

DATE: July 18, 1989

TO: Councilmember Ron Roberts

FROM: City Attorney

SUBJECT: Door-to-Door Soliciting

Your memorandum dated June 30, 1989, requested clarification of the application of certain restrictions in the proposed ordinance amending San Diego Municipal Code section 33.1406.1 restricting the hours for door-to-door solicitation from sunset to 8:00 a.m. You asked specifically whether such restrictions would apply to nonprofit, political, or religious organizations engaged in distributing information, requesting donations, collecting information or polling individuals in a household. You stated your belief that the City Council intends to apply time restrictions to organizations engaged in the above activities. You further requested appropriate language for the ordinance to carry out the City Council's intention.

You also asked whether the terms "nonprofit" and "charitable" are synonymous. Finally, you requested clarification of the presented issues prior to the next meeting of the City Council. The solicitation ordinance agenda item has been continued until July 24, 1989.

Introduction

As requested by your memorandum, changes have been prepared to prohibit expressly door-to-door solicitation between sunset and 8:00 a.m. by persons distributing information only, requesting donations, collecting information or polling persons in a household (Attachment One). Also attached is a copy of the current solicitation ordinance. (Attachment Two).

Changes have been made to the definition of "solicitor" (San Diego Municipal Code section 33.1401(a), "interviewer" (SDMC section 33.1401(b)), the section on regulation and identification requirements (SDMC section 33.1402) and the section on hours of solicitation by changing "9:00 p.m." to "sunset" (SDMC section

33.1406). Both "nonprofit" and "charitable" organizations are separately listed and regulated by the changes.

This memorandum also discusses constitutional considerations not completed during the initial phase of our research into the proposed amendments. In particular, research has focused on constitutional pitfalls of ordinances, with time-of-day restrictions on door-to-door solicitations. Courts have analyzed such ordinances to determine whether they meet the constitutional standards. To sustain a time, place, and manner restriction on First Amendment activities, the city must show that the

restriction (1) is content neutral; (2) serves a legitimate governmental objective; (3) leaves open alternative channels of communication; and (4) is the least restrictive and narrowly tailored means of serving the governmental objective.

An analysis of court decisions focusing on the constitutional pitfalls of "sunset" and other time-of-day restrictions on solicitation ordinances has been prepared and follows. Finally, it is concluded that the existing San Diego solicitation ordinance, as amended by a "sunset" restriction, would not meet federal constitutional standards. While a "sunset" restriction renders the ordinance vulnerable to several constitutional challenges, changes that expand its coverage tend to strengthen it against a content neutral standard challenge only. The ordinance would still fail to meet other constitutional standards.

Constitutional Standard for Solicitation Ordinance

State and federal courts confronted with regulations prohibiting door-to-door canvassing have applied a time, place, and manner analysis to the regulations. Some courts including the California First District Court of Appeals, have applied a four-part analysis that requires the municipality to show that the restriction (1) is content neutral, (2) serves a legitimate governmental interest, (3) leaves open alternative channels of communication, and (4) is the least restrictive and narrowly tailored means of serving a governmental objective. Alternatives for California Women, Inc. v. County of Contra Costa, 145 Cal. App. 3d 436, 450 (1983); City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir. 1986), *aff'd* 479 U.S. 1048 (1987). Other courts have adopted a less rigorous analysis by not requiring the regulation to be the least restrictive means to serve the government's legitimate interests. Pennsylvania Alliance for Jobs and Energy v. Council of Munhall, 743 F.2d 182, 185 (3rd Cir. 1984).

The United States Supreme Court has recognized substantial First Amendment protections for door-to-door solicitors. See Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248, 1251 (7th Cir. 1985) cataloging Supreme Court cases. Simultaneously, the Court has recognized the right and power of a municipality to regulate solicitation, so long as the regulation is in furtherance of a legitimate governmental objective. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981).

The San Diego solicitation ordinance presents issues raised in prior state and federal decisions. Similar issues were raised in Alternatives for California Women, Inc., and Illinois Public

Action Council.

In *Alternatives for California Women, Inc.*, an organization concerned with aiding battered women and their children, and which engaged in door-to-door canvassing in order to disseminate information and solicit donations, brought suit against a county following enactment of an ordinance which prohibited door-to-door peddling and soliciting between sunset and 8:00 a.m. The California First District Court of Appeals granted injunctive relief and declared that the ordinance was unconstitutional. The Court of Appeals in deciding the ordinance discriminated on the basis of content and was insufficiently related to the deterrence of crime to justify its effect on First Amendment rights stated as follows:

The effect of the ordinance as a prohibition against soliciting after sunset abridges ACW's First Amendment rights without protecting the residents' privacy from intrusion by persons who are not "peddlers" or "solicitors" as defined in chapter 56.4. Moreover, the limitation of the ordinance to "peddlers" and "solicitors" as thus defined, is insufficiently related to the deterrence of crime to justify its effect on First Amendment rights. As ACW points out, "it is simply inconceivable that one approaching a house with a criminal purpose would be given pause by an Ordinance which would allow him to canvass door-to-door so long as he did not append an appeal for funds to his purported message. Nor will common experience support the dubious claim that posing as a solicitor of funds affords one a greater opportunity to commit a crime than would, say, posing as a

pollster seeking to administer a lengthy questionnaire.

Id. at 449.

The Court of Appeals further held that the ordinance was unconstitutional because of the availability of less restrictive means which did not entail diminution of First Amendment rights by stating as follows:

The County's interests can be advanced by less restrictive means which do not entail diminution of First Amendment rights. These include enforcement of existing laws against fraud (see Pen. Code, section 484), trespass

(Pen. Code, section 602), breach of the peace, and any other substantive offenses which might be committed. (Citations omitted.) The County may adopt appropriate registration and identification procedures to protect its residents against wrongdoing by spurious solicitors (citations omitted) and it has enacted a comprehensive regulatory scheme which serves that purpose The County may also "punish those who call at a home in defiance of the previously expressed will of the occupant." (Citations omitted.)

In light of the less restrictive alternative available to the County for the furtherance of its legitimate governmental interest, the challenged ordinance is unconstitutional because it is not drawn as narrowly as possible to avoid infringing First Amendment rights. (Citations omitted.)

Id. at 449-450.

In *Illinois Public Action Council*, the Seventh Circuit Court of Appeals held that a city ordinance which limited door-to-door soliciting to hours between 9:00 a.m. and 5:00 p.m., Monday through Saturday, was not narrowly tailored to achieve the city's legitimate interest in preventing fraudulent sales activity and in protecting privacy of its citizens. The content-neutral issue was not claimed or raised in this case. The Court of Appeals noted that the Supreme Court of the United States had not clearly articulated the proper legal standard of reviewing an ordinance with time restrictions on solicitation (id. at 1551) and that a

four-part test was developing on time, place, and manner restrictions on First Amendment activities (id. at 1552). The Court of Appeals adopted the less-restrictive-means standard used by the Eighth Circuit Court of Appeals (id. at 1553) in *ACORN v. City of Frontenac*, 714 F.2d 813, 817 (8th Cir. 1983).

The Eighth Circuit Court of Appeals decision in *ACORN*, followed in *Alternatives for California Women, Inc.*, held that where regulations infringe on First Amendment freedoms, the government has the burden of proving that its objectives could not be achieved by less restrictive means. Applying this standard to time-of-day solicitation restrictions, the court stated that:

Frontenac has a legitimate interest in protecting its residents from crime. This objective can be served satisfactorily by

enforcement of the city's application and identification requirements for all canvassers, peddlers, and solicitors. In addition, trespassing, fraud, and burglary or any other offense against a resident may be prohibited and the violator punished under existing penal laws The City's trespassing laws may be enforced against those who enter or remain on private property after its owner has indicated that the intruder is unwelcome.

ACORN v. City of Frontenac, 714 F.2d at 818-819.

Legitimate Governmental Interest

Residential privacy and the prevention of crime are proper governmental interests. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 619 (1976).

While residential privacy and the prevention of crime are proper governmental interests, a correlation or nexus must exist between the governmental interests and the ordinance. There must be a factual basis to support the city's claim that the ordinance is justified to protect those governmental interests.

In *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250 (1986), the court struck down ordinances of ten New Jersey cities proscribing commercial and noncommercial door-to-door canvassing and solicitation during evening hours, generally after 5:00 p.m., 6:00 p.m. or sunset. There was no challenge to the

municipalities' right to bar canvassing after 9:00 p.m. *Id.* at 1253. The court found that the evidence presented failed to show a correlation between canvassing and crime. It also held that the record was inconclusive as to the uniformity of the public desire not to be bothered by solicitors in the evening. Canvassers for citizens groups were able to show "they were warmly received by the majority of the people they talked to 'while canvassing.'" *Id.* at 1258.

The city has the heavy burden of showing a factual basis for the interests of crime prevention and residential privacy. It has to prove that crimes associated with door-to-door solicitation, e.g., consumer fraud, are most commonly committed after sunset. The city would also have to show a public annoyance justification for the restrictions. Since First Amendment rights are involved, the city would have to show that a compelling governmental interest would be furthered toward crime prevention and protection of privacy interests and there are no less restrictive means by which that interest can be advanced. *Carey v. Brown*, 447 U.S. 455, 461-462 (1980).

Content Neutral Standard

Time, manner, and place regulations must be applicable to all speech without regard to content. *Consolidated Edison Co v. Public Service Comm'n*, 447 U.S. 530, 536 (1980).

In *Alternatives for California Women, Inc.*, the California Court of Appeals found that an ordinance prohibiting "soliciting" between sunset and sunrise by persons in the business of peddler or solicitor failed to meet the content neutral test for constitutionality. The court stated as follows:

The challenged ordinance permits unlimited access by persons who wish to approach residents about random subjects, but it does not do this for persons or organizations soliciting funds (such as ACW). The ordinance discriminates on the basis of the content of a speaker's message to the extent that a person who literally solicits from residents is regulated but one who seeks only a receptive listener is not. This disparity has the effect of making the ordinance constitutionally deficient. (Citations omitted.)

Id. at 450.

Conclusion

The city must show both a significant relationship between the San Diego solicitation ordinance restrictions and a legitimate governmental interest and that less restrictive alternatives are inadequate to protect that interest to sustain time, place, and manner restriction on First Amendment activities. *Illinois Public Action Council*, 796 F.2d at 1552; *Alternatives for California Women, Inc.*, 145 Cal. App. 3d at 449-450.

The California Court of Appeals in *Alternatives for California Women, Inc.*, 145 Cal. App. 3d at 449 recognized that residential privacy and the prevention of crime are proper governmental interests but found the sunset restriction unconstitutional in holding that those interests can be advanced by less restrictive means which do not entail diminution of First Amendment rights. Such means include existing laws against fraud, trespass, breach of the peace and other substantive offenses which might be committed. Also included are comprehensive registration and identification procedures to protect its residents against wrongdoing by spurious solicitors such as those found in San Diego Municipal Code sections 33.1402, 33.1403 and 33.1405.

The Court of Appeals also considered the residential privacy interest and stated as follows:

ACW finally contends that the ordinance unconstitutionally infringes on the First Amendment rights of residents of the County to receive communications from ACW. This argument is also correct.

(8) The First Amendment requires that the decisions as to what communication a resident will receive must be made in the first instance by the resident himself, and that this decision cannot be usurped by government. (Citation omitted.) The ordinance is unconstitutional because it has the proscribed effect.

Id. at 449.

In summary, we conclude that the current San Diego solicitation ordinance, as amended by a "sunset" restriction,

would not meet the constitutional standards expressed by the California First District Court of Appeals in *Alternatives for California Women, Inc.*, and the Seventh Circuit Court of Appeals, in *Illinois Public Action Council*.

While the "sunset" restrictions would make the ordinance highly vulnerable to a successful constitutional challenge, the other changes broadening the scope of persons and activities regulated could strengthen it. The ordinance would be less vulnerable to challenge on content neutral grounds if it included within its regulatory scheme nonprofit, charitable, political or religious organizations engaged in distributing information, requesting donations, collecting information or polling individuals in a household. Such changes would not be sufficient to support a "sunset" or "darkness" restriction on solicitation because less restrictive means are available which do not entail diminution of First Amendment rights and the First Amendment rights of residents to receive communications would be unconstitutionally infringed upon by such limitations. *Alternatives for California Women, Inc.*, 145 Cal. App. 3d.

The current time limitation of 9:00 p.m. has not been challenged probably due to a lack of incentive for canvassing beyond that hour. An earlier time limitation of "sunset" or "darkness" would more likely produce a challenge to the time restriction from a variety of interests.

The legal position of an ordinance restricting solicitation after 9:00 p.m. received some support in *Citizens for a Better Environment v. Village of Olympia*, 511 F. Supp. 104 (N.D. Ill.

1980) when the court stated:

The Court is mindful that its analysis on this question, taken alone, could be directed with equal force toward an attack upon an ordinance restricting solicitation to, for example, sometime after 9:00 p.m. That question is not now before the Court. However, the Court pauses to note that the public annoyance argument might well assume a quite different cast in the context of a case attacking an ordinance that forbade soliciting after some late evening hour in view of the supportable fact that the overwhelming majority of residents in communities such as defendants' are either asleep or preparing for sleep by those hours.

Id. at 107 n. 5 (cited as authority in *Alternatives for California Women, Inc.*, 145 Cal. App. 3d at 450).

In *New Jersey Citizen Action*, 797 F.2d at 1253, where ten ordinances were contested in a single action there was no challenge to the municipalities' right to bar canvassing after 9:00 p.m.

While the present 9:00 p.m. restriction on door-to-door solicitation may be defensible under the quoted rationale in *Citizens for a Better Environment*, 511 F. Supp. at 107 n. 5, which held a sunset restriction on soliciting unconstitutional, the city would be highly vulnerable to a constitutional challenge of a "sunset" or "darkness" limitation.

In conclusion, the city council is urged to consider retention of the present 9:00 p.m. time limitation for door-to-door solicitation and adoption of the changes that broaden the scope of persons and activities regulated by the current solicitation ordinance.

Please contact me if I can be of further assistance to you.

JOHN W. WITT, City Attorney

By

Joseph M. Battaglino

Deputy City Attorney

JMB:mk:520.1(x043.2)

Attachments

ML-89-70