

2005 DRAFTING REQUEST

Bill

Received: 02/23/2005

Received By: mdsida

Wanted: As time permits

Identical to LRB:

For: Tamara Grigsby (608) 266-0645

By/Representing: Anne

This file may be shown to any legislator: NO

Drafter: mdsida

May Contact:

Addl. Drafters:

Subject: Criminal Law - drugs

Extra Copies:

Submit via email: YES

Requester's email: Rep.Grigsby@legis.state.wi.us

Carbon copy (CC:) to: robin.ryan@legis.state.wi.us
cathlene.hanaman@legis.state.wi.us
marc.shovers@legis.state.wi.us

Pre Topic:

No specific pre topic given

Topic:

Municipal ordinances regarding drug paraphernalia

Instructions:

2001 AB 62 minus counties

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	mdsida 03/01/2005	lkunkel 03/01/2005		_____			
/1			rschluet 03/02/2005	_____	mbarman 03/02/2005	lnorthro 04/04/2005	

FE Sent For:

↳ Not Needed

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May Contact:

Addl. Drafters:

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/?	mdsida	1/mk 3/1					

FE Sent For:

<END>

2001 ASSEMBLY BILL 62

February 1, 2001 - Introduced by Representatives FOTI, KRAWCZYK, HUNDERTMARK, LA FAVE, AINSWORTH, ALBERS, DUFF, HAHN, JESKEWITZ, LADWIG, M. LEHMAN, LEIBHAM, MUSSER, OTT, OWENS, PETROWSKI, PLOUFF, SERATTI, STONE, URBAN, VRAKAS and WADE, cosponsored by Senators ERPENBACH, FARROW, BURKE, DARLING, S. FITZGERALD, HUELSMAN, ROESSLER and SCHULTZ. Referred to Committee on Urban and Local Affairs.

1 AN ACT *to repeal* 60.23 (21) (title); *to renumber and amend* 60.23 (21); *to*
2 *amend* 66.0107 (1) (a), 66.0107 (1) (b), 349.02 (2) (b) 2., 349.02 (2) (b) 4., 778.25
3 (1) (a) 1., 818.02 (7) and 961.577; and *to create* 59.54 (25m) and 778.25 (1) (a)
4 1m. of the statutes; **relating to:** local ordinances governing drug
5 paraphernalia.

Analysis by the Legislative Reference Bureau

Current law prohibits the possession, manufacture, and delivery of drug paraphernalia. If a person 17 years of age or older violates the prohibitions relating to drug paraphernalia, he or she is subject to criminal penalties (a fine or imprisonment or both). If a person under the age of 17 violates the prohibitions relating to drug paraphernalia, he or she is subject to suspension or revocation of his or her privilege to operate a motor vehicle for not less than six months nor more than five years and either or both of the following: a forfeiture (civil monetary penalty) of up to \$500, depending on whether the person has previous drug paraphernalia offenses, and a requirement that he or she participate in community service work. In addition, current law prohibits and provides more severe criminal penalties for the possession or use of drug paraphernalia used to produce, analyze, or store methamphetamine.

Current law also allows a city, village, or town to enact and enforce ordinances prohibiting the possession, manufacture, or delivery of drug paraphernalia. The ordinances must prohibit the same conduct that is prohibited under the state

ASSEMBLY BILL 62

statutes relating to the possession, manufacture, and delivery of drug paraphernalia generally (as opposed to the state statutes governing the possession or use of methamphetamine-related drug paraphernalia). In addition, the ordinances can apply only to the possession, manufacture, and delivery of drug paraphernalia by a person under the age of 17.

This bill allows a city, village, or town to enact and enforce ordinances prohibiting the possession, manufacture, or delivery of drug paraphernalia by persons 17 years of age and older. The ordinances must prohibit the same conduct that is prohibited under the state statutes relating to the possession, manufacture, and delivery of drug paraphernalia generally. Under the bill, a prosecutor could charge a person aged 17 years or older for violating either an ordinance enacted under this bill or the state statutes. A person prosecuted for violating an ordinance enacted under this bill would be subject to a forfeiture in an amount established by the ordinance instead of being subject to the criminal penalties provided under the state statutes.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 59.54 (25m) of the statutes is created to read:

2 59.54 **(25m)** DRUG PARAPHERNALIA. The board may enact and enforce an
3 ordinance to prohibit conduct that is the same as that prohibited by s. 961.573 (1) or
4 (2), 961.574 (1) or (2), or 961.575 (1) or (2) and provide a forfeiture for violation of the
5 ordinance. Any ordinance enacted under this subsection does not apply in any
6 municipality that has enacted an ordinance prohibiting conduct that is the same as
7 that prohibited by s. 961.573 (1) or (2), 961.574 (1) or (2), or 961.575 (1) or (2).

8 **SECTION 2.** 60.23 (21) (title) of the statutes is repealed.

9 **SECTION 3.** 60.23 (21) of the statutes is renumbered 66.0107 (1) (bp) and
10 amended to read:

11 66.0107 **(1)** (bp) ~~Adopt~~ Enact and enforce an ordinance to prohibit conduct that
12 is the same as that prohibited by s. 961.573 (1) or (2), 961.574 (1) or (2), or 961.575
13 (1) or (2) and provide a forfeiture for violation of the ordinance.

14 **SECTION 4.** 66.0107 (1) (a) of the statutes is amended to read:

ASSEMBLY BILL 62

1 66.0107 (1) (a) Prohibit all forms of gambling and fraudulent devices and
2 practices;

3 **SECTION 5.** 66.0107 (1) (b) of the statutes is amended to read:

4 66.0107 (1) (b) Seize anything devised solely for gambling or found in actual
5 use for gambling and destroy the device after a judicial determination that it was
6 used solely for gambling or found in actual use for gambling; and

7 **SECTION 6.** 349.02 (2) (b) 2. of the statutes is amended to read:

8 349.02 (2) (b) 2. Chapter 961 and local ordinances that strictly conform to s.
9 961.573 (1) or (2), 961.574 (1) or (2), or 961.575 (1) or (2).

10 **SECTION 7.** 349.02 (2) (b) 4. of the statutes is amended to read:

11 349.02 (2) (b) 4. Local ordinances enacted under s. 59.54 (25), ~~60.23 (21)~~ or
12 66.0107 (1) (bm).

13 **SECTION 8.** 778.25 (1) (a) 1. of the statutes is amended to read:

14 778.25 (1) (a) 1. Under s. 125.07 (4) (a) or (b), 125.085 (3) (b), or 125.09 (2),
15 ~~961.573 (2), 961.574 (2) or 961.575 (2)~~ or under a local ordinance strictly conforming
16 to one of those statutes brought against an adult in circuit court or against a minor
17 in the court assigned to exercise jurisdiction under chs. 48 and 938.

18 **SECTION 9.** 778.25 (1) (a) 1m. of the statutes is created to read:

19 778.25 (1) (a) 1m. Under s. 961.573 (2), 961.574 (2), or 961.575 (2) brought
20 against a minor in the court assigned to exercise jurisdiction under chs. 48 and 938
21 or under a local ordinance strictly conforming to s. 961.573 (1) or (2), 961.574 (1) or
22 (2), or 961.575 (1) or (2) brought against an adult in circuit court or against a minor
23 in the court assigned to exercise jurisdiction under ch. 48 and 938.

24 **SECTION 10.** 818.02 (7) of the statutes is amended to read:

Rose +ube
8-4

MEMORANDUM

To: Ald. Robert Donovan

From: Jeff Osterman, Legislative Reference Bureau

Date: November 15, 2001

Subject: LAWS PROHIBITING SALE OF DRUG PARAPHERNALIA

+++++

Section 106-36 of the Milwaukee Code of Ordinances (copy attached) prohibits the possession, manufacture, sale, delivery or advertisement of drug paraphernalia. This ordinance makes no distinction between adults and minors who commit these acts. Section 106-36 became effective on January 22, 1990. Attached you will find an article from the Milwaukee Sentinel describing the dramatic impact this ordinance had on the drug paraphernalia business in the month that followed. About a dozen retailers who were provided with copies of the new ordinance almost immediately removed all such items from their stores. In addition, the police were able to issue several citations to individuals for possession of drug paraphernalia.

Unfortunately, the effectiveness of this ordinance was quickly curtailed by a change in state law that occurred at about the same time. As the attached article from The Municipality indicates, 1989 Wisconsin Act 121, which took effect on August 1, 1990, authorized municipalities to prohibit the possession, manufacture or delivery of drug paraphernalia by persons under age 18. This legislation effectively precluded the enforcement of municipal drug paraphernalia ordinances against adults. A copy of subch. VI of ch. 961, Wis. Stats., is attached for your consideration (this is the current form of the drug paraphernalia provisions of 1989 Act 121). You will note that the age cut-off has been changed to 17, rather than 18. Section 961.577 specifically authorizes municipalities to enact legislation prohibiting drug-paraphernalia activities by juveniles. This has been interpreted to mean that municipalities are not authorized to enact local laws that go beyond the juvenile-related provisions of subch. VI of ch. 961, including any ordinance prohibiting the sale of drug paraphernalia by or to adults.

In light of this information and the recurring drug paraphernalia problems in the city of Milwaukee, one can make the following arguments in support of changing state law to allow municipalities to prohibit the sale of drug paraphernalia by adults:

- Drug-paraphernalia and drug-abuse problems are most acutely experienced at the local level, particularly in urban areas of Wisconsin. Local authorities, including police and courts, are most familiar with the location and severity of such problems and have the greatest interest enforcing laws against drug paraphernalia. Therefore, municipalities have a legitimate

interest in enacting legislation to prohibit drug paraphernalia activities involving adults.

- A local ordinance prohibiting the sale of drug paraphernalia by adults can be highly effective, as was demonstrated during the few months in 1990 when the City of Milwaukee was able to enforce s. 106-36 against all persons, not just minors.
- Without a local ordinance prohibiting the sale of drug paraphernalia by adults, it is undoubtedly easier for minors to obtain drug paraphernalia. The ability of minors to obtain alcohol and cigarettes from adults has been well-documented; it is likely that adults serve as "conduits" for drug paraphernalia, as well.
- A municipal ordinance is easier to enforce against adults than a state law, since the burden of proof is lower for a municipal ordinance violation than a violation of state law.
- Drug-related gang activity and drug-related criminal activity continue to plague many neighborhoods in Milwaukee. The widespread availability of drug paraphernalia to adults undoubtedly contributes to these problems. The City of Milwaukee needs as many tools for addressing these issues as possible, and a local ordinance to ban the sale of drug paraphernalia to adults is one such tool.

Interestingly, on February 1, 2001, a bill was introduced -- 2001 Assembly Bill 62 -- to allow a municipality to enact and enforce ordinances prohibiting the possession, manufacture or delivery of drug paraphernalia. Under the proposed legislation (copy attached), a prosecutor could charge a person aged 17 or older for violating either a local ordinance or the state law. Assembly Bill 62 was passed by the Assembly and has been referred to the state Senate's committee on Judiciary, Consumer Affairs and Campaign Finance Reform.

Attached you will find a draft of a resolution expressing Common Council support for passage of 2001 Assembly Bill 62.

01545

MEMORANDUM

To: Ald. Willie, L. Hines, Jr.

From: Jeff Osterman, Legislative Reference Bureau

Date: November 25, 2002

Subject: LAWS PROHIBITING SALE OR USE OF MARIJUANA "BLUNTS"

+++++

You have inquired as to what can be done about the proliferation of marijuana blunt sales and use in the city of Milwaukee. A marijuana blunt is basically a marijuana "joint" wrapped in a cigar leaf. There appear to be 2 main ways of making a blunt: 1) remove the tobacco from a cigar and re-pack and re-roll the cigar's outer leaf with marijuana; 2) purchase an empty blunt wrapper (looks like a cigar overleaf and sold under such brand names as "Blunt Wrap" and "True Blunt") and fill it with marijuana. You have expressed particular concern about the second type of blunt, since there seems to be no legal, legitimate purpose for selling or buying blunt wraps (i.e., while cigarette-rolling is rare, cigar-rolling is unheard of).

Section 106-36 of the Milwaukee Code of Ordinances (copy attached) prohibits the possession, manufacture, sale, delivery or advertisement of drug paraphernalia. While blunts or blunt wraps are not specifically listed in the definition of "drug paraphernalia," one could argue that they fall under sub. 1-L as "objects used, intended for use or designed for use in ingesting, inhaling or otherwise introducing marijuana...into the human body..." More significantly, sub. 2-L states that one of the criteria for determining whether an object is drug paraphernalia is "the existence and scope of legitimate uses for the object in the community." As far as you and I know, there is no legitimate use for "blunt wraps," and certainly no significant scope of that use. When was the last time someone was observed rolling, or was reported to have rolled, his or her own cigar?

Unfortunately, the City of Milwaukee currently lacks the authority to enforce s. 106-36. A little history will explain why. Section 106-36 became effective on January 22, 1990. Attached you will find an article from the Milwaukee Sentinel describing the dramatic impact this ordinance had on the drug paraphernalia business in the month that followed. About a dozen retailers who were provided with copies of the new ordinance almost immediately removed all such items from their stores. In addition, the police were able to issue several citations to individuals for possession of drug paraphernalia.

Unfortunately, the effectiveness of this ordinance was quickly curtailed by a change in state law that occurred at about the same time. As the attached article from The Municipality indicates, 1989 Wisconsin Act 121, which took effect on August 1, 1990, authorized municipalities to prohibit the possession, manufacture or delivery of

drug paraphernalia by persons under age 18. This legislation effectively precluded the enforcement of municipal drug paraphernalia ordinances against adults. A copy of subch. VI of ch. 961, Wis. Stats., is attached for your consideration (this is the current form of the drug paraphernalia provisions of 1989 Act 121). You will note that the age cut-off has been changed to 17, rather than 18. Section 961.577 specifically authorizes municipalities to enact legislation prohibiting drug-paraphernalia activities by juveniles. This has been interpreted to mean that municipalities are not authorized to enact local laws that go beyond the juvenile-related provisions of subch. VI of ch. 961, including any ordinance prohibiting the sale of drug paraphernalia by or to adults. Thus, s. 106-36 of the Milwaukee Code of Ordinances, which makes no distinction between adults and minors buy, sell or possess drug paraphernalia, cannot be enforced.

To correct this problem, 2001 Wisconsin Assembly Bill 62 was introduced on February 1, 2001 (see attached copy). This legislation would enable a municipality to enact and enforce an ordinance prohibiting the possession, manufacture or sale of drug paraphernalia by persons 17 years or older. The Milwaukee Common Council went on record in support of Assembly Bill 62 when it passed File Number 011096 on December 21, 2001 (copy attached):

Unfortunately, Assembly Bill 62 is officially "dead." While the Assembly passed the bill and the Senate's Committee on Judiciary, Consumer Affairs and Campaign Finance Reform recommended concurrence, the bill was not scheduled for a full Senate vote before the 2001-2002 legislative session ended. Therefore, at this time, the most appropriate course of action to address the "blunt problem" may be to contact your representatives in the State Assembly and Senate and ask them for reintroduction and timely passage of legislation similar or identical to Assembly Bill 62 or have the Common Council include the bill in its 2003 legislative package resolution. Once that legislation is enacted, the Milwaukee Police Department can resume enforcement of s. 106-36. At that time you may wish to amend the definition of "drug paraphernalia" to explicitly include "blunt wraps" or some similar term, although, as mentioned earlier, the definition already seems to be broad enough to cover marijuana blunts.

106-36 Morals and Welfare

stops the motor vehicle the person is the operator of and sells or purchases or attempts to sell or purchase illegal drugs to or from a known drug seller or purchaser; transfers small objects or packages for currency in a furtive fashion or manifestly endeavors to conceal himself, herself or any object or package which reasonably could be involved in illegal drug activity; takes flight upon appearance of a police officer. The violator's conduct must be such as to demonstrate a specific intent to induce, entice, solicit or procure another to engage in illegal drug activity. No arrest may be made for a violation of this section unless the arresting officer first affords the person an opportunity to explain the person's presence and conduct, unless flight by the person or other circumstances make it impracticable to afford such an opportunity, and no one shall be convicted of violating this section if it appears at trial that the explanation given was true and disclosed a lawful purpose.

106-36. Drug Paraphernalia. 1. DEFINITION. In this section "drug paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance, as defined in ch. 961, Wis. Stats., in violation of this section. It includes, but is not limited to:

a. Kits used, intended for use or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived.

b. Kits used, intended for use or designed for use in manufacturing, compounding, converting, producing, processing or preparing controlled substances.

c. Isomerization devices used, intended for use or designed for use in increasing the potency of any species of plant which is a controlled substance.

d. Testing equipment used, intended for use or designed for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances.

e. Scales and balances used, intended for use or designed for use in weighing or measuring controlled substances.

f. Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use or designed for use in cutting controlled substances.

g. Separation gins and sifters used, intended for use or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana.

h. Blenders, bowls, containers, spoons and mixing devices used, intended for use or designed for use in compounding controlled substances.

i. Capsules, balloons, envelopes or other containers used, intended for use or designed for use in packaging small quantities of controlled substances.

j. Containers and other objects used, intended for use or designed for use in storing or concealing controlled substances.

k. Hypodermic syringes, needles and other objects used intended for use or designed for use in parenterally injecting controlled substances into the human body.

L. Objects used intended for use or designed for use in ingesting, inhaling or otherwise introducing marijuana, cocaine, hashish or hashish oil into the human body, including but not limited to:

L-1. Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads or punctured metal bowls.

L-2. Water pipes.

L-3. Carburetion tubes and devices.

L-4. Smoking and carburetion masks.

L-5. Objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand.

L-6. Miniature cocaine spoons and cocaine vials.

L-7. Chamber pipes.

L-8. Carburetor pipes.

L-9. Electric pipes.

L-10. Air-driven pipes.

L-11. Chillums.

L-12. Bongs.

L-13. Ice pipes or chillers.

2. DETERMINATION OF DRUG PARAPHERNALIA. In determining whether an object is drug paraphernalia, the following shall be considered:

Morals and Welfare 106-38

- a. Statements by an owner or by anyone in control of the object concerning its use.
- b. Prior convictions, if any, of an owner or of anyone in control of the object, under any city, state or federal law relating to any controlled substance.
- c. The proximity of the object in time and space to a direct violation of this section.
- d. The proximity of the object to controlled substances.
- e. The existence of any residue of controlled substances on the object.
- f. Direct or circumstantial evidence of the intent of an owner or of anyone in control of the object to deliver it to persons whom the person knows, or should reasonably know, intend to use the object to facilitate a violation of this section. The innocence of an owner or of anyone in control of the object as to a direct violation of this section shall not prevent a finding that the object is intended for use, or designed for use as drug paraphernalia.
- g. Oral or written instructions provided with the object concerning its use.
- h. Descriptive materials accompanying the object which explain or depict its use.
- i. National and local advertising concerning its use.
- j. The manner in which the object is displayed for sale.
- k. Direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise.
- L. The existence and scope of legitimate uses for the object in the community.
- m. Expert testimony concerning its use.

3. PROHIBITED ACTIVITIES.

- a. **Possession of Drug Paraphernalia.** No person may use or possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of this section.
- b. **Manufacture, Sale, or Delivery of Drug Paraphernalia.** No person may sell, deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing that it will be used to

plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of this section.

c. **Delivery of Drug Paraphernalia to a Minor.** Any person 18 years of age or over who violates par. b by delivering drug paraphernalia to a person under 18 years of age is guilty of a special offense.

d. **Advertisement of Drug Paraphernalia.** No person may place in any newspaper, magazine, handbill or other publication, or upon any outdoor billboard or sign, any advertisement, knowing that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia.

e. **Exemption.** This subsection does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies and other persons whose conduct is in accordance with ch. 961, Wis. Stats. This section does not prohibit the possession, manufacture or use of hypodermics, in accordance with ch. 961, Wis. Stats.

4. **PENALTIES.** a. Any drug paraphernalia used in violation of this section shall be seized and forfeited to the city.

b. Any person who violates sub. 3-a, b or d shall, upon conviction, be subject to a forfeiture of not more than \$500, together with the costs of prosecution, and upon default of payment be imprisoned in the county jail or house of correction until the costs are paid, but not to exceed 20 days.

c. Any person who violates sub. 3-c shall, upon conviction, be subject to a forfeiture of \$1,000, together with the costs of prosecution, and upon default of payment be imprisoned in the county jail or house of correction until the costs are paid, but not to exceed 40 days.

106-38. Possession of Marijuana.

1. **DEFINITIONS.** In this section, "marijuana" and "practitioner" shall be defined as in s. 961.01(14) and (19), Wis. Stats., respectively.

Good Morning
in Part 2 today

Milwaukee Sentinel, Tues., 2/20/90

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E PAGE 8 / JANZ

Arreola says drug items are off shelves

By LORI SKALITZKY
Sentinel staff writer

Owners of 12 businesses believed to have sold drug paraphernalia removed such items from their shelves within a day of receiving copies of a new city ordinance banning the paraphernalia, Police Chief Philip Arreola said Monday.

The ordinance went into effect Jan. 22.

"We went to 12 places and gave them a copy of the ordinance, and in every case the owners took them off the shelves within a day," Arreola told editors of the Milwaukee Sentinel.

"In some cases, they gave the items to the Police Department for destruction."

Several citations have been issued to individuals for possession of drug paraphernalia since the ordinance went into effect, he said.

However, quick compliance with the law meant that none of the 12 businesses police say sold the items have been cited, he said.

Arreola estimated that 90% of shop owners who sold the items agreed with the ordinance, but had been selling the drug paraphernalia because it was legal and provided a way to make money.

In cases where citations were issued, the paraphernalia was discovered on individuals who had been arrested for other offenses, Arreola said. He did not know the number of citations that have been issued.

Arreola said officers are being trained in enforcement of the ordinance.

"It's not the answer to all drug abuse, but it's a step in the right direction," Arreola said of the ordinance.

Arreola also told Sentinel editors the idea of a gun buy-back program "is not a closed issue."

A recent proposal by Project Respect that would pay citizens \$50 for turning in a gun was vetoed by Mayor John O. Norquist at the urging of Arreola.

Arreola said then that more work needed to be done to ensure the program would be effective.

The Public Safety Committee asked Arreola to study the issue to determine whether a program that would be run by the Police Department was feasible.

"We will evaluate it and see if there's a way to do it that will be effective," he said.

Gun buy-back programs have been effective in some communities, he said.

Overall, Arreola said he is "comfortable" with the department he inherited from former Chief Robert J. Ziarnik.

Arreola said he has tried to establish a system where more authority would be given to officers at every command level.

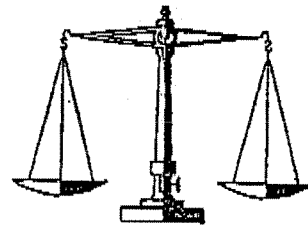
He said he was surprised at the number of items that have been placed on his desk that could have been handled at the district level.

Arreola also has reinstated a department newsletter he hopes will help bolster morale among officers.

Bov. 6. tells

Legal Comment

by James H. Schneider
League Legal Counsel



New Limits on Municipal Regulations of Marijuana and Drug Paraphernalia

A number of municipalities recently have expressed interest in and adopted drug paraphernalia ordinances. Also, various municipalities currently have marijuana ordinances. In light of these circumstances and the general interest in combating drugs, municipal officials may be interested to learn that provisions in a recent state law, 1989 Wisconsin Act 121, cast serious doubt on the authority of municipalities to enact drug paraphernalia ordinances for adults and also severely restrict the use of municipal ordinances to regulate marijuana usage.

Before turning to the provisions involved, this Comment first sketches out municipal authority to regulate drugs.

Municipal Authority to Regulate Drugs

In a 1974 opinion, the attorney general concluded that municipalities do not have the authority to enact marijuana ordinances.¹ The attorney general reasoned that the comprehensive state regulation of drugs in ch. 161, Stats., is intended to be statewide and uniform, thus precluding municipal regulation.²

The League responded in 1975 with an opinion concluding that under their broad general powers, municipalities have the power to regulate the possession of marijuana because such regulation is complementary to, and not in conflict with, state regulation.³

In spite of the attorney general's opinion many communities have marijuana ordinances. Municipal authority to regulate marijuana has never been challenged in a reported Wisconsin appellate case, probably because anyone caught violating the law would rather be prosecuted for an ordinance violation than challenge the ordinance's validity and risk criminal prosecution.

Act 121 — Marijuana Ordinances

The Act creates sec. 66.051(4), Stats., effective Jan. 31, 1990, which provides that cities and villages may adopt

¹ 63 OAC 107 (1974)

² Although municipalities do not have explicit authority to regulate drugs, they do have explicit authority to prohibit conduct prohibited by the criminal code, chs. 941 to 948, except sec. 944.21 (obscene material or performance). Sec. 66.051, Stats.

³ Powers of Municipality #726.

ordinances prohibiting possession of 25 grams⁴ or less of marijuana. The Act also provides that "any person who is charged with possession of more than 25 grams . . . or who is charged with possession of any amount of marijuana following a conviction for possession of marijuana, in this state shall not be prosecuted under this subsection."⁵

In other words, ordinance prosecution is forbidden for possession of more than 25 grams of marijuana and for second and subsequent violations, regardless of the amount involved. This scheme is unrealistic — it is difficult to imagine the district attorney in most counties prosecuting someone for the possession of, for example, one joint, where the person has a prior ordinance conviction. Most DA's will use their resources to prosecute more serious offenses. Also, the state does not compile information on municipal ordinance violations. Therefore, it may be difficult to determine whether an individual has a previous ordinance conviction and thus is supposed to be prosecuted under the criminal laws.

In addition, where marijuana use is prevalent, district attorneys may be unwilling to prosecute for violations involving small amounts, such as one ounce (about 28 grams). If ordinance enforcement is unavailable, and the DA is unwilling to issue a charge for use of a small amount, then the practical effect is to legalize the use of small amounts of marijuana.

To sum up, by trying to get tough on marijuana use, the legislature has restricted and in some cases removed the only practical enforcement tool — ordinance prosecution — for first and later violations involving small amounts of marijuana.

Act 121 — Paraphernalia Ordinances

Act 121 authorizes municipalities to prohibit the possession, manufacture and delivery of paraphernalia by persons under 18.⁶ This provision takes effect on Aug. 1, 1990. By creating complex provisions concerning

⁴ 28.349 grams = 1 oz.

⁵ Also, counties, but not towns, may enact marijuana ordinances, subject to the same restrictions. Sec. 59.07 (107).

⁶ Sec. 161.577. Also, towns, but not counties, may enact such ordinances. Secs. 60.23(21) and 161.577.

paraphernalia and specifically providing that municipalities may enact ordinances to regulate juvenile use of drug paraphernalia, the legislature in all probability has precluded municipal enforcement of drug paraphernalia ordinances against adults after the effective date of the Act.⁷

The drug paraphernalia law will be very difficult to enforce because of uncertainty whether the equipment is to be used for drugs or legal uses. By precluding municipal ordinance enforcement against adults, with its lower burden of proof (as compared to proof beyond a reasonable doubt in criminal cases), the legislature has made enforcement of the law very difficult and unlikely.

Conclusion — If municipalities (and other local

government units) wish to regulate the adult use of drug paraphernalia and small amounts of marijuana, as discussed above, the provisions created by Act 121 will have to be amended. The amendments would have to authorize enforcement of paraphernalia ordinances against adults and should allow municipal prosecution for second and subsequent marijuana violations involving less than a specified amount. In addition, the 25 gram limit should perhaps be changed to 28 or 29 grams to correspond to one ounce, or some higher figure.

Alternatively, the limit on the amount which may be prosecuted as an ordinance violation could be removed, thereby leaving it up to the particular community and DA to work out an enforcement policy adapted to the needs and resources of the particular community and county, as had been the case. This latter alternative, from the point of view of realistic enforcement, seems preferable.

⁷ See *Anchor Savings & Loan Ass'n v. Equal Opportunities Comm'n*, 120 Wis.2d 391, 355 N.W.2d 234 (1984).

(Powers of Municipality #830)

Vending Machine Regulation

You have written with several questions concerning food and beverage vending machines ...

1. In your letter you noted that legislation was recently enacted exempting certain vending machines from personal property taxes. You asked what specific types of vending machines are exempted from personal property taxes.

Section 70.111(23), Stats., which was created by 1989 Wisconsin Act 31 and took effect on January 1, 1990, provides that the following vending machines are exempt from personal property taxes:

"All machines that automatically dispense soda water beverages, as defined in sec. 97.29(1)(i), and items included as a food or beverage under sec. 77.54(20)(a) and (b) upon the deposit in the machines of specified coins or currency, or insertion of a credit card, in payment for the soda water beverages, food or beverages."

Section 97.29(1)(i) defines "soda water beverage" as "all beverages commonly known as soft drinks or soda water, whether carbonated, uncarbonated, sweetened or flavored." Section 77.54(20)(a) defines "food" or "beverage" very broadly to "include by way of illustration and not of limitation, milk and milk products, cereal and cereal products (meal, grits, flour, bread and other bakery products), meats and meat products, fish and fish products, seafoods, poultry and poultry products, vegetables and vegetable juices, fruits and fruit juices..., canned goods..., nuts, berries, melons, sugar, salt, coffee, coffee substitutes, tea, cocoa..., desserts..., candy... [etc.]... or any combination of the above."

Legal Opinions

Requests for advisory legal opinions must be made through the city or village attorney or governing body. Cities and villages without a municipal attorney may submit their requests through the mayor or president, the clerk or the governing body.

Based on the above, it appears that most, if not all, vending machines that dispense food and beverages are exempted from personal property taxes as of January 1, 1990. This means that the only vending machines that are taxable are those that dispense cigarettes, chewing gum, combs, hygienic products and other non-food or non-beverage items.

if

you should move, please inform the League office of your new address.

2. You also asked whether the village may license food and beverage vending machines and game machines.

In my opinion your municipality may, under its police powers, license game machines and certain types of food and beverage vending machines not regulated by the state to further the public health, safety and welfare. However, your village may not license vending and game machines for the sole purpose of raising revenue. A discussion follows.

Municipalities are expressly prohibited from licensing or imposing an inspection fee on food or beverage vending machines that the state regulates. Sec. 50.51(1m). The state licenses all vending machines that dispense servings of food or beverage except those that "dispense only bottled, prepackaged or canned soft drinks, a one cent vending device, a vending machine dispensing only candy, gum, nuts, nut meats, cookies or crackers or a vending machine dispensing only prepackaged Grade A pasteurized milk or milk products." Sec. 50.50(7). See also sec. HSS 198.02(1), Wis. Admin. Code.

Municipalities are expressly authorized to grant licenses for the sale of soda water beverages under sec. 66.053(2). Thus, it appears that municipalities may license only those food or beverage vending machines that dispense canned or bottled soda pop, prepackaged milk or milk products, candy, gum, nuts, cookies and crackers.

It is important to bear in mind, however, that all licensing ordinances, as exercises of the police power, must be reasonable. This means that a licensing requirement must be rationally related to the public health, safety

Please turn to page 156

..Number

DRAFT

..Version

ORIGINAL

..Reference

..Sponsor

ALD. DONOVAN

..Title

Resolution expressing the City of Milwaukee's support for passage of 2001 Wisconsin Assembly Bill 62, an act allowing municipalities to enact and enforce ordinances prohibiting the possession, manufacture or delivery of drug paraphernalia by persons 17 years of age and older, and directing the Intergovernmental Relations Division-Department of Administration to lobby for its passage.

..Analysis

This resolution expresses the City of Milwaukee's support for passage of 2001 Wisconsin Assembly Bill 62 and directs the Intergovernmental Relations Division-Department of Administration to lobby for passage of this legislation. Assembly Bill 62 would enable municipalities to enact and enforce local ordinances banning the possession, manufacture or delivery of drug paraphernalia by persons 17 years of age and older. Under current state law, municipalities can only pass and enforce local ordinances relating to drug paraphernalia activities involving juveniles.

..Body

Whereas, Section 106-36 of the Milwaukee Code of Ordinances prohibits the possession, manufacture, sale, delivery or advertisement of drug paraphernalia by any person, adult or juvenile; and

Whereas, Subchapter VI of ch. 961, Wisconsin Statutes, effectively precludes a municipality from enacting legislation to prohibit the possession, manufacture, sale, delivery or advertisement of drug paraphernalia by persons age 17 or older, thus severely limiting the City of Milwaukee's ability to enforce s. 106-36; and

Whereas, Drug-related gang activity and drug-related criminal activity continue to plague many neighborhoods in Milwaukee; and

Whereas, The widespread availability of drug paraphernalia to adults undoubtedly contributes to these problems; and

Whereas, Drug-paraphernalia and drug-abuse problems are most acutely experienced, understood and combated at the local level, thus giving municipalities a legitimate interest in enacting ordinances prohibiting drug-paraphernalia activities involving adults; and

Whereas, An enforceable ordinance prohibiting the sale, manufacture or possession of drug paraphernalia could be a useful weapon in Milwaukee's on-going war on drugs; and

Whereas, During the few months in 1990 when the City of Milwaukee was able to enforce s. 106-36 against all persons, not just juveniles, there was a significant reduction in the number of stores selling drug paraphernalia, as well as an increase in the number of citations written for possession of drug paraphernalia; and

Whereas, 2001 Wisconsin Assembly Bill 62, which was introduced on February 1, 2001, has been referred to the State Senate for consideration and would enable a municipality to enact and enforce and ordinance prohibiting the possession, manufacture or sale of drug paraphernalia by persons 17 years of age or older; now, therefore, be it

Resolved, By the Common Council of the City of Milwaukee, that the City of Milwaukee supports passage of 2001 Wisconsin Assembly Bill 62; and, be it

Further Resolved, That the Intergovernmental Relations Division- Department of Administration is directed to lobby for passage of 2001 Wisconsin Assembly Bill 62.

..Requestor

..Drafter
LRB01545-1
JDO
11/15/01

2236

2005 - 2006 LEGISLATURE

LRB-07391
MGD:lmk&jld:rs

Keep

2005 BILL

3/4

ReGen

1 AN ACT *to repeal* 60.23 (21) (title); *to renumber and amend* 60.23 (21); and *to*
 2 *amend* 66.0107 (1) (a), 66.0107 (1) (b), 349.02 (2) (b) 2., 349.02 (2) (b) 4., 778.25
 3 (1) (a) 1., 778.25 (1) (a) 1m., 818.02 (7) and 961.577 of the statutes; **relating to:**
 4 municipal ordinances regarding drug paraphernalia.

Analysis by the Legislative Reference Bureau

Current law prohibits the possession, manufacture, and delivery of drug paraphernalia. If a person 17 years of age or older violates one of the prohibitions relating to drug paraphernalia, he or she is subject to criminal penalties, a fine or imprisonment or both. If a person under the age of 17 violates one of the prohibitions relating to drug paraphernalia, he or she is generally subject to suspension or revocation of his or her privilege to operate a motor vehicle for not less than six months nor more than five years and either or both of the following: a forfeiture (civil monetary penalty) of up to \$500, with the amount depending on drug paraphernalia offenses the person committed in the preceding 12 months, and a requirement that he or she participate in community service work. Current law prohibits and provides more severe penalties for both adults and juveniles for the possession or use of drug paraphernalia used to produce or store methamphetamine.

Current law also allows a city, village, or town to enact and enforce ordinances prohibiting the possession, manufacture, or delivery of drug paraphernalia by a person under the age of 17. The ordinances must prohibit the same conduct that is prohibited under the state statutes relating to the possession, manufacture, and delivery of drug paraphernalia generally, as opposed to the state statutes governing

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the possession, manufacture, and delivery of methamphetamine-related drug paraphernalia. Current law allows a county with a population of 500,000 or more (currently only Milwaukee County) to enact the same type of ordinance prohibiting the possession, manufacture, and delivery of drug paraphernalia by a person, regardless of the person's age.

This bill allows a city, village, or town to enact and enforce an ordinance prohibiting the possession, manufacture, or delivery of drug paraphernalia by persons 17 years of age and older. The ordinance must prohibit the same conduct that is prohibited under the state statutes relating to the possession, manufacture, and delivery of drug paraphernalia generally. A prosecutor could then charge a person 17 years of age or older with violating either the ordinance or one of the state statutes. A person prosecuted for violating an ordinance enacted under this bill would be subject to a forfeiture in an amount established by the ordinance instead of being subject to the criminal penalties provided under the state statutes.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 60.23 (21) (title) of the statutes is repealed.

2 **SECTION 2.** 60.23 (21) of the statutes is renumbered 66.0107 (1) (bp) and
3 amended to read:

4 66.0107 (1) (bp) -Adopt Enact and enforce an ordinance to prohibit conduct that
5 is the same as that prohibited by s. 961.573 (1) or (2), 961.574 (1) or (2), or 961.575
6 (1) or (2) and provide a forfeiture for violation of the ordinance.

7 **SECTION 3.** 66.0107 (1) (a) of the statutes is amended to read:

8 66.0107 (1) (a) Prohibit all forms of gambling and fraudulent devices and
9 practices;

10 **SECTION 4.** 66.0107 (1) (b) of the statutes is amended to read:

11 66.0107 (1) (b) Seize anything devised solely for gambling or found in actual
12 use for gambling and destroy the device after a judicial determination that it was
13 used solely for gambling or found in actual use for gambling; and

14 **SECTION 5.** 349.02 (2) (b) 2. of the statutes is amended to read:

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1 349.02 (2) (b) 2. Chapter 961 and local ordinances that strictly conform to s.
2 961.573 (1) or (2), 961.574 (1) or (2), or 961.575 (1) or (2).

3 **SECTION 6.** 349.02 (2) (b) 4. of the statutes is amended to read:

4 349.02 (2) (b) 4. Local ordinances enacted under s. 59.54 (25) or (25m), ~~60.23~~
5 ~~(21)~~, or 66.0107 (1) (bm).

6 **SECTION 7.** 778.25 (1) (a) 1. of the statutes is amended to read:

7 778.25 (1) (a) 1. Under s. 125.07 (4) (a) or (b), 125.085 (3) (b), or 125.09 (2),
8 ~~961.573 (2), 961.574 (2) or 961.575 (2)~~ or under a local ordinance strictly conforming
9 to one of those statutes brought against an adult in circuit court or against a minor
10 in the court assigned to exercise jurisdiction under chs. 48 and 938.

11 **SECTION 8.** 778.25 (1) (a) 1m. of the statutes is amended to read:

12 778.25 (1) (a) 1m. Under s. 961.573 (2), 961.574 (2), or 961.575 (2) brought
13 against a minor in the court assigned to exercise jurisdiction under chs. 48 and 938
14 or under a local ordinance enacted under s. 59.54 (25m) or 66.0107 (1) (bp) brought
15 against an adult in circuit court or against a minor in the court assigned to exercise
16 jurisdiction under chs. 48 and 938.

17 **SECTION 9.** 818.02 (7) of the statutes is amended to read:

18 818.02 (7) In an action for a forfeiture under s. 961.573 (2), 961.574 (2) or
19 961.575 (2), or under a local ordinance strictly conforming to one of those statutes s.
20 961.573 (1) or (2), 961.574 (1) or (2), or 961.575 (1) or (2).

21 **SECTION 10.** 961.577 of the statutes is amended to read:

22 **961.577 Municipal ordinances.** Nothing in this subchapter precludes a city,
23 village, or town from prohibiting conduct that is the same as that prohibited by s.
24 961.573 (1) or (2), 961.574 (1) or (2), or 961.575 (1) or (2) or a county with a population

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1 of 500,000 or more from prohibiting conduct that is the same as that prohibited by
2 s. 961.573 (1) or (2), 961.574 (1) or (2), or 961.575 (1) or (2).

3 (END)

Northrop, Lori

From: Mcginnis, Cindy
Sent: Monday, April 04, 2005 12:46 PM
To: LRB.Legal
Subject: Draft review: LRB 05-2236/1 Topic: Municipal ordinances regarding drug paraphernalia

It has been requested by <Mcginnis, Cindy> that the following draft be jacketed for the ASSEMBLY:

Draft review: LRB 05-2236/1 Topic: Municipal ordinances regarding drug paraphernalia