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TOBACCO LAW ENFORCEMENT

Iowa Code Chapter 453A

Definitions:

Alternative nicotine product - a product, not consisting of or containing tobacco, that provides for the ingestion into the body of nicotine, whether by chewing, absorbing, dissolving, inhaling, snorting, or sniffing, or by any other means. . . [it] does not include cigarettes, tobacco products, or vapor products, or a product that is regulated as a drug or device by the United States food and drug administration under chapter V of the federal Food, Drug, and Cosmetic Act.

Cigarette - any roll for smoking made wholly or in part of tobacco, or any substitute for tobacco, regardless of size, shape, flavor, adulterated or mixed with any other ingredient, where the roll has a wrapper or cover made of any material. Cigars are excluded. 453A.1(3).

Cigarette Vending Machine - any self-service device for public use that takes money and dispenses cigarettes or tobacco products. 453A.1(4).

Person - every individual, firm, association, joint stock company, syndicate, partnership, corporation, trustee, agency or receiver, or respective legal representative. 453A.1(18).

Retail Permit - permit issued to retailer by its local licensing authority. 453A.1(22). (retail permit includes those issued to retailers pursuant to Division II of 453A (tobacco products). Iowa Code section 453A.22(8)).

Retailer - every person in this state who sells, distributes, or offers for sale, for consumption or possesses for the purpose of sale for consumption, cigarettes, alternative nicotine products, or vapor products regardless of quantity or amount or the number of sales. 453A.1(21). Pursuant to Iowa Code section 453A.22(8), retailer includes those in the business of selling tobacco products to consumers pursuant to Division II of 453A (tobacco products). Iowa Code section 453A.42(10).

Tobacco Products - cigars, little cigars, cheroots, stogies, periques, granulated, plug, cut, crimp cut, ready rubbed, and other smokeless tobacco, snuff, snuff flower, cavendish, plug and twist tobacco, fine cut and other chewing tobaccos, shorts, or refuse scraps, clippings, cuttings and sweepings of tobacco, and other kinds and forms of tobacco, prepared in such manner as to be suitable for chewing or smoking in a pipe or otherwise, or both for chewing and smoking. Cigarettes are excluded from this definition. 453A.1(26).

Vapor Product - any noncombustible product, which may or may not contain nicotine, that employs a heating element, power source, electronic circuit, or other electronic, chemical, or mechanical means, regardless of shape or size, that can be used to produce vapor from a solution or other substance. . . includes an electronic cigarette, electronic cigar, electronic cigarillo,

electronic pipe, or similar product or device. . . [it] does not include a product regulated as a drug or device by the United States food and drug administration under chapter V of the federal Food, Drug, and Cosmetic Act.

CIVIL PROSECUTION OF CIGARETTE/TOBACCO PERMIT HOLDERS

If a Retailer or its employee has committed any of the following violations:

- * sells, gives or otherwise supplies any tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes to a person under the age of 18 (453A.2(1))
- * Any sales of tobacco, tobacco products, alternative nicotine products, vapor products or cigarettes through a vending machine located in a place where a person under the age of 18 is present or permitted to enter at any time (453A.36(6))

Then the following penalties shall be assessed:

- * 1st violation - \$300.00. Failure to pay this civil penalty shall result in an automatic 14 day suspension of the retail permit. (453A.22(2)(a)).
- * 2nd violation (within 2 years) - \$1500.00 **or** a 30 day suspension of the retail permit. Retailer may voice a preference in penalty. (453A.22(2)(b))
- * 3rd violation (within 3 years) - \$1500.00 **and** a 30 day suspension of the retail permit. (453A.22(2)(c)).
- * 4th violation (within 3 years) - \$1500.00 **and** a 60 day suspension of the retail permit. (453A.22(2)(d)).
- * 5th violation (within 4 years) - the retail permit **shall** be revoked. (453A.22(2)(e)).

PROCEDURE

City/County enforcement:

City and County Attorneys should be aware of tobacco compliance checks in their jurisdiction. Law enforcement agencies who conduct compliance checks must notify the City Clerk or County Auditor of any noncompliant locations within 72 hours of issuing a citation. (28E Agreement for Tobacco Enforcement 5.1.2). You may want to ask your City Clerk or County Auditor to forward you all the criminal citations involving Iowa Code sections 453A.2(1) or 453A.36(6) that fall within the jurisdiction of the City/County. The Alcoholic Beverages Division (ABD), forwards violations to the Attorney General's Office.

The City/County has the first opportunity to pursue administrative action against a permit holder. 453A.2(6). If the City/County chooses to pursue this matter, it must, within 60 days of

the adjudication of the underlying criminal violation, assess a penalty either by settlement or hearing. After 60 days, jurisdiction for the civil penalty transfers to the ABD. The State may grant a waiver of the 60 day deadline upon request. The permit holder is entitled to constitutional procedural due process rights which are notice and an opportunity to be heard. *Randall's International Inc. v. Iowa Beer & Liquor Control Dept.*, 429 N.W.2d 163 (Iowa 1988).

You may attempt to resolve these matters prior to or after bringing an administrative action. The penalties are mandatory and there is no authority to suspend or modify the fines or suspensions specifically outlined in the Iowa Code. For resolution purposes, begin by sending a Notice of Hearing by certified mail to the cigarette permit holder. The Notice should be sent to the permit holder at the business location and to the address of the legal owner as found on the permit application. Send the same information to the City/County. (Sample Notices of Hearing are attached.)

Include with your Notice of Hearing to the permit holder the Hearing Complaint, and copies of the cigarette/tobacco/vapor products permit application, the cigarette/tobacco/vapor products permit, the criminal citation and the disposition of the criminal action. Enclose an Acknowledgment and Settlement Agreement setting out the resolution available for the violation. (Sample Acknowledgment and Settlement Agreements are attached.) As stated previously, the penalties are mandatory and there is no authority to suspend or modify the statutory fines or suspensions. If the permit holder chooses to voluntarily forfeit the permit in lieu of the statutory penalties, the forfeiture must be for no less than one year. Any signed Agreement must be accompanied by a check in the appropriate amount and forwarded to the City/County. (Samples Hearing Complaints are attached.)

After the City/County receives the Settlement Agreement it must issue an Order acknowledging same. If a suspension is involved, the suspension dates must be included in the Order. (Sample Orders Accepting the Agreement are attached.)

If you do not reach resolution, file the Hearing Complaint with the City/County and schedule a hearing. To prove a violation of 453A.2(1), there must be substantial evidence that: 1) a sale of tobacco or vapor products was made to a minor **and** 2) the sale was made by the permit holder or an employee of the permit holder. Exhibits will include certified copies of the cigarette/tobacco /vapor products permit, the criminal citation and the criminal disposition. If the violation is for a second or subsequent violation, a certified copy of the Order or Settlement Agreement pertaining to the first and/or subsequent violation from the issuing authority must be included in the evidence presented to prove a previous violation.

If the City/County finds a violation of Iowa Code 453A, the City/County must issue an order and forward same to the prosecuting entity and the permit holder. (Sample Orders Assessing Penalties are attached.) If the offense is a first violation, the \$300.00 penalty must be paid or there is an automatic suspension of the permit for 14 days. This is an additional penalty for not paying the assessed fine, not an alternative to the \$300.00 penalty. Any civil penalties

assessed and collected by the City/County shall be retained by that city/county. 453A.2(5).

An appeal of this order must be made by a Writ of Certiorari to the District Court. I.R.Civ.P. 1.1401 et seq. *Meyer v. Jones II*, 696 N.W.2d 611 (Iowa 2005).

State enforcement:

If the City/County does not assess a penalty within 60 days of adjudication of the criminal citation or declines to prosecute the civil offense, the matter **shall** be transferred to the ABD. Iowa Code section 453A.2(6)(2011). Civil penalties assessed and collected by ABD are placed in a fund used to develop and administer the tobacco compliance employee training program. 453A.2(7).

Affirmative Defense:

Retailers may assert an affirmative defense of training as a bar to prosecution of the civil sanction for selling to a minor if the **employee** who sold the tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes has a valid certificate of completion of the tobacco compliance employee training program conducted by ABD. Only completion of the ABD program may be used for this affirmative defense. The retailer may assert this defense **only**: once in four years for a violation of 453A.2 that occurs at the same place of business. (453A.22(3)).

Resource personnel:

ABD is responsible for developing a tobacco compliance employee training program. (453A.5). The training is online. Questions about this program may be directed to Shannon Pogones at 515-281-3426 or Pogones@IowaABD.com

Questions about whether there has been any violation of 453A in a particular jurisdiction may be directed to Connie Larson at 515-281-5846 or Connie.Larson@iowa.gov.

MISCELLANEOUS TOBACCO ENFORCEMENT

Criminal:

A person, other than a retailer, who sells, gives, or otherwise supplies any tobacco, tobacco products, alternative nicotine products, vapor products or cigarettes to any individual under the age of 18, is guilty of a simple misdemeanor. 453A.3(1)(a). The penalties include fines of \$65.00 to \$625.00 and/or up to thirty (30) days in jail. Any person under eighteen years of age convicted pursuant to this section may be required to pay a fine of up to \$100.00 or perform community service. 903.1(3).

An employee of a retailer who sells, gives, or otherwise supplies tobacco, tobacco products, alternative nicotine products, vapor products or cigarettes to a person under eighteen years of age, is guilty of a simple misdemeanor. 453A.3(1)(b). See 805.8C(3)(b): 1st offense \$100.00, 2nd offense 250.00, 3rd or subsequent offense \$500.00.

Identification:

If a permit holder has a reasonable belief based on factual evidence that a driver's license or non operator's identification card offered by a person attempting to purchase tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes or tobacco products is altered or falsified or belongs to another person, the permit holder or employee may retain the license or card. The permit holder must give the person a receipt for the card with the date and hour of seizure noted. Within 24 hours of seizure, the card must be given to the appropriate law enforcement agency of the jurisdiction and the permit holder must file a written report of the circumstances why the card was retained. 453A.4.

Minors:

A person under eighteen shall not smoke, use, possess, purchase, or attempt to purchase any tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes. 453A.2(2). Civil penalty: 1st offense \$50.00, 2nd offense \$100.00, 3rd and subsequent offense \$250.00. 805.8C(3)(c). (No criminal penalty surcharge or court costs).

A person under eighteen who alters or displays or has in their possession a fictitious or fraudulently altered driver's license or a non-operator's id card, and who uses this license or card to smoke, use, possess, purchase, or attempt to purchase any tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes, commits a simple misdemeanor. 321.216C. This is punishable by a fine of \$200.00. 805.8A(4)(j).

No violation of 453A.2:

An individual under eighteen who possesses tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes as part of that individual's employment with a person who holds a valid cigarette/tobacco permit or who lawfully offers for sale or sells cigarettes or tobacco products does not commit a violation as long as he/she does not sell to a minor. 453A.2(3).

An individual under eighteen does not commit a violation of this section if he/she is participating in a compliance check of tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes laws if the compliance effort is conducted:

- * by or under the supervision of law enforcement officers; or

- * with the advance knowledge of law enforcement officers and reasonable measures are taken to ensure that the use of tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes by those under eighteen does not result from participating in the compliance effort. 453A.2(8).

FAQ'S

1. Why are cigarette permit cases prosecuted in front of local licensing bodies?

In Iowa, cigarette permits are issued locally. Cities issue permits to retailers within their corporate limits. Counties issue permits to retailers in unincorporated areas of their counties. 453A.13. The only State issued retail permit is the one held by Amtrak for its club car that travels across several Iowa counties. 453A.23.

2. Within what time frame does a City or County have to begin prosecution?

A City or County has 60 days from the date of adjudication of the criminal violation to assess a penalty. Prosecution must therefore begin in a timely manner to meet that deadline. If the City/County fails to assess a penalty within this time period, the jurisdiction transfers to the State of Iowa. 453A.2(6).

3. If a violation of 453A.2(1) is found, is the City/County required to impose a sanction?

Yes. Iowa Code section 453A.22(2), requires the City/County assess a penalty dependent on whether it is a first, second, third, fourth or fifth violation.

4. Can the City/County suspend the sanction/fine?

No. The penalties are mandatory and there is no authority to suspend or modify the fines or suspensions specifically outlined in the Iowa Code.

5. Will the State prosecute the permit holder if the local licensing authority declines to do so?

Yes. If the City/County Attorney can not or will not prosecute, the Iowa Attorney General's Office will pursue the retail sanctions in front of an Administrative Law Judge. The Attorney General's Office will act on behalf of the ABD. 453A.2 as amended by 2011 Iowa Acts, H.F. 467 section 13 (effective date July 1 2011).

6. What is done with the fine money collected?

If the City/County prosecutes the case, the civil penalties are paid to and retained by the

City/County. If the Attorney General's Office prosecutes the case, the penalty is paid to the Treasurer, State of Iowa and deposited in the tobacco training and compliance fund. 453A.2(5).

7. How do I find out if there have been violations in my jurisdiction that I need to pursue?

Contact your local law enforcement or City Clerk/County Auditor. Or you may contact Steve Brown at ABD 515 -314-3655 or Connie Larson at the Attorney General's Office 515-281-5846.

8. Where can I find sample forms?

Sample forms are attached.

You may also go to www.iowaattorneygeneral.gov, click on the bars to the left, click on "I would like to", click on "view the office divisions", click on Revenue and Tobacco Enforcement Division and scroll to the bottom of the page and click on Tobacco Enforcement Index. If you prefer a hard copy of the prosecution manual, please call Connie Larson at 515-281-5846 or email her at Connie.Larson@iowa.gov.

9. If the permit holder fails to pay the assessed penalty, how do I collect?

You may pursue this to judgment in small claims court.

10. For a first violation, is the \$300.00 fine applicable even if the retailer serves the 14 day suspension for not paying within thirty days after imposition of the sanction?

Yes. Even if the permit holder serves the 14 day suspension, the permit holder is still obligated to pay the \$300.00 fine. The 14 day suspension is an additional penalty for not paying the fine in a timely manner.

11. What happens if the permit holder forfeited its permit or went out of business?

You may defer pursuing the violation, but if the same person applies for a new permit within one year, the previous violation may be considered in determining whether to grant the new permit.

12. What if the retailer has changed ownership since the citation was issued?

The new owners cannot be held liable for a violation that occurred before they were the owners of the business. It may be impossible to pursue sanctions against the former owners if they no longer hold a permit. Timely prosecution of these matters is crucial.

However, sham transfers to evade liability, for example from husband to wife, should not preclude you from pursuing prosecution.

13. What rules apply at the hearing.

Permit holders are entitled to ten days notice and an opportunity to be heard. Iowa Code section 453A.22(1). They may be represented by legal counsel at their expense. Hearsay rules do not apply to the hearing because the penalties are administrative not criminal.

14. What are some common defenses and rebuttal thereto?

- a. Honest mistake - permit holder claims to have made one honest mistake with no intention to sell to a minor. An intent to sell to a minor is not an element of this offense. There is no exception to the penalty. Once you prove that a minor was given or sold cigarettes or tobacco products by the permit holder or an employee thereof, the case is complete.
- b. Vicarious liability - permit holder claims it is wrong to be held liable for a clerk's mistake. This defense is often combined with evidence that the retailer trained and instructed the employee to check identification before selling cigarettes and tobacco products.
- c. Non-profit organization - permit holder claims it is a nonprofit business that does good work for the community. The Iowa Code does not exempt these organizations.
- d. Good corporate citizen - permit holder claims it employs a lot of people, pays a lot of taxes and supports various community projects. The Iowa Code does not allow an exemption for this situation.
- e. Entrapment - permit holder claims it was entrapped. The Iowa Supreme Court has ruled that the use of undercover youth in alcohol stings is not entrapment. *Jim O. Inc. v. City of Cedar Rapids*, 587 N.W.2d 476 (Iowa 1998).
- f. Fake ID - permit holder claims a fake id was shown to the clerk. All undercover youth use their real identification. Prior to entering and after exiting the business, law enforcement examine the identification of all undercover youth.

Affirmative Defense - Permit holder may assert an affirmative defense of training if the employee who sold the tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes has a valid certificate of completion of the tobacco compliance employee training program. 453A.5. Only completion of the ABD sanctioned program may be used in asserting this defense. The permit holder may assert this defense only:

once in four years for a violation of 453A.2 and for a violation which takes place at the same place of business location. (453A.22(3)).

15. When does the four year period begin?

Time begins to run from the date the permit holder asserts the affirmative defense.

16. Does the permit holder have a right of appeal from a City/Council decision?

Yes. The permit holder may file a Writ of Certiorari with the district court arguing the City/County order was illegal. I.R.Civ. P. 1.1401 et seq. *Meyer v. Jones II*, 696 N.W.2d 611 (Iowa 2005).

17. If the criminal citation is dismissed, deferred or the defendant is found not guilty, can the action proceed against the permit holder?

Yes. Civil sanctions can be pursued independently of what happens with the criminal prosecution of the clerk.

18. Is the permit holder required to remove tobacco, tobacco products, alternative nicotine products, vapor products, or cigarettes from its shelves while serving a license suspension?

No. However, the permit holder may want to remove the product for its own protection. If a sale is made (even to an adult) while a business is under suspension, the retailer faces more penalties.

TOBACCO CASE LAW

Randall's International Inc. v. Iowa Beer & Liquor Control Dept., 429 N.W.2d 163 (Iowa 1988) (ABD) There is no due process violation when a retailer's beer permit is suspended as a result of an employee's criminal conviction for selling beer to a minor.

Jim O. Inc. v. City of Cedar Rapids, 587 N.W.2d 476 (Iowa 1998) (ABD) using minor for undercover sting not entrapment because it doesn't exceed the bounds of lawful police conduct and there is no proof that law enforcement tempted, induce or persuaded the bartender to break the law.

State v. Casey's General Stores, Inc., 587 N.W.2d 599 (Iowa 1998) (criminal) corporations convicted of simple misdemeanors based on employee selling alcohol to minors; relevant criminal statutes impose obligation on the corporation not prohibiting certain conduct, no vicarious liability on licensee for employee sale to minor, vicarious liability of a corporation not

satisfied in this case; reversed, dismiss charges. (NOTE: Casey's involved a criminal action. The contested cases arising out of Iowa Code 453A.2 against the location are administrative, therefore there is no constitutional violation based on vicarious liability)

Nash Finch Company v. City Council of the City of Cedar Rapids, 672 N.W.2d 822 (Iowa 2003) (city council) (writ of certiorari to district court-show inferior board or officer exercising judicial functions, exceeded jurisdiction or acted illegally), supreme court review of district court ruling is at law-illegality established if the board did not act in accordance with a statute, if decision not supported by substantial evidence or if the actions were unreasonable, arbitrary, or capricious, bound by trial court findings if supported by substantial evidence, "evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion."; substantial evidence supports council decision; #475 store was continuation of #465 such that aggregation of violations was appropriate.

State v. Lasley, 705 N.W.2d 481 (Iowa 2005) (criminal) sale of cigarettes to minor on Indian reservation; court has subject matter jurisdiction.

1st violation

NOTICE OF HEARING

Date

Permit Holder
Address
City, Iowa Zip

RE: Retail Business Name
Retail Business Address
City, Iowa Zip

The **city/county** has scheduled a hearing before the **city council/county board of supervisors** at **time on day of week, month, day, 20__**, **city council chambers/county supervisors' board room**. The Hearing Complaint, which has been filed against you, is attached.

If you or your representative fail to appear at this hearing, a decision may be rendered against you. You have the opportunity to be heard at this hearing and to be represented by an attorney at your own expense regarding the mandatory \$300.00 civil penalty prescribed by Iowa Code section 453A.22(2)(a) for the violation of Iowa Code section 453A.2(1), selling, giving, or otherwise supplying any tobacco, tobacco products, or cigarettes to any person under eighteen years of age.

If you wish to settle this case in lieu of the public hearing, you must sign and date the enclosed Acknowledgment/Settlement Agreement and return it along with a check in the amount of \$300.00 made out to the **city/county to city/county attorney, address** no later than ten (10) business days prior to the hearing date. Accepting and abiding by the terms of this Acknowledgment will satisfy the penalty for a first violation pursuant to Iowa Code section 453A.22(2), and will conclude the matter.

If you have questions, you may reach me by phone at **number**. If you have retained counsel in this matter, he/she should contact me.

Sincerely,

City/County Attorney

2nd violation

NOTICE OF HEARING

Date

Permit Holder
Address
City, Iowa Zip

RE: Retail Business Name
Retail Business Address
City, Iowa Zip

The **city/county** has scheduled a hearing before the **city council/county board of supervisors** at **time on day of week, month, day, 20__**, **city council chambers/county supervisors' board room**. The Hearing Complaint, which has been filed against you, is attached.

If you or your representative fail to appear at this hearing, a decision may be rendered against you. You have the opportunity to be heard at this hearing and to be represented by an attorney at your own expense regarding the mandatory \$1500.00 civil penalty or a 30 day cigarette permit suspension prescribed by Iowa Code section 453A.22(2)(b) for the violation of Iowa Code section 453A.2(1), selling, giving, or otherwise supplying any tobacco, tobacco products, or cigarettes to any person under eighteen years of age.

If you wish to settle this case in lieu of the public hearing, you must sign and date the enclosed Acknowledgment/Settlement Agreement and return it along with a check in the amount of \$1500.00 made out to the **city/county** to **city/county attorney, address** or make a check mark next to the selection of a thirty day suspension, no later than ten (10) business days prior to the hearing date. Accepting and abiding by this Acknowledgment/Settlement Agreement will satisfy the penalty for a second violation pursuant to Iowa Code section 453A.22(2), and will conclude the matter.

If you have questions, you may reach me by phone at **number**. If you have retained counsel in this matter, he/she should contact me.

Sincerely,

City/County Attorney

3rd violation

NOTICE OF HEARING

Date

Permit Holder
Address
City, Iowa Zip

RE: Retail Business Name
Retail Business Address
City, Iowa Zip

The **city/county** has scheduled a hearing before the **city council/county board of supervisors at time on day of week, month, day, 20__**, **city council chambers/county supervisors' board room**. The Hearing Complaint, which has been filed against you, is attached.

If you or your representative fail to appear at this hearing, a decision may be rendered against you. You have the opportunity to be heard at this hearing and to be represented by an attorney at your own expense regarding the mandatory \$1500.00 civil penalty and a 30 (thirty) day cigarette permit suspension prescribed by Iowa Code section 453A.22(2)(c) for the violation of Iowa Code section 453A.2(1), selling, giving, or otherwise supplying any tobacco, tobacco products, or cigarettes to any person under eighteen years of age.

If you wish to settle this case in lieu of the public hearing, you must sign and date the enclosed Acknowledgment/Settlement Agreement agreeing to a civil penalty of \$1500.00 and a 30 (thirty) day suspension of the cigarette permit and return it along with a check in the amount of \$1500.00 made out to the **city/county to city/county attorney, address**, no later than ten (10) business days prior to the hearing date. Accepting and abiding by this Acknowledgment/Settlement Agreement will satisfy the penalty for a third violation pursuant to Iowa code section 453A.22(2), and will conclude the matter.

If you have questions, you may reach me by phone at **number**. If you have retained counsel in this matter, he/she should contact me.

Sincerely,

City/County Attorney

4th violation

NOTICE OF HEARING

Date

Permit Holder
Address
City, Iowa Zip

RE: Retail Business Name
Retail Business Address
City, Iowa Zip

The **city/county** has scheduled a hearing before the **city council/county board of supervisors** at **time on day of week, month, day, 20__**, **city council chambers/county supervisors' board room**. The Hearing Complaint, which has been filed against you, is attached.

If you or your representative fail to appear at this hearing, a decision may be rendered against you. You have the opportunity to be heard at this hearing and to be represented by an attorney at your own expense regarding the mandatory \$1500.00 civil penalty and a 60 day cigarette permit suspension prescribed by Iowa Code section 453A.22(2)(c) for the violation of Iowa Code section 453A.2(1), selling, giving, or otherwise supplying any tobacco, tobacco products, or cigarettes to any person under eighteen years of age.

If you wish to settle this case in lieu of the public hearing, you must sign and date the enclosed Acknowledgment/Settlement Agreement agreeing to a civil penalty of \$1500.00 and a sixty day suspension of the cigarette permit and return it along with a check in the amount of \$1500.00 made out to the **city/county to city/county attorney, address**, no later than ten (10) business days prior to the hearing date. Accepting and abiding by this Acknowledgment/Settlement Agreement will satisfy the penalty for a fourth violation pursuant to Iowa Code section 453A.22(2), and will conclude the matter.

If you have questions, you may reach me by phone at **number**. If you have retained counsel in this matter, he/she should contact me.

Sincerely,

City/County Attorney

5th violation

NOTICE OF HEARING

Date

Permit Holder
Address
City, Iowa Zip

RE: Retail Business Name
Retail Business Address
City, Iowa Zip

The **city/county** has scheduled a hearing before the **city council/county board of supervisors** at **time on day of week, month, day, 20__**, **city council chambers/county supervisors' board room**. The Hearing Complaint, which has been filed against you, is attached.

If you or your representative fail to appear at this hearing, a decision may be rendered against you. You have the opportunity to be heard at this hearing and to be represented by an attorney at your own expense regarding the mandatory revocation of your cigarette permit prescribed Iowa Code section 453A.22(2)(d) for the violation of Iowa Code section 453A.2(1), selling, giving, or otherwise supplying any tobacco, tobacco products, or cigarettes to any person under eighteen years of age.

If you wish to settle this case in lieu of the public hearing, you must sign and date the enclosed Acknowledgment/Settlement Agreement and return it to **city/county attorney, address**, no later than ten (10) business days prior to the hearing date. Accepting and abiding by this Acknowledgment/Settlement Agreement will satisfy the penalty for a fifth violation pursuant to Iowa code section 453A.22(2), and will conclude the matter.

If you have questions, you may reach me by phone at **number**. If you have retained counsel in this matter, he/she should contact me.

Sincerely,

City/County Attorney

BEFORE THE _____ CITY COUNCIL OR
THE _____ BOARD OF SUPERVISORS

Retailer	Permit Holder
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ACKNOWLEDGMENT / SETTLEMENT AGREEMENT

1. The undersigned hereby knowingly and voluntarily acknowledge the following:
 - a. Retailer and Permit Holder have received the Complaint in the above case.
 - b. The facts and allegations contained in the Complaint, attached hereto and incorporated herein by reference, are true and correct.
 - c. Permit Holder has the right to a hearing and voluntarily waives same and submits to the statutory penalties prescribed by Iowa law.
 - d. Employee, an employee of Retailer, sold tobacco to a minor on Date, in violation of Iowa Code section 453A.2.
 - e. The violation noted in paragraph “d” herein, will count as an official first violation of Iowa Code section 453A.2 pursuant to Iowa Code section 453A.22.

2. Enclosed with this Acknowledgment/Settlement Agreement is a check in the amount of \$300.00 made payable to CITY/COUNTY to settle the above-referenced Complaint.
3. Permit Holder acknowledges that in order to conclude this matter the IMAYOR OR CHAIRPERSON OF THE BOARD OF SUPERVISORS must approve this settlement agreement.

Permit Holder

printed name of signator

Date

NOTE: This must be signed by an individual cigarette permittee, or in the case of another business entity, by the individual(s) who has (have) authority to bind the entity.

If you decide to sign and date this Acknowledgment/Settlement Agreement and waive your appearance at a hearing, this document, properly signed and dated as well as a check in the amount \$300.00 made payable to CITY/COUNTY should be returned to:

CITY/COUNTY ATTORNEY
ADDRESS

BEFORE THE _____ CITY COUNCIL OR
THE _____ BOARD OF SUPERVISORS

Retailer	Permit Holder
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ACKNOWLEDGMENT / SETTLEMENT AGREEMENT

1. The undersigned hereby knowingly and voluntarily acknowledge the following:
 - a. Retailer and Permit Holder have received the Complaint in the above case.
 - b. The facts and allegations contained in the Complaint, attached hereto and incorporated herein by reference, are true and correct.
 - c. Permit Holder has the right to a hearing and voluntarily waives same and submits to the statutory penalties prescribed by Iowa law.
 - d. Employee, an employee of Retailer, sold tobacco to a minor on Date, in violation of Iowa Code section 453A.2.
 - e. The violation noted in paragraph “d” herein, will count as an official second violation of Iowa Code section 453A.2 pursuant to Iowa Code section 453A.22.

2. To settle the above-referenced Complaint (check one):
____ enclosed with this Acknowledgment/Settlement Agreement is a check in the amount of \$1500.00 made payable to CITY/COUNTY: or
____ acknowledgment of a thirty day suspension beginning on the date that will be specified in the official order received from CITY/COUNTY.
3. Permit Holder acknowledges that in order to conclude this matter the MAYOR OR CHAIRPERSON OF THE BOARD OF SUPERVISORS must approve this settlement agreement.

Permit Holder

printed name of signator

Date

NOTE: This must be signed by an individual cigarette permittee, or in the case of another business entity, by the individual(s) who has (have) authority to bind the entity.

If you decide to sign and date this Acknowledgment/Settlement Agreement and waive your appearance at a hearing, this document, properly signed and dated as well as a check in the amount \$1500.00 made payable to CITY/COUNTY or acknowledgment of a thirty day permit suspension should be returned to:

CITY/COUNTY ATTORNEY
ADDRESS

BEFORE THE _____ CITY COUNCIL OR
THE _____ BOARD OF SUPERVISORS

Retailer	Permit Holder
----------	---------------

ACKNOWLEDGMENT / SETTLEMENT AGREEMENT

1. The undersigned hereby knowingly and voluntarily acknowledge the following:
 - a. Retailer and Permit Holder have received the Complaint in the above case.
 - b. The facts and allegations contained in the Complaint, attached hereto and incorporated herein by reference, are true and correct.
 - c. Permit Holder has the right to a hearing and voluntarily waives same and submits to the statutory penalties prescribed by Iowa law.
 - d. Employee, an employee of Retailer, sold tobacco to a minor on Date, in violation of Iowa Code section 453A.2.
 - e. The violation noted in paragraph “d” herein, will count as an official third violation of Iowa Code section 453A.2 pursuant to Iowa Code section 453A.22.

2. To settle the above-referenced Complaint, enclosed with this Acknowledgment/Settlement Agreement is a check in the amount of \$1500.00 made payable to CITY/COUNTY and an acknowledgment of a thirty day suspension beginning on the date that will be specified in the official order received from the MAYOR OR CHAIRPERSON OF THE BOARD OF SUPERVISORS.
3. Permit Holder acknowledges that in order to conclude this matter the MAYOR OR CHAIRPERSON OF THE BOARD OF SUPERVISORS must approve this settlement agreement.

Permit Holder

printed name of signator

Date

NOTE: This must be signed by an individual cigarette permittee, or in the case of another business entity, by the individual(s) who has (have) authority to bind the entity.

If you decide to sign and date this Acknowledgment/Settlement Agreement and waive your appearance at a hearing, this document, properly signed and dated as well as a check in the amount \$1500.00 made payable to CITY/COUNTY should be returned to:

CITY/COUNTY ATTORNEY
ADDRESS

BEFORE THE _____ CITY COUNCIL OR
THE _____ BOARD OF SUPERVISORS

Retailer	Permit Holder
----------	---------------

ACKNOWLEDGMENT / SETTLEMENT AGREEMENT

1. The undersigned hereby knowingly and voluntarily acknowledge the following:
 - a. Retailer and Permit Holder have received the Complaint in the above case.
 - b. The facts and allegations contained in the Complaint, attached hereto and incorporated herein by reference, are true and correct.
 - c. Permit Holder has the right to a hearing and voluntarily waives same and submits to the statutory penalties prescribed by Iowa law.
 - d. Employee, an employee of Retailer, sold tobacco to a minor on Date, in violation of Iowa Code section 453A.2.
 - e. The violation noted in paragraph “d” herein, will count as an official fourth violation of Iowa Code section 453A.2 pursuant to Iowa Code section 453A.22.

2. To settle the above-referenced Complaint, enclosed with this Acknowledgment/Settlement Agreement is a check in the amount of \$1500.00 made payable to CITY/COUNTY and an acknowledgment of a sixty day suspension beginning on the date that will be specified in the official order received from the MAYOR OR CHAIRPERSON OF THE BOARD OF SUPERVISORS.
3. Permit Holder acknowledges that in order to conclude this matter the MAYOR OR CHAIRPERSON OF THE BOARD OF SUPERVISORS must approve this settlement agreement.

Permit Holder

printed name of signator

Date

NOTE: This must be signed by an individual cigarette permittee, or in the case of another business entity, by the individual(s) who has (have) authority to bind the entity.

If you decide to sign and date this Acknowledgment/Settlement Agreement and waive your appearance at a hearing, this document, properly signed and dated as well as a check in the amount \$1500.00 made payable to CITY/COUNTY should be returned to:

CITY/COUNTY ATTORNEY
ADDRESS

BEFORE THE _____ CITY COUNCIL OR
THE _____ BOARD OF SUPERVISORS

Retailer	Permit Holder
----------	---------------

ACKNOWLEDGMENT / SETTLEMENT AGREEMENT

1. The undersigned hereby knowingly and voluntarily acknowledge the following:
 - a. Retailer and Permit Holder have received the Complaint in the above case.
 - b. The facts and allegations contained in the Complaint, attached hereto and incorporated herein by reference, are true and correct.
 - c. Permit Holder has the right to a hearing and voluntarily waives same and submits to the statutory penalties prescribed by Iowa law.
 - d. Employee, an employee of Retailer, sold tobacco to a minor on Date, in violation of Iowa Code section 453A.2.
 - e. The violation noted in paragraph “d” herein, will count as an official fifth violation of Iowa Code section 453A.2 pursuant to Iowa Code section 453A.22.

2. To settle the above-referenced Complaint Permit Holder acknowledges that his permit shall be revoked.
3. Permit Holder acknowledges that in order to conclude this matter the MAYOR OR CHAIRPERSON OF THE BOARD OF SUPERVISORS must approve this settlement agreement.

Permit Holder

printed name of signator

Date

NOTE: This must be signed by an individual cigarette permittee, or in the case of another business entity, by the individual(s) who has (have) authority to bind the entity.

If you decide to sign and date this Acknowledgment/Settlement Agreement and waive your appearance at a hearing, this document, properly signed and dated should be returned to:

CITY/COUNTY ATTORNEY
ADDRESS

BEFORE THE _____ CITY COUNCIL OR
THE _____ BOARD OF SUPERVISORS

In RE: _____ :
NAME _____ : Docket No.
ADDRESS _____ :
CITY, STATE _____ :
Permit Holder _____ :
NAME _____ :
ADDRESS _____ : HEARING COMPLAINT
CITY, STATE _____ :
Retailer _____ :

The CITY OR COUNTY, by and through undersigned counsel, hereby makes the following complaint against PERMIT HOLDER, cigarette permit holder.

1. Iowa Code section 453A.2(1) provides that, “a person shall not sell, give, or otherwise supply any tobacco, tobacco products, or cigarettes to any person under eighteen years of age.”

2. Iowa Code section 453A.22(2)(a) provides that if a permit holder or an employee of a permit holder has violated Iowa Code section 453A.2(1), the permit holder shall be assessed a civil penalty of three hundred dollars (\$300.00) for the first violation of Iowa Code section 453A.2(1).

3. On or about DATE, PERMIT HOLDER held a retail cigarette permit obtained under Iowa Code section 453A.13(2)(a) from CITY/COUNTY, Iowa for RETAILER, a retailer as defined in Iowa Code section 453A.1(21).

4. On or about DATE, EMPLOYEE, an employee of the permit holder (OWNER OF THE PERMIT), sold tobacco products to a person under eighteen years of age.

5. On DATE, EMPLOYEE/OWNER pled guilty to selling tobacco products to a person under eighteen years of age.

WHEREFORE, the undersigned requests that the CITY COUNCIL OR COUNTY BOARD OF SUPERVISORS find that an employee of the permit holder or permit holder has committed a first violation of Iowa Code section 453A.2(1) and assess a civil penalty in the amount of \$300.00 against PERMIT HOLDER.

CITY/COUNTY ATTORNEY

BEFORE THE _____ CITY COUNCIL OR
THE _____ BOARD OF SUPERVISORS

In RE: _____ :

NAME _____ : Docket No.
ADDRESS _____ :
CITY, STATE _____ :
Permit Holder _____ :

NAME _____ :
ADDRESS _____ : HEARING COMPLAINT
CITY, STATE _____ :
Retailer _____ :

The CITY OR COUNTY, by and through undersigned counsel, hereby makes the following complaint against PERMIT HOLDER, cigarette permit holder.

1. Iowa Code section 453A.2(1) provides that, “a person shall not sell, give, or otherwise supply any tobacco, tobacco products, or cigarettes to any person under eighteen years of age.”

2. Iowa Code section 453A.22(2)(b) provides that if a permit holder or an employee of a permit holder has violated Iowa Code section 453A.2(1) twice within a two year period, the permit holder shall be assessed a civil penalty of fifteen hundred dollars (\$1500.00) or the retailer’s permit shall be suspended for a period of thirty days for the second violation of Iowa Code section 453A.2(1).

3. On or about DATE, PERMIT HOLDER held a retail cigarette permit obtained under Iowa Code section 453A.13(2)(a) from CITY/COUNTY, Iowa for RETAILER, a retailer as defined in Iowa Code section 453A.1(21).

4. On or about DATE, EMPLOYEE, an employee of the permit holder (OWNER OF THE PERMIT), sold tobacco products to a person under eighteen years of age.

5. On DATE, EMPLOYEE/OWNER pled guilty to selling tobacco products to a person under eighteen years of age.

6. On or about DATE, EMPLOYEE, an employee of the permit holder (OWNER OF THE PERMIT), sold tobacco products to a person under eighteen years of age.

7. On DATE, EMPLOYEE/OWNER pled guilty to selling tobacco products to a person under eighteen years of age.

WHEREFORE, the undersigned requests that the CITY COUNCIL OR COUNTY BOARD OF SUPERVISORS find that an employee of the permit holder or permit holder has committed a second violation of Iowa Code section 453A.2(1) and enter the appropriate remedy against PERMIT HOLDER.

CITY/COUNTY ATTORNEY

BEFORE THE _____ CITY COUNCIL OR
THE _____ BOARD OF SUPERVISORS

In RE: _____ :
NAME _____ : Docket No.
ADDRESS _____ :
CITY, STATE _____ :
Permit Holder _____ :
NAME _____ :
ADDRESS _____ : HEARING COMPLAINT
CITY, STATE _____ :
Retailer _____ :

The CITY OR COUNTY, by and through undersigned counsel, hereby makes the following complaint against PERMIT HOLDER, cigarette permit holder.

1. Iowa Code section 453A.2(1) provides that, “a person shall not sell, give, or otherwise supply any tobacco, tobacco products, or cigarettes to any person under eighteen years of age.”

2. Iowa Code section 453A.22(2)(c) provides that if a permit holder or an employee of a permit holder has violated Iowa Code section 453A.2(1) three times within a three year period, the permit holder shall be assessed a civil penalty of fifteen hundred dollars (\$1500.00) and the retailer’s permit shall be suspended for a period of thirty days for the third violation of Iowa Code section 453A.2(1).

3. On or about DATE, PERMIT HOLDER held a retail cigarette permit obtained under Iowa Code section 453A.13(2)(a) from CITY/COUNTY, Iowa for RETAILER, a retailer as defined in Iowa Code section 453A.1(21).

4. On or about DATE, EMPLOYEE, an employee of the permit holder (OWNER OF THE PERMIT), sold tobacco products to a person under eighteen years of age.

5. On DATE, EMPLOYEE/OWNER pled guilty to selling tobacco products to a person under eighteen years of age.

6. On DATES, RETAILER was found to have committed a first and second violation of Iowa Code section 453A.2(1).

WHEREFORE, the undersigned requests that the CITY COUNCIL OR COUNTY BOARD OF SUPERVISORS find that an employee of the permit holder or permit holder has committed a third violation of Iowa Code section 453A.2(1) and assess the permit holder a civil penalty of fifteen hundred dollars (\$1500.00) and suspend the retailer's permit for a period of thirty days.

CITY/COUNTY ATTORNEY

BEFORE THE _____ CITY COUNCIL OR
THE _____ BOARD OF SUPERVISORS

In RE: _____ :

NAME _____ : Docket No.
ADDRESS _____ :
CITY, STATE _____ :
Permit Holder _____ :

NAME _____ :
ADDRESS _____ : HEARING COMPLAINT
CITY, STATE _____ :
Retailer _____ :

The CITY OR COUNTY, by and through undersigned counsel, hereby makes the following complaint against PERMIT HOLDER, cigarette permit holder.

1. Iowa Code section 453A.2(1) provides that, “a person shall not sell, give, or otherwise supply any tobacco, tobacco products, or cigarettes to any person under eighteen years of age.”

2. Iowa Code section 453A.22(2)(d) provides that if a permit holder or an employee of a permit holder has violated Iowa Code section 453A.2(1) four times within a three year period, the permit holder shall be assessed a civil penalty of fifteen hundred dollars (\$1500.00) and the retailer’s permit shall be suspended for a period of sixty days for the fourth violation of Iowa Code section 453A.2(1).

3. On or about DATE, PERMIT HOLDER held a retail cigarette permit obtained under Iowa Code section 453A.13(2)(a) from CITY/COUNTY, Iowa for RETAILER, a retailer as defined in Iowa Code section 453A.1(21).

4. On or about DATE, EMPLOYEE, an employee of the permit holder (OWNER OF THE PERMIT), sold tobacco products to a person under eighteen years of age.

5. On DATE, EMPLOYEE/OWNER pled guilty to selling tobacco products to a person under eighteen years of age.

6. On DATES, RETAILER was found to have committed a first, second and third violation of Iowa Code section 453A.2(1).

WHEREFORE, the undersigned requests that the CITY COUNCIL OR COUNTY BOARD OF SUPERVISORS find that an employee of the permit holder or permit holder has committed a fourth violation of Iowa Code section 453A.2(1) and assess a civil penalty of fifteen hundred dollars (\$1500.00) and suspend the retailer's permit for a period of sixty days.

CITY/COUNTY ATTORNEY

BEFORE THE _____ CITY COUNCIL OR
THE _____ BOARD OF SUPERVISORS

In RE: _____ :
NAME _____ : Docket No.
ADDRESS _____ :
CITY, STATE _____ :
Permit Holder _____ :
NAME _____ :
ADDRESS _____ : HEARING COMPLAINT
CITY, STATE _____ :
Retailer _____ :

The CITY OR COUNTY, by and through undersigned counsel, hereby makes the following complaint against PERMIT HOLDER, cigarette permit holder.

1. Iowa Code section 453A.2(1) provides that, “a person shall not sell, give, or otherwise supply any tobacco, tobacco products, or cigarettes to any person under eighteen years of age.”

2. Iowa Code section 453A.22(2)(e) provides that if a permit holder or an employee of a permit holder has violated Iowa Code section 453A.2(1) five times within a four year period, the retailer’s permit shall be revoked for the fifth violation of Iowa Code section 453A.2(1).

3. On or about DATE, PERMIT HOLDER held a retail cigarette permit obtained under Iowa Code section 453A.13(2)(a) from CITY/COUNTY, Iowa for RETAILER, a retailer as defined in Iowa Code section 453A.1(21).

4. On or about DATE, EMPLOYEE, an employee of the permit holder (OWNER OF THE PERMIT), sold tobacco products to a person under eighteen years of age.

5. On DATE, EMPLOYEE/OWNER pled guilty to selling tobacco products to a person under eighteen years of age.

6. On DATES, RETAILER was found to have committed a first, second, third, and fourth violation of Iowa Code section 453A.2(1).

WHEREFORE, the undersigned requests that the CITY COUNCIL OR COUNTY BOARD OF SUPERVISORS find that an employee of the permit holder or permit holder has committed a fifth violation of Iowa Code section 453A.2(1) and revoke the retailer's permit.

CITY/COUNTY ATTORNEY

BEFORE THE _____ CITY COUNCIL OR
THE _____ BOARD OF SUPERVISORS

In RE: Retailer Address	Permit Holder Legal Name Address ORDER ACCEPTING ACKNOWLEDGMENT/SETTLEMENT AGREEMENT FIRST VIOLATION
-----------------------------------	---

On this ____ day of _____, 20____, the _____ City
Council/ _____ County Board of Supervisors has before it the attached
Acknowledgment/Settlement Agreement signed by the above-captioned permit holder.
The city/county FINDS that the permit holder acknowledged in the Agreement that a
first violation of Iowa Code section 453A.2 occurred on _____ and that the
mandatory sanction for this violation is a \$300.00 civil penalty. The permit holder has
submitted a check in the amount of \$300.00 with the Agreement.

IT IS THEREFORE ORDERED that the Acknowledgment /Settlement Agreement
be approved. This sanction is consistent with Iowa Code section 453A.22(2)(a) for a
first violation of Iowa Code section 453A.2(1).

Mayor/Chairperson Board of Supervisors

BEFORE THE _____ CITY COUNCIL OR
THE _____ BOARD OF SUPERVISORS

In RE: Retailer Address	Permit Holder Legal Name Address ORDER ACCEPTING ACKNOWLEDGMENT/SETTLEMENT AGREEMENT SECOND VIOLATION
-----------------------------------	--

On this ____ day of _____, 20____, the _____ City Council/ _____ County Board of Supervisors has before it the attached Acknowledgment/Settlement Agreement signed by the above-captioned permit holder. The city/county FINDS that the permit holder acknowledged in the Agreement that a second violation of Iowa Code section 453A.2 occurred within a two year time period, the most recent of which occurred on _____ and that the mandatory sanction for this second violation is a \$1500.00 civil penalty or a thirty (30) day suspension of the cigarette permit. The permit holder has chosen the civil penalty and has submitted a check in the amount of \$1500.00 with the Agreement/a thirty (30) day cigarette permit suspension.

IT IS THEREFORE ORDERED that the Acknowledgment /Settlement Agreement be approved. The thirty (30) day suspension of the permit holder's cigarette permit shall begin on _____. This sanction is consistent with Iowa Code section 453A.22(2)(b) for a second violation of Iowa Code section 453A.2(1).

Mayor/Chairperson Board of Supervisors

BEFORE THE _____ CITY COUNCIL OR
THE _____ BOARD OF SUPERVISORS

In RE: Retailer Address	Permit Holder Legal Name Address ORDER ACCEPTING ACKNOWLEDGMENT/SETTLEMENT AGREEMENT THIRD VIOLATION
-----------------------------------	---

On this ____ day of _____, 20____, the _____ City Council/ _____ County Board of Supervisors has before it the attached Acknowledgment/Settlement Agreement signed by the above-captioned permit holder. The city/county FINDS that the permit holder acknowledged in the Agreement that a third violation of Iowa Code section 453A.2 occurred within a three year time period, the most recent of which occurred on _____ and that the mandatory sanction for this third violation is a \$1500.00 civil penalty and a thirty (30) day suspension of the cigarette permit. The permit holder has submitted a check in the amount of \$1500.00 with the Agreement.

IT IS THEREFORE ORDERED that the Acknowledgment /Settlement Agreement be approved. The thirty (30) day suspension of the permit holder's cigarette permit shall begin on _____. This sanction is consistent with Iowa Code section 453A.22(2)(c) for a third violation of Iowa Code section 453A.2(1).

Mayor/Chairperson Board of Supervisors

BEFORE THE _____ CITY COUNCIL OR
THE _____ BOARD OF SUPERVISORS

In RE: Retailer Address	Permit Holder Legal Name Address ORDER ACCEPTING ACKNOWLEDGMENT/SETTLEMENT AGREEMENT FOURTH VIOLATION
-----------------------------------	--

On this ____ day of _____, 20____, the _____ City Council/ _____ County Board of Supervisors has before it the attached Acknowledgment/Settlement Agreement signed by the above-captioned permit holder. The city/county FINDS that the permit holder acknowledged in the Agreement that a fourth violation of Iowa Code section 453A.2 occurred within a three year time period, the most recent of which occurred on _____ and that the mandatory sanction for this fourth violation is a \$1500.00 civil penalty and a sixty (60) day suspension of the cigarette permit. The permit holder has submitted a check in the amount of \$1500.00 with the Agreement.

IT IS THEREFORE ORDERED that the Acknowledgment /Settlement Agreement be approved. The sixty (60) day suspension of the permit holder's cigarette permit shall begin on _____. This sanction is consistent with Iowa Code section 453A.22(2)(d) for a fourth violation of Iowa Code section 453A.2(1).

Mayor/Chairperson Board of Supervisors

BEFORE THE _____ CITY COUNCIL OR
THE _____ BOARD OF SUPERVISORS

In RE: Retailer Address	Permit Holder Legal Name Address ORDER ACCEPTING ACKNOWLEDGMENT/SETTLEMENT AGREEMENT FIFTH VIOLATION
-----------------------------------	---

On this ____ day of _____, 20____, the _____ City
Council/ _____ County Board of Supervisors has before it the attached
Acknowledgment/Settlement Agreement signed by the above-captioned permit holder.
The city/county FINDS that the permit holder acknowledged in the Agreement that a
fifth violation of Iowa Code section 453A.2 occurred within a four year time period, the
most recent of which occurred on _____ and that the mandatory sanction
for this fifth violation is the revocation of the permit holder's cigarette permit

IT IS THEREFORE ORDERED that the Acknowledgment /Settlement Agreement
be approved. The permit holder's cigarette permit shall be revoked for one year
beginning _____. This sanction is consistent with Iowa Code section
453A.22(2)(e) for a fifth violation of Iowa Code section 453A.2(1).

Mayor/Chairperson Board of Supervisors

BEFORE THE _____ CITY COUNCIL OR
THE _____ COUNTY BOARD OF SUPERVISORS

In RE: Retailer Address	Permit Holder Legal Name Address ORDER ASSESSING PENALTY FIRST VIOLATION
-----------------------------------	---

On this ____ day of _____, 20____, after a public hearing on the matter, the _____ City Council/ _____ County Board of Supervisors FINDS that based upon evidence submitted by the city/county Attorney's Office, on _____ the above-captioned permit holder committed a violation of Iowa Code section 453A.2(1), by selling, giving, or otherwise supplying any tobacco, tobacco products, or cigarettes to any person under eighteen years of age and that this was a first violation of this statute.

IT IS THEREFORE ORDERED, that the above-captioned permit holder remit three hundred dollars (\$300.00) to the city/county on or before _____ (30 days from the date of this Order). This sanction is consistent with Iowa Code section 453A.22(2)(a) for a first violation of Iowa Code section 453A.2(1). Be advised that failure to pay the civil penalty by this date shall automatically result in the suspension of the cigarette permit for a period of fourteen (14) days in addition to the \$300.00 fine.

Mayor/Chairperson of the Board of Supervisors

BEFORE THE _____ CITY COUNCIL OR
THE _____ COUNTY BOARD OF SUPERVISORS

In RE: Retailer Address	Permit Holder Legal Name Address ORDER ASSESSING PENALTY SECOND VIOLATION
-----------------------------------	--

On this ____ day of _____, 20____, after a public hearing on the matter, the _____ City Council/ _____ County Board of Supervisors FINDS that based upon evidence submitted by the city/county Attorney's Office, on _____ the above-captioned permit holder committed a violation of Iowa Code section 453A.2(1), by selling, giving, or otherwise supplying any tobacco, tobacco products, or cigarettes to any person under eighteen years of age and that this was a second violation of this statute within a period of two years.

IT IS THEREFORE ORDERED, that the above-captioned permit holder remit fifteen hundred dollars (\$1500.00), on or before _____ (30 days from the date of this Order) to the city/county OR begin serving a thirty (30) day suspension of the permit holder's cigarette permit beginning on _____. This sanction is consistent with Iowa Code section 453A.22(2)(b) for a second violation of Iowa Code section 453A.2(1).

Mayor/Chairperson of the Board of Supervisors

BEFORE THE _____ CITY COUNCIL OR
THE _____ COUNTY BOARD OF SUPERVISORS

In RE: Retailer Address	Permit Holder Legal Name Address ORDER ASSESSING PENALTY THIRD VIOLATION
-----------------------------------	---

On this ____ day of _____, 20____, after a public hearing on the matter, the _____ City Council/ _____ County Board of Supervisors FINDS that based upon evidence submitted by the city/county Attorney's Office, on _____ the above-captioned permit holder committed a violation of Iowa Code section 453A.2(1), by selling, giving, or otherwise supplying any tobacco, tobacco products, or cigarettes to any person under eighteen years of age and that this was a third violation of this statute within a period of three years.

IT IS THEREFORE ORDERED, that the above-captioned permit holder remit fifteen hundred dollars (\$1500.00), on or before _____ (30 days from the date of this Order) to the city/county and begin serving a thirty (30) day suspension of the permit holder's cigarette permit on _____. This sanction is consistent with Iowa Code section 453A.22(2)(c) for a third violation of Iowa Code section 453A.2(1).

Mayor/Chairperson of the Board of Supervisors

BEFORE THE _____ CITY COUNCIL OR
THE _____ COUNTY BOARD OF SUPERVISORS

In RE: Retailer Address	Permit Holder Legal Name Address ORDER ASSESSING PENALTY FOURTH VIOLATION
-----------------------------------	--

On this ____ day of _____, 20____, after a public hearing on the matter, the _____ City Council/ _____ County Board of Supervisors FINDS that based upon evidence submitted by the city/county Attorney's Office, on _____ the above-captioned permit holder committed a violation of Iowa Code section 453A.2(1), by selling, giving, or otherwise supplying any tobacco, tobacco products, or cigarettes to any person under eighteen years of age and that this was a fourth violation of this statute within a period of three years.

IT IS THEREFORE ORDERED, that the above-captioned permit holder remit fifteen hundred dollars (\$1500.00), on or before _____ (30 days from the date of this Order) to the city/county and begin serving a sixty (60) day suspension of the permit holder's cigarette permit on _____. This sanction is consistent with Iowa Code section 453A.22(2)(d) for a fourth violation of Iowa Code section 453A.2(1).

Mayor/Chairperson of the Board of Supervisors

BEFORE THE _____ CITY COUNCIL OR
THE _____ COUNTY BOARD OF SUPERVISORS

In RE: Retailer Address	Permit Holder Legal Name Address ORDER ASSESSING PENALTY FIFTH VIOLATION
-----------------------------------	---

On this ____ day of _____, 20____, after a public hearing on the matter, the _____ City Council/ _____ County Board of Supervisors finds that based upon evidence submitted by the city/county Attorney's Office, on _____ the above-captioned permit holder committed a violation of Iowa Code section 453A.2(1), by selling, giving, or otherwise supplying any tobacco, tobacco products, or cigarettes to any person under eighteen years of age and that this was a fifth violation of this statute within a period of four years.

IT IS THEREFORE ORDERED, that the above-captioned permit holder's cigarette permit shall be revoked for at least one year beginning _____. This sanction is consistent with Iowa Code section 453A.22(2)(e) for a fifth violation of Iowa Code section 453A.2(1).

IT IS FURTHER ORDERED that pursuant to Iowa Code section 453A.22(5), no person or entity shall be granted a new cigarette permit for this location (address) until at least one (1) year has passed from the beginning date noted herein, unless good cause to the contrary can be shown.

Mayor/Chairperson of the Board of Supervisors

Westlaw

Page 1

429 N.W.2d 163
(Cite as: 429 N.W.2d 163)

▷

Supreme Court of Iowa.
RANDALL'S INTERNATIONAL INC. d/b/a Randall Foods, North Grand Shopping Center, Ames, Iowa 50010, Appellant,
v.
The HEARING BOARD OF the IOWA BEER & LIQUOR CONTROL DEPARTMENT, the Iowa Beer & Liquor Control Department, and the City of Ames, Iowa, Appellees.

No. 87-530.
Sept. 21, 1988.
Rehearing Denied Oct. 13, 1988.

Beer permittee appealed from the decision of the District Court for Story County, Carl D. Baker, J., affirming suspension of permit as consequence of its employee having pled guilty to charge of selling beer to minor. The Supreme Court, Carter, J., held that: (1) permit suspension was constitutionally permissible despite absence of any finding of neglect on permittee's part; (2) suspension was not based on unconstitutional presumption of permittee's own culpability; and (3) permittee was not entitled to participate in employee's criminal proceeding as element of due process in license suspension proceeding.

Affirmed.

West Headnotes

[1] Constitutional Law 92 ↪4289

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4266 Particular Subjects and Regulations
92k4289 k. Intoxicating Liquors.
Most Cited Cases

(Formerly 92k287.2(3))

Possibility that statute authorized administrative sanction against beer permittee based entirely on isolated act of nonmanagerial employee, without regard to whether licensee itself was culpable in hiring, training, or supervising employee, did not offend federal due process clause. I.C.A. § 123.50, subd. 3; U.S.C.A. Const.Amends. 5, 14.

[2] Intoxicating Liquors 223 ↪106(4)

223 Intoxicating Liquors
223IV Licenses and Taxes
223IV(B) Revocation or Forfeiture of Rights
223k106 In General
223k106(4) k. Violations of Law. Most Cited Cases

Suspension of beer permit was not founded on unconstitutional presumption of permittee's own culpability based on criminal conviction of its employee for selling beer to minor; strict liability offenses do not involve irrebuttable presumptions, but flatly prohibit doing of particular act. I.C.A. § 123.50, subd. 3.

[3] Constitutional Law 92 ↪4289

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4266 Particular Subjects and Regulations
92k4289 k. Intoxicating Liquors.
Most Cited Cases
(Formerly 92k287.2(3))

Intoxicating Liquors 223 ↪106(4)

223 Intoxicating Liquors
223IV Licenses and Taxes
223IV(B) Revocation or Forfeiture of Rights
223k106 In General
223k106(4) k. Violations of Law. Most

429 N.W.2d 163
(Cite as: 429 N.W.2d 163)

Cited Cases

Beer permittee did not have right of participation in its employee's criminal prosecution for selling beer to minor as element of due process in subsequent permit suspension proceedings. U.S.C.A. Const.Amends. 5, 14.

*163 Robert W. Goodwin, Ames, for appellant.

Thomas J. Miller, Atty. Gen., Lynn W. Walding, Asst. Atty. Gen., and John R. Klaus, City Atty., Ames, for appellees.

Considered by LARSON, P.J., and SCHULTZ, CARTER, NEUMAN and SNELL, JJ.

CARTER, Justice.

Randall's International, Inc. (Randall Foods), a retail grocery establishment, appeals from the district court's order affirming a decision of the Iowa Beer and Liquor Control Department (the agency) to suspend its class "C" beer permit for one week as a consequence of one of its employees having pled guilty to selling beer to a minor. Randall Foods contends that (1) Iowa Code section 123.50(3) (1985), which authorizes suspension of a grocery store owner's beer permit upon proof that an employee of the store has been convicted of selling beer to a minor, violates due process by creating an impermissible standard of vicarious liability and an irrebuttable presumption of guilt; and (2) the district court erred in ruling that the issuance of a beer permit conveys no property interest entitled to due process protections under the fourteenth amendment to the federal constitution. Because we conclude that Randall Foods' arguments on the merits fail to establish a denial of due process, we affirm the judgment of the district court on that basis without considering whether a constitutionally protected property interest is at stake.

On August 23, 1985, the police in Ames conducted a "sting" operation by sending a *164 minor to attempt to purchase beer at thirty-four establishments licensed to sell beer in that city. A cashier

from Randall Foods was later charged with selling beer to a minor during that operation. Randall Foods' night manager knew of the citation but did not know that a court date was set. Subsequent attempts by Randall Foods' general manager to reach the employee proved to be fruitless. On August 26, the employee pled guilty to selling beer to a minor in violation of Iowa Code section 123.49(2)(h), was adjudged guilty on such plea and was sentenced to pay a fine.

As a result of the employee's conviction, the Ames City Council, as local issuing authority for Randall Foods' class "C" beer permit, voted to suspend that license for a two-week period from December 18, 1985, to January 1, 1986. On administrative appeal to the hearing board of the respondent agency, the suspension was reduced to one week but otherwise upheld. The final agency order was issued May 12, 1986. On March 27, 1987, the district court affirmed the agency's decision.

[1] The constitutional challenge lodged by Randall Foods to the agency's suspension order is directed at the statutory scheme under which the suspension was invoked. Randall Foods urges that Iowa Code section 123.50(3) (1985) violates due process because it authorizes an administrative sanction against the license holder based entirely on the isolated act of a nonmanagerial employee and without regard to whether the license holder itself was culpable in hiring, training, or supervising the offending party. Although we agree that the statutory scheme does appear to permit sanctions against a licensee without regard to direct managerial culpability, we are not convinced that this potentiality offends against the federal due process clause.

Randall Foods urges that its constitutional arguments find support in the Court's observations in *United States v. Park*, 421 U.S. 658, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975). It reads into that decision a constitutionally mandated requirement that some neglect of the principal be established in order to impose vicarious liability for a state imposed sanc-

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tion aimed at a protected liberty or property interest.

At the outset, we note that the *Park* decision did not directly apply the due process clause. The Court was reviewing the sufficiency of jury instructions to present the elements the government must prove to gain a conviction under a federal criminal statute. The Court approved an instruction that the president of a large national food chain could be criminally liable for either permitting or not acting to prevent rodent contaminated food shipments in interstate commerce. The Court suggested that the statute in question imposed on persons exercising supervisory authority both a duty to seek out and remedy violations and a duty to implement measures to insure that violations will not occur. *Park*, 421 U.S. at 673, 95 S.Ct. at 1911, 44 L.Ed.2d at 501.

We considered the impact of the *Park* decision and the earlier cases of *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), and *United States v. Dotterweich*, 320 U.S. 277, 64 S.Ct. 134, 88 L.Ed. 48 (1943), in *Iowa City v. Nolan*, 239 N.W.2d 102 (Iowa 1976). At that time we concluded these cases recognize that certain types of public welfare legislation may dispense with "awareness of wrongdoing" as an element of the proscribed conduct. *Nolan*, 239 N.W.2d at 104. In *Dotterweich*, the Court described this approach as follows:

In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.

Dotterweich, 320 U.S. at 281, 64 S.Ct. at 136, 88 L.Ed. at 51.

We applied this principle in *Nolan* in order to uphold traffic offenses charged against the owner of an illegally parked automobile. In discussing the vicarious liability issue, we considered the case of *Commonwealth v. Koczwara*, 397 Pa. 575, 155

A.2d 825 (1959), *cert. denied*, 363 U.S. 848, 80 S.Ct. 1624, 4 L.Ed.2d 1731 (1960), which, like the present case, involved beer sales to minors. In *Koczwara* the court concluded *165 that although an individual's liberty interest may perhaps not be constitutionally encroached based on an employee's error of judgment, economic sanctions may validly result therefrom in a regulated enterprise. It upheld the conviction, for purposes of imposing a criminal fine, of the proprietor of a liquor establishment whose employees had made a prohibited sale.

The *Nolan* and *Koczwara* decisions and the federal decisions which we have discussed all involve criminal sanctions which were upheld as valid public welfare legislation. The reasoning which supports those decisions within the context of a criminal statute is, we believe, all the more forceful when applied to administrative agency regulation. Randall Foods' arguments on the vicarious liability issue do not convince us that there was any violation of due process with respect to the suspension of its class "C" beer permit.

[2] We also have considered and reject Randall Foods' contention that the suspension of its beer permit was based on an unconstitutional presumption of its own culpability based on the criminal conviction of its employee. Section 123.50(3) provides:

If any ... beer permittee, or employee of a licensee or permittee is convicted of a violation of section 123.49, subsection 2, paragraph " h " [illegal sale to a minor,] ... the administrator or local authority shall, in addition to the other penalties fixed for such violations [assess a prescribed period of suspension].

(Emphasis added.) The statute is written so as to make the conviction of the licensee's employee the prohibited act upon which the principal's license revocation is based. As observed in *State v. Conner*, 377 N.W.2d 664, 665 (Iowa App.1985):

[C]ertain crimes may be defined as strict liability or prohibited acts and ... if this is properly classi-

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fied as such, there is no constitutional violation....
Strict liability offenses, if properly classified, do
not involve irrebuttable presumptions, but flatly
prohibit the doing of a particular act.

Id. at 665. *See also State v. Drake*, 219 N.W.2d
492, 496 (Iowa 1974).

[3] Finally, we conclude, contrary to Randall
Foods' assertion to the contrary, that the hearing
procedure accorded under Iowa Code section
123.39 (1985) is adequate to satisfy procedural due
process requirements. It is untenable to suggest, as
Randall Foods does, that it should have been accord-
ed a right of participation in its employee's crimin-
al proceeding as an element of due process in the li-
cense suspension proceedings. We have considered
all arguments advanced and find no basis for over-
turning the orders of the agency or the district
court. The judgment of the district court is af- firmed.

AFFIRMED.

Iowa, 1988.
Randall's Intern. Inc. v. Hearing Bd. of Iowa Beer
& Liquor Control Dept.
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C

Supreme Court of Iowa.
JIM O. INC. d/b/a Ernie's Avenue Tavern, Appel-
lant,
v.
CITY OF CEDAR RAPIDS and The Alcoholic
Beverages Division of the Commerce Department
State of Iowa, Appellees.

No. 97-875.
Dec. 23, 1998.

Liquor licensee sought judicial review of \$300 civil penalty imposed by Alcoholic Beverages Division of Commerce Department after bartender sold two beers to an underage patron. The District Court, Linn County, Patrick K. Grady, Jr., J., affirmed penalty, and licensee appealed. The Supreme Court, Neuman, J., held that: (1) statute subjecting liquor licensee to penalty for selling alcoholic beverages to underage persons was not constitutionally vague as applied to licensee; (2) bartender's pleading guilty to a violation of statute prohibiting sale of alcohol to underage persons did not prevent Division from enforcing civil penalty against licensee; and (3) record did not support licensee's entrapment defense.

Affirmed.

West Headnotes

[1] Administrative Law and Procedure 15A ↪ 796

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak796 k. Law Questions in General.

Most Cited Cases

Supreme Court's review under the Administrative Procedure Act is for the correction of errors at law. I.C.A. § 17A.20.

[2] Appeal and Error 30 ↪ 893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate
Court
30k893(1) k. In General. Most
Cited Cases
Challenges the constitutionality of a governing statute are reviewed de novo.

[3] Constitutional Law 92 ↪ 4289

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)12 Trade or Business
92k4266 Particular Subjects and Regulations
92k4289 k. Intoxicating Liquors.
Most Cited Cases
(Formerly 92k287.2(3))

Intoxicating Liquors 223 ↪ 18

223 Intoxicating Liquors
223II Constitutionality of Acts and Ordinances
223k18 k. Penalties. Most Cited Cases
Statute subjecting liquor licensee to penalty for selling alcoholic beverages to underage persons met test of fair notice and fair enforcement, despite absence of affirmative duty to check identification of every customer and, thus, statute was not constitutionally vague as applied to liquor licensee against whom civil penalty was imposed after bartender sold two beers to underage patron. I.C.A. § 123.49, subd. 2, par. h.

[4] Constitutional Law 92 ↪ 990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions

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92VI(C) Determination of Constitutional Questions

92VI(C)3 Presumptions and Construction as to Constitutionality

92k990 k. In General. Most Cited Cases
(Formerly 92k48(1))

Constitutional Law 92 ⚡1034

92 Constitutional Law

92VI Enforcement of Constitutional Provisions

92VI(C) Determination of Constitutional Questions

92VI(C)4 Burden of Proof

92k1032 Particular Issues and Applications

92k1034 k. Vagueness in General.

Most Cited Cases

(Formerly 92k48(4.1))

Statutes are presumed constitutional, and a party asserting a vagueness challenge must negate every reasonable basis upon which the statute might be sustained.

[5] Criminal Law 110 ⚡13.1

110 Criminal Law

110I Nature and Elements of Crime

110k12 Statutory Provisions

110k13.1 k. Certainty and Definiteness.

Most Cited Cases

(Formerly 110k13.1(1))

To withstand constitutional attack, a penal statute must: (1) give a person of ordinary intelligence fair notice of the conduct prohibited, and (2) provide explicit standards for enforcement.

[6] Statutes 361 ⚡47

361 Statutes

361I Enactment, Requisites, and Validity in General

361k45 Validity and Sufficiency of Provisions

361k47 k. Certainty and Definiteness.

Most Cited Cases

Degree of vagueness that the Constitution tolerates, as well as the relative importance of fair notice and fair enforcement, depend in part on the nature of the statutory enactment.

[7] Intoxicating Liquors 223 ⚡18

223 Intoxicating Liquors

223II Constitutionality of Acts and Ordinances

223k18 k. Penalties. Most Cited Cases

Bartender's bald assertion that a person she thought to be a police officer would have not permitted an underage companion to buy a drink did not meet threshold of reasonable care required by statute subjecting liquor licensee to penalty for selling alcoholic beverages to underage persons, as was required for licensee to sustain an applied constitutional challenge to statute. I.C.A. § 123.49, subd. 2, par. h.

[8] Intoxicating Liquors 223 ⚡180

223 Intoxicating Liquors

223VII Actions for Penalties

223k180 k. Defenses. Most Cited Cases

Bartender's pleading guilty to a violation of statute prohibiting sale of alcohol to underage persons did not prevent Alcoholic Beverages Division of Commerce Department from enforcing a civil penalty against liquor licensee under statute subjecting liquor licensee to penalty for selling alcoholic beverages to underage persons; Division proceeded, not on basis of licensee's or its employee's criminal conviction, but on proof of a prohibited act authorizing assessment of a penalty. I.C.A. § 123.49, subd. 2, par. h; Code 1995, § 123.47A.

[9] Intoxicating Liquors 223 ⚡179

223 Intoxicating Liquors

223VII Actions for Penalties

223k179 k. Grounds of Action. Most Cited Cases

Criminal conviction under statute subjecting liquor licensee to penalty for selling alcoholic beverage

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ages to underage persons is not a prerequisite to imposition of a civil penalty. I.C.A. § 123.49, subd. 2, par. h.

[10] Intoxicating Liquors 223 ↪180

223 Intoxicating Liquors

223VII Actions for Penalties

223k180 k. Defenses. Most Cited Cases

Record, which contained no proof that law enforcement officials tempted, induced, or persuaded bartender to break the law, did not support liquor licensee's claim that bartender was entrapped into selling two beers to underage patron, who entered bar with undercover police officer as part of "sting" operation.

[11] Criminal Law 110 ↪37(2.1)

110 Criminal Law

110II Defenses in General

110k36.5 Official Action, Inaction, Representation, Misconduct, or Bad Faith

110k37 Entrapment

110k37(2) What Constitutes Entrapment

110k37(2.1) k. In General. Most Cited Cases

"Entrapment" occurs when a peace officer induces an otherwise law-abiding citizen to commit an offense.

[12] Criminal Law 110 ↪37(2.1)

110 Criminal Law

110II Defenses in General

110k36.5 Official Action, Inaction, Representation, Misconduct, or Bad Faith

110k37 Entrapment

110k37(2) What Constitutes Entrapment

110k37(2.1) k. In General. Most Cited Cases

To rise to the level of prohibited activity, for purposes of entrapment defense, a police officer's conduct must involve excessive incitement, urging,

persuasion, or temptation.

[13] Criminal Law 110 ↪37(3)

110 Criminal Law

110II Defenses in General

110k36.5 Official Action, Inaction, Representation, Misconduct, or Bad Faith

110k37 Entrapment

110k37(2) What Constitutes Entrapment

110k37(3) k. Originating Intent; Furnishing Opportunity or Facilities. Most Cited Cases

Conduct merely affording a person an opportunity to commit an offense is not "entrapment."

*477 Linda Hansen Robbins of Irvine & Robbins, L.L.P., Cedar Rapids, for appellant.

James H. Flitz, Cedar Rapids, for appellee City of Cedar Rapids.

Lynn M. Walding, Assistant Attorney General, for appellee Alcoholic Beverages Div. of the Commerce Dept. State of Iowa.

Considered by HARRIS, P.J., and LARSON, CARTER, NEUMAN, and TERNUS, JJ.

NEUMAN, Justice.

The Alcoholic Beverages Division of the Commerce Department of the State of Iowa imposed a civil penalty of \$300 on Jim O. Inc. d/b/a Ernie's Avenue Tavern after one of the tavern's bartenders sold two beers to an underage patron. On appeal from a district court judgment affirming the penalty, Jim O. challenges the constitutionality of Iowa Code section 123.49(2)(h) (1995), alleged substantive and procedural irregularities, and the tactics used by law enforcement. Finding no merit in any of these contentions, we affirm.

The Cedar Rapids police department engaged Tiffany Vomacka, a seventeen-year-old high school

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student, to assist the department in enforcing underage drinking laws. On August 23, 1995, Tiffany accompanied officer John McDaniel, dressed in plain clothes, in a "sting" operation at Ernie's Avenue Tavern. They arrived around 2 p.m. and seated themselves at the bar. The bartender on duty, Diane Harrington, took Tiffany's order for two beers and served them without making any inquiry about Tiffany's age. Officer McDaniel then identified himself and issued Harrington a citation for violating Iowa Code section 123.49(2)(h).

Harrington pleaded guilty to an amended complaint alleging violation of *478 Iowa Code section 123.47A. Subsequently the Cedar Rapids city council passed a resolution assessing Jim O. a \$300 civil penalty for violating Iowa Code section 123.49(2)(h). Jim O. appealed the decision to the Alcoholic Beverages Division of the Department of Commerce. See Iowa Code § 123.39(1)(a) (authorizing review in accordance with chapter 17A).

At the hearing before the alcoholic beverages division, Harrington testified that she believed Tiffany's companion was a police officer because she had seen him, in uniform, at a convenience store just the night before. She assumed he would not let a minor purchase beer for him, so she did not question Tiffany's age. She also believed it likely that Tiffany was the officer's wife or girlfriend, and approximately twenty-three years of age. On cross-examination, however, Harrington admitted that she had previously pleaded guilty to serving alcohol to a person younger than twenty years of age.

The agency affirmed the \$300 civil penalty. Jim O. sought judicial review under Iowa Code chapter 17A. The district court affirmed. Jim O.'s appeal is before us in accordance with Iowa Code section 17A.20.

I. Scope of Review.

[1][2] Our review is for the correction of errors at law. *Foods, Inc. v. Iowa Civil Rights Comm'n*, 318 N.W.2d 162, 164-65 (Iowa 1982). To the ex-

tent appellant challenges the constitutionality of a governing statute, however, our review is de novo. *Wettach v. Iowa Bd. of Dental Examr's*, 524 N.W.2d 168, 170 (Iowa 1994).

II. Issues on Appeal.

[3] A. *Vagueness challenge.* Jim O. begins by claiming that Iowa Code section 123.49(2)(h) is unconstitutionally vague as applied to the facts sketched above. The statute states:

A person or club holding a liquor control license or retail wine or beer permit under this chapter, and the person's or club's agents or employees, shall not do any of the following:

....

h. Sell, give, or otherwise supply any alcoholic beverage, wine, or beer to any person, knowing or failing to exercise reasonable care to ascertain whether the person is under legal age, or permit any person, knowing or failing to exercise reasonable care to ascertain whether the person is under legal age, to consume any alcoholic beverage, wine, or beer.

Iowa Code § 123.49(2)(h). Appellant contends the statutory phrase "reasonable care to ascertain whether the person is under legal age" is not clear and requires the licensee to guess at what conduct is required or prohibited. In a nutshell, appellant argues that absent any affirmative duty to check the identification of every customer, the statute leaves a licensee without direction as to what "ascertain" involves.

[4][5][6] Appellant assumes a heavy burden in attacking section 123.49(2)(h). Statutes are presumed constitutional, and a party asserting a vagueness challenge must negate every reasonable basis upon which the statute might be sustained. *Wettach*, 524 N.W.2d at 171. To withstand constitutional attack, a penal statute must (1) give a person of ordinary intelligence fair notice of the conduct prohibited, and (2) provide explicit standards for en-

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forcement. *State v. Peterson*, 490 N.W.2d 53, 54 (Iowa 1992). These standards, however, need not be mechanically applied. "The degree of vagueness that the constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depend in part on the nature of the enactment." *State v. Duncan*, 414 N.W.2d 91, 96 (Iowa 1987). Thus, for example, a law interfering with the exercise of fundamental rights would be tested by a more stringent standard than, for example, the liquor control statute at issue here. *See id.*

Jim O. has failed to convince us that a person of ordinary intelligence would not understand the responsibility imposed by section 123.49(2)(h). The alleged problem of "ascertainment" may be easily overcome by simply requiring patrons to furnish proof of age before the licensee serves them. Yet the legislature has written the statute to give the licensee freedom from routine "carding" when the age of the patron is known or reasonably beyond question. In our view, *479 the statute easily meets the test of fair notice and fair enforcement.

[7] Jim O., moreover, is in a poor position to sustain an applied constitutional challenge under this record. Its bartender made no effort whatsoever to ascertain the minor patron's age. Harrington's bald assertion that a person she thought to be a police officer would not permit an underage companion to buy a drink simply does not meet the threshold of "reasonable care" required by the statute. The assignment of error is without merit.

[8][9] B. *Statutory compliance.* Jim O. next contends the agency misunderstood and misapplied the statutory scheme prohibiting the sale of liquor to a minor. It claims that because the bartender pleaded guilty to a violation of section 123.47A, ^{FN1} the agency is prevented from enforcing a civil penalty against the tavern under section 123.49(2)(h). The question is whether a criminal conviction under section 123.49(2)(h) is a prerequisite to imposition of a civil penalty. We hold that it is not.

FN1. Section 123.47A prohibits a "person"

from selling liquor to someone, "knowing or having reasonable cause to believe that the person is age eighteen, nineteen, or twenty." This Code section was repealed by 1997 Iowa Acts ch. 126, § 54. The Code no longer makes a distinction between the ages of eighteen, nineteen, and twenty; it now sets the legal age at twenty-one or more. *See* Iowa Code §§ 123.47, 123.3(19) (1997). The decision before us, however, is not affected by this change.

Iowa Code chapter 123 is a comprehensive liquor control statute. It contains penalty provisions for prohibited acts, some discretionary and others automatic, depending on the offense implicated. Thus if a licensee or its employee were convicted of violating section 123.49(2)(h), the agency (or local authority) would be required to assess a civil penalty of \$300 for a first offense. *See* Iowa Code § 123.50(3)(a). Iowa Code section 123.39(1)(b)(2), however, authorizes the agency to impose a civil penalty for "violation of any of the provisions" of the chapter. (Emphasis added.) Reinforcing that authority, subsection (c) of the same statute declares "[a] criminal conviction is not a prerequisite to suspension, revocation, or imposition of a civil penalty pursuant to this section." Iowa Code § 123.39(1)(c).

Here the agency proceeded, not on the basis of the licensee's or its employee's criminal conviction, but on proof of a prohibited act authorizing assessment of a penalty. The record made before the agency substantially supports its finding, affirmed on judicial review, that Jim O.'s bartender sold alcohol to Tiffany Vomacka without exercising reasonable care to ascertain whether she was under legal age, in violation of section 123.49(2)(h). In lieu of suspension or revocation of the permit for such a violation, the legislature directs that the agency shall impose a civil penalty of \$300. *See* Iowa Code § 123.39(4). No misapplication of the law has been established.

[10] C. *Entrapment.* Jim O. also complains because the agency, and district court, found no merit

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in its entrapment defense. The appellant contends the violation was "obtained by fraud." But for the "illegal acts" of the police, it argues, the tavern's law-abiding bartender "would not have been tricked into providing beer to a minor."

[11][12][13] The facts revealed by the record simply do not support appellant's claim of entrapment. Entrapment occurs when a peace officer induces an otherwise law-abiding citizen to commit an offense. *State v. Babers*, 514 N.W.2d 79, 83 (Iowa 1994). To rise to the level of prohibited activity, the officer's conduct must involve "excessive incitement, urging, persuasion, or temptation." *Id.* "Conduct merely affording a person an opportunity to commit an offense is not entrapment." *State v. Tomlinson*, 243 N.W.2d 551, 553 (Iowa 1976).

Appellant cites no authority for its proposition that using seventeen year olds or undercover officers in "sting" operations exceeds the bounds of lawful police conduct. Nor are we persuaded by the bartender's claim that because she had previously seen the officer in uniform he thereby "vouched" for Vomacka's age when they entered the bar together. The record contains no proof that law enforcement officials tempted, induced, or persuaded *480 the bartender to break the law. Thus the agency and district court correctly rejected the appellant's entrapment defense.

III. Conclusion.

We have considered all arguments pressed by the appellant, whether mentioned or not, and find them to be without merit. We hold Iowa Code section 123.49(2)(h) is not unconstitutionally vague as applied to the facts in the record before us. We are convinced the agency, and the district court, correctly followed the statutory requirements of Iowa Code chapter 123 and the appellant tavern was not unlawfully entrapped by the Cedar Rapids police department. Accordingly, we affirm the judgment of the district court.

AFFIRMED.

Iowa,1998.
Jim O. Inc. v. City of Cedar Rapids
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C

Supreme Court of Iowa.
STATE of Iowa, Appellee,
v.
CASEY'S GENERAL STORES, INC., Appellant.
State of Iowa, Appellee,
v.
Hy-Vee, Inc., Appellant.

No. 97-1123.
Nov. 25, 1998.

Corporate defendants were convicted in District Court, Mahaska County, Michael R. Stewart and Annette J. Scieszinski, JJ., of selling alcoholic beverages to minors, and they appealed. The Court of Appeals affirmed, and defendants were granted discretionary review. The Supreme Court, Ternus, J., held that (1) criminal culpability of defendants' employees did not provide a basis for convictions, and (2) evidence was insufficient to hold defendants liable under statute providing for corporations' vicarious liability.

Reversed and remanded for dismissal.

West Headnotes

[1] Criminal Law 110 ↪ 1144.13(3)

110 Criminal Law
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(2) Construction of Evidence

110k1144.13(3) k. Construction in Favor of Government, State, or Prosecution. Most Cited Cases

In appeal on the alleged insufficiency of the evidence to support the verdict, Supreme Court reviews the record in the light most favorable to the

state.

[2] Criminal Law 110 ↪ 1134.29

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.29 k. Constitutional Issues in General. Most Cited Cases
(Formerly 110k1134(3))

Supreme Court reviews the trial court's interpretation of the relevant statutes for correction of errors of law.

[3] Statutes 361 ↪ 181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases

Primary rule of statutory interpretation is to give effect to the intention of the legislature.

[4] Statutes 361 ↪ 188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases

Statutes 361 ↪ 208

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k208 k. Context and Related Clauses. Most Cited Cases

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To ascertain legislative intent, Supreme Court looks to the language of the statute, considering not only the commonly understood meaning of the words used in the statute, but also the context within which they appear. I.C.A. § 4.1, subd. 38.

[5] Statutes 361 ↪ 223.2(.5)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k223 Construction with Reference to Other Statutes

361k223.2 Statutes Relating to the Same Subject Matter in General

361k223.2(.5) k. In General. Most Cited Cases

Supreme Court construes statutes that relate to the same or a closely allied subject together so as to produce a harmonious and consistent body of legislation.

[6] Intoxicating Liquors 223 ↪ 159(2)

223 Intoxicating Liquors

223VI Offenses

223k157 Sales or Gifts to Prohibited Persons

223k159 To Minors

223k159(2) k. Intent, Knowledge, or Good Faith of Seller. Most Cited Cases

Intoxicating Liquors 223 ↪ 168

223 Intoxicating Liquors

223VI Offenses

223k166 Persons Liable

223k168 k. Principal's Liability for Acts of Agent or Servant. Most Cited Cases

Statutes prohibiting sale of alcohol to minors by person or club holding a liquor control license or retail wine or beer permit did not impose vicarious liability on a licensee or permittee; statutes required proof of defendant's criminal intent to support conviction and there was no legislative expression of an intent to impose vicarious liability. I.C.A. §§ 123.47, 123.49, subd. 2, par. h.

[7] Criminal Law 110 ↪ 59(1)

110 Criminal Law

110VII Parties to Offenses

110k59 Principals, Aiders, Abettors, and Accomplices in General

110k59(1) k. In General. Most Cited Cases

Torts 379 ↪ 131

379 Torts

379I In General

379k129 Persons Liable

379k131 k. Vicarious Liability. Most Cited Cases

(Formerly 379k21)

Vicarious liability occurs when one person is made liable, though without personal fault, for the bad conduct of someone else.

[8] Criminal Law 110 ↪ 59(1)

110 Criminal Law

110VII Parties to Offenses

110k59 Principals, Aiders, Abettors, and Accomplices in General

110k59(1) k. In General. Most Cited Cases

Doctrine of vicarious liability is contrary to the basic premise of criminal justice that crime requires personal fault.

[9] Criminal Law 110 ↪ 59(1)

110 Criminal Law

110VII Parties to Offenses

110k59 Principals, Aiders, Abettors, and Accomplices in General

110k59(1) k. In General. Most Cited Cases

If a statutory crime requires mental fault, an employer must personally know or be wilful or have the requisite intention before he will be liable for the criminal conduct of his employee.

[10] Intoxicating Liquors 223 ↪ 159(2)

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223 Intoxicating Liquors

223VI Offenses

223k157 Sales or Gifts to Prohibited Persons

223k159 To Minors

223k159(2) k. Intent, Knowledge, or Good Faith of Seller. Most Cited Cases

Person or club holding a liquor control license or retail wine or beer permit cannot be held strictly criminally liable for the illegal sale of alcohol to a minor; there must be proof that the sale to a minor was made with the knowledge, or by the direction, sanction, or approval of the defendant. I.C.A. §§ 123.47, 123.49, subd. 2, par. h.

[11] Intoxicating Liquors 223 ↪ 159(1)

223 Intoxicating Liquors

223VI Offenses

223k157 Sales or Gifts to Prohibited Persons

223k159 To Minors

223k159(1) k. In General. Most Cited Cases

Sale of alcohol to a minor was commission of a prohibited act, rather than omission of a specific duty or affirmative obligation, and, thus, statute imposing criminal liability on corporate defendant for an offense consisting of an omission to discharge a specific duty or an affirmative performance imposed by law did not apply to sales of alcoholic beverages to a minor by corporate defendants' employees in contravention of corporate policies and procedures. I.C.A. §§ 123.47, 123.49, subd. 2, par. h, 703.5, subd. 1.

[12] Intoxicating Liquors 223 ↪ 159(1)

223 Intoxicating Liquors

223VI Offenses

223k157 Sales or Gifts to Prohibited Persons

223k159 To Minors

223k159(1) k. In General. Most Cited Cases

Intoxicating Liquors 223 ↪ 159(2)

223 Intoxicating Liquors

223VI Offenses

223k157 Sales or Gifts to Prohibited Persons

223k159 To Minors

223k159(2) k. Intent, Knowledge, or Good Faith of Seller. Most Cited Cases

Conduct constituting the offense of selling alcohol to a minor, as contemplated by statute imposing criminal liability on corporate defendant for an offense consisting of an omission to discharge a specific duty or an affirmative performance imposed on the accused by the law, is not the mens rea element of the crime, but rather is the core conduct of selling alcohol to a minor. I.C.A. §§ 123.47, 123.49, subd. 2, par. h, 703.5, subd. 1.

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Kerry A. Finley and Kermit Anderson of Finley, Alt, Smith, Schamberg, May & Craig, P.C., Des Moines, for appellant Hy-Vee.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and Charles A. Stream, County Attorney, for appellee.

Considered by McGIVERIN, C.J., and LARSON, CARTER, SNELL, and TERNUS, JJ.

TERNUS, Justice.

This consolidated appeal involves simple misdemeanor convictions of two corporations whose employees sold alcoholic beverages to underage customers during a "sting" operation by the local police. The corporations argue they cannot be held criminally responsible for their employees' actions under the circumstances presented. We agree and so reverse their convictions and remand for dismissal of the criminal charges.

I. Background Facts and Proceedings.

The factual predicate for the charges at issue here is undisputed. Both appellants, Casey's General Stores, Inc. and Hy-Vee, Inc., operate stores in

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Oskaloosa, Iowa. On October 26, 1996, cashiers in both stores sold alcoholic beverages to underage customers without requiring identification or attempting to ascertain the customer's age. These sales violated policies and procedures established by the corporations to prevent the sale of alcoholic beverages to minors.

Both corporations were charged with the crime of selling alcoholic beverages to an underage person in violation of Iowa Code sections 123.47 and 123.49(2)(h) (1995). These simple misdemeanor charges were tried to the court and both defendants were found guilty. Their convictions were affirmed on appeal to the district court. We then granted discretionary review. See Iowa Code § 814.6(2)(d).

II. Issues on Appeal and Standard of Review.

The defendants allege procedural defects in the citation, summons and service of the charges; they also raise constitutional claims related to their convictions. We need not reach these issues, however, because we find merit in the defendants' contention that the evidence cannot sustain their convictions under sections 123.47 and 123.49(2)(h).

Casey's and Hy-Vee argue that there is no evidence that they, as corporate entities, engaged in culpable conduct so as to directly violate sections 123.47 and 123.49(2)(h). The State does not contest this assertion, but rather relies on the corporations' alleged vicarious responsibility for their employees' actions. The State first contends that corporate liability for illegal sales made by an employee is implicit in sections 123.47 and 123.49(2)(h). Alternatively, the State claims Iowa Code section 703.5(1) imposes vicarious liability upon corporate employers under the facts presented here.

[1][2] The precise claim in this appeal is based on the alleged insufficiency of the evidence to support the verdict. We review the record in the light most favorable to the *601 State in assessing the sufficiency of the evidence. See *State v. Milner*, 571 N.W.2d 7, 10 (Iowa 1997). The determinative question, however, is whether the statutes in ques-

tion render corporate defendants criminally responsible for the actions of their employees in selling alcoholic beverages to a minor in contravention of company policies and procedures. We review the trial court's interpretation of the relevant statutes for correction of errors of law. See *State v. Francois*, 577 N.W.2d 417, 417 (Iowa 1998); *State v. White*, 563 N.W.2d 615, 617 (Iowa 1997).

[3][4][5] The primary rule of statutory interpretation is to give effect to the intention of the legislature. See *White*, 563 N.W.2d at 617. To ascertain that intent, we look to the language of the statute. See *id.* We consider not only the commonly understood meaning of the words used in the statute, but also the context within which they appear. See *Lockhart v. Cedar Rapids Community Sch. Dist.*, 577 N.W.2d 845, 847 (Iowa 1998); Iowa Code § 4.1(38). Finally, we construe statutes that relate to the same or a closely allied subject together so as to produce a harmonious and consistent body of legislation. See *State v. McSorley*, 549 N.W.2d 807, 809 (Iowa 1996). We turn now to a review of the pertinent statutes.

III. Do Sections 123.47 and 123.49(2)(h) Impose Vicarious Liability on a Licensee or Permittee for the Sale of Alcohol to a Minor?

[6] Section 123.47 prohibits the sale of alcohol to a minor:

A person shall not sell ... alcoholic liquor, wine, or beer to any person knowing or having reasonable cause to believe that person to be under the age of eighteen....

Section 123.49(2)(h) contains a similar prohibition:

A person or club holding a liquor control license or retail wine or beer permit under this chapter, and the person's or club's agents or employees, shall not....

....

h. Sell, give, or otherwise supply any alcoholic

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beverage, wine, or beer to any person, knowing or failing to exercise reasonable care to ascertain whether the person is under legal age....

The State argues that the evidence supports the defendants' convictions for violating these statutes under the following rationale.

The State first points out that the statutory prohibitions apply to a "person," and that word is defined to include a corporation. *See* Iowa Code § 123.3(25). Because a corporation can act only through an employee, the State reasons that the legislature must have contemplated criminal liability for corporations based on the acts of their employees. We find this analysis unpersuasive because these statutes do not impose vicarious liability.

[7][8][9] Vicarious liability occurs when "one [person] is made liable, though without personal fault, for the bad conduct of someone else." *See* Wayne R. La Fave & Austin W. Scott, Jr., *Criminal Law* § 3.9, at 250 (2d ed.1986) [hereinafter "La Fave, *Criminal Law*"]; *see also* *Randall's Int'l Inc. v. Hearing Bd.*, 429 N.W.2d 163, 165 (Iowa 1988) (holding permittee was vicariously liable under section 123.50(3) for employee's sale of beer to a minor for purposes of administrative regulation). This doctrine is contrary to the "basic premise of criminal justice that crime requires personal fault." La Fave, *Criminal Law* § 3.9, at 250; *accord* John J. Yeager, *Ten Years with the Iowa Criminal Code*, 38 Drake L.Rev. 831, 847 (1988-89). As La Fave explains in his treatise on criminal law,

It is a general principle of criminal law that one is not criminally liable for how someone else acts, unless of course he directs or encourages or aids the other so to act. Thus, unlike the case with torts, an employer is not generally liable for the criminal acts of his employee even though the latter does them in furtherance of his employer's business. In other words, with crimes defined in terms of harmful acts and bad thoughts, the defendant himself must personally engage in the acts and personally think the bad thoughts, un-

less, in the case of a statutory crime, the legislature has otherwise provided.

*602 La Fave, *Criminal Law* § 3.2(f), at 202; *accord id.* § 3.9(a), at 251. Thus, if a statutory crime requires mental fault, "it is the rule that the employer must personally know or be wilful or have the requisite intention [before he will] be liable for the criminal conduct of his employee...." *Id.* at 252.

We begin, therefore, with an examination of the statutes to determine whether they require mental fault or whether they impose strict liability.^{FN1} Such an examination reveals that a mens rea element is included in both crimes.

FN1. When a statute imposes strict liability, it is only necessary to prove that the defendant committed the culpable act; it is not necessary to establish any mens rea or mental fault. *See* La Fave, *Criminal Law* § 3.9, at 250; *see also* *Iowa City v. Nolan*, 239 N.W.2d 102, 104-05 (Iowa 1976) (holding city ordinance imposed strict criminal responsibility on owner of illegally-parked car where ordinance dispensed with mens rea or scienter requirement).

We had the opportunity to consider whether section 123.47 required mental fault in *Bauer v. Cole*, 467 N.W.2d 221 (Iowa 1991), a negligence case premised on a violation of section 123.47. In that case, the plaintiffs, an injured minor and his parents, sued the hosts of a New Year's Eve party for injuries sustained by the minor in an automobile accident. *Bauer*, 467 N.W.2d at 222. The plaintiffs alleged the defendants had provided liquor to the minor driver causing his intoxication, which in turn caused the accident. *Id.* The plaintiffs appealed from an adverse jury verdict, claiming error in the instruction submitting the plaintiffs' negligence claim based on section 123.47. *Id.* at 223.

In the challenged instruction, the trial court had required the plaintiffs to prove the defendants had

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knowingly supplied alcohol to the minor driver. *Id.* The plaintiffs argued that knowledge was not an element of the offense. *Id.* In ruling that the instruction was correct, this court held that section 123.47 requires proof of the defendants' criminal intent: "[W]e conclude that defendants' knowledge of the transaction must be shown to prove a criminal violation under section 123.47." *Id.*; accord *La Fave, Criminal Law* § 3.9(a), at 252 (stating if the statutory crime is worded in language such as "knowingly," "wilfully," or "with intent to," the statute requires mental fault).

[10] We think the same conclusion is appropriate with respect to section 123.49(2)(h). Section 123.49(2)(h) requires that the defendant sell the alcoholic beverage "knowing or failing to exercise reasonable care to ascertain whether the person is under legal age." Iowa Code § 123.49(2)(h). Similarly, section 123.47 requires that the defendant "know[] or hav[e] reasonable cause to believe" that the person buying the alcoholic beverage is under the age of eighteen. *Id.* § 123.47. The similar language of section 123.49(2)(h) calls for the same interpretation given to section 123.47 in *Bauer*, namely, that proof of the defendant's criminal intent is required for a criminal violation. Thus, a licensee or permittee cannot be held strictly criminally liable for the illegal sale of alcohol to a minor; there must be proof that the sale to a minor was made "with the knowledge, or by the direction, sanction, or approval of the defendant." *Bauer*, 467 N.W.2d at 223 (quoting *State v. Schultz*, 242 Iowa 1328, 1334, 50 N.W.2d 9, 12 (1951)); accord Iowa Code §§ 703.4, .5(2) (defining responsibility of employers for crimes committed by employees); *Fullmer v. Tague*, 500 N.W.2d 432, 434 (Iowa 1993) (holding that a plaintiff, to prevail on a negligence claim predicated on section 123.47, "must prove the defendants' knowing and affirmative delivery of the beer to the underage person").

Because sections 123.47 and 123.49(2)(h) specifically require fault, we will not read vicarious liability into these criminal statutes, but must first

find a legislative expression of an intent to impose vicarious liability. See *La Fave, Criminal Law* § 3.9(a), at 252 ("[I]f the statute requires mental fault, it will not be presumed that the legislature intended that the fault of the employee should suffice for conviction of the employer."). Clearly, there is no expression of such an intent in the statutory language. In contrast, we note that the legislature has imposed vicarious liability on licensees and permittees for *civil* fines and penalties assessed for a violation of section 123.49(2)(h). See *603 Iowa Code § 123.50(3) (allowing suspension of license or permit upon *employee's* conviction of a violation of section 123.49(2)(h)); *Randall's Int'l*, 429 N.W.2d at 165. If the legislature had intended the same result with respect to *criminal* liability, it could easily have said so. Therefore, we reject any suggestion that chapter 123 itself imposes vicarious criminal liability on licensees and permittees for the illegal sale of alcoholic beverages to minors. See *State v. Adjustment Dept. Credit Bureau, Inc.*, 94 Idaho 156, 483 P.2d 687, 691 (1971) (where statutory offense required criminal intent, corporate defendant could not be held vicariously criminally liable for employee's violation of statute unless employee's actions were "authorized, requested, or commanded" by a high managerial agent of the company); *Commonwealth v. J.F. Lomma, Inc.*, 404 Pa.Super. 185, 590 A.2d 342, 346 (1991) (where statute required knowledge, corporate defendant could not be held criminally liable for employee's violation of statute unless corporation knew or had reason to know that employee would violate the statute).

IV. Are the Defendants Vicariously Liable Under Section 703.5?

[11] We now consider the State's contention that the defendants can be held vicariously liable for the conduct of their employees under section 703.5(1). Section 703.5 provides for the vicarious liability of a corporation in two different situations:

A ... private corporation ... shall have the same level of culpability as an individual committing

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the crime when any of the following are true:

1. *The conduct constituting the offense consists of an omission to discharge a specific duty or an affirmative performance imposed on the accused by the law.*

2. *The conduct or act constituting the offense is committed by an agent, officer, director, or employee of the accused while acting within the scope of the authority of the agent, officer, director or employee and in behalf of the accused and when said act or conduct is authorized, requested, or tolerated by the board of directors or by a high managerial agent...*

Iowa Code § 703.5 (emphasis added). We think the first subsection of this statute addresses crimes of omission, ones in which the criminal statute imposes an obligation on the corporation to do something, as opposed to criminal statutes prohibiting certain conduct.^{FN2} See La Fave, *Criminal Law* § 3.3, at 202 (noting that some crimes are defined as an omission to act in the face of a legal duty to act, as opposed to more typical crimes that are committed by affirmative action, i.e., the performance of a prohibited act); *Black's Law Dictionary* 1086 (6th ed.1990) (defining "omission" as "[t]he neglect to perform what the law requires"). The second subsection of the statute addresses criminal conduct that consists of the commission of a prohibited act. See *Black's Law Dictionary* 276 (defining "commission" as "the doing or perpetration of a criminal act"). With this distinction in mind, we now consider the application of this statute to the case before us.

FN2. Iowa Code section 703.5(1) is taken almost verbatim from Model Penal Code section 2.07(1)(b). The drafters of the Model Code intended this species of vicarious liability to be very limited in scope:

Subsection (1)(b) deals with a situation where the criminal law speaks explicitly

to corporations.... The reference to a "specific" duty imposed on corporations by law is designed to make it clear that the provision does not govern in such a case as negligent homicide, where the duty violated is one that the law imposes generally. Rather, the section will apply when there is a failure, for example, to file a report of a kind that the corporation is specifically required to file, or to maintain records that the corporation is required by law to keep.

Model Penal Code § 2.07 cmt. 1(b), at 335 (1985).

The State does not rely on section 703.5(2) to support the defendants' convictions. Indeed, there is no evidence in the record that these sales of alcohol to minors were "authorized, requested, or tolerated" by the companies' boards of directors or any high managerial agents of the defendants. Therefore, we must focus on the requirements of section 703.5(1) and decide whether there is sufficient evidence of those requirements to support the application of this statute in this case. To determine whether section 703.5(1) applies, we must identify the "conduct constituting*604 the offense" and then consider whether that conduct constitutes "an omission to discharge a specific duty or an affirmative performance imposed on the accused by the law." Iowa Code § 703.5(1).

[12] The State argues that the conduct constituting the offense is the failure to use reasonable care to ascertain the purchaser's age.^{FN3} But a defendant can be convicted of a violation of sections 123.47 and 123.49(2)(h) in the absence of such evidence, for example, where the defendant knew the purchaser was a minor. Thus, the requirement of reasonable care is merely a substitute for the mens rea or knowledge element of the crime. We think "the conduct constituting the offense," as contemplated by section 703.5(1), is not the mens rea element of the crime, but rather is the core conduct of selling alcohol to a minor.

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FN3. Prior to 1986, chapter 123 placed an affirmative obligation on employees of state liquor stores to demand evidence of legal age from a prospective purchaser of alcohol who appeared to be under the legal age. See Iowa Code § 123.48 (1985) (repealed 1986). No similar statute exists today.

We next consider whether this conduct is “an omission to discharge a specific duty or an affirmative performance imposed on the accused by law” within the meaning of section 703.5(1). The sale of alcohol to a minor is the *commission* of a prohibited act; it is not the *omission* of a specific duty or affirmative obligation. Therefore, section 703.5(1) does not apply.

V. Summary.

Sections 123.47 and 123.49(2)(h) do not impose vicarious liability on licensees and permittees for illegal sales made by their employees. Therefore, the criminal culpability of Casey's and Hy-Vee's employees does not provide a basis for the convictions of these corporations. In addition, the factual prerequisites of the statute providing for a corporation's vicarious liability, section 703.5, are not satisfied under the facts before us.

We conclude, therefore, that there is insufficient evidence to support a finding that the corporate defendants violated sections 123.47 and 123.49(2)(h). Accordingly, we reverse the defendants' convictions and remand for dismissal of the charges.

REVERSED AND REMANDED.

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C

Supreme Court of Iowa.
NASH FINCH COMPANY, Appellant,
v.
CITY COUNCIL OF THE CITY OF CEDAR RAPIDS, Iowa, Appellee.

No. 02-1189.
Dec. 17, 2003.

Background: City council suspended company's permit to sell cigarettes, and company filed petition for writ of certiorari. The District Court, Linn County, Kristin L. Hibbs, J., dismissed writ, and company appealed.

Holding: The Supreme Court, Ternus, J., held that substantial evidence supported city council's finding that two of company's stores where employees violated first statute by selling cigarettes to minors were same place of business, within meaning of second statute providing for aggregation of violations of first statute and suspension of permit to sell cigarettes.

Affirmed.

West Headnotes

[1] **Municipal Corporations 268** ↪104

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(A) Meetings, Rules, and Proceedings in General
268k104 k. Appeal from Decisions. Most Cited Cases

City exercising governmental function is "tribunal," within meaning of rule providing that writ of certiorari shall only be granted where inferior tribunal is alleged to have exceeded proper jurisdiction or otherwise acted illegally. I.C.A. Rule 1.1401.

[2] **Municipal Corporations 268** ↪104

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(A) Meetings, Rules, and Proceedings in General
268k104 k. Appeal from Decisions. Most Cited Cases

Illegality is established in certiorari action against city council if city has not acted in accordance with statute, if its decision was not supported by substantial evidence, or if its actions were unreasonable, arbitrary, or capricious. I.C.A. Rule 1.1401.

[3] **Municipal Corporations 268** ↪104

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(A) Meetings, Rules, and Proceedings in General
268k104 k. Appeal from Decisions. Most Cited Cases

Supreme Court is bound by findings of trial court in certiorari action against city council if findings are supported by substantial evidence in record; evidence is substantial when reasonable mind would accept it as adequate to reach conclusion.

[4] **Statutes 361** ↪181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In General. Most Cited Cases

Statutes 361 ↪188

361 Statutes
361VI Construction and Operation

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361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited

Cases

In interpreting and applying statutory provisions, Supreme Court attempts to give effect to general assembly's intent in enacting law; generally, this intent is gleaned from language of statute.

[5] Statutes 361 ↪188

361 Statutes

361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited

Cases

Statutes 361 ↪208

361 Statutes

361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic

Aids to Construction

361k208 k. Context and Related Clauses. Most Cited Cases

Supreme Court gives words in statute their ordinary meaning, keeping in mind context of provision at issue.

[6] Statutes 361 ↪205

361 Statutes

361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic

Aids to Construction

361k205 k. In General. Most Cited Cases

Supreme Court strives to interpret each provision of statute in manner consistent with statute as integrated whole.

[7] Licenses 238 ↪41

238 Licenses

238I For Occupations and Privileges

238k41 k. Penalties and Forfeitures and Actions Therefor. Most Cited Cases

Violations of statute prohibiting sale of cigarettes to minors need not occur while same permit for sale of cigarettes is in effect in order for violations to be aggregated, for purpose of imposing penalties on permit holder; second statute specifically provides for aggregation of violations occurring within two years, yet permits are only issued for one year. I.C.A. §§ 453A.2, subd. 1, 453A.13, subd. 3, 453A.22, subd. 2, par. b.

[8] Licenses 238 ↪38

238 Licenses

238I For Occupations and Privileges

238k38 k. Revocation, Suspension, or Forfeiture. Most Cited Cases

"Place of business," within meaning of first statute providing that suspension of license to sell cigarettes based on violations of second statute forbidding sale of cigarettes to minors is only applicable to place of business at which violations occurred, means business operation itself, rather than physical location of business. I.C.A. §§ 453A.1, subd. 19, 453A.2, subd. 1, 453A.22, subd. 2, par. b.

[9] Licenses 238 ↪38

238 Licenses

238I For Occupations and Privileges

238k38 k. Revocation, Suspension, or Forfeiture. Most Cited Cases

Substantial evidence supported city council's finding that two of company's stores where employees violated first statute by selling cigarettes to minors were same "place of business," within meaning of second statute providing for aggregation of violations of first statute and suspension of permit to sell cigarettes, where first violation occurred at first store, second violation occurred at second store, second store opened immediately upon closing of first store, second store was on same street as first store, and personnel from first store transferred to second store. I.C.A. §§ 453A.1,

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subd. 19, 453A.2, subd. 1, 453A.22, subd. 2, par. b.

*823 Mark A. Roberts of Simmons, Perrine, Albright & Ellwood, P.L.C., Cedar Rapids, for appellant.

James H. Flitz, City Attorney's Office, Cedar Rapids, for appellee.

TERNUS, Justice.

Appellant, Nash Finch Company, appeals from a district court judgment upholding the action of appellee, City Council of the City of Cedar Rapids, suspending Nash Finch's permit for the sale of cigarettes based on the company's second violation of Iowa Code section 453A.2(1) (1999). Nash Finch contends the district court erred in holding two company stores were the same "place of business" for purposes of aggregating offenses under *824 Iowa Code section 453A.22. Finding no error, we affirm.

I. Background Facts and Proceedings.

In 1999, Nash Finch owned and operated four Econofoods stores in the Cedar Rapids area, including one at 2300 Edgewood Road S.W. This store was the only Econofoods store on the west side of Cedar Rapids, and was known internally as Econofoods # 465. (We will refer to this establishment as store # 465 throughout the remainder of this opinion.) Cigarettes were sold at this location under the authority of cigarette permit no. 488, issued by the City of Cedar Rapids to Nash Finch for store # 465.

On April 8, 1999, an employee of store # 465 was cited for violating section 453A.2(1) by selling cigarettes to a minor. *See* Iowa Code § 453A.2(1) ("A person shall not sell, give, or otherwise supply any tobacco, tobacco products, or cigarettes to any person under eighteen years of age."). After the employee was found guilty, the city imposed a civil penalty of \$300 on Nash Finch, pursuant to Iowa Code section 453A.22. *See id.* § 453A.22(2)(a) (providing for the imposition of a \$300 civil penalty for a first violation of section 453A.2 by a re-

tailer or its employee).

On June 27, 2000, store # 465 closed. The remaining inventory and equipment from this store were either auctioned off or dispersed among other stores. The following day, June 28, 2000, Nash Finch opened a new Econofoods store approximately 1200 feet northwest of the old store, at 2100 Edgewood Road S.W. This store was designated as Econofoods # 475. It did not share any common walls or parking areas with the old store. In addition, the stores' finances were separate, with each maintaining its own accounting ledgers and payrolls. Although the entire contents of store # 475 were new, ninety percent of the employees from the old store, including all of the management personnel, transferred to the new store.

As noted earlier, store # 465 had a city permit to sell cigarettes. This permit had been issued for the period from July 1, 1999, through June 30, 2000. *See id.* § 453A.13(3) (requiring that all permits issued to a retailer "expire on June 30 of each year"). Prior to the opening of the new store, a paralegal at Nash Finch's corporate headquarters prepared an application for a cigarette permit for store # 475 commencing on July 1, 2000, the anticipated opening date for the new store. Later, the company decided to open store # 475 three days early, but learned the city council would not be able to approve the permit by the earlier date. The city clerk offered to "transfer" the cigarette permit from store # 465 to store # 475 for the three-day period between the new opening date and July 1, 2000. Consequently, store # 475 was allowed to sell cigarettes from June 28, 2000, through June 30, 2000, under the authority of permit no. 488. Thereafter, it sold cigarettes under new permits issued every July 1.

On January 9, 2001, an employee of store # 475 was cited by the police for selling cigarettes to a minor in violation of section 453A.2(1). She later pled guilty. On August 1, 2001, the city council, finding Nash Finch had been convicted "on two occasions for selling cigarettes to persons under 18

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years of age," suspended its cigarette permit for store # 475 for thirty days. *See id.* § 453A.22(2)(b) (providing for a thirty-day suspension of a retailer's permit if the retailer or an employee of the retailer has violated section 453A.2 for the second time within a two-year period). Nash Finch opposed the suspension, arguing the first violation did not occur at the same store as the second violation. The council rejected this argument, noting (1) *825 store # 475 opened the very next day after store # 465 closed; (2) both stores had the same management and primarily the same market; (3) the workforce from store # 465 and its liquor license were transferred to store # 475; and (4) Nash Finch operated no other Econofoods stores on the southwest side of Cedar Rapids. Based on these facts, the council concluded the violation at store # 475 was a second violation for purposes of section 453A.22 and warranted a thirty-day suspension.

Nash Finch filed a petition for writ of certiorari, resulting in a trial before the district court. Focusing on the physical and financial separateness of the two stores, Nash Finch contended store # 465 and store # 475 were not the same "place of business" as that term is defined by Iowa Code section 453A.1(19). Consequently, it claimed, the violation at store # 465 could not be aggregated with the violation at store # 475. Nash Finch argued that in the absence of aggregation, there was not substantial evidence to find a second violation had occurred at store # 475. Therefore, it asserted, the council acted illegally in suspending the cigarette permit for store # 475.

Acknowledging that the legislature may not have intended to aggregate violations occurring at two separate places of business operated simultaneously by the same entity, the district court believed the facts of this case were different. The court concluded from the evidence that store # 475 replaced store # 465 and therefore they were the same "place of business" within the meaning of chapter 453A. The trial court ruled there was substantial evidence to support the council's suspension

of Nash Finch's cigarette permit for store # 475 and, accordingly, dismissed the writ of certiorari.

Nash Finch has appealed the district court's decision. This court stayed the suspension pending resolution of this appeal.

II. Scope of Review.

[1] Iowa Rule of Civil Procedure 1.1401 provides that "[a] writ of certiorari shall only be granted ... where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded proper jurisdiction or otherwise acted illegally." Iowa R. Civ. P. 1.1401. "A city exercising a governmental function is a tribunal within the meaning of [this] rule." *Sergeant Bluff-Luton Sch. Dist. v. City Council*, 605 N.W.2d 294, 297 (Iowa 2000).

[2][3] We recently set forth the principles governing our review of such cases:

Our review of a district court ruling is at law. "An illegality is established if the board has not acted in accordance with a statute; if its decision was not supported by substantial evidence; or if its actions were unreasonable, arbitrary, or capricious." We are bound by findings of the trial court if they are supported by substantial evidence in the record. Evidence is substantial when "a reasonable mind would accept it as adequate to reach a conclusion."

Perkins v. Bd. of Supervisors, 636 N.W.2d 58, 64 (Iowa 2001) (citations omitted). "The plaintiff bears the burden to prove the illegality." *City of Grimes v. Polk County Bd. of Supervisors*, 495 N.W.2d 751, 752 (Iowa 1993).

III. Statutory Provisions.

Because the issue in this case is one of statutory interpretation, we start with the relevant portions of the applicable statute. Under Iowa law a "retailer" desiring to sell cigarettes must obtain a permit. *See* Iowa Code § 453A.13(1). Although the department of revenue and finance issues "state

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permits to distributors, wholesalers, and cigarette vendors [persons selling cigarettes*826 in vending machines],” cities may issue permits to retailers within their city limits. *Id.* § 453A.13(2)(a). A “retailer” is defined broadly to include “every person in this state who shall sell, distribute, or offer for sale or consumption or possess for the purpose of sale or consumption, cigarettes.” *Id.* § 453A.1(21).

A permit must be obtained “for each place of business owned or operated” by a retailer. *Id.* § 453A.13(7). The permit must “describe clearly the place of business for which it is issued.” *Id.* § 453A.13(9). The statute defines the term “place of business,” in relevant part, as

any place where cigarettes are sold or where cigarettes are stored within or without the state of Iowa by the holder of an Iowa permit or kept for the purpose of sale or consumption....

Id. § 453A.1(19).

Permits are “nonassignable.” *Id.* § 453A.13(9). Nonetheless, they may be “exchanged.” *See* Iowa Admin. Code r. 701-82.2(3).^{FN1} Rule 701-82.2(3) states:

FN1. The legislature has given the director of the department of revenue and finance authority to adopt rules for the administration of chapter 453A. *See* Iowa Code § 453A.25(2). *See generally id.* § 453A.56 (providing for uniform and equitable implementation of the statute throughout the state).

If a permittee changes the location of an operation requiring a permit but remains within the jurisdiction of the same entity which granted the original permit, the permittee may exchange the invalid permit (valid only for the location described in the permit) for a valid permit free of charge, without the partial payment-partial refund process.

Id.

Chapter 453A prohibits the sale of cigarettes to persons under the age of eighteen. *See* Iowa Code § 453A.2(1). The statute provides progressive penalties for multiple violations of this prohibition, including suspension and ultimately revocation of the retailer's permit. *See id.* § 453A.22(2). It does not, however, expressly state when a violation should be considered a “second,” “third,” or “fourth” violation by the particular retailer. *E.g., id.* § 453A.22(2)(b) (“For a second violation within a period of two years, the retailer's permit shall be suspended for a period of thirty days.”). The statute does provide, nonetheless, that suspensions and revocations are applicable only “to the *place of business* at which the violation occurred.” *Id.* § 453A.22(4) (emphasis added).

[4][5][6] In interpreting and applying these statutory provisions, we “attempt to give effect to the general assembly's intent in enacting the law. Generally, this intent is gleaned from the language of the statute.” *Griffin Pipe Prods. Co. v. Guarino*, 663 N.W.2d 862, 864 (Iowa 2003) (citations omitted). We give words their ordinary meaning, keeping in mind the context of the provision at issue. *Id.*; *William C. Mitchell, Ltd. v. Brown*, 576 N.W.2d 342, 347 (Iowa 1998). In addition, we strive to interpret each provision of a statute “in a manner consistent with the statute as an integrated whole.” *Griffin Pipe Prods. Co.*, 663 N.W.2d at 864.

IV. Discussion.

[7][8][9] Nash Finch argues that because the statutory scheme contemplates that each “place of business” must have its own permit, the council and district court erred in concluding a violation occurring under the permit issued to store # 475 could be aggregated with a violation occurring under a different permit issued to a different store. Initially, we reject any suggestion *827 that only violations happening while the same permit is in effect can be aggregated. Violations must logically be aggregated by place of business, not by a particular permit. We

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reach this conclusion because the statute specifically provides for aggregation of violations occurring within two years, yet permits are only issued for one year. See Iowa Code §§ 453A.13(3), 453A.13.22(2)(b). See generally *Am. Legion v. Cedar Rapids Bd. of Review*, 646 N.W.2d 433, 439 (Iowa 2002) (“We will not interpret a statute so as to render a part of it superfluous.”); *State v. Jennie Coulter Day Nursery*, 218 N.W.2d 579, 582 (Iowa 1974) (“[T]he legislature will be presumed to have inserted every part in a statute for a purpose and to have intended that every part shall be carried into effect.”). It follows, then, that aggregated violations can occur during the terms of different permits covering the same place of business. Thus, the determinative question is whether store # 475 was the same “place of business” as store # 465.

The statutory definition of “place of business” is of little assistance in answering this question because it does not elaborate on the term from a geographical or business continuation perspective. The statute merely provides that a “place of business” is “any place where cigarettes are sold ... by the holder of an Iowa permit.” Iowa Code § 453A.1(19) (emphasis added). Although the word “place” has many definitions, it is our judgment the one that fits best in this context is “a building or locality used for a special purpose.” *Webster's Third New International Dictionary* 1727 (unabr. ed.2002). While the word “any” also has many meanings, in this context, we think it more likely means “one, no matter what one: EVERY.” *Id.* at 97. We interpret Nash Finch's argument to rest on the premise that “place” means a precise “building” or address. But under the common meaning of the terms, “any place” might also mean wherever the business is conducted. Cf. *State v. Cahalan*, 204 Iowa 410, 412-13, 214 N.W. 612, 613 (1927) (holding “place,” as used in statute defining liquor nuisance, was not limited to a particular building but included entire area where illicit liquor business was conducted).

Because neither interpretation is unreasonable,

we think the statute is ambiguous. See *State v. Albrecht*, 657 N.W.2d 474, 479 (Iowa 2003) (“A statute is ambiguous if reasonable minds could differ or be uncertain as to the meaning of the statute.” (Citations omitted.)). When a statute is ambiguous, the court may consider, among other factors, the purpose of the statute, the consequences of a particular construction, and any administrative interpretation of the statute. See Iowa Code § 4.6; *State v. Sailer*, 587 N.W.2d 756, 760 (Iowa 1998).

We turn first to the department's rule, which reflects its view of the statutory scheme implemented in chapter 453A. See *Mortimer v. Fruehauf Corp.*, 502 N.W.2d 12, 14 (Iowa 1993) (noting court gives “deference to an interpretation by the responsible administrative agency”).^{FN2} Under rule 701-82.2(3), the department allows a permit to be transferred when “the location of [the] operation” changes. Thus, when the business operation is simply moved to another location, the permit can be exchanged for one covering the new location *828 without the necessity of applying for a new permit and obtaining approval for its issuance. (It appears that is what the city clerk intended to do here.) This agency interpretation implies that the focus of the regulatory scheme is the business or operation of the specific retailer because once the retailer is issued a permit, it can automatically be transferred to a new location. Consistent with this focus, it appears the element of primary importance in the phrase, “place of business,” is the business operation itself, and not the physical location.

FN2. We do not apply the rules set forth in Iowa Code section 17A.19(11) concerning the deference to be accorded “to the view of the agency with respect to particular matters,” as the Administrative Procedure Act does not govern the present certiorari action. See Iowa Code §§ 17A.2 (stating that “a political subdivision of the state” is not an “agency” within the ambit of chapter 17A); .19(11) (stating deference rules are used by court “[i]n making the

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determinations required” for judicial review of agency action).

This focus is consistent with the purpose of the statute. A review of chapter 453A reveals a legislative intent to regulate the sale of cigarettes by retailers in the state, and more specifically to discourage the sale of cigarettes to minors. This legislative purpose is best furthered by holding a retailer responsible for multiple violations of the statute arising out of the same operation, even when that operation has moved to a new location. There is simply nothing in the statute to indicate a retailer should gain a fresh start, free from the burdens of prior violations, simply by relocating. Certainly such an interpretation of the statute would be contrary to the legislative goal of deterring violations by the same retailer through the application of progressive penalties for multiple violations.

Based upon our consideration of the entire statute, its implementing rules, and its purpose, we conclude the mere relocation of a business does not automatically produce a new “place of business” for purposes of aggregating violations. Accordingly, in the present case, aggregation is not precluded simply because the first violation occurred at a different physical location than the second violation. The determinative question is whether store # 475 is the same “operation” as store # 465. See Iowa Admin. Code r. 701-82.2(3) (permitting transfer of permit when “location of an operation” changes). Thus, we reject Nash Finch's contention that the council and district court erroneously interpreted the statute when they focused on whether store # 475 was a replacement for the business formerly operated as store # 465.

The remaining question, then, is whether the district court correctly concluded there was substantial evidence to support the council's implicit finding that store # 475 was the same operation as store # 465, or, under the terminology used by the district court, whether store # 475 replaced store # 465. We think there is substantial evidence in support of this finding. Store # 475 opened immedi-

ately upon the closing of store # 465; they never operated simultaneously. The stores were located on the same street, only 1200 feet apart, and served the same market. Although inventory and equipment were not transferred from one location to the other, common sense suggests the purchase of new equipment and inventory was necessary to ensure that the new store would be operational immediately upon the closing of the old store. More importantly, the personnel from store # 465 transferred, with few exceptions, to the new location.^{FN3} While store # 475 had some *829 employees working prior to the closing of store # 465, these employees were apparently readying the store for operation, as store # 475 was not open for business until store # 465 closed. In addition, the record shows the old store's cigarette permit and liquor license were transferred to the new store.^{FN4} Finally, Nash Finch's own company witness testified that store # 475 “was a replacement store.”

FN3. Nash Finch challenges a finding by the city council that the management at the two locations was the same at the time of the violations. While the record shows the stores had the same manager when the two violations occurred, the assistant managers were different. We do not find the council's unsupported generalization to be important, however. As our discussion makes plain, the significant fact is that all of the management personnel from store # 465 transferred to store # 475, a fact that supports the council's ultimate conclusion that store # 475 was a continuation of the operation formerly conducted at store # 465.

FN4. Although Nash Finch complains that the city clerk had no authority to “transfer” store # 465's cigarette permit to the new store, we conclude the clerk's action was consistent with the spirit, if not the literal terms, of rule 701-82.2(3) providing for the exchange of a permit upon relocation of a business.

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We think these facts provide ample support for the council's conclusion that store # 475 was a mere continuation of the operation formerly conducted by Nash Finch at store # 465. Therefore, the violations that occurred at each store occurred at the same "place of business." Consequently, the council correctly aggregated the violations occurring at the two locations for purposes of determining the appropriate penalty for the second violation.

V. Disposition.

In conclusion, we find no error in the district court's ruling that the city council did not act illegally in suspending the cigarette permit for store # 475 for thirty days. Therefore, we affirm. The stay previously entered by this court shall expire upon issuance of procedendo.

AFFIRMED.

All justices concur except WIGGINS, J., who takes no part.

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Westlaw

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C

Supreme Court of Iowa.
STATE of Iowa, Appellant,
v.
Lester Tobias LASLEY, Appellee.

No. 03-1938.
Oct. 28, 2005.

Background: Defendant, who was employed at store owned by Indian tribe, was charged with providing tobacco to an underaged person. Tribe filed motion to dismiss for lack of subject matter jurisdiction. The District Court, Tama County, John J. Willett, Magistrate, granted motion. State filed application for discretionary review.

Holdings: Upon grant of application, the Supreme Court, Lavorato, C.J., held that:

- (1) discretionary review by Supreme Court of state's appeal of dismissal of charge was appropriate;
- (2) statute prohibiting person from selling, giving, or otherwise supplying any tobacco, tobacco products, or cigarettes to a person under 18 years of age was criminal/prohibitory in nature, such that state had jurisdiction to enforce statute against defendant; and
- (3) reinstatement of prosecution was not barred by prohibition against double jeopardy.

Reversed and remanded.

West Headnotes

[1] Criminal Law 110 ⚡1134.29

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.29 k. Constitutional Issues
in General. Most Cited Cases
(Formerly 110k1134(3))

Appellate review of an issue of statutory interpretation is for correction of errors at law.

[2] Criminal Law 110 ⚡1134.39

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)4 Scope of Inquiry
110k1134.39 k. Jurisdiction and Venue. Most Cited Cases
(Formerly 110k1134(3))
Appellate court reviews proceedings concerning subject matter jurisdiction at law.

[3] Criminal Law 110 ⚡1024(2)

110 Criminal Law
110XXIV Review
110XXIV(D) Right of Review
110k1024 Right of Prosecution to Review
110k1024(2) k. Discharge of Defendant in General. Most Cited Cases
Discretionary review by Supreme Court of state's appeal of dismissal of charge of providing tobacco to an underaged person that had been filed against Indian, who was employed at store owned by Indian tribe, was appropriate, as Court was faced with issue of Indian sovereignty that immediately called into question subject matter jurisdiction, which Court was duty bound to address, and it was of no import whether tribe had standing, because subject matter jurisdiction required Court to determine whether it had jurisdiction regardless of how issue was raised.

[4] Criminal Law 110 ⚡105

110 Criminal Law
110VIII Jurisdiction
110k105 k. Waiver of Objections. Most Cited Cases
Subject matter jurisdiction may be raised at any time.

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[5] Criminal Law 110 ⚡️1033.1

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in
Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1033.1 k. Jurisdiction. Most Cited
Cases .

Supreme Court may raise the issue of subject
matter jurisdiction sua sponte.

[6] Indians 209 ⚡️106

209 Indians
209I In General
209k106 k. Authority Over and Regulation of
Tribes in General. Most Cited Cases
(Formerly 209k2)

The Federal Constitution grants congress broad
general powers to legislate in respect to Indian
tribes. U.S.C.A. Const. Art. 1, § 8, cl. 3; U.S.C.A.
Const. Art. 2, § 2, cl. 2.

[7] Indians 209 ⚡️211

209 Indians
209V. Government of Indian Country, Reserva-
tions, and Tribes in General
209k211 k. State Regulation. Most Cited
Cases
(Formerly 209k32(2))

Although Indian tribes retain attributes of sov-
ereignty, state laws may be applied to tribal Indians
on reservations if congress grants a state authority
to do so.

[8] Indians 209 ⚡️260

209 Indians
209VII Offenses and Prosecutions
209VII(A) In General
209k260 k. In General. Most Cited Cases
(Formerly 209k32(13))

For a state law to be enforceable under the
criminal offense provision of that federal law ex-
pressly granting six states criminal and civil juris-

diction over specified areas of Indian country with-
in the states and providing for the assumption of
such jurisdiction by other states, such law must be
criminal/prohibitory and not civil/regulatory. 18
U.S.C.A. § 1162; 28 U.S.C.A. § 1360.

[9] Indians 209 ⚡️274(2)

209 Indians
209VII Offenses and Prosecutions
209VII(B) Jurisdiction and Power to Enforce
Criminal Laws
209k271 Indian Defendant
209k274 Crime Committed in Indian
Country or on Reservation
209k274(2) k. State Court or Au-
thorities. Most Cited Cases
(Formerly 209k32(13))

Statute prohibiting person from selling, giving,
or otherwise supplying any tobacco, tobacco
products, or cigarettes to a person under 18 years of
age was criminal/prohibitory in nature, such that
state had jurisdiction to enforce statute against Indi-
an who had allegedly sold cigarettes to an underage
person at store that employed him, which store was
owned by Indian tribe; statute did not merely regu-
late sale of tobacco, but absolutely prohibited one
from furnishing it in any manner to underaged per-
sons, statute's purpose was to promote safety and
health of all underaged persons, and allowing sale
of tobacco products to underaged persons on tribe's
reservation would circumvent legislature's determi-
nation that furnishing such products to underaged
persons was dangerous to their health. I.C.A. §
453A.2(1).

[10] Criminal Law 110 ⚡️303.45

110 Criminal Law
110XVI Nolle Prosequi or Discontinuance
110k303.5 Dismissal, Nolle Prosequi, or Dis-
continuance
110k303.45 k. Reinstatement. Most Cited
Cases
Reinstatement of prosecution of defendant,
who was an Indian, for providing tobacco to an un-

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deraged person following trial court's erroneous dismissal of charge was not barred by rule permitting court, in furtherance of justice, to dismiss any criminal prosecution, and further providing that such dismissal was bar to another prosecution for same offense if offense was simple or serious misdemeanor, as dismissal at issue did not result from trial court's or prosecutor's motion, but, rather, from motion of Indian tribe, and trial court dismissed charge based on ground of lack of subject matter jurisdiction. U.S.C.A. Const.Amend. 5; I.C.A. § 813.2, Rule 2.33(1).

[11] Double Jeopardy 135H ↪54

135H Double Jeopardy
135HIII Elements of Former Jeopardy
135Hk54 k. Preliminary or Summary Proceedings. Most Cited Cases

Reinstatement of prosecution of defendant for providing tobacco to an underaged person, following trial court's erroneous dismissal of charge, was not barred by constitutional prohibition against double jeopardy, as erroneous dismissal came before defendant was ever placed in jeopardy; no jury had been empaneled and sworn, nor had trial court begun to receive evidence. U.S.C.A. Const.Amend. 5.

[12] Criminal Law 110 ↪303.30(2)

110 Criminal Law
110XVI Nolle Prosequi or Discontinuance
110k303.5 Dismissal, Nolle Prosequi, or Discontinuance

110k303.30 Grounds and Considerations
110k303.30(2) k. Interest or Furtherance of Justice. Most Cited Cases

Appropriate reasons for trial court to dismiss a criminal prosecution under rule allowing trial court to do so "in the furtherance of justice" include facilitating the state in gathering evidence, procuring witnesses, or plea bargaining. I.C.A. § 813.2, Rule 2.33(1).

[13] Double Jeopardy 135H ↪51

135H Double Jeopardy

135HIII Elements of Former Jeopardy
135Hk51 k. In General. Most Cited Cases

Jeopardy does not attach until defendant is put to trial before the trier of facts, whether the trier be a jury or a judge. U.S.C.A. Const.Amend. 5.

[14] Double Jeopardy 135H ↪59

135H Double Jeopardy
135HIII Elements of Former Jeopardy
135Hk59 k. Empanelling and Swearing Jury, or Swearing Witness and Receiving Evidence. Most Cited Cases

In a trial by jury, jeopardy attaches when the jury is empaneled and sworn. U.S.C.A. Const.Amend. 5.

[15] Double Jeopardy 135H ↪59

135H Double Jeopardy
135HIII Elements of Former Jeopardy
135Hk59 k. Empanelling and Swearing Jury, or Swearing Witness and Receiving Evidence. Most Cited Cases

In a bench trial, jeopardy attaches when the judge begins to receive evidence. U.S.C.A. Const.Amend. 5.

*483 Thomas J. Miller, Attorney General, Donald D. Stanley, Jr., and Brian Meyer, Assistant Attorneys General, Brent D. Heeren, County Attorney, and Richard Vander Mey, Assistant County Attorney, for appellant.

Steven F. Olson and Jeffrey S. Rasmussen of Blue-Dog, Olson & Small, P.L.L.P., Minneapolis, Minnesota, for appellee.

LAVORATO, Chief Justice.

This proceeding stems from a charge of an alleged sale of cigarettes to an underaged person by an individual on an Indian reservation in violation of Iowa Code section 453A.2(1) (Supp.2001). A magistrate dismissed the charge, concluding that the court lacked subject matter jurisdiction because

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of Indian sovereign immunity. The State sought discretionary review, which we granted. The Sac and Fox Tribe of the Mississippi in Iowa (Tribe), owner of the establishment where the offense allegedly took place, sought the dismissal. The State contends the magistrate had subject matter jurisdiction and the Tribe has no standing.

The Tribe contends the magistrate correctly determined the court did not have subject matter jurisdiction. In addition, the Tribe contends discretionary review was inappropriate and for that reason we have no jurisdiction to hear the appeal. In the event we conclude there was subject matter jurisdiction for the magistrate to hear the case, the Tribe contends reinstatement and prosecution of the charge is barred.

We conclude we have jurisdiction to hear the appeal, there was subject matter jurisdiction for the magistrate to hear the case, and reinstatement and prosecution of the charge is not barred. Accordingly, we reverse the magistrate's dismissal order and remand for an order reinstating the charge and for further proceedings consistent with this opinion.

I. Background Facts.

On March 13, 2003, an officer with the Tama County Sheriff's department issued an Iowa Uniform Citation and Complaint against Lester Tobias Lasley, charging him with providing tobacco to an underaged person in violation of Iowa Code section 453A.2(1). The Tribe owned the Meskwaki Trading Post, in Tama County, where Lasley was employed and where he allegedly provided the tobacco to the underaged person. The Tribe is a federally *484 recognized tribal entity. See *Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 67 Fed.Reg. 46,328, 46,330 (July 12, 2002); see also *Sac & Fox Tribe of the Miss. in Iowa v. Licklider*, 576 F.2d 145, 147-50 (8th Cir.1978) (describing history of the Tribe dating back to the 1700s and concluding the land located in Tama County and occupied by the Tribe constitutes an Indian reservation).

Later, Brad S. Jolly, an attorney with a Minnesota law firm, applied for admission pro hac vice. In the application, Jolly represented that he was appearing as counsel for Lasley, "in his status as an employee" of the Tribe, and as counsel for the Tribe. The application further stated that Jolly's law firm had been retained to act as counsel for Lasley "in his status as an employee" of the Tribe and as counsel for the Tribe, including the Tribe's trading post.

Jolly also filed a motion to dismiss for lack of subject matter jurisdiction, alleging that the State of Iowa "lacks civil regulatory jurisdiction" over the Tribe and its reservation.

Following a hearing, Magistrate John J. Willett filed a decision in which the magistrate granted Jolly's application for admission pro hac vice and noted that Jolly was appearing on behalf of the Tribe. The court also noted in its ruling that Jolly argued that this was a civil/regulatory matter and for that reason the State lacked civil/regulatory jurisdiction within the boundaries of the tribal lands. The court further noted that the State argued that because the defendant was an individual in a criminal case, the State had authority to enforce its criminal statutes against him even though the criminal act allegedly took place on land owned by the Tribe. Framing the issue as "whether the lack of subject matter jurisdiction extends to an individual employee of the Tribe," the court dismissed the case for lack of such jurisdiction. The court reasoned that the statutes of Iowa regulating tobacco were in fact regulatory and therefore could not be enforced either against the Tribe or its employees.

The State filed a motion to reconsider and enlarge, asking the court to reconsider its decision that the criminal complaint was regulatory rather than criminal. The State also challenged the Tribe's standing to appear in a criminal case when the defendant in open court acknowledged that he did not ask Jolly to represent him. As to the standing issue, the State asked the court to add the following facts

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to its decision:

The Court's recitation of facts regarding the July 30, 2003, hearing fails to make any reference to statements made by the defendant, Lester Lasley, in open court, in the presence of the presiding magistrate and Brad Jolly, counsel for the Tribe, that he did not ask to have an attorney represent him, that attorney Jolly was not his attorney, that he had not asked attorney Jolly or attorney Jolly's law firm to represent him, and, further, that in fact he just wished to plead guilty.

In its ruling on the State's motion to reconsider and enlarge, the court noted that Lasley appeared pro se and wished to have the matter finalized on the date he appeared. However, the court also noted that "it is not that simple. [Lasley] was charged with an act allegedly occurring on tribal lands while [Lasley] was employed by the Tribe in a tribal business operated upon tribal land." The court refused to change its decision as to the jurisdictional question but did grant the State's motion to expand its findings by incorporating the above cited facts regarding Lasley's statements in open court.

*485 The State sought discretionary review, maintaining the charge was criminal/prohibitory rather than civil/regulatory. The State also raised the standing issue it earlier raised before the magistrate. Later, the State filed a supplement to its application that included the expanded findings about Lasley's statements in open court. We granted the State's application over the Tribe's resistance.

II. Issues.

We consider the following issues: (1) whether the case is appropriately before us on discretionary review, (2) whether the Tribe has standing in the case, (3) whether subject matter jurisdiction is lacking, and (4) whether reversing the dismissal and reinstating the prosecution is the appropriate remedy.

III. Scope of Review.

[1][2] Because the case raises an issue of statutory interpretation, our review is for correction of

errors at law. *State v. Wolford Corp.*, 689 N.W.2d 471, 473 (Iowa 2004). In addition, we review proceedings concerning subject matter jurisdiction at law. *Tigges v. City of Ames*, 356 N.W.2d 503, 512 (Iowa 1984).

IV. Appropriateness of Discretionary Review and Standing.

Because our resolution of both issues turns on the law concerning subject matter jurisdiction, we address them together.

The Tribe contends discretionary review of the State's appeal is inappropriate because the magistrate did not find the statute invalid. The Tribe relies on Iowa Rule of Criminal Procedure 2.73(1) which provides that in simple misdemeanor cases "[a]n appeal may be taken by the plaintiff only upon a finding of invalidity of an ordinance or statute." Iowa R.Crim. P. 2.73(1).

The State sought discretionary review pursuant to Iowa Code section 814.5(2) (2003) which allows the State to seek such review under limited circumstances. The ground the State relies on provides discretionary review may be available when the underlying case resulted in "[a] final judgment or order raising a question of law important to the judiciary and the profession." Iowa Code § 814.5(2)(d).

[3][4][5] We need not concern ourselves with the obvious tension between rule 2.73(1) and section 814.5(2) because we are faced here with an issue of Indian sovereignty, which immediately calls into question subject matter jurisdiction. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 1702, 140 L.Ed.2d 981, 985 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); *see also State v. Bear*, 452 N.W.2d 430, 432 (Iowa 1990) (recognizing that Indian sovereignty raises a question of subject matter jurisdiction). "Subject matter jurisdiction may be raised at any time." *Bear*, 452 N.W.2d at 432; *Hyde v. Buckalew*, 393

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N.W.2d 800, 802 (Iowa 1986) (“The issue whether the legislature intended to waive its sovereign immunity with respect to a particular type of claim is a matter of [subject matter] jurisdiction, the power of the court to hear and adjudicate a particular class of cases, and the State may raise that issue by motion to dismiss at any stage of the proceeding.”). In addition, this court may raise the issue sua sponte. *State ex rel. Vega v. Medina*, 549 N.W.2d 507, 508 (Iowa 1996).

In *Lansky ex rel. Brill v. Lansky*, we noted the importance of resolving jurisdictional issues first, especially those involving subject matter jurisdiction, no matter how the issue is presented:

*486 The general theme of Iowa cases provides that, when a court is confronted with a question of its own authority to proceed, it should take charge of the proceedings affirmatively, regardless of the vehicle used to raise the issue. The court should utilize the most efficient method at its disposal to determine the true facts and then decide the issue promptly. When the court's power to proceed is at issue, the court has the power and duty to determine whether it has jurisdiction of the matter presented. Subject matter jurisdiction should be considered before the court looks at other matters involved in the case and before it determines whether the parties are entitled to a jury trial. *The court should be less concerned about the form in which the question of subject matter jurisdiction reaches it and more concerned about establishing an efficient, prompt, trustworthy solution, even if innovative and unusual approaches are required to reach the issue.*

449 N.W.2d 367, 368 (Iowa 1989) (emphasis added) (citations omitted).

Although there was some question whether Jolly was in fact representing the defendant, the magistrate never actually made a ruling on that issue. As far as the court was concerned, the important question was whether it had subject matter jurisdiction to hear the matter. The court was not concerned, and nor are we, with how the issue was raised. Because of where the alleged offense occurred—on Indian land and in a trading post belonging to the Tribe—the subject matter jurisdiction issue was so apparent that the court should have and probably would have raised the issue on its own even had Jolly not appeared. Because the subject matter jurisdiction issue is in the case, we are duty bound to address it regardless of whether a statutory provision or rule permitted appeal by the State.

The same reasoning applies to the State's argument that the Tribe had no standing to intervene in this criminal case because it was not a defendant and its attorney had no permission from Lasley to represent him. Whether the Tribe had standing is not determinative because we are not concerned with how the issue of subject matter jurisdiction was raised or who raised it. Again, the issue was so obvious that the court should have and probably would have raised it on its own even had Jolly not appeared.

That brings us to the subject matter jurisdiction issue.

V. Subject Matter Jurisdiction.

The State contends the statute under which Lasley was charged is criminal/prohibitory, and therefore enforceable against him despite the fact that he was working on an Indian reservation. In contrast, the Tribe contends that the statute is civil/regulatory and therefore provides no subject matter jurisdiction for the prosecution of the charge against Lasley. The Tribe's fall-back position is that the State's attempt to exercise jurisdiction over Lasley is tantamount to an attempt to exercise jurisdiction over the Tribe. For that alternative reason, the Tribe concludes, subject matter jurisdiction is lacking for the prosecution of the charge against Lasley.

[6][7] **A. Applicable law.** The Federal Constitution “grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the

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Supreme Court has] consistently described as 'plenary and exclusive.' " *United States v. Lara*, 541 U.S. 193, 200, 124 S.Ct. 1628, 1633, 158 L.Ed.2d 420, 428 (2004) (citations omitted); see U.S. Const. art. I, § 8, cl. 3 (Indian Commerce Clause); U.S. Const. art. II, § 2, cl. 2 (Treaty Clause). In *California v. Cabazon Band of Mission *487 Indians*, the United States Supreme Court reiterated several principles regarding Indian sovereignty:

Indian tribes retain "attributes of sovereignty over both their members and their territory," and ... "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided.

480 U.S. 202, 207, 107 S.Ct. 1083, 1087, 94 L.Ed.2d 244, 253 (1987) (citations omitted). Thus, although Indian tribes retain attributes of sovereignty, state laws may be applied to tribal Indians on reservations if Congress grants a state authority to do so.

As applied to this case, Congress has twice expressly provided the State of Iowa jurisdiction to apply its laws to tribal Indians on the Tribe's reservation. In 1948, Congress conferred criminal jurisdiction over offenses committed "by or against Indians on the Sac and Fox Indian Reservation" located in Iowa. Act of June 30, 1948, ch. 759, 62 Stat. 1161. The statute, commonly known as Public Law 846, reads:

Jurisdiction is hereby conferred on the State of Iowa over offenses committed by or against Indians on the Sac and Fox Indian Reservation in that State to the same extent as its courts have jurisdiction generally over offenses committed within said State outside of any Indian reservation: *Provided, however,* That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against

Indians on Indian reservations.

Id.

Interpreting a similar statute by Congress granting similar authority to the State of Kansas, the United States Supreme Court held that the statute confers jurisdiction on both minor and major offenses committed by or against Indians on Indian reservations in accordance with state law. *Negonsott v. Samuels*, 507 U.S. 99, 105, 113 S.Ct. 1119, 1123, 122 L.Ed.2d 457, 465 (1993). The proviso part of the statute simply means that federal courts retain jurisdiction over offenses subject to federal jurisdiction under the Indian Major Crimes Act, while Kansas courts have jurisdiction to try persons for the same conduct when it violates state law. *Id.*

In 1953, Congress enacted what is commonly known as Public Law 280. Act of Aug. 15, 1953, ch. 505, § 2, 67 Stat. 588 (codified as amended at 18 U.S.C.A. § 1162 (2000)); Act of Aug. 15, 1953, ch. 505, § 4, 67 Stat. 589 (codified as amended at 28 U.S.C.A. § 1360 (1993)). Public Law 280 expressly granted six states, not including Iowa, criminal and civil jurisdiction over specified areas of Indian country within the states and provided for the assumption of such jurisdiction by other states. *Id.*; *Cabazon*, 480 U.S. at 207, 107 S.Ct. at 1087, 94 L.Ed.2d at 253-54.

"The primary concern of Congress in enacting Pub.L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Bryan v. Itasca County*, 426 U.S. 373, 379, 96 S.Ct. 2102, 2106, 48 L.Ed.2d 710, 715-16 (1976). Section 2, which was the central focus of the Act, granted broad criminal jurisdiction over offenses committed by or against Indians within specified Indian country within the states. *Id.* at 380, 96 S.Ct. at 2107, 48 L.Ed.2d at 716.

Section 4 of the Act gave the enumerated six states "jurisdiction over civil causes of action

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between Indians or to which Indians are parties which arise in *488 ... Indian country." Act of Aug. 15, 1953, ch. 505, § 4, 67 Stat. 589 (codified as amended at 28 U.S.C.A. § 1360 (1993)). This provision was "primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes...." *Bryan*, 426 U.S. at 383, 96 S.Ct. at 2108, 48 L.Ed.2d at 718. Section 4 was thus interpreted to grant the courts of the enumerated six states jurisdiction over private civil litigation—such as laws of contract, tort, marriage, divorce, insanity, and descent—involving reservation Indians, but not to grant general civil/regulatory authority over Indian reservations. *Cabazon*, 480 U.S. at 208, 107 S.Ct. at 1087, 94 L.Ed.2d at 254; *Bryan*, 426 U.S. at 383-85 & 384 n. 10, 96 S.Ct. at 2108-09 & 2108 n. 10, 48 L.Ed.2d at 718-19 & 718 n. 10.

Obviously, Iowa did not assume criminal jurisdiction under Public Law 280 because it already had such jurisdiction under Public Law 846. However, Iowa "accepted Congress' invitation" as to section 4 of Public Law 280, relating to civil jurisdiction, "by passing Iowa Code section 1.12 in 1967." *Meier v. Sac & Fox Indian Tribe of the Miss. in Iowa*, 476 N.W.2d 61, 63 (Iowa 1991). Section 1.12 provides:

The state of Iowa hereby assumes jurisdiction over civil causes of actions between Indians or other persons or to which Indians or other persons are parties arising within the Sac and Fox Indian settlement in Tama county. The civil laws of this state shall obtain on the settlement and shall be enforced in the same manner as elsewhere throughout the state.

Iowa Code § 1.12.

[8] For a state law to be enforceable under the criminal offense provision of Public Law 280, such law must be "criminal/prohibitory" and not "civil/regulatory." *Cabazon*, 480 U.S. at 208, 107

S.Ct. at 1088, 94 L.Ed.2d at 254. In *Cabazon*, the Court approved the following test for determining whether a state law is criminal/prohibitory or civil/regulatory:

[I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy.

Id. at 209-10, 107 S.Ct. at 1088-89, 94 L.Ed.2d at 254.

The Court made it clear, however, that just because "an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub.L. 280." *Id.* at 211, 107 S.Ct. at 1089, 94 L.Ed.2d at 256. "Otherwise, the distinction between § 2 [criminal offense provision] and § 4 [civil action provision] of [Public Law 280] could easily be avoided and total assimilation [of Indians] permitted." *Id.* When Congress passed Public Law 280, it had no intention of effecting total assimilation and

nothing in [Public Law 280's] legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governes as did exist and a conversion of the affected tribes into little more than "private, voluntary organizations," "a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers....

*489 *Bryan*, 426 U.S. at 387-88, 96 S.Ct. at 2110-11, 48 L.Ed.2d at 720-21 (citation omitted).

In *Cabazon*, two tribes in Riverside County,

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California conducted bingo games on their reservations pursuant to an ordinance approved by the Secretary of the Interior. 480 U.S. at 204-05, 107 S.Ct. at 1086, 94 L.Ed.2d at 252. The county attempted to impose several restrictions through an ordinance on the tribes regarding the playing of bingo inside the reservations. *Id.* at 205-06, 107 S.Ct. at 1086, 94 L.Ed.2d at 252-53. The tribes sued the county in federal district court for declaratory and injunctive relief, alleging the county had no authority to apply ordinances regulating bingo inside the reservations. *Id.* at 206, 107 S.Ct. at 1086, 94 L.Ed.2d at 253. The State intervened, asserting that the bingo games on the two reservations violated a state statute making it a misdemeanor in California to conduct unregulated bingo and insisted that the tribes comply with the law. *Id.* at 205-06, 107 S.Ct. at 1086, 94 L.Ed.2d at 252-53. California was one of the six states that was granted criminal jurisdiction under Public Law 280 over offenses committed by or against Indians within all Indian country within the state. *Id.* at 207, 107 S.Ct. at 1087, 94 L.Ed.2d at 253-54. The trial court held that the state had no authority to enforce its gaming laws within the reservations and granted the tribes' motion for summary judgment, a decision which was affirmed by the ninth circuit. *Id.* at 206, 107 S.Ct. at 1086, 94 L.Ed.2d at 253. The Supreme Court agreed. *Id.* at 222, 107 S.Ct. at 1095, 94 L.Ed.2d at 263. The Court, employing the criminal/prohibitory and civil/regulatory test, held that because California permitted a substantial amount of gambling activity, including bingo, and promoted gambling through its state lottery, the statute and ordinance in question regulated rather than prohibited gambling in general and bingo in particular. *Id.* at 210-11, 107 S.Ct. at 1088-89, 94 L.Ed.2d at 255-56.

B. Analysis. As mentioned, Iowa's jurisdiction over criminal offenses committed by or against Indians on the Tribe's reservation derives from Public Law 846 rather than Public Law 280. Nevertheless, we think we are bound by the *Cabazon* criminal/prohibitory and civil/regulatory analysis under Public Law 280 for two reasons. First, the grant of

criminal jurisdiction under Public Law 846—offenses committed by or against Indians on the Sac and Fox Indian Reservation—mirrors the language under section 2 of Public Law 280. And, as mentioned, at the invitation of Congress we accepted through Iowa Code section 1.12, by nearly identical language found in section 4 of Public Law 280, jurisdiction over civil causes of actions. In *State ex rel. Department of Human Services v. Whitebreast*, we employed the *Cabazon* test in deciding that the State's action through its Child Support Recovery Unit to collect reimbursement for aid paid on behalf of an Indian child from an Indian father was not a private civil action within the meaning of Iowa Code section 1.12 but rather grew out of the State's public, regulatory duty to recover from the Indian father. 409 N.W.2d 460, 463 (Iowa 1987). For these reasons, we see no difference in the scope and intent of the grant of authority regarding criminal jurisdiction to Iowa in Public Law 846 and our acceptance of Congress's invitation to accept civil jurisdiction in Iowa Code section 1.12 from that contained in Public Law 280.

Second, but most important, the *Cabazon* test ensures against the undermining or destruction of tribal self-government, a result that would seriously erode what is left of Indian sovereignty. The test also ensures against *total* assimilation, which *490 Congress to this date has not expressed any desire to accomplish.

[9] With the *Cabazon* test in mind, we proceed to determine whether the statute under which Lasley was charged is criminal/prohibitory or civil/regulatory. In doing so, we heed the Court's admonition in *Cabazon*, that the particular State law in question in any given case must be given individual and detailed examination before it can be characterized as either criminal/prohibitory or civil/regulatory. *Cabazon*, 480 U.S. at 211 n. 10, 107 S.Ct. at 1089 n. 10, 94 L.Ed.2d at 256 n. 10. To us that means that we must analyze the statute under which Lasley was charged and the specific conduct it governs before we can draw any conclusions.

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The statute under which Lasley was charged provides: "A person shall not sell, give, or otherwise supply any tobacco, tobacco products, or cigarettes to any person under eighteen years of age." Iowa Code § 453A.2(1) (Supp.2001). The applicable penalty provision states: "An employee of a retailer who violates section 453A.2, subsection 1, commits a simple misdemeanor punishable as a scheduled violation under section 805.8C, subsection 3, paragraph ' b '." *Id.* § 453A.3(1)(b). Scheduled fine amounts, which increase as the number of offenses increase, are provided in Iowa Code section 805.8C(3)(b)(1)-(3). No one disputes that section 453A.2(1) is a public offense punishable through criminal prosecution and therefore criminal in nature. The question remains however whether, notwithstanding this fact, this statute is part of a regulatory scheme and is for that reason civil/regulatory.

As mentioned, Public Law 846 grants the State of Iowa jurisdiction over offenses committed *by or against Indians* on the Sac and Fox Indian Reservation in Iowa. Although the record does not reveal whether Lasley is an Indian, no one claims he is not. If the record were otherwise, the State of Iowa would apparently have jurisdiction. *See United States v. John*, 587 F.2d 683, 686 (5th Cir.1979) (when neither the offender nor the victim are Indians, there is no basis for federal jurisdiction, so that the crime will be tried in state court according to state law). We proceed on the basis that Lasley is an Indian belonging to a federally recognized tribal entity.

That brings us to the decisive issue: Is Iowa Code section 453A.2(1) criminal/prohibitory and therefore enforceable in state court under Public Law 846? Or is the statute civil/regulatory and therefore outside the State's jurisdiction? For reasons that follow, we think the statute is criminal/prohibitory.

We first note that the statute does not merely regulate the sale of tobacco. Rather, it *absolutely* prohibits one from furnishing in any manner any to-

bacco, tobacco products, or cigarettes to any person under eighteen years of age. Iowa Code § 453A.2(1). So the intent of the law is generally to prohibit certain conduct—the hallmark under the *Cabazon* test for establishing that a statute is criminal/prohibitory. Moreover, as the State points out, selling cigarettes to an underaged person anywhere in Iowa violates the State's public policy because there is a statute absolutely forbidding it—another hallmark under the *Cabazon* test for establishing that a statute is criminal/prohibitory. *See* Iowa Code § 142A.1(2) (stating the purpose of Iowa Code chapter 142A is to establish a "comprehensive tobacco use prevention and control initiative" to specifically address "reduction of tobacco use by youth and pregnant women, promotion of compliance by minors and retailers with tobacco sales laws and ordinances, and enhancement of the capacity of youth to make healthy choices"). The public policy in this *491 state now recognizes the health hazards of cigarette smoking as to all citizens of this state, not just underaged persons. *See* Iowa Code ch. 142B (prohibiting smoking in certain public places and imposing a civil fine for a violation of the statute). Section 453A.2(1) was not simply intended to regulate conduct occurring on the Tribe's reservation. Rather it represents the legislature's exercise of its police power by way of a criminal statute to protect underaged persons from the harmful consequences resulting from tobacco usage and to prohibit distribution of tobacco products to underaged persons on the reservation in the same manner as such conduct is prohibited elsewhere in the State. *See Austin v. Tennessee*, 179 U.S. 343, 348-49, 21 S.Ct. 132, 134, 45 L.Ed. 224, 228 (1900) (noting the potential of "deleterious effects" of cigarettes and determining that it is within the province of the legislature to prohibit their sale entirely provided such act is designed for protection of public health).

The Tribe's attempt to compare the facts here to those in *Cabazon* favorable to the Tribe fails to convince us that the statute is civil/regulatory. True, the rationale for the *Cabazon* decision was the fact that the State of California permitted and even en-

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couraged gambling in the State. Under the Tribe's interpretation of this rationale, simply because the State of Iowa allows the sale of cigarettes, it cannot prohibit the sale of cigarettes to underaged persons on the reservation. But, as the State points out, a closer reading of *Cabazon* shows that the Court found significant that there was no effort to forbid the playing of bingo by any member of the public *over the age of 18*. *Cabazon*, 480 U.S. at 211, 107 S.Ct. at 1089, 94 L.Ed.2d at 256. *Cabazon* does not support the proposition that because selling cigarettes to adults is permitted throughout the state, it follows that sale of cigarettes to underaged persons on the Tribe's reservation should be permitted.

We note that the Court in *Cabazon* cited with approval *United States v. Marcyes*, 557 F.2d 1361 (9th Cir.1977) as an example of lower courts demonstrating an ability to identify prohibitory laws. *Cabazon*, 480 U.S. at 211 n. 10, 107 S.Ct. at 1089 n. 10, 94 L.Ed.2d at 256 n. 10. The ninth circuit adopted and applied the prohibitory/regulatory distinction in determining whether a state law governing the possession of fireworks was made applicable to Indian reservations by the Assimilative Crimes Act, 18 U.S.C. § 13. *Marcyes*, 557 F.2d at 1363-65. The court concluded that even though there were limited exceptions to the statute's prohibition, the fireworks law was prohibitory in nature. *Id.* at 1364. Relying on public policy, the court in *Marcyes* reasoned that

[t]he possession of fireworks is not the same situation encountered in other regulatory schemes such as hunting or fishing, where a person who wants to hunt or fish merely has to pay a fee and obtain a license. The purpose of such statutes is to regulate the described conduct and to generate revenues. In contrast, the purpose of the fireworks laws is not to generate income, but rather to prohibit their general use and possession in a legitimate effort to promote the safety and health of all citizens. Moreover, by allowing appellants to operate their stands on the reservation or in any federal enclave would entirely circumvent

Washington's determination that the possession of fireworks is dangerous to the general welfare of its citizens.

Id.

Likewise providing tobacco products to underaged persons is not the same situation encountered in true regulatory schemes in which the purpose is to regulate*492 conduct and raise revenue. That is not the purpose behind the statute in question. Rather the purpose is to strictly prohibit the conduct proscribed by the statute in order to promote the safety and health of all underaged persons. Allowing the sale of tobacco products to underaged persons on the Tribe's reservation would circumvent the legislature's determination that furnishing such products in any manner to underaged persons is dangerous to the health of such persons. *Cf. State v. Robinson*, 572 N.W.2d 720, 722-24 (Minn.1997) (applying *Cabazon* test with additional analytical considerations in concluding underage drinking statute was criminal/prohibitory as against state public policy of protecting both minors and the public from physical and other injuries resulting from alcohol consumption, despite fact that such sales under proper regulation are allowed to be made to adults).

As mentioned, the Tribe has a fall-back position. The Tribe argues as follows:

The very nature of the offense itself requires the individual to be acting in some capacity as a seller of tobacco products. In this case, Mr. Lasley's capacity to sell tobacco products exists only because he is an employee of the Tribe's subordinate economic enterprise. Therefore, the attempt to exercise jurisdiction over Mr. Lasley is tantamount to an attempt to exercise jurisdiction over the Tribe itself.

The Tribe cites no authority to support this contention. More important, the State charged Lasley, not the Tribe, with violating Iowa Code section 453A.2. The sanctions for licensed retailers who vi-

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olate section 453A.2 include revocation of permit, see Iowa Code § 453A.22(1), and penalties, see Iowa Code § 453A.22(2).

VI. Remedy.

[10][11] The Tribe contends that in the event we reverse the magistrate's dismissal, the law does not permit reinstatement of the prosecution. In support of its contention, the Tribe relies on Iowa Rule of Criminal Procedure 2.33(1).

Rule 2.33(1) provides:

The court, upon its own motion or the application of the prosecuting attorney, in the furtherance of justice, may order the dismissal of any pending criminal prosecution, the reasons therefor being stated in the order and entered of record, and no such prosecution shall be discontinued or abandoned in any other manner. Such a dismissal is a bar to another prosecution for the same offense if it is a simple or serious misdemeanor; but it is not a bar if the offense charged be a felony or an aggravated misdemeanor.

Iowa R.Crim. P. 2.33(1). Clearly, this rule does not support the Tribe's contention because the dismissal did not result from the magistrate's or the prosecutor's motion, but rather on the motion of the Tribe. See *State v. Fisher*, 351 N.W.2d 798, 801 (Iowa 1984) (only the court or the prosecutor may move to dismiss pursuant to rule 2.33(1); rule 2.33(1) "is not available to a defendant").

[12][13][14][15] Moreover, the rule lists only one ground for dismissal: "in the furtherance of justice." Iowa R.Crim. P. 2.33(1). Appropriate reasons to dismiss under this rule "include[] 'facilitating the State in gathering evidence, procuring witnesses, or plea bargaining.'" *Fisher*, 351 N.W.2d at 801 (citation omitted). The magistrate gave none of these reasons for the dismissal; the dismissal was purely on the grounds of lack of subject matter jurisdiction. In addition, even if this were a 2.33(1) dismissal, the erroneous dismissal of the case is not a bar to prosecution. See *493*State*

v. Hartley, 549 N.W.2d 794, 795- 96 (Iowa 1996) (evaluating dismissal of a serious misdemeanor pursuant to rule 27(1) [now 2.33(1)] and concluding as follows: "We have held that an erroneous dismissal prior to a defendant's being placed in jeopardy does not prevent future prosecution."). Here there was an erroneous dismissal, and the dismissal came before Lasley was ever put in jeopardy. "Jeopardy does not attach until a defendant is put to trial before the trier of facts, whether the trier be a jury or a judge." *State v. Beecher*, 616 N.W.2d 532, 536 (Iowa 2000). In a trial by jury, jeopardy attaches when the jury is empanelled and sworn. *Id.* In a bench trial, jeopardy attaches when the judge begins to receive evidence. *Id.* Neither event had occurred here when the court entered its dismissal order.

VII. Disposition.

In sum, we conclude the appeal is properly before us and it matters not whether the Tribe has standing because subject matter jurisdiction requires us to determine whether we have jurisdiction regardless how the issue was raised. We further conclude that the statute under which Lasley was charged is criminal/prohibitory, which means the magistrate has subject matter jurisdiction to hear the case. We therefore reverse the magistrate's decision to the contrary. We remand for further proceedings because there is no bar to reinstatement and prosecution of the charge. In reaching our decision, we have carefully considered all of the arguments and contentions of the parties. Those we have not addressed either lack merit or were not properly raised for our review.

REVERSED AND CASE REMANDED.

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