

CITY OF MILWAUKEE

Form CA-43

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Alderman Michael S. D'Amato, Chair
Zoning, Neighborhoods and Development Committee
Room 205 – City Hall

Re: CCFN 040644 – An Ordinance Relating to Zoning Regulations
for Parking Lots in the C9D (Civic Activity) Downtown Zoning District

Dear Alderman D'Amato:

This letter will respond to your request of April 20, 2005 for the opinion of this office as to the legality and enforceability of the above-referenced proposed ordinance, which is a text amendment to the "Downtown District's Use Table" included within the City of Milwaukee Zoning Code ("Code") as § 295-703-1 (Table), Milwaukee Code of Ordinances ("MCO"). This proposed ordinance would change the use classification of parking lots located in subdistrict B of zoning district C9D ("Civic Activity") from that of a special use ("S") to that of a limited use ("L"). The effect of this ordinance would thus be to remove the necessity for a parking lot located in zoning district C9D subdistrict B to obtain a special-use permit, and would render any such lot as a *de facto* permitted use provided that the applicable limited-use standards contained in § 295-703-2-L of the Code are met. *See*, § 295-703-1-b, MCO.

We conclude that this proposed ordinance would be legal and enforceable, provided that certain requisites are met. The primary requirement is that a full and appropriate legislative record must be developed indicating that adoption of the proposed ordinance would be in the public interest and not solely for the benefit of any parking lots located within the affected area, *i.e.*, zoning district C9D subdistrict B.

A brief discussion of the history of this proposed ordinance would be in order. According to the Department of City Development ("DCD"), the only parking lot located

within zoning district 9D subdistrict B is the parking lot currently owned and operated by the Wisconsin Center District ("District"), a tax-exempt entity, and comprising the area adjacent to the Midwest Airlines Center ("Center"). This parking lot is located between North Fourth and North Sixth Streets on the south side of West Kilbourn Avenue, on the land eventually envisioned for construction of Phase III of the Center.

Since 1996, the District has been permitted to operate a parking lot upon this parcel by virtue of a series of special-use permits granted by the Board of Zoning Appeals ("BOZA"), the last of which expired on March 3, 2005. Each of these permits contained a condition restricting the availability of this parking lot to patrons of events held at the Midwest Airlines Center (a facility immediately adjoining the lot). The District has filed an application with BOZA for an extension and amendment of its special-use permit, which includes a request for removal of the restriction on the availability of the parking lot to patrons of the Midwest Airlines Center and for permission to operate it as a general commercial parking lot available to the general public at all times. This new application is pending and has not yet been heard by BOZA. While this pending application does not directly affect the discussion contained in this opinion or our conclusions based upon that discussion, it should be noted that the adoption of this proposed ordinance would remove the necessity for further pursuit of the District's pending special-use permit application, since the affected parking lot would be transformed from a special use to a limited use.

As previously noted, the proposed ordinance was introduced as a text amendment to the use classification of principal-use and accessory-use parking lots in the C9D (Civic Activity) zoning district, with an addition to the applicable limited-use standards restricting the amendment to Subdistrict B of that zoning district. Proposed § 295-703-L-2, MCO. The form of the proposed ordinance thus did not suggest the existence of any issues concerning its legality and enforceability. Accordingly, it was recommended for passage by the Zoning Code Technical Committee in September, 2004. The first indication that our office received as to the existence of any issue with respect to the legality or enforceability of the proposed ordinance came on April 14, 2005, when we received a large package of material from counsel for Isaacs Family Limited Partnership ("Isaacs"), the operator of a large parking facility located at 330 West Wells Street, approximately one-half block east from the District's parking lot. While the material submitted by Isaacs' counsel raised numerous issues, his chief contentions may be briefly summarized as follows:

1. That the District has allegedly operated its parking lot for some period of time in violation of the conditions attached to its special-use permit, specifically by permitting patrons of facilities other than the Midwest Airlines Center to utilize that lot.
2. That the continued operation of the District's parking lot would allegedly fail to satisfy two of the applicable standards established by the Code for renewal of the District's special-use permit, *i.e.*, "protection of property" and "traffic and pedestrian safety" (§§ 295-311-2-d-2 and d-3, MCO). The former is alleged due to loss of revenue occasioned to neighboring non-tax-exempt parking lots that would not be benefited by the proposed ordinance, including Isaacs' lot. The latter is alleged as a consequence of purported traffic backups in the eastbound lanes of West Kilbourn Avenue caused by vehicles lining up to enter the District's parking lot impeding access to Isaacs' lot and other neighboring, competing lots.
3. That the proposed ordinance would constitute illegal "spot zoning" benefiting solely the District's parking lot at the expense of all other neighboring and competing parking lots, including Isaacs' lot.

We believe that contentions 1 and 2 above are directed at the special-use permit proceedings currently pending before BOZA and not to the legality or enforceability of the proposed ordinance. We thus shall not discuss these items in this letter. Item 3, however, does directly impact upon the legality and enforceability of the proposed ordinance. Therefore, we must address the issue of whether its adoption would result in a form of illegal "spot zoning." Our conclusion is that that proposition is, at best, doubtful, for the reasons outlined below.

First, we must ascertain whether the proposed ordinance constitutes spot zoning at all. The term "spot zoning" refers to "the practice whereby a single lot or area is granted privileges which are not granted or extended to other land in the vicinity in the same use district." *Cushman v. City of Racine*, 39 Wis. 2d 303, 306-307, 159 N.W.2d 67, 69 (1968); *Step Now Citizens Group v. Town of Utica Planning and Zoning Committee*,

2003 WI App 109 ¶ 27, 264 Wis. 2d 662, 679, 663 N.W.2d 833, 841. Since the District's parking lot adjoining the Midwest Airlines Center is the only parking lot located within zoning district C9D subdistrict B, and thus the only parking lot benefited or even affected by the proposed ordinance, the proposed ordinance at least technically constitutes a form of spot zoning, as that term is defined by Wisconsin courts. This is because the proposed ordinance would accord a particular type of privilege to the District's parking lot not accorded to any other parking lot within its particular use district, *i.e.*, C9D (Civic Activity)—the ability to operate without first securing and maintaining a special-use permit.

One noteworthy feature of the proposed ordinance is that, while the limited-use status of the District's parking lot would be unique within zoning district C9D (Civic Activity), it would not be unique with respect to downtown zoning districts generally. Indeed, the current Downtown District's Use Table (§ 295-703-1 (Table), MCO) indicates that two other downtown zoning-use districts (C9A and C9G) also classify parking lots as limited uses with the same limited-use standards as that which would be extended by the proposed ordinance to zoning district C9D subdistrict B. Attached to this opinion is a copy of the zoning map for the Central Business District (downtown), which outlines in yellow highlighter zoning district C9D subdistrict B (the small area between North Fourth and North Sixth Streets and West Wisconsin and West Kilbourn Avenues) and the various other areas in or near downtown within zoning districts C9A and C9G.

This map demonstrates that a not-insignificant part of the downtown area is included within those zoning districts, and thus within areas where parking lots are limited and not special uses. Parts of those areas are located within relatively easy walking distance of the District's parking lot and of the surrounding areas comprised within the C9D (Civic Activity) zoning district. Thus, while the District's parking lot is technically a form of spot zoning in that it is the only lot within the particular zoning district affected by the proposed ordinance, it would be misleading to conclude that the proposed ordinance would extend a unique privilege to the District's parking lot not available to at least some other parking lots located in close proximity elsewhere within the Central Business District.

This, however, constitutes only the beginning of the requisite analysis. The next step must be to determine whether this particular instance of spot zoning would be "illegal,"

and it is here that we believe that this conclusion is, at best, doubtful. A long line of Wisconsin cases has established that spot zoning is not, *per se*, illegal in this state. See, e.g., *Howard v. Village of Elm Grove*, 80 Wis. 2d 33, 41-42, 257 N.W.2d 850, 854 (1977), in which the Wisconsin Supreme Court stated as follows:

Spot zoning is the practice whereby a single lot or area is granted privileges which are not granted or extended to other land in the vicinity in the same use district, and this court's position has long been that this type of rezoning is not illegal *per se*. *Rodgers v. Menomonee Falls*, 55 Wis. 2d 563, 572, 201 N.W.2d 29 (1972); *Cushman v. Racine*, 39 Wis. 2d 303, 306, 159 N.W.2d 67 (1968). It has been characterized both as a necessary device to provide flexibility to comprehensive zoning ordinances (2 Anderson, *American Law of Zoning*, s 9.17 at 129 (1976)) and as "the very antithesis of planned zoning" (1 Williams, *American Land Planning Law*, s 27.01 at 561 (1974)). However, spot zoning is a form of rezoning and "should only be indulged in where it is in the public interest and not solely for the benefit of the property owner who requests rezoning." *Buhler v. Racine County*, 33 Wis. 2d 137, 150-51, 146 N.W.2d 403 (1966) (CURRIE, C. J. Concurring); *Cushman v. Racine*, *supra* 39 Wis. 2d at 309, 159 N.W.2d at 67.

Similarly, in *Bubolz v. Dane County*, 159 Wis. 2d 284, 297, 464 N.W.2d 67, 73 (Ct. App. 1990), the Court of Appeals stated as follows:

Spot zoning is the practice of allowing a single lot or area special privileges which are not extended to other land in the vicinity in the same use district. *Howard v. Village of Elm Grove*, 80 Wis. 2d 33, 41, 257 N.W.2d 850, 854 (1977). Spot zoning is not *per se* illegal. *Ballenger v. Door County*, 131 Wis. 2d 422, 426, 388 N.W.2d 624, 627 (Ct. App. 1986). However, rezoning should be consistent with long-range planning and based on considerations which affect the whole community. *Bell v. City of Elkhorn*, 122 Wis. 2d 558, 568, 364 N.W.2d 144, 148 (1985). Thus, spot zoning should only be indulged in where it is in the public interest and not solely for the benefit of the property owner who request rezoning. *Cushman*, 39 Wis. 2d at 309, 159 N.W.2d at 70-71.

See also the following cases, all ruling to the same effect: *Bell v. City of Elkhorn*, 122 Wis. 2d 558, 567-568, 364 N.W.2d 144, 148 (1985); *Rodgers v. Village of Menomonee Falls*, 55 Wis. 2d 563, 573, 201 N.W.2d 29, 34 (1972); *Cushman v. City of Racine*, *supra*, 39 Wis. 2d at 306-307, 309, 159 N.W.2d at 69, 70-71; *Step Now Citizens Group v. Town of Utica Planning and Zoning Committee*, *supra*, 264 Wis. 2d at 679-681, 663 N.W.2d at 841-842; *Ballenger v. Door County*, 131 Wis. 2d 422, 426-427, 388 N.W.2d 624, 627 (Ct. App. 1986). Similarly, Wisconsin courts have ruled that "not every zoning enactment allowing an area situated in a larger zone to be devoted to a use inconsistent with the larger area use constitutes illegal spot zoning." *Ballenger v. Door County*, *supra*, 131 Wis. 2d at 428, 388 N.W.2d at 628, citing *Higbee v. Chicago B&Q R.R.*, 235 Wis. 91, 98-99, 292 N.W. 320, 322-323 (1940).

The upshot of these decisions is that the legality of spot-zoning determinations depends not upon the benefits accorded to particular property owners but rather upon factors "consistent with long-range planning" that are "based upon considerations affecting the whole community." *Ballenger v. Door County*, *supra*; *Heaney v. City of Oshkosh*, 47 Wis. 2d 303, 310, 177 N.W.2d 74, 77 (1970). Since spot zoning "should only be indulged in where it is in the public interest and not solely for the benefit of the property owner who requests rezoning," the interests of the public health, morals, and safety as well as the promotion of public welfare, convenience, and general prosperity must be paramount in the deliberations and conclusions of the Common Council with respect to the proposed ordinance. *See, e.g., Step Now Citizens Group v. Town of Utica Planning and Zoning Committee*, *supra*, 264 Wis. 2d at 680, 663 N.W.2d at 842; *Ballenger v. Door County*, *supra*, 131 Wis. 2d at 427, 388 N.W.2d at 627. In this respect, "the nature and character of the parcel, the use of the surrounding land and the overall scheme or zoning plan are also relevant." *Id.*; *see also Heaney v. City of Oshkosh*, *supra*, 47 Wis. 2d at 310, 177 N.W.2d at 77-78. If the proposed ordinance satisfies these requirements, it will likely be upheld by the courts notwithstanding the fact that it may constitute a form of spot zoning.

This conclusion comports with the general standard governing judicial review of zoning ordinances generally. In *Willow Creek Ranch, LLC v. Town of Shelby*, 2000 WI 56 ¶ 40, 235 Wis. 2d 409, 431, 611 N.W.2d 693, 703, the Wisconsin Supreme Court expressed this standard as follows:

A municipality's zoning decision represents a valid exercise of its police power. *State ex rel. American Oil Company v. Bessent*, 27 Wis. 2d 537, 540, 135 N.W.2d 317 (1965); *State ex rel. Carter v. Harper*, 182 Wis. 148, 155, 196 N.W. 451 (1923). Since zoning ordinances are enacted for the benefit and welfare of the citizens of a municipality, this court generally afforded great deference to zoning decisions. See *Jelinski v. Eggers*, 34 Wis. 2d 85, 93-94, 148 N.W.2d 750 (1967). However, we may declare a zoning ordinance or action unconstitutional when it served no legitimate purpose and is arbitrary and unreasonable, having no substantial relation to public health or safety. *Kmiec v. Town of Spider Lake*, 60 Wis. 2d 640, 647, 211 N.W.2d 471 (1973). See also *Cushman v. City of Racine*, 39 Wis. 2d 303, 311, 159 N.W.2d 67 (1968).

In this situation, it is therefore incumbent upon the Common Council to demonstrate that this proposed ordinance, if adopted, would satisfy these standards. This can best be accomplished by the development of a legislative record sufficient to conclusively demonstrate that the adoption of the proposed ordinance would be in the public interest, and would promote the public health, safety, welfare, convenience, and general prosperity. It is also incumbent upon the Common Council, should it choose to adopt the proposed ordinance, to demonstrate through the legislative record that the impetus for its adoption arises from the promotion and advancement of these interests and not from any desire to benefit any particular property owner (in this case, the District). To the extent that this requirement is not satisfied, the prospects for this proposed ordinance, should it be adopted and thereafter challenged and subjected to judicial review, would be impaired.

Alderman Michael S. D'Amato, Chair
Zoning, Neighborhoods and Development Committee
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If the Zoning, Neighborhoods and Development Committee has any further questions concerning this file, please do not hesitate to contact this office for guidance.

Very truly yours,



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SSM:lmb
enclosure
c: Alderman Willie Hines, Council President
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