

CITY OF MADISON, WISCONSIN

REPORT OF: CITY ATTORNEY	PRESENTED <u>June 6, 2006</u>
TITLE: Zoning Changes relating to Adult Entertainment Establishments	REFERRED _____
AUTHOR: Michael P. May City Attorney	REREFERRED _____
DATED: June 9, 2006	REPORTED BACK _____
	ADOPTED _____ POF _____
	RULES SUSPENDED _____
	ID NUMBER _____

TO THE MAYOR AND COMMON COUNCIL:

RE: Ordinance relating to Zoning Changes for Adult Entertainment Establishments
Legistar File No. 03842

Adult entertainment establishments are restricted under City zoning ordinances to M-1 districts. In addition, the zoning ordinances require a buffer of 1,000 feet between the establishment and other specified uses.

The practical impact of the buffer zone is to eliminate from eligibility large portions of M-1 districts. This ordinance would make more space available by allowing four lane state or federal highways, with a posted speed at 45 miles per hour or more, to act as effective buffers. By making more sites available to adult entertainment establishments, the City may avoid a potential legal challenge to its current zoning ordinance.

Legal Analysis.

The United States Supreme Court has made it clear that the First Amendment guarantees the right to locate adult establishments within cities, subject to certain reasonable restrictions. Cities are not allowed to effectively exclude such establishments through their zoning. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986).

The rules established by the Supreme Court do not create hard and fast lines to determine when a city has violated this rule against "effective preclusion." The City does not guarantee the economic viability of locations, nor is it a guarantor that the real estate market is such that potential locations will be for sale at the time they are sought by an adult entertainment business. However, areas that appear hypothetically to be available based upon zoning, but are effectively precluded by the application of buffers, deed restrictions, or the physical impossibility of actually building on a site, may be taken into account.

In examining the available sites, courts look at percentage of sites available, both in terms of total acres within the municipality and in terms of number of lots, the size of the city, and the number of applicants who might seek to place such establishments within the city.

The City Zoning Unit has done some preliminary calculations on the existing ordinance. Our office understands they also are developing maps to show the areas likely to be affected by this proposed change in the ordinance. The calculations and the maps are estimates, because it is only by looking at a specific site that the application of the ordinance is clear. However, based on some of those preliminary estimates, it appears that the current ordinance would restrict adult entertainment establishments to something in the range of 1.2 % of the available land in the City. This is in the lower end of the range of

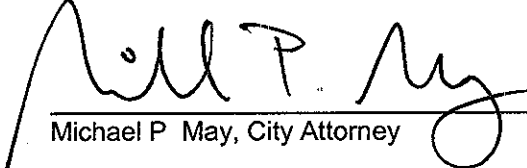
reasonableness established by court decisions. Based on an examination of available parcels, about 0.33% would be available. This may be below the range of reasonableness. Countervailing factors are the gross number of parcels available, which appears to be nearly 200. Given the limited number of potential applicants for such sites, this figure would support an argument that our ordinance offers sufficient sites. As noted above, however, each site would have to be examined to determine if it truly falls within an allowable area for adult entertainment establishments.

This ordinance amendment will make additional sites available, but not significantly more sites. Estimates from the Zoning Unit suggest that perhaps an additional 118 acres and 37 sites will be available under the new ordinance. While the availability of these sites may forestall, as a practical matter, any challenge to the existing ordinance, the new sites barely increase the percentages cited above (see estimated calculations below)

If the City's ordinance were challenged, it likely would face additional arguments, beyond those related to available properties. For example, some recent cases have ruled that municipalities must have specific evidence of the negative secondary effects of such establishments. *Daytona Grand Inc. v. City of Daytona Beach*, 410 F. Supp. 2d 1173 (M D. Fla., 2006). In addition, an argument may be made that some of the sites are not commercially viable due to their location. This final argument does not appear to be one that has been accepted by the courts.

Conclusion.

Because the examination of these ordinances is so fact intensive, it is impossible to opine with any certainty as to the results of any challenge to our existing ordinance, or even the ordinance as would be amended pursuant to this change. This amendment makes additional sites available and thus makes any legal challenge to the ordinance less likely to succeed and, as a practical matter, may make such a challenge unlikely to be made. The additional sites made available appear to have more practical impact than constitutionally significant legal impact.


Michael P. May, City Attorney

Calculations.

All figures are estimates based on analysis by the Zoning Unit.

Current Ordinance:

M-1 acres available:	1883
(Less unusable sites—airport, deed restricted):	<u>(1389)</u>
Net acres available:	494

Percentage of acres available: $494 / 40,032 = 1.2\%$

M-1 parcels available:	323
(Less unusable sites)	<u>(129)</u>
Net parcels available:	194

Percentage of parcels available: $194 / 59,147 = 0.33\%$

Proposed Ordinance with amendment:

M-1 acres available:	2001
(Less unusable sites):	<u>(1389)</u>
Net acres available:	612

Percentage of acres available: $612 / 40,032 = 1.5\%$

M-1 parcels available:	360
(Less unusable sites):	<u>(129)</u>
Net parcels available:	231

Percentage of parcels available: $231 / 59,147 = 0.39\%$