



Board of Zoning Appeals

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March 19, 2009

To the Honorable Common Council,

It is my understanding that the proposed resolution, File No. 081571, concerning special use and variance applications to the Board of Zoning Appeals (BOZA) will be discussed at the Zoning, Neighborhood, and Development Committee meeting on Friday, March 20, 2009. In light of the recent news about Wisconsin day care operations, and after reviewing the content of this resolution, I would like to offer a few concerns that I have with the pending resolution and offer procedural modifications that may assist the State in closing the damaging loopholes that exist currently in the licensing system.

The resolution states:

This resolution requests that the Board of Zoning Appeals defer consideration of special use permits or use variance applications for a period of 6 months commencing on the effective date of this resolution and/or apply strict scrutiny to all such applications in accordance with the applicable criteria specified by the Zoning Code.

The Board of Zoning Appeals has always been an independent, quasi-judicial body that permits ample opportunity for Aldermen, appellants, constituents, and staff to provide testimony and opinions on land use matters on a case by case basis. The Board must review each case independently, as the appellant, lot, operation, and zoning district, etc., will all be different. In my opinion, this resolution will not assist the Board in its evaluation of day care proposal.

In fact, the resolution requests the Board to impose a moratorium on consideration of special use and variance applications for day care businesses. This position is in direct conflict with an existing City Attorney opinion regarding enacting moratoriums (see attached pay day/ title loan opinion). The resolution also requests that the Board apply a "strict scrutiny" standard to day care applications. The Board already carefully reviews every Special Use and Variance appeal that it considers and approves as outlined in the Milwaukee Code of Ordinances (Chapter 295-311). No Special Use permit or Variance appeal, for a day care facility or any other proposed use, is approved without a complete application submittal, staff review with recommendations, a public hearing, and the creation of a file that is available to all interested parties.

Furthermore, the Board does not lightly grant approvals for any land use and will actively participate in the process, including the revocation of a Board approved permit, upon finding that a use is operating in a manner that is contrary to the Board's ruling. The Board is committed to assisting local interested parties in confronting day care providers that are operating in violation of their Board approval. By use of the authority granted to BOZA by state statute, city ordinance, and its own rules and procedures, the Board via its staff, will begin to request additional information from all day care providers. The additional information will be added to the BOZA informational booklet that specifies materials needed for day care centers (see attached) These additional materials include:

1. Summarized attendance records.
2. Yearly inspection reports.
3. Violations noted and confirmed by the State in a formal hearing.
4. Sanctions imposed by the State.
5. Any violations which have been found against an appellant while serving as either an "operator" or "licensee" in a State licensed or certified day care.
6. That all day care providers submit a contact phone number that is monitored during all operating hours.
7. All day care appellants are to provide an updated plan of operation as part of the BOZA submittal process even for appeals commonly referred to as renewals.
8. The Board staff will establish a contact person at to verify the validity of the information submitted by the applicant.

It is the hope of the Board that by obtaining this additional information, prior to conducting an actual hearing, that all interested parties will be better informed regarding the appeal and that the Board will make the appropriate decision based upon the evidence presented. As for appellants with no professional child care experience, be assured that the Board will impose an extremely thorough review process upon all aspects of their appeal. This review can lead to potential outcomes ranging from permit denials to approvals that are granted for a "reasonable" period of time that allow for both the operator to conduct business, but will afford the Board an opportunity for review after several years. Lastly, regarding Board approved day care facilities and adherence with all aspects of their conditions of approval, the Board would encourage the City of Milwaukee Development Center to discontinue the use of no-inspection occupancy permits. Upon the application and ultimate issuance of an occupancy permit, a zoning inspection, at a minimum, should be performed to ensure compliance.

March 19, 2009

File No. 081571
Board of Zoning Appeals

This proposal represents a sincere effort by the Board to do its part in better regulating the day care facilities that it renders a decision upon.

Please feel free to contact either me or the Board Secretary, Kari Egerstrom Collins, regarding the content of this letter.

Sincerely,

A handwritten signature in cursive script that reads "Catherine M. Doyle". The signature is written in black ink and is positioned above the printed name and title.

Catherine M. Doyle, Chairwoman
Board of Zoning Appeals

Uses that require *additional* information for the Plan of Operations:

DAY CARE CENTERS (and or Schools)

- Explain where on the lot or street the children will be dropped off and picked up.
- Explain if the daycare is independently operated and owned, or if it is operated with assistance from the county, a church, or any other organization.
- Explain how many children will be cared for and their ages.
Example: 75 total children throughout the day ages 6 months to 12 years — 3 shifts of no more than 25 children per shift.
- List the daily activities for the children; how much time will be scheduled for each activity or rest period, including meals and snacks, and at what time the activities or rest periods will occur.
- Square footage (length x width) of the outdoor, fenced play area. Also include:
 - a. The maximum number of children that will be on the outdoor play area at any one time.
 - b. How many children will be on the play area in one day. (Maximum of three shifts per day.)
- Supplemental Day Care Center Transportation Information:
 - a. Indicate the estimated number or percentage of children brought to your day care center by each of the following means of transportation:
 1. Parent's Personal Vehicle
 2. Day Care Center Van Service
 3. County/ School Bus
 4. Walking
 - b. If children are to be transported to and from your day care center by van service provided by your day care center, please specify how many vehicles will be needed/used to provide this service, and where they will park when children are dropped off and picked up.
 - c. If children are picked up or dropped off by school bus, explain where school bus loading and unloading will occur.
 - d. When children are driven to the site by their parents, describe the location where parents will park their vehicles. If this parking is off street, indicate the number of parking stalls available that will be dedicated for this purpose. If parents will be parking their vehicles on the street, describe where this parking will occur and if parking is readily available at this location.
 - e. Please indicate the location where parking will be provided for employees of the day care center, and the number of parking spaces available at this location for that purpose.

GROUP LIVING ARRANGEMENTS

Rooming Houses, Community Living Arrangements (CLA), Community Based Residential Facilities (CBRF), Homes for the Aged, Limited or Personal Care Nursing Homes, Halfway Houses

- The number of tenants and/or clients.
- The number of live-in counselors, if any.
- What types of institutions or residences the clients will come from and what type of residents will live there.
- Any recreational and educational activities, programs, and facilities available to the residents.
- Buffer areas (such as shrubbery or fencing) and ground elevations (large slopes) on or surrounding the lot. [Only if not shown on a site plan.]
- For Group Homes and Group Foster Homes, please submit a copy of the State License Application.
- For CBRF's and CLA's, per requirement imposed by state statute, submit a summary of your efforts to establish a community advisory committee in the neighborhood in which the facility will be located.
- State whether or not a Reasonable Accommodation request will be sought.

CHURCHES

- The number of members.
- Size (square feet) of the main assembly room and the number of seats.

CAR WASHES/CAR REPAIR

- Include a description of mechanical washing and drying equipment.
- State whether or not the installation of car rims, alarms, and or stereos will take place on site.

CITY OF MILWAUKEE

Form CA-43

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Assistant City Attorneys

July 21, 2004

Clifton W. Crump, Secretary
Board of Zoning Appeals
809 Building - 1st Floor

Re: Moratorium on Special-Use Permit and Variance
Applications from Payday Loan Agencies

Dear Mr. Crump:

This opinion will respond to your inquiry of July 7, 2004 in response to a request from Alderman Robert W. Puente that pending applications by payday loan agencies to the Board of Zoning Appeals ("BOZA") for special-use permits or variances be held in abeyance "until the Common Council approves an ordinance, which would limit the concentration of these facilities." You have inquired as to whether BOZA has the authority to hold such appeals in abeyance until such an ordinance is passed. We are pleased to respond to this request, and conclude that the answer is "no."

For purposes of this opinion, we shall assume that the special-use permit or variance applications within the scope of Alderman Puente's request have been properly filed, are accompanied with all required information and fees, and have been submitted to all relevant "parties of interest" for input and comment. See, §§ 295-311-1-d and 295-311-2-a through 2-c, Milwaukee Code of Ordinances ("MCO") (special-use permits); §§ 295-311-3-a and 3-c, MCO (variances). There is no authority enabling BOZA to impose a moratorium upon hearings with respect to applications filed by payday loan agency applicants, once those applications have satisfied all applicable procedural requisites. To the contrary, any attempt to do so would both implicate evident due-process concerns, and directly violate a pertinent state statute.

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As to the former, the Fourteenth Amendment to the U.S. Constitution and Art. I § 1 of the Wisconsin Constitution provide that a person may not be deprived of property without due process of law. The right to apply under prescribed procedures for a special-use permit or for a variance constitutes "property" for this purpose, thus invoking constitutional due-process requirements. This includes "the opportunity to be heard at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976); *In re Interest of Christopher D.*, 191 Wis.2d 680, 701, 530 N.W.2d 34, 42 (Ct. App. 1995). Due process and fair play include entitlement to a fair and impartial hearing before an administrative tribunal with respect to matters within its lawful jurisdiction. *Marris v. City of Cedarburg*, 176 Wis.2d 14, 24, 498 N.W.2d 842, 847 (1993). A BOZA-imposed moratorium freezing the conduct of hearings upon these properly filed and pending payday loan agency applications would contravene the concepts of due process and fair play, as it would effectively deny all such applications by operation of law.

As to the latter, Wis. Stat. § 62.23(7)(e)6., pertaining to hearings before boards of zoning appeals, states as follows:

6. The board of appeals shall fix a reasonable time for the hearing of the appeal or other matter referred to it, and give public notice thereof, as well as due notice to the parties in interest, and decide the same within a reasonable time. Upon the hearing, any party may appear in person or by agent or by attorney. In any action involving a listed property, as defined in s. 44.31(4), the board shall consider any suggested alternatives or recommended decisions submitted by the landmarks commission or the planning commission.

(Emphasis added).

Thus, a properly submitted appeal to BOZA, over which BOZA has jurisdiction, must be heard and determined "within a reasonable time," under the foregoing statute. "...

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[O]nce an application which satisfies the legal requirements is filed, the statute requires a hearing within a reasonable time period and with the appropriate notice." *Tateoka v. City of Waukesha Board of Zoning Appeals*, 221 Wis.2d 656, 668, 583 N.W.2d 871, 876 (Ct. App. 1998). This is not discretionary on the part of BOZA; it is a clear statutory command. Nor does this situation present exceptional circumstances of the type that would justify a departure from the clear command of Wis. Stat. § 62.23(7)(e)6. Cf. *Tateoka v. City of Waukesha Board of Zoning Appeals*, *supra* (upholding a rule denying rehearings on variance applications that were not accompanied "by a summary of facts evidencing a substantial change in circumstances such that a rehearing is warranted" on the grounds that the rule operated to deny hearings only on matters that had been previously decided).

This conclusion is also consistent with the description of the BOZA process contained in BOZA's "General Information Booklet," particularly pp. 6-7 thereof entitled "How the BOZA Process Works." The clear import of that process is that a hearing will be scheduled on any appeal that has been properly filed and submitted with necessary information and fees. (See, especially, "How the BOZA Process Works," Step 5, second paragraph, and Step 7).

Therefore, we conclude that BOZA does not possess the authority to implement a moratorium upon special-use permit or variance applications submitted by or on behalf of payday loan agency applicants on its own initiative to facilitate consideration of a potential ordinance regulating the location of such businesses. We shall now turn to consideration of whether the Common Council may itself impose such a moratorium. We again conclude, under these circumstances, that the answer to this inquiry is "no."

A zoning moratorium, also sometimes referred to as "interim zoning" implicates constitutional issues of "taking" of private property without just compensation under the Fifth Amendment to the U.S. Constitution and Art. I § 13 of the Wisconsin Constitution, but is not *per se* unconstitutional. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002). It is permitted when properly authorized by statute. *Walworth County v.*

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City of Elkhorn, 27 Wis.2d 30, 38, 133 N.W.2d 257, 262 (1965); see also *Arnold Bernhard & Company, Inc. v. Planning and Zoning Commission of the Town of Westport*, 194 Conn. 152, 479 A.2d 801 (1984) (collecting cases upholding moratoria and other temporary or interim zoning measures).

The Legislature has promulgated statutes authorizing the imposition of zoning freezes on other interim zoning measures under particular circumstances. See, e.g., Wis. Stat. § 62.23(7)(da) (authorizing interim zoning up to two years by a city which has not adopted a zoning ordinance in order to preserve existing land uses pending adoption of a comprehensive zoning plan); Wis. Stat. § 62.23(7)(em) (authorizing “historic preservation” ordinances regulating development of places, structures, or objects having “a special character, historic, archaeological or aesthetic interest”); and Wis. Stat. § 62.23(7a)(b) (authorizing interim zoning for up to a maximum of three years to preserve existing land uses within a municipality’s extraterritorial zoning jurisdiction pending preparation of a comprehensive zoning plan for the area). Here, however, such statutory authorization is lacking.

Another issue raised in this context concerns whether such a delay of a moratorium upon consideration and determination of payday loan agency applications comports with the scope of the City’s “police powers.” The power to enact zoning ordinances is also supported by, and within the scope of, the City’s “police powers” (i.e., its authority to regulate in the interests of public health, safety, and welfare), as set forth by Wis. Stat. § 62.11(5). While municipalities are accorded a wide scope of discretion in the exercise of their police powers, ordinances and other measures enacted in aid of the “police power” must be reasonable, not arbitrary, and rationally related to a legitimate municipal objective. *State ex rel. Grand Bazaar v. City of Milwaukee*, 105 Wis.2d 203, 208-212, 313 N.W.2d 805, 808-810 (1982); *Clark Oil and Refining Corp. v. City of Tomah*, 30 Wis.2d 547, 553-554, 141 N.W.2d 299, 302-303 (1966); *Froncek v. City of Milwaukee*, 269 Wis. 276, 281-282, 69 N.W.2d 242, 245-246 (1955). The applicable standard of scrutiny was summarized by the Wisconsin Supreme Court in *Willow Creek Ranch, LLC v. Town of Shelby*, 235 Wis.2d 409, 611 N.W.2d 693, 2000 WI 56 (2000), as follows:

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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 the municipality, this court generally affords 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 serves 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).

235 Wis.2d at 431, 611 N.W.2d at 720.

There is a very considerable risk that the proposed moratorium would be vulnerable to a claim that it represents an unreasonable or arbitrary exercise of the City's "police powers" under Wis. Stat. § 62.11(5). A moratorium on special-use permit or variance applications, of an indeterminate length and with no avenue of appeal, is a significant infringement upon a property owner's (or tenant's) right to use and/or develop property for a lawful purpose. The confinement of the scope of such a moratorium to one particular line of business (the payday loan industry) raises the issue of why that line of business has been targeted to the exclusion of others. Given these considerations, there is a significant possibility that a court will invalidate any moratorium on payday loan agency applications as unreasonable and/or arbitrary and thus in excess of the City's "police powers," particularly in light of the absence of statutory authorization for such a measure.

Finally, the proposed ordinance raises related issues of "substantive" due process. In *Pro-Eco, Inc. v. Board of Commissioners of Jay County, Indiana*, 57 F.3d 505 (7th Cir.

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1995) the court defined the scope of “substantive due process” doctrine in the zoning context as follows:

Pro-Eco also claims that the Board’s ordinance deprived Pro-Eco of its substantive due process rights. In order to claim that a zoning ordinance interferes with its substantive rights, Pro-Eco must be able to demonstrate either that the ordinance infringes a fundamental liberty interest, *Reno v. Flores*, 507 U.S. 292, 301-303, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993) or that the ordinance is ‘arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.’ *Euclid v. Ambler Realty Company*, 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed.2d 303 (1926). We have interpreted ‘arbitrary and unreasonable’ to mean invidious or irrational. *Coniston [Coniston Corp. v. Village of Hoffman Estates]* 844 F.2d 461 at 467 (7th Cir. 1988); *Burrell v. City of Kankakee*, 815 F.2d 1127, 1129 (7th Cir. 1987).

57 F.3d at 514.


The proposed moratorium does not appear to implicate a “fundamental liberty interest”; at most “property interests” are implicated. However, it would raise a serious question of whether it would be “arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare,” which parallels the previous inquiry with respect to whether it would be within the proper scope of the City’s “police powers.” We do perceive considerable risk in this area, particularly in that the infringement upon “property interests” implicated by the proposed moratorium is a substantial one, for a significant and indeterminate duration, and triggered by a factor unrelated to the land-use characteristics of the individual property affected (*i.e.*, the fact that the permit applicant happened to be engaged in a particular line of business).

In light of all of these factors, we must conclude that, in our opinion, an industry-specific moratorium on consideration of special-use permit and variance applications


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submitted by or on behalf of payday loan agencies would be neither legal nor enforceable and would not likely withstand judicial scrutiny. If you have any additional questions on this matter, please contact this office.

Very truly yours,



GRANT F. LANGLEY
City Attorney



STUART S. MUKAMAL
Assistant City Attorney

SSM:lmb
c: Alderman Robert W. Puente
1082-2004-1975:83168

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