

November 16, 2009

Dear Plan Commission Colleagues:

I am very sorry that I will not be able to join at tonight's Plan Commission meeting. Unfortunately, my husband is out-of-town and my daughter is quite sick (not surprisingly, there is a definite shortage of babysitter volunteering for duty when you toss out the words "flu-like" symptoms!!)

I am writing to let you know that I support item number 3, which would amend Section 28.10(4)(d)7 of the zoning code. I am sure that you will hear a variety of legal arguments on this matter and will leave those to the lawyers to hash out. However, I do want to let you know that it is my belief that Schmidt's Towing has been operating in good faith in my aldermanic district since receiving Plan commission approval for their operation in 1994.

Thanks.

Julia Kerr



AXLEY BRYNELSON, LLP

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PETER J. CONRAD
(608) 260-2483
pconrad@axley.com

November 13, 2009

City of Madison Planning Commission
215 Martin Luther King, Jr., Boulevard
Madison, WI 53703

Re: Menzel Enterprises, Inc.
Our File: 12192.57819

Dear Commissioners:

We represent Menzel Enterprises, Inc. ("Menzel"). On behalf of Menzel, we object to the City's proposed ordinance amendment pertaining to sec. 28.10(4)(d)7, which would retroactively remove the 500-foot distance requirement between residential districts and auto storage yards for individuals and businesses that applied for a conditional use prior to January 1, 1995.

Essentially, this ordinance amendment stems from an erroneously issued CUP to property located at 1621 Beld Street. That property is zoned M-1. As you are aware, M-1 zoning allows automobile storage yards as a conditional use, **provided** the entire property on which the automobile storage lot is sited is located at least 500 feet from a residentially-zoned property. 1621 Beld Street obtained a conditional use permit for an automobile storage yard in 1994. However, that CUP was issued in direct violation of the Madison Zoning Code. Specifically, the property is located within 500 feet of residential-zoned property. Thus, the City was notified that the CUP was issued in violation of the Madison Zoning Code. Apparently, rather than enforcing its ordinance, the City is trying to grant a special privilege to this property, by exempting it, and only it, from the required 500-foot separation requirement.

We object to the proposed ordinance amendment for several reasons. First, to the best of our knowledge, the purpose of the ordinance amendment is to provide a benefit to one, and only one, property. The ordinance amendment is not proposed for the purpose of promoting the health, safety, morals or general welfare of the community as required by Wis. Stat. § 62.23(7). Rather, "This amendment corrects an error by City staff and Plan Commission in 1994 approving a conditional use without taking into account the proper distance requirement in the ordinance." Obviously, the City has made a determination that locating auto storage yards at least 500 feet from residential property promotes health, safety, morals or general welfare of the community. This amendment plainly runs contrary to that goal. Its only intention is to correct a past mistake. That is not a rational basis upon which the City can establish a zoning law. Quite frankly, this ordinance amendment is of questionable legality, and vulnerable to legal challenge.

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Next, we object to the ordinance amendment because it does not treat individuals and businesses in the City equally or fairly. First, the proposed amendment only benefits one property. Second, the City commonly encounters zoning violations. In this case, the City has chosen to change its laws to accommodate one property, rather than enforce its ordinance, as it does against others. We believe that this is not only a bad practice for the City, but unfair to its residents and businesses. Moreover, even if this is just a one-time case, that fact further supports the idea that this property is getting special treatment from the City without any rational basis. Frankly, we find it disconcerting that the City would consider changing its zoning laws in order to accommodate only one property to the exclusion of all other citizens' businesses within the City.

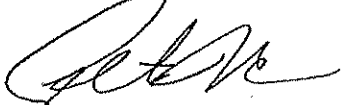
Third, this proposed ordinance amendment runs contrary to the City's proposed comprehensive plan. The future land use of the sole property benefited by the proposed ordinance amendment is identified in the City's comprehensive plan as medium-density residential. This property is also identified as a redevelopment area. An automobile storage yard is not consistent with medium density residential use. Therefore, if the City passes a zoning law that perpetuates the nonconformance with the City's comprehensive plan, it would plainly be an action that is inconsistent with that comprehensive plan.

Finally, we note that, regardless of whether the City tries to retroactively validate an illegally issued CUP to operate an automobile storage yard, automobiles can be stored on this property in a legal fashion. Specifically, like everyone else in the City, the property owner can construct a building and park vehicles inside. This would have the effect of requiring this property to be treated the same as all others within the City of Madison.

For the above-mentioned reasons, we strongly object to the proposed ordinance amendment.

Sincerely,

AXLEY BRYNELSON, LLP



Peter J. Conrad

PJC:egt



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November 16, 2009

City of Madison Plan Commissioner
215 Martin Luther King, Jr. Blvd.
Madison, WI 53710

RE: Amendment to Auto Storage Yard Ordinance

Dear Commissioner:

We represent Schmidt's Auto, Inc. ("Schmidt's"). We were not intending to send you a letter regarding this matter since we perceive that the adoption of this amendment raises no legal nor policy concerns. However, I do wish to respond to matters raised by Attorney Conrad in his November 13, 2009, letter.

I totally agree with the City Attorney's Office that what you have before you is perfectly legal. The City Attorney is recommending that you exercise your wide discretion in adopting this ordinance amendment. This amendment creates a class, namely, all 1994 applicants that applied for a conditional use permit relating to the storage yard ordinance. Wisconsin law is replete with statutes that create a class to whom the law applies to even though it appears to only apply to one individual or entity. There is a long line of cases, beginning in 1913, that a legislative body can legally adopt an ordinance or an amendment to that ordinance similar to the one that you have before you.

Adopting this ordinance amendment is not only legally permissible, but it is the right thing to do. First, Attorney Conrad states that there is no rational basis for the Commission to take this action. Nothing could be further from the truth. Schmidt's has complied with the conditions of approval that the Commission imposed on it at their Beld Street location for nearly 15 years. A recent inspection by the City confirms this. As a result, Schmidt's has established a vested interest since they reasonably relied on the City's interpretation of the salvage yard ordinance and have continued serving the City and its residents in conformity with those conditions of approval. The recent Court of Appeals case decided on September 24, 2009, in *Town of Cross Plains v. Kitt's Field of Dreams Korner, Inc.*, discusses how a business acquires a "vested interest" and Schmidt's meets that test.

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LAW FIRM

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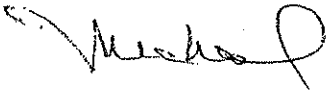
Second, Attorney Conrad argues that adopting this ordinance amendment does not promote the safety and general welfare of the City. This statement has no merit. I say that because City staff has recommended to the Council, to be considered at their December 8, 2009, meeting, that the City should award its towing contract to Schmidt's for an additional 18 months beginning on December 30, 2009. Therefore, if the City were not to adopt this ordinance amendment, it is quite conceivable that the City would have no towing contract as of January 1, 2010. To argue that such a consequence would not be contrary to the general welfare is absurd.

Finally, Attorney Conrad argues that adopting this amendment would be contrary to the Comprehensive Plan (the "Plan"). The fact of the matter is that the M-1 zoning of this property trumps the Plan since it is simply advisory to the Commission. Moreover, the 1994 Plan did not call for medium-residential use, as it does now. Under this unique set of facts, the current Plan should not be used to put Schmidt's out of business.

Thank you for your consideration to this matter.

Sincerely,

DEWITT ROSS & STEVENS^{s.c.}



Michael R. Christopher

MRC:dso

cc: Assistant City Attorney Kitty Noonan
Mark Olinger
Brad Murphy
Matt Tucker

Firchow, Kevin

From: Karin Austin [karin@heatcoolinc.com]
Sent: Monday, November 16, 2009 12:11 PM
To: Firchow, Kevin
Subject: Schmidt's Auto

Follow Up Flag: Follow up
Flag Status: Flagged

RE: Schmidt's Auto

To whom it may concern.

We have been neighbors with Schmidt's Auto for almost 16 years. They are a very reputable business and it has been our pleasure to call them our neighbors.

Gary Miller
President
Heating & Cooling, Inc.