

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

MEMORANDUM

TO: Common Council

FROM: Doran Viste, Assistant City Attorney

DATE: May 18, 2021

RE: File No. 65316 (Substitute Resolution Prohibiting the Eviction of Temporary Encampments at Reindahl Park)

On May 17, 2021, Alder Bennett prepared a substitute resolution to File No. [65316](#), which substitute was considered and recommended for approval by the City-County Homeless Issues Committee at its meeting that evening. This substitute will be before the Council for consideration at the May 18, 2021 meeting.

It is the City Attorney's Office's opinion that there are several legal considerations that the Council should take into account before taking any action on this resolution. Staff also believe that a referral of this Substitute to the Board of Health, the Plan Commission and the Board of Parks Commissioners would be appropriate.

The purpose of this memo is to outline some of these concerns. However, due to the time constraints involved, this memo is not an exhaustive look at the issues raised by this substitute resolution.

Background

On May 6, 2020, the Mayor issued [Emergency Order #2](#). This Order was issued in the early days of the pandemic to allow for City staff to create temporary permissible encampments (TPEs) in City parks and greenways where those persons experiencing unsheltered homelessness could temporarily reside, consistent with Center for Disease Control (CDC) [interim guidance](#) on the issue. Within these designated areas, certain City ordinances that would normally prohibit such encampments would not be enforced, including ordinances prohibiting lodging in the parks, being in parks after closure, requiring a campground license, and zoning restrictions. The Mayor was given the authority to revoke a TPE designation upon certain conditions. Upon revocation of a TPE designation, occupants would have five days to remove themselves and their belongings from the site, after which the City could proceed to enforce the camping related ordinances and apply the City's lost and abandoned property procedures under MGO Sec. 8.44.

On January 5, 2021, the Council adopted RES-21-00036 (File No. [60412](#)), confirming Emergency Order #2.

Since the issuance of Emergency Order #2, only two TPEs were created: one at Reindahl Park and one in a greenway at Starkweather Creek. The large encampment at McPike Park was not a TPE. The TPE designation at Reindahl was revoked, based upon the procedures in Emergency Order #2 and RES-21-00036, on May 9, 2021.

Substitute Resolution

On May 4, 2021, Ald. Bennett introduced a resolution to prohibit the eviction of temporary encampments in Reindahl Park (File No. [63516, ver 1](#)). On May 17, 2021, Ald. Bennett prepared a [Substitute Resolution](#) addressing this subject matter. Under the Substitute Resolution, the Council would be “updating TPE criteria and permitting the continued use of Reindahl Park until a suitable alternative site is established”. Among the changes being proposed by this resolution would be to amend the Council’s January 5, 2021 resolution to update the criteria applicable to TPEs, direct staff to identify additional sites for TPEs, and suspend enforcement of camping related ordinances at Reindahl Park until alternative sites are identified and approved by the Common Council.¹

Among the changes being made to the TPE program by the Substitute Resolution are the following:

- Putting the authority to designate a TPE site under the Common Council, instead of City staff.
- Allowing TPEs to be created anywhere in the City, not just within City parks and greenways. This would allow a TPE to be created on private land.
- Allowing TPEs to be created even if the existing COVID-19 public health emergency is ended. This would untether the TPE program from the current public health emergency and make it a permanent program.
- Allows the Council to revoke a TPE at any time, instead of allowing the Mayor to revoke it, subject to certain conditions.
- Requires the provision of certain basic services at TPEs, including accessible toilets, running water, drinkable water, trash receptacles and disposal services, lighting, and outreach services.

Potential Legal Issues

The proposed Substitute raises some legal issues that should be considered by the Council in its deliberations. There may be additional legal and/or policy issues raised by the Substitute that are not addressed herein due to the abbreviated time we have had to review and analyze the Substitute and to consult with appropriate City staff.

¹ While not addressed by this memo, it should be noted that the Original and Substitute Resolution both assert that the City “served an eviction notice to persons living in temporary encampments” at McPike Park and Reindahl Park and ordered them to vacate pursuant to MGO Sec. 8.44. This is not correct. An eviction is a legal proceeding tied to a legal right to occupy a premises. There has never been a legal agreement between the City and the campers at the parks, nor does MGO Sec. 8.44 provide for the issuance of any sort of “order to vacate” City premises. Rather, the City informed the occupants that the City’s existing camping-related ordinances would be enforced and that any property remaining after 5 days would be removed under the provisions of Sec. 8.44. Accordingly, the Substitute Resolution misstates these facts.

- Legality of campgrounds.
 - Campgrounds are regulated by State law and all campgrounds must be licensed and meet certain minimum criteria (Wis. Stat. Sec. [97.67](#) and Wis. Admin Code Ch [ATCP 79](#)). PHMDC has been designated by the State as the local regulatory body enforcing the State law on campgrounds. MGO 7.53 is the City's campground license ordinance, but ultimately, the legality of a campground is a State law issue.
 - When preparing the initial order last year, PHMDC raised concerns about the City establishing unlicensed campgrounds—but were assured that these would only be temporary places where the CDC guidance on dealing with homeless populations could be followed during the pandemic.
 - The TPE program established by Emergency Order #2 was never meant to be permanent or allow private unlicensed campgrounds. It was expressly tied to the COVID-19 public health emergency and the CDC guidance. Nor was it the City's intent to create licensed campgrounds.
 - The Substitute requires amenities that actual campgrounds are required to have, such as running water, drinking water, and bathrooms. This could result in the creation of sites that may look more like licensed campgrounds but have yet to be licensed by the State or had full inspections and necessary review from PHMDC.
 - As such, the Substitute appears to exempt certain types of campgrounds (TPEs approved by the Council) from State law by Council decree. However, the Council likely cannot exempt the City or private parties from these State laws. Moreover, PHMDC and DATCP could still enforce State laws regarding campgrounds, putting these TPEs potentially in conflict with State law. If the City permits camping on its property without establishing a legal campground, the City could be issued citations and forfeitures as owner of the property.
 - This resolution, by untethering TPEs from the COVID-19 public health emergency and the CDC guidance and allowing them on public or private lands, will inevitably set up a confrontation with PHMDC and possibly the State, and create more confusion on this issue. If the City wants to create or allow campgrounds, it would be preferable to follow the existing laws on doing so.
- Possible conflicts with the authority of the Board of Parks Commissioners
 - The Board of Parks Commissions has unique statutory authority over the use and enjoyment of the City's parks. Under Wis. Stat. Sec. [27.08\(2\)\(a\)](#), the Board has the following authority:

To govern, manage, control, improve and care for all public parks, parkways, boulevards and pleasure drives located within, or partly within and partly without, the corporate limits of the city, and secure the quiet, orderly and suitable use and enjoyment thereof by the

people; also to adopt rules and regulations to promote those purposes.

- The Substitute gives the Council the sole authority to create TPEs, including in City parks, even beyond the COVID-19 public health emergency. There is no recognition of the Board's unique authority as it relates to encampments in the parks.
 - When not exercising its emergency powers under MGO Sec. 3.19(2), the Council likely cannot create TPEs in the parks without the approval of the Board of Parks Commissioners. It is not known whether the Board will approve of TPEs at Reindahl or elsewhere in the City's park system, but there is significant potential that the Council's determinations will be at odds with the Board's, setting up conflicts and uncertainty in the future.
- Conflicts with the Zoning code
 - The City's zoning code does now include camping as a permitted use in any zoning district.
 - The Substitute, by untethering TPEs from the public health emergency and making them applicable to all public and private lands, arguably crafts a zoning exemption, to all zoning districts in the City, making temporary permanent encampments a conditional use City-wide.
 - A zoning amendment must follow State law requirements, which includes submitting the proposed amendment to the Plan Commission and holding a public hearing. The Substitute provides for no input of the Plan Commission in the determination to create a TPE, nor does it require a public hearing or provide for any due process rights for those aggrieved by the Council's determination.
 - Following through on the Substitute's procedures, especially on private property after the public health emergency is over, could subject the City to a mandamus action in Circuit Court with neighbors of the TPE suing the City to enforce its own zoning code.
 - Authority to act when not tied to emergency
 - Emergency Order #2 was issued by the Mayor under the City's emergency powers authority provided to her under RES-20-00286 ([File 60077](#)), to "issue orders to suspend the operation of, amend, create, or adopt city policies or ordinances, and suspend enforcement actions, that are not in conflict with existing state or federal laws, in order to mitigate the effects of the coronavirus pandemic on city workers, residents of, and businesses within the City of Madison."
 - By the time the Council approved Emergency Order #2 on January 5, 2021, the original emergency declaration expired.
 - The Council's approval of Emergency Order #2 on January 5, 2021 arguably was done under its own emergency authority in MGO Sec. 3.19 during the duration of the COVID-19 pandemic.

- The Substitute would strip away the link between the TPE orders and the COVID-19 public health emergency and place the creation, regulation and elimination of TPEs solely under the Council's purview, including the non-enforcement of various camping relating ordinances in the City.
- It is questionable what authority the Council would have to create a TPE program, by resolution, that is not tied to an ongoing emergency. If the Council wants to alter certain ordinances or create exceptions thereto under non-emergency situations, the Council can do so by amending the ordinances. Otherwise, a resolution cannot amend an ordinance.

The foregoing lays out some of the issues which the Council should consider when the Substitute Resolution comes before it this evening. As noted above, City staff are suggesting that this matter be referred to the Board of Health, the Plan Commission and the Board of Parks Commissioners so that they may have the opportunity to consider this matter and all relevant legal and policy issues, and make recommendations which are under their jurisdiction.

/s/ *Doran Viste*

Doran Viste, Assistant City Attorney