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, l. 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