LEGISTAR FILE I.D. NO. 35013

CITY OF MADISON, WISCONSIN

REPORT OF THE CITY ATTORNEY

AUTHOR: Michael P. May, City Attorney

DATED: July 29, 2014

TO THE MAYOR AND COMMON COUNCIL:

RE: Revisions to Section 23.01, MGO in light of the Supreme Court Decision in *McCullen v. Coakley.*

This report accompanies the revisions to sec. 23.01, MGO, our ordinance aimed at protecting those seeking health care. The background to the amendments is set out at great length in the attached memorandum dated July 10, 2014, and previously sent to the Mayor and all Alders.

In *McCullen v. Coakley,* the US Supreme Court established new standards for examining ordinances like the City's sec. 23.01. First, in order to meet the "narrow tailoring" requirement under the First Amendment, such an ordinance may only reach facilities where the City could show a history of problems. This requirement is met in the new ordinance by applying it to reproductive health care facilities, rather than all health care facilities. The second requirement is more difficult to meet. The Court said that more extensive limits on speech like buffer zones are only allowed when other, more traditional regulations have failed. Our analysis of the new requirement set forth in *McCullen* and the City's history at reproductive health care facilities in the City suggests that the City cannot justify a continued buffer zone.

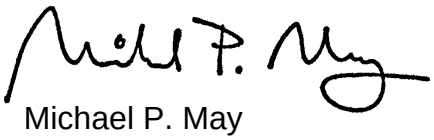
Since the *McCullen* decision, our office has been following developments in other locations and has been in contact with some national organizations supporting health care choices. Several cities have simply repealed their buffer zone ordinances; some buffer zone ordinances have been enjoined by the courts. The ordinances that have been enjoined had "fixed" buffer zones, not the floating zones in sec. 23.01, but we have been unable to find a legal rationale, at least at the current time, to sustain Madison's buffer zones in light of *McCullen.* We believe sec. 23.01 could be subject to the same analysis in court, thus leading to the recommendation that no buffer or bubble zones be used at this time.

The attached ordinance therefore takes a different approach. It directly regulates disruptive or harassing conduct and behaviors. It expands on the language barring obstruction of access to entrances to include language from the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE), 18 USC sec. 248, referenced in *McCullen.* The FACE Act has withstood a number of First Amendment challenges. By regulating this conduct, the City's ordinance similarly should survive challenges and, if the application of this ordinance and related ordinances on obstructing public ways prove ineffective, the City could revisit the need for buffer zones.

The adoption of the pending ordinance is also recommended because it will moot much of the pending lawsuit against the City. Even though the City is not enforcing the buffer zones, a court could still enter an injunction against the ordinance, which could trigger liability for damages and attorneys' fees.

The City Attorney recommends adoption of the amendments to sec. 23.01, MGO.

Respectfully submitted,



Michael P. May
City Attorney