

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN**

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MADISON VIGIL FOR LIFE, INC.,  
GWEN FINNEGAN, JENNIFER DUNNETT,  
MARY MARKIELEWSKI,  
THERESA KLINKHAMMER, CONSTANCE  
NIELSEN, STUDENTS FOR LIFE OF MADISON,  
BADGER CATHOLIC, FR. RICHARD HEILMAN,  
SARAH QUINONES and RYAN WOODHOUSE,

Plaintiffs,

Case No: 14-cv-157-wmc

v.

THE CITY OF MADISON, WISCONSIN,

Defendants.

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**DEFENDANT CITY OF MADISON'S BRIEF IN SUPPORT OF ITS  
MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

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Plaintiffs brought this suit to challenge the constitutionality of Madison General Ordinance 23.01 (MGO 23.01) as passed by the City of Madison Common Council on February 25, 2014. However, since the date this lawsuit was filed, a sponsor of MGO 23.01 made a motion for the Common Council to reconsider the ordinance. That motion was referred to the Council's next meeting, scheduled for March 18, 2014. As a result, MGO 23.01 has been suspended.

Because it is uncertain at this stage whether MGO 23.01, or some modified version of it, will become the law of the City, plaintiffs' lawsuit is premature and does not present a ripe case or controversy over which the Court can exercise subject matter jurisdiction. Accordingly, the City of Madison moves to dismiss plaintiffs' complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

The City also moves to dismiss the complaint under Rule 12(b)(5) for insufficiency of service of process. Plaintiffs did not follow the procedures for service provided in Rule 4(j)(2)(A) of the Federal Rules of Civil Procedure by serving the Mayor, so they were required to comply with the alternative option in Rule 4(j)(2)(B) by following state law procedures for accomplishing service. Under state law, only an adult resident of Wisconsin who is not a party to the action may serve the Summons and Complaint on the Mayor, City Manager or Clerk. Wis. Stat. § 801.10(1). Because plaintiffs' attorney, a non-resident of Wisconsin and a representative of a party, attempted to serve the complaint on the City Clerk, service was insufficient.

### **BACKGROUND<sup>1</sup>**

On February 25, 2014, the City of Madison Common Council voted unanimously to approve Madison General Ordinance 23.01, "Prohibition on Obstructing Entryways to Health Clinics." Decl. of Michael May, ¶ 2. The following day, plaintiffs filed this lawsuit for injunctive and declaratory relief, concurrently moving for a temporary restraining order and preliminary injunction against the enforcement of the ordinance. Plaintiffs' attorney, Matthew Bowman, served the summons and complaint on the City Clerk on February 26. Dkt. #6.

Under both state and municipal law, an ordinance passed by the City's Common Council does not become an enforceable law until several procedural steps have occurred. First, the ordinance must be presented to the Mayor for approval or disapproval. MGO 2.36. Once the Council's ordinance has been submitted, the Mayor has five days to either approve or disapprove

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<sup>1</sup> In ruling on a motion to dismiss for lack of subject matter jurisdiction, the Court may consider facts outside the allegations of the complaint. *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 701 (7th Cir. 2003) ("The court may look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists."). See also *Pollack v. U.S. Dept. of Justice*, 577 F.3d 736, 745 (7th Cir. 2009); *United Transportation Union v. Gateway Western Railroad Co.*, 78 F.3d 1208, 1210, n.1 (7th Cir. 1996); *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir. 1993).

of the ordinance. Wis. Stat. § 66.09(8)(c). If the Mayor approves the ordinance, or fails to act within five days, the ordinance is then published in a newspaper. MGO 1.04. An ordinance is effective once published. *Id.*

The City Clerk presented MGO 23.01 to the Mayor on February 28, 2014. Decl. of Michael May, ¶ 3. The Mayor approved the ordinance on that same day. *Id.* at ¶ 3. *See also* Exhibit C to the Decl. of Michael May. However, shortly after the Common Council passed MGO 23.01, sponsors of the ordinance considered modification of the language of the ordinance. Decl. of Michael May, ¶ 5.

Under MGO 2.21, the Common Council may reconsider actions or ordinances that it has already acted upon. A motion for reconsideration must be made either at the same meeting at which the matter was considered or at the next succeeding meeting. MGO 2.21. If the motion is made at the next succeeding meeting but was not included on the agenda, it will be referred to the next Common Council meeting. MGO 2.05, 2.21. This is done to comply with Open Meetings Law requirements. Decl. of Michael May, ¶ 7.

On March 4, 2014, the Common Council held another Council meeting. *Id.* at ¶ 6. During the meeting, one of the sponsors of the MGO 23.01, Alder Lisa Subeck, made a motion to reconsider MGO 23.01. *Id.* The motion was referred to the Council's next meeting, which is scheduled for March 18, 2014. *Id.* at ¶ 7. This means that the Common Council will consider Alder Subeck's motion to reconsider at its March 18 meeting. *Id.*

The effect of a motion for reconsideration is governed by Robert's Rules of Order. *Id.* at ¶ 9. *See also* Exhibit B to the Decl. of Michael May. There is no specific Madison General Ordinance that explains the effect of a motion for reconsideration. However, under MGO 2.32, Robert's Rules govern Common Council actions "[i]n the absence of a standing rule." MGO

2.32. Under Robert's Rule § 37, "Reconsider," "the effect of *making* a motion to *Reconsider* is the suspension of all action that depends on the result of the vote proposed to be reconsidered. . . ." *Robert's Rules* § 37, p. 321 (emphasis in rule) (Attached as Exhibit A to the Decl. of Michael May).

On March 6, 2014, MGO 23.01 was published. Decl. of Michael May, ¶ 4. However, as a result of Alder Subeck's motion to reconsider, MGO 23.01 had already been suspended at the time of publication. *Id.* at ¶ 9. The ordinance will remain suspended until the Common Council decides Alder Subeck's motion to reconsider. *Id.* At this stage, it is uncertain whether the Common Council will pass the motion to reconsider. *Id.* at ¶ 8. If the Council approves reconsideration of MGO 23.01, the Council could decide to modify the language of the ordinance. *Id.*

## ARGUMENT

### A. Ripeness

It is well established that federal courts may not exercise subject matter jurisdiction over a case unless there is a controversy ripe for adjudication. *Flying J Inc. v. New Haven*, 549 F.3d 538, 544 (7th Cir. 2008) ("[R]ipeness . . . when it implicates the possibility of this Court issuing an advisory opinion, is a question of subject matter jurisdiction under the case-or-controversy requirement" of Article III.). The case-or-controversy requirement "keeps federal courts in the business of resolving existing legal disputes and out of the business of offering advice on the legality of a proposed course of action." *Deveraux v. City of Chicago*, 14 F.3d 328, 330 (7th Cir. 1994). *See also Wisconsin Central, Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir. 2008) ("[C]ourts should not render decisions absent a genuine need to resolve a real dispute.").

The doctrine of ripeness is essentially a question of timing. If a plaintiff can point to a threatened injury that is sufficiently imminent and certain, judicial review may be appropriate. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) (controversy is ripe "[w]here the inevitability of the operation of a statute against certain individuals is patent.") However, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotations omitted). Additionally, legal issues that will require further factual development are not fit for review. *Wisconsin Central*, 539 F.3d at 759.

Plaintiffs' claims in this case are not ripe for judicial review. Plaintiffs are attempting to challenge an ordinance that has been suspended and cannot be enforced against them. At this stage, any threatened injury identified by plaintiffs rests entirely on "contingent future events" that may occur in the Common Council. It would be pure speculation to predict at this stage whether the challenged version or a modified version of MGO 23.01 will become enforceable law, let alone when that might happen. Unless and until there is a final and enforceable version of MGO 23.01, there is nothing for the Court to review. *See, e.g., Indiana Right to Life v. Shepard*, 507 F.3d 545, 550 (7th Cir. 2007) (where there is "no evidence of a real threat of enforcement" of law, case is not ripe); *Federation of Advertising Industry Representatives v. City of Chicago*, 326 F.3d 924, 932 (7th Cir. 2003) (dismissing case for lack of justiciable controversy where challenged ordinance had been repealed and there was "no way of knowing the likelihood that [newly proposed] ordinance will actually be enacted").

In sum, plaintiffs are asking the Court to issue an advisory opinion about the constitutionality of a suspended and unenforceable ordinance. Because the Court cannot

exercise subject matter jurisdiction to issue an advisory opinion, plaintiffs' complaint should be dismissed as premature.

**B. Insufficiency of Service of Process**

Under Rule 4(j)(2), plaintiffs may serve the City by either: (A) "delivering a copy of the summons and complaint to [the City's] chief executive officer," which is the Mayor, or (B) "serving a copy of each in the manner prescribed by [Wisconsin] law for serving a summons or like process on such a defendant." Fed. R. Civ. P. 4(j)(2). Because plaintiffs did not serve the Mayor, plaintiffs were required to follow option (B), complying with the requirements of service under state law. Under Wisconsin law, subject to some exceptions not applicable here, only an "adult resident of the state where service is made who is not a party to the action" may accomplish service. Wis. Stat. § 801.10(1).

Documents on file with the Court show that plaintiffs attempted to accomplish service by having their attorney, Matthew Bowman, deliver a copy of the Summons and Complaint to the City Clerk. Dkt. #6. Bowman resides at a Washington D.C. address and is not a resident of Wisconsin. *Id.* He is also a representative of a party. Accordingly, plaintiffs did not accomplish service on the City in the manner prescribed by state law. Service is therefore defective and insufficient to establish personal jurisdiction over the City.

**CONCLUSION**

Plaintiffs' complaint is premature and it was not properly served. It should be dismissed.

DATED: March 7, 2014.

BOARDMAN & CLARK LLP  
By

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