

Waste Management Landfill - Shire Outlot  
Development Moratorium

**ORDINANCE NO. 1958-04**  
by the Plan Commission

WHEREAS, on December 7, 1999 the Common Council of the City of Brookfield adopted and approved Resolution No. 6469, adopting the Year 2020 Master Plan for the City of Brookfield, which plan was also adopted by the City Plan Commission on January 11, 2000; and

WHEREAS, a component of said Plan articulates land use/development goals and objectives for the City; and

WHEREAS, the Plan identified seven "potential additional focus areas", areas where..."The City should monitor activity in these areas to assure they proceed in accordance with community expectations. Objective: Closely monitor and guide activity in identified "focus areas" in order to assure development occurs in accordance to community expectations and overall City goals."; and

WHEREAS, while the geographic extent of the focus areas were not described precisely, it is clear that one of the seven "focus areas" centered on the Waste Management landfill located in Section 20, Town 7 North, Range 20 East in the City of Brookfield, County of Waukesha, State of Wisconsin; and

WHEREAS, Waste Management and NFI Properties LLC have submitted to the City a certified survey map dividing lands containing the landfill into two outlots and a preliminary plat called The Shire containing Outlots 6 - 10 and bounding the north, west and southwest perimeter of the landfill; and

WHEREAS, Special Counsel Richard Lehmann, in an opinion offered to the Plan Commission on March 8, 2004, in the context of preliminary plat review of the Shire and a CSM dividing the remnant lands thereof concluded that the focus area designation was intended and is reasonably interpreted as addressing the portions of the property that constituted the former landfill and adjoining areas that are or may be implicated by migrating environmental contaminants. Although the landfill area is not part of the subdivision, those areas where the DNR and DHFS concluded in their February 5 letter report that presently insufficient data is available for such agencies to assess safety and health suitability with respect to Outlots 6 thru 10 of the Preliminary Plat of The Shire are being placed in no build outlots and may be released from this status only upon further study and city approval; and

WHEREAS, the placement of the lands now identified as Outlots 6 through 10 was mandated by the City, and also concurred in by Developer of The Shire, coupled with conditions of preliminary plat approval adopted on March 16, 2004 that call for Outlots 6 thru 10 to be addressed by the City at one or more later dates on a de novo basis, the conditions being specifically stated in the minutes of the March 8, 2004 Plan Commission Meeting and the March 16, 2004 Common Council Meeting which are attached hereto as Exhibits "A" and "B" respectively. The inclusion of the Outlots in the Plat will convey no presumption that they will later be converted into buildable status, or that their later review will be bound by Ordinances and the City's Master Plan or components thereof that existed at the time of preliminary plat review; and

WHEREAS, the Plan Commission has recommended establishment of a moratorium on consideration of property owner-initiated requests for development approvals or change of platting status of lands within the aforementioned outlots and landfill area to be in effect until August 1, 2006 or until completion and implementation of the work by State agencies to provide the City with site specific guidance on health, safety and contamination issues and City de novo review and action on those issues and release by the City of associated restrictions on the outlots, coupled with City action to establish and adopt development goals and implementation measures for the "focus area," whichever is sooner; and

NOW THEREFORE BE IT ORDAINED, by the Common Council of the City of Brookfield that a moratorium on development considerations or approval with respect to each of Outlots 6 thru 10 as depicted on Exhibit "C" and the outlots depicted on Exhibit "D" until the earlier of (i) August 1, 2006, or (ii) the point in time at which the City has released the outlots from the restrictions contained in Exhibits A & B relating to the Preliminary Plat approval and has adopted measures to define and implement development goals for the focus area; and

BE IT FURTHER ORDAINED, exceptions to this moratorium may be authorized by the Common Council, after recommendation from the Plan Commission, in instances where there has been a demonstrated hardship and a compelling public interest and necessity or fairness and equity for considering and approving requests prior to the ending date of the moratorium are found to exist. Granting of such exceptions may only be done by action of the Common Council and only upon express and technically supported

findings on landfill-related health, safety and environmental safety issues.

ADOPTED AND APPROVED April 6, 2004

Kristine A. Schmidt, City Clerk

Jeff R. Speaker, Mayor

Published: April 15, 2004

# EXHIBIT "A"

THESE ARE THE MINUTES OF **REGULAR PLAN COMMISSION** MEETING HELD ON **MARCH 8, 2004**, AT 7:00 P.M., IN THE COUNCIL CHAMBERS OF BROOKFIELD CITY HALL, 2000 N. CALHOUN ROAD, BROOKFIELD, WISCONSIN

MAYOR JEFF SPEAKER IN THE CHAIR

**COMMISSIONERS PRESENT:** Alderman Jack Shaw, Commissioner Michael Faber, Alderman Gary Mahkorn, and Commissioner Beverly Wentz

**COMMISSIONERS ABSENT & EXCUSED:**

Commissioner Richard Brandt and Alderman Karl Schulz

**ALSO PRESENT:** Director of Community Development Dan Ertl, Planning Administrator Michael Theis, Neighborhood Planner/Designer Carrie Johnson, City Attorney Sue Schalig, Assistant City Attorney Karen Flaherty, Community Development Assistant Sherry Rasmussen, Director of Administration Dean Marquardt, Director of Public Works Tom Grisa, City Engineer Jeff Chase, Alderman Cindy Kilkenny, Alderman Kari Clappier, Alderman Jim Heinrich, Alderman Steven Ponto, Alderman Scott Berg, Alderman Tom Schellinger

## 5. The Shire Preliminary Plat And Certified Survey Map

The next item on the agenda was the request of NFI Properties, LLC, 450 North Sunnyslope Road, Suite 270, Brookfield, WI 53008-0825, Joseph C. Niebler, Sr., Manager, and Waste Management, N96 W13600 County Line Road, Germantown, WI 53022, Jack E. Dowden, Area Director, for preliminary plat approval of the Shire, a 25-lot subdivision and a preliminary Certified Survey Map creating two outlots of remnant lands located at approximately 1300 North Brookfield Road.

Mr. Theis presented the following staff **report**, stating that items in bold in the staff report was language recommended by Special Counsel Richard Lehmann: 1. The applicants are requesting preliminary plat approval of The Shire, a 25-lot subdivision, and a preliminary Certified Survey Map that would create two outlots of the remnant lands, all located at approximately 1300 North Brookfield Road. The site is zoned "R-2" Single-family Residential District, "M-1" Multiple-family Residential District, "C" Conservancy District, "FF" Flood Fringe Overlay District, "SW"

Shoreland/Wetland Overlay District, "NSW" Non-Shoreland/Wetland Overlay District and Conditional Use. The conditional use permitting a landfill was created by Ordinance No. 460 adopted May 21, 1968. The landfill stopped receiving waste in 1980. All lots in the proposed plat meet or exceed the minimum lot requirements of the City's "R-2" or "M-1" zoning district. Regarding conditional use Ordinance No. 460, the city's special counsel recommends the following language be a condition of preliminary plat approval:

**"The final plat approval application shall be accompanied by draft deed restrictions applicable to the entirety of the plat stating that uses authorized by City of Brookfield Conditional Use Ordinance No. 460 (1968) shall not be exercised within this subdivision."**

2. The development concept consists of removal of a temporary cul-de-sac at Overlook Circle and extension of a road east, connecting with two dead end streets, Hamilton Drive and Revere Drive. Lands south of this road and west of the landfill will be accessed by a cul-de-sac and through street connecting with Brookfield Road. The easterly 950' of the through street will be located in an easement across lands depicted as Outlot 1 of a CSM, on lands owned by Waste Management. All other streets will be in public rights-of-way. The street pattern connects three streets currently terminated at the property line and provides one new arterial access, promoting traffic disbursement and neighborhood connectivity. Regarding the street in the easement, special counsel recommends the following language:

**"The intended street lying south of the landfill and connecting to Brookfield Road shall be transferred to the City in the form of assignment of an easement interest under Wisconsin Statutes sec. 62.22, in a transaction accompanying, but separate from the plat. City acceptance of the transfer shall be conditioned upon the following terms regarding environmental liability:**

**The issuance of a Pollution Legal Liability Policy naming the City as an additional insured which relates to both the easement area as well as the other lands to be platted, and an agreement with Waste Management of Wisconsin as to its assumption of remediation responsibility relative to the street. The**

terms of the insurance policy and the assumption agreement shall be subject to approval by the City Attorney.

Receipt of an Assurance Letter from the Wisconsin DNR attesting to the fact that, in the exercise of its enforcement discretion, DNR will not seek remediation responsibility against the City under the proposed transfer of a roadway easement by the developer/Waste Management to the City, based upon the fact that Waste Management is performing all necessary remediation relating to the Landfill.

Completion of all construction and restoration associated with the road prior to City acceptance of the improvement."

3. The plat's exterior boundary is a minimum of 20' from the limits of the landfill. That portion of the plat adjacent to the landfill is comprised of non-buildable outlots. These outlots may be converted to buildable lots at some time in the future dependent upon the City's conclusion that concerns about environmental health issues have been adequately analyzed. The City's special counsel offers the following opinion regarding the City's regulation of these outlots

"The lands that are the subject of the proposed subdivision are located adjacent to a solid waste landfill which is listed as an NPL site under the Federal Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"). There is a documented release of contamination from the landfill migrating from the site. The Wisconsin Department of Natural Resources is providing oversight responsibility for the investigation, cleanup, and long-term monitoring of the landfill site as a cooperating agency with the U.S.EPA. The Wisconsin Department of Health and Family Services (DHFS) has a cooperative agreement with the federal Agency for Toxic Substances and Disease Registry and in this capacity has the authority to address public health issues and community health concerns related to

CERCLA sites in Wisconsin. DNR and DHFS have issued a report dated 2/5/04 summarizing their review of public health issues regarding the proposed subdivision development (the "Report").

Based upon the foregoing and under authority of Section 16.16.040.C.1, interpreted in the light of the public health and safety purposes of the Ordinance as a whole as expressed in Section 16.040.010, the City determines that no lots within this proposed subdivision should be sized, shaped or oriented so as to include lands which, in the judgment of the City, upon advice of the DNR, DHFS, and other appropriate and reliable sources of information, represent an unacceptable risk to human health or the environment or for which there is insufficient data to form a judgment that the lands are safe for development from the perspective of human health and the environment. The City concludes that there is a reasonable possibility that, based upon further monitoring results and the future advice of DNR and DHFS, some of the implicated areas may later be determinable by the City to be appropriate for designation as or conversion to lots.

Accordingly, and based in part on the Report and the judgments of the DNR and DHSF, the City determines that areas identified as outlots 6, 7, 8, 9, and 10 in the Shire preliminary plat are not approved for designation as buildable lots and shall not be included as buildable lots in the final plat. These outlots shall be shown as outlots 6, 7, 8, 9, and 10 in the final plat."

Special counsel recommends the following language as a condition of approval of the preliminary plat:

The final plat as submitted for city review and approval shall be accompanied by drafted deed restrictions applicable to the area of outlets 6 through 10 containing the following provisions:

1. None of outlots 6, 7, 8, 9, and 10 shall be buildable until released from these restrictions by subsequent action of the Brookfield Common Council, followed by recording of the adopted instrument releasing the restrictions in accordance with the exercise of judgment by the City with advice and counsel by DNR, DHFS, and other appropriate and reliable sources of information on the health and environmental implications of proposed development of such lands. This prohibition does not cover monitoring, investigation and remediation activities that are required by applicable law.

2. None of outlots 6, 7, 8, 9, and 10 may be divided into separate parcels, whether denominated lots, outlots, dedication areas or easements, condominium units or common areas, or the like, by any means within the regulatory jurisdiction of the City under ch. 236 of the Statutes without City review and approval under the City's land division/subdivision ordinance. The City process for review and action on requested divisions or parcelizations within outlots 6, 7, 8, 9, and 10 shall be a de novo process. The fact that outlots 6, 7, 8, 9, and 10 were shown as lots in the originally submitted version of this plat and will be shown as outlots 6, 7, 8, 9, and 10 in a final plat submitted pursuant to these conditions of preliminary plat approval shall not grant any entitlement or presumption of approval for conversion into lots or later release from the no build restrictions herein.

3. The final plat as submitted shall be accompanied by a second set of deed restrictions applicable to all lots shown on the final plat, stating the following:

"Buyers of lots in this subdivision are hereby put on notice that certain parts of the subdivision plat denominated as outlots 6, 7,

8, 9, and 10 are in that status due to the potential for health and environmental impacts confirmed in or subject to further monitoring to assess potential for impacts as documented in the Report and may be released from restricted outlot status by later action of the City of Brookfield and allowed to be converted to residential lots when, in the exercise of discretion by the City, such release is appropriate based upon consultation with DNR, DHFS, and other appropriate and reliable sources of information."

4. There are other outlots depicted in the plat. Outlot 1 contains wetland for future city acquisition. Potentially 8.85 acres of wetland could be acquired by the City for purposes of open space preservation. Outlot 2 contains a detention basin to be owned as an undivided interest by all lot owners in the subdivision. The entirety of the basin should be contained in an outlot/s. Outlots 3 - 5 are intended to be conveyed to abutting property owners. Special counsel recommends the following language be contained in deed restrictions:

**"The revised preliminary plat and the final plat shall include Outlots 3-5 that shall be deed restricted to prohibit their use as buildable parcels unless and until they are merged with adjoining platted lots resulting in a combined parcel that satisfies all regulatory standards for residential building lots."**

5. The DNR Bureau of Endangered Resources has reviewed the proposed development and concluded that the project is unlikely to impact state-listed species including the Butler's garter snake.

6. On November 3, 2003 the Park and Recreation Commission recommended fee in lieu of public site and open space dedication, acquisition of Outlot 1 through a combination of dedication and purchase and acquisition of an access easement agreement for implementation of the Greenway Corridor Recreational Trail Plan.

7. In addition to the deed restriction recommendations of special counsel, a declaration of restrictions has been proposed that will attempt to restrict tree removal within the parameters of the approved Grading Plan, restrict access to individual lots as depicted on the approved Grading Plan and as further provided for in the Development Agreement and assign ownership of the

detention basin outlot as an undivided interest of all lot owners in the subdivision.

8. Preliminary grading, drainage and stormwater management plans have been submitted to the City Engineering Division. Given the topographic characteristics present at the site and the preliminary nature of the civil plans, it cannot be concluded at the time of this report's preparation that the number of buildable lots depicted on a final plat will be equivalent to the number depicted on the preliminary plat. The applicant acknowledges that the final civil design plans, prepared in compliance with all applicable standards and sections of the municipal code may result in a loss of buildable lots. The potentially impacted areas of the plat include but are not limited to those lots bounding Outlot 2, the detention basin parcel and lots along the steep grade of Arwen Way, i.e. Lots 4, 5, 6, 19, 20, and 21.

9. The designation of the site of the subdivision as a "focus area" in the City 2020 Master Plan was intended and is reasonably interpreted as addressing the portions of the property that constituted the former landfill and adjoining areas that are or may be implicated by migrating environmental contaminants. The landfill area is not part of this subdivision. The areas where presently insufficient data is available to assess safety and health suitability within the subdivision boundaries are being placed in no build outlots and may be released from this status only upon further study and city approval.

10. The Certified Survey Map will divide the remnant lands beyond the plat boundary into two, non-buildable outlots. Outlot 1 contains the landfill. Outlot 2 contains wetlands. Technical corrections and adjustments to the common boundary of the outlots are required.

11. The Plan Commission has received prior correspondence from SEWRPC and the Departments of Natural Resources and Health and Family Services regarding the primary environmental corridor and environmental health topics.

Mr. Theis presented the following staff **recommendation**: The preliminary plat integrates existing dead end and temporarily terminated streets into a local street system that provides neighborhood connectivity and access to the arterial street system. The lots proposed meet or exceed the minimum requirements of the base zoning districts. Regional and State agencies have

reported to the City regarding the status of sanitary sewer service and environmental health issues. Those reports have been considered in the design of the plat and the buildable/non-buildable status of lands contained there in. Special council has commented upon the relationship of the acknowledgement of the "landfill" in the 2020 Master Plan as an additional focus area and the Shire plat. The plat is not a part of the focus area. Nonetheless, the study of the landfill will not be constrained by this plat. Placement of certain lands to be platted in an outlot status with deed restrictions establishes the future land use expectations and development criteria for future utilization of the property as well as providing for the logical and orderly extension of improvements for the future division of land. The certified survey map addresses remnant lands not contained in the plat, placing them in a non-buildable status of outlot and appropriately segregating wetlands for future acquisition by the City.

Staff recommends approval of the preliminary Certified Survey Map subject to:

1. Technical corrections.
2. Adjustment to the common boundary of Outlots 1 and 2 so as to coincide with the wetland delineation accepted by the Wisconsin DNR.
3. Provision of an access easement agreement for implementation of the Greenway Corridor Recreational Trail Plan.

Staff recommends approval of the preliminary plat subject to:

1. Technical corrections.
2. Execution of a Development Agreement obligating the applicant to the improvements and requirements associated with development of the subdivision and securing the installation of same including acknowledging compliance with all recommendations of special counsel as articulated in the preceding staff report.
3. Approval of final grading, drainage, stormwater, roadway and utility plans by the City of Brookfield Engineering Department. The applicant shall acknowledge in writing that the final civil design plans, prepared in compliance with all applicable standards and sections of the municipal code may result in a loss of buildable lots. The potentially impacted areas of the plat include

but are not limited to those lots bounding Outlot 2, the detention basin parcel and lots along the steep grade of Arwen Way, i.e. Lots 4, 5, 6, 19, 20, and 21.

4. Satisfaction of any and all outstanding assessments and payment of all municipal review, inspection and new lot creation fees including Planning Office special Review Fees as calculated and paid prior to recording the final plat.

5. Submittal and execution of deed restrictions with the final plat including assignment of maintenance for outlots and stormwater facility owned by the subdivision homeowners association, restrict tree removal within the parameters of the approved Grading Plan, and restrict access to individual lots as depicted on the approved Grading Plan and as further provided for in the Development Agreement. Further, expressly requiring that the deed restrictions contain the following clauses:

**A. Uses authorized by City of Brookfield Conditional Use Ordinance No. 460 (1968) shall not be exercised within this subdivision.**

**B. 1. None of outlots 6, 7, 8, 9, and 10 shall be buildable until released from these restrictions by subsequent action of the Brookfield Common Council, followed by recording of the adopted instrument releasing the restrictions in accordance with the exercise of judgment by the City with advise and counsel by DNR, DHFS, and other appropriate and reliable sources of information on the health and environmental implications of proposed development of such lands. This prohibition does not cover monitoring, investigation and remediation activities that are required by applicable law.**

**2. None of outlots 6, 7, 8, 9, and 10 may be divided into separate parcels, whether denominated lots, outlots, dedication areas or easements, condominium units or common areas, or the like, by any means within the regulatory jurisdiction of the City under ch. 236 of the Statutes without City review and approval under the City's land**

division/subdivision ordinance. The City process for review and action on requested divisions or parcelizations within outlots 6, 7, 8, 9, and 10 shall be a de novo process. The fact that outlots 6, 7, 8, 9, and 10 were shown as lots in the originally submitted version of this plat and will be shown as outlots 6, 7, 8, 9, and 10 in a final plat submitted pursuant to these conditions of preliminary plat approval shall not grant any entitlement or presumption of approval for conversion into lots or later release from the no build restrictions herein.

3. The final plat as submitted shall be accompanied by a second set of deed restrictions applicable to all lots shown on the final plat, stating the following:

"Buyers of lots in this subdivision are hereby put on notice that certain parts of the subdivision plat denominated as outlots 6, 7, 8, 9, and 10 are in that status due to the potential for health and environmental impacts confirmed in or subject to further monitoring to assess potential for impacts as documented in the Report and may be released from restricted outlot status by later action of the City of Brookfield and allowed to be converted to residential lots when, in the exercise of discretion by the City, such release is appropriate based upon consultation with DNR, DHFS, and other appropriate and reliable sources of information."

C. Outlots 3-5 that shall be non-buildable as parcels unless and until they are merged with adjoining platted lots resulting in a combined parcel that satisfies all regulatory standards for residential building lots.

6. Final plat approval will be contingent upon the following conditions and terms regarding environmental liability associated with that portion of Rivendell Drive that is located in an easement:

"The intended street lying south of the

landfill and connecting to Brookfield Road shall be transferred to the City in the form of assignment of an easement interest under Wisconsin Statutes sec. 62.22, in a transaction accompanying, but separate from the plat. City acceptance of the transfer shall be conditioned upon the following terms regarding environmental liability:

A. The issuance of a Pollution Legal Liability Policy naming the City as an additional insured which relates to both the easement area as well as the other lands to be platted, and an agreement with Waste Management of Wisconsin as to its assumption of remediation responsibility relative to the street. Waste management will assume responsibility for remediation for Preexisting Pollution conditions imposed on the city by reasons of reconstruction, possession, or maintenance activities associated with the Shire Development roadway easement but only to the extent that the City was not negligent in the performance of any such activities." The terms of the insurance policy and the assumption agreement shall be subject to approval by the City Attorney.

B. Receipt of an Assurance Letter from the Wisconsin DNR attesting to the fact that, in the exercise of its enforcement discretion, DNR will not seek remediation responsibility against the City under the proposed transfer of a roadway easement by the developer/Waste Management to the City, based upon the fact that Waste Management is performing all necessary remediation relating to the Landfill.

C. Completion of all construction and restoration associated with the road prior to City acceptance of the improvement."

7. A blanket lien shall be placed on the lotted portions of the subdivision requiring payment from the closing on sale of lots by the subdivider to other parties of the amount of \$2,600 per lot into an escrow fund controlled by the city treasurer, to

assure payment of property taxes for the period starting with the first tax year following recording of the plat and extending until the date on which the entire area of Outlots 6-10 is released from required Outlot designation and allowed to be divided into lots for sale or building development or the tenth tax year following recording of the plat, whichever comes first.

A tax year is considered to be 2005 for taxes levied in 2004 for collection in 2005, etc. If portions of the Outlot 6-10 area is released from restriction and lotted, the amount of deposits shall be reduced proportionally. If, for example, portions of the outlots representing 6 of the 17 lots originally proposed for the outlot area are released, the deposits for each year beyond that year shall be reduced by 35%.

The property taxes on the outlots may be paid from the escrow fund as they come due, the mechanics to be determined by the City Treasurer. The subdivider shall remain responsible for any property taxes remaining unpaid because of any deficiencies in the escrow funds.

8. Provision of an access easement agreement for implementation of the Greenway Corridor Recreational Trail Plan.

9. Approval expires on March 16, 2006 unless a final plat is recorded prior thereto.

Mr. Joseph Neibler, NFI Properties, and Ms. Lynn Morgan, Waste Management, were present to answer questions.

Mayor Speaker said he had a lot of input from the public about this development, and he saw some benefit from that input.

He thought the City would have addressed some of the issues raised, but perhaps not all of them. He thought it was very commendable that the public got involved and how they got involved, acting in a reasonable and calm manner and having one spokesman to speak at Common Council meetings. He wanted to mention several things. One was that the developer has voluntarily agreed to modify his original proposal putting certain parts of the subdivision plat into outlots until the potential health and environmental impact in these areas are adequately addressed in the future. A second thing was that the Wisconsin Department of Natural Resources, and the Wisconsin Department of Health and Family Services provided an opinion letter February 5 that development on the remaining lots of the proposed Shire development will not represent risk to human health or the environment. The City also received an assurance letter from the Department of Natural Resources assuring that it will not hold the City responsible for any clean-up liability if the City accepts the new roadway for the development. Waste Management has agreed they will not seek cost recovery against

the City for addressing clean-up issues with the landfill and has agreed to assume any clean-up costs associated with conveyance to the City of the proposed right-of-way for the development. Waste Management is also taking out an environmental insurance policy which will name the City as an additional insured person for this proposed project. Mayor Speaker said all of these were done because the public got involved and they should be commended. He also thanked Mr. Theis for all of his work on this project.

Mr. Steven Ponto, 4<sup>th</sup> District Alderman and Council President, also spoke, saying he had met with the developer when he was first proposing this development, with the neighbors several times at their request, had made a site visit, and had asked for one of the two public information meetings that were held. He said his goal was to get all the information out before the City had to act, and that everyone involved had done their part well. He said he was convinced that many of the people who live in this area have very sincere concerns about environmental issues and the attendant health risks, and they know there are issues concerning groundwater contamination and methane gas. He thought there was some confusion as to how much study has been done by Waste Management about volatile organic compounds in the area and the extent to which that information has been shared with the Department of Health & Family Services. He thought perhaps there was no written report on this aspect and would like to see all the evidence out in front of the public and all the local governmental bodies and complete tests on some of these issues. Alderman Ponto said it was unfortunate, but the City does have time constraints due to the timing restrictions placed upon the approval process by State statute. He does think that it would be important to potential buyers of lots in this development (and to their lenders) that there be environmental audits that assure that there aren't any issues in the area. He said that until the last twenty or twenty-five years, the history of government considering the environmental hazards has been to underestimate them and he would personally have to be confident that there are no environmental hazards to either the current residents or to future residents of the Shire before he votes in favor of this development.

Mr. Neibler said he had attended other informational meetings held by the Department of Natural Resources and the State Department of Health regarding issues on this development, in addition to those held by the City. Mr. Neibler said he had discussed this property at length with representatives from the various agencies and had looked at all the same issues the neighbors had regarding environment issues with the landfill. He said any groundwater issues are not an issue with respect to this subdivision. The gas migration issue was raised recently enough so that he decided to pull the lands that might be affected so

more complete testing might be done. The Department of Health and the DNR have both stated that the lots which he is proposing are not involved with any potential contamination from the landfill. Mr. Niebler said he has been treated very professionally by all involved. He has lived in Brookfield for the last 28 years and thinks this will be a beautiful subdivision when it is completed.

Mayor Speaker said some trees were marked and asked what that meant. Mr. Niebler said his vision is for this to be a wooded subdivision and he will deed restrict the removal of any tree that is 4" in diameter or more (4' off the ground) if it's not within the building pad or the driveway. In response to a question by Mayor Speaker about the actual area where trees would be cut down, Mr. Niebler said it would be the actual building pad and then any trees within about 15' of the building pad because they would die anyway with excavation. Mr. Niebler said SEWRPC had estimated that trees would be removed from about 16,000 square feet of each lot but he thinks it will more likely be about 9-10,000 square feet.

Commissioner Faber said he had a lot of questions to ask and thought it would be better to divide the discussion up into topics. One would be health/landfill/safety/pollution issues. A second would be the primary environmental corridor, and the third would be discussion of the particular recommendation.

Commissioner Faber asked if, since there was no liner for the landfill, some of the material might have leaked out beyond the limits of the landfill.

Ms. Lynn Morgan, Waste Management, said there is evidence to the south and southeast of liquids that could have come into contact with waste.

Mr. Niebler said that what happens is that the landfill is not lined on the bottom, but it is lined on the top. Stormwater and runoff water do not permeate through the cap but there is water that migrates underground that is passing through the waste mass. This migrates to the south and east and picks up compounds called volatile organic compounds. Those compounds dissipate very rapidly when they hit air. Mr. Niebler said Mr. Warzecha, from the DNR, has said that it would be a concern, health-wise, if any of that water was used for human consumption but it is not. It may come up in well water but, again, because of the rapidity of dissipation upon contact with the air, it is not a concern. He added that there is no evidence of any soil contamination on any of the lands beyond the waste mass.

Commissioner Faber said he disagreed with Mr. Niebler's

characterization that any of the contaminated groundwater posed no health risks.

Mr. Niebler said he did not mean to portray that as such. His intent was that groundwater issues were a separate remediation issue and do not affect this subdivision.

Commissioner Faber asked for confirmation that Outlot 2 would be permanently removed from any developable possibility. Mr. Theis said that outlot was zoned wetland and conservancy and could not be developed.

Commissioner Faber said he had other concerns from a health standpoint about Outlots 9 and 10. He said he was not comfortable with the rationale given by the DNR why those areas might be suspect and not areas further west - why only up to a certain line. He said he is also uncomfortable with the notion that the applicant wants to be able to come back and perhaps develop those outlots in the future.

Mr. Niebler said he agreed that the State did not have specific data with respect to those areas that were placed into Outlots 9 and 10 but because they were uncomfortable, a buffer zone was created. He said the reality was that those lots probably will be developed in the future so he is including them now for stormwater and detention basin design. Discussion of future development of the outlots is not relevant to the issue before the Plan Commission tonight - approval of the preliminary plat for the 25 lots already platted. Mr. Niebler also pointed out that if any of the outlots were proposed for development in the future, the same procedure would have to take place from the very beginning for those lots.

Commissioner Faber asked Mr. Lehmann and Mr. Harrington if the DNR's conclusions regarding the existing parcels is the only standard that the Plan Commission could consider from an environmental standpoint. He said he is asking that question because there was a lack of definition that the DNR gave for how they selected what they were comfortable with and what they weren't. He said this calls into question whether common sense would have a role because no standards were provided.

Mr. Lehmann said it was specified in the staff report that the release of the lands that were placed in outlots because of possible environmental and health reasons can only be done by the City with the advice from State agencies. The responsibility for the release of those outlots cannot be deferred to any other agency or entity. Mr. Lehmann also affirmed that Mr. Niebler was correct in saying that just because the outlots are included within the boundaries of this subdivision does not presume in any

way that they can be developed in the future.

Mr. Harrington, after presenting the Plan Commission with his background in environmental law, said Mr. Warzecha is generally regarded as a very, very competent and thorough public servant. Mr. Harrington said it was his judgment, also, that Mr. Warzecha takes a very conservative approach on analyzing environmental issues and did apply that to this particular issue.

Mr. Harrington said he wasn't at the public information meeting, so he didn't hear some of the particular questions raised, but one of the conclusions made by Mr. Warzecha was that - based on current information - there is no unacceptable risk to human health or safety. He emphasized that the DNR does not take these conclusions lightly. He could not speak to the issue of how the "line" was drawn by the DNR to designate "safe" and "maybe not safe" but that would have prompted the developer to put those areas surrounding the west and southwest side into an outlot area. He said that Mr. Lehmann had drafted the language regarding the future on the outlots with broad discretion if decision makers in the future want to go beyond whatever the agency finds in terms of making future decisions.

Commissioner Faber asked if they could use the "go beyond" in the present situation - if the Plan Commission wanted to be more conservative than the agencies who have studied the situation.

Mr. Lehmann said they could - if they had additional information or a different judgment about probabilities but it couldn't just be an arbitrary decision. An actual case would have to be built for denial.

Mayor Speaker asked if there were any other comments about the environmental issues. There were none.

Commissioner Faber said he was very troubled that this land was not in the primary environmental corridor. He said he had walked the entire site and there are so many trees that would need to come down. He feels very strongly that when this property was removed from the primary environmental corridor in the 1970's for another development project, it should have been returned to the primary environmental corridor right away. This would have put a much lower density of what could be developed on this land. He said he doesn't fault the developer, but it did raise the question for him of whether there is some sort of legal limit on when the City could initiate returning this property to the primary environmental corridor, if not now then at some point in the future if the development does not occur.

Mr. Lehmann said if the preliminary plat is approved, the

applicant has two years to begin developing the property. He said it would not be possible to legally put this land back into the primary environmental corridor while the development is occurring. If for some reason, the land is not developed in that time, then the City could pursue that action. Mr. Lehmann said that the DNR or SEWRPC could initiate a reversal, but they have indicated they are not interested in pursuing this.

Commissioner Faber said he was suggesting that if the process of reversing a primary environmental corridor decision for this property takes a significant amount of time, then perhaps they could start looking into it now so that if the development doesn't take place, an action to implement this would be in place. Mr. Lehmann said it is a process that might take 90 days but it would depend on the number of cases ahead of it and other factors.

Mr. Niebler said one of the first things he did when looking into this development was to go to SEWRPC and look at their maps to determine whether this land was eligible for the extension of sanitary sewer and it was. He said that not only had this property been removed from the primary environmental corridor in the 1982, inclusion in the primary environmental corridor had been revisited in 1990 and 1991 and it was decided again not to include this land in the primary environmental corridor. The removal of land from the primary environmental corridor in 1982 included lands that have since been developed and have homes on them now.

Commissioner Wentz said she had heard that the 1982 proposal for this land had homes in a cluster development, which would help save a larger chunk of the woods. She asked Mr. Niebler if he had considered that.

Mr. Niebler said that would have had to apply for a planned unit development rezoning which would have been a much lengthier process. He added that SEWRPC had determined that 37% of the tree canopy would be destroyed with cluster development and 37-38% with his proposal - no difference.

Commissioner Faber said he had some issues to discuss that require closed session because it would pertain to potential legal ramifications.

In continuing action, pursuant to 19.85(1) of the Wisconsin Statutes, after first convening in open session, the Mayor will explain the nature of the business to be considered in closed session, and upon a motion duly made, seconded and adopted, meeting in Closed Session for the following purpose:

a. Under 19.85(1)(g) Conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved.

*(Discussion concerning the preliminary plat approval of the Shire, a 25-lot subdivision and a preliminary Certified Survey Map creating two outlots of remnant lands located at approximately 1300 North Brookfield Road.)*

- Commissioner Faber moved to convene into Closed Session under Section 1985(1)(g). The motion was seconded by Alderman Mahkorn and passed unanimously. Recorded as a roll call. 9:45 p.m.

Present during closed session were as follows: Mayor Speaker, Special Legal Counsel Richard Lehmann, Special Legal Counsel Art Harrington, Assistant City Attorney Karen Flaherty, Director of Community Development Dan Ertl, Director of Administration Dean Marquardt, Director of Public Works Tom Grisa, City Engineer Jeff Chase, Planning Administrator Mike Theis, Alderman Scott Berg, Alderman Steve Ponto, Alderman Jim Heinrich, Alderman Cindy Kilkenny, Alderman Kari Clappier, Community Development Assistant Sherry Rasmussen.

- Alderman Shaw moved to reconvene into Open Session under Section 19.85(2) Wisconsin Statutes. The motion was seconded by Commissioner Faber and passed unanimously. Recorded as a roll call. 10:15 p.m.

Commissioner Faber said he would like to explain his views. He said the primary environmental corridor designation is unfortunate but after hearing all the input, he is in the very uncomfortable position of believing that the Plan Commission does not have a choice in leaving this as is while the plat is pending or continues to either a final plat being approved or not approved. He said he would prefer that this land were in a primary environmental corridor but the City doesn't have that choice and, based on the advice of legal counsel, the City is not in a very strong legal position to pursue inclusion of this land in the primary environmental corridor at this point. Commissioner Faber said that on the health and landfill issues, if the lots that are now shown as outlots hadn't been withdrawn, he would have voted against this for lack of information as well as common sense but withdrawal of the outlots places the question of whether that land can ever be developed into the future. He looks at the remaining plat of those lots and they seem to be of an orderly size and shape. He agrees with the developer agreeing to put deed restrictions on tree removal. The language from special counsel regarding the future of the outlots is

satisfactory. Commissioner Faber said this leads him to the conclusion that he will have to support the staff recommendation.

Mayor Speaker, Alderman Mahkorn and Commissioner Wentz agreed with Commissioner Faber's summation.

Commissioner Wentz asked if monitoring will continue on the land regarding the groundwater contaminants and the methane gas. Lynn Morgan said they will be in contact with the City, possibly someone in Engineering.

Mr. Tom Grisa, Director of Public Works, said he would be the contact person.

Commissioner Faber asked what the remediation effort was at this point. Ms. Morgan said they are in discussions about the remediation plan.

- Commissioner Faber moved to approve the staff recommendation as stated on p. 15-18 of this staff report. The motion was seconded by Commissioner Wentz and passed unanimously.

EXHIBIT "B"

THESE ARE THE MINUTES OF A **REGULAR COMMON COUNCIL** MEETING HELD AT 7:45 P.M., TUESDAY, **MARCH 16, 2004**, IN THE COUNCIL CHAMBERS OF BROOKFIELD CITY HALL, 2000 N. CALHOUN ROAD, BROOKFIELD, WISCONSIN

MAYOR JEFF SPEAKER PRESIDING

**ALDERMEN PRESENT:** Gary Mahkorn, Scott Berg, Cindy Kilkenny, Jack Shaw, Karl Schulz, Kari Clappier, Brad Steinke, Thomas Schellinger, Jim Garvens, Jim Heinrich, Jerome Wolff, Richard Brunner, Mike Franz, Steve Ponto

**ALDERMEN ABSENT & EXCUSED:** None

**ALSO PRESENT:** Director of Public Works Tom Grisa, Director of Community Development Dan Ertl, Director of Administration Dean Marquardt, Director of Finance Robert Scott, Assistant City Attorney Karen Flaherty, City Clerk Kris Schmidt, Director of Information Technology Fred Miller, Police Chief Dan Tushaus, Director of Human Resources Jim Zwerlein, Attorney Vince Moschella, Attorney Richard Lehmann, Attorney Art Harrington, Representative from the Dept. of Natural Resources Delwiche, Representative from Dept. of Health Warlyicka, Executive Director of SEWRPC Phil Evenson

Mayor Jeff Speaker called the meeting of the Common Council to order at approximately 8:10 p.m. (One public hearings was heard previously - a portion of Washington Street Vacation.) Four people spoke from the audience during the 15 minute segment set aside for the citizens to address the Council regarding the proposed Shire subdivision and the Superfund site. A petition was submitted containing 17 signatures against the proposed Shire Residential Development/ Waste Management Superfund landfill site.

\* \* \* \* \*

The next item was Item #5 of the Plan Commission, the Request of NFI Properties LLC, 450 N. Sunnyslope Rd., Suite 270,

Brookfield, WI 53008-0825, Joseph C. Niebler Sr., Manager, and Waste Management, N96 W13600 County Line Rd., Germantown, WI 53022, Jack E. Dowden, Area Director, for preliminary plat approval of the "Shire", a 25 lot subdivision and a preliminary Certified Survey Map creating two outlots of remnant lands located at approximately 1300 N. Brookfield Road. (SE 1/4 of Sec. 20 and NE 1/4 of Sec. 29)

The Plan Commission recommended approval of the preliminary plat and preliminary Certified Survey Map as recommended by staff and as stated on pp. 15-18 of the minutes.

Alderman Schulz moved approval of the Plan Commission recommendation. The motion was seconded by Alderman Garvens.

Alderman Steinke moved to amend the approval to require Waste Management to provide indemnification to the City for this property as a condition of approval of the preliminary plat. The amendment was seconded by Alderman Kilkenny and carried 10 ayes and 4 nos with Alderman Schulz, Alderman Brunner, Alderman Garvens, and Alderman Mahkorn voting no.

Alderman Mahkorn moved to amend condition 7, to state: "A lump sum payment in the total amount of \$25,000.00 shall be made by the owner of Outlots 6-10 into an escrow fund controlled by the city treasurer to assure the payment of property taxes for the period starting with the first tax year following recording of the plat and extending until the date on which the entire area of Outlots 6-10 is released from required Outlot designation and allowed to be divided into lots for sale or building development or the tenth tax year following recording of the plat, whichever comes first. A tax year is considered to be 2005 for taxes levied in 2004 for collection in 2005, etc. The property taxes on the outlots may be paid from the escrow fund as they come due, the mechanics to be determined by the City Treasurer. The owner shall remain responsible for any property taxes remaining unpaid because of any deficiencies in the escrow funds. Any funds remaining after the payment of the forgoing taxes shall be returned to the owner." The motion was seconded by Alderman Shaw and carried unanimously.

Alderman Schulz moved to amend the approval for the Shire plat as follows: "In order to preserve natural topography and trees located on steep slopes the Council encourages and invites the applicant to apply for rezoning to PDD Planned Development district - Residential in order to pursue a cluster design of single family homes that diminishes the impact on topography and tree removal. This amendment does not affect the approval status of the preliminary plat but allows for a cluster design to be pursued if so desired by the applicant. The motion was seconded

by Alderman Clappier and carried unanimously.

The original motion to approve the Shire Preliminary Plat and preliminary Certified Survey Map as amended carried, 8 ayes and 6 nos; Alderman Kilkenny, Alderman Wolff, Alderman Ponto, Alderman Berg, Alderman Schellinger, and Alderman Franz voting no.

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Alderman Schulz moved to table the Resolution approving an Agreement between the City of Brookfield, Waste Management, and NFI Properties LLC regarding liability and insurance issues. The motion was seconded by Alderman Shaw and carried unanimously.

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