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June 26, 2007

Mr. Jeff Osterman
Legislative Fiscal Analyst
Office of City Clerk
Room B-11, City Hall

Re: Common Council File No. 070231
A Substitute Ordinance Relating To Board Of Zoning Appeals
And City Plan Commission Consideration Of Applications
For Approval Of Various Zoning-Related Matters

Dear Mr. Osterman:

On June 18, 2007, you requested an opinion of this office concerning the legality and enforceability of the above-referenced proposed substitute ordinance. Specifically, this proposed substitute ordinance would require applicants for: (a) most zoning map amendments and planned developments to the City Plan Commission ("Commission"); (b) special use permits and use variances to the Board of Zoning Appeals ("Board") to complete and submit an affidavit certifying that applicant's status with respect to several categories of proceedings involving the City of Milwaukee ("City"). Specifically, the required affidavit would indicate whether the applicant is:

1. Delinquent in the payment of any property tax, special assessment, special charge or special tax due to the City, provided that all appeals of the tax, assessment or charge have been concluded or the time to appeal has expired.
2. A party against whom the City has an outstanding judgment, provided that all appeals of the judgment have been concluded or the time to appeal has expired.

3. A party against whom the City has outstanding health or building and zoning code violations or orders from the Commissioner of Health or Commissioner of Neighborhood services that are not actively being abated, provided that all appeals of orders to correct violations have been concluded or the time to appeal has expired.
4. A party who has been convicted of violating an order of the Commissioner of Health or Commissioner of Neighborhood Services within the past year, provided that all appeals of the conviction have been concluded or the time to appeal has expired.
5. The owner of a premises found to be in violation of § 80-10, Milwaukee Code of Ordinances ("MCO") to whom the Commissioner of Neighborhood Services has charged the costs of police enforcement, pursuant to s. 80-10-4, provided that all appeals of these charges have been concluded or the time to appeal has expired.

In the case of an individual applicant, the required affidavit would be executed by the applicant. Proposed § 295-313-1, MCO. In the case of an applicant that is an entity (e.g. a corporation or partnership), the required affidavit would be executed by a duly authorized director, officer, partner, general partner, member or manager of the applicant. Proposed § 295-313-2, MCO.

In our opinion, this proposed substitute ordinance is legal and enforceable. We wish, however, to indicate the basis for this conclusion, and to express certain cautions that must be observed with respect to the use of the information obtained by way of this type of affidavit in zoning-related proceedings.

The evident intent of this proposed substitute ordinance is to permit the City to obtain certain information from applicants for specified categories of zoning-related permits and approvals. These categories of information, in turn, pertain to whether the applicant is: (a) current or delinquent in the fulfillment of obligations to the City; or (b) the subject of certain types of City enforcement actions pertaining to the management of property. The City (more particularly, the Board, the Commission, and other interested City officials), is certainly entitled to obtain this information from the applicant, particularly in that it

involve matters already of public record. Furthermore, it may well be that such information will constitute admissible evidence in rezoning, special use permit, or use variance proceedings conducted before the Commission or the Board since it may bear upon the credibility or feasibility of a project or plan of operation submitted by the applicant in conjunction with an application for a zoning map amendment, a planned development, a special use permit, or use variance. This will not, of course, be true in all cases; the relevance and admissibility of such evidence must always remain subject to the judgment of the Commission or the Board as the administrative tribunal, in light of the record before it as a whole.

This conclusion does not, however, indicate that an application for a zoning-related permit or approval may depend entirely, or even primarily, upon evidence contained in the affidavits encompassed by this proposed substitute ordinance. Such a result would be fundamentally contrary to the premise and objectives of zoning itself. In this respect, we would note two related and equally important propositions. First, 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); *see also, 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 powers of the Commission and of the Common Council to rezone a property via a zoning map amendment or approval of a planned development as well as the Board's powers to issue permits and approvals such as a special use permit or a use variance must all be exercised in a reasonable manner and in furtherance of legitimate police power objectives. Indeed, the criteria specified by the Zoning Code as applicable to the Board's grant or denial of special use permits and use variances are all directed specifically to the furtherance of police power objectives. *See*, §§ 295-311-2-d and d-1-4, MCO (special-use permit criteria); secs. 295-311-3-d, d-1-d-4 and d-6, MCO (use variance criteria). The proper standard of determination in any zoning-related proceeding is whether an application for a zoning permit for approval is or is not consistent with fulfillment of the City's legitimate police power objectives, and not the identity or character of the applicant.

Second, zoning is a type of regulation directed at the use of property, and not at the individuals or entities that may happen to own or manage property. Wis. Stat. § 62.23(7)(a); *Step Now Citizens Group v. Town of Utica Planning and Zoning Committee*, 2003 WI App. 109 ¶¶ 25, 30, 264 Wis. 2d 662, 678, 680; 663 N.W. 2d 833, 841-842. *See also* Rathkopf's *The Law of Zoning and Planning* (2005 Ed.) Vol. 1 § 1:12 (stating in pertinent part that: "zoning ordinances and decisions thereunder may be held ultra vires where such zoning regulation: . . . (2) is based on the identity or status of land users", *id.*

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at p. 1-37); § 2:15 (stating that: "zoning deals with land use, not the owner, operator or occupant of the land," *id.* at p. 2-42). Another indication of this principle is the fact that a zoning status, permit or variance is not personal to its grantee but follows and runs with the land, irrespective of subsequent changes of ownership or control. *See Goldberg v. Board of Zoning Appeals of the City of Milwaukee*, 115 Wis. 2d 517, 523, 340 N.W.2d 558, 561 (Ct. App. 1983) (variances); *Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 899 (7th Cir. 2005) (planned developments).

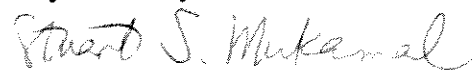
This confirms our earlier advice that the evidence obtained by way of the affidavits required to be submitted under this proposed substitute ordinance is of consequence only with respect to the credibility or feasibility of a project or plan of operation, or as to other matters bearing upon the proposed use of property constituting the subject matter of a zoning-related application. The Commission, the Board, the Common Council, or other pertinent tribunals should evaluate such evidence in light of these objectives and not upon their judgment of the general character of the applicant, independently from their evaluation of the application itself in accordance with the police power objectives underlying the City's zoning authority.

In light of the foregoing comments, we reiterate that the proposed substitute ordinance is legal and enforceable.

Please contact this office if you have any further questions concerning this matter.

Very truly yours,


GRANT E. LANGLEY
City Attorney


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SSM:bl

c: Mr. Barry Zalben
Alderman Robert Bauman
1055-2007-1670/120715