

# CITY OF MILWAUKEE

Form CA-43

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May 31, 2005

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Alderman Robert Donovan  
Chair, Public Safety Committee  
City Hall, Room 205

Re: Enhanced Forfeitures for Violations Committed Against Certain People or Property

Dear Alderman Donovan:

On May 26, 2005, you asked this office to review Common Council File Number 041646, "An ordinance prescribing enhanced forfeitures for violations committed against certain people or property," for legality and enforceability. This ordinance would allow the maximum forfeiture for any violation of Chapters 105, 106, or 110 to be increased by up to \$5,000 if the actor who committed the violation intentionally selected the victim of the violation, "in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person...whether or not the actor's belief or perception was correct."

While this proposal, in our opinion, does not violate the constitution, we believe that there is an almost insurmountable problem. The violation of a City ordinance is *not* a crime, and therefore, cannot be "punished" by a fine. Rather, ordinance violations are "punished" by the imposition of a forfeiture, which is intended to compensate the City for the cost of enforcement. This is the essential distinction between crimes and ordinances.

This ordinance was extensively modeled on Wis. Stat. § 939.645. That statute was challenged on first amendment grounds in a case that was ultimately heard by the United States Supreme Court. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). In that

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case, the Court ruled that § 939.645, Stats., did not violate the defendant's free speech rights because it punished conduct rather than speech. *Id.* at 487. Moreover, the Court concluded that the statutory enhancement did not have an unconstitutional chilling effect on free speech. *Id.* at 488-89.

Therefore, we can conclude that the proposed ordinance would likely survive a first amendment challenge. It should be noted that enhancers of this type in other states have been challenged on grounds not reached by the *Mitchell* Court. For instance, we were able to locate challenges based on due process, vagueness and overbreadth, and equal protection grounds. Overall, however, such challenges have not been successful.

We note, however, that one of the reasons the United States Supreme Court upheld § 939.645, Stats., was that the state was able to demonstrate that "bias-inspired conduct" inflicted greater harm than the same conduct not so inspired. *Mitchell*, 508 U.S. 487-88. The desire to redress this greater harm provided a rational basis to treat bias-inspired conduct differently. *Id.* at 488. Therefore, as we would advise you prior to the adoption of any ordinance which creates classifications, we encourage you to develop a record which demonstrates the need for the distinction. In the case of this proposed ordinance, such a record might establish, for instance, that "bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." *Id.*

Apart from any concern as to the constitutionality of such an enhancement is the question of whether the City has the authority to enact such an enhancement. As a general matter, the City does have the authority to enact ordinances proscribing conduct that is prohibited under state law, so long as the ordinance does not conflict with state law on the subject. *Hack v. Mineral Point*, 203 Wis. 215, 220 (1931) *overruled on other grounds by State ex rel. Keefe v. Schmiede*, 251 Wis. 79, 85-86 (1947). As previously stated, the proposed ordinance largely tracks the language employed in the state statute.

One area where the ordinance, of necessity, diverges from the statute is in the amount of the enhancement. The statute provides three differing enhancements of both the applicable fine and the term of imprisonment depending on whether the

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underlying violation was a felony, a Class A misdemeanor, or a different class of misdemeanor. In contrast, the proposed ordinance provides a uniform \$5,000 forfeiture enhancement regardless of the underlying violation. This divergence raises two possible concerns.

The first concern is that an ordinance may not prescribe a greater forfeiture than the fine the state imposes on the same conduct. *Madison v. McManus*, 44 Wis. 2d 396, 402 (1969). The proposed ordinance does not present this possibility because each of the three statutory enhancements calls for at least \$5,000 increase in the imposed fine.

The second concern, the distinction between a fine and a forfeiture, is more problematic. Section 939.12, Stats., provides:

A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime.

As the Wisconsin Supreme Court noted:

Wisconsin municipalities cannot create crimes; therefore they cannot impose either a fine or imprisonment as a sanction for violation of a municipal ordinance.

*State v. Thierfelder*, 174 Wis. 2d 213, 222 (1993) (citation omitted). The Court explained the distinction between fines and forfeitures this way:

Punishment for a crime whether by imprisonment or fine is an end in itself and has for its object punishment and the deterrent effect. Forfeiture for an ordinance violation is not a criminal penalty and cannot be justified on the ground of punishing people. In theory at least, forfeitures are to pay the cost of efficiently enforcing...ordinances and regulations.

*McManus*, 44 Wis. 2d at 402.

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The proposed ordinance is thus vulnerable to a challenge that some amount of the enhancement is "so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *Thierfelder*, 174 Wis. 2d at 228 (citation omitted). Thus, unless some evidence can be introduced which would establish that bias-inspired conduct results in much greater enforcement costs, (a \$5,000 enhancement would often constitute a forfeiture ten times higher than the maximum forfeiture for the underlying offense), we do not believe this proposal is legal and enforceable.

Finally, we have some suggestions regarding the draft. The word "forfeitures" in 50-15-1 should be changed to the singular "forfeiture" in order to agree with the verb "is." We also suggest that 50-15-3 be amended to provide: "This section provides for the enhancement of the forfeiture applicable for the underlying code violation. This section shall not apply except upon proof of all of the issues specified in sub 1." The use of "forfeiture" rather than "penalty" is for the sake of consistency, and the amendment of the second sentence is in recognition of the lack of juries in municipal court.

We hope this answers your question. Should you require additional information, please do not hesitate to contact us.

Very truly yours,

  
GRANT F. LANGLEY  
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1033-2005-1484:93614

c: Barry Zalben, Ronald Leonhardt



Office of the City Clerk

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City Clerk

**Carolyn Hill Robertson**  
Deputy City Clerk

May 24, 2005

Grant Langley, City Attorney  
City Hall, Rm. 800  
200 E. Wells St.

Dear Mr. Langley:

Attached, please find a copy of Common Council File Number 041646, An ordinance prescribing enhanced forfeitures for violations committed against certain people or property. This file is currently pending before the Public Safety Committee. Given the importance of this matter, I would ask your office to opine as to the legality and enforceability of this ordinance, as drafted, prior to its passage by the Common Council. It would be extremely helpful to the members of the Public Safety Committee if we could have this opinion in hand by the time of our meeting on June 2, 2005.

Should you have any questions, please do not hesitate to contact me.

Thank you very much for your assistance in this matter.

Sincerely,

Ald. Robert Donovan, Chair  
Public Safety Committee

Cc: James Owczarski