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April 23, 2007

Ms. Vanessa Koster  
DCD, Assistant Planning Director  
809 North Broadway, 2<sup>nd</sup> Floor  
Milwaukee, WI 53202

Re: City Plan Commission Proposed Policy

Dear Ms. Koster:

This letter responds to your request for the opinion of this office as to the propriety of the City Plan Commission ("CPC") establishing a policy which would condition its consideration of any zoning change application upon the requesting party demonstrating that such party is not in violation of other requirements or obligations in favor of the City. Under the proposed policy, the CPC would decline to consider any zoning change application brought by a party delinquent in the payment of real estate or personal property taxes, the subject of an unpaid civil judgment in favor of the City, the owner of property subject to outstanding orders from either the Department of Health or Department of Neighborhood Services or who has been convicted of certain crimes relating to property or neighborhood stability.

We conclude that such a policy is not barred by state law and so could be permissible. Such a policy would, however, be inconsistent with the current Milwaukee Zoning Code ("Code") and could only be implemented upon adoption of an appropriate ordinance which specifies the factors to be employed by the CPC in considering a zoning change application.

The statute which authorizes and enables city zoning power is Wis. Stats. Sec. 62.23(7). It is silent on the issue of conditioning a zoning change upon compliance with other factors unrelated to the subject property and its permitted use, neither requiring nor prohibiting same.

Moreover, Wis. Stats Sec. 62.23(7)(a) provides that the grant of zoning authority is "for the purpose of promoting health, safety, morals or the general welfare of the community." Such subsection goes on further to provide that "this subsection and any ordinance, resolution or regulation enacted or adopted under this section shall be liberally construed in favor of the city." This language evinces a strong legislative intent to vest in a city broad latitude in making zoning and land use decisions.

An analogy may be drawn with the process of obtaining an alcoholic beverage license from the city. *Tavern League of Wisconsin v. City of Madison* 131 Wis.2d 477 (Ct. App. 1986) held that the City of Madison had the statutory authority to condition the grant of a liquor license on the payment of local (but not state or federal) taxes. The Court explained that “under sec. 62.11(5) Stats., the city’s power to act in matters of local concern is limited ‘only by express language’ elsewhere in the statutes.” Since the Court found no other statutory restriction limiting the city’s power to collect local taxes, it held that the city possesses the authority to condition the issuance of alcoholic beverage licenses upon applicants’ payment of local taxes, assessments and forfeitures.


The power of zoning granted to a city pursuant to Wis. Stats. Sec. 62.23(7)(a) is expressly provided to repose in the city’s Common Council. The current Code makes no provision for the consideration of any of the proposed, non-zoning factors. Accordingly, any effort to condition zoning decisions upon the presence or absence of additional factors would be permissible only with the adoption by the Council of an ordinance which specifies such factors. The CPC does not have the authority on a unilateral basis to adopt or implement such a policy.

Note that this was the method—adoption of an ordinance—utilized by Madison and upheld by the Court in the *Tavern League* decision. Note, as well, however, that *Tavern League* found constitutional limitations, both on the basis of equal protection and due process, to Madison’s method of tying the grant of a liquor license to the payment of local taxes. Any ordinance in Milwaukee designed to condition zoning changes upon satisfaction of additional, non-zoning issues must address such constitutional issues.

In particular, any ordinance must provide that applicants for a zoning change are not treated any differently than other, similarly situated petitioners coming before the City in connection with a zoning-related matter. Additionally, any such ordinance must afford all such petitioners an opportunity, upon notice and a hearing, to challenge any adverse determination related to any non-zoning issue.

Very truly yours,

  
GRANT F. LANGLEY  
City Attorney

  
KEVIN P. SULLIVAN  
Assistant City Attorney