



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

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FILE NO. 08-003

PUBLIC HEALTH:
Relocation of a "Retail Tobacco Store"
under the Smoke Free Illinois Act

The Honorable John J. Cullerton
Majority Caucus Whip
State Senator, 6th District
111 Capitol Building
Springfield, Illinois 62706

Dear Senator Cullerton:

You have asked whether a "retail tobacco store," as defined in the Smoke Free Illinois Act (410 ILCS 82/1 *et seq.* (West 2007 Supp.)), that was in operation before January 1, 2008, will be exempt from the limitations of section 35 of the Act (410 ILCS 82/35 (West 2007 Supp.)) if it relocates after January 1, 2008. For the reasons stated below, it is my opinion that if an existing business that qualifies for the retail tobacco store exemption under section 35 of the Smoke Free Illinois Act relocates after January 1, 2008, then it will be subject to the same limitations as a retail tobacco store that begins operating after that date.

BACKGROUND

Smoke Free Illinois Act

The General Assembly enacted the Smoke Free Illinois Act (the Act) to address the numerous, detrimental health effects of exposure to secondhand tobacco smoke. *See* 410 ILCS 82/5 (West 2007 Supp.). Thus, section 15 of the Act (410 ILCS 82/15 (West 2007 Supp.)) prohibits any person from smoking "in a public place or in any place of employment[.]"¹ Further, section 15 provides that "[s]moking is prohibited in indoor public places and workplaces unless specifically exempted by Section 35 of this Act." Section 35 exempts from the Act's smoking prohibition certain specified areas, including retail tobacco stores that were in operation prior to the Act's effective date of January 1, 2008. Section 35 provides:

¹The Act defines the terms "public place" and "place of employment" as follows:

"Public place" means that portion of any building or vehicle used by and open to the public, regardless of whether the building or vehicle is owned in whole or in part by private persons or entities, the State of Illinois, or any other public entity and regardless of whether a fee is charged for admission, including a minimum distance, as set forth in Section 70 of this Act, of 15 feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited. * * * A "public place" includes, but is not limited to, * * * retail stores, * * * commercial establishments, * * * enclosed shopping centers, [and] retail service establishments[.]

"Place of employment" means any area under the control of a public or private employer that employees are required to enter, leave, or pass through during the course of employment, including, but not limited to entrances and exits to places of employment, including a minimum distance, as set forth in Section 70 of this Act, of 15 feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited[.] 410 ILCS 82/10 (West 2007 Supp.).

Notwithstanding any other provision of this Act, *smoking is allowed in the following areas:*

* * *

(2) *Retail tobacco stores* as defined in Section 10 of this Act in operation prior to the effective date of this amendatory Act of the 95th General Assembly. The retail tobacco store shall annually file with the Department by January 31st an affidavit stating the percentage of its gross income during the prior calendar year that was derived from the sale of loose tobacco, plants, or herbs and cigars, cigarettes, pipes, or other smoking devices for smoking tobacco and related smoking accessories. *Any retail tobacco store that begins operation after the effective date of this amendatory Act may only qualify for an exemption if located in a freestanding structure occupied solely by the business and smoke from the business does not migrate into an enclosed area where smoking is prohibited.* (Emphasis added.) 410 ILCS 82/35 (West 2007 Supp.).

Section 10 of the Act defines "retail tobacco store" to mean:

a retail establishment that derives more than 80% of its gross revenue from the sale of loose tobacco, plants, or herbs and cigars, cigarettes, pipes, and other smoking devices for burning tobacco and related smoking accessories and in which the sale of other products is merely incidental. 410 ILCS 82/10 (West 2007 Supp.).

Retail Tobacco Store

The information you have provided indicates that a certain business that was in operation prior to January 1, 2008, currently qualifies as a "retail tobacco store," as the Act defines that term. The proprietors wish to relocate the business. The issue is whether, after relocating, the business would still be considered a retail tobacco store that was "in operation" and entitled to the exemption in section 35 of the Act.

ANALYSIS

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. *In re M.T.*, 221 Ill. 2d 517, 524 (2006). The statutory language is the best indicator of legislative intent, and that language must be given its plain and ordinary meaning. *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 26 (2005).

Section 35 of the Act distinguishes between two categories of retail tobacco stores: (1) those that were "in operation" prior to the effective date of the Act; and (2) those "that begin[] operation" after the Act's effective date. In the context of the Act, it is clear that the phrase "in operation" refers to a retail tobacco store that was operating before January 1, 2008; in other words, a pre-existing business.² Section 35 generally exempts stores in operation before the effective date of the Act from the Act's provisions. In contrast, a store that begins operation after January 1, 2008, qualifies for the exemption only if "located in a freestanding structure occupied solely by the business and smoke from the business does not migrate into an enclosed area where smoking is prohibited." The Act, however, does not specifically address whether an existing retail tobacco store which is relocated after January 1, 2008, will benefit from the section 35 exemption only if it moves to a freestanding structure, as is required for stores that begin operating after that date.

The purpose of distinguishing between retail tobacco stores operating on the Act's effective date and those commencing operation after that date is clearly to "grandfather" in

²Likewise, the phrase "begins operation" clearly refers to a retail tobacco store that comes into existence and starts operating after January 1, 2008.

existing businesses that may not meet the requirements of the Act. As stated in *Wine & Spirits Merchandisers, Inc. v. Illinois Liquor Control Comm'n*, 104 Ill. App. 3d 377, 379 (1982):

A grandfather clause is commonly regarded as a portion of a statute which establishes different treatment of parties based upon a date certain. [Citation.] Grandfather clauses permit the continuation of otherwise illegal activity in order to obviate unfairness to those who engaged in such activity before it was outlawed by the legislature. [Citation.] Because they create an exception to the general provisions of the statute, such clauses must be strictly construed.

Thus, as a result of the grandfather clause, those retail tobacco stores that were operating before January 1, 2008, may continue to do business in their existing locations and benefit from the section 35 exemption despite the fact that they may generate secondhand smoke that migrates into adjacent areas.

If, however, an existing retail tobacco store elects to relocate after January 1, 2008, then, strictly construing the grandfather clause, that business is subject to the limitations of section 35. The purpose of the section 35 limitations is not to prohibit a retailer from engaging in the sale of tobacco, but rather to protect the health of persons who might inadvertently be exposed to the secondhand smoke that the retail store generates. If a retailer chooses to move from a location that is grandfathered in under the Act to another location that is not, then the retailer must bear any economic burden of that decision.

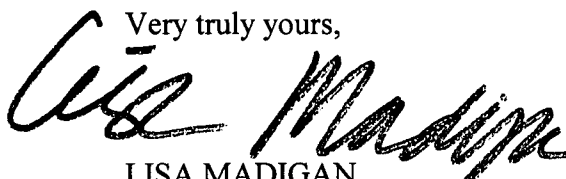
It is important to note that the Act does not limit the right of retailers to sell tobacco products, only to permit smoking in their establishments. Thus, a retail tobacco store may operate in any location without reference to the section 35 limitations if it does not permit smoking on its premises.

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CONCLUSION

If an existing business that qualifies for the retail tobacco store exemption under section 35 of the Smoke Free Illinois Act relocates after January 1, 2008, it is my opinion that the business will be subject to the same limitations as a retail tobacco store that begins operating after that date.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Madigan", written in a cursive style.

LISA MADIGAN
ATTORNEY GENERAL