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March 28, 2012

Alderman James A. Bohl, Jr.
Fifth Aldermanic District
Chair, Licenses Committee
City Hall, Room 205

Re: Proposed code amendment to Precious Metal and Gem Dealers License,
Milwaukee Code of Ordinances § 92-10,
Common Council File No. 110384.

Dear Alderman Bohl:

On February 13, 2012, you orally requested that this office issue a legal opinion as to whether the City of Milwaukee may require commercial transactions subject to a precious metal and gem (PM&G) license to be conducted solely from a fixed business location. You were concerned that such a requirement would be an unlawful restraint of trade. For the reasons set forth below, and with the development of a satisfactory record, we believe we could defend a regulation that prohibits City of Milwaukee PM&G licensees and secondhand jewelry licensees from other Wisconsin jurisdictions from conducting mobile secondhand jewelry transactions involving service from motor vehicles, hotel conference rooms, and door-to-door salesmen.

I. The City's Police Power to Regulate Business Practices.

The City's legal authority to regulate business practices derives from its statutory police powers to act in furtherance of the public health, safety and welfare, as set forth in Wis. Stat. § 62.11(5). This provision states as follows:

(5) Powers. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.

The extent of the City's discretion in the exercise of its police powers is broad, although not unlimited. It is a basic principle that ordinances enjoy a presumption of validity. *State ex rel. Grand Bazaar Liquors Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 208-209, 313 N.W.2d 805, 808 (1982); *State ex rel. Hammervill Paper Company v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784, 792-793 (1973).

This standard requires that courts uphold the constitutionality, legality, and enforceability of a municipal ordinance if the ordinance is “rationally related” to promotion of the public health, safety, morals or general welfare. *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, *supra*, 105 Wis. 2d 203, 209, 211, 313 N.W.2d 805, 808, 810 (1982). Every presumption is exercised in favor of sustaining “police power” ordinances, and the burden of proof is on the party challenging the validity of such an ordinance: if there is any “reasonable basis for its enactment” the ordinance is sustained. *State ex rel. Baer v. City of Milwaukee*, 33 Wis. 2d 624, 630, 633-634, 148 N.W.2d 21, 24, 26 (1967). *State ex rel. Normal Hall, Inc. v. Gurda*, 234 Wis. 290, 299-300, 291 N.W. 350, 354-355 (1940). In *Thorp v. Town of Lebanon*, 235 Wis. 2d 610, 612 N.W.2d 59, 2000 WI 60 (2000), the Wisconsin Supreme Court reaffirmed the following mode of analysis to any constitutionally-based claim that the provisions of an ordinance lacks a “rational basis,” stating as follows:

... [W]e note that the burden on a plaintiff to prove that an ordinance lacks a rational relationship to a valid governmental objective is difficult. The rational basis test has been characterized as creating a ‘frequently insurmountable task’ for the challenger of an ordinance to prove ‘beyond a reasonable doubt that the ordinance possesses no rational basis to any legitimate municipal objective’ *Grand Bazaar*, 105 Wis. 2d 209, 313 N.W.2d 805. Moreover, ordinances enjoy a presumption of validity, even when they are challenged on the basis of equal protection. *State v. Post*, 197 Wis. 2d 279, 301, 541 N.W.2d 115 (1995). An opponent of an ordinance must establish the ordinance’s unconstitutionality beyond a reasonable doubt. *Id.*: *Kimec v. Town of Spider Lake*, 60 Wis. 2d 640, 651, 211 N.W.2d 471 (1973) . . .” 235 Wis. 2d 610, 637, 612 N.W.2d 59, 74.

In formulating a proposed ordinance, care should be taken to assure the following: (a) that the means employed by the ordinance are “reasonable”; (b) that the means employed by the ordinance are “rationally related” to the attainment of its stated objectives; and (c) that the ordinance itself operates in a nondiscriminatory fashion. *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, *supra*; *Clark Oil and Refining Corp. v. City of Tomah*, 30 Wis. 2d 547, 141 N.W.2d 299 (1966); *Froncek v. City of Milwaukee*, 269 Wis. 276, 281-282, 69 N.W.2d 242, 245-246 (1955). While the police-power “test” applicable to this proposed ordinance is not particularly stringent, it must still be met. “The rational-basis standard of review is ‘not a toothless one.’” *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, *supra*, 105 Wis.2d 203, 209, 313 N.W.2d 805, 809, *citing Schweiker v. Wilson*, 450 U.S. 221, 234, 101 S.Ct. 1074, 1082, 67 L.Ed.2d 186 (1981).

II. The Regulation of Secondhand Jewelry Dealers.

In order to operate as a secondhand jewelry dealer in the State of Wisconsin, one must be first licensed pursuant to Wis. Stat. § 134.71(4). A secondhand jewelry dealer license issued by any municipality in the State of Wisconsin authorizes that licensee to operate as a secondhand jewelry dealer anywhere in the state. *Id.*

The City of Milwaukee is authorized to license secondhand jewelry dealers with a principal place of business in the city. Wis. Stat. § 134.71(5). While undefined in this section of the statutes,

“principal place of business” is defined by Black’s Law Dictionary, 7th Ed. (1999) as: “The place of a corporation’s chief executive offices, which is typically viewed as the “nerve center.”” This definition is generally consistent with definitions of ‘principal place of business’ found in other parts of Wisconsin statutes. Further, the City may enact additional regulations of secondhand jewelry dealers by ordinance as long as they are at least as stringent as other requirements set forth in the state statute. Wis. Stat. § 134.71(14).

You ask whether the City of Milwaukee may require *all* secondhand jewelers to operate from a fixed location in the City of Milwaukee. Based upon testimony before the Common Council Licenses Committee on February 13, 2012, it would seem that this provision was considered for two independent, but related, reasons. First, both Wis. Stat. § 134.71(8) and MCO § 92-10-6 require extensive written and database documentation of every secondhand jewelry transaction. Having a known and consistent place of business where those records are stored and subject to police inspection greatly assists enforcement of the law. Second, the License Committee heard testimony and comments regarding troublesome secondhand jewelry practices occurring in the City that pose a public safety threat due to an unreasonable risk of robbery: to wit, mobile secondhand jewelry transactions involving service from motor vehicles, hotel conference rooms, and door-to-door salesmen. Pursuant to Wis. Stat. § 134.71(5) & (14), and with an appropriate legislative record, we believe we could defend a regulation that prohibits City of Milwaukee PM&G licensees and secondhand jewelry licensees from other Wisconsin jurisdictions from conducting the mobile secondhand jewelry transactions described above.

III. The Proposed Amendments to the PM&G Ordinance.

The proposed amendments contained in Common Council File No. 110384 would specifically require City of Milwaukee PM&G licensees to operate from a fixed location, regardless of whether that location is temporary or permanent, by eliminating the loophole in the current code that exempted from licensure any “precious metal and gem dealer” who did not conduct transactions “from a fixed and regular place of business.” MCO § 92-10-c. The amendment also specifically permits other Wisconsin municipal secondhand jewelry licensees to conduct business in the City without obtaining a PM&G license issued by Milwaukee. Additionally, based on your concerns, the PM&G license exceptions were made consistent with state law so that the municipal regulations were at least as stringent as Wis. Stat. § 134.71(1)(h).

Further proposed amendments would require license applicants to include a plan of operation in the application process. The plan of operation must identify the location of the applicant’s business within the City at which all required records are kept available for police inspection, a description of how offsite transactions will be conducted, the hours of business operation, the status of all permits relating to occupancy and business operations, and identification of the processes which the license applicant will use to ensure the mandatory reporting requirements of purchasing secondhand jewelry.

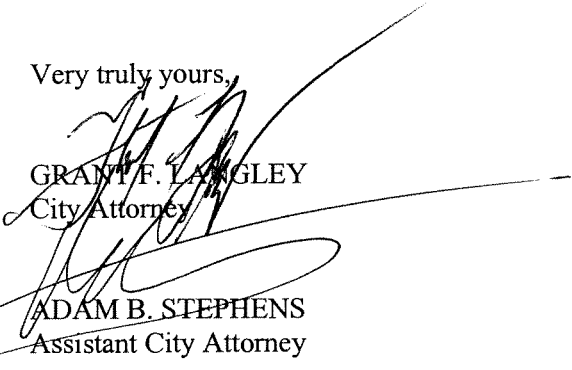
Also, as is true with other licensed premises, the proposed amendments will permit the Common Council to determine the issuance, denial, nonrenewal or revocation of a PM&G license based upon review of a proposed plan of operation and consideration of probative evidence of factors identified in MCO § 85-4-4-c relative to activities of persons who congregate or may congregate on or around the business premises and engage in disorderly and/or criminal behaviors.

Alderman James A. Bohl, Jr.
March 28, 2012
Page 4

V. Conclusion.

In sum, the City of Milwaukee may prohibit PM&G licensees and secondhand jewelry licensees from other Wisconsin jurisdictions from conducting mobile secondhand jewelry transactions involving service from motor vehicles, hotel conference rooms, and door-to-door salesmen. Further, we opine that the provisions contained in File No. 110384 and discussed above are legal and enforceable.

Very truly yours,



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