

CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, CCB
266-4511

DATE: June 30, 2009

MEMORANDUM

TO: Plan Commission

FROM: Katherine Noonan, Assistant City Attorney

SUBJECT: **2609 E. Washington Ave.**

You have before you an application for a conditional use for an outdoor eating area at 2609 E. Washington Ave. and have requested an opinion on your ability to waive certain off-street parking requirements.

The Plan Commission does not have the authority to waive ordinance requirements unless that authority is provided for by ordinance. For example, staff and the Plan Commission are authorized to reduce/waive the minimum off-street parking requirements if certain conditions are met. Sec. 28.11(2)(c). Pursuant to Sec. 28.11(3)(g)8., the Plan Commission may waive parking in yards of residential developments. Any off-street parking requirements that are applicable to 2609 E. Washington may be waived only if similarly authorized.

This application is subject to off-street parking requirements under several ordinance provisions. Sec. 28.12(11)(g)7. requires that a proposed conditional use shall conform to all applicable regulations of the district in which it is located. Sec. 28.11(2)(a)1. requires that all buildings and structures erected and all uses of land established after the effective date of this ordinance shall provide accessory parking facilities as required in the district. The specific requirements of the parking facilities are found in Sec. 28.11(3), which also contains references to Sec. 10.08.



Department of Planning and Community and Economic Development
Building Inspection Division

Website: www.cityofmadison.com

Madison Municipal Building
215 Martin Luther King, Jr. Boulevard
P.O. Box 2984
Madison, Wisconsin 53701-2984
TDD 608 266 4747
FAX 608 266 6377
PH 608 266 4551

TO: Plan Commission
FROM: Matt Tucker, Zoning Administrator
DATE: June 30, 2009
SUBJECT: Site Plan Changes and Site Compliance Questions, 2609 E. Washington Ave.

At its June 15th meeting, the Plan Commission asked staff to provide further information as to the site plan requirements for the proposed project, which involves a change to the site to accommodate a Conditional Use outdoor eating/drinking area associated with the tavern at the property. To effectively address the questions of the Plan Commission, some history/background is beneficial.

History/background

City records indicate the tavern as an established land use of the site dating as early as 1954, and there is no site plan on file with the City that shows the existing parking configuration and building locations. The parking area on the property is currently paved, although somewhat aged, and may be in need of repairs.

As part of the realignment of Milwaukee Street that occurred in conjunction with the Union Corners project, the corner gas station was demolished and lands were dedicate to right-of-way for future street realignment. The remainder of the gas station site was added to the subject site. No site plan exists to account for this newly added area. The proposed location for outdoor seating will be placed upon the foundation slab of the former gas station building.

In its current state, no plan exists showing the required accessible parking, bicycle parking, and parking lot landscaping for the site. These requirements were adopted long after the tavern was established, and are not required unless the owner or agent requests a change to the site/use.

Questions of the Plan Commission

1) Among the conditions of approval recommended by City Agencies, which come directly from Madison General Ordinances (MGO)?

A complete reference to zoning subsections for each staff comment is included in the Planning Division staff report.

Conditions of approval (or commonly referred to as "staff comments" are provided as part of the Zoning Administrators report. The staff comments serve two purposes. First, a technical review of the proposed Conditional Use requires a report from the Zoning Administrator indicating how the proposed use meets the requirements in MGO 28. Secondly, the review provides an

opportunity to make the petitioner aware of certain typical ordinance requirements in advance, so they are not surprised after the public hearing and subsequent approval.

The submitted plan shows the building and parking area, along with the following areas: “no parking” area ; “loading area” ; “dumpster area” ; “concrete slab” ; “concrete platform” and “lawn”. Seven trees are shown that appear to overhang the property, but none of these trees are located on site, nor is there any detail as to their species or supporting information that they serve as parking lot landscaping for the site. The Zoning Ordinance requires parking that meets paving and parking lot geometrics requirements, on-site landscaping of parking areas, the provision of accessible parking stalls and associated signage.

Since very little information was provided for review (a site plan with little detail was submitted) it is not possible for Zoning Staff to provide a technical review relative to the ordinance requirements found in MGO 28. In response, general statements are provided indicating that certain ordinance requirements must be met. Staff cannot find that the site meets certain requirements because a detailed parking lot plan has not been submitted. The staff comment regarding paving simply identify that off-street parking areas must be paved with an acceptable material. The site may in fact not need repaving, but the information has not been provided for staff to determine compliance with the paving requirement.

2) *What proposed changes to the site or use trigger the ordinance requirements identified?*

Changes to a site that trigger the ordinance requirements include projects that require a building permit, zoning certificates, occupancy permits, or changes of use of a property. The following code sections relate to this requirement:

- Sec. 28.12(5)(a) Zoning Certificates, General Requirements. *Except for lots used for garden purposes or for public recreation purposes, and without buildings or structures, and except as provided hereunder in Subsection (6) for a change in use, no permit pertaining to the use of land, buildings or structures shall be issued by any officer, department or employee of the City unless the application for such permit has been examined by the office of the Zoning Administrator and has affixed to it a certificate of the office of the Zoning Administrator indicating that the proposed use of land, buildings or structures and any future proposed buildings or structures comply with all of the provisions of this ordinance.*
- Sec. 28.11(2)(a)1. code-compliant parking: *For all buildings and structures erected and all uses of land established after the effective date of this ordinance, accessory parking and loading facilities shall be provided as required by the regulations of the districts in which such buildings or uses are located.*
- Sec. 28.11(3), Specific requirements of the parking facilities for the tavern (including the new outdoor eating/drinking area) *Off-street parking facilities accessory to uses allowed by this ordinance shall be provided in accordance with the regulations set forth herein...* which also contains references to Sec. 10.08, CONSTRUCTION OF DRIVEWAY

APPROACHES AND PARKING FACILITIES. More specifically, Sec. 10.08(8)(j) *When a building permit is required for the reconstruction or remodeling of an existing commercial site or a zoning or occupancy certificate is required for use or change of use for any land, buildings or structures, all of the existing, as well as the proposed, driveway approaches and parking facilities shall comply with all design standards as set forth in this ordinance.*

- Furthermore, specific to conditional uses, Sec. 28.12(11)(g)7. requires that a proposed conditional use shall conform to all applicable regulations of the district in which it is located.

3) *What, if any, discretion do staff and the PC have in applying these conditions?*

With certain projects, the Staff and the Plan Commission have discretion to approve some modifications to requirements in MGO 28, when specifically authorized. The following code subsection authorizes discretion for the PC in this case:

- Sec. 28.04(12) d. 1. & 2. *Minimum And Maximum Height Of Screening* establishes regulations for height of screening and driveway vision clearance. These regulations not apply to conditional uses subject to Plan Commission Review. The driveway vision clearance requirement of comment No. 14 may be waived by the Plan Commission, but the intersection vision clearance requirement may not be waived.

While staff is tasked with reviewing final plans for compliance with MGO 28, staff does not have discretion to waive or modify the ordinance requirements identified in the staff report. Since the parking lot plans submitted do not provide the necessary detail for a technical review, it is not clear what modifications to the site must be implemented as part of this project.

Conclusion

The proposed Conditional Use request for an outdoor eating/drinking area at the site requires a zoning certificate. This change to the use will require the site to be represented in compliance with current ordinance requirements. The parking lot plans submitted with the application do not provide detail necessary to determine compliance with the requirements of MGO 28.

Members of the Plan Commission,

As you can imagine, my appearance at the Plan Commission June 15th was a frustrating experience. I know you wanted to help me by approving my conditional use permit for The Malt House's outside seating. I hope the city attorney finds a way to let you do it. It shouldn't be this difficult to place non-permanent seating and fencing on an existing, privately-owned and leased, slab of concrete. I am proposing NO permanent changes to existing real property.

You all laughed at the possibility of me having to negotiate the city bureaucracy to get to the heart of the code issue, and tried to save me from that experience by having me return in three weeks. Little did you know that I'd already been pounding my head against that bureaucracy for some time. The parking lot issue is just the newest twist in my tale of frustration.

The conditional use application requests a certified survey map. There is none for my property drafted after 1998, though the property was enlarged recently. I went to the city and county assessors' offices looking for one. No luck. City Planning did not have one. Neither did Zoning. At last I decided to try Traffic Engineering to see if they had a survey map of my property because they had been involved with the Milwaukee Street move. Surely, they had one. No such luck. In fact, City Traffic Engineer John Leach stood in front of me and two of his staff members, laughed, and told me I'd have to pay a surveyor to create a CSM. Pay a surveyor just so I can put out some picnic tables for my customers? You gotta be kidding!

Somehow the city had purchased my property and the adjoining property, joined them to create a new larger property, built a road through the newly created property, then sold the property to my landlord without having to create a CSM. Can private citizens get away with that kind of missing documentation and process evasion? How can traffic engineering skirt the rules like that?

I engaged a friend of mine, a landscape architect with prior city approval experience, to help me with the map problem. She located the private surveyor who mapped out the Milwaukee Street move and obtained a street survey map from him. She was able to overlay that with the existing 1998 property map to create something she could use as a basis for the layout for my application. She then added my fencing, furniture, landscaping, etc to this amalgamated map. I don't have her bill yet, but at her normal rates I'm \$4000-5000 deep into this project before the filing fees of \$550. I'll try to negotiate a discount with her, of course, but this has been a very costly exercise to get approval for temporary seating. This level of detail/cost is onerous to small business tenants and, I think, constitutes an undue burden.

Yes, the corner is blighted. My customers will be looking at the empty Union Corners lot, a dirty book store, a pizza takeout/delivery business, a check cashing place, and a hair salon that sometimes doubles as a drug house when I *do* get patio approval. They'll also get a nice view of the capitol looking west along Washington. Sometimes, though, as in the Shady Wood example, improvements to a neighborhood come in increments. My business is now a vital part of the fabric of this neighborhood. The neighborhood wants to sit outside and look at the world while they enjoy an adult beverage. The temporary seating I'm proposing *is* an improvement to the neighborhood. The neighborhood knows it and I believe you do too.

It will also be a good thing for neighborhood safety to have my customers out there watching. The neighborhood association and my MPR beat officer (Office Mike Brennan) each think it will be a good thing for neighborhood safety to have people out on the corner watching.

Alder Cnare correctly points out that it is in my best interest in the long term to have a nice parking lot. I agree. If I had a long term lease or had an ownership interest in the real estate rather than being a lessee, I'd be very interested in bringing my parking lot to code. I have strong doubts that I will be able to amortize this capital real improvement in the time remaining on my lease (2 more years), even if I had the funds in the bank. Imminent occupancy at Union Corners, a longer lease, or land ownership would make it possible for me to secure a loan for the improvement. None of those are true, so no loan will be forthcoming.

Somehow, I wonder if this would've have been easier if I'd proposed tables and chairs on the public sidewalk rather than on private property.

I've been in business for just over a year now. I quit my high-paying computer analyst career to do start my own business. It's been a challenge but emotionally rewarding. I'm glad, for now, I get to keep my house. I'm trying the best I can to make this business something the neighborhood, my staff, and I can be proud of. We're doing what we can with what we have, and as we gain experience and income, we'll keep improving The Malt House.

Thanks for (re)considering my application.

Best Regards,
Bill Rogers
The Malt House

Here are my specific objections to conditions 4-8 of the conditions for approval:

4. When the applicant submits final plans for approval, the applicant shall show the following: items in the terrace as existing (e.g., signs and street light poles), type of surfaces, existing property lines, addresses, one contiguous plan (showing all easements, all pavement markings, building placement, and stalls), signage, percent of slope, vehicle routes, dimensions of radii, aisles, driveways, stalls including the two (2) feet overhang, and a scaled drawing at 1" = 20'.

This seems like an amazing amount of detail required for three picnic tables. I could concede this point.

5. The applicant shall modify the gravel areas to bituminous, or Portland Cement concrete in accordance with City of Madison standards and specifications. All off-street facilities shall be paved in accordance to City of Madison General Ordinance Section 10.08(6)(a) 10. The applicant shall note type of pavement in the parking lot.

This is an undue economic burden for a short-term tenant.

Section 10.08(6)(a) 10. All off-street parking facilities, except a parking space accessory to a single family dwelling, shall be

improved with a bituminous, or Portland Cement concrete pavement, or paving brick surface in accordance with City of Madison standards and specifications. Such parking facilities shall be so graded and drained as to dispose of all surface water, in accordance with existing City drainage policies and ordinances. Such parking facilities shall be so arranged and marked to provide for orderly and safe parking and storage of vehicles, and shall be so designed as to prevent encroachment onto adjacent land areas, parking facilities or street rights-of-way through the use of a permanently installed, continuous six-inch (6") minimum height curbing, such as poured concrete or rolled asphalt curb (backfilled) or timbers, precast or preformed wheel stops permanently pinned in place or guardrail erected at a height of eighteen (18) inches to the center from the paved parking surface, or fencing of sufficient strength to act as a vehicle bumper stop.

6. The applicant shall design the surface parking area for stalls and backing up according to Figure II of the ordinance using the 9' or wider stall for the commercial/retail area. The applicant shall dimension the parking spaces according to M.G.O.

This is an undue economic burden for a short-term tenant.

7. The parking facility shall be modified to provide for adequate internal circulation for vehicles. This can be accommodated by eliminating a parking stall at the dead ends. The eliminated stall shall be modified to provide a turn around area ten (10) to twelve (12) feet in width and signed "No Parking Anytime."

My lot is 60' wide. Assuming the average car is 16 feet long, cars parked on each side of the lot have 28' to back up into or turn around in. Sec. 10.08(6)(b)2 requires 24 feet between the rears of vehicles parked on opposite sides of a lot for a 9' stall. My lot currently provides 28 feet to back up or turn around in. It is unnecessary to eliminate parking stalls to provide adequate internal circulation for vehicles.

8. Public signing and marking related to the development may be required by the City Traffic Engineer for which the developer shall be financially responsible.

This provision is entirely too vague and potentially catastrophic. For instance, if the city became my landlord, as has been rumored with Mayor Dave looking to take over Union Corners' mortgage, what would prevent the City Traffic Engineer from moving the big billboard sign from Union Corners' lot to my lot at my expense?