



**City of Racine, Wisconsin
Common Council**

AGENDA BRIEFING MEMORANDUM

COMMITTEE: Public Safety and Licensing **LEGISLATION ITEM #:** 0215-19

AGENDA DATE: March 12, 2019

DEPARTMENT: City Attorney's Office

Prepared By: Deputy City Attorney Nhu Arn

Reviewed by: City Attorney Scott Letteney

SUBJECT: Communication from Ald. Perez proposing a new ordinance that would ban the possession and purchase of e-cigarettes or vaping devices by minors.

EXECUTIVE SUMMARY:

The legality of whether municipalities have the authority to ban minors from purchasing or possessing e-cigarettes (rather than just banning the sale or possession of nicotine by minors) has not been tested in court. However, the city likely has the authority to regulate this issue pursuant to a municipality's police powers.

With respect to the current proposal, the committee has three options available: 1) Adopt the state statute that prohibits minors from possessing nicotine (which would include any electronic cigarettes, or e-cigarettes, that contain nicotine) and bans the sale of such products to minors; 2) Enact an ordinance that specifically prohibits minors from possessing e-cigarettes (including e-cigarettes that are nicotine-free) and bans the sale of such products to minors; or 3) Decline to enact such any ordinance and allow officers to rely on state law to enforce the existing ban of nicotine by minors.

25 BACKGROUND & ANALYSIS:

26 Current state law bans the sale of “nicotine products” to minors and likewise prohibits a minor from
27 possessing the same.¹ Most electronic cigarettes (also known as e-cigarettes, vape pens, vape sticks,
28 vaping devices, etc.) typically contain nicotine as part of the e-liquid solution, which is dispensed by the
29 e-cigarette as an aerosol to be inhaled. As a result, current state law effectively prohibits minors from
30 possessing e-cigarettes only when they contain nicotine as part of the e-liquid solutions. It is important to
31 note that while current state law is clear on the sale and possession of nicotine by minors, it does not
32 specifically regulate e-cigarettes.

33 The ability to locally regulate nicotine-free e-cigarettes, in particular, is questionable. While e-cigarettes
34 are typically used to dispense solutions containing nicotine, there are other substances that may be inhaled
35 as an aerosol outside of nicotine; these include flavorings, chemicals and other substances. Depending on
36 the nature of the substance being inhaled, the potential negative health effects of these nicotine-free e-
37 cigarettes may vary. The committee is being asked to consider an ordinance that would specifically ban
38 the possession and sale of all e-cigarettes (including nicotine free e-cigarettes) by minors. In this case, the
39 city’s options are three-fold:

- 40 1) First, the city may choose to simply adopt the state’s ban of the sale and possession of nicotine by
41 minors, which would effectively prevent the minors from possessing or purchasing most e-
42 cigarettes. This would not, however, prevent minors from purchasing nicotine-free e-cigarettes.
43 State law requires that any municipal enacting an ordinance to regulate such conduct strictly
44 conform to state statute. As such, the city would be well within its authority to enact such an
45 ordinance. Since the city currently prohibits the possession of tobacco products by minors, it
46 could simply amend sections 66-646 through 66-650 of the City of Racine Code of Ordinance to
47 also prohibit the possession of nicotine by minors. Once that change is codified in the ordinance,
48 City of Racine police officers may cite individuals and referred them to Municipal Court for
49 prosecution.
50
- 51 2) Second, the city may choose to go one step further and ban the possession and sale of e-cigarettes
52 to minors, rather than just nicotine. It is unclear whether a municipality has the authority to enact
53 such an ordinance. On the one hand, the state legislature has preempted the field of cigarettes and
54 nicotine products by enacting Wis. Stat. secs. 134.66 and 254.92. Both provisions of the statutes
55 require municipalities to strictly conform to state law, which implicates that these are matters of
56 statewide concern. Where the legislature has preempted the state and declared an issue to be a
57 matter of statewide concern, a municipality has no authority to act.² Arguably, the statewide
58 concern over regulations of cigarettes and nicotine products would also extend to e-cigarettes,
59 which typically contains nicotine. Reading the statutes broadly, it would seem that municipalities
60 do not have the authority to act independently on this issue. On the other hand, one could argue
61 that the state has been silent on the regulation of nicotine-free e-cigarettes and that these are
62 completely distinct from traditional cigarettes that contain tobacco and nicotine. In such case, a
63 municipality may rely on its police powers to regulate the public health, moral and safety. The
64 issue of preventing minors from possessing a product deemed harmful to their health would seem
65 to fit such a bill. Given the lack of clarity from the state at this time, a few Wisconsin
66 municipalities have opted to enact an ordinance to regulate the use of nicotine free e-cigarettes by
67 minors. Should the city decide to follow this trend, it should proceed knowing that this ordinance
68 may eventually be challenged in court.

- 69 3) Third, the city may choose to take no action at this time. Because state law current prevents the
70 sale and possession of nicotine by minors, any law enforcement officer may rely on state statute
71 to cite a person in violation. Where the municipality has not enacted a specific ordinance but state
72 statute prohibits such behavior, any law enforcement officer may enforce the matter by citing the
73 person and referring it to Circuit Court to be prosecuted.

74 Lastly, I would note that although it was requested at the previous Public Safety and Licensing meeting
75 that Wis. Stat. sec. 101.123 be modified to prohibit nicotine by minors, this provision is not relevant to
76 the issue at hand. Wis. Stat. sec. 101.123 serves only to prohibit smoking within certain facilities, but
77 does not address the use or possession of tobacco by minors, nor does it define smoking to include e-
78 cigarettes. Therefore, if the objective is to prohibit the use of e-cigarettes by minors, it would be much
79 more efficient to go with either of the first options above, rather than to modify Wis. Stat. sec. 101.123.

81 **BUDGETARY IMPACT:** N/A

83 **OPTIONS/ALTERNATIVES:**

- 84 1) Adopt the state statute prohibiting the sale and possession of nicotine by minors.
85 2) Enact an ordinance banning all e-cigarettes.
86 3) Take no action and rely on state statute for enforcement.

88 **RECOMMENDED ACTION:** The City Attorney's Office makes no specific recommendation and
89 defers to the discretion of the Common Council in making this policy decision.

91 **ATTACHMENT(S):** None.

¹ Wis. Stat. §§ 134.66., 254.92.

² Wis. Const., Art. XI, sec. 3.