An Annotated Model Panhandling Ordinance: Preventing Harassment While Protecting Free Speech

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Editor's Note: This Model Panhandling Ordinance is part of Dean Wegner's paper to be presented to attendees of IMLA's Annual Conference in Niagara Falls, Ontario, Canada on October 16, 2017. The regulation of panhandling has become a more challenging proposition since the United States Supreme Court's very splintered decision in Reed v. Town of Gilbert, 576 U.S. ___ (2015), which altered First Amendment analysis of "content-based" and "content-neutral" regulation of signs in significant ways. Dean Wegner's presentation will cover the substantial analyses behind each of the provisions in the Model and will allow open discussion of the many nuances involved. Dean Wegner's complete presentation, co-authored with her student, Matthew Norchi, UNC Law J.D. 2018, will be published in the South Dakota Law Review in 2018. *Copyright © 2017 South Dakota Law Review and Judith Wegner; reprinted with permission.* *Dean Wegner and IMLA thank the South Dakota Law Review for granting permission for this early publication in hopes that the model may assist practitioners grappling with related issues.*

This annotated Model Ordinance was developed based on a review of case law through mid-August, 2017, ordinances adopted nationally, and consideration of "plain English" principles that endeavor to help readers understand public laws and policies. Commentary is provided in italics.

Preliminary Observations: Questions Worth Asking... and Answering

It may be helpful to readers to reflect carefully on some initial issues before trying to draft ordinances in this complex area involving confusing precedent and sophisticated First Amendment standards. Here are some preliminary considerations worth careful attention.

1. Why are you acting and what problem(s) are you trying to address?

A good summary of possible motives for regulation was provided in a recent American Bar Association CLE program, "Panhandling and Solicitation: Understanding the First Amendment Implications," June 14, 2016. Common motivations include: reducing homelessness, limiting public begging, maintaining clean and orderly view-scapes, protecting public and traffic safety. Specific problems that policymakers may wish to address include reducing adverse effects on business, addressing public concerns about disorder and safety, and assisting those who are homeless/ending homelessness.

One common justification for action against panhandling is tied to the "broken windows" theory of policing, articulated by George Kelling and James Q Wilson in "Broken Windows: The Police and Neighborhood Safety," THE ATLANTIC MONTHLY (March 1982). The basic idea behind this theory is that police interventions in small matters can curb urban disorder (such as broken windows) and can keep such disorder from becoming more accepted/acceptable. Zero-tolerance policies rely on similar thinking. It is important to bear in mind that the "broken windows" argument reflects a theory, not a confirmed fact. For an excellent compilation of research on the broken windows theory, see Center for Evidence-Based Crime Policy, George Mason University,http://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/broken-windows-policing/ (last visited March 16, 2017) (citing recent studies and need for additional targeted research to prove this theory).

There is also a risk that in our currently divided society, anti-panhandling ordinances are really aimed at pushing poor and homeless people out of sight of the public, or criminalizing the status of being poor or homeless. Dislike of panhandling and panhandlers is not the kind of justification courts will uphold as the undergirding of panhandling regulations.

2. What burden of proof will you need to carry?

Jurisdictions updating their panhandling ordinances should be alert, from the start, to the importance of statements of purpose, the need for securing evidence and making findings, and the application of burdens of proof. Although Reynolds v. Middletown, 779 F.3d 222 (4th Cir. 2015), was decided prior to Reed, its guidance is helpful in this regard because it addresses the burden of proof and requisite evidence in some detail. The court initially observed that the plaintiff (in this case the panhandler) "has the burden of showing that speech was restricted by the governmental action in question." Once plaintiff had met the initial requirement, the government was required to prove that its panhandling ordinance was "narrowly tailored to further a significant government interest and that it [left] open ample alternative channels of communication." Most significantly, the court held that the government needed to make "some evidentiary showing that the recited harms are real, not merely conjectural, and that the [challenged regulation] alleviates such harms in a direct and material

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way," even if not offering a "panoply of empirical evidence."

In reaching this conclusion the court relied upon the Supreme Court's decision in McCullen v. Coakley, 134 S.Ct. 2518 (2014), applying intermediate scrutiny to an abortion clinic buffer requirement applicable to protesters on public sidewalks. The Reynolds court emphasized that the government must show that it had actually tried other means to address problems associated with panhandling on medians, and that these other means had been unsuccessful. Since the county in Reynolds had relied only on the opinion of law enforcement officials and had not actually tried to implement alternative methods for addressing perceived problems, it had failed to meet intermediate scrutiny requirements. Bear in mind that both these cases were applying an intermediate scrutiny standard, rather than the higher strict scrutiny standard adopted in Reed to apply to content-based regulation.

Courts other than the Fourth Circuit have expressed similar views. For example, in Speet v. Schuette, 726 F.3d 867 (6th Cir. 2013), the Sixth Circuit struck down, on overbreadth grounds, Michigan's "anti-begging" statute and a Grand Rapids, Michigan ordinance that had resulted in hundreds of arrests of those simply holding signs asking for help or verbally soliciting charity. The court also rejected an argument that the Michigan statute could be construed more narrowly to meet constitutional requirements in reaching its ultimate conclusion. An earlier Sixth Circuit opinion is also relevant in this context: See Satawa v. Macomb County Road Commission, 689 F.3d 506 (6th Cir. 2012) (landscaped median with adequate space for multiple uses had history of being treated as traditional public forum; hypothetical traffic-safety justification was insufficient to justify denial of application for permit to display Nativity scene on road median).

3. How might you proceed in gathering evidence to guide proposed government action in this sensitive area meets stringent demands regarding purposes and tailoring of means?

The Center for Problem-Oriented Policing provides a helpful guide to creating community dialogues designed to adduce evidence needed in developing panhandling policies. See Michael S. Scott, Problem-Oriented Guides for Police Report 13: Panhandling (US Department of Justice, 2002), available for download at http://www.popcenter.org/problems/pdfs/Panhandling.pdf. The guide is particularly helpful regarding strategies for collecting useful evidence. Id. at 13-16. Although this guide on panhandling was published in 2002, and thus only considers case law to that date, it still has a great deal of insight to offer.

4. ***How can you frame the ordinance in a way that makes it understandable to the lay people who will be obliged to conform to its requirements?***

Policymakers and citizens sometimes are tempted to focus on the "people" who they believe are the source of the perceived "problem" they want government to address. That temptation may have been increased as a result of the current deeply acrimonious political climate. For good or ill, the courts and the First Amendment require a different approach: look at the adverse effects and address them with tailored solutions, don't just look at speakers whose messages some people may not like to hear. This approach should not be surprising, since it is already evident in well-known land use cases relating to such matters as adult uses and billboards. In some ways, it may be helpful to realize that some people view panhandlers much as they do various "nuisances" they dislike. The local government's approach should be designed to ameliorate well-grounded conflicts between diverse users of public spaces where possible, rather than picking "winners" and "losers."

That means that it is very important to sort out real interests, not just positions (as explained by the authors of "Getting to Yes"). That means that an initial focus needs to be on "what conduct" rather than "who." "What conduct" can include defining objectively determined danger, engagement in intimidation/threats, interference with reasonable expectations of privacy, interference with access by others who are navigating within congested public spaces, or creation objectively determined risk of traffic accidents or exacerbation of traffic congestion.

Once the "what" is clear, the decision about "who" must follow regulations may be more challenging. The courts have made it clear that content-based regulation must meet a high bar. Regulating only panhandlers (and not others engaged in comparable conduct) makes is likely that ordinances will be struck down under Reed and other precedent. Efforts to claim that ordinances are instead directed to regulate time, place, and manner of use of public forums (such as public squares, sidewalks and streets) must be content-neutral and must employ "narrow tailoring." As a result, it is inevitable that jurisdictions wanting to regulate the kind of conduct associated with panhandling should also regulate other forms of charitable solicitation (for example fire-fighters' one-day "fill the boot" campaigns), and electioneering that involves solicitation activities occurring in public streets. The latter types of activities have historically taken place on traffic medians in which many jurisdictions have recently wanted to regulate panhandling. It may be possible to justify distinctions (e.g. charitable or electioneering campaigns that are limited to a few days in duration might be allowed, but it would appear appropriate to allow panhandling in comparable locations during that same period and to take extra precautions regarding safety).

The model ordinance proposed here accordingly covers "panhandling, begging, charitable and political solicitation" rather than only panhandling.

5. How should you structure the ordinance so that it places clear policy choices before the City Council and interested citizens, and makes it likely to withstand potential judicial challenge?

The Center for Problem-Oriented Policing Report on Panhandling, referenced in Note 3 above, provides a very helpful template of possible options for regulating the kinds of problematic conduct that is sometimes associated with panhandling. See id. at pages 17-26. These responses are grouped in the following categories: enforcement responses, public education responses, situational responses, and social services/treatment responses. The following law enforcement responses are discussed: prohibiting aggressive panhandling, prohibiting panhandling in specified areas, prohibiting interference with pedestrians and vehicles, banning panhandlers on probation from certain areas with the best panhandling potential (in order to discourage panhandling), requiring panhandlers to engage in certain types of community service if found to have violated governing laws, and requiring panhandlers to obtain solicitation permits. The Center's

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Type of conduct	Where Regulations Apply	Penalty
Passive (written or oral) in non-designated areas	Non-designated areas (no showing of personal security/privacy or public safety/traffic	None
Passive in Sensitive Protected Areas (personal security/privacy) OR could create disincentive for aggressive panhandling in such areas by imposing a "most severe" penalty in such cases	Designated areas with higher personal security/privacy concerns (ATMs, bus stops, congested sidewalks, etc.)	Moderate (drafted in this fashion) Most severe if aggressive panhandling in such areas? (could revise accordingly if desired)
Passive in Dangerous Areas (relates to public safety/traffic congestion)	Traffic medians that are too small or designated high volume/high speed traffic area	Moderate
Aggressive	Everywhere in jurisdiction	Severe

Report correctly notes that ordinances prohibiting all panhandling are likely to be invalidated by the courts. Prohibitions of panhandling at night have also been struck down.

This Model Ordinance addresses the first three of these strategies–aggressive panhandling, panhandling in specified areas (where security or privacy is of particular concern), and prohibiting interference with pedestrians and vehicles– since these are the most common strategies used today. The ordinance is structured to address each of these areas specifically, clearly, and separately so that a reviewing court can clearly discern the links between governmental purpose, evidence, and actions. This approach also tries to reflect the relative severity of the regulated conduct in the view of regulators. It includes a clear "safe harbor" for passive solicitation (signs or speech alone) except in "sensitive protected areas and "dangerous areas" relating to highways, traffic and medians. Setting forth a rational framework of this sort should assist a court in upholding the ordinance, since it is clear that the jurisdiction is regulating solicitation in a nuanced fashion and not trying to criminalize all types of solicitation. Clear delineations among different types of solicitation will also make it possible to uphold major parts of the ordinance if some others were to be struck down.

6. How might communities and policymakers who believe that panhandling is closely related to homelessness proceed?

There are a number of important resources that can help communities and policymakers understand the connections between homelessness and panhandling. The following websites are particularly helpful: National Law Center on Homelessness and Poverty, https://www.nlchp.org/; American Bar Association Center on Homelessness and Poverty, http://www.americanbar.org/groups/public_services/homelessness_poverty.html .

7. How might communities and policymakers avoid wasting time on legally unsustainable ordinances?

There is good reason to avoid wasting time on overly broad ordinances that can't be sustained. In this context unsustainable ordinances include those that prohibit all panhandling, those that prohibit panhandling in the nighttime (without targeted restrictions), broad prohibitions on panhandling in certain public areas unless tied to concrete government justifications, and panhandling in traffic medians (unless justified by studies of danger and congestion and applied primarily to very busy streets and very small traffic medians that lack adequate footing for those standing in such spaces).

The Annotated Model Ordinance follows.

Title: Public Panhandling, Begging, Charitable and Political Solicitation Regulated

[Note that this ordinance does not attempt to cover activities of "itinerant performers" or "buskers" who typically perform and request contributions, and are thus regulated as "commercial," "cultural" activities. There is a separate body of case law and often separate ordinances governing such activities].

I. Purpose/Findings:

[This section should include statements of purpose and factual findings. Such provisions might include language such as that found in the Pittsburgh, PA panhandling ordinance, available at Municode.com; the Pittsburgh language has been revised to reflect the analysis used by the author]

§ XXX.01 – PURPOSE AND FINDINGS.

The City Council does hereby find that:

(a) It is the intent of Council in enacting this Ordinance to recognize free speech rights for all citizens while at the same time protecting the coexistent rights for all citizens to enjoy safe and convenient travel in public spaces free from intimidating conduct, threats, and harassment that stem from certain types of abusive solicitation, or that may give rise to interference with other's activities if they occur in particular settings and contexts; [*effectively documents Council's commitment to respect First Amendment concerns but also to address other significant governmental issues*] and

(b) Council finds that there are numerous forms of solicitation that are not in and of themselves inherently threatening or aggressive, including vocal requests for a donation; carrying or displaying a sign requesting donations; shaking or jingling a cup of change; and ringing a bell in compliance with

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any applicable noise ordinance; [*Again, reflects commitment to protect less intrusive First Amendment rights of solicitors*] and

(c) However, Council finds that there has been an increase in aggressive solicitation in the City, which threatens the security, privacy, and freedom of movement of both residents and visitors; [*should have actual evidence and data to back up that proposition*] and

(d) Council also finds that the presence of solicitors in certain specific areas (such as near to or adjacent to automatic teller machines, adjacent to sidewalk cafes, at public bus stops, and in public garages in the nighttime) create reasonable concerns by citizens objectively worried about their privacy, freedom of movement, and personal security [*this section was edited to remove reference to the "captive audience" doctrine that has as yet not been sufficiently developed by the courts*] and

(e) Council further finds that certain forms of solicitation impede the orderly flow of pedestrian and vehicular traffic and leads to concerns regarding traffic and public safety, particularly in congested roadways and sidewalks (as defined below to include highly traveled areas, lines to enter buildings, historic districts with narrow sidewalks or on small traffic medians of high-speed or high-volume streets and highways) *[need to have evidence of areas to be described and size of medians as problematic*] ; and

(f) This Ordinance is not intended impermissibly to limit an i dividual's right to exercise free speech associated with solicitation; rather it aims to impose specific time, place, and manner restrictions on solicitation and associated conduct in certain limited circumstances; namely, limiting aggressive panhandling, panhandling at locations or times deemed particularly threatening and dangerous, and panhandling in places where people are a "captive audience" and there is a wish to avoid or reduce a threat of inescapable confrontations; and

(g) In promulgating this Ordinance, Council seeks to impose regulations that are narrowly tailored to serve the aforementioned significant governmental interests.*[A shorter but also effective statement of purpose is found in the Hartford, CT panhandling ordinance, available on municode.com: Generally. The purpose of this section is to regulate certain behavior to preserve the public order, to protect the citizens of Hartford and to ensure the safe and uninterrupted passage of both pedestrian and vehicular traffic, without unconstitutionally impinging upon protected speech, expression or conduct.]*

II. Definitions

(a) "Aggressive begging, panhandling, or solicitation" includes the following forms of conduct:

i. Confronting someone in a way that would cause a reaso able person to fear bodily harm;

ii Accosting an individual by approaching or speaking to the individual or individuals in such a manner as would cause a reasonable person to fear imminent bodily harm or the commission of a criminal act upon his or her person, or upon property in his or her immediate possession;

iii. Touching someone without his or her consent;

iv. Using obscene or abusive language toward someone while attempting to panhandle or solicit him or her;

v. Forcing oneself upon the company of another by engaging in any of the following conduct:

(1) Continuing to solicit in close proximity to the individual addressed after the person to whom the solicitation is directed has made a negative response, either verbally, by physical sign, by attempting to leave the presence of the person soliciting, or by other negative indication;

(2) Blocking the passage of the individual solicited; or

(3) Otherwise engaging in conduct that could reasonably be construed as intending to compel or force a person to accede to a solicitation.

vi. Acting with the intent to intimidate someone into giving money, or

vii. Other conduct that a reasonable person being solicited would regard as threatening or intimidating in order to solicit a contribution or donation.

(b) "Areas with heightened personal security concerns" include the following locations:

i. Areas within, or within 20 feet of, a public parking g rage, between dusk and dawn, when a reasonable individual would have a justified, reasonable concern for his or her safety, security, and welfare;

ii. Areas within 20 feet of a public bus stop or public transit entrance where a reasonable individual would have a reasonable, justified concern for his or her personal security due to congestion and close proximity to others;

iii. Areas within 20 feet of access to building entrances, public events venues, public accommodations or commercial businesses where a reasonable individual would have a reasonable, justified concern for his or her personal security due to congestion and close proximity to others;

iv. Areas within a designated commercial or historic district in which a high volume of pedestrian traffic or narrow sidewalks and streets give a reasonable person a justified, reasonable concern about his or her personal security due to congestion and close proximity to others; or

v. Other areas in which congestion could give a reasonable person a reasonable, justified concern for his or her personal security due to congestion and close proximity to others.

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(c) "Areas with heightened personal privacy concerns" include the following

i. Locations within 20 feet of an automated teller machine, or financial institution in which an automated teller machine is located, where "financial institution" means any bank, industrial bank, credit union, or savings and loan.

ii. Locations within 20 feet of a sidewalk café during operating hours unless the solicitor's presence is authorized by the proprietor;

iii. Other locations in which a reasonable person would have a reasonable and justified concern about whether congestion and close proximity to others could compromise his or her interests in privacy.

(d) "Areas with heightened public safety concerns" include the following:

i. Streets or highways;

ii. Traffic medians where such medians provide less than 8 square feet of flat space for standing;

iii. Traffic medians of whatever size within designated high traffic or high-speed roadways,

(e) "Begging, panhandling and charitable or political solicitation" includes the following activities: actions that are conducted in the furtherance of the purpose of immediately collecting contributions for the use of one's self or others. As used in this ordinance, the word, "solicit," and its forms, includes requests for funding arising from begging, panhandling, charitable, or political fundraising initiatives. "Begging, panhandling and charitable or political solicitation" includes both "aggressive" and "passive" forms of begging, panhandling and charitable or political solicitation, but these forms are regulated separately under this ordinance.

(f) High traffic roadways include the following [define based on local conditions]

(g) High speed roadways include the following [define based on local conditions]

(h) Regulated traffic medians include areas that meet the following definitions

i. Areas with "medians" situated between traffic lanes running in opposite directions where such medians have less than 8 square feet of flat area between traffic lanes; or

ii. Areas with "medians" that are otherwise designated as unsafe for activities by pedestrians, due to associated high-volume or high- speed traffic.

(1) Passive panhandling, begging, charitable or political solicitation. "Passive panhandling, begging, charitable or political solicitation" includes conduct that falls within the definition in part (e) of this section, but only such conduct that involves requests for contributions presented in writing without speaking, oral requests for contributions that do not constitute "aggressive panhandling, begging, charitable or political solicitation," or other activities that do not fall within the definition of "aggressive begging, panhandling or solicitation" as defined in subsection (a) of this section.

[Definitions are always central to clear thinking about regulatory regimes. This model ordinance draft was developed after consulting a myriad of ordinances in effect around the country and those that have been subject to litigation. Readers may observe that the definitions include several core provisions: defining panhandling, begging and charitable/political solicitation; defining aggressive solicitation; defining passive solicitation; defining particularly sensitive areas due to personal security and privacy concerns; and defining solicitation in streets or highways or where street medians in particular or high volume/high speed traffic corridors raise public safety and traffic congestion concerns. This approach seems advisable given the case law that has developed both before and after Reed, and will facilitate continuing regulation in the event of judicial invalidation of part of the ordinance (given the severability provision that follows). Penalty provisions are left undefined given likely differences between various jurisdictions.]

III. Passive Begging, Panhandling, Charitable and Political Solicitation: When Regulated

Passive panhandling, begging, charitable or political solicitation permitted except where expressly prohibited.

The City Council finds that "passive panhandling, begging, charitable or political solicitation," as defined in section II(i) of this ordinance should be treated as speech protected under the First Amendment unless other well- grounded governmental concerns are implicated. Accordingly, passive panhandling, begging, charitable or political solicitation is permitted throughout the jurisdiction except as prohibited in parts V and VI of this ordinance.

[Note that regulating passive solicitation in settings described in part V may raise judicial questions unless there is adequate evidence demonstrating grounded concerns for adverse impacts from passive solicitation in areas giving rise to particular concerns in the face of passive panhandling. At least arguably, there could be reasonable grounds for concern about privacy and security. The standards set out in part V ground the regulation in "a reasonable person" with "reasonable, justified concerns" so would require evidence on a case-by-case basis. Some jurisdictions might choose to regulative passive solicitation only as to traffic medians (small and/or in high-volume, high speed areas) where voice requested and signage might themselves arise due to traffic problems.]

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enforcement. In fact, the chance of such pre-emption within an urban area seems slim. First, it may be difficult if not impossible to show that an individual urban farm operation complies with all of the generally-accepted agricultural protocols (GAAMPS). But the reality is that the urban farming operation was almost always not in place before surrounding residential development was built. Thus, in most cases, urban farming does not meet the requirements to win protection under any right-to-farm laws, and local code enforcement efforts are typically not limited by those laws.

Moreover, as the Michigan State Law Review article noted, urban farming laws are not focused on pre-empting any part of the community. Instead the article states, such laws are implemented at by the local government, and involve "local master plans, zoning ordinances, and land use regulations created by communities which "minimizes conflicts arising from incompatible land uses." As such, where urban agriculture can take place, the rules under which it can do so are at some level agreed upon by the community.

A key aspect of local government is that no part of the community can be ignored. Thus, while urban farming continues to attract interest, and the trend continues in which local governments work with residents and those interested in urban farming to allow some limited crops and livestock, neither part of the community has been pre-empted. And that involvement continues even after the laws are in place, as those laws have to be enforced. The code enforcement challenges can be straightforward or, in some cases, daunting. But even for urban agriculture, local laws restricting agriculture to limit conflict with the surrounding community are only effective to the extent they can be enforced. And that can depend on the facts. When persons work with local code enforcement staff to address problems, as happens in most cases, enforcement through the court system can be avoided. But when those laws have to be enforced, the limits and rules in place, including limits on noise and odors, are only as effective, in a specific complaint, as the evidence supporting the charges! ML

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IV. Aggressive Panhandling, Begging, Charitable and Political Solicitation Prohibited

(a) Aggressive panhandling, begging, charitable and political solicitation prohibited. No person shall engage in aggressive panhandling, begging, charitable or political solicitation as defined in section II(a) of this ordinance at anytime, anywhere in this jurisdiction.

(b) Penalties [link to penalties provision to be developed below.]

[Note: Aggressive panhandling might warrant more serious penalties than those imposed for other offenses, and might warrant more severe penalties in some contexts or settings].

[Comment: This section was drafted based on conceptual considerations, after reviewing a variety of ordinances from jurisdictions around the country. Many such ordinances unfortunately seem to conflate regulation of aggressive panhandling and solicitation, with panhandling and solicitation in particular areas. This model ordinance seeks to separate these issues so they can be considered straightforwardly by policymakers and by any reviewing court. Note, too, that this model ordinance explicitly states that aggressive panhandling is regulated separately from "passive panhandling" to make the point that the city is attentive to various sorts of governmental interests and how they should be balanced. In a sense, the draft model ordinance endeavors to take to heart the "balancing test" suggested in Justice Breyer's concurring judgment in Reed, and to strike appropriate balances between the freedom of solicitors/panhandlers and the implications of their activities on others.]

V. Regulation of Panhandling, Begging, Charitable and Political Solicitation in Areas with Specific Personal Safety and Privacy Concerns

(a) *Regulated locations*. Both "passive" and "aggressive" panhandling, begging, charitable and political solicitation activities are regulated in the following areas that give rise to specific personal safety and privacy concerns as defined in part II of this ordinance:

i) Areas with heightened personal security concerns as previously defined in subsection II (b); and

ii) Areas with heightened privacy considerations as previously defined in subsection II(c).

(b) Prohibition. Neither "aggressive" nor "passive" panhandling, begging, charitable and political solicitation shall be conducted in areas defined as involving heightened personal security or heightened privacy considerations.

(c) Penalties. [It may be appropriate to create heightened penalties for aggressive panhandling in these sensitive areas. The current draft prohibits both passive and aggressive panhandling in these areas and does not differentiate in terms of penalties as between the two types. Jurisdictions might wish to prohibit only aggressive panhandling in these sensitive areas and might impose more serious penalties than in other areas where aggressive panhandling is prohibited.]

VI. Panhandling, Begging, Charitable Protection of Public Access and Vehicular Safety in Public Streets and Highways and on Traffic Medians and on High Volume and High Speed Highways.

(a) Areas regulated.

i) Areas regulated by this section include those defined as "areas with heightened public safety concerns" as defined in section II (d) of this Ordinance.

(b) Findings. The City Council finds as follows:

1. Public Safety. Both aggressive and passive begging, panhandling, charitable or politicals licitation within streets and highway rights of way, or on small traffic medians (under 8 square feet in size), or on traffic medians located on high speed and high-volume traffic corridors as

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North Carolina case leaves open the question whether Voter ID violates Section 2 of the Voting Rights Act.

Other election law cases have planted issues squarely before the Court that may be decided during the October 2017 term. The issues include whether the NC Congressional Redistricting Plan violates the First Amendment right to freedom of association (*Common Cause v. Rucho*); whether the Wisconsin redistricting plan violates the First and Fourteenth Amendment (*Gill v. Whitford*); and whether removal of eligible voters from Ohio's voter-registration rolls violated the NVRA and deprived eligible citizens of the right to vote (*Ohio A. Philip Randolph Institute and NEOCH v. Husted*).

Near the end of the term on June 19, 2017, the Court agreed to hear *Gill v. Whitford*, a case that is focused on whether partisan gerrymandering in Wisconsin violated the Constitution and whether there is indeed a judicially discernable and manageable standard by which political gerrymander cases are to be decided. The case will be argued during the October 2017 term. One of the issues in this case will likely be whether evidence of an "efficiency gap" is relevant to such a claim.[2] A detailed analysis of these most recently minted (or soon-to-be decided) election law decisions will be provided at IMLA's April 2018 Annual Meeting in Washington, D.C.

Editor's Note: Ben Griffith, partner in the Griffith Law Firm, Oxford, Mississippi, is a longstanding IMLA member and Chair of the IMLA International Committee. He is an acknowledged expert on voting rights issues and is the Editor of America Votes: A Guide to Modern Election and Voting Laws, now in its second edition.

Notes

1. Stephen E. Gottlieb, *Democracy Essential to the Legitimacy of Constitutional Interpretation, Legitimacy in Constitutional Interpretation*, March 10, 2017 p. 1 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2931153

2. See Nicholas Stephanopoulos & Eric McGee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015).

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identified in this ordinance, give rise to an increased risk of injury to solicitors on medians, traffic congestion, and traffic accidents that may affect drivers or solicitors.

2. Alternative Sites. This ordinance provides ample alternative sites for passive begging, pa handling, charitable and political solicitation in areas that do not give rise to enhanced public safety concerns or personal privacy and security concerns.

3. Evidence, The City Council has undertaken and carefully reviewed studies designed to identify areas in which small traffic medians may put solicitors or motorists at risks, and high speed and high volume traffic corridors that likewise are especially dangerous, in order to assure that these regulations are grounded in appropriate governmental concerns, are narrowly tailored, and allow alternative avenues for communication.

(c) Prohibitions

1. Generally. Both passive and aggressive begging, panhandling, charitable and political solicitation shall be restricted in "areas with heightened public safety concerns" as defined in subsection II(d).

2. Exceptions. The City Council may identify limited periods each year in which these prohibitions should not be enforced as a result of particularly pressing governmental concerns related to such activities.

a. Charitable initiatives. The Council may designate up to two days a year as days on which these prohibitions shall not apply in order to allow effective solicitation for designated charities, provided that appropriate safety measures are implemented.

b. Election activities. The Council may designate up to 5 days a year as days on which these prohibitions shall not apply in order to allow effective political communications in connection with local, state, and federal elections, provided that appropriate safety measures are implemented.

c. Documented public safety plan. In the event that the City Council designates days as exceptions from this ordinance's requirements, it shall also adopt a documented public safety plan to reduce risks to public safety that might otherwise arise.

d. Comparable treatment. To the extent that the City Council adopts exceptions to the prohibitions set forth in section VI(c)(1), relating to charitable initiatives and election activities, such exceptions shall extend to all parties otherwise covered by the provisions of this ordinance relating to begging, panhandling, charitable and political solicitation.

VII. Penalties

[This model ordinance does not address penalties, since penalties would need to be integrated with those applicable under other local ordinances. Note that there are opportunities to specify differing penalties for different offenses under this ordinance. Note 5 above suggests, for example, the possibility of enhanced penalties for aggressive panhandling in sensitive areas. Enhanced penalties might also be appropriate for recidivists. Some public policy advisers have suggested that a possible penalty for solicitors on probation would be to prohibit them from soliciting in particularly desirable locations. Because of the importance of local judgments on such matters, this draft model ordinance does not attempt to set out options for penalties.]

VIII. Severability

[Include severability provision that would allow provisions not struck down to remain intact].

Questions or comments? Please contact Judith Wegner at Judith_wegner@unc.edu.