

CITY OF MILWAUKEE

Form CA-43

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April 26, 2004

Alderman Joe Davis, Sr.
Common Council – City Clerk's Office
200 East Wells Street, Room 205
Milwaukee, WI 53202

Re: Payday Loan Agencies – Zoning Regulations

Dear Alderman Davis:

During the course of a February 2, 2004 meeting we were asked to provide a legal opinion addressing the regulation of "payday loan agencies," as defined in sec. 295-201-431 of the City of Milwaukee Zoning Code. We were specifically asked to discuss the establishment of distance requirements governing the location of such agencies. The genesis for current concerns with respect to payday loan agencies is the relatively recent proliferation of such facilities within the City, as summarized in a January 29, 2004 memoranda and attached map prepared by the City's Legislative Reference Bureau.

Payday loan agencies are currently classified as a special use in those zoning districts within the City where they are permitted. The term payday loan agency is defined in the Zoning Code as an establishment providing loans to individuals in exchange for personal check as collateral, generally the term also encompasses businesses commonly known as "title loan" agencies.

We have previously issued legal opinions addressing the standards applicable to special uses for payday loan agencies and proposed ordinances which would have included "over-concentration" as an additional criteria for some special uses. In a May 7, 2003 letter to Craig Zetley, Chairman of the Board of Zoning Appeals ("Board"), we addressed the consideration of payday loan agencies by the Board of Zoning Appeals and discussed the factors which the Board is able to consider during the course of its deliberations with respect to the grant of a special use for such businesses. That opinion did not, however, specifically address the potential for amendments to the Zoning Code itself which would specifically address and regulate payday loan agencies.

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In an August 23, 2001 legal opinion addressed to Alderman Paul Henningsen we concluded that Common Council File No. 000796, which created additional factor for grant of a special use addressing over-concentration, was not necessary because those types of factors are already encompassed within existing findings for the grant of a special use. At present, Common Council File No. 031506 seeks to create a similar criteria for the grant of a special use addressing over-concentration. For the same reasons expressed in our August 23, 2001 legal opinion, we do not believe that Common Council File No. 031506 is necessary, but that does not mean that the Common Council is unable to regulate the concentration and intensity of uses through amendments to the Zoning Code.

We believe that, under proper circumstances, the Common Council has the power to adopt amendments to the Zoning Code which establish distance requirements for uses such as payday loan agencies. Zoning ordinances establishing distance requirements typically address uses such as filling stations, liquor outlets, and adult uses and impose a minimum distance between such uses. In the alternative, a minimum distance to other types of uses, such as churches or schools, is required. Generally, distance restrictions are upheld by the courts as reasonably related to promoting the public welfare because they control harmful secondary effects related to the restricted use. Rathkopf, *The Law of Zoning and Planning*, § 3:9 (4th ed.).

Initially, we note that the adoption of zoning ordinances must be reasonable and address legitimate governmental objections. In *State ex rel. American Oil Co. v. Bessent*, 27 Wis. 2d 537, 544, 545, 135 N.W.2d 317, 321, 322 (1965) the Wisconsin Supreme Court stated:

“ . . . as early in the history of zoning as . . . [1923] . . . this court considered a comprehensive zoning ordinance as justified in the exercise of the police power not only in the interest of public health, morals, and safety, but particularly for the promotion of public welfare, convenience, and general prosperity. General welfare was equated with the stabilization of the value of property and the promotion of the permanency of desirable home surroundings and of the happiness and comfort of the citizens . . .

. . . The concept of public welfare is broad and inclusive and embraces in comprehensive zoning the orderliness of community growth, land value, and aesthetic objectives.

(Citations omitted) . . .

However, unreasonable classifications in zoning ordinances, whether comprehensive or not, and restrictions which are not reasonably germane to legitimate objectives or which prohibit a particular use of land ignoring its natural

characteristics for such use or which are arbitrary have been held to be unconstitutional on the facts presented.

(Citations omitted) . . .”

When enacting Zoning Code provisions which establish a distance requirement for particular uses, the Common Council should consider a record which demonstrates a reasonable relationship between the proposed distance requirement and amelioration of the harmful secondary effects of such uses. The United States Court of Appeals recently upheld a Town of St. Joseph, Wisconsin ordinance enacted to address the undesirable “secondary effects” of adult uses in the context of a First Amendment constitutional challenge. *G.M. Enterprises v. Town of St. Joseph, Wisconsin*, 350 F.3d 631 (7th Cir., 2003). The manner in which the town developed a record prior to enactment of that ordinance provides a useful model for the city to follow in considering the establishment of distance requirements.

Prior to enactment of its ordinance the St. Joseph Town Board collected sixteen studies from around the country which demonstrated a correlation between sexually oriented businesses and negative secondary effects. The Board also considered court decisions from other jurisdictions and police reports generated over a ten year period. In adopting the ordinance, the Board made clear its primary objective to minimize and control the adverse secondary effects. *G.M. Enterprises, supra* @ 633 and 634.

In reaching its decision affirming the Town of St. Joseph ordinance, the court considered decisions by the United States Supreme Court in *City of Renton v. Playtime Theaters*, 475 U.S. 41 106 Sup. Ct. 925 89 L.Ed.2d 29 (1986) and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 Sup. Ct. 728, 152 L.Ed.2d 670 (2002). The *Playtime Theaters* case involved an ordinance which treats theaters that specialize in adult films differently from other kinds of theaters and the *Alameda Books* case involved an ordinance that prohibited multiple adult entertainment businesses from operating in the same building. Applying those cases to the analysis of the process utilized by the Town of St. Joseph in adopting its ordinance, the 7th Circuit noted:

“*Alameda Books* does not require a court to re-weigh the evidence considered by a legislative body, nor does it empower a court to substitute its judgment in regards to whether a regulation will best serve a community, so long as the regulatory body has satisfied the *Renton* requirement that it consider evidence ‘reasonably believed to be relevant to the problem’ addressed. (Citations omitted) . . .”

The decision went on to note that in *Alameda Books*:

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“The plurality expressed similar support for judicial deference to local law makers: ‘we acknowledge that the Los Angeles City Council is in a better position than the judiciary to gather and evaluate data on local problems.’ Id. at 440, 122 Sup. Ct. 728.

Again referencing the *Alameda Books* decision the 7th Circuit noted:

“Further, the purpose of the evidentiary requirement of *Alameda Books* is to require municipalities to demonstrate reliance on some evidence in reaching a reasonable conclusion about the secondary effects. A municipality need not ‘prove the efficacy of its rationale for reducing the secondary effects prior to implementation. (Citations omitted.)”

While the memoranda prepared by the legislative reference bureau present some information concerning the proliferation of and practices followed by payday loan agencies, we believe that the Common Council could benefit from a somewhat more extensive record in the consideration of zoning ordinance provisions regulating such facilities. In addition to the articles cited by the legislative reference bureau there are a number of additional outstanding articles, papers and judicial decisions addressing such facilities which could supplement the record before the Common Council and provide additional information to be utilized in consideration of any amendments to the Zoning Code.

We note that the City of Madison has adopted an ordinance which creates a 5,000 foot distance requirement for payday loan agencies and also that Common Council File No. 031614, which would establish a similar requirement in Milwaukee, remains pending before the Zoning Neighborhoods and Development Committee. Although we do not have specific information regarding the record which was before Madison’s Common Council when it enacted its zoning ordinance amendment, we believe that development of a more extensive record would assist Milwaukee’s Common Council in considering such an amendment and in determining what specific distance requirement might be most appropriate to address concerns with respect to the secondary effects of payday loan agencies.

Another action which the Common Council may wish to consider would be the initiation of request to the City’s Plan Commission for further study of the overall impact of payday loan agencies, as well as other types of financial institutions, through the development of a Comprehensive Plan element addressing such uses. Any amendments to the Zoning Code ultimately must be referred to the City’s Plan Commission and, in conjunction with the preparation of proposed Zoning Code amendments, a Comprehensive Plan element might well provide additional information to the Common Council in aid of its deliberations. A similar approach was recently utilized relative to the enactment of Zoning Code amendments regarding transmission towers. In that case, prior to the introduction of any Zoning Code amendments

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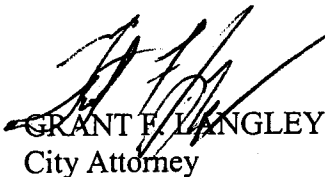
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addressing transmission towers, the City's Plan Commission developed a Comprehensive Plan element which set forth broad planning objectives relative to transmission towers. That Comprehensive Plan element was deemed necessary in light of the proliferation of transmission towers generally, a situation which now exists with respect to payday loan agencies.

In summary, the City of Milwaukee does possess the authority to promulgate distance requirements as part of the City's Zoning Code in order to control adverse secondary impacts of particular uses upon the general public. We believe that the most expeditious manner for the Common Council to proceed in regulating such uses, where an adverse impact upon the public welfare has been found to exist, would be first to initiate an evaluation of such uses by the City's Plan Commission and then to assemble as much additional information as possible in order to aid the Common Council in its deliberations. Such an approach should result in the adoption of Zoning Code amendments which not only promote the protection of the public health, safety and welfare but which also can be defended as a reasonable and appropriate exercise of the city's police power.

Very truly yours,



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