

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

Date: December 13, 2011

**MEMORANDUM**

TO: Vending Oversight Committee

FROM: Lara M. Mainella, Assistant City Attorney

RE: ID # 24764, An Ordinance Creating Section 9.53, and amending Sections 10.25, 1.08(3)(a), and 1.08(4) of the Madison General Ordinances to allow information tables and vending of expressive items on city sidewalks, creating permits and designated sites for the same, creating permits for mobile vending of expressive items, and establishing bail deposits for violations.

This memorandum will provide an overview of basic First Amendment concepts and the history behind this proposed ordinance, MGO 9.53. This ordinance will create an opportunity for people wishing to exercise freedom of speech with the use of a table or other equipment on city sidewalks, especially downtown, and authorize on-street sales of expressive items where such sales are currently prohibited.

Right now, anyone may exercise the right to freedom of speech on a City sidewalk at any time, without a permit, if doing so on-foot and not blocking traffic or pedestrians or creating a hazard or disturbance. It is perfectly legal to stand and speak or sing, hand out literature, give things away for free, solicit donations for a cause, carry a clipboard and seek signatures on the city sidewalks, and gather with other people doing the same. These rights, guaranteed by the U.S. and Wisconsin Constitutions, are not affected by this ordinance and will not be changed.

Activities that are regulated, and in some instances, prohibited by ordinance include placing equipment on sidewalk for any purpose, and offering things for sale (street vending) without appropriate permit(s). As described in the Analysis to this ordinance, MGO 10.25(1) prohibits the placement of articles on the sidewalk, including tables, containers, other equipment, unless doing so with some type of permit. There currently is no "table permit" in the City ordinances. MGO 9.53 would allow this.

The ordinances that currently restrict the use of tables or vending expressive items are:

- MGO 10.25(1): tables and other equipment are prohibited without a permit that allows the placement or encroachment of equipment into the city right-of-way.
- MGO 10.056: a street-use permit is available for anyone wishing to hold an "event" and with this permit, the event sponsor can set up equipment and occupy a space on the city street or sidewalk for the duration of the permit. But this process is used primarily for organized events and festivals, applications are reviewed at a meeting

of the Street Use Staff Commission, and additional fees are involved. While this process is constitutional, it is not always practical for small groups or individuals who would just like to have a table for a short time.

- MGO 9.13(6): On-street sales (street vending) of any item other than homemade food or handmade arts and crafts is prohibited in the geographic area of the State Street Mall/Capitol Concourse Vending Area (see attached map.) Food or Craft vending must occur from assigned sites, with special permits, health license for food, and insurance. Mobile vending is not permitted. Seeking donations at a set price in exchange for goods is considered a form of vending.
- MGO 9.13: Street vending is limited to specific, assigned sites in other areas such as the Camp Randall and Southeast Campus vending areas. Even outside these areas, a person must obtain a \$150 annual (\$75 monthly) street vending license and maintain insurance in order to sell things from the city sidewalk or a truck parked on the street. These rules have existed for years in MGO 9.13.

#### **What this ordinance will do:**

Sec. 9.53 would make literature tables and vending of expressive items lawful in all of these locations. This ordinance will *expand* the opportunities for expression of speech on city sidewalks with the aid of a table, and offer the ability to sell certain “expressive items” where previously such sales were illegal. While the courts differ in opinion as to whether the use of a table is a protected First Amendment activity, this ordinance recognizes that a table can be helpful and establishes an organized method to obtain a table permit.

“The streets and public ways of a municipal corporation are held by it in trust for the public, to be used for the ordinary purpose of travel....” McQuillen’s Municipal Corporations, Sec. 30.73. Madison is unique in its promotion and regulation of food and craft vendors downtown. This ambience is maintained by the enforcement of MGO 9.13(6) and our model is admired and studied by many other cities. The challenge with this ordinance was to balance our elaborate and celebrated street vending system, which places a high value on unique, homemade, high quality products, with the legitimate concerns of those wishing to speak, share ideas and offer items for sale that do not fit into that mould but contribute to the “marketplace of ideas” that is the Capitol Square.

The need for a process to permit tables and expressive vending downtown was brought to the city’s attention after members of a nonprofit group were cited for “Placing Articles on Sidewalk” and for “No Street Vending Permit.” The group was cited for erecting a table displaying books and newspapers for a socialist organization and offering these for sale and/or in exchange for donation. The group did not hold nor qualify for a street vending license in this location (State Street.) The table citation, issued under MGO 10.25(1), was challenged in municipal court on First Amendment grounds, and the City prevailed. The defendant appealed and a Dane County circuit judge found the enforcement of 10.25(1) against a table displaying protected literature was unconstitutional “*as applied*” to that *particular situation*.<sup>1</sup> While this office disagrees with the result of that decision,<sup>2</sup> the decision

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<sup>1</sup> An “as applied” decision only applies to the particular facts of that case. The Dane County Circuit judge did *not* find that MGO 10.25 is invalid or cannot be used for other tables or under other circumstances. Circuit court decisions do not create binding precedential caselaw.

was not appealed. This ordinance offers a solution that balances the city's interests in regulating vending, avoiding clutter and pedestrian hazards against the citizen's interest in using a table to get out their message. It will be a complement to the street vending regulations downtown. The ordinance will allow options for "expressive vending" and make the use of a table on city sidewalks legal with a simple, inexpensive permit.

### **Tables and the First Amendment:**

People are often confused about what the First Amendment guarantees, particularly in public spaces. "Even in a public forum, the government may impose reasonable restrictions on the time, place or manner of protected speech, if the restrictions are: (a) justified without reference to the content of the regulated speech, (b) narrowly tailored to serve significant governmental interests, and (c) leave open ample alternative channels for communication." Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753 (1989).

With respect to tables, the Seventh Circuit has found that there is "no private constitutional right to erect a structure on public property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures." Lubavitch Chabad House, Inc. v. City of Chicago, 917 F.2d 341, 347 (7th Cir. 1990). The Ninth Circuit, on the other hand, has found some protection for tables: "[T]he erection of tables in a public forum is expressive activity protected by our Constitution to the extent that the tables facilitate the dissemination of First Amendment speech" but "the same cannot be said for...chairs, umbrellas, and boxes. The use of tables on public sidewalks is protected only to the extent that its use "facilitates" the exercise of expressive activities. Montgomery, 856 U.S. at 1557. For example, placing a table on a public sidewalk to sell ice cream is not entitled to protection under the First Amendment because the table's use in this context is not for expressive purposes...." A.C.L.U. of Nevada v. City of Las Vegas, 466 F.3d 784, 799 (9<sup>th</sup> Cir. 2006). In this Nevada case, the tables were used to sell T-shirts bearing a political message. Therefore, this ordinance would also allow the use of tables to sell certain "expressive items" that express a message regarding political, philosophical, religious, ideological or any other noncommercial topic, with an "E" permit.

### **This ordinance does not impose a "prior restraint:"**

MGO 9.53 creates an easy process to obtain a "T" permit for a table, an "E" permit to sell expressive items from your table, and an "M" permit to sell expressive items without a table. These permits allow activities that were previously illegal. Anyone conducting these activities prior to the enactment of this ordinance were not doing so with the city's permission - so it is incorrect to conclude that this ordinance creates a restraint where none existed.

A "prior restraint" occurs when the government requires a person to seek permission from the government prior to expressing their message in a public forum. While prior restraints are highly disfavored in the law, a permit requirement is only a problem when the procedures do not meet certain constitutional safeguards; for example, if an application has to be filed too far in advance, if the fees or conditions are unreasonable, or if the ordinance gives too much discretion to the officials administering it. If an ordinance allows a

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<sup>2</sup> For example, a federal district court in California recently upheld on a facial First Amendment challenge, an ordinance virtually identical to MGO 10.25(1) and found it to be a constitutional. Davidovich v. City of San Diego, 2011 WL 6013010 (S.D.Cal. 2011), Slip Op, Dec. 6, 2011.

government official to deny a permit to speak or gather in a public place without objective criteria, there is danger of censorship. Sometimes, onerous or subjective insurance requirements are considered to work an unlawful prior restraint. This is the type of “prior restraint” that could violate the constitution.

The U.S. Supreme Court and Wisconsin courts recognize that government can require a permit for expressing speech in a public space without causing an unlawful prior restraint:

“Regulations of the use of a public forum that ensure the safety and convenience of the people are not “inconsistent with civil liberties but ... [are] one of the means of safeguarding the good order upon which [civil liberties] ultimately depend.” *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762, 85 L.Ed. 1049 (1941). Such a traditional exercise of authority does *not* raise the censorship concerns that prompted us to impose the extraordinary procedural safeguards on the film licensing process in *Freedman*.” *Thomas v. Chicago Park District*, 534 U.S. 316, 323, 122 S.Ct. 775, 780 (2002).

“[T]he constitution does not require that government officials have no discretion and flexibility in deciding *whether* and *under what conditions* to grant permits and licenses.... See *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).” *Sauk County v. Gumz*, 266 Wis.2d 758, 786-787 (Ct. App. 2003).

In *Sauk Co. v. Gumz*, the Wisconsin Court of Appeals gave examples where advanced permits for the exercise of free speech were found to be constitutional:

“The advance filing requirements that courts have upheld for parades or demonstrations have generally been less than a week: *A Quaker Action Group v. Morton*, 516 F.2d 717, 735 (D.C.Cir.1975) (two-day advance notice requirement for demonstrations of up to 3,000 in front of White House is reasonable); *Progressive Labor Party v. Lloyd*, 487 F.Supp. 1054, 1059 (D.Mass.1980) (three-day advance filing requirement for parade permit approved in context of a broader challenge); *Handley v. City of Montgomery*, 401 So.2d 171, 183 (Ala.Crim.App.1981) (filing requirements that have the result of requiring applications between four and eleven days before the event, and nine days for the plaintiff, is reasonable given the need for advance planning); *Powe v. Miles*, 407 F.2d 73, 84 (2d Cir.1968) (two-day advance filing requirement for parade is reasonable); *Jackson v. Dobbs*, 329 F.Supp. 287, 292 (N.D.Ga.1970) (marchers must obtain permit by 4:00 p.m. on day before the march) *aff'd* 442 F.2d 928 (5th Cir.1971).

*Id.*, 266 Wis.2d 758, 799, fn. 19 (Ct. App. 2003).

Thus, we conclude that there is no “prior restraint” imposed by this ordinance. The permit is administrative and available immediately – a person need simply apply, fill out a form, pay a small fee, and can obtain their permit and site assignment the same day (or online.) T and E sites in the downtown area are issued on first come, first served basis but the Vending Coordinator is authorized to create extra sites if the current sites are full. If an applicant fills out the paperwork and pays the fee (daily T permit is \$5/day, \$15/month or \$25/year) a permit will be issued. A permit allows the city to establish appropriate, safe places to set up

a table in the busy downtown area, and grants the permit holder the privilege of reserving that spot for a number of days if they wish.

The new "M" permit authorizes mobile street vending, particularly on the Mall/Concourse, where currently one can only vend from an assigned site and again, only homemade/handcrafted items. With an M permit, a person on foot can sell (or request donations in a specific dollar amount) items that do not fit the definition of "handcrafted" for purposes of the existing street vending regulations. The M permit makes it very clear that indeed a person can stand on the corner and solicit a donation in exchange for an item of value, as long as that item is an "expressive item" such as a newspaper, a button with a political or other noncommercial message, etc. Currently, sec. 9.13(6) prohibits such vending within the Mall/Concourse vending area because (a) it's not homemade food or handcrafted artwork (b) the vendor is not operating in an assigned site and (c) the vendor does not carry insurance. Elsewhere in the City, outside the regulated vending areas, a person can vend these items (or any item) but must pay for a monthly or annual vending permit and maintain commercial general liability insurance. The new M permit is available for a fee of \$5 annually, does not require any insurance and does not require the vendor to remain in an assigned site. (The new T and E permits also do not require proof of insurance.)

The proposed ordinance includes a "Purpose and Findings" section, explaining the need and rationale for these new permits. The Common Council and referral bodies are encouraged to read and discuss this language, formulate your own findings and make requests, if necessary, to include any additional findings in the final ordinance language.

cc: Ald. Rummel

