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Is the Wisconsin Legislature Going to Make Tailgating Illegal?

WILL's Analysis of Substitute Amendment 1 to AB 433

On February 12, 2018, an amendment[1] was offered to AB 433[2] that would, in short, regulate the consumption of alcohol on certain nonpublic (and public) places by requiring a retail license to be obtained. The bill – along with the amendment – has passed the Assembly and is waiting for a floor vote in the Senate. What major policy problem the proposed amendment is designed to solve is unclear. But what is clear – whether intended or unintended – is that **the amendment would negatively impact Wisconsin's long-standing tradition of tailgating (or at least your ability to have a beer with your brat).**

While we have not seen tailgating featured in the Marquette Law School poll, our guess is that in a State that is well known for beer and brats, it is quite popular. But the amendment is admittedly complex and the legislature may have a reason for doing this. Our goal for this memo is to explain the potential impact of Substitute Amendment 1 to AB 433.

The proposed amendment does several things that hurt tailgating. First, it would add the following language to Wis. Stat. § 125.09 (restrictions on possession of alcohol):

> No owner or person in charge of property that is not a public place and who receives payment for temporary use of the property by another person for a specific event may permit the consumption of alcohol beverages on the property, unless the person has an appropriate retail license or permit and the consumption of alcohol beverages occurs on that portion of the property covered by the retail license or permit.

Let's parse this:

1. No owner or person in charge of property that is not a public place [Let's say, for example, a homeowner or business close to Lambeau Field];

[1] Assembly Substitute Amendment 1
https://docs.legis.wisconsin.gov/2017/related/amendments/ab433/asa1_ab433

[2] A commonsense bill that allows wineries to stay open until midnight.

2. who receives payment for temporary use of the property for a specific event [Let's say the homeowner or business charges for a parking space for a Packers game and allows tailgating on their property];

3. may permit the consumption of alcohol beverages on the property [but wait…]

4. unless the owner has a retail license to sell alcohol beverages [business or homeowners who allow tailgating with Lambeau parking cannot permit alcohol to be consumed in the parking area unless they obtain a license];

Obtaining a license from a municipality could require a significant amount of money, time, and resources. Most problematically, municipalities can have a quota for how many licenses they may hand out. It would create a sort of tailgating chaos, if such a law were enforced (and if it were not, then why would we want it on the books?).

To put it another way, under this amendment a business or homeowner would need an expensive license in order to charge someone to use their property to consume alcohol. This is also commonly known as "tailgating.[3]"

But in state law, there is a so-called "stadium exception." *See* Wis. Stat. § 125.09. The stadium exception simply says that certain public buildings, such as stadiums, are exempt from the prohibitions in § 125.09. But none of the homeowners or business owners in our example – those that surround Lambeau Field – are themselves "stadiums." **Therefore the stadium exception would not apply to any of them.**

Furthermore, the proposed amendment makes another change in the law that might also affect tailgating. According to § 125.09:

> "No owner, lessee, or person in charge of a public place may permit the consumption of alcohol beverages on the ***premises*** of the public place, unless the person has an appropriate retail license or permit." (emphasis added).

But the amendment would change § 125.09 by switching "premise" with "property" as follows:

> No owner, lessee, or person in charge of a public place may permit the consumption of alcohol beverages on the ~~premises~~ property of the public place, unless the person has an appropriate retail license or permit.

The reason for this change is unclear, as retail licenses and permits apply to licensed "premises" and there is no reference to licensed "property" in the pertinent statutes.

[3] Given how confusing the Amendment is, it is difficult to say just how many recreational activities would be impacted by this amendment. Besides tailgating, one could imagine a certain deer camp or fishing camp that would be impacted.

But what might be the effect of this change? Now let's take Miller Park as an example. Miller Park and the stadium parking lot are both public places. According to § 125.09, Miller Park cannot allow the consumption of alcoholic beverages on the *premises* unless it has a retail license or permit, but the stadium exception described above applies.

But what is the effect of changing "premises" to "property"?

Again let's parse this, starting with the law that exists now. Under the first sentence, what are the "premises" of Miller Park? Is this just the stadium itself, or does it include the parking lot? Under existing law, it does not matter. If the "premises" are the stadium itself, then the parking lot is not covered by the prohibition in the first sentence in the statute. No problem for tailgating in the parking lot. If the "premises" are both the stadium and the parking lot, then the stadium exception applies to them both and again there is no problem with tailgating in the parking lot.

But there could be problems in the Amendment. First, the prohibition in the first sentence would much more clearly apply to the parking lot. It is part of the public "property" even if it is not part of the "premises." Thus, under the first sentence, the Brewers would be required to prohibit the consumption of alcoholic beverages in the parking lot unless the "stadium exception" applies. But does it apply after this change?

The stadium exception simply says that the prohibition in the first sentence does not apply to "stadiums." But the Miller Park parking lot is not a "stadium." You don't need a ticket to the stadium in order to be in the parking lot. Thus, the stadium exception likely does not apply to the parking lot, and if it does not then changing the word "premises" to the word "property" has a substantial effect. **It means no beer with your brat at your Miller Park tailgate.**

We admit that this effect is uncertain. Someone could – and almost certainly will – argue that our analysis is wrong and tailgating at Miller Park has not been made illegal. We hope we are wrong, but why take the risk? What exactly is it intended to accomplish?

The situation is clearer with Lambeau Field. According to its most recent license application, the Packers have a license that covers Lambeau field only. It does not cover the Lambeau parking lots. Since the license does not include the parking lots (not just those of the adjacent landowners that we discussed above), **the amendment could mean the end of tailgating at Lambeau.**

The bigger picture is that this amendment raises a serious question of when and whether the government needs to interfere with people's private activity. Is there some good reason why the legislature needs to restrict Wisconsin's ability to have a brat and a beer on public or private property before a Packers or Brewers game? We'd like to hear it. It doesn't sound like a good idea to these Wisconsinites.