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

Date: January 27, 2016

MEMORANDUM

TO: Mayor Paul Soglin
Police Chief Michael Koval

FROM: Michael P. May, City Attorney

RE: Legal Status of Sec. 24.12, MGO, Panhandling

I. INTRODUCTION

This memorandum will examine and explain the new cases that make almost all panhandling regulation subject to successful legal challenge. Based on these cases, our office recently recommended, and the Madison Police Department agreed, to discontinue enforcement of sec. 24.12, MGO, the City's panhandling ordinance.

II. A BRIEF HIISTORY OF SEC. 24.12, MGO.

Section 24.12 is Madison's panhandling ordinance. Prior to 2012, Madison banned menacing and aggressive panhandling citywide, with special restrictions prohibiting panhandling within 50 feet of an ATM, 25 feet from a sidewalk café or an intersection and varying prohibitions on distances from commercial buildings. *See,* for example, Legistar No. 01036, adopted in 2005.

On September 18, 2012 the City Council amended Sec. 24.12, MGO, *see* Legistar No. 26604. The amendment added a prohibition on panhandling within 25 feet of an alcohol-licensed establishment, and modified the distance-based bans from an intersection, an open sidewalk café or an ATM. The ordinance also banned panhandling in the "Central Business District" and created a definition of this district which included the 100 through 800 blocks of State Street, the Capitol Square and its surrounding area. Sec. 24.12 (2), MGO. The changes sought to close gaps in the law in response to problematic and constant panhandling in certain areas of State Street. Jeff Glaze, *Madison City Council bans panhandling on State Street mall, Capitol concourse,* Wisconsin State Journal (Sep. 19, 2012). The ordinance also added a much more extensive statement of purpose.

The stated purpose of Sec. 24.12, MGO, "Panhandling Prohibited," is to "ensure unimpeded pedestrian traffic flow, to maintain and protect the physical safety and well-being of pedestrians and to otherwise foster a safe and harassment-free climate in public places in the City of Madison." Sec. 24.12 (1), MGO. The purpose section also cites "significant public and governmental interest in

encouraging the public presence of residents and visitors in the Central Business District, and their unimpeded use of public areas and private businesses in the area." The City noted it received "regular" complaints from residents and businesses alike in the Central Business District on the "deleterious effects of panhandling in the area."

A report from the City Attorney accompanying the 2012 ordinance amendment referred to case law that supported the constitutionality of the ordinance at that time.

Sec. 24.12, MGO, bans three specific types of panhandling: "aggressive," "menacing" and "location-based." Under sec. 24.12(3), MGO, a person may not panhandle "in a manner or under circumstances manifesting an express or implied threat or coercion," creating the so-called "aggressive panhandling" ban. "Menacing panhandling" can be found under sec. 24.12(4), MGO, which prohibits panhandling "in an aggressive or intimidating manner." The third type of panhandling prohibited, "location-based panhandling," makes panhandling within 25 feet of an alcohol licensed establishment, the Central Business District, an intersection, an open sidewalk café, or ATM, illegal. Sec. 24.12(5), MGO.

III. PANHANDLING ORDINANCES ARE NOW BEING TREATED AS CONTENT-BASED LAWS REVIEWED WITH STRICT SCRUTINY.

The act of panhandling has long been recognized as a form of speech protected by the First Amendment. "While some communities might wish all solicitors, beggars and advocates of various causes be vanished from the streets, the First Amendment guarantees their right to be there, deliver their pitch and ask for support." *Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000). Police departments are expected to be aware of this, and the Madison Police Department certainly is. (See *Pindak v. Dart*, No. 10 C 6237, 2015 WL 5081363, at 33 (N.D. Ill. Aug. 27, 2015)(deputies exposed to individual liability for removing panhandlers from Daley Plaza because they should have known that panhandling is a form of protected speech)). Madison has made a point of refining our panhandling ordinance, sec. 24.12, MGO, over the years to remain constitutional.

However, recent cases have increased the constitutional protection afforded to panhandling, and the level of judicial scrutiny applied to ordinances like Madison's. Ordinances that restrict or prohibit speech associated with asking for money are now subject to "strict scrutiny" under the First Amendment, as the result of a recent US Supreme Court case striking down a sign ordinance, *Reed v. Town of Gilbert,* ___ U.S. ___, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015) and *Norton v. City of Springfield*, a Seventh Circuit case applying *Reed* to a panhandling ordinance in Illinois. *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015), *pet. S. Ct. pending*.

Content-based laws have always been subject to the highest level of constitutional scrutiny ("strict scrutiny"), but *Reed* changed the standard for

determining if a law is content- based. Under *Reed*, if a violation of the law is determined by listening to what the speaker says – it is "content based on its face" and subject to strict scrutiny. This is "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed,* at 135 S. Ct. 2228. Under prior jurisprudence, the mere fact that a law distinguishes between broad topics of speech did not immediately doom such laws, which were subject to intermediate scrutiny.

This new standard adopted in *Reed* has now been extended to panhandling in several federal circuits in addition to the Seventh Circuit, which governs Wisconsin. As stated in *Norton*, "few regulations will survive this rigorous standard." Id. at 413 (7th Cir. 2015).

IV. APPLICATION OF THE NEW CONSTITUTIONAL STANDARD SHOWS SEC. 24.12, MGO, WOULD IN ALL LIKELIHOOD BE STRUCK DOWN.

This section will discuss the cases leading to our conclusion that sec. 24.12, MGO, would in all likelihood not survive strict judicial scrutiny under current case law, and be found unconstitutional.

Norton v. City of Springfield, Illinois

As binding precedent on the State of Wisconsin, the U.S. Court of Appeals for the 7th Circuit recently ruled on a panhandling ordinance in Springfield, Illinois. Springfield's ordinance was directed at panhandling in its downtown historic district. Although the 7th Circuit originally found the ordinance content-neutral and constitutional,[1] the case was reheard in light of the *Reed* decision. In *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015), the 7th Circuit changed its prior ruling, holding that, under *Reed*, the ordinance was content-based – "Springfield's ordinance regulates panhandling 'because of the topic discussed'." *Id*. at 412. "Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification." Id. The parties did not argue that there was a compelling justification; the City of Springfield apparently conceded that it could not meet the strict scrutiny test if the ordinance was deemed to be content-based. Therefore, the 7th Circuit found the ordinance unconstitutional under *Reed*. *Id.* at 412-13. In December, the City of Springfield petitioned the U.S. Supreme Court to hear this case and we are following its progress.

Following the ruling, Springfield revised its anti-panhandling ordinance. The revised ordinance was challenged by the same plaintiffs but in another case - *Norton v. City of Springfield*, No. 15-3276, 2015 U.S. Dist. LEXIS 162705 (C.D. Ill. Dec. 4, 2015). Because this case came to the District Court after *Reed* and after the 7th Circuit already applied *Reed* to panhandling, the district court quickly

[1] See *Norton and Otterson v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014).

found the revised ordinance still addresses the content of the plaintiffs' speech, i.e. asking pedestrians for "an immediate donation of money or other gratuity." The court concluded the revised ordinance was still a content-based restriction of speech and did not survive strict scrutiny. *Id.* at *4-6.

In both *Norton* cases, the court found the ordinance content-based because Springfield prohibits requests for an immediate donation but not a request for future donations. Madison's ordinance also prohibits requests for an "immediate" donation, so this could place our ordinance in even greater peril.

Browne v. City of Grand Junction, CO

After *Reed* and around the same time as the *Norton* cases, federal courts around the country started striking down panhandling ordinances. In *Browne v. City of Grand Junction,* 85 F. Supp. 3d 1249 (D. Colo. 2015) the plaintiffs challenged an ordinance prohibiting panhandling by the city of Grand Junction, Colorado. The ordinance was strikingly similar to MGO 24.12, making unlawful so-called "aggressive panhandling," "menacing panhandling" and "location-based panhandling." 85 F. Supp. 3d at 1164. The plaintiffs challenged the ordinance on grounds that it violated their ability to fully exercise their First Amendment rights. *Id.* at 1165.

The *Browne* court relied extensively on *Reed* in its decision. Specifically, the *Browne* court observed that because the ordinance on its face appeared to restrict the plaintiffs' freedom of speech, the court looked at whether the restriction was "content-based" or "content-neutral." As explained above, an ordinance that regulates on the basis of the content of the speech must survive strict judicial scrutiny. An ordinance regulating speech can withstand strict scrutiny only if the municipality can prove that the ordinance is (a) necessary to serve a compelling public interest and (b) that the ordinance is the least-restrictive means of achieving that interest. *Id.* In practical application, once a court subjects a law to strict scrutiny, the law almost always is struck down.

The *Browne* court held that the challenged provision of the panhandling ordinance was a content-based restriction of protected speech because the ordinance deemed it unlawful to "panhandle or solicit or attempt to solicit employment, business, or contributions of any kind directly from the occupant of any vehicle." *Id.* Looking at the language of the ordinance on its face, the court held the provision of the ordinance singled out particular content for differential treatment and for that reason, strict judicial scrutiny applied to the court's review. *Id.*

McLaughlin v. City of Lowell, Mass.

Following *Browne* was the decision of *McLaughlin v. City of Lowell*, No. 14-10270-DPW, 2015 U.S. Dist. LEXIS 144336 (D. Mass. Oct. 23, 2015). Two homeless men challenged the constitutionality of Lowell's panhandling

ordinance. The *McLaughlin* case featured an ordinance resembling Sec. 24.12, MGO. The City of Lowell ordinance banned distinct categories of panhandling: all panhandling in the Downtown Lowell Historic District —much like Madison's ban in the "Central Business District"— "menacing" panhandling (coercive tactics that were otherwise legal under existing Lowell law) "aggressive panhandling" and "location-based panhandling." *Id.* at *2-6.

Beginning its analysis on the "Downtown" provision of the panhandling ordinance, the *McLaughlin* court held the provision was plainly content-based because it targeted a form of expressive speech. The court examined whether the ban in the historic district was the "least restrictive means" of achieving a compelling governmental interest. *Id.* at *18. The preamble to the ordinance laid out Lowell's desire to protect and promote tourism and economic development, particularly that "The City has a compelling interest in providing a safe, pleasant environment and eliminating nuisance activity within the Downtown Historic District; and Solicitation, begging or panhandling substantially burdens tourism within the Downtown Historic District." *Id.* at *18-21. Despite the City's well-worded preamble, the court held that promoting tourism and economic revitalization in the downtown historic district did NOT rise to the level of a "compelling" governmental interest for First Amendment purposes; thus not satisfying the first requirement of strict scrutiny. Accordingly, the court held that tourism promotion is not sufficiently important to allow content-based restrictions on speech to survive strict scrutiny. *Id.* at *21-23.

Like Madison, the City of Lowell prohibited "aggressive panhandling", and the law was unable to survive strict scrutiny because the ordinance imposed duplicitous penalties on violators in addition to the applicable laws that already existed to punish such behavior. For this reason, the ordinance was not the "least restrictive means" of enforcing the City's stated public safety interest. *Id.* *34-43.

Thayer v. City of Worcester

The federal district court struck down another panhandling ordinance in Massachusetts, in *Thayer v. City of Worcester,* No. 13-40057-TSH, 2015 U.S. Dist. LEXIS 151699 (D. Mass. Nov. 9, 2015). (Like *Norton*, the *Thayer* case was pending when *Reed* was decided and the First Circuit remanded the case to the lower court to make a decision under *Reed*.) The City of Worcester, Massachusetts, prohibited panhandling in a similar way to Madison. One provision dealt with "aggressive panhandling" and the other provision prohibited panhandling within 20 feet of an ATM, bank, check-cashing business, mass transportation, sidewalk cafes and other areas. *Id.* at *20-25. Citing *Reed*, the District Court of Massachusetts began its analysis by looking into the ordinance to see if it was content-based or content-neutral. *Id.* at *35-36. The court found the panhandling ordinance to be content-based, noting its similarities to the *Browne* and *McLaughlin* cases because it placed restrictions on soliciting contributions, a noted expressive activity protected by the First Amendment. *Id.* at *36-37. The court noted that content-based regulations are presumptively invalid and rarely defeat strict scrutiny on review and required the City to

establish that the ordinance furthered a compelling interest and is narrowly tailored to achieve the interest. *Id.* at *37.

The City of Worcester made clear the governmental interest behind the ordinance was promoting public safety (City Council minutes, preamble to the ordinance and the City Manager's report that from January 2011-January 2012 police had been dispatched to respond to 181 incidents of aggressive behavior by individuals who may have been panhandling were all presented as evidence). *Id.* at *39-40. Recognizing public safety as a compelling interest,[2] the court moved on to asking whether the provisions of the ordinance were the least restrictive means available. *Id.* at *40-41. Leaning on the *Browne* and *McLaughlin* opinions, the *Thayer* court found that the entirety of the ordinance failed because it was not the least restrictive means available to protect the public and therefore, did not satisfy strict scrutiny. *Id.* at 45. Addressing the public safety concerns related to aggressive panhandlers, the court stated,

> "Post *Reed*, municipalities must go back to the drafting board and craft solutions which recognize an individual's (right) to continue in accordance with their rights under the First Amendment, while at the same time, ensuring that their conduct does not threaten their own safety, or those being solicited. In doing so, they must define with particularity the threat to public safety they seek to address, and then enact laws that precisely and narrowly restrict *only* that conduct which would constitute such a threat."
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> *Id.* at 45-46.

Common Themes in the Cases

The ordinances in the above cases prohibited both aggressive panhandling and location-based panhandling, restrictions similar to sec. 24.12, MGO, and were all found to be content-based, because they prohibit speech about money but not other topics, or because they prohibit requests for an immediate donation but not a request for future donations.

In each case, the ordinance did not survive one of the prongs of "strict scrutiny", that is, either (a) the City could not identify a "compelling government interest" or (b) the City could not prove that the law was "narrowly tailored" and the "least restrictive means" of protecting the City's interest in public safety. It seems nearly impossible – absent some guidance from the courts -- to craft an ordinance that is the "least restrictive means" to achieve these interests. Under this standard, the law must be so tightly drafted that it is the ONLY way to prohibit the unwanted conduct. The courts thus far have provided no useful

[2] Our office also advised suspending enforcement of sec. 12.235, MGO, which regulates panhandling on highways. Because of the clear public safety involved with highway safety, we intend to propose a revision to this ordinance to remove the speech aspects of it, with the intent that it will withstand constitutional challenge.

guidance on meeting this test. Therefore, we conclude that until the case law changes, Sec. 24.12, MGO, likely would not survive constitutional challenge.

A common theme of the recent cases striking down aggressive or menacing panhandling laws are that such behaviors can be enforced with existing laws – making the panhandling law unnecessary. While the ability to enforce behavior through existing laws does not, in itself, make the panhandling law unconstitutional, the courts are using this as part of their "narrow tailoring" analysis under strict scrutiny. As the argument goes, a law against aggressive panhandling is not narrowly tailored to the particular conduct (aggressive behavior) if there is already another law that prohibits it (e.g., disorderly conduct.) Put another way, it is unnecessary to pass a law that targets the *speech* (asking for money) when you already have a law that prohibits the disorderly or dangerous *behavior*.

Another theme is that while the ordinance prohibits harassing or aggressive conversation about money, it does not prevent the very same aggressiveness when speaking about any other topic. A street preacher or a political advocate may follow and harass you while speaking about religion or politics, or sports, or any other topic. That is not illegal *per se*. They can also talk to you about these topics politely, near an ATM, intersection or other prohibited locations. But under sec. 24.12, MGO, a person cannot follow and harass you (or talk to you politely near an ATM) if the topic of conversation is, "Give me some money." The courts ask a simple question: why is it OK to harass somebody on the street about the Chicago Bears, or religion, or politics, but not about money? This is the heart of the concern about regulating speech according to the *content*– and this concern is likely to be upheld, if the U.S. Supreme Court continues on the path it has forged in *Reed*.

V. CONCLUSION.

Sec. 24.12, MGO, is similar to the ordinances that were ruled unconstitutional in *Browne*, *McLaughlin*, *Thayer* and both *Norton* cases. All of these cases sought to curtail panhandling in some way and all of them were ruled unconstitutional on grounds they were content-based restrictions on freedom of speech. When a government tried to show the panhandling law served a compelling state interest, they failed, either due from lack of evidence supporting the existence of a state interest or from the court not recognizing a proposed state interest. Even if a compelling interest like public safety was accepted, in no instance was the regulation found to meet the second prong of the strict scrutiny standard, being narrowly tailored and the least restrictive means of serving the governmental interest.

Therefore, we continue our advice to suspend enforcement of <u>all</u> subsections of sec. 24.12, MGO, as we most recently advised on January 7, 2016. MPD has removed these sections from the MPD bail book. We will continue to monitor developments in the law, and update you and modify our advice accordingly.

Unless or until we obtain better or different guidance from the U.S. Supreme Court or the Seventh Circuit, the City should continue to suspend enforcement of sec. 24.12, MGO.

CC: All Alders
Maribeth Witzel-Behl