



August 13, 2009

Mike Piccolo
Assistant City Attorney
City of Spokane
808 W. Spokane Falls Blvd # 550
Spokane, WA 99201-3326

Re: SMC 10.10.027

Dear Mr. Piccolo,

I wanted to share with you an action taken recently by the City of Spokane Valley regarding a proposed ordinance regulating solicitation which was substantially similar to Spokane's ordinance SMC 10.10.027, effective January 2009, which enforces place restrictions on panhandling. The Valley's attorney, Cary Driskell, had asked for our analysis of the ordinance prior to its consideration by the council on August 12, 2009. In response, I sent him an analysis based largely on our comments on Spokane's ordinance with the added benefit of the new 9th Circuit *Berger* decision. Once more, we determined the ordinance is an unconstitutional content-based restriction not narrowly tailored to a substantial government interest. Moreover, as the *Berger* decision makes clear, the restrictions appear to be outside the scope of the "captive audience doctrine" which is limited to activities implicating significant privacy issues.

The City of Spokane Valley decided not to adopt the ordinance. Instead, they plan to embark on an educational campaign to help the public at large find avenues other than regulation to help the indigent, for example through better partnerships with local charities or script from local businesses that could be given out in the place of money and redeemed for food, other goods or services. My understanding is they plan to implement this program through the aid of a multi-jurisdictional advisory committee.

I have attached our memo to Mr. Driskell and a memo from him to his council in hopes these developments might be of interest to the City of Spokane.

Best regards,


Bonne Beavers
Center for Justice



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Memorandum

To: City Council

From: Cary Driskell, Deputy City Attorney; Jeana Poloni, Legal Intern

CC: Dave Mercier, City Manager; Mike Connelly, City Attorney

Date: August 4, 2009

Re: Panhandling update

This update is being provided to the Council to give current information about an opinion from the Center for Justice regarding the proposed ordinance, which incorporates discussion of a new case out of the 9th Circuit Court of Appeals, and to provide you with a recommendation for proceeding at this point in time. A copy of Ms. Beavers' opinion is attached to this memo for your reference.

As the Council is aware, staff drafted a proposed ordinance that would regulate some forms of panhandling, and would have placed some time, place and manner restrictions on panhandling. The proposed ordinance was based very closely on the regulations adopted by the City of Spokane in 2008. As Spokane did, staff sent a copy of the draft regulations to the Center for Justice for their review and comment, as any challenge to the proposed regulations would most likely come from their office.

The City received a letter and memorandum on July 16, 2009 from Bonnie Beavers of the Center for Justice. The memo provides a general analysis of the constitutional caselaw surrounding panhandling and first amendment regulations (pages 2 and 3), and asserts that the proposed ordinance is likely an illegal content-based restriction of speech. They reach this conclusion because not all speech in the public areas (sidewalks) is banned, only that which seeks contributions. Because it is content-based, it must be narrowly tailored to a compelling governmental interest, such as public safety. Case law, including the new *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009) case, make clear that solicitation from a "captive audience" who may not want to give money, but feel compelled to because they cannot easily walk away, otherwise disengage, or avert their eyes, does not rise to the level of a compelling governmental interest. There would have to be something like an identifiable public safety concern, supported by statistical data, to implement such regulations.

Ms. Beavers' memorandum does clearly recognize that cities have the ability to enforce provisions such as our prohibitions on obstructing traffic or on aggressive panhandling. There is an opportunity to be more active in enforcing the existing prohibitions on obstructing traffic, if the factual conduct in the individual case meets the criteria as a violation of law.

Staff has a call in to the City of Spokane to determine how they intend to proceed in light of the *Berger* case, but had not heard back by the time this memo was due to Council.

Based on these developments, staff recommends *not* proceeding with consideration of the proposed ordinance, and instead focus on implementing the educational program previously discussed until a more favorable legal environment is present.

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July 16, 2009

Cary P. Driskell
Deputy City Attorney
City of Spokane Valley
11707 East Sprague Avenue
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Dear Cary,

We appreciate your asking us to provide comments on Spokane Valley's proposed Ordinance Limiting Solicitation, SVMC § 7.40.020. This ordinance is substantially similar to Spokane Municipal Code 10.10.27, which we previously reviewed along with several others for the City of Spokane. The following comments on SVMC 7.40.020 were lifted from our comments to the City of Spokane with a few revisions tailored to your proposal and the benefit of the Ninth Circuit's "captive audience" analysis in its reversal of the Berger case issued last month. I've also attached a copy of our comments to the City of Spokane in the event they might be helpful.

If you have any questions, feel free to give us a call.

All the best,

A handwritten signature in cursive script that reads "Bonne Beavers".

Bonne Beavers
Staff Attorney
Center for Justice

CENTER FOR JUSTICE COMMENTS
RE: SVMC 7.40.020 Limitations on Solicitation
Date: 7.16.09

This section prohibits solicitation within 15 feet of an automated teller machine, the entrance of a building, unless the solicitor has permission from the owner or occupant, a self-service fuel pump, a public transportation stop, and any parked vehicle as occupants of such vehicle enter or exit when the occupants are the subject of solicitation or designated loading/unloading, for-hire vehicle of taxi zones. Solicitation under the code is limited to requests for immediate contributions. SVMC 7.40.010(A)(8). We believe the regulation may be subject to challenge as a content-based restriction on protected speech.

As you know, begging or panhandling, i.e. solicitation for the purpose of immediately receiving contributions, is a constitutionally protected activity under the First Amendment. *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1451 (1994) (citing *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980)); *U.S. v. Kokinda*, 497 U.S. 720 (1990); *Spokane v. Marr*, 129 Wn. App. 890, 894 (Div. 3 2005) (citations omitted). Where such activity occurs in traditional public fora, such as sidewalks, streets or public parks, “the government’s ability to permissibly restrict expressive conduct is very limited.” *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1021 (9th Cir. 2008) (quoting *United States v. Grace*, 461 U.S. 171, 177 (1983)). See also *Hague v. CIO*, 307 U.S. 496, 515 (1939) (these fora have been immemorially held in trust for the public for “assembly, communicating thoughts between citizens, and discussing public questions”). Because government restrictions on the use of these public spaces “risk placing speech on topics of public importance within the purview of only the wealthy or those who enjoy the support of local authorities,” (*Long Beach*, 522 F.3d at 1021 citing *Grossman v. City of Portland*, 33 F.3d 1200, 1205 n. 8 (9th Cir.1994); *City of Richmond*, 743 F.2d at 1356, “First Amendment protections are strongest and regulation is most suspect” within those areas. *Id.* (quoting *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir.

1994). See also *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 791 (9th Cir. 2006) (warning of trend toward privatization of public property and transforming public fora into “heavily-regulated domains”).

Although regulation of speech in traditional public fora is disfavored, it may nevertheless be regulated according to prescribed principles. To pass constitutional muster, such regulations must satisfy four criteria. They must be 1) justified without reference to the content of the regulated speech; 2) narrowly tailored to serve a significant government interest; 3) leave open ample channels for communication of the information, and 4) provide adequate standards to guide government discretion, particularly in licensing decisions. *Forsythe County v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

We believe this ordinance is content-based because it only prohibits speech that includes a request for immediate contributions. A law is content-based rather than content-neutral if “the main purpose in enacting it was to suppress or exalt speech of certain content, or if it differentiates based on the content of speech on its face.” *ACLU of Nevada v. City of Las Vegas (ACLU II)*, 466 F. Supp. 784, 793 (9th Cir. 2006). Even if a law is content-based, it may yet pass constitutional muster if it is necessary to serve a compelling state interest and is narrowly tailored to achieve that end. *Perry Educ. Ass’n v. Perry Local Educ. Ass’n*, 460 U.S. 37, 45 (1983); *Loper v. New York Police Dept.*, 999 F.2d 699, 703 (2nd Cir. 1993). Under federal jurisprudence, a regulation is narrowly tailored if it “promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (citations omitted). Further, it may not burden substantially more speech than necessary to achieve the scheme’s important goals. *United States v. Baugh*, 187 F.3d 1037, 1043 (9th Cir. 1999).

As drafted, this ordinance is arguably content based and hence subject to strict scrutiny. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002). SVMC 7.40.020 prohibits only speech

which asks for immediate contributions. Speech that does not include such a request does not fall within the reach of this ordinance. Thus one could approach someone exiting a vehicle and ask for signatures for political calls to action or to pass out leaflets and not run afoul of this ordinance, even where doing so might make that person uncomfortable or unable to easily disengage. As such, it is not content-neutral. *See ACORN v. St. Louis County*, 930 F.2d 591 (8th Cir. 1991) (anti-solicitation law was content-neutral because it limited solicitations for all purposes); *ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986) (city's statute content-neutral because it prohibits all kinds of solicitation, including that by charitable organizations); *International Society for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge*, 876 F.2d 494 (5th Cir. 1989) with *Benefit v. City of Cambridge*, 424 Mass. 918, 679 N.E.2d 184 (Mass. 1997) (anti-solicitation law content-based because the content determined guilt or innocence); *Loper v. New York City Police Department*, 999 F.2d 699 (2d Cir. 1993).

Content-based laws must be narrowly tailored to a compelling state interest to pass constitutional muster. The "state interest" identified in the draft appears to be to protect persons from potential discomfort or feelings of coercion due to an inability to easily disengage based on the place in which the solicitation occurs. It does not prohibit coercive solicitation – the code already deems this unlawful – but is merely prophylactic – "to help ensure that donations arising from such contact are less likely to be coerced."

Without evidence of improper behavior, however, a listener's annoyance or discomfort "does not provide a basis for a law burdening that activity." *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989). *See also Seattle v. Webster*, 115 Wn. 2d 635, 653 (1990) (J. Utter, concurring and dissenting) ("While a municipality may regulate First Amendment activity to prevent obstruction of passage, *see Shuttlesworth v. Birmingham*, 382 U.S. 87, 91 (1965), it may not restrict First Amendment rights just to prevent annoyance to the citizenry"). Clearly, many people feel uncomfortable and unable to disengage

when someone, perhaps disheveled and obviously poor, asks for money. The courts have never, however, deemed this sufficient to outlaw panhandling.

While promoting this interest is unlikely to trump protected speech activities, public safety might. *Madsen v. Women's Health Center*, 512 U.S. 753 (1994) (public safety is a recognized legitimate state interest). However, because the ordinance allows others to approach persons in these locations, the City must show that these place restrictions are necessary to promote the safety of its citizens from solicitation that is otherwise lawful. Given that the place restrictions are not targeted to intimidating behavior, as defined in this code, it appears on its face unrelated to safety.

It would also appear the City may be attempting to regulate panhandling on the basis of the "captive audience" doctrine. Under this doctrine, some courts have allowed restrictions where the audience does not have the freedom to choose whether or not to hear the message. *Cohen v. California*, 403 U.S. 15, 21 (1971) (courthouse visitors were not captive to displays of free speech). Courts have refused, however, to extend this doctrine to restrictions on speech in a public forum. *Kuba v. I-A Agricultural Association*, 387 F.3d 850, 861 (9th Cir. 2004). As far as we can find, no court has ever upheld the type of protection from solicitation that the City wants to extend to public fora, especially where the public can simply "avert their eyes" from an unwelcome solicitation. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (pedestrians on public street are not captive audience and can simply avert their eyes from any unwanted speech).

This issue was addressed more recently by the Ninth Circuit in *Berger v. City of Seattle*, --- F.3d ---, 2009 WL 1773200 (9th Cir 2009). As the court explained,

The Supreme Court's "captive audience" jurisprudence fully supports our conclusion that public park-goers, in general, are not a protectable captive audience for constitutional purposes. "The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, we are inescapably captive audiences for many purposes." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975) (internal quotation marks and citation omitted). Only in "narrow circumstances" may government restrain speech to protect

such audiences. *Id.* at 210-11, 95 S.Ct. 2268. “The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.” *Cohen v. California*, 403 U.S. 15, 21, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971).

Such substantial privacy interests include “the psychological [and] physical well-being of the [hospital] patient held ‘captive’ by medical circumstance.” *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 768-71, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) (validating an injunction creating a 36-foot buffer zone around entrances of an abortion clinic in which picketing and demonstrating, among other activities, were barred); *see also Hill v. Colorado*, 530 U.S. 703, 728-30, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (upholding an eight-foot regulatory buffer around clinic entrances due to the “unique concerns that surround health care facilities,” where those using the facilities “are often in particularly vulnerable physical and emotional conditions”). They also encompass “the quiet enjoyment” of one’s home. *Frisby*, 487 U.S. at 483, 108 S.Ct. 2495 (upholding a ban on “focused picketing taking place solely in front of a particular residence”).

The unique privacy and self-determination interests involved in protecting medical facilities and residences simply do not exist for those waiting in line or having lunch outdoors in a public park. Indeed, we have already rejected such a comparison in *Kuba*, 387 F.3d at 861 n. 10, explaining that patrons of a “place of public entertainment” were not a captive audience similar to the intended audiences in *Madsen* and its progeny, because they were obviously not “particularly vulnerable,” as are the patients and doctors in such cases.

Id. at 17.

As the *Berger* court makes clear, the captive audience doctrine is an attempt to balance one’s right to be left alone while in public against another’s First Amendment rights. It is doubtful that substantial privacy interests are implicated for those merely filling their gas tanks or emerging from buildings or vehicles, or waiting for a ride. This is not to say that the privacy interests of persons at ATMs might be implicated, however. One could argue that most people feel uncomfortable when anyone approaches close enough to see how much money was obtained from the ATM or to decipher one’s pin number, whether or not they intend to ask for anything. The question then is whether a content-based restriction is necessary to achieve the legitimate goal of public safety in this context. If the City’s intent is really safety, then the City might consider an ordinance targeting the “act” of

approaching within a certain distance of ATMs, which is not a regulation of speech, or an ordinance that prohibits all solicitation, which would more likely be seen as narrowly tailored to that interest.

The analysis might also be somewhat different for gas stations which, I presume, are on private property. It may be that the owners could themselves, unlike the City, prohibit solicitation of all kinds as may home owners without running afoul of the constitution.

Without a doubt, panhandlers who obstruct traffic or threaten individuals are in violation of existing law. For those who do not, even in the places implicated here, the distinction is not narrowly drawn. Further, the distinction is not narrowly drawn where solicitation near the entrance of a building but on a public sidewalk is left to the unfettered discretion of private persons. Such a provision may also be unreasonable as susceptible to arbitrary and discriminatory enforcement. *State v. Smith*, 111 Wn. 2d 1, 7 (1988).

Thus as drafted, we believe this ordinance is subject to attack as a content-based restriction that is not narrowly tailored to a compelling government interest.