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March 21, 2022

James Owczarski
City Clerk
City Hall, Room 205

Re: Review of Ordinance for Legality and Enforceability (File No. 211674)

Dear Mr. Owczarski:

You requested an opinion regarding the legality and enforceability of the proposed ordinance in the above referenced file, which if adopted would define a single violation of one of eleven referenced traffic violations, as a nuisance per se. While the Common Council has wide discretion in defining activities that constitute a nuisance per se, we do not believe that the ordinance would eliminate the need for the City to establish a public nuisance in an injunction action against a problem driver. Accordingly, it is our view that the proposed ordinance would not be enforceable in an injunction action. We note, however, that an ordinance directed at habitual violations of the more serious traffic laws, would stand a better chance of being upheld by a court in an injunction action. Our reasoning is set forth below.

The Proposed Ordinance

The proposed ordinance would create §80-49-5 of the Milwaukee Code of Ordinances, which would provide as follows:

§80-49-5 Reckless Driving Declared a Nuisance per se. Any violation of the following is declared a nuisance per se: §346.04, 346.05, 346.39, 346.46, 346.57, 346.59, 346.62, 346.63, 346.89, 346.94, 346.595, Wis. Stats.

The traffic laws referenced in the proposed ordinance consist of the following:

1. 346.04- Obedience to orders or signals of a traffic officers; fleeing an officer.
2. 346.05- Vehicles to be driven on right side of road.



3. 346.39- Disobeying a flashing red or yellow signal.
4. 346.46- Vehicles to stop at stop signs and school crossings.
5. 346.57- Speeding
6. 346.59- Driving too slow
7. 346.62- Reckless driving
8. 346.63- Operating under the influence of intoxicants or other drugs.
9. 346.89- Inattentive driving
10. 346.94- Driving on sidewalk, racing, and other miscellaneous violations.
11. 346.595- Rules relating to the riding of motorcycles and mopeds (e.g. no side saddle riding, no more than 2 persons)

A review of the proposed ordinances highlight two things: the ordinance would apply to a single violation of one of the listed traffic laws; and the listed traffic laws include both serious and relatively minor violations. For example, one violation for “driving too slow” would, under the proposed ordinance, be a nuisance per se.

Power to Declare a Nuisance Per Se

The Common Council has broad authority to protect the health, safety, and welfare of city residents, including the ability to define and take action against public nuisances. *City of S. Milwaukee v. Kester*, 347 Wis. 2d 334, 830 N.W.2d 710, 2013 WI App. 50 (Wis. Ct. App. 2013). A nuisance per se may be established by law, and no actual injurious consequences are required to support a finding of a nuisance per se. *Id.* When a municipality has enacted an ordinance that defines a nuisance per se, courts should not interfere in this determination absence a showing of oppressiveness or unreasonableness. *Id.* An injunction is a permissible remedy to enforce an ordinance establishing a nuisance per se. *Id.*

The utility of an ordinance declaring an activity to be a nuisance per se is that the municipality can enforce the ordinance in an injunction proceeding without having to prove to the judge that the activity in question constitutes a public nuisance. For example, in the *Kester* case, the City of South Milwaukee brought an injunction action against Kester to enforce its ordinance declaring that a convicted sex offender living within 1000 feet of a school constituted a public nuisance. The Wisconsin Court of Appeals affirmed the trial court’s granting of an injunction requiring Kester to move and held that because the City’s ordinance declared to be a nuisance per se, the city was not required to prove in the injunction proceeding that Kester living within 1000 feet of a school was a public nuisance. *Id.* Notably, Kester did not argue that the ordinance was oppressive or unreasonable. *Id.*

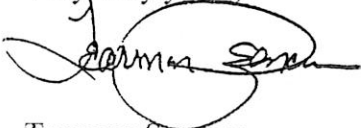
A Court Is Likely To Conclude That The Ordinance In File No. 211674 Is Unreasonably Broad.

James Owczarski, City Clerk
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We have noted that the proposed ordinance is very broad. A single violation of a relatively minor traffic law is declared to be a nuisance per se. We believe that in an injunction proceeding brought by the City, a court would likely conclude that the proposed ordinance is unreasonably broad and would require the City to prove that the activities of the particular defendant driver constitute a public nuisance that needs to be abated. In other words, we do not believe that the proposed ordinance would accomplish the goal of making it easier for the City to obtain injunctive relief against problem drivers.

It is our opinion that an ordinance declaring habitual or repeated violations of the more serious traffic laws to be a nuisance per se would stand a much better chance of being upheld by a court in an injunction proceeding. In this regard, the Wisconsin Supreme Court has held that repeated violations of the criminal law or of a local ordinance can constitute a public nuisance. *State V. Samuels Co., INC*, 60 Wis. 2d, 631, 638-639, 211 N.W.2d 417(1973) (repeated violations by a metal salvage yard of an ordinance regulating noise and vibration levels are a public nuisance).

Very truly yours,



Tearman Spencer
City Attorney



Todd Farris
Deputy City Attorney

TF:kdb
1055-2022-255:279504