

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

Date: September 9, 2009

MEMORANDUM

TO: Plan Commission

FROM: Katherine C. Noonan, Assistant City attorney

RE: New Zoning Code Review

Several questions arose during your review of the new Zoning Code. Responses to those questions follow.

Temporary Zoning. Wis. Stat. §66.0217(8) allows a temporary designation of zoning classification when land is annexed.

“... An ordinance under this subsection may temporarily designate the classification of the annexed area for zoning purposes until the zoning ordinance is amended as prescribed in s. 62.23(7)(d).”

This designation is not a rezoning. The statute notes that to establish City zoning, the procedure in s. 62.23(7)(d) must be followed. This procedure requires the standard map amendment public hearing, while action on annexation ordinances does not require a public hearing.

Because land brought into the City has typically been agricultural land that is planned for redevelopment, the practice has been to assign a temporary classification of Agriculture. This designation does not imply any future use, and is based instead on the usual existing use of the land at the time it comes into the City.

Sec. 28.04(6)(e)(7) states that the temporary classification for annexed lands is Agriculture, however, a different designation may be assigned in the annexation ordinance. Although not required by Wis. Stat. §66.0217(8), the City ordinances prohibit the issuance of permits until a permanent zoning classification is assigned. The inability to obtain permits under a temporary zoning classification prevents development of annexed lands before its uses can be considered by the Common Council. This zoning designation does not, however, prohibit permits to maintain buildings existing on the lands at the time of annexation.

Should the Common Council wish to change the default temporary zoning classification from Agriculture to something else, it can do so, however, the temporary zoning carries no development rights because there is no ability to obtain permits. In all cases, the

Common Council will consider the permanent zoning classification, which is the one that carries with it the rights to certain uses.

Because City practice is to not accept land use applications until land is in the City, it is not typical to assign permanent zoning as part of the annexation ordinance, even if a public hearing were to occur. (Planning staff reports that the practice of designating newly annexed lands as Temporary Agriculture has worked very well for many years with little confusion among property owners as to what it means. Staff does not recommend changing this process.)

Mixed-Use Buildings in Any Residential Neighborhood. There is no legal issue with allowing mixed-used buildings in any residential neighborhoods. It is purely a policy decision and if a decision is made to allow them, such language should be included in the District regulations, as well as any limitations on their location.

History of Compliance. The Plan Commission currently has the ability to consider the past history of an applicant's compliance with the City Building, Minimum Housing, and Zoning Codes when determining whether standards for approval are met. The Commission also has the ability to impose conditions of approval that address the issue.

In the case of map amendments, the final decision is a legislative one made by the Common Council and the standards are less detailed than those for conditional uses because the decision is based on the general police power lodged in public health, safety, and welfare. The Plan Commission may recommend conditions that are consistent with the intent of the ordinance and that will protect the public interest. See Sec. 28.182(6) in the new Code.

For conditional uses, the standards are more extensive and a number of them are relevant to an applicant's history of compliance with City codes.

Sec. 28.183(6)(a)3. states that "[t]he establishment, maintenance or operation of the conditional use will not be detrimental to or endanger the public health, safety, or general welfare."

Sec. 28.183(6)(a)5. states that "[t]he uses, values and enjoyment of other property in the neighborhood for purposes already established will not be substantially impaired or diminished in any foreseeable manner."

Sec. 28.183(6)(a)6. states that "[t]he establishment of the conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district."

Standards 3 and 5, in particular, are relevant when noise, lighting, parking, and other factors that impact neighboring properties are an issue. Building maintenance, as

reflected in past code compliance issues on other properties owned by the applicant, similarly impacts neighboring properties and is a valid concern when determining whether the conditional use standards are met. Any of these issues can be significant enough to warrant denial of an application, depending on the specific facts of a particular proposal.

Alternatively, the Plan Commission currently is able to impose conditions on an approval/recommendation that address these same issues.

Sec. 28.183(6)(b)1. states that “[b]efore granting a conditional use, the Plan Commission may stipulate conditions and restriction on the establishment, location, construction, maintenance and operation of the conditional use.”

Several years ago, a condition was imposed on a project to address a history of lax minimum housing code compliance that required an outside maintenance company for the project. This particular condition was imposed on a PUD rezoning request, however, the same outcome on a conditional use request would have been reasonable.

The fact that code violations are not specifically identified in no way prevents consideration of them. In fact, noise, parking, lighting, etc. are not specifically mentioned either, and are routinely issues for discussion. The fact that the Plan Commission may not have routinely addressed past history of code compliance in no way means that the authority to address the issue is lacking.