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

August 6, 1999

OPINION 99-009

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

FROM: Eunice Gibson, City Attorney

SUBJECT: **Constitutionality of Sec. 25.10, MGO, Which Prohibits Loitering For Purposes of Illegal Drug Activity**

You have asked my opinion as to whether or not Sec. 25.10, MGO, is constitutional, after the U.S. Supreme Court decision in Chicago v. Morales, 119 s. CT. 1849, 67 USLW 4415 (June 10, 1999). I believe Madison's ordinance is constitutional.

In Chicago v. Morales, a defendant had challenged a Chicago ordinance intended to prohibit loitering in public places by criminal street gang members. The U.S. Supreme Court held Chicago's ordinance unconstitutional. The ordinance violated the constitutional right to due process of law because it was impermissibly vague. 67 USLW at 4422. Madison's ordinance, on the contrary, is very specific.

The Chicago ordinance provided in relevant part:

> "(a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member **loitering** in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section."
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> "(l) **Loiter** means to remain in any one place **with no apparent purpose.**"
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This vague definition of "loiter" was fatal to the constitutionality of Chicago's ordinance. The justices who wrote separate opinions gave examples of its possibilities for unfair and

unconstitutional application to law-abiding activities.

Justice Stevens noted:

> ". . .It is difficult to imagine how any citizen of the City of Chicago standing in a public place with a group of people would know if he or she had an 'apparent purpose.'" 67 USLW at 4419.

and

> ". . .Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member." 67 USLW at 4420.

and

> "Ironically, the definition of loitering in the Chicago ordinance not only extends its scope to encompass harmless conduct, but also has the perverse consequence of excluding from its coverage much of the intimidating conduct that motivated its enactment. . . it has no application to loiterers whose purpose is apparent. . .." 67 USLW at 4420, 4421.

Justice O'Connor pointed out:

> ". . .the ordinance applies to hundreds of thousands of persons who are <u>not</u> gang members, standing on any sidewalk or in any park, coffee shop, bar, or 'other location open to the public'. . .." 67 USLW at 4421. (Emphasis in original.)

Vagueness may invalidate a criminal law for either of two independent reasons. **First,** it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; **second,** it may authorize and even encourage arbitrary enforcement. 67 USLW at 4419.

The Chicago definition of "loiter" was impermissibly vague on both counts. Not only did it forbid a great deal of harmless behavior, but it provided no guidance to police officers in the exercise of their discretion to order people to disperse or to arrest them. Such vagueness violates due process.

In contrast to that, Madison's ordinance provides as follows:

> "(3) It shall be unlawful for any person who loiters or drives in any public place in a manner and under circumstances manifesting the purpose of inducing, enticing, soliciting or procuring another to engage in illegal drug

activity.

(a) Among the circumstances which may be considered in determining whether such purpose is manifested are that the person:

1. Frequents, either on foot or in a motor vehicle, a known area of illegal drug activity;
2. Repeatedly beckons to stop or attempts to stop known drug sellers or purchasers or engages known drug sellers or purchasers in conversation;
3. Stops the motor vehicle the person is the operator of and sells or purchases or attempts to sell or purchase illegal drugs to or from a known drug seller or purchaser;
4. Transfers small objects or packages for currency in a furtive fashion or manifestly endeavors to conceal herself/himself or any object or package which reasonably could be involved in illegal drug activity;
5. Takes flight upon appearance of a police officer.

(b) The circumstance stated in (3)(a)1. or (3)(a)5. is not enough by itself to manifest the purpose of inducing, enticing, soliciting or procuring another to engage in illegal drug activity.

(c) The violator's conduct must be such as to demonstrate a specific intent to induce, entice, solicit or procure another to engage in illegal drug activity."

* * *

This language not only provides the kind of notice that will enable ordinary people to understand what conduct it prohibits, it also limits police discretion sufficiently to avoid arbitrary enforcement.

In Chicago v. Morales, the Supreme Court also cites cases where "loitering" ordinances have been held to be constitutional. For example, in Tacoma v. Luvene, 118 Wash. 2d 826, 827 P. 2d 1374 (1992) an ordinance similar to Madison's was upheld. It was not vague because it specifically defined the prohibited activity (loitering with purpose to engage in drug-related activities). Chicago v. Morales, 67 USLW at 4419, n. 25.

The Supreme Court also cited People v. Superior Court, 46 Cal. 3d 381, 394-395, 758 P. 2d 1046, 1052 (1988). That case upheld an ordinance forbidding loitering for the purpose of engaging in or soliciting a lewd act.* The California Supreme Court held that the ordinance was not vague,

*Madison has a somewhat similar ordinance. See Sec. 26.08, MGO. It prohibits loitering for purposes of prostitution.

because it required proof of specific intent to do an act already prohibited by law. Chicago v. Morales, 67 USLW at 4419, n. 25.

Although the U.S. Supreme Court did not mention it, the Wisconsin Supreme Court has also upheld an ordinance forbidding loitering for purposes of illegal drug activity. See Milwaukee v. Wilson, 96 Wis. 2d 11, 13, 291 N.W. 2d 452 (1980). Madison's ordinance is modeled on the Milwaukee ordinance approved in that case.

There is nothing in the U.S. Supreme Court's decision in Chicago v. Morales which would support a conclusion that Sec. 25.10, MGO, is unconstitutional. Rather, the opinions of the various justices all point to necessary elements that are contained in Madison's ordinance.

Eunice Gibson
City Attorney

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CAPTION: The recent decision of the U.S. Supreme Court in Chicago v. Morales does not raise questions about the constitutionality of Sec. 25.10, MGO, which prohibits loitering for purposes of illegal drug activity.

cc: City Clerk