

CITY OF MILWAUKEE

Form CA-43

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August 1, 2003

Ronald D. Leonhardt, City Clerk
City Hall, Room 205

Re: Section 115-41, Milwaukee Code of Ordinances

Dear Mr. Leonhardt:

On November 5, 2002 you forwarded to this office a query as to whether or not the above-referenced section could be repealed in that no appeal to the Common Council had ever taken place under that section. We conclude that this section may be repealed.

Section 115-41 of the Milwaukee Code of Ordinances ('MCO') states as follows:

Right of Appeal. When the commissioner determines that a license or permit to do work under this chapter should not be issued, the applicant shall have a right to file his written objections with respect to such determination with the city clerk and thereupon such applicant shall be heard by the common council in the manner in which the common council shall direct. If the common council determines that a permit shall be issued, the commissioner shall issue such a permit. (Emphasis in original).

The general subject of Chapter 115, MCO is street construction and work on public ways. We note that there are permits for excavation (§ 115-3, MCO), permits for the excavation and new street pavements (§ 115-5, MCO), permits for drainage ditch obstructions or structures (§ 115-9, MCO), permits for the temporary occupancy of streets and public ways (§§ 115-10 and 115, 11, MCO), licenses for concrete construction in the public way (§ 115-26, MCO), permits for bicycle parking facilities (§ 115-32.5, MCO), permits for sidewalk area dining facilities (§ 115-32.6 -4, MCO), permits for newspaper stands and newspaper vending boxes (§§ 115-33 and 115-33.5, MCO), permits for flowerpot holders (§ 115-33.6, MCO), permits for food distributors at Commission Row (§ 115-35, MCO), permits for the installation of heated pavements (§ 115-36, MCO), permits for the installation of underground sprinkling systems (§ 115-37) and permits for the erection of telephone booths on public property (§ 115-39, MCO).

Section 68.02(1), Wis. Stats., provides as follows:

68.02 Determinations reviewable. The following determinations are reviewable under this chapter:

- (1) The grant or denial in whole or in part after application of any initial permit, license, right, privilege, or authority, except an alcohol beverage license.
- (2) The suspension, revocation or nonrenewal of an existing permit, license, right, privilege, or authority, except as provided in s. 68.03(5). [The exception deals with a grant or a denial of an alcohol beverage license which is handled pursuant to the provisions of Chapter 125, Wis. Stats. and Chapter 90 of the Milwaukee Code of Ordinances]. (Emphasis in original).

It is clear to us that each of these permits represent, to a greater or lesser degree, property interests which may be affected by the granting or denial of a permit. Further, some liberty interest could be at stake in the case of newsstands. It has been held that constitutional due process protections apply to procedures affecting licenses necessary to engage in one's livelihood. *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed. 2d 90 (1971). It has also been held that there is a property interest in the renewal of a liquor license for purposes of the Fourteenth Amendment (applicable to states and political subdivisions of states), *Reed v. Village of Shorewood*, 704 F.2d 943, 949 (7th Cir. 1983). Although what is at issue in Chapter 115, MCO are "permits" as opposed to "licenses", the difference between a permit and a license for constitutional procedural due process purposes is next to negligible. As is observed in *McQuillin Mun. Corp.* § 26.161(3rd Ed.):

The general rule is that a license to operate a motor vehicle is a mere privilege and not a contract or property right. Thus, a license, permit or certificate of convenience and necessity required of public movers is not a franchise.

But, permits, driver's licenses and certificates of public convenience and necessity to qualify as property interests for purposes of procedural due process and as such even a temporary deprivation of the permit, in the form of a suspension, constitutes a deprivation of due process within the meaning of the Fourteenth Amendment. (Footnotes deleted). (Emphasis supplied).


In order to satisfy due process, a hearing must be held which is "meaningful." *Armstrong v. Menzel*, 380 U.S. 542, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62 (1965).

Ronald D. Leonhardt
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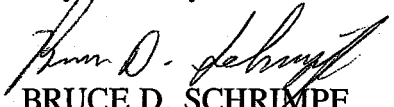
It is clear to us that these interests are preserved by the application of § 68.02(1) and (2), Wis. Stats. Consequently, § 115-41, MCO may be repealed.

Finally, we observe that if, in fact, § 115-41 is repealed amendments will have to be made to § 115-5-2-b.

Very truly yours,



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