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October 29, 2014

Sara Grewing  
City Attorney  
City of St. Paul  
1400 City Hall Annex  
25 West Fourth Street  
St. Paul, MN 55102

Re: 543 James Avenue (Schmidt Bottle Warehouse Annex) –Nonconforming Use Permit; Our File #28,882-06

Dear Ms. Grewing:

This firm represents Premier Storage, LLC (“Premier”) with regard to the nonconforming use permit (the “Permit”) for the reestablishment of a nonconforming use at 543 James Avenue (the “Property”) in the City of St. Paul (the “City”). This letter is regarding the recent appeal (the “Appeal”) of the September 5, 2014 City Planning Commission decision approving the Permit and the applicable legal standards guiding the City Council’s review of the Appeal at the November 5, 2014 City Council meeting.

#### **BACKGROUND AND INTRODUCTION**

The Property is part of the historic Jacob Schmidt Brewing Company (the “Schmidt Brewery”) site. The structure on the Property has been referred to as the bottle warehouse annex by the City, and consists of approximately 78,000 square feet of vacant warehouse space. The last major tenants of the Property were Xcel Energy and Dedicated Logistics Inc., both of which occupied the Property from 2005 to 2009. However, it is important to note that owners of the Property never stopped using the building as a warehouse. During the period that BHGDN LLC owned the property it was used by Xcel Energy, subcontractors for Xcel Energy, Dedicated Logistics, Anchor Fastener, Weis Construction and subcontractors for Weis Construction. Weis Construction and its subcontractors used the Property for storage and staging while working on the renovation of the Schmidt Brewery site for artist lofts. During that time, the Property was consistently listed for either lease or sale through various brokers. (See correspondence of David Kreitzer, dated October 29, 2014.)

In 2012-2013, the Property received approvals for two phases of alterations associated with a proposed microbrewery and a restaurant. Due to the unique constraints of the Property, including a lack of visibility from West Seventh Street, the industrial nature of the structure itself, and factors such as the adjacent train tracks, the proposal failed.

The proposed reuse of the Property is internalized community storage, a low-impact warehousing and storage use. The self-service storage will be fully enclosed and climate controlled with secured access. The proposed use will include use of the majority of the warehouse for internalized community storage, and the remainder of the Property will be reused consistent with the T3 District. The proposed use is consistent with the existing and historical nonconforming warehousing and storage use.

On September 5, 2014, the City Planning Commission adopted City Planning staff's recommendation and approved the Permit to operate the proposed use, internalized community storage, at the Property. This decision was subsequently appealed by the West 7th Federation, which is urging the City Council to reverse the decision of the Planning Commission. However, the Property continues to retain lawful nonconforming rights to a warehousing and storage use and the proposed use will fall into the same use classification. In light of the permanency of nonconforming rights under state law, we strongly encourage the City to approve the Permit. Under Minnesota law, the City's process is merely an acknowledgement of the nonconforming rights that run with the Property and the City has little or no discretion to deny an application where the nonconforming rights have not been abandoned and the required findings have been met. Moreover, denial of the Permit under the current circumstances would be a regulatory taking under the Penn Central analysis as described below.

#### DISCUSSION

1. **The Property has Been Continuously Marketed and the Property Owners Have Actively Prevented the Abandonment of Nonconforming Rights for a Warehouse and Storage Use.**

In 2008, the Property, along with the entire Schmidt Brewery, was rezoned from I2 General Industrial District to T3 Traditional Neighborhood District. As a result of the rezoning, the use of the Property for warehousing and storage became a lawful nonconforming use under both City and State law. Since 2008, the Property owners have used or marketed the Property as a warehouse consistently and have expressed no intent to abandon such use. Thus, based on the protected nature of nonconforming rights under state law, the proposed warehousing and storage use is a permitted and authorized use of the Property.

Under Minnesota law, legal nonconforming uses may continue to operate, including through repair, replacement, restoration, maintenance, or improvement, but not expansion. Nonconforming rights lapse, however, when the nonconformity or occupancy is abandoned for a period of more than one year. Minn. Stat. sec. 462.357, subd. 1e(a); City Code sec. 61.106(a). Minnesota courts have held that abandonment of a nonconforming use requires proof of two factors:

- (1) The intent to abandon; and
- (2) an overt act or failure to act indicating the owner no longer claims a right to the nonconforming use.

Haefele v. City of Eden Prairie, 2000 Minn. App. LEXIS 1306, \*11 (Minn. Ct. App. Dec. 26, 2000) (quoting Cnty of Isanti v. Peterson, 469 N.W.2d 467, 470 (Minn. Ct. App. 1991), overruled on other grounds by Tyroll v. Private Label Chems., Inc., 505 N.W.2d 54 (Minn. 1993)).

In Haefele, the court held that a property owner's efforts to market a nonconforming use demonstrated his intention to maintain nonconforming rights. Id. at \*12, 13. The court enjoined the city from interfering with the owner's nonconforming use of his property and further held that the city council's decision relied upon impermissible policy considerations such as its goal of bringing nonconforming property back into conformance. Id. at \*13.

Here, the Property owners have consistently marketed or used the Property as a nonconforming warehouse and storage use since prior to 2008, when the use became nonconforming. Following the departure of the last major tenants in 2009, during the period from 2009-2014, the Property owners sought and found interim users of the building as a warehouse. The Property owners' representatives brought to the City a number of potential end users of the building, including a grocery store, housing for clients of The Salvation Army, a school bus company, and a grocery store. In each instance, the City, through Councilmember Dave Thune, discouraged reuse of the building. The Property was nearly successful in marketing the building in 2012/2013 for a microbrewery and restaurant with a warehousing element; however, that sale fell through due to the limited access and visibility of the Property. The Property has also been continuously maintained and improved as a warehouse during this time. Significant resources have been expended to make the Property attractive to potential warehouse and storage users, including landscaping and parking lot improvements.

Since 2008, the Property owners have, at no time, expressed either: 1) the intent to abandon, or 2) an overt act or failure to act indicating the owner no longer claims a right to the nonconforming use. These factors demonstrate that the existing nonconforming warehouse and storage use has not been abandoned under state law.

We strongly caution the City to avoid reliance on invalid considerations raised by the neighborhood group in its appeal regarding the desire of certain individuals in the community to see the Property redeveloped in conformity with the existing T3 District. As with in Haefele, these concerns are indisputably irrelevant to determining whether the nonconforming rights of the Property have been legally abandoned, and may not form the basis of the City's refusal to recognize the nonconforming rights of the Property.

## **2. The City has Little or No Discretion to Deny the Permit Under State Law.**

The City's process to review the Permit is simply recognition of rights that are guaranteed under state law. Premier pursued the Permit application under guidance from planning staff that the Permit was the necessary process for the City to confirm nonconforming use rights under Minnesota law. The City has evaluated the Permit under a list of findings enumerated under City Code section 62.109(e). While the City process gives consideration to factors that are inconsistent with factors that are deemed appropriate for consideration by Minnesota courts, the staff recommendation and Planning Commission approval indicated that the result would be effectively the same as with consideration of the valid factors under Minnesota law. However, in light of the current appeal, it

appears that the City may be poised to consider factors that are invalid under Minnesota law for determining that the nonconforming use of the Property has been abandoned. In any event, under either set of evaluative factors, the proposed continuation of the nonconforming use meets the necessary burden of proof and the City has little or no authority to deny the Permit.

Minnesota law provides permanent rights for nonconforming uses. In determining whether those rights have been abandoned, the City's review is narrow. The Minnesota Court of Appeals determined in the Haefele decision that the City can simply not rely upon impermissible policy considerations, such as the goal of bringing a nonconforming property back into conformance with the current zoning. Id. at \*13. Because there has been no abandonment of the nonconforming rights to a warehouse and storage use on the Property, as described above, those nonconforming rights remain and run with the land. Thus, the City has no authority to deny the Permit under state law.

Unlike a legislative decision by the City Council, such as a rezoning or policy decision, the City's review of the Permit is a quasi-judicial decision. A quasi-judicial decision requires that the City Council evaluate the circumstances and make a decision based on the applicable evaluative factors. Premier contends that the findings addressed in the staff report and from City Code section 62.109 are invalid considerations under Minnesota law and that the factors for evaluation of the application are limited to consideration of the intent of Property owner to abandon the nonconforming rights. Notwithstanding this contention, the proposed use of the Property satisfies the findings under the City Code, leaving the City with little or no discretion to deny the rights guaranteed to the Property under Minnesota law. (See Staff Report.)

**3. If the City Denies the Permit Based on the Opposition of Certain Neighbors, it Will be an Arbitrary and Capricious Decision.**

If the City acts to deny the Permit to use Property for a valid continuation of a lawfully established nonconforming use based on the opposition of the West 7th Federation, it will be arbitrary and capricious act, and therefore legally invalid. A city's decision is arbitrary and capricious when its reasons are legally insufficient or are not supported by the facts found in the record. See, e.g., Trisko v. City of Waite Park, 566 N.W.2d 349, 352 (Minn. Ct. App. 1997). "The simple fact that community members oppose a landowner using his land for a particular purpose is not a legally sufficient reason for denying a special use permit." Barton Contracting Co., Inc. v. City of Afton, 268 N.W.2d 712, 718 (Minn. 1978). For example, in Wajda v. City of Minneapolis, the Minneapolis City Council was found to have acted arbitrarily and capriciously when it denied a property owner a beer license to operate an on-sale beer establishment. 246 N.W.2d 455, 459 (Minn. 1976). The court determined the use remained a legal nonconforming use because there was no evidence that the owner had terminated or abandoned the use, and the city's decision was arbitrarily and capriciously based upon neighborhood complaints regarding the property. Id.

At no point has the nonconforming use of the Property been abandoned, as evidenced by its efforts to sell the Property to various operators and improvement of the Property. The West 7th Federation has provided no evidence to contradict these facts. Against this factual background, the City may not legally deny the Permit or interfere with the Property owners attempts to sell the Property for use warehousing and storage. As in Wajda, any denial of the Permit at this juncture would only be

politically motivated and based upon neighborhood opposition that is wholly unrelated to the actual nonconforming use of the Property. Moreover, the neighborhood's desire to bring the Property into conformance with the vision of the T3 District may not form the basis for denying the Permit and is an invalid consideration under Haefele. Premier therefore requests that the City deny the appeal, grant the Permit, and refrain from otherwise interfering with the Property's nonconforming use rights.

4. **The City's Failure to Recognize the Existing Nonconforming Rights Would Constitute a Regulatory Taking Under State and Federal Law.**

The United States Supreme Court has held that a use restriction on real property may constitute a regulatory taking if not reasonably necessary to the effectuation of a substantial public purpose, or perhaps if it has an unduly harsh impact upon the owner's use of the property. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 127(U.S.1978). The Court in Penn Central described the factors that must be balanced in determining whether a regulation, such as the denial of nonconforming rights, would constitute a regulatory taking. In applying the *Penn Central* balancing test, Minnesota courts will look to: (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with the property owner's distinct investment-backed expectations; and (3) the character of the governmental action. Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 632-642 (Minn.2007). Under these factors, a denial of the Permit would be a clear regulatory taking under Minnesota law, based on a weighing of the following factors, all of which favor the Property owner.

a. **Penn Central Factor: Economic Impact of the Regulation on the Property Owner.**

In evaluating the economic impact of a Permit denial on the Property owner, the courts review the magnitude of the impact and whether the land use regulation leaves any reasonable, economically viable use of the Property. *Id.* at 635. Here, the nature of the construction and design of the existing building make any other use of the Property uneconomical and nonviable. The structure on the Property consists of a modern tilt-up concrete warehouse that cannot be viably modified nor economically demolished for new development. The structure's foundation is up to an additional story below grade in some places and, due to the geographic conditions, demolition would require excavation of an entire hill along Duke Street to the east of the Property. The Property owner's active marketing or use of the Property for more than five years without yielding any long term tenants or buyers, along with the failure of the proposed microbrewery, is evidence that the denial of the Permit would result in a substantial economic impact to the Property. Even the adjacent developer, Dominion, passed on development of the Property due to the nonviable prospect of redeveloping the site. Based on these economic circumstances, the City's decision to deny the Permit would leave no reasonable, economically viable use of the Property and a court applying the Penn Central balancing test would find this factor favors the Property owner.

b. **Penn Central Factor: The Owner's Investment-Backed Expectations.**

A second factor in the Penn Central balancing test is the effect of the regulations on the Property owner's investment-backed expectations. The Property owner purchased the Property as a warehouse and storage use with reasonable expectations that uses such as the proposed use of the

Property would be permitted. The Property was constructed as a warehouse and the owners have spent considerable resources to maintain and improve the Property in an effort to attract new tenants. The Property owner's investment-backed expectations that the Property could be used for warehousing and storage purposes, such as the proposed use, are legitimate and reasonable in light of the existing structure, the historic use, and the character of the surrounding neighborhood. If the City were to deny the Permit and prohibit the use of the Property for the proposed use, the decision would upset the legitimate investment-backed expectations of the Property owner.

c. Penn Central Factor: Character of the Government Action.

In evaluating the character of the government action, Minnesota courts evaluate the nature rather than the merit of the government action. More specifically, whether the regulation is general in application or whether the burden of the regulation falls disproportionately on relatively few property owners. *Id.* at 640. Here, the City's decision to deny the Permit would affect only the Property. Premier is simply requesting that the City allow a lawful nonconforming use that is consistent with the historical nature of the building, the historical land use, and the character of the neighborhood. The proposed lawful nonconforming use of the Property is otherwise protected under state law and consistent with the expectations of the Property owner. These considerations bear in favor of the Property owner. However, if the City denies the Permit, as a result of complaints of neighborhood activists and a desire to bring the Property into conformance with the current zoning, the decision would be unlawful under state law. Thus, this third prong, considering the character of the government action would be unequivocally in favor of the Property owner.

Taken together, the Penn Central factors would all favor the Property owner if the City acts to deny the Permit. The result of this three prong analysis is that the City's denial would effectuate a regulatory taking of the nonconforming rights associated with the Property warranting just compensation under state and Constitutional law.

d. Under Minnesota Law the Denial of Nonconforming Rights Must be Compensated as a Taking.

It is also important to note that the Takings Clause of the Minnesota Constitution is interpreted more broadly than that of the United States Constitution, extending not only to actual physical taking of property, but damages to property as well. *See Id.* at 633. In Minnesota, a zoning ordinance may constitutionally prohibit the creation of uses, creating a nonconforming use; however, existing nonconforming uses must either be permitted to remain or be eliminated by use of eminent domain. *County of Morrison v. Wheeler*, 722 N.W.2d 329 (Minn. Ct. App. 2006). If the Permit is denied, the City must compensate the Property owner as an act of eminent domain. The state legislature has made it clear that eliminating nonconforming rights may be a compensable taking under the Minnesota constitution. Minnesota Statutes section 117.184 states that any local zoning or land use regulation that requires the removal of a legal nonconforming use as a condition or prerequisite for the issuance of a permit or other approval constitutes a taking and is prohibited without the payment of just compensation. This section arguably will apply if the City acts to deny the Permit, which would effectively condition any and all subsequent approvals on the forfeiture of nonconforming rights. This would be a taking compensable under Minnesota law.

**5. The “Highest and Best Use” Analysis is the Incorrect Legal Standard.**

In approving the Permit at the Planning Commission, certain Commissioners discussed that the warehousing and storage use is not the “highest and best use” of the land. While that analysis is often considered in making legislative decisions regarding land use and zoning classification, this analysis is inapplicable here. The correct analysis is the question whether the existing and proposed nonconforming warehousing and storage use has been intentionally abandoned under the two-part analysis described above. The vague aspirational statements regarding highest and best uses of the land are not applicable and not valid legal evaluative factors. Reliance upon such an analysis to deny the Permit would weigh considerably in favor of an arbitrary and capricious decision.

**6. The West 7th Federation’s Appeal is Unsupported by the Facts.**

The Appeal filed by the West 7th Federation states that the decision by the Planning Commission to approve the nonconforming use permit was erroneous and listed four supporting reasons. Because the existing and proposed uses are lawfully nonconforming uses, the factors identified by the West 7th Federation are irrelevant. However, for the sake of discussion, we have addressed each of these below:

a. The Permit Conforms to the City’s Comprehensive Plan.

As is stated in the Staff Report, the Permit does conform to the City’s Comprehensive Plan. The Property is designated by the Comprehensive Plan as a Neighborhood Center and an Opportunity Site on a Mixed-Use Corridor. These designations guide the Property for a mix of uses, to which the proposed use of the site will contribute. City Comprehensive Plan LU-1; LU-21. The internalized community storage will be entirely enclosed within the warehouse on the Property, which will create an opportunity to establish an active use, consistent with the T3 District, on the remaining portion of the Property, which has ample parking. The proposed use will also be consistent with the Neighborhood Center designated and contribute to promoting the neighborhood as a compact, mixed-use community by providing an essential service close to residences, as well as providing a community amenity. LU-13. The proposed adaptive reuse of the Property is consistent with the City’s Comprehensive Plan.

b. The Great River Passage Master Plan is Not Applicable, Absent an Act of Eminent Domain by the City.

The Great River Passage Master Plan (the “Great River Plan”) is a long-range planning document intended to lay out a vision for integrating the Mississippi River into the community. The Great River Plan is “primarily a parks plan” but also incorporates recommendations for redevelopment sites. Great River Plan at 5. In the Appeal, the West 7th Federation states that the granting of the Permit “[d]oes not conform to Great River Passage Master Plan.” The Property is located approximately 1,200-1,500 feet away from the Mississippi River. Presumably the Appeal is referring to the designation of the Property, along with the rest of the Schmidt Brewery as part of a “River-Oriented Redevelopment Opportunity.” Id. at 27. The plan recognizes that redevelopment of such sites will require “coordinated public and private efforts.” Id. at 26. The plan further acknowledges that the City cannot foist the development vision on property owners:

Until such time as the City purchases any of the sites or areas, or enters into a development agreement for the sites or areas, covered in the vision/concept plans, private property owners may use their properties for any legal use.

Id. at 5. Thus, unless the City is willing to acquire the Property for the purposes of redevelopment, the Great River Plan is merely aspirational in its applicability to the Property. Therefore, in light of the nonconforming rights to use the Property as a warehousing and storage use, the Great River Plan is not relevant to the City Council's current considerations.

c. The Proposed Use Will Allow the Property to Meet the Aims of a Neighborhood Center or Mixed Use Corridor Designation.

Not only is the proposed use a continuation of the existing lawful nonconforming use, the proposed use is the only viable use of the Property that has been proposed in more than five years. Approving the Permit and acknowledging the nonconforming rights of the Property as a warehousing and storage use would be allowed for a use that not only complements the existing Schmidt Brewery development, but will also ensure that the Property is actively maintained and create the conditions for an active reuse of the remainder of the Property. The size and design of the structure on the Property necessitates a larger operation such as the proposed use to occupy the warehousing portion of the building to ensure that the building itself can remain viable and meet property tax and maintenance obligations. The proposed use will permit the balance of the site to become activated, thus contributing to an active neighborhood center and mixed use corridor. The portion of the Property not occupied by the warehousing and storage use will include ample parking and space for an active use, such as a restaurant or retail that could not otherwise exist or support the entire Property on its own.

d. The Proposed Use is Consistent With and Not Detrimental to the Existing Character of the Neighborhood and the Newly Redeveloped Schmidt Brewery Site.

The existing neighborhood is and has historically been an industrial area with warehouse facilities. While the current multifamily development has changed the character of the vicinity, the neighborhood's appeal is derived from its residential/industrial character. The Property itself is a substantial feature of the existing neighborhood and the Schmidt Brewery. The Property was developed as a warehousing and storage use and has consistently been used as such or marketed as such since it was constructed. The proposed use is consistent and complementary to the newly constructed artist lofts on the rest of the Schmidt Brewery site and the enclosed nature of the storage operations will ensure limited off-site impacts. As such, residents of the artist lofts and nearby townhomes have petitioned for approval of the Permit.

Any exterior alterations or improvements to the Property will comply with the City's historic preservation requirements for the Schmidt Brewery Preservation District, which are intended to preserve the character of the district. The low-impact use will not be detrimental to the neighborhood or surrounding properties, and surrounding neighbors support the application to reuse the Property for internalized community storage, including Dominion, the developer of the balance of the Schmidt Brewery site.

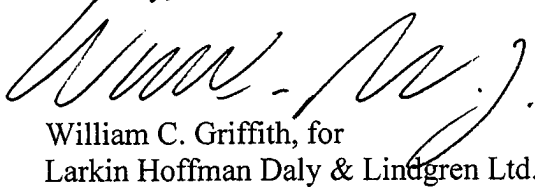


## CONCLUSION

The City's process to review nonconforming rights is merely a mechanism to recognize the rights that are already protected under Minnesota law. However, the Appeal raises the specter that the City Council will rely on impermissible considerations proffered by the West 7th Federation in making its decision. The proposed use is a continuation of the existing nonconforming use rights to operate as warehousing and storage, and these rights have not been abandoned by the Property owner. If the City Council denies the Permit based on the opposition of the West 7th Federation, not only will the decision be arbitrary and capricious under state law, but the denial will effect a regulatory taking under state and Constitutional law. We sincerely encourage the City to approve the Permit based on the above-stated legal status. Any denial will not only deprive Premier and the Property owner the right to operate a lawful use on the Property, but it would deprive the community of an important supportive land use.

Please let me know if you have any questions. Thank you.

Sincerely,



William C. Griffith, for  
Larkin Hoffman Daly & Lindgren Ltd.

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Enclosures

cc: Mayor and City Council Members  
Bill Dermody  
Todd Jones  
John Flottmeier  
Robert C. Long, Esq.

October 28, 2014

Sara Grewing, City Attorney  
City of St. Paul  
1400 City Hall Annex  
25 West Fourth Street  
St. Paul, MN 55102

Re: 543 James Avenue

Dear Ms. Grewing:

Since 2004, I have represented BHGDN LLC, the current property owner of the warehouse located at 543 James Avenue (the "Property") in its efforts to sell or lease the Property. This letter is written in support of correspondence to you from William C. Griffith, who is representing Premier Storage, LLC in its application for a nonconforming use permit to reuse the Property for internalized community storage.

As representative of BHGDN LLC, I brought a number of potential end users of the Property to the City for review between 2004 and 2011. These end users included a company which would have used the Property for school bus parking, The Salvation Army, Global/Flea Market and a grocery chain. In each instance, the City through Councilmember Dave Thune, discouraged the proposed reuse of the warehouse building. However, it is important to note that owners of the Property never stopped using the building as a warehouse. During the period that BHGDN LLC owned the property it was used by Xcel Energy, subcontractors for Xcel Energy, Dedicated Logistics, Anchor Fastener, Weis Construction and subcontractors for Weis Construction.

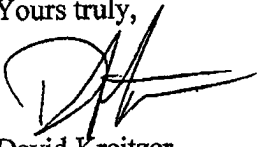
During the same time period, we listed the property with various brokers seeking a long term user or buyer. Brokers representing the property included Welsh, Colliers, Java Properties and Management Services Worldwide, Inc.

In approximately 2010, Councilmember Dave Thune initiated the process for designation of the Property and adjacent brewery site as an historic landmark, which further limited reuse of the Property. In 2010, Dominion signed a purchase agreement with BHGDN LLC to buy the brewery site, but declined to purchase the bottle annex portion of the site, which is now the subject of the application submitted by Premier Storage, LLC. On or around November 15, 2012, Dominion closed on the Property and began renovation of the brewery site.

Throughout this time period, the Property owner did not intend to relinquish its nonconforming use rights, nor did it abandon use of the Property as a warehouse. In fact, throughout this period, the property was used for warehouse purposes. On behalf of the Property owner, we respectfully request that the City adopt the Planning Commission's recommendation, grant a nonconforming use permit and allow reuse of the Property for internalized community storage as proposed by Premier Storage, LLC.

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Yours truly,

A handwritten signature in black ink, appearing to be 'DK' with a long horizontal stroke extending to the right.

David Kreitzer

cc: John Flottmeier

4829-5380-0736, v. 1