Form CA 43

CITY OF MILWAUKEE

JAMES B. BRENNAN
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800 CITY HALL
MILWAUKEE, WISCONSIN 53202
278-2601

October 17, 1975

Honorable E. Griffin
Alderman - 3rd Aldermanic District
Office of the City Clerk
205 City Hall

Dear Alderman Griffin: Re: C.C. File No. 74-1942

This is written in response to your communication of October 10, 1975, in which you indicate a certain zoning change was made of a parcel of property on West Oakland Avenue from residential to local business. You indicate that at the present time an Open Pantry store is being built at that location. Your letter indicates also that the change was granted partly on the basis of a verbal agreement made to you that the building would be set ten feet from the alley in order to provide space for truck loading. The ordinance which was passed changing the zoning did not and could not include such a stipulation and the store is presently being built five feet from the alley. You ask for my opinion concerning the enforceability of the agreement which you state the Open Pantry store made to you.

You are correct that such a stipulation could not be included as a condition of the zoning change because such a condition would be considered contract zoning which is not legal in this State.

The issue of placing conditions on rezoning is discussed thoroughly in the Wisconsin case of *State ex rel. Zupancic vs. Schimenz*, 46 Wis.(2d)22 (1970). That case has as its rule the following:

> "We think landowners may make a contract which may legitimately be recognized by the zoning authorities as a motivation for rezoning

> but such zoning must meet the test of all valid zoning, *i.e.*, must be for the safety, welfare, health of the community, sec. 62.23(7), Stats., and it should not constitute spot zoning. Spot zoning per se is not illegal and we do not consider the rezoning in this case to be illegal spot zoning because it was in the public interest and not solely for the benefit of the developer. * * *"

The rule of this case is simply a statement that no agreement can be made between the Zoning Authority and a particular person or enterprise in return for the rezoning of the parcel. It indicates that an agreement can be reached between property owners or an agreement could voluntarily be made concerning the use of the property after its rezoning. The importance of this case is that such an agreement is not between the Zoning Authority and the owner of the parcel to be rezoned, but is a condition voluntarily placed on the owner's own property. In the matter at hand, the owner could have voluntarily filed a deed restriction or a declaration of restrictions which the Zoning Authority could have taken into account in their determination if a zoning change could be made. Such a position is discussed at page 29 of the *Zupancic* case.

In answer to your particular question, it is my opinion that since an agreement cannot be proven and is not of record, it would be impossible at this point in time for us to enforce such a restriction.

Because of your interest in this area of the law, I am attaching hereto a copy of the *Zupancic* case which, I feel, would be most informative regarding what is required in situations such as this.

I have consulted with the Building Inspector's office concerning the issuance of the permit in this matter, and they have informed me that the plans which were submitted to them by the Open Pantry comply in all respects with the restrictions placed on buildings in local business districts and, therefore, they were legally obliged to issue the permit.

If you have any further questions concerning this matter, please feel free to contact me.

Very truly yours,

James B. Brennan

JAMES B. BRENNAN, City Attorney

By _____
JAMES E. FITZGERALD
Assistant City Attorney

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Enc.

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January 24, 1977

To the Honorable
Committee on Zoning & Development
of the Common Council
205 City Hall

Dear Committee Members:

Re: Ord. to create Sec. 16-7(2).1240 rel. change in area districts from "F-3" to "E", lands on S/S of W. Mill Rd., E. of W. Appleton Ave. (15th Dist.)
C.C. File No. 76-80

This is written in response to your request dated November 5, 1976, relative to the above-captioned file. The file contains an ordinance to change an area district from F-3 to E zoning. The letter from the City Plan Commission contained in the file indicates that the matter was the subject of a public hearing, held on May 11, 1976. The letter indicates that at that time, no objections were made to the rezoning. The letter further indicates that subsequent to the hearing, a letter was received from a neighbor indicating an objection to the proposal. The petitioner indicates that he is willing to restrict development to two-family structures on lots which would be required under F-3 zoning. In effect, what this would do would be to maintain the same lot size presently required under F-3 zoning, but would allow the construction of two-family dwellings instead of the present single-family residences.

The legal question which is presented is simply if an agreement could be entered into between the City and the developer imposing this restriction upon parcels of property which, when rezoned from F-3 to E zoning, would allow the construction of two-family dwellings on lots smaller than the lots required under the F-3 zoning.

I have reviewed the state of the law on this matter and I am of the opinion that the case of *State ex rel. Zupancic v. Schimenz*, 46 Wis. 2d 22, answers the question involved in this matter. That case involved a similar fact situation in that an agreement was entered into between adjacent land owners relative to future development of properties, which agreement was taken into consideration when the lands involved were rezoned. The case clearly holds that any contract between a zoning authority and a property owner relative to the rezoning of property would be illegal. At p. 30 of that decision, the court states as follows:

> "We hold that when a city itself makes an agreement with a landowner to rezone the contract is invalid; this is contract zoning. However, when the agreement is made by others than the city to conform the property in a way or manner which makes it acceptable for the requested rezoning and the city is not committed to rezone, it is not contract zoning in the true sense and does not vitiate the zoning if it is otherwise valid. . . ."

Under the rule of the *Zupancic* case, it therefore is impossible for the City and a property owner to enter into a contractual agreement relative to the rezoning of property.

The *Zupancic* case itself is a variation from a situation where a direct contract is entered into between a zoning authority and a property owner in that the agreement which is involved in the *Zupancic* case was entered into between two adjoining property owners. The Supreme Court indicates at p. 32 as follows:

> "We think landowners may make a contract which may legitimately be recognized by the zoning authorities as a motivation for rezoning but such zoning must meet the test of all valid zoning, *i.e.*, must be for the safety, welfare, health of the community, sec. 62.23(7), Stats., and it should not constitute spot zoning. . . ."

A zoning authority can therefore take into account a contract which has been entered into between two adjacent property owners when a proposal is made to rezone an area. The court in the *Zupancic* case upheld the right to do this even though the agreement between the two property owners bestowed upon the City the right to enforce the agreement as a third-party beneficiary.

On the basis of the above discussion, it is our opinion that it would be illegal for the City to enter into a direct agreement with a property owner relative to additional restrictions to be placed upon a rezoning. A rezoning must stand on its own without reference to side agreements. Agreements between adjacent property owners can be one of the factors which can be taken into account when a rezoning of an area is contemplated by a zoning authority.

If you have any further questions concerning this matter, please feel free to contact me.

Very truly yours,

JAMES B. BRENNAN
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May 4, 1989

Mr. Ricardo Diaz
Commissioner
Department of City Development
809 Building

Attn: John Hyslop

Re: Use of Restrictive Covenants

Dear Mr. Diaz:

This is in response to a communication from the former Commissioner of the Department of City Development relative to the use of restrictive covenants in limiting private land use. The question specifically asked was:

> Assuming that in some unique situations "voluntary" restrictive covenants are the best solution to resolving a development/zoning problem, should or can the city be involved in reviewing documents and insuring they will function as expected and are properly recorded.

In State ex rel. Zupancic v. Schimenz, 46 Wis. 2d 2230, 174 N.W.2d 533 (1970) the court noted that if the City itself makes an agreement with a landowner relative to zoning, this is contract zoning and is invalid. However, if an agreement is made by others than the City to conform the property in a way or manner which makes it acceptable for the requested rezoning and the City is not committed to rezone, it may be valid if such zoning meets the test of all valid zoning, i.e., it must be for the safety, welfare and health of the community and, should not constitute spot zoning.

The court in Zupancic, supra, held that where deed restrictions which prevented a parcel owner from building a car wash were of record when he purchased the parcel, and that both the owner and the building inspector had constructive knowledge of the deed restrictions, there was no waiver of enforcement of the restrictions by the issuance of a permit to construct the car wash because the building inspector had no authority to waive the enforcement of deed restrictions.

While the court in the above case allowed the restrictive covenant to stand, many restrictive covenants are unenforceable. This is particularly true of restrictive covenants that are contrary to local, state and federal fair housing enactments (sec. 66.432, 101.22, Stats., 43 U.S.C. § 36.04). In Mayers v. Ridley, 465 F.2d 630 (D.C. Cir. 1972), the court held that the District of Columbia recorder of deeds violated the Federal Housing Act by accepting deeds containing illegal restrictive covenants for recording.

Furthermore, in a fairly recent Wisconsin case, Dodge v. Carauna, 127 Wis. 2d 62 (1985), an action challenging the restriction in a deed forbidding the erecting of structures on the land without the developers approval, the court stated the following:

> Public policy in Wisconsin favors the free and unrestricted use of property. Crowley v. Knapp, 94 Wis. 2d 421, 434, 288 N.W.2d 815, 822 (1980). "Accordingly, restrictions contained in deeds . . . must be strictly construed to favor unencumbered and free use of property . . . [such restrictions] must be expressed in clear, unambiguous, and peremptory terms." Id. at 434-35, 288 N.W.2d at 822.
>
> The fundamental inquiry regarding a deed restriction is: "Is [it] a reasonable one under all the facts and circumstances of the transaction in the light of 'the situation, business, and objects of the parties,' and [is] the restriction 'for a just and honest purpose, for the protection of the legitimate interests of the party

in whose favor it is imposed. . .'" (Citation omitted.) McKinnon v. Benedict, 38 Wis. 2d 607, 619, 157 N.W.2d 665, 670 (1968). The standard of validity for a deed restriction in Wisconsin is reasonablenesss. LeFebvre v. Osterndorf, 87 Wis. 2d 525, 533, 275 N.W.2d 154, 159 (Ct. App. 1979).

If the City participates in the preparation of a "voluntary" restrictive covenant, this may constitute contract zoning, which is invalid. Zupancic, supra. In addition, a voluntary restrictive covenant in a deed, is a matter negotiated between the two parties and since the parties are free to negotiate a modification at a later time, this would probably not be an effective tool for resolving development/zoning problems.

Very truly yours,

GRANT F. LANGLEY
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