



# MEMORANDUM

Office of the City Attorney

Phone: 334-5011/Fax 334-2229  
Box 46

**TO:** Commissioners Yvonne Hinson-Rawls, Lauren Poe, and Todd Chase, Members of the Public Safety Committee      **DATE:** March 7, 2013

**FROM:** Stephanie M. Marchman, Sr. Asst. City Attorney; Lee C. Libby, Asst. City Attorney II

**SUBJECT:** Creating Buffer Zones Around Medical Clinics

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## OVERVIEW

The Public Safety Committee is considering the need for buffer zones around women’s medical clinics to keep protesters from passing the barrier. The following is a summary of the legal analysis applied by the courts to such buffer zones under the First Amendment of the United States Constitution, as well as a summary of existing laws which may address some of the concerns raised by women’s medical clinics.

## FIRST AMENDMENT ANALYSIS

Regulations at the state and local level and court-issued injunctions creating buffer or bubble zones<sup>1</sup> near women’s medical clinics have been challenged and litigated at every level of the judicial system since Roe v. Wade was decided in 1973. In fact, the United States Supreme Court has considered injunctions/regulations related to abortion protesters on four different occasions. In these cases, citizens generally claim that these types of regulations/injunctions violate their right to freedom of speech under the First Amendment. The courts’ decisions in this area are mixed – some regulations/injunctions are upheld as constitutional, others are struck down entirely or in part as unconstitutional.

Generally, the courts view these types of regulations/injunctions as “content neutral.” In other words, the regulations/injunctions are not crafted to prohibit speech (i.e., to prevent protesting at a women’s medical clinic). Instead, the purpose of the regulations/injunctions is often aimed to resolve some public, health, or safety problem associated with the protesting, such as blocking traffic on public streets and sidewalks, blocking safe access to the medical clinics, invasion of medical privacy, interference with a women’s freedom to seek lawful medical and counseling services in connection with her pregnancy, and threats to a patient’s psychological and physical well-being.

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<sup>1</sup> A “buffer zone” is usually a fixed area of public property around a medical facility within which free speech activities may not occur, and a “bubble zone” is usually an area on public property that follows or “floats” with a person or vehicle outside the medical facility within which free speech activities may not occur.

Since these regulations/injunctions often restrict speech in a “traditional public forum” (i.e., public sidewalks and streets), the courts review the regulations/injunctions to determine if they are *reasonable time, place, and manner restrictions narrowly tailored to serve a significant governmental interest*.

Generally, with these types of regulations/injunctions, a significant governmental interest can be shown, such as public safety (i.e., the regulation/injunction is necessary to allow for women to have safe access to the clinic where protesters are blocking access). However, in analyzing the type of regulations/injunctions at issue (e.g., an 8 foot buffer zone, an 8 foot bubble within 100 feet of a clinic, a combination buffer/bubble zone), the court’s analysis often turns on whether the regulation/injunction addresses the significant government interest (like blocking access to a clinic) without burdening substantially more speech than necessary.

The following are several examples of court’s decisions related to buffer or bubble zones created by municipal ordinance:

- In Brown v. City of Pittsburgh, 586 F.3d 263 (3<sup>rd</sup> Cir. 2009), the Court held that the **City of Pittsburgh’s ordinance’s** combination of a 15 foot buffer zone and 100 foot bubble zone around hospitals, medical offices, and clinics **was not sufficiently narrowly tailored** to the government’s interest in protecting those attempting to enter health care facilities, but that each standing alone would be facially valid (i.e., the City could enact either the buffer or bubble zone, but not both).
- In Halfpap v. City of West Palm Beach, 2006 WL 5700261 (S.D. Fla. 2006), the Court concluded that the **City of West Palm Beach’s ordinance** prohibiting any person from protesting within a designated public buffer safety zone of 20 feet around a health care facility’s entrances or public areas immediately surround the facility “**impermissibly restricts protected speech.**” The Court reasoned that “[t]he size of the City’s Buffer Zone exceeds any distance ever approved by the Supreme Court in such a context; the evils which the City identified as bases for the Ordinance are not supported by the record; and the remedy for those evils (even if they were supported by the record) is far from narrowly tailored to address them.”
- In Sabelko v. City of Phoenix, 120 F.3d 161 (9<sup>th</sup> Cir. 1997), the Court held that a **City of Phoenix ordinance** imposing an 8 foot floating buffer zone restriction upon protesters outside abortion clinics **was not narrowly tailored and thus violated the First Amendment’s free speech clause.**

In order for the City of Gainesville to enact a lawful ordinance providing for a buffer zone near medical clinics, it would need to demonstrate a record of health, safety, and welfare problems near medical clinics in the City, and it would need to narrowly craft restrictions to address those particular problems.

## **EXISTING LAWS**

There are various criminal and civil laws which provide protection to medical clinics and their patients at this time. Florida criminal laws potentially implicated include trespass (Section 810.09, Florida Statutes), battery (Section 784.03, Florida Statutes), assault (Section 784.011, Florida Statutes), and stalking (Section 784.048, Florida Statutes). If there is sufficient proof of a violation of these Florida criminal statutes, then the protestor(s) can be charged and prosecuted for violations of the already existing state criminal statutes. There are also federal criminal and civil remedies under the Freedom of Access to Clinic Entrances (F.A.C.E.) Act in 18 USC § 248.

Protestors blocking the roads or sidewalks or driveways may also be charged with violations of Section 26-189 of the City of Gainesville Code of Ordinances (Congregating on the streets and sidewalks); Section 23-41 of the City of Gainesville Code of Ordinances (Obstruction of roads generally), and/or Florida Statute Section 316.2045 (Obstruction of public streets, highways, and roads). In addition, protesters may also be cited with violations of the City's noise ordinance (Chapter 15, City of Gainesville Code of Ordinances).

Private citizens and clinics may also file civil actions in tort against protesters for trespass, assault, battery, and intentional infliction of emotional distress, among other causes of action, as well as seek a civil injunction in the state or federal courts prohibiting protesters from violating the rights of the clinics and/or patients.

With any of these existing laws, it will have to be proven in a court that a protester violated a law through eye witness testimony, photographs, videos, or other evidence. Prosecutors often decline to prosecute criminal cases where a matter involves one witness's testimony against the contradictory testimony of an equally credible witness, as this evidence is not likely to prove beyond any reasonable doubt that an offense occurred. Likewise, a buffer zone would face the same proof issues that exist with the laws above, thereby making it difficult to prosecute a protester for a buffer zone violation absent testimony of independent witnesses and/or video surveillance of the violation.

cc: Assistant City Manager Paul Folkers  
Police Chief Tony Jones