drawings.” See **CITY 216-17.**

31. Because DHS advised OI that OI could not secure nursing home licensing for the proposed overnight stay rooms until nursing home beds came open in Wisconsin, and because OI had no control over when nursing home beds might come open, OI reassessed the potential regulation of OI’s overnight stay rooms. Upon reassessing that question, OI concluded 1) the overnight stay rooms could be registered and regulated through the State of Wisconsin as a residential care apartment complex (“RCAC”), and 2) if and when OI’s overnight stay rooms were registered as an RCAC, the overnight stay

rooms would constitute a permitted use of OI's property in the C-3 zoning district for reasons that are explained in more detail below.

32. On November 2, 2021, a conference call occurred between the Zoning Officer and OI's development team, consisting of OI's Don Schreiner and Anthony Brown, and Dave Mikos and Mike Hunt of OI's architectural firm Anderson Mikos. From OI's perspective, one important purpose of the call was to inform the Zoning Officer of OI's intent to seek registration of the overnight stay rooms as a RCAC and to confirm the OI Property was zoned properly for such a use under the zoning ordinance as amended by the Council through City Ordinance No. 3719. Before the call occurred, on 10/28/21, OI's legal counsel circulated an email memo to the OI team summarizing OI's analysis of the zoning issues. A true and accurate copy of that email memo is included in OI's exhibits. **See OI Exhibit 11 at OI 660-663.** During the ensuing conference call, the OI team reviewed the analysis set forth in the email memo and explained OI's position on zoning issues under the amended ordinance to the Zoning Officer. OI's analysis is discussed further below.

33. The Zoning Officer did not disagree with OI's zoning analysis during the above-noted conference call. The Zoning Officer also expressed his view that since the C-3 zoning for the property permitted Medical Facility uses, OI's proposed overnight stay rooms should properly be viewed as an accessory use to the ASC / medical facility, and no separate zoning analysis for the overnight stay rooms was therefore necessary.

34. Because the Zoning Officer expressed his view during the above-noted conference call that the overnight stay rooms would constitute an allowable accessory use that would be permitted as part of the principal use of an ASC as a medical facility, the materials OI submitted to the City for further review of the project after the conference call occurred largely omit any reference to the overnight stay rooms as being a use separate from the ASC / medical facility component of the use. The straightforward explanation for this is that because the City was not considering the uses to be separate to the best of OI's knowledge, there was no need for OI to address the uses as being separate in any subsequent submissions. See, e.g., CITY 221 (site plan describing project as "Ambulatory Surgery Treatment Center"); CITY 225 (describing project as "Proposed Medical Facility"); CITY 229 ("ASTC & Extended Stay"); etc.

35. For the same reasons, the communications the Zoning Officer transmitted to OI following the above-noted conference call regarding the proposed development also omit reference to the overnight stay rooms as being a use separate from the primary use of an ASC / medical facility. See, e.g., CITY 379 (referencing the project as a "Proposed Medical Facility"); CITY 418 ("Ambulatory Surgery Center"); CITY 428 (building permit issued describing work as "ORTHOPEDIC AMBULATORY SURGERY CENTER"); and CITY 429 (Architectural Review Certificate and Certificate of Zoning Compliance referring to project as "Medical Facility" and stating, "The Planning & Building Services Division has received the architectural and site plans for the construction of a new 26,571 square foot Medical Facility on the property located at 2102 Freeman Pkwy in the City of Beloit. This development includes the construction of an Ambulatory Surgery Center building . . .").

The permit at issue

36. On January 14, 2022, the Zoning Administrator issued a building permit, certificate of zoning compliance, and architectural review certificate to OI, and thereby permitted construction of OI's project to proceed. See **CITY 428-29**.

BHS' appeal and motion

37. On February 14, 2022, BHS initiated this appeal. The issues raised in BHS' appeal are addressed below.

38. On March 22, 2022, BHS filed a "Motion to Stay Further Construction on the Property Located at 2102 Freeman Parkway Pending a Final Decision of the Beloit Board of Appeals". The issues raised in BHS' motion to stay are addressed below.

Controlling Law and Standards of Review

39. The ZBOA has the following powers under Wis. Stat. § sec. 62.23(7)(e)7, Stats:

To hear and decide appeals where it is alleged there is error in any . . . determination made by an administrative official in the enforcement of this section or of any ordinance adopted pursuant thereto; to hear and decide special exception to the terms of the ordinance upon which such board is required to pass under such ordinance; to authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in practical difficulty or unnecessary hardship . . .

40. "In exercising the above mentioned powers [the ZBOA] may, in conformity with the provisions of such section, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from, and may make such order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken, and may issue or direct the issue of a permit." Wis. Stat. § 62.23(8).

41. Importantly, in exercising the above-mentioned powers, the ZBOA has no power or authority to question the validity or wisdom of the zoning ordinance as the City Council has enacted it. The ZBOA's only function in this appeal is to apply the ordinance as it has been written by the Council. **Ledger v. Waupaca Board of Appeals**, 146 Wis.2d 256 (Ct. App. 1988). As the **Ledger** court explained, zoning boards of appeal

are creatures of the legislature, not unlike state administrative agencies. As such, their powers are limited by the statutes creating them and defining their authority. Every administrative agency must conform precisely to the statutes from which it derives power. Moreover, the powers of such agencies are legislative, not judicial in their nature. They do not include the authority

to ignore or invalidate any part of a duly adopted zoning ordinance. ***The board must accept the ordinance as written.***

Id. at 263 (citations omitted) (emphasis added). Consistent with this mandate, the ZBOA’s rules of procedure state, “The Board does not have authority to amend or repeal any provision of the zoning ordinance. Its sole authority is to interpret the ordinance and apply its provisions to the factual situation presented.” See ZBOA Guidelines for Board of Appeals Meetings, Section 5.

42. The ZBOA may and should take judicial notice of the content of the City’s zoning ordinance in its entirety as it existed both before and after the Council amended it through City Ordinance No. 3719, including the zoning map included in the Ordinance and found at **OI Exhibit 4 (at OI 076)** which establishes the OI Property is zoned for C-3 uses.

43. The City’s comprehensive plan and future land use map are merely guides for future decision-making that have no regulatory effect. Wis. Stat. § 66.1001(2m) (“The enactment of a comprehensive plan by ordinance does not make the comprehensive plan by itself a regulation”). Because the City’s comprehensive plan and future land use plan are not part of the City’s zoning ordinance, and because the ZBOA’s mandate is to accept and apply the zoning ordinance as written, the comprehensive plan and future land use map are irrelevant to the issues raised by BHS’ appeal.

44. Table 6.1-1 of the ordinance lists all the uses allowed within the zoning ordinance’s base zoning districts. Within that table, a “P” indicates that a use is allowed by right in the respective zoning district, subject to compliance with all other applicable regulations of the ordinance. See Ordinance Section 6.1.2. Similarly, a “C” indicates that a use is allowed only if reviewed and approved as a conditional use, in accordance with the CUP procedures of the ordinance. See Ordinance Section 6.1.3.

The ZBOA may and should conclude OI’s Project would be permitted under the old ordinance.

45. As explained above, OI abandoned its efforts to develop the Gateway Boulevard property into an ASC after BHS fought OI’s efforts tooth and nail on the grounds that 1) OI’s proposed use would constitute a “hospital” use under the zoning ordinance as it existed before the Council enacted City Ordinance No. 3719, and 2) such hospital uses were not permitted uses of the Gateway Boulevard property because it was zoned for M-2 uses at the time.

46. When OI began its search for alternate locations in the early part of 2021, OI could not possibly have operated on any expectation the Council would amend the ordinance as it related to OI’s proposed development. As a result, OI focused its search on finding property within the City that was already zoned to allow hospital uses as a permitted use by right.

47. Under the old version of the ordinance, the use table found at Table 6.1-1 clearly stated that “hospitals” were permitted uses in the C-1, C-2, and C-3 districts. The definition of “hospital” uses found at Section 11.2.4.d provided:

1. Characteristics. *Hospitals include uses providing medical or surgical care to patients and offering overnight care.*
2. Accessory Uses. Accessory uses include outpatient clinics, offices, laboratories, meeting areas, cafeterias, parking, maintenance facilities and housing facilities for staff or trainees.
3. Examples. Examples include medical centers and hospitals.
4. Exceptions. Uses that provide exclusive care and planned treatment or training for psychiatric, alcohol, or drug problems, where patients are residents of the program, are classified in the Group Living category. Medical clinics or offices that provide care where patients are generally not kept overnight are classified as Offices. Emergency medical clinics are classified as Retail Sales/Service.

48. OI purchased the OI Property after OI confirmed the OI Property was already zoned for C-3 uses, anticipating the old ordinance would apply.

49. OI respectfully asserts OI’s proposed use of the OI property meets the definition of a “hospital” use under the old ordinance. This is why OI’s written commentary to the Council regarding draft City Ordinance No. 3719 openly noted that the Council’s passage of the ordinance amendment would not affect OI’s proposed development, as 1) the proposed development already met the definition of a hospital use under the old version of the ordinance such that OI could proceed with the project on the OI Property as a matter of right if the ordinance were not amended, and 2) OI’s proposed development would also be a permitted use on the OI Property as a matter of right if the Council saw fit to enact the amendment and thereby clarify that ASCs are medical facilities that are allowed by right on C-3 property.

50. For the reasons noted above, OI’s proposed use of the OI property to develop an ASC with overnight stay rooms constitutes a permitted “hospital” use of the OI property under the old version of the ordinance. The ZBOA should so find.

The ZBOA may and should conclude the Zoning Officer correctly granted approval for OI’s project under the current ordinance because OI’s proposed uses are permitted by right.

51. As noted above, OI’s development team explained to the Zoning Officer in early November 2021 that OI intended to operate the ASC as such, and to register the overnight stay rooms as an RCAC. When OI’s development team provided that explanation, OI’s development team explained as follows.

52. First, the ASC component of OI's proposed use is permitted as a matter of right for the following reasons:

a. The amended ordinance defines "medical facility" in part by stating that "examples [of a "medical facility"] include . . . ambulatory surgery centers" such as what OI proposes to build. See City 467 (amending Ordinance Section 11.2.4.d.3).

b. The amended ordinance updated the use table at Table 6.1-1 to provide that "medical facilities" are permitted uses in the C3 zone. See City 465 (Ordinance No. 3719, Section 3).

c. OI's proposal is to construct and operate an ASC on the property. Because ASCs are permitted uses in the C3 zone, the zoning analysis goes no further, and zoning approval for the ASC component of OI's proposed development should be granted.

53. Next, the overnight stay rooms component of OI's proposed development constitutes a permitted use of the OI Property under the amended ordinance, either as an accessory use as the Zoning Officer determined, or as a "deemed hotel" use for the reasons explained below.

54. Accessory use analysis.

a. Regarding principal and accessory uses, the ordinance states, "Principal uses are assigned to the category that most closely describes the nature of the principal use," and "accessory uses are allowed by right in conjunction with a principal use unless otherwise stated in the regulations." See Ordinance Section 11.2.1.a and 11.2.1.c. "When all principal uses of a development fall within one use category, the entire development is assigned to that use category," and "When the principal uses of a development fall within different use categories, each principal use is classified in the applicable category and each use is subject to all applicable regulations for that category." See Ordinance Section 11.2.1.b.

b. Here, under a principal use versus accessory use analysis, the ASC component of OI's development would clearly be considered as OI's proposed principal use. Because the overnight stay rooms are accessory uses to the proposed principal use just as much as hospital rooms are accessory uses in hospitals, it is appropriate for the Zoning Officer to have concluded that 1) OI's proposed ASC is permitted by right as a "medical facility" in the C-3 district, and 2) OI's proposed overnight stay rooms are an accessory use for the medical facility and therefore permitted by right as well.

55. "Deemed hotel" analysis.

a. Under the "deemed hotel" analysis, zoning for OI's proposed use should be approved because 1) the amended ordinance categorizes RCAC's as a special type of "Group Living" use and directs that zoning officials deem them to be "hotel" uses when lodging is to be arranged for less than 30 days as OI proposes to do, and 2) because hotel uses are permitted by right in the C-3 district, OI's proposed RCAC use should be deemed a permitted use. A detailed explanation of this rationale is set forth in the email

memo OI's development team relied upon in discussing these same issues with the Zoning Administrator. See **OI Exhibit 11 (OI 660-663)**. Rather than restate those points here, OI elects instead to incorporate and adopt by reference the content of that email memo as though it were fully set forth herein. Summarizing the memo's analysis, the Council through the language of the ordinance has already decided that C-3 uses are to be permitted on OI's property, that OI's proposed ASC is a C-3 use, and that OI's proposed overnight stay rooms also constitute C-3 uses as OI has proposed them. It was not unreasonable for the Council to decide such uses should be deemed to be hotels/motels rather than group living uses when tenancies last less than 30 days because such uses more closely resemble hotel/motel uses than residential living uses. Nobody has challenged the Council's wisdom on that question, and because the Council has directed that this is how such uses are to be treated, OI's proposed use already fits the zoning for the property and should be permitted as such.

The ZBOA should reject BHS' appeal for lacking merit.

56. The arguments BHS has advanced in this appeal show that BHS does not understand the most basic principles of Wisconsin zoning law. BHS' arguments are without merit for the following reasons.

57. First, BHS fails to recognize that the Zoning Officer and the ZBOA are both entitled to conclude that OI's proposed use constitutes a "hospital" use that is permitted by right in the C-3 district under the old ordinance, *just as BHS previously argued to the Plan Commission and to the ZBOA*.

58. Next, to the extent that BHS raises arguments dependent upon the comprehensive plan, BHS' arguments miss the mark because the comprehensive plan has no force of law and the ZBOA has no power to consider it here. The only thing BHS has shown by arguing the ZBOA should overturn the Zoning Officer's approval of OI's proposed development because the approval "contradicts the City of Beloit Comprehensive Plan" is that BHS does not understand Wisconsin Zoning 101. As noted, the City's comprehensive plan and future land use map are to serve as *guides* for the Council in considering *potential future changes* to the zoning ordinance. Because the plan is not an ordinance in and of itself, and because it has regulatory effect on OI's proposed use, and because controlling law instead requires the ZBOA to limit its review to interpreting and applying the ordinance *as the Council has enacted it*, every argument BHS has advanced in reliance on the comprehensive plan is irrelevant.

59. Next, although the ZBOA's sole function is to interpret and apply the zoning ordinance as written, BHS' appeal offers no cogent analysis of how the zoning ordinance applies to OI's proposed development and no coherent argument as to how the Zoning Officer failed to apply the ordinance properly. For example:

a. Within the same paragraph, BHS asserts "medical facility uses are not permitted on the property by right under . . . Ordinance No. 3719" despite the fact that Section 3 of Ordinance No. 3719 *expressly amends Table 6.1-1 of the Zoning Ordinance to add "Medical Facility" as a new use and to establish that medical facilities are permitted uses in the C-3 district*, and despite the fact that OI admits a couple paragraphs

later that “a medical facility “includes an ambulatory surgical center” as OI has proposed. See BHS’ Appeal, Attachment A, pages 1-2. Since BHS’ misreading of the ordinance on this point is so glaringly obvious, and since the ZBOA has no power to disregard the plain language of the ordinance as BHS’ argument would have the ZBOA do, the ZBOA should reject BHS’ argument out of hand.

b. Next, BHS argues that at page 2 of its appeal attachment that OI’s development “may only be permitted on the property by a conditional use permit,” but BHS’ appeal is devoid of a single reference to the use table, and there would be no basis for BHS to argue a CUP is required for any aspect of OI’s proposed use if BHS did bother to look at the use table. Again, BHS’ reading of the ordinance is so blatantly wrong that the ZBOA should reject it out of hand.

c. Next, BHS argues at page 2 of its appeal attachment that the Zoning Officer erroneously granted approval for OI’s proposed development of an ASC because the Zoning Officer failed to compile a record sufficient to show whether the proposed *overnight stay rooms* would also be permitted somehow, leaving BHS to speculate as to what the use of the overnight stay rooms will be and therefore object that “it’s all not allowed” just because BHS doesn’t get it. The absurdity of this argument is laid bare by the recognition that if OI submitted the exact same application for *an ASC only*, OI’s proposed use would be permitted as a matter of right because an ASC is a medical facility that is permitted in the C-3 district. Because the ASC is clearly permitted, BHS cannot possibly argue the Zoning Officer’s approval of the ASC use was wrong. And because BHS cannot possibly make that argument, BHS’ real argument amounts to a concern that OI’s use of the overnight stay rooms might someday, somehow, constitute a violation of the ordinance. BHS fails to grasp that 1) OI’s use of the overnight stay rooms will constitute a permitted use of the property for the reasons explained above, and 2) even if one were to assume they do not, the appropriate response by the Zoning Officer would be not to deny approval of the ASC use but to permit the ASC use to go forward with conditions on how the overnight stay rooms are used.

d. Finally, to the extent that BHS’ appeal is premised on BHS’ failure to understand the above-described rationales upon which the Zoning Officer and OI development team reached consensus that OI’s proposed overnight stay rooms are a permitted use, either as an accessory use or a “deemed hotel” use that is permitted in the C-3 district, it should be axiomatic that BHS’ failure to understand the basis upon which the zoning approval is granted does not mean the approval was granted in error or that BHS’ appeal has any merit.

The ZBOA should deny BHS’ motion to stay for lacking merit.

60. BHS has moved the ZBOA for an order “staying further construction” on OI’s property on the grounds that BHS’ filing of this appeal triggers an automatic stay of all “proceedings” in furtherance of the action appealed from. The ZBOA should deny BHS’ motion because BHS misreads the plain language of the very law upon which its motion relies. Neither Wis. Stat. § 62.23(7)(e)5 nor Section 2-1004 provide that an appeal to this body automatically stays all *construction activities* being performed on the OI Property. Instead, the statute states, “An appeal shall stay all *legal proceedings in furtherance of*

the action appealed from,” and the ordinance states, “the filing of a complete notice of appeal stays all *proceedings in furtherance of the decision appealed.*” The word “proceedings” is a legal term of art. Although the Wisconsin statutes do not define the word “proceedings,” our statutes are replete with uses of the word that clearly indicate from context that the word refers to legal proceedings, such as a zoning enforcement action brought by a zoning officer, a court action brought by a zoning officer, etc. Here, because there are no legal proceedings that the filing of BHS’ appeal could possibly stay, and certainly no legal proceedings ongoing “*in furtherance of the action appealed from,*” i.e., to further the Zoning Officer’s action to approve OI’s development, there is no reason for the ZBOA to grant BHS’ motion. It should also not be lost on the ZBOA that the only authority BHS has cited in support of its motion comes from single New York state trial court judge who issued a decision in 1957 which BHS believes supports its position, and putting aside the fact that a 65-year old decision from a single New York state judge is far from binding precedent for the ZBOA, BHS’ motion fails to acknowledge that later decisions from other New York trial judges decided similar cases the opposite way. See, e.g., ***Linder v. Incorporated Village of Freeport, et al.***, 61 Misc.2d 667, 305 N.Y.S.2d 581, 582-583 (1969) (“Clearly the actions which are sought to be enjoined are *in furtherance of the inspector’s action in revoking the permit*”).

PROPOSED ORDER

At the conclusion of this appeal, the ZBOA should enter an order as follows:

The Beloit Zoning Board of Appeals, having considered the appeal in this matter, adopts OI’s proposed findings of fact and conclusions of law as its own, and therefore ORDERS that the decision of the Zoning Officer to approve OI’s subject development is AFFIRMED in all respects.

Dated April 1, 2022.

DILLON & GRUBE LLC

Electronically signed by

/s/ Duffy Dillon

Duffy Dillon [WI 1036112]

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STATE OF WISCONSIN
CITY OF БЕЛОIT
BEЛОIT BOARD OF APPEALS

Appeal of Administrative Decision filed by Beloit Health System and Nommo Donald of the Director of Planning & Building Services/Zoning Officer's January 14, 2022 Architectural Review Certificate and Certificate of Zoning Compliance for the Property Located at 2102 Freeman Parkway.

FILE NO. BOA 2022-01

APPELLANTS' NOTICE OF MOTION AND MOTION TO STAY

Appellants Beloit Health System and Nommo Donald hereby move the Beloit Board of Appeals, pursuant to Wisconsin Statute § 62.23(7)(e)8 to stay the proceedings on April 12, 2022, pending receipt of open records from the City of Beloit and Wisconsin Department of Health Services.

The grounds for this motion are as follows:

1. The Appellants timely filed this appeal on February 14, 2022.
2. Between February 14, 2022 and March 10, 2022, Appellants did not receive either an acknowledgment of the filing of the appeal or any notice of the date of a proposed hearing.
3. On March 7, 2022, Appellants sought information relating to the status of the appeal from the Community Development Director of the City of Beloit, but did not receive a response. Instead, an email was received on March 7, 2022, from outside legal counsel for the City of Beloit that stated that outside counsel would confer with the City of Beloit and respond with a statement of the City of Beloit's position within a few days.
4. On March 10, 2022, I received an email from counsel for the City of Beloit which informed the Appellants that Attorney Matthew J. Fleming had been appointed to represent the

Board of Appeals and that the Appellants could contact Attorney Fleming with inquiries related to the status of the appeal.

5. The Appellants, though counsel, emailed Attorney Fleming on March 11, 2022 inquiring about the status of the appeal. The email to Attorney Fleming advised that the Appellants had learned for the first time from an article in the Beloit Daily News that the Board of Appeals had scheduled a hearing on the appeal for April 12, 2022. As of March 11, 2022, the Appellants had not received notice of any hearing, including notice of the purpose for any such hearing.

6. Attorney Fleming responded to the email on March 11, 2022, and indicated that he had received some mixed messages about the April 12th date, but understood the Boards Rules of Procedure established April 12th as the hearing date.

7. The parties participated in a scheduling conference by telephone on March 22, 2022 at 1:30 p.m. A hearing date of April 12th for the appeal was ordered during the scheduling conference.

8. Appellants submitted open records requests to the City of Beloit and the Wisconsin Department of Health Services on March 18, 2022, requesting records related to OrthoIllinois' development which is the subject of this appeal.

9. The City of Beloit provided a copy of the administrative record to the Appellants on March 25, 2022. The administrative record provides records sought by the Appellants through the open records requests, but does not contain email communications between the City of Beloit and its employees, between the City and OrthoIllinois, or communications with other third-parties relating to the City's grant of an Architectural Review Certificate and Certificate of Zoning Compliance on January 14, 2022. No records have been received from the Wisconsin Department of Health Services to date.

10. The Appellants believe that such communications are necessary for the Appellants to receive a full and fair hearing before the Board of Appeals.

11. The Appellants are not bringing this motion for purposes of delay.

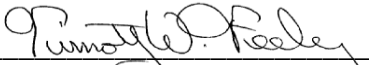
12. The Appellants intention relating to this motion is not to criticize the City of Beloit, the Board of Appeals, or any party or counsel representing a party to this proceeding. Rather, the purpose of this motion is to ensure the Appellants have adequate time to prepare in light of the expedited time frame ordered for the appeal proceedings.

Dated this 1st day of April, 2022.

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