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February 6, 2023

Mr. Jim Owczarski
City Clerk, City of Milwaukee
200 E. Wells Street, Room 205
Milwaukee, WI 53202

RE: Legality and enforceability of ordinance establishing a 6-month
Moratorium on the Issuance of Certificates of Occupancy for Businesses
Selling Electronic Cigarettes and Paraphernalia, File No. 221499

Dear Mr. Owczarski:

You asked the Office of the City Attorney whether the proposed ordinance, File No. 221499, establishing a 6-month moratorium on the issuance of new occupancy certificates to establishments selling electronic cigarettes and electronic cigarette paraphernalia, is legal and enforceable. We reviewed the proposed substitute ordinance, which clarifies the businesses which will be subject to the moratorium and grandfathers applications submitted before the effective date of the moratorium. It is our opinion that the substitute ordinance, if adopted, would be legal and enforceable as a valid exercise of the City's police powers.

Historically, Wisconsin courts have upheld "development moratoriums" on land divisions and re-zonings while the municipality was developing or updating its comprehensive plan. See e.g. *Wisconsin Realtors Ass'n v. Town of West Point*, 2008 WI App 40 (2008) (moratorium on land divisions); *City of New Berlin v. Stein*, 58 Wis. 2d 417, 206 N.W. 2d 207, cert. denied, 414 U.S. 1092 (1973) (interim zoning freezing existing uses).

In 2011, the Legislature enacted Wis. Stat. § 66.1002 which sets forth uniform requirements for a "development moratorium", which is defined in §66.1002(1)(b) as "a moratorium on rezoning or approving any subdivision or other division of land by plat or certified survey map that is authorized under [Wis. Stat.] Ch. 236." Our view is that the proposed moratorium *is not* a development moratorium under this statute. In addition, our opinion is that § 66.1002 does not reflect an intent by the State Legislature to prohibit municipalities from adopting moratoriums in other contexts.



Thus, the question is whether the City has the authority under its police powers to adopt the proposed moratorium ordinance. We believe that it does. In that regard, we note the serious health issues associated with electronic cigarette products and paraphernalia and the proliferation of so-called “Vape shops” and the concern that the marketing of electronic cigarette products targets young people, people of color, and people residing in economically depressed areas of the City.

As you know, the City has broad and substantial discretion to protect the health, safety, and welfare of the public and to promote good order and commercial benefits of residents and visitors alike pursuant to the home rule statute, Wis. Stat. § 62.11(5). Under § 62.11(5), the City has the “power to act for the government and good order of the city ... and for the health, safety, and welfare of the public....[and that] the powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.” The legislature has declared that § 62.11(5) “shall be liberally construed in favor of the rights, powers, and privileges of cities to promote the general welfare, peace, good order and prosperity of such cities and inhabitants thereof.” See Wis. Stat. § 62.04.

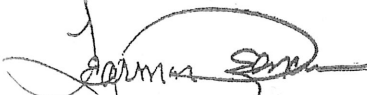
Police power is an inherent attribute of government and allows ordinances to be enacted for the public’s health, safety, and welfare. *State ex rel. Baer v. City of Milwaukee*, 33 Wis. 2d 624, 629, 148 N.W.2d 21 (1967). Municipalities have broad authority through their police powers to protect “the health, safety, and welfare” of their residents. *City of South Milwaukee v. Kester*, 2013 WI App, ¶9, review denied, 2013 WI 87. When a challenge to the exercise of police powers is directed at the legislative means employed, the issue is properly framed as one of substantive due process. *Metropolitan Milwaukee Ass'n of Commerce, Inc. v. City of Milwaukee*, 2011 WI App 45, ¶49. Substantive due process requires that the ordinance have a rational relationship to the purpose or object of the enactment; if it does and the object is a proper one, the exercise of police power is valid. *Id.*

There is a presumption that ordinances, like statutes, are valid. *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis. 2d 203, 208 (1982). If an ordinance is challenged, the challenging party “bears the frequently insurmountable task of demonstrating beyond a reasonable doubt that the ordinance possesses no rational basis to any legitimate municipal objective.” *Id.* at 209. It is an objective determination of whether the ordinance is rationally related to public health, safety, morals, or general welfare. *Id.* at 211. The reasonableness of an ordinance depends upon whether it accomplishes the objects for which the municipality exists. *Id.* at 212. Courts are to “indulge in every presumption possible to sustain an ordinance, and will search for any reasonable basis for its enactment.” *Id.* at 217-8, quoting *State ex rel. Grand Bazaar v. Milwaukee*, 102 Wis. 2d 208 (Ct. App. 1981).

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In conclusion, it is our opinion that the proposed substitute ordinance establishing a 6-month moratorium on businesses selling electronic cigarettes and paraphernalia can be successfully defended as a valid exercise of the City's police powers, and, therefore, that the substitute ordinance would be valid and enforceable if adopted.

Very truly yours,



TEARMAN SPENCER
City Attorney



TODD FARRIS
Deputy City Attorney

STF/MC 283732

..Number

221499

..Version

PROPOSED SUBSTITUTE

..Sponsor

ALD. BROSTOFF

..Title

A substitute ordinance relating to a moratorium on the issuance of certificates of occupancy for establishments selling electronic smoking devices or electronic smoking device paraphernalia.

..Section

200-42.5 cr

..Analysis

This ordinance creates a moratorium, until after August 1, 2023, on the issuance of certificates of occupancy, temporary certificates of occupancy, and conditional certificates of occupancy for establishments selling electronic smoking devices or electronic smoking device paraphernalia.

..Body

Whereas, The Common Council finds that the availability and use of electronic smoking devices may have harmful impacts on the welfare of Milwaukee residents; and

Whereas, The Common Council wishes to review the City's existing regulatory structure for establishments selling electronic smoking devices, and to develop revised regulations that better serve the interests of the residents of Milwaukee; and

Whereas, It is therefore appropriate to declare a moratorium on the issuance of certificates of occupancy for new establishments that sell electronic smoking devices or electronic smoking device paraphernalia; now, therefore

The Mayor and Common Council of the City of Milwaukee do ordain as follows:

Part 1. Section 200-42.5 of the code is created to read:

200-42.5. Certificate Moratorium; Electronic Smoking Device Establishments.

1. PURPOSE. The city, in the exercise of its authority to issue certificates of occupancy and the administration and enforcement of its building and zoning regulations, strives to follow certificate-issuance procedures and practices that best meet the needs of the residents of Milwaukee while allowing property owners to make reasonable use of their properties. The city recognizes that a proliferation of establishments selling electronic smoking devices or electronic smoking device paraphernalia, as defined in s. 106.30.2, particularly when concentrated geographically, can have a negative impact on public health, safety and welfare. Therefore, the city finds that an in-depth examination of its regulations for establishments selling electronic smoking devices or electronic smoking device paraphernalia is timely and necessary. For that purpose, a temporary moratorium on the issuance of certificates of occupancy, temporary certificates of occupancy and conditional certificates of occupancy for establishments selling electronic smoking devices or electronic smoking device paraphernalia is established.

2. DEFINITIONS. In this section:

a. "Electronic smoking retailer" means an establishment selling electronic smoking devices or electronic smoking device paraphernalia that has 10 percent or more of the establishment's floor space dedicated to, or more than 10 percent of the establishment's stock-in-trade consisting of, electronic smoking devices or electronic smoking device paraphernalia.

b. "Department" means the department of neighborhood services or any department to which the department of neighborhood services' functions or duties under this section have been delegated pursuant to a memorandum of understanding.

3. MORATORIUM. a. General. A moratorium on the issuance of certificates of occupancy, temporary certificates of occupancy, and conditional certificates of occupancy for electronic smoking retailers is established commencing on the effective date of this ordinance [city clerk to insert date] and terminating on August 1, 2023.

b. Pending Certificate Applications. An application for a certificate of occupancy for an electronic smoking retailer that has been submitted for approval prior to the effective date of this ordinance shall be reviewed under the existing ordinances in place at the time of application, subject to the requirements and limitations of s. 66.10015, Wis. Stats.

4. ENFORCEMENT. a. Both the department and the police department shall have the authority to inspect any electronic smoking retailer during operating hours and to enforce the provisions of this section.

b. Failure of an establishment to comply with the requirements of this section may constitute grounds for the suspension, revocation or nonrenewal of licenses issued by the city to operate the establishment.

..LRB

APPROVED AS TO FORM

Legislative Reference Bureau

Date: _____

IT IS OUR OPINION THAT THE ORDINANCE
IS LEGAL AND ENFORCEABLE

Office of the City Attorney

Date: _____

..Requestor

..Drafter
LRB177842-3
Gunnar Raasch
2/6/2023