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TO: Members of the Safety and Licensing Committee

FROM: Stacy Doucette, Assistant City Attorney

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RE: Guidelines for Determining Substantially Related Offenses

According to Statute, licenses or permits related to alcohol beverages shall not be issued to any person who has habitually been a law offender or to any person who has been convicted of a felony and the circumstances of the offense(s) or conviction(s) substantially relate to the circumstances of the particular job or licensed activity. The purpose of this memo is to help guide the committee members in making objective determinations. However, the circumstances of each application are unique and the decisions that are made must be based upon each applicant's individual circumstances.

First, the committee should evaluate the duties associated with jobs requiring operator's licenses. Secondly, the committee should look at the statutory elements of the offense. Finally, the committee may conduct a factual inquiry with the applicant and the officer assigned to the committee if necessary. However, the factual inquiry should be limited only to details that will help the committee determine if the tendencies and inclinations to behave a certain way are likely to reappear in another context. Then, based on what the committee has learned, the committee must determine whether the opportunities created by issuing an operator's license will place this person in a position where they may be exposed to situations that could cause them to engage in illegal acts again. In other words, this person has demonstrated an inclination to engage in conduct that is illegal and the committee must determine whether there is a potential temptation for this individual to break the law again if given the opportunity.

1) Elements of the licensed activity

Two general types of jobs acquired with operator's licenses.

- A) Those who sell alcohol for on premise consumption at taverns, restaurants etc.
- B) Those who sell alcohol for off premise consumption at gas stations, liquor stores etc.

*Keep in mind that once a person is granted a license they can use it for either type of job.

Selling alcohol is a heavily regulated industry in which significant elements of the job are directly controlled by state statutes and/or local ordinance which are designed for the

protection of public health and safety.

Both jobs require a certain level of responsibility. The operator is expected to serve alcohol in a responsible manner. The operator must make sure that the people they are selling to or serving are 21 or older. The operator also has a responsibility to not over serve an individual and create an unsafe condition for both the individual and other members of the public.

Also, licensees will encounter police authority on the job more than most employees because the activity of serving alcohol is routinely monitored by police and the police are often summoned for assistance at or outside licensed premises.

The licensee will also have the opportunity presented by his employment to come in contact with many members of the public. Some of whom will be under the influence of alcohol, feeling the effects of alcohol or have their judgment impaired by alcohol. This high degree of contacts could facilitate the opportunity for criminal activity - in particular, drug offenses and sex offenses.

Licensees typically will be hired in positions that include a responsibility for and contact with cash, credit card and check transactions.

Finally, licensees may also have a greater degree of independence than an unlicensed employee, since the licensee can work without supervision. A person can sell/serve alcohol without a license as long as they are being supervised by someone holding an operator's license or manager's license, whereas, a licensed employee may work alone.

2) Elements of the Offense

The "substantial relationship" test does not require that the context of the offense and the job duties be identical. Substantially related does not mean just alcohol related offenses. Alcohol related offenses are only a portion of the offenses that may be considered substantially related. In addition, substantially related does not mean that the offense occurred at a place of employment. The elements will vary with each offense. If the committee needs to make a determination, the elements will be provided for the committee if requested.

3) Factual Inquiry

In some cases, what the committee learns prior to any factual inquiry will be enough to make the substantially related determination. In other cases, the elements of the offense may be too general; therefore, the committee can engage in a limited factual inquiry with the applicant.

The purpose of the inquiry should be limited to only details that will help the committee determine whether the opportunities created by issuing an operator's license will place this person in a position where they may be exposed to situations that could trigger them to engage in illegal acts again. The purpose of the inquiry is not to determine whether the applicant should have been convicted or not.

In most cases the committee will not know the details of what happened; therefore, it would be reasonable for the committee to ask what happened and why. However, the committee must keep in mind that frequently the only person at the meeting with any personal knowledge about the underlying factual circumstances of the offense is the person who was convicted and frequently that person will describe a version of the underlying factual circumstances that is self-exculpatory and inconsistent (to a greater or lesser degree) with the fact that they were convicted. Therefore, the committee must remember that the one fact that is definitely true is that the person engaged in the elements of the crime otherwise there would not be a conviction.

- 4) Felonies – If a committee member makes a determination that a felony is substantially related, the law requires that the license should be denied; therefore, the committee member should be recommending that the license is denied.

Other Offenses – Although other offenses on a person's record may be considered substantially related, the law does not require that the license be outright denied unless the person has habitually been a law offender and that pattern of behavior is substantially related.

Habitual Law Offender - A person who has "habitually been a law offender," is someone who has committed more than one offense in a relatively short time or someone who continuously violates the law over a period of time. Although, the committee may find that one offense is not substantially related on a person's record, the record as a whole may still be considered substantially related. The purpose of the test is to assess whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context. Each situation is unique but in general a person who continues to violate the law usually reveals that they have not been deterred from breaking the law. Each offense may build upon the next offense. In addition, a pattern of good behavior may also factor into the assessment. Therefore, by looking at the pattern of behavior, the various offenses within that pattern of behavior and the responsibilities that come with the license, the committee must ask whether the granting of such a license will place this person in a position whereby the person may be exposed to a situation that could cause this individual to engage in illegal acts again.

- 5) Examples of decisions made by Labor and Industry Review Commission and Wisconsin Supreme Court. *Unfortunately, none are specific to operator's licenses.
- a) Conviction for delivery of drugs was substantially related to person employed as a machine operator at a paper mill because the employee had a large amount of free time, the employee had only intermittent supervision and the workplace was very large.
 - b) Conviction for forgery and burglary were substantially related to person employed as an insurance agent because the job would require the person to handle funds in the form of checks and cash and would regularly deal with forms that could be forged for personal gain.
 - c) Conviction for armed robbery was substantially related to person licensed as school bus driver because the conviction indicates a disregard for both personal and property rights and it indicates a propensity to use force or the threat of force to accomplish one's

purposes. Therefore, the conviction indicates personal qualities that are contradictory to the job, which requires a person who is patient and levelheaded.

- 6) The following is a list of questions that each committee member should ask themselves and if necessary the applicant and/or the police department before making a final determination. Since each situation is unique, not all of the questions will apply to every case and additional considerations may be warranted. The ultimate determination is up to the committee; however, you want your decisions as a committee to be consistent.

If you have any additional questions or concerns, please feel free to contact me at 832-1580.

HELPFUL HINTS FOR DETERMINING SUBSTANTIALLY RELATED OFFENSES

a) Factors about the job

- 1) Environment - contact with a large number of different people who may be under the influence.
- 2) Responsibilities – don't serve underage persons, don't serve intoxicated persons, maintain control of environment, etc.
- 3) Supervision – licensed employee can work alone
- 4) Expectation that employee will cooperate when needed with police
- 5) Handle large amounts of money, checks, credit and debit cards
- 6) License can transfer from place to place

b) Questions about the crime

- 1) Did the crime involve alcohol or drugs?
- 2) Did the crime involve a lack of cooperation with police or a person of authority?
- 3) Did the crime involve a lack of trustworthiness or honesty?
- 4) Specifically, did the crime involve a lack of trustworthiness or honesty with money?
- 5) Where did the crime take place?
- 6) Who was the victim of the crime?
- 7) Will the new job provide them the opportunity to commit a similar crime?

c) Questions about the individual

- 1) Any indication of rehabilitation? (for example: Have they participated in an alcohol or drug program?)
- 2) Are they currently on probation or parole? Have they successfully completed probation or parole? What did they have to do as part of their probation or parole?
- 3) Has a significant amount of time passed that assures that the person has dramatically changed their behavior? If a significant amount of time has passed, what changed? Was it because they were imprisoned or on parole or probation?
- 4) Has the individual denied or "not recalled" facts pertaining to the crime?
- 5) Has the person had the opportunity to commit other offenses?
- 7) What was the age of the applicant when they committed the offense and what is their age now?
- 8) Has the person committed any other crimes before or after the crime in question?
- 9) Are any of those crimes (not necessarily felonies) substantially related?
- 10) Is there any pattern of behavior?
- 11) Would you consider the applicant to be a habitual law offender?
- 12) Have the courts declared the applicant a habitual law offender? If so, then you must deny the license.

d) Factors that should not affect your decision to grant a license

- 1) Appearance
- 2) Who the applicant will be working for.
- 3) The fact that the individual turned 18 or 21.
- 4) The fact that the person may lose their job if they don't get a license.
- 5) The fact that you feel sorry for the individual.
- 6) The fact that the person has or had a license somewhere else.
- 7) The fact that the person has been working for the same person for a length of time.
- 8) The length of time between the conviction and the application.

RELEVANT STATUTES

WSA 125.04 – General Licensing Requirements

(5) Qualifications for licenses and permits. (a) *Natural persons.* Licenses and permits related to alcohol beverages, issued to natural persons under this chapter, may be issued only to persons who fulfill all of the following requirements:

1. Do not have an arrest or conviction record, subject to ss. 111.321, 111.322, 111.335 and 125.12(1)(b).
2. Have been residents of this state continuously for at least 90 days prior to the date of application.
3. Have attained the legal drinking age.
4. Have submitted proof under s. 77.61(11).
5. Have successfully completed within the 2 years prior to the date of application a responsible beverage server training course at any location that is offered by a technical college district and that conforms to curriculum guidelines specified by the technical college system board or a comparable training course that is approved by the department or the educational approval board. This subdivision does not apply to an applicant who held, or who was an agent appointed and approved under sub. (6) of a corporation or limited liability company that held, within the past 2 years, a Class "A", "Class A" or "Class C" license or a Class "B" or "Class B" license or permit or a manager's or operator's license.

(b) Criminal offenders. No license or permit related to alcohol beverages may, subject to ss. 111.321, 111.322 and 111.335, be issued under this chapter to any person who has habitually been a law offender or has been convicted of a felony unless the person has been duly pardoned.

WSA 125.12 Revocations, suspensions, refusals to issue or renew

(2) Revocation or suspension of licenses by local authorities.

(ag) *Complaint.* Any resident of a municipality issuing licenses under this chapter may file a sworn written complaint with the clerk of the municipality alleging one or more of the following about a person holding a license issued under this chapter by the municipality:

1. The person has violated this chapter or municipal regulations adopted under s. 125.10.
2. The person keeps or maintains a disorderly or riotous, indecent or improper house.
3. The person has sold or given away alcohol beverages to known habitual drunkards.
4. The person does not possess the qualifications required under this chapter to hold the license.
5. The person has been convicted of manufacturing, distributing or delivering a controlled substance or controlled substance analog under s. 961.41(1); of possessing, with intent to manufacture, distribute or deliver, a controlled substance or controlled substance analog under s. 961.41(1m); or of possessing, with intent to manufacture, distribute or deliver, or of manufacturing, distributing or delivering a controlled substance or controlled substance analog under a substantially similar federal law or a substantially similar law of another state.

5m. The person has been convicted of possessing any of the materials listed in s. 961.65 with intent to manufacture methamphetamine under that subsection or under a federal law or a law of another state that is substantially similar to s. 961.65.

6. The person knowingly allows another person, who is on the premises for which the license under this chapter is issued, to possess, with the intent to manufacture, distribute or deliver, or to manufacture, distribute or deliver a controlled substance or controlled substance analog.

6m. The person knowingly allows another person, who is on the premises for which the license under this chapter is issued, to possess any of the materials listed in s. 961.65 with the intent to manufacture methamphetamine.

7. The person received the benefit from an act prohibited under s. 125.33 (11).

WSA 111.335. Arrest or conviction record; exceptions and special cases

(1)(a) Employment discrimination because of arrest record includes, but is not limited to, requesting an applicant, employee, member, licensee or any other individual, on an application form or otherwise, to supply information regarding any arrest record of the individual except a record of a pending charge, except that it is not employment discrimination to request such information when employment depends on the bondability of the individual under a standard fidelity bond or when an equivalent bond is required by state or federal law, administrative regulation or established business practice of the employer and the individual may not be bondable due to an arrest record.

(b) Notwithstanding s. 111.322, it is not employment discrimination because of arrest record to refuse to employ or license, or to suspend from employment or licensing, any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job or licensed activity.

(c) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ or license, or to bar or terminate from employment or licensing, any individual who:

1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity; or

2. Is not bondable under a standard fidelity bond or an equivalent bond where such bondability is required by state or federal law, administrative regulation or established business practice of the employer.

(cg)1. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to deny or refuse to renew a license or permit under s. 440.26 to a person who has been convicted of a felony and has not been pardoned for that felony.

2. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to revoke a license or permit under s. 440.26(6)(b) if the person holding the license or permit has been convicted of a felony and has not been pardoned for that felony.

3. Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ a person in a business licensed under s. 440.26 or as an employee specified in s. 440.26(5)(b) if the person has been convicted of a felony and has not been pardoned for that felony.

(cm) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ as an installer of burglar alarms a person who has been convicted of a felony and has not been pardoned.

(cs) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to revoke, suspend or refuse to renew a license or permit under ch. 125 if the person holding or applying for the license or permit has been convicted of one or more of the following:

- 1. Manufacturing, distributing or delivering a controlled substance or controlled substance analog under s. 961.41(1).**
- 2. Possessing, with intent to manufacture, distribute or deliver, a controlled substance or controlled substance analog under s. 961.41(1m).**
- 3. Possessing, with intent to manufacture, distribute or deliver, or manufacturing, distributing or delivering a controlled substance or controlled substance analog under a federal law that is substantially similar to s. 961.41(1) or (1m).**
- 4. Possessing, with intent to manufacture, distribute or deliver, or manufacturing, distributing or delivering a controlled substance or controlled substance analog under the law of another state that is substantially similar to s. 961.41(1) or (1m).**
- 5. Possessing any of the materials listed in s. 961.65 with intent to manufacture methamphetamine under that section or under a federal law or a law of another state that is substantially similar to s. 961.65.**

(cv) Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ in a position in the classified service or in a position described in s. 230.08(2)(k) a person who has been convicted under 50 USC, Appendix, section 462 for refusing to register with the selective service system and who has not been pardoned.