

CITY OF MILWAUKEE

Form CA-43

GRANT F. LANGLEY
City Attorney

RUDOLPH M. KONRAD
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November 1, 2005

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Assistant City Attorneys

Alderman Jim Bohl
City Hall, Room 201

Re: Restricting Sale of Single Cigars

Dear Alderman Bohl:

You posed several questions regarding the legality of restricting the sale of cigars in the City of Milwaukee. You ask whether the City can, at all retail outlets, prohibit the sale of single cigars that were intended by the manufacturer to be sold by the pack. If not, you ask whether the City could prohibit the sale of such single cigars at service stations. Finally, you ask whether the City may restrict the sale of "blunt" cigars in any manner. The state legislature has declared the regulation of tobacco products to be a matter of statewide concern, and has provided that localities may only enact ordinances in strict conformity with state law on the subject. Further, because state law does not particularly regulate the sale of such cigars, a statutory change would be necessary before the City could enact any of the regulations you inquired about.

Currently, the state does not specifically regulate the sale of single cigars or "blunts." Section 134.66 of the Wisconsin Statutes is entitled "Restrictions on sale or gift of cigarettes or tobacco products." Wisconsin Statute § 134.66(2)(e) provides:

No retailer or direct marketer may sell cigarettes in a form other than as a package or container on which a stamp is affixed under s. 139.32(1).

Alderman Jim Bohl
November 1, 2005
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Pursuant to Wis. Stat. § 134.66(1)(a), for purposes of section 134.66, "cigarette," has the same meaning as in section 139.30(1m), specifically:

[A]ny roll of tobacco wrapped in paper or any substance other than tobacco.

Further, it should be noted that Wis. Stat. § 134.66(5) provides, in relevant part:

LOCAL ORDINANCE. A county, town, village, or city may adopt an ordinance regulating the conduct regulated by this section only if it strictly conforms to this section.

The City of Milwaukee has adopted an ordinance in strict conformity with Wis. Stat. § 134.66(2)(e), located at MCO § 106-30-3-e.

At first glance, the definition of "cigarette" used in both Wis. Stat. § 134.66(1)(a) and MCO § 106-30-1-a appears to encompass the cigars you describe. However, Wis. Stat. § 134.66(1)(j) also incorporates the definition of "tobacco products" used in section 139.75(12), namely:

[C]igars; cheroots; stogies; periques; granulated, plug cut, crimp cut, ready-rubbed and other smoking tobacco; snuff; snuff flour; cavendish; plug and twist tobacco; fine cut and other chewing tobaccos; shorts; refuse scraps, clippings, cuttings and sweepings of tobacco and other kinds and forms of tobacco prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking; but "tobacco products" does not include cigarettes, as defined under s. 139.30(1m).

Thus, the definition of "cigarette," which does not specifically include "cigars," and the definition of "tobacco products," which does specifically include "cigars," appear to be mutually exclusive, and section 134.66(2)(e) only applies to the former. In addition, the definitions of "cigarette" and "tobacco products" used in Chapter 139, and referenced in section 134.66 are those definitions which are employed for tax purposes. "Cigarettes" and "tobacco products" are taxed differently, and pursuant to Chapter 139, stamps are not affixed to "cigars" as they

Alderman Jim Bohl
November 1, 2005
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are to "cigarettes." Because there are no stamps affixed to cigars, Wis. Stat. § 134.66(2)(e) and the analogous MCO § 106-30-3-e cannot be construed to prohibit the sale of single "blunt" cigars you describe.

Moreover, because Wis. Stat. § 134.66 deals with restrictions on both the sale of "cigarettes" and the sale of "tobacco products" including cigars, and because section 134.66(5) provides that any ordinance "regulating the conduct regulated by this section" may only be adopted if it "strictly conforms" to section 134.66, we must conclude that the City has no power to either restrict the sale of single cigars, restrict the location of the sale of single cigars, or restrict the sale of "blunt" cigars in any manner.

Local attempts to regulate the field of tobacco sales in a more stringent manner than state law have not been successful. For instance, the court of appeals struck down a local ordinance which banned self-service displays of tobacco, a subject on which state law was silent, concluding that the legislature declared tobacco distribution to be a matter of statewide concern calling for uniform regulation. *U.S. Oil, Inc. v. City of Fond du Lac*, 199 Wis. 2d 333, 342-43 (Ct. App. 1996). The court wrote: "The overall depth of legislative coverage in the field of tobacco sales informs us that the 'strict conformity' language was intended to stop local rulemaking wherever the state law was silent, not enable it." *Id.* at 350. Thus, we must conclude that if the City were to enact any of the regulations you inquired about, they would not be legal and enforceable.

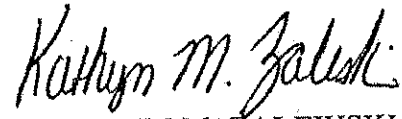
We hope this answers your questions. Should you require any additional information, do not hesitate to contact us.

Alderman Jim Bohl
November 1, 2005
Page 4

Very truly yours,



~~GRANT E. LANGLEY~~
City Attorney



KATHRYN M. ZALEWSKI
Assistant City Attorney

KMZ:kmz
c: Ronald D. Leonhardt, City Clerk
1033-2005-2323:98285

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Assistant City Attorneys

October 13, 2006

Martin G. Collins
Commissioner, Department of Neighborhood Services
Municipal Building, Room 104

Re: Sale of Individually Wrapped Cigars

Dear Commissioner Collins:

Our office was recently advised that BOZA has been conditioning the grant of Special Use permits for the operation of motor vehicle filling stations on the following:

That individually sold cigars, cigarette wrapping paper, Black and Mild cigars, Blunt cigars, glass tubes (i.e. type associated with individually sold flowers) and any other item deemed to be drug paraphernalia not be sold on the premises.

We were made aware of the condition by General Counsel for General Cigars Company, who alleged the condition is contrary to state law and threatens legal action.

In an opinion dated November 1, 2005, our office opined that the City may not restrict the sale of single cigars or blunts because the state has preempted the regulation of tobacco products. (Copy of opinion attached.) In the interim, the state enacted 2005 Wis. Act 116, which enabled the City to proscribe the possession and delivery of drug paraphernalia by adults, (in addition to minors as was previously allowed). MCO § 106-36 was subsequently amended to do just that.

Martin G. Collins
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The expansion of the City's ability to regulate drug paraphernalia does not, however, expand the City's authority to regulate the sale of cigars or blunts. The state statutes regarding drug paraphernalia exclude "[a]ny items, including pipes, papers and accessories, that are designed for use or primarily intended for use with tobacco products." Wis. Stat. § 961.571(1)(b)2. Section 106-36-3-e-2 contains an almost verbatim exclusion to this effect. As explained in our November 2005 opinion, cigars and blunts constitute "tobacco products." Although the statute does not specifically exclude "tobacco products," but rather excludes items "designed for use...with tobacco products," the implication is clear. Thus, the current condition set forth is contrary to state law and is unenforceable, except with respect to glass tubes.

We informed BOZA of our conclusion and further advised that BOZA could condition the grant of a Special Use on the requirement that the service station comply with Wis. Stat. § 961.571 and MCO § 106-36, but noted that the ordinance and statute do not proscribe the sale of "individually sold cigars, cigarette wrapping paper, Black and Mild cigars, [or] Blunt cigars," nor may these items otherwise be regulated by the City for the reasons set forth in our prior opinion.

Based on our advice, and after review of the pertinent laws, BOZA has amended the condition to provide:

That glass tubes (i.e. type associated with individually sold flowers) and any other item deemed to be drug paraphernalia as defined by S. 106-36 of the Milwaukee Code of Ordinances or Section 961.571 of the Wisconsin State Statutes not be sold on the premises.

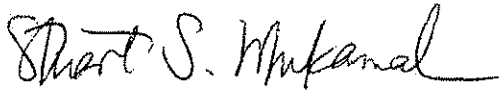
We believe this amended condition, which does not implicate the sale of individual cigars or cigarette wrapping paper, is enforceable. We further suggest that the holders of Special Use permits that have been conditioned on the prior, unenforceable provision be notified that the condition will not be enforced in the case of "cigars, cigarette wrapping paper, Black and Mild cigars, [or] Blunt cigars." If you have any questions, please do not hesitate to contact us.

Martin G. Collins
October 13, 2006
Page 3

Very truly yours,



GRANT F. LANGLEY
City Attorney



STUART S. MUKAMAL
Assistant City Attorney



KATHRYN M. ZALEWSKI
Assistant City Attorney

KMZ:kmz
c: Clifton Crump
1049-2006-2591:110857

CITY OF MILWAUKEE

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Assistant City Attorneys

November 2, 2004

Jim Copeland, Manager
License Division
City Hall, Room 105

Ronald D. Leonhardt
City Clerk
City Hall, Room 205

Re: Inquiry as to whether or not one holding a power of attorney may make an application on behalf of a principal, who is not in the country, for a retail cigarette and tobacco product retailer's license

Dear Messrs. Copeland and Leonhardt:

You inquire as to whether or not one holding a power of attorney as an attorney-in-fact may validly make a renewal application on behalf of a principal currently out of the country. We are pleased to be able to respond.

Wisconsin Statutes § 134.65(1); (1m); (2), (3), (4) and (5) provide as follows:

Cigarette and tobacco products retailer license. (1) No person shall in any manner, or upon any pretense, or by any device, directly or indirectly, sell, expose for sale, possess with intent to sell, exchange, barter, dispose of or give away any cigarettes or tobacco products to any person not holding a license as herein provided or a permit under ss. 139.30 to 139.41 or 139.79 without first obtaining a license from the clerk of the city, village or town wherein such privilege is sought to be exercised.

(1m) A city, village, or town clerk may not issue a license under sub. (1) unless the applicant specifies in the license application whether the applicant will sell, exchange, barter, dispose of, or give away the cigarette or tobacco products over the counter or in a vending machine, or both.

(2) (a) Except as provided in par. (b), upon filing of a proper written application a license shall be issued on July 1 of each year or when applied for and continue in force until the following June 30 unless sooner revoked. The city, village or town may charge a fee for the license of not less than \$5 nor

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Jim Copeland
Ronald D. Leonhardt
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more than \$100 per year which shall be paid to the city, village or town treasurer before the license is issued.

(b) In any municipality electing to come under this paragraph, upon filing of a proper written application a license shall be issued and continue in force for one year from the date of issuance unless sooner revoked. The city, village or town may charge a fee for the license of not less than \$5 nor more than \$100 per year which shall be paid to the city, village or town treasurer before the license is issued.

(3) Each such license shall name the licensee and specifically describe the premises where such business is to be conducted. Such licenses shall not be transferable from one person to another nor from one premises to another.

(4) Every licensed retailer shall keep complete and accurate records of all purchases and receipts of cigarettes and tobacco products. Such records shall be preserved on the licensed premises for 2 years in such a manner as to insure permanency and accessibility for inspection and shall be subject to inspection at all reasonable hours by authorized state and local law enforcement officials.

(5) Any person violating this section shall be fined not more than \$100 nor less than \$25 for the first offense and not more than \$200 nor less than \$25 for the 2nd or subsequent offense. If upon such 2nd or subsequent violation, the person so violating this section was personally guilty of a failure to exercise due care to prevent violation thereof, the person shall be fined not more than \$300 nor less than \$25 or imprisoned not exceeding 60 days or both. Conviction shall immediately terminate the license of the person convicted of being personally guilty of such failure to exercise due care and the person shall not be entitled to another license hereunder for a period of 5 years thereafter, nor shall the person in that period act as the servant or agent of a person licensed hereunder for the performance of the acts authorized by such license. [Emphasis added].

We note that nothing in Wis. Stat. § 134.65 specifically addresses the right of an agent of the license applicant to make application.

The requirements of Wis. Stat. § 134.65(1) have been adopted by the Milwaukee Common Council in § 106-30 of the Milwaukee Code of Ordinances dealing with the sale of tobacco products. In relevant portion § 84-43-2 of the Milwaukee Code of Ordinances provides:

2. LICENSE REQUIRED. It shall be unlawful for any person, firm or corporation in any manner, or upon any pretense, or by any device, directly or

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indirectly, to sell, exchange, barter, dispose of or give away, any cigarettes or tobacco products without first obtaining a license therefor.

Section 84-43-3 of the Milwaukee Code of Ordinances provides:

3. LICENSE APPLICATION; ISSUANCE. An application for a license shall be filed in writing with the city clerk and require the name of the person, firm or corporation, the address of the premises where the business is to be conducted and a statement by the applicant indicating whether he or she intends to sell, exchange, barter, dispose of, or give away cigarettes or tobacco products over the counter, in a vending machine, or both. Every license shall name the licensee and the place wherein he or she is authorized to conduct such business. Each license shall be issued for a period of one year from the date of issuance unless sooner revoked for a violation of this section or other pertinent sections of the code. [Emphasis added].

We note that nowhere in § 84-43 of the Milwaukee Code Ordinances has specific allowance been made for an attorney-in-fact of a principal to make application for the license.

Wisconsin Statutes § 243.10 contains the form for the Wisconsin basic power of attorney for finances and property. That form specifically states that “. . . some 3rd parties or some transactions may not permit use of this document. . .”

First, it is our opinion that the City is not required to accept an application from an attorney in fact.


We could find no case directly on point as to whether a license is a type of property that can be acquired by use of a power of attorney, even if the City would like to conduct business in this manner.

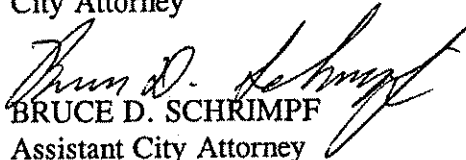
We are of the opinion that licensing is a matter that is highly personal to the licensee. The licensee is required to have a police department check and be fingerprinted. In addition, the licensee has to be held to standards the violation of which can result in criminal action as to the licensee. For these reasons we believe that the City of Milwaukee could require that applications for licenses must be actually executed and applied for the actual licensee and not

Jim Copeland
Ronald D. Leonhardt
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an attorney in fact. In order to accomplish such a change we also believe that it should be made a part of the substantive ordinance.

Very truly yours,


GRANT E. LANGLEY
City Attorney


BRUCE D. SCHRIMPF
Assistant City Attorney

BDS:wt:80271
1055-2004-1294

0550

CITY OF MILWAUKEE

Form CA-43a

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ORDINANCE ENFORCEMENT DIVISION

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749 W. State Street
Milwaukee, Wisconsin 53233
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June 22, 2004

Ms. Patricia Fauteck, Tobacco Control Program Coordinator
Milwaukee Health Department
1230 West Grant Street
Milwaukee, WI 53215

Re: Retail Sale of Tobacco Products to Minors in Milwaukee

Dear Ms. Fauteck:

In a communication dated May 24, 2004, you requested an opinion as to whether the sale of a single cigarette by a retailer to a minor would constitute a violation of the Milwaukee Code of Ordinances.

Section 106-30 of the Milwaukee Code of Ordinances prohibits a retailer from selling cigarettes in any form other than as a package or container on which a stamp is affixed pursuant to the provisions of §139.32(1), Stats. This provision of Wisconsin State Law requires that a tax stamp prepared by the Secretary of Revenue for Wisconsin, be attached to each package in which cigarettes are packed, prior to the first sale within the state. Therefore, it is a violation of §106-30-3-e of the Milwaukee Code of Ordinances to sell a single cigarette to anyone irrespective of that individual's age.

In addition, §106-30-2 of the Milwaukee Code of Ordinances prohibits a retailer from selling or giving to any person under the age of 18 any cigarette or tobacco product, except that a person under the age of 18 may purchase or possess cigarettes or tobacco products for the sole purpose of resale in the course of employment during his or her

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Ms. Patricia Fauteck

June 22, 2004

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working hours if employed by a retailer. As a result, the prohibition imposed upon retailers would not extend to the sale of tobacco products to an individual under the age of 18 who was employed by a retailer.

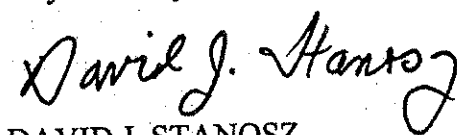
Therefore, it is our opinion that any retailer who sells a single cigarette to an individual under the age of 18 could be issued two citations, one for a violation of §106-30-2 MCO, and a second for a violation of §106-30-3-e MCO.

The penalty provision for a violation of §106-30 MCO is located in §106-30-5 MCO, which provides for a penalty range of \$0-\$500 if the person has not committed a previous violation within 12 months of the date of the violation, or in the alternative, not less than \$200 nor more than \$500 if the person has committed a previous violation within 12 months of the date of the violation.

If you have any further questions regarding this matter, please feel free to contact our office.

Very truly yours,


GRANT E. LANGLEY
City Attorney


DAVID J. STANOSZ
Assistant City Attorney

DJS/ms

cc: Deputy Chief Dale Schunk, Milwaukee Police Department

1032-2004-1586/82206

0279

CITY OF MILWAUKEE

Form CA-43a

GRANT F. LANGLEY
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August 9, 2002

Dr. Seth Foldy, Commissioner of Health
841 North Broadway, Room 315
Milwaukee, WI 53202

RE: ENFORCEMENT OF STATUTORY RESTRICTIONS ON THE SALE OF
TOBACCO PRODUCTS TO AND THE POSSESSION OF TOBACCO
PRODUCTS BY PERSONS UNDER THE AGE OF 18

Dear Dr. Foldy:

In correspondence dated June 10, 2002, you requested an opinion regarding the enforcement of the recently amended Wisconsin Statute restricting the sale of tobacco products to persons under the age of 18, and the corresponding prohibition on the purchase or possession of tobacco products by persons under the age of 18. You ask whether information collected by a minor purchasing tobacco products can be used to issued a citation to the seller, and under what conditions.

Section 134.66, Stats., imposes restrictions on the sale or gift of cigarettes and tobacco products. In addition, sec. 254.92, Stats., prohibits the purchase or possession of cigarettes or tobacco products by a person under the age of 18. Section 254.916, Stats., as recently amended by 2001 Wisconsin Act 75, both regulates and limits the manner in which investigations of tobacco distributors are conducted. Both sec. 134.66, Stats., and sec. 254.92, Stats., expressly authorize cities to enact ordinances regulating tobacco products if the ordinance is in strict conformity with the state statute.

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The City of Milwaukee has enacted sec. 106-30 of the Milwaukee Code of Ordinances which prohibits the sale of tobacco products to persons under the age of 18, and sec. 106-30.5, which prohibits the purchase or possession of tobacco products by persons under the age of 18, with the exception of minors who are working for a retailer, and minors who are participating in an investigation under sec. 254.916, Stats.

The use of persons under the age of 18 to assist in the investigation of distributors of tobacco products is strictly regulated by the requirements of sec. 254.916, Stats., the pertinent portion of which reads as follows:

254.916(1)(c).

(c) No retailer may be subjected to an unannounced investigation more than twice annually unless the retailer is found to have violated s. 134.66 (2) (a) or (am), or a local ordinance adopted under s. 134.66 (5), during the most recent investigation.

254.916(2).

(2) With the permission of his or her parent or guardian, a person under 18 years of age, but not under 15 years of age, may buy, attempt to buy or possess any cigarette or tobacco product if all of the following are true.

254.916(2)(a).

(a) The person commits the act for the purpose of conducting an investigation under this section.

254.916(2)(b).

(b) The person is directly supervised during the conducting of the investigation by an adult employee of a governmental regulatory authority.

254.916(2)(c).

(c) The person has prior written authorization to commit the act from a governmental regulatory authority or a district attorney or from an authorized agent of a governmental regulatory authority or a district attorney.

254.916(3).

(3) All of the following, unless otherwise specified, apply in conducting investigations under this section.

254.916(3)(a).

(a) If questioned about his or her age during the course of an investigation, the minor shall state his or her true age.

254.916(3)(b).

(b) A minor may not be used for the purposes of an investigation at a retail outlet at which the minor is a regular customer.

254.916(3)(c).

(c) The appearance of a minor may not be materially altered so as to indicate greater age.

254.916(3)(d).

(d) A photograph or videotape of the minor shall be made before or after the investigation or series of investigations on the day of the investigation or series of investigations. If a prosecution results from an investigation, the photograph or videotape shall be retained until the final disposition of the case.

254.916(3)(e).

(e) A governmental regulatory authority shall make a good faith effort to make known to the retailer or the retailer's employee or agent, within 72 hours after the occurrence of the violation, the results of an investigation, including the issuance of any citation by a governmental regulatory authority for a violation that occurs during the conduct of the investigation. This paragraph does not apply to investigations conducted under a grant received under 42 USC 300x-21.

254.916(3)(f).

(f) Except with respect to investigations conducted under a grant received under 42 USC 300x-21, all of the following information shall be reported to the retailer within 10 days after the conduct of an investigation under this section.

Dr. Seth Foldy, Commissioner of Health
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Page 4

254.916(3)(f)1.

1. The name and position of the governmental regulatory authority employee who directly supervised the investigation.

254.916(3)(f)2.

2. The age of the minor.

254.916(3)(f)3.

3. The date and time of the investigation.

254.916(3)(f)4.

4. A reasonably detailed description of the circumstances giving rise to a violation, if any, or, if there is no violation, written notice to that effect.

In any instance where a Milwaukee Municipal Citation is issued as a result of an investigation conducted by the health department, if the defense raises an issue concerning the legality of the investigation, it will be necessary for our office to present evidence to the court regarding compliance with the above requirements.

You also ask whether such a minor could be in violation of the law. Sec. 254.92(2)(b), Stats., states that a person under the age of 18, but not under the age of 15 may purchase, attempt to purchase or possess cigarettes or tobacco products in the course of an investigation under sec. 254.916, Stats. Therefore, individuals, ages 15-17 may purchase tobacco products in the course of an investigation and not be held to be in violation of either state law or a local ordinance enacted in strict conformity therewith.

You ask whether the citations can be prosecuted in Municipal Court. In general, sec. 755.045, Stats., indicates that municipal courts have exclusive jurisdiction over any action in which a municipality seeks to impose forfeitures for violations of municipal ordinances. Therefore, in those instances where a Milwaukee Municipal Citation is issued to an individual for a violation of secs. 106-30 or 106-30.5 of the Milwaukee Code of Ordinances, such citations with rare exception are to be filed as returnable to Milwaukee Municipal Court.

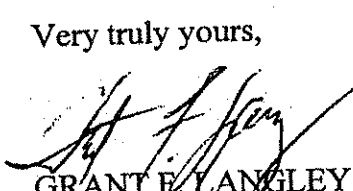
If your department wishes to issue citations for violations of secs. 106-30 and 106-30.5, it will be necessary for the Common Council to adopt an ordinance designating you to perform that function. Pursuant to sec. 50-25 of the Milwaukee Code of Ordinances, as

Dr. Seth Foldy, Commissioner of Health
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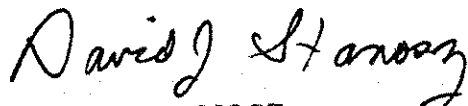
well as sec. 800.02(2), Stats., police officers are currently authorized to issue citations for all ordinance violations. As a result, municipal citations could be issued by the Milwaukee Police Department for violations of secs. 106-30 and 106-30.5 of the Milwaukee Code of Ordinances and they would be prosecuted in Municipal Court.

As always, if you have any additional questions or concerns, please feel free to contact our office.

Very truly yours,



GRANT E. LANGLEY
City Attorney



DAVID J. STANOSZ
Assistant City Attorney

DJS/ms
1084-2002-1786/55971