

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

Date: July 10, 2014

MEMORANDUM

TO: Mayor Paul Soglin
All Alders

FROM: Michael P. May
City Attorney

RE: Recommendation Regarding Sec. 23.01, MGO, in Light of the U.S.
Supreme Court's Decision in *McCullen v. Coakley*

On June 26, 2014, the United States Supreme Court decided *McCullen v. Coakley*, 573 U.S. ___, 2014 U.S. LEXIS 4499, Docket No. 12-1168 (2014). In a 9-0 ruling, the Court struck down as unconstitutional a Massachusetts law establishing a fixed buffer zone outside clinics providing abortion services.

After reviewing the decision, I announced on July 1, 2014, that the City of Madison would suspend enforcement of the portion of sec. 23.01, MGO, that established a buffer zone around health facilities in the City, effective as of the date of the *McCullen* ruling. In this memorandum, I will provide a more detailed explanation of the *McCullen* decision, explain the reasons for suspending enforcement of a portion of our ordinance, and recommend possible further actions by the Common Council.

Background.

A. Sec. 23.01, MGO

On January 21, 2014, thirteen Madison Alderpersons sponsored the creation of sec. 23.01, Madison General Ordinances (MGO). The new ordinance was titled "Prohibition on Obstructing Entryways to Health Clinics," and included two significant features. First, it made it unlawful for any person to "intentionally obstruct, detain, hinder, impede, or block another person's entry to or exit from a health care facility." Second, it established a "buffer zone" of 160 feet from the entrance to a health care facility. Within that zone, no person could approach within 8 feet of another person for the purpose of leafleting, displaying a sign, or engaging in oral protest, education or counseling, unless the person being approached consented.

The proposed ordinance was referred to the Board of Health for Madison and Dane County. Testimony and other submissions were provided to the Board of Health and to

the Common Council when the ordinance came back for approval. The ordinance was approved on February 25, 2014.¹

Before the ordinance went into effect, Alder Lisa Subeck, the primary sponsor of the ordinance, moved for reconsideration.² The motion was made at the Council meeting of March 4, 2014. The effect of a motion for reconsideration is to suspend the effectiveness of the ordinance. Robert's Rules of Order Newly Revised (11th ed.), p. 321, I. 9-28, applicable to the Council by sec. 2.32, MGO.

On March 18, 2014, the Common Council approved reconsideration and adopted a substitute ordinance that changed the definition of health care facilities and modified the size of the buffer zones, among other changes. The ordinance passed unanimously.³

B. Madison Vigil for Life v. City of Madison

On February 26, 2014, within hours of the passage of the first version of sec. 23.01, MGO, Madison Vigil for Life, Inc., and other plaintiffs sued the City of Madison in U.S. District Court for the Western District of Wisconsin (Case No. 14-CV-157). The plaintiffs alleged that the City's Buffer Zone ordinance violated their First Amendment rights of free speech. The plaintiffs asked for a declaration that the Madison ordinance was unconstitutional and void and sought injunctive relief and a temporary restraining order. They also requested unspecified damages and an award of actual attorney's fees. Because the case is brought under 42 USC sec. 1983, prevailing plaintiffs may collect actual attorney's fees.

On February 28, 2014, U.S. District Judge William Conley issued an Opinion and Order denying the plaintiffs' request for a temporary restraining order. Relying on *Hill v. Colorado*, 530 U.S. 703 (2000), the Court found that plaintiffs had not shown a probability of success on the merits and that the ordinance likely was constitutional since it was modeled on the law at issue in *Hill*.

In preparing the ordinance, our office tried to track the language and analysis that the Supreme Court provided in the *Hill v. Colorado* decision. Thus, we were satisfied when the District Court ruled, at least on a preliminary review of the ordinance, that it met the standards in *Hill*, which the Court found to be controlling precedent.

In light of the Supreme Court's repudiation of much of the *Hill v. Colorado* precedent in the *McCullen* decision, excerpts from the District Court's order are instructive as to the state of the law at the time the ordinance was approved:

The court concludes that plaintiffs are not entitled to a temporary restraining order with respect to the Ordinance, because they have not yet shown any

¹ A copy of this version of the ordinance, Version 1, is attached to this memo as Appendix A.

² Madison ordinances take effect the day after publication. Sec. 1.04, MGO. Publication occurs after the Mayor has approved the proceedings and they are sent to the official City newspaper. This usually means ordinances are effective about 10 days after passage.

³ The Substitute Ordinance and the accompanying Report of the City Attorney are attached as Appendix B.

likelihood of success on the merits of their case. ... More specifically, the court finds: (1) the Supreme Court's decision in *Hill v. Colorado* ... appears to dictate an adverse outcome on the merits of plaintiffs' claims, at least as to the facial challenges plaintiffs now bring; and (2) the differences plaintiffs have identified to date between the Ordinance and a nearly identical prohibition considered in *Hill* do not sufficiently distinguish this case to allow for a different outcome. (Order, page 2).

* * *

...[P]laintiffs argue that there was evidence in *Hill* of "demonstrations in front of abortion clinics [that had] impeded access to those clinics and were often confrontational," ... whereas the City has proffered no such evidence here. As an initial matter, the City has not yet been given an opportunity to make such a proffer. Nor is it clear the City needs to do so to prevail, since the Supreme Court in *Hill* does not appear to rely heavily on those confrontations. Rather, the *Hill* Court focused on the "unwilling listener's interest in avoiding unwanted communication," ... and the "particularly vulnerable physical and emotional conditions" of people attempting to enter health care facilities. The fact that there are no confrontational demonstrations in the record does not lessen the legitimacy of those interests. Furthermore, "the government may rely upon its own 'real-world experience' in enacting regulations." [citation omitted] ... Thus, the lack of a specific, violent encounter in Madison on the current record does not distinguish this case from *Hill* in any meaningful sense. (Order, page 5).

* * *

Plaintiffs also argue that the Ordinance is "overbroad" because it applies in a large number of locations geographically. This concern was specifically addressed and rejected by the *Hill* Court, which held "[t]he fact that the coverage of a statute is broader than the specific concern that led to its enactment is of no constitutional significance." ... Rather, [w]hat is important is that all persons entering or leaving health care facilities share the interests [i.e., in privacy and access] served by the statute." ... Health care patients in Madison undoubtedly share the same interests in privacy and access as do those in Colorado, and so with respect to persons entering and exiting hospitals and clinics, plaintiffs' overbreadth argument is necessarily unavailing. (Order at 10-11).

This memorandum will not go into a detailed description of *Hill v. Colorado* because the District Court Order mirrors the analysis done by the City Attorney in drafting and revising sec. 23.01, MGO. *Hill* was very clear that the City need not show a series of specific violent incidents that could not be dealt with by other ordinances to justify the buffer zone ordinance, nor was there any constitutional significance to the fact that the ordinance applied to facilities beyond where any such confrontations occurred. As we shall see when we examine the *McCullen* decision, those clear rulings in *Hill* – the very rulings that were the basis of the City's ordinance -- are now seriously in doubt.

The case against the City remains alive in the U.S. District Court, with discovery deadlines recently adjusted, and no decision from the court on new motions for injunctive relief filed by plaintiffs after the revised ordinance was approved by the Common Council.

McCullen v. Coakley.

As noted above, this decision was issued on June 26, 2014. At issue was a Massachusetts law that was different than the buffer zone at issue in *Hill* and also different than the Madison ordinance. The Colorado-Madison laws created a buffer zone around the entrances to health care facilities, and the driveway entrance in Madison's case. However, nothing prohibited any person from entering the buffer zones, engaging in speech, holding signs and offering leaflets in those zones. The limitation was that no person could approach another person in the zone to closer than 8 feet to engage in such speech, unless the person being approached consented. This meant that persons could stand in place and offer leaflets or speak or carry signs even within the buffer zone.

The Massachusetts law established a fixed 35-foot buffer zone at entrances and driveways to clinics that provided abortion services. Nobody except those going to the clinic, employees, or service representatives could come within the 35-foot zone. According to the *McCullen* decision, Massachusetts previously had a Colorado-Madison type of buffer zone – a law that had been upheld in the federal courts -- but found it ineffective to stop confrontations at clinics providing abortion services. *McCullen*, Majority Slip Op. at 2-4.

Although the Supreme Court ruling against the Massachusetts fixed buffer zone was a 9-0 ruling, it is important to examine the concurring opinions by four justices. These justices would overrule *Hill v. Colorado*. Justice Scalia castigates the majority opinion as carrying forward "this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents." *Id.*, Scalia Concurring Slip Op. at 1. Justice Scalia also thinks that the "Court itself has *sub silentio* (and perhaps inadvertently) overruled *Hill*." Justice Scalia and the two justices joining in his opinion refuse to join in any portion of the majority opinion except the result. Justice Alito, writing a separate concurring opinion, disagrees with the majority and agrees with Justice Scalia that the Massachusetts law is not content-neutral and therefore is unconstitutional.

The majority opinion, written by Chief Justice Roberts, was able to draw in four other justices to strike down the Massachusetts law but completely avoids addressing whether the Court should overrule *Hill v. Colorado*.⁴ At the same time, my reading of

⁴ Among the other matters on which the concurring justices take the Majority to task is the Majority's failure to directly address *Hill*. The Court had explicitly asked the parties to brief whether *Hill* should be overruled; the Majority never mentions the issue.

the decision suggests that it may cut the ground out from under the Colorado-Madison version of buffer zones.

The Court in *McCullen* applies standard First Amendment law, conceding that the government may adopt reasonable time, place and manner restrictions on free speech, so long as the restrictions meet three tests:

- a. The regulations must be content neutral;
- b. The regulations must be narrowly tailored to serve a significant government interest; and
- c. The regulations must leave open ample alternate means of communication.

McCullen, Majority Slip Op. at 9.

The Colorado-Madison buffer zone laws apply to a wide range of health care facilities. This is done to meet the “content neutral” test; there is a concern (and some suggestion in *Hill*) that applying a buffer zone only to clinics providing abortion services, where most problems occur, would be content-based because most communications would be about abortion. The *McCullen* Court rejects any such distinction and says that the law is content-neutral even though it only applies at clinics providing abortion services. Majority Slip Op. at 11-14. The Court looks no further than the face of the legislation, which says nothing about the content of the speech.⁵

When the Court looks at the question of whether the law is narrowly tailored, the Colorado-Madison laws suffer two blows that appear fatal. First, directly contrary to the ruling in *Hill*, the Court states that Massachusetts cannot extend to all clinics a buffer zone remedy devised due to problems only arising at clinics that provide abortion services. The Court says:

For a problem shown to arise only once a week in one city at one clinic, creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution. (*Id.*, Majority Slip Op. at 26.)

Thus, under *Hill*, that the legislative body extends the buffer zone to places with no direct evidence of problem encounters is of no consequence; under *McCullen*, it is proof that the law is not narrowly-tailored and thus unconstitutional.

In this same portion of the ruling, the Court also holds that Massachusetts had alternative means of policing the clinics and had failed to show that those means would not be effective:

⁵ As pointed out by Justice Alito in concurrence, this conclusion seems a bit facile. Employees of the clinic could approach a patient within the buffer zone and urge the patient to obtain abortion services and would be free to do so as they are exempt from the buffer zone rules. An anti-abortion advocate doing the same and urging the patient to forego an abortion would be subject to arrest. Alito, Concurring Slip Op. at 2.

The Commonwealth points to a substantial public safety risk created when protestors obstruct driveways leading to the clinics. ... That is, however, an example of its failure to look to less intrusive means of addressing its concerns. Any such obstruction can readily be addressed through existing local ordinances.

* * *

The Commonwealth also asserts an interest in preventing congestion in front of abortion clinics. ... But the Commonwealth could address that problem through more targeted means.

* * *

To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency.

McCullen, Majority Slip Op. at 24-25, 26, 28.

These passages are troubling. The *Hill* decision did not require, and the government is not normally required to show, some sort of "exhaustion of remedies" to prove that other methods would not be effective, in order to show a regulation is narrowly tailored. But here, the *McCullen* Court appears to impose just such a requirement.

In this same section of the opinion, the Court approvingly notes methods other than buffer zones used by other jurisdictions to address the problems at health facilities, suggesting Massachusetts look at these other laws. But the Court adds in a footnote that "We do not 'give [our] approval' to this or any of the other alternatives we discuss." *Id.*, Majority Slip Op. at 24, n. 8.

In the case of the Madison ordinance, the City did extend the buffer zone to other health facilities even though the problems mostly developed at a clinic providing abortion services. The City also has little evidence that it tried enforcing other ordinances or statutes before adopting the buffer zone law. Because of these differences between our ordinance and the new standards announced in *McCullen*, the City likely cannot enforce the ordinance as written.

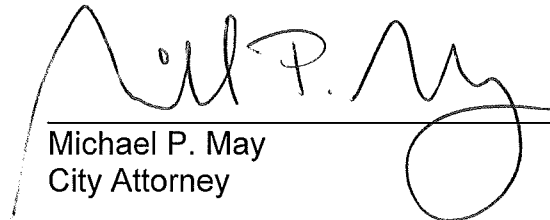
Recommendation.

1. Based upon the *McCullen* ruling, I recommend that the Council repeal those portions of sec. 23.01, MGO, that adopt the buffer zone. The City is not able to enforce the ordinance in light of *McCullen*, and leaving the law on the books opens the City up to additional lawsuits. Repealing this portion may also moot much of the pending lawsuit. We recommend that the City continue to enforce the portion that prohibits physical interference with persons going to or from health clinics, and make clear it applies to driveway entrances. A draft ordinance to make these changes is attached as Appendix C to this memorandum.

2. The City could consider adoption of a stronger law on interference with health access, such as a version of the federal Freedom of Access to Clinic Entrances Act, 18 USC § 248, referred to in the *McCullen* decision.

3. The City should enforce its existing ordinances on obstruction of sidewalks and rights of way, such as secs. 10.23(1) and 10.26, MGO, the portion of sec. 23.01, MGO, on physical interference, and any other similar laws. If enforcement of these laws proves ineffective in protecting patients' rights of access to health care, the City could then revisit application of a buffer zone to specific clinics where problems occur.

By taking these steps, the City should insulate itself from challenges based on the First Amendment, use existing or new laws to protect access to health care, and position itself to again adopt a buffer zone law if these other measures are not effective.



Michael P. May
City Attorney

CC: Chief Mike Koval
Janel Heinrich

Appendix A



City of Madison

City of Madison
Madison, WI 53703
www.cityofmadison.com

Master

File Number: 32827

File ID: 32827

File Type: Ordinance

Status: Report of Officer

Version: 1

Reference:

Controlling Body: BOARD OF
HEALTH FOR
MADISON AND
DANE COUNTY

File Created Date : 01/15/2014

File Name: Buffer zone

Final Action:

Title: Creating Section 23.01 and amending Section 1.08(3)(a) of the Madison General Ordinances to create a buffer zone at the entrance of health care facilities to protect patients from protestors and creates a bail schedule for violation thereof.

Notes: 5421buffer.zone

CC Agenda Date: 02/25/2014

Agenda Number: 40.

Sponsors: Lisa Subeck, David Ahrens, Shiva Bidar-Sielaff, Joseph R. Clausius, Mark Clear, Denise DeMarb, Larry Palm, Scott J. Resnick, Marsha A. Rummel, John Strasser, Michael E. Verveer, Anita Weier, Ledell Zellers and Lauren Cnare

Effective Date:

Attachments: Buffer zone ord handout.pdf, E mail registrants.2 13.14.pdf, Gwen Finnegan testimony.pdf, Registrations 2 13 14.pdf, Support e mails.pdf, Support e mails.II.pdf

Enactment Number:

Author: Kevin Ramakrishna

Hearing Date:

Entered by: dalthaus@cityofmadison.com

Published Date:

History of Legislative File

Ver- sion:	Acting Body:	Date:	Action:	Sent To:	Due Date:	Return Date:	Result:
1	Attorney's Office/Approval Group	01/15/2014	Referred for Introduction				
	Action Text:	This Ordinance was Referred for Introduction					
	Notes:	Board of Health for Madison and Dane County; Public Safety Review Committee					
1	COMMON COUNCIL	01/21/2014	Referred	BOARD OF HEALTH FOR MADISON AND DANE COUNTY		02/13/2014	
	Action Text:	This Ordinance was Referred to the BOARD OF HEALTH FOR MADISON AND DANE COUNTY					
	Notes:	Additional referral to Public Safety Review Committee					
1	BOARD OF HEALTH FOR MADISON AND DANE COUNTY	01/21/2014	Referred	PUBLIC SAFETY REVIEW COMMITTEE		02/11/2014	

	Action Text:	This Ordinance was Referred to the PUBLIC SAFETY REVIEW COMMITTEE		
	Notes:			
1	PUBLIC SAFETY REVIEW COMMITTEE	02/11/2014	Return to Lead with the Recommendation for Approval	02/13/2014 Pass
			BOARD OF HEALTH FOR MADISON AND DANE COUNTY	
	Action Text:	Item number 32827 was unanimously approved by the PSRC members.		
	Notes:	Absent: 2 Paul E. Skidmore and Maurice S. Cheeks Ayes: 7 Merrilee Pickett; Ernest E. Horinek; Matthew S. MacWilliams; Wayne S. Strong; Bruce P. Frey; John Strasser and Chan M. Stroman		
1	PUBLIC SAFETY REVIEW COMMITTEE	02/11/2014		
1	BOARD OF HEALTH FOR MADISON AND DANE COUNTY	02/13/2014	RECOMMEND TO COUNCIL TO ADOPT - REPORT OF OFFICER	Pass
	Action Text:	A motion was made by Kay, seconded by Edgar, to RECOMMEND TO COUNCIL TO ADOPT - REPORT OF OFFICER. The motion passed by voice vote/other.		
	Notes:			
1	COMMON COUNCIL	02/25/2014		

Text of Legislative File 32827

Fiscal Note

There may be a small increase in General Fund revenues derived from forfeitures.

Title

Creating Section 23.01 and amending Section 1.08(3)(a) of the Madison General Ordinances to create a buffer zone at the entrance of health care facilities to protect patients from protestors and creates a bail schedule for violation thereof.

Body

DRAFTER'S ANALYSIS: This ordinance creates a protective zone within 160 feet of health clinics for patients to be allowed entry and exit without obstruction. Additionally, this ordinance will prevent anyone from actively approaching, to within eight feet, people intending to use the health clinic's service in order to engage in oral protest, education, counseling, passing of leaflets or handbills, or displaying signs to the person. This ordinance also creates a bail schedule for this offense.

The Common Council of the City of Madison do hereby ordain as follows:

1. Section 23.01 entitled "Prohibition on Obstructing Entryways to Health Clinics" of the Madison General Ordinances is created to read as follows:

"23.01 PROHIBITION ON OBSTRUCTING ENTRYWAYS TO HEALTH CLINICS.

- (1) Restrictions. It shall be unlawful for any person to do any of the following:
 - (a) Intentionally obstruct, detain, hinder, impede, or block another person's entry to or exit from a health care facility.
 - (b) Intentionally approach another person to within eight (8) feet without consent for the purpose of doing any of the following on a public way or sidewalk area within a radius of one hundred sixty (160) feet from an entrance to a health care facility:
 - 1. Pass a leaflet or handbill to the person.
 - 2. Display a sign to the person.
 - 3. Engage in oral protest, education or counseling with the person.
- (2) Definitions. In this section a "health care facility" means a hospital, clinic or office that is used by a licensed physician. Where an office used by a health care

facility is located in a multi-office building, the common areas of the entire building shall also be deemed a health care facility.

(3) Penalty. Violators shall be subject to a forfeiture of not less than fifty dollars (\$50) nor more than one thousand dollars (\$1000)."

2. Subdivision (a) of Subsection (3) entitled "Schedule of Deposits" of Section 1.08 entitled "Issuance of Citations for Violations of Certain Ordinances and Providing a Schedule of Cash Deposits" of the Madison General Ordinances is amended by creating and amending therein the following:

<u>"Offense</u>	<u>Ord. No./Adopted Statute No.</u>	<u>Deposit</u>
Obstruct entrance to health care	23.01	\$300, 1st
clinics for purpose of protesting.		\$500, 2nd
	\$750, 3rd"	

EDITOR'S NOTE: New bail deposits must be approved by the Municipal Judge prior to adoption. This deposit has been so approved.

CITY OF MADISON, WISCONSIN

AN ORDINANCE _____

PRESENTED
REFERRED

January 21, 2014
BOHMDC; PSRC

Creating Section 23.01 and amending Section 1.08(3)(a) of the Madison General Ordinances to create a buffer zone at the entrance of health care facilities to protect patients from protestors and creates a bail schedule for violation thereof.

Drafted by: Kevin Ramakrishna

Date: January 15, 2014

SPONSOR: Aids. Subeck, Ahrens, Bidar-Sielaff, Clausius, Clear, DeMarb Palm, Resnick, Rummel, Strasser, Weier, Verveer, Zellers

DRAFTER'S ANALYSIS: This ordinance creates a protective zone within 160 feet of health clinics for patients to be allowed entry and exit without obstruction. Additionally, this ordinance will prevent anyone from actively approaching, to within eight feet, people intending to use the health clinic's service in order to engage in oral protest, education, counseling, passing of leaflets or handbills, or displaying signs to the person. This ordinance also creates a bail schedule for this offense.

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- (1) Restrictions. It shall be unlawful for any person to do any of the following:
 - (a) Intentionally obstruct, detain, hinder, impede, or block another person's entry to or exit from a health care facility.
 - (b) Intentionally approach another person to within eight (8) feet without consent for the purpose of doing any of the following on a public way or sidewalk area within a radius of one hundred sixty (160) feet from an entrance to a health care facility:
 - 1. Pass a leaflet or handbill to the person.
 - 2. Display a sign to the person.
 - 3. Engage in oral protest, education or counseling with the person.
- (2) Definitions. In this section a "health care facility" means a hospital, clinic or office that is used by a licensed physician. Where an office used by a health care facility is located in a multi-office building, the common areas of the entire building shall also be deemed a health care facility.
- (3) Penalty. Violators shall be subject to a forfeiture of not less than fifty dollars (\$50) nor more than one thousand dollars (\$1000)."

Approved as to form:

2. Subdivision (a) of Subsection (3) entitled "Schedule of Deposits" of Section 1.08 entitled "Issuance of Citations for Violations of Certain Ordinances and Providing a Schedule of Cash Deposits" of the Madison General Ordinances is amended by creating and amending therein the following:

<u>"Offense</u>	<u>Ord. No./Adopted Statute No.</u>	<u>Deposit</u>
Obstruct entrance to health care clinics for purpose of protesting.	23.01	\$300, 1st \$500, 2 nd \$750, 3 rd

EDITOR'S NOTE: New bail deposits must be approved by the Municipal Judge prior to adoption. This deposit has been so approved.

Appendix B



City of Madison

City of Madison
Madison, WI 53703
www.cityofmadison.com

Master

File Number: 32827

File ID: 32827

File Type: Ordinance

Status: Passed

Version: 2

Reference:

Controlling Body: COMMON COUNCIL

File Created Date : 01/15/2014

File Name: Buffer zone

Final Action: 03/18/2014

Title: SUBSTITUTE Creating Section 23.01 and amending Section 1.08(3)(a) of the Madison General Ordinances to create a buffer zone at the entrance of health care facilities to protect patients and creates a bail schedule for violation thereof.

Notes: 5421buffer.SUB
MAYOR APPROVAL DATE: 3/19/14

Sponsors: Lisa Subeck, David Ahrens, Shiva Bidar-Sielaff, Joseph R. Clausius, Mark Clear, Denise DeMarb, Larry Palm, Scott J. Resnick, Marsha A. Rummel, John Strasser, Michael E. Verveer, Anita Weier, Ledell Zellers, Lauren Cnare and Sue Ellingson

Effective Date: 03/27/2014

Attachments: Buffer zone ord handout.pdf, E mail registrants.2 13.14.pdf, Gwen Finnegan testimony.pdf, Registrations 2 13 14.pdf, Support e mails.pdf, Support e mails.II.pdf, Version 1, Report of the City Attorney

Enactment Number: ORD-14-00046

Author: Kevin Ramakrishna

Hearing Date:

Entered by: dalthaus@cityofmadison.com

Published Date: 03/26/2014

History of Legislative File

Ver- sion:	Acting Body:	Date:	Action:	Sent To:	Due Date:	Return Date:	Result:
1	Attorney's Office/Approval Group	01/15/2014	Referred for Introduction				
	Action Text:	This Ordinance was Referred for Introduction					
	Notes:	Board of Health for Madison and Dane County; Public Safety Review Committee					
1	COMMON COUNCIL	01/21/2014	Referred	BOARD OF HEALTH FOR MADISON AND DANE COUNTY		02/13/2014	
	Action Text:	This Ordinance was Referred to the BOARD OF HEALTH FOR MADISON AND DANE COUNTY					
	Notes:	Additional referral to Public Safety Review Committee					
1	BOARD OF HEALTH FOR MADISON AND DANE COUNTY	01/21/2014	Referred	PUBLIC SAFETY REVIEW COMMITTEE		02/11/2014	
	Action Text:	This Ordinance was Referred to the PUBLIC SAFETY REVIEW COMMITTEE					
	Notes:						

1	PUBLIC SAFETY REVIEW COMMITTEE	02/11/2014			
1	PUBLIC SAFETY REVIEW COMMITTEE	02/11/2014	Return to Lead with the Recommendation for Approval	BOARD OF HEALTH FOR MADISON AND DANE COUNTY	02/13/2014 Pass

Action Text: Rosalind Woodward – Supports the ordinance. A retired woman's healthcare provider shared that over the years she has witnessed medical treatment of woman stating that services provided by clinics are legal medical procedures and are considered to be a necessary part of a comprehensive woman's health plan. She said that the women seeking the services are doing what you would be doing if you had a hip replacement, hysterectomy, or a gall bladder removed. She said women are attending to their own medical needs as they see fit.

Christopher Lee – Opposes the ordinance. He shared that whether you are pro-life or pro-choice it really does not matter but with this particular issue he said on the ordinance. He said it is wrong to place restrictions on freedom of speech and assembly and that if someone wants to tell a person they should not visit a clinic or business it is their freedom of speech as long as there is peaceful demonstration.

Lynnsey Erickson – Supports the ordinance. She indicates that patients deserve the privacy and respect when entering a healthcare facility and that they should not be met with hostility, harassment or intimidation. She said the ordinance allows a nice balance as it will protect patients that are seeking healthcare but continues to allow free speech as individuals can still protest but gives patients the ability to enter a healthcare facility without being harassed or spoken to without their consent.

Anahise Eicher – Supports the ordinance. She mentioned the biggest concern is for patient safety and privacy and that individuals should be able to move freely to whatever appointment without feeling threatened or intimidated. She said that the ordinance strikes an appropriate balance with free speech as it still allows protests to continue but it also at the same time protects an individual's personal space and safety with the ability to access legal healthcare with dignity without threats or intimidation.

Wendi Kent – Supports the ordinance. She said she is representing the National Organization for Woman. (NOW) She shared that when seeking healthcare that every human being deserves space without being harassed. She said it is common for side walk preachers and harassers to treat everyone coming to a clinic that provides abortion as being seen for that. She said people come to the clinic may be there for another reason such as a check-up or seeking measures to prevent pregnancy indicating that she experienced first-hand being harassed to the point where it deterred her from continuing to receive prenatal services. She shared that we have rules regarding free speech and when it is harmful to others no matter which side they are on that no one has the right to intimidate, harm or assault a woman attempting to access healthcare.

Gwen Finnegan – Opposes the ordinance. Ms. Finnegan is the director of Vigil of Life, Madison and shares she opposes the gag rule and feels that it violates First Amendment rights. She said Vigil of Life brings a peaceful and prayerful witness and invite the people that they encounter to engage in conversation where they encourage choosing life. She said they are also there to offer hope and healing to mothers who have chosen abortion. Vigil of Life she said ensembles on public sidewalks at Planned Parenthood being peaceful with one or two individuals. She mentioned there are other protests and demonstrations within the City that have caused disruption that were not related to abortion or healthcare facilities where the City's response was to praise people who peacefully ensemble to exercise democracy and first amendment rights. HANDOUT

Greg Packnett – Supports the ordinance. He shared that woman feel intimidated or threatened at healthcare clinics as they walk into the clinic to receive healthcare. He shared a story where an individual who was protesting at a healthcare clinic later brought back a gun and he said according to the man's testimony indicated that he would have used it on those who received healthcare at the clinic. He feels that the eight feet buffer zone is reasonable and still gives the ability to exercise the First Amendment rights which he believes in.

Jennie Dye – Supports the ordinance. Ms. Dye had to leave to attend another meeting.

Natalie Deibel – Supports the ordinance. Is available to answer questions.

Marie Kumerow – Supports the ordinance. Does not wish to speak, available to answer questions

Natalie Goodwin – Supports the ordinance. Does not wish to speak.

Jamie Beam – Supports the ordinance. Does not wish to speak.

There were 73 e-mails received that were in support of creating a buffer zone ordinance.

Ernie Horinek made a motion to enter into discussion and action on the item. Alder Strasser seconded the motion.

Alder Subeck who is a sponsor of the ordinance shared the reason for the ordinance saying there is a

daily protest presence at Planned Parenthood which ranges from small to large groups of individuals sharing that it is not the presence she is concerned with it is the sidewalk counselors who make woman feel uncomfortable, threatened or intimidated by being overly aggressive. She said the ability to approach patients is still in the confines with our current law and that is why this ordinance is needed to ensure every woman who walks through all healthcare clinics is protected by the buffer zone. Lastly, she said that the ordinance still allows free speech while protecting the patient by the zone in which another individual cannot enter without permission.

Alder Strasser inquired with Captain Ackeret if the Police Department has a stand on the ordinance. Captain Ackeret said that the department does not have a stand on the ordinance and would enforce the ordinance if passed.

The committee voted unanimously in favor of the ordinance.

Notes:

Absent: 2 Paul E. Skidmore
Maurice S. Cheeks
Ayes: 6 Merrilee Pickett
Ernest E. Horinek
Matthew S. MacWilliams
Wayne S. Strong
Bruce P. Frey
John Strasser
Non Voting: 1 Chan M. Stroman

- | | | | | | |
|---|---|--|---|---------------------------|------|
| 1 | BOARD OF HEALTH FOR MADISON AND DANE COUNTY | 02/13/2014 | RECOMMEND TO COUNCIL TO ADOPT - REPORT OF OFFICER | Pass | |
| | Action Text: | A motion was made by Kay, seconded by Edgar, to RECOMMEND TO COUNCIL TO ADOPT - REPORT OF OFFICER. The motion passed by voice vote/other. | | | |
| | Notes: | | | | |
| 1 | COMMON COUNCIL | 02/25/2014 | Adopt | Pass | |
| | Action Text: | A motion was made by Resnick, seconded by Clausius, to Adopt. The motion passed by voice vote/other. | | | |
| | Notes: | | | | |
| 1 | COMMON COUNCIL | 03/04/2014 | Reconsider | Pass | |
| | Action Text: | A motion was made by Subeck, seconded by Palm, to Reconsider. The motion passed by voice vote/other. | | | |
| | Notes: | | | | |
| 1 | COMMON COUNCIL | 03/04/2014 | Refer to a future Meeting to Adopt | COMMON COUNCIL 03/18/2014 | Pass |
| | Action Text: | A motion was made by Subeck, seconded by Rummel, to Refer to a future Meeting to Adopt to the COMMON COUNCIL. The motion passed by voice vote/other. | | | |
| | Notes: | Common Council 3-18-2014 | | | |
| 2 | COMMON COUNCIL | 03/18/2014 | Reconsider | Pass | |
| | Action Text: | A motion was made by Subeck, seconded by Resnick, to Reconsider. The motion passed by voice vote/other. | | | |
| | Notes: | | | | |
| 2 | COMMON COUNCIL | 03/18/2014 | Adopt Substitute | Pass | |
| | Action Text: | A motion was made by Subeck, seconded by Bidar-Sielaff, to Adopt Substitute. The motion passed by voice vote/other. | | | |
| | Notes: | | | | |

Text of Legislative File 32827

Fiscal Note

There may be a small increase in General Fund revenues derived from forfeitures.

Title

SUBSTITUTE Creating Section 23.01 and amending Section 1.08(3)(a) of the Madison

General Ordinances to create a buffer zone at the entrance of health care facilities to protect patients and creates a bail schedule for violation thereof.

Body

DRAFTER'S ANALYSIS: This substitute ordinance creates a protective zone within 100 feet of the entrance to health clinics and 30 feet of the driveway entrance for a health clinic for patients to be allowed entry and exit without obstruction. Within these zones, it is unlawful to intentionally approach a person without their consent, within eight feet, in order to engage in oral protest, education, counseling, pass leaflets or handbills, or display signs to the person. This ordinance also prohibits, generally, anyone from physically and intentionally hindering a person's entrance or exit from a health care facility. This ordinance also creates a bail schedule for these offenses.

The Common Council of the City of Madison do hereby ordain as follows:

1. Section 23.01 entitled "Prohibition on Obstructing Entryways to Health Clinics" of the Madison General Ordinances is created to read as follows:

"23.01 PROHIBITION ON OBSTRUCTING ENTRYWAYS TO HEALTH CLINICS.

- (1) Purpose and Findings. The Common Council recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment without interference is important to the residents of the City, and that the exercise of a person's right to speak for or against such counseling and treatment, including the right to protest or counsel against certain medical procedures, must be balanced against another person's right to obtain medical counseling or treatment in an unobstructed manner. Therefore, the Common Council finds that this ordinance is necessary to further the City's significant governmental interests in protecting citizens' rights to come and go from a health care facility.
 - (2) Restrictions. It shall be unlawful for any person to do any of the following:
 - (a) Physically and intentionally obstruct, detain, hinder, impede, or block another person's entry to or exit from a health care facility.
 - (b) Intentionally approach another person to within eight (8) feet without consent for the purpose of doing any of the following on a public way or sidewalk area within either of the zones listed in sub. (c):
 - 1. Pass a leaflet or handbill to the person.
 - 2. Display a sign to the person.
 - 3. Engage in oral protest, education or counseling with the person.
 - (c) Zones.
 - 1. A radius of one hundred (100) feet from an entrance to a health care facility.
 - 2. A radius of thirty (30) feet from the point where the right-of-way intersects with the curbcut of any private driveway for the property upon which the health care facility is located, if any such point falls outside the zone in sub. (c)1.
 - (3) Definitions. In this section:
 - (a) "Health care facility" means a place used by a licensed physician or nurse practitioner to routinely provide medical treatment.
 - (b) "Entrance" means a location of ingress and egress to a building. Where a health care facility is located in a multi-use or multi-office building and does not have a separate entrance, then the zone in (2)(c)1. applies to all entrances to the building.
 - (4) Penalty. Any person violating any provision of this ordinance shall be subject to a forfeiture of not less than fifty dollars (\$50) nor more than one thousand dollars (\$1000)."
2. Subdivision (a) of Subsection (3) entitled "Schedule of Deposits" of Section 1.08

entitled "Issuance of Citations for Violations of Certain Ordinances and Providing a Schedule of Cash Deposits" of the Madison General Ordinances is amended by creating therein the following:

<u>Offense</u>	<u>Ord. No./Adopted Statute No.</u>	<u>Deposit</u>
Prohibition on obstructing	23.01	\$300, 1st
entryways to health clinics.		\$500, 2nd
	\$750, 3rd & sub."	

EDITOR'S NOTE: New bail deposits must be approved by the Municipal Judge prior to adoption. This deposit has been so approved.

CITY OF MADISON, WISCONSIN

REPORT OF THE CITY ATTORNEY

AUTHOR: Michael P. May, City Attorney

DATED: March 12, 2014

TO THE MAYOR AND COMMON COUNCIL:

RE: BUFFER ZONE ORDINANCE

At the Council meeting on March 18, 2014, the Council will have before it a motion to reconsider the adoption of Sec. 23.01, MGO. This ordinance was adopted on February 25, 2014, and a motion to reconsider was made at the meeting on March 4, 2014, and referred to the meeting of March 18. It is commonly referred to as the Buffer Zone ordinance.

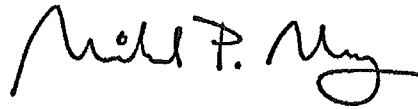
If the Council votes to reconsider the ordinance, we have prepared a Substitute, working with Alder Lisa Subeck. The Substitute does the following things:

1. Includes a short section on Findings and Purpose.
2. Adds the word "physically" to the subsection (23.01(2)(a)) on interfering with persons attempting to access health care facilities.
3. Changes the general zone from entrances to health care facilities from 160 feet to 100 feet. Within that zone, persons may not approach others without their consent to closer than 8 feet for the purposes described in the ordinance. This change brings our ordinance exactly in line with the ordinance approved by the U.S. Supreme Court in *Hill v. Colorado*. The *Hill* case was relied upon extensively by the federal court in its recent ruling in *Madison Vigil for Life, Inc., et. al v. City of Madison*, rejecting a request for a temporary restraining order against the version of the ordinance adopted on February 25.
4. Adds a shorter zone of 30 feet around a driveway entrance to health care facilities in order to protect those arriving by vehicle. This zone only applies if the 100 foot zone does not protect the driveway entrance.

5. Removes the provision that applied the ordinance to common areas in a multi-use building, and replaces it by applying the definition of entrance to all entrances in a multi-use building, if the health care facility doesn't have its own separate entrance.
6. Refines the definition of health care facility to make it a place where a physician or nurse practitioner routinely provides medical treatment. This should more narrowly tailor the application of the buffer zones.

The Substitute should be in Legistar. A red-lined version showing the changes made with the Substitute is attached to this report.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael P. May". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael P. May
City Attorney

CITY OF MADISON, WISCONSIN

ANA
SUBSTITUTE
ORDINANCE

PRESENTED
REFERRED

January 21, 2014
BOHMDC; PSRC

Creating Section 23.01 and amending Section 1.08(3)(a) of the Madison General Ordinances to create a buffer zone at the entrance of health care facilities to protect patients from protesters and creates a bail schedule for violation thereof.

DRAFT

Drafted by: Kevin Ramakrishna, Michael May, Lara Mainella

Date: January 15 March 12, 2014

SPONSORS: Aids. Subeck, Ahrens, Bidar-Sielaff, Clausius, Clear, DeMarb Palm, Resnick, Rummel, Strasser, Weier, Verveer, Zellers

DRAFTER'S ANALYSIS: This substitute ordinance creates a protective zone within 400 feet of the entrance to health clinics and 30 feet of the driveway entrance for a health clinic for patients to be allowed entry and exit without obstruction. Additionally, this ordinance will prevent anyone from actively approaching, to Within these zones, it is unlawful to intentionally approach a person without their consent, within eight feet, people intending to use the health clinic's service in order to engage in oral protest, education, counseling, passing of pass leaflets or handbills, or displaying display signs to the person. This ordinance also prohibits, generally, anyone from physically and intentionally hindering a person's entrance or exit from a health care facility. This ordinance also creates a bail schedule for this offense these offenses.

6

The Common Council of the City of Madison do hereby ordain as follows:

1. Section 23.01 entitled "Prohibition on Obstructing Entryways to Health Clinics" of the Madison General Ordinances is created to read as follows:

"23.01 PROHIBITION ON OBSTRUCTING ENTRYWAYS TO HEALTH CLINICS.

(1) ~~Restrictions.~~ It shall be unlawful for any person to do any of the following:

(a) ~~Intentionally~~(1) Purpose and Findings: The Common Council recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment without interference is important to the residents of the City, and that the exercise of a person's right to speak for or against such counseling and treatment, including the right to protest or counsel against certain medical procedures, must be balanced against another person's right to obtain medical counseling or treatment in an unobstructed manner. Therefore, the Common Council finds that this ordinance is necessary to further the City's significant governmental interests in protecting citizens' rights to come and go from a health care facility.

(2) Restrictions. It shall be unlawful for any person to do any of the following:

Approved as to form:

Michael P. May, City Attorney

- (a) ~~Physically and intentionally obstruct, detain, hinder, impede, or block another person's entry to or exit from a health care facility.~~
- (b) ~~Intentionally approach another person to within eight (8) feet without consent for the purpose of doing any of the following on a public way or sidewalk area within a radius of one hundred sixty (160) feet from an entrance to a health care facility: either of the zones listed in sub. (c):~~
 - 1. ~~Pass a leaflet or handbill to the person.~~
 - 2. ~~Display a sign to the person.~~
 - 3. ~~Engage in oral protest, education or counseling with the person.~~
- (c) ~~Zones:~~
 - 1. ~~A radius of one-hundred (100) feet from an entrance to a health care facility.~~
 - 2. ~~A radius of thirty (30) feet from the point where the right-of-way intersects with the curbcut of any private driveway for the property upon which the health care facility is located, if any such point falls outside the zone in sub. (c)1.~~

(3) Definitions. In this section:

(a) ~~"Health care facility" means a hospital, clinic or office that is place used by a licensed physician, or nurse practitioner to routinely provide medical treatment. Where an office used by a health care facility is located in a multi-office building, the common areas of the entire building shall also be deemed a health care facility.~~

(b) ~~"Entrance" means a location of ingress and egress to a building. Where a health care facility is located in a multi-use or multi-office building and does not have a separate entrance, then the zone in (2)(c)1. applies to all entrances to the building.~~

(34) ~~Penalty. Violators. Any person violating any provision of this ordinance shall be subject to a forfeiture of not less than fifty dollars (\$50) nor more than one thousand dollars (\$1000)."~~

2. Subdivision (a) of Subsection (3) entitled "Schedule of Deposits" of Section 1.08 entitled "Issuance of Citations for Violations of Certain Ordinances and Providing a Schedule of Cash Deposits" of the Madison General Ordinances is amended by creating and amending therein the following:

<u>"Offense</u>	<u>Ord. No./Adopted Statute No.</u>	<u>Deposit</u>
Obstruct entrance to health care clinics for purpose of protesting.	23.01	\$300, 1st \$500, 2 nd
<u>Prohibition on Obstructing Entryways to Health Clinics</u>		\$750, 3 rd and subsequent

EDITOR'S NOTE: New bail deposits must be approved by the Municipal Judge prior to adoption. This deposit has been so approved.

Appendix C

CITY OF MADISON, WISCONSIN

AN ORDINANCE _____

PRESENTED
REFERRED

July 15, 2014
8/5/2014 Common Council
Meeting

Amending Section 23.01 of the Madison
General Ordinances to eliminate the buffer zone.

Drafted by: Michael May

Date: July 10, 2014

SPONSORS:

DRAFTER'S ANALYSIS: This ordinance amends Sec. 23.01 of the Madison General Ordinances to eliminate the buffer zone at the entrance of health care facilities, in light of the US Supreme Court's decision in *McCullen v. Coakley*. See the related legal memorandum for the City Attorney.

The Common Council of the City of Madison do hereby ordain as follows:

1. Section 23.01 entitled "Prohibition on Obstructing Entryways to Health Clinics" of the Madison General Ordinances is created to read as follows:

"23.01 PROHIBITION ON OBSTRUCTING ENTRYWAYS TO HEALTH CLINICS.

- (1) Purpose and Findings. The Common Council recognizes that access to health care facilities for the purpose of obtaining medical counseling and treatment without interference is important to the residents of the City, and that the exercise of a person's right to speak for or against such counseling and treatment, including the right to protest or counsel against certain medical procedures, must be balanced against another person's right to obtain medical counseling or treatment in an unobstructed manner. Therefore, the Common Council finds that this ordinance is necessary to further the City's significant governmental interests in protecting citizens' rights to come and go from a health care facility.
- (2) Restrictions. It shall be unlawful for any person to do any of the following:
 - (a) Physically and intentionally obstruct, detain, hinder, impede, or block another person's entry to or exit from the entrance to a health care facility.
 - (b) Intentionally approach another person to within eight (8) feet without consent for the purpose of doing any of the following on a public way or sidewalk area within either of the zones listed in sub. (c):
 - 1. Pass a leaflet or handbill to the person.
 - 2. Display a sign to the person.
 - 3. Engage in oral protest, education or counseling with the person.
 - (c) Zones.
 - 1. A radius of one hundred (100) feet from an entrance to a health care facility.
 - 2. A radius of thirty (30) feet from the point where the right-of-way intersects with the curbcut of any private driveway for the property upon which the health care facility is located, if any such point falls outside the zone in sub. (c)1.
- (3) Definitions. In this section:
 - (a) "Health care facility" means a place used by a licensed physician or nurse practitioner to routinely provide medical treatment.

Approved as to form:

- (b) "Entrance" means a location of ingress and egress to a building. Where a health care facility is located in a multi-use or multi-office building and does not have a separate entrance, then ~~the zone in (2)(c)1. applies to all entrances to the building~~ "entrance" means all entrances to the building. "Entrance" includes a driveway to the health care facility property.
- (4) Penalty. Any person violating any provision of this ordinance shall be subject to a forfeiture of not less than fifty dollars (\$50) nor more than one thousand dollars (\$1000)."