

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

(619) 236-6220

**DATE:** September 25, 2014

**TO:** Marti Emerald, Chair, Public Safety and Livable Neighborhoods Committee

**FROM:** City Attorney

**SUBJECT:** Median Safety Ordinance

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**INTRODUCTION**

This memorandum is in response to an inquiry from your office regarding the legality of enacting an ordinance prohibiting pedestrians from standing on street medians. This memo will briefly highlight potential legal issues and identify additional facts that would need to be gathered and analyzed prior to the adoption of such an ordinance. It should not be relied upon as a legal opinion or advice from this Office, but is provided as *preliminary legal guidance only*. Upon further refinement or direction from the City Council or a Council Committee, this Office will provide the necessary in-depth legal review and analysis.<sup>1</sup>

**POTENTIAL LEGAL ISSUES**

**I. REGULATING PEDESTRIAN CONDUCT ON MEDIANS MUST BE WITHIN THE AUTHORITY OF THE CITY**

The City has the authority to “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” Cal. Const. art. XI, § 7. The law generally recognizes that a city “has broad discretion in determining what is reasonable in endeavoring to protect the public health, safety, morals, and general welfare.” *Carlin v. City of Palm Springs*, 14 Cal. App. 3d 706, 711 (1971) (citing *McKay Jewelers, Inc. v. Bowron*, 19 Cal. 2d 595, 600 (1942)). An ordinance prohibiting pedestrians from standing on medians, enacted pursuant to a city’s police powers, must be “reasonably related” to public safety.

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<sup>1</sup> It is our understanding that this topic will be docketed for general discussion at a future Public Safety and Livable Neighborhoods Committee meeting.

*McKay Jewelers*, 19 Cal. 2d at 600. Based on these principles, the City is likely empowered to enact such an ordinance, provided that a reasonable relation to identifiable public safety goals can be established.

## II. PREEMPTION BY THE CALIFORNIA VEHICLE CODE

A local ordinance may not conflict with a state law.<sup>2</sup> A conflict may exist if the local ordinance is duplicative of a state law, contradicts a state law, or regulates a subject matter fully occupied by state law. *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139, 1150 (2006) (citations omitted). However, “[l]ocal ordinances within the scope of a city’s traditional police powers are presumed valid” and a person claiming preemption carries the burden of showing preemption. *California Veterinary Medical Association v. City of West Hollywood*, 152 Cal. App. 4th 536, 548-49 (2007) (citing *Big Creek Lumber Co.*, 38 Cal. 4th at 1149).

Regulation of medians is closely related to traffic safety and pedestrian or vehicular traffic. Therefore, the issue of preemption by the California Vehicle Code (Vehicle Code) may be raised. The Vehicle Code has an express preemption provision. Vehicle Code section 21(a) provides that “a local authority shall not enact or enforce any ordinance or resolution on the matters covered by this code . . . unless expressly authorized by this code.” However, there is no provision in the Vehicle Code regulating either the general use of medians or pedestrian conduct on medians. Therefore, there is no duplication of or direct conflict with state law in an ordinance prohibiting pedestrians from standing on medians.

The Vehicle Code does regulate some pedestrian activity on roadways, such as entering the path of a vehicle (section 21950(b)); unnecessarily delaying traffic while in a crosswalk (section 21950(b)); yielding to traffic while outside of a crosswalk (section 21954(a)); crossing outside of a crosswalk (section 21955); walking in the middle of a roadway (section 21956(a)); and soliciting a ride while standing in a roadway (section 21957). The question is whether the pedestrian regulations in the Vehicle Code occupy the entire field of pedestrian conduct. The case law indicates that they do not. *See Juan Xiloj-Itzep et al. v. City of Agoura Hills*, 24 Cal. App. 4th 620, 642-43 (1994) (a Vehicle Code section related to pedestrian solicitation near freeways did not preempt the entire field of pedestrian solicitation). The Vehicle Code’s silence on medians and pedestrian conduct on medians indicates that the subject matter has not been expressly or impliedly fully occupied by state law. Therefore, a local ordinance preventing pedestrians from standing on medians would likely not be preempted by the Vehicle Code.

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<sup>2</sup> Although a charter city may exercise full control over municipal affairs, it may not conflict with state law when regulating a matter of statewide concern. If a court determined that regulation of pedestrian conduct on street medians was a matter of statewide concern, a local ordinance preventing pedestrians from standing on medians would likely not be preempted by state law for the reasons discussed in this memo.

### III. SOLICITATION AND SPEECH

#### A. Indirect Regulation of Protected Speech

Prohibiting pedestrians from standing on medians will indirectly regulate speech and expressive activity such as panhandling and solicitation by preventing these activities from occurring on medians. In addition to the well established speech protections in public places, Courts have also found that solicitation is protected by both the California and United States Constitutions. *Los Angeles Alliance for Survival (Alliance) v. City of Los Angeles*, 22 Cal. 4th 352, 364-65 (2000). See also *International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles*, -- F.3d -- (9th Cir. 2014), 2014 WL 4086794, at \*5. An ordinance that regulates protected speech is likely to be upheld as a reasonable time, place, and manner regulation if it is content-neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative avenues of communication. *Alliance*, 22 Cal. 4th at 364.

Two Worcester, Massachusetts ordinances that prohibited aggressive panhandling and pedestrians walking or standing on any traffic island were recently upheld by a Federal Appeals Court after a facial challenge. *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014). When evaluating the government interest, the Court noted that the ordinances were supported by evidence of 181 incidents of aggressive panhandling and significant concerns regarding the safety of drivers and pedestrians during specific distracting median activities. *Id.* at 64-65. Based on these factors, the Court reasoned that

[I]t would be hard to gainsay the City Manager's conclusion that the previously unrestricted practice [of free access to traffic islands] was 'an accident waiting to happen' even though it has not happened yet. The whole point of soliciting or demonstrating at such places, after all, is to distract the attention of drivers to some degree.

*Id.* at 68-69.

Based on these principles, any median ordinance must be content-neutral, meaning that it applies equally to all pedestrians regardless of the message of their speech or expressive activity. After the government interest is identified, the ordinance should be narrowly tailored to address the specific problem demonstrated by the evidence. The ordinance should not limit any more speech or expressive activity than necessary, and should leave open other locations where a pedestrian may solicit or communicate his or her message.

#### B. Direct Regulation of Soliciting on Street Medians

Many cities throughout the nation have attempted to directly regulate solicitation from streets and street medians. Many of these ordinances have been challenged, yielding mixed results from the courts.

In 1987, the City of Redondo Beach attempted to prohibit solicitation from streets and highways. Streets and highways were defined specifically to include medians and sidewalks.

*Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F. 3d 936, 941 (9th Cir. 2011). An enforcement effort in 2004, aimed at curbing day-laborer solicitation, prompted a challenge to the ordinance. The Ninth Circuit recognized Redondo Beach's government interest in improving traffic flow and traffic safety, but held that the ordinance was not narrowly tailored to furthering these interests. *Id.* at 948. The Court reasoned that the ordinance restricted far more speech than necessary, including speech that posed no traffic flow or traffic safety risk, such as selling Girl Scout cookies on the sidewalk. *Id.* at 948-49. Notably, the Court also found the ordinance to be "geographically overinclusive" because it applied to all streets in the city, despite evidence that the problem was limited to "a small number of major streets and medians." *Id.* at 949.

A similar ordinance in Desloge, Missouri was struck down in 2013. Desloge enacted an ordinance prohibiting people from standing in or entering the roadway to solicit from occupants of vehicles or to distribute anything to occupants of vehicles. *Traditionalist American Knights of the Ku Klux Klan v. City of Desloge, Missouri*, 983 F. Supp. 2d 1137, 1142 (E.D. Mo. 2013). The term "roadway" was specifically defined to include center medians. *Id.* During the injunction hearing a city traffic engineer testified to the public safety threat posed by roadway solicitation. He focused on the risks to drivers and pedestrians posed by distracted drivers, leading the Court to recognize the significant government interest in public safety. *Id.* at 1146-47. However, the Court then ruled that the ordinance was not narrowly tailored to this interest because there was no evidence that solicitation actually caused accidents. The Court also commented on the scope of the ordinance, noting that it was "not limited to problematic intersections or times of day, which could be easily discerned from accident reports." *Id.* at 1149-50.

Other solicitation ordinances have been upheld. For example, in 1983, Baton Rouge, Louisiana prohibited people from entering a street, including the shoulder or neutral ground of the street, in order to solicit from the occupant of a vehicle. *The International Society for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge*, 876 F.2d 494, 495-96 (5th Cir. 1989). The ordinance preamble cited traffic safety concerns and the death of a news vendor while soliciting in the street as the bases of the restriction. *Id.* The Court found that the ordinance was sufficiently narrowly tailored to addressing these interests and restricted no more speech than necessary. *Id.* at 499. Although this ordinance applied citywide, the Court noted that other solicitation locations and methods were still available. *Id.* at 498-99. Individuals remained free to solicit from pedestrians or engage in other forms of speech. *Id.*

Any median ordinance enacted in San Diego should be limited to those areas posing a demonstrable public safety risk, should limit no more speech than necessary, and should leave open other areas for solicitation.

#### **IV. ADDITIONAL INFORMATION THAT MUST BE GATHERED**

As illustrated above, in order for an ordinance prohibiting pedestrians from standing on medians to be legally sound and enforceable, it must be based on evidence of a specific problem to be addressed. A thorough legislative record must be developed in order to establish the nature of the problem and demonstrate that the prohibition is a narrowly tailored solution. Evidence gathering will also ensure internal consistency within the City on its approach to medians.

Additional information would need to be gathered from the appropriate City departments as to the number and nature of the medians in the City, current pedestrian activity occurring upon the medians, and evidence demonstrating that the activity poses a public safety risk. For example, the record should reflect the various widths of the medians, whether any medians are designed for pedestrian use, and whether the problem is limited to a particular area or extends to all medians within the City. Evidence of traffic accidents or criminal activity associated with pedestrian conduct on medians would also be helpful if it exists. Information regarding maintenance of the medians and any permissible activity, such as landscaping, irrigation, and repairs, should also be included.<sup>3</sup>

Although the City need not wait until a serious accident occurs in order to address a public safety concern, any public safety regulation must be supported with specific evidence of the problem. A perceived or merely anecdotal problem would likely not suffice. As one appellate court recently noted, “[a] hypothetical traffic-safety concern resting on aberrant behavior, which has never happened – nor has there been any record of it being threatened – in sixty years does not qualify as a significant government interest.” *Satawa v. Macomb County Road Commission*, 689 F.3d 506, 526 (6th Cir. 2012).

### CONCLUSION

In order to be legally enforceable, an ordinance preventing pedestrians from standing on medians must meet all Constitutional requirements and be supported by evidence of a public safety concern. Once the nature and scope of the problem are fully identified, the ordinance must be narrowly tailored to resolving the problem. Additional information discovered during the fact-gathering process may raise additional legal issues. Upon further refinement of the issue or further direction from the City Council or a Council Committee, the City Attorney’s Office will provide any additional legal review and analysis and assist with drafting the desired ordinance.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Michelle A. Garland  
Michelle A. Garland, Deputy City Attorney

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Doc. No.: 859503\_6  
cc: Public Safety and Livable Neighborhood Committee Members  
Hon. Mayor Kevin Faulconer  
Andrea Tevlin, Independent Budget Analyst

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<sup>3</sup> For example, a community garden is currently proposed for the wide median separating traffic on Pacific Beach Drive between Kendall Street and Jewell Street. The proposal appears to have generated some support from within the City. See Dave Schwab, *Seeds Being Planted For Community Garden Spots Across PB*, SDNews.com, August 6, 2014, [http://sdnews.com/view/full\\_story/25566355/article-Seeds-being-planted-for-community-garden-spots-across-PB](http://sdnews.com/view/full_story/25566355/article-Seeds-being-planted-for-community-garden-spots-across-PB).