

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

MEMORANDUM

TO: Mayor, Common Council

FROM: Doran Viste, Assistant City Attorney

DATE: June 4, 2021

RE: Temporary Permissible Encampment Order Status

On May 6, 2020, the Mayor issued [Emergency Order #2](#) (the "TPE Order"). The TPE Order was issued in the early days of the pandemic to allow 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. On January 5, 2021, the Council adopted RES-21-00036 (File No. [60412](#)), confirming the TPE Order. There is a pending resolution (File No. [63516](#)) that would amend the TPE Order. The purpose of this memo is to outline the current status of the TPE Order.

It is the City Attorney's Office's opinion that, with the expiration of all local public health orders and emergency declarations related to the COVID-19 pandemic, the TPE Order has expired in part. No additional TPEs can be created under the process that was used, and the City's ordinances are once again fully enforceable within designated TPEs. Revoking and winding down, or continuing to wind down, any TPEs¹ may continue as provided for under the TPE Order, but any additional efforts to allow for such temporary encampments must be done by Ordinance amendment.

¹ There are only two remaining TPEs, one in Starkweather Park and the other in the City-owned Starkweather greenway. The TPE at Reindahl Park has already been revoked, although the City has halted its efforts to break-up the encampment.

History of Emergency Declarations and Public Health Emergency Orders

On March 23, 2020, the Mayor declared a state of emergency in the City of Madison due to the COVID-19 pandemic, pursuant to the emergency powers granted to her under Wis. Stat. § 323.11² and 323.14(4)³ and MGO Sec. 3.19⁴.

Subsequently, on March 31, 2020, the Council adopted RES-20-00286 ([File 60077](#)), formally declaring a state of emergency due to COVID-19 in the City of Madison pursuant to Wis. Stat. § 323.11 and MGO Sec. 3.19. The declaration of this state of emergency expired on June 2, 2020.

While the City has taken numerous official and administrative actions in response to the ongoing pandemic over the last 15 months, no further City emergency declarations have been made by the Mayor or the Council. Rather, since May 18, 2020, Public Health Madison & Dane County (PHMDC) issued a series of 16 separate emergency orders, under the authority contained in Wis. Stat. § 252.03⁵, to prevent, suppress and control the spread of COVID-19 in the community. Effective June 2, 2021, PHMDC's emergency

² Wis. Stat. § 323.11 reads: "The governing body of any local unit of government may declare, by ordinance or resolution, an emergency existing within the local unit of government whenever conditions arise by reason of a riot or civil commotion, a disaster, or an imminent threat of a disaster, that impairs transportation, food or fuel supplies, medical care, fire, health or police protection, or other critical systems of the local unit of government. The period of the emergency shall be limited by the ordinance or resolution to the time during which the emergency conditions exist or are likely to exist."

³ Wis. Stat. § 323.14(4) reads, in relevant part:

"(4) Powers during an emergency.

(a) The emergency power of the governing body conferred under s. 323.11 includes the general authority to order, by ordinance or resolution, whatever is necessary and expedient for the health, safety, protection, and welfare of persons and property within the local unit of government in the emergency....

(b) If, because of the emergency conditions, the governing body of the local unit of government is unable to meet promptly, the chief executive officer or acting chief executive officer of any local unit of government shall exercise by proclamation all of the powers conferred upon the governing body under par. (a) or s. 323.11 that appear necessary and expedient. The proclamation shall be subject to ratification, alteration, modification, or repeal by the governing body as soon as that body can meet, but the subsequent action taken by the governing body shall not affect the prior validity of the proclamation."

⁴ MGO Sec. 3.19 read, in relevant part:

"(1) Notwithstanding any other provision of law to the contrary the Common Council is empowered to declare, by ordinance or resolution, an emergency existing within the city whenever conditions arise by reason of war, conflagration, flood, heavy snow storm, blizzard, catastrophe, disaster, riot or civil commotion, acts of God, and including conditions, without limitation because of enumeration, which impair transportation, food or fuel supplies, medical care, fire, health or police protection or other vital services of the City. The period of the emergency shall be limited by the ordinance or resolution to the time during which the emergency conditions exist or are likely to exist.

(2) The emergency power of the Common Council conferred under Subsection (1) includes the general authority to order, by ordinance or resolution, whatever is necessary and expedient for the health, safety, welfare and good order of the city in the emergency....

(3) If, because of the emergency conditions, the Common Council is unable to meet with promptness, the Mayor or, in the event of her/his inability to act, the president of the Council or other successor as determined under Section 3.02(3), shall exercise by proclamation all of the powers conferred upon the Common Council under Subsec. (1) or (2) which within the discretion of the Mayor or the Mayor's successor appear necessary and expedient for the purposes herein set forth. The proclamation shall be subject to ratification, alteration or repeal by the Common Council as soon as the Common Council can meet, but the subsequent action by the Common Council shall not affect the prior validity of the proclamation."

⁵ Wis. Stat. § 252.03(2) reads "Local health officers may do what is reasonable and necessary for the prevention and suppression of disease; may forbid public gatherings when deemed necessary to control outbreaks or epidemics and shall advise the department of measures taken."

orders have expired and there no longer remains any local, state or national state of emergency within the City related to the COVID-19 pandemic.

The TPE Order

The [TPE Order](#) was originally issued by the Mayor on May 6, 2020 based upon the legislative authority granted to her under the Council's original emergency declaration. In the emergency declaration, the Mayor was specifically granted the authority 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." The TPE Order did this by suspending enforcement of certain camping-related ordinances⁶ in specified areas, subject to various conditions. The TPE Order was submitted to the Council for approval on May 5, 2020, but was not adopted by the Council until January 5, 2021.⁷ By that date, the original emergency declaration had expired, although PHMDC's emergency orders remained in place.⁸

Under the Council's resolution adopting the TPE Order, the Council authorized the use of City property by those experiencing unsheltered homelessness during the COVID-19 pandemic under specific conditions. Based upon the authority underlying the TPE Order, and the wording of the Order itself, with the expiration of all public health orders and emergency declarations, some of these conditions are no longer applicable.

- Under condition 1 of the TPE Order, City staff were authorized to designate areas as TPEs under certain criteria. However, this authorization was only to be "allowed during the City's declared COVID-19 public health emergency." The last public health emergency declaration expired on June 2, 2021. Hence, City staff can no longer designate areas as TPEs under the TPE Order. Therefore, no new TPEs may be created as of June 2, 2021 under the TPE Order.
- Under condition 2 of the TPE Order, certain ordinances are not to be enforced within designated TPEs "during the City's declared COVID-19 public health emergency". As there are no longer any public health emergencies in place, this

⁶ The TPE Order temporarily suspended the enforcement of the following ordinances within designated TPEs: Sec. 7.53, requiring a campground license; Sec. 8.21, park closure hours; Sec. 8.265, prohibition on lodging in parks; Sec. 8.40, prohibition on camping in conservation parks; and Chapter 28, the City's zoning code, which generally does not allow camping on any zoning lot.

⁷ The delay in the Council's approval of the TPE Order was due, in part, to delays in the meeting schedule of the City-County Homeless Issues Committee, the lead referral, due to the pandemic's impact on the City's public meetings. The City-County Homeless Issues Committee met on March 3, 2020, but did not hold its first virtual meeting under the City's revised virtual committee procedures until October 19, 2020. In addition, a separate resolution was introduced on October 6, 2020 that would have rescinded the TPE Order altogether (File No. [62393](#)). An amended version of that resolution was eventually placed on file on January 5, 2021 at the same time the TPE Order was approved.

⁸ There exists an argument that by the time the Council acted on January 5, 2021 to approve the TPE Order that its action was moot as the City's public health emergencies and declarations had long since expired and that this was neither a new emergency declaration nor an exercise of PHMDC's statutory authority. That question was not asked at the time and the purpose of this memo is not to examine this issue, but only to address the current status of the TPE Order. The legality of the Council's January 5, 2021 resolution approving the TPE Order is therefore assumed.

portion of the TPE Order is no longer in effect, meaning that the City's camping, park use and park closure, and zoning related ordinances are in effect again, even in areas that have been designated as TPEs. Therefore, as of June 2, 2021 and the expiration of the last public health order, occupants of existing TPEs, and the City itself, are no longer exempt from the specified ordinances within designated TPEs.

- Under conditions 3 and 4 of the TPE Order, the Mayor may revoke a TPE designation under certain conditions, at which point certain processes are required to end the encampment and address property left behind. These procedures were not conditioned upon the existence of a public health order. As such, under Section 6 of the TPE Order, they still are in effect until such time as either the Mayor ends the TPEs or the Council takes further action. This means that the Mayor can still terminate any TPE's existing on June 2, 2021, subject to the specified procedures, and staff may proceed as directed under the TPE Order to remove property from the location.

Thus, based upon the underlying legal foundations for the TPE Order and the conditions imposed by the Council when the TPE Order was approved, along with the expiration of all public health orders and emergency declarations related to COVID-19 as of June 2, 2021, no new TPEs can be created, the City's ordinances are fully enforceable within any remaining TPEs, and any remaining TPEs may be revoked by the Mayor and cleaned up by staff following the procedures outlined in the TPE Order.

Impact of the End of the Health Orders on the Pending Resolution

On May 18, 2021, hours before the Council was to consider a pending resolution that would amend the TPE Order (File No. [65316](#)), PHMDC announced that it would be ending all public health orders on June 2, 2021. At that night's Council discussion on the pending resolution, it was not yet known how this change in conditions would impact the pending resolution or the TPE Order. The resolution was ultimately referred to other Committees for further input.

As noted above, with the expiration of all health orders and emergency declarations, the TPE Order has already largely expired by its own terms. No new TPEs can be created and the City's ordinances are once more effective within the encampments, both against the occupants of the encampments and the City itself. Existing TPEs would still be subject to the revocation and clean-up process, but it is fair to say that the City has returned to the status quo that existed before the emergency orders, where encampments on public property are illegal and subject to enforcement and removal, even if enforcement and removal itself is seen as a last resort.

In looking at the pending substitute resolution, there are problems that exist due to the end of the public health orders and the end of sections 1 and 2 of the TPE Order. Specifically, the pending resolution directs staff to identify one or more TPE locations to accommodate those persons at the Reindahl Park TPE. However, staff cannot identify new TPE locations because TPEs are no longer allowed under the TPE Order. In

addition, the pending resolution states that the City will continue to suspend enforcement of ordinances at the Reindahl TPE until a new TPE site is located and approved by the Council. As noted above though, no new TPE site can be located, meaning that this condition cannot be met. In effect, this would mean a permanent suspension of certain ordinances at the Reindahl Park TPE, even though that provision of the original TPE Order is no longer in effect. Finally, the pending resolution would give the Council the authority to create and revoke TPEs, regardless of whether there is a public health emergency in place. This change would, in effect, allow the Council to exercise emergency powers in the absence of an emergency declaration. If the Council wants to grant itself these powers and suspend or alter the applicability of certain ordinances at Reindahl Park, or elsewhere, on a permanent or limited basis, then, in the absence of a public emergency and the exercise of its statutory and ordinance emergency powers, the Council will have to amend the ordinances themselves.⁹ A resolution cannot amend an ordinance or grant powers to the Council beyond those delegated to it by State statute or City ordinance.

Conclusion

The TPE Order was originally issued under the exercise of the Mayor's emergency powers granted by the City's original declaration of a state of emergency. That emergency declaration expired on June 2, 2020. One year later, on June 2, 2021, the last of PHMDC's public health orders related to the COVID-19 pandemic also expired, leaving no ongoing emergency or public health declaration related to COVID-19 within the City. Based upon the legal authority used to issue the TPE Order, and the terms of the TPE Order itself, the TPE Order is largely no longer in effect. No new TPE's may be approved, and the City's camping-related ordinances may be enforced against persons in the encampments again. However, the City does need to follow the procedures to revoke and clean-up encampment sites. While there is a pending resolution that would seek to modify the TPE Order, those changes, since they no longer have the support of any sort of declared emergency, should be undertaken by ordinance amendments, not by resolution.

*/s/ **Doran Viste***

Doran Viste, Assistant City Attorney

Encl.

⁹ As was discussed in my May 18, 2021 [Memo](#) to the Common Council that is attached to the pending resolution, pursuant to the State law requirements on the regulation of campgrounds, the City is subject to State laws and [regulations](#) on campgrounds. In creating or allowing for encampments, the City may have to obtain a campground license if the City intends to operate a campground offering four or more campsites, and getting a license would require the City to meet the minimum campground standards, which include the following: having an operator; providing drinking water and male and female toilets within 400 feet of campsites; meet the density requirements of no more than 20 campsites per acre and 6 persons per site; meet the distance requirements of 10 feet between sites; refuse services; campfire limitations; and a campground register. The Council cannot avoid these requirements by ordinance.



Legislation Details (With Text)

File #: 60077 **Version:** 3 **Name:** Declaring a State of Emergency for the City of Madison

Type: Resolution **Status:** Passed

File created: 3/23/2020 **In control:** COMMON COUNCIL

On agenda: 3/31/2020 **Final action:** 3/31/2020

Enactment date: 4/3/2020 **Enactment #:** RES-20-00286

Title: Declaring that a state of emergency is hereby in existence for the City of Madison pursuant to Wis. Stats. § 323.11 and Madison General Ordinances Section 3.19.

Sponsors: Satya V. Rhodes-Conway

Indexes:

Code sections:

Attachments: 1. Proclamation of Emergency - 32320, 2. Emergency Proclamation Memo from Mayor 32320, 3. Emergency Orders-Projected Impact Summary.pdf, 4. 60077 v2.pdf, 5. 60077_v3_Final.pdf, 6. Emergency Order

Date	Ver.	Action By	Action	Result
3/31/2020	1	COMMON COUNCIL	Adopt Alternate	Fail
3/31/2020	1	COMMON COUNCIL	Adopt With Amendment(s)	Fail
3/31/2020	1	COMMON COUNCIL	Adopt With Amendment(s)	Pass
3/23/2020	1	Mayor's Office	RECOMMEND TO COUNCIL TO ADOPT UNDER SUSPENSION OF RULES 2.04, 2.05, 2.24, & 2.25 - MISC. ITEMS	

The fiscal impact of specific ordinance or policy changes authorized by the emergency declaration will be described in fiscal notes of future resolutions and/or ordinance changes presented to the Common Council for approval.

On March 23, 2020 the Mayor declared a state of emergency in the City of Madison resulting from the COVID-19 outbreak. This resolution formalizes the Mayor’s declaration. As a result of the emergency declaration the Mayor has introduced 24 additional ordinance amendments to mitigate the impact of the COVID-19 outbreak on residents, businesses, and workers in the City of Madison. The projected fiscal impact of these measures is \$1.1 million in 2020. The attached summarizes these emergency measures and the projected fiscal impact. Assumptions used for these cost estimates are based on known information as of March 26, 2020.

Declaring that a state of emergency is hereby in existence for the City of Madison pursuant to Wis. Stats. § 323.11 and Madison General Ordinances Section 3.19.

WHEREAS, on March 23, 2020, the Mayor issued a proclamation declaring a state of emergency for the City of Madison resulting from evidence of increasing transmission of COVID-19;

WHEREAS, the conditions necessitating declaration of a state of emergency continue to exist; and

WHEREAS Madison General Ordinance Section 3.19 provides that upon a Mayoral proclamation of a local state of emergency, the Common Council shall meet to ratify, by resolution or ordinance, the state of emergency and may, on a prospective basis, modify the regulations issued pursuant to the state of emergency;

NOW THEREFORE, BE IT HEREBY RESOLVED BY THE COMMON COUNCIL OF THE CITY OF MADISON:

1. That the state of emergency proclaimed for the City of Madison by the Mayor on March 23, 2020, is hereby ratified.
2. That the Common Council adopts this resolution declaring an emergency exists in the City of Madison due to the emergency described above.

BE IT FURTHER RESOLVED:

3. That a state of emergency is hereby declared for the City of Madison pursuant to Wis. Stats. § 323.11 and Madison General Ordinances Section 3.19.
4. That the state of emergency shall be in effect until ~~the emergency conditions no longer exists~~ June 2, 2020.
5. This proclamation of emergency shall be given prompt and general publicity and shall be filed promptly with the City Clerk.
6. This proclamation of emergency activates the City of Madison emergency operations plan.
7. That this proclamation shall take effect immediately from and after its issuance.
8. That pursuant to the authority granted by the above provisions, the following regulations are now in effect and have the force of law:
 - (a) Under this Declaration, the Mayor may, after consultation with the City Attorney, 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. This includes the power to extend deadlines, waive penalties, issue permits or licenses, contract or waive contractual terms, or such other actions as are appropriate to protect the health, safety and welfare of the City and its residents.
 - (b) To the extent any such actions by the Mayor affect a legislative enactment of the Common Council, the actions shall be presented in a resolution to the Common Council at the next ~~regularly scheduled~~ meeting when the resolution may be considered. By the resolution, the Council will affirm, rescind, or amend any of the orders issued by the Mayor.

The authority granted by this Declaration expires ~~sixty (60) days~~ June 2, 2020. ~~after the Director of Public Health Madison and Dane County and the Governor of Wisconsin determine to end the emergency actions they have taken or will take to combat the coronavirus pandemic.~~



Office of the Mayor

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May 6, 2020

EMERGENCY ORDER #2

Order to Support Safe Outdoor Space Practices for People Experiencing Unsheltered Homelessness

WHEREAS, on March 17, 2020, Public Health Madison & Dane County announced that community spread of COVID-19 was occurring in Dane County, with the first confirmed community death being reported on March 25; and,

WHEREAS, on March 23, 2020, Mayor Rhodes-Conway issued a Proclamation of Emergency due to COVID-19, which Proclamation was ratified by the Common Council on March 31, 2020 by RES-20-00286 and will continue to be in effect until June 2, 2020; and,

WHEREAS, under the City's emergency proclamation, the Mayor may, after consultation with the City Attorney, 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, including the power to take such actions as are appropriate to protect the health, safety and welfare of the City and its residents; and,

WHEREAS, on March 26, the Mayor issued the first Emergency Order pursuant to the Emergency Proclamation, providing for the modification of a number of ordinances or policies, which were subsequently approved or modified by the Common Council;

WHEREAS, as of May 5, 2020, there have been 8,566 confirmed cases and 353 deaths from COVID-19 in Wisconsin, with 443 confirmed cases and 22 deaths in Dane County; and,

WHEREAS, individuals experiencing homelessness during the COVID-19 pandemic and public health emergencies have needed public assistance to secure areas where it is possible to observe proper social distancing, however there remain some individuals who are not using such resources and are instead taking temporary shelter or residency in City parks, greenways and other City lands; and,

WHEREAS, the Centers for Disease Control (the CDC) has issued interim guidance on dealing with populations experiencing unsheltered homelessness (sleeping outside or in places not meant for human habitation) during the COVID-19 pandemic (<https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>). The CDC recognizes that this is a population at risk for COVID-19 infection where there is risk of community spread of the disease, such as in Dane County. The CDC has recommend that, during community spread of COVID-19, in dealing with such populations:

- Encampments should not be broken up;

- That persons staying in encampments should be encouraged to set up their tents/sleeping quarters with at least 12 feet by 12 feet of sleeping space per person;
- That nearby restroom facilities with running water are open 24 hours a day, and that there is hand hygiene materials (soap and paper towels) available;
- If restroom facilities are not available, access to portable latrines with handwashing facilities should be available for encampments of more than 10 people; and,
- Straightforward communications should be provided to the encampments about COVID-19, proper social distancing recommendations, and health and hygiene recommendations to protect themselves from infection.

WHEREAS, while it is against City ordinance and policy to be present in City parks overnight, to camp in parks (including conservation parks), or to take shelter in or reside in City greenways or on other City lands, during the term of the COVID-19 public health emergencies, it is in the City's interest, as recommended by the CDC, to allow certain encampments in City parks and greenways to remain in place to protect the inhabitants of these encampments and the community from further spread of the disease.

NOW THEREFORE, based upon the foregoing, I hereby order that:

1. The Operations Section Chief of the City's Emergency Operations Center, or the Deputy Operations Section Chief, may designate specified areas within City parks and greenways where temporary permissible encampments (TPEs) will be allowed during the City's declared COVID-19 public health emergency. Criteria for TPE approval shall include the following:
 - a. The proposed TPE site is located at least 500 feet from any residential property;
 - b. The proposed TPE site is not in a flood plain or other low lying area susceptible to flooding, or otherwise in a location that is deemed unsafe;
 - c. The proposed TPE is accessible via public property or right of way;
 - d. The proposed TPE is accessible for delivery, servicing and removal of portable toilets, hand washing stations, and trash containers;
 - e. The usable area of the site is sufficient to enable its users to practice recommended social distancing protocols (12 feet by 12 feet per person);
 - f. The presence of an encampment on or near City-owned land or associated facilities (e.g.. park shelters), or its use as a TPE will not prevent, disrupt or interfere with their intended public use;
 - g. The use of city-owned land as a TPE will not prevent City staff from performing normal maintenance or upkeep of the site and/or its facilities; and,
 - h. The site is not located in an environmentally sensitive area.
2. In designated TPEs, during the City's declared COVID-19 public health emergency, the following ordinances shall not be enforced:
 - a. Section 7.53: A campground license shall not be required for a TPE.
 - b. Section 8.21: Park closure hours shall not be enforced against occupants of an encampment or service providers.
 - c. Section 8.265: The prohibition on lodging in parks shall not be enforced against occupants of a permissible encampment.
 - d. Section 8.40: The prohibition on camping in conservation parks shall not be enforced against occupants of a permissible encampment.

- e. Chapter 28: Any provision of the City's zoning code which might otherwise prohibit the TPE shall not be enforced.
3. The Mayor, in consultation with Public Health Madison and Dane County (PHMDC) and the Community Development Division, may revoke a TPE designation when any one of the following occurs:
 - a. The Director of PHMDC determines that a COVID-19 public health emergency no longer exists;
 - b. The continued use of the TPE no longer serves the health and safety of its users or the community;
 - c. The site is no longer suitable as a TPE;
 - d. The users of a TPE engage in illegal and/or unsafe behaviors or continued use of the TPE is deemed disruptive to neighboring residents or otherwise makes the area unavailable or unsafe for its intended public uses; or,
 - e. Members of TPE have violated City of Madison Parks Behavioral Policy and have been removed from the TPE.
4. Upon revocation of a TPE, occupants of a TPE shall have up to five (5) days to remove themselves and any items from the location, after which the City may enforce the above ordinances and proceed under Section 8.44, the City's Lost and Abandoned Property ordinance.
5. This Emergency Order #2 shall be presented to the Common Council for approval or modification at the Council meeting of May 19, 2020, under the resolution introduced by title only on May 5, 2020, Legistar No. 60412.

/s/Satya Rhodes-Conway

Satya Rhodes-Conway

Mayor



Legislation Details (With Text)

File #: 60412 **Version:** 1 **Name:** Allowing Temporary Use of Specified City Lands for People Experiencing Unshelter Homelessness

Type: Resolution **Status:** Passed

File created: 5/5/2020 **In control:** COMMON COUNCIL

On agenda: 1/5/2021 **Final action:** 1/5/2021

Enactment date: 1/11/2021 **Enactment #:** RES-21-00036

Title: Confirming Mayoral Emergency Order #2 and providing a COVID-19 response for people experiencing unsheltered homelessness by allowing temporary use of specified City Lands, Terminable at any time by the City in order to support safe outdoor space practices

Sponsors: Satya V. Rhodes-Conway, Grant Foster, Marsha A. Rummel, Max Prestigiacom, Tag Evers, Shiva Bidar, Arvina Martin, Keith Furman, Christian A. Albouras, Lindsay Lemmer

Indexes:

Code sections:

Attachments: 1. Body, 2. CCHIC Emailed Comments 10-19-20.pdf, 3. Public Comment - CCHIC 10-19-20.pdf

Date	Ver.	Action By	Action	Result
1/5/2021	1	COMMON COUNCIL	Table	Pass
1/5/2021	1	COMMON COUNCIL	Take Off The Table	Pass
1/5/2021	1	COMMON COUNCIL	Adopt	Pass
1/5/2021	1	COMMON COUNCIL	Refer to a future Meeting to Adopt	Fail
12/1/2020	1	COMMON COUNCIL	Refer to a future Meeting to Adopt	Pass
10/19/2020	1	CITY-COUNTY HOMELESS ISSUES COMMITTEE	RECOMMEND TO COUNCIL TO ADOPT - REPORT OF OFFICER	Pass
5/19/2020	1	COMMON COUNCIL	Refer	Pass
5/5/2020	1	COMMON COUNCIL	Refer to a future Meeting to Adopt	Pass
5/5/2020	1	Attorney's Office	Referred for Introduction	

The proposed resolution authorizes the use of City property by those experiencing unsheltered homelessness during the COVID-19 pandemic subject to certain conditions outlined in the resolution. The Parks Division is in the process of determining the requirements to accommodate this use of City property. At this point, the Division estimates costs of approximately \$15,000 in staff time (2 hours of labor per week) and approximately \$50,000 in purchased services (to rent portable toilets and handwashing stations that are serviced daily). The Division has available funding to cover these costs in the short term. The status of the budget will be reviewed for the 2nd quarter projection and an appropriation may be necessary at that time.

Confirming Mayoral Emergency Order #2 and providing a COVID-19 response for people experiencing unsheltered homelessness by allowing temporary use of specified City Lands, Terminable at any time by the City in order to support safe outdoor space practices

See "Body" in Attachments.

Body to Legistar File No. 60412

WHEREAS, on March 17, 2020, Public Health Madison & Dane County announced that community spread of COVID-19 was occurring in Dane County, with the first confirmed community death being reported on March 25; and,

WHEREAS, on March 23, 2020, Mayor Rhodes-Conway issued a Proclamation of Emergency due to COVID-19, which Proclamation was ratified by the Common Council on March 31, 2020 by RES-20-00286 and will continue to be in effect until June 2, 2020; and,

WHEREAS, under the City's emergency proclamation, the Mayor may, after consultation with the City Attorney, 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, including the power to take such actions as are appropriate to protect the health, safety and welfare of the City and its residents; and,

WHEREAS, on March 26, the Mayor issued the first Emergency Order pursuant to the Emergency Proclamation, providing for the modification of a number of ordinances or policies, which were subsequently approved or modified by the Common Council;

WHEREAS, as of May 5, 2020, there have been 8,566 confirmed cases and 353 deaths from COVID-19 in Wisconsin, with 443 confirmed cases and 22 deaths in Dane County; and,

WHEREAS, individuals experiencing homelessness during the COVID-19 pandemic and public health emergencies have needed public assistance to secure areas where it is possible to observe proper social distancing, however there remain some individuals who are not using such resources and are instead taking temporary shelter or residency in City parks, greenways and other City lands; and,

WHEREAS, the Centers for Disease Control (the CDC) has issued interim guidance on dealing with populations experiencing unsheltered homelessness (sleeping outside or in places not meant for human habitation) during the COVID-19 pandemic (<https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>). The CDC recognizes that this is a population at risk for COVID-19 infection where there is risk of community spread of the disease, such as in Dane County. The CDC has recommended that, during community spread of COVID-19, in dealing with such populations:

- Encampments should not be broken up;
- That persons staying in encampments should be encouraged to set up their tents/sleeping quarters with at least 12 feet by 12 feet of sleeping space per person;

- That nearby restroom facilities with running water are open 24 hours a day, and that there is hand hygiene materials (soap and paper towels) available;
- If restroom facilities are not available, access to portable latrines with handwashing facilities should be available for encampments of more than 10 people; and,
- Straightforward communications should be provided to the encampments about COVID-19, proper social distancing recommendations, and health and hygiene recommendations to protect themselves from infection.

WHEREAS, while it is against City ordinance and policy to be present in City parks overnight, to camp in parks (including conservation parks), or to take shelter in or reside in City greenways or on other City lands, during the term of the COVID-19 public health emergencies, it is in the City's interest, as recommended by the CDC, to allow certain encampments in City parks and greenways to remain in place to protect the inhabitants of these encampments and the community from further spread of the disease; and,

WHEREAS, on May 6, 2020, Mayor Rhodes-Conway issued Emergency Order #2, authorizing the designation of temporary permissible encampments on certain City property and the non-enforcement of certain City Ordinances within these encampments, under specified conditions, to provide a COVID-19 response to those experiencing unsheltered homelessness during the ongoing pandemic.

NOW THEREFORE BE IT RESOLVED that Emergency Order #2 is confirmed; and,

BE IT FURTHER RESOLVED that the use of City property by those experiencing unsheltered homelessness during the COVID-19 pandemic is authorized on and subject to the following conditions:

1. The Operations Section Chief of the City's Emergency Operations Center, or the Deputy Operations Section Chief, may designate specified areas within City parks and greenways where temporary permissible encampments (TPEs) will be allowed during the City's declared COVID-19 public health emergency. Criteria for TPE approval shall include the following:
 - a. The proposed TPE site is located at least 500 feet from any residential property;
 - b. The proposed TPE site is not in a flood plain or other low lying area susceptible to flooding, or otherwise in a location that is deemed unsafe;
 - c. The proposed TPE is accessible via public property or right of way;
 - d. The proposed TPE is accessible for delivery, servicing and removal of portable toilets, hand washing stations, and trash containers;
 - e. The usable area of the site is sufficient to enable its users to practice recommended social distancing protocols (12 feet by 12 feet per person);

- f. The presence of an encampment on or near City-owned land or associated facilities (e.g., park shelters), or its use as a TPE will not prevent, disrupt or interfere with their intended public use;
 - g. The use of city-owned land as a TPE will not prevent City staff from performing normal maintenance or upkeep of the site and/or its facilities; and,
 - h. The site is not located in an environmentally sensitive area.
2. In designated TPEs, during the City's declared COVID-19 public health emergency, the following ordinances shall not be enforced:
- a. Section 7.53: A campground license shall not be required for a TPE.
 - b. Section 8.21: Park closure hours shall not be enforced against occupants of an encampment or service providers.
 - c. Section 8.265: The prohibition on lodging in parks shall not be enforced against occupants of a permissible encampment.
 - d. Section 8.40: The prohibition on camping in conservation parks shall not be enforced against occupants of a permissible encampment.
 - e. Chapter 28: Any provision of the City's zoning code which might otherwise prohibit the TPE shall not be enforced.
3. The Mayor, in consultation with Public Health Madison and Dane County (PHMDC) and the Community Development Division, may revoke a TPE designation when any one of the following occurs:
- a. The Director of PHMDC determines that a COVID-19 public health emergency no longer exists;
 - b. The continued use of the TPE no longer serves the health and safety of its users or the community;
 - c. The site is no longer suitable as a TPE;
 - d. The users of a TPE engage in illegal and/or unsafe behaviors or continued use of the TPE is deemed disruptive to neighboring residents or otherwise makes the area unavailable or unsafe for its intended public uses; or,
 - e. Members of TPE have violated City of Madison Parks Behavioral Policy and have been removed from the TPE.

4. Upon revocation of a TPE, occupants of a TPE shall have up to five (5) days to remove themselves and any items from the location, after which the City may enforce the above ordinances and proceed under Section 8.44, the City's Lost and Abandoned Property ordinance.
5. This attached Policy Statement shall be used in application of this Emergency Resolution.
6. This Emergency Resolution will remain in effect until the Mayor ends the TPEs pursuant to this Resolution, or until the Common Council takes further action, whichever occurs first.

COVID-19 Response: Policy Statement on Supporting Safe Outdoor Space Practices for People Experiencing Unsheltered Homelessness

Background

The City of Madison's primary goal is to ensure that people experiencing homelessness have safe accommodations. Since the onset of the current public health crisis, local officials and service providers have collaborated to expand and improve short-term shelter accommodations with an eye toward more safely serving shelter users. Accordingly, we strongly encourage those without housing to utilize these resources. A variety of different settings is available depending on an individual's particular circumstances:

- Persons who have tested positive for COVID-19 infection, or who exhibit symptoms generally associated with COVID-19 (fever, or new onset cough or shortness of breath), will, depending on the severity of their symptoms, be referred to a hospital or a medical respite hotel until their conditions improve.
- Persons who meet higher risk criteria - older adults, and people of any age who have certain underlying medical conditions (heart or lung disease, diabetes, weakened immune systems) that put them at greater risk if they are exposed to COVID-19 infection, will be placed in a local hotel.
- Persons who do not fit either of the above descriptions can use overnight shelters operated by Porchlight (single men) and the Salvation Army (single women and families).

There will, however, be instances in which people may be unable to use shelter resources, or may elect not to use them. In Madison and elsewhere, some turn to camping on vacant properties or in parks, often in violation of local ordinances. The Centers for Disease Control (CDC) has advised against disrupting such encampments during community spread of COVID-19 because doing so can cause people to disperse throughout the community, break connections with service providers, and increase the risk for transmitting the virus. Instead, the CDC recommends that localities try to support encampments and connect them to services. Consistent with that advice, City staff have formulated temporary policies to guide the response to unsheltered homelessness during the coronavirus pandemic.

To enhance public safety and reduce the threat of transmission of COVID-19, the City will temporarily curtail its active enforcement of ordinances that limit or restrict overnight stays on City properties in favor of applying the policies described below. That does not mean, however, that those ordinances are waived, nor is it intended to grant any person the right to stay on private property without the owner's consent, or on City property, in circumstances not consistent with the policy's guidelines. In its application of the policy, the City will attempt to support conditions and practices that promote public health and safety. The temporary policy is outlined below.

Designation of Temporary Permissible Encampments (TPE)

In accordance with the following guidelines, the Operations Section Chief of the City's

Emergency Operations Center may act to designate locations on or within City parks and greenways for which temporary permissible encampments (TPEs) will not be disturbed.

- The proposed TPE site is located at least 500 feet from any residential property;
- The proposed TPE site is not in a flood plain or other low lying area susceptible to flooding, or otherwise in a location that is deemed unsafe;
- The proposed TPE is accessible via public property or right of way;
- The proposed TPE is accessible for delivery, servicing and removal of portable toilets, hand washing stations, and trash containers;
- The usable area of the site is sufficient to enable its users to practice recommended social distancing protocols (12 feet by 12 feet per person);
- The presence of an encampment on or near City-owned land or associated facilities (e.g.. park shelters), or its use as a TPE will not prevent, disrupt or interfere with their intended public use;
- The use of city-owned land as a TPE will not prevent City staff from performing normal maintenance or upkeep of the site and/or its facilities;
- The site is not located in an environmentally sensitive area.

The City will not allow encampments that do not substantially conform to these guidelines and, in instances where persons are using non-conforming sites, may assist them in finding alternative locations.

Temporary Services at TPE Sites

The City, where feasible, may support TPE sites with the following temporary facilities and services:

- Portable toilets and hand washing stations at encampments where people lack access to restroom facilities.
- Trash containers and collection.
- Regular visits by outreach workers to facilitate referrals to housing or shelter, provision of wellness checks, dissemination of COVID-19 educational materials, and distribution of basic supplies and hygiene kits.

Users of designated TPEs are subject to the City of Madison Parks Behavioral Policy (Attachment A) and, in the event of violations, may be prohibited from using TPEs.

Termination of TPE Designation

The Mayor, in consultation with Public Health Madison and Dane County (PHMDC) and the Community Development Division, may revoke a TPE designation when any one of the following occurs:

- The Director of PHMDC determines that a COVID-19 public health emergency no longer exists; or
- The continued use of the TPE no longer serves the health and safety of its users or the community; or
- The site is no longer suitable as a TPE; or

- The users of a TPE engage in illegal and/or unsafe behaviors or continued use of the TPE is deemed disruptive to neighboring residents or otherwise makes the area unavailable or unsafe for its intended public uses; or
- Members of TPE have violated City of Madison Parks Behavioral Policy and have been removed from the TPE.

A decision to deny or revoke a TPE designation is not subject to appeal. Upon such a decision, the City shall notify outreach staff so they can work with TPE users to secure alternative shelter. The City shall post a notice at the TPE site providing users with five (5) calendar days' notice to vacate the site. Any personal property remaining on site after 5 days shall be considered lost/abandoned property and handled per Madison General Ordinances Sec. 8.44.

Communications Plan

Develop a communications strategy to inform the public and respond to questions that might arise.

- Provide a description and rationale of the policy to alders and advise them of locations in their districts designated as TPEs.
- Consult and collaborate with law enforcement and Parks staff to ensure a clear understanding and application of the policy.
- Create a reporting system for outreach workers to provide regular updates regarding the size, concerns, and needs at encampments
- Create a point of contact within the City to respond to questions or concerns about encampments.
- Notify residents of the need for City of Madison to support encampments and this population.
- Provide encampment users with pertinent information about rules, responsibilities and available services.

Assessment of Needs

Maintain contact with campsites with the goal of helping to meet ongoing needs.

- Regularly monitor and assess the needs of campers - in conjunction with outreach workers, redeployed City staff or Madison Police Dept.
- Perform ongoing assessments of campers, including screening to detect COVID-19-related symptoms, to facilitate referrals to appropriate shelter settings.
- Help meet basic needs- food, water and safety supplies.

Staffing and Resources

Prioritize efforts to connect campers to housing and services network.

- Expand the number of outreach workers in the field.
- Ensure people are connected to the Coordinated Entry system.

- Determine availability and feasibility of resources to support placement into permanent housing.

Orderly Removal of Encampments

Prepare strategies to clean-up campsites and return them to former/intended uses.

- Develop clear guidance describing the process to be followed when TPE authorizations end.
- Provide persons a reasonable amount of time to access other housing or shelter accommodations.
- Work with other service providers to help address non-compliance issues or overcome reluctance to access available housing or shelter options.



Legislation Details (With Text)

File #: 65316 **Version:** 2 **Name:** SUBSTITUTE: Updating TPE criteria and permitting the continued use of Reindahl Park until a suitable alternative site is established

Type: Resolution **Status:** Items Referred

File created: 5/4/2021 **In control:** CITY-COUNTY HOMELESS ISSUES COMMITTEE

On agenda: 5/4/2021 **Final action:**

Enactment date: **Enactment #:**

Title: SUBSTITUTE: Updating TPE criteria and permitting the continued use of Reindahl Park until a suitable alternative site is established. Prohibiting the eviction of temporary encampments in Reindahl Park.

Sponsors: Juliana R. Bennett, Grant Foster, Tag Evers, Yannette Figueroa Cole, Patrick W. Heck, Jael Currie, Arvina Martin, Michael E. Verveer, Christian A. Albouras

Indexes:

Code sections:

Attachments: 1. Substitute.pdf, 2. Reindahl Park 65316 version 1.pdf, 3. 5-18-21 written public comment 65316.pdf, 4. Memo to Council re File 63516.pdf

Date	Ver.	Action By	Action	Result
5/18/2021	1	COMMON COUNCIL	Call the Question	Fail
5/18/2021	2	COMMON COUNCIL	Re-refer	Pass
5/17/2021	1	CITY-COUNTY HOMELESS ISSUES COMMITTEE		
5/4/2021	1	COMMON COUNCIL	Refer	Pass
5/4/2021	1	Council Office	Referred for Introduction	

The proposed resolution would authorize the ongoing use of public parks as temporary permissible encampments (TPEs), and prohibit the eviction of individuals taking shelter in TPEs.

Parks currently has two operating contracts for cleanup at McPike Park and Reindahl Park. The McPike contract totals \$20,000 and expires on 5/31/21, and the Reindahl contract totals \$15,000 and expires on 6/15/21. The scope of these contracts includes transportation, documentation, and storage of abandoned personal property, as well as cleanup of unwanted structures, human waste, hazardous materials, and other disposal as necessary.

The Parks Division estimates an additional \$50 per week in cleanup costs per park with a TPE. Over the course of a year, this cost would total to \$2,600 per park with a TPE. This cost does not include cleanup at restroom facilities, which are not currently open. If restroom facilities are opened, that would result in an additional \$117 per week, or a total cost of \$8,700 per park per year.

SUBSTITUTE: Updating TPE criteria and permitting the continued use of Reindahl Park until a suitable alternative site is established. Prohibiting the eviction of temporary encampments in Reindahl Park.

WHEREAS, the July 2019 Point in Time Count of Homelessness Madison/Dane County

(
<https://0dae4f91-4a77-41b6-8005-0e9000834ebd.filesusr.com/ugd/73dee7_c2f276f97ac644f99d222cd1dd16e50a.pdf>) stated by the Homeless Services Consortium of Dane County identified 650 people experiencing homelessness in Dane County on a single night in July 2019 and an estimated 800 people in July 2020; and

WHEREAS, on March 17, 2020, Public Health Madison & Dane County announced that community spread of COVID-19 was occurring in Dane County, with the first confirmed community death being reported on March 25; and

WHEREAS, individuals experiencing homelessness during the COVID-19 pandemic and public health emergencies have needed public assistance to secure areas where it is possible to observe proper social distancing, however there remain some individuals who are not using such resources and are instead taking temporary shelter or residency in City parks, greenways and other City lands; and

WHEREAS, the Centers for Disease Control (the CDC) has issued interim guidance on dealing with ~~populations~~ individuals experiencing unsheltered homelessness (sleeping outside or in places not meant for human habitation) during the COVID-19 pandemic ([\(<https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>](https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html))). The CDC recognizes that this is a population at risk for COVID-19 and the most up-to-date guidance recommends allowing temporary permissible encampments (TPEs) to remain; and

~~WHEREAS, on March 23, 2020, Mayor Rhodes-Conway issued a Proclamation of Emergency due to COVID-19, which allowed for the temporary encampment in public parks and other designated areas; and~~

~~WHEREAS, on May 6, 2020, Mayor Rhodes-Conway issued Emergency Order #2, authorizing the designation of temporary permissible encampments on certain City property and the non-enforcement of certain City Ordinances within these encampments; and~~

~~WHEREAS, on January 5, 2020, Resolution 21-00036 confirmed Emergency Order #2 and established criteria for establishing and revoking TPE designation; and~~

~~WHEREAS, on February 4, 2021, the City of Madison served an eviction notice to persons living in temporary encampments in McPike Park with an order to vacate the premise by February 28, 2021, as per Madison General Ordinance 8.44; and~~

~~WHEREAS, on April 9, 2021, the City of Madison served an eviction notice to persons living in temporary encampments in Reindahl Park with an order to vacate the premise by May 9, 2021, as per Madison General Ordinance 8.44; and~~

~~WHEREAS, the remaining designated TPE location at Starkweather is inaccessible and unsuitable to serve as a TPE location;~~

~~NOW, THEREFORE, BE IT RESOLVED that the criteria set forth in Resolution 21-00036 are hereby updated (see attached). the Madison Common Council will continue to authorize the use of public parks and other designated areas as temporary permissible encampments (TPEs).~~

~~BE IT FURTHER RESOLVED that the Madison Common Council directs staff to identify one or more TPE locations that meet the updated criteria established in this resolution with sufficient capacity to accomodate those currently located at Reindahl Park and other previously designated TPEs.~~

~~BE IT FINALLY RESOLVED that the City will continue to suspend enforcement of those ordinances outlined in section 2 or RES-21-00036 at Reindahl Park until appropriate alternate TPE locations are identified and approved by the Common Council with capacity sufficient to accomodate all of those currently located at Reindahl Park. the Madison Common Council will prohibit the removal and eviction of persons taking shelter in temporary permissible encampments.~~

**Resolution Updating TPE Criteria and Permitting the Continued Use of Reindahl Park
Until a Suitable Alternative Site is Established**

WHEREAS, the [July 2019 Point in Time Count of Homelessness Madison/Dane County](#) by the Homeless Services Consortium of Dane County identified 650 people experiencing homelessness in Dane County on a single night in July 2019 and an estimated 800 people in July 2020; and

WHEREAS, on March 17, 2020, Public Health Madison & Dane County announced that community spread of COVID-19 was occurring in Dane County, with the first confirmed community death being reported on March 25; and,

WHEREAS, individuals experiencing homelessness during the COVID-19 pandemic and public health emergencies have needed public assistance to secure areas where it is possible to observe proper social distancing, however there remain some individuals who are not using such resources and are instead taking temporary shelter or residency in City parks, greenways and other City lands; and,

WHEREAS, the Centers for Disease Control (the CDC) issued [interim guidance](#) on dealing with individuals experiencing unsheltered homelessness (sleeping outside or in places not meant for human habitation) during the COVID-19 pandemic. The CDC recognizes that this is a population at risk for COVID-19 and the most up-to-date guidance recommends allowing temporary permissible encampments (TPEs) to remain; and,

WHEREAS, on May 6, 2020, Mayor Rhodes-Conway issued Emergency Order #2, authorizing the designation of temporary permissible encampments on certain City property and the non-enforcement of certain City Ordinances within these encampments, and

WHEREAS, on January 5, 2020, [Resolution 21-00036](#) confirmed Emergency Order #2 and established criteria for establishing and revoking TPE designation; and,

WHEREAS, on February 4, 2021, the City of Madison served an eviction notice to persons living in temporary encampments in McPike Park with an order to vacate the premise by February 28th, 2021 as per Madison General Ordinance 8.44; and,

WHEREAS, on April 9, 2021, the City of Madison served an eviction notice to persons living in temporary encampments in Reindahl Park with an order to vacate the premise by May 9th, 2021 as per Madison General Ordinance 8.44; and,

WHEREAS, the remaining designated TPE location at Starkweather is inaccessible and unsuitable to serve as a TPE location;

NOW THEREFORE BE IT RESOLVED, that the criteria set forth in [Resolution 21-00036](#) are hereby updated (see attached); and

BE IT FURTHER RESOLVED, that the Madison Common Council directs staff to identify one or more TPE locations that meet the updated criteria established in this resolution with sufficient capacity to accommodate those currently located at Reindahl Park and other previously designated TPEs; and

BE IT FINALLY RESOLVED, that the City will continue to suspend enforcement of those ordinances outlined in section 2 of RES-21-00036 at Reindahl Park until appropriate alternate TPE locations are identified and approved by the Common Council with capacity sufficient to accommodate all of those currently located at Reindahl Park.

Update to RES-21-00036

BE IT FURTHER RESOLVED that the use of City property by those experiencing unsheltered homelessness ~~during the COVID-19 pandemic~~ is authorized on and subject to the following conditions:

1. The **Common Council** ~~Operations Section Chief of the City's Emergency Operations Center, or the Deputy Operations Section Chief,~~ may designate specified areas ~~within City parks and greenways~~ where temporary permissible encampments (TPEs) will be allowed ~~during the City's declared COVID-19 public health emergency~~. Criteria for TPE approval shall include the following:

- a. ~~The proposed TPE site is located at least 500 feet from any residential property;~~ **The site is able to be accessed safely by foot and by bicycle and is within walking distance of a bus line;**
- b. The proposed TPE site is not in a flood plain or other low lying area susceptible to flooding, or otherwise in a location that is deemed unsafe;
- c. The proposed TPE is accessible via public property or right of way;
- d. The proposed TPE is accessible for delivery, servicing and removal of portable toilets, hand washing stations, and trash containers **and can be reasonably accessed by other authorized motor vehicles including by emergency services and service providers;**
- e. The usable area of the site is sufficient to enable its users to practice recommended social distancing protocols (12 feet by 12 feet per person);
- f. ~~The presence of an encampment on or near City-owned land or associated facilities (e.g., park shelters), or its use as a TPE will not prevent, disrupt or interfere with their intended public use;~~ **The site is within walking distance of a convenience or food store;**
- g. The use of city-owned land as a TPE will not prevent City staff from performing normal maintenance or upkeep of the site and/or its facilities; and,
- h. The site is not located in an environmentally sensitive area.

2. In designated TPEs, ~~during the City's declared COVID-19 public health emergency,~~ the following ordinances shall not be enforced:

- a. Section 7.53: A campground license shall not be required for a TPE.
- b. Section 8.21: Park closure hours shall not be enforced against occupants of an encampment or service providers.
- c. Section 8.265: The prohibition on lodging in parks shall not be enforced against occupants of a permissible encampment.
- d. Section 8.40: The prohibition on camping in conservation parks shall not be enforced against occupants of a permissible encampment.
- e. Chapter 28: Any provision of the City's zoning code which might otherwise prohibit the TPE shall not be enforced.

3. The **Common Council** ~~Mayor, in consultation with Public Health Madison and Dane County (PHMDC) and the Community Development Division,~~ may revoke a TPE designation **at any time**. ~~when any one of the following occurs:~~

- a. ~~The Director of PHMDC determines that a COVID-19 public health emergency no longer exists;~~

- ~~b. The continued use of the TPE no longer serves the health and safety of its users or the community;~~
- ~~c. The site is no longer suitable as a TPE;~~
- ~~d. The users of a TPE engage in illegal and/or unsafe behaviors or continued use of the TPE is deemed disruptive to neighboring residents or otherwise makes the area unavailable or unsafe for its intended public uses; or,~~
- ~~e. Members of TPE have violated City of Madison Parks Behavioral Policy and have been removed from the TPE.~~

4. Upon revocation of a TPE, occupants of a TPE shall have up to five (5) days to remove themselves and any items from the location, after which the City may enforce the above ordinances and proceed under Section 8.44, the City's Lost and Abandoned Property ordinance.

~~5. This attached Policy Statement shall be used in application of this Emergency Resolution.~~

~~6. This Emergency Resolution will remain in effect until the Mayor ends the TPEs pursuant to this Resolution, or until the Common Council takes further action, whichever occurs first.~~

5. The following basic services will be provided at designated TPEs:

- a. Accessible toilets
- b. Running water and/or hand washing stations
- c. Drinking water
- d. Receptacles for trash, recycling, and needle disposal that are collected on a regular basis
- e. Lighting (as needed)
- f. Regular visits by outreach workers to facilitate referrals to housing or shelter, provision of wellness checks, dissemination of educational materials, and distribution of basic supplies and hygiene kits.

6. The following additional services will be provided as feasible at designated TPEs:

- a. Showers
- b. Access to electrical outlets
- c. Storage lockers

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