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City of Gainesville Policy Program Preliminary Research & Analysis

TOPIC: Buffer Zones around Medical Facilities
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EXECUTIVE SUMMARY

Buffer zones, in addition to similar policies such as noise ordinances or law enforcement zones, around reproductive health care facilities or medical facilities in general, can and do exist across the country on the state and local level in order to protect citizens' access to health care. A buffer zone is a set distance or area in which people cannot intrude or in which certain actions are prohibited. There are two main types of buffer zones: fixed and floating. A fixed buffer zone is set around a permanent location, such as a health care facility, and certain actions are prohibited in this area. A floating buffer zone is one which follows an individual person and requires others to remain a certain distance (generally 6-8 feet) from that person.

While buffer zones have been implemented across the country, they have had varying degrees of effectiveness. A 2013 survey found that 51% of the facilities with buffer zones reported a decrease in criminal activity near the facility after the buffer zone was in place, and 75% said that the zones improved patient and staff access. However, no buffer zone or similar policy is able to entirely restrict demonstrators' ability to protest, and as such several facilities with buffer zone policies have still experienced significant protests around their facilities, most notably seen in Pensacola, Florida.¹

¹ <https://now.org/resource/clinic-buffer-zones-at-risk-in-massachusetts-case-before-supreme-court/>

The primary challenge that comes with implementing any type of barrier around a medical facility is ensuring that First Amendment rights are not violated. In order to do this, **any “buffer zone” must be specifically concentrated around areas which, if obstructed, can impede the functioning of and access to any health care facility** (i.e. the entrance). Courts have historically allowed both fixed and floating buffer zones around health care facilities, and in Florida the most common type of buffer zone has been a fixed buffer zone.

In order for this policy to be successfully and legally implemented in Gainesville, the city would need to show that they have a need for these buffer zones, and that public health is threatened without such a zone. The United States Supreme Court has also historically agreed that a buffer zone *specifically* around a reproductive health care facility can still be content neutral and constitutional, so the city has the option of pursuing a buffer zone around either medical facilities as a whole or reproductive facilities specifically.

HISTORY/BACKGROUND INFORMATION

Introduction

Florida municipalities, such as Melbourne and Pensacola, mostly seem to have fixed buffer zones, where no one can enter within a certain distance of a health care facility unless you are an employee or patient of the facility. Nationally, however, states such as Colorado and Montana have found the most success with a combination of the two, where within a certain distance of a health care facility (such as within 100 feet), no one can approach within 6 feet of another person without their consent. However, **examples of both fixed and floating buffer zones have been found unconstitutional, so the constitutionality depends less on the type of buffer zone than it does on the narrowness of the ordinance.**

Buffer zones, or similar policies, are possible to institute through municipal statutes, as seen in Pensacola and West Palm Beach, however the largest instance of a fixed buffer zone in Florida, located in Melbourne, was enacted through the judicial branch.

In Florida, the municipalities which have created policies to protect health care facilities from protesters all did so in response to specific acts of violence, including arson and homicide. **Thus, while there is legal precedent for buffer zones in Florida, it may be necessary for Gainesville to show that there is a need for a buffer policy, and that without it public health is threatened.**

Nationally

There is currently no federal law which prohibits protesting or gathering around any health care facility. However, **the Freedom of Access to Clinic Entrances Act (1994) does prohibit the use of force, threat of force, or physical obstruction with the attempt to interfere or intimidate any person obtaining**

reproductive health services.² This legislation, however, has only been used to prosecute 15 violations since its passing.³

The United States Supreme Court has also upheld some buffer zones as constitutional, most notably in *Hill v. Colorado*, in which the Court held that the Colorado statute which made it unlawful for any person within 100 feet of a health care facility's entrance to knowingly approach within 8 feet of another person to pass a leaflet or brochure, engage in oral protest, or display a sign without consent was constitutional.⁴

However, in *McCullen v. Coakley* (2014), the Court struck down a buffer zone statute in Massachusetts, which had created a fixed 35 foot buffer zone around any reproductive health care facility. No one was allowed to enter this zone, with the exception of those entering or exiting the facility, employees or agents of the facility, law enforcement or medical officials, or anyone using the sidewalk to reach their destination. The Court ultimately held that this was unconstitutional because the buffer zone law burdened more speech than was necessary to achieve the state's interest in protecting access to health care and preventing obstruction.⁵ With these Court rulings, the constitutionality of buffer zones surrounding medical facilities still stands, however any policy must be tailored so as not to overburden free speech.

Two states across the country have successfully implemented a buffer zone policy, including Colorado as mentioned above. In addition, **Montana has a 36 foot fixed buffer zone outside of reproductive health facilities, within which protestors must remain 8 feet away from patients and clinic workers.**⁶ As mentioned above, Massachusetts attempted to be the only state to implement a state-wide fixed ban after they found their original combination of fixed and floating (similar to Colorado) to be ineffective, however this attempt was not successful.

Several cities have also attempted or created buffer zone laws. **Chicago, Illinois, has created an 8 foot floating buffer zone within 50 feet of an entrance to a reproductive health facility.**⁷ Pittsburgh, Pennsylvania, attempted to establish a 15 foot buffer zone around entrances to health care facilities and an 8 foot floating buffer zone to prohibit the approaching of any patient or healthcare worker.⁸ While the combination of the two buffer zones was found unconstitutional, **Pittsburgh has implemented a new policy with only the 15 foot fixed zone which has been found constitutional.**⁹ Several additional cities have implemented buffer laws, however others, such as St. Louis, Missouri, have attempted but failed to pass similar policies due to criticisms of potential free speech violations.

² <https://www.justice.gov/crt-12>

³ <https://talkpoverty.org/2019/05/07/helped-patients-get-abortion-clinic-parking-lots-saw-horrifying/>

⁴ <https://www.oyez.org/cases/1999/98-1856>

⁵ <https://www.oyez.org/cases/2013/12-1168>

⁶ <http://www.prochoicemontana.org/news/press/20140627.shtml>

⁷ <https://news.bloomberglaw.com/health-law-and-business/chicagos-beats-challenge-to-abortion-clinic-bubble-zone-law>

⁸ <https://prochoice.org/buffer-zone-challenged-in-pittsburgh/>

⁹ <https://news.bloomberglaw.com/health-law-and-business/pittsburghs-abortion-clinic-buffer-zone-passes-legal-test>

City of Gainesville Policy Program Preliminary Research & Analysis
Buffer Zones around Medical Facilities

An additional method to manage these concerns that has been attempted by both state and local governments is a noise regulation policy, which prohibits shouting or loud noises within 100 feet of a medical facility. This policy has been implemented at the state-wide level in Maine, and in cities such as Palm Beach, Florida.¹⁰

These examples all show that there are legal and constitutional manners in which municipalities can create buffer zones around health care facilities, so long as they do not overburden free speech.

Gainesville/Alachua County

The City of Gainesville currently has two ordinances which could be applied to this policy area. **The first is §26-189 which prohibits the congregation on a public sidewalk or street without a permit.¹¹ The second is §19-80, which prevents solicitation on public and private property.¹²** While neither specifically addresses congregation outside of healthcare facilities, their enforcement could help to eliminate some public health and safety concerns regarding protesting outside of health care facilities. Additionally, the existence of ordinances at the municipal level in Florida show the possibility for this type of policy in Gainesville.

In 2013, the reproductive health facility Bread and Roses, located in Gainesville, applied for a 35 foot buffer zone around the clinic, in addition to an 8 foot floating buffer zone around anyone within 100 feet of entering the clinic, however this request was denied by the City. This request was made in response to a group of protesters who were granted a 40 day permit which allowed them to protest near the clinic, but who failed to follow the rules and whose permit was not revoked. Bread and Roses proposed a model ordinance to the City of Gainesville, and the request was reviewed by the City Commission's Public Safety Committee. The request was ultimately denied, upon recommendation from the Gainesville Police Department who reviewed the complaints but found no evidence of violence or harassment to support the need for a buffer zone.¹³ Similarly, the City Attorney's Office recommended against the request, as they felt there was not a sufficient record of problems to support regulation.¹⁴

This instance highlights the most likely challenge Gainesville will face in implementing a policy designed to protect health care facilities, as clinics in the community will likely need to demonstrate a specific need for this sort of policy. **The constitutionality of buffer zone policies depends on the protection of a legitimate interest such as public health, and if the City cannot show that there is currently a threat to this interest, it is unlikely the policy will be upheld.**

¹⁰ <https://www.bustle.com/p/maine-can-enforce-noise-ordinance-to-guard-abortion-clinics-against-protesters-75158>

¹¹

https://library.municode.com/fl/gainesville/codes/code_of_ordinances?nodeId=PTIICOOR_CH26TRMOVE_ARTV_IPAASST_S26-189COSTSI

¹²

https://library.municode.com/fl/gainesville/codes/code_of_ordinances?nodeId=PTIICOOR_CH26TRMOVE_ARTV_IPAASST_S26-189COSTSI

¹³ <https://www.wuft.org/news/2013/04/09/bread-and-roses-clinic-applies-for-buffer-zone-to-protect-against-protestors/>

¹⁴ <https://www.ocala.com/news/20130203/gainesville-mulls-request-for-buffer-zone-around-abortion-clinics>

PRELIMINARY RESEARCH AND FINDINGS

There are several things which are needed in order for a buffer zone to properly balance patient protection and free speech. The first is that **the state or city must have a legitimate interest in implementing the buffer zone**. Courts have upheld interests such as protecting public health, ensuring access to health care, and preventing obstruction outside of facilities. The second requirement is that **the zone must be narrowly tailored and located in a position in which patient and state interests are actually threatened** (i.e. facility entrances) rather than around the entire building. The third requirement is that **any ordinance must be content neutral**, which means that while a buffer zone can be placed specifically around a reproductive health care facility, any demonstrations within the buffer zone must be prohibited, not simply one type of demonstration. Finally, **the ordinance must allow for alternative methods of communication** (such as the holding of signage).

Below are a series of more detailed analyses of specific case studies which have taught us these lessons.

Melbourne, Florida¹⁵

Women's Health Center Inc. operated several reproductive health facilities throughout central Florida and expressed a need to prohibit protesters from physically abusing and disturbing those entering or exiting the clinic, as they were interfering with access to the clinic. In 1992, a state court agreed and banned demonstrators from a 36 foot buffer zone around the entirety of the clinic, and banned demonstrators from making excessive noise and using images visible to patients. The original injunction also created a 300 foot zone around the residences of the clinic's employees, staff, owners, or agents. In 1994, **the United States Supreme Court ultimately upheld the 36 foot buffer zone at the front of the clinic and the limitations based on noise making, but struck down the buffer zone along the back and the sides of the clinic along with the limitations placed on images and the 300 foot zones.**

This buffer zone was not created through the legislative process, but rather was **established judicially** by Judge Robert McGregor, Circuit Judge for the Eighteenth Judicial Circuit of Florida. The zone was instituted after pro-life demonstrators physically intimidated clinic doctors and employees, and picketed on the sidewalk and street adjacent to the clinics.¹⁶ In this instance, the Women's Health Center and other reproductive health care clinics sought and were granted, by a Florida trial court, an injunction which restrained the demonstrators' ability to protest. It was this injunction which created the 36 foot buffer zone and was ultimately upheld by the United States Supreme Court in *Madsen v. Women's Health Center, Inc.* (1994).

Specific community backlash is difficult to find on the subject, however there undoubtedly was a large community response to the policy, given that the case was ultimately appealed through the United States Supreme Court. The demonstrators specifically included Judy Madsen, who belongs to the group Operation Rescue, a Christian anti-abortion activist organization whose goal is to close down abortion clinics throughout the country.

¹⁵ <https://www.oyez.org/cases/1993/93-880>

¹⁶ <https://ir.law.fsu.edu/cgi/viewcontent.cgi?article=1502&context=lr>

City of Gainesville Policy Program Preliminary Research & Analysis Buffer Zones around Medical Facilities

Takeaways: This is ultimately an example of a fixed buffer zone in a municipality in the State of Florida.¹⁷ Additionally, this shows some of the requirements that must be met, such as that the buffer zone cannot be surrounding the entirety of any facility, but rather only near the entrances, and that alternative forms of communication (such as photos) cannot be banned.

Pensacola, Florida

Pensacola's law, created in 1995, differs from other buffer zone laws because it does not restrict any gathering or demonstrations on sidewalks. Rather, it outlaws anyone other than law enforcement officials from entering or creating an obstruction on any public property within 8 feet of all health care facilities, with the exception of public sidewalks. While this ban has been challenged multiple times in courts, it has routinely been upheld as constitutional.¹⁸

§8-1-19 falls under the "General Provisions" of the "Offenses" section of the Code of Ordinances, which also holds public nuisance and destruction of property codes. This code is specifically applied to "abortion clinics", and any clinic within Pensacola is automatically subject to the regulation.

Any articles conveying community pushback or support for the policy have not been found, largely given that the ordinance was passed in 1995. The ordinance was also likely passed in response to a series of attacks by anti-abortion demonstrators, including Dr. David Gunn being fatally shot in 1993 in Pensacola during a protest and Dr. James Britton and James Barrett, a clinic escort, being shot and killed outside of another abortion clinic in the city.

Despite this policy, Pensacola has still seen a large amount of anti-abortion demonstrators at its clinics, most notably during a 40 Days for Life event.¹⁹

Takeaways: Excluding public sidewalks from the buffer zone provides a legislative route that is more likely to be constitutional, as it leaves substantial space open for demonstrators to occupy. **While this would mean that demonstrators could gather on the sidewalks, the statutes listed in the Gainesville section of the background information provides potential outlets for the city to prevent such gatherings.**

West Palm Beach, Florida

The city has currently banned all shouting and amplified sound within 100 feet of a health care center. This ordinance came in response to a 2005 arson incident which destroyed part of Presidential Women's Health Center, as city leaders felt that amplified sound could escalate tensions surrounding clinics. **In the**

¹⁷ <https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-assembly/abortion-protests-buffer-zones/>

¹⁸ https://library.municode.com/fl/pensacola/codes/code_of_ordinances?nodeId=TITVIII_OF_CH8-1_GEPR_S8-1-18PRREPI

¹⁹ <https://www.vox.com/2015/12/10/9881238/pro-life-abortion-violence>

original ordinance, the city also mandated a 20 foot buffer zone which prohibited protests near clinics, however that portion of the ordinance was struck down due to free speech violations.²⁰

§34-38 is a city ordinance under the “Noise Ordinances” of the “Environment” Chapter on the Code of Ordinances.²¹ Any health care facility, which includes hospitals, physicians’ offices, walk-in medical centers, medical diagnostic centers, surgical centers, and facilities which are certified to perform medical procedures, are subject to this ordinance.²²

There was a fairly large degree of community pushback to this ordinance, largely from anti-abortion advocates in the community. Lawsuits were brought against the city, alleging that the ordinance was unconstitutional as it violated the First Amendment, and void for vagueness. However, the court ultimately held that the ordinance was narrowly tailored and constitutional.²³

Takeaways: **While noise ordinances would not be able to prevent demonstrators from approaching patients or employees, it may prevent some of the larger stressors such as chants or yelling.** This method is also more likely to be found constitutional.

The State of Colorado²⁴

Colorado Statute 18-19-122, found under the “Offenses Against Public Peace, Order, and Decency” section of the Colorado Criminal Code, makes it unlawful for any person within 100 feet of a health care facility’s entrance to knowingly approach within 8 feet of another person to pass a leaflet or form of literature, display a sign, engage in oral protest, counsel, or educate without that person’s consent. The floating zone provision of the Colorado statute was repeatedly contested and challenged in state courts, however both the fixed and floating buffer zones were **ultimately upheld by the United States Supreme Court in *Hill v. Colorado*.**

The Court held that the state had a compelling interest in creating the legislation, with its interest being to protect citizens entering or exiting a medical facility from unwanted communication. The Court also held that the legislation was sufficiently content neutral and narrowly tailored, in that it does not completely prevent demonstrators from getting their points heard, while still protecting the wellbeing of patients.

²⁰ <https://rewire.news/article/2013/10/31/judge-upholds-quiet-zone-around-florida-abortion-clinic/>

²¹

https://library.municode.com/fl/west_palm_beach/codes/code_of_ordinances?nodeId=PTIICOOR_CH34EN_ARTII_NOCORE_S34-38SOLIHECAFA

²² <https://caselaw.findlaw.com/us-11th-circuit/1674856.html>

²³ https://blogs.findlaw.com/eleventh_circuit/2014/08/no-megaphones-outside-abortion-clinics-sounds-ok-to-11th-cir.html

²⁴ <https://www.oyez.org/cases/1999/98-1856>

City of Gainesville Policy Program Preliminary Research & Analysis Buffer Zones around Medical Facilities

Takeaways: Buffer zones can be created in a constitutional manner and, more specifically, the combination of fixed and floating buffer zones can be constitutional. A buffer zone can be created around any health care facility, rather than simply a reproductive health care facility.

The State of Massachusetts²⁵

Originally, Massachusetts had a policy similar to Colorado, where within an 18 foot radius around reproductive health care facilities no one could approach within six feet of another person. However, the state felt that this type of policy was too difficult to enforce and was not preventing forms of harassment.

In response, Massachusetts created a 35 foot fixed buffer zone around reproductive health care facilities from which individuals were excluded, with exceptions for people entering or leaving the facility, employees, law enforcement or medical officials, or people using the sidewalk to reach a destination.

The United States Supreme Court ultimately held that the statute was unconstitutional in *McCullen v. Coakley* (2014), as it burdened free speech more than was necessary to achieve the state's interests of protecting access to health care and preventing obstruction.

Takeaways: **Buffer zones specifically surrounding reproductive health care facilities can still be content neutral, and the state's goals of protecting public health and preventing obstruction can be legitimate state interests.** However, any policy designed to protect such interests must be narrowly tailored to those interests and not overburden free speech. Buffer zones CANNOT: require enforcement officials to examine the content of the message to find whether it's unconstitutional, burden speech more than necessary.

New York City, New York²⁶

New York City's buffer zone policy was specifically addressed in the United States Supreme Court's opinion in the Massachusetts case as an example of an alternative policy which would likely be constitutional. Originally, NYC attempted to implement a 15 foot fixed and a 15 foot floating buffer zone around reproductive health clinics, but while the floating zone was struck down the fixed zone was upheld. Currently, **New York City law sets a 15-foot buffer zone in front of reproductive health clinics, and in 2005 a federal court in Buffalo, NY, issued an injunction which required protestors to abide by the same 15 foot buffer zone in front of clinics in 17 counties across New York.**²⁷

Takeaways: When the Court struck down Massachusetts' fixed buffer law, it was not because fixed buffer laws as a whole were unconstitutional, but rather it was because Massachusetts' was too broad. If Gainesville wants to implement a similar policy, a fixed size more similar to New York's would likely be more feasible.

²⁵ <https://www.npr.org/sections/thetwo-way/2014/06/26/325806464/states-cant-mandate-buffer-zones-around-abortion-clinics-high-court-says>

²⁶ <https://nypost.com/2014/07/10/ny-attorney-general-abortion-clinic-buffer-zones-are-intact/>

²⁷ <https://www.mtsu.edu/first-amendment/article/1462/schenck-v-pro-choice-network-of-western-new-york>

City of Gainesville Policy Program Preliminary Research & Analysis
Buffer Zones around Medical Facilities

Summary

The Florida municipal policies which were created all came about after an incident of extreme violence at a reproductive health care clinic. However, the existence of statewide buffer zone policies suggest that while a specific instance of violence does not need to occur at a clinic in order for a buffer zone policy to be constitutional, there does need to be evidence that the state or city's interest in public health/safety is threatened without the policy.

There are essentially four options the City could take, should they wish to pursue boundaries around medical facilities further: 1) a fixed only buffer zone (likely between 8-20 feet) around the entrances of a facility. 2) A mixture of a fixed/floating buffer zone. 3) A law-enforcement zone which excludes public sidewalks. 4) A noise ordinance policy around clinics.

PRELIMINARY COST/BENEFIT ANALYSIS

Costs

- There will almost certainly be some level of community pushback from groups who choose to protest/demonstrate outside medical facilities.
- There are also likely to be legal challenges to any ordinance.
- Increased need for law enforcement presence.
- No buffer zone or noise ordinance will be able to entirely prohibit protesting or gathering outside of facilities.

Benefits

- Public health benefits, including less stress for incoming patients
 - There is research which suggests that more stress around the time of a medical procedure can lead to longer recovery times, more need for anesthesia, etc.
- Less obstruction around medical facilities

PRELIMINARY AND ILLUSTRATIVE LIST OF POTENTIAL STAKEHOLDERS

- Religious organizations
- Reproductive health care facilities
 - Bread and Roses
- Gainesville Police Department
- Health care/medical facilities in general

RECOMMENDED POINTS FOR FURTHER RESEARCH/DISCUSSION

- Fixed versus Floating Buffer Zones
- Discussions with local police about enforcement capabilities
- Medical facilities v. reproductive health facilities

PROPOSED TIMELINE FOR FURTHER ACTION

If the Commission wishes to proceed with this policy, it is recommended for referral to the appropriate charter officer for further analysis on, among other things, operational and fiscal impact.

ADDITIONAL RESOURCES

https://prochoice.org/wp-content/uploads/face_act.pdf

<https://www.nirhealth.org/wp-content/uploads/2015/07/WLPsafeSpace.pdf>

http://prochoice.org/pubs_research/publications/downloads/Legal_Remedies.pdf

<https://www.sun-sentinel.com/news/fl-xpm-2005-01-19-0501190192-story.html>