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Legal Opinion 2008-01

To: The Honorable Karl F. Dean
Mayor of Metropolitan Government
100 Metropolitan Courthouse
Nashville, Tennessee 37201

Date: February 20, 2008

You requested a comprehensive legal analysis of Ordinance No. BL2007-66 to answer the following question:

QUESTION

Whether a court is likely to find Ordinance No. BL2007-66, which addresses panhandling, is valid under the free speech provisions of both the Constitution of the United States[1] and the Constitution of the State of Tennessee.[2]

ANSWER

It is the opinion of the Department of Law that a court is likely to find that Ordinance No. BL2007-66 is valid under the free speech provisions of the Constitution of the United States and the Constitution of the State of Tennessee.

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[1] Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. U.S. CONST. amend. V.

[2] That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. But in prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases. TENN.CONST. art. I, § 19,

ORDINANCE IN QUESTION

Ordinance No. BL2007-66 ("Ordinance")[3] describes begging that includes several kinds of conduct in many locations and makes some of that conduct unlawful while permitting other kinds. Aggressive face-to-face demands, face-to face requests, and begging while passively standing or sitting are identified. Begging while passively standing or sitting is not considered panhandling and is lawful. Aggressive face-to-face demands are always unlawful. Face-to face requests are always unlawful after dark and before sunrise on streets, alleys, sidewalks, public places or parks and are also unlawful in certain locations during daytime hours.

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[3] 11.12.090 Aggressive Panhandling.

A. Definitions.

1. "Panhandling" means any solicitation made in person upon any street, alley, sidewalk, public place or park requesting an immediate donation of money or other thing of value for oneself or another person or entity. The sale of an item for an amount far exceeding its value, under circumstances in which a reasonable person would understand that the purchase is, in substance, a donation, shall be considered panhandling for the purpose of this section. Panhandling shall not include the act of passively standing or sitting, performing music, or singing with a sign or other indication that a donation is being sought but without any vocal request other than a response to an inquiry by another person.
2. "Aggressive panhandling" means:
   a. To approach or speak to a person in such a manner as would cause a reasonable person to believe that the person is being threatened with:
      1. Imminent bodily injury; or
      2. The commission of a criminal act upon the person or another person, or upon property in the person's immediate possession;
   b. To persist in panhandling after the person solicited has given a negative response;
   c. To block, either individually or as part of a group of persons, the passage of a solicited person;
   d. To touch a solicited person without the person's consent;
   e. To render any service to a motor vehicle, including but not limited to any cleaning, washing, protecting, guarding or repairing of said vehicle or any portion thereof, without the prior consent of the owner, operator or occupant of such vehicle, and thereafter asking, begging or soliciting alms or payment for the performance of such service, regardless of whether such vehicle is stopped, standing or parked on a public street or upon other public or private property; or
   f. To engage in conduct that would reasonably be construed as intended to intimidate, compel or force a solicited person to make a donation.

B. It shall be unlawful for any person to engage in an act of panhandling when either the panhandler or the person being solicited is located in, on, or at any of the following locations:

1. Any bus stop;
2. Any sidewalk café;
3. Any area within twenty-five (25) feet (in any direction) of an automatic teller machine (ATM) or entrance to a bank;
4. Any daycare or community education facility, as defined by Section 17.04.060 of the Metropolitan Code;
5. Within ten (10) feet of a point of entry to or exit from any building open to the public, including commercial establishments.

C. It shall be unlawful to engage in the act of panhandling on any day after sunset or before sunrise.

D. It shall be unlawful for any person to engage in an act of aggressive panhandling.

ANALYSIS

I. FREE SPEECH BACKGROUND

U.S. CONSTITUTION: The U.S. Supreme Court has held that the free speech protected by the First Amendment of the U. S. Constitution does not give absolute protection for every utterance. *Roth v. U.S.*, 354 U.S. 476, 482, 77 S.Ct. 1304, 1307 (1957). Any law that restricts speech, even if the purpose of the law has nothing to do with communication, will require that the law meet "the high, First-Amendment standard of justification." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 576, 111 S.Ct. 2456, 2465-2466 (1991). In 1951, the U.S. Supreme Court held that a city ordinance prohibiting uninvited solicitors from going door to door of private residences did not violate the First Amendment. *Breard v. City of Alexandria, La.,* 341 U.S. 622, 642, 71 S.Ct. 920, 932 (1951). In 1980, the Supreme Court limited the holding of *Breard v. City of Alexandria* to commercial solicitations and concluded that the First Amendment provided greater protection to soliciting from door to door for charitable or political purposes. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 631, 100 S.Ct. 826, 833 (U.S.Ill. 1980) (ordinance requiring permits for solicitation and barring solicitation by charitable organizations that did not use at least 75 percent of their receipts for charitable purposes held invalid as insufficiently related to the governmental interests asserted to justify its interference with protected speech).

TENNESSEE CONSTITUTION: The free speech clause of the First Amendment to the United States Constitution is similar to Article I, section 19 of the Tennessee Constitution. In part, it states that "[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Article 1, section 19 provides protection of free speech rights at least as broad as the First Amendment. *Leech v. Am. Booksellers Ass'n, Inc.,* 582 S.W.2d 738, 745 (Tenn.1979). In 1996, the Tennessee Supreme Court stated:

> Both this Court and the United States Supreme Court have held that charitable solicitation is constitutionally fully protected speech.
>
> ...
>
> Statutes that regulate solicitation, regulate speech on the basis of its content. Therefore, any regulation imposing limitations on the right to solicit charitable contributions must withstand "exacting First Amendment scrutiny." This Court has recognized that "all basic rights of free speech are subject to reasonable regulation, and that in determining whether a regulation is reasonable there must be a

> "balancing of the freedom of expression against recognized competing rights." The analysis to be applied when reviewing a challenge to a statute based on an impermissible burden on free expression is as follows:
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> > Regulations which restrain speech on the basis of its content presumptively violate the First Amendment. Such a regulation may be upheld only if the State can prove that "the burden placed on free speech rights is justified by a compelling state interest. The least intrusive means must be utilized by the State to achieve its goals and the means chosen must bear a substantial relation to the interest being served by the statute in question.

State v. Smoky Mountain Secrets, Inc. 937 S.W.2d 905, 910 (Tenn. 1996). (internal citations omitted.)

II. FREE SPEECH ANALYSIS

If the Ordinance is challenged, a court is likely to follow several steps in analyzing a free-speech claim raised by this panhandling or begging regulation. First, the court must determine if the speech prohibited is speech that the U.S. Supreme Court has identified, or is likely to identify, as fully protected by the First Amendment of the U.S. Constitution. Next, the court will decide whether the forum is public or nonpublic in order to determine the proper standard to apply. Third, the court will then apply the appropriate standard. *Charlotte Ave. Medical Clinic, Inc. v. Freeman*, 1989 WL 9521 (Tenn.App. February 10,1989);.*Cornelius v. NAACP Legal Defense and Educ'al. Fund, Inc.,* 473 U.S. 788, 797, 105 S.Ct. 3439, 3446, 87 L.Ed.2d 567 (1985). To apply the appropriate standard, a court must determine whether the speech regulation in question is content based or content neutral.

- FREE SPEECH: FULLY PROTECTED SPEECH

Neither the United States Supreme Court[4] nor the Supreme Court of Tennessee has yet decided the specific issue of whether and to what extent the government may regulate an individual's right to beg or panhandle in public places. The U. S. Supreme Court and the Tennessee Supreme Court have both determined that "solicitation" is a form of speech entitled to full First Amendment protection and not a form of commercial speech that receives lesser protection. *Schaumburg v.*

[4] **Aggressive Begging on the Public Streets.** Ronald D. Rotunda & John E. Nowak, 4 Treatise on Const. L. § 20.47 (3d ed.) (Freedom of Speech: Reasonable Time, Place, and Manner Restrictions on Speech, Without Regard to Content)

Citizens for a Better Environment, 444 U.S. at 629, 100 S.Ct. at 832 (door-to-door or on-street solicitation of contributions by charitable organizations was exercise of speech that is fully protected by the First Amendment); *United States v. Kokinda,* 497 U.S. 720, 725, 110 S.Ct. 3115, 3118, 111 L.Ed.2d 571 (1990)(while solicitation was protected speech under First Amendment, regulation of speech activity subjected only to reasonableness analysis because post office sidewalk was not a public forum); *State v. Smoky Mountain Secrets, Inc.* 937 S.W.2d at 910.

At present all but one of the federal Circuit Courts of Appeal that have considered begging and panhandling regulation have concluded that those regulations implicate speech that is entitled to full First Amendment protection. *Berger v. City of Seattle*, 512 F.3d 582, 588 (9th Cir. 2008); *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006); *Gresham v. Peterson*, 225 F.3d 899,903 (7th Cir. 2000); *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 953, (D.C. Cir 1995). State courts in Massachusetts, Ohio, and New York have reached the same conclusion. *Benefit v. City of Cambridge*, 424 Mass. 918, 922, 679 N.E.2d 184, 187 (1997); *State v. Dean*, 170 Ohio App.3d 292, 298, 866 N.E.2d 1134, 1139 (Ohio App. 2007); *People v. Barton*, 8 N.Y.3d 70, 75 861 N.E.2d 75, 79 (2006). The Second Circuit Court of Appeals held that full First Amendment protection did not apply to panhandling; a Florida court held panhandling was only entitled to "some degree" of First Amendment protection, and the California Supreme Court held that the California Constitution required a lesser level of scrutiny than the First Amendment. *Young v. New York City Transit Authority*, 903 F.2d 146, 148 (2nd Cir. 1990)(opinion released in March, 1990, a few months before the U.S. Supreme Court opinion in *United States v. Kokinda* that again held that solicitation was fully protected speech even when not carried out in public forum); *Ledford v. State*, 652 So.2d 1254, 1256 (Fla.App. 1995);. *Los Angeles Alliance For Survival v. City of Los Angeles,* 22 Cal.4th 352, 993 P.2d 334 (2000).

As the majority of the federal Circuit Courts of Appeal and state courts considering the issue have determined that panhandling and begging are forms of speech that are entitled to full protection by the First Amendment, it is the opinion of the Department of Law that a court reviewing the Ordinance will determine that panhandling is a form of speech entitled to full First Amendment protection.

- FREE SPEECH: PUBLIC FORUM

The Ordinance defines panhandling as a solicitation upon any street, alley, sidewalk, public place, or park and prohibits any panhandling at all bus stops, sidewalk cafes, within 25 feet of an automatic teller machine or entrance to a bank, at any daycare or community education facility, or within 10 feet of the entrance or exit of any building open to the public. Additionally, it prohibits any panhandling after sunset or before sunrise. Sidewalks and parks are recognized by the courts as public

forums.[5] It is the opinion of the Department of Law that the Ordinance will be analyzed as regulation of speech in a public forum.

- FREE SPEECH: CONTENT BASED OR CONTENT NEUTRAL

A court would next determine whether the regulation of the speech is content neutral or content based. A court will first question whether the Ordinance was adopted because the government disagrees with the content of the speech protected, that is, whether it is the specific speech it wishes to suppress. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 2754 (U.S.N.Y. 1989). "The governments' purpose is the controlling consideration." *Id* at 791. As a general rule, laws that by their terms distinguish favored speech on the basis of ideas or views expressed are content based.[6]

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[5] Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague v. Committee for Indus. Organization, 307 U.S. 496, 515, 59 S.Ct. 954, 964 (1939). *See also, Cornelius v. NAACP Legal Defense and Educational Fund, Inc.,* 473 U.S. 788, 802, 105 S.Ct. 3439, 3449 (1985)

[6] Deciding whether a particular regulation is content based or content neutral is not always a simple task. We have said that the "principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys." ("The government may not regulate [speech] based on hostility-or favoritism-towards the underlying message expressed"). The purpose, or justification, of a regulation will often be evident on its face. But while a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary to such a showing in all cases. Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content.

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. See, *e.g., Burson v. Freeman,* 504 U.S. 191, 197, 112 S.Ct. 1846, 1850, 119 L.Ed.2d 5 (1992) ("Whether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign"); *Boos v. Barry,* 485 U.S. 312, 318-319, 108 S.Ct. 1157, 1162-1163, 99 L.Ed.2d 333 (1988) (plurality opinion) (whether municipal ordinance permits individuals to "picket in front of a foreign embassy depends entirely upon whether their picket signs are critical of the foreign government or not"). By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral. See, *e.g., Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984) (ordinance prohibiting the posting of signs on public property "is neutral-indeed it is silent-concerning any speaker's point of view"); *Heffron v. International Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640, 649, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981) (State Fair regulation requiring that sales and solicitations take place at designated locations "applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds"). (some internal citations omitted)

Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 642, 114 S.Ct. 2445, 2459 (U.S.Dist.Col. 1994).

In *Kokinda*, a plurality[7] of the Supreme Court stated:

> It is the inherent nature of solicitation itself, a content-neutral ground, that the (Postal) Service justifiably relies upon when it concludes that solicitation is disruptive of its business.

Since then, the Supreme Court has indicated that it may find a regulation of the immediate request of funds to be a content neutral regulation. *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 & 683 (1992) 72 FDMLR 2767 FN232. It must be noted that neither the *Kokinda* nor the *Lee* cases involved the traditional public forums implicated in the Ordinance – sidewalks and parks. Nonetheless, the trend in the cases since 1990 and the majority of the opinions at this time indicate that regulations that do not prohibit all speech related to begging and instead impose time, place or manner restrictions on solicitations or immediate solicitations are more likely to be determined to be content neutral. *Berger v. City of Seattle*, 512 F.3d at 591; *State v. Dean*, 866 N.E.2d at 1139; *Los Angeles Alliance For Survival v. City of Los Angeles,* 993 P.2d at 342; *Loper v. New York City Police Dept.*, 999 F.2d 699, 705 (2nd Cir 1993). Therefore, while there is room for doubt until the Tennessee Supreme Court, the Sixth Circuit Court of Appeals, or the U.S. Supreme Court address begging regulations in a public forum, it is the opinion of the Department of Law that the regulation of the request for immediate assistance covered by the Ordinance will be held to be a content neutral regulation.

- CONTENT NEUTRAL: TIME, MANNER, & PLACE; NARROWLY TAILORED; ALTERNATIVE CHANNELS

A content neutral regulation will be upheld if it imposes time, place and manner restrictions that are narrowly tailored, serve a significant government interest, and leave open alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. at 791.

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[7] In United States v. Kokinda, the Court upheld a federal statute prohibiting solicitation on post office premises, in part because a four-justice plurality held that such a regulation was content neutral. This holding came despite the protests of dissenting Justice Brennan, joined by three other Justices, who argued that the regulation was indeed content-based since "a person on postal premises [who] says to members of the public, 'Please support my political advocacy group,' . . . cannot be punished" but one who says, "'Please contribute $10,' . . . is subject to criminal prosecution." With the departure of Justices Brennan and Marshall from the Court, and the arrival of Justice Thomas, the plurality in Kokinda grew to a majority in International Society for Krishna Consciousness, Inc. v. Lee, which upheld a Port Authority of New York and New Jersey regulation prohibiting the repetitive solicitation of money within airport terminals operated by that body. The majority held that the prohibition on solicitation satisfied a standard of reasonableness, thereby eliminating the need for this Note to evaluate the constitutionality of scenarios like that described by Justice Brennan in Kokinda.
Adam Zitter, *Good Laws for Junk Fax? Government Regulation of unsolicited Solicitation,* 72 Fordham LR 2767, 2797, May, 2004.

TIME, PLACE AND MANNER RESTRICTION: In making the determination, a court will be expected to follow the U.S. Supreme Court's guidance.

- The regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests;

- The regulation need not be the least restrictive or least intrusive means of doing so as long as it promotes a substantial government interest that would not be achieved as effectively in the absence of the regulation;

- A time, place, or manner regulation may not burden substantially more speech than is necessary to further the government's legitimate interests;

- The regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.

Ward v. Rock Against Racism, 491 U.S. at 798. Based on the "narrowly tailored" analysis of the cases that have held panhandling or soliciting regulations to be content neutral, it is the opinion of the Department of Law that the Ordinance is narrowly tailored to achieve its purposes and is likely to be held valid as a time, manner, and place restriction. *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d at 956; *Berger v. City of Seattle*, 512 F.3d at 592; *Gresham v. Peterson*, 225 F.3d at 906; *State v. Dean*, 866 N.E.2d at1140.

SIGNIFICANT GOVERNMENT INTEREST: The recent cases that have considered whether the government has a significant interest that is served by the panhandling regulation have found that the government does have a substantial interest in protecting the safety and convenience of people using the public forum and in promoting safe and accessible areas of commerce. *Berger v. City of Seattle*, 512 F.3d at 592; *Gresham v. Peterson*, 225 F.3d at 906; *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d at 955; *State v. Dean*, 866 N.E.2d at1140. It is the opinion of the Department of Law that upon presentation of evidence leading to the proposal and enactment of the Ordinance detailing the safety, convenience, and accessibility concerns of the government, a court will find that the government has a significant interest that is served by the panhandling regulation.

ALTERNATIVE CHANNELS OF COMMUNICATION: The Ordinance leaves open alternative channels for soliciting assistance: passive solicitation for immediate assistance is fully permitted, non-immediate solicitation is fully permitted unless aggressive, and panhandling (immediate, active solicitation) during the daytime is

permitted in any public area not specifically identified as long as it is not aggressive panhandling. It is the opinion of the Department of Law that a court is likely to find that ample alternative channels for soliciting are provided by the ordinance. *Berger v. City of Seattle*, 512 F.3d at 598; *Gresham v. Peterson*, 225 F.3d at 906; *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d at 958; *State v. Dean*, 866 N.E.2d at 1141.

CONCLUSION

It is the opinion of the Department of Law that a court is likely to find that the Ordinance does not violate the Free Speech provisions of either the Constitution of the United States or the Constitution of the State of Tennessee.

THE DEPARTMENT OF LAW
OF THE METROPOLITAN
GOVERNMENT OF NASHVILLE
AND DAVIDSON COUNTY

Sue B. Cain

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Director of Law

cc: Vice Mayor Diane Neighbors
Members of the Metropolitan Council