



Board of Zoning Appeals

June 7, 2007

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Georgia M. Cameron  
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**Secretary**  
Clifton W. Crump

Grant Langley  
City Attorney  
City Hall, Rm. 800  
Milwaukee, WI. 53202

RE: File No. 070160 (Proposed Substitute)

Dear Mr. Langley,

The above referenced substitute ordinance was heard before the City Plan Commission (CPC) on Monday June 4<sup>th</sup>. The CPC recommended that the matter be placed on file. Craig Zetley, whom is the Chairman of the Board of Zoning Appeals (BOZA), spoke against the ordinance stating that its passage could both harm many of the procedural efficiencies that have been developed by BOZA and viable economic development. Given the Board Chairman's concerns and the fact that the City Attorney's Office has advised the Board that "concentration" in and of itself does not constitute legal grounds for the denial of a land use, please address the following question when opining on the legality and enforceability of this proposed substitute ordinance:

Prior to BOZA denying a proposed land use must the record demonstrate, even if file No. 070160 (substitute) is adopted by the Common Council (CC), that some element of the existing Special Use criteria is negatively impacted?

This matter is scheduled to be heard before the Zoning, Neighborhoods, and Development (ZND) Committee on June 12<sup>th</sup>. Please advise this office on this matter ASAP so that the Board applies the correct legal standard to all pending Special Use appeals.

Sincerely,

Clifton W. Crump, Secretary  
Board of Zoning Appeals

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City Attorney

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June 7, 2007

Clifton Crump, Secretary  
Board of Zoning Appeals  
809 Building – First Floor

Re: CCFN 070160 (Proposed Substitute A) – An Ordinance  
Relating to Required Board of Zoning Appeals Findings  
for the Granting of Special-Use Permits

Dear Mr. Crump:

This letter will respond to your request dated June 7, 2007 for the opinion of this office concerning an aspect of the legality and enforceability of the above-referenced proposed substitute ordinance. Specifically, your question is as follows:

Prior to BOZA denying a proposed land use must the record demonstrate, even if file No. 070160 (substitute) is adopted by the Common Council (CC), that some element of the existing Special Use criteria is negatively impacted?

The answer to your inquiry is “yes.” In fact, proposed Substitute A (copy attached) specifically adopts this approach by “tying” the amendatory language therein to two of the established and existing criteria governing the evaluation of special-use permit applications by the Board of Zoning Appeals (“Board”)—specifically, “protection of public health, safety and welfare” (§ 295-311-2-d-1, Milwaukee Code of Ordinances (“MCO”)); and “protection of property” (§ 295-311-2-d-2, MCO).

This conclusion is consistent with the fundamental nature of the zoning power. The City’s zoning authority arises from its police powers, which in turn are directed to the protection and promotion of the health, safety, morals and general welfare of the City and its citizens. Wis. Stat. §§ 62.11(5) and 62.23(7)(a);

Clifton Crump, Secretary

June 7, 2007

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*Willow Creek Ranch, LLC v. Town of Shelby*, 2000 WI 56 ¶ 40, 235 Wis. 2d 409, 431, 611 N.W.2d 693, 703; *City of Milwaukee v. Leavitt*, 31 Wis. 2d 72, 76, 142 Wis. 2d 169, 171 (1966). The four existing special-use criteria are all directed toward these “police power” goals. They provide a framework for Board oversight of uses that are presumptively permitted, but that may require scrutiny because of their particular location. The Zoning Code expresses this concept in its definition of a “special use,” as follows: “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.” § 295-201-619, MCO; *see also State ex rel. Skelly Oil Co. v. Common Council of the City of Delafield*, 58 Wis. 695, 700-701, 207 N.W.2d 585, 587 (1973); *Hearst-Argyle Stations, Inc. v. Board of Zoning Appeals of the City of Milwaukee*, 2003 WI App 48 ¶ 15, 260 Wis. 2d 494, 505, 659 N.W.2d 424, 430; *Wisconsin Department of Transportation v. Office of the Commissioner of Transportation*, 135 Wis. 2d 195, 199-200, 400 N.W.2d 15, 17 (Ct. App. 1986).

In order for the Board to deny an application for a special-use permit, it must make a finding that one or more of the four criteria applicable to evaluation of special-use permit applications as set forth by §§ 295-311-2-d-1 through d-4, MCO have not been met by the applicant. This serves the purpose of demonstrating that grant of the proposed application would not promote (indeed would be inconsistent with) “the health, safety, morals or the general welfare” of the City and of its citizens. Wis. Stat. § 62.23(7)(a). The law does not contemplate denial of a special-use permit application on any other basis. Consequently, while “geographic concentration” of a particular type of use denoted by the Zoning Code as a “special use” may constitute evidence of a failure to fulfill one or more of these criteria (and thus evidence that may be used in support of a denial of a special-use permit application), it does not constitute grounds for denial of such an application in and of itself. The City does not possess the authority to deny a special-use permit application solely on the grounds that it may result in an “overconcentration” of that use in a particular part of the City, absent a further showing that such “overconcentration” would result in a detrimental impact to the public health, safety, morals or welfare. Any attempt to do so would, in our opinion, be well beyond the permissible bounds of

Clifton Crump, Secretary

June 7, 2007

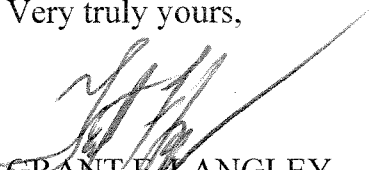
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the police power and would constitute an unlawful infringement on the right of property owners to utilize their properties for lawful and presumptively permitted purposes.

On April 23, 2001, this office issued an opinion (copy attached) which advised that the addition of a special-use permit criterion entitled "No Overconcentration of Use" would be redundant because it would "not create any new requirements for the grant of a special use which are not already encompassed within the Zoning Code." We believe that the current proposed substitute ordinance is equally redundant, for the same reason. Nonetheless, as currently stated, it appears to be legal and enforceable because it is tied to two of the Code's existing special-use permit criteria, and merely states that "geographic concentration" may in certain circumstances be considered as evidence in the Board's determination of whether those criteria have or have not been met in particular cases.

If you have any further questions, please do not hesitate to contact this office.

Very truly yours,



GRANT F. LANGLEY  
City Attorney



STUART S. MUKAMAL  
Assistant City Attorney

SSM:lmb  
enclosures  
1082-2007-1582:120154

..Number

070160

..Version

PROPOSED SUBSTITUTE

..Reference

..Sponsor

ALD. BOHL, MURPHY, DONOVAN, D'AMATO, HAMILTON, PUENTE, DUDZIK,  
BAUMAN, ZIELINSKI AND WADE

..Title

A substitute ordinance relating to required board of zoning appeals findings for the granting of special use permits.

..Sections

295-311-2-d-1 am

295-311-2-d-2 am

..Analysis

Currently, in order to approve a special use permit, the board of zoning appeals is required to make 4 findings, including findings that:

1. The use will be designed, located and operated in a manner so that the public health, safety and welfare is protected
2. The use, value and enjoyment of other property in the neighborhood will not be substantially impaired or diminished by the establishment, maintenance or operation of the special use.

This ordinance provides that the board of zoning appeals may consider geographic concentration of establishments of the same type as the proposed special use as evidence that either or both of these standards will not be met.

..Body

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

Part 1. Section 295-311-2-d-1 and 2 of the code is amended to read:

**295-311. Appeals.**

**2. SPECIAL USE PERMITS.**

d. Findings.

d-1. 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.

>>A geographic concentration of establishments of this type may be evidence, in certain circumstances, that the public health, safety and welfare will not be protected.<<

d-2. Protection of Property. The use, value and enjoyment of other property in the neighborhood will not be substantially impaired or diminished by the establishment, maintenance or operation of the special use. >>A geographic concentration of establishments of this type may be evidence, in certain circumstances, that the proposed use will substantially impair or diminish property values.<<

..LRB

APPROVED AS TO FORM

\_\_\_\_\_  
Legislative Reference Bureau

Date:\_\_\_\_\_

..Attorney

IT IS OUR OPINION THAT THE ORDINANCE  
IS LEGAL AND ENFORCEABLE

\_\_\_\_\_  
Office of the City Attorney

Date:\_\_\_\_\_

..Requestor

..Drafter

LRB07243-2

JDO

06/04/2007

# CITY OF MILWAUKEE

Form CA-43

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Assistant City Attorneys

August 23, 2001

Alderman Paul Henningsen, Chair  
Zoning, Neighborhoods & Development  
Committee of the Common Council  
200 East Wells Street, Room 205  
Milwaukee, WI 53202

RE: Common Council File No. 000796 - Over Concentration of Use

Dear Alderman Henningsen:

In a July 3, 2001 memorandum, we were asked to provide a legal opinion concerning the additional finding proposed for the grant of a special use by File No. 000796. That Common Council File creates a fifth finding for the grant of a special use by the Board of Zoning Appeals through an amendment to section 295-59.5.5 of the Zoning Code. The proposed new finding set forth in the draft ordinance reads as follows:

c-5. No Overconcentration of Use. Operation of the use at the proposed location will not result in a concentration of establishments of this type in the neighborhood that is so high that the concentration will substantially impair or diminish property value or public health, safety and welfare in the neighborhood.

Specifically, we were asked for an opinion as to the manner in which the required finding could be further defined in the Zoning Code and what, if any, standards could be applied to such a determination by the Board of Zoning Appeals.

Initially, we should note that the language set forth in the proposed new finding does not create any new requirements for the grant of a special use which are not already encompassed within the Zoning Code. Section 295-59-5.5-c-1, specifically addresses the

public health, safety and welfare and sec. 295-59-5.5-c-2. specifically addresses the impact of a proposed special use upon the value of other property in the neighborhood. Accordingly, it is our belief that the addition of the proposed new finding regarding the overconcentration of a type of use, at least as it is currently phrased, will have no real impact on the deliberations of the Board of Zoning Appeals or the evidence which must be presented by an applicant to support the grant of a special use.

The development of specific standards to address a concept such as the concentration of a particular use is very problematic. Given the diverse nature of the City, the level of "concentration" of a particular use in various neighborhoods which might be deemed to constitute an "overconcentration" could vary substantially. For example, along North Water Street the location of a bar or nightclub every 100 feet is probably not an overconcentration, the location of similar facilities 500 or 1,000 feet apart in other neighborhoods of the City could very well be deemed to constitute an overconcentration. It may be more appropriate for the Common Council to consider alternative means to address the concerns which gave rise to Common Council File No. 000796 rather than attempt to create comprehensive standards for evaluating overconcentration.

Traditionally, our Zoning Code has addressed specific concentration of use concerns through the vehicle of spacing requirements. For example, sec. 295-14-9 of the Zoning Code requires adult premises to be located at least 500 feet from residentially-zoned districts and at least 1,000 feet from each other. Section 295-112-2-h. of the Zoning Code requires bed & breakfast facilities to be located at least 600 feet from each other.

In apparent recognition of the distinction between various neighborhoods in the City, sec. 295-14-11-b. of the Zoning Code specifically provides for the relaxation of the 600 foot requirement for bed & breakfasts in an area bounded by West Juneau Avenue, West Michigan Street, North 27<sup>th</sup> Street, and North 35<sup>th</sup> Street because that area has been specifically designated as a bed & breakfast district and a greater concentration of bed & breakfast facilities is encouraged.

It may be that, to the extent concentrations of particular types of uses are deemed to create problems which should be addressed by the Zoning Code, the inclusion of specific spacing requirements in the ordinances would be a more viable approach to such regulation.

Another manner in which the City could address such concerns would be through the creation of specific Comprehensive Plan elements to address various specific uses in various parts of the City. Such an effort was recently undertaken with respect to transmission towers through the adoption of a Transmission Tower Policy Statement by the City's Plan Commission. The adoption of such Comprehensive Plan elements would then automatically be incorporated into the Board of Zoning Appeals consideration of applications for special uses



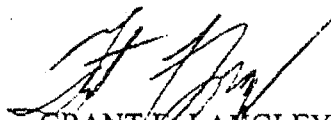
inasmuch as sec. 295-5.5-c-4. requires special uses to be designed, located, and operated in a manner consistent with the City's Comprehensive Plan.

Significantly, the adoption of new elements as part of the City's Comprehensive Plan could also aid in the creation of requirements tailored to meet the specific needs of various neighborhoods and areas within the City. In considering the overall impact of a particular use in different parts of the City, the Plan Commission might then be able to distinguish between the level of concentration for a particular use which would be appropriate on the City's far northwest side and the level of concentration which might be appropriate on the City's near southside or downtown.

In summary, inasmuch as the new finding proposed in Common Council File No. 000796 is already encompassed by the existing findings which the Board of Zoning Appeals is required to make in order to grant a special use, we do not believe that the adoption of that file would result in any significant change with respect to the grant of individual special uses.

It would be our pleasure to work with you and members of the Zoning, Neighborhoods and Development Committee in exploring potential alternatives to File No. 000796, such as the creation of specific spacing requirements within the Zoning Code or the initiation of a request to the City's Planning Staff to undertake the preparation of specific Comprehensive Plan elements which could address the appropriate concentration of particular uses as part of the comprehensive plan.

Very truly yours,

  
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THOMAS O. GARTNER  
Assistant City Attorney

TOG/kg  
c: Robert Harvey  
Ronald D. Leonhardt  
1033-2001-2020  
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