



MEMORANDUM

LEGISLATIVE REFERENCE BUREAU

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To: Ald. Joe Davis, Sr.
From: Richard L. Withers, Legislative Fiscal Analyst ext. 8532
Date: June 4, 2012
Subject: Licensing and Regulation of Tobacco Retail Activities

The following summary of applicable state laws and related legal opinions provided by the Office of the City Attorney has been prepared at your request to assist discussion of Communication File Number 120216 entitled, "Communication relating to state and municipal licensing and regulation of retail tobacco sales." This File is Item 21 on the Judiciary & Legislation Committee Meeting Agenda for Monday afternoon, June 4, 2012.

- Section 134.66(55), Wis. Stats., requires municipal tobacco licensing ordinances to be in strict conformity with state law.

The Wisconsin Court of Appeals in *U.S. Oil Inc. v. City of Fond du Lac*, 199 Wis. 2d 333 (1996), held that the regulation of tobacco sales was a matter of statewide concern and that any municipal regulation not in strict conformity with state law was pre-empted.

- The City Attorney has issued opinions consistent with the holding in *U.S. Oil Inc. v. City of Fond du Lac*:

Opinion of June 22, 2004 – s. 106-30 of the code prohibiting sale of cigarettes in any form other than as a package or container on which a tax stamp is affixed is in conformity with s. 139.32(1), Wis. Stats., and prohibits sale of single cigarettes to persons of any age

Opinion of November 1, 2005 – singly-packaged cigars fall within the state's definition of "tobacco products" and not the definition of "cigarettes" and therefore are not subject to the prohibition against single sales of cigarettes

Opinion of October 13, 2006 – blunts or single cigars may not be regulated as "drug paraphernalia" where the state has excluded items from the definition of "drug paraphernalia" that are designed for use or primarily intended for use with tobacco products.

- The licensing system established under s.134.65, Wis. Stats., for retail tobacco sales provides the following applicable requirements:

No person may sell, possess with intent to sell, exchange, barter or give away cigarettes or tobacco products without obtaining a license from the city clerk

No license may be issued unless the applicant specifies whether the sale or other transfer of cigarettes or tobacco products is over-the-counter or by vending machine

Licenses shall name the licensee and specifically describe the premises

Licenses are not transferrable from the licensee to another or from one premises to another

A renewal license application may only be made by the licensee and not by an "attorney-in-fact" (City Attorney opinion of November 2, 2004)

Accurate records of purchases and receipts must be kept and preserved for inspection on the premises for 2 years

Penalties for violating the section include fines of not less than \$25 nor more than \$100 for a first offense; and

Conviction results in immediate termination of the license "of the person convicted of being personally guilty" and the person is not entitled to another license for a period of 5 years, and the person shall not act on behalf of a licensee.

- Restrictions on the sale or gift of cigarettes or tobacco products are provided in s. 134.66, Wis. Stats., including the following:

A retailer may not sell or provide cigarettes, nicotine products, or tobacco products to any person under the age of 18

Retailers must post notice of the prohibition on sales to minors including vending machines

Agents, employees and contractors of licensees must be trained

A court shall suspend licenses for unlawful sales to minors for periods of not more than 3 days for a first violation in 12 months and not less than 15 days nor more than 30 days for a violation within 12 months after committing 3 or more other violations.

Please contact the Bureau if you have further questions.

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