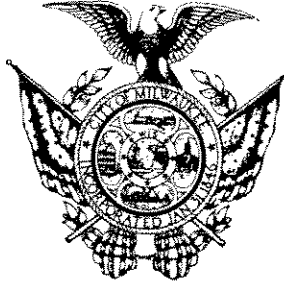


# CITY OF MILWAUKEE

Form CA-43

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October 12, 2005

To the Honorable Common Council  
of the City of Milwaukee  
Room 205 – City Hall

Attn: Ron Leonhardt

Re: CC File 050770/An ordinance relating to roadside memorials

Dear Council Members:

We are returning the above file without approval as to legality and enforceability.

## The Proposed Ordinance

The proposed ordinance defines “roadside memorial” as items commemorating the site of a fatal accident or occurrence. Other types of memorials (for a fallen soldier in Iraq, for example), are not included in the definition.

The proposed ordinance appears to permit the placement of roadside memorials within the boundaries of any public streets, sidewalks or walkways for 14 or fewer days from the date of the fatal accident or occurrence.<sup>1</sup> This blanket permission is granted without regard to the size of the memorial, the materials it contains (sharp objects, for example), or whether it obstructs the use of the thoroughfare. It also permits their placement in any street, sidewalk, or roadway, with no exceptions or review as to whether it is safe or practical at a particular location. Any message contained in the memorial is permitted, regardless of content.

The proposed ordinance requires DPW to dismantle and discard the memorial “after 30 days” from the accident or occurrence. The ordinance does not set an outer limit; under this unclear

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<sup>1</sup> We say it “appears” to permit placement of memorials because the wording is ambiguous. It states that no roadside memorial may be “left” (by whom?) for more than 14 days, implying, but not specifically stating, that the memorials may be “left” for fewer days without consequence.

Honorable Common Council  
October 12, 2005  
Page 2

wording, DPW could leave a memorial in place for months without violating this provision. It also requires DPW to “discard” all items, even those of value.

### **Current Ordinances**

Currently, as a matter of practice, even though prohibited, the placement of roadside memorials have not resulted in the issuance of citations, and an extended period of time generally passes before DPW is notified and they are removed.

Existing ordinances completely prohibit placement of any items on City streets and sidewalks unless they are explicitly listed in § 115-32, MCO. Section 115-32-1-i permits “other obstructions of a temporary nature permitted by the commissioner [of public works] or the common council.” We know of no temporary permits of this type issued in a blanket fashion as is contemplated by the proposed ordinance – where there are no safety or aesthetic standards whatsoever (size, composition, placement), and no review by a responsible public official before approval.

Section 244-18, MCO states that it is unlawful for anyone, other than a government employee in the performance of a public duty, to place, paste, or fasten temporary signs or banners on any curb, streetwalk, public thoroughfare surface, pole, tree, public building, etc., except as may be permitted by the Code. Thus, no types of public speech or advertisements are officially permitted to be affixed to city poles or buildings.

### **Legal Analysis**

A federal court in Florida ruled that an ordinance prohibiting temporary and permanent signs from being placed on public property, but exempting (thus, permitting) roadside memorials and political signs, was unconstitutional. *Coral Springs Street Systems, Inc. v. City of Sunrise*, 287 F. Supp. 2d 1313 (S.D. Fla. 2003), reversed on other grounds, 371 F.3d 1320 (11<sup>th</sup> Cir. 2004). The district court relied upon *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed. 2d 800 (1981), in which the United States Supreme Court ruled that a city may not choose among different forms of noncommercial speech and favor some forms over others. To do so, said the Supreme Court, violates the First Amendment. 287 F. Supp. at 1318.

On appeal, the Eleventh Circuit Court of Appeals found that most of the issues had been mooted because the City of Sunrise had subsequently changed its sign ordinances; however, the Court of Appeals noted that the portion of the sign ordinance containing the exemption for roadside memorials was not changed, and the Court did not disagree with the lower court’s conclusion.

Honorable Common Council  
October 12, 2005  
Page 3

While the motivation behind the expression of grief in a roadside memorial is very understandable, City officials are bound to comply with the provisions of the First Amendment, which prohibit the city from allowing one kind of noncommercial speech on its property, and not another. A legal challenge to this proposed ordinance may be successful, insofar as it officially and formally allows people to put items and signs in the roadway or sidewalk, or affix them to City poles, in order to express their thoughts on a death at that site, but for no other purposes.

Even if there were no constitutional issues relating to the legality of the proposed ordinance, there are other concerns with the manner in which the ordinance is written. The proposed ordinance contains no standards to define where the memorials can and cannot be placed, how large they can be, or what materials are prohibited. DPW would have no authority to remove any memorial sooner than 30 days.

#### RECOMMENDATIONS

If the intent of this proposal is to have DPW remove memorials if they have been there longer than 30 days, an ordinance (or internal policy) can be drafted to require that DPW remove all obstructions that are in violation of current ordinances, including roadside memorials, no later than one month of DPW's being notified of their existence. Obviously, even though these memorials are not currently allowed on city property, their removal has not been a priority for busy DPW crews, so that, as a matter of practice, they will remain in place for a period of time.

If the intent is to officially permit memorials on city property, section 115-32 must be amended to comply with the First Amendment, subject to reasonable time, place, and manner restrictions.

Very truly yours,



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LUB:bl

c: Mr. Barry Zalben  
Alderman Mike McGee, Jr.

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