


# Legal Memorandum

**To:** Nikki Elsen – City Clerk

**Cc:** Mayor Mitch Reynolds, Council President Chris Kahlow, Andrea Trane – Director of Planning, Development & Assessment

**From:** Stephen F. Matty, City Attorney 

**Date:** May 8, 2024

**Re:** A24-00158: Substantial change in circumstances  
Rezoning petition; Section 115-34

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You identified that Ms. Hetti Brown, on behalf of the Reach Center, has submitted the same rezoning application that was recently denied on March 14, 2024 in Ord. 24-0190, which failed due to the lack of a supermajority vote after legal objectors filed a protest petition in opposition to the request. The following month on April 11, 2024, the Common Council enacted Ord. 24-0278, which repealed the protest petition process to rezoning applications in accordance with 2023 Act 16. The Common Council decided to make the ordinance effective after passage and publication rather than a future effective date of January 1, 2025. You indicated that the Ms. Brown refiled the rezoning application based upon an oral opinion from my office. You asked me to clarify the opinion.

## ANALYSIS

Municipal Code Section 115-34 is the controlling authority on whether to process the recently filed rezoning application. Section 115-34 provides,

After a petition or ordinance for rezoning of property has been heard and denied, no other petition or ordinance by the same owner affecting the same property or portion thereof, requesting the same change in zoning shall be filed, introduced or heard for a period of one year from the date of said denial.

Ordinances like Section 115-34 are typically enacted in order to prevent the inefficient allocation of municipal resources. Typically, they require a substantial change in circumstances in order to process a similar application. Frequently, the application, itself, will contain the substantial change. At other times, the substantial change could be something beyond the “four corners” of the application. For example, there could be a substantial change in the underlying law on how the application is processed. The City’s Board of Zoning Appeals has a similar rule of procedure but takes a more expansive approach to analyzing the issue. The rule from BOZA reads,

After an appeal has been heard and denied by the Board, no other appeal for the same property may be made for a period of one (1) year from the date of filing of the decision, unless the appeal is substantially different from the appeal which was denied. The determination as to whether the appeal is substantially different is in the discretion of the City's Chief Building Inspector. The one (1) year waiting period does not apply to appeals for variances which have lapsed due to a failure to commence or complete work as required. (Approved 11/19/08)

(Emphasis added).

The Common Council could decide that 2023 Act 16 was a substantial change in circumstances in this instance for which the rezoning application could be deliberated again notwithstanding the one-year prohibition. Indeed, Wis. Stat. § 62.11(3)(e) provides, the “[common] council shall in all other respects determine the rules of its procedure.” To that end, the Legal Department sees a number of options available to the Common Council concerning the recent rezoning application submission.

First, the issue of whether a substantial change in circumstances due to the change in Wisconsin law could be placed on the future agenda of the Common Council. Under this scenario, there would be no processing of the rezoning application until the Common Council first determines whether the substantial change in circumstances is present. The parties both in favor and opposed to the position may wish to speak on the issue at a public meeting. The Common Council might hear speakers talk about the inability to petition their government given Section 115-34 or that the applicants were unaware of the upcoming change in the law based on Ord. 24-0278. Had they known, they might have sought referral until the Ord. 24-0278 became effective. On the other hand, 2023 Act 16 was enacted on June 22, 2023 and became effective on June 24, 2023. It is also a common principle of law, however, that persons are bound by the law even when they are ignorant of it.

If the Common Council determines there is a substantial change in circumstances due to the change in the law, then the rezoning application could be processed normally. The best way to effectuate this would be to change Section 115-34 allowing for substantial circumstances beyond the “four corners” of the document before processing the rezoning application. In the event the Common Council determines no substantial circumstance exists due to the change in the law, then the rezoning application would not be processed and the application fee should be returned to the applicant.

Second, the City could decide to move forward by not placing the issue nor rezoning application on the upcoming agenda. In this scenario, the application fee should be returned to the applicant. Even if the issue of whether a substantial circumstance exists is not placed on the agenda, any Council Member could still decide to sponsor legislation to amend or repeal Section 115-34 in order to allow reapplication in less than one year.

## CONCLUSION

For the reasons stated above, the rezoning application could be reprocessed given the substantial change in circumstances of the law removing the ability of a protest petition and supermajority voting requirement. If it is determined to proceed in this fashion, then it is recommended that Section 115-34 is amended in accordance with the determination.

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