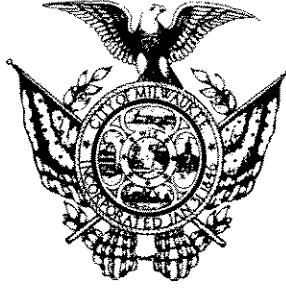


# CITY OF MILWAUKEE

Form CA-43

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January 30, 2006

Hon. Common Council  
City of Milwaukee  
Room 205, City Hall  
200 E. Wells Street  
Milwaukee, WI 53202

Attention: Mr. Ronald Leonhardt

**RE: Common Council File No. 051053 (Version 2)**  
**A Substitute Ordinance relating to presence of minors on the premises of certain businesses**

Dear Ms. Leonhardt:

On December 28, 2005, the City Clerk's office wrote to us on behalf of Alderman Zielinski, asking us to review proposed truancy legislation for legality and enforceability.

On January 10, 2006, the City Clerk's office wrote to us again on behalf of Alderman Zielinski, this time forwarding two additional, and different, versions of the legislation. We were again asked to review them for legality and enforceability.

We were not informed by either the City Clerk's office or the alderman that one version had subsequently been introduced and was scheduled to be heard by the Public Safety Committee on January 26, 2006; if we had, we would have appeared at the hearing to provide legal guidance to the committee.

Common Council file No. 051053 (Version 2) approved by the Public and Safety Committee on January 26, 2006 states: "No person who operates a place of business, as defined in sub. 1, may

Ms. Amy Hefter  
January 30, 2006  
Page 2

allow a person under the age of 18 years to loiter on the premises in violation of s. 106-23-2." This ordinance applies to all students attending schools, public, private and parochial, in the City of Milwaukee.

In a prior opinion dated January 29, 2003, regarding the legality and enforceability of a proposed ordinance that would penalize businesses that permit truants on their premises, our office raised concerns regarding the language and enforceability of such an ordinance. In that opinion, the proposed ordinance that was being reviewed stated that "no operator of an establishment shall allow a truant to remain in or upon the establishment's premises." In the opinion our office referred to the current Milwaukee City Ordinance Sec. 106-23.3.1 MCO entitled "Contributing to Truancy," which states, "Except as provided in sub. 4, no person 18 years of age or older shall knowingly encourage or contribute to truancy of a minor under the age of 18 years."

The 2003 City Attorney opinion stated that any such ordinance should include a level of knowledge on the part of a potential violator that the minor should have been in school. The opinion also stated that "the burden would be upon the City to show in the prosecution of these cases that the business operator had knowledge of the truancy and allowed the individual to stay on the premises." Similarly, the proposed ordinance approved by the Public Safety Committee does not require that the business owners know that the minor is truant at the time the minor enters the business.

The January 29, 2003 opinion also raised enforceability concerns regarding the proposed ordinance. We opined that "these cases would prove to be very difficult to successfully enforce." The opinion suggested that it would be very difficult to show that the operator of an establishment knew the minor was truant or that the minor falls within an exemption of the ordinance. Given that there are many schools in the City and they may have varying off days, and because there may be many reasons why a minor might not be "required" to be at school on a particular day, the proposed ordinance approved by the Public Safety Committee would be extremely difficult, if not impossible, to enforce.

In addition, even though an ordinance is granted a presumption of constitutionality which can only be rebutted by establishing its invalidity beyond a reasonable doubt, *Walworth County v. Transhow*, 165 Wis. 2d 521, 525 (Ct. App. 1991), "[a]n ordinance is unconstitutionally overbroad if its language given its normal meaning, is so sweeping that the sanctions may be applied to conduct which the state is not permitted to regulate." *Id.* 528. The proposed ordinance states that minors are not allowed to remain on the business premise "at times" when they are required to be in "regular school attendance." The proposed ordinance defines "regular school attendance" as "all of any day in which school is held during a school semester." Apart from being very confusing, this part of the ordinance may be unconstitutionally overbroad because students who would not otherwise be

Ms. Amy Hefter  
January 30, 2006  
Page 3

required to be in school, e.g. students visiting a convenience store before or after school, or in the evenings, might be subject to the proposed ordinance.


The City Clerk's office wrote us on January 10, 2006 asking us to review any differences in the legality or enforceability of the ordinance if applied only to public schools versus public, private and parochial schools. (This distinction is not used in the ordinance approved by the Public Safety Committee.) In order to defeat an equal protection challenge to preventing MPS students from entering a store while permitting the same activity by private school students, the City would have to make legislative findings in order to make sure there is a rational basis to distinguish between students attending Milwaukee public schools and students attending private and parochial schools. We cannot imagine findings that could justify such disparate treatment.

For the above reasons, we cannot sign this proposed ordinance as legal and enforceable. Should you have any further questions or concerns regarding this proposed ordinance, please contact our office at your convenience. We would be happy to assist in possible redrafting of this ordinance.

Very truly yours,



GRANT F. LANGLEY  
City Attorney



ELOISA DeLEÓN  
Assistant City Attorney

EDL/edl  
Attachment  
1033-2005-3614:101160