CITY OF MILWAUKEE

Form CA-43

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May 7, 2003

Craig Zetley, Chairman
Board of Zoning Appeals
809 North Broadway, 1st Floor
Milwaukee, WI 53202

Re: Payday Loan or Title Loan Agencies
BOZA Case Numbers 24480, 24481, and 24482

Dear Mr. Zetley:

In your letter of February 27, 2003, you have requested the advice of this office concerning the range of information that can be considered by the Board of Zoning Appeals ("Board") when interpreting and applying the criteria set forth in the Zoning Code ("Code") for issuance of special-use permits to "payday loan" or "title loan" agencies (sometimes collectively referred to in this opinion as the "payday loan" industry). Section 295-311-2-d-1 of the Code, sets forth the following as one of the criteria applicable to evaluation of any application for a special-use permit:

> Protection of Public Health, Safety, and Welfare. The use will be designed, located, and operated in a manner so that the public health, safety, and welfare is protected.

The question concerning the scope of the Board's authority has arisen as a consequence of certain business practices associated with the operation of "payday loan" or "title loan" agencies, which have engendered controversy. These include such matters as lending practices, interest rates, and loan "rollovers." Your question is directed at whether such matters may be considered by the Board as factors governing its determination on special-use permit applications submitted by such businesses. We have additionally reviewed correspondence that has been transmitted to you by counsel for Payday Loan Store of Wisconsin, Inc., an applicant for three special-use permits that are now pending before the Board, and for Legal Action of Wisconsin, Inc., an opponent of the pending applications. Given that these permit applications refer to "payday loan" agencies, our discussion will focus upon that line of business; we note, however, that we are not aware of any distinction between "payday loan" and "title loan" agencies with respect to the specific issue raised by your letter of February 27, 2003.

A "payday loan" agency (more precisely entitled a "deferred deposit" agency) is a business that provides short-term loans to individuals at very high rates of interest. Typically, in a "payday loan" arrangement, the following steps occur:

1. The borrower will provide to the lender items such as a paycheck stub, photo identification, and/or a recent bank statement;

2. The borrower then completes a loan application and submits a post-dated check to the lender and in return receives cash proceeds of the loan, which will be less than the face amount of the check;

3. The post-dated check is then held by the lender until the loan is due—usually a period of two weeks or thereabouts reflecting the fact that such loans are generally intended to get the borrower through the period until his or her next payday (hence the term "payday loan"); and

4. At the due date, the lender will deposit the check unless the borrower is able to pay the loan in full (generally the face amount of the check) at that time or unless the lender and the borrower agree to "roll over" the loan for an additional period.

The "payday loan" industry is regulated by the Wisconsin Department of Financial Institutions under § 138.09, *Wis. Stats.* and other applicable statutes, particularly the Wisconsin Consumer Act (chs. 421-427, *Wis. Stats.*) and its implementing regulations, which may be found at Wis. Adm. Code ch. DFI-Bkg 80. One noteworthy feature of this regulatory scheme is that loans made thereunder that are either "precomputed" or "based upon the actuarial method," after October 31, 1984, are not subject to any maximum interest-rate limit. § 138.09(7)(bp), *Wis. Stats.*

With the foregoing in mind, we now turn to a discussion of the applicable legal principles. The pending permit applications request the issuance of a special-use permit. A "special use" is defined in § 295-102-619 of the Code as follows:

> SPECIAL USE means a use which is generally acceptable in a particular zoning district but which, because of its characteristics and the characteristics of the zoning district in which it would be located, requires review on a case-by-case

basis to determine whether it should be permitted, conditionally permitted, or denied.

Thus, a "payday loan" agency is a lawful use, the operation of which both the State and the City have seen fit to permit. Whether such a use will, in fact, be permitted to operate at any particular location is subject to case-by-case review by the Board, in accordance with the special-use permit criteria set forth in § 295-311-2-d of the Code. The key in this respect is case-by-case review. If a type of use is designated as a "special use" in a particular zoning district, the Board cannot simply permit or ban all such uses on a blanket basis, but must instead perform that review with respect to each application, as directed by the Code.

The extent of the Board's discretion in evaluating special-use permit applications submitted by "payday loan" agencies and similar businesses is governed by the measure of the City's "police power." The Code (ch. 295, Milwaukee Code of Ordinances) represents a traditional and extremely well-established vehicle for the exercise of police powers vested in the City. *See* § 62.11(5), *Wis. Stats.*; *Willow Creek Ranch, LLC v. Town of Shelby*, 2000 WI 56, 235 Wis.2d 409, 611 N.W.2d 693; *State ex rel. American Oil Company v. Bessent*, 27 Wis.2d 537, 135 N.W.2d 317 (1965). Indeed, the adoption of a comprehensive zoning code represents the primary vehicle by which a municipality promotes the public health, safety, and welfare through regulation of the use of land within its jurisdiction. *Village of Euclid, OH v. Ambler Realty Company*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); *City of Milwaukee v. Leavitt*, 31 Wis.2d 72, 142 N.W.2d 169 (1966). Notably, the literal text of § 295-311-2-d-1 of the Code, setting forth the special-use criterion referenced in your letter of February 27, 2003 is stated in explicit police-power terms—*i.e.*, whether the use in question "will be designed, located, and operated in a manner so that the public health, safety, and welfare is protected." The Board has broad discretion to hear testimony and apply this criterion to the full extent necessary to assure protection of the public health, safety, and welfare. The City, in the exercise of its police-power, has delegated this authority to the Board.

The question before us thus concerns the legitimate extent of the Board's authority to regulate the operations of the "payday loan" industry as an exercise of its delegated police powers and under the "public welfare" criterion of the special-use permit ordinance, § 295-311-2-d-1 of the Code. We have found no cases directly relevant to this inquiry, but we can provide some guidance through the application of well-established principles.

It cannot be fairly disputed (and counsel for Payday Loan Store of Wisconsin, Inc. acknowledges) that the Board may exercise such regulatory authority over traditional land-use criteria, including (but not necessarily limited to) those enumerated in the special-use conditions set forth by §§ 295-311-2-d-2 through 2-d-4 and 295-311-e of the Code. It also cannot be fairly disputed (and counsel for Payday Loan Store of Wisconsin, Inc. also acknowledges) that the definition of a "special use" set forth in § 295-201-619 of the Code authorizes the Board "to conduct a location specific inquiry to see if the proposed special use creates conflicts with the characteristics of the location and surrounding neighborhood."

The difficulty is that your inquiry reaches beyond consideration of traditional land-use criteria or other site-specific considerations. It implicates the broader question of whether (and if so, to what extent) the Board may exercise its delegated police powers to regulate the lending practices and other business conduct of the "payday loan" industry—and, if it disapproves of that conduct, whether it may consequently deny or limit the issuance of special-use permits to applicants from that industry. This question is far more problematic, particularly as this industry is, as earlier noted, a lawful enterprise that the State has not chosen to prohibit or (in the case of interest rates charged on loans made after October 31, 1984) even to limit. Thus, we must consider whether the Board may intervene in an area where the State has chosen not to.

The available case law provides no reliable guidance applicable to this specific context. We have found two Wisconsin cases supporting a broad construction of the type of "public welfare" criterion implicated here. In those cases, however, the secondary impacts of the land use in question were significantly more tangible and directly applicable to the general public than the comparable adverse secondary impacts here (*i.e.*, the risk of loan defaults by "payday loan" customers and the resultant financial distress and potential bankruptcies).

First, we consider the decision of the Wisconsin Supreme Court in *Edward Kraemer & Sons, Inc. v. Sauk County Board of Adjustment*, 183 Wis.2d 1, 515 N.W.2d 256 (1994). In that case, the Court upheld the board's broad discretion to consider generalized effects on public welfare in its evaluation of an application submitted by a mining corporation for a "special exception" that would authorize it to extract minerals on land zoned for agricultural use. The Court specifically rejected the contention that the board's discretion was limited to consideration of only the specific standards enumerated in the zoning ordinance applicable to "mining extraction" activities and ruled that the board may also consider standards of general applicability that may be pertinent to consideration of the impact of a proposed use upon the "public welfare." In this respect, the Court stated as follows:

> . . . [T]he "public health, safety and welfare" standard, is a general standard that provides the Board with flexibility and discretion to consider how a proposed special exception could affect the public welfare. The standard allows the Board to consider potential harm to individuals living near the proposed mineral extraction site, including exposure to health hazards from the dust and threats to safety posed by blasting. The public health, safety and welfare standard is also broad enough to enable the Board to consider the generalized effects on the public welfare that concern the Board in this case—harm to the public that would result from partial destruction of a natural area that both permit supporters and opponents agree is of great geologic importance.

183 Wis.2d at 11, 515 N.W.2d at 260. The court also rejected the contention that the application of the "public welfare" standard by the board constituted an impermissible delegation of legislative authority. *Id.*, 183 Wis.2d at 14-15, 515 N.W.2d at 261-262. The environmental harm described by the Court, however, was more directly related to the proposed land use and more likely to affect the general public in the vicinity of the mine, than the risks of harm posed by the grant of a special-use permit to a "payday loan" agency.

In a more recent case the Wisconsin Court of Appeals confirmed that the "general welfare" component of the criteria applicable to special use permits may be broadly construed by boards of appeal to include consideration of positive, community-wide secondary impacts of a proposed use. *Sills v. Walworth County Land Management Committee*, 2002 WI 111, 254 Wis. 2d 538, 648 N.W.2d 878 [petition for review denied 2002 WI 109, 254 Wis. 2d 261 648 N.W.2d 477] dealt with the review of the grant of a conditional use permit by the Walworth County Land Management Committee. The facts in that case involve a request to permit the creation and operation of a public museum at a historic estate located on Geneva Lake. In reaching its decision to grant the conditional use permit, the Walworth County Land Management Committee considered not only traditional zoning factors such as traffic and impact upon property values but also the historic benefit of preserving the site as a public museum.

The Court of Appeals, in upholding the Committee's decision concluded that "the phrase general welfare" has a broad meaning encompassing a wide range of areas." 648 N.W.2d at 883. The Court went on to say that it was " . . . persuaded that the general welfare is promoted by the preservation of historical sites and maintenance of museums to educate the public and to inspire patriotism and respect for our history." 648 N.W.2d at 884. As is the case with the Code, the

Walworth County ordinance set forth as its stated purpose the promotion of the general welfare of Walworth County, including comfort, health, safety, prosperity and aesthetics. 648 N.W.2d at 883. The decision supports a broad interpretation of the general welfare and acknowledges that "the weight to be accorded all of this evidence was within the discretion of the Committee." 648 N.W.2d at 885, citing *Delta Biological Resources Inc. v. Bd. of Zoning Appeals*, 160 Wis. 2d 905, 915, 467 N.W.2d 164 (Ct. App. 1991).

Similarly, zoning boards of appeal have been accorded considerable discretion to regulate matters that influence the physical and visual environment, such as aesthetics and architectural design. *See, e.g., Gabriel v. Village of Wind Point*, 157 Wis.2d 668, 460 N.W.2d 800 (Ct. App. 1990); *Racine County v. Plourde*, 38 Wis.2d 403, 157 N.W.2d 591 (1968); *State ex rel. Saveland P.A. Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955); McQuillin, *The Law of Municipal Corporations* (2000 rev.), Vol. 8 at §§ 25.29-25.31. And, in a few contexts, zoning regulations excluding certain businesses from particular zoning districts or sections of a local jurisdiction have been upheld on the basis of proven adverse secondary impacts upon the general public in those specific geographical areas. Such situations most frequently arise with respect to regulation of the location of adult bookstores and movie houses or other adult businesses. *See, e.g., City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976); however, the permissible scope of such regulation may not extend so far as to ban an adult or other lawful use from locating anywhere within a jurisdiction. *Town of Wayne v. Bishop*, 210 Wis. 218, 565 N.W.2d 201 (Ct. App. 1997).

Thus, while the available case law seems to accord significant discretion to the Board in applying the "public welfare" component of the special-use permit criteria contained in § 295-311-2-d-1 of the Code, it does not indicate that that discretion is unlimited or that it might extend to regulation of a "payday loan" agency's lending and other business practices. Such matters have no bearing upon the appearance or physical environment of the locations in which "payday loan" agencies choose to operate; nor do they affect the compatibility between those agencies and neighboring land uses. Nor does this situation resemble the adult-use context in the sense of implicating proven adverse secondary impacts upon the general public arising from the very nature of the business and resulting from its location in particular zoning districts or areas of the jurisdiction. While adverse secondary impacts may certainly be felt by that segment of the "payday loan" industry's customer base that falls into default on their loan-repayment obligations, there is, to our knowledge, no proof demonstrating that the existence or operation of the industry, in and of itself, is somehow inimical to the interests of the general public. Indeed, it can be argued to the contrary—*i.e.*, that the "payday loan" industry fills a needed market niche in

providing short-term credit to a class of borrowers who, for a variety of reasons, find such credit to be necessary or useful, even at very high rates of interest and other loan charges.

A second item of concern is the significant possibility that a reviewing court would find State preemption of regulation of the "payday loan" industry's business practices. The police power does not extend to matters preempted by State statute or regulation. Municipalities may not pass ordinances or make regulations that "infringe the spirit of a state law or are repugnant to the general power of the state." *Anchor Savings & Loan Assn. v. Madison Equal Opportunities Commission*, 120 Wis.2d 391, 396, 355 N.W.2d 234, 237 (1984); *Fox v. City of Racine*, 225 Wis. 542, 545, 275 N.W. 513, 514 (1937). Further, "a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required, or authorize what the legislature has expressly forbidden." *Fox v. City of Racine, supra*, 225 Wis. at 545, 275 N.W. at 514; *DeRosso Landfill Company, Inc. v. City of Oak Creek*, 200 Wis.2d 642, 651, 547 N.W.2d 770, 773 (1996); *Wisconsin's Environmental Decade v. Department of Natural Resources*, 85 Wis.2d 518, 529, 271 N.W.2d 69, 74 (1978).

In this instance, the legislature has passed a comprehensive statutory scheme for the regulation of all branches of the credit industry (including its "payday loan" component), including provisions for regulation of rates of interest (ch. 138, *Wis. Stats.*) and of the industry's consumer-lending practices (chs. 421-427, *Wis. Stats.*). Significantly, in § 138.09(7)(bp), *Wis. Stats.*, the legislature made, and consciously expressed, its choice not to impose any fixed maximum rate of interest upon the precise categories of loans most commonly offered by "payday loan" agencies. This statutory scheme is supplemented by a regulatory regime under the auspices of the Department of Financial Institutions. In *Anchor Savings & Loan Assn. v. Madison Equal Opportunities Commission, supra*, the Wisconsin Supreme Court ruled that the City of Madison did not have the power to regulate the credit practices of a state-chartered savings and loan association, invalidating an ordinance barring discrimination in mortgage lending on the basis of marital status on the grounds that it was pre-empted by state legislation. Notably, this included the legislature's adoption of "a complex and comprehensive statutory structure dealing with all aspects of credit and lending in ch. 138, Stats., which governs rates of interest, variable rate contracts, federal rate parity, residential mortgages and credit discrimination." 120 Wis.2d at 397-398, 355 N.W.2d at 238. The Supreme Court also specifically rejected the contention that the Madison ordinance came within the City's "home-rule" powers under Art. XI § 3(1). Not coincidentally, the subject matter of the *Anchor Savings & Loan* case is closely related to that encompassed by this opinion, and the source of the State preemption in that case is one of the

very same chapters of the Wisconsin Statutes (ch. 138) implicated in the regulation of the credit practices of the "payday loan" industry.

We have also searched for non-Wisconsin cases that might provide guidance on the issue of the application of zoning regulations to the "payday loan" industry, and have found two such cases, both from Missouri. The decisions in these cases, however, are not directed to the specific inquiry raised by your letter and are thus of limited value. In *State ex rel. Sunshine Enterprises of Missouri, Inc. v. Board of Adjustment of the City of St. Ann*, 64 S.W.3d 210 (Mo. Sup. Ct. 2002), the Missouri Supreme Court invalidated a local zoning ordinance prohibiting the location of "short-term loan establishments" anywhere within the City of St. Ann, on the grounds that it conflicted with a state statute classifying "personal services" businesses and financial institutions as "permitted uses" within "general commercial districts." Although Wisconsin appears to have not adopted a comparable statute, this decision is consistent with the general principle, noted above, that "a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required." In *Missouri Title Loans, Inc. v. City of St. Louis Board of Adjustment*, 62 S.W.3d 408 (Mo. Ct. App. E.D. 2001), the Missouri Court of Appeals upheld a determination by the board to deny a conditional-use permit to a "title loan" agency on the basis of an evidentiary record indicating that the grant of that permit would decrease neighborhood property values, increase traffic, and attract undesirable business invitees. Such a determination, however, was not premised upon a general "public welfare" conditional-use criterion comparable to § 295-311-2-d-1 of the Code and would be more akin to an application of a protection-of-property criterion such as that found in § 295-311-2-d-2 of the Code.

Thus, while we do not necessarily agree with the suggestion of counsel for Payday Loan Store of Wisconsin, Inc. that the "public welfare" criterion set forth in § 295-311-2-d-1 of the Code refers only to matters related to "land use," we do not believe that the scope of that criterion is unlimited. The text of the Zoning Code states that a special-use permit shall not be granted unless the Board makes a finding that the proposed use will be "operated in a manner that the public health, safety, and welfare is protected." That text does encompass not only "land use" issues, but also those matters within the traditional reach of the City's police powers under § 62.11(5) *Wis. Stats.* We caution, however, that there is a significant risk that it would not encompass any attempt to regulate the lending or other business practices of the "payday loan" industry, and that the courts may very well invalidate any determination by the Board upon an application submitted by a "payday loan" agency based in whole or in part upon any such attempt. Further, we believe that any such attempt may be preempted by existing State

legislation and administrative regulation applicable to regulation of the credit practices and related operations of the "payday loan" industry.

If you have any further questions concerning this matter, please contact this office for further guidance.

Very truly yours,

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