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THE CHANGING LANDSCAPE OF DAY LABORER REGULATIONS

An Update on Employment and Other Solicitation Cases

presented by
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THE CHANGING LANDSCAPE OF DAY LABORER REGULATIONS

An Update on Employment and Other Solicitation Cases

For decades, communities have grappled with the interests and rights of laborers seeking employment from city streets and sidewalks.

Community complaints including blocking pedestrian ways, distraction to motorists, danger to laborers, traffic congestion, harassing women, damaging parkway landscaping, fighting with one another, petty crimes, and a drain on police resources,[1] have resulted in local government attempting to address the problems through the use of varying options. Many considered legislation prohibiting solicitation of employment. Others opened skilled worker or day laborer hiring centers in an attempt to "encourage" day laborers to move from the streets to the hiring centers; some used a combination, and others required registration of employees. The common thread through all these various means of addressing the problem is the spawning of litigation. In the spring of 2007, I presented a paper at the IMLA Spring Conference discussing Glendale's experience and some of the cases and results in other jurisdictions.

Early legal challenges were based on first amendment grounds and led to mixed results depending on the breadth or limitations of the ordinance under challenge.[2]

It rapidly became clear that legislation could only survive if it was a content neutral regulation of time, place and manner, narrowly crafted to address significant governmental interests and that reasonable alternative avenues of communicating a solicitor's message ("hire me") were available.

What has begun to become even clearer now is the inconsistent application of first amendment jurisprudence to the anti-solicitation regulations. If ever an issue speaks out for guidance from the Supreme Court, this certainly is one. It is with this framework in mind that this paper outlines the recent court decisions and pending matters. Initially, I use the Glendale case to outline the issues, arguments, and analysis of the constitutional challenges to anti-solicitation regulations.

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[1]Glendale costs of enforcement were determined to be $109,200 annually.

[2]*Acorn v. Phoenix (ACORN)*, 798 F.2d 1260 (9th Cir. 1986) – Ordinance upheld
Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA I) v. Burke, 1999 WL 33288183 (C.D. Cal.1999) - Ordinance found to be content neutral.
Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA II) v. Burke, 2000 WL 148147 (C.D. Cal.2000) – Ordinance struck down
Xiloj-Itzep v. Agoura Hills, 24 C.A. 4th 620 (1994) – Ordinance upheld

COMITE de JORNALEROS & NDLON v. CITY OF GLENDALE

In August 1996, Glendale adopted an anti-solicitation ordinance at the same time it opened a skilled worker center across the street from the local Home Depot.

On May 19, 2004, NDLON, represented by MALDEF, filed suit in United States District Court to declare the original Glendale anti-solicitation ordinance unconstitutional. Before the hearing on a request for preliminary injunction, the City, on June 29, 2004, adopted Amended Ordinance 9.17.030.3 The amended ordinance provides:

> "No person shall stand in or on any street, roadway, curb, parkway, alley, highway and driveway, and solicit, or attempt to solicit, employment, business or contributions of money or other property from the occupant of any vehicle while that vehicle is located on any public street, roadway, alley, highway or driveway and not lawfully parked within, or immediately adjacent to, any Industrial or Commercial Zone within the City."
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> Street is defined as "a way or place of whatever nature, publicly maintained and open to the use of the public for purpose of vehicular travel ..." (GMC 9.17.020)

On July 21, 2004, NDLON filed an amended complaint challenging the amended ordinance (*Comite de Jornaleros de Glendale & NDLON v. City of Glendale*, CV-04-0352-SJ ["*Comite*"]).

PLAINTIFF'S CHALLENGE

In both the trial and appellate court, plaintiffs' basic contentions can be summarized as follows:

(1) The amended ordinance is content based because it regulates solicitation speech and not other categories or exempts certain speakers.

(2) The amended ordinance regulates speech, not the secondary effects thereof.

(3) Even if not content based, it is not narrowly tailored to meet the City's interests.

(4) The amended ordinance fails to leave open ample alternative avenues of communication.

(5) The amended ordinance is vague as laborers are uncertain where solicitation is permitted.

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[3] Glendale suspended enforcement of the ordinance in 2001 in response to the decision in CHIRLA II.

CONTENT BASED ARGUMENT

Plaintiffs asserted that the Glendale ordinance singles out a particular topic or category of speech and as a result, is content based citing *City of Cincinnati v. Discovery Network, Inc.*[4] Other similar cases[5] advance plaintiffs' claim that a blanket solicitation ordinance is subject to strict scrutiny and must be the least restrictive means to further a compelling governmental interest.[6] If plaintiffs are correct, the anti-solicitation ordinance survives only if it is narrowly crafted to achieve a compelling governmental interest.[7] Under a compelling interest test, the ability to craft an anti-solicitation ordinance to regulate anything more than in-roadway solicitation would be questionable.

The City contended the anti-solicitation ordinance is not content based and is therefore subject to "intermediate scrutiny" as the anti-solicitation ordinance is *viewpoint* neutral and does not target protected speech, only the "secondary effects" of solicitation[8] and that it applies to all groups without reference to viewpoint.[9]

The City relied on *ACORN, (supra)*, where the Ninth Circuit determined that an anti-solicitation ordinance in the City of Phoenix was content neutral, as it applied to solicitors regardless of viewpoint.

The District Court in its "Comite" opinion granting both a preliminary and permanent injunction agreed with Glendale that the amended ordinance was not content based and targeted secondary effects. However, the District Court found flaws with the City's ordinance under the "Narrow Tailoring" and "Alternative Avenues of Communication" tests discussed below.

SIGNIFICANT INTERESTS ANALYSIS

The Glendale Ordinance was supported by a legislative record which included increased calls to police for service at locations where day laborers congregated. The

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[4] 507 US 410 (1993) – A municipal ordinance which distinguishes between news racks containing commercial handbills and news racks that displayed newspapers was content-based).

[5] See also *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee,* 505 US 672 at 704 (1992)

[6] *ACLU v. City of Las Vegas,* 333 F3d 1092 at 1099 (9th Cir. 2003)

[7] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 US 37 (1983)

[8] *U.S. v. Kokinda*, 497 US 720 (1990) and *ACORN v. City of Phoenix,* 798 F2d 1260 at 1267 (9th Cir. 1986)

[9] *Int'l Soc'y for Krishna Consciousness of New Orleans v. City of Baton Rouge,* 867 F. 2d 494 (5th Cir. 1989)

service calls included fights, intoxication, vehicle swarming, aggressive solicitation, inhibiting the flow of traffic, blocking pedestrians, and a myriad of misdemeanor offenses. The free flow of traffic/pedestrians has been found sufficient to justify a limitation on solicitation.[10] The District Court agreed with Glendale that its proffered reasons underpinning the amended ordinance were significant.

NARROWLY TAILORED PRONG

If an ordinance is content neutral, it may be enforced if it is narrowly tailored to serve a significant governmental interest and leaves open ample alternative avenues of communication. In general, narrow tailoring requires a particular "fit" between the regulation at issue and the asserted governmental purposes (in the case of day laborers, alleviating significant secondary effects, including traffic congestion, assuring the safety of drivers and pedestrians, preserving and improving the quality of life for residents and business owners, among other things). The ordinance does not have to be the least restrictive or the least intrusive means of furthering the city's interests. [11] A regulation is narrowly tailored if the means chosen are not substantially broader than necessary to achieve the government's interests. The Ninth Circuit applied this standard in *ACORN* and the Fifth Circuit in *International Society for Krishna Consciousness*, cases involving solicitation ordinances similar to Glendale's. The Ninth Circuit held that Phoenix's significant interest in promoting traffic flow and traffic safety justified the restriction of vehicle-addressed solicitation and that the restriction imposed – prohibiting fund solicitation from vehicles stopped at intersections, was narrowly tailored.[12] The Eighth Circuit likewise found a similar solicitation ordinance narrowly tailored.[13]

In the Glendale ordinance, the governmental interests extend beyond only traffic concerns. Such solicitation activities in Glendale involve people running into the streets and swarming vehicles – conduct which obviously has traffic safety concerns and impedes the free flow of traffic. In addition, such solicitation practices create pedestrian safety hazards as well as quality of life issues for residents and business owners. Solicitation and secondary effects which flow therefrom were found by the District Court

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[10] *Heffron v. International Soc. for Krishna Consciousness*, 452 US 640 (1981) – Prohibition against distributing written material except from booths at state fair, found justified.

ACORN v. Phoenix, (supra)

[11] *Ward v. Rock Against Racism,* 491 US 781 at 797 (1981)

[12] *ACORN, supra*, at 1268 and 1270.

[13] *Association of Community Organizations for Reform Now (ACORN) v. St. Louis County* 930 F2d 591 (8th Cir. 1991).

as "significant governmental interests" which justify an appropriately tailored ordinance.[14]

Glendale has also asserted that additional restrictions on solicitation from curbs and parkways is narrowly tailored to promote a significant governmental interest – pedestrian safety and traffic concerns along with quality of life issues. Curbs and parkways are elevated areas immediately next to the street. Allowing individuals to stand in large numbers in those areas to solicit work, business or contributions presents a danger. Individuals could fall into the street and become injured by passing vehicles. Alternatively, vehicles driving in the curb lane or attempting to park could strike individuals standing on the curb with mirrors, door handles or any other number of protrusions. Additionally, a large number of individuals standing on curbs and parkways could impact traffic flow as drivers slow down in anticipation of these individuals entering the street.[15] As noted in *City of Renton v. Playtime Theaters, Inc.*[16], cities are free to address particular problems individually or can further amend ordinances to include other types of conduct that are later shown to produce the same kinds of secondary effects. To date, Glendale has not experienced problems with excessive numbers of jugglers or acrobats congregating on curbs or parkways.

The District Court determined that allowing individuals to "stand on the curb" while prohibiting "solicitation speech alone" was not the "reasonable fit" between the interests of the City and the ordinance. The Court further wove into its analysis vagueness created by the uncertain meaning of sidewalks, curbs and parkways. The ordinance was therefore found by the District Court to fail the "narrow tailoring" test.

AMPLE ALTERNATIVE AVENUES OF COMMUNICATION

The second prong of the analysis when addressing a content-neutral ordinance is that the regulation must leave open ample alternative avenues of communication.[17]

The Ninth Circuit has noted that governmental action will generally not be stricken down for failure to leave open ample alternative avenues of communication unless the government enactment will foreclose an entire medium of public expression across the

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[14] Preliminary injunction in *Comite de Jornaleros de Glendale v. City of Glendale,* pages 4, 13, and 16 and permanent injunction (order re response to Order to Show Cause), pg. 4 (permanent injunction available on request).

[15] Plaintiff and the District Court asserted that the curb restriction is not necessary because people other than solicitors, such as acrobats, jugglers and dog walkers, can stand on the curb all day without repercussion.

[16] 475 U.S. 41 (1986)

[17] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 US 37 (1983)

landscape of a particular community or setting.[18] As noted in the previous discussion of narrow tailoring, the Ninth Circuit has already spoken to this issue in the solicitation context in *ACORN (supra)* by determining that it strains credulity to believe that *ACORN* is left without ample alternatives by the mere foreclosure of one questionable approach to soliciting contributions.

In the *Comite* case, the evidence was uncontroverted that the ordinance does not ban communication or solicitation. The Glendale ordinance allows solicitation from city sidewalks and solicitors can announce their availability for work to legally parked vehicles from any location, or from any other public property not specifically excluded by the ordinance. Finally, solicitation can occur on private property or in residential areas or from the skilled worker's center (day laborer).[19] In the final coup de gras, the District Court disagreed and determined that the skilled workers' center was not a reasonable alternative avenue for seeking work, as the center was not mentioned in the ordinance, and in the Court's words... "still remains in the unsteady hands of the city."

RESULT

After the case was fully briefed on appeal to the 9th Circuit, plaintiff broached the possibility of settlement. After numerous rounds of negotiation, the case was settled on the following terms[20]:

- Plaintiffs waived all costs and attorney's fees.
- City will consider adoption of an amended ordinance which clearly permits solicitation from sidewalks and will also permit solicitation from parkways and to vehicles which are fully stopped out of travel lanes.
- If the amended ordinance is adopted, the City will dismiss the appeal, and plaintiffs will not challenge the amended ordinance.

COMITE DE JORNALEROS DE REDONDO BEACH (9th Circuit Case #06-55750)

The District Court entered judgment granting a permanent injunction against the enforcement of the Redondo Beach anti-solicitation ordinance. In the 29-page opinion, the District Court determined that *NDLON* and *Comite* exist, has a membership, and the members do not have to be citizens to have standing to challenge the Redondo Beach anti-solicitation ordinance.

The opinion granting the permanent injunction found that the anti-solicitation ordinance is content neutral as it focuses on the inherently disruptive nature of the solicitation itself and not the content of the speech.

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[18] *Colacurcio v. City of Kent*, 163 F3d 545, 554 (9th Cir. 1995)

[19] See *Xiloj-Itsep v. City of Agoura Hills, supra*.

[20] During negotiations, plaintiffs raised a preemption argument which was not raised in their complaint or briefs.

It was also determined that the secondary effects doctrine is applicable and even if the ordinance was content based, the regulation can be analyzed as content neutral if justified to eliminate a secondary affect indirectly related to the communicative impact of the speech. It was acknowledged that the Redondo Beach ordinance was enacted to curtail traffic congestion, vandalism, litter, occasional fights, etc. As a positive note, the District Court also determined that the secondary affects doctrine is not exclusive to adult businesses and can be applicable to an ordinance such as one which regulates solicitation.

However, like the Glendale *Comite* case, it was determined that the application of the Redondo Beach ordinance was broader than the ordinance in *ACORN,* as the Redondo Beach ordinance applied to individuals who stand on the sidewalk as well as vehicles which are lawfully parked. This is in contrast to the Glendale ordinance which allows solicitation from sidewalks and also allows solicitation to vehicles which are lawfully parked.

Under the narrow tailoring prong, Redondo Beach asserted that private parking lots were available as well as labor centers in the metropolitan Los Angeles area. The District Court determined that allowing solicitation from private parking lots would create a possible trespass and as such does not leave open an alternative avenue of communication. In addition, the existence of labor centers in metropolitan Los Angeles was insufficient to support the requirement of an adequate alternative channel for speech as no center was located in Redondo Beach. *Xiloj-Itzep* was distinguished noting that Agoura Hills had a day laborer center within the community.

Plaintiffs have been awarded $208,000 in costs and attorney's fees.

Redondo Beach has appealed the judgment granting the permanent injunction to the Ninth Circuit. Briefing was completed and oral argument held on May 9, 2008.

At oral argument, the City focused on the precedent established by *ACORN*[21]. The court quizzed the parties on whether the ordinance regulated commercial, not pure speech, and whether someone who was possibly violating another law (undocumented individual seeking employment) should have standing to challenge the ordinance. A decision is expected in the next four to six months.

AMERICAN CIVIL LIBERTIES UNION OF NEVADA V. CITY OF LAS VEGAS, 466 F.3d 784 (9th Cir. 2006)

Sometimes referred to as ACLU II, this case involves the continued attempt by Las Vegas to address the proliferation of solicitors in an area known as Fremont Street Experience, a five block tract in downtown Las Vegas.

[21] *ACORN v. City of Phoenix* (supra)

The economic downturn of the 1990s did not leave downtown Las Vegas unscathed. It was unable to compete with the Las Vegas Strip, and the area was in an economic decline. At a cost of public and private funding of $70,000,000, the area was transformed into what is now known as the Fremont Street Experience. It was intended as an attraction to compete with the numerous other entertainment venues in Las Vegas and continues to play its role as a pedestrian thoroughfare.

It soon became apparent that many solicitation activities in the area would disrupt the comfortable environment and in turn would cause visitors, tenants and corporate sponsors of the Fremont Street Experience ("FSE") to go elsewhere.

In response to these concerns, the city adopted ordinances restricting activities in the FSE, including solicitation at multiple locations within Las Vegas.

Solicitation in the ordinance is broadly defined as "to ask, beg, solicit or plead, whether orally, or in a written or printed manner, for the purpose of obtaining money, charity, business or patronage or gifts or items of value for oneself or another person or organization." In addition, with regard to the FSE, the ordinance adopted a ban on vending, tabling and leafleting, exempting therefrom labor related activities.

The ACLU and other plaintiffs challenged the anti-solicitation ordinance as well as the prohibition against setting up tables (tabling), vending and leafleting.

After the first ruling by the District Court, along with an appeal which reversed, plaintiff filed an amended complaint which challenged the solicitation ordinance on its face and as applied, as well as the vending tabling ordinances.

The District Court granted summary judgment for the City on the solicitation ordinance, finding it to be a content neutral time, place, and manner restriction, and found the tabling ordinance violated plaintiff's equal protection rights as applied to them. Both parties cross-appealed.

The Ninth Circuit, as it relates to the anti-solicitation measure, parted from the analysis in *ACORN* as well as other cases.[22] It determined that although the record reflected the solicitation ordinance was not enacted for the purpose of suppressing speech with certain content, the fact that the ordinance differentiated between handbills which contained certain language and those containing other language was sufficient to require an official to examine the content of the message conveyed. This "examination" leads to a content-based distinction, as it singled out certain speech for differential treatment based on the idea expressed.

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[22] *U.S. Kokinda Int'l. Soc'y for Krishna Consciousness of New Orleans v. City of Baton Rouge*; *Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005); Ward *v. Rock Against Racism*, (supra); *Thomas v. Chicago Park District*, 434 U.S. 316, 122 S.Ct. 775 (2002)

While an argument can be made that the Court conflated two views on content neutrality and content-based acts of solicitation, the fact is that the 9th Circuit apparently carved out a narrow exception to distinguish *ACORN.* Emphasizing that regulation which distinguishes based on the printed content of a message requires an official to view the message before determining whether it is lawful or otherwise violative of a regulatory scheme, leads to a conclusion that the regulation is content-based requiring same to be analyzed under the lens of strict scrutiny.

PRACTICAL EFFECT:

The decision in ACLU has cast doubt on the continued viability of *ACORN* and the notion that an anti-solicitation regulation is content neutral. The waters become murkier still when Las Vegas is compared to the more recent decisions of the Ninth Circuit, as well as other recent District Court decisions.

BERGER V. CITY OF SEATTLE, 512 F.3d 582 (9th Cir. 2008)[23]

In this two to one decision, the Court determined among other things that rules issued in 2002 to guide the conduct of street performers at the 80 acre Seattle Center site do not offend the constitution. Although five regulations were challenged, the one most applicable here is the rule which barred active solicitation by street performers. The Court first determined that the area of Seattle Center was a traditional public forum such that government's ability to regulate speech be analyzed either as a content-based restriction requiring strict scrutiny or a content neutral restriction.

The Court first determined that since the regulations were not adopted because of any disagreement with the message of street performers, such a regulation was content neutral even though it may have an incidental effect on some forms of solicitation. The Court, citing *ACORN*, noted that this content neutral regulation was supported by significant governmental interests, including promoting and protecting public safety, the orderly management of pedestrians, and avoiding congestion. The Court expressed concern that solicitation demands a response which then requires an individual to search for currency and pass it along. This in turn has the probability of increasing the risk of congestion. The Court, again citing *ACORN*, determined that the regulation was narrowly tailored to address the substantial governmental interests as it is only active solicitation that was the subject of complaints and concerns. Finally, the Court determined that the regulations left open ample alternative avenues for communication as it specifically permitted passive acceptance of donations through the use of a music case, box or other depository for donations.

The decision in *Berger* seemed to temper the decision in ACLU II, and give hope to agencies which had adopted or were contemplating adoption of anti-solicitation ordinances. However, as noted, the *Berger* case was granted en banc review rendering

[23] En Banc Review Granted July 14, 2008.

it non-citable and tempering a public agency's ability to rely on its reasoning in conjunction with *ACORN*.

LOPEZ V. TOWN OF CAVE CREEK, ARIZONA, ____ F.2d _____ 2008 WL2422234 - DECIDED JUNE 2, 2008.

The District Court in the Lopez case was faced with an ordinance that made it unlawful for any person to stand on or adjacent to a street or highway and solicit or attempt to solicit employment, business or contributions from the occupant of any vehicle. A violation would constitute a civil traffic offense, which could result in a civil penalty not to exceed $250.00. The language in this ordinance is strikingly similar to the language in *ACORN*.

The similarity notwithstanding the District Court determined that *ACORN* was distinguishable and ACLU II was controlling in that the ordinance differentiates based on the content of speech on its face by prohibiting solicitation speech, but not political, religious, artistic or other categories of speech. As a result, this Court determined that an official must necessarily examine the content of the message that is conveyed, running afoul of ACLU II.

The Court also noted that even if the ordinance was content neutral, it would still be impermissible as it was not narrowly tailored under the town's interests. While the Court noted the town's interest in traffic safety is significant, the ordinance fails to promote the asserted interests as City fails to provide evidence that traffic safety is endangered by day laborers soliciting employment from vehicle occupants.

Finally, the Court noted that even if there was sufficient evidence, the ordinance disregarded far less restrictive and more precise means to promote traffic safety such as enforcement of existing traffic, parking and loitering laws. Not surprising, the Court noted that it joined other District Courts in the Ninth Circuit which have found similar anti-solicitation ordinances unconstitutional (albeit as a content neutral ordinance) including the Redondo Beach, Glendale and CHIRLA cases.

TIMES-NEWS PUBLISHING COMPANY V. CITY OF BURLINGTON (2008) WL2622995 DECIDED JUNE 30, 2008

In Times-News, the District Court was confronted with an ordinance prohibiting solicitation of occupants of vehicles being operated upon public streets or highways. Specifically, the ordinance made it unlawful for any person to stand on any street, highway or right-of-way, excluding sidewalks, within the city while soliciting or attempting to solicit any employment, business or contributions from the driver or

occupants of any vehicle.[24] Violation of the ordinance is a misdemeanor subjecting the violator to a fine of not more than $50.00 or seven days imprisonment.

The Times-News challenged the ordinance, seeking a preliminary injunction, contending that the ordinance was unconstitutional as applied to them.

Unlike the Court in *Lopez v. Town of Cave Creek*, the Court found that the ordinance was adopted not because of any disagreement with the message conveyed, and that it applies even handedly to all who wish to solicit from motorists, and was therefore, (citing *Heffron* (supra)) content neutral. The Court found that the avowed purpose of the ordinance was to protect public safety and to address what the city deemed as a significant hazard to both pedestrians and motorists, noting that in matters of public safety, the State need not wait for personal injuries, citing *ACORN v. St. Louis County*, 30 F.2d 591 (8th Cir. 1991) and that the dangers of soliciting amongst traffic is self-evident and supported by common sense, citing *ACORN v. Phoenix* (supra). The City also produced expert opinion evidence that soliciting in the roadways and the rights-of-ways amongst traffic is a dangerous activity, including videotape of street vendors standing in the roadway medians, walking on active roadways to sell newspapers to passing motorists, and selling to motorists who are stopped at green lights, causing other traffic to divert or stop until the transaction is completed.

Finally, Times-News faulted the ordinance because it did not focus on particular streets or highways and swept too broadly including any person on any street soliciting any sales from a motorist, thereby arguably failing the narrowly tailored test. The Court found that the least restrictive means is not required and that government is not required to develop a "newspaper exemption" and that doing so could have created further problems, including a possible claim that by excluding newspapers, the ordinance could be vulnerable to a "content-based" challenge[25].

OBSERVATIONS

These cases appear to follow the adage that "the dog don't bark according to no rule." The cases cited above, as well as others from Ohio[26], and New York[27] are analyzed either as content based, content neutral, or as a form of commercial speech. As agency attorneys who may be called upon to advise local councils, the lack of certainty is at

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[24] With the exception of the phrase "or adjacent" and some minor stylistic linguistic changes which are of little substantive consequence, the ordinance in Cave Creek is virtually identical to that of Burlington.

[25] cf: *Weinberg v. City of Chicago*, 310 F.3d 1029 (7th Cir. 2002) – newspaper exception does not render peddling ordinance unconstitutional as book and merchandise peddling would create greater disruption.

[26] *State v. Ohio* (2007).

[27] *People v. Barton* (2006).

least disconcerting. Alternatively, it may lead to a conclusion to sit on the sidelines and let others steer the litigation ship toward the harbor of certainty.

OTHER CREATIVE ALTERNATIVES AND CHALLENGES

Challenges to cities which provide day laborer centers have been gathering momentum on another front. With some, it is anti-immigration groups protesting near day laborer centers or areas where day laborers congregate, including filming of contractor's vehicles, leafleting, and posting company or personal information on websites,[28] etc. The centers are targeted for protest to discourage use and operation, and possibly seek a political remedy (closure of the center and stringent enforcement of immigration laws). In others, litigation was commenced to halt the use of property for a laborer center. In *Karunakaram, et al. v. Town of Herndon, and County of Farifax, Virginia*, plaintiffs sought to enjoin the use of taxpayer funds to finance Project Hope and Harmony, a private operator of a day laborer center on town owned property for which a conditional use permit (C.U.P.) was granted. The case was asserted under a theory that the town and county were aiding and abetting illegal immigrants to procure unlawful employment, and, as a result, were in violation of state and/or local laws which require the expenditure of funds to be for a lawful purpose or use of property in a lawful manner. Plaintiffs'' second amended complaint is replete with citations to the Illegal Immigration and Control Act of 1986.[29] *Herndon* has apparently closed the day worker center.[30]

According to counsel, Plaintiff has non-suited (dismissed) the case.

GARCIA v. CITY OF LAGUNA BEACH IN CAL. COURT OF APPEALS, No. G039824

Plaintiffs challenged the day laborer center established by the City of Laguna Beach in 1999. On stipulated facts, the trial court granted judgment for the City finding no unlawful expenditure of taxpayer funds to hire or refer for a fee, employment of an alien with knowledge the alien is unauthorized[31] or to induce an illegal alien to reside in the United States knowing the fact that the residency is in violation of law. In addition, the City is not providing benefits as the term is used under 8 U.S.C. §1621(c).

The plaintiffs have appealed and the matter has been fully briefed with a hearing date anticipated for September 2008.

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[28] See, for example, WeHireAliens.com, NoInvaders.org, operationshameonyou.org, firecoalition.com, and illegalemployers.org.

[29] 8 U.S.C. §1324 (Part VIII - general penalty provisions)

[30] Last day of operation reportedly was on September 14, 2007.

[31] 8 U.S.C. §1324a.

REGISTRATION OF EMPLOYERS

At least one city has adopted an ordinance which regulates employers of day laborers. The City of Vista, California in June, 2006, adopted an ordinance targeted to address many conditions faced by day laborers and employers.

In summary, the ordinance requires employees or agents who employ day laborers (as defined) to obtain a registration certificate. Obtaining a certificate is a no-fee ministerial process. The certificate must be displayed on the vehicle used to transport a day laborer from an "uncontrolled location" (as defined). Upon a day laborer accepting employment, the employer or agent must immediately provide a complete "term sheet" (as defined) prior to operation of the vehicle used to transport a day laborer.

On July 17, 2006, Vista's ordinance was challenged in U.S. District Court[32] on grounds that it acts as a prior restraint on speech, as it sets no effective time limit for issuance of the permit, delegates unbridled discretion to the City, and negates meaningful judicial review.

The City opposed an application for TRO asserting: (1) the ordinance and an adopted policy clarifying the ordinance mandates issuance of a certificate in two days and no other additional information to deem the application complete is necessary; (2) the employer can use a sample city "term sheet" which is in English and Spanish; and (3) a writ of mandate under *CCP* § 1094.8(a) and (d) is available for review of the issuance, revocation or denial of the permit.

On August 1, 2006, the Court denied the requested TRO, finding the potential constitutional infirmities in the ordinance were addressed by a subsequent written implementation policy adopted by the city manager and that language which seeks to limit the imposition of a mandatory duty, although possibly precluding mandate relief was severable. As a result, the District Court determined that plaintiff would not suffer irreparable harm if the TRO is denied. The case has been dismissed through a settlement. The agreement is that first time offenders could register on site with the code enforcement officer.

HOUSE BILL 2412 – ARIZONA

Arizonia's state legislature is considering a bill which would prohibit standing, etc. on or adjacent to a public street or highway and disrupting vehicle or pedestrian traffic for the purpose of soliciting day laborer employment. The matter is currently pending before the Senate on reconsideration.

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[32] *Calderon, et al v. City of Vista,* (2006) CV 1443 - L(LSP)

HOUSE BILL 729 – PUBLIC CHAPTER 529 – TENNESSEE

Effective January 1, 2008, an employer who knowingly hires an illegal immigrant could lose their license to conduct business. The clear and convincing evidence standard applies. The State Commissioner of Labor and Workforce Development conducts a hearing and, if a violation is found, local government is requested to revoke or suspend the business license.

ILLEGAL IMMIGRANT VOLUNTARY DEPORTATION

A pilot program launched by the Federal Government in August 2008 allows non-criminal illegal immigrants to turn themselves in to one of five cities for deportation. The so-called "scheduled departure" program will be in place through August 22, 2008. Immigrant rights advocates have criticized the program.

ENFORCEMENT OF EXISTING LAWS

Finally, as noted by the court in Lopez, agencies can enforce "nuisance" and other laws such as trespass, littering, traffic infractions, and public urination in an attempt to address some of the problems associated with congregations of day laborers. However, enforcement of these laws is labor intensive and costly.[33]

WHERE DO WE GO FROM HERE?

Local government is invariably faced with difficult challenges when attempting to address day laborer issues: (1) adopt legislation to address concerns related to the conduct of solicitors, which legislation runs the risk of legal challenge; (2) establish a day laborer center to encourage the employment solicitors to move from the streets to the center. This option faces potential opposition from anti-immigration groups;[34] (3) only enforce existing laws such as littering, traffic infractions, urination in public, loitering with intent to commit crime(s) and trespass. Enforcement of these laws can be very labor intensive and, for the most part, necessitate commission in the presence of a peace officer. (4) Do nothing and face community complaints about traffic and pedestrian hazards, nuisance conduct and general quality of life issues; (5) duck into our fox hole and wait for a definitive decision from a circuit court in your jurisdiction or, hopefully, the grant of review and decision by the Supreme Court.

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[33] The estimated cost in Glendale was approximately $2,100 per week or $109,200 annually based on nine man hours per day, five days per week. This does not include the cost of jailors or legal staff. The subject of illegal expenditure of taxpayer funds to maintain a site is currently being litigated in *Garcia* (supra).

[34] Thousand Oaks received a "cease and desist" letter from Judicial Watch after establishing a day laborer site.