

**GRANT F. LANGLEY**  
City Attorney

**RUDOLPH M. KONRAD**  
**LINDA ULISS BURKE**  
**VINCENT D. MOSCHELLA**  
Deputy City Attorneys

**CITY OF**  
**MILWAUKEE**  
**Office of the City Attorney**

**THOMAS O. GARTNER**  
**BRUCE D. SCHRIMPF**  
**ROXANE L. CRAWFORD**  
**SUSAN D. BICKERT**  
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**MARYNELL REGAN**  
**G. O'SULLIVAN-CROWLEY**  
**KATHRYN M. ZALEWSKI**  
**MEGAN T. CRUMP**  
**ELOISA DE LEÓN**  
**ADAM B. STEPHENS**  
**KEVIN P. SULLIVAN**  
Assistant City Attorneys

June 26, 2007

Alderman Robert G. Donovan  
8<sup>th</sup> Aldermanic District  
Common Council, City Clerk  
Room 205, City Hall  
200 East Wells Street  
Milwaukee, WI 53202

Alderman Robert Bauman  
4<sup>th</sup> Aldermanic District  
Common Council, City Clerk  
Room 205, City Hall  
200 East Wells Street  
Milwaukee, WI 53202

Re: Proposed ordinance to permit the suspension or revocation of occupancy  
permit for nuisance activity

Dear Aldermen:

On April 2, 2007, Alderman Donovan requested a legal opinion as to the legality and enforceability of a proposed ordinance relating to the suspension or revocation of occupancy permits for nuisance activity occurring at certain residential rental properties. Based upon review of state enabling statutes, current code authority and the attached legal opinions issued by this office on June 15, 2007 and November 16 1998, it is our opinion that the proposed ordinance would not be legal and enforceable without a change in state law.

The City wields considerable power to respond to nuisance activity at residential rental property. As you know, the Community Prosecution Unit of the City Attorney's Office is responsible for conducting nuisance abatement litigation in the circuit court and has filed 17 lawsuits against the owners of drug-house nuisance properties since August 2005. These cases have frequently led to the closure of the buildings and removal of nuisance residents within a couple of weeks of filing suit. In addition, the circuit court has ordered the owners to properly screen prospective tenants, actively manage their properties and document their rental practices with this office and the police department. Most of these cases resolve by the sale of the properties to informed and cooperative third parties.

In addition, the recent amendment of Section 80-10 Milwaukee Code of Ordinances (Chronic Nuisance Premises), as authored by the Community Prosecution Unit, will

OFFICE OF THE CITY ATTORNEY

Milwaukee City Hall Suite 800 • 200 East Wells Street • Milwaukee, Wisconsin 53202-3551 • Telephone: 414.286.2601 • TDD: 414.286.2025 • Fax: 414.286.8550

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Alderman Robert Bauman

permit a progressively tougher response to nuisance behavior at residential rental property. Once the police department requires a nuisance abatement plan from an owner, the plan must be successfully implemented or bills for police services will be issued. Once three bills are issued, the owner is put on notice regarding the Chronic Nuisance Premises citation, and, if issued, will be vertically prosecuted in Municipal Court by the Community Prosecution Unit. Successful prosecution will result forfeiture in the thousands of dollars and may serve as the basis of a nuisance abatement action in circuit court seeking the closure of the property.

In conclusion, it is the opinion of this office that revocation of occupancy permits to address nuisance activity is not authorized by law. This office will continue assist the Department of Neighborhood Services and Police Department in reviewing the conceptual rental property licensing ordinance.

If you have any further questions, please do not hesitate to contact the undersigned.

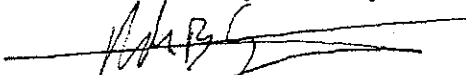
Very truly yours,



GRANT F. LANGLEY  
City Attorney



ELOISA DeLEÓN  
Assistant City Attorney



ADAM B. STEPHENS  
Assistant City Attorney

GFL/EDL/ABS/dj

c: Ronald D. Leonhardt  
1033-2007-1128/119805

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**ADAM B. STEPHENS**  
**KEVIN P. SULLIVAN**  
**BETH CONRADSON CLEARY**  
**THOMAS D. MILLER**  
Assistant City Attorneys

June 15, 2007

Mr. Martin Collins, Commissioner  
Department of Neighborhood Services  
841 North Broadway, 10<sup>th</sup> Floor

Re: Revocation of Occupancy Permits

Dear Mr. Collins:

In an e-mail message dated February 15, 2007, you posed several questions arising in the aftermath of the Circuit Court's decision in *Porush v. City of Milwaukee Board of Zoning Appeals*, 2006-CV-002153. In that case, Judge Dwyer ruled that § 200-31, Milwaukee Code of Ordinances (MCO), only authorizes revocation of certificates of occupancy in the context of the construction of a building. As you know, this office has not appealed that decision. You asked how to amend § 200-31 or other ordinances to allow revocation of occupancy permits for illegal occupancy or use.

Representatives of this office met with you and your staff on March 5, 2007 to discuss ways to address illegal occupancy or uses. As a result of that meeting, this office has advised your staff on methods to increase forfeitures for certain illegal uses, we approved a process for situations when your inspectors cannot gain access for reinspection, and we discussed with you the types of circumstances that could be considered for immediate appeal directly to you. We are also developing a sample affidavit to be used when we bring an injunction to enforce orders to discontinue an illegal use or occupancy.

We met again with you and your staff on April 23, 2007. At that meeting we discussed the reasons you desire to revoke certificates of occupancy for illegal uses and occupancy. We also discussed the jurisdiction of the Board of Zoning Appeals and the Board of Standards & Appeals.

This office previously assisted you in code revisions related to occupancy permits, and defended your actions in the *Porush* matter. It is our opinion, based on extensive research, that neither state statutes nor City ordinances permit the revocation of residential occupancy certificates for illegal occupancy or use of an existing building.

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Milwaukee City Hall Suite 800 • 200 East Wells Street • Milwaukee, Wisconsin 53202-3551 • Telephone: 414.286.2601 • TDD: 414.286.2025 • Fax: 414.286.8550

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A certificate of occupancy has an accepted meaning. It is generally considered as being complementary to a building permit. The building permit evidences that what the owner intends to erect on the property is legal. The certificate of occupancy is issued after completion, and evidences that what has been built is in compliance with the law and that the proposed use is legal at the time of issuance. *Rathkopf's Law of Zoning and Planning*, § 69:24, Volume 4 (Thompson West 2005).

*Rathkopf*, the seminal treatise in this area, states at § 69.29:

A certificate of occupancy which is regular and valid when issued cannot be, and should not be, revoked for changed conditions subsequent to its issuance. The facts set forth in a certificate of occupancy, attesting to the compliance of a building with the code and zoning ordinance, speak as of the date of issuance of the certificate; it is not intended as an assurance that the occupancy of the building will forever adhere to the same conditions. However, it furnishes a measuring rod against which to measure a subsequent use of the premises. It permits a determination of whether the use or the structure itself has changed.

As we have discussed with you, there are a number of remedies available when a residence is illegally used or occupied. Prohibiting the owner from using his or her own property for a legal purpose by revoking an occupancy permit, is not currently sanctioned by law; in our opinion, such authority would require a specific amendment to state law.

A. The Code.

1. Section 200-31. Revocation of Permit or Approval. This is the section that your department had been using to revoke occupancy permits for code violations for illegal use or occupancy of parts of a building. It permits DNS to revoke a certificate of occupancy and to "stop construction . . ." for a variety of reasons, including a violation of the code or orders. This is the section that Judge Dwyer ruled was limited to construction. That is consistent with the context of the provision and the structure of the Code and, based on our research, is also consistent with most views of the purpose of an occupancy permit.
2. Section 200-11. Enforcement - 4. Illegal Occupancy and Use. This section explicitly applies to existing buildings, where the occupancy or use violates the code. It does not authorize revocation of an occupancy permit. It only authorizes DNS to issue an order to discontinue the use or occupancy; it does not prevent the continued legal use of the premises. Even where a building or dwelling unit is

unsafe or unfit for human habitation, DNS can only issue an order to discontinue, followed by a court action if the owner fails to obey the order. § 200-11-5. The same is true in emergencies. § 200-12.5.

3. Section 295-311-1-a-2. This section was added to give BOZA the authority to hear appeals of revocation of occupancy certificates "for violations of this chapter made pursuant to s. 200-31." Under the court's ruling, this only covers new construction.
4. Section 200-17-4 was changed to read so that Standards and Appeals would not hear appeals of revocations of occupancy "made pursuant to s. 200-31 for violations of Ch. 295." Again, § 200-31 is limited to new construction.

B. State Law

1. Enforcement of the zoning code. In addition to civil penalties, if a building is used in violation of a zoning ordinance, the City may go to court to restrain, correct, or abate the violation. Wis. Stat. § 62.23(7)(f).
2. Enforcement of building code. The Council may provide for enforcement of the building code by withholding building permits, imposing forfeitures, and injunctive action. Wis. Stat. § 62.23(9)(a).

Thus, there is no authority for revoking a residential occupancy permit as a penalty for an illegal use or occupancy, or for other violations of the code. As we stated in our 1998 opinion, attached, the zoning code cannot be used, for example, to address behavioral issues at a property. See, *Great Lakes Tanning Co. v. City of Milwaukee*, 250 Wis. 74 (1947); Am. Jur. 2d, Zoning and Planning, § 648.

Wisconsin case law dealing with revocation of occupancy permits is limited to situations where the permits were issued in error or the building was not constructed in accordance with zoning regulations. See, i.e., *Lake Bluff Housing Partners v. City of South Milwaukee*, 2001 WI App 150, 246 Wis. 2d 785 (Ct. App. 2001); *City of Milwaukee v. Leavitt*, 31 Wis. 2d 72 (1966).

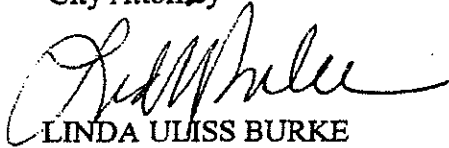
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Therefore, we advise that you continue to explore means of achieving compliance with use and occupancy regulations other than through attempts to revoke occupancy permits. We will continue to assist you in this endeavor.

Very truly yours,



GRANT F. LANGLEY  
City Attorney



LINDA ULISS BURKE  
Deputy Assistant City Attorney

LUB:wt:  
Enc.  
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