


# Legal Memorandum

**To:** Mayor and Common Council

**Cc:** Larry Kirch and Amy Peterson

**From:** Stephen F. Matty, City Attorney 

**Date:** August 13, 2014

**Re:** Legistar No. 14-0827  
1353 Avon Street rezoning: requirement of deed restriction

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It is the opinion of the Legal Department that the action taken by various governing bodies on the above rezoning request appears to be contrary to state law as improper contract zoning. Likewise, the recommended course of action of the governing bodies to simply place a deed restriction with a reverter clause is also contrary to the long-standing advice the Legal Department has provided the Common Council. This legislation should be revisited.

## Facts

On August 4, 2014 the City Plan Commission recommended that the above rezoning request “be approved if the applicant records a covenant on the property stating that the property will revert back to R2-Residence zoning if the property is no longer being used as a salon.” On August 5, 2014, the Judiciary and Administration Committee approved the City Plan Commission report.

These actions appear to be based on the Planning and Development Department's recommendation dated August 4, 2014, which states, in part:

Staff is very supportive of this business change and acknowledges the potential benefit to neighbors and northside residents. Staff cautions the Commission on the potential of the rezoning. If in the future another commercial entity is proposed for the site: a bar, accounting firm, tattoo parlor, restaurant, etc. It will be a legal use. Staff's caution is primarily because of Logan Middle School across the street. Staff has spoken to the applicant and asked if they would be willing to file a restrictive covenant on their property stating that should the salon cease to exist the property would revert back to

R2-Residence zoning. This would still allow the residence and the theatre but would not allow any other commercial use to occur without Council approval. The applicant was receptive to the idea and stated that they would try to have that completed in time for the City Plan Commission meeting.

(emphasis added).

### Analysis

The Legal Department has provided long-standing advice to the City Council and City staff that the attempts to rezone property with deed restrictions do not necessarily comply with state law. The Legal Department understands that this might have been the preferred method of rezoning for many years by the Common Council prior to my appointment as City Attorney. Nonetheless, the Legal Department since my appointment to office has consistently advised the Common Council and City staff that the deed restriction method of rezoning does not provide the "security blanket" it purports to be. The Legal Department's ability to enforce such a rezoning might be dubious and the Legal Department reserves the ability to decline its prosecution in the future. For more specific analysis, please refer to the attached Legal Memorandum dated July 9, 2008 on this topic.

For the reasons previously identified in the Legal Department's July 9, 2008 memorandum, the above-mentioned zoning ordinance, as currently presented to the Common Council, appears to be contrary to state law as improper contract zoning. Likewise, the ordinance does not appear to qualify as a proper conditional zoning ordinance. The Common Council should revisit this issue rather than approving the suggested action from the City Plan Commission and Judiciary and Administration Committee.

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# Legal Memorandum

To: Stephen F. Matty, City Attorney  
CC: Larry Kirch, Director of Planning and Development  
From: Krista A. Gallagher, Assistant City Attorney *KAG*  
Date: July 9, 2008  
Re: Contract and Conditional Zoning

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## ISSUE:

The issue presented is to research and present the law concerning contract and conditional zoning.

## BACKGROUND:

The issue of contract and conditional zoning typically arises in the City of La Crosse in the context of rezoning ordinances. On occasion, various City commissions, boards, and committees have approved a rezoning ordinance subject to certain conditions or requirements being met.

## ANALYSIS:

### Zoning Power in General:

Municipalities are granted zoning power pursuant to sec. 62.23(7), Wis. Stat. Wisconsin courts have determined that reasonable zoning is constitutional and valid as an exercise of the police power. See *State ex rel. Carter v. Harper*, 182 Wis. 148, 155, 196 N.W. 451 (1923). Further, zoning is a matter within legislative discretion, and only when the limits of such discretion are exceeded will the courts find the zoning ordinance invalid. See *Howard v. Village of Elm Grove*, 80 Wis. 2d 33, 43, 257 N.W.2d 850, 855 (1977); *Buhler v. Racine County*, 33 Wis. 2d 137, 146, 146 N.W.2d 403, 408 (1966); *La Crosse v. Elbertson*, 205 Wis. 207, 211, 237 N.W. 99 (1931). However, while zoning policies and decisions of municipalities are afforded a presumption of validity and review of such determinations are limited, a court must still consider various factors in its determination of whether a rezoning is valid and reasonable. To be valid, rezoning must meet the test for all valid zoning, i.e., must be for the safety, welfare, health of the community and should not constitute illegal spot zoning. *Zupancic v. Schimenz*, 46 Wis. 2d 22, 32, 174 N.W.2d 533 (1970). (Note: Spot zoning is not illegal *per se*, however, it depends on the circumstances of the particular zoning. *Id.* For example, spot zoning has not been found

invalid when it was in the public interest and not solely for the benefit of the owner. *Id.*)  
In addition, rezoning should be consistent with long-range planning and based on considerations which affect the whole community. See *Buhler v. Racine County*, 33 Wis. 2d 137, 146 N.W.2d 403 (1966).

**Contract Zoning and Conditional Zoning:**

The key cases discussing contract and conditional zoning are *Zupancic v. Schimenz*, 46 Wis. 2d 22, 174 N.W.2d 533 (1970) and *Konkel v. City of Delafield*, 68 Wis. 2d 574, 229 N.W.2d 606 (1975).

***Zupancic v. Schimenz*, 46 Wis. 2d 22, 174 N.W.2d 533 (1970):**

In *Zupancic*, the issue on appeal was whether a declaration of restrictions limiting the use of the subject land was a part of a contract to rezone the property and was therefore invalid. *Zupancic*, 46 Wis. 2d at 25. In *Zupancic*, developers in 1961 requested that a parcel located in the City of Milwaukee zoned as "neighborhood shopping" be rezoned as "local business" in order to sell it for use as a bowling alley. *Id.* Such use as a bowling alley was not permitted in a neighborhood shopping district. *Id.* The request for zoning was referred to the city plan commission, which held hearings. *Id.* Some home owners near the area were opposed to the zoning change, but not to the bowling alley. *Id.* The developers negotiated with the home owners, and as a result, there was an agreement that "the developers would limit the use to a bowling alley of the land to be rezoned." *Id.* at 25-26. Consequently, a declaration of restrictions was drafted which provided that while the parcel was zoned local business, the only local business use permitted was a bowling alley. *Id.* at 26. Any other use was restricted to uses permitted under the neighborhood shopping zoning. *Id.* The declaration also provided for other certain requirements, including a buffer planting strip, structural requirements, placement of air-conditioning equipment, and a fence to prevent access to a nearby property. *Id.* The declaration further provided that the restrictions were for the benefit of the city, were to be enforced by the city, were to run with the land, and were binding until January 1, 1982, which was a period of approximately 20 years. *Id.* The city plan commission recommended that the rezoning ordinance be passed. *Id.* Two days later, the declaration of restrictions was executed, and the following day the staff report recommending approval of the rezoning was sent to the committee of the common council. *Id.* The declaration of restrictions was then recorded, and a week later, the rezoning ordinance became effective. *Id.*

A few weeks later, the common council by resolution divided the plated lot to create the parcel for the bowling alley and provided that compliance with the restrictions was a condition of the revision. *Id.* As a result of the division of the plated lot, there was a smaller piece of the original property, which Joseph Zupancic and two others entered into an offer to purchase for use for a car wash. *Id.* The offer to purchase was subject to deed restrictions of record and to Zupancic obtaining a permit to build a car wash. *Id.* at 27. Zupancic did not know of the deed restriction which would not permit the car wash on the parcel, and the seller did not remember it. *Id.* Zupancic initially obtained a building permit to use the parcel for a car wash. *Id.* Zupancic entered into a contract to buy car wash equipment and made a down payment on the equipment. *Id.* Shortly thereafter, the building permit was revoked as the alderman of the district wanted the zoning of the parcel studied. *Id.* The common council subsequently rezoned the parcel from local business back to neighborhood shopping. *Id.* Zupancic filed a writ of mandamus and argued that the rezoning was part of an illegal contract, and if valid, the City waived its

rights to enforce the restriction. *Id.* at 27-28. The city in response argued that the declaration of rights was valid because 1) it was not an incident of a contract for zoning or a condition of rezoning; and 2) this type of contract relating to zoning is not illegal as a matter of law. *Id.* at 27.

The *Zupancic* Court recognized that contract zoning is illegal, and then went on to distinguish contract zoning from conditional zoning. *Id.* at 28-34. The Court defined contract zoning as "when a city itself makes an agreement with a landowner to rezone." *Id.* at 30. As a result of such an agreement, the contract is invalid and the ordinance void. *Id.* The rationale behind such a determination is that "a municipality may not surrender its governmental powers and function or thus inhibit the exercise of its police or legislative powers." *Id.* at 28. In addition, the Court noted that "contract zoning is illegal not because of the result but because of the method." *Id.*

As to conditional zoning, the Court held:

"[W]hen the agreement is made by others than the city to conform the property in a way or manner which makes it acceptable for the requested zoning and the city is not committed to rezone, it is not contract zoning in the true sense and does not vitiate the zoning if it is otherwise valid. This latter situation is sometimes confused with conditional zoning. But conditional zoning properly understood involves only an adopted zoning ordinance which provides either: 1) The rezoning becomes effective immediately with an automatic repealer if specified conditions are not met within a set time limit, or 2) the zoning becomes effective only upon the conditions being met within the time limit."

*Id.* at 30.

The Court went on to discuss an argument advanced by *Zupancic* that an "implied contract" was created based on the timing of the recording of the deed restriction and the rezoning. *Id.* at 31. The Court rejected this argument and found that the facts in the case were not sufficient to render the rezoning and contract illegal. *Id.* at 28. In this case, the Court determined that there was no agreement with the city (by either the common council or city plan commission) to rezone. *Id.* The facts demonstrated only an agreement between the developers and the home owners regarding the use of the property if it was rezoned by the City. *Id.* "The rezoning did not require the conditions demanded by the home owners." *Id.* While the developers and home owners expected favorable action by the city plan commission, this was based on no objection to the rezoning by the home owners and the proposed rezoning was good land use and consistent with the developing character of the neighborhood. *Id.* at 28-29. The Court also rejected *Zupancic's* argument that the city was a party to the contract because only the city could enforce the deed restriction. *Id.* at 33. The Court determined that "at most, the city was a third-party beneficiary protecting the public interest." *Id.*

The Court provided that "landowners may make a contract which may legitimately be recognized by the zoning authorities as a motivation for rezoning but such zoning must meet the test of all valid zoning, i.e., must be for the safety, welfare, health of the community, sec. 62.23(7), Stats., and it should not constitute spot zoning." *Id.* The Court went on to state that "in recognizing the legality of what was done here, we caution that

the procedure might well lead to an agreement with the zoning authority which might be fatal." *Id.* The Court stated that "[w]here the imposition of conditions on land development is desirable, it might better be done by uniform ordinances providing for special uses, special exceptions and overlaid districts." *Id.* Further, "authorizing in the zoning ordinance the plan commission or governing body to grant 'special uses and conditional uses' on definite standards from the automatic permissive uses listed in the zoning ordinance is preferable to the method used in the instant case." *Id.*

It is worth noting that the Court went on to reject Zupancic's argument that the city waived its right to enforce the restrictions on the use of the property because it initially granted the building permit. *Id.* at 34. The Court determined that the inspector had no authority or intention to waive enforcement of the restrictions. *Id.*

*Konkel v. City of Delafield, 68 Wis. 2d 574, 229 N.W.2d 606 (1975):*

Conditional zoning was further discussed by the Wisconsin Supreme Court in *Konkel v. City of Delafield, 68 Wis. 2d 574, 229 N.W.2d 606 (1975)*. In *Konkel*, the plaintiffs, residents of the City of Delafield, filed an action for a declaratory judgment asserting that an ordinance passed by the Delafield Common Council was invalid. *Konkel, 68 Wis. 2d at 575*. The ordinance provided that a property was conditionally rezoned and the conditional rezoning was done upon certain conditions being met, including that the use of the property was a planned unit development of condominiums, the land was conditionally rezoned only for the present optionee, and the zoning was subject to two proposed amendments pending before the common council, namely the planned unit development and an amendment to R-5 zoning. *Id.* The ordinance further provided if any of the conditions were not met, then the property would revert back to its present zoning and the ordinance would be null and void. *Id.*

The plaintiffs asserted that the ordinance was invalid because the zoning of the property would revert automatically to a single-family district in the event that the conditions set forth by the zoning ordinance were not met. *Id.* The plaintiffs contended that this bypassed statutory procedural due process required by sec. 62.23(7)(d), Wis. Stat. *Id.* They asserted that the rezoning upon reversion would be without notice and as such, the entire ordinance must fail. *Id.* The Court declined to address the validity of the reverter clause, although it indicated that a convincing argument could be made that since the original zoning ordinance contemplated a subsequent rezoning if the conditions were not met, one notice and one hearing might satisfy the statutory and due process requirements. *Id.* at 577. The Court did not address the issue further as it determined that the ordinance did not become effective until the conditions of the ordinance were met. *Id.* The Court held that as such, "[t]he validity of the ordinance is free from doubt. The municipal corporation has not surrendered or contracted away any of its governmental functions or powers. The function of the council and the powers conferred upon it by statute are not impaired." *Id.*

The plaintiffs further asserted that under any view, the ordinance is vague and unenforceable since there is no time period at the end of which failure or satisfaction of the specific conditions can be ascertained. *Id.* at 579. The Court held:

"We agree that, for the practical administration of this ordinance, a time limit for the meeting of the conditions ought to have been set. We do not,

however, consider this a fatal defect. This is not contract zoning. The city has not bound itself irrevocably to zone R-5; and at any time that the council concludes that a reasonable time has passed without meeting the conditions, the ordinance can be repealed. The state of limbo can be terminated at the will of the legislative body. The common council has retained full control of its legislative powers. By repealing the ordinance, a new rezoning does not take place. It merely would terminate the possibility of making effective the rezoning to R-5."

*Id.* The Court concluded that "the ordinance is valid in that it simply is an ordinance that makes rezoning effect at such time as the conditions set forth by the council in the ordinance are satisfied." *Id.* at 580.

#### Other Authority:

It is worth noting that there are some unpublished cases discussing conditional zoning. In particular, in *Galuska v. Racine County*, 145 Wis. 2d 895, 428 N.W.2d 561 (Ct. App. 1988) (unpublished), the plaintiffs alleged that the county engaged in illegal contract zoning because the county board considered and ultimately approved an application for a conditional use permit at the same time that the rezoning petition was under consideration. The Court rejected the plaintiffs' argument and found there was no contract zoning as no such agreement was alleged nor did the facts support a finding of contract zoning. The Court went on to state there were no principal uses as a matter of right in the proposed zoning district. As such, the concurrent consideration of the conditional use application was proper "since any use of the property would be conditional under the proposed rezoning."

In addition, it is worth noting that there is a League of Wisconsin Municipalities opinion, Zoning #390 (July 25, 1980), regarding a council imposing an owner occupancy requirement as condition precedent to rezoning. The author of the League opinion states that he is "hesitant to blanketly endorse an owner occupancy requirement as a condition precedent to granting the rezoning request." He states that he was unable to find any authority "which supports, in any manner, the imposition of the type of condition contemplated here." He further states that such a condition would create potential constraint on future transfers and sales of the properties involved, and there could be situations where an individual owns several of the houses and obviously could not occupy an apartment in each house. He expresses his uncertainty that "the imposition of an owner occupancy requirement will necessarily insure the tranquility of the neighborhood which was the expressed reason for seeking to impose that condition for rezoning." The author of the opinion goes on to suggest, as an alternative, amending the section of the zoning code to provide for a conditional use, which would then enable the "municipality to exercise some control over the extent of certain uses which, although desirable in limited number, could have a detrimental effect on the community if permitted without restrictions."

#### **CONCLUSION:**

In summary:

Contract zoning is illegal and occurs "when a city itself makes an agreement with a landowner to rezone." *Zupancic v. Schimenz*, 46 Wis. 2d 22, 30, 174 N.W.2d 533 (1970). As a result of such an agreement, the contract is invalid and the ordinance void. *Id.* The

rationale behind such a determination is that "a municipality may not surrender its governmental powers and function or thus inhibit the exercise of its police or legislative powers." *Id.* at 28.

In contrast, use of conditional zoning by a municipality has been upheld by the Wisconsin Supreme Court. See *Konkel v. City of Delafield*, 68 Wis. 2d 574, 229 N.W.2d 606 (1975). Conditional zoning involves "only an adopted zoning ordinance which provides either: 1) The rezoning becomes effective immediately with an automatic repealer if specified conditions are not met within a set time limit, or 2) the zoning becomes effective only upon the conditions being met within the time limit." *Zupancic*, 46 Wis. 2d at 30. Under conditional zoning, the zoning authority does not enter into an enforceable agreement promising such rezoning. See 8 McQuillin, *Municipal Corporations*, sec. 25.94. Regardless, such rezoning "must meet the test of all valid zoning, i.e., must be for the safety, welfare, health of the community, sec. 62.23(7), Stats., and it should not constitute spot zoning." *Zupancic*, 46 Wis. 2d at 33. In addition, rezoning should be consistent with long-range planning and based on considerations which affect the whole community. See *Buhler v. Racine County*, 33 Wis. 2d 137, 146 N.W.2d 403 (1966).

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ORDINANCE NO.: \_\_\_\_\_

AN AMENDED ORDINANCE to amend Subsection 15.02(B) of the Code of Ordinances of the City of La Crosse transferring certain property from the Residence District to the Local Business District allowing for a theatre and salon at 1353 Avon Street.

THE COMMON COUNCIL of the City of La Crosse do ordain as follows:

SECTION I: Subsection (B) of Section 15.02 of the Code of Ordinances of the City of La Crosse is hereby amended by transferring certain property from the Residence District to the Local Business District on the Master Zoning Map, to-wit:

NORTHERN ADDITION LOT 22 BLOCK 6 LOT  
17-10075-140

SECTION II: This ordinance is contingent upon the owner recording a covenant on the property stating that the property will revert back to R2 residential zoning if the property is no longer being used as a salon.

SECTION III: This ordinance shall take effect and be in force from and after its passage and publication.

\_\_\_\_\_  
Timothy Kabat, Mayor

\_\_\_\_\_  
Teri Lehrke, City Clerk

Passed:

Approved:

Published:



**CITY OF LA CROSSE, WISCONSIN**  
**CITY PLAN COMMISSION**  
**REPORT**  
**August 4, 2014**

➤ **AGENDA ITEM – PC2014-08-04-04**

AN ORDINANCE to amend Subsection 15.02(B) of the Code of Ordinances of the City of La Crosse transferring certain property from the Residence District to the Local Business District allowing for a theatre and salon at 1353 Avon Street.

➤ **ROUTING: J&A Committee**

➤ **BACKGROUND INFORMATION:**

The property, which houses the Muse Theatre is located at 1353 Avon Street, and is depicted in **MAP PC2014-08-04-04**. The applicant is requesting a change in zoning, to allow a full service salon to be operated in the building as well. Proposed hours for the salon are Tuesday through Saturday 10:00 a.m. to 6:00 p.m. Current hours for the theatre are Friday and Saturday, 7:30-10:00 p.m. Currently there is a conditional use permit on the property to allow for the theatre use, but it does not allow for the salon, thus a rezoning to local business is needed.

The application states that the salon is a short term use, probably only being operated for three more years. Discussions with the owners indicated that they would like to remodel the upstairs and live there in the future.

➤ **GENERAL LOCATION:**

1353 Avon Street, across from Logan Middle School.

➤ **RECOMMENDATION OF OTHER BOARDS AND COMMISSIONS:**

N/A

➤ **CONSISTENCY WITH ADOPTED COMPREHENSIVE PLAN:**

The future land use map indicates this area as single family residential, thus this rezoning is not consistent. However Google shows just a handful of hair establishments on La Crosse's northside, with half of them being barber shops, and not full service salons. The neighborhood may benefit from this salon.

















➤ **PLANNING RECOMMENDATION:**

Staff is very supportive of this business change and acknowledges the potential benefit to neighbors and northside residents. Staff cautions the Commission on the potential of the rezoning. If in the future another commercial entity is proposed for the site: a bar, accounting firm, tattoo parlor, restaurant, etc. It will be a legal use. Staff's caution is primarily because of Logan Middle School across the street. Staff has spoken to the applicant and asked if they would be willing to file a restrictive covenant on their property stating that should the salon cease to exist the property would revert back to R2-Residence zoning. This would still allow the residence and the theatre but would not allow any other commercial use to occur without Council approval. The applicant was receptive

to the idea and stated that they would try to have that completed in time for the City Plan Commission meeting. **If the applicant does record a covenant on the property this Ordinance is recommended to approval. If the owner decides to not record a covenant this Ordinance is recommended for denial as the potential for a use detrimental to the neighborhood, particularly in close proximity to the school, is too high.**

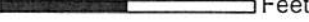


### BASIC ZONING DISTRICTS

	R1 - SINGLE FAMILY
	R2 - RESIDENCE
	WR - WASHBURN RES
	R3 - SPECIAL RESIDENCE
	R4 - LOW DENSITY MULTI
	R5 - MULTIPLE DWELLING
	R6 - SPECIAL MULTIPLE
	PD - PLANNED DEVELOP
	TND - TRAD NEIGH DEV.
	C1 - LOCAL BUSINESS
	C2 - COMMERCIAL
	C3 - COMMUNITY BUSINESS
	M1 - LIGHT INDUSTRIAL
	M2 - HEAVY INDUSTRIAL
	PS - PUBLIC & SEMI-PUBLIC
	PL - PARKING LOT
	UT - PUBLIC UTILITY
	CON - CONSERVANCY
	FW - FLOODWAY
	A1 - AGRICULTURAL
	EA - EXCLUSIVE AG
	City Limits
	SUBJECT PROPERTY



0 45 90 180 Feet





### BASIC ZONING DISTRICTS

- R1 - SINGLE FAMILY
- R2 - RESIDENCE
- WR - WASHBURN RES
- R3 - SPECIAL RESIDENCE
- R4 - LOW DENSITY MULTI
- R5 - MULTIPLE DWELLING
- R6 - SPECIAL MULTIPLE
- PD - PLANNED DEVELOP
- TND - TRAD NEIGH DEV.
- C1 - LOCAL BUSINESS
- C2 - COMMERCIAL
- C3 - COMMUNITY BUSINESS
- M1 - LIGHT INDUSTRIAL
- M2 - HEAVY INDUSTRIAL
- PS - PUBLIC & SEMI-PUBLIC
- PL - PARKING LOT
- UT - PUBLIC UTILITY
- CON - CONSERVANCY
- FW - FLOODWAY
- A1 - AGRICULTURAL
- EA - EXCLUSIVE AG
- City Limits
- SUBJECT PROPERTY

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