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CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511

Date: October 17, 2013

MEMORANDUM

TO: Members of the ALRC

FROM: Jennifer Zilavy, Assistant City Attorney

RE: Centers For Visual And Performing Arts License

The staff team recommended combining the City's entertainment licenses (21+ and 18+) so licensed establishments have the discretion to hold 18+ events rather than limit eligibility through regulation. Our office questions whether that recommendation may be carried out without acting contrary to the State's alcohol regulations in Chapter 125, Wis. Stat.

There are many regulations in Chapter 125 relating to underage persons. The general rule, which is very clear, is that underage persons are not allowed on a licensed premise unless accompanied by a parent, guardian or spouse of legal drinking age *or* unless there is a statutory exception. The statutory exceptions are specific and limited. The clear intent of Chapter 125 is to prohibit underage persons from being on a licensed premise.

Case law interpreting provisions of Chapter 125, Wis. Stats., also finds the intent of the statutes is to keep underage persons out of licensed establishments unless one of the narrowly drawn exceptions applies. There are few cases on point, but one such case narrowly interpreted at least one of the statutory exceptions for allowing underage on a premise.

A bowling alley is one of those exceptions. Minors are allowed in bowling alleys even if they are a licensed premises. However, in *State v. Ludwig*, 31 Wis. 2d 690, 143 N.W.2d 548 (1966), the owner of a bowling alley was convicted of violating the statute that prohibited minors from frequenting the *barroom* area of the bowling alley. The bowling alley consisted of the bowling alley, a barroom and a restaurant, all under one roof. The Supreme Court, in upholding the trial court's ruling, quoted the trial court as follows:

> There is sense in the law. It does not forbid the presence of minors In a hotel, drug store, grocery store, or bowling alleys even though the owner or operator of such premises holds a license for the sale of fermented malt beverage. The predominant purpose of those establishments is to furnish lodging, food, sale of drugs and groceries, and for the recreation of bowling. ***Their entry and presence on those and like exempted premises are primarily for their indulgence

> in that particular accommodations. The law does forbid the presence of minors, for amusement purposes, in bars and taverns where fermented malt beverages are primarily and exclusively sold, consumed and dispensed.

The trial court also stated that "[p]ermitting a minor to be at a bowling alley for recreational purposes does not grant the unrestricted leave to loiter in bar rooms however free, easy, convenient or inviting the access be."

Although this case is from 1966, it remains law today and supports the intent of the statute to prohibit the presence of underage persons on a licensed premise unless their presence is due to a statutory exception and their purpose in being on the licensed premise is to engage in the excepted activity, which in the case of our VPA ordinance, would be live entertainment. It is permissible for them to be on the premise of a VPA for the limited purpose of enjoying the live entertainment. They are not permitted to roam the licensed premises and mingle at the bar. They are allowed on the premise strictly for purposes of the live entertainment.

BACKGROUND INFORMATION ON THE 18+

Sometime around 2004, the ALRC talked about finding a way to make live entertainment accessible to persons 18 and up, particularly college students, in an effort to provide that group with something to do other than consume alcohol at unregulated house parties.

I agreed to research whether there was a way to accomplish the ALRC's goal. I began with a conversation with Roger Johnson at the Department of Revenue, our go-to guru for all things alcohol. I spoke with Mr. Johnson about the Centers For Visual And Performing Arts ("VPA") in § 125. Wis. Stat. and whether we could allow live music venues to have 18 and up on the premise for live music shows based upon that statute. Mr. Johnson stated that the statute did not define Centers For Visual and Performing Arts and that "narrowly" defining Centers for the Visual and Performing Arts in our ordinances would be a way that we could accomplish the goal of providing more live entertainment options for 18 and up persons. Mr. Johnson stressed the importance of narrowly defining VPA's so that the exception in the statute did not become the rule. Initially, the ALRC accepted the idea of narrowly defining VPA's. However, as the drafting process went on, and as the ordinance was amended over the years, the more narrow criteria was expanded.

The original draft of the VPA license was titled "Centers For The Visual And Performing Arts." In 2007, the title was amended to read as it currently reads, "18+ Centers For The Visual And Performing Arts." A small, yet significant change that I believe allowed the original intent of the ordinance to be expanded to a point where it is today, which is a point where the exception is now the rule.

The original criteria for the VPA license was (1) at least one performance stage larger than 200 square feet; and (2) a legal capacity of no less than two hundred (200) patrons. This criteria was amended prior to the adoption of the ordinance to read:

1. Pays a fee to performers or an agreed-upon designee.
2. Has a legal capacity established by building inspection of no less than one hundred (100) patrons.
3. Provides live entertainment as that term is defined in this subsection. Patrons eighteen (18) years of age and older may be allowed onto the premises one half hour before the scheduled performance time and must be off the premises within one half our after the performance ends. "Live Entertainment" means a performance being heard and/or viewed at the time of performance and in the physical presence of a live audience.

In December 2009, the criteria was amended again, this time the minimum patron capacity was reduced to forty nine (49) and the definition of "Live Entertainment" was amended to read: "means a live music or disc jockey performance being heard and/or viewed at the time of performance and in the physical presence of a live audience. Live entertainment does not include non amplified or acoustic music performed by a single artist, or performances where an uncompensated patron sings along with a machine that plays pre recorded music, commonly known as "karaoke"." I believe the purpose of this amendment was to expand the pool of establishments who could obtain the VPA license.

At the time when the ALRC wanted to add "disc jockey" into the category of live music performance, I recommended against doing so because I believed this expanded the VPA to a point where it was really no longer an exception to the general rule regarding VPA's. Finally, in August 2013, the criteria for any minimum capacity was completely removed.

As you can see, as the ordinance has gone through various changes over the years which has resulted in an ordinance well beyond what was originally intended. The expanded definition of VPA has now effectively swallowed the rule and this means that the City's current regulation likely is in conflict with State Statute, and thus, not valid. If a new ordinance that is not in conflict with state statute is not adopted, the OCA will be put in the uncomfortable position of questioning future licenses under our current 18+ VPA ordinance. In addition to the ordinance changes, the consideration and weighing of factors in Sec. 38.06(12)(2), MGO of VPA applicants has been lacking over the years.

A short way of expressing the problem is this: the state law exception for VPA assumes a business primarily devoted to the visual and performing arts, and incidentally selling alcohol (think of the Overture Center). With all the changes in the City's ordinance over the years, OCA thinks is authorizes taverns that happen to have some visual and performing arts to qualify for the exception.

The proposed Entertainment License Ordinance that is before you, combines the two licenses into one ordinance and tightens the criteria for the VPA license so that it remains an appropriate exception to the general rule of the statute. If there is a concern that those who currently hold what is now titled the 18+ VPA license will be unfairly prejudiced by the proposed ordinance because they would be unable to meet the new criteria, the ALRC can recommended

grandfathering the existing 18+ VPA licenses and apply the proposed ordinance to all future VPA applicants. Although this still raises the legal issues noted above, the OCA could support such a compromise as a matter of equity. The existing license holders relied on the OCA and the City saying they qualified as a VPA and it would be unfair to strip their license after that reliance. The VPA grandfathering would apply until the license changed hands.

I recommend changing the VPA and General Entertainment License Application so that there are specific criteria on the application itself that must be provided before the application can even come before the ALRC. This will assure that the requirements set forth in the ordinance, for example, specifics of a security/operational plan, are available for consideration at the time the ALRC hears the application.

CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511

Date: November 15, 2013

MEMORANDUM

TO: Members Of The Alcohol License Review Committee

FROM: Michael P. May, City Attorney
Jennifer Zilavy, Assistant City Attorney

RE: Entertainment Licenses

This is an updated and revised memorandum, replacing the memo dated October 16, 2013 and provided to the ALRC on October 16, 2013. In this memorandum, we explain why the City needs to carefully consider its current use of the "18+ Centers for the Visual and Performing Arts" licenses. We believe the current ordinance, and any simple recodification of that ordinance likely is contrary to state law.

BACKGROUND

A. History of the Ordinance.

Sometime around 2004, the ALRC talked about finding a way to make live entertainment accessible to persons 18 and up, particularly college students, in an effort to provide that group with something to do other than consume alcohol at unregulated house parties.

In researching whether there was a way to accomplish the ALRC's goal, we contacted Roger Johnson at the Department of Revenue, a state expert on alcohol regulation. We spoke with Mr. Johnson about the Centers For Visual Or Performing Arts ("VPA") in § 125.07(3)(a)3., Wis. Stat., and whether we could allow live music venues to have 18 and up on the premise for live music shows based upon that statute. Mr. Johnson stated that the statute did not define Centers For Visual Or Performing Arts and that **"narrowly" defining** Centers for the Visual Or Performing Arts in our ordinances would be a way that we could accomplish the goal of providing more live entertainment options for 18 and up persons while not running afoul of the Statute. Mr. Johnson stressed the importance of narrowly defining VPA's so that the exception in the statute did not become the rule. Initially, the ALRC accepted the idea of narrowly defining VPA's. However, as the drafting process went on, and as the ordinance was amended over the years, the more narrow criteria was expanded.

The original draft of the VPA license was titled "Centers For The Visual And Performing Arts." In 2007, the title was amended to read as it currently reads, "18+ Centers For The Visual And

Performing Arts." A small, yet significant change that began to expand the original intent of the ordinance to a point where it is today, which is a point where the exception is now the rule, and likely in conflict with the Statute.

The original criteria for the VPA license were: (1) at least one performance stage larger than 200 square feet; and (2) a legal capacity of no less than two hundred (200) patrons. See Ordinance 05-00121, Legistar 00902, adopted 07/12/2005. These criteria were amended prior to the adoption of the ordinance to read:

1. Pays a fee to performers or an agreed-upon designee.
2. Has a legal capacity established by building inspection of no less than one hundred (100) patrons.
3. Provides live entertainment as that term is defined in this subsection.
   Patrons eighteen (18) years of age and older may be allowed onto the premises one half hour before the scheduled performance time and must be off the premises within one half hour after the performance ends.
   "Live Entertainment" means a performance being heard and/or viewed at the time of performance and in the physical presence of a live audience.

In December 2009, the criteria was amended again, this time the minimum patron capacity was reduced to forty nine (49) and the definition of "Live Entertainment" was amended to read: "means a live music or disc jockey performance being heard and/or viewed at the time of performance and in the physical presence of a live audience. Live entertainment does not include non amplified or acoustic music performed by a single artist, or performances where an uncompensated patron sings along with a machine that plays pre recorded music, commonly known as "karaoke"." It appears the purpose of this amendment was to expand the pool of establishments that could obtain the VPA license. See Ordinance 09-00174, Legistar 16205, adopted 12/15/09.

At the time the ALRC wanted to add "disc jockey" into the category of live music performance, our office recommended against doing so because we believed this expanded the VPA to a point where it was really no longer an exception to the general rule regarding VPA's. Finally, in August 2013, the criteria for a minimum capacity was eliminated.

As you can see, the ordinance has gone through various changes over the years which have resulted in an ordinance well beyond what was originally intended. The expanded definition of VPA has now effectively swallowed the rule: almost any tavern can get a VPA by offering some live entertainment. Because of this, the City's current regulation likely is in conflict with State Statute, and thus, not valid.

Recently, in considering changes to the ALDO Ordinance, the staff team recommended combining the City's entertainment licenses (21+ and 18+) so that licensed establishments offering live entertainment would all get the same license and all would have discretion to hold 18+ events.

There are two ordinance drafts before you. Draft "A", directly incorporates the suggestions of the staff team and as drafted, is likely contrary to Chapter 125, Wis. Stat. Draft "B" incorporates the suggestions of the staff team and has additional provisions that make it more consistent with chapter 125, Wis. Stat.

B. Legal Background.

There are many regulations in Chapter 125 relating to underage persons. The general rule, which is very clear, is that underage persons are not allowed on a licensed premise unless accompanied by a parent, guardian or spouse of legal drinking age *or* unless there is a statutory exception. The statutory exceptions are specific and limited. The clear intent of Chapter 125 is to prohibit underage persons from being on a licensed premise.

The list of statutory exceptions in §125.07(3)(a), Wis. Stats., includes (1) hotels and grocery stores; (2) restaurants if the "principal business" conducted is that of a restaurant and *not* the sale of alcohol beverages; (3) Class "A" or "Class A" retail premises if the underage person enters to make a purchase of items *other than alcohol beverages* and *leaves after the purchase*; (4) certain types of recreational facilities, including certain facilities offering bowling, billiards, golf, fishing, skiing, curling, soccer, tennis, and volleyball, as well as athletic fields, stadiums, coliseums, "*centers for the visual or performing arts,*" and movie theaters; (5) dance halls or banquet or hospitality rooms attached to a licensed premises and used for certain purposes; (6) underage persons who engage in certain types of activities on the licensed premises, such as transaction business with the licensee or, if at least age 18, providing entertainment for customers, subject to certain conditions; (7) employees working on the licensed premises; (8) premises for which temporary Class "B" retail beer licenses (but not temporary "Class B" retail wine licenses) have been issued if the issuing local official grants an exception to allow underage persons on the premises; and (9) specific dates if various conditions are met and a law enforcement agency has provided prior written authorization or been given advance notice.

As noted above, "center for the visual or performing arts" is not defined in the statute. In such cases, the words are to take on their ordinary meaning, §990.01(1), Wis. Stats., and a dictionary definition is helpful in determining the meaning, *Rock-Koshkonong Lake District v. Wis. Dept. of Natural Resources,* 2013 WI 74 ¶128, ___ Wis. 2d ___, 833 N.W. 2d 800, 828-29. Webster's New Collegiate Dictionary (1980) defines center as (among other definitions) "a point, area, person, or thing that is most important or pivotal in relation to an indicated activity, interest, or condition (*a railroad center*) . . . ." Thus, with respect to a "center" for the visual or performing arts, we know that the visual and performing arts must be the most important or pivotal activity in that location.

Visual or performing arts are defined as "arts, such as dance, drama and music that are performed before an audience" (American Heritage Dictionary 4th Edition, 2000). If we take those definitions, look at the intent of the statute and look at our community's bona fide centers for the visual and performing arts, such as Overture, Barrymore, Majestic, Orpheum,

Sundance, and Marcus Theater to name a few, we see that the commonality is that alcohol service is incidental to the primary business of providing visual and performing arts entertainment. We have to take the ordinary dictionary definitions and apply them in the context of the statute, and consider the statute's intent, so our end result is not in conflict with the Statute.

As you read through the list of exceptions, the common theme is that the primary activity of the premise is something **other than** the sale and/or consumption of alcohol (with the exception of Class "A" or "Class A" stores which sell other items incidental to the sale of alcohol). This is the statutory interpretation rule of *noscitur a sociis*, Latin for "it is known from its associates", and provides that it may be helpful to consider the common characteristics of a group of words or phrases in interpreting any one of them. *Schill v. Wisconsin Rapids School District,* 2010 WI 86 ¶ 66, 327 Wis. 2d 572, 786 N.W. 2d 177. There is no exception stated for taverns that have bands, or taverns that have disc jockeys or similar entertainment and that is because a tavern's principal business is (or it is a "center" for) the sale of alcohol. The Statute intends to keep underage persons out of places whose primary business is the sale of alcohol.

Case law interpreting provisions of Chapter 125, Wis. Stats., also shows the intent of the statutes is to keep underage persons out of licensed establishments unless one of the narrowly drawn exceptions applies. There are few cases on point, but one such case narrowly interpreted at least one of the statutory exceptions for allowing underage on a premise.

A bowling alley is one of those exceptions. Minors are allowed in bowling alleys even if they are a licensed premises. However, in *State v. Ludwig*, 31 Wis. 2d 690, 143 N.W.2d 548 (1966), the owner of a bowling alley was convicted of violating the statute that prohibited minors from frequenting the *barroom* area of the bowling alley. The bowling alley consisted of the bowling alley, a barroom and a restaurant, all under one roof. The Supreme Court, in upholding the trial court's ruling, quoted the trial court as follows:

> There is sense in the law. It does not forbid the presence of minors In a hotel, drug store, grocery store, or bowling alleys even though the owner or operator of such premises holds a license for the sale of fermented malt beverage. The predominant purpose of those establishments is to furnish lodging, food, sale of drugs and groceries, and for the recreation of bowling. ***Their entry and presence on those and like exempted premises are primarily for their indulgence in that particular accommodations. The law does forbid the presence of minors, for amusement purposes, in bars and taverns where fermented malt beverages are primarily and exclusively sold, consumed and dispensed.

The trial court also stated that "[p]ermitting a minor to be at a bowling alley for recreational purposes does not grant the unrestricted leave to loiter in bar rooms however free, easy, convenient or inviting the access be."

Although this case is from 1966, it remains law today and supports the intent of the statute to prohibit the presence of underage persons on a licensed premise unless their presence is due to a statutory exception and their purpose in being on the licensed premise is to engage in the excepted activity, which in the case of our Visual and Performing Arts ordinance, would be live entertainment. It is permissible for them to be on the premise of a Visual and Performing Arts venue for the limited purpose of enjoying the live entertainment. They are not permitted to roam the licensed premises and mingle at the bar. They are allowed on the premise strictly for purposes of the live entertainment.

APPLICATION OF THE LAW TO THE ORDINANCES

A short way of expressing the problem is this: the state law exception for VPA assumes a business primarily devoted to the visual and performing arts, and incidentally selling alcohol (think of the Overture Center). With all the changes in the City's ordinance over the years, we believe the existing ordinance, and Draft "A", authorize taverns that happen to have some visual and performing arts to qualify for the exception. If a new ordinance, such as Draft "A", that is in conflict with the state statute is adopted, our office will be put in the uncomfortable position of questioning future licenses.

Draft "B" that is before you, combines the two licenses into one ordinance and tightens the criteria for the VPA license so that it remains an appropriate exception to the general rule of the statute and is not in conflict with the statute. If there is a concern that those who currently hold what is now titled the 18+ VPA license will be unfairly prejudiced by the proposed ordinance because they would be unable to meet the new criteria, the ALRC can recommended grandfathering the existing 18+ VPA licenses and apply the proposed ordinance to all future VPA applicants. Although this still raises the legal issues noted above, we could support such a compromise as a matter of equity. The existing license holders relied on our office and the City saying they qualified as a VPA and it would be unfair to strip their license after that reliance. The VPA grandfathering would apply until the license changed hands.

For the foregoing reasons, we advise adoption of Draft "B" which upholds the intent of the Statute and would therefore not be in conflict with the Statute.

Regardless of which draft is adopted, we recommend changing the Entertainment License Application so that there are specific criteria on the application itself that must be provided before the application can even come before the ALRC. This will assure that the requirements set forth in the ordinance, for example, specifics of a security/operational plan, are available for consideration at the time the ALRC hears the application.

Copy: ACA Roger Allen
Captain Carl Gloede
Alcohol and Food Policy Coordinator Mark Woulf
Madison City Clerk Designee, Eric Christianson

CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511

Date: December 16, 2013

MEMORANDUM

TO: Alcohol License Review Committee

FROM: City Attorney Michael May and Assistant City Attorney Jennifer Zilavy

RE: Entertainment Licenses

Mark Woulf, Michael Donnelly, Michael May and Jennifer Zilavy met to discuss options for expanding the availability of visual and performing arts licenses to more venues. The OCA remains concerned about the legality of expanding the visual and performing arts licenses ("VPA") (18+) due to the statutory constraints, however, in the course of the meeting we came up with three potential categories for visual and performing arts licenses that we think could potentially be legally viable and are worthy of exploring further.

1. Bona fide visual and performing arts venue. This is an establishment whose primary business focus is live entertainment. Existing businesses that fall into this category are: The Comedy Club, The Majestic, Segredos, The Frequency and High Noon Saloon. There is no question that these establishments are VPAs consistent with the statute.

2. A bona fide restaurant that occasionally has live entertainment and/or uses space for banquets and/or wedding celebrations. Restaurants are allowed to have all ages on their premise for dining purposes. Those restaurants that would be interested in the occasional 18+ live entertainment events would need a VPA license that would require specific conditions and regulations for such events. Existing businesses are: The Weary Traveler, Porto Bella, AJ Bombers and Otto's.

3. Bars. A bar's primary business focus is serving alcohol. A handful of bars currently have 18+ licenses and have live entertainment on some nights. Existing businesses are: The Cardinal, Plan B, Johnny O's and Murphy's Tavern, Soto, Red Zone, Sprecher's Pub and the Bayou. The proposal is to grandfather the VPA of existing bars for the life of their business. This category of establishments presents the most difficulty in crafting a VPA without running afoul of the statute. We talked about the possibility of have temporary licenses available for such events and possibly expanding the number of temporary licenses that would be available on an annual basis.

We seek input from the ALRC before proceeding to draft ordinances changes to follow this model.

Copy: Mark Woulf
Captain Carl Gloede