

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

Date: August 1, 2012

MEMORANDUM

TO: Mayor Soglin

FROM: Maureen O'Brien, Assistant City Attorney

RE: Zoning Regulations to Limit Negative Effects of Fast Food

You recently asked whether the City of Madison could use its zoning power to regulate the fast food industry. In short, the answer is yes, depending on how this is accomplished. The City has broad authority under Wis. Stat. § 62.23(7) to establish zoning regulations for the purpose of promoting health, safety, morals or the general welfare of the community.

Background on Zoning

Zoning is the act of dividing the City's land into zoning districts and establishing rules for each district. The zoning code regulates the size and location of structures and establishes the permitted, conditional, and prohibited uses of land in each district.

A conditional use is an exception to the expressly permitted uses of land in a zoning district.¹ All conditional uses must satisfy a list of basic standards in order to be approved. This list is outlined in the zoning code, and it includes requirements such as "The 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."²

The code also establishes additional conditional use standards that are specific to the type of use. For example, no adult entertainment establishment may be located within one thousand feet of a place of worship, a residential lot, park, school, playground, daycare, library, youth recreation center, or any other adult entertainment establishment.³

¹ MGO 28.03(2), Rev. 279.

² MGO 28.183, effective January 2, 2013.

³ MGO 28.151, effective January 2, 2013.

Using the zoning code, the City could prohibit fast food restaurants in some districts, allow them as a conditional use requiring approval in others, and establish conditions that must be met before a conditional use permit will be granted.

A properly enacted zoning regulation holds a strong presumption of validity when challenged in court.⁴ Such a regulation would face rational basis review; it will survive if it bears a rational relationship to a legitimate policy objective.⁵ Therefore, a carefully established policy objective will be important to the success of such an ordinance.

Potential Obstacles

1. National Precedent.

Most other cities that regulate fast food restaurants through zoning have not done so for the purpose of promoting public health. They have mostly focused on traffic safety concerns, aesthetics and preserving the unique local character of tourist areas. That is not to say regulation for the explicit purpose of promoting health cannot be done, as Wis. Stat. § 62.23(7) specifically allows this. The key is a well-articulated policy objective identifying the health concern and rationally connecting that concern to fast food restaurant locations.

The attached, non-exhaustive chart provides some examples of ways other cities have regulated fast food restaurants. Examples include prohibiting drive-through windows to avoid traffic congestion and danger to pedestrians, and limiting chain restaurants to protect the unique character of the neighborhood or the mix of available shopping options. These purposes have generally been upheld as legitimate, but only a few cases are specifically related to fast food.⁶ As will be discussed in paragraph 5., the City should carefully construct any regulations that seek to promote local character to avoid unconstitutional interference with interstate commerce.

In 2008, the City of Los Angeles implemented a temporary moratorium on the development of new fast food restaurants. The stated policy objectives included aesthetics, community character, diverse business options *and* public health. So far, this action has not been challenged in court, but it will be a good example to watch.

⁴ *State ex rel. American Oil Co. v. Bessent*, 27 Wis. 2d 537, 546, 135 N.W.2d 317 (1965)

⁵ *Town of Rhine v. Bizzell*, 2008 WI 76, ¶37, 311 Wis. 2d 1, 751 N.W.2d 780 .

⁶ Drive-through as legitimate traffic and pedestrian safety concern: *Pamica Assocs. v. Colchester Zoning & Planning Comm'n*, 2007 Conn. Super. LEXIS 3023 (Conn. Super. Ct. Nov. 13, 2007); *Maxi Drug v. Zoning Bd. of Review of Portsmouth*, 2002 R.I. Super. LEXIS 47 (R.I. Super. Ct. 2002); *Terraciano v. E. Lyme Zoning Bd. of Appeals*, 2006 Conn. Super. LEXIS 2177 (Conn. Super. Ct. July 19, 2006); *Matter of Franklin Sq. Donut Sys., LLC v. Wright*, 63 A.D.3d 927 (N.Y. App. Div. 2d Dep't 2009)

Aesthetics and protection of unique local character as legitimate interests: *Franchise Developers, Inc. v. Cincinnati*, 30 Ohio St. 3d 28 (Ohio 1987); *Organized v. City of Coronado*, 2003 Cal. App. Unpub. LEXIS 5769 (Cal. App. 4th Dist. June 13, 2003)

2. Existing Restaurants

The City won't be able to use zoning to eliminate existing fast food restaurants. Any zoning change that creates non-conforming uses must allow them to continue to exist as is, pursuant to Wis. Stat. § 62.23(7)(h). Therefore, the City's zoning power will extend to current restaurants only if they undergo specific kinds of changes to their uses or structures.

3. Conditions of Approval

If the City chooses to make fast food restaurants a conditional use there are limitations on what conditions it may attach. The conditions must serve a legitimate government interest and have a connection to the projected impact of the proposed development.⁷ If the City is interested in pursuing new, unique conditions specific to fast food restaurants, more research would be advised.

4. Proximity

The City does not have many regulations regarding the proximity of one kind of use to another, when both uses are allowed in the district. Adult entertainment establishments are one of the few categories of uses which must be a certain distance away from other types of uses. To support a similar regulation for fast food, the City should be prepared to articulate why the categories of uses are particularly incompatible. For example, a policy goal explaining the harm the City seeks to prevent by locating fast food restaurants a certain distance away from schools.

5. Constitutional Challenges

It is possible that an ordinance restricting fast food restaurants could be subject to constitutional challenge for interfering with interstate commerce, and for taking private property without giving proper compensation.

An ordinance which discriminates against out-of-state businesses in favor of in-state businesses may create an unconstitutional burden on interstate commerce. A Florida zoning ordinance which prohibited all "formula restaurants" and limited "formula retail stores" was struck down for this reason.⁸ To avoid this concern, an ordinance should be neutral regarding in-state and out-of-state businesses, and have at most an incidental effect on interstate commerce.⁹ If the ordinance has a direct effect on interstate commerce, then it must serve a legitimate local purpose that cannot be adequately addressed by reasonable non-discriminatory alternatives.¹⁰ The main problem with the Florida ordinance, the court held, was that it failed to identify a legitimate local purpose. Though preserving "small town character" is a legitimate purpose, the court held that the

⁷ *Dolan v. City of Tigard*, 512 U.S. 374, 386 (U.S. 1994)

⁸ *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. Fla. 2008)

⁹ *Pike v. Bruce Church*, 397 U.S. 137, 142 (U.S. 1970)

¹⁰ *Bainbridge v. Turner*, 311 F.3d 1104, 1109 (11th Cir. 2002)

town had failed to show that it actually had unique small town character, and failed to show how their ban would protect this undefined character.¹¹ With some thought, it should not be hard to craft an ordinance which steers clear of these problems.

A use restriction on real property may constitute an unconstitutional “taking” of private property if it has an unduly harsh¹² impact on the owner’s use of the property or if it denies all, or substantially all, practical uses of a property.¹³ This analysis involves a consideration of the regulation’s economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.¹⁴ So long as a property owner can make a similarly profitable use of the land, the fact that it cannot be developed into a specific type of restaurant should not establish a regulatory taking.

Conclusion

The City has broad authority under Wis. Stat. § 62.23(7) to establish zoning regulations for the purpose of promoting health. The key to the success of a zoning ordinance directed at curbing the negative health effects of fast food is a well articulated policy goal. Generally, if the ordinance is a rational means to achieving the City’s legitimate public health goals, it should survive legal challenge.

¹¹ *Island Silver* at 848

¹² *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (U.S. 1978)

¹³ *R.W. Docks & Slips v. State*, 2001 WI 73, P15 (Wis. 2001)

¹⁴ *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 315 (U.S. 2002)