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## League of WI Municipalities

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**June 2010 Note**

### **Holes in Statewide Smoking Ban Cause Confusion: Municipal Ordinances Can Clear up Ambiguity**

**By Curt Witynski, Assistant Director**

The new statewide smoking ban that takes effect July 5, 2010 may allow smoking in some indoor areas. An ambiguous definition of "enclosed place" in the new state law has caused confusion about whether certain indoor areas are subject to the prohibitions on smoking. Municipalities and bar owners may disagree over how to interpret the law. Under the new state law, communities retain the ability to enact more stringent indoor no smoking ordinances. Communities may wish to adopt an ordinance that more clearly defines the indoor areas in which smoking is prohibited.

#### **Where Smoking is Prohibited by the New State Law**

2009 Wisconsin Act 12 prohibits smoking in certain listed "enclosed places", including restaurants, taverns, and any other enclosed place of employment or public place.

Act 12 defines an "enclosed place" as a structure or area that has a roof and more than two substantial walls. The legislature recently changed the definition of "substantial wall" to mean "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."

#### **Where the Confusion Lies**

These two key definitions are confusing and could be interpreted to permit smoking in areas thought by many to be indoor areas subject to the ban. For example, some might argue that a room with four walls in which 25 percent of two of the walls is covered by windows that are cracked open does not come within the definition of enclosed place and is therefore open to smoking.

Similarly, a business with sliding doors and large windows on two of its four walls could argue that the law permits smoking within the room when the windows and sliding doors are open.

Under such an interpretation, smoking would be allowed in a long narrow building with large doors on each end when the doors are kept open.

This ambiguity in the law is particularly problematic when tavern owners seek to build shelters for their patrons to use when smoking outdoors. A municipality and tavern owner may disagree over whether a proposed shelter is an "enclosed place" where smoking is disallowed.

Municipal officials may want to consult their legal counsel about adopting a no smoking ordinance that clarifies the definition of "enclosed place," thereby reducing confusion.

#### **Local Authority to Regulate Smoking**

Under Act 12 municipalities retain the same authority they had under prior law to enact ordinances regulating indoor smoking. Namely, municipalities can enact ordinances that, complying with the purposes of the state law, protect the health and comfort of the public. Wis. Stat. Sec. 101.123(4m).

We read this to mean that municipalities can adopt more, but not less, stringent regulations of indoor smoking. Pursuant to this grant of authority, a municipality can adopt an ordinance that clarifies what indoor areas are subject to the smoke-free law.

Municipal officials should consult their legal counsel if the municipality is interested in adopting a no

smoking ordinance that provides an unambiguous definition of "enclosed place" or uses different language to describe indoor areas subject to the smoking ban.

### **Possible Solutions**

One option would be to adopt language similar to what the Department of Commerce was considering as part of a rulemaking on the smoking ban. While the agency has decided not to proceed with the rulemaking, the language they were considering could serve as a model for municipalities. The proposed rule would have prohibited smoking in any "enclosed indoor areas."

An "enclosed indoor area" was defined to mean "all space between a floor and a ceiling that is bounded by walls, doors, or windows, whether open or closed, covering more than 50 percent of the combined surface area of the vertical planes constituting the perimeter of the area. A wall includes any retractable divider, garage door, or other physical barrier, whether temporary or permanent. A 0.011 gauge screen with an 18 by 16 mesh count is not a wall."

This definition is clearer and easier to apply than the definition of "enclosed place" in Act 12.

Another option would be to adopt language similar to the City of Verona's no smoking ordinance. That ordinance prohibits smoking in "any enclosed area of a place of employment." "Enclosed area" is defined as "all space between a floor and ceiling that is enclosed on all sides by permanent or temporary walls or windows (exclusive of doorways), which extend from the floor to the ceiling."

A municipality may adopt an ordinance clarifying application of the no smoking law to indoor areas in their community at any time before or after the state law takes effect on July 5th.

### **Local Regulation of Outdoor Areas Preempted.**

Bear in mind that Act 12 greatly limits municipal authority to regulate smoking outside of buildings. Under the Act, municipalities only have authority to prohibit outdoor smoking on municipally owned property. This means, for example, that municipalities may not prohibit smoking in outdoor seating areas of restaurants.

The state law explicitly provides that the person in charge of a restaurant, tavern, private club, or retail establishment may designate an outside area that is within a reasonable distance from any entrance to the establishment where customers, employees, and other associated persons may smoke. A local ordinance may not define what qualifies as a "reasonable distance" from the establishment and bars.

### **Conclusion**

The new state smoking ban that takes effect July 5 has some holes in it that could be filled by adopting a local ordinance. The new state law prohibits smoking in enclosed places of employment, including bars and restaurants. The definition of enclosed place is confusing and open to interpretation. Municipalities may want to adopt a no smoking ordinance that provides an unambiguous definition of "enclosed place" or uses different language to describe indoor areas subject to the smoking ban.

Smoke-Free Wisconsin has published a helpful FAQ on the state smoking ban written by the Boardman Law Firm. It appears in this issue of the Municipality. We have posted the FAQ and other information on the smoking ban on our Website: <http://www.lwm-info>.

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AN ORDINANCE: By Public Services & Safety  
Committee  
Re: Amending Ord. §8-32 to **repeal** the restaurant  
smoking ban and **adopt** Wis. Stat. §101.123  
relating to the statewide smoking ban

ORDINANCE NO. 1406

Introduced: June 2, 2010

Committee/Commission Action:

**RECOMMENDED FOR PASSAGE**

## AN ORDINANCE

The Common Council of the City of Neenah, Wisconsin, do ordain as follows:

**Section 1.** Section 8-32 repealed and recreated to read as follows:

### **Sec. 8-32 – Statewide Smoking Ban**

- (a) *Smoking Ban Adopted.* The City hereby adopts, by reference, the provisions of Wis. Stat. §101.123, Smoking prohibited, pertaining to the statewide smoking ban.
- (b) *Definitions.* For purposes of enforcing the smoking ban in the City of Neenah, the following definition shall apply instead of the definition found in state statutes:
- “*Enclosed place*” shall mean all space between a floor and a ceiling that is bounded by walls, doors, or windows, whether open or closed, covering more than 50 percent of the combined surface area of the vertical planes constituting the perimeter of the area. A wall includes any retractable divider, garage door, or other physical barrier, whether temporary or permanent. A 0.011 gauge screen with an 18 by 16 mesh count is not a wall.
- (c) *Inspection and enforcement.* The City Health and/or Police Department shall have the power to enter any premises subject to the smoking ban under state law to ascertain whether the premises are in compliance with this section and take appropriate enforcement action pursuant to Wis. Stat. §101.123.

**Section 2. Severability.** In the event any section, subsection, clause, phrase or portion of this ordinance is for any reason held illegal, invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remainder of this ordinance. It is the legislative intent of the Common Council that

this ordinance would have been adopted if such illegal provision had not been included or any illegal application had not been made.

**Section 3. Repeal and Effective Date.** All ordinances or parts of ordinances and resolutions in conflict herewith are hereby repealed. This ordinance shall take effect July 5, 2010.

Approved:

Moved by: \_\_\_\_\_

Adopted: \_\_\_\_\_

Approved: \_\_\_\_\_

Published: \_\_\_\_\_

\_\_\_\_\_  
George Scherck, Mayor

Attest:

\_\_\_\_\_  
Patricia A. Sturn, City Clerk

THIS INSTRUMENT WAS DRAFTED BY:

City Attorney James G. Godlewski

211 Walnut Street

Neenah, WI 54956

State Bar No. 1005210