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MEMORANDUM

To: Members of the South Bend Common Council

From: Richard A. Nussbaum, II, Attorney for Women's Care Center, Inc. ("WCC")

CC: Robert Palmer; Mayor Pete Buttigieg

Re: Vote to Override Veto of Bill 05-18

Date: May 11, 2018

I. Introduction

On April 23, 2018, the Common Council by a vote of 5-4 approved Bill 05-18, the rezoning petition of WCC of 3527 Lincolnway West ("Rezoning"). On April 27, 2018, the Mayor vetoed the Rezoning claiming in part in his Veto Message:

"The City does have a set of neighborhood policies, intended to ensure that growth and development benefit all concerned. I am responsible for guiding and impartially applying these policies....I would have to concur this is the highest and best use of the land...I would have to find that the neighborhood would be made better by this change in law...and that the proposed change is compatible with current conditions, future development, and property values in the area." (emphasis supplied)

Then the Mayor comes to the conclusion: **"In my judgement, the neighborhood would not benefit from having the zoning law changed in order to place next door to each other two organizations with deep and opposite commitments on the most divisive social issues of our time."**

We echo the statement of Father John Jenkins recognizing what a fine public servant Mayor Pete has been and will continue to be. He brings great intellect and effort in his role as Mayor, and has fostered a very positive message about South Bend based in what he has done for our Community and his well known national ambitions. However, in his veto, the Mayor has put his own judgment and ambitions over the deliberations of the Council.

We also acknowledge his taking the time to meet in his office with myself and a representative of WCC to exchange ideas and solutions for concerns. The net effect of that meeting were the actions

the Mayor acknowledged in his Veto Message by WCC to avoid confusion between the WCC and the Whole Women Health Alliance Facility (“WWHA”). The confusion factor seemed to be the primary concern of the Mayor during the meeting.

We believe the Mayor’s veto should be overridden for the following reasons:

- Zoning is primarily a legislative act and the veto imposes the Mayor’s beliefs over those of the Council after three (3) public Hearings and two (2) separate sessions of the Council Committee of the Whole
- The Record created in this matter does not support the information cited by the Mayor in his veto message, and relies on matters outside the zoning criteria set by state law.
- There is overwhelming support for this rezoning petition in the neighborhood and the community as a whole

II. Zoning – Primarily a Legislative Act

State law makes clear the criteria for zoning amendments and then establishes a process through the legislative process (ie: the Common Council) to review and make a decision on those criteria.¹ In fact State law has a default policy of not allowing the Mayor to veto a zoning change. The Mayor of the City of Indianapolis does not have the right to veto a zoning change,² Mayors of second class cities like South Bend do not have the right to veto a zoning change unless the Municipal Code grants that right to the Mayor,³ and finally the Court of Appeals has decided even in Cities like South Bend the Mayor does not have the right to veto a Bill approving a “Special Use”.⁴

State law also limits access to the courts when a zoning amendment is made by the Council. Unlike actions by the Board of Zoning Appeals and Area Plan Commission, which may be appealed to a local Superior or Circuit Court, a zoning decision by the Council may not. The state statute involved specifically says legislative acts are not subject to Court Review through a writ of certiorari.⁵

Therefore we suggest in his Veto Message the Mayor dramatically fails to recognize the crucial role the Council, the legislative branch of government, plays in zoning decision. In making a decision whether or not to override the Mayor’s veto the Council should take into consideration the fact the Mayor by exercising a veto of this Bill is placing his view of the zoning amendment over what was decided by the Council in approving the Petition. State law provides a process for the Legislative branch to have the final say in zoning process by overriding by a 2/3 vote the veto of the Executive Branch.⁶

¹ I.C. 36-7-4-603

² I.C. 36-3-4-14(b)(6)

³ 36-7-4-609; The City of South Bend opted in to a mayoral veto in Section 21-07.05(e)(1)(f)

⁴ Heidbreater, Inc. v. BZA City of Crown Point, 558 N.E.2d 199 (Ind. Ct. App. 2006)

⁵ I.C. 36-7-4-1601(b)

⁶ I.C. 36-7-4-609(f).

III. Record Does Not Support a Veto

A review of the record in this matter reveals:

- The APC and the Community Investment Department found the petition meets the zoning criteria and specifically find the property being rezoned is in the Bendix Node as defined by the Council approved West Side Main Street Plan (2014). More importantly the use is found to be appropriate and consistent with that plan. The Council by its vote concurred in these recommendations
- No credible evidence of violence would result if the petition was granted and WCC located next to WWHA's facility. Thirty-four (34) years of operations in ten (10) states and twenty-nine (29) sites have yielded NO incidents of violence. In fact, twenty-two (22) of twenty-nine (29) WCC facilities are located adjacent to an abortion provider with NO incidents of violence.
- Remonstrators have tendered misleading evidence providing pictures which were not attributable to the WCC, and in fact where no WCC facility existed.
- The statistics showing three (3) times the amount of violence where pro-life and pro-choice facilities are located adjacent to each other were never presented at any of the three (3) Public Hearings held to address this rezoning. However, the Mayor seems to rely significantly on this unverified and biased evidence rather than thirty-four (34) years of actual statistics in exercising his veto.
- The WCC has offered to the Council, signed written commitments to address safety concerns raised regarding protestors and signage, and then made further commitments to the Mayor about alleviating confusion concerns he has. **FINALLY, THE WCC HAS AS OF MAY 10, 2018 PLEDGED TO PARTICIPATE IN THE CITY SIDEWALK PROGRAM TO ALLOW SIDEWALKS TO BE PUT IN PLACE FROM THE WEST SIDE OF THE WCC DRIVEWAY TO THE BUS STOP LOCATED NEARBY AT THE ILLINOIS/LINCOLNWAY WEST INTERSECTION. PART OF THAT COMMITMENT IS WCC WILL PAY THE NEIGHBORS' PORTION OF THE PROJECT (SEE ATTACHED EMAIL).**
- The crux of the Veto by the Mayor is based on the location of the two (2) facilities, and specifically says he is not taking a position on the divergent missions of the two (2) facilities. Therefore his Veto is based on "secondary effects" caused by the location of the facilities (ie: incidents of violence). He is treating this matter as if the WCC is a "Controlled Use" like adult theaters and bars whose locations are regulated by the Municipal Code. Courts have routinely overturned laws which do not provide evidence in the record of "secondary effects". No such record exists.

IV. Overwhelming Public Support

There were no members of the neighborhood who appeared at any of the three (3) Public Hearings held by the APC or Council in opposition to this rezoning. In fact WWHA never appeared at a public hearing to remonstrate. The adjacent neighbor appeared and testified in favor of the rezoning as well as submitted written support. A representative of hundreds of families in the 1st District and the neighborhood, Father Glenn Kohrman, also appeared and testified. Thousands of signatures on a petition in support were filed and a blind City-wide poll found overwhelming support for the rezoning.

V. Conclusion

The Council spent a great deal of time and effort to review and then decide whether or not the rezoning petition of WCC should be approved based on state zoning criteria. The Mayor has not vetoed this Bill based on zoning criteria. The Legislative process should be vindicated by overriding the veto of the Executive. As a result, the numerous known and proven benefits the WCC provide will be available to West Side residents consistent with the West Side Main Streets Plan. In addition, South Bend can be a shining light on how divisive issues can be peacefully addressed.

Richard A. Nussbaum

From: Ann Manion <annmanion13@gmail.com>
Sent: Thursday, May 10, 2018 10:18 PM
To: smcbride@southbendin.gov; kwhite@southbendin.gov
Cc: 'Michael Hamann'; Richard A. Nussbaum; annmanion13@gmail.com
Subject: Thank you and a follow-up....

Karen and Sharon,

I would like to thank you for meeting this morning with Mike Hamann and me. It means a lot that you would take the time to listen and to try and help. You know we are desperately trying to find a solution that would be a win for the city and the women of South Bend. After our meeting, I spoke with board members and key staff. Women's Care Center is happy commit to participating in the city's program to provide sidewalks along Lincolnway from the west end of our driveway to the bus stop on Illinois/near Elwood. We are happy to pay for not only our portion of the sidewalk but for all the intervening neighbors. Please share our commitment with other council members if you think it would be helpful.

Thanks again,

Ann Manion