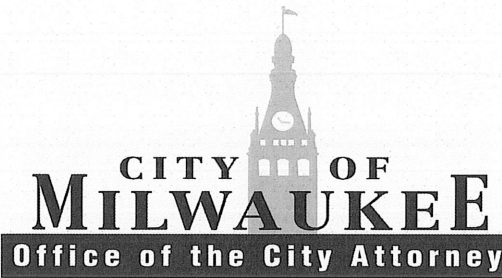


TEARMAN SPENCER
City Attorney

CELIA M. JACKSON
Special Deputy City Attorney

ODALO J. OHIKU
ROBIN A. PEDERSON
YOLANDA Y. MCGOWAN
TODD FARRIS
Deputy City Attorneys



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

PATRICIA A. FRICKER
HEIDI WICK SPOERL
GREGG C. HAGOPIAN
KATHRYN Z. BLOCK
THOMAS D. MILLER
JEREMY R. MCKENZIE
PETER J. BLOCK
JENNY YUAN
ALLISON N. FLANAGAN
HEATHER H. HOUGH
ANDREA J. FOWLER
PATRICK J. MCCLAIN
ELLENY B. CHRISTOPOULOS
HANNAH R. JAHN
JULIE P. WILSON
GREGORY P. KRUSE
KIMBERLY A. PRESCOTT
JAMES M. CARROLL
MEIGHAN M. ANGER
ALEXANDER R. CARSON
ALEX T. MUELLER
ALEXANDER COSSI
LISA A. GILMORE
NICHOLAS R. SINRAM
TAVISS K. SMITH
CHRISTIAN THOMAS
KATHERINE A. HEADLEY
ANTHONY JACKSON
Assistant City Attorneys

September 22, 2021

James R. Owczarski, City Clerk
200 East Wells Street, Room 205
Milwaukee, WI 53202

Re: Common Council File No. 210362

Dear Mr. Owczarski:

Attached please find Common Council File No. 210362. The Office of the City Attorney is returning this file unsigned due to concerns that it is not legal and enforceable because it would impose a special use like licensing procedure on all legal nonconforming motor vehicle repair facilities regardless of whether the facility constitutes a public nuisance or otherwise endangers the public health, safety and welfare of the City. We note, however, that nonconforming cannot constitute a public nuisance and that the City has broad authority to define what constitute nuisance activities. Accordingly, we suggest that the Common Council strengthen the nuisance ordinance for automobile service stations in Section 80-7, Milwaukee Code of Ordinances ("Ordinances") to address the problem facilities that motivated the Council to adopt File No. 210362. Our reasoning is set forth below.

Section 62.23(7)(h) of the Wisconsin Statutes provides that:

The continued lawful use of a building, premises, structure or fixture existing at the time of the adoption or amendment of a zoning ordinance may not be prohibited although the use does not conform with the provisions of the ordinance. The nonconforming use may not be extended. The total structural repairs or alterations in such a nonconforming building, premises, structure or fixture shall not during its life exceed 50 percent of the assessed value of the building, premises, structure or fixture unless permanently changed to a conforming use. If the nonconforming use is discontinued for a



period of 12 months, any future use of the building, premises, structure, or fixture shall conform to the ordinance.

The Wisconsin Supreme Court has held that “a nonconforming use existing at the time a zoning ordinance goes into effect cannot be prohibited or restricted by statute or ordinance, where it is a lawful business or use of property and is not a public nuisance or harmful in any way to the public health, safety, morals or welfare.” *Des Jardin v. Town of Greenfield*, 262 Wis. 43, 47, 53 N.W. 2d 784 (1952). The problem with the ordinance in File No. 210362 is that it broadly applies to all nonconforming motor vehicle repair facilities including facilities that are not being operated in a way that constitutes a nuisance or otherwise endangers health, safety and welfare. Thus, it is our view that a court would conclude that the ordinance is invalid because it includes restrictions on nonconforming uses that are not being operated in a manner which constitute a nuisance or otherwise endanger health, safety and welfare.

As we noted above, we do see a way for the City to address problem nonconforming motor vehicle repair facilities. The City could amend its nuisance ordinance for automobile services in Section 80-7, Ordinances. Section 80-7 currently provides:

Garage, Service Station or Parking Lot. Any public garage, used car lot, or automobile service station, parking lot or space which shall become noxious, foul, offensive or dangerous and prejudicial to public health or which shall seriously or permanently interfere with life or safety by the testing or running of gasoline engines at various speeds, backfire or the emitting of smoke and gases, odors of gasoline or oils, or the stirring up of dusts and dirt, is declared a public nuisance.

As you know, the Commissioner of the Department of Neighborhood Services is granted the authority under Section 80-2, Ordinances to cause the summary abatement of nuisance activities and to pursue an injunction if necessary.

It is our view that the Common Council would be acting within its authority if it decided to amend Section 80-7, Ordinances to address the matters listed in Section 17. a-d. of the ordinance in File No. 210362. Municipalities have broad authority through their police powers to protect the health, safety and welfare of their residents, including the ability to define and take action against public nuisances. *City of South Milwaukee v. Kester*, 347 Wis. 2d 334, 344, 830 N.W. 2d 710 9 (Ct. App 2017). When a municipality has enacted an ordinance that defines a public

James R. Owczarski, City Clerk

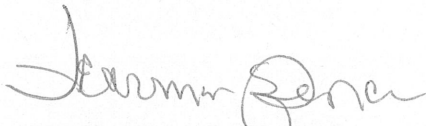
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nuisance per se, courts should not interfere in this determination absent a show of “oppressiveness or unreasonableness.” *Id.*, quoting *Boden v. City of Milwaukee*, 8 Wis. 2d 318, 325, 99 N.W. 2d 156 (1959). With respect to nonconforming uses, neither the legitimacy of the business nor the length of time it has been in existence is controlling in determining whether a public nuisance exists,” *State v. H. Samuels Co, Inc.*, 60 Wis. 2d 631, 635, 211 N.W. 2d 417 (1973), because “a public nuisance can always be abated.” *Madison Metro. Sewerage Dist. v. Committee on Water Pollution*, 260 Wis. 229, 251, 50 N.W. 2d 424 (1951).

Please let us know if you have any questions or comments about this matter.

Very truly yours,



TEARMAN SPENCER
City Attorney



TODD FARRIS
Deputy City Attorney

TF/cdr

Attachment

/276705

..Number
210362
..Version
SUBSTITUTE 1
..Reference

..Sponsor
ALD. PEREZ

..Title
A substitute ordinance relating to the licensing of nonconforming motor vehicle repair facilities.

..Section
81-79 cr
84-47 cr

..Analysis
This ordinance establishes a license requirement for nonconforming motor vehicle repair facilities, which are motor vehicle repair facilities that were legally established but no longer comply with the regulations of the zoning code.

..Body
The Mayor and Common Council of the City of Milwaukee do ordain as follows:

Part 1. Section 81-79 of the code is created to read:

81-79. Nonconforming Motor Vehicle Repair Facility. 1. Each license shall be valid for one year from the date of issuance.

2. The fee for a new or renewal license shall be \$50.
(See s. 84-47.)

Part 2. Section 84-47 of the code is created to read:

84-47. Nonconforming Motor Vehicle Repair Facilities. 1. FINDINGS; PURPOSE.
The common council finds that certain legally nonconforming motor vehicle repair facilities may have deleterious effects on surrounding neighborhoods, including consuming much-needed on-street parking spaces and creating visual and noise nuisances, particularly when motor vehicle repair is conducted outdoors or during late-night hours. Because these uses are legally nonconforming, rather than uses requiring review by the board of zoning appeals, residents of surrounding neighborhoods have no means to provide public input on the manner in which these businesses are operating. For these reasons, and to protect the health, safety and general welfare of the community, the common council enacts the following regulations.

2. DEFINITION. In this section, "nonconforming motor vehicle repair facility" means a light motor vehicle repair facility, light motor vehicle body shop, heavy motor vehicle repair facility or heavy motor vehicle body shop, as these terms are defined in ch. 295,

which is also a nonconforming prohibited use or a nonconforming special use, as these terms are defined in ch. 295.

3. LICENSE REQUIRED. No person, firm or corporation shall operate a nonconforming motor vehicle repair facility unless the person, firm or corporation possesses a valid license issued pursuant to this section. See s. 81-79 for the required fee.

4. APPLICATION. License application forms shall be obtained from the city clerk and require the information specified in s. 85-12.

5. PLAN OF OPERATION. An application for a nonconforming motor vehicle repair facility license shall be accompanied by a completed plan of operation on a form provided therefor by the city clerk. The plan of operation shall include:

a. The hours of operation for the premises.

b. The number of customers expected on a daily basis at the premises.

c. The legal occupancy limit of the premises.

d. The number of off-street parking spaces available at the premises, both for employee parking and parking of customer vehicles.

e. Plans the applicant has to ensure the orderly appearance and operation of the premises with respect to litter, noise, and storage of motor vehicle parts and supplies.

f. Any other licenses held by the applicant or attached to the premises.

g. A description of any provisions made for clean-up of the premises.

h. A site plan showing:

h-1. The locations of all entrances and exits to the premises from the street, as well as all entrances and exits to the building in which the nonconforming motor vehicle repair activity is conducted.

h-2. The locations and dimensions of any off-street parking and loading areas for customer and employee motor vehicles.

i. Such other reasonable and pertinent information the common council or the licensing committee may from time to time require.

6. CHANGES TO BE REPORTED. See ss. 85-35 to 85-39 for provisions relating to changes to applications and plans of operation.

- 7. LICENSE FEE.** See ch. 81 for the required license fee.
- 8. AGE QUALIFICATION.** No license shall be issued to any person or any agent of a corporation or limited liability corporation who is not 18 years of age or older.
- 9. DISQUALIFICATION.** Whenever any application is denied, or a license is revoked, surrendered or not renewed, the procedures for disqualification for license and change of circumstances provided in ss. 85-13 and 85-15 shall apply.
- 10. INVESTIGATION.** Each application for a new license shall be referred to the chief of police, the commissioner of neighborhood services and the commissioner of public works in accordance with s. 85-21-2. All applicants for nonconforming motor vehicle repair facility licenses shall be exempt from the fingerprinting requirement provided in s. 85-21-1.
- 11. OBJECTION.** An objection to issuance of a license shall be based on the factors set forth in s. 85-2.7-4. If the local common council member, chief of police, commissioner of neighborhood services or commissioner of public works recommends against an application, no license shall be issued unless the applicant requests, in writing, an appeal before the licensing committee. An appeal shall be requested no more than 10 working days after the date on which the applicant was notified of the recommendation of the common council member, chief or commissioner. An appeal shall be forwarded by the city clerk to the licensing committee for its recommendation as to whether a license should be granted. The procedure for considering an appeal shall be as provided in s. 85-2.7.
- 12. ISSUANCE.** See s. 85-12.5 for provisions relating to the issuance of a license.
- 13. POSTING.** Each license shall be posted in a conspicuous place on the premises.
- 14. TRANSFER.** See s. 85-19 for provisions relating to the transfer of a license and the change of licensee names.
- 15. RENEWAL.** Application for renewal of a license shall be made to the city clerk in accordance with the provisions of s. 85-26. The city clerk shall refer the application to the chief of police. If the applicant still meets the licensing qualifications, the license shall be issued unless a written objection has been filed under s. 85-3. If there is objection to renewal of the license, the procedure for considering the renewal application shall be as specified in ss. 85-3 to 85-5.
- 16. REVOCATION OR SUSPENSION OF LICENSE.** Any license issued under this section may be suspended or revoked for cause by the common council after notice to the licensee and a hearing. Notice and hearing on the revocation shall be conducted in accordance with s. 85-3.

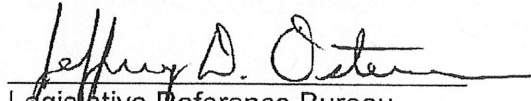
17. REGULATIONS. Every licensed nonconforming motor vehicle repair facility shall be operated in compliance with the following standards:

- a. No motor vehicle owned by a customer of the repair facility shall be parked on the street before, during or after repair work.
- b. No outdoor motor vehicle repair shall be permitted.
- c. The facility shall not operate between the hours of 10 p.m. and 7 a.m.
- d. No excessive noise shall be generated by the facility.

18. ENFORCEMENT, PENALTY. a. A person who violates any provision of this section or fails to comply with an order of the commissioner that was issued under this section or otherwise issued concerning the operation of a nonconforming motor vehicle repair facility shall be liable upon conviction to a Class J penalty under s. 61-16. Each day of a continued violation is a separate offense.

b. Citations may be issued for any violation of this section with or without prior order or notice. The stipulation, forfeiture and court procedure set forth in s. 50-25 shall apply

.LRB
APPROVED AS TO FORM



Legislative Reference Bureau

Date: 7/20/2021

..Attorney

IT IS OUR OPINION THAT THE ORDINANCE
IS LEGAL AND ENFORCEABLE

Office of the City Attorney

Date: _____

..Requestor

Department of City Development

..Drafter

LRB176738-2

Jeff Osterman

06/21/2021