CITY OF MILWAUKEE

Form CA-43

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Honorable Common Council
City Hall, Room 205

Re: Legality and enforceability of File No. 011725, Substitute 5, referring to secondhand motor vehicle dealers and auto wreckers licenses

Dear Council Members:

The above-referenced file has been sent to us for a review as to legality and enforceability. Section 93-1, Milwaukee Code of Ordinances ("MCO") identifies and defines the term "auto wrecker", "bicycle", "business", motor vehicle", and "retail", "secondhand", "used", and "wholesale." Section 93-5, MCO, requires that licenses are required for any person, firm, or corporation engaging in the business of buying, selling, exchanging or dealing in used or secondhand motor vehicles, bicycles and used or secondhand parts of motor vehicles and bicycles and used secondhand tires and batteries or the business of auto wrecking without first having obtained a license.

The licensing scheme requires an application, an investigation by the Chief Police, the Commissioner of Neighborhood Services, and the Commissioner of Health, all of whom are required to report their findings within 15 days to the Utilities and Licenses Committee ("U&L"). (Section 93-7-4, MCO).

One purpose of this legislation is to allow for neighborhood objections to initial grants or renewals of licenses. Yet, no proceeding for identifying and notifying potentially affected neighbors seems to have been created.

Section 93-9, MCO, of the proposal sets forth the qualifications of licensees and confines itself essentially to a person who has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the particular licensed activity. No other qualifications are set forth. As will be seen later, that will also cause problems. When one reviews the proposed § 90-11-3-a, one

finds more reasons are listed as a basis for denial than are listed here for qualifications. We suggest that the two sections be reconciled.

Specifically, we would suggest, and borrowing concepts from other provisions of the codes of ordinances regarding other licenses, that the Common Council may want to consider whether or not the individual has paid the license fees, whether or not untruthful statements have been made on the application, whether or not the person possesses the necessary experiential qualifications and background to engage in the business at hand as grounds for denial of a license or renewal of a license. The only thing that seems to be addressed for qualifications of licensees are whether or not the person has an arrest or conviction record. While useful, such a history is not always indicative of an inability to hold such a license.

Section 93-11, MCO, sets forth the procedure for providing notice to the license applicant if there is a possibility that the license will not be granted, and an opportunity for hearing.

We note that the recommendations center on the following areas of inquiry:

> 93-11-3-a. The recommendations of the committee regarding the applicant shall be based on evidence presented at the hearing. Probative evidence concerning whether or not the license should be granted may be presented on the following subjects:
>
> a-1. Whether or not the applicant meets the statutory and municipal requirements.
> a-2. The appropriateness of the location and premises to be licensed.
> a-3. Whether such location will create undesirable neighborhood problems.
> a-4. Whether there is an overconcentration of businesses licensed under ch. 93 in the neighborhood such that the concentration will have an adverse impact upon the public health, safety and welfare of the neighborhood. Among factors to be considered in terms of impact are litter, noise and traffic.
> a-5. Whether or not the applicant has been charged with or convicted of any felony, misdemeanor, municipal offense or other offense, the circumstances of which substantially relate to the licensed activity.
> a-6. Whether or not the applicant has had an application denied, pursuant to s. 218.0116, Wis. Stats., as amended.
> a-7. Any other factors which relate to the public health, safety and welfare of the community.

We suggest that if the committee is entitled to make recommendations upon all those subjects, then sec. 93-9, MCO, entitled "Qualifications for Licenses.", should be amended to include those items upon which the committee may make a recommendation. Otherwise there is a basis for denial that is not part of the qualifications for the grant of the license.

The provisions set forth above substantially replicate themselves in sec. 93-13, MCO, regarding renewals of licenses and sec. 93-15, MCO, regarding revocations or suspensions of licenses. The remainder of the proposal substantially replicates the current provisions of Chapter 93, MCO.

We concentrate our attention on the proposed sec. 93-11-3-a-6, MCO, regarding sec. 218.0116, Wis. Stats. [Incorrectly cited in the proposal as § 218.006, Wis. Stats.].

We read this provision as the basis for committee and council action which would have the effect of not granting, or conceivably non-renewing or revoking a dealers license for activity for which the dealer may have been found guilty under sec. 218.0116, Wis. Stats.

Chapter 218, Wis. Stats., is entitled "Finance Companies, Auto Dealers, Adjustment Companies and Collection Agencies." The chapter sets up and sets forth a comprehensive scheme for licensing and regulating automobile dealers as established by the State of Wisconsin. Section 218.0116, Wis. Stats. sets forth those bases upon which a license issued by the State of Wisconsin could be denied, suspended or revoked. Those reasons include:

(1) proof of unfitness (a),
(2) material misstatement in application for a license (am),
(3) filing a materially false or fraudulent income or franchise tax return as certified by the Department of Revenue (b),
(4) willful failure to comply with any provision of ss. 218.0101 to 218.0163 or any rule or regulation promulgated by the licensor under sec. 218.0101 to 218.0163(bm),
(5) Wis. Stats., willfully defrauding any retail buyer, lessor or prospective lessee to the buyer's lessee's or prospective lessee's damage (c),
(6) willful failure to perform any written agreement with any retail buyer, lessee or prospective lessee (cm),
(7) failure or refusal to furnish and keep in force any bond required (d),
(8) having made a fraudulent sale, consumer lease, prelease agreement, transaction or repossession (dm),
(9) fraudulent misrepresentation, circumvention or concealment through whatsoever subterfuge or device of any of the material particulars or the nature thereof

required hereunder to be stated or furnished to the retail buyer, lessee or prospective lessee (e),

(10) employment of fraudulent devices, methods or practices in connection with compliance with the statutes [of the State of Wisconsin] with respect to the retaking of goods under retail installment contracts or consumer leases and the redemption and resale or subsequent lease of the retaken goods (em),

(11) having engaged in any unconscionable practice relating to the licensed business activity (f),

(12) having charged a finance charge in excess of the rate permitted by s. 422.201(3), Wis. Stats. (fm),

(13) having sold a retail installment contract or consumer lease to a sales finance company that is not licensed under ss. 218.0101 to 218.0163 (g),

(14) having violated any law relating to the sale, lease, distribution or financing of motor vehicles (gm),

(15) as a manufacturer, coercing or attempting to coerce any motor vehicle dealer to order any commodity or service and pay the same that the individual has not ordered (h),

(16) as a manufacturer attempting to induce or coerce any motor vehicle dealer to enter into any agreement with the manufacturer by threatening to cancel any franchise existing between the manufacturer and the dealer (hm).

The provisions of sec. 218.0116, Wis. Stats., are amplified and expanded upon in Chapters 138, 139, 140, and 142, Wisconsin Administrative Code. Additionally, Chapters 341 and 342, Wisconsin Statutes deal with the licensing and titling of motor vehicles. Those chapters also set forth responsibilities of motor vehicle dealers. None of the foregoing matters are matters purely of local concern.

It is clear to us that the State of Wisconsin has, as a result of the creation of Chapters 218, 341 and 342 Wis. Stats., and Chapters 138, 139, 140, and 142 of the Wisconsin Administrative Code established the comprehensive system for the licensing and regulation of automotive dealers. Those matters are clearly matters of state-wide and not merely local concern.

A municipality's ability to regulate matters of state-wide concern is limited. As a the Wisconsin Supreme Court observed more than six decades ago.

> "municipalities may enact ordinances in the same field and on the same subject covered by state legislation where such ordinances do not conflict with, but

> rather complement, the state legislation." *Fox v. Racine*, 225 Wis. 542, 546, 275 N.W. 513 (1937) (quoting *Milwaukee v. Childs Co.*, 195 Wis. 148, 151, 217 N.W. 703 (1928)). Therefore, wrote the *Fox* court, where "'the state has entered the field of regulation, municipalities may not make regulation inconsistent therewith' "because "a municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required, or authorize what the legislature has expressly forbidden." *Fox*, 225 Wis. at 545, 275 N.W. 513; (quoting *Hack v. Mineral Point*, 203 Wis. 215, 219, 221, 223 N.W. 82 (1930)). The principle announced in *Fox* "has been the rule in Wisconsin and still is" the rule when addressing the question of whether state legislation preempts a municipal ordinance. *Anchor*, 120 Wis. 2d at 397, 355 N.W.2d 234; see also *Wisconsin Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 433 n. 7, 293 N.W.2d 540 (1980). Summarizing the court's preemption analysis, the *Anchor* court outlined four tests to determine when a state statute invalidates a local ordinance. A municipal ordinance is preempted if (1) the legislature has expressly withdrawn the power of municipalities to act; (2) it logically conflicts with state legislation; (3) it defeats the purpose of state legislation the spirit of state legislation; or (4) it violates the spirit of state legislation. Should any one of these tests be met, the municipal ordinance is void.

(*DeRosso Landfill Company, Inc. v. City of Oak Creek*, 200 Wis. 2d 642, 651, 547 N.W.2d 770 , 773 (1996) (footnotes deleted).

The current provision which is entitled "Section 93-3-a-6" allows for the possibility of the Milwaukee Common Council to, in effect, "second guess" the actions of the Department of Revenue, the Department of Commerce, and the Department of Transportation to deal with the motor vehicle dealer in a particular way under a given set of circumstances. For example, if a dealer received a suspension of its license as a result of action brought by one of those agencies under Chapter 218, it is entirely possible for the Common Council to refuse to renew, suspend more severely, or even revoke the individual's license for the same or similar activity which was the subject of an action brought under Chapter 218. That, we believe, is not intended by the legislature in adopting Chapter 218, and logically conflicts with the state legislation.

As a consequence, we are convinced that that portion of the proposed sec. 93-3, MCO, is in conflict with state law and would not be legal or enforceable. Additionally, we highly

recommend that secs. 93-11-3-a and 93-9, MCO, be reconciled, and a system of notifying potentially affected neighbors be created.

Sincerely,

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