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

February 26, 2002

OPINION 2002-03

TO: Mayor Susan J. M. Bauman
Members of the Common Council

FROM: Larry W. O'Brien, Acting City Attorney

SUBJECT: **Constitutionality of Sec. 25.10, MGO, Which Prohibits Loitering For Purposes of Illegal Drug Activity, in the context of disparate impact.**

You have asked whether Sec. 25.10, MGO, could withstand a constitutional challenge based upon the disproportionate impact enforcement of the ordinance has on the African American community. I believe that the ordinance would withstand such a challenge.

Presumably, the claim against the City would be an alleged violation of a person's right to equal protection of the law on grounds that African Americans are arrested for violations of Sec. 25.10, MGO, dramatically more often than Caucasian individuals. Disparate impact in and of itself does not lead to the conclusion that a law is unconstitutional. Applying traditional equal-protection analysis, case law establishes that "even if a neutral law has a disproportionately adverse impact upon a racial minority, it is unconstitutional ... only if that impact can be traced to a discriminatory purpose." U.S. v. Lattimore, 974 F.2d 971, 974 (8th Cir. 1992), citing Personnel Administrator of Massachusetts v. Fenney, 442 U.S. 256, 272, 99S.Ct. 2282, 2292 (1979). The phrase "[d]iscriminatory purpose ... implies that the decisionmaker, in this case [the common council and/or the police department], selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Id. at 279, 99 S.Ct. At 2296.

Sec. 25.10, MGO, clearly is neutral on its face and was carefully drafted so that it limits police discretion for the very purpose of avoiding arbitrary enforcement. There is no evidence that the common council had a discriminatory motive in mind when it passed this ordinance and there is no evidence to suggest that the police department had discriminatory motives in mind in their enforcement of this ordinance. In fact, there is ample evidence to the contrary. There is ample evidence that the common council and the police department were concerned with constitutional application of this ordinance and that they wanted to make certain that the ordinance was crafted in a way that it would withstand constitutional muster. The police department has repeatedly stated that this ordinance is a "tool" for them to use in areas of the City where there is considerable illegal drug activity and open-air drug markets.

To further assure non-discriminatory enforcement of Sec. 25.10, MGO, the police department requires officers to attend specific training regarding Sec. 25.10, MGO, (which is provided jointly by the police department and the City Attorney's Office) before they can enforce Sec. 25.10, MGO. The training sessions were generally 3 hours in length and discussed each element of the ordinance, what qualified as suspect behavior, what did not qualify as suspect behavior and the reasons therefore. There were also specific examples of various scenarios officers might encounter with discussion and analysis as to whether the ordinance would apply.

The policy of allowing only officers specifically trained under Sec. 25.10, MGO, to enforce Sec. 25.10, MGO, remains in place today and there are a limited number of police officers who are currently qualified to enforce this ordinance. This policy helps to assure that the ordinance is being enforced in a constitutional and nondiscriminatory manner.

The United States Supreme Court has made it clear that a racially disproportionate impact does not render official action unconstitutional. The Court has stated that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." Washington v. Davis, 426 U.S. 229, 242, 96 S.Ct. 2040, 2049 (1976). Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Village of Arlington Heights v. Metropolitan Housing Development Corp., 49 U.S. 252, 265 (1977).

The issue of equal protection has been raised repeatedly in the context of sentencing guidelines for crack cocaine. Statutory penalties for crack cocaine are much more severe than those for powder cocaine. The argument is that more African Americans are arrested for crack cocaine than whites and that more whites are arrested for powder cocaine than African Americans. In those cases, defendants raise the issue of equal protection on grounds that crack sentences disproportionately subject minorities to longer prison sentences than whites. The courts in the 7th Circuit have universally rejected these constitutional challenges. U.S. v. Booker, 73 F.3d 706 7th Cir. 1996). In U.S. v. Lattimore, 974 F.2d 971, (8th Cir. 1992), the 8th circuit dealt with this issue and found no discriminatory intent and no equal-protection violation regarding the disparate impact in sentencing for crack cocaine. The court did state that their holding was not to say that a racially disparate impact is not serious, rather, the court's job is to decide whether the sentencing guidelines or the statute run counter to equal protection principles in the constitutional sense. Id. at 974.

In Armendariz v. Penman, 31 F.3d 860 (9th cir. 1994), an equal protection claim was raised relative to the City of San Bernardino's code enforcement "sweeps" which was a stepped up code enforcement program devised to enhance code compliance and reduce crime. The city targeted various high crime areas for the sweeps. The plaintiffs alleged that their right to equal protection of the law was violated because their community was singled out arbitrarily, capriciously and maliciously for the code enforcement sweeps. The court stated that an equal protection claim could be established if the plaintiffs could show "that the City of San Bernardino's officials enforced the housing and fire codes in an arbitrary and invidiously discriminatory manner. Id. at 868, citing Sierra Lake Reserve v. City of Rocklin, 938 F.2d 951,

958 (9th cir. 1991). The court went on to state that "[a]lthough equal protection challenges to state action that does not 'trammel[ ] fundamental personal rights or implicate [ ] a suspect classification' receive only rational basis scrutiny. Armendariz at 868, citing Lockary v. Kayfetz, 927 F.2d 1150, 1155 (9th cir. 1990). Rational basis scrutiny requires only that the state articulate a "rational relationship" between its action and a "legitimate state interest." Armendariz at 868, citing New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976).

The Armendariz court determined that it was rational for the city of San Bernardino to target high crime areas for housing code enforcement sweeps in order to reduce blight and therefore crime. The court found that the plaintiffs did not state a claim for a violation of their rights under the equal protection clause. Armendariz at 868.

I do not believe that the disparate impact in the enforcement of Sec. 25.10, MGO, raises a constitutional concern.

_____

Larry W. O'Brien
Acting City Attorney

jaz:kak

CAPTION: Constitutionality of Sec. 25.10, MGO, Which Prohibits Loitering For Purposes of Illegal Drug Activity, in the context of disparate impact.

bcc: City of Madison Home Page – IS Simle and IS Sweeney (via e-mail attachment) with a copy to AT Group – minus this page
Central Opinion Book
Attorney Book
File