

CITY OF MADISON, WISCONSIN

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**REPORT OF THE CITY ATTORNEY**

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TO THE MAYOR AND COMMON COUNCIL:

RE: Changes recommended by the EOC to the Chronic Nuisance Premises Ordinance, Sec. 25.09, MGO.

The EOC has recommended seven (7) total amendments to the Chronic Nuisance Premises ordinance. The City Attorney's office does not have issue with four (4) of the proposed amendments, but does have concern that three (3) of them may weaken the ordinance and/or limit enforcement. The concerns are as follows:

1. Sec. 25.09(2)(a)2. The EOC states their reasoning for this change is that they believe if a search warrant is executed and no evidence is found, it is not appropriate to label the property a Chronic Nuisance Premises ("CNP"). The EOC also believes that it is a "legally substantial" step to require the district attorney's ("DA") office to actually file charges for the drug activity in order for the premises to be declared a CNP. It appears that the EOC believes that it is easy to get a search warrant and that the police simply have to walk into a judge's office and request one.

This reasoning is flawed. A search warrant is not issued unless there is probable cause to believe that the object or objects sought are linked with the commission of a crime and are located on the premises. The judge has to be presented with sufficient **facts** and must have a **substantial** basis for believing that probable cause exists. The complaint submitted to the judge is sworn to by the applying officer and/or accompanied by a sworn affidavit and/or sworn testimony. Additionally, there may be times when upon execution of a search warrant, little or no evidence of illegal drug activity is found, however, that does not mean that illegal drug activity is not occurring on the premise. It only means that on that particular date, little, or no evidence was found. There could be several reasons, which do not negate the validity of the search warrant, for the evidence not being on premise at the time a search warrant is executed.

The EOC is probably not aware that there are many cases in which the DA does not file charges even though they have sufficient basis to do so. Thus, forcing the City to rely on the DA filing charges in a particular case could impinge on the City's use of the ordinance in certain circumstances. Certainly not to a significant degree, but it could still be problematic.

2. Sec. 25.09(2)(c). The EOC believes that in cases where physical arrest and/or referral of charges do not result in charges being filed, it would not be appropriate to "label" a premises a CNP. Regardless of whether charges are filed, the behavior is still occurring. Obviously, MPD needs probable cause to arrest an individual. There are situations in which MPD has referred an individual to the DA's office for charges and the DA declines to file charges. The reason for not filing charges is frequently something other than a lack of probable cause. It would be problematic to condition the ability to enforce a provision of our ordinance on the actions of another completely independent agency.
3. Sec. 25.09(3)(b)2. The EOC's concern with this provision is that true domestic abuse victims will be chilled from contacting the police. The EOC feels that victims will not call the police because they will be worried about losing their housing. The City was concerned about allowing the chronic "domestic" abuse situations that typically involve two (2) adult roommates. The example MPD has given is two adults (could be two (2) males, two (2) females, or one of each) who are living together a basically take turns beating each other up—hitting each other—engaging in behavior that constitutes domestic abuse under the statute. The City was very sensitive to the true domestic abuse situation where one party is consistently victimized and that is why the review provision was built into the ordinance. We still feel it is important to be able to count domestic incidents as nuisance activities in certain circumstances after such circumstances were subject to the review process set forth in the CNP ordinance. Those involved with the drafting of the CNP ordinance did meet with domestic abuse agency representatives and they were comfortable with our original position and the review process built into the ordinance.
4. The City Attorney's office is not concerned about changes the EOC recommends to Sections 25.09(3)(a)6.; (3)(b)3.b.; and (6)(a) – 2 changes to that section.

Respectfully submitted,

Michael P. May  
City Attorney