



CITY OF WAUWATOSA

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COMMUNITY DEVELOPMENT COMMITTEE MEETING Tuesday, March 11, 2008

PRESENT: Alds. Birschel, Didier, Donegan, Herzog, Krill -6

EXCUSED: Alds. Meaux, Minear

ALSO N. Welch, Community Dev.; Dir. A. Kesner, City Atty.; N. Kreuser, Health Officer;
PRESENT: J. Archanbo, City Admin.

Ald. Treis as Chair called the meeting to order at 8:00 p.m.

Conditional Use – 8320 W. Blue Mound Road

The committee reviewed a request by Stephanie Atterberry-Hughes and Phillip Jennings for a Conditional Use for a massage therapy establishment in the AA Business District at 8320 W. Blue Mound Road. Ms. Welch reported that the Plan Commission unanimously recommended approval with hours of operation of 9 a.m. to 8 p.m. Monday through Saturday.

Ms. Atterberry-Hughes, 1716 S. 82nd Street, West Allis, explained that she has all the necessary state, national, and continuing education certifications and performs mostly medically related work.

Moved by Ald. Krill, seconded by Ald. Donegan to recommend to Council approval of the Conditional Use. Ayes: 6

Proposed Amendment to Smoke-Free Restaurant Ordinance

The committee reviewed a request by Robert H. Messinger of Hector's—A Mexican Restaurant, 7118 W. State Street, for an extension of the city's smoke-free restaurant ordinance hardship exemption beyond the sunset date of July 1, 2008. In his letter of January 9, 2008, Mr. Messinger cited loss of revenue and concerns about survival of the business if, after July 1, he becomes the only business of his type on State Street that doesn't allow smoking. A February 19, 2008, memo from Dr. Nancy Kreuser, Health Officer, opposes any extension.

Dr. Kreuser reported that she is under an obligation to advise on the prevention of disease and risk factors relating to human health hazards. The ordinance was passed in 2003 and took effect July 1, 2006 with a provision for July 1, 2008 sunset of its hardship exemption, giving businesses a great deal of time to prepare. She noted that factors such as the economy, the amount of construction in the community, competition, and changes in operation might affect a business's bottom line.

The State of Wisconsin is moving forward on protecting the public from exposure to tobacco smoke, Dr. Kreuser reported. State legislation was introduced last April through the Senate, and an Assembly hearing was held last month. The bill is now awaiting a vote by both bodies, possibly as early as next week. The Wisconsin Restaurant Association supports the bill, and the Wisconsin Public Health Association also endorses a comprehensive bill. State legislation would preempt most local ordinances currently in place. There are now 15 countries that are smoke free, 23 states have smoke-free laws, and Minnesota and Illinois have implemented statewide smoke-free workplace legislation. The Milwaukee Regional Medical Complex has gone smoke free within certain distances on its grounds. The Surgeon General concluded in 1964 and 2006 that tobacco smoke is a known health hazard. On February 8, 2008, the first smoke-triggered fatal asthma attack occurred. Dr.

Kreuser said that she and the Board of Health believe the ordinance to be sound public health policy and recommend keeping it in place until state legislation becomes effective.

City Attorney Kesner explained that extending or eliminating the hardship exemption's sunset date of July 1, 2008, would require an ordinance amendment, a two-step process that would bring the matter back to committee following introduction to Council. If the committee chooses not to recommend a change, the three existing hardship exemptions would end July 1. One of those establishments, Bigg's Roadhouse, reportedly intends to qualify as a tavern and then would not need the exemption. The other two are Hector's and The Open Hearth.

Expressing confidence that the state legislature will pass some kind of statewide smoking ban, Ald. Herzog felt that the exemptions could be extended until that time. Mr. Kesner noted that the state bill may include some delayed effective dates and has mentioned pre-emption of local ordinances, but details are unknown right now.

Ald. Krill asked about other establishments now seeking exemptions and required staff time. Dr. Kreuser indicated that processing each exemption request took about 20 hours; otherwise, there have been no complaints or citations and it has basically been self-regulated. She did not feel reprocessing would be needed should the sunset date be extended. Mr. Kesner added that it might be difficult for a business to now initiate a hardship claim, but further information could be reviewed to determine the effectiveness of existing exemptions.

Margaret Capper, 2136 N. 90th Street, who recently became Mr. Messinger's banker, distributed copies of proprietary financial information. She pointed out that when the smoking ban began in July 2006, the outdoor patio where patrons were able to smoke was still open. She acknowledged that the true cause of decreases in revenue is speculative but noted that beverage receipts dropped by almost 20% when the patio shut down in October, and there was an almost 24% drop the following December and January. Once the exemption was granted, food and beverage sales increased. Ms. Capper explained that a second establishment opened by Mr. Messinger in Bay View is financially independent of this location with separate ownership, a separate banking relationship, and no financial ties.

Ms. Capper mentioned the need to restructure debt when it became apparent that the business was in jeopardy. Mr. Messinger was very successful for 18 years but has not yet fully recovered from the losses he sustained. It is starting to be much more manageable, but he is not in a position to lose any more business. Mr. Messinger took a wage of \$14,000 in 2007, has not terminated any of his 22 employees, and has maintained a high level of employee health insurance. He has paid local taxes and state sales taxes in full and has been loyal to his employees and community. Regarding the ability to plan for this change, Ms. Capper noted that the building was constructed in 1910. Any changes would be expensive and close to impossible due to the layout and the possibility that many existing conditions that are now "grandfathered" would lose that status.

Mr. Messinger said that he understands the value of a smoking ban in public places and explained that he would like an extension only until an overall state ban takes effect. Otherwise, his would be the only non-smoking establishment on State Street, and he fears that he would be unable to keep up his current level of commitment to staff and the community.

Tim Capper, 6822 W. Wells Street, said he has been in the bar and restaurant business for 34 years and is the former owner of Colonel Hart's, 7342 W. State Street. He spoke of the growth of State Street bars and restaurants to the point that the Village is a destination for people in and outside of Wauwatosa. Mr. Messinger was an early sponsor of Hartfest, he pays assessments to the Village Business Improvement District, and he has participated in community activities at every level. The business is an asset to the whole city, and losing it would leave a void. Giving them the opportunity to compete would be in the best interest of the community until a statewide smoking ban levels the playing field. The building itself is being put to its best use, and Mr. Messinger has shown a commitment to his employees that is second to none.

Ald. Krill commented that this is a very unusual and extremely limited situation since a statewide ban is likely to replace the piecemeal approach now in place. In the meantime, he suggested extending the hardship for a set period, perhaps nine months, which he saw as a compromise with very little harm to the city.

In answer to statements by Ald. Donegan, Mr. Messinger agreed that the ban hits him severely and disproportionately. He mentioned competition from Colonel Hart's, Leff's Lucky Town, the Chancery, and Firefly Grill, all of which allow smoking and are nearby, as well as Saz's to the east in Milwaukee. He said there is no physical way to divide the building and close off the bar area. Not only is there a problem with restroom locations, but also, any investment of over \$30,000 would subject him to current code requirements, ending a grandfathering situation and making it financially impossible. The establishment has 2,000 sq. ft., with 1,000 in the dining room, 700 in the bar, and 300 in the kitchen and storage. To use upstairs space, he would need two more parking spaces.

Asked by Ald. Donegan about loss of business due to the smoking ban, Mr. Capper said he saw the decline. Hector's had a lunch crowd of young professionals who sat in the bar and smoked after eating. Similar professionals came after work also, and a lot of them smoked. Dining room patrons who would come to the bar for an after-dinner drink and cigarette were instead going out the door and heading elsewhere. With a greater profit margin on beverages than on food, it is tough when 15-20% of that income is lost.

While agreeing that it can't be said with certainty that any loss is due to the smoking ban, Ms. Capper reiterated that anything that jeopardizes any portion of sales is a problem. The business is starting to move in the right direction but there is no room for error or any margin to lose.

Ald. Donegan asked Dr. Kreuser about evidence supporting claims that the ban is causing loss of revenue. She was not aware of any scientific research that addresses these particular circumstances and has not confirmed that other businesses affected by construction also saw losses, although she felt that other factors should be considered. The ordinance requires at least a 10% decrease in sales and projected ongoing losses due to the ban, she noted. Research says there is no correlation between the ban and negative effects.

Ald. Donegan said that there is a strong likelihood that a business will lose some customers if they stop offering something that customers want and a direct competitor provides. He supports the ban and believes it is an ordinance with good balance, but there is now an uneven playing field for one or two businesses, which is not consistent with the spirit of the ordinance or the community.

Moved by Ald. Donegan, seconded by Ald. Krill to recommend that the ordinance be amended to extend the existing hardship exemptions to the effective date of state non-smoking legislation –

Ald. Donegan declined to accept a friendly amendment by Ald. Krill to extend the exception for nine months or to the effective date of a state law, if earlier. Ald. Krill withdrew his second.

The motion was seconded by Ald. Herzog.

Ald. Donegan confirmed his intent to extend the exception until there is a level playing field for all taverns and restaurants. Mr. Kesner reported that one of the proposals under consideration has different effective dates for taverns and restaurants, although that may change. Hector's would probably be seen as level with competition when taverns become subject to the ban.

With consent of the second, Ald. Donegan clarified that the motion applies to the effective date of Wisconsin legislation for taverns –

The Chair asked if a floor-to-ceiling panel could be erected to separate the restaurant from the bar. Mr. Messinger said that patrons would still have to enter the bar to use the men's room, contrary to ordinance requirements. Extensive renovations would trigger a requirement to bring the entire building up to code.

Ald. Birschel commented on review of financial information that led to the exemptions. He saw Hector's as a unique business that should survive. Ald. Didier thanked Mr. Messinger for being forthcoming with information. She said this is a unique situation, the Village has to be viable, and businesses should not be driven out. Ald. Krill also stressed that this is a very unique situation. He felt it is fair to assume that state legislation will pass in short order.

Ald. Herzog sought confirmation that the three businesses with existing exemptions would be extended without further applications or submittals. Mr. Kesner said that the three businesses would be grandfathered; one may qualify as a tavern and not require a hardship exemption.

Vote on the motion, Ayes: 6

Asked again about additional establishments that might apply for an exemption, Mr. Kesner said it would be almost impossible for any other business to establish hardship since it requires comparing the current year with the previous year. At this point, the previous year would also have been under the smoking ban.

The meeting adjourned at 9:16 p.m.

Carla A. Ledesma, City Clerk
Wauwatosa, Wisconsin

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