



City of North Port

Office of the City Attorney

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To: Kevin Vespia, Police Chief

From: Amber L. Slayton, Assistant City Attorney

Through: Mark Moriarty, City Attorney

Date: December 12, 2016

RE: Request for Legal Services – Solicitation Ordinance

The above-referenced Request for Legal Services has been reviewed.

I. The Draft Ordinances

You presented for review a draft ordinance based on the City of Punta Gorda's solicitation ordinance in residential zones. From a form standpoint, the draft ordinance is missing a reference in the block to the provision of severability, conflicts, and an effective date. Also, the signature block should be updated to reflect Mayor Linda M. Yates' name.

For the reasons explained below, pursuant to recent changes in the law, it is likely a court would find the ordinance unconstitutional. Accordingly, attached is an alternative draft ordinance for your consideration.

II. Legal Analysis

A. *Reed v. Town of Gilbert*

A solicitation ordinance regulates speech. In examining whether a restriction on protected speech violates the First Amendment, courts employ varying standards. The first determination a court must make is whether the restriction applies to specific content; in order to avoid discrimination against particular messages, content-based regulations are analyzed with the strictest scrutiny. Content neutral regulations enjoy more latitude. In public fora, a regulation is subject to stricter scrutiny if it is content-based than if it is a content-neutral time, place or

manner regulation, because a content-based regulation “raises a very serious concern that the government is using its power to tilt public debate in a direction of its choosing.”¹

In 2015, the United States Supreme Court decided *Reed v. Town of Gilbert*², which examined a municipality’s sign ordinance. The decision provided clarification as to how courts should determine whether a restriction is content-based or content-neutral. The *Reed* analysis extends beyond signs and applies to other restrictions of speech, including solicitation and panhandling.³ *Reed* holds that a regulation of speech is content-based if the regulation applies to speech “because of the topic discussed or the idea or message expressed.”⁴ The Court stated:

A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of “animus toward the idea contained” in the regulated speech.⁵

Thus, the determination of whether a law is content-neutral or content-based on its face must be considered before turning to the law’s justification or purpose.

In application, the *Reed* analysis has had the effect of deeming a broader scope of regulation to be content based, as *Reed* clarifies that “a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.”⁶ Thus, in the sign context, a discriminating viewpoint may involve the treatment of signs that advocate voting “yes” or “no” on a particular proposition, but a content-based analysis may involve regulating political signs differently than commercial signs.

Upon determining a regulation to be content based, a court must apply the strict scrutiny standard of review. True to its name, this is the most difficult standard to survive, as under strict scrutiny, a court must presume that an ordinance is unconstitutional and must strike it down unless the city can demonstrate that it is narrowly tailored and “necessary to serve a compelling state interest.”⁷ A city “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”⁸

B. Unconstitutional Content-Based Regulations on Solicitation

1. Florida Statutes § 316.2045

¹ *Cutting v. City of Portland, Me.*, 802 F.3d 79, 84 (1st Cir. 2015); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 185 (D. Mass. 2015).

² 135 S. Ct. 2218.

³ *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1289 (D. Col. 2015).

⁴ *Id.* at 2227.

⁵ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

⁶ *Id.* at 2230.

⁷ *Browne*, 136 F. Supp. 3d at 1291.

⁸ *Clatterbuck v. City of Charlottesville*, 92 F. Supp. 3d 478 (W.D. Va. 2015) (emphasis omitted) (quoting *Turner Broad Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)).

You inquired as to including a regulation akin to the solicitation in roadway provision in Florida Statutes Section 316.2045. This statute purports to regulate the obstruction of public streets, highways, and roads. In 2003, the United States District Court for the Middle District of Florida declared the statute unconstitutional, finding it violated the Equal Protection Clause, declaring it void for vagueness, and holding that it was overbroad and not narrowly tailored to meet the government's compelling interest.⁹ The Florida Legislature amended the statute in 2007, but did not repeal or modify the unconstitutional language. Section (2) of this statute could likely be challenged successfully under *Reed* as being content-based, as it applies only to persons soliciting. Thus, the City should exercise caution in relying on this provision as the basis for adopting a similar ordinance.

2. Aggressive Panhandling

Recently, courts have struck down ordinances addressing “aggressive” panhandling and solicitation pursuant to *Reed*. This type of ordinance bans behavior such as: continuing to solicit from a person after the person has given a negative response, unwanted touching or physical contact, blocking or interfering with free passage, using violent or threatening language, soliciting in a manner that would likely cause a reasonable person to fear immediate harm or danger.

In *Thayer v. City of Worcester*, the First Circuit Court of Appeals upheld the constitutionality of such an ordinance.¹⁰ Days after deciding the *Reed* case, the United States Supreme Court vacated the *Thayer* judgment and remanded the case to the lower court for further consideration in light of *Reed*.¹¹ The lower court applied the *Reed* analysis and determined that the city had a compelling government interest in protecting the safety and welfare of the public, but that the aggressive solicitation ordinance was not narrowly tailored to the least restrictive means available to achieve that interest: “Their failure was because they were duplicative of existing criminal laws and/or they were not the least restrictive means of achieving the government’s goal.”¹² Other courts have held similarly, applying the *Reed* analysis and holding that almost identical laws violate the First Amendment right to freedom of speech.¹³

Thus, the problem in this case is that [the city] has taken a sledgehammer to a problem that can and should be solved with a scalpel. In attempting to combat what it sees as a threatening behavior that endangers public safety,

⁹ *Bischoff v. Florida*, 242 F. Supp. 2d 1226 (M.D. Fla. 2003).

¹⁰ See *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014) (retired Supreme Court Justice Souter authored the opinion in his role as a visiting Associate Justice), *vacated*, 135 S.Ct. 2887 (2015).

¹¹ *Thayer v. City of Worcester*, 135 S.Ct. 2887 (2015).

¹² *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 236 (D. Mass. 2015); see also *McLaughlin*, 140 F. Supp. 3d 177; *Browne*, 136 F. Supp. 3d 1276 (challenged provisions of ordinance are over inclusive because they prohibit protected speech that poses no threat to public safety).

¹³ See *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177 (D. Mass. 2015) (finding provisions unconstitutional that banned vocal panhandling, banned aggressive panhandling, banned panhandling by means that were already criminalized, and provided a 20 foot buffer zone surrounding certain locations); *Browne v. City of Grand Junction, Col.*, 136 F. Supp. 3d 1276 (D. Col. 2015) (finding provisions unconstitutional that banned aggressive panhandling and banned panhandling during certain hours and in certain places).

[the city] has passed an ordinance that sweeps into its purview non-thrashing conduct that is constitutionally protected.¹⁴

3. Other Restrictions

Courts have recently found other similar restrictions on solicitation to be unconstitutional, including:

- Tampa’s prohibitions on soliciting in certain neighborhoods and near transit stops, sidewalk cafes, and automatic teller machines;¹⁵
- Prohibitions on aggressive and coercive panhandling and limitations on panhandling locations;¹⁶
- Banning aggressive panhandling and banning panhandling during certain hours and in certain places;¹⁷
- Creating a buffer zone for solicitation in a particular area of the city;¹⁸ and
- A content-neutral regulation banning standing, sitting, staying, driving or parking on median traffic strips, found to be unconstitutional because it took a broad sweeping approach: “In fact, it is hard to imagine a median strip ordinance that could ban more speech.”¹⁹

Please let me know if there are any questions, comments, or concerns. If none, no further action will be taken on this Request for Legal Services. The matter will be deemed concluded. The file will be closed.

¹⁴ *Browne*, 1294.

¹⁵ *Homeless Helping Homeless, Inc. v. City of Tampa, Fla.*, 8:15-cv-1219-T-23-AAS (M.D. Fla. August 5, 2016) (opinion attached).

¹⁶ *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177 (D. Mass. 2015) (ordinance in question criminalized: panhandling “intended or likely to cause a reasonable person to fear bodily harm to oneself”; intentionally touching; interfering with the passage of pedestrians or vehicles; using violent or threatening language or gestures; continuing to panhandle after a person has given a negative response; following with the intent of asking for money; panhandling in a group of two or more in an intimidating fashion).

¹⁷ *Browne v. City of Grand Junction, Col.*, 136 F. Supp. 3d 1276 (D. Col. 2015) (ordinance in question criminalized: panhandling one-half hour after sunset to one-half hour before sunrise; continuing to request money after the person has refused; obstructing sidewalk or other passage way; panhandling on a bus or in a parking facility).

¹⁸ *Clatterbuck v. City of Charlottesville*, 92 F. Supp. 3d 478 (W.D. Va. 2015) (ordinance in question prohibited soliciting on the Downtown Mall within 50 feet of 2nd Street West and 4th Street East, when those streets were open to vehicular traffic).

¹⁹ *Cutting v. City of Portland, Me.*, 802 F.3d 79, 88 (1st Cir. 2015) (ordinance in question prohibited any person from standing, sitting, staying, driving or parking on a median strip, except pedestrians in the course of crossing from one side of the street to the other; the court found the ordinance to be content neutral, but not narrowly tailored to achieve the governmental interest).