

BREWER'S OFFSITE RETAIL LOCATION SUMMARY

By Felice Borisy-Rudin, JD, PhD, and Julia Sherman, April 2021

This summary by the Wisconsin Alcohol Policy Project explains what municipalities can and cannot do to limit where brewer's off-site retail outlets get located.

With warm weather, beer gardens¹ tend to pop-up in Wisconsin as frequently as construction signs. Brewers may operate a temporary beer garden at an off-site location or "retail outlet." Some communities have reported seeing a brewer's offsite retail outlet appear without municipal approval or knowledge. This summary discusses beer gardens associated with brewers' off-site retail outlets. It does not address beer gardens on licensed premises or government-run beer gardens. Section I of this summary provides a background on brewer's permits. Section II of the summary (starting on p. 3) discusses how a municipality may regulate a brewer's off-site retail outlet.

I. BACKGROUND ON BREWER'S PERMITS

1. Municipalities No Longer Have the Power to License Brewer's Retail Outlets.

In 2011, as part of its budget act, the Wisconsin Legislature removed the power of municipalities to license brewers' retail outlets, and instead gave the Wisconsin Department of Revenue (DOR) the sole power to provide permits for brewers' retail outlets.² Chapter 125 of the Wisconsin Statutes provides municipalities with authority to grant licenses to sell alcohol beverages. It also provides the DOR with authority to grant permits to sell alcohol beverages. A municipality (city, village, or town) issues alcohol beverage retail licenses. The DOR issues an alcohol beverage retail permits. A brewer holds a brewer's permit, not a Class "B" permit, and not any class of license.

2. Each Brewer's Permit Allows Retail Sales at Several Locations.

In addition to various brewing, bottling, storage, transport, and sales privileges, a brewer's permit issued by the DOR allows a brewer to conduct retail sales of fermented malt beverages (beer) on the brewer's premises and at a second off-site retail outlet.³ The state permit authorizes the brewer to conduct retail sales to individuals, at the brewery premises or at an off-site retail outlet established by the brewer, of beer and other fermented malt beverages manufactured by the brewer or by other Wisconsin brewers, for on or off-premises

¹ The phrase "beer garden" has a long Wisconsin history, and usually refers to an outdoor location where beer or intoxicating liquor is sold. *State v. Hall*, 141 Wis. 30, 123 N.W. 251, 252 (1909).

² 2011 Wis. Act 32. The same act removed switched wholesaler regulation from municipalities to the DOR.

³ Wis. Stat. §§125.29(3).

consumption.⁴ While a brewer may have more than one brewer’s permit, and may have an on-site retail outlet at each brewery, the DOR has recently stated that it only allows one off-site retail outlet per brewer, regardless of the number of permits that person holds.⁵

Additional perks of the brewer’s permit include:

- A brewer may operate a restaurant on its premises and at its off-site retail outlet.⁶
- Each brewer may offer free taste samples at either or both locations and may provide free taste samples at Class “A” premises.⁷
- A few brewers, who had liquor licenses as of June 1, 2011, may sell liquor and wine, for on-premises consumption at both their brewery premises and off-site retail outlet.⁸
- A brewer may own and/or operate places of sale of fermented malt beverages at the state fair park or on any Wisconsin county fairgrounds.

3. The DOR is Required to Issue Permits to Eligible Brewer Applicants.

The permitting process for brewers leaves very little room for discretion. By statute, “The department [of revenue] shall issue brewer’s permits to eligible applicants.”⁹ An eligible applicant must hold a valid business tax registration certificate, and may not hold a Class “A” license, Class “B” license or permit, wholesaler’s permit, or a brewpub permit.¹⁰ A DOR agent “familiar with activities of fermented malt beverage brewers” is required to process the applications; and the permits “shall be” issued and renewed based on the requirements in Wis. Stat. §125.29(1) and (2), provided that the brewer meets the eligibility requirements.¹¹

A brewer may change its off-site location as often as it wants, using a simple single page form, BT-136 Secondary.¹² This unique ability makes it possible for the brewer to conduct temporary pop-up beer gardens at different locations throughout the state, so long as each secondary location occurs on a different date. Each brewer’s off-site retail outlet must be approved by the

⁴ Permits sale of fermented malt beverages manufactured at the brewery, other premises of the brewer, or at another Wisconsin brewery, for on-premise consumption or in original unopened packages or containers for off-premise consumption. Wis. Stat. §§125.29(3)(e)-(g).

⁵ Special Agent Tyler Quam, DOR on Tap: An Alcohol Industry Update, A&TEU, Wis. Dep’t of Revenue (May 2021).

⁶ Wis. Stat. §125.29(6).

⁷ Wis. Stat. §§125.29(3)(i).

⁸ Grandfather clause for brewers that held an intoxicating liquor license or permit on June 1, 2011. Wis. Stat. §125.29(3)(h).

⁹ Wis. Stat. §125.29(3).

¹⁰ Wis. Stat. §125.29(1), (2)(a), (5).

¹¹ Wis. Admin. Code Tax 7.23(4)(e)1.

¹² BT-136 Secondary, Permit Extension/Secondary Location (Relating to Brewery Permit and Fermented Malt Beverage), Wis. Dept. of Revenue.

DOR prior to the brewer conducting business at that location. The DOR form requests that the application be submitted at least two weeks in advance, which gives very little time for review.

When asked what factors the DOR reviews in considering secondary location permits, a DOR agent noted that the following conditions are reviewed:¹³

- Whether the brewery already has off-site premises operating at the same time;
- Whether the proposed off-site premise has another alcohol beverage license or permit; and
- Whether any municipal ordinances apply to the proposed off-site retail outlet location.

The DOR has stated that it will reach out to the municipality for information.¹⁴ The DOR also encourages the brewer to reach out to the municipality to learn what local regulations would apply to the proposed off-site retail outlet, such as “zoning, beer garden license, hours of sale, etc.”¹⁵ In practice, it may be the brewer rather than the DOR that first contacts the municipality.¹⁶ In making its decision, the DOR may rely on information provided by the brewer (such as a forwarded email from the municipal clerk), in addition to or instead of information received from the municipality directly.

Note that although the DOR states that conflicts with the municipal code are considered, nothing in the statutes or administrative code mentions municipal ordinances as a reason for refusal. If the brewer’s retail outlet does violate municipal code, the municipality can and should enforce its ordinances against the brewer.

Practical Advice for Communities: The only heads-up a municipality may receive of a proposed temporary brewer’s outlet may be a telephone call or email to the clerk from either the brewer or the DOR agent, with very little time for turnaround, possibly as little as a day. Understanding zoning maps (or finding someone who does) and a list of specific ordinances that would prohibit or limit the brewer’s proposed retail outlet location could be very helpful, as would notifying the DOR of any applicable ordinances.

¹³ April 23, 2021 telephone conversation with Zachary Dolan, Revenue Agent 5, Alcohol & Tobacco Enforcement Unit, Wis. Dept. of Revenue.

¹⁴ Special Agent Tyler Quam, DOR on Tap: An Alcohol Industry Update, A&TEU, Wis. Dep’t of Revenue (May 2021).

¹⁵ *Id.*

¹⁶ April 21, 2021 telephone conversation with Jeffrey Glazer, Clinical Assoc. Prof., UW Law & Entrepreneurship Clinic, and attorney that represents craft brewers.

I. HOW A MUNICIPALITY MAY REGULATE A BREWER'S OFF-SITE OUTLET

Municipalities have several practices by which they can exert and enforce control on brewers' retail outlets. These practices include:

- Using the zoning code.
- Enacting ordinances authorized under Ch. 125.
- Regulating the use of alcohol in municipal parks.
- Regulating retail food establishments.

Counties can also enact zoning and regulatory ordinances, although they have less authority under Ch. 125 than municipalities for alcohol beverage regulation. Most county ordinances (with certain exceptions) do not apply to cities, villages, and some towns (e.g., those with village powers).¹⁷ For example, general county zoning authority is limited to those areas that are "outside the limits of incorporated villages and cities."¹⁸ As a general rule, a municipality that wishes to enforce an ordinance usually must enact its own ordinance.

1. Using the Zoning Code.

Counties, cities, villages, and towns with village powers, may use their zoning codes to require conditional use permits for certain types of outlets in certain districts, e.g., to limit the presence of tasting rooms, or to require beer gardens to be a set distance from residences. Wis. Stat. §125.10(3) explicitly states, "Except as provided in s. 125.68, this chapter [125] does not affect the power of municipalities to enact or enforce zoning regulations." Therefore, a municipality may use its zoning power to place reasonable restrictions on the locations of alcohol beverage outlets.

A valid zoning ordinance usually meets several criteria:

- It divides the municipality into more than one zone;
- Within each zone, it allows certain uses as of right, may provide for some conditional uses, and prohibits those uses that are not listed;
- It controls where a use takes place, instead of how;
- It classifies uses in general terms and attempts to address all possible uses for each zone;

¹⁷ A municipality may by resolution request that the county exercise its powers in the municipality for a particular function. Wis. Stat. §59.03(2); a municipality may also enter into an intergovernmental cooperation agreement with a county. Wis. Stat. §66.0301.

¹⁸ Wis. Stat. §59.69(4).

- It usually makes a prospective, “fixed, forward-looking determination about what uses will be permitted”¹⁹; except that conditional uses allow for individual level decisions; and
- It usually grandfathers in landowners whose use at the time of adoption of the new ordinance was legal.

A municipality can add brewers’ retail outlets and beer gardens as uses to their zoning code and delineate in which zoning districts they are permitted, conditional, or prohibited.²⁰ It can also specify what outdoor uses (such as a beer garden) are permitted, conditional or prohibited in each zone, and provide criteria for conditional uses. To keep its ordinance valid as a zoning ordinance, the municipality should classify the use based on the zone. For example, a beer garden might be conditional in a commercial zone and prohibited in a residential zone.

2. Ordinances Authorized Under Chapter 125.

Wis. Stat. §125.10(1) provides municipalities with substantial power to regulate the sale of alcohol beverages, through enacting regulations that incorporate part or all of chapter 125, and through enacting additional regulations for the sale of alcohol beverages that are not in conflict with Chapter 125. Below are a few types of alcohol ordinances a municipality might be able to use to place limits on pop-up beer gardens.

a. Municipal Authority to Regulate Alcohol Beverage Sales

Since there is no section in Chapter 125 that states closing hours or operator’s license requirements for brewers’ retail premises, it is probably legal for a municipality to enact an ordinance defining the closing hours for brewers’ retail outlets within that municipality. Also, the municipality may be able to enact an ordinance requiring bartenders at the brewer’s retail outlet to have an operator’s license or be supervised by someone who is either the permittee, agent, or manager (if the municipality has elected to issue manager’s licenses under Wis. Stat. §125.18).

b. Outdoor Service and Beer Gardens

Municipalities may regulate outdoor service of alcohol or beer gardens anywhere in the municipality. This power also includes the ability to regulate or prohibit the sale of alcohol in

¹⁹ *Zwiefelhofer v. Town of Cooks Valley*, 2012 WI 7, ¶¶ 36-43, 338 Wis. 2d 488, 506–11, 809 N.W.2d 362, 371–73.

²⁰ For example, Madison prohibits tasting rooms in its alcohol overlay district and requires conditional use permits for tasting rooms in its downtown core and urban mixed-use districts. Madison defines a “tasting room” as “an establishment which offers fermented malt beverages or intoxicating liquors for consumption on the premises that are manufactured or rectified on the premises or at an off-site location associated with the premises.” City of Madison Municipal Code §28.072, Table 28E-2, and §28.127. This definition would include a brewer’s off-site retail outlet.

municipal spaces, including streets, sidewalks, and municipal right of way.²¹ An outdoor service ordinance could also address other factors such as noise level, amplified sound, and proximity to residences.

In drafting an ordinance regulating outdoor alcohol sales and consumption, use language broad enough to include the retail outlets authorized by a brewer’s permit.

Two examples:

- i. Neenah’s beer garden ordinance requires not just licensees, but holders of “any . . . permit issued by the State of Wisconsin” to have “obtained the permission of the Common Council” prior to operating in any outdoor area.²² Neenah also requires certain conditions be met for outdoor operations, including a fence around the temporary extension, a gated entrance and exit, the presence of a licensed bartender, certain time limits and amplified sound restrictions.
- ii. One village prohibits the drinking of “intoxicating liquor or fermented malt beverage in any parking lot that is open to the public during the hours that any store that is served by such parking lot is open for business to the public” unless the Village Board has granted the business a written permit “for the consumption of intoxicating liquor or fermented malt beverages in any designated parking lot, specifying the conditions as may be necessary to protect the public interest in the use thereof.”²³

Practical Advice for Communities: In scanning your municipality’s ordinances, be aware that language that only refers to licensees may leave a municipality without the ability to regulate brewer’s beer gardens. A coalition can review the ordinances and look for ones that may need updating. If you want brewery retail outlets included in the definition of “beer garden,” make sure the definition is broad enough to include holders of alcohol beverage permits issued by the DOR.

c. Open Intoxicants / Open Containers

Another way of addressing beer gardens is to focus on the unintended consequences—and keep people from walking away from the beer garden with open intoxicants. Open containers ordinances can also be used to prevent drinking on the public right-of-way or even on unlicensed parking lots. Oddly enough, while Wisconsin prohibits motorists from transporting

²¹ “Where a municipality has the power to regulate or prohibit the sale of merchandise on its streets, sidewalks, or other public places, this power includes the power to regulate or prohibit the sale of specific articles, and to regulate or prohibit sales in defined sections or streets of the municipality or during specifically defined periods, provided that the regulation or prohibition is reasonable and not discriminatory.” 39 Am. Jur. 2d Highways, Streets, and Bridges § 213.

²² City of Neenah Ordinance No. 2019-15, adopted June 18, 2019.

²³ Village of Shorewood Hills Municipal Code §8.06(3).

open containers of alcohol beverages in the driver or passenger compartments of a vehicle, it does not have a state-wide law regarding pedestrians carrying open intoxicants or open containers of alcohol beverages.

Regulation on carrying open containers of alcohol beverages is left to local control.²⁴ It is therefore up to municipalities to enact their own open container ordinances for municipal public places such as streets, sidewalks, and parks.

Some municipalities address alcohol consumption in public places by mostly prohibiting it, but allowing permitted exceptions. For example, Madison offers a street use permit exception.²⁵ Green Bay offers a sidewalk café permit and provides an exception for certain sporting events.²⁶

3. Regulating the Use of Alcohol in Municipal Parks.

Counties and municipalities have the power to govern their parks, including how, when, and where alcohol is used or sold in their parks. They may create ordinances limiting the use of their parks, and limiting when or if alcohol may be sold or consumed in the parks.²⁷

For example, Madison regulates when and where anyone can sell, possess, or consume alcohol at each of its parks and some of its municipal buildings, based on the needs of each location.²⁸ In some parks, alcohol is prohibited entirely; while in others, it is permitted at certain times or under specified conditions. As another example, Racine County specifically provide guidelines and a permit process with clear limitations for applicants interested in operating beer gardens in a county park.²⁹

²⁴ Wis. Stat. §125.09(1), the general restriction requiring a retail license or permit for consumption of alcohol beverages in public places “does not apply to municipalities, school buildings, campuses of private colleges . . . at the place and time an event sponsored by the private college is being held, churches, premises in a state fair park or clubs.”

²⁵ In Madison, it is “unlawful to possess an open container of or consume alcohol beverage on a public street or alley” except when a street use permit and a temporary malt beverage license have been obtained for an event. Madison City Ord. 38.07(7).

²⁶ Green Bay prohibits “any open or unsealed container containing an alcoholic beverage on any public way, in any parking lot held out for public use, or on or within the premises of a public place, or on or in any motor vehicle on a public way or in parking lot held out for public use” with certain exceptions. Green Bay Municipal Code §27.301.

²⁷ Wisconsin Statutes Ch. 27 provides municipalities with the power “to govern, manage, control improve and care for all public parks, parkways, boulevards and pleasure drives” within or partially within the municipality, to “secure the quiet, orderly and suitable use and enjoyment thereof by the people; also, to adopt rules and regulations to promote those purposes.” Wis. Stat. §§ 27.08(2), 27.13.

²⁸ Madison prohibits the sale, possession, and consumption of alcohol beverages in certain listed city properties, except under certain conditions expressly stated within that list. Madison’s ordinance affects anyone who wishes to sell, possess, or consume alcohol on the listed properties, and therefore would include brewers’ off-site retail outlets. City of Madison Municipal Code §8.24) (Rev. 3/15/14).

²⁹ Racine County requires approval of county park temporary beer garden applications by its Public Works, Parks and Facilities Committee, and the Racine County Board. Each applicant is limited to 2 events per year, 4 or fewer days each. Barriers, signage,

4. Regulating Retail Food Establishments.

A brewer's permit allows a brewer to operate a restaurant on its premises and at its off-site retail outlet.³⁰ Any brewer that operates a restaurant at its retail outlet would need to comply with all retail food licensing requirements, including having a valid license issued by either the Department of Agriculture, Trade and Consumer Protection (DATCP) or a local (county or municipal) health department granted agent status.³¹ A brewer's off-site retail outlet would need its own retail food license under Wis. Stat. Ch. 97 to serve food, unless exempted by statute.³² A restaurant may be permanent or temporary.³³ Wis. Stat. §97.30 describes the circumstances under which a retail food license is required. While giving away certain free snacks would not make an alcohol outlet into a restaurant, selling grilled hot dogs, burgers, and brats would probably be sufficient to require a retail food license.

CONCLUSIONS:

While municipalities cannot license brewers' retail outlets, they can use a combination of ordinances to create conditions that restrict the locations where the brewers' off-site retail outlets may be legally present, and to place conditions by ordinance on the operations of those retail outlets. They can also create zones where a conditional use permit is required for placement of an alcohol retail outlet or an outdoor beer garden, thereby permitting the placement of conditions on a case-by-case basis. While not all the tools listed above will fit every situation, probably at least one of the above suggestions could help decrease the likelihood of brewers locating temporary off-site retail outlets at multiple locations within a municipality.

Whether or not the municipality uses any of the above tools, the municipal clerk should be prepared to inform the DOR or a brewer making inquiries if any municipal ordinances create conflicts with or limit use of the proposed location for a brewer's off-site retail outlet. If the DOR approves a brewer's temporary off-site retail outlet and the municipality discovers that the brewer is violating any municipal ordinances, the municipality may cite and prosecute the brewer for its violations. The municipality should also be aware that if a brewer does set up a temporary off-site retail outlet without the DOR's approval, that brewer can be cited for

sight triangles, a plan of responsible service, licensed operators, clean-up and removal plan, a contractual agreement or memorandum of understanding with Racine County, general liability and liquor liability insurance, and a reservation fee are all required. Application for Temporary Beer Garden, Racine County, Wisconsin, available at <https://www.racinecounty.com/home/showdocument?id=34822>.

³⁰ Wis. Stat. §125.29(6).

³¹ Wis. Stat. §97.30(2)(a).

³² "Each retail food establishment shall have a separate license." Wis. Stat. §97.30(2)(a).

³³ Wis. Stat. §97.01(15b).

unpermitted operation of a retail outlet by the municipality's police department or referred to the DOR for investigation.

This summary document is intended only for educational purposes. It is not intended to provide legal advice. As every community's needs are different, for specific information relating to your municipality, it is best to contact your community's municipal clerk.

Please feel welcome to contact the Wisconsin Alcohol Policy Project with technical assistance questions. The Wisconsin Alcohol Policy Project receives funding from the Wisconsin Department of Health Services.

Wisconsin Alcohol Policy Project

Comprehensive Injury Center, Medical College of Wisconsin
Please contact us for questions, technical assistance, or training.

Maureen Busalacchi, Director, mbusalacchi@mcw.edu

Felice Borisy-Rudin, Policy Analyst, fborisyrudin@mcw.edu

<https://www.mcw.edu/departments/comprehensive-injury-center/wi-alcohol-policy-project>

WARNING AND DISCLAIMER: THE WISCONSIN ALCOHOL POLICY PROJECT PROVIDES TECHNICAL ASSISTANCE, TOOLS, AND TRAININGS. THE WISCONSIN ALCOHOL POLICY PROJECT DOES NOT PROVIDE LEGAL ADVICE, LEGAL COUNSEL, OR LEGAL REPRESENTATION. READING THE CONTENT PROVIDED BY THE WISCONSIN ALCOHOL POLICY PROJECT DOES NOT ESTABLISH AN ATTORNEY-CLIENT RELATIONSHIP. CONTACTING THE WISCONSIN ALCOHOL POLICY PROJECT OR PROVIDING IT OR ITS STAFF WITH INFORMATION DOES NOT ESTABLISH AN ATTORNEY-CLIENT RELATIONSHIP. IF YOU NEED LEGAL REPRESENTATION, YOU SHOULD CONSULT WITH YOUR OWN ATTORNEY.