

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

Date: December 30, 2016

MEMORANDUM

TO: All Alders

FROM: Michael P. May, City Attorney

RE: Median Protection Ordinance: Recommendations of the Homeless Issues Committee, Legistar No. 44204

No alder asked our office to prepare an Alternate ordinance to reflect the recommendations of the Homeless Issues Committee. Those recommendations include:

1. Signs noting the new requirement are to be added at all locations covered by the ordinance.
2. Persons claiming to be homeless are exempt from any citations, but the Madison Police Department (MPD) officers are required to escort the person to “the nearest legal space.”
3. No citations may be issued unless the individual person has been given a warning at the particular site.
4. City staff is to provide a report to the Council 6 months after adoption, with referral of the report to the Homeless Issues Committee.

I have a number of concerns about these items. Let’s start with the least problematic and work our way up.

Report Requirement. There is no problem with this item. It is unusual to designate in an ordinance one specific referral, and I would suggest deleting that. Including one referral in the ordinance might suggest no others were allowed.

Signage Requirement. There are few instances where the City is required or allowed to post signs in the ROW not required by state traffic regulations. Traffic Engineering Staff have advised me that there are 471 intersections along arterials with medians. The average cost to install a sign when its audience is not moving traffic—i.e. the sign can be manufactured at a smaller size -- is \$80. A fiscal note of approximately \$150,000 therefore would be necessary to install signs to comply with the amendment. This would also require a budget amendment.

TE Staff do not recommend installing additional signs, as they are costly and an additional maintenance item to track and repair. City TE staff had always anticipated working with MPD to develop maps for handing out to identify the arterial streets and areas where the ordinance was in effect.

Second, by placing a signage requirement in the ordinance, it likely becomes an element of proving a violation in Municipal Court. In every case, the City would have to show the necessary signage.

Warning Requirement. This should not be placed in the ordinance language. First, it will create a very difficult issue of enforcement. Any person receiving a citation will claim a failure to first warn at that location. This will become a defense in any trial of the citation, and the City would be required to prove the warning with clear, satisfactory and convincing evidence. This will likely require the MPD to maintain a written record of warnings. Second, the placement of the requirement in the ordinance confuses enforcement discretion with the elements of a violation. MPD officers often determine that certain offenses are worthy of warnings or education rather than immediate enforcement. In some instances, there is an MPD policy on such enforcement discretion. But these are clearly within the jurisdiction of the enforcement agency; to specify something like this in the ordinance itself confuses the nature of a discretionary warning, and effectively makes it an element of the violation itself. Finally, it is my understanding that the MPD has made a commitment to give warnings and education before enforcing the new restrictions, accomplishing what is intended without the related problems.

Exemptions for Homeless and Escorting to Legal Site. First, basing exemption from an ordinance on a person's residential status likely would be found to have no rational relationship to the purpose of the ordinance and would be found to be illegal. Second, assuming some rational basis related to ability to pay, it would apply to all ordinances, and the City ought to simply state we will not enforce any ordinances that might include a citation against homeless persons. Third, it is unrealistic to make an officer take the time and make the determination of where the "next legal space" is at each location. Fourth, the person so moved will simply move back to the illegal location, since they cannot be cited. Fifth, every person approached for violation of the ordinance will claim to be homeless, exempting them from enforcement.

If the warning and exemption requirements are added to the ordinance, I would advise the MPD to simply not attempt to enforce it. If it is the Council's wish to add these items, I recommend the Council be more straightforward and adopt a motion to place the ordinance on file.

CC: Mayor Paul Soglin
Police Chief Mike Koval
Captain Brian Ackeret
Dave Dryer