

**COMMITTEE ON HEALTH
AD HOC COMMITTEE
MARSHFIELD, WISCONSIN
MINUTES OF SEPTEMBER 8, 2010**

Meeting called to order by Chairperson Feddick at 5:32 p.m., in the Council Chambers of City Hall Plaza.

PRESENT: Alderpersons Feddick, Spiros and Wagner, Marvin Duerr, Chris Jockheck, Andy Martin and Dr. Steven Kirkhorn

ABSENT: None

ALSO PRESENT: City Attorney Hutchinson, Deputy Clerk Panzer, David Wille, Lois Greehling and Liz Welter

Chairperson Feddick asked City Attorney Hutchinson to answer the three questions that he was going to research from the last meeting.

Question 1: Does the definition of mass transit under State Statutes 340.01 (28m) include a taxi cab?

Answer: Yes.

Question 2: Can the City prescribe a distance which a smoking facility may be separated from the primary establishment by adding a provision to the City's fire code?

Answer: He discussed this issue and the next one with the League of Wisconsin Municipalities Attorney's office and the indication was no, because you are really just going around the door to do the same thing that is already prescribed in the statute. You can't use that vehicle to try to say a smoking structure is okay.

Question 3: Can the City adopt a more aggressive fine structure than that provided in the State Statute?

Answer: It appears that there really is no clear answer whether the City can do this. At the last meeting, he said that he thought the State preempted our authority to do so. The interpretation that he got both from Attorney Wolfgram and from the League of Wisconsin Municipalities Attorney's office is that the City could well be subject to a legal challenge if we had a fine structure that exceeded that provided in the state statute. The challenge might be predicated upon the concept that it is more penal in nature than simply complying with the purpose of this section in which the language in subsection (4m) from the state statute says we may adopt our own ordinance, but in doing so we must comply with the state statute and the purpose behind the state statute is to protect the health and comfort of the public and the opinion he got is that perhaps a more serious fine structure goes beyond that and the question is do you really need a greater fine structure to comply with the purpose of the statute and so forth.

Chairperson Feddick thanked City Attorney Hutchinson for his research and time he put into helping the committee dissect this issue.

Jockheck expressed concerns about the fact that no where in either the City Ordinance or the state law does it address what kind of structure can be put up for the purpose of providing an area for smoking. He also expressed concerns about the enforcement issue of who in terms of inspection makes the final decision on compliance of these type buildings. He said he thought that was one of the things that this committee was going to address, because there was a lot of confusion from the tavern owners, the restaurant owners and the other retail establishments as to what sort of structure they could put up.

Aldersperson Wagner said the ordinance that we are going to pass is going to become part of Chapter 11 of the Municipal Code which addresses public nuisances and generally in speaking, the Police Department has the right to enforce all the public nuisances in the City. When it comes to construction

if something is being built, the Building Inspector will be required to issue a permit for it. He mentioned that he received a complaint last Thursday from a local tavern owner saying that the Building Inspector is currently refusing to issue permits until we pass something, because he doesn't know what we are going to pass.

Alderson Spiros said the issue comes back to the fact that we don't want somebody constructing something that is going to permit smoking in places that are designated to be nonsmoking. That should be the goal, the health and welfare of the public and the Police Department is probably the best to enforce that.

Duerr said he doesn't know if we have to define anything. We have a building code. We have law enforcement officers that are sworn to uphold the law. This is a state law and the law says you can't smoke an enclosed public places.

Jockheck said there were a number of instances where a tavern owner constructed something and then was told he had to take it down, so clearly there was a problem and it isn't being addressed here.

Alderson Wagner explained what happened before the state law took effect. The point is there are multiple codes they have to meet and state law is much, much more specific than what we had before. The Fire Chief and the Police Department just want something specific enough that they can enforce. Two substantial walls with a roof are much better than a building.

Duerr said if you mirror the state law as your ordinance you would have everything covered. You have a fire code, a building code, enforcement and you have a safe environment for the public.

CH10-01 Motion by Spiros, second by Duerr to recommend to the Common Council that the City adopt the state law as our local City Ordinance.

Martin asked if there would be clear cut answers for a business owner who goes to the City for a building permit for a facility for his smoking patrons.

Duerr said the only confusion would be between the Department of Commerce and municipalities of what is considered a substantial wall.

Alderson Spiros said the state law really does define things a lot better than what the City did, so it is going to make it a little bit more black and white than when you take a look at the two ordinances together. From that standpoint it is a good thing. As time goes on it will define things a little more as cities ask questions, challenge things and things come out of the State. We just have to be careful, because there a lot of things that we still can't do as far as identifying this or identifying that, because it doesn't give us the right as far as distances and things. Even though he would like to make it a little tougher than what it is; it doesn't give us the right in some of those areas.

Jockheck said his problem with the state law is that you can not define a reasonable distance.

Alderson Wagner said there is absolutely no case in which the City code was stricter or could be made stricter than the state code, therefore the state code is what we need to comply with. If we adopt the state code we can't define a reasonable distance. Under our code we couldn't do it either. If we didn't adopt the state code we couldn't adopt another code that said a reasonable distance is 15 feet, 25 feet or whatever. We are absolutely prohibited. Whether we adopt this code or not, it is the law of the land and we can't define that distance. The only thing he wanted to amend into it was something about the windows in a substantial wall not being able to be closed and under (id) of the State Statutes which says "Substantial wall" means a wall with no opening or with an opening that either does not allow air in

from the outside or is less than 25 percent of the wall's surface area. Unfortunately, we are stuck with the state law as being the absolute limits of what we can and can not do. He disagreed with Marvin Duerr on one point. He doesn't like the idea of bar owners being able to build a structure that they could put big screen TVs and furniture in and then be able to close up and lock up. If they do have windows that are capable of closing on two of the walls to meet the state code and then two of the walls don't; anytime a police officer drives by and sees those windows closed he is going to go in there and check to see if there is smoking in that place, because as soon as they close those windows up it becomes an indoor place. So that is going to give the Police Department a parameter for enforcement that they didn't have before.

Dave Wille expressed concerns about the ambiguity in the state law. He wondered if a business would be allowed to carve out a corner of their building and make 25 percent of the exterior walls window so that it then would be allowed indoor smoking and if there was a way to clear up the ambiguity in the state bill.

City Attorney Hutchinson said one of the things that a committee the City worked on earlier tried to do is say that the 25 percent opening may not be closeable at anytime, because the argument is if you have a window there and it is closed that is a substantial wall. It seemed to him at the time that this was being discussed, that the 25 percent opening has to be open all the time or you simply have converted it to a substantial wall. He thinks it is possible for the City to define that opening and say that it has to be open all the time. The argument is that it is perhaps a little more stringent. There is no question that the opening can be closed. His opinion is that you want to keep that opening there to avoid being a substantial wall and closing the place in. He doesn't think that under the state statutes it prohibits someone from taking a corner of their building, cutting out two openings in the outside walls and putting in two substantial walls inside, so they have a smoking area. It does not have more than two substantial walls, it has a roof over it, but in theory it is closed off from the rest of the facility.

Alderspersion Spiros said as tight as everybody thought our local ordinance was. It is really not. When you look at it versus the state law as good as we all thought this was and what we voted for was this great smoking ordinance when he looks at it versus the state law it is terrible. It is not well defined. It is truly not stronger. It is not better. The state law is better and that is the one we need to go with.

Alderspersion Wagner asked if smoking is prohibited under the state law at Beell Stadium and the grandstands at the Fair.

City Attorney Hutchinson said the sports arena is defined in the state statute and it does mean any stadium. At the Fairgrounds, separate that question; it is an open area, it is not enclosed, smoking might be permitted however, we would probably want to look at whether there is something in the State Statutes on Municipal property, because there is no smoking allowed in certain municipal owned buildings. He would have to look at it a little more carefully to see if it addresses outdoor smoking at the Fairgrounds.

Vote on motion **CH10-01**. Ayes-7

Motion carried

Motion by Spiros, second by Duerr to adjourn at 6:32 p.m.

Motion Carried

Lori A. Panzer
Deputy City Clerk