

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA)

v.)

Criminal No. MI-2007-644

STEPHEN ANDREW THOMAS)

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

COMES NOW the defendant, Stephen A. Thomas ("Mr. Thomas"), by counsel, and for his memorandum in support of motion to dismiss states the following:

FACTS

On September 16, 2006 Mr. Thomas drove his vehicle to a 7-11 located in the Town of Herndon (the "Town"). Mr. Thomas parked and exited his vehicle, walked across the parking lot, and approached a couple of men about the possibility of hiring one of them to assist him with yard work. He reached such an agreement with one individual, and the two of them returned to Mr. Thomas' vehicle and began driving toward his home. Shortly thereafter, Mr. Thomas was stopped in his vehicle by the Herndon police. Mr. Thomas was charged with vehicle solicitation, in violation of Herndon Ordinance, Division 5, Sec. 42-136 (the "Ordinance"). A copy of the Ordinance is attached as *Exhibit A*.

ARGUMENT

I. The Ordinance is Facially Overbroad and Chills a Substantial Amount of Protected Speech

Both the First Amendment to the United States Constitution and Article I, § 12 of the Virginia Constitution severely limit a government's authority to restrict the expression of speech. The Supreme Court of the United States has specifically found that solicitation is a recognized form of speech protected by the First Amendment. United States v. Kokinda, 497 U.S. 720, 725

(1990). But see Singson v. Com., 46 Va.App. 724, 742-43, 621 S.E.2d 682, 690 (2005). As set forth below, the Ordinance is a content-based regulation that is neither necessary, nor narrowly tailored to achieve any state interest.

A. The Ordinance is a content based restriction and subject to strict scrutiny¹

The Supreme Court of the United States has made clear that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” Police Dept. v. Mosley, 408 U.S. 92, 95 (1972). In both the First and Fourteenth Amendments contexts, a content based law is presumptively invalid, and is subject to strict scrutiny. City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 434 (2002). Strict scrutiny requires that the law is necessary to serve a compelling state interest. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983). The principal inquiry for determining whether a law is content based is “whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). To be content neutral, a regulation must be capable of being “justified without reference to the content of the regulated speech.” Id.

1. The Ordinance Regulates Speech Based Upon Content and Subject Matter

Generally, anti-solicitation laws that have been construed to be content neutral limit all solicitations, without respect to content. In Xiloi-Itzep v. City of Agoura Hills, the California Court of Appeals considered the following city ordinance:

It shall be unlawful for any person, while the occupant of any vehicle, to solicit, or attempt to solicit, employment, business or

¹ Under the Equal Protection clause of the Fourteenth Amendment, a restriction placed on expressive activity because of its content is not permitted. See Mosley, 408 U.S. 92 (deeming unconstitutional an ordinance that described permissible picketing in terms of its subject matter, thus allowing for peaceful labor picketing while prohibiting peaceful nonlabor picketing). In Equal Protection cases, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment. Id., 408 U.S. at 95. As such, the analysis set forth in this section applies with equal force to an Equal Protection challenge.

contributions of money or other property from a person who is within the public right-of-way...²

24 Cal. App.4th 620, 629 (1994). The Court found that the city's ordinance was content-neutral since the conduct prohibited did not "depend on the message of the solicitor," but *applied to all vehicle-addressed solicitations, without reference to content*. *Id.* at 637. The Xiloi-Itzep court specifically contrasted the Agoura Hills ordinance from those in other cases in which ordinances had been deemed content-based. For example, Blair v. Shanahan involved a San Francisco ordinance that prohibited all panhandling, but not other solicitations of pedestrians. 775 F. Supp. 1315 (N.D. Cal. 1991). As such, "the prohibited conduct [in Blair] depended upon the message of the solicitor." Xiloi-Itzep, 24 Ca. App. 4th at 637. Similarly, for the same reasons, the United States Supreme Court invalidated the portion of an ordinance prohibiting all picketing near schools, except labor picketing, because it was content-specific. *Id.* (citing Grayned v. City of Rockford, 408 U.S. 104 (1972)). See also ACORN v. City of Phoenix, 798 F.2d 1260, 1267-68 (finding the Phoenix ordinance content neutral where it did not single out any group or the context of any speech because it applied "evenhandedly to every organization or individual, regardless of viewpoint, which would desire to solicit contributions, business, or employment from the occupants of vehicles traveling on Phoenix streets"); Int'l Soc'y for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge, 876 F.2d 494, 497 (5th Cir. 1989) (holding that the Baton Rouge ordinance was content neutral because it applied "even-handedly to every organization or individual, regardless of viewpoint, which attempts to solicit 'employment, business or charitable contributions of any kind from the occupant of any vehicle' traveling on Baton Rouge streets"); ACORN v. St. Louis County, 930 F.2d 591, 594 (8th Cir. 1991) (finding ordinance content neutral where it prohibited any person from standing in a

² The ordinance, like the Town's Ordinance, contained a reciprocal provision prohibiting pedestrians from soliciting (based on the same terms) from any person traveling in a vehicle along a public right-of-way. *Id.* at 629.

roadway for the purpose of soliciting "a ride, employment, charitable contribution or business from the occupant of any vehicle").

By contrast, the only speech that the Ordinance limits is speech that seeks employment of or from another person or entity. Other substantially similar forms of speech or solicitation, even when accomplished by identical means, are not proscribed.³ For example, the Ordinance places no restrictions on soliciting charitable contributions – a practice that frequently occurs in the middle of the street, or panhandling. Likewise, individuals are not prohibited from selling goods on the sidewalks, or even from standing in highway medians to sale goods such as flowers or newspapers directly to vehicle drivers. Nor are religious proselytizers prevented from soliciting persons in vehicles or pedestrians who have temporarily exited their vehicles. Thus, one may silently stand on the sidewalk holding a sign toward traffic that solicits the purchase of goods, or but may not hold do the same to solicit services.

2. The Ordinance Cannot be Justified Without Reference to Content

Where the determination of whether any particular speech falls within the purview of a regulation depends upon the content of that speech, the regulation is content based, regardless of the various interests in safety and esthetics proffered by the government. See City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993). On the other hand, where a regulation applies categorically to all speech at a particular time and place to achieve a specified purpose, it is justified without reference to content. See Ward v. Rock Against Racism 491 U.S. 781 (1989).⁴

³ Notably, at least one draft of the Ordinance included a provision that restricted soliciting "employment, business, or contributions of money or other property." However, such language was excluded from the Ordinance that was ultimately adopted, and under which Mr. Thomas was charged. Clearly the town council considered extending the prohibition to all types of solicitations but opted, instead, to target only one specific subject matter. See *Exhibit B*.

⁴ For example, a regulation only on heavy metal performances would be content based, notwithstanding the fact that such performances are more likely to cause the noise concerns at issue.

In the case at bar, the Ordinance is purportedly justified on the basis that “[t]he cumulative impact of *this type of unregulated solicitation* [i.e. employment solicitation] on the highways, sidewalks, driveways, parking areas, or alley on a daily basis creates a safety hazard and a significant and substantial risk to the interest of the public in the free flow of traffic.” (Emphasis added). Patently, this justification references the content of the regulated speech. It singles out a discreet subsection of a particular type of speech based specifically on its subject matter and content.

There is nothing inherent in the solicitation of employment that makes it any more disruptive or distracting to traffic than other types of solicitation not implicated by the Ordinance. Accordingly, the Ordinance constitutes an impermissible restriction on expression based solely on its subject matter or content. Mosley, 408 U.S. at 95. However, the Ordinance is clearly not necessary to achieve traffic safety, nor is it the least restrictive manner in achieving the Town’s purpose. As such, under a strict scrutiny test, the Ordinance is facially unconstitutional.

B. Even if the Ordinance is Content Neutral, it is not Narrowly Tailored to Serve a Significant Government Interest

Even if this Court finds that the Ordinance is a content neutral restriction, it is unconstitutional because it is not narrowly tailored to serve significant government interests. To be valid, government regulations on speech and assembly in public forums must (i) be content neutral; (ii) be narrowly tailored to serve a significant government interest; and (iii) leave open alternative channels of communication. Ward v. Rock Against Racism, 491 U.S. 781 (1989). While a regulation of the time, place or manner of speech need not be the least restrictive means of doing so, the Supreme Court has explicitly articulated that “a statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” Frisby v. Schultz, 487 U.S. 474, 485 (1988).

The Ordinance is purportedly designed to prevent the distraction of drivers from their duty to watch traffic and drive safely and to facilitate the free flow of travel. However, in the case at bar, the Ordinance is not limited to situations implicating driving safety or the free flow of traffic. Nor is it even limited to vehicle solicitation. For example, the Ordinance prohibits solicitation from any pedestrian who temporarily exits a vehicle. Given the broad definition of pedestrian⁵, the Ordinance encompasses every person on any highway, road, street, driveway, parking lot or alley, not at his permanent residence, who rode a bike or drove a car or other vehicle, for any purpose whatsoever, to his temporary destination.⁶ In addition, the defined term "highway" includes "every way or place open to the use of the public for purposes of vehicular or pedestrian travel..." Therefore, streets that are entirely blocked to vehicular traffic are equally affected, as are driveways and parking lots, both public and private, regardless of whether they are visible from any flowing traffic. Further, the Ordinance facially restricts substantially more speech than is necessary, or that it can reasonably target to achieve its goal. For example, by its plain language, many services are prohibited, despite any detrimental effect on traffic.⁷

The very definition of solicitation under the Ordinance illustrates its extraordinary breadth. "Solicitation means or includes the act of requesting or announcing by any means the availability for or of employment; or any action which seeks to offer, contract for, purchase, sell,

⁵ "Pedestrian" means "any individual who is utilizing a highway, sidewalk, driveway, parking area, or alley, while traveling or stopping without the use of a vehicle." Sec. 42-134(b). "Highway" means "the entire width between the boundary lines of every way or place open to the use of the public for purposes of vehicular or pedestrian travel in the commonwealth, including sidewalks, streets, and alleys." *Id.*

⁶ Equally troubling is the apparent lack of intent required in the commission of this offense. Sec. 42-136 contains no "knowingly" or "knew or should have known" standard. Accordingly, even where one is unaware that the person to whom he solicits employment temporarily exited and parked her vehicle or bicycle, he is guilty of vehicle solicitation under this provision.

⁷ The following situations are prohibited: taxi cab, bus and valet parking services; curbside ordering/delivery at restaurants; standing in a residential driveway and asking a 10-year old neighbor, who rides his bike past your house, to rake your leaves; help wanted signs in any store window that are visible from a parking lot or street; fundraising carwashes in a parking lot or driveway; silently holding a sign on the sidewalk to advertise any available service (although, notably, the same sign advertising a product rather than a service would be permitted); driving a car or van that displays advertisements for a service; calling someone from a cell phone inside a vehicle to offer a job to someone who is walking on a the sidewalk or standing in his own driveway.

or procure employment.” Sec. 42-134(b) (Emphasis added). In addition, listed as an act that “may indicate a solicitation” is an approach between or among individuals at a location “frequented for employment,”⁸ as well as individuals departing the place of approach together, or the utilization of a vehicle in the approach or departure. *Id.* Incredibly, under the Ordinance, two individuals merely approaching one another in a parking lot would seemingly provide ample articulable suspicion for the purposes of a Terry stop. Accordingly, the Ordinance is not narrowly tailored.

II. The Ordinance is Unconstitutional As Applied to the Case at Bar

For many of the same reasons set forth above, the Ordinance is unconstitutional as applied to Mr. Thomas. Specifically, the content-based nature of the Ordinance and the fact that the Ordinance is not narrowly tailored are fatal as applied against Mr. Thomas. At the time of the alleged solicitation, Mr. Thomas had safely parked and exited his vehicle. He spoke to another individual about obtaining yard work services. When the individual agreed, both returned to his vehicle. The entire encounter took place between two pedestrians in a parking lot. At no time was Mr. Thomas blocking traffic or otherwise interfering with the safety or free flow of traffic.

Clearly, the speech proscribed by the Ordinance burdens a substantial amount of speech and is significantly broader than is necessary to achieve the purpose of ensure traffic safety. Indeed, Mr. Thomas’ case illustrates that very point. Nothing said or done by Mr. Thomas could reasonably be construed as a dangerous distraction to drivers or pedestrians, yet he has been charged with a criminal offense.

By including in the Ordinance substantial restrictions that, by their definitions, are set off and, in many cases, invisible, from traffic, as well as by including a limitation on the ability of

⁸ This would include any business or other establishment that provides or regularly engages services or labor for compensation.

pedestrians to solicit other pedestrians, even when hidden from traffic, or on "highways" closed to vehicular use, the Herndon town council far surpassed the purview of narrowly tailored restrictions. Instead, it opted to protect some types of solicitous speech, while singling out just one for criminalization. In the process of ensuring that it effectively squelched every conceivable method of communication of the specific speech it seeks to eliminate, the town council criminalized substantially more speech than is necessary, and, undoubtedly in some case, substantially more speech than it intended. Further, it is unjustifiable and inexcusable that Mr. Thomas could have had the identical encounter, without legal consequence, so long as he had asked that his yard work be done as a favor for free, and not for compensation, or so long as he had asked to purchase a good, rather than a service. Therefore, the Ordinance is unconstitutional as applied to Mr. Thomas.

III. Regardless of Whether the Ordinance Proscribes Only Commercial Speech, Strict Scrutiny is Appropriate

The Town asserts that the Ordinance regulates only commercial speech. Many, but not all commercial speech cases are subject to the standard set forth in Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y., 447 U.S. 557 (1980) (setting up test for commercial speech that is subject to intermediate scrutiny). Central Hudson applies the intermediate test to regulations on commercial speech. Id. at 563 (holding a restriction on commercial speech valid if it seeks to advance a substantial government interest, directly advances the asserted interest and reaches no further than necessary to accomplish that interest). However, as set forth below, where commercial speech is regulated for reasons other than specific commercial concerns, strict scrutiny may be applied.

The Ordinance is not limited to commercial speech, but prohibits noncommercial speech, as well. Where commercial speech is inextricably intertwined with otherwise fully protected speech, it does not retain its commercial character for the purposes of a level of scrutiny. See

Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781,796 (1988).

Where “the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another test. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression.” Id. The Ordinance proscribes the act of requesting or announcing by any means the availability for or of employment. See Section 42-134. Certainly, one can make known his availability for employment in a myriad of ways that include or constitute significant amounts of non-commercial speech. Therefore, at the very least, in many situations, the proscribed communications may consist of a mixture of commercial and non-commercial speech that are inextricably linked. As such, it is important to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed along with commercial speech. Discovery Network, 507 U.S. at 423. Therefore, strict scrutiny should be applied.

Even if this Court finds that the Ordinance proscribes only commercial speech, it does not necessarily follow that the correct standard is intermediate scrutiny:

[It is an error to conclude] that all commercial speech regulations are subject to a similar form of constitutional review simply because they target a similar category of expression. The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them.

When a State regulates commercial messages to protect consumers from misleading...sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review. When a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.

44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 501 (1995) (Stevens, J., joined by Kennedy and Ginsburg, JJ.); Id. at 518 (Thomas, J., concurring) (questioning the application of Central Hudson analysis and advocating application of strict scrutiny); Id. at 517 (Scalia, J., concurring) (expressing discomfort with the Central Hudson test because it “seems...to have nothing more than policy intuition to support it”). Similarly:

Whatever power the State may have to regulate commercial speech, it may not use that power to limit the content of commercial speech, as it has done here, for reasons unrelated to the preservation of a fair bargaining process. Such content-discriminatory regulation – like all other content-based regulation of speech – must be subject to strict scrutiny.

Lorillard Tobacco Co. v. Reilly, 533 U.S. at 577 (Kennedy, J., concurring, joined by Scalia, J.); Id. at 572 (Thomas, J., concurring) (agreeing that where regulations “restrict truthful speech in order to suppress the ideas it conveys” – as opposed to preventing fraud and deception – “strict scrutiny is appropriate, whether or not the speech in question may be characterized as ‘commercial.’”) See also Thompson v. Western States Medical Center, 535 U.S. 357, 367-68 (2002) (recognizing that several Members of the Court have expressed doubts about the Central Hudson analysis and whether it should apply in particular cases, but declining to address the issue as neither party raised a challenge to the standard).

In the case at bar, the reasons for drawing a distinction between commercial and noncommercial speech have no application. Concerns regarding false advertising or fraud are not implicated, and the Town has never asserted otherwise. Accordingly, the regulation is entirely unrelated to the preservation of a fair bargaining process. Rather, the Ordinance restricts truthful speech in order to suppress a certain subject matter and content. As set forth above, where, as here, the issue is not related to the potential commercial harms that justify lower scrutiny in some situations, strict scrutiny is appropriate.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests that this Court grant his motion to dismiss.

Respectfully submitted,

STEPHEN A. THOMAS
By Counsel

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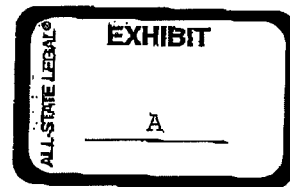
By: Alexa Mosley
Rodney G. Leffler (VSB No. 18742)
Alexa K. Mosley (VSB No. 71300)
Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this memorandum in support of motion to dismiss was sent by facsimile this 31st day of May, 2007, to:

Atticus J. Reaser
Deputy Town Attorney for Town of Herndon
CAPSALIS BRUCE & REASER PLC
2200 Wilson Boulevard
Suite 800
Arlington, Virginia 22201
Facsimile (703) 525-2489

Alexa Mosley
Alexa K. Mosley



TOWN OF HERNDON, VIRGINIA

ORDINANCE

SEPTEMBER 13, 2005

Ordinance- An ordinance amending the Town Code to add new Division 5, Vehicle Solicitation, Article III, Specific Street Regulations, Chapter 42, Motor Vehicles and Traffic, Herndon Town Code (2000), as amended to prohibit employment solicitation using a motor vehicle.

BE IT ORDAINED by the Town Council of the Town of Herndon that:

1. The Herndon Town Code (2000), as amended is amended by adding new Division 5, Vehicle Solicitation, to Article III, Specific Street Regulations, Chapter 42, Motor Vehicles and Traffic, as follows:

DIVISION 5. VEHICLE SOLICITATION

Sec. 42-134. Definitions.

(a) Except as provided in subsection (b) below, words or phrases used in this article shall have the meanings ascribed to them by Code of Virginia §46.2-100, except where the context clearly requires a different meaning in this article.

(b) These terms shall convey these respective meanings.

[insert in alphabetical order]

Alley means a narrow public thoroughfare not exceeding 20 feet in width which provides only a secondary means of access to abutting properties and is not intended for general traffic circulation.

Business means and includes the exchange of any type of product, goods, or service; or any performance or activity which is provided or performed in exchange for money, labor, goods, or any other form of consideration.

Curb means an edging built in or along a roadway to form part of a gutter.

Driveway means a private road connecting one or more parking areas, buildings, or structures with a street or alley.

Employment means service, industry, or labor performed by a person for wages or other compensation or under any contract of hire written or oral, express or implied.

Highway means the entire width between the boundary lines of every way or place open to the use of the public for purposes of vehicular or pedestrian travel in the Commonwealth, including sidewalks, streets, and alleys.

Pedestrian means any individual who is utilizing a highway, sidewalk, driveway, parking area, or alley, while traveling or stopping without the use of a vehicle.

Person means any individual, company, corporation, partnership, unincorporated association, business, or other legal entity.

Parking area means privately or publicly owned property which is designed or used primarily for the parking of vehicles and which adjoins one or more commercial establishments or residential buildings; and includes but is not limited to parking spaces, driveways, setbacks, and landscaped areas.

Sidewalk means that portion of the highway, other than the roadway, set apart by curbs, barriers, markings or other delineation and which is used principally for pedestrian travel.

Solicitation means or includes the act of requesting or announcing by any means the availability for or of employment; or any action which seeks to offer, contract for, purchase, sell, or procure employment. The following acts, among others, may indicate a solicitation when accomplished in the context of securing employment at a location frequented for employment: approach between or among individuals; departing the place of approach together; utilization of a vehicle in the approach or departure. A solicitation is complete when made, whether or not an employment relationship is created. Solicitation does not include any lawful activity conducted at a temporary assembly site for day workers, approved by conditional use permit under the town's zoning ordinance.

Traveling means to go, move, or be upon any highway, sidewalk, driveway, parking area, or alley.

Vehicle means every device in, on or by which any person or property is or may be transported or drawn on a highway, except devices moved by human power or used exclusively on stationary rails or tracks. For the purposes of this article bicycles, electric personal assistive mobility devices, electric power assisted bicycles, and mopeds shall be vehicles while operated on a highway.

Sec. 42-135. Findings.

The town council makes the following findings:

(a) The activity of unregulated pedestrians' soliciting employment from occupants of vehicles distracts drivers from their primary duty to watch traffic and be alert for potential hazards in the highway, to observe all traffic control signs and to be prepared to move through the town with safety.

(b) The activity of unregulated soliciting employment by occupants of vehicles to pedestrians on highways, sidewalks, driveways, parking areas, or alleys distracts drivers from their primary duty to watch other vehicles or pedestrians and to move through the town with safety.

(c) The practice of unregulated soliciting employment from within a highway, sidewalk, driveway, parking area, or alley constitutes a visual blight, inconvenience to workers, and a public nuisance; and subjects the solicitor, pedestrians and vehicle driver to an unacceptable level of danger by distracting drivers from their primary duty to watch traffic; results in the delay and obstruction of

the public's free flow of travel, and results in congestion and blockage of the streets, parking area, driveways, and sidewalks.

(d) Distracted drivers are more prone to be involved in automobile accidents; and vehicular accidents constitute a substantial public safety problem.

(e) The cumulative impact of this type of unregulated solicitation on the highways, sidewalks, driveways, parking areas, or alleys on a daily basis creates a safety hazard and a significant and substantial risk to the interest of the public in the free flow of travel.

Sec. 42-136. Vehicle Solicitation.

(a) It is unlawful for any person, while occupying as a pedestrian any portion of a highway, sidewalk, driveway, parking area, or alley to solicit or attempt to solicit employment from any pedestrian who temporarily exits a vehicle or person traveling in a vehicle on a highway, sidewalk, driveway, parking area, or alley.

(b) It is unlawful for any person occupying or traveling in any vehicle, or who temporarily exits a vehicle to solicit, or attempt to solicit, employment from a person who is pedestrian on a highway, sidewalk, driveway, parking area, or alley.

Sec. 42-137. Penalty.

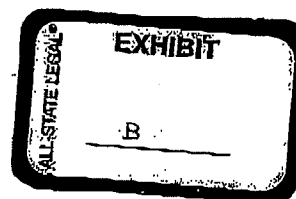
Any person violating the provisions of this article shall be guilty of a class 2 misdemeanor, punishable as set forth in Section 1-14 of this code. Any such person shall be deemed guilty of a separate offense for each act of solicitation which is a violation of this article.

2. This ordinance shall be effective on and after the date of its adoption for offenses committed on and after that date.

3. The provisions of this ordinance are severable. If any part is declared legally unenforceable, the other parts shall remain in effect.

DLAntisolicitationOrdinance6SEP05

TOWN OF HERNDON
ORDINANCE
SEPTEMBER 13, 2005



ORDINANCE - An ordinance amending the Town Code to add new Division 5, Vehicle Solicitation, Article III, Specific Street Regulations, Chapter 42, Motor Vehicles and Traffic, Herndon Town Code (2000), as amended to prohibit employment solicitation using a motor vehicle.

BE IT ORDAINED by the Town Council of the Town of Herndon that:

1. The Herndon Town Code (2000), as amended is amended by adding new Division 5, Vehicle Solicitation, to Article III, Specific Street Regulations, Chapter 42, Motor Vehicles and Traffic, as follows:

Sec. 42-134. Definitions.

- (a) Except as provided in subsection (b) below, words or phrases used in this article shall have the meanings ascribed to them by Code of Virginia §46.2-100, except where the context clearly requires a different meaning in this article.
- (b) These terms shall convey these respective meaning:

Alley means a narrow public thoroughfare not exceeding 20 feet in width which provides only a secondary means of access to abutting properties and is not intended for general traffic circulation.

Business means and includes the exchange of any type of product, goods, or service; or any performance or activity which is provided or performed in exchange for money, labor, goods, or any other form of consideration.

Curb means an edging built in or along a roadway to form part of a gutter.

Driveway means a private road connecting one or more parking area, houses, garages, or other buildings or structures with a street or alley.

Employment means the service, industry or labor performed by a person for wages or other compensation or under any contract of hire written or oral, express or implied.

Highway means the entire width between the boundary lines of every way or place open to the use of the public for purposes of vehicular or pedestrian travel in the Commonwealth, including sidewalks, streets, and alleys.

Pedestrian means any individual who is utilizing a highway, sidewalk, driveway, parking area, or alley, while traveling or stopping without the benefit of any vehicle.

Person means any individual, company, corporation, partnership, unincorporated association, business, or other legal entity.

Parking area means privately or publicly owned property which is designed or used primarily for the parking of vehicles and which adjoins one or more commercial establishments or residential buildings; and includes but is not limited to parking spaces, driveways, setbacks, and landscaped areas.

Sidewalk means that portion of the highway, other than the roadway, set apart by curbs, barriers, markings or other delineation and which is used principally for pedestrian travel.

Solicitation means or includes the act of requesting or announcing by any means the availability for or of employment, the sale of goods, or request for a contribution of money or other property; or any action which seeks to offer, contract for, purchase, or sell goods or employment, or to make or receive a contribution of money or other property. A solicitation is complete when made, whether or not an actual contract of sale, or whether or not an employment relationship, is created. Solicitation does not include any lawful activity conducted at a temporary assembly site for day workers, approved by conditional use permit under the town's zoning ordinance.

DL Antisolicitation Ordinance 6SEP05

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alley.

Vehicle means every device in, on or by which any person or property is or may be transported or drawn on a highway, except devices moved by human power or used exclusively on stationary rails or tracks. For the purposes of this article bicycles, electric personal assistive mobility devices, electric power assisted bicycles, and mopeds shall be vehicles while operated on a highway.

Sec. 42-135. Findings.

The town council makes the following findings:

- (a) The activity of unregulated soliciting employment, business or contributions from occupants of vehicles distracts drivers from their primary duty to watch traffic and be alert for potential hazards in the highway, to observe all traffic control signals, signs and warnings, and to be prepared to move through the town with safety.
- (b) The activity of unregulated soliciting employment, business, or contributions by occupants of vehicles to pedestrians on highways, sidewalks, driveways, parking areas, or alleys distracts drivers from their primary duty to watch other vehicles or pedestrians and to move through the town with safety.
- (c) The practice of soliciting employment, business or contributions from within a public street, highway, or parking area subjects the solicitor, pedestrians and vehicles to an unacceptable level of danger by distracting drivers from their primary duty to watch traffic, results in the delay and obstruction of the public's free flow of travel, and results in congestion and blockage of the streets, parking area, driveways, and sidewalks when such persons approach the vehicles to negotiate with the occupants.
- (d) Distracted drivers are more prone to be involved in automobile accidents; and accidents on the public highways constitute a substantial traffic safety problem.
- (e) The cumulative impact of this type of unregulated solicitation on the highways, sidewalks, driveways, parking areas, or alleys on a daily basis creates a safety hazard, which poses a significant and substantial risk to the interest of the public in the free flow of travel.

Sec. 42-136. Vehicle Solicitation.

(a) It is unlawful for any person, while occupying as a pedestrian any portion of a highway, sidewalk, driveway, parking area, or alley to solicit or attempt to solicit employment, business, or contributions of money or other property from any person traveling in a vehicle on a highway, sidewalk, driveway, parking area, or alley.

(b) It is unlawful for any person occupying or traveling in any vehicle, to solicit, or attempt to solicit, employment, business or contributions of money or other property from a person who is pedestrian on a highway, sidewalk, driveway, parking area, or alley.

Sec. 42-137. Penalty.

Any person violating the provisions of this article shall be guilty of a class 2 misdemeanor, punishable as set forth in Section 1-14 of this code. Any such person shall be deemed guilty of a separate offense for each act of solicitation which is a violation of this article.

2. This ordinance shall be effective on and after the date of its adoption for offenses committed . . .