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September 20, 2018

Memorandum

To: Ordinance & License Committee, Common Council
From: Brian Running
Re: Municipal Code §11.40, the panhandling ordinance

As I mentioned at a recent Council meeting, the ACLU recently sent us a letter stating their opinion that our panhandling ordinance is unconstitutional. Seven other Wisconsin cities got similar letters.

We have done our research, communicated with other city attorneys, and looked at this from every angle, and we have reached an inescapable conclusion: The ACLU is right, our ordinance doesn't pass muster under a couple of recent case decisions from the U.S. Supreme Court (*Reed v. Town of Gilbert*) and the 7th Circuit Court of Appeals (*Norton v. City of Springfield*). A number of other cities have repealed their panhandling ordinances for the same reason, notably the City of Madison. We also learned that many other cities in Wisconsin have never had a panhandling ordinance.

In a nutshell, our panhandling ordinance violates the First Amendment because it discriminates on the basis of the content of speech. The ordinance prohibits people from approaching others and asking for money, but doesn't prohibit people from approaching others and asking for the time, or directions, or any other information. It also doesn't prohibit people from approaching others and asking for money donations to the March of Dimes, or the MDA, or the Salvation Army, and so on. The difference between these examples is only in the subject matter of the speech, which makes it content-based discrimination. The government can't prohibit speech based on its content.

Before the recent U.S. Supreme Court case, there were distinctions drawn between regulations that controlled the subject-matter of speech (regardless of the viewpoint being expressed), and regulations that controlled the viewpoints being expressed. The Supreme Court eliminated that distinction and now says that any content-based regulation is unconstitutional.

In addition to looking at the panhandling ordinance, we have been working on a thorough revision of Municipal Code Chapter 27, the sign code, in response to the same Supreme Court decision, and that will be coming to O&L soon. We are thoroughly reviewing the remainder of the Municipal Code to see if there are any other ordinances that will need to be revised or repealed.

For reference, there have been only nine citations issued under §11.40 in the last two years, and a few of those were to repeat offenders. That's not many citations. In addition, the persons to whom the citations were issued are indigent, and are essentially immune to any kind of monetary penalty. As you know, money forfeitures are our only tool to enforce municipal citations. A \$187 ticket means nothing to these panhandlers, the forfeiture could be \$10,000 and it wouldn't make any difference. None of the nine citation recipients have paid their tickets, two of them served jail time instead of paying. Presumably, some of the recipients would be happy to go to jail. Based on this, it's reasonable to assume that a repeal of §11.40 is not going to result in much of a change in real life.

It's unfortunate that this issue has come up just as aggressive behavior by homeless people in the downtown has increased markedly. There is increased political pressure to increase enforcement against aggressive people downtown, so the idea of repealing an ordinance aimed at that sort of aggressive behavior is not well-timed. However, we have no choice in this case. It's not just a hypothetical that we will be sued if we don't repeal §11.40. Not only might the ACLU take action, but it's worth noting that the lawyers who sued the City of Springfield, Illinois over their panhandling ordinance are the same lawyers that sued the City of Waukesha for its sex-offender ordinance. There are lawyers watching, and they will sue.

Other cities have responded to this situation by passing laws that focus on the location of the panhandling, rather than the panhandling itself. For instance, cities where panhandlers in the medians at intersections are a nuisance have passed laws prohibiting people from being in medians. If we see an increase in panhandling activity after the repeal of §11.40, and we are able to craft an ordinance that addresses the issue in a content-neutral way, we can look at that. And, if panhandling behavior becomes too aggressive, other laws such as disorderly conduct, assault, and battery will still apply.