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April 21, 2025

Alderman Peter Burgelis
200 East Wells Street, Room 205
Milwaukee, WI 53202

Re: The Sale of Hookah to Persons Under 21

Dear Alderman Burgelis,

We write regarding file CC 241661. The proposed substitute ordinance may not be legal and enforceable without some changes. We recommend working with our office to address those issues prior to adoption. I recognize there has been a long history with hookah related files and a delayed review from my office. I have reviewed requests dating back to 2023 and while I can't undo that history, I can commit to working to get the analysis correct now.

The substitute file creates an impermissible age restriction on tobacco. I recognize that is not the intent, however, the provisions below appear to bootstrap a limitation to tobacco usage that is not in strict conformity with state law and unlikely to survive a challenge.

There are two sections that include tobacco usage:

106-30.3. Sale of Hookah to Persons Under 21. 1. DEFINITIONS.

In this section:

- a. "Hookah" means any recreational water pipe used to inhale heated or vaporized substances, including, but not limited to, tobacco, shisha and tobacco-free shisha.

108-3. Definitions.

2.7. HOOKAH SERVICE means the rental or complimentary use of a hookah provided by an establishment. A hookah is any recreational water pipe used to inhale heated or vaporized substances, including, but not limited to, tobacco, shisha or tobacco-free shisha.



These are problematic. As we've discussed previously, we cannot regulate the age of tobacco consumption, sale, etc. The argument that this regulation of hookahs is not also a regulation of tobacco is easily defeated when we directly cite tobacco in defining what is being prohibited. Even with the removal of this direct language, a challenge could be mounted to the regulation that hookahs are used to smoke tobacco and therefore subject to Chapter 139 of state statute. Chapter 139, specifically Wis. Stat. 139.44, requires strict conformity with state law – municipal governments cannot regulate tobacco beyond the state regulation.

Municipal regulation of tobacco has been challenged before. In *U.S Oil v. City Fond du Lac*, the City of Fond du Lac lost at both the trial court and court of appeals. In that case, the City of Fond du Lac sought to prohibit pull tab, self-service cigarette vending machines (among other regulations). The Court of Appeals summarized the strict conformity language in state law:

After searching the relevant statutes, we conclude that the "strictly conforms" language within the tobacco regulations *must be read as withdrawing municipalities' ability to act outside of state mandates*. Contrary to the City's position, we believe that the state rules are comprehensive.

Hence, what the City claims is intended silence in regards to a particular aspect of tobacco regulation is better described as differences in the *depth* of coverage that the legislature decided to assign to each aspect of a potential tobacco sale. While it is true that vending sales are closely regulated, *see, e.g.,* § 134.66(2)(c), STATS., and there is nothing discussing self-service displays, we must nonetheless look at the entire regulatory scheme. And when we do, we see evidence that the legislature considered everything when it entered the arena of tobacco distribution. The statutes range in coverage from taxation of this product, *see* ch. 139, STATS., to limitations on who may possess this product during the course of distribution. *See* § 48.983(3), STATS. The state has even gone so far as establishing affirmative defenses to the penalty provisions of the statutes. *See* § 134.66(3), STATS.

U.S Oil, Inc. v. City of Fond du Lac, 199 Wis. 2d 333, 349 (Ct. App. 1996) (emphasis added).

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Importantly, the file also seeks to encompass hookah usage in the City's licensing scheme. This is an area where municipal governments have greater regulatory authority. We believe including businesses that rent or provide hookahs in the Public Entertainment license is allowable, legal and enforceable.

We will work with you to explore how to regulate hookahs, however, at this time it is our opinion that the provisions currently in the substitute file are not legal and enforceable.

You've also asked a somewhat related question regarding synthetic marijuana. There is an existing ordinance, 105-50.1 prohibiting the possession, sale, and use of synthetic marijuana. If that ordinance does not achieve the policy goals you have identified, we would be happy to work with you on crafting different solutions.

Please don't hesitate to reach out with any questions.

Thank you!

Evan

RAP/JMD/mc

C: Jim Owczarski

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