fundamental rights, or is not rationally related to any legitimate goal of government.

Constitutional Law > Equal Protection > Scope of Protection
HN2 When dealing with economic regulation, any conceivable basis for the classification is sufficient to justify it. Parties challenging legislation under the equal protection clause cannot succeed so long as it is evident from all the considerations presented to the legislature, and those of which the court can take judicial notice, that the question is at least debatable.

Constitutional Law > Equal Protection > Scope of Protection
HN3 When the legislature has or could have had some evidence before it that reasonably supports a classification, challengers cannot prevail merely by tendering evidence in court that the legislature was mistaken.

Constitutional Law > Fundamental Freedoms > Overbreadth & Vagueness
Governments > Legislation > Overbreadth & Vagueness
HN4 Vague laws present two kinds of problems. The first is that persons of ordinary intelligence will not know how to conform their conduct to the law. The second is the lack of explicit standards for application of the law, with the consequence that persons charged with enforcement of the law may act arbitrarily and discriminatorily. The vagueness doctrine is enforced most strictly when the law interferes with free expression or the exercise of other constitutional rights. Economic regulation is subject to a less stringent analysis because such regulation usually deals with a narrower subject and those affected by it are more likely to consult the law, seeking clarification if necessary, in order to plan their behavior. Moreover, legislation that has civil rather than criminal penalties is given great leeway because the consequences of imprecision are qualitatively less severe.

Constitutional Law > Equal Protection > Scope of Protection
Constitutional Law > Substantive Due Process > Scope of Protection
HN5 The various freedoms preserved by Wis. Const. art. I, § 1, are substantially the equivalent of the due-process and equal-protection-of-the-laws clauses of the Fourteenth Amendment to the United States Constitution.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Supplemental Jurisdiction
HN6 When deciding to exercise supplemental jurisdiction, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.

Governments > Local Governments > Duties & Powers
HN7 Municipalities have the power to act for the government and good order of the city and for the health, safety and welfare of the public, Wis. Stat. § 62.11(5), only when dealing with the local affairs and government of municipalities, Wis. Const. art. XI, § 3, and they lack the power to legislate with regard to matters of statewide concern.

COUNSEL: For City of Madison, DEFENDANT: Michael P May, City Attorney, Madison, WI USA.

JUDGES: BARBARA B. CRABB, District Judge.

OPINIONBY: BARBARA B. CRABB

OPINION: [*802] OPINION AND ORDER

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This is a civil action brought pursuant to 42 U.S.C. § 1983. Plaintiff The **Payday Loan** Store of Wisconsin contends that defendant City of Madison has enacted an ordinance that violates plaintiff's rights to equal protection and due process and is unconstitutionally vague. In addition, plaintiff contends that the ordinance is preempted by state law.

When plaintiff filed its complaint, it sought a preliminary injunction to prevent defendant from enforcing the allegedly unconstitutional ordinance. Defendant responded to the motion and submitted a motion for summary judgment at the same time, asserting that the legal principles determining the motions were the same. Defendant asked that its motion for summary judgment be addressed without allowing plaintiff time for discovery, arguing that any discovery would be unnecessary. I agreed that discovery would not assist plaintiff (because legislative decisions are "not subject to courtroom **[**2]** factfinding and may be based on rational speculation unsupported by evidence or empirical data," FCC v. Beach Communications, Inc., 508 U.S. 307, 315, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993)), and gave its counsel an opportunity to advise the court whether he wanted an opportunity for additional briefing; he wrote to the court on August 12, 2004, to say that additional briefing would not be necessary and that the court should proceed to decide the motion.

I conclude that defendant's motion for summary judgment must be granted because plaintiff cannot show that defendant lacked any rational basis for legislating the nighttime closing of **payday loan** stores. Without such a showing, plaintiff cannot succeed on its claim that it was denied equal protection or that it was denied substantive due process. The clear wording of the ordinance defeats plaintiff's claim that it is unconstitutionally vague. Finally, plaintiff lacks any support for its contention that the ordinance is preempted by state law.

For the purpose of deciding this motion, I find from the findings of fact proposed by the parties in connection with the two motions that the following facts are material and undisputed. **[**3]**

UNDISPUTED FACTS

Plaintiff The **Payday Loan** Store of Wisconsin, Inc., d/b/a Madison's Cash Express, is a Wisconsin corporation with its principal place of business in Chicago, Illinois. Defendant City of Madison is a body corporate and politic that may sue and be sued.

Plaintiff is a financial services company that operates five branches in Madison, Wisconsin. On November 7, 2003, it opened a new facility at 2722 East Washington Avenue. As of the time of the hearing on the motion for preliminary injunction, the facility was open 24 hours a day, seven days a week and was the only 24-hour business of its type in Madison.

All of plaintiff's **payday loan** customers have checking accounts and a large percentage of its check cashing customers have bank accounts. Plaintiff provides a number of services, including short-term licensed loans known as "**payday loans,**" a currency exchange and check cashing operation, notary services, bill paying and facsimile and copy services. Plaintiff sells stamps, envelopes and bus passes and maintains a stand-alone ATM in its lobby.

[*803] Plaintiff is licensed by the Wisconsin Department of Financial Institutions to make short-term licensed loans. In a typical **[**4]** transaction, a borrower presents a paycheck stub, photo identification and a recent bank statement, completes a loan application and submits a post-dated check. Plaintiff completes a note and other loan documents and makes certain disclosures to the customer. It holds the post-dated check until the loan comes due and thereafter applies the check to pay off the loan unless the customer pays the loan in full before it has come due. Plaintiff charges $ 22 for each $ 100 borrowed for a two-week licensed loan.

Plaintiff is licensed by the Wisconsin Department of Financial Institutions to operate a

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community currency exchange business. In return for a fee, it agrees to cash payroll checks, insurance proceed checks, government checks and other third-party checks.

When plaintiff invested in the East Washington facility, it did so in anticipation that it would be able to operate 24 hours a day. When it began its planning, the business was a permitted use under defendant's zoning ordinance.

Plaintiff takes a number of steps to maintain security for its operation, including proper lighting, the use of safes and hourly sweeps and surveillance of all of its stores. The lighting inside and outside **[**5]** the store make the parking lot and store open to view.

On November 4, 2003, defendant's Common Council proposed a new ordinance, entitled "Hours of Operation for **Payday Loan** Businesses." Section (2) of the ordinance provided that no **payday loan** business could be open between the hours of 9 pm and 6 am. At a public meeting held on January 6, 2004, the council voted to adopt the ordinance with one dissenting vote. The mayor approved the ordinance on January 9, 2004 and it became effective fifteen days later.

On or about February 10, 2004, defendant agreed not to enforce the payday lending ordinance against plaintiff's currency exchange business pending a review of the language of the ordinance and plaintiff agreed not to make **payday loans** during the prohibited hours. On February 24, 2004, Alderperson Markle presented amendments to the ordinance to broaden the definition of **payday loan** business to include community currency exchange businesses. The Common Council adopted the amendments on May 18, 2004; the mayor approved them on May 24, 2004; and they took effect on June 8, 2004.

The ordinance does not prohibit ATM's, supermarkets, convenience stores and other similar businesses from **[**6]** disbursing cash between 9 pm and 6 am. Some ATM's allow eligible customers to take cash advances on their credit cards 24 hours a day.

OPINION

A. Equal Protection

*HN1*To succeed on a claim that a legislative decision is violative of equal protection rights, a plaintiff must show that the legislation burdens a suspect class, affects fundamental rights or is not rationally related to any legitimate goal of government. Johnson v. Daley, 339 F.3d 582, 585 (7th Cir. 2003). Plaintiff does not suggest that it is a member of a suspect class or that it has a fundamental right to run a **payday loan** operation 24 hours a day. Its entire case rests on its contention that the **payday loan** ordinance treats similarly situated entities differently. It allows the nighttime operation of ATM's and retailers that provide cash back from purchases while requiring **payday loan** stores to close at night. Moreover, it allows many businesses **[*804]** to operate between 9 pm and 6 am although they have the potential to affect residential neighborhoods through excessive noise and lights, while requiring payday stores to close during those hours. Plaintiff maintains that these distinctions are discriminatory **[**7]** and unsupported by a rational basis.

Plaintiff argues that it makes no sense to force it to close while allowing other businesses and ATM's to dispense cash throughout the night. If it is dangerous for individuals to leave its facility with large sums of case, it is equally dangerous for them to leave an ATM or a store that returns cash back on purchases. Defendant denies that ATM's and grocery stores are similarly situated to plaintiff because both of these facilities limit to well under $ 2000 the amount of cash that they will allow customers to withdraw or that they will give back on a purchase. Defendant argues that it had at least six reasons for differentiating between **payday loan** stores and other commercial establishments and ATMS: (1) Closing a cash-based business that advertises loans of up to $ 2,000 that can be obtained in minutes will

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deter nighttime crime activity; (2) persons who want to borrow money at 3 am may use that money to buy illegal drugs or engage in prostitution; (3) exiting a **payday loan** store at 3 am may make a person a target for criminal activity; (4) if police calls to payday stores are unnecessary, limited police resources can be devoted to other needs; **[**8]** (5) the presence of a 24-hour **payday loan** store sends a message that the neighborhood is of low quality; and (6) prohibiting **payday loan** stores from operating overnight will reduce the influx of non-residents traveling into a given neighborhood late at night to obtain cash.

It is not necessary (or permissible) to decide whether plaintiff's reasons for the ordinance are compelling or whether there is objective evidence to support them. *HN2*When dealing with economic regulation, any "conceivable basis" for the classification is sufficient to justify it. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (1973). Parties challenging legislation under the equal protection clause cannot succeed so long as "it is evident from all the considerations presented to [the legislature], and those of which [the court can] take judicial notice, that the question is at least debatable.'" Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463, 66 L. Ed. 2d 659, 101 S. Ct. 715 (1981) (quoting United States v. Carolene Products Co., 304 U.S. 144, 153-54, 82 L. Ed. 1234, 58 S. Ct. 778 (1938)).

*HN3*When the legislature has or could have had some evidence before **[**9]** it that reasonably supports a classification, challengers cannot prevail "merely by tendering evidence in court that the legislature was mistaken." Clover Leaf Creamery, 449 U.S. at 464. For this reason, it is irrelevant whether plaintiff's proposed facts show that serious crime is not a problem in the area of its East Washington Avenue store, that the actual number of police calls to plaintiff's stores is low, that plaintiff has taken steps to ensure the security of its employees and customers and that defendant had no evidence before it that plaintiff's stores are more apt to disturb nearby residences than are other businesses in the same area. It is irrelevant that Dr. Rick Lovell, an expert in the study of crime, crime patterns and crime deterrence and suppression, adduced evidence purporting to show that defendant's ordinance was based on misapprehensions about the relation of crime to the **payday loan** business and about the effectiveness of legislating against the nighttime operation of **payday loan** businesses in deterring crime. Legislative decisions "may be based on rational **[*805]** speculation unsupported by evidence or empirical data." Beach Communications, 508 U.S. at 315. **[**10]**

As I noted in the order denying plaintiff's motion for a preliminary injunction, "the city council could speculate rationally that people emerging from a **payday loan** store with large amounts of money in their pockets would be involved in crime, either as victims of robbery or as customers for illegal drugs or prostitution." Aug. 5, 2004 Order, dkt. # 33, at 3. It goes without saying that communities have an interest in preventing crime. Whether the **payday loan** ordinance is the best method of prevention is not the issue. It is the legislative body's prerogative to choose the steps it wishes to take to advance its goals. National Paint & Coatings v. City of Chicago, 45 F.3d 1124, 1127 (7th Cir. 1995).

It is not relevant that the legislation leaves unregulated other conduct that seems equally undesirable. Legislatures are permitted to legislate in small increments and deal with the problems they deem most acute. Johnson, 339 F.3d at 586-87 (citing Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489, 99 L. Ed. 563, 75 S. Ct. 461 (1995)). Thus, it does not matter whether plaintiff has evidence that users of ATM machines are just as likely **[**11]** targets for robbers as are customers of **payday loan** stores, or whether other commercial establishments on East Washington Avenue are noisier, have brighter lighting or attract more nighttime traffic. The common council could have believed that closing **payday loan** stores at night would help reduce crime and help reduce the total amount of nighttime traffic, noise and bright lights in the area. The legislature need not address all 24-hour operations at one time. "Scope-of-coverage provisions" are virtually unreviewable" because the government "must be allowed leeway to approach a perceived problem incrementally."

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Beach Communications, 508 U.S. at 316. "If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U.S. 270, 275, 84 L. Ed. 744, 60 S. Ct. 523 (1940). Because plaintiff cannot show that the council could not have believed that the **Payday loan** ordinance would help reduce crime, nighttime traffic and noise, it has failed to show that the regulation violates its equal protection rights.

B. Due Process **[**12]**

Plaintiff asserted a claim of violation of due process, but it rests on the same ground as his equal protection claim that the ordinance has no rational basis. Plaintiff is not asserting that it was denied any procedural rights to which it was entitled. Therefore, its due process claim falls with its equal protection claim. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 459, 470 n.12, 66 L. Ed. 2d 659 (1981) ("From our conclusion under equal protection, however, it follows *a fortiori* that the [ban on plastic nonreturnable milk containers] does not violate the Fourteenth Amendment's Due Process Clause: National Paint, 45 F.3d at 1129 (refusing to consider claim that ordinance violates substantive due process rights; "economic regulation must be evaluated under equal protection principles"); see also Albright v. Oliver, 510 U.S. 266, 273, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994) ("Where a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, that amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims. **[**13]** '")

[*806] C. Vagueness

Plaintiff argues that the ordinance does not give the "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972). It contends that the ordinance does not provide fair notice of the extent to which it may operate between 9 pm and 6 am because it does not make clear whether plaintiff can continue to offer services other than currency exchange and **payday loans** during the nighttime hours.

*HN4*Vague laws present two kinds of problems. The first is the one just noted, which is that persons of ordinary intelligence will not know how to conform their conduct to the law. The second is the lack of explicit standards for application of the law, with the consequence that persons charged with enforcement of the law may act arbitrarily and discriminatorily. Grayned, 408 U.S. at 108-09.

The vagueness doctrine is enforced most strictly when the law interferes with free expression or the exercise of other constitutional rights. Brockert v. Skornicka, 711 F.2d 1376, 1381 (7th Cir. 1983). Economic regulation **[**14]** is subject to a less stringent analysis because such "regulation usually deals with a narrower subject and those affected by it are more likely to consult the law, seeking clarification if necessary, in order to plan their behavior." Id. (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982)). Moreover, legislation that has civil rather than criminal penalties is given great leeway "because the consequences of imprecision are qualitatively less severe." Id. at 498-99.

The **payday loan** ordinance is economic regulation that imposes only civil sanctions. Therefore, it does not require the high degree of clarity that would be necessary for an ordinance that impinged on free speech or another constitutional right. Nevertheless, it is clear both on its face and as applied. It prohibits any **payday loan** business from being open between 9 pm and 6 am. Plaintiff operates a **payday loan** business that cannot be open during the prohibited hours, even if plaintiff is not engaging in the business of making **payday loans** or operating a currency exchange during that time. The ordinance does not prohibit "engaging **[**15]** in **payday loan** activities" during nighttime hours; it says that

the business cannot be open. Persons of ordinary intelligence can understand the ordinance's prohibition. Law enforcement personnel can enforce the ordinance: if a **payday loan** business is open after 9 pm or before 6 am, it is in violation of the ordinance and subject to a civil fine. The ordinance poses no danger of arbitrary or discriminatory enforcement.

D. Wisconsin Constitution

It is not necessary to address plaintiff's allegations of violations under the equal protection and due process violations of the Wisconsin Constitution. Plaintiff concedes that there is no substantial difference between the federal and the state provisions. Plt.'s Reply Br., dkt. # 27, at 3. State ex rel. Briggs & Stratton v. Noll, 100 Wis. 2d 650, 657, 302 N.W.2d 487 (1981) ("'It is well settled by Wisconsin case law that *HN5*the various freedoms preserved by sec. 1, art. I, Wis. Const., are substantially the equivalent of the due-process and equal-protection-of-the-laws clauses of the Fourteenth amendment to the United States constitution.'" (quoting Haase v. Sawicki, 20 Wis. 2d 308, 121 N.W.2d 876 (1963)). **[**16]**

Therefore, the conclusions I have reached concerning plaintiff's federal constitutional **[*807]** claims are equally applicable to its state constitutional claims.

E. Preemption by State Law

For its last argument, plaintiff contends that the ordinance is preempted by state law. Like plaintiff's state constitutional issues, this argument does not implicate any federal issue and it would be permissible to dismiss it on that ground, rather than exercise supplemental jurisdiction over it. 28 U.S.C. § 1367(c)(3). However, I believe it would advance judicial efficiency to decide it along with the federal questions. Burrell v. City of Mattoon 378 F.3d 642 (7th Cir. 2004); see also City of Chicago v. International College of Surgeons, 522 U.S. 156, 173, 139 L. Ed. 2d 525, 118 S. Ct. 523 (1997) ("*HN6*When deciding to exercise supplemental jurisdiction, 'a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.'") (quoting Carnegie-Mellon University. v. Cohill, 484 U.S. 343, 350, 98 L. Ed. 2d 720, 108 S. Ct. 614 (1988)). I will address the preemption issue for the sake of judicial **[**17]** economy because it does not raise any novel, complex or unsettled issue of state law.

It is undisputed that *HN7*municipalities have the power to act for the government and good order of the city and for the health, safety and welfare of the public, Wis. Stat. § 62.11(5), only when dealing with the local affairs and government of municipalities, Wis. Const. Art. XI, § 3, and that they lack the power to legislate with regard to matters of statewide concern. Plaintiff argues that the ordinance oversteps defendant's authority in two respects. First, it provides that a **payday loan** operation and a currency exchange operation cannot be operated together in Madison and must be at least 5,000 feet from each other, in direct violation of the express provision in Wis. Stat. § 138.09(3)(e) le that such businesses may be run out of the same building. Second, the state regulates **payday loan** businesses and community currency exchange businesses and defendant's ordinance violates the spirit of the state regulatory system by disallowing legitimately licensed businesses from operating.

As to the first challenge, plaintiff has failed to show that it has **[**18]** any standing to raise it. The provision requiring 5,000 feet of separation between **payday loan** businesses does not apply to any of plaintiff's businesses now in operation in Madison (and it is highly doubtful that the ordinance prohibits the operation of **payday loan** and currency exchange businesses on the same premises). If and when plaintiff is denied permission to open another such business because of this restriction, it may be able to satisfy the elements of standing, which require an injury in fact, a causal relation between the injury and the challenged conduct and a likelihood that the injury will be redressed by a favorable decision, Lee v. City

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of Chicago, 330 F.3d 456, 468 (7th Cir. 2003) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)). At this time, when plaintiff has not shown that it is suffering or about to suffer "an invasion of a legally protected interest that is concrete and particularized," id., this court lacks jurisdiction to entertain plaintiff's challenge to the ordinance as preempted by state law.

As to the second challenge, plaintiff has not established any conflict between the state's **[**19]** regulations of plaintiff's **payday loan** and currency exchange operations and the ordinance. The state regulations concern licensing and the regulation of consumer transactions, including record keeping and limitations on advertising. They have nothing to do with hours of operation or location of businesses.

[*808] Plaintiff maintains that the ordinance "violates the spirit of the state regulatory system by disallowing legitimately licensed businesses from operating." Plt.'s Br., dkt. # 4, at 46. Plaintiff misstates the effect of the ordinance. It does not prevent legitimately licensed businesses from operating; it merely says where they can operate and during what hours. It does not violate the spirit of the state regulatory system.

Plaintiff cites a Wisconsin case, Anchor Savings & Loan Ass'n Co. v. Madison Equal Opportunities Comm'n, 120 Wis. 2d 391, 355 N.W. 2d 234 (1984), in support of its position, but that case is nothing like this one. In Anchor Savings, the issue was whether a state-chartered savings and loan had acted properly in denying a loan to a divorced man. The savings and loan had considered the applicant's court-ordered support and maintenance payments **[**20]** as fixed expenses, disqualifying him for a loan, whereas if he had been married, the same money would have deemed flexible expenses and he would have been granted a loan. The applicant complained to the Madison Equal Opportunities Commission, which held that Anchor had violated a local ordinance prohibiting creditors from discriminating on the basis of marital status. Anchor appealed, contending that the City lacked authority to regulate its lending practices. The Supreme Court of Wisconsin agreed, holding that the commission's decision conflicted with the comprehensive legislative scheme governing all aspects of credit and lending.

Telling a state-chartered savings and loan association how to calculate a loan applicant's qualifications for a loan is a far cry from telling a state-licensed **payday loan** operation where it may locate its business and what hours it may operate. These latter matters have nothing to do with the state's legislation and regulations regarding the loans themselves and the licensing and responsibilities of loan providers.

I conclude that defendant has shown that it is entitled to summary judgment on all of the claims raised by plaintiff in its complaint. **[**21]**

ORDER

IT IS ORDERED that defendant City of Madison's motion for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendant City and close this case.

Entered this 31st day of August, 2004.

BY THE COURT:

BARBARA B. CRABB

District Judge

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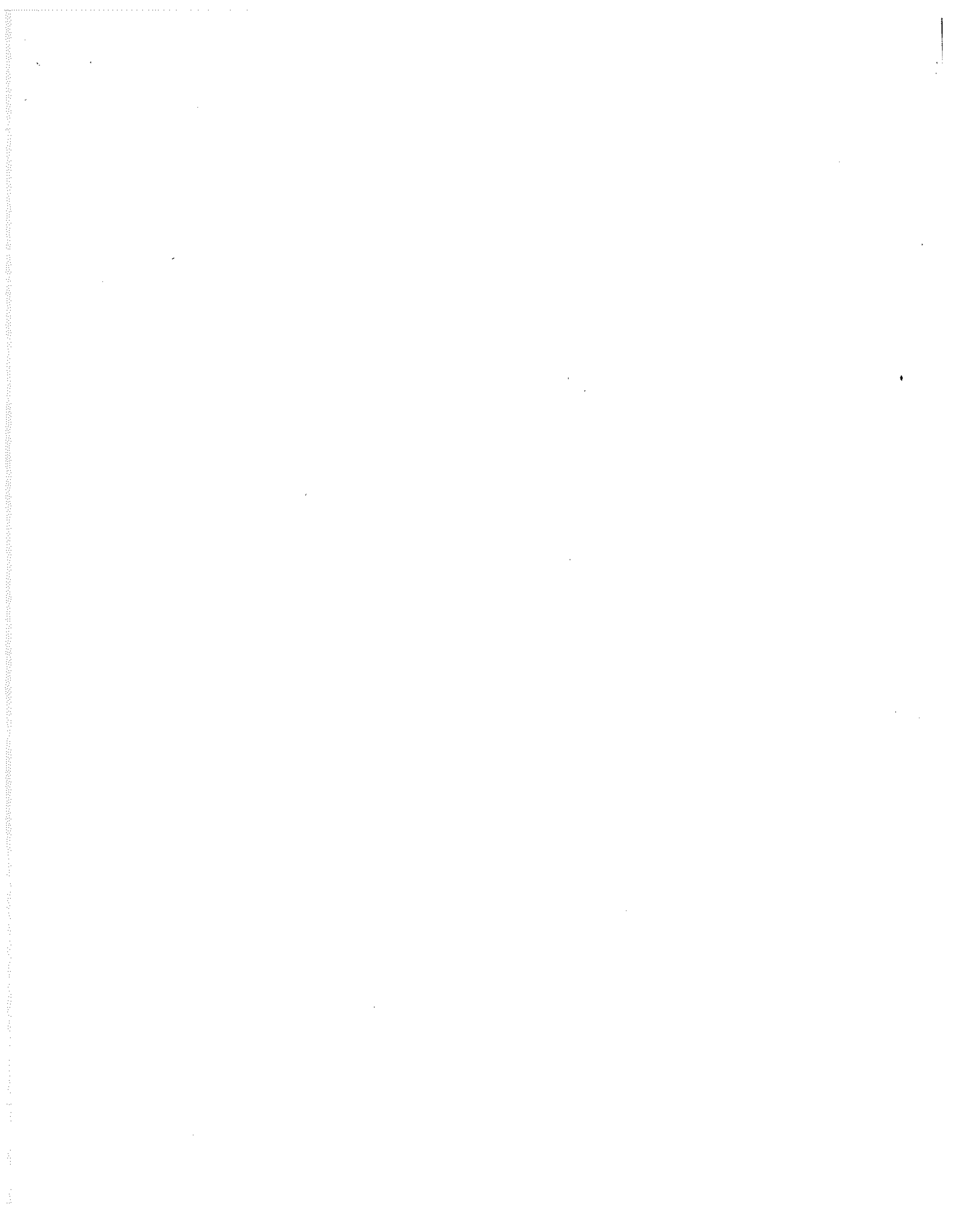

Form CA-43

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May 7, 2003

Craig Zetley, Chairman
Board of Zoning Appeals
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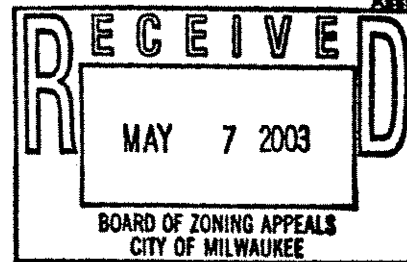

Re: Payday Loan or Title Loan Agencies
BOZA Case Numbers 24480, 24481, and 24482

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.

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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

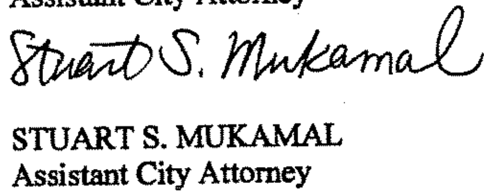
legislation and administrative regulation applicable to regulation of the credit practices and related operations of the "payday loan" industry.

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

Very truly yours,

GRANT F. LANGLEY
City Attorney

THOMAS O. GARTNER
Assistant City Attorney



STUART S. MUKAMAL
Assistant City Attorney

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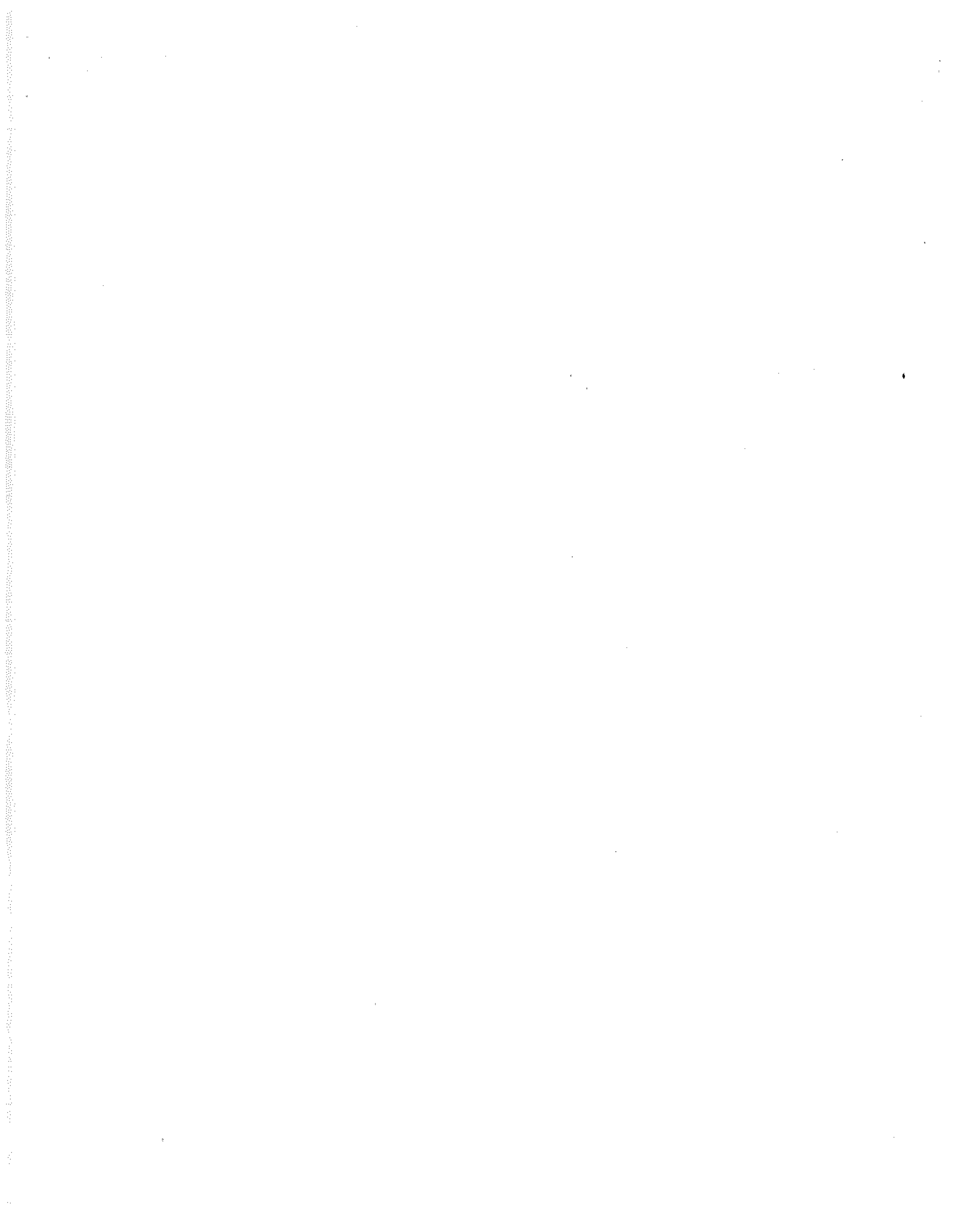

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LEGAL AID SOCIETY OF MILWAUKEE, INC.

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Telephone: (414) 765-0600
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September 24, 2003

Mr. Craig Zetley
Chairperson
Board of Zoning Appeals for the City of Milwaukee
809 North Broadway, 1st Floor
Milwaukee, WI 53202

Alderman Don Richards
City of Milwaukee Common Council
200 East Wells Street
Milwaukee, WI 53202

RE: Item No. 25065, Variance Application of First Payday Loans of Wisconsin for Payday Loan Operation at 6902 North 76th Street

Dear Chairman Zetley and Alderman Richards:

This letter is submitted in opposition to the pending variance request from First Payday Loans of Wisconsin, an Illinois company, to operate a payday loan store at 6902 North 76th Street, Milwaukee. Legal Aid opposes the pending application because of the adverse effects expanded payday lending operations will have in the City of Milwaukee--effects that would be inconsistent with the "public interest." The City Attorney's Office has ruled that BOZA, according to available case law, is accorded "significant discretion...in applying the 'public welfare' component of the special-use permit criteria contained in § 295-311-2-d-1 of the [Zoning] Code." (May 7, 2003 letter from the Office of the City Attorney to BOZA.) A variance request must meet a similar "public interest" standard.

Legal Aid, accordingly, submits three concrete bases for the Board of Zoning Appeals to deny the pending application based on appropriate "public interest" discretionary factors.[1]

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[1] Materials referenced in this letter will be offered at scheduled hearings as attachments. The expert report of Professor Christopher Lewis Peterson is, however, enclosed.

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1. <u>Adverse Impact Resulting From the "Clustering" of Payday Lending Operations: The Oversaturation of 76th Street</u>

The proposed location at 6902 North 76th Street will likely overload northwest neighborhoods of the City of Milwaukee with clusters of high-cost, long-term debt pushers. As of February 2003, Legal Aid determined that, of the 69 payday lending locations in Milwaukee County, 61% were located within city limits. Other "fringe banking" businesses follow the same pattern: 86% of the check cashers or currency exchanges in the Milwaukee County are located within the city; and 100% of the pawnbrokers in Milwaukee County are located within the city. These operations have not just "clustered" within the City of Milwaukee, as opposed to outlying areas, the easily observable fact is that these businesses tend to cluster in certain areas or neighborhoods of the city. As of February 2003, 61% of the payday loan store locations in the City of Milwaukee were located on just three thoroughfares.

The one City of Milwaukee street that contains more payday lending than any other is 76th Street, which already has eleven outlets on that street, and another five within ten blocks. Along 76th Street, there was one cluster at 3906, 4750, 4760 and 4847 North 76th Street, plus 7600 W. Capitol Drive. Another cluster was found at 5910, 6404, 6520, 6863 and 6864 North 76th Street. A final cluster was found at 7941 and 8066 North 76th Street.

The obvious fact is that First Payday loans now intends to add to this payday loan imbalance on North 76th Street, by adding a location at 6902 North 76th Street. Circumstances will only worsen if the payday loan applicant, QC Financial, is allowed to open up an outlet at 6454 North 76th Street.

The oversaturation or clustering of other payday loan and fringe banking operations in city neighborhoods predictably has negative consequences for other businesses in the area. This clustering effect tends to suggest to visitors, and other prospective business developers, that these particular neighborhoods are troubled by high numbers of credit-risk residents. Of course, the clustering effect ends up denigrating the quality of these neighborhoods, when the truth is that they have viable economies with large numbers of hardworking, income-producing, asset-building families. The clustering effect of fringe banking businesses (including payday lenders), in short, sends the wrong message--certainly, a message that is contrary to the economic development interests of the city and the public welfare. These adverse impacts are detailed by Christopher Lewis Peterson, University of Florida, Levin College of Law, in his expert report to BOZA.

Given the tendency of these businesses to oversaturate these areas and to cluster on particular thoroughfares, many municipalities are now turning to licensing maximums and per capita formulas. St. Joseph, Missouri, for example, has proposed to limit payday lending operations to one outlet for every 15,000 residents. If that formula were used in the City of Milwaukee, the city would welcome no more than 40 payday loan outlets. However, as of February 2003, the city had already exceeded that number, and now First Payday Loans and others plan to make the numbers even higher.

2. Adverse Impact of Payday Lending on Nonprofit Services: The Increased Burden on Consumer Counseling Nonprofits

It is fairly predictable that expanded payday loan operations in the City of Milwaukee will lead to an increasing burden on the resources of nonprofits, such as Consumer Credit Counseling Services (CCCS). These charitable entities, usually funded by local United Way campaigns with every limited dollars, have reported serious increases in client numbers and problems directly attributable to payday lending excesses. For example, the following newspaper accounts are relevant:

> July 9, 2000, The Record: "It's been a real problem," said Sue Becerra, Executive Director of the Consumer Credit Counseling Service of Mid-Counties, a Stockton-based non-profit that helps people overcome debt. 'The number of clients we've seen who've gotten in trouble over payday loans has increased 500% over the last year.'"

> January 31, 2000, Akron Beacon Journal: Bob Frazer of Dayton Consumer Credit Counseling Services said "His surveys show that the average CCCS client has 4 open, or unpaid, payday loans and that some have up to 30. Said Frazer, 'It's a trap.'"

> September 19, 1999, Dayton Daily News: "Officials from the Consumer Credit Counseling Services of Miami Valley as well as the Legal Aid Society of Dayton, said that they are serving more clients who try to bale themselves out of financial waterfalls with payday loans only to see them eventually file for bankruptcy."

> February 21, 1999, Indianapolis Star: Melinda Wright of Consumer Credit Counseling Service "noted a sharp increase in clients with payday loans in the past 6 months."

Payday lending has had a similar effect on the nonprofit services offered by the Legal Aid Society of Milwaukee. The City of Milwaukee should be concerned about the negative impact that may result from expanded payday lending operations insofar as they draw down the limited nonprofit resources available to assist financially-stressed families.

Likewise, the City of Milwaukee should be concerned about the drain that will result on the court systems, state and local consumer protection agencies, as well as the effects that will follow for other local businesses, such as landlords, telephone companies, utilities, and medical providers. Typically, payday lenders, with their far more aggressive collection efforts, nose out these vital service industries when "short-term" payday loans overwhelm their customers with spiraling long-term debt. These adverse impacts are also detailed by Assistant Professor Christopher Lewis Peterson of the University of Florida, Levin College of Law, in his expert report for BOZA.

3. <u>First Payday Loans' Misleading Operation Plan: The Long-Term Debt Coverup</u>

First Payday's "plan of operation" which was filed with BOZA on June 20, 2003, deliberately misstates, in our view, the nature of the operation and its goals. First Payday (at page 1) states:

> "Our goal is to ensure that individuals have an opportunity to receive *short-term*, small personal loans, typically under $500, when an emergency arises. The loans that we offer are not offered by other lending institutions because of the administrative costs and burden. Our lending office is specialized to assist people who typically have a difficult time obtaining emergency funds."

(Emphasis added.)

There are at least three fundamental flaws in this "plan of operation" description. First, it has been firmly established through scholarly research that payday lenders cannot operate as profitable businesses if their customers were to receive just single installment loans for one, short, single loan term. By representing their product to be "short-term" loans, First Payday misrepresents the true "long-term" debt consequences of its business. Indeed, the payday lending business model requires that customers become chronic borrowers, burdened with *long-term* debt through the process of repeated "rollovers" or renewals of their short-term loans. Payday lenders, such as First Payday, make money by getting desperate consumers to take out multiple short-term loans so that they can be rolled over into long-term debt. This point is well-documented in the article by Dr. Michael A. Stegman, MacRae Professor of Public Policy and Business as the University of North Carolina at Chapel Hill, in his *Economic Development Quarterly* article,

February, 2003 entitled, *Payday Lending: A Business Model that Encourages Chronic Borrowing*.

In another study, Professor John P. Caskey, Professor of Economics at Swarthmore College, reviewed raw data gathered by the Wisconsin Department of Financial Institutions specific to payday loan customers in the State of Wisconsin. His conclusions directly contradict the claims of First Payday. Caskey concludes in his April 2002 report, *The Economics of Payday Lending*, at page 25:

> "[T]he data are consistent with the charge that more payday loan customers are frequent borrowers who may well be trapped in a persistent and costly debt cycle. Over 40% of the longer-term payday loan customers in Wisconsin, for example, had 20 or more loan transactions over the course of a year. Assuming that they borrowed the average amount for Wisconsin customers ($245) and that they paid an average finance charge ($49) with each transaction, they would have each spent at least $980 in finance charges in order to keep a $245 loan outstanding for most of a year."

Second, First Payday represents that it is offering loan products that "are not offered by other lending institutions...." However, as explained in greater detail above, the City of Milwaukee has been inundated with payday lending and auto title lending outlets. There simply is no shortage of alternative financial service institutions, especially in the geographic area proposed to be served by First Payday on North 76th Street.

Third, payday lenders, such as First Payday, do not provide debt counseling services or any other service that is "specialized to assist people" in the best ways to deal with their needs for emergency funds. In fact, the payday lending business model requires that lenders offer their products for the undisclosed, yet paramount purpose of dragging customers into chronic, long-term, high-cost debt. This paramount purpose completely negates any business purpose to provide "specialized" assistance in the form of debt counseling or debt management services. The Board of Zoning Appeals should note that First Payday's plan of operation materials noticeably omit any reference to the annual interest rate, annual percentage rate, the finance charges, the return check charges, the delinquency charges, and other costs or charges that it plans to impose on its customers. Inasmuch as it is the applicant's burden to establish that its operations will be run consistent with the public welfare, and given First Payday's history of excessive loan charges, more information should be disclosed.

CONCLUSION

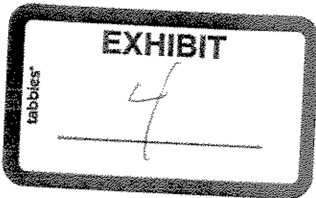
For the foregoing reasons, the Legal Aid Society of Milwaukee submits that the proposed expansion of payday loan outlets to include the First Payday location at 6902 North 76th Street is contrary to the public interest. Further, we doubt that First Payday can establish either the "exceptional circumstances" or "hardship" elements that must also be proven to obtain a zoning variance.

Very truly yours,

LEGAL AID SOCIETY OF MILWAUKEE, INC.

JAMES A. WALRATH
Executive Director

JAW/vlv
Enc.



Payday Loans: Everything You Need to Know, or More

Wisconsin Payday Loan Forum
Madison, WI
September 22, 2005

Jean Ann Fox, CFA

- jafox@erols.com
- 757-867-7523
- www.consumerfed.org

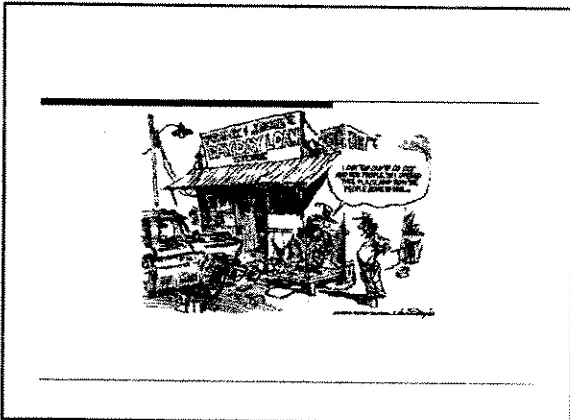
- Consumer Federation of America is a non-profit association of 300 consumer groups, established in 1968 to advance the consumer interest through research, education and advocacy.

Payday Loans: Quick Cash for Cold Checks or Debits

- Borrower writes a check for loan amount and fees/authorizes debit
- Lender gives cash loan and holds check/debit authorization until payday
- On due date, borrower redeems the check with cash, lets lender deposit check, or pays the finance charge to roll over loan

Payday Loan Market

- Industry claims 100 million loans, $6 billion paid to borrow about $40 billion 2004, 22,000 retail payday loan outlets, growing 15% a year
- Payday loan stores, pawn shops, check cashers, other storefronts
- Payday loans via Internet, telephone
- Industry:Consolidating/Cashing In



What makes payday lending predatory?

- Extremely expensive
- Little or no underwriting
- Risks a valuable asset
- Fosters coercive collection tactics
- Unaffordable repayment terms
- Ruses to evade consumer protections
- Lack of recourse for consumers, mandatory arbitration clauses

High Cost and Short Terms

- Payday loans cost from $15 to $30 to borrow $100. Average APR 470%
- Loans are for $100 to $1,000, typically around $350 plus finance charge
- Loan term averages 14 to 15 days, due in full on next payday
- NSF fees for returned checks extra

Low Risk to Lenders

- ACE report to SEC 3.97% loan loss as % of matured loan volume
- AA IPO 1.5% loaned in 2003 not recovered, not counting NSF fees
- Motley Fool says 2% PDL default rate
- Missouri 5.4% loans charged off
- Colorado annual report 4% write off
- Florida reports 2% default

Who Uses Payday Loans?

- Have a job or steady income/benefits
- Have a bank account
- Have ID
- Clear TeleTrack or other database inquiry
- Younger
- Female
- Low to middle income
- Credit constrained
- Low/no savings
- Convenience driven

Vulnerable Groups of Consumers Targeted

- African American communities are twice or three times more likely to have payday lenders than predominantly white communities
- Military bases are targeted by payday lenders
- Women make up 64% of customers, industry funded study
- Hispanic consumers targeted in Pima County Study

Wisconsin DFI Study 2001

- 54% women, 46% men, age 39
- 64% renters, 22% home owners
- Average net income $18,675, average gross income $24,673
- 14 day loans, 542% APR, $246 average loan amount with $49.73 finance charge
- 53% loans were rolled over
- 22% rolled twice, 17% rolled >5x

Repeat Borrowing Life Blood of Payday Loan Industry

- 91% of all payday loans made to repeat borrowers with five or more loans per year (CRL)
- 79% of loans made to long-time customers are same day renewals or new loans before payday (WI Caskey)
- Average Iowa borrower had over 12 loans per year at single lender
- FastBucks: 80% of customers buy back checks before loan is due

Check Holding Leads to Coercive Collection Tactics

- ☐ Check bounces, two NSF fees added
- ☐ Bad credit rating on check databases
- ☐ Default reported to credit bureaus
- ☐ Lender sues to collect on "bad" check
- ☐ Some threaten criminal prosecution
- ☐ Some threaten court martial
- ☐ Repeat ACH attempts rack up fees

Signing Away Your Rights

- ☐ Mandatory arbitration clauses
- ☐ Agree not to file for bankruptcy
- ☐ Agree not to join or bring a class action lawsuit
- ☐ Voluntary wage assignment
- ☐ Agree to leave bank account open until loan repaid

Legal Status of Payday Lending

- ☐ 35 states and DC authorize payday lending with safe harbor from usury
- ☐ 2 states have no usury caps or substantive payday loan regulations
- ☐ 13 states prohibit through usury and small loan laws (counting Arkansas)

Ruses and Scams to Evade Laws

- Thinly-veiled retail transactions with a rebate, phone card sales, Internet access with a rebate
- Sham lease arrangements, sale-leaseback, cash "leasing"
- Rent-a-bank payday lending
- Rent a lender from SD or MO
- Credit Services Organization

FDIC and Rent-a-Bank Lending

- Issued revised guideline that more than three months of loans in last 12 months unsafe for bank partners. Big hit on publicly traded lenders.
- Issued cease and desist order to County Bank of Rehoboth Beach, DE to improve unsafe and unsound banking practices
- First Fidelity Bank pulled out of NC

2005 Legislative Battles

- Industry bill killed in Texas, Maine, NC
- Bills pending in Michigan, Pennsylvania, South Carolina
- Compromise bills enacted in Illinois and Nevada
- Industry amendments passed in Ohio, North Dakota, Kansas, Rhode Island; stopped in KY
- Advocates' bills defeated in Virginia, Washington, New Mexico, Iowa, Arkansas, Oklahoma, Utah, West Virginia, Missouri

Legislative Trends

- Industry bills advance in MI and PA
- "No Limit" states, NV, IL, new laws
- Higher loan limits in WA, OH, IL, RI
- VA and ND clarify that state law applies to Internet loans
- "Military Protections" for GA enacted in VA, WA, TX
- Database added in ND

Local Ordinances

- Pima County/Tucson zoning ordinances proposed
- Jacksonville, FL/Duval County ordinance, rate cap for loans to military
- National City, CA proposed local ordinance

New Mexico AG Proposed Regs

- Rates above 54% APR pawn unfair
- Term less than four months unfair
- Loan for more than 25% monthly income unfair, must underwrite
- Paying one loan with another unfair
- High risk of loss of collateral unfair

State and Local Enforcement

- DC AG stopped debits to pay loans
- NC Banking Commissioner case on Advance America, bank pull-out
- WA AG and DFI case against payday lender threats of criminal action
- NY, CO, KS, MA cases against unlicensed Internet lenders
- IN and AR cases on Internet access with a rebate ruse

Questions?