



LEGAL DIVISION
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DATE: September 17, 2018
TO: City Council
CC: Diane Wolfe Marlin, Mayor; Carol Mitten, City Administrator
FROM: James L. Simon, City Attorney

RE: Repeal of Urbana City Code Section 15-69 – Aggressive Solicitation.

On August 1, 2011, the City Council adopted Ordinance No. 2011-07-099, codified as UCC Sec. 15-68. Ordinance No. 2011-07-099 seeks to regulate aggressive solicitation tactics rather than the speech itself. Other communities have adopted aggressive solicitation ordinances quite similar to Ordinance No. 2011-07-099.

In recent years, courts have struck down aggressive solicitation ordinances similar to UCC Sec. 15-68 on various First Amendment grounds including: (i) the First Amendment protects peaceful requests for charity in public places; (ii) the ordinances are not content-neutral (thereby requiring a more strict form of scrutiny); (iii) such ordinances serve no compelling governmental interest since other constitutional means exist to protect citizens' safety; (iv) the ordinances are not narrowly drawn to address the conduct sought to be addressed; and (v) such ordinances usually contain no location restrictions. E.g., see, *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015) (court struck down an ordinance that was content-based¹); *Norton v. City of Springfield, Illinois*, 806 F.3d 411 (7th Cir. 2015) (court struck down an ordinance that regulated panhandling in city's historic district based on content); *Cutting v. City of Portland, Maine*, 802 F.3d 79 (1st Cir. 2011) (court struck down an ordinance that prohibited solicitation from the city's roadway median strips since the ordinance was not sufficiently narrowly tailored); *Clatterbuck v. City of Charlottesville*, 92 F.Supp.3d 478 (W.D. Va. 2015) (court struck down a "begging" ordinance that prohibited solicitation within 50 feet of two intersections within the city's pedestrian mall); *McLaughlin v. City of Lowell*, 140 F.Supp.3d 177 (D. Mass. 2015) (court struck down an ordinance that banned aggressive solicitation in parks and on sidewalks). In each of these cases, the court held that solicitation ("panhandling", "begging") was a constitutionally protected form of speech or expressive conduct.

¹ By "content based", courts mean that if one must read or hear what is being said in order to determine whether the ordinance in question applies. In *Reed v. Town of Gilbert Arizona*, 135 S.Ct. 2218 (2015), the U.S. Supreme Court struck down a town's ordinance that treated certain types of temporary signs differently than other types of temporary signs. The Supreme Court held that the ordinance required one to read (i.e., assess the content of) the signs to ascertain whether the town's sign ordinance applied. Essentially, governmental regulation based on content discriminates (favors) one type of content over another. A "content neutral" ordinance does not require one to read the content of a sign or hear the content of the verbal speech when determining whether the ordinance being challenged applies. For example, in *Reed* the Court held that ordinances that regulate the shape, size, color, and location of signs would be "content neutral."

Unfortunately, the law in the area is not fully settled. First Amendment cases turn on the specific facts presented to the courts. For example, in *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), the court upheld a city’s aggressive solicitation ordinance on grounds that (i) it was content neutral; (ii) the plaintiffs failed to demonstrate that it was susceptible to a substantial number of illegitimate applications; and (iii) it was not unconstitutionally vague. However, the court sent the case back to the district court for further litigation on the issue whether or not the ordinance’s prohibition on “aggressive panhandling” during nighttime hours was constitutional.

Litigation of constitutional issues involving free speech under the First Amendment can be very costly. In *Norton*, the court held that Springfield’s ordinance was content based in violation of the First Amendment. The ordinance banned solicitation for the immediate payment of money but not requests that involved the future payment of money or signs seeking charitable donations payable in the future. Plaintiffs’ sought to recover attorneys’ fees in excess of \$417,000. The federal district court directed the city pay \$333,830.80 in attorneys’ fees. *Norton v. City of Springfield, Illinois*, U.S. District Court for the Central District of Illinois (December 14, 2017). An appeal of the district court’s fees order remains pending.²

The City Council has two options. The City Council can elect not to repeal Ordinance No. 2011-07-099 (UCC Sec. 15-68). In doing so, the City Council runs the risk that the ACLU will find one or more plaintiffs to challenge the ordinance. Defending the ordinance would be quite costly regardless of the outcome of the suit. Should the plaintiff(s) win the suit, the City would be required to reimburse the plaintiff(s) attorneys’ fees and other costs. On the other hand, the City Council can elect to repeal Ordinance No. 2011-07-099. Doing so would not significantly inhibit the City from regulating the aggressive sort of conduct sought to be regulated while allowing those in need to solicit donations. The intent of the Ordinance was regulate the following conduct:

- (1) Touching another person without that person's consent;
- (2) Blocking the path of the person solicited or blocking the entrance to any building or vehicle;
- (3) Continuing to solicit or to request a donation from a person after that person has refused an earlier request;
- (4) Following or remaining alongside a person who walks away from the solicitor after being solicited;
- (5) Making any statement, gesture, or other communication that would cause a reasonable person to feel threatened into making a donation; or
- (6) Using profane or abusive language during the solicitation or following a refusal to make a donation.
- (7) Soliciting in groups of two or more individuals.

² https://herald-review.com/news/state-and-regional/crime-and-courts/springfield-to-appeal-court-order-to-immediately-pay-k-to/article_913adeed-060b-5dc0-aa8b-355ac96b7af8.html

UCC Sec. 15-68. The City has adopted other ordinances that address the above-listed conduct but do not regulate the speech that might be present with such conduct. Some of the other ordinances including prohibitions on aiding and abetting (UCC Sec. 15-1); assault (UCC Sec. 15-16), battery (UCC Sec. 15-17), reckless conduct (UCC Sec. 15-18), criminal trespass to land (UCC Sec. 15-35) disorderly conduct (UCC Sec. 15-60, and mob action (UCC Sec. 15-61).

It is worth noting that the City has not sought to enforce UCC Sec. 15-68 in recent years. If UCC Sec. 15-68 was constitutionally challenged, the City would have to present significant evidence that the above conduct accompanied solicitations for money on a frequent basis. As one court stated: “When the government defends a regulation of speech as a means to redress past harms or prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured.’” *Clatterbuck v. City of Charlottesville*, 92 F.Supp.3d 478, 487 (W.D. Va. 2015), citation omitted.

RECOMMENDATION

The City Attorney recommends that the City Council repeal Ordinance No. 2011-07-099 (UCC Sec. 15-68). A repeal of the this ordinance will not significantly negatively impact the City’s ability to address the types of aggressive conduct sought to be banned by the ordinance – i.e., unwanted touching, preventing one from proceeding in his/her intended direction, harassing persons for donations, use of gestures and words of a threatening nature, and use of abusive speech many a person rejects a solicitation request. It is also worth noting that on December 18, 2017, the City recently repealed its peddlers, solicitors and transient merchant ordinance (formerly, UCC Ch. 17) on substantially similar grounds. See Ordinance No. 2017-10-064.

ORDINANCE NO. 2018-10-072

AN ORDINANCE REPEALING URBANA CITY CODE SECTION 15-68

(Repeal of Aggressive Solicitation Ordinance)

WHEREAS, The City of Urbana, Illinois (“City”) is a home rule unit of local government pursuant to Article VII, Section 6, of the Illinois Constitution of 1970 and may exercise any power and perform any function pertaining to its government and affairs, including the power to regulate for the protection of public health, safety, and welfare; and

WHEREAS, On July 7, 2011, the City Council enacted Urbana City Code Section 15-68 entitled “Aggressive Solicitation” (Ordinance No. 2011-07-099) to regulate the use of aggressive conduct in connection with solicitation for the immediate tender of money; and

WHEREAS, courts carefully and fully scrutinize government regulation of speech on First Amendment (U.S. Const. Amend. I) grounds especially where it appears that the governmental regulation is based on the content of the speech (allowing some forms of speech while banning other forms of speech); and

WHEREAS, courts construe expressive conduct as well as words (including solicitation for the immediate tender of money) as speech for First Amendment purposes; and

WHEREAS, courts have struck down other municipalities’ aggressive solicitation (panhandling) ordinances that contain many of the same restrictions as Urbana City Code Section 15-68 on grounds that they violate the First Amendment; and

WHEREAS, the City has other ordinances for regulating the aggressive conduct that the City Council sought to regulate without regulating constitutionally protected speech such as the City’s ordinances dealing with aiding and abetting (UCC Sec. 15-1); assault (UCC Sec. 15-16), battery (UCC Sec. 15-17), reckless conduct (UCC Sec. 15-18), criminal trespass to land (UCC Sec. 15-35) disorderly conduct (UCC Sec. 15-60, and mob action (UCC Sec. 15-61); and

WHEREAS, the City Council finds that repealing Urbana City Code Section 15-68 will serve the citizens of the City of Urbana, Illinois while not unduly restraining the enforcement of City ordinances concerning aiding and abetting, assault, battery, reckless conduct, disorderly conduct, criminal trespass to land, and mob will allowing persons in need of financial assistance and/or who are homeless to seek such assistance from other citizens of and visitors to the City of Urbana.

NOW, THEREFORE, BE IT ORDAINED by the City Council of the City of Urbana, Illinois, as follows;

Section 1.

Urbana City Code Section 15-68 entitled “Aggressive Solicitation” shall be and hereby is repealed in full upon the effective date of this Ordinance.

Section 2.

Those sections, paragraphs, and provisions of the Urbana City Code that are not expressly amended or repealed by this Ordinance shall be and hereby are re-enacted, and it is expressly declared to be the intention of this Ordinance not to repeal or amend any portions of the Urbana City Code other than as expressly set forth in this Ordinance. The invalidity of any section or provision of this Ordinance hereby passed and approved shall not invalidate other sections or provisions hereof.

Section 3.

This Ordinance shall not be construed to affect any suit or proceeding pending in any court, or any rights acquired, or a liability incurred, or any cause or causes of action acquired or existing prior to the effective date of this Ordinance; nor shall any right or remedy of any character be lost, impaired, or be affected by this Ordinance.

Section 4.

The City Clerk is directed to publish this Ordinance in pamphlet form by authority of the corporate authorities, and this Ordinance shall be in full force and effect from and after its passage and publication in accordance with Section 1-2-4 of the Illinois Municipal Code (65 ILCS 5/1-2-4).

This Ordinance is hereby passed by the affirmative vote, the “ayes” and “nays” being called, of a majority of the members of the City Council of the City of Urbana, Illinois at a duly notice and convened meeting of the said City Council.

PASSED BY THE CITY COUNCIL this ____ Day of _____, 2018.

AYES:

NAYS:

ABSENTIONS:

Charles A. Smyth, City Clerk

APPROVED BY THE MAYOR this ____ Day of _____, 2018

Diane Wolfe Marlin, Mayor