First Amendment Issues: Solicitation Ordinances

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I. SOLICITATION AND PRIVATE RESIDENCES

A. Introduction:

The United States Supreme Court in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton* (2002) 536 U.S. 150; 122 S.Ct. 2080 ("*Watchtower Bible*"), effectively overturned an Ohio ordinance making it a nuisance to engage in door-to-door advocacy without first registering with the Mayor and receiving and displaying a permit. The 6-3 majority opinion held the ordinance violated the First Amendment as applied to religious proselytizing, anonymous political speech, and the distribution of handbills.

The court did not specify the applicable standard of review and instead rested its opinion on two grounds. First the court found the ordinance violated the overbreadth doctrine (*Watchtower, supra,* at 2089), second the court found the Village failed to tailor the ordinance to its stated purpose (*Id.*).[1]

Under the first prong of the court's analysis, the court stated the mere fact that the ordinance covers so much speech raised constitutional concerns. (*Watchtower Bible, supra,* at 2090.) The court considered the ordinance too broad because it interfered with the speaker's interest in speaking with anonymity, it ignored the fact that some speakers may object on religious or patriotic grounds to seeking a permit in the first place, and it effectively banned a significant amount of spontaneous speech since speakers could not receive a permit on weekends or holidays when the Mayor's office was closed. (*Ibid.*)

After finding the ordinance was overbroad, the court went on to conclude the Village had not tailored its ordinance to satisfy the stated justifications. The Village argued it adopted its ordinance in order to protect residents from fraud and crime and allowed for preservation of privacy in the home. (*Watchtower Bible, supra,* at 2091.) The court held the ordinance fell short of reaching these goals. It concluded the ordinance did not protect from fraud because the ordinance regulated more than just commercial speech and the solicitation of funds; it did not protect against crime because it failed to include several categories of potential criminals, including persons posing as stranded motorists and census takers; and the ordinance did not protect the privacy of residents because residents could accomplish this goal by posting no solicitation signs. (*Ibid.)*

Although the court did not specify the applicable level of scrutiny, under the second prong of the court's analysis, the court requires some balance between the affected speech and the governmental interests that the ordinance purports to serve. (*Watchtower Bible, supra,* at 2089.) This suggests the court might apply a balancing test to review of future solicitation ordinances.[2] It is possible the court would apply intermediate scrutiny to its review of solicitation ordinances since Justice Breyer's concurring opinion suggests the appropriate standard is intermediate scrutiny. (*Id.* at 2091-92.) Justice

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[1] It is not clear whether the court intended to create a new two-pronged test in *Watchtower Bible* or whether the Justices simply could not agree on the applicable level of scrutiny and whether the ordinance survived that level of scrutiny. As Justice Rehnquist's dissent states, "It is not clear what test the court is applying or under which part of the test the ordinance fails." (*Watchtower Bible*, *supra*, at 2094.)

[2] The court generally applies two tests in reviewing ordinances on First Amendment grounds. The court will either apply a strict scrutiny analysis in which the ordinance must be narrowly tailored to

Rehnquist, writing the lone dissenting opinion, however, argued the court actually applied some "unworkable" standard that appears to be higher than intermediate scrutiny. (*Id., supra,* at 2094.) Justice Rehnquist argued intermediate scrutiny should apply for all content-neutral regulations of speech that occur at private residences. (*Ibid.*)

B. Extent of the Holding in *Watchtower Bible*

1. Canvassing and Pamphleteering by Religious Organizations

The *Watchtower Bible* case prohibits cities from requiring religious organizations to seek and display a permit prior to engaging in door-to-door "proselytizing." The court, however, left open the possibility that a city could require a permit for organizations, including religious organizations, where the members are not solely "proselytizing," but are seeking funds. If an organization actively seeks donations, this may fall outside the scope of the holding in *Watchtower Bible*.

However, even if the organization is actively seeking donations, the court will still apply some form of heightened scrutiny in reviewing the ordinance. This is because the Supreme Court has clearly established that collecting funds for charitable, political or religious purposes involves a variety of speech interests and is therefore protected by the First Amendment. (*Village of Schaumburg v. Communities for a Better Environment* (1980) 444 U.S. 620, 632 ("*Village of Schaumburg*").) The court has clarified that soliciting financial support is intertwined with the communication of, the dissemination of, and propagation of views and ideas and the advocacy of causes. (*Ibid.*) Therefore, cities cannot treat the solicitation of funds as purely commercial speech. *Village of Schaumburg* makes clear that a city may adopt a regulation regarding the solicitation of funds if it does not unduly intrude upon the rights of free speech. (*Id.* citing *Hynes v. Mayor of Oradell* (1976) 425 U.S. 610.) An ordinance imposing a restriction or permit requirement on the solicitation of funds must therefore pass some form of heightened scrutiny.

2. Canvassing and Pamphleteering by Non-religious Organizations

The *Watchtower Bible* case prohibits a city from requiring a person to first seek a permit where the speaker wishes to engage in anonymous political speech or distribution of handbills. The holding of Watchtower *Bible,* therefore, extends to groups other than religious groups. The city cannot require a permit for any pure speech involving political speech or the distribution of handbills.

The court's reasoning for finding the ordinance was overbroad was based in part upon the court's interests in anonymous speech. (Citing *McIntyre v. Ohio Elections Commission* (1955) 514 U.S. 334.)[3] The Court of Appeals in *Watchtower Bible* had held that door-to-door solicitors do not have an interest in anonymity because face-to-face interaction destroyed all possibility of remaining anonymous. The Supreme Court rejected this determination stating, "The fact that circulators revealed their physical

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satisfy a compelling state interest, or the intermediate scrutiny analysis that provides that "government may impose reasonable restrictions on the time, place or manner of protected speech, provided the restrictions 'are justified without reference to content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of information.'" (*Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791.)

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identities did not foreclose our consideration of the circulators' interest in maintaining their anonymity." (*Watchtower Bible, supra,* at 2090.) The court concluded that strangers should be allowed to remain strangers unless there is some special state interest in requiring disclosure of identity. The court identified two such interests that would outweigh the interests in anonymous speech. First the court identified needs of the state to protect the integrity of the ballot-initiative process (citing *Buckley v. American Constitutional Law Foundation, Inc.* (1999) 525 U.S. 182 ("ACLF")). Second, the court identified the need to prevent fraudulent commercial transactions. (*Watchtower Bible, supra*, at 2090.) Thus, the court may uphold a permit process where the city has some special interest in denying the right to anonymous speech.

An additional "special state interest" for denying anonymous political speech may include political speech that involves charitable solicitations. The court in *Buckley v. Valeo* (1976) 424 U.S. 1, held donors to political causes do not have an interest in anonymous speech because the state interest in preserving the political process outweighs the need for anonymity. A second "special state interest" may include the state's right to require petition circulators sign a notarized affidavit or permit. The court in *ACFL* upheld a portion of a Colorado law that required petition circulators provide a notarized affidavit containing the petitioner's name, address and signature. (*Id.* at 199.) The court stated an affidavit requirement "exemplifies the type of regulation for which *McIntyre* left room." (*Id.* at 200.) The court further explained the affidavit requirement provided necessary information without exposing the circulator to "heat of the moment" harassment. (*Id.* at 199.)

ACLF factually applies to all one-on-one political advocacy. However, its holding may be limited somewhat by *Watchtower Bible* since *ACLF*'s registration requirements could have provided grounds for the Court in *Watchtower Bible* to uphold the ordinance, but the court instead avoided this precedents and held registration requirements violated a speakers' right to anonymity.

In addition the holding of Watchtower *Bible* permits the distribution of handbills. This would presumably extend to pamphleteering by non-religious as well as religious organizations.

3. Canvassing and Pamphleteering by Commercial Organizations or for a Commercial Purpose

The *Watchtower Bible* opinion is limited specifically to political and religious advocacy. The opinion does not expressly apply to commercial speech but may impact commercial speech in two ways.

First, the *Watchtower Bible* opinion permits the distribution of handbills without a permit. The opinion does not define "handbill." To the extent the term handbill includes commercial handbills, this opinion prohibits a city from requiring a permit for distribution so long as the person is not seeking face-to-face solicitation of money or peddling services.

Second, the court clarified that cities have an interest in some form of regulation, particularly where commercial speech is involved. (*Watchtower Bible, supra,* at 2088 citing *Cantwell v. Connecticut* (1940) 310 U.S. 296 ("*Cantwell*").) The court in *Watchtower Bible* stated: "had [the ordinance] been

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[3] The court in *McIntyre* identified a number for justifications for anonymity including: A fear of economic or social retaliation, a fear of social ostracism, a desire to preserve one's privacy, and a belief that ideas may be more persuasive when anonymous.

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construed to apply only to commercial activity and solicitation of funds, arguably the ordinance would have been tailored to the Village's interests." (*Ibid.*)

Because the opinion in *Watchtower Bible* does not directly apply to commercial speech, presumably the courts' prior precedents including *Cantwell,* decided on free exercise grounds, and *Valentine v. Christensen* (1942) 316 U.S. 52, 54 ("*Valentine*") will apply. The court in *Cantwell* stated that "without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." (*Cantwell, supra,* at 306-307.)

These opinions suggest (1) a city may adopt a solicitation ordinance so long as the ordinance passes some form of heightened scrutiny, and (2) protecting residents from crime and fraud will provide an adequate justification for adopting such an ordinance.

C. Impact of Watchtower Bible on Prior Case Law

The Watchtower Bible opinion leaves most of the court's prior precedents intact. The opinion does not appear to either expressly or impliedly overrule any prior court opinions. The following is a summary of the court's prior precedents impacting door-to-door solicitations.

1. City Cannot Completely Forbid Door-to-Door Solicitations—But Has Power to Regulate

The court in *Martin v. City of Struthers* (1943) 319 U.S. 141, 147 struck down an ordinance forbidding solicitors or distributors of literature from knocking on residential doors in the community. The 5-to-4 majority opinion concluded that on balance "[t]he dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." (*Ibid.*)

The court has observed that it "has consistently recognized a municipality's power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing. A narrowly drawn ordinance, that does not vest in municipal officers the undefined power to determine what messages residents will hear, may serve these important interests without running afoul of the First Amendment." (*Hynes v. Mayor of Oradell* (1976) 425 U.S. 610, 616-17.) The court in *Watchtower Bible* may have impliedly overruled dicta from *Hynes* that indicated the court had through its prior precedents supported government regulations that require a canvasser give some form of notice to officials prior to canvassing house-to-house for charitable or political purposes. The *Hynes* dicta may be overruled as it applies to religious proselytizing, anonymous political speech and the distribution of handbills.

Although the City may have the power to regulate door-to-door solicitations, this ordinance may not grant discretion to the City regarding whether to approve the speech. (*Cantwell*, *supra*, at 307.)

2. City Cannot Require Percentage of Funds be Used for Charitable Purpose

The court has invalidated ordinances that require charitable organizations use at least 75% of their receipts directly for charitable purposes, defined so as to exclude the expenses of solicitation,

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salaries, overhead, and other administrative expenses, in order to receive a door-to-door solicitation permit. *(Village of Schaumburg, supra*, at 632; see also *Larson v. Valente* (1982) 456 U.S. 228.) The court rejected the city's contention that the ordinance was required to prevent fraud because it could not be said that all associations that spent more than 25% of their receipts on overhead were actually engaged in a profit making enterprise, and, in any event, more narrowly drawn regulations, such as disclosure requirements, could serve this governmental interest. (*Village of Schaumburg, supra,* at 632.)

The court extended the holding of *Village of Schaumberg* in *Maryland v. Joseph H. Munson Co.* (1984) 467 U.S. 947 ("*Munson*"), and *Riley v. National Fed'n of the Blind* (1988) 487 U.S. 781 ("*Riley*"). In both *Munson* and *Riley* the court invalidated provisions that required some relationship between the amount of money collected and the costs spent on charitable purposes. The court stated it saw "no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent" or any scheme that shifts the burden to the fundraiser to show that a fee structure is reasonable. (*Riley, supra,* 487 at 493.)

3. Occupant Objection Provisions Acceptable

The Witnesses did not challenge the constitutionality of Village of Stratton ordinance section 116.07, regarding the rights of owners or occupants to prohibit solicitation at his or her residence. An ordinance, therefore, may limit a speaker's right to disseminate ideas and written materials where the resident posts a "No Solicitation or Peddling" sign. The Village in *Watchtower Bible* provides these signs to any resident who requests a sign. A city may therefore provide a similar provision for residents at their request.

II. SOLICITATION AND PUBLIC PLACES

The court in *Watchtower Bible* specifically narrowed its holding to apply only to door-to-door solicitations involving religious proselytizing, anonymous political speech and distribution of handbills. However, the court's justification for its holding appears to extend to all forms of solicitation, including solicitation on public property. First, the court determined the distribution of religious materials is "high value" speech equivalent to worship in churches and preaching from the pulpit. Second, the court concluded door-to-door solicitation is an essential avenue of communication that is essential to poorly financed groups. Third, the court recognized that champions of unpopular causes may be subject to harassment by government officials and social ostracism if the speaker is forced to first get a permit. Fourth, the court recognized the "pure and uncomplicated" benefits of verbal communication between individuals. (*Watchtower Bible*, *supra*, at 2087-88.)

Thus, *Watchtower Bible* may provide justification for challenging prior court precedents regarding solicitation even in public places. The following is an analysis of the current Supreme Court formulation for analyzing solicitation in public places.

A. Impact of *Watchtower Bible* on Solicitation on Government Property

The court has long recognized the right of the government to manage its own property. However, the court balances this right against the rights of individuals to free speech on property that has

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traditionally be held open for speech. The court has formulated a forum approach to analyzing whether the government may restrict the rights of the public to speak on public property. The forum analysis assigns different levels of scrutiny depending upon how particular property is characterized. Property is either characterized as a traditionally public forum, a limited public forum or a nonpublic forum. (*Perry Educ. Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37, 45-48 ("*Perry*").) In traditional public forums, content-based restrictions on speech are subject to strict scrutiny and therefore must serve a compelling government interest and be narrowly tailored to achieve that interest. (*Ibid.*) For content-neutral time, place and manner restrictions on speech in a traditional public forum. The court will examine whether the government restriction is "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communications." (*Ibid.*)

For limited public forums, strict scrutiny is accorded only to restrictions on speech that falls within the designated category for which the forum has been opened. "Thus, in a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre." (*Travis v. Owego-Apalachin Sch. Dist.* (2d Cir. 1991) 927 F.2d 688, at 692.) For expressive uses that do not fall within the limited category for which the forum was opened, the restrictions need only be viewpoint neutral and reasonable. (*Ibid.*)

Nonpublic forums need only be viewpoint neutral and a reasonable regulation to be constitutional. (*International Soc'y for Krishna* Consciousness*, Inc. v. Lee* (1992) 505 U.S. 672, 678 ("*ISKON*").)

The court looks at how the property has traditionally been used (*Perry, supra,* at 46), the physical characteristics of the property, and the context of the property's use, including the location and principal purpose for the property (*United States v. Kokinda* (1990) 497 U.S. 720, 727 (plurality opinion)("*Kokinda*"), to determine whether the property is a public forum, a limited public forum or a nonpublic forum. (*ISKON, supra,* for the first time incorporated both the *Perry* historical test and the *Kokinda* principal purpose test.)[4] In applying the forum test the court has held that sidewalks and residential streets are traditional public forums (*Hague v. CIO* (1939) 307 U.S. 496, 515-16; *Frisby v. Schultz* (1988) 487 U.S. 474, 480-82), however the sidewalk leading to a post office is not a public forum (*Kokinda, supra,* at 727). Postal boxes are not public forums (*United States Postal Service v. Council of Greenburgh Civic Assns.* (1981) 453 U.S. 114), but teachers' school mailboxes are a limited public forum (*Perry, supra,* at 45). The court relies on the facts of a case to determine whether a particular location is a public forum.[5]

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[4] Justice Kennedy would apply a compatibility test to determine whether public property is a traditional public forum. Recent court opinions suggest the Justice Kennedy approach could garner a majority support at some time in the future. Under the compatibility test Justice Kennedy would compare the public property at issue with other public forums to determine whether the were physically similar. (*ISKON, supra*, at 2720-22 (Kennedy, J. concurring).) Second, Justice Kennedy would determine whether the government had permitted speech on the property and last he would evaluate whether the speech would interfere with the purpose of the public property. (*Id.*)

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1. Solicitation is Considered Speech

a. Begging and Charitable Solicitations Protected

The court has determined that soliciting funds for charitable purposes is protected first amendment speech. (*ISKON, supra,* at 677-78, *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.* (1985) 473 U.S. 788, 797.) Most courts also find that begging is protected by the First Amendment. At least one court has held that begging is merely conduct and should not be considered free speech. (*Young v. New York City Transit Auth.* (2nd Cir. 1990) 903 F.2d 146.) This court, however, reversed itself on this holding two years later.[6] The Federal Court in the Northern district of California in *Blair v. Shanahan* (N.D. Cal. 1991) 775 F.Supp. 1315, 1322-24, vacated after settlement (1996) 919 F.Supp. 1316 ("*Blair*"), held that begging is speech—even though the speaker was compensated for his or her speech. (*Ibid.*) Therefore, begging and solicitation of funds for a charitable purpose are considered speech protected by the First Amendment.

b. Pamphleteering Protected

In *Lovell v. City of Griffin* (1932) 303 U.S. 444 (*"Lovell"*), the court struck down a permit system that applied to the distribution of all circulars, handbills or literature of any kind. The court concluded that the "First Amendment necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest." (*Id.* at 452.) The court in *McIntyre* extended *Lovell* to anonymous distributions of pamphlets. (*McIntyre, supra,* at 342.) Therefore, the distribution of handbills, pamphlets and circulars are protected speech under the First Amendment.

2. Standard of Review

As set out above, the question of whether the government may restrict solicitations in public places will depend upon the type of forum involved and whether the ordinance is content-neutral or content-based.

a. Content Neutral Regulations Favored

In determining whether a regulation is content-based or content-neutral the court will look at whether the ordinance is aimed at the content of speech. If the ordinance is not aimed at the content of the message, then the court will apply a more deferential standard.

The Massachusetts Supreme Court recently overturned a Massachusetts ordinance that prohibited "Persons wandering abroad and begging, or who go about from door to door or in public or private

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[5] In addition, the court in *Heffron v. International Society for Krishna Consciousness, Inc.* (1981) 452 U.S. 640, 651, held a traditional public forum is a place that is "continually open, often uncongested, and constitutes not only a necessary conduit in the daily affairs of a locality's citizens, but also a place where people may enjoy the open air or the company of friends and neighbors in a relaxed environment."

[6] The 2nd Circuit in *Loper v. New York City Police Dept.* (2nd Cir. 1993) 999 F.2d 699, 704, held that "begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation…We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed."

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ways, areas to which the general public is invited, or in other public places for the *purpose of begging or to receive alms…*" (*City of Cambridge G.L. c. 272, § 66, emphasis added.*) The court determined the ordinance was content-based because it only restricted speech for the purpose of "begging" and "asking for alms," and it did not cover any other type of speech including seeking money for parking meters, the bus, telephone calls, donations for school teams or political and social causes. (*Benefit v. City of Cambridge* (1997) 424 Mass. 918.) The court in *Blair, supra,* at 1324, found that an ordinance is content-based where the emphasis of the ordinance is on the beggar's motivation.

By comparison, an ordinance is content-neutral where the ordinance is based upon conduct rather than speech. (*Blair, supra,* at 1324.)

Content-based ordinances are subject to strict scrutiny review and the city, therefore, must advance a compelling government interest in order to justify a content-based regulation.

Content-neutral regulations, by comparison, need only be reasonable time, place and manner regulations. Therefore, the city needs only to justify its regulation with a "significant" government interest. Courts have upheld content-neutral regulations based upon the government's need to control noise, crowds, and the safe movement of traffic and people through public places—such as airports. (*ISKON, supra,* at 684-685.)

b. Government Interests

(i) Traditional Public Forum – Strict or Intermediate Review

Where solicitation occurs on a traditional public forum the ordinance will either be subject to strict scrutiny review or intermediate scrutiny review.

The 9th Circuit has concluded protecting citizens from the "annoyance" of solicitations is not compelling government interest. (*Blair, supra,* at 1324.) However, the court in *Blair* noted that the government may protect its citizens against "threatening and coercive" conduct. (*Ibid.*) Protecting against coercion, threatening and intimidating conduct is, therefore, a compelling government interest.

The court in *Schneider v. Town of Irvington* (1939) 308 U.S. 147, 161, held that "the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it."

It appears, one of the only "compelling interest" for prohibiting solicitations on a traditional public forum is to protect members of the public from threatening and coercive conduct.[7] For expressive uses that do not fall within the limited category for which the forum was opened, the restrictions need only be viewpoint neutral and reasonable. Thus, any viewpoint neutral government interest will be presumed valid.

(ii) Limited Public Forum – Look to the Purpose of the Forum

For limited public forums, the court will only review the ordinance using strict scrutiny review for those expressive uses for which the city opened up the forum for general access.[8] For expressive uses that do not fall within the limited category for which the forum was opened, the restrictions need only be viewpoint neutral and reasonable. Thus, any viewpoint neutral government interest will be presumed valid.

The court in *Hotel Employees & Restaurant Employees Union, Local 100 of New York, NY & Vicinity, AFL-CIO v. City of New York Dept. of Parks & Recreation* (2nd Cir. 2002) 311 F.3d 534, for example, held that Fountain Plaza in front of Lincoln Center may be a limited public forum and that the forum was opened for the limited purpose of expression through "performance, entertainment, or other artistic [means]." (*Id.* at 553.) The court found the city could limit access by union groups picketing labor practices because union picketing did not fall within the limited purpose for which the City opened up the forum. The court will, therefore, uphold any provision that seeks to limit the use of the property for proposed activities that fall within the class of expressive activities for which the forum was opened.

3. Narrowly Tailoring the Restriction is Required

For both strict scrutiny and intermediate scrutiny review the court looks at whether the ordinance is narrowly tailored. The difference between the two tests lies in the means by which the ordinance attempts to achieve its purposes. For strict scrutiny review the ordinance must be the least restrictive means while for intermediate scrutiny, the city need not demonstrate the least restrictive means. (*Ward*, *supra*, at 791.)

The court in *Blair* noted that although the ordinance was aimed at a compelling government interest, the government ordinance was not narrowly tailored to satisfy the government interest. The court noted that the government had "at its disposal a plethora of content-neutral statutes which the population at large may be protected from threatening conduct." The city was free to punish "beggars who transgress peaceful limits." The court noted that charges could have been brought for disorderly conduct, trespass, assault and battery, and other offenses that may result from peaceful activity turned aggressive. (*Blair; supra,* at 1324.) The court, therefore, looks for any alternatives for accomplishing the government's stated objectives without infringing on speech.

B. Impact of *Watchtower Bible* on solicitation on Hybrid Public Properties

The First Amendment precludes government restraint of expression and it does not require individuals to turn over their homes, businesses or other property to those wishing to communicate about a particular topic. (*Garner v. Louisiana* (1961) 368 U.S. 157, 185, 201-07.) However, the government need not have a possessory interest in property for a public forum to exist. Rather, the courts have held that "either government ownership or regulation is sufficient for a First Amendment forum of some kind to exist." (*First Unitarian Church of Salt Lake City v. Salt Lake City* (10th Cir. 2002) 308 F.3d 1114, 1122 ("*First Unitarian Church*").) The courts will apply the forum analysis to any property owned by a private party that is burdened by the government (including a government ease-

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[7] Note, although *Blair* suggests this is a compelling government interest, if the ordinance were aimed at protecting against intimidation and threats the ordinance would be aimed at conduct and would therefore be content-neutral. Thus, an ordinance aimed at protecting against coercion and threats would likely be subject to intermediate scrutiny.

[8] A city does not create a limited public forum when it allows selective access for individual speakers rather it creates a limited forum where it opens up an otherwise nonpublic forum for general access for a specified class of speakers. (*Arkansas Educational Television Commission v. Forbes* (1997) 523 U.S. 666, 679.)

ment) or any property that is "functionally akin" to public property. (*Ibid.*) In addition, a speaker may have a right to speech on private property where the State Constitution grants a right to speech on private property. (*PruneYard Shopping Center v. Robins* (1980) 447 U.S. 74.)

First, property is considered a public forum where a private person owns the property and the government has in some way burdened the property. (*First Unitarians*, *supra*, at 1122.) The court in *First Unitarian Church* held that a government easement reserved over private property transformed otherwise private property into a public forum.

Second, if private property is functionally akin to public property then neither private property owners nor the government may forbid speech on the property. In *Marsh v. Alabama* (1946) 326 U.S. 501, the court held that the private owner of a company town could not forbid distribution of religious materials by a Jehovah's Witness on a street in the town's business district. Because the town, wholly owned by a private corporation, had all the "attributes of any American municipality", the court reasoned, "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." (*Ibid.*)

The court has since narrowed its interpretation of *Marsh,* but the government and private property owners are still subject to a forum analysis where the private property is "functionally akin" to public property.

The court first narrowed the *Marsh* holding in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza* (1968) 391 U.S. 308, where the court held the constitution protected the rights of union picketers who objected to a store's employment of nonunion laborers. The court found the shopping center was the functional equivalent of the business district involved in *Marsh* and announced there was "no reason why access to a business district in a company town for the purpose of exercising First Amendment rights should be constitutionally required, while access for the same purpose to property functioning as a business district should be limited simply because the property surrounding the 'business district' is not under the same ownership.'" (*Id.* at 319. Justices Black, Harlan, and White dissented. Id. at 327, 333, 337.) Justice Marshall argued the State "may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." (*Id.* at 319-20.)

The court in *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551, again narrowed the holding of *Marsh* when it held a private property owner could prohibit picketing which was not directly related to operation of a shopping center. The court held several members of an antiwar group who attempted to distribute leaflets on the mall of a large shopping center could be rightfully excluded from the shopping center. The court found the shopping center's interest in business activity outweighed the speech interests of the leafleters because the center had not dedicated its property to a public use, the Plaintiffs' leafleting was not related to any activity of the shopping center and reasonable alternatives of speech were available to the Plaintiffs. (*Ibid.*)

The court in *Hugdens v. NLRB* (1976) 424 U.S. 507, formally overruled *Logan Valley Plaza* by holding that shopping centers are not functionally equivalent to the company town involved in *Marsh.* (*Hudgens v. NLRB* (1976) 424 U.S. 507.)

Picketers and pamphleteers may have a constitutionally protected right to speech on private property where the state constitution protects speech. (*PruneYard Shopping Center v. Robins* (1980). In *PruneYard*, *supra,* the court held that a State court interpretation of the State Constitution to protect picketing in a privately owned shopping center did not deny the property owner any federal constitutional rights.

Thus, to the extent the city attempts to extend the reach of an ordinance onto private property, the City may have to satisfy the forum analysis discussed above to determine whether the regulation will withstand constitutional review.

1. Albertson's v. Young—The California Approach

California courts interpreting the California Constitution have taken an approach similar to the Federal approach. The courts in California will look at the nature and circumstances of the private property to determine whether the property has become the functional equivalent of a traditional public forum. The court's look at the facts and circumstances to determine whether the forum encouraged people to come to the private property to meet and talk. The court in *Albertson's v. Young* (2003) 131 Cal. Rptr. 2d 721 ("*Albertson's*"), held a grocery store was not a functional equivalent of a traditional public forum where the grocery store did not have a central meeting place and did not encourage people to visit the store. The *Albertson's* court focused on the fact that the store did not have a plaza, walkways or courtyards for patrons to spend time together. (*Id.*) If the private property provides the types of facilities that would encourage people to congregate and remain on the premises, such as courtyards and seating areas, then the court will likely consider the business a hybrid public forum.

In addition, a private property owner could be required to open up the property for speech, the Court in *Albertson's* clarified, where the expressive activity is specifically related to the business of the property. Under these circumstances, the speaker has a greater interest in access to the property. (*Albertson's supra,* citing *In re Lane* (1969) 71 Cal. 2d 872.)

C. Summary of Regulating Speech on Public Property

Where the City seeks to regulate conduct in public places, including government property and hybrid public property that is the functional equivalent of public property, the City must consider whether the property has been traditionally open for speech or whether the City has intentionally opened up otherwise private property for speech by a wide group of the public on a limited subject. If so, the City must justify its ordinance with a compelling government interest that is narrowly tailored. The ordinance need not be the least restrictive means if it is a limited public forum, but it must leave open ample alternative channels for communication.

The City can likely only limit solicitation on public property using (1) time, place and manner restrictions, such as its permit process, (2) through the City's nuisance ordinances; or (3) through what are often called "aggressive solicitation" ordinances that are narrowly tailored to justify a compelling government interest. We have attached a sample "aggressive solicitation" ordinance.

III. ADOPTING A SOLICITATION ORDINANCE TO SURVIVE WATCHTOWER BIBLE

A. Purpose

Justice Breyer in a concurring opinion joined by Justices Souter and Ginsburg would require a city make findings to justify the ordinance. Justice Breyer's opinion states there was no evidence of specific crime or fraud associated with door-to-door solicitation. (*Watchtower Bible, supra,* at 2091) Justice Breyer would require the city to give its real reasons for adopting the ordinance and the justification must be supported by more than an anecdote and supposition. (*Id.* citing *United States v. Playboy Entertainment Group, Inc.* (2000) 529 U.S. 803.)

The facts presented in *Watchtower* demonstrated that the Village of Stratton had only one police officer for 300 residents and that the police officer was not on duty at all times. This evidence alone was not enough to demonstrate a need for the ordinance. Rather, the Village likely would be required to demonstrate not only the inability to police the entire area but a demonstrated crime problem. The court stated the "absence of any evidence of a special crime problem related to door-to-door solicitation in the record before us" lessens this interest. (*Watchtower Bible, supra,* at 2091.)

B. Scope

To comply with *Watchtower Bible,* an ordinance must withstand both challenges based upon the overbreadth doctrine and some form of tailoring. An ordinance is overbroad and therefore void if the ordinance, although not aimed at constitutionally protected conduct, sweeps within its ambit other activities that constitute an exercise of otherwise constitutionally protected rights. (*Thornhill v. Alabama* (1940) 310 U.S. 88, 97.)

C. Model Ordinance Highlights

The model ordinance attached attempts to regulate solicitation not covered by *Watchtower Bible.*

The First section regulates door-to-door peddling or solicitation. We have elected to use the word "peddling" in the ordinance to distinguish constitutionally protected speech from less protected commercial speech. The City's ability to adopt this type of ordinance may depend upon the extent the City finds a localized need for regulation. If the City finds persons are being taken advantage of, defrauded, or victimized by door-to-door solicitors, the City may impose this types of regulation. Once the City finds a localized need for regulation, the City may impose conditions on those seeking to sell goods or services door to door. The City may, as the attached model ordinance does, impose licensing requirements on solicitors. The model ordinance requires commercial vendors seeking to sell goods or services door-to-door to first apply for and receive a license from the City. It allows the City to investigate the applicant prior to issuance of the permit.[9] In addition, it imposes conditions and regulations on how peddlers transact business. Some Cities that have adopted similar provisions also

[9] To avoid liability under the Tort Claims Acts for creating a dangerous condition, the City should not issue a permit until it has conducted this investigation.

require the peddler post a bond to cover any damage caused by the solicitation. We have excluded the distribution of handbills from the ordinance to comply with *Watchtower Bible*.

The second part of the ordinance relates to solicitation on public property. As discussed above, where the City seeks to restrict solicitation on public property the City should do so in a content-neutral manner. The City may restrict solicitation in public places through its nuisance ordinance or through a time, place and manner restriction, such as a content-neutral permit requirement. In addition, the City may restrict solicitation in public places through an "aggressive solicitation" ordinance, such as the ordinance attached. This ordinance is aimed at preventing fear of imminent bodily harm or intimidation, and will therefore likely be considered a "compelling government interest" that may pass even the strictest scrutiny.

The ordinance restricts speech on both government and private property, including banks, check cashing businesses, ATM machines and public areas including streets and sidewalks. Each City can tailor the ordinance toward other locations, including bus stations and public rights of way. The City should make localized findings on why an ordinance covers speech in a particular location.

This model ordinance does not include any regulations restricting religious and political groups from soliciting funds door-to-door or requiring these groups to first seek and receive a license prior to soliciting funds. As mentioned above, a City may adopt such an ordinance – even after *Watchtower Bible* – if the ordinance is tailored to meet the City's needs. (*Village of Schaumberg*, *supra*.) The City must make findings of the localized need for such an ordinance and then tailor the ordinance to remedy the local concern.

APPENDIX A

Model Ordinance

SOLICITATORS AND PEDDLERS

Title 5 BUSINESS LICENSES AND REGULATIONS

Chapter 5.01 LICENSE TAXES, RELATED PROVISIONS,
AND REGULATION OF PEDDLERS

5.01.010. Peddler—Defined.
5.01.020. Peddler—License required.
5.01.030. Peddler—Application for license.
5.01.040. Peddler—Contents of application.
5.01.050. Peddler—Other information.
5.01.060. Peddler—Application fees.
5.01.070. Peddler—Photograph required.
5.01.080. Peddler—Fingerprints required.
5.01.090. Peddler—Investigation—Character and business responsibility.
5.01.100. Peddler—License and identification card to be carried on person.
5.01.110. Peddler—Conditions and regulations.
5.01.120. Peddler—Revocation of license.
5.01.130. Peddler's license—Appeals to city council.
5.01.140. Peddling unlawful where "No Peddlers" sign posted.
5.01.150. Distribution of handbills—excluded

5.01.000 LEGISLATIVE FINDINGS.

[Justices Breyer, Souter and Ginsburg have suggested that specific factual findings of crime, fraud etc. that the ordinance seeks to reduce. These Justices suggest these findings should be localized. Prior to adopting an ordinance limiting door-to-door solicitation or peddling, the City should first adopt localized findings.]

5.01.010 PEDDLER DEFINED.

"Peddler" means any person who goes from house to house or from place to place in the city selling or taking orders for or offering to sell or take orders for goods, wares and merchandise for present or future delivery or for services to be performed immediately or in the future whether such person has, carries or exposes a sample of such goods, wares and merchandise or not and whether he is collecting advance payments on such sales or not.

5.01.020 PEDDLER—LICENSE REQUIRED.

It is unlawful for any person to act as Peddler within the city without having first obtained a license issued pursuant to this chapter.

5.01.030 PEDDLER—APPLICATION FOR LICENSE.

Applicants for license under this chapter shall file with the finance officer an application in writing on a form to be prescribed by the finance officer.

5.01.040. PEDDLER—CONTENTS OF APPLICATION.

The application shall contain the following information:

A. The name and address of the Peddler;

B. The name and address of the person, firm or corporation by whom the Peddler is employed;

C. The length of service of each Peddler with such employer;

D. The place of residence and nature of the employment of the Peddler with such employer during the last preceding year;

E. The nature or character of the goods, wares merchandise or services to be offered by the Peddler;

F. A personal description of the Peddler;

G. A statement as to any convictions of any crimes, misdemeanors, violations of municipal ordinances, the date, the nature of the offense and the penalty assessed therefor.

5.01.050 PEDDLER—OTHER INFORMATION.

Such information shall be accompanied by such credentials and other evidence of good moral character and identity of each Peddler as may be reasonably required by the finance officer.

5.01.060 PEDDLER—APPLICATION FEES.

A. The application fee for Peddlers hereunder shall be as follows:

1. For each new application where an investigation is required, five dollars for each application payable in advance;

2. For each replacement application or issuance of a new identification card, five dollars for each such replacement.

B. Fees and investigations as used in this section refers solely to individuals and not to firms.

5.01.070 PEDDLER—PHOTOGRAPH REQUIRED.

Each application for a license as required by this chapter must be accompanied by two prints of a recent photograph of the Peddler, which photographs shall not exceed two inches square in size and shall be full front views of the face and head only of such Peddler.

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5.01.080 PEDDLER—FINGERPRINTS REQUIRED.

At the time of making the application for a license, each Peddler shall present himself at the office of the chief of police of the city for the purpose of being fingerprinted and supplying routine information required on the fingerprinting forms provided without expense by the city, including the physical characteristics of each person, identifying marks or scars, age, name, address and signature. Such fingerprint records are to be taken in triplicate and each individual so presenting herself is advised that the city reserves the right to retain one of such fingerprint records in its files for permanent safekeeping, and to send one such fingerprint record to the Federal Bureau of Investigation of the Department of Justice at Washington, D.C., and to the Criminal Investigation Department of the California Department of Justice at Sacramento, California, for the purpose of filing. No fingerprint records will be returned in the event the license applied for is not issued or is subsequently suspended or revoked.

5.01.090 PEDDLER—INVESTIGATION—CHARACTER AND BUSINESS RESPONSIBILITY.

The original copy of the application shall promptly be referred to the chief of police, who shall promptly make an investigation of the applicant's character and business responsibility. If the applicant's character or business responsibility is found to be unsatisfactory, the chief of police shall endorse on such application his disapproval and the reason therefor and return the application to the finance officer. The finance officer shall notify the applicant that his application is disapproved and that no license will be issued. If the chief of police finds that the applicant's character and business responsibility are satisfactory, he shall endorse his approval on the application and return it to the finance officer, who shall promptly issue the license and identification card.

5.01.100 PEDDLER—LICENSE AND IDENTIFICATION CARD TO BE CARRIED ON PERSON.

Each applicant for a license must at all times retain in his possession the business license issued by the finance officer and each applicant issued an identification card must retain the same in his personal possession at all times were engaged in the business so licensed within the city and must produce and show the same on the demand of any person solicited or of any police officer or official of the city. No person issued an identification card shall alter, remove or obliterate any entry made upon such license or card, or deface such license or card in any way. Each license and card shall be personal and not assignable or transferable, nor shall any license or card be used by any person other than the licensee or the person for whom issued.

5.01.10 PEDDLER—CONDITIONS AND REGULATIONS.

The following conditions and regulations shall also apply to the exercises of the privileges granted by licenses issued under the provisions of this chapter in addition to those set forth in other parts of this chapter or elsewhere in this code:

A. Shouting—calling wares. No person acting under authority of any license issued under this chapter shall shout or call his wares in a loud, boisterous or unseemly manner, or to the disturbance of citizens or dwellers in the city.

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B. Identification by comparing signature with that on license. Every Peddler, upon the request of any police officer or other officer of the city, shall sign his name for comparison with the signature upon the license or card or the signature upon the license application.

C. Order to be written in duplicate. Any person acting under authority of any license issued under this chapter who solicits orders for future delivery shall write each order at least in duplicate, plainly stating the quantity of each article or commodity ordered, the price to be paid therefor, the total amount ordered and the amount to be paid on or after delivery. One copy of such order shall be given to the customer.

D. Every Peddler shall, upon request of any person solicited, provide his/her name, business address and telephone number and the name, business address and telephone number of the person, organization, or entity an whose behalf solicitation is being made.

5.01.120. PEDDLER—REVOCATION OF LICENSE.

A. A license issued under this chapter may be suspended or revoked by the chief of police for any of the following causes:

1. Fraud, misrepresentation or false statement contained in the application for license;
2. Fraud, misrepresentation or false statement made in the course of carrying on his business as Peddler;
3. Any violation of this chapter;
4. Conviction of any crime or misdemeanor involving moral turpitude;
5. Conducting the business of soliciting or of canvassing in an unlawful manner or in such a manner as to constitute a breach of the peace or to constitute a menace to the health, safety or general welfare of the public.

B. This section shall be self-executing and the suspension or revocation shall be effective immediately. The city clerk shall give notice of the suspension or revocation of license and sufficient notice shall be given if mailed or delivered to the licensee at his last known local address.

5.01.130 PEDDLER'S LICENSE—APPEALS TO CITY COUNCIL.

In the event that any applicant desires to appeal from any order, revocation or other ruling of the finance officer, the chief of police or any other officer of the city, made under the provisions of this chapter, such applicant or any other person aggrieved shall file written notice of such appeal with the city clerk and such matters shall be heard at the next regular meeting of the city council, at which time the city council shall hear and receive evidence, written and oral upon all matters involved. The decision of the city council may be final upon all parties concerned.

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5.01.140 PEDDLING UNLAWFUL WHERE "NO PEDDLERS" SIGN POSTED.

It is unlawful for any person described in Section 5.08.800 of this chapter to perform or attempt to perform the acts described in such section by ringing the doorbell or mocking at the door or otherwise calling attention to his presence of or at any residence whereon a sign bearing the words "No Peddlers", "No Solicitors" or words of similar import is painted or affixed so as to be exposed to public view, and no such person, described in Section 5.08.800 shall perform or attempt to perform any of the acts described in such section in any building, structure or place of business whereon or wherein a sign bearing the words "No Peddlers", "No Solicitors" or words of similar import, is painted or affixed so as to be exposed to public view.

5.01.050 DISTRIBUTION OF HANDBILLS—EXCLUDED

Nothing in this chapter shall prohibit persons from distributing handbills door-to-door within the city without a permit.

AGGRESSIVE SOLICITATION

As described in detail above, the author concludes one of the few ways to restrict solicitation in public places is to adopt an ordinance that focuses on conduct rather than speech. One way to accomplish this is to adopt an ordinance that restricts aggressive solicitation in public places, including government property and specified private property.

Cities adopting aggressive solicitation ordinances typically include the ordinance in the Public Peace, Morals & Safety chapter; Streets & Sidewalks. Below is a simple ordinance.

Title 9 Public Peace, Morals & Welfare

Chapter 28 Aggressive Solicitation

9.28.10. Legislative findings.
9.28.20. Definitions.
9.28.30. Prohibited acts.
9.28.40. Penalties
9.28.50. Construction and severability.

9.28.010 – LEGISLATIVE FINDINGS.

A. The city council finds that the increase in aggressive solicitation throughout the city has become extremely disturbing and disruptive to residents and businesses, and has contributed not only to the loss of access to and enjoyment of public places, but also to an enhanced sense of fear, intimidation and disorder.

B. The city council also finds that solicitation at major intersections in the city and near freeway on and off-ramps poses a dangerous condition for the solicitor and motorists in the area.

C. Aggressive solicitation usually includes approaching or following pedestrians, repetitive soliciting despite refusals, the use of abusive or profane language to cause fear and intimidation, unwanted physical contact, or the intentional blocking of pedestrian and vehicular traffic. The city council further finds that the presence of individuals who solicit money from persons at or near banks, automated teller machines, or in public transportation vehicles is especially troublesome because of the enhanced fear of crime in those confined environments. Motorists also find themselves confronted by persons seeking money who, without permission, wash their automobile windows at traffic intersections, despite explicit instructions by drivers not to do so. People driving or parking on city streets frequently find themselves faced with persons seeking money by offering to open car doors or locate parking spaces. Such activities carry with them an implicit threat to both persons and property.

D. The city council is enacting this chapter pursuant to its police power, as stated in Article XI, Section 7 of the California Constitution, in addition to the power set forth in Section 647(c) of the state of California Penal Code. This law is timely and appropriate because current laws and city regulations are insufficient to address the aforementioned problems.

E. The law is not intended to limit any persons from exercising their constitutional right to solicit funds, picket, protest or engage in other constitutionally protected activity. Rather, its goal is to protect citizens from the fear and intimidation accompanying certain kinds of solicitation that have become an unwelcome and overwhelming presence in the city.

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9.28.020 – DEFINITIONS.

As used in this chapter:

A. "Solicit" means to request an immediate donation of money or other thing of value from another person, regardless of the solicitor's purpose or intended use of the money or other thing of value. The solicitation may be, without limitation, by the spoken, written, or printed word, or by other means of communication.

B. "Aggressive manner" means and includes:

1. Intentionally or recklessly making any physical contact with or touching another person in the course of the solicitation without the person's consent;
2. Following the person being solicited, if that conduct is: (i) intended to or is likely to cause a reasonable person to fear imminent bodily harm or the commission of a criminal act upon property in the person's possession; or (ii) is intended to or is reasonably likely to intimidate the person being solicited into responding affirmatively to the solicitation;
3. Continuing to solicit within the immediate area of the person being solicited after the person has made a negative response, if continuing the solicitation is: (i) intended to or is likely to cause a reasonable person to fear imminent bodily harm or the commission of a criminal act upon property in the person's possession; or (ii) is intended to or is reasonably likely to intimidate the person being solicited into responding affirmatively to the solicitation;
4. Intentionally or recklessly blocking the safe or free passage of the person being solicited or requiring the person, or the driver of a vehicle, to take evasive action to avoid physical contact with the person making the solicitation. Acts authorized as an exercise of one's constitutional right to picket or legally protest, and acts authorized by a permit issued pursuant to Section ______________ of the __________________ Municipal Code, shall not constitute obstruction of pedestrian or vehicular traffic;
5. Intentionally or recklessly using obscene or abusive language or gestures: (i) intended to or likely to cause a reasonable person to fear imminent bodily harm or the commission of a criminal act upon property in the person's possession; or (ii) words intended to or reasonably likely to intimidate the person into responding affirmatively to the solicitation; or
6. Approaching the person being solicited in a manner that: (i) is intended to or is likely to cause a reasonable person to fear imminent bodily harm or the commission of a criminal act upon property in the person's possession; or (ii) is intended to or is reasonably likely to intimidate the person being solicited into responding affirmatively to the solicitation.

C. "Automated teller machine" means a device, linked to a financial institution's account records, which is able to carry out transactions, including, but not limited to: account transfers, deposits, cash withdrawals, balance inquiries, and mortgage and loan payments.

D. "Automated teller machine facility" means the area comprised of one or more automatic teller machines, and any adjacent space which is made available to banking customers after regular banking hours.

E. "Bank" means any banking corporation, savings and loan association, or credit union chartered under the laws of this state or the United States.

F. "Check cashing business" means any person duly licensed by the superintendent of banks to engage in the business of cashing checks, drafts or money orders for consideration pursuant to the provisions of the banking laws.

G "Public area" means an area to which the public or a substantial group of persons has access, and includes, but is not limited to, alleys, bridges, buildings, driveways, parking lots, parks, playgrounds, plazas, sidewalks, and streets open to the general public, and the doorways and entrances to buildings and dwellings, and the grounds enclosing them.

9.28.030 - Prohibited Acts.

It is unlawful for any person to solicit money or other things of value, or to solicit the sale of goods or services:

A. In an aggressive manner in a public area;

B. In any public transportation vehicle, or bus station or stop;

C. Within fifteen feet of any entrance or exit of any bank or check cashing businesses or within fifteen feet of any automated teller machine during the hours of operation of such bank, automated teller machine or check cashing business without the consent of the owner or other person legally in possession of such facilities. When an automated teller machine is located within an automated teller machine facility, such distance shall be measured from the entrance or exit of the automated teller machine facility;

D. On private property if the owner, tenant, or lawful occupant has asked the person not to solicit on the property, or has posted a sign clearly indicating that solicitations are not welcome on the property; or

E. From any operator of a motor vehicle that is in traffic on a public street, including, but not limited to major intersections in the city and near freeway on and off-ramps, whether in exchange for cleaning the vehicle's windows, or for blocking, occupying, or reserving a public parking space, or directing the occupant to a public parking space; this paragraph shall not apply to services rendered in connection with emergency repairs requested by the operator or passengers of such vehicle.

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