2017
Municipal Attorneys
Winter Conference

Municipal Attorneys Winter Conference

March 23 – 24, 2017
School of Government, Chapel Hill, NC

Thursday, March 23

12:30 pm Registration

1:00 pm Lessons from Hurricane Matthew
Norma Houston, *School of Government*

2:00 pm Federal Public Corruption Enforcement: What Municipal Attorneys Need to Know
Mike Savage, *Assistant United States Attorney*
Mac McCarley, *Parker Poe Law Firm*
Robert Hagemann, *City Attorney, Charlotte*
Eric Davis, *FBI Supervisory Special Agent, Charlotte Office*

3:00 pm Break

3:30 pm Panhandling Regulation After *Reed*
Professor Judith Wegner, *UNC School of Law*

4:30 pm Cocktail Reception

Continues on next page

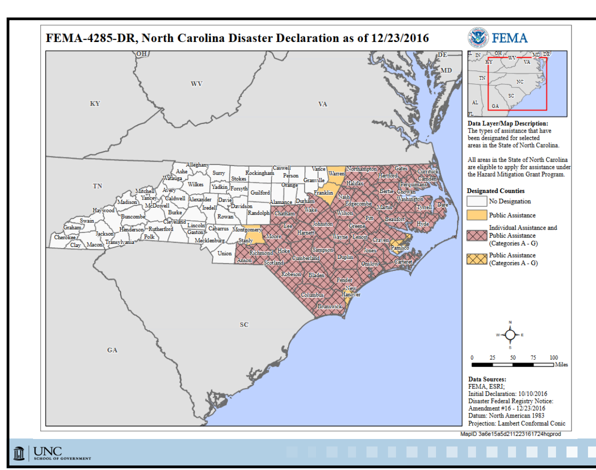
Friday, March 24

8:00 am	Breakfast in Dining Hall
9:00 am	Ethics: Board Conflicts and Civility, and the Role of the Attorney Chris McLaughlin, *School of Government* Peg Carlson, *School of Government*
10:00 am	Break
10:15 am	Small-Cell Wireless and Road Rights of Way Lisa Glover, *Town of Cary*
11:15 am	Legislative Update Rose Williams, *NC League of Municipalities* Erin Wynia, Legislative Counsel, *NC League of Municipalities* Sarah Collins, Legislative & Regulatory Counsel, *NC League of Municipalities*
12:15 pm	Business Meeting

Lessons from Hurricane Matthew

Disaster Recovery Legal Issues:
Fall 2016 Aftermath
Norma Housto
Municipal Attorneys Winter Conferenc
March 23, 201
UNC
SCHOOL OF GOVERNMENT

Fall 2016 Disasters
TROPICAL STORM
HERMINE
HURRICANE
MATTHEW
September
October
November
TROPICAL STORM
JULIA
WESTERN N.C. WILDFIRES
UNC


FEMA-4285-DR, North Carolina Disaster Declaration as of 12/23/2016
FEMA
Designated Counties
No Designation
Public Assistance
Individual Assistance and Public Assistance (Categories A - G)
Public Assistance (Categories A - G)
UNC

Major Recovery Challenges
Housing
Infrastructure
Business
CONDEMNED
ROAD CLOSED
DUE TO FLOODING
Local Government
Unmet Needs
Hazard Mitigation
$
Risk
UNC

STOP
DISASTER AFTERMATH LEGAL ISSUES
UNC

Emergency Shelters
Sex Offenders
Disruptive/Under the Influence
SEX
OFFENDER
REGISTRY
UNC

City/County Authority

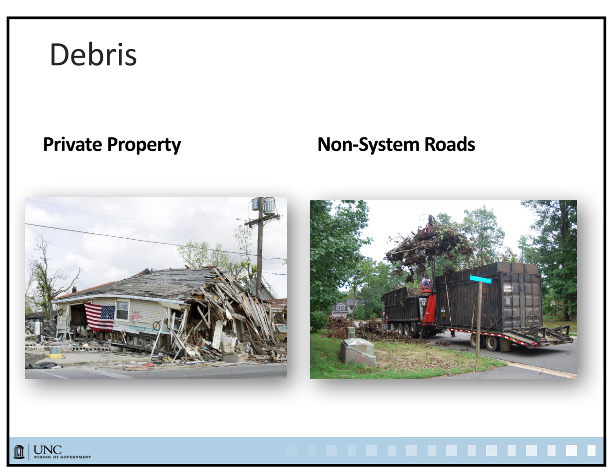
Closing Other Gov't Buildings

Denying Access to EM Workers

Debris

Private Property

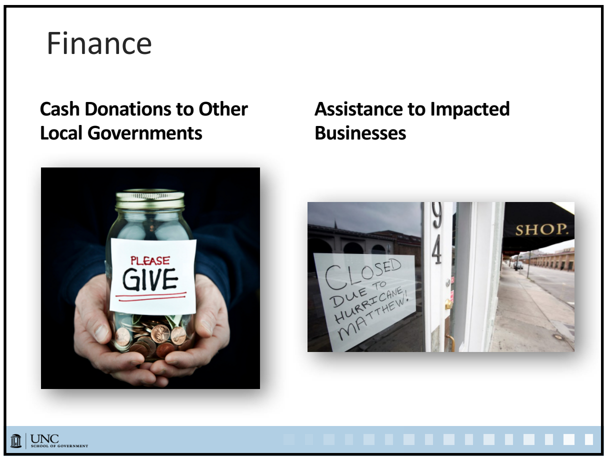
Non-System Roads



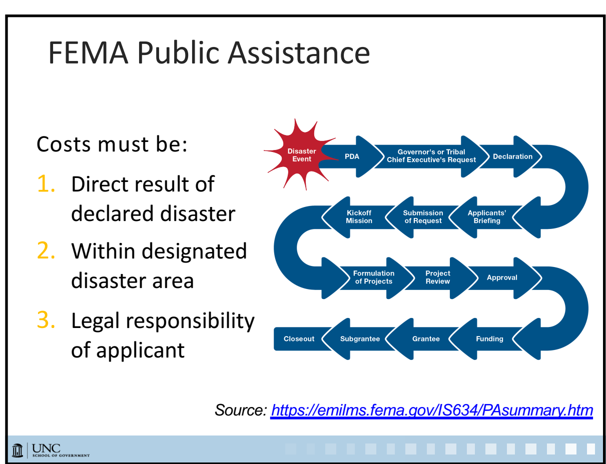
Finance

Cash Donations to Other Local Governments

Assistance to Impacted Businesses



What Are Your Issues?



Categories of Reimbursable Costs

Emergency Work

- **Debris Removal** (Category A)
- **Emergency Protective Measures** (Category B):
  - EOC operations
  - Search & Rescue / Security in disaster area
  - Provisions for population (food, water, etc.)
  - Temporary medical facilities / medical evacuation
  - Shelters / Mass care
  - Generators
  - Emergency repairs / reestablishing access

Permanent Work

- **Roads & Bridges** (Category C)
- **Water Control Systems** (Category D)
- **Public Buildings** (Category E)
- **Pubic Utilities** (Category F)
- **Other public facilities** (Category G)

Common Federal Reimbursement Problems (44 CFR Parts 13, 206)

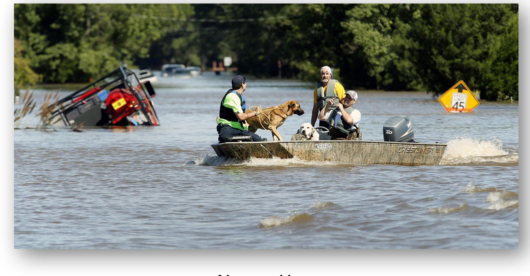
- Contracting – competitive bidding requirements
- Debris removal ("non-system roads")
- Private property exclusion
- "Lack of legal responsibility" exclusion
- Personnel – overtime compensation
- Inadequate/no documentation
- No local state of emergency declaration

PRACTICAL TIPS

EM Legal Preplanning Checklist

- ☑ Become NIMS compliant
- ☑ Preposition contracts (such as debris removal)
- ☑ Execute mutual aid & interlocal agreements
- ☑ Compile & back-up relevant documents
- ☑ Develop templates for declarations, contracts, etc.
- ☑ Check local ordinances for needed updates
- ☑ Be familiar with local, state, and federal laws
- ☑ Involve local attorney
- ☑ Review local plan / conduct exercises

Stay Safe!



Norma Houston
nhouston@sog.unc.edu

Federal Public Corruption Enforcement: What Municipal Attorneys Need to Know

FILED
CHARLOTTE, NC
MAY 12 2014
US District Court
Western District of NC

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA CHARLOTTE DIVISION

UNITED STATES OF AMERICA	)	DOCKET NO. 3:14CR87
	)	
v.	)	**FACTUAL BASIS**
	)	
(1) PATRICK DEANGELO CANNON	)	**UNDER SEAL**
	)	

NOW COMES the United States of America, by and through Anne M. Tompkins, United States Attorney for the Western District of North Carolina, and hereby files this Factual Basis in support of the plea agreement filed simultaneously in this matter.

This Factual Basis does not attempt to set forth all of the facts known to the United States at this time.

By their signatures below, the parties expressly agree that there is a factual basis for the guilty plea that the defendant will tender pursuant to the plea agreement. The parties also agree that this Factual Basis may, but need not, be used by the United States Probation Office and the Court in determining the applicable advisory guideline range under the *United States Sentencing Guidelines* or the appropriate sentence under 18 U.S.C. § 3553(a). The defendant agrees not to object to any fact set forth below being used by the Court or the United States Probation Office to determine the applicable advisory guideline range or the appropriate sentence under 18 U.S.C. § 3553(a) unless the defendant's right to object to such particular fact is explicitly reserved in the plea agreement. The parties' agreement does not preclude either party from hereafter presenting the Court with additional facts which do not contradict facts to which the parties have agreed not to object and which are relevant to the Court's guideline computations, to 18 U.S.C. § 3553 factors, or to the Court's overall sentencing decision.

The defendant agrees that in the event that the defendant fails to enter or attempts to withdraw the defendant's plea of guilty, this Factual Basis may be used for any and all purposes by the United States during trial. The defendant agrees that this Factual Basis is true and accurate, that it is a confession sufficient to prove the defendant's guilt beyond a reasonable doubt, and that it constitutes an admission, as defined by Rule 801(d)(2)(A) of the Federal Rules of Evidence, and will be admissible against him, without objection. In addition, the defendant knowingly and voluntarily waives the right to object to the admission of this Factual Basis on any ground, including Federal Rule of Criminal Procedure 11(f) and Federal Rule of Evidence 410.

INTRODUCTION

1. Beginning on or about December 7, 2009, and continuing through March 26, 2014, PATRICK DEANGELO CANNON ("CANNON")—then an elected member of the City Council, and/or Mayor Pro Tem or Mayor of the City of Charlotte, North Carolina ("Charlotte" or the "City")—devised and intended to devise a scheme and artifice to defraud and deprive the citizens of Charlotte and the government of Charlotte of their right to his honest and faithful services through bribery and the concealment of material information.

2. It was a manner and means of CANNON's scheme and artifice to defraud the citizens of Charlotte that he would secretly use his official elected positions to enrich himself by soliciting and accepting gifts, payments, and other things of a total value of at least $50,000 from persons doing and wanting to do business in Charlotte in exchange for the use of his elected offices and for his official action, including, but not limited to, the use of his official influence to encourage any Council member, City employee, and/or others to act in a manner favorable to those persons who were secretly paying him.

CANNON's Elected Offices

3. CANNON was an at-large member of the Charlotte City Council from December 7, 2009 until December 2, 2013. On June 14, 2010, the City Council selected CANNON to be the Mayor Pro Tem. On November 5, 2013, CANNON was elected to be the Mayor of Charlotte and was sworn in as the 56th Mayor of Charlotte on December 2, 2013. CANNON resigned from the Office of Mayor on March 26, 2014. CANNON agrees that at all times pertinent to the Bill of Information he was an elected official and owed a fiduciary duty to provide his honest services to the public, including the citizens and government of Charlotte.

The City of Charlotte, North Carolina

4. The City of Charlotte is a political subdivision of the State of North Carolina and the largest municipality in Mecklenburg County, North Carolina ("Mecklenburg County"). Charlotte has a council-manager form of government. The Mayor and City Council are elected every two years, with no term limits.

    a. The City Council is comprised of eleven members (seven from districts and four at-large). The City Charter provides the City Council with all legislative powers and the power to employ the City Manager, the City Attorney and the City Clerk. All policy proposals must have the Council's approval before they become law. City Council meetings provide a forum in which policy proposals are deliberated, debated and finally decided. City Council members vote on a wide range of matters involving the City, including, but not limited, to zoning variances, the budget, tax rates, approval of contacts, planning proposals and condemnation by eminent domain. The City Council also makes two-thirds of the citizen appointments to the City's *ad hoc* and permanent boards, committees and commissions and nominates representatives to various County and regional boards, associations and committees. CANNON acknowledges that his authority as a Council Member to vote on zoning, planning, and eminent domain matters and on

appointments to City boards, committees and commissions provided him with influence over zoning issues as well as City boards, committees and commissions.

b. The Mayor is *ex officio* chairman of the City Council and only votes in case of a tie. The Mayor has the power to veto ordinances passed by the Council; which vetoes can be overridden by a two-thirds majority of the Council. The City Charter defines the role of Mayor to include acting as the executive and ceremonial head of the City, presiding over City Council meetings, and serving as spokesman for the Council. The Mayor also votes on all rezoning petitions in which a valid three-quarter protest petition has been filed and generally makes one-third of the citizen appointments to the City *ad hoc* and permanent committees. CANNON acknowledges that his authority as Mayor to vote or veto certain zoning matters and directly appoint members to City boards, committees and commissions provided him with influence over zoning issues as well as City boards, committees and commissions.

c. The Mayor Pro Tem is elected by a vote of the City Council. The Mayor Pro Tem assumes all duties, powers and obligations of the Office of Mayor in the Mayor's absence.

5. The City's employees are organized into Departments, which include the Charlotte Area Transit System ("CATS"), the Charlotte-Mecklenburg Planning Department ("Planning Department"), the Charlotte-Mecklenburg Police Department ("CMPD"), the Engineering and Property Management, and the Neighborhood and Business Services Department.

6. While City employees report to the City Manager, City Council members and the Mayor often call or contact City employees on behalf of constituents who are having problems, or questions about the provision of City services. Constituent services by the City's elected and appointed officials are official acts provided free of charge. CANNON acknowledges that his use of both formal and informal influence—including behind-the-scenes influence over other City Council members and City and County employees—constituted "official acts" as described in the Bill of Information.

7. The City Council and the Mecklenburg County Board of County Commissioners (BOCC) have entered into agreements providing for coordination of certain governmental functions and services. For example, the Charlotte-Mecklenburg Planning Commission advises both the City Council and the BOCC with respect land use, design plans, zoning, transportation and economic development. However, the County Government also has direct responsibility for certain functions within the City, such as building codes enforcement. CANNON acknowledges that his authority as Mayor to directly appoint members of certain City-County boards and committees members and his authority as a Council Member to vote on the appointment of certain City-County boards and committees provided him with influence over certain City-County boards and committees.

Zoning and Permits

8. The City Council has passed ordinances governing how, when and where business is conducted, buildings and residences are constructed and public safety and order is maintained. Included within these ordinances are land use planning and zoning regulations. Zoning approval is required to operate a business in Charlotte-Mecklenburg and to obtain a Charlotte-Mecklenburg business license.

   a. Plans for commercial site development located within the City must be submitted for review by various City and County Departments, including the Planning Department. Building permit applications and, if necessary, re-zoning applications are submitted concurrently to Mecklenburg County Codes Enforcement for required building permits.

   b. Zoning regulations are the rules that determine how parcels of land may be used. Zoning districts are established by the City Council upon recommendation of the Planning Commission. The Official Zoning Map determines the ordinance standards, rules, regulations and conditions of which developments and businesses within a particular zoning district must conform. When land owners want to develop or use their property in ways that do not conform to the Official Zoning Map, they must apply for a change to their zoning classification, also commonly referred to as a "rezoning." Examples of zoning ordinances in Charlotte include how many feet a bar or night club must be from a school, church or residential neighborhood. In this regard, the Charlotte City Council enacted an adult zoning ordinance strictly limiting where and how adult clubs could operate. The City Council has the power and duty to initiate and make amendments to City Zoning ordinances and zoning maps. CANNON acknowledges that his authority as Mayor and a Council Member with respect to zoning matters provided him with influence over City zoning matters.

9. The Charlotte-Mecklenburg Planning Commission (the "Planning Commission") has the power and duty to review and make recommendations to the City Council for amendments to zoning regulations and maps. The Planning Commission is comprised of 15 members, of which the Council appoints five, the Mayor two and the BOCC seven members. The Commission is divided into two major working committees: the Zoning Board of Adjustment and the Planning Committee.

   a. The Zoning Board of Adjustment (the "Zoning Board") has the power and duty to hear appeals from and to review any specific order, requirement, decision and/or determination by the Zoning Administrator. The Zoning Board also hears and decides petitions for certain types of zoning variances, but may not grant variances for use changes.

   b. The Planning Committee develops recommendations on land use, urban design, transportation and other policy plans and on ordinance text amendments.

c. The day-to-day functions of the Planning Commission and City Council are carried out by the professional staff of the City's Planning Department. The Planning Staff is led by the Planning Director. The powers and duties of the Planning Commission Staff include, but are not limited to, reviewing certain applications for building permits, recommending and commenting on amendments to zoning regulations and the zoning map, determining street classifications, reviewing rezoning petitions, and informing applicants with regard to zoning requirements and procedures. The Zoning Administrator reports to the Planning Director and is responsible for, among other duties, rendering interpretations of zoning regulations and zoning district boundaries. CANNON acknowledges that his authority as Mayor and City Council Member provided him with influence over zoning and planning matters and access to City zoning and planning staff.

10. Building inspections, permits and certificates of occupancy in Mecklenburg County are issued by the County Codes Enforcement, a division of the County's Land Use and Environmental Services Agency ("LUESA"). Codes Enforcement employees report to the County Manager. It is established practice and procedure for County employees to respond to constituent inquiries from the elected officials of Charlotte, the County's largest municipality. Such constituent services are official acts provided free of charge regardless of whether they are received directly from a constituent or through an elected official. CANNON acknowledges that his positions as an elected official of the County's largest municipality provided him with inside access to, and influence over, County officials and codes enforcement staff.

Proposed Mass Transit and Development Projects

11. CATS is the agency responsible for operating mass transit in Charlotte and Mecklenburg County. CATS operates light rail transit, historical trolleys, express shuttles, and bus services serving Charlotte and its immediate suburbs. The LYNX light rail system is presently comprised of a 9.6 mile north–south line known as the Blue Line. CANNON acknowledges that his authority as Mayor and a Council Member with respect to budget, appropriations, transportation and eminent domain matters provided him with influence over CATS.

12. The Blue Line Extension (BLE) is an extension of the existing LYNX Blue Line light rail service. The approximately 9 mile extension presently under construction will extend from Ninth Street in Center City through the North Davidson and University areas, terminating on the UNC Charlotte campus. The alignment of the BLE was published in 2011. The alignment determined how property owners in the right of way and adjacent areas would be impacted, including whether the properties would be purchased by the City or taken by eminent domain. Certain business owners in the BLE's proposed alignment were required to change or relocate their businesses. Such relocations would require approvals from various City and County officials, including Zoning, Planning and CATS officials.

13. The LYNX Gold Line Project is a proposed street car line that would provide an east-west link through Charlotte's central business district. The first phase of the Gold Line project is currently under construction. The second phase of the Gold Line is to extend from the

central business district west to French Street near the Johnson C. Smith University. The proposed Gold Line was the subject of considerable debate by the City Council, which initially voted against City funding. On or about May 28, 2013, the City Council led by then Mayor Pro Tem CANNON voted to approve City funding of the Gold Line. At its May 28, 2013 business meeting, the City Council authorized the City Manager to apply for federal grants to fund the Gold Line extension. CANNON acknowledges that his position as Mayor allowed him to lobby for federal and state funding of the LYNX Gold Line project.

Relevant Individuals and Entities

14. Businessman No. 1 ("BM1") is the owner of a company that owns and operates a certain live adult entertainment club in Charlotte (the "Club"). The Club was impacted by the proposed BLE extension alignment announced in 2011. The proposed BLE alignment required the City to acquire land on which the Club owned by BM1 is located. In order to continue operating as an adult club, either the BLE alignment needed to be changed or BM1 had to relocate the Club. Changing the BLE alignment required approval from CATS and the City's Planning Department. Moving the Club required variances and approvals from the City's Zoning Administrator, Planning Department, as well as building permits issued by the County's LUESA. CANNON acknowledges that he had an understanding with BM1 that in exchange for secret payments of cash and other things of value, he would use his elected positions for the benefit of BM1 as needed or as requested by BM1.

15. Undercover Employee No. 1 ("UCE1") was an undercover agent with the Federal Bureau of Investigation ("FBI") whom CANNON believed was a business manager for a venture capital company based in Chicago, Illinois. UCE1 was first introduced to CANNON on or about November 18, 2010 by a businessman known to CANNON. UCE1 and CANNON ultimately established a close working relationship. CANNON believed that UCE1 and his investors were very interested in conducting business in Charlotte and wanted to "test the waters" by opening a nightclub/bar. During 2012 and 2013, CANNON had numerous conversations with UCE1 regarding a possible location to open a nightclub/bar. CANNON, who was also a part of these discussions, recommended several properties. UCE1 selected a property in the Uptown Charlotte area that UCE1, CANNON and the businessman called the "Firehouse." CANNON knew that this property had parking problems and would require several zoning changes, as well as permitting requirements; thereby potentially requiring CANNON's influence and intervention. CANNON acknowledges that it was part of his scheme to defraud Charlotte of his honest services that he would solicit, accept and agree to accept secret payments of cash and other things of value from UCE1 in exchange for the use of his elected positions for the benefit of UCE1 as needed or as requested by UCE1.

16. Undercover Agent No. 2 ("UCE2") was an undercover FBI agent whom CANNON believed was a real estate developer from Las Vegas, Nevada attempting to secure major investments from a group of foreign investors to build mixed use commercial real estate developments in Charlotte. CANNON acknowledges that it was part of his scheme to defraud Charlotte of his honest services that he would solicit, accept and agree to accept secret payments of cash and other things of value from UCE2 in exchange for the use of his elected positions for the benefit of UCE2 as needed or as requested by UCE2.

THE SCHEME TO DEFRAUD
CHARLOTTE OF HIS HONEST SERVICES

17. Between on or about December 7, 2009, and continuing until on or about March 26, 2014, in Mecklenburg County within the Western District of North Carolina and elsewhere, CANNON, aided and abetted by others, devised and intended to devise a scheme and artifice to defraud and deprive the citizens and City of Charlotte of their right to his honest and faithful services through bribery and the concealment of material information.

The Scheme to Solicit and Accept Cash and Things of Value from BM1

18. Beginning no later than his installation as City Councilman At-Large on or about December 7, 2009, and continuing until on or about March 26, 2014, CANNON secretly solicited, accepted and agreed to accept periodic cash payments and checks from or on behalf of BM1 in exchange for the use of his elected offices to make contacts and exert official influence over City zoning, planning and transportation officials.

19. Specifically, in and around January 2013, CANNON accepted a cash payment of about $2,000 from BM1 in exchange for the use of his influence in relocating the Club away from the proposed BLE alignment so that it could remain open as an adult club. CANNON's official acts on behalf of BM1 included, but were not limited to:

    a. Soliciting the support of the Councilman in whose District the Club was located;

    b. Contacting the City Zoning Administrator and other City and County officials in order to urge them to approve zoning variances necessary to move and reconstruct the Club on the same property; and

    c. Arranging a meeting between BM1 and CATS officials so that the Club could remain open prior to reconstruction during an annual racing event in which the Club earned significant revenue.

    d. During the above acts, CANNON agrees that he wilfully failed to disclose the extent of his relationship with BM1 and cash payments and other items of value he received from BM1 to the City and County employees whom he contacted on behalf of BM1. CANNON admits that he intended to engage in a *quid pro quo* exchange with BM1 in which he would receive cash and other things of value in exchange for the use of his official office as needed or as required by BM1. CANNON agrees and admits that his actions breached his fiduciary duty to provide his honest services to the citizens and City of Charlotte.

The Scheme to Solicit and Accept Cash and Things of Value from UCE1

20. Beginning no later than December 12, 2012 and continuing until on or about March 26, 2014, CANNON secretly solicited, accepted and agreed to accept $12,500 in cash and the occasional use of an apartment in exchange for CANNON's use of his elected offices to make contacts and exert official influence over City and County officials considering

building permits, zoning variances and other permits necessary to open a night club/bar in the "Firehouse" location. CANNON's official acts on behalf of UCE1, included, but were not limited to:

a. Contacting the City Zoning Administrator to request information on behalf of UCE1;

b. Promising to use his influence as an elected City official to move UCE1's applications for business licenses, planning and building permits to "the top of the pile;"

c. Talking to the "right people to see the [Firehouse] project through;" and

d. Being available as needed to assist UCE1 with City and County officials so that UCE1 would not have "any real problems."

e. During the above acts, CANNON agrees that he willfully failed to disclose to the City employees whom he contacted on behalf of UCE1, that UCE1 had paid him cash and allowed him occasional free access to an apartment. Moreover, CANNON intended to engage in a *quid pro quo* exchange with UCE1 in which he would receive cash and other things of value in exchange for the use of his official office as needed or as required by UCE1. CANNON agrees and admits that his actions breached his fiduciary duty to provide his honest services to the citizens and City of Charlotte.

The Scheme to Solicit and Accept Cash and Things of Value from UCE2

21. Beginning no later than May 21, 2013 and continuing until on or about March 26, 2014, CANNON secretly solicited, accepted and agreed to accept a total of $36,000 in cash, a trip to Las Vegas, and the occasional use of an apartment in exchange for the use of his elected offices to create and make false representations to persons whom CANNON then believed were interested in investing in Charlotte real estate developments, promising to make contacts and exert official influence over City and County officials considering commercial development plans, building permits, and zoning variances necessary to open for a mixed-use residential/ commercial development. CANNON's official acts on behalf of UCE2, included, but were not limited to:

a. Agreeing to tell UCE2's investors that he had used his official assistance to address zoning and permitting issues on behalf of a mixed-use development in Charlotte;

b. Traveling to Las Vegas and delivering a presentation in his capacity as Mayor Pro Tem of Charlotte to a group he then believed were potential foreign investors, which presentation utilized a story that he had created and included the false representation that he had previously used his influence on behalf of UCE2 in a certain mixed commercial-residential development in Charlotte;

c. Contacting the City Manager for information on the construction schedule for the Lynx Gold Line Phase 2 and promising to give UCE2's company preference over other potential developers;

d. Promising to use his new position as Mayor to secure federal financing for the BLE and Gold Line Phase 2 to benefit UCE2's company;

e. Offering to use, and then actually using the Mayor's office as place to persuade a purportedly skeptical investor to follow through with his investment in UCE2's company; and

f. Promising to introduce UCE2 to the City's Planning Director and "position" her in case UCE2 needed official help with his development in the future.

g. During the above acts, CANNON agrees that he willfully failed to disclose to the City employees whom he contacted on behalf of UCE2 that UCE2 had paid him cash, paid for a trip to Las Vegas, and allowed him occasional free access to an apartment. Moreover, CANNON intended to engage in a *quid pro quo* exchange with UCE2 in which he would receive cash and other things of value in exchange for the use of his official office as needed or as required by UCE2. CANNON agrees and admits that his actions breached his fiduciary duty to provide his honest services to the citizens and City of Charlotte.

Manner and Means

22. CANNON's scheme and artifice to defraud the citizens of Charlotte was carried out in the manner and by the means described in the Introductory paragraphs of the Bill of Information filed herewith and in the following manner and means, among others:

Date(s)	Payor	Bribe ("Quid")	Official Act(s) ("Quo")
Jan. 1-31, 2013	BM1	$2,000 cash	CANNON urged a Council Member to intervene with City official on behalf of the Club.
Jan. 17, 2013	UCE1	$12,500 cash	CANNON promised to use his influence to move UCE1's applications for business licenses, planning and building permits to "the top of the pile."
July 1, 2013	UCE1 UCE2	$1,000 cash Hotel Room Air Fare	CANNON traveled to Las Vegas to give a false presentation as Charlotte Mayor Pro Tem to a group of UCEs posing as foreign investors.

Date(s)	Payor	Bribe ("Quid")	Official Act(s) ("Quo")
July 2, 2013	UCE2	$5,000 cash	CANNON gave a false presentation as Mayor Pro Tem to a group of UCEs posing as foreign investors and promised to use his official position as needed to benefit UCE2's real estate projects.
July 19, 2013	UCE2	$10,000 cash	CANNON used his official position as Mayor Pro Tem to successfully recruit a payment to UCE2's company from a UCE posing as a foreign investor and called the City's Zoning Administrator on behalf of UCE1.
Dec. 11, 2013	UCE2	Key and Use of Apartment	CANNON called the City Manager on behalf of UCE2, provided UCE2 with the Planning Director's contact information, and advised UCE2 to tell the Planning Director that he had previously met with CANNON and the City Manager.
Feb. 21, 2014	UCE2	$20,000 cash	CANNON used the Mayor's office and his elected position to convince a UCE posing as a skeptical foreign investor to "close" on a $25 million payment to UCE2's company.

Execution of the Scheme Via Interstate Wire Transmissions

23. CANNON, for the purpose of executing the above-described scheme and artifice to defraud Charlotte of his honest services, transmitted and caused to be transmitted by means of wire communication in interstate commerce, certain signals, and sounds, including a call he directed a certain City employee (the "City Employee") to make from Charlotte, North Carolina, to UCE1's Chicago mobile phone number.

    a. On or about July 19, 2013, while in a meeting with UCE2 in which he received $10,000 cash, CANNON called the City Employee in the presence of UCE2 and stated in pertinent part:

    > [Receives voicemail] [City Employee] how are you? This is your brother in Greekdom Patrick Cannon giving you a call hope all is well. Listen [City Employee], I need for you to see if you might take a moment out of your busy schedule to call a gentleman by the name of [spelling out UCE1's name] phone number 773-XXX-XXXX. Again 773-XXX-XXXX. He is, uh, I need to see if you can talk to him in regards to a piece of property um that I'm sure you're familiar with. It's the old firehouse um up where a - I think it was Engine Number One used to be located there. It's right there at Graham Street and Fifth and so he had a few

questions uh with regard to it and I wanted to know if you'd be so kind as to give him a call. And um field some of his questions for him please. After doing so would you give me a call to follow up and let me know how that went. 704-XXX-XXXX. 704-XXX-XXXX. Thanks so much [City employee]. Talk to you later. Bye now.

b. At approximately 9:30 AM on July 23, 2013, the City Employee placed a call from Charlotte, North Carolina to UCE1's mobile telephone beginning with area code 773, which is a Chicago, Illinois area code, in which he/she left a voice mail stating:

> Hello Mr. [UCE1], this is [City Employee] with the City of Charlotte Planning Department. Council member Patrick Cannon asked that I give you a call to see if I can answer your questions. If you still need assistance, please call me at 704-XXX-XXXX. Thank you, Bye.

c. At approximately 9:48 AM on July 23, 2013, UCE1, then in Miami, Florida, returned the City Employee's call in Charlotte, North Carolina. During the call, UCE1 and the City Employee discussed the Firehouse property and residential setbacks that might preclude outdoor entertainment. They also discussed the possibility of getting waivers for outdoor entertainment and also contacting persons with building code compliance.

24. CANNON also executed the scheme by making or causing one or more the following interstate wire transmissions on or about the dates listed below:

Date	FROM: Person/Location	TO: Person/ Location	Wire	Subject Matter	Bribe
1/14/2013	CANNON Charlotte, NC	UCE 1 Atlanta, GA	Email	Re-transmission of HERS Attachment	$12,500
3/17/2013	CANNON Charlotte, NC	UCE 1 Atlanta, GA	Text	"I may need a duplicate key for the condo lol."	Use of the UCE Apart.
6/13/2013	CANNON Charlotte, NC	UCE-5180 W.P.B., FL	Call	Voice mail (VM) re: Las Vegas trip	$6,000 $2,726
2/11/2014	UCE2 Hartford, CT	CANNON Charlotte, NC	Call	Plans for a meeting at the Mayor's office with a UCE posing as a skeptical investor	$20,000
3/9/2014	UCE2, NC	CANNON Washington, DC	Call	Return call discussing their next meeting and payment	Future payments

CANNON'S KNOWLEDGE AND INTENT

25. CANNON agrees and admits that at all times pertinent and material to the Bill of Information:

    a. He owed a fiduciary duty to provide his honest services to the public, including the citizens and government of Charlotte. CANNON understands that the phrase "to owe a fiduciary duty to the public" means that he had a duty to act with honesty and loyalty in the public's interest, not for his own enrichment.

    b. He violated his fiduciary duty when, as an elected official, he knowingly devised and participated in a bribery scheme.

    c. He engaged in a "*quid pro quo*." He understands that the phrase "*quid pro quo*" means "this for that" or "these for those." He acknowledges that he intended to accept money or other things of value in exchange for his official action, even if the payments he received were not always correlated with a specific official act. He further acknowledges and agrees that even if the payments and things of value he accepted were not directed to a specific official act, he was involved in a "course of conduct" in which cash and other things of value flowed to him in exchange for a pattern of official actions favorable to the persons and businesses that secretly paid him.

    d. That cash payments and other things of value were given to, and accepted by, him with the intent that he would be retained by his benefactors on an "as needed" basis, so that whenever the opportunity presented itself he would take specific official actions on the payors' behalf.

    e. That the term "official act" includes any act within the range of his official duty as a public official—or within the range of any other City Council member's or City or County employee's official duty—including, but not limited to any decision, recommendation, or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before such public official, in such public official's official capacity.

    f. His "official acts" included the decisions or actions generally expected of him and those in City government whom he contacted on behalf of his secret benefactors.

    g. His "official action" included the exercise of both his formal official influence (such as his potential vote on a zoning or contracting matter or appointment of a specific person to a City committee) and his informal official influence (such as his behind-the-scenes influence on other City Council members and City and County officials and employees).

    h. His "official actions" in the course of the scheme included "constituent services." CANNON understands and agrees that it is no defense to honest service fraud that

he could have lawfully performed constituent services on behalf of BM1, UCE1 and UCE2, but for his solicitation and acceptance of cash and other things of value for those services.

i. He knew that he was acting in his public and not his private capacity.

j. Official acts taken by CANNON in the course of the scheme included the use of his offices to influence zoning and permitting decisions and local government planning decisions, as well as providing special access to local government officials and other favors.

k. He acted knowingly, meaning that he was conscious and aware of his actions; realized what he was doing and what was happening around him; and did not act out of ignorance, mistake, or accident.

l. He acted with the specific intent to defraud Charlotte of his honest services. CANNON understands that to act with "intent to defraud" means to act knowingly and with the specific intent to deceive, for the purpose of depriving the public and government of their right to his honest services. While CANNON outwardly purported to be exercising independent judgment in his official work and contacts with City employees, he instead received secret personal benefits for such official work and contacts. In this regard, the public was deceived by CANNON's deliberate omission that he had and would solicit and accept cash and other things of value.

m. His misrepresentations, false pretenses and deliberate concealment of his receipt of payments and other things of value in exchange for the use of his official offices and official acts was material. CANNON understands that a representation, statement, false pretense, or omission is "material" if it has a natural tendency to influence or is capable of influencing a decision or action by citizens of Charlotte or their government.

STIPULATED SENTENCING FACTORS

26. CANNON admits and agrees to the following for the purposes of establishing his offense level under the Federal Sentencing Guidelines:

a. He was, and acted as, an elected public official.

b. He accepted more than one bribe during the course of the charged scheme.

c. The total value of the bribes was not less than $50,000.

d. The victims in this case are the citizens and City of Charlotte.

27. CANNON reserves the right to dispute any specific offense characteristic not addressed herein or in the Plea agreement filed herewith.

Government's Counsels' Signatures and Acknowledgements

28. The undersigned Assistant United States Attorneys by and through Anne M. Tompkins, United States Attorney for the Western District of North Carolina, hereby certify in accordance with the Federal Rules of Criminal Procedure and this Court's Superseding Order Requiring a Factual Basis (Cause No. 3:14 mc 005), that this Factual Basis admits all of the elements of the offense charged in the Bill of Information and provides a factual basis for the defendant's plea of guilty.

Michael E. Savage
Assistant United States Attorney

5/9/2014
Date

Craig Randall
Assistant United States Attorney

5/9/2014
Date

Defendant's Counsels' Signatures and Acknowledgments

29. We, James E. Ferguson, II and Henderson Hill, have read this Factual Basis, the Bill of Information, and the Plea Agreement in this case, and have discussed them with defendant, Patrick Deangelo Cannon. Based on those discussions, we are satisfied that the defendant understands the Factual Basis, the Bill of Information, and the plea agreement.

James E. Ferguson, II, Esq.
Attorney for Defendant

5/8/2014
Date

Henderson Hill, Esq.
Attorney for Defendant

5/8/2014
Date

Authority, Signature, and Acknowledgment of the Defendant

30. I, Patrick Deangelo Cannon, have read this Factual Basis and the Bill of Information and have discussed them with my attorneys, James E. Ferguson, II and Henderson Hill. I agree and stipulate that the facts outlined herein accurately describe the events and circumstances surrounding my offense. I fully understand the contents of this Factual Basis, and enter into this Factual Basis without reservation.

Patrick Deangelo Cannon
Defendant

5-8-14
Date

FREQUENTLY USED STATUTES
IN STATE AND LOCAL PUBLIC CORRUPTION CASES

A. Title 18, United States Code, Section 666(a)(1)(B):

(1) 18 U.S.C. § 666(a)(1)(B) provides in pertinent part:

(a) Whoever, if the circumstances described in subsection (b) of this section exists –

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more ….

shall be fined under this title [$250,000], imprisoned not more than 10 years, or both. . . .

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one-year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to *bona fide* salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section—

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

(2) The elements of § 666(a)(1)(B) are:

- First, the defendant was, at the time alleged in the indictment, an agent of an organization or of any state or local government or agency that received, in any one-year period, benefits in excess of $10,000 under a Federal program involving any form of Federal assistance; and

- Second, the defendant solicited **or** demanded for the benefit of any person, **or** accepted **or** agreed to accept, anything of value from any person;

- Third, the defendant **intended to be influenced or rewarded** in connection with any business, transaction, or series of transactions of the organization, state or local government or agency involving anything of value of $5,000 or more; and

- Fourth, the defendant did so **corruptly**.

  - An act is done "corruptly" if it is done with the intent to engage in some more or less specific *quid pro quo*, that is, to receive a specific benefit in return for the payment, or to induce a specific act. *See* Pattern Jury Instructions for the United States District Court for the District of South Carolina (hereinafter "D.S.C. Pattern Instructions") at 119 (citing *United States v. Jennings*, 160 F.3d 1006, 1021 n. 6 (4th Cir. 1998) in which the Fourth Circuit criticized the definition of "corruptly" in *3 Federal Jury Practice and Instructions*, § 25.09 (1990), and adopted its own definition from *United States v. Arthur*, 544 F.2d 730, 734 (4th Cir. 1976).

  - A payment is made with corrupt intent only if it was made or promised with the intent to corrupt the particular official. Not every payment made to influence or reward an official is intended to corrupt him. One has the intent to corrupt an official only if he makes a payment or promise with the intent to engage in a fairly specific *quid pro quo* with that official. The defendant must have intended for the official to engage in some specific act or omission or course of action or inaction in return for the payment charged in the indictment. *Id.*

  - To influence means that a payment was made before the official action. To reward means that a payment was made afterwards. Payments made to influence official action and to reward official action are both prohibited, but payments made without corrupt intent are not criminal acts. *Id.*

  - Payments, sometimes referred to as goodwill gifts, made with no more than some generalized hope or expectation of ultimate

benefit on the part of the donor are neither bribes nor gratuities, since they are made neither with the intent to engage in a relatively specific *quid pro quo* with an official nor for or because of a specific official act. *Id.*

B. Title 18, United States Code, Section 1951

(1) 18 U.S.C. § 1951 provides in pertinent part

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by … extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section--

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(2) The elements of § 1951(extortion under color of official right) are:

- First: the defendant was a public official

- Second, the defendant obtained [attempted to obtain] property from another with that person's consent;

- Third, the property was not lawfully due defendant or his office;

- Fourth, the defendant obtained the property knowing that it was provided in return for official acts; and

- Fifth, the defendant obtained the property in a manner that affected interstate commerce.

C. Title 18, United States Code, Sections 1343 and 1346

(1) 18 U.S.C. §§ 1343 and 1346 provide in pertinent part

> **[§1343]** Whoever, having devised or intending to devise any scheme or artifice to defraud . . . transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.
>
> **[§1346]** [T]he term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

(2) The elements of a §§ 1343 and 1346 violation are:

- First, the defendant knowingly devised or participated in a scheme to defraud the public of its right to the honest services of (the public official) through bribery or kickbacks;
    - This element requires proof of defendant's breach of a fiduciary duty through participation in a bribery or kickback scheme.
- Second, the defendant did so knowingly and with an intent to defraud;
    - An intent to defraud means to act with the intent to deceive for the purpose of depriving the public of its right to the fiduciary's honest services through bribery or kickbacks.

- Deceit in an honest-services case may consist of the nondisclosure or concealment of the bribery or kickback scheme, or other evidence that the defendant is pretending loyalty to his principal while scheming to act in his own interests.

- Third, the scheme or artifice to defraud involved a material misrepresentation, false statement, false pretense, or concealment of fact; and

> A deception is material if it has "a natural tendency to influence, or [is] capable of influencing, the decision of the decision-making body to which it was addressed."

- Fourth, in advancing, or furthering, or carrying out the scheme to defraud, the defendant transmitted, or caused to be transmitted, any writing, signal, or sound by means of a wire communication in interstate or foreign commerce.

(3) Honest Services Post-*Skilling*

- One of the main points established by the Supreme Court in *Skilling* is that federal, not state, standards govern§ 1346 bribery and kickback prosecutions. The Court stated that its construction of the statute" establish[ed] a uniform national standard," 130 S. Ct. at 2933 (citations, quotations omitted), and emphasized that the statute draws its content from the *pre-McNally* cases (which did not require a violation of state law, *see e.g., United States v. Mandel,* 591 F.2d 1347, 1361 (4th Cir. 1979) (collecting cases)), as well as from other federal statutes defining bribes and kickbacks. *Id.* at 2933-34.

- *Skilling* did not change the established understanding that the mail and wire fraud statutes punish "schemes" to defraud—and so the government need not prove a completed bribe or kickback or the actual taking of official action. *See* 18 U.S.C. §§ 1341, 1343 (permitting conviction of anyone who, "having devised or intending to devise any scheme or artifice to defraud," causes a mailing or interstate wiring in furtherance of the scheme); *Pasquantino v. United States,* 544 U.S. 349,

371 (2005) ("the wire fraud statute punishes the scheme, not its success") (citations, quotations omitted); *see also United States v. George,* 477 F.2d 508, 512 (7th Cir. 1973) ("since the gravamen of the offense is a 'scheme to defraud,' it is unnecessary that the Government allege or prove that the victim of the scheme was actually defrauded or suffered a loss").

- Post-*Skilling* elements of Honest Services Fraud include the following:

(1) The first element of an honest-services fraud is the **breach of a fiduciary duty** through participation in a bribery or kickback scheme. Many *pre-McNally* cases either required a breach of a duty (often characterized as a fiduciary duty) as a separate element or simply stated that the defendant breached a duty to the public or to an employer by agreeing to accept or by demanding bribes or kickbacks. *E.g., United States v. Conner,* 752 F.2d 566,573,574 (11th Cir. 1985) ("fiduciary" duty of corporate employee); *United States v. Mandel,* 591 F.2d 1347, 1362 (4th Cir.), vacated, 602 F.2d 653 (4th Cir. 1979) *(per curiam)* ("fiduciary" duty of public official); *George,* 477 F.2d at 514 ("fiduciary" duty of corporate purchasing agent). The defendant himself need not be a fiduciary: a private citizen, for instance, does not owe a duty of honest services to the public—but he can be held liable under the statute by devising or participating in a bribery scheme intended to deprive the public of its right to an elected official's honest services. *See, e.g., United States v. Lovett,* 811 F.2d 979, 984 (7th Cir. 1987) (lawyer guilty of mail fraud for bribing mayor, and thereby depriving the citizens of their right to the mayor's honest services). The public official/ fiduciary need not even be a party to the scheme. *See United States v. Potter,* 463 F.3d 9, 17 (1st Cir. 2006) (businessmen guilty of honest services fraud for scheming to bribe state speaker of the house; no requirement that public official agree to the scheme; "that [official] might prove unwilling

or unable to perform, or that the scheme never achieved its intended end, would not preclude conviction").

(2) ***Bribes and Kickbacks***. The breach of the fiduciary duty must be by participation in a bribery or kickback scheme - which involves the actual, intended, or solicited exchange of a thing of value for official action. *See United States v. Sun-Diamond Growers,* 526 U.S. 398, 404 (1999) (interpreting§ 20l(b): "In other words, for bribery there must be a *quid pro quo-a* specific intent to give or receive something of value *in exchange* for an official act." (emphasis 'in original)); *United States v. Kemp,* 500 F.3d 257, 281 (3d Cir. 2007). A kickback, like a bribe, involves a fiduciary's exchange of official action for a thing of value from a third party-usually in the context of a transaction that itself provides the source of the funds to be "kicked back." As *Skilling* explains, that is what happened in *McNally* itself. *See* 130 S. Ct. at 2932 ("a public official, in exchange for routing * ** insurance business through a middleman company, arranged for that company to share its commissions with entities in which the official held an interest"); *see also, e.g., United States v. Blanton,* 719 F.2d 815, 816-818 (6th Cir. 1983) (governor arranged for friends to receive state liquor licenses in exchange for a share of the profits). It is important to distinguish bribes from gratuities—that is, the payment of things of value to reward, rather than in exchange for or to influence official action. Gratuities are *not* covered by§ 1346 as interpreted by *Skilling*.

(3) An "**official act**" is a decision or action on a "question, matter, cause, suit, proceeding or controversy." That question or matter must involve a formal exercise of governmental power, and must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision or take an action on that question or matter, or agree to do so. Setting up a meeting, talking to another official, or

organizing an event—without more—does not fit that definition of "official act." *McDonnell v. United States*, 136 S. Ct. 2355, 2358 (2016) (reversing conviction of the former Governor of Virginia on grounds that arranging meetings in exchange for gifts was not an official act).

In *McDonnell*, the Supreme Court held there are two requirements for an "official act." First, the Government must identify a "question, matter, cause, suit, proceeding or controversy" that "may at any time be pending" or "may by law be brought" before a public official. Second, the Government must prove that the public official made a decision or took an action "on" that "question, matter, cause, suit, proceeding or controversy," or agreed to do so. *Id.* at 2367–2372.

Because a typical meeting, call, or event is not itself a question or matter, the next step is to determine whether arranging a meeting, contacting another official, or hosting an event may qualify as a pending "decision or action." *Id.* at 2359.

The federal bribery statute, 18 U.S.C. § 201(a)(3), provides that a question or matter must be "pending" or "may by law be brought" before "any public official." "Pending" and "may by law be brought" suggest something that is relatively circumscribed—the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete. "May *by law* be brought" conveys something within the specific duties of an official's position. *Id.*

Using this definition of "official act," the Court found the district court instruction that "official acts encompassed 'acts that a public official customarily performs' including acts 'in furtherance of longer-term goals" or "in a series of steps to exercise influence or achieve an end'" was over-inclusive. The district court

did not instruct the jury that to convict Governor McDonnell, it had to find that he made a decision or took an action—or agreed to do so—on the identified "question, matter, cause, suit, proceeding or controversy," as properly defined. *Id*. at 2360.

From:
Sent: Wednesday, March 26, 7:00 PM
To: _Everyone (City &)
Cc:
Subject: DOCUMENT HOLD LETTER
Attachments: Litigation Hold Letter.doc

To: All City Employees

The City has received a subpoena for all documents and records relating to from January 1, to present. Effective immediately all employees shall preserve any and all documents in their possession relating to pursuant to the attached litigation hold letter.

Please read the litigation hold letter very carefully, but please be mindful that the documents to preserve include all types of documents, hardcopy and electronic on either City or personal devices or accounts, as highlighted therein.

Any questions concerning this email or the litigation hold letter should be addressed to in the City Attorney's Office.

CITY ATTORNEY
OFFICE OF THE CITY ATTORNEY

DOCUMENT HOLD DIRECTIVE

(see instructions below)

The City of [redacted] ("[redacted]" or the "City") received a federal subpoena for records and information regarding [redacted]. The subpoena is extremely broad and covers any document at all relating to [redacted] from January 1, [redacted] to the date of the subpoena, March 26, [redacted] Examples of these documents include, but are not limited to the following:

a. Agendas, dates and materials for ethics training taken by [redacted]

b. Personal financial disclosures, requests for conflict of interest advice, and recusals by [redacted]

c. Compensation and benefits paid to [redacted]

d. Travel by [redacted], including, but not limited to, itineraries, agendas, expense and trip reports;

e. [redacted] email accounts, telephone numbers, or other methods of communication; including passwords, encryption codes and billing records;

f. [redacted] calendar, including, but not limited to, any Outlook or electronic calendars and/or archives of calendars.

In addition, please preserve the following additional categories of documents:

a. All communications between [redacted] and any City Manager, department head or employees, including, but not limited to, emails, electronically recorded voice mails, letters, memoranda and notes;

b. Policies, procedures, rules, training materials, advisory opinions, and notices relating to ethics, conflicts of interest, and/or gifts to the City Council; including, but not limited to, agendas and materials for ethics training;

c. Documents relating to [redacted] LLC; [redacted] LLC; the [redacted] LLC and any other entity in which [redacted] has been an owner, officer, agent or representative. Such documents should include, but are not limited to, contracts, bids, payments, invoices, permit applications, zoning variances, planning requests, citations, and/or citizen complaints.

Finally, any and all electronic devices assigned to or used by [redacted] at any time, including mobile telephones, personal digital devices, iPads or tablets, laptop and desktop computers must be immediately secured so as to preserve the devices and data therein in their current condition and produced to the grand jury in a manner that will permit forensic examination. If you are in

possession of any such item, you must inform [redacted] immediately to facilitate preservation of that item.

Obligation to preserve records

Due to this investigation and/or litigation, it is the obligation of all City Employees to ensure that relevant records are preserved.

STARTING IMMEDIATELY YOU MUST CONTINUE TO PRESERVE ANY AND ALL RECORDS, WHETHER IN ELECTRONIC OR PAPER FORM, RELATING TO THIS MATTER. This directive supersedes any City policy regarding preservation or deletion of records.

The obligation applies to both paper records and electronic records (such as e-mails, or text messages that are saved on your device). The terms "documents" and "records" are extremely broad and include, for example, memos, binders, paper files, invoices, payment records, log books, contracts, correspondence, e-mails, word files, spreadsheets, photographs, voice mail recordings, etc. Preservation is required regardless of where the records are now kept, for example, file cabinets, desk drawers, local hard drives, server, flash drive, home computer, iPhone, Blackberry, any form of PDA, cell phone, etc.

If you are in doubt as to whether you need to preserve certain documents or types of documents, please retain them until you have verified the relevance of the documents with counsel for the City.

How to preserve

Until further notice, you must retain all documents and information related to or concerning [redacted] or one of the other topics listed above. To the extent practicable, clearly mark all such documents and information, and files or boxes containing such documents or information, **"Subject to Document Hold Directive – Destruction Prohibited,"** or similar wording to that effect. Do not discard or delete any relevant records. Keep them in a location where you know they will not be accidentally discarded or deleted by others. Do not manually delete any relevant e-mails that you may have saved outside the internal City email system.

If records exist in hard copy form, you must keep them, without alteration, organized in the way that you would normally keep them for business purposes (for example, if you usually file them in folders, continue to do so). All copies, including drafts, must be maintained. You will be contacted at a later date should it become necessary to physically collect the materials.

Compliance with this Document Hold Directive is mandatory. **This Document Hold Directive will remain in place until you receive notice from [redacted] Our outside legal counsel, Parker, Poe, Adams & Bernstein LLP, may be contacting you in the future to discuss and/or gather documents and information in your possession, as well as information about where documents may be stored electronically.** If you have any questions about this Notice or the preservation obligations, you should immediately email [redacted] at [redacted] or [redacted] at [redacted] **Thank you for your cooperation. Failure to abide by the above instructions could result in penalties against the City and involved employees.**

Panhandling Regulation after *Reed*

PANHANDLING AND SOLICITATION IN LIGHT OF REED V. TOWN OF GILBERT

By Matthew Norchi*

I. EXECUTIVE SUMMARY

This paper discusses the state of panhandling and solicitation regulations in light of the recent Supreme Court case, *Reed v. Town of Gilbert*. In the Supreme Court case, *Village of Schaumburg v Citizens for a Better Environment*, the Court determined that charitable solicitation warranted full First Amendment protection, as it conveyed messages of political speech, and thus fell under the core purpose of First Amendment protection. While there is no Supreme Court case directly on point regarding the protection of panhandling, the general consensus was that individual acts of begging fell under the protection that *Schaumburg* offered. Various lower courts, as well as academic viewpoints, supported that assertion.

Despite the protection offered by the First Amendment, municipalities and local governments were still able to craft laws that regulated panhandling and solicitation, through regulating not the speech itself, but rather the time, place, and manner of the speech. Time, place, and manner regulations enjoy vast historical precedent in First Amendment jurisprudence, and are a method that governments can use to create regulations that pass examinations of their constitutionality.

However, in 2015, *Reed v. Town of Gilbert* was decided by the Supreme Court. *Reed*, a case involving a town's discriminatory treatment of signs, created an exceedingly broad rule regarding the method through which courts must examine the constitutionality of certain laws, ostensibly including panhandling and solicitation ordinances. While the vote in *Reed* was unanimous, the Court had deep divisions between its members regarding the methodology used in the majority opinion. Following the decision in *Reed*, the state of panhandling and solicitation regulations has been left extremely suspect, with many lower courts construing the holding of *Reed* to effectively preclude the possibility of municipalities or local governments creating ordinances that pass a constitutional test.

This paper discusses the state of the law both prior to and after *Reed*, and argues that (1) certain aspects of panhandling should be treated as conduct, rather than speech, and (2), that the time, place, and manner category still provides a method for local governments to craft effective panhandling and solicitation ordinances. Part II discusses the state of the panhandling and solicitation laws prior to *Reed*. Part III discusses *Reed*, and the divisions regarding its methodology. Part IV discusses the state of panhandling and solicitation jurisprudence following *Reed*, and also offers possible avenues for governments to craft revised panhandling and solicitation regulations. Part V concludes. Two Appendices follow. Appendix A captures a recent summary of major cities' panhandling and homeless regulations as provided by the National Law Center on Homelessness and Poverty (https://www.nlchp.org/) Appendix B offers an annotated draft ordinance on panhandling that might prove a helpful example for municipalities moving forward.

* J.D. Candidate, Class of 2018, UNC School of Law, norchi@ad.unc.edu. This paper was completed under the supervision of Professor Judith Wegner (Judith_wegner@unc.edu), who also contributed modest editing, significant substantive content in part IV, and the draft ordinance in Appendix B.

II. Panhandling and Solicitation Ordinances Pre-Reed

A. *The Protection of Solicitation and Panhandling*

The First Amendment and its protections are something that Americans take for granted, and generally hold as true without much more than a cursory thought. It is well understood that the First Amendment protects free speech – but there is a great deal of nuance that goes into what kinds of speech are actually protected, and what those protections actually entail. In other words, there are some types of speech that, according to the overall body of jurisprudence, warrant more protection than others. To start, the distinction between content-based and content-neutral laws is a vital component of First Amendment law, as content-based laws, or laws that regulate based on the message being conveyed, are subject to a higher degree of examination than are content-neutral laws (laws that are agnostic to the message conveyed, or only incidentally effect speech). Constitutional examination takes the form of scrutiny tests: to survive strict scrutiny, the most stringent constitutional test, a regulation must serve a compelling state interest as well as be narrowly tailored (using the least restrictive means possible) to achieve that interest,[1] while intermediate scrutiny imposes a less exacting test. Additionally, certain categories of speech are more protected than others: for instance, laws that suppress political speech are subject to strict scrutiny, while commercial speech generally only invokes intermediate scrutiny.[2]

Because "almost all laws fail strict scrutiny and many others can pass intermediate scrutiny",[3] it is vital to understand where panhandling and charitable[4] solicitation fit on the protection spectrum, as solicitation and panhandling often include both commercial and political speech elements. While begging and charitable solicitation share many common strands of DNA, they are also distinct, as charitable solicitation typically involves the raising of funds for a larger organization, while begging is generally characterized as involving more isolated, personal activity.[5] In *Schaumburg v. Citizens for a Better Environment*,[6] the United States Supreme Court held that charitable solicitation warranted full First Amendment protection – meaning that laws restricting panhandling or solicitation would generally be subject to strict scrutiny. In *Schaumburg*, the Court considered a law requiring charities that solicited door-to-door to dedicate at least 75% of donations to charitable purposes.[7] The Court rejected the idea that canvassing for donations is purely commercial speech, because charitable solicitors advocate for particular social or political issues, as opposed to being engaged in a pure profit-making enterprise.[8] *Schaumburg* remains important, because it illustrates that even though soliciting for charitable donations or causes could be considered a form of commercial speech, or even more like conduct than speech, the Supreme Court is unwilling to differentiate between those aspects, and generally treats charitable solicitation as non-commercial protected speech.

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[1] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
[2] *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 Harv. L. Rev. 1981, 1990 (2016).
[3] Leslie Kendrick, *Content Discrimination Revisited*, 98 Va. L. Rev. 231, 237 (2012).
[4] Commercial solicitation is distinct from charitable solicitation, and is generally subjected to intermediate scrutiny as a form of commercial speech. *See Free Speech Doctrine After Reed v. Town of Gilbert*, 129 Harv. L. Rev. 1981, 1990 (2016).
[5] Despite the distinction, the two concepts are often legally intertwined; further, many ordinances define ordinances in such a way that they necessarily encompass both charitable solicitation and panhandling. Thus, while some aspects of this memorandum touch only panhandling (aggressive panhandling, for instance), other parts treat them functionally as one.
[6] Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).
[7] *See also* Anthony Lauriello, Reed v. Town of Gilbert *and the Death of Panhandling Regulation*, 116 Colum. L.Rev. at 5. [hereinafter Lauriello].
[8] *See* Lauriello, *supra* note7, at 5.

Two other Supreme Court Cases, *Secretary of State of Maryland v. Joseph Munson Co.,*[9] and *Riley v. National Federation of the Blind of North Carolina, Inc*.,[10] affirmed the Supreme Court's protection of charitable solicitation in viewing solicitation regulations via a strict scrutiny approach. In *Joseph Munson Co.,* the Court struck down a ban on organizations that devoted more than a certain percentage of their contributions towards operating costs,[11] while in *Riley*, the Court struck down a more nuanced ban regarding stipulations of contributions.[12] Both cases held that the regulations regarding how contributions were to be allocated impermissibly impeded the charitable organization's freedom to disseminate information.

While there is not a Supreme Court decision regarding the status of panhandling protection, the general consensus is that panhandling fits under the *Schaumburg* umbrella of protection.[13] The Supreme Court is silent on whether panhandling is considered protected speech.[14] However, most courts have interpreted panhandling as failing under the *Schaumburg* umbrella, and thus subject to strict scrutiny and full First Amendment protections.[15] In *Loper v. New York City Police Department*,[16] the Second Circuit held that begging was defined as a "communicative activity" since there was little difference between begging and soliciting or a larger organization. Accordingly, the prohibited warranted strict scrutiny.[17]

[9] 467 U.S. 947 (1984).
[10] 487 U.S. 781 (1988).
[11] In *Joseph Munson Co.*, a Maryland ordinance prohibited the solicitation of contributions for charitable organizations by disallowing organizations from allocating more than 25% of their received contributions to operating costs. *Id*. The Court, citing *Schaumburg*, noted that this created a chilling effect on charitable organizations, and that their First-Amendment protected fundraising and speech activity was infringed upon by the percentage ban. *Id* at 948.
[12] In *Riley*, the North Carolina General Assembly created a scale, which delineated a three-tiered schedule of percentages regarding the reasonability of charitable organizations allocation of funds: up to 20% of contributions being used for operating costs was considered "reasonable"; 20-35% was deemed unreasonable if the organization could not show that the solicitation at issue involved "dissemination of information, discussion, or advocacy relating to public issues"; and amounts of 35% or more created a rebuttable presumption that the allocation was unreasonable. See Riley, 487 U.S. 781, 781 (1988). The Court held that while the state had an interest in protecting both charities and the public from fraud, the percentage-tier system was not narrowly tailored enough to withstand the strict scrutiny that solicitation regulation demands. *Id*.
[13] *See* Lauriello, *supra* note 7, at 14.
[14] *Id.*
[15] *Id.*
[16] Loper v. N.Y. City Police Dep't, 999 F.2d 699 (2d Cir. 1993) (striking down New York City's broad prohibition on loitering with the purpose of begging).
[17] *See* Lauriello, *supra* note 7, at 16.

The Fourth,[18] Sixth,[19] Seventh,[20] Ninth,[21] and Eleventh[22] circuits have all adopted a *Loper*-like approach to First Amendment protection for panhandling.[23] Blanket bans on panhandling, such as the ban in *Loper* and *Speet v. Schuette*,[24] are generally held as unconstitutional (even prior to *Reed*) for being too broadly constructed such that they burdened more speech than is necessary to accomplish the underlying interest.[25]

B. Time, Place, and Manner Restrictions

Despite the powerful deference given to free speech in the U.S., a central tenet of First Amendment law is that governments maintain the right to place restrictions on speech, based not on the content, but on the time, place, and manner of the speech.[26] Generally, public forums (places such as streets, or large public areas) are protected from government regulation, due to their historical use as places for the public to assemble, communicate, and disseminate information.[27] The cases noted above all revolve around regulations based in public forums. However, the government can create laws that regulate the time, place and manner of speech, provided they laws are "content-neutral, are narrowly

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[18] *See* Reynolds v. Middleton, 779 F. 3d 222, 224 (4th Cir. 2015). Reynolds, a homeless man who supported himself by soliciting donations, challenged a Virginia town's ordinance that prohibited solicitation within county roadways and on median (the ordinance's intent was to curb accidents). *Id*. The Fourth Circuit, citing panhandling's First Amendment protection, struck down the ban because it was not supported by enough evidence, and thus prevented both dangerous and non-dangerous forms of solicitation. *Id*. *See also* Clatterbuck v. City of Charlottesville, 92 F.Supp. 3d 478 (W.D. Va. 2015). In *Clatterbuck*, the district court for the Western District of Virginia held that an ordinance certain forms of solicitation was content-based, because it "plainly distinguish[ed] between types of solicitations on its face." *Id* at 487. Because the city did not illustrate that the law was the least restrictive means through which to accomplish its interest, the law was ruled unconstitutional. *Id* at 491.

[19] *See* Speet v. Schuette, 726 F. 3d 867(6th Cir. 2013) In *Speet*, the Sixth Circuit Court of Appeals struck down a Michigan law that banned and criminalized begging in the streets. *Id* at 870. The Court held that panhandling was protected, and that while preventing fraud and abuse was a valid government interest, the ordinance was not narrowly tailored enough to serve that interest. *Id* at 880.

[20] *See* Gresham v. Peterson, 225 F. 3d 899 (7th Cir. 2000). In *Peterson*, the Seventh Circuit Court of Appeals upheld a solicitation ban as falling under the time, place and manner umbrella of permissible regulation (*see infra* Part II, Section B); importantly, however, the court acknowledged that begging fell under the *Schaumburg* and *Loper* protection of begging. *Id* at 907.

[21] *See* ACLU v. City of Las Vegas, 466 F. 3d 784 (9th Cir. 2006). Here, the Ninth Circuit struck down a panhandling regulation as an invalid restriction on First Amendment rights, thus incorporating panhandling into Schaumburg's protection umbrella. *Id* at 801. *See also Civil Liberties Union of Idaho, Inc. v. City of Boise*, 998 F. Supp. 2d 908 (D. Idaho 2014) (holding that a blanket ban on solicitation was invalid).

[22] *See* Smith v. Fort Lauderdale, 177 F. 3d 954 (11th Cir. 1999). In Fort Lauderdale, the Eleventh Circuit held that panhandling is protected under the First Amendment, but using similar reasoning as the Seventh Circuit in Gresham, upheld an ordinance prohibiting panhandling on beaches in order to protect the town's successful tourism trade. *Id* at 956.

[23] *See* Lauriello, *supra* note 7, at 18.

[24] *See* note 18, *supra.*

[25] *See* Lauriello, *supra* note 7, at 22.

[26] *See* Clark v. Community. for Creative Non-Violence, 468 U.S. 288, 293 (1984) Justice Byron White wrote in *Clark* that, "expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place or manner restrictions. We have often noted that restrictions of this kind are valid provide they are justified to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.*

[27] This idea dates back to earlier eras where the great majority of societal discourse and the spread of ideas took place in streets or town squares. *See* Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.")

tailored to serve a significant government interest,[28] and leave open ample alternative channels of communication."[29] This test is the intermediate scrutiny test, and accordingly, laws have been upheld as constitutional, under intermediate scrutiny, that regulate where certain speech can take place, rather than what kind of speech can take place.[30]

With regard to panhandling and solicitation, the landmark case that illustrates this concept is *International Society for Krishna Consciousness, Inc. v. Lee*.[31] In *Krishna*, the Port Authority of New York and New Jersey implemented an ordinance that restricted both the distribution of "flyers, brochures, pamphlets, books or any other written material," as well as "the solicitation and receipt of funds" in airport terminals.[32] International Society for Krishna Consciousness (ISKCON), a religious organization that solicited funds and disseminated information about their organization in public places, brought suit, arguing that their First Amendment rights were being violated by the ordinance.[33]

In *Krishna*, there was no debate as to whether the solicitation in question was a form of protected speech under the *Schaumburg* umbrella;[34] rather, the vital turning point of the case was whether airport terminals were public forums.[35] If airport terminals were to be held as public forums, then the ordinance would be subject to strict scrutiny; if, on the other hand, airport terminals were considered as a different type of forum, then the ordinance would be subject to the far less exacting intermediate scrutiny test. The Court distinguished airport terminals from streets and other established public forums, and thus subjected the ordinance to the "reasonable under the circumstances" test of intermediate scrutiny, and found that the law was valid.[36] *Krishna*, still ostensibly good law, stands for the proposition that

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[28] However, this is not the same narrowly tailored as in strict scrutiny. The restrictions do indeed need to be narrowly tailored, though they need not be the "least restrictive or least intrusive" methods for accomplishing the government's interest. See *Ward v. Rock Against Racism,* 491 U.S. 781, 786 (1989). Rock Against Racism was an organization that hosted several annual rock concerts in New York City promoting anti-racism. *Id* at 784. In response to a host of noise complaints over the years, the City created a set of guidelines relating to permissible noise levels. *Id* at 785. Rock Against Racism sued the city, stating that the guidelines violated its free speech rights. *Id* at 786. Justice Kennedy, writing the majority opinion, noted that while the concerts were considered to be the type of speech most protected by the First Amendment, the city's guidelines were appropriate time, place, and manner restrictions. *Id* at 799. *Ward* remains somewhat vague, as Kennedy famously wrote that though time, place and manner regulations need not use the most restrictive means possible, the restrictions could not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id* at 799.
Racism, 491 U.S. 781, 786 (1989)
[29] *See* Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1983).
[30] *See* Lauriello, *supra* note 7, at 7.
[31] 505 U.S. 672 (1992). See also Young v. New York City Transit Authority, 903 F.2d 146 (2nd Cir. 1990). In Young, begging was banned in the New York City subway system. Id at 147. The Second circuit held that the ordinance banning begging was content-neutral, and thus constitutional. Id at 168. Further,
[32] *Krishna*, 505 U.S. 672, 677 (1992). The Port Authority owned and operated three airports in the New York City Metropolitan Area: John F. Kennedy International Airport, La Guardia Airport, and Newark International Airport. *Id* at 675.
[33] ISKCON's practice of disseminating information and soliciting funds was a ritual known as *sankirtan* and its primary purpose is to raise funds for the religious movement. *Krishna*, 505 U.S. 672, 674-75 (1992).
[34] *Krishna* 505 U.S. 672, 676 ("It is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment . . . [b]ut it is also well settled that the government need not permit all forms of speech on property that it owns and controls.").
[35] *Krishna,* 505 U.S. 672, 679 (1992).
[36] *Krishna*, 505 U.S. 672, 680 (1992). Chief Justice Rehnquist, writing for the Court noted that, "the tradition of airport activity does not demonstrate that airports have been made available for speech activity," and further, that airport terminals "generally, have [not] been intentionally opened by their operators to such activity." *Id* at 680.

panhandling and charitable solicitation regulation is possible, so long as the regulation is not targeted at the speech itself.

However, an dimension of *Krishna* is Justice Kennedy's concurring opinion, in which challenged the majority's methodology, though still ultimately siding with its result.[37] Justice Kennedy argued that while airport terminals were not public forums, ultimately, the solicitation ban was a valid time, place, and manner restriction of free speech, because it was content-neutral and aimed at abusive practices, not the protected act of soliciting.[38] Justice Kennedy's concurrence, seemingly a footnote to the controlling opinion in *Krishna,* could actually provide a meaningful signpost for post-*Reed* interpretations of time, place, and manner panhandling/solicitation regulations. (See Part IV for a more in depth-discussion of Justice Kennedy's concurring opinion and its applicability)

In addition to the Supreme Court's decision in *Krishna*, there are several lower court decisions that prove illustrative of valid restrictions on panhandling via the time, place, and manner distinction. In *Smith v. Fort Lauderdale*, the Eleventh Circuit upheld a ban in Fort Lauderdale, Florida, that specifically targeted begging on its beaches, a thriving tourist destination.[39] Utilizing the time, place, and manner test, the court noted that the city of Fort Lauderdale had a significant interest in protecting its tourist business.[40] The city's restriction, only on the beach areas, left ample alternatives for solicitation, and did not burden "substantially more speech than is necessary to further the government's interest."[41]

Some earlier cases, such as *Seattle v Webster*,[42] upheld ordinances limiting activities by panhandlers that interfered with pedestrian traffic. This case upheld an ordinance which made it unlawful to intentionally obstruct pedestrian traffic against a challenge that it was unconstitutionally overbroad as sweeping within its prohibitions constitutionally protected activities, was unconstitutionally vague, and constituted an unreasonable exercise of police power.

Additionally, the Seventh Circuit, in *Gresham v. Peterson*, upheld an even more nuanced ordinance relating to the prohibition on panhandling.[43] The ordinance was crafted to define panhandling as involving an oral request for money, and instead of creating an outright ban, restricted panhandling from sunset to sunrise.[44] At all hours, individuals were allowed to passively sit or stand and carry signs that included written requests for money.[45] Further, panhandling acts taking places near bus stops, public transportation venues, near banks or ATMs, and near parked motor vehicles were banned.[46] Finally,

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[37] Specifically, Kennedy contested the Court's methodology which led them to determine that airports are not public forums: "the Court's error lies in its conclusion that the public forum status of public property depends on the government's defined purpose for the property, or on an explicit decision by the government to dedicate the property to expressive activity." *See Krishna*, 505 U.S. 672, 695 (1992).

[38] *See Krishna*, 505 U.S. 672, 693 (1992) ("The Port Authority's rule disallowing in-person solicitation of money for immediate payment, however, is in my view a narrow and valid regulation of time, place, and manner of protected speech in this forum, or else is a valid regulation of the nonspeech [*sic*] element of expressive conduct. I would sustain the Port Authority's ban on solicitation and receipt of funds.").

[39] Smith v. Fort Lauderdale, 177 F. 3d 954 (11th Cir. 1999).

[40] *Id.* at 956.

[41] *Id.*

[42] Seattle v. Webster, 802 P2d 1333 (WA 1990)

[43] Gresham v. Peterson, 225 F. 3d 899 (7th Cir. 2000).

[44] *Id.* at 902.

[45] *Gresham*, 225 F. 3d 899, 902 (7th Cir. 2000).

[46] *Id*.

particularly aggressive panhandling acts were defined in the ordinance,[47] and banned at all times.[48] The court held that the ordinance served a valid government interest (creating a non-threatening public environment), was narrowly tailored[49] to accomplish the interest, and thus was an acceptable time, place, and manner restriction.[50]

C. Aggressive Panhandling Ordinances

Aggressive panhandling ordinances are another method through which municipalities have attempted to regulate the negative aspects of panhandling. Aggressive panhandling ordinances vary across jurisdictions, but a common thread is that they, instead of outright banning panhandling, seek to curb behavior that is threatening and dangerous to other individuals in public areas.[51] The First Circuit considered one such ordinance in *Thayer v. City of Worcester*.[52] In *Thayer*, the First Circuit initially upheld an ordinance passed by the city of Worcester that banned forms of aggressive panhandling as well as panhandling in the middle of streets or on medians.[53] The city's aggressive panhandling ordinance was adopted out of concern that "'[p]ersons approached by individuals asking for money, objects or other things of any value are particularly vulnerable to real, apparent or perceived coercion when such request is accompanied by ... [certain forms of] aggressive behavior.'"[54] Former Supreme Court Justice David Souter, writing the opinion for the First Circuit, examining the regulations under a pre-*Reed* framework, found that the city's ordinances were content-neutral, because they were not intended to discriminate as to messages amongst panhandlers.[55] Thus, the ordinances were subjected to intermediate scrutiny.[56] However, the Supreme Court's holding in *Reed* dramatically altered the outcome in *Thayer*. (See Part IV, Section B for a discussion of *Thayer*'s ultimate outcome.)

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[47] The ordinance reads: "It shall be unlawful to engage in an act of panhandling in an aggressive manner. Including any of the following actions: (1) Touching the solicited person without the solicited person's consent; (2) Panhandling a person while such person is standing in line and waiting to be admitted to a commercial establishment; (3) blocking the path of a person being solicited, or the entrance to any building or vehicle; (4) following behind, ahead or alongside a person who walks away from the panhandler after being solicited; (5) Using profane or abusive language, either during the solicitation or following a refusal to make a donation, or making any statement, gesture, or other communication which would cause a reasonable person to be fearful or feel compelled; or (6)Panhandling in a group of two (2) or more persons." *Gresham*, 225 F. 3d 899, 902 (7th Cir. 2000).

[48] *Id.*

[49] The court noted that "under the ordinance, one could lawfully hold up a sign that says 'give me money' and sing 'I am cold and starving,' so long as one does not *voice words* to the effect of 'give me money.'" *Id* at 907.

[50] *Gresham*, 225 F. 3d 899, 906 (7th Cir. 2000) ("The city chose to restrict [panhandling] where it is considered especially unwanted or bothersome—at night, around banks and sidewalk cafes, and so forth . . . By limiting the ordinance's restrictions to only those certain times and places where citizens naturally would feel most insecure in their surroundings, the city has effectively narrowed the application of the law to what is necessary to promote its legitimate interest.").

[51] There is a lot of variation with these ordinance, with some denying actual violent conduct, while some take a very loose approach to "aggressive." *See* Lauriello, *supra* note 7, at 22.

[52] Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014).

[53] *Id.*

[54] *Id.* at *64-65.*

[55] *Id* at 71. ("The district court had a sufficient basis in text, common experience, and evidence of the City's intent to conclude that the ordinances were not designed to suppress messages expressed by panhandlers, Girl Scouts, the Salvation Army, campaigning politicians, or anyone else subject to restriction.").

[56] Thayer v. City of Worcester, 755 F.3d 60, 71 (1st Cir. 2014).

D. The Captive Audience Doctrine

Another important doctrine with regard to panhandling and solicitation regulation is the captive audience theory. The basic idea of the captive-audience doctrine is that the First Amendment protects both a right to speak and a right to listen. In most situations, such as in a public forum, the listener can simply walk away if they do not like what they are hearing. A captive-audience situation would be a circumstance where a listener is forced, through one manner or another, to listen to a speaker. For instance, In *Hill v. Colorado*,[57] the Court upheld a regulation designed to protect people from protestors near abortion clinics. The Court observed that there exists a compelling government interest in protecting a citizen going from their house to a health care facility from encountering a confrontational setting.[58]

However, a more recent Supreme Court may have placed doubt on the applicability of the Court's holding in *Hill*. In *McCullen v. Coakley*,[59] Chief Justice John Roberts actually discussed the captive audience theory as under the beneficial umbrella of the marketplace of ideas, rather than as a First Amendment issue.[60] With regard to captive-audience situations, the Chief Justice noted that, "a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose . . . this aspect of traditional public forums is a virtue, not a vice."[61] Thus, this holding seems to limit, or nullify the opinion in *Hill*, by suggesting that an individual subject to unwanted speech in a captive-audience situation might actually benefit from this situation, rather than being harmed by it.

The Court's somewhat contradictory rulings may present a murky picture regarding whether the captive-audience theory could work as a viable manner for crafting local ordinances. However, it is an important theory to highlight with regard to constructing effective panhandling or solicitation ordinances, especially in light of the rule in *Reed*, because might provide a method of balancing the competing interests of First Amendment protection of freedom of speech, while also protecting citizens from uncomfortable and potentially threatening situations.

III. *REED V. TOWN OF GILBERT*

The previous section explained that the protection of charitable solicitation was a settled area of First Amendment doctrine prior to *Reed*. While panhandling doctrine was not quite as clear-cut, there was a reasonable consensus among lower courts regarding its protection. Certainly, there was debate as to the extent to which jurisdictions could regulate panhandling and charitable solicitation, but the general consensus was the panhandling and solicitation were protected, with the understanding that governments could impose valid time, place, and manner restrictions on begging or solicitation. *Reed v. Town of Gilbert*, a case involving town signage, has created a good deal of uncertainty regarding the regulation of panhandling and solicitation going forward. This section, as briefly as possible, traces the background of *Reed*, its holding, and finally the concurring opinions that may shed light on its limitations.

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[57] 530 U.S. 703, 734 (2000).
[58] *Id.*
[59] 134 S. Ct. 2518 (2014).
[60] *See* Lauriello, *supra* note 7, at 13.
[61] McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014). *See also* Lauriello, *supra* note 7, at 13.

A. Background

Reed v. Town of Gilbert[62] dramatically altered the distinction between content-neutral and content-based laws, and has created wide-ranging consequences as a result. *Reed* involved an ordinance adopted by the town of Gilbert, Arizona creating a "comprehensive code governing the manner in which people may display outdoor signs."[63] The sign code created several sign categories constructed around the message(s) conveyed in the sign, and then created different restrictions for each category.[64] The Court singled out three particularly relevant sign categories: "Ideological Signs," "Political Signs," and "Temporary Directional Signs Relating to a Qualifying Event."[65] Ideological signs were treated most favorably and were allowed to be up to 20 square feet in area, and to be placed in all zoning districts without time limits.[66] Political signs were treated less favorably than ideological signs, and were allowed up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and rights-of-way; these signs were permitted to be displayed up to 60 days prior to a primary election, and up to 15 days following a general election.[67] Temporary directional signs were subjected to stricter restrictions than the other two categories; they could be no larger than 6 square feet, and were allowed to be displayed no more than 12 hours prior to the qualifying event, and no more than 1 hour afterward.[68]

"Temporary Directional Signs Relating to a Qualifying Event," were signs directing the public to a meeting or gathering of a nonprofit group.[69] A local Church, Good News Community Church, and its pastor, Clyde Reed, desired to promote the time and location of their Sunday church services.[70] However, the Church was a small entity lacking in funds for a building of its own, and was accustomed to holding services at locations in and around the town.[71] In order to alert its attendees of the location, Church members would place 15-20 temporary signs around the town, often in right-of-ways, and frequently kept the signs up from early on Saturdays to midday on Sunday.[72] The town became aware of this practice, and cited the Church twice for violating the code; Reed later contacted the sign code compliance office to reach an understanding, but was unable to do so.[73] Suit was then filed in the United States District Court for the District of Arizona, arguing that the sign code violated the Church's freedom of speech.[74] The District Court granted summary judgment, and the Court of Appeals for the Ninth Circuit affirmed.[75] The Supreme Court granted certiorari, and reversed the decision of the two lower courts.[76]

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[62] 135 S. Ct. 2218 (2015).
[63] Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2224 (2015).
[64] *Id.*
[65] *Id.* at 2224-2225.
[66] *Id.* at 2224.
[67] *Id.* at 2224-2225.
[68] *Id.* at 2224.
[69] *Id.*
[70] *Id.* at 2225.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.* at 2226.
[75] *Id.*
[76] *Id.*

B. The Holding

1. The Court's Analytical Framework

Justice Clarence Thomas, wrote an opinion joined by the Chief Justice, and Justices Scalia, Kennedy, Alito, and Sotomayor. Justice Alito wrote a concurring opinion joined by Justices Kennedy and Sotomayor. Justice Breyer wrote an opinion concurring in the judgment, while Justice Kagan wrote an opinion concurring in the judgment that was joined by Justices Breyer and Ginsberg. In short, although the Court reached a 9-0 vote to strike down the Gilbert, Arizona ordinance, its reasoning was remarkably splintered.

Justice Thomas began his analysis by stating that content-based laws are de-facto unconstitutional, unless the government can prove that they are narrowly tailored to serve a compelling state interest.[77] He then offered a new definition of "content-based" regulations that included situations in which "a law applies to particular speech because of the topic discussed or the idea or message expressed."[78] Stating that this approach relied upon a common-sense understanding, Justice Thomas wrote that courts were required to contemplate whether a regulation of speech "on its face" draws distinctions based on the message conveyed.[79] The Court noted that some facial distinctions based on a message are obvious (such as those addressing regulated speech in terms of its particular subject matter), while others are more subtle (addressing regulated speech with an eye to its function or purpose).[80] The Court held that both distinctions were to be assessed based upon information related to promulgation of the regulation, and concluded that both types were subject to strict scrutiny.[81] Justice Thomas accordingly stressed that some facially content-neutral regulations would be considered content-based regulations of speech (and subject to strict scrutiny) if they involved "laws that cannot be 'justified without reference to the other content of the regulated speech,'' or that were adopted by the government "because of disagreements with the message the speech conveys."[82]

2. Framework Applied

The principal opinion held that the Town of Gilbert's sign code was content-based on its face, because of the distinctions it made when defining the different sign categories.[83] In deciding the case, the Supreme Court rejected the lower court's reasoning that suggested the government did not regulate the sign based on a disagreement or that its regulations were not based on the communicative content of the sign.[84] Justice Thomas noted that "because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content-based, a court must evaluate

[77] *Id.*
[78] *Id.* at 2227.
[79] *Id.* at 2227
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* The ordinance defined temporary directional signs on the basis of whether a sign conveys the message of directing the public to church or another qualifying event; political signs were defined on the basis of whether a sign's message "designed to influence the outcome of an election; and ideological signs were defined based on whether a sign "communicates a message or idea" that do not fit within the Code's other categories. *Id.*
[84] *Id.*

each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny."[85]

The Thomas opinion additionally rejected the idea that "content-neutrality" is flexible, or that it is meant to be applied only to protect viewpoints and ideas from government censorship or favoritism.[86] Justice Thomas stated that it is "well established" that the First Amendment's opposition to content-regulation not only applies to the censoring of certain viewpoints, but also the prevention of public discussions on topics in their entirety.[87] He further noted that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."

One final area touched on by the principal opinion was the idea of speaker-based distinctions. Justice Thomas's opinion rejected the notion that the town sign code's distinctions were speaker based; in other words, they rejected the idea that the signs hinged on "the content-neutral elements of who is speaking through the sign and whether and when an event is occurring."[88] The principal opinion went further, saying that even if the sign code was speaker-based, this did not automatically render it content-neutral. Justice Thomas insisted that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content-preference."[89] Thus, they essentially held that laws distinguishing amongst speakers requires strict scrutiny, because the preference for certain speakers could bely a preference for certain content.

C. The Concurrences & Reed's Applicability Beyond Signs

*Reed'*s holding went far beyond the facts of the case in creating a broad rule of applicability that presumably implicates almost any municipal ordinance imaginable that regulates speech. Three concurring opinions were filed in *Reed* (two of them concurring in the judgment only as noted above). All of the concurrences appeared at least somewhat concerned with the widespread effects that the principal opinion could have on regulations.[90] The concurring opinions suggest that though there was a general agreement with the outcome of the case, there were deep divisions regarding the majority's analytical framework. Normally, concurring opinions might be treated as mere footnotes to a majority decision. However, with the recent passing of Justice Antonin Scalia, it is unclear if the Court will retain its stance. Thus, these concurrences may shed light on how the Court would treat future cases involving panhandling or solicitation regulation.

Justice Alito, joined by Justices Kennedy and Sotomayor filed a joint concurring opinion in which these three Justices sought to add qualifying language to the reasoning reflected in the principal opinion.[91] In Justice Alito's view, the content-based First Amendment classification system was important, and underscored Justice Thomas's reasoning, saying that "limiting speech based on its 'topic' or 'subject' . . . may interfere with democratic self-government and the search for truth."[92] Justice

[85] *Id* at 2228.
[86] *Id* at 2229.
[87] *Id.*
[88] *Id.* at 2230.
[89] *Id.*
[90] *Id* at 2239.
[91] *Id.* at 2233-34.
[92] *Id.*

Alito's opinion stressed the understanding of the three justices joining it that, notwithstanding language in the principal opinion, municipalities would not be "powerless" to enact and enforce reasonable sign regulations.[93] Justice Alito's concurring opinion mentioned a number of scenarios where he believed certain sign regulations would not be content based.[94] Perhaps most importantly, Justice Alito's concurrence did not suggest the application of Justice Thomas's reasoning in situations that do not involve rule signs.[95]

Justice Breyer filed his own separate opinion concurring only in the judgment and also joined Justice Kagan's separate opinion concurring only in the judgment.[96] Justice Breyer's opinion argued for more nuance regarding the content-based distinctions, and was troubled by the amount of weight that might be given labeling a regulation or law as content-based label.[97] Justice Breyer argued that instead of treating the content-based "category" as the definitive tool with which to parse through the constitutionality of laws, the category should be treated as a strong, but not determinative factor weighing against the constitutionality of a law.[98] Justice Breyer observed that a more precise method would be to weigh the damage being done to First Amendment principles versus the regulatory goals being accomplished.[99] According to Justice Breyer, his approach would require examination of "the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so."[100] Justice Breyer concluded his opinion concurring in the judgment by noting that, in his view, strict scrutiny was not warranted in *Reed*, because it involved no traditional public forum, nor any effort to censor a particular viewpoint, but the Town of Gilbert's regulations violated the First Amendment even using a less stringent standard.[101]

Finally, Justice Kagan, joined by Justices Ginsburg and Breyer, authored an opinion concurring only in the judgment. Justice Kagan, a noted First Amendment scholar prior to her appointment to the Supreme Court,[102] wrote that a large number of ordinances were adopted in "cities and towns across America" regulating sign posting, and exempting some entire categories based on their subject matter.[103] Justice Kagan noted that though the subject-matter distinctions in these ordinances was often entirely innocuous,[104] the laws would be subject to strict scrutiny under *Reed*'s bright line rule for content-

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[93] *Id.*
[94] *Id*. at 2233-34.
[95] *Id*.
[96] *Id* at 2234-39.
[97] *Id* at *2235.*
[98] *Id.* ("The better approach is to generally treat content-discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, not determinative legal tool, in an appropriate case, to determine the strength of a justification.").
[99] *Id* at 2236.
[100] *Id* at 2236.
[101] *Id* at 2236.
[102] For examples of her work, see Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. CHI. L. REV. at 413-517 (1996); Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29-77 (1992); Elena Kagan, *Regulation of Hate Speech and Pornography after R.A.V.*, 60 U. CHI. L. REV. 873-902 (1993).
[103] *Id.*
[104] *See id*. Kagan noted that "some municipalities generally prohibit illuminated signs in residential neighborhoods, but lift that ban for signs that identify the address of a home or the name of its owner or occupant." Another example she cited was that safety signs in some municipalities are allowed to be posted without a permit, though other signs require permits. Finally,

discrimination, and thus inevitably principal opinion's constitutional test.[105] Justice Kagan noted two prime reasons that the Supreme Court subjected content-based speech regulations to strict scrutiny: (1) to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," and (2) to ensure that the government has not regulated speech based on opposition or agreement towards the underlying message being espoused.[106] However, according the Justice Kagan's argument, most of the subject matter discrimination prevalent in sign codes do not raise those important concerns. Kagan noted that protection from subject-matter discrimination was meant to safeguard the public from the government's skewing the public's debate of ideas, but that the safeguard "need not last forever," and that it should be possible to "administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function."[107] Ultimately, Justice Kagan concluded that the Town of Gilbert's sign ordinance did not pass strict scrutiny, intermediate scrutiny, or even the "laugh test," and thus, there was no reason to "cast a constitutional pall on reasonable regulations quite unlike the law before us."[108]

Justice Kagan's concurring opinion would prove to be prophetic regarding the difficulty that municipalities and governments would incur when trying to pass benign legislation on a myriad of topics unrelated to signage. Panhandling and solicitation have been particularly affected, because of the First Amendment related protections afforded such activities. Perhaps the most important and controlling aspect of *Reed's* ruling and its applicability to panhandling or solicitation legislation is found in the text of the holding itself. *Reed's* central holding—the idea that "speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter"[109]—is the controlling factor, because even mentioning the subject matter means that, under *Reed*, the regulation is content-based, and thus subject to strict scrutiny. Seventh Circuit Judge Frank Easterbrook noted this as a vital consequence of the holding, saying that it "effectively abolishes any distinction between content regulation and subject-matter regulation."[110] Essentially, this means that by even touching the topic of panhandling or solicitation, ordinances are likely to invoke strict scrutiny from a court, and thus fail a constitutional test.

A broad interpretation of *Reed* would effectively disregard the idea of government suppression of certain messages as the problem and instead embrace a broader rule that treats all regulations as content-based just by singling out a subject or topic for regulation. In other words, reading *Reed's* rule broadly "divorces the content distinction from its intended purpose of ferreting out impermissible government motive."[111] Further, this rule is possibly broad enough to cover nearly all conceivably relevant regulations.[112] The provision that a regulation is found to be content based whenever it cannot be "justified without reference to the content of the regulated speech" could be read to include "any regulation that even incidentally distinguishes between activities or industries."[113] Thus, because of the

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Kagan noted that the federal Highway Beautification Act limits signs along interstate highways unless they direct travelers to notable locations, and also that, generally speaking, historical sign markers are exempt from regulations. *Id*.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.* at 2239.

[109] *Id.* at 2230.

[110] Noah Feldman, *Brother Can You Spare Me A Dime. Or Else*, BLOOMBERG VIEW (May 10, 2016, 3:09 PM), https://www.bloomberg.com/view/articles/2016-05-10/panhandling-isn-t-always-free-speech.

[111] *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1983 (2016)

[112] *Id.*

[113] *Id.*

elimination of the content-based distinction, many panhandling laws that would previously have been upheld as constitutional have been struck down. The next section explores competing interpretations of *Reed*, and the ability for local governments to create effective panhandling and solicitation ordinances in light of *Reed's* holding.

IV. Competing Interpretations of *Reed*

While *Reed*'s facts involve signs, which are fundamentally different than begging or verbal requests for donation, the broad nature of its ruling appears to render it applicable to a variety of different subjects that raise First Amendment concerns, including panhandling and charitable[114] solicitation. Additionally, the Supreme Court has, in no uncertain terms, professed the decision's apparent applicability given a remand to the First Circuit to reconsider a panhandling ordinance in the *Thayer* case in light of *Reed*. Further, various other lower courts have reconsidered their positions after *Reed*, even when not told explicitly by the Supreme Court to do so. Despite *Reed*'s seeming applicability to regulations of panhandling and solicitation, this section argues that the courts may be construing *Reed* to broadly, especially in the aftermath of Justice Scalia's death. Additionally, this part of the paper suggests that there are two likely paths forward for towns aiming to craft effective panhandling legislation. Towns might argue that (1) aggressive panhandling is distinct from regular panhandling, and should be treated more as conduct than as constitutionally protected speech; and that (2) appropriate time, place, and manner restrictions remain unaffected by *Reed*'s holding, and still provide meaningful regulatory strategies. This section proceeds by discussing the general response to *Reed* by courts, before turning to the applicability of time, place, and manner restrictions. It concludes by touching once again on the captive audience doctrine.

A. Panhandling and Solicitation Regulation After Reed – General Response

1. Broad Bans and the Lower Court Trend

The majority view towards *Reed* is that though it endangered virtually all panhandling or solicitation regulation, blanket bans are likely the most vulnerable. Asking for money is a form of speech, even if it contains elements of conduct. As a Columbia Law Review article puts it, "it would be impossible to know if a solicitation took place or was immediate without determining the content of the solicitation."[115] For instance, banning panhandling would require an inquiry to determine "whether the panhandler simply said, 'Good morning,' or, 'Good morning, can you spare some change?'"[116] As Justice Thomas said in *Reed*: "speech regulation targeted at specific subject matter is content-based even

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[114] Commercial and charitable solicitation are distinct entities, and *Reed* did not mention commercial solicitation in its holding. In light of this silence, lower courts have upheld various laws where solicitations, in a purely commercial context, have been banned. One quite recent example is *Vivint La., LLC v. City of Shreveport*, a case in the United States Court for the Western District of Louisiana. In *Vivint*, an ordinance was passed that banned door to door solicitation for goods: "It shall be unlawful for any solicitor, peddler, hawker, itinerant merchant or transient vendor of merchandise to go in and upon an private residence in the city, not having been requested or invited to do so by the owner or occupant of such residence, for the purpose of soliciting orders for the sale of goods, wares and merchandise, or for the purpose of disposing of or peddling or hawking such goods, wares and merchandise." *See Vivint La., LLC v. City of Shreveport*, CIVIL ACTION NO. 15-0821 (W.D. La. Sep. 30, 2016). The district court upheld the ban, stating that the city of Louisiana had a substantial interest in regulating commercial speech to protect the privacy of individuals in their own homes. *Id*. Thus, pure commercial solicitation is likely unaffected by *Reed*.

[115] *See* Lauriello, *supra* note 7, at 31.

[116] *Id.*

if it does not discriminate among viewpoints within that subject matter."[117] Additionally, even if a court viewed a blanket ban as content-neutral, it would most likely fail intermediate scrutiny as over-inclusive because it would not be reasonably tailored to the problem at hand.[118]

Various lower courts have interpreted *Reed*'s virtual elimination of traditional content-based distinctions as leaving little room for the creation of constitutionally valid panhandling and solicitation ordinances. One prime example is *Norton v. City of Springfield*,[119] a case that began its process prior to *Reed*, and eventually had to be reconsidered in light of *Reed's* holding. In *Norton*, the City of Springfield, Illinois passed an ordinance defining panhandling as "an oral request for an immediate donation for money," and banned the act in its downtown historic area.[120] However, signs requesting money were allowed, as well as vocal requests for money to be sent later.[121] The Springfield's ordinance reflected the view that requests for money to be given instantly, particularly at night, or where there are no other bystanders in the immediate area, could be found threatening to individuals going about their business, and thus singled these forms of panhandling out for regulation.[122]

The plaintiffs in Springfield argued that the rule barring oral requests for immediate money, but allowing requests for money to be paid at a later date was a form of content discrimination.[123] The Seventh Circuit, in its initial opinion, disagreed, and upheld the town's ordinance. The Seventh Circuit focused on the idea that the ordinance violated neither of the Supreme Court's two traditional content-based classifications: (1) regulation restricting speech based on the content it conveys; or (2) regulation that restricts speech because the government disapproves of its message.[124] The Seventh Circuit reasoned that the regulation was "indifferent to the solicitor's stated reason for seeking money, or whether the requester states any reason at all," explaining that the an immediate request for money did not encompass any political idea, nor did it regulate a certain type of request for money.[125]

Upon rehearing in light of *Reed*, however, the Seventh Circuit was forced to reconsider its previous approach. The court, in an opinion by Judge Easterbrook, applying the Supreme Court's holding in *Reed* that speech regulation aimed at a specific topic is content-based, even if does not distinguish among viewpoints within that subject matter, and found that because Springfield's ordinance regulated panhandling on its face, it was content-based discrimination and thus failed to pass strict scrutiny for lack of justification.[126] On February 29, 2016, the Supreme Court denied the City of Springfield's petition for certiorari, thus tacitly approving of *Reed's* applicability to the panhandling ordinance in *Norton*.[127]

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[117] Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2230 (2015) (internal citations omitted).
[118] *See* Lauriello, *supra* note 7, at 32.
[119] 768 F.3d 713 (7th Cir. 2014).
[120] Norton v. City of Springfield, Ill., 768 F.3d 713, 714 (7th Cir. 2014).
[121] *Id.*
[122] *Id.*
[123] *Id*.
[124] *Id.* at 717.
[125] *Id.* ("Springfield's ordinance does not regulate speech by the pitch used; it does not say, for example, that 'give me money because I'm homeless' or 'give me money because I support the governor' is permissible, while 'give me money because my daughter is sick' or 'give me money because the distribution of income is inequitable' is forbidden.").
[126] *See* Norton v. City of Springfield, Ill., 806 F.3d 411, 413 (7th Cir. 2015).
[127] City of Springfield, Ill. v. Norton, 136 S. Ct. 1173, 194 L. Ed. 2d 178 (2016)

2. Aggressive Panhandling as Just Speech: Are the Courts Correct?

One of the interesting aspects of panhandling and solicitation ordinances post *Reed* is that courts have focused primarily on the speech aspect of panhandling, and have not probed whether a different approach may be needed where both speech and conduct is involved. This distinction would seem to be particularly important when consideration regulation of "aggressive panhandling," often distinguished from "passive panhandling" involving only vocal requests alone or holding up signs. "Aggressive panhandling" ordinances typically prohibit panhandling in groups, voicing threats, pursuing a potential donor who has declined, making physical contact, approaching someone in a constrained space, and so on.

The prototypical Supreme Court case involving "speech plus conduct" is *United States v. O'Brien*. [128] *O'Brien* involved a criminal prosecution for burning a draft card during the volatile years of the Vietnam War, after Congress in 1965 had prohibited willful destruction of draft cards. The Court recognized that O'Brien's actions (burning the draft card) served as a reflection of his views on the war and on the military draft, but concluded that the case did not only relate to speech and the relevant draft regulations regulated expressive conduct rather than speech as such. In reaching its decision that O'Brien could be prosecuted, the Court considered whether the obligation to maintain an intact draft card was intended as a means of punishing speech with which the government disagreed, or whether the regulation should be assessed under a more complex standard. Writing for the Court, Chief Justice Warren held that, when a law or regulation limits this sort of hybrid of speech and conduct, it needed to be justified under the following test: There must be a sufficiently important governmental interest in regulating the non-speech element so as to justify incidental limitations on freedoms protected by the First Amendment, the regulation must be within the constitutional power of the government to enact, the regulation must further an important or substantial government interest, that interest must be unrelated to the suppression of speech (or "content neutral"), and no more speech can be prohibited than is essential to override the government interest.[129]

It would seem that "aggressive panhandling" should properly be considered under this standard, rather than under *Reed*, at least where ordinances defining and regulating "aggressive panhandling" actually define conduct in a way that relates to important governmental interests. Case law prior to *Reed* (such as the *Lopez* and *Young* cases discussed earlier) considered O'Brien as part of the analysis. Since Reed, however, the case law to date has not grappled with this distinction, however.

Thayer v. City of Worcester is a prime example of this trend. The First Circuit's opinion in *Thayer* initially upheld the City of Worcester's panhandling ordinance.[130] However, a writ of certiorari was granted by the Supreme Court, and the Court vacated the First Circuit's ruling and remanded the case to the appeals court, expressly requiring the circuit to reconsider the case in light of the *Reed* holding.[131] On remand, the Massachusetts federal district court applied *Reed* quite stringently. [132] The Worcester ordinance in question included extensive limitations, including those that prohibited "aggressive panhandling," restricted use of traffic islands, and soliciting any person in public after dark.

[128] 391 U.S. 367 (1968).

[129] Id at 376-77.

[130] 755 F.3d 60 (1st Cir. 2014),

[131] Thayer v. City of Worcester, Mass., 135 S. Ct. 2887, 192 L. Ed. 2d 918 (2015) (remanding).

[132] 144 F.Supp.3d 218 (D. MA 2015).

The court took careful note of Massachusetts statutes that themselves prohibited assault and battery, accosting a vehicle's inhabitants for purposes of solicitation, and obstructing streets and sidewalks. The district court concluded that the prohibition on aggressive panhandling was content-neutral on its face and had as its purpose attention to public safety concerns. The court then reviewed provisions to determine whether they were narrowly tailored to serve legitimate content-neutral government interests albeit not necessarily by the least restrictive means, and concluded that the ordinance sought to address concerns for public safety and welfare. However, the court found the prohibition on nighttime solicitation was overbroad, and viewed provisions regarding aggressive panhandling as "content-based," where, in the court's view the kind of conduct addressed could have been adequately addressed under state criminal law. The broad ban on solicitation and other activities on traffic medians throughout the jurisdiction was overbroad and lacked adequate supporting evidence.

This subsequent district court decision in *Thayer* is among the most limiting to date involving regulation of panhandling and solicitation by local governments in the aftermath of *Reed.* The court's view that conduct that was criminalized by state statute could not be treated as part of a panhandling ordinance seems artificial and exceptional. It may be, however, that the broad range of prohibitions (no nighttime solicitation, no panhandling on traffic islands) suggested that the point of the ordinance was to criminalize homelessness and panhandling excessively so that its purpose was in fact to penalize panhandling (thus falling under the "purpose" strand of Justice Thomas's *Reed* analysis).

It may also be that the First Circuit and its district courts by coincidence ended up addressing a number of problematic, over-broad panhandling ordinances and thus began a strand of jurisprudence that might not be accepted elsewhere. For example in *Cutting v. City of Portland, Maine*,[133] the First Circuit considered a Portland, Maine ordinance that made all median strips in the city off-limits to sitting, standing, staying, parking or driving. The court concluded that median strips constituted traditional public forums, so a high standard of review was justified. Although enforcement of the ordinance was directed at panhandling, it was not narrowly tailored given its application not only to 8 inch medians but to broader medians. Strikingly, the court found that *Reed* was inapplicable where the ordinance on its face was content-neutral, notwithstanding the city's informal interpretation that allowed placement of campaign signs on medians. The court concluded that alternative sites for panhandling such as sidewalks were not sufficient to offset the wholesale ban on median activities. It carefully considered the city's public safety justification but concluded that public safety concerns were not supported by evidence where medians throughout the city had different characteristics and where the city did not produce evidence of those on medians moving off medians into streets. The ordinance accordingly failed the "narrow tailoring requirement" and also failed the requirement that no less restrictive means of controlling danger (such as limiting certain medians from panhandling or other activities) would suffice.

One further district court decision from the First Circuit bears mentioning. In *McLaughlin v. Lowell*,[134] the District Court for the District of Massachusetts struck down elements of the local panhandling ordinance that banned "vocal" panhandling in the downtown area (regarding that prohibition as content-based and lacking in justification) and "aggressive" panhandling including panhandling in groups of two or more elsewhere in city (citing the *Cutting* and *Thayer* decisions). The court noted that the city's "definition of panhandling targets a particular form of expressive speech—the solicitation of immediate charitable donations—and applies its regulatory scheme only to that subject

133 802 F.3d 79 (1st Cir. 2015).
134 McLaughlin v. City of Lowell, 140 F. Supp. 3d 177 (D. Mass. 2015).

matter."[135] Thus, the court subjected the ordinance to strict scrutiny, which it duly failed for not having the requisite narrow tailoring.[136]

Despite the reasoning in these various lower court opinions, as noted at the outset of this section, there is another viable way for courts to consider aggressive panhandling ordinance that would allow for a more favorable outcome for municipalities: treat aggressive panhandling acts as conduct. On a fundamental level, the treatment of aggressive panhandling as conduct makes sense: what is being banned is not any form of political speech or request, it is the aggressive act or acts that infringe upon other people's ability to go about their day unobstructed. As noted earlier, the Supreme Court has never actually considered whether or to what extent panhandling alone is constitutionally protected. While regular panhandling would almost certainly fall under the *Schaumburg* penumbra, it does seem a bit of a stretch to include violent or imprudently persistent acts as the constitutional equivalent of the charitable solicitations considered in *Schaumburg* and other like cases.

Harvard Professor Noah Feldman, who specializes in constitutional and First Amendment law, supports this proposition.[137] Professor Feldman has argued that *Reed* might not have the wide-ranging applicability that most courts have so far assumed. As Professor Feldman puts it, "the *Reed* decision wasn't intended to stop the government from outlawing a course of conduct that is put into action through words. The facts in the *Reed* case had nothing to do with conduct. The sign ordinance that the court struck down simply treated different temporary signs differently based on what they said." He further argues that blackmail and harassment are courses of conduct that the government can regulate, and that regulations of these activities are not intended to "curb speech;" rather, they are attempting to stop harmful conduct from occurring, and in the process, are incidentally suppressing some amount of speech.[138] Professor Feldman argues that aggressive panhandling is more akin to the some of the courses of conduct that governments are allowed to ban, rather than the speech protected by *Schaumburg*.

Taking Professor Feldman's argument one step further, it may be possible that aggressive panhandling, if treated as conduct, might not even trigger strict scrutiny, because the aggressive or violent conduct is the target, not the speech. In First Amendment jurisprudence, laws that are primarily targeted towards conduct, but incidentally burden speech in the process, are subject to intermediate scrutiny.[139] Further, there is actually some precedent for treating begging or the solicitation of donations as conduct: Justice Kennedy's concurring opinion in *Krishna*. In *Krishna*, he noted that the direct soliciting of funds was a "nonspeech [*sic*] element of expressive conduct," and thus subject to intermediate scrutiny.[140] This concurring opinion is admittedly not controlling; however, it speaks to the

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[135] *Id.* at 185.
[136] *Id.* at 185.
[137] Noah Feldman, *Brother Can You Spare Me A Dime. Or Else*, BLOOMBERG VIEW (May 10, 2016, 3:09 PM), https://www.bloomberg.com/view/articles/2016-05-10/panhandling-isn-t-always-free-speech. See also Enrique Armijo, *Reed v. Town of Gilbert: Relax, Everybody*, 58 B.C. L. Rev. 65 (2017) (arguing that *Reed* only stands for proposition that ordinance that on its face targets particular speech or has the purpose of targeting such speech must withstand a higher level of scrutiny).
[138] Noah Feldman, *Brother Can You Spare Me A Dime. Or Else*, BLOOMBERG VIEW (May 10, 2016, 3:09 PM), https://www.bloomberg.com/view/articles/2016-05-10/panhandling-isn-t-always-free-speech.
[139] As previously discussed, *see* United States v. O'Brien, 391 U.S. 367 (1968). In *O'Brien*, the Supreme Court upheld a ban on the burning of draft cards in the Vietnam era; the Court held that while the burning of cards was a political message, the true target of the law was conduct. *Id* at 377.
[140] Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 703 (1992).

notion that there may be more to the legality of panhandling and solicitation ordinances than is commonly understood, especially post-*Reed*.

Practically speaking, the conceptual argument that aggressive panhandling should be treated as "speech plus conduct" rather than "speech alone" may mean little in the way of a proactive legal strategy for municipalities. They still must craft ordinances and wait for law suits in order to defend those ordinances as valid. However, municipalities could carefully frame ordinances in such a way that they specifically target problematic and violent conduct (as opposed to some of the broader aggressive panhandling ordinance discussed in Part II), and hold the conduct argument in their back pocket for legal defenses. The reality is that local communities cannot sit idly by and wring their hands in despair as a result of *Reed*. Local governments need to continually craft ordinances that probe *Reed* in attempts to find meaningful limits or viable paths for constitutionally valid regulations. The treatment of aggressive panhandling as conduct is one theoretical concept that these governments can use to find such limits or paths. Even if the argument that aggressive panhandling would not trigger strict scrutiny is without merit because properly drafted "aggressive panhandling" ordinances should address "speech plus conduct," ordinances that are carefully constructed to only target legitimately harmful behavior may pass strict scrutiny, because they narrowly target behavior averse to human safety, a fundamentally justifiable government interest

B. Time, Place, and Manner Restrictions and their Role Post-Reed

There have been a number of federal district court cases involving local governments' attempts to create time, place, and manner regulations on panhandling, and almost all of them have failed judicial review. However, this section argues that courts may be reading the content-discrimination ruling in *Reed* too strictly, or that narrowly crafted approaches might survive review.

Examples of "time" restrictions include prohibition on panhandling or solicitation at any time during nighttime hours (typically from 30 minutes after sunset to 30 minutes before sunrise). "Place" restrictions have tended to target areas where prospective donees may feel particularly vulnerable and potentially feel coerced (such as locations close to ATM machines, or in sidewalk cafes), areas that may be crowded (such as historic districts or downtown commercial districts), or areas where public safety concerns may be particularly notable (need to maintain pedestrian access on sidewalks and avoid congestion and accidents related to activities on traffic medians).

One of the most perplexing questions created by Reed is the fate of the "time, place, and manner" category of First Amendment regulations. The notion of "time, place, and manner" regulations arises in a very specific context: when use of a "public forum" is at issue (an area historically and presumptively entitled to be available for speech by members of the public), but there are strong, content-neutral reasons to the government to manage its use for the benefit of all (typically by using regulations of when, where, and how activities can take place in such forums). Traditionally, where public forums are involved, and the government does not seek to regulate the content of speech (so the context is one of content-neutrality), the government can nonetheless impose "time, place, and manner" restrictions so long as they pass a heightened level of scrutiny in which the government demonstrates a significant government interest, narrowly tailored to meet

that interest, and preserves ample remaining *alternative channels for communication.*[141] Insofar as panhandling and solicitation are concerned, traditional regulatory actions are directly tied to management of time, place, and manner of solicitation in some locales while leaving others more open as alternative channels for communication.

A clear pre-*Reed* example of time, place and manner regulation of public forums is provided by *Gresham v. Peterson*,[142] a Seventh Circuit decision regarding an Indianapolis ordinance decided in 2000. The Indianapolis ordinance had a broad reach, prohibiting panhandling or other charitable solicitation upon any street, place or park where a person requested immediate donation of money or other gratuity, other than passively standing or sitting with a sign without a vocal request. The ordinance also prohibited panhandling after sunset or before sunrise, panhandling where the panhandler or person solicited was situated at a bus stop or public transportation facility, at a parked or stopped vehicle, in a sidewalk café, or within 20 feet of an ATM or bank entrance. It also prohibited "aggressive panhandling" including panhandling in groups of two or more, and imposed a hefty fine of $2500 per incident. The Seventh Circuit applied the traditional "public forum/time, place, and manner" tests and considered whether the ordinance was narrowly tailored to achieve important government objectives and whether adequate channels of communication were preserved. The court found that the city could reasonably conclude that vocal and aggressive panhandling, panhandling at night or near ATMs could give rise to intimidation and threaten by citizens; and determined that ordinance preserved adequate channels of communication for panhandling both during the day and at night.

Unfortunately, if *Reed* is interpreted to make nearly all forms of regulation appear to be "content-based," courts may never get to appropriate consideration of the "public forum" framework discussed in *Gresham,* which in many respects is the one that should typically apply (at least if there is no over targeting of regulations to deliberately deter panhandling in comparison to other types of Free Speech activity. If Reed is given a sweeping application at the initial point of classification, regulation of panhandling would then be subject to "strict scrutiny" (a somewhat more exacting standard than that application to time, place and manner regulations). *Reed* itself invokes a "strict scrutiny" test for sign regulations when it treats them as *content-based* (whether facially content-based or with a purpose that is content-based); and under that standard, certain sign regulations presumptively unconstitutional unless the government can show that it is *necessary* to achieve a *compelling government interest* while using *the least restrictive means*. Obviously, the *Reed* standard is intended to be a more stringent one, even if not necessarily a fatal one (as is more common when strict scrutiny is used to address race-based equal protection problems). Yet, it can be very difficult to distinguish between "significant" and "compelling" government concerns (are traffic safety and aesthetic concerns merely "significant" but not "compelling"?) and even harder to determine whether a particular regulatory strategy is not only "well-tailored" but also "least restrictive." While Justice Thomas references the traditional cases and tests for "time, place, and manner" regulations as part of his *Reed* discussion,[143] he does not really grapple with tensions that arise when "public forum" analysis is obviously called for (as with many panhandling regulations) and his blurring of content-neutral and content-based classification at the outset makes it harder to bring the appropriate analytical framework into play.

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[141] See McCullen v. Coakley, 134 S.Ct. 2518 (2014) (addressing buffer zones on sidewalks that are public forums, where the zones were applicable to abortion clinics); Ward. v. Rock Against Racism, discussed at note 24, (relating to sound regulations applicable in Central Park (another traditional public forum).

[142] 225 F.3d 899 (7th Cir. 2000)

[143] See note 24 and associated text *supra*.

Although there have been a number of cases since *Reed* that address situations involving public forums (particularly sidewalks and access to traffic island medians within highways), there has not been a great deal of in-depth analysis of the question just posed. Instead, it appears that many municipalities have in fact moved to regulate panhandling in traffic medians but have done so in a blunderbuss fashion, prohibiting panhandling in such areas throughout their jurisdictions, often without addressing why panhandling should be prohibited, but firefighters "Fill the Boot" charitable campaigns or electioneering activities should be allowed in the self-same locations. These ill-conceived strategies have (not surprisingly) resulted in losses in court. Going forward, however, local governments should recognize that panhandling and solicitation ordinances addressing activities in public forums can potentially be salvaged if adequate evidence is provided of real problems is adduced and legitimate time, place, and manner regulations can be crafted to meet their concerns in settings such as these.

A brief review of post-*Reed* decisions reveals both the short-comings of blunderbuss strategies and the potential for sustaining more targeted regulation of panhandling using well-tailored time, place, and manner regulations provided that adequate analysis, justifications, and evidence are employed.

In *Browne v. City of Grand Junction*,[144] the federal district court addressed Grand Junction, Colorado ordinances that banned panhandling in the following regards:

- Panhandling was limited within 30 minutes after sunset and 30 minutes before sunrise;
- Panhandling was prohibited when the panhandler knowingly continued to request the person solicited for money or other thing of value after the person solicited has refused the panhandler's initial request;
- Panhandling was conducted within twenty (20) feet of an automatic teller machine (ATM) or of a bus stop;
- Panhandling was conducted in a public parking garage, parking lot or other parking facility;
- Panhandling was directed toward a person within the patio or sidewalk serving area of a retail business establishment that serves food and/or drink, or waiting in line to enter a building, an event, a retail business establishment, or a theater.[145]

The ordinance defined panhandling to mean "knowingly approach, accost or stop another person in a public place and solicit that person without that person's consent, whether by spoken words, bodily gestures, written signs or other means, for money, employment or other thing of value."[146] Using the *Reed* analysis, as well as the decisions in *Thayer* and *Norton*,[147] the Colorado federal district court ruled that the ordinance was content-based, and thus subject to strict scrutiny.[148] The court's conclusion offers some bottom-line guidance: "the problem in this case is that Grand Junction has taken a sledgehammer to a problem that can and should be solved with a scalpel."[149] Indeed, it is striking that the plaintiffs did not challenge prohibitions on aggressive panhandling that involved threatening behavior, of the sort

[144] 136 F.Supp.3d 1276 (D. CO 2015).
[145] *Id.* at 1281.
[146] *Id.* 1297.
[147] The court noted that, "Although only persuasive, the Court believes that the outcomes in *Thayer* and *Norton* provide yet additional support for the correctness of its prior conclusion that Ordinance No. 4627 is a content-based speech restriction." *Id.* at 1291.
[148] *Id.* at 1291-94.
[149] *Id*. at 1294.

discussed in the section just above, and that portion of the ordinance was upheld. The structure and definitional approaches used in the ordinance made it difficult for the court to view the overall approach as other than an effort to limit panhandling writ large.

Another federal district court case involving a city's attempt to create time, place, and manner restrictions is *Homeless Helping Homeless, Inc. v. City of Tampa, Florida*.[150] In Homeless Helping Homeless, the city of Tampa created an ordinance that banned aggressive requests for money, persistently requesting money even after being denied, and impeding the "free movement of the solicited person."[151] This aspect of the ordinance (addressing aggressive panhandling) was not challenged. In addition, however, the ordinance limited panhandling in certain zones, including a particular downtown area, sidewalk cafes, and near ATMs or bank entrances, but carefully defined these constraints as not applying when panhandlers used only signs to convey their message.[152] Resigned to invoking *Reed*,[153] the district court refuted the idea that the ordinance was content neutral, because it drew distinctions based on the expressed message of individuals.[154] In other words, the law punished those who asked for donations or payment, but was silent on all other forms of communication. Thus, this distinction, according to the judge, required strict scrutiny in keeping with the ruling in *Reed*.[155] Because of the stringent standards associated with strict scrutiny, and the city's admission that its ordinance was not the least restrictive means of advancing its interest, Judge Merryday was forced to strike the ordinance.[156] Although Judge Merryday eventually (and begrudgingly) invoking *Reed* in his ruling, he spoke to the troubling nature of *Reed*, observing that:

> *Reed v. Town of Gilbert*, an opinion accompanied by three distinct concurring opinions joined by a total of seven justices and an opinion adjudicating a sign-ordinance dispute, appears to govern this action. In other words, an opinion that resolves a dispute about parishioners temporarily planting some small signs directing people to a church service is written in such sweeping terms that the opinion appears to govern a dispute about an ordinance that regulates face-to-face demands for money from casual passers-by.[157]

Judge Merryday's statement underscores the problems inherent in reading *Reed* so broadly. Apparently the City of Tampa also read *Reed* quite broadly since it conceded that it had no compelling governmental interest to support the limitations on locations for panhandling involving active speech (rather than just holding up signs), and that least restrictive means had not been used, even though another jurisdiction might have taken a different stance on that point. *Reed*'s framework appears to

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[150] No. 8:15-CV-1219-T-23AAS, 2016 WL 4162882 (M.D. Fla. Aug. 5, 2016)
[151] *Id.* at 2 (M.D. Fla. Aug. 5, 2016).
[152] *Id.*
[153] The district court judge, Steven D. Merryday, suggested in his opinion that though he was bound by Reed, he did not agree with its holding: "[w]ithout *Reed*, which governs for the moment (despite prominently featuring the badges of a transient reign), I would follow Judge Easterbrook in *Norton v. City of Springfield*, and similar decisions, and I would uphold the City's ordinance, which results from a constructive and demonstrably benign legislative attempt to manage fairly and humanely a tangible and persistent problem in a manner narrowly and artfully tailored to fit the compelling facts in the affected community. Homeless Helping Homeless, Inc. v. City of Tampa, Florida, No. 8:15-CV-1219-T-23AAS, 2016 WL 4162882 at 2 (M.D. Fla. Aug. 5, 2016).
[154] *Id.*
[155] *Homeless Helping Homeless, Inc. v. City of Tampa, Florida*, 2016 WL 4162882 (M.D. FL. Aug. 5, 2016)
[156] *Id.*
[157] *Id.* at 2.

invite strict scrutiny for nearly every ordinance involving any sort of regulation of message or expression, simply by the ordinance having broached the subject matter in its text.

Two recent post-*Reed* state supreme court decisions are also noteworthy for the possibilities they reveal, if not for the results that they achieve.[158] In *City of Lakewood, Utah v. Willis*,[159] the Utah Supreme Court considered a City of Lakewood ordinance that prohibited panhandling near or on major roadways within the community (including at on- and off-ramps connecting city roadways or overpasses with state intersections, and at intersections of major arterials or islands on principal arterials). The court concluded that these seeming "place" restrictions could not be upheld because the prohibitions in question only targeted panhandlers and solicitors seeking to obtain "money or goods as a charity" and not solicitation more generally (for example of votes or customers). Even more recently the Kentucky Supreme Court, in the as yet unreported decision in *Champion v. Commonwealth,*[160] considered a Lexington-Fayette Urban County ordinance prohibiting all "begging and solicitation of alms" on public streets and intersections throughout county (imposing penalties up to $100 per incident or jail time of 10-30 days for violations). The court held the ordinance invalid following *Reed*, after concluding that whether the regulation was facially content-based on content-neutral but intended to limit panhandling communication. Applying strict scrutiny, the court concluded that the ordinance only targeted panhandling rather than other types of messages, failed adequately to justify its broad application on grounds of public safety and efficient traffic management, and was both over- and under-inclusive insofar as it regulated all roadways and intersections while failing to address other types of activities (such as electioneering) that could disrupt traffic and raise safety issues. [161]

In striking contrast to the above cases that address ordinances that comprehensively try to limit panhandling generally, it is worth considering a recent Seventh Circuit decision involving Wrigley Field in Chicago. In *Left Field Media, LLC v. City of Chicago*,[162] the court upheld a Chicago ordinance that prohibited peddling on sidewalks adjacent to Wrigley Field, where the relevant area for pedestrian passage was especially narrow and crowds would otherwise spill into the street. The court concluded that there was a clear rational basis for the ordinance, and judged that *Reed* was not applicable where no distinction had been made based on content of speech.

What, then, are the overall lessons to be learned about how municipalities might address panhandling within the framework of permissible time, place, and manner regulations for public

[158] See also Clatterbuck v. City of Charlottesville, 92 F.Supp.3d 478 (W.D. VA 2015) (in case challenging criminalization of panhandling (where ordinance prohibited panhandling on two streets intersecting downtown mall, and created 50 foot panhandling buffer zone), concluding that requisite evidence was missing to support connection between ordinance provisions and demonstrable problems, where evidence did not support claims of driver distraction or danger; and citing *McCullen v. McCloskey*, 134 S.Ct. 2518 (2014) in support of conclusion, in decision rendered pre- *Reed*).

[159] 375 P.3d 1056 (UT 2016) (en banc)

[160] 2017 WL 636420 (KY, 2017).

[161] Compare Watkins v. City of Arlington, 123 F.Supp.3d 856 (N.D. TX 2015) (city ordinance prohibited solicitation or sale/distribution of any material to the occupant of any motor vehicle stopped on a public roadway in obedience to a traffic control sign light by someone on a public roadway, but allowing such conduct by someone not in the roadway itself or on medians or islands; court concluded that state statute allowing firefighters to solicit contributions for charity while standing in roadway was permissible and not susceptible to narrowing construction; ordinance was content-neutral and was narrowly tailored to protect significant governmental interests in pedestrian and traffic safety and adequate alternative channels of communication remained available). This decision seems questionable based on other courts' analysis.

[162] 822 F.3d 988 (7th Cir. 2016)

forums? It is worth considering the pre-*Reed Gresham* decision as an initial framework. Under *Gresham,* (1) the focus was on curbing the negative effects of panhandling and solicitation rather than trying to shut down panhandling speech altogether. *Gresham* also (2) provided a clear definition of panhandling (vocal requests for money), (3) targeted abusive panhandling actions (not just speech) as ones to be prohibited, (4) restricted panhandling in only those areas that would harm or impede individuals from going about their business, (5) allowed all forms of panhandling (including vocal requests, but not including violent or aggressive acts) for all daylight hours, but restricted such actions from sunset to sunrise; and (6) allowed for beggars to make non-vocal requests for money (e.g. holding signs with a request for money) and sit or stand at times, so long as they do not vocally request money.[163]

The ordinance in *Gresham* is distinct from that in *Browne*, because its definition is less broad, and finely balances the needs and concerns of charitable solicitors, panhandlers and those experiencing homelessness by granting all of them significant time periods to solicit and request donations, while also allowing municipalities to grapple with ways to ensure safe and unobstructed public areas. The shortcomings identified in later cases must also be carefully considered. The later cases appear to have targeted all panhandling more aggressively, reflecting social discomfort with having to encounter those in poverty face-to-face. While recent ordinances seem to have continued to focus on aggressive panhandling as a central concern, they have often created definitions of panhandling that blur definitions of the kind of activities regulated and where and how those activities can be conducted. By trying to do all that they can to eliminate panhandling from their jurisdictions, municipalities likely will continue to lose in court and may miss a chance to develop fairer and more balanced approaches to dealing with homelessness and poverty within their populations.

Reed certainly seems a formidable stumbling block to panhandling and solicitation ordinances, especially with regard to the use of time, place, and manner restrictions. However, though *Reed* was seemingly decided unanimously, there are deep divisions in methodology underlying the decision. Time, place, and manner restrictions had historically been a major aspect of First Amendment doctrine. Despite *Reed*'s apparently far-reaching consequences, the historical applicability of time, place, and manner restrictions, Justice Scalia's passing, the sheer number of justices adding qualifying language through concurrences in *Reed*, and Justices Kennedy's previous writings all suggest that there may still be a place for panhandling and solicitation ordinances using the time, place, and manner doctrine, provided adequate attention is given to developing clear justifications and adequate evidence to support government concerns and actions.

C. Captive Audience and Its Applicability

Another possible, though admittedly uncertain, area of analysis potentially relating to panhandling and solicitation policies, is the captive audience doctrine. Though the applicability of captive-audience to anything other than abortion clinics is murky at best, it is a doctrine worth briefly discussing. Ordinances that outlaw solicitors or beggars from conducting their activities when their audience has no meaningful opportunity to escape, such as in subways, or other constricted areas, may be able to survive under this theory, as *Reed* did not seem to impact the doctrine. It also could be used as a theory in defense of certain aggressive panhandling acts where individuals are cornered or threatened. However, the Supreme Court's ruling in *Hill* seems to place a limit on the extent of the captive-audience

[163] Gresham v. Peterson, 225 F. 3d 899, 902 (7th Cir. 2000).

doctrine theory's scope. Even without *Hill*, it is unclear as to how captive audience could fit within the current First Amendment legal landscape, as most of the physical places governed by the doctrine would be treated as non-public forums, and thus open to other legal avenues for municipalities. Nonetheless, municipalities may wish to continue to track the evolution of this area of doctrine in case it opens the way for relevant regulation going forward.

V. CONCLUSION

While the First Amendment's protection of charitable solicitation was relatively clear prior to the *Reed* decision, the state of panhandling regulation has become more muddled, especially with the lack of direct Supreme Court precedent regarding its protection. Despite this relative uncertainty, lower courts have been able to render reasonable decisions regarding panhandling and solicitation ordinances based on a large body of First Amendment precedent. However, *Reed*, using a blunt instrument where a fine scalpel was required, may have crafted a broad rule that seems to undercut nearly every attempt local governments can make to regulate in this arena. This paper has contended that *Reed* simply cannot and should not be read so broadly, as doing so would result in the virtual elimination of a long-standing doctrines of valid government regulations: those relating to regulation speech that is intertwined with conduct and those relating to regulating speech in public forums through time, place, and manner restrictions.

This paper has contended that interpreting *Reed* generally to prohibit panhandling or solicitation ordinances is simply incorrect. Professor Noah Feldman put it succinctly: "the First Amendment shouldn't be read in such an absolute way [as in *Reed*] -- and if it is, the consequences for the rest of our law are apt to be disastrous."[164] So far, some courts have been tempted to interpret *Reed* in this absolute fashion, and the result has been the striking of many panhandling and solicitation regulations. *Reed* itself involves a dispute over signs, and has no mention of conduct, which is heavily implicated in any definition of aggressive panhandling. Further, it is inconceivable that the content-discrimination aspect of *Reed* can be held to wipe out the time, place, and manner body of regulation applicable to public forums such as those often implicated in panhandling. Even disregarding the flaws in the principal opinion in *Reed*, the Court itself was extremely divided. Seven of the eight current justices either filed or joined concurring opinions attempting to qualify or limit the holding. This fact, the effect of Justice Scalia's passing, and Justice Kennedy's past concurring opinion in *Krishna*, all suggest that *Reed* is not the definitive statement on panhandling and solicitation that it is taken as.

In light of the view that *Reed* is not the obstinate obstacle to municipalities that it appears, local governments should continually craft panhandling ordinances that test the limits of legality. Municipalities do not have the luxury of giving up their prerogative to craft ordinances to better their jurisdiction simply because of troubling legal precedent.

Three appendices follow to assist those endeavoring to think about best practices in addressing panhandling. Appendix A draws from a chart provided by the National Law Center on Homelessness and Poverty, providing a recent survey of strategies regarding panhandling and homelessness adopted in major jurisdictions around the country. Appendix B includes a model panhandling ordinance with relevant commentary. Appendix C includes advice on panhandling from the US Department of Justice.

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[164] Noah Feldman, *Brother Can You Spare Me A Dime. Or Else*, BLOOMBERG VIEW (May 10, 2016, 3:09 PM), https://www.bloomberg.com/view/articles/2016-05-10/panhandling-isn-t-always-free-speech.

APPENDIX A: PROHIBITED CONDUCT CHART

With the assistance of the law firm Sullivan & Cromwell, the Law Center examined the city codes of 187 cities across the country, which are listed in our Prohibited Conduct Chart. Through online research, we identified laws that restrict or prohibit seven different categories of conduct disproportionately performed by homeless people, including sleeping, sitting or lying down, and living in vehicles within public space.

Researchers carefully evaluated the language and definitions used in various codes to avoid including laws that appeared directly aimed at preventing other illegal acts unrelated to homeless individuals, such as loitering with the intent to solicit prostitution. Also, the chart does include laws that, while not facially discriminatory, could be or have been enforced in a manner that disproportionately affects homeless individuals.

Although the chart reviews the laws in existence in different cities, enforcement of these laws varies widely.

2016 PROHIBITED CONDUCT CHART

		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
Total number of surveyed cities with this type of ordinance		34	50	61	93	88	73	60	100	50	114	12
Percent of surveyed cities with this type of ordinance		18.2%	26.7%	32.6%	49.7%	47.1%	39.0%	32.1%	53.5%	26.7%	61.0%	6.4%
AK	Anchorage					X		X			X	
AK	Fairbanks											
AK	Juneau					X	X		X	X		
AL	Mobile		X					X	X	X		
AL	Montgomery	X			X	X	X	X	X			
AR	Fayetteville				X	X					X	
AR	Little Rock		X	X	X				X	X	X	
AR	North Little Rock									X		

2016 PROHIBITED CONDUCT CHART

		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
AZ	Glendale			X			X					
AZ	Mesa	X			X	X				X	X	
AZ	Phoenix	X		X		X	X	X	X		X	
AZ	Scottsdale			X			X					
AZ	Tempe	X		X		X	X			X	X	
AZ	Tucson		X		X	X					X	
CA	Bakersfield	X		X			X					
CA	Berkeley		X		X	X			X			
CA	El Cajon	X	X	X	X		X	X			X	
CA	Fresno				X				X			

2016 PROHIBITED CONDUCT CHART

		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
CA	Long Beach		X	X	X		X		X		X	
CA	Los Angeles				X			X	X		X	
CA	Modesto			X	X	X	X		X		X	
CA	Oakland	X				X	X	X	X	X	X	
CA	Redondo Beach			X	X		X		X	X	X	
CA	Sacramento			X	X	X			X	X	X	
CA	San Bruno					X	X				X	
CA	San Diego				X	X	X	X				
CA	San Francisco		X		X		X		X		X	
CA	San Jose		X		X	X	X					

2016 PROHIBITED CONDUCT CHART

		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
CA	San Luis Obispo				X	X	X		X		X	
CA	Santa Barbara	X		X	X	X				X	X	
CA	Santa Cruz	X		X		X	X	X	X		X	
CA	South Lake Tahoe	X	X	X	X		X					
CA	Tracy			X			X		X	X	X	
CA	Ukiah			X	X		X		X		X	
CA	Union City					X	X	X	X		X	
CO	Boulder			X	X		X				X	
CO	Colorado Springs	X		X	X	X		X		X	X	
CO	Denver			X	X	X		X				

2016 PROHIBITED CONDUCT CHART

		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
CO	Lakewood				X	X			X		X	
CT	Hartford							X			X	
CT	New Haven		X		X	X		X			X	
CT	Norwalk				X			X			X	
CT	Stamford							X	X			
DC	Washington							X			X	
DE	Dover				X				X		X	
DE	Wilmington							X		X	X	
FL	Bradenton			X		X						
FL	Clearwater			X	X	X	X	X		X	X	

2016 PROHIBITED CONDUCT CHART

		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
FL	Daytona Beach	X		X		X		X			X	
FL	Fort Lauderdale					X	X	X			X	
FL	Fort Myers		X		X	X			X		X	
FL	Gainesville				X	X	X			X	X	X
FL	Hallandale Beach	X	X	X	X		X				X	
FL	Jacksonville		X		X	X	X				X	X
FL	Key West			X	X	X	X				X	
FL	Lake Worth			X			X		X			
FL	Miami	X	X	X	X	X	X	X	X		X	
FL	Naples		X						X			

2016 PROHIBITED CONDUCT CHART

		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
FL	Orlando	X	X	X	X	X		X			X	X
FL	Palm Bay		X		X				X	X	X	X
FL	Sarasota	X	X	X	X		X				X	
FL	St. Augustine	X		X					X	X	X	
FL	Tampa	X	X		X		X			X	X	X
GA	Albany	X		X		X		X		X		
GA	Athens				X		X	X		X		
GA	Atlanta	X		X	X		X		X		X	
GA	Augusta				X	X		X	X		X	
GA	Brunswick		X	X				X		X		

2016 PROHIBITED CONDUCT CHART

		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
GA	Columbus			X			X	X				
GA	Savannah						X		X	X		
GA	Statesboro							X	X	X		
GA	Stone Mountain	X					X	X				
GA	Washington							X				
HI	Honolulu				X				X		X	
HI	Maui County				X						X	
IA	Bettendorf				X	X					X	
IA	Cedar Rapids											
IA	Davenport				X		X	X				X

2016 PROHIBITED CONDUCT CHART												
		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
IA	Des Moines				X			X	X			
IA	Waterloo											
ID	Boise		X	X	X	X	X	X	X	X		
ID	Idaho Falls			X								
ID	Pocatello								X		X	
IL	Chicago		X							X		
IL	Evanston		X						X		X	
IL	Woodstock										X	
IN	Bloomington				X							
IN	Indianapolis		X					X		X	X	X

2016 PROHIBITED CONDUCT CHART

		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
IN	Jeffersonville						X		X			
IN	South Bend			X	X	X			X	X	X	
KS	Lawrence		X		X				X	X	X	
KS	Topeka		X				X		X			
KS	Wichita			X	X		X	X	X	X		
KY	Covington		X		X						X	X
KY	Lexington		X							X		
KY	Louisville	X		X							X	
LA	Baton Rouge								X		X	
LA	Lafayette					X	X				X	

2016 PROHIBITED CONDUCT CHART

		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
LA	New Orleans		X		X	X			X		X	
LA	Shreveport		X		X		X		X		X	
MA	Boston		X			X			X		X	
MA	Fall River				X				X			
MA	Worcester										X	
MD	Baltimore					X		X			X	X
MD	Elkton					X			X			
MD	Frederick				X			X	X	X		
ME	Augusta						X					
ME	Bangor				X			X			X	

2016 PROHIBITED CONDUCT CHART												
		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
ME	Portland					X	X	X	X		X	
MI	Detroit						X	X	X		X	
MI	Kalamazoo				X				X		X	
MI	Pontiac					X			X	X	X	
MN	Minneapolis			X	X		X				X	
MN	St. Paul				X	X	X	X	X		X	
MO	Kansas City			X		X		X				
MO	St. Louis							X	X		X	
MS	Biloxi					X	X	X	X			
MT	Billings						X	X			X	

2016 PROHIBITED CONDUCT CHART												
		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
NC	Asheville	X		X		X		X	X		X	
NC	Charlotte		X	X		X					X	
NC	Raleigh		X						X	X	X	
ND	Fargo										X	
ND	Grand Forks				X	X					X	
NE	Lincoln					X			X	X		
NE	Omaha								X			
NH	Concord			X		X			X		X	
NH	Manchester	X	X		X	X	X		X			
NJ	Atlantic City	X	X			X			X		X	

2016 PROHIBITED CONDUCT CHART

		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
NJ	Newark				X				X	X	X	
NJ	Trenton	X				X					X	
NM	Albuquerque				X				X		X	
NM	Santa Fe			X			X				X	
NV	Las Vegas		X		X		X				X	X
NV	North Las Vegas		X		X	X			X			
NV	Pahrump	X				X	X	X		X		
NV	Reno				X	X			X		X	
NY	Buffalo		X			X			X	X		
NY	New York				X	X	X		X	X	X	

2016 PROHIBITED CONDUCT CHART

		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
NY	Rochester		X		X	X			X		X	
OH	Cincinnati					X				X	X	
OH	Cleveland		X			X			X		X	
OH	Columbus				X	X			X		X	
OH	Dayton					X	X				X	X
OH	Toledo					X		X	X	X		
OK	Oklahoma City		X	X	X				X		X	
OK	Tulsa			X	X		X		X		X	
OR	Beaverton					X	X		X			
OR	Corvallis	X	X		X	X	X				X	

2016 PROHIBITED CONDUCT CHART

		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
OR	Eugene		X	X		X			X			
OR	Portland		X	X	X	X			X			
PA	Allentown				X	X		X	X		X	
PA	Philadelphia					X		X	X	X		
PA	Pittsburgh				X						X	
RI	Newport	X				X		X	X			
RI	Providence		X			X			X		X	
SC	Charleston				X		X	X	X		X	
SC	Columbia			X		X		X			X	
SD	Pierre			X		X	X			X		

2016 PROHIBITED CONDUCT CHART

		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
SD	Rapid City		X			X			X			
SD	Sioux Falls			X		X			X		X	
TN	Memphis								X		X	
TN	Nashville				X						X	
TX	Amarillo			X	X				X			
TX	Austin		X	X		X			X		X	
TX	Corpus Christi				X				X			
TX	Dallas	X			X				X		X	X
TX	El Paso				X				X	X		
TX	Fort Worth				X					X	X	

2016 PROHIBITED CONDUCT CHART

		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
TX	Houston				X	X	X				X	
TX	San Antonio			X	X	X	X		X		X	
UT	Salt Lake City	X		X	X	X	X	X				
VA	Norfolk		X	X			X	X			X	
VA	Richmond			X		X		X	X		X	
VA	Roanoke						X					
VA	Suffolk			X							X	
VA	Virginia Beach	X	X	X		X	X			X		
VT	Burlington				X			X	X		X	
VT	Montpelier								X	X		

2016 PROHIBITED CONDUCT CHART												
		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
WA	Olympia	X			X	X				X		
WA	Seattle				X	X	X					
WA	Spokane	X		X	X	X				X		
WA	Woodinville				X		X		X			
WI	Eau Claire			X	X			X	X			
WI	Madison		X		X				X	X		
WI	Milwaukee								X		X	
WV	Charleston						X		X	X		
WY	Cheyenne						X	X				

	PREVALENCE OF LAWS BY YEAR										
	Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
Year	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
2006	14%	30%	19%	34%	31%	16%	17%	47%	19%	57%	N/A
2009	14%	37%	21%	41%	33%	18%	21%	57%	18%	62%	N/A
2011	18%	41%	21%	49%	37%	33%	25%	67%	22%	68%	N/A
2014	18%	26%	32%	49%	47%	38%	32%	53%	26%	61%	7%
2016	18%	27%	33%	50%	47%	39%	32%	53%	27%	61%	6%

Annotated Model Ordinance: Panhandling and Solicitation

(3/18/17, Professor Emerita Judith Wegner, Judith_wegner@unc.edu)

This annotated model ordinance was developed based on a review of case law through mid-March, 2017, ordinances from North Carolina and elsewhere, and consideration of "plain English" principles that endeavor to help readers understand public laws and policies. *Commentary is provided in italics.*

Preliminary Observations: Questions Worth Asking… and Answering

It may be helpful to readers to reflect carefully on some initial issues before trying to draft ordinances in this complex area involving confusing precedent and sophisticated First Amendment standards. Here are some preliminary considerations worth careful attention.

1. ***Why are you acting and what problem(s) are you trying to address?***

    A good summary of possible motives for regulation was provided in a recent American Bar Association CLE program, Panhandling and Solicitation: Understanding the First Amendment Implications, June 14, 2016. Common motivations include: reducing homelessness, limiting public begging, maintaining clean and orderly view-scapes, protecting public and traffic safety. Specific problems that policymakers may wish to address include reducing adverse effects on business, addressing public concerns about disorder and safety, and assisting those who are homeless/ending homelessness.

    One common justification for action against panhandling is tied to the "broken windows" theory of policing, articulated by George Kelling and James Q Wilson in "Broken Windows: The Police and Neighborhood Safety," The Atlantic Monthly (March 1982). The basic idea behind this theory is that police interventions in small matters can curb urban disorder (such as broken windows) and can keep such disorder from becoming more accepted/acceptable. Zero-tolerance policies rely on similar thinking. It is important to bear in mind that the "broken windows" argument reflects a theory, not a confirmed fact. For an excellent compilation of research on the broken windows theory, see, Center for Evidence-Based Crime Policy, George Mason University, http://cebcp.org/evidence-based-policing/what-works-in-policing/research-evidence-review/broken-windows-policing/ (last visited March 16, 2017) (citing recent studies and need for additional targeted research to prove this theory).

    There is also a risk that in our currently divided society, anti-panhandling ordinances are really aimed at pushing poor and homeless people out of sight of the public, or criminalizing the status of being poor or homeless. Dislike of panhandling and panhandlers is not the kind of justification courts will uphold as the undergirding of panhandling regulations.

2. ***What burden of proof will you need to carry?***

    Jurisdictions updating their panhandling ordinances should be alert, from the start, to the importance of statements of purpose, the need for securing evidence and making findings, and the application of burdens of proof. Although Reynolds v. Middletown, 779 F.3d 222 (4th Cir.

2015), was decided prior to Reed, its guidance is helpful in this regard because it addresses the burden of proof and requisite evidence in some detail. The court initially observed that the plaintiff (in this case the panhandler) "has the burden of showing that speech was restricted by the governmental action in question." Once plaintiff had met the initial requirement, the government was required to prove that its panhandling ordinance was "narrowly tailored to further a significant government interest and that it [left] open ample alternative channels of communication." Most significantly, the court held that the government needed to make "some evidentiary showing that the recited harms are real, not merely conjectural, and that the [challenged regulation] alleviates such harms in a direct and material way," even if not offering a "panoply of empirical evidence."

In reaching this conclusion the court relied upon the Supreme Court's decision in McCullen v. Coakley, 134 S.Ct. 2518 (2014), applying intermediate scrutiny to an abortion clinic buffer requirement applicable to protesters on public sidewalks. The Reynolds court emphasized that the government must show that it had actually tried other means to address problems associated with panhandling on medians, and that these other means had been unsuccessful. Since the county in Reynolds had relied only on the opinion of law enforcement officials and had not actually tried to implement alternative methods for addressing perceived problems, it had failed to meet intermediate scrutiny requirements. Bear in mind that both these cases were applying an intermediate scrutiny standard, rather than the higher strict scrutiny standard adopted in Reed to apply to content-based regulation.

Courts other than the Fourth Circuit have expressed similar views. For example, in Speet v. Schuette, 726 F.3d 867 (6th Cir. 2013), the Sixth Circuit struck down, on overbreadth grounds, Michigan's "anti-begging" statute and a Grand Rapids, Michigan ordinance that had resulted in hundreds of arrests of those simply holding signs asking for help or verbally soliciting charity. The court also rejected an argument that the Michigan statute could be construed more narrowly to meet constitutional requirements in reaching its ultimate conclusion. An earlier Sixth Circuit opinion is also relevant in this context. See also Satawa v. Macomb County Road Commission, 689 F.3d 506 (6th Circ. 2012) (landscaped median with adequate space for multiple uses had history of being treated as traditional public forum; hypothetical traffic-safety justification was insufficient to justify denial of application for permit to display Nativity scene on road median).

3. ***How might you proceed in gathering evidence to guide proposed government action in this sensitive area meets stringent demands regarding purposes and tailoring of means?***

The Center for Problem-Oriented Policing provides a helpful guide to creating community dialogues designed to adduce evidence needed in developing panhandling policies. See Michael S. Scott, Problem-Oriented Guides for Police Report 13: Panhandling (US Department of Justice, 2002), available as an appendix to the principal paper and for download at [http://www.popcenter.org/problems/pdfs/Panhandling.pdf.](http://www.popcenter.org/problems/pdfs/Panhandling.pdf) The guide is particularly helpful regarding strategies for collecting useful evidence. Id at 13-16. Although this guide on panhandling was published in 2002, and thus only considers case law to that date, it still has a great deal of insight to offer.

4. ***How can you frame the ordinance in a way that makes it understandable to the lay people who will be obliged to conform to its requirements?***

Policymakers and citizens sometimes are tempted to focus on the "people" who they believe are the source of the perceived "problem" they want government to address. That temptation may have been increased as a result of the current deeply acrimonious political climate. For good or ill, the courts and the First Amendment require a different approach: look at the adverse effects and address them with tailored solutions, don't just look at speakers whose messages some people may not like to be around. This approach should not be surprising, since it is already evident in well-known land use cases relating to such matters as adult uses and billboards. In some ways it may be helpful to realize that some people view panhandlers much as they do various "nuisances" they dislike. The approach needed from government should be designed to ameliorate well-grounded conflicts between diverse users of public spaces where possible, rather than picking "winners" and "losers."

That means that it is very important to sort out real interests, not just positions (as explained by the authors of Getting to Yes). That means that an initial focus needs to be on "what conduct" rather than "who." "What conduct" can include creating objectively determined danger, engaging in intimidation/threats, interfering with reasonable expectations of privacy, interfering with access by others who are navigating within congested public spaces, creating objectively determined risk of traffic accidents or exacerbation of traffic congestion.

Once the "what" is clear, the decision about "who" must follow regulations may be more challenging. The courts have made it clear that content-based regulation must meet a high bar. Regulating only panhandlers (and not others engaged in comparable conduct) makes is likely that ordinances will be struck down under Reed and other precedent. Efforts to claim that ordinances are instead directed to regulate time, place, and manner of use of public forums (such as public squares, sidewalks and streets) must be content-neutral and must employ "narrow tailoring." As a result, it is inevitable that jurisdictions wanting to regulate the kind of conduct associated with panhandling should also regulate other forms of charitable solicitation (for example fire-fighters' one-day "fill the boot" campaigns), and electioneering that involves solicitation activities occurring in public streets. The latter types of activities have historically taken place on traffic medians in which many jurisdictions have recently wanted to regulate panhandling. It may be possible to justify distinctions (e.g. charitable or electioneering campaigns that are limited to a few days in duration might be allowed, but it would appear appropriate to allow panhandling in comparable locations during that same period and to take extra precautions regarding safety).

The model ordinance proposed here accordingly covers "panhandling, begging, charitable and political solicitation" rather than only panhandling.

5. ***How should you structure the ordinance so that it places clear policy choices before the City Council and interested citizens, and makes it likely to withstand potential judicial challenge?***

The Center for Problem-Oriented Policing Report on Panhandling, referenced in Note 3 above, provides a very helpful template of possible options for regulating the kinds of problematic conduct that is sometimes associated with panhandling. See pages 17-26. These responses are grouped in the following categories: enforcement responses, public education responses, situational responses, and social services/treatment responses. The

following law enforcement responses are discussed: prohibiting aggressive panhandling, prohibiting panhandling in specified areas, prohibiting interference with pedestrians and vehicles, banning panhandlers on probation from certain areas with the best panhandling potential (in order to discourage panhandling), requiring panhandlers to engage in certain types of community service if found to have violated governing laws, and requiring panhandlers to obtain solicitation permits. The Center's Report correctly notes that ordinances prohibiting all panhandling are likely to be invalidated by the courts. Prohibitions of panhandling at night have also been struck down.

This model ordinance addresses the first three of these strategies (aggressive panhandling, panhandling in specified areas, and prohibiting interference with pedestrians and vehicles) since these are the most common strategies used today. The ordinance is structured to address each of these areas specifically, clearly, and separately so that a reviewing court can clearly discern the ties between governmental purpose, evidence, and actions. This approach also tries to reflect the relative severity of the regulated conduct in the view of regulators. It includes a clear "safe harbor" for passive action (signs or speech alone) except in "sensitive protected areas and "dangerous areas" relating to traffic and medians. Setting forth a rational framework of this sort should assist a court in upholding the ordinance, since it is clear that the jurisdiction is regulating solicitation in a nuanced fashion and not trying to criminalize all types of solicitation. Clear delineations among different types of solicitation will also make it possible to uphold major parts of the ordinance if some others were to be struck down.

Type of conduct	Regulations Apply	Penalty
Passive (written or oral) in non-designated areas	Non-designated areas (no showing of personal security/privacy or public safety/traffic)	None
Passive in Sensitive Protected Areas (personal security/privacy) OR could create disincentive for aggressive panhandling in such areas by imposing a "most severe" penalty in such cases	Designated areas with higher personal security/privacy concerns (ATMs, bus stops, congested sidewalks, etc.)	Moderate (drafted in this fashion) Most severe if aggressive panhandling in such areas? (could revise accordingly if desired)
Passive in Dangerous Areas (relates to public safety/traffic congestion)	Traffic medians that are too small or designated high volume/high speed traffic area	Moderate
Aggressive (defined)	Everywhere in jurisdiction	Severe

6. ***How might communities and policymakers who believe that panhandling is closely related to homelessness proceed?***

   There are a number of important resources that can help communities and policymakers understand the connections between homelessness and panhandling. The following websites are particularly helpful: National Law Center on Homelessness and Poverty, https://www.nlchp.org/; American Bar Association Center on Homelessness and Poverty, http://www.americanbar.org/groups/public_services/homelessness_poverty.html .

7. ***How might communities and policymakers avoid wasting time on legally unsustainable ordinances?***

   There is good reason to avoid wasting time on overly broad ordinances that can't be sustained. In this context unsustainable ordinances include those that prohibit all panhandling, those that prohibit panhandling in the nighttime (without targeted restrictions), broad prohibitions on panhandling in certain public areas unless tied to concrete government justifications, and panhandling in traffic medians (unless justified by studies of danger and congestion and applied primarily to very busy streets and very small traffic medians that lack adequate footing for those standing in such spaces).

The model ordinance (with annotations) follows.

Title: Public Panhandling, Begging, Charitable and Political Solicitation Regulated

[This title is employed for reasons explained in note 4, above. Note that this ordinance does not attempt to cover activities of "itinerant performers" or "buskers" who typically perform and request contributions, and are thus regulated as "commercial," "cultural" activities. Asheville and Chapel Hill, NC regulate such activities separately]

I. Purpose/Findings:

[This section should include statements of purpose and factual findings. Such provisions might include language such as that found in the Pittsburgh, PA panhandling ordinance, available at Municode.com; the Pittsburgh language has been revised to reflect the analysis used by the author]

§ XXX.01 – PURPOSE AND FINDINGS.

The City Council does hereby find that:

(a) It is the intent of Council in enacting this Ordinance to recognize free speech rights for all citizens while at the same time protecting the coexistent rights for all citizens to enjoy safe and convenient travel in public spaces free from intimidating conduct, threats, and harassment that stem from certain types of abusive solicitation, that may occur at particular settings and contexts; [effectively documents Council's commitment to respect First Amendment concerns but also to address other significant governmental issues] and

(b) Council finds that there are numerous forms of solicitation that are not in and of themselves inherently threatening or aggressive, including vocal requests for a donation; carrying or displaying a sign requesting donations; shaking or jingling a cup of change; and ringing a bell in compliance with any applicable noise ordinance. [Again, reflects commitment to protect less intrusive First Amendment rights of solicitors]

(c) However, Council finds that there has been an increase in aggressive solicitation in the City, which threatens the security, privacy, and freedom of movement of both residents and visitors; [should have actual evidence and data to back up that proposition] and

(d) Council also finds that the presence of solicitors in certain specific areas (such as near to adjacent to automatic teller machines, adjacent to sidewalk cafes, at public bus stops, and in public garages in the nighttime) create reasonable concerns by citizens objectively worried about their privacy, freedom of movement, and personal security [this section was edited to remove reference to the "captive audience" doctrine that has as yet not been sufficiently developed by the courts] and

(e) Council further finds that certain solicitation impedes the orderly flow of pedestrian and vehicular traffic that leads to concerns regarding traffic and public safety, particularly in congested roadways and sidewalks (as defined below to include highly traveled areas, lines to enter buildings, historic districts with narrow sidewalks or on small traffic medians of high-speed or high-volume streets and highways) [need to have evidence of areas to be described and size of medians as problematic] ; and

(g) This Ordinance is not intended to impermissibly limit an individual's right to exercise free speech associated with solicitation; rather it aims to impose specific time, place, and manner restrictions on solicitation and associated conduct in certain limited

circumstances; namely, aggressive panhandling, panhandling at locations or times deemed particularly threatening and dangerous, and/or panhandling in places where people are a "captive audience" and there is a wish to avoid or reduce a threat of inescapable confrontations; and

(h) In promulgating this Ordinance, Council seeks to impose regulations that are narrowly tailored to serve the aforementioned significant government interests.

[A shorter but also effective statement of purpose is found in the Hartford, CT panhandling ordinance, available on municode.com: Generally. The purpose of this section is to regulate certain behavior to preserve the public order, to protect the citizens of Hartford and to ensure the safe and uninterrupted passage of both pedestrian and vehicular traffic, without unconstitutionally impinging upon protected speech, expression or conduct.*]*

II. Definitions

(a) "Aggressive begging, panhandling, or solicitation" includes the following forms of conduct:

i. Confronting someone in a way that would cause a reasonable person to fear bodily harm;

ii. Accosting an individual by approaching or speaking to the individual or individuals in such a manner as would cause a reasonable person to fear imminent bodily harm or the commission of a criminal act upon his or her person, or upon property in his or her immediate possession;

iii. Touching someone without his or her consent;

iv. Using obscene or abusive language toward someone while attempting to panhandle or solicit him or her;

v. Forcing oneself upon the company of another by engaging in any of the following conduct:

(1) Continuing to solicit in close proximity to the individual addressed after the person to whom the solicitation is directed has made a negative response, either verbally, by physical sign, by attempting to leave the presence of the person soliciting, or by other negative indication;

(2) Blocking the passage of the individual solicited; or

(3) Otherwise engaging in conduct that could reasonably be construed as intending to compel or force a person to accede to a solicitation.

vi. Acting with the intent to intimidate someone into giving money, or

vii. Other conduct that a reasonable person being solicited would regard as threatening or intimidating in order to solicit a contribution or donation.

(b) "Areas with heightened personal security concerns" include the following locations

i. Areas within, or within 20 feet of a public parking garage, between dawn and dusk, when a reasonable individual would have a justified, reasonable concern for his or her safety, security, and welfare;

ii. Areas within 20 feet of a public bus stop or public transit entrance where a reasonable individual would have a reasonable, justified concern for his or her personal security due to congestion and close proximity to others;

iii. Areas within 20 feet of access to building entrances, public events venues, public accommodations or commercial businesses where a reasonable individual would have a reasonable, justified concern for his or her personal security due to congestion and close proximity to others;

iv. Areas within a designated commercial or historic district in which a high volume of pedestrian traffic or narrow sidewalks and streets give a reasonable person a justified, reasonable concern about his or her personal security due to congestion and close proximity to others; or

v. Other areas in which congestion could give a reasonable person rise a reasonable, justified concern his or her personal security due to congestion and close proximity to others.

(c) "Areas with heightened personal privacy concerns" include the following

i. Locations within 20 feet of an automated teller machine or financial institution in which an automated teller machine is located, where "financial institution" means any bank, industrial bank, credit union, or savings and loan.

ii. Locations within 20 feet of a sidewalk café during operating hours unless the solicitor's presence is authorized by the proprietor;

iii. Other locations in which a reasonable person would have a reasonable and justified concern about whether congestion and close proximity to others could compromise his or her interests in privacy.

(d) "Areas with heightened public safety concerns" include the following

i. Traffic medians where such medians provide less than 8 square feet of flat space for standing AND

ii. Traffic medians of whatever size within designated high traffic or high speed roadways,

(e) "Begging, panhandling and charitable or political solicitation" includes the following activities includes the following matters: Actions that are conducted in the furtherance of the purpose of immediately collecting contributions for the use of one's self or others. As used in this ordinance, the word, "solicit," and its forms, includes requests for funding arising from begging, panhandling, charitable or political fundraising initiatives. "Begging, panhandling and charitable or political solicitation" is defined to include both "aggressive" and "passive" forms of begging, panhandling and charitable or political solicitation, but these forms are regulated separately under this ordinance.

(f) *High traffic roadways include the following* [define based on local conditions]

(g) *High speed roadways include the following* [define based on local conditions]

(h) Regulated traffic medians include areas that meet the following definitions

i. Areas with "medians" situated between traffic lanes running in opposite directions where such medians have less than 8 square feet of flat area between traffic lanes; or

ii. Areas with "medians" that are otherwise designated as unsafe for activities by pedestrians due to associated high-volume or high-speed traffic.

(i) Passive panhandling, begging, charitable or political solicitation. "Passive panhandling, begging, charitable or political solicitation" includes conduct that falls within the definition in part (e) of this section, but only such conduct that involves requests for contributions presented in writing without speaking or oral requests for contributions that do not constitute "aggressive panhandling, begging, charitable or political solicitation" as defined in subsection (a) of this section.

[Definitions are always central to clear thinking about regulatory regimes. This model ordinance draft was developed after consulting a myriad of ordinances in effect around the country and those that have been subject to litigation. Readers may observe that the definitions include several core provisions: defining panhandling, begging and charitable/political solicitation; defining aggressive solicitation; defining passive solicitation; defining particularly sensitive areas due to personal security and privacy concerns; and defining solicitation where street medians in particular or high volume/high speed traffic corridors raise public safety and traffic congestion concerns. This approach seems advisable given the case law that has developed both before and after Reed, and will facilitate continuing regulation in the event of judicial invalidation of part of the ordinance (given the severability provision that follows). Penalty provisions are left undefined given likely differences between various jurisdictions.

III. Passive Begging, Panhandling, Charitable and Political Solicitation: When Regulated

(a) *Passive panhandling, begging, charitable or political solicitation permitted except as otherwise provided.*

The City Council finds that "passive panhandling, begging, charitable or political solicitation," as defined in section II(i) of this ordinance should be treated as speech protected under the First Amendment unless other well-grounded governmental concerns are implicated. Accordingly, passive panhandling, begging, charitable or political solicitation is permitted throughout the jurisdiction except as prohibited in parts V and VI of this ordinance.

[Note that regulating passive solicitation in settings described in part V may raise judicial questions unless there is adequate evidence demonstrating grounded concerns for adverse impacts from passive solicitation in areas giving rise to particular concerns in the face of passive panhandling. At least arguably, there could be reasonable grounds for concern about privacy and security. The standards set out in part V ground the regulation in "a reasonable person" with "reasonable, justified concerns" so would require evidence on a case-by-case basis. Some jurisdictions might choose to regulative passive solicitation only as to traffic medians (small and/or in high-volume, high speed areas) where voice requested and signage might themselves arise due to traffic problems.]

IV. Aggressive Panhandling, Begging, Charitable and Political Solicitation Prohibited

(a) Aggressive panhandling, begging, charitable and political solicitation regulated.

No person shall engage in aggressive panhandling, begging, charitable or political solicitation as defined in section II(a) this ordinance at anytime, anywhere in this jurisdiction.

(b) Penalties [link to penalties provision to be developed below.]

[Note: Aggressive panhandling might warrant more serious penalties than those imposed for other offenses, and might warrant more severe penalties in some settings, as noted in Note 5 above].

[Comment: This section was drafted based on conceptual considerations, after reviewing a variety of ordinances from jurisdictions around the country. Many such ordinances unfortunately seem to conflate regulation of aggressive panhandling and solicitation with panhandling and solicitation in particular areas. This model ordinance seeks to separate these issues so they can be considered straightforwardly by policymakers and by any reviewing court. Note, too, that this model ordinance explicitly states that aggressive panhandling is regulated separately from "passive panhandling" to make the point that the city is attentive to various sorts of governmental interests and how they should be balanced. In a sense, the draft model ordinance endeavors to take to heart the "balancing test" suggested in Justice Breyer's concurring judgment in Reed, and to strike appropriate balances between the freedom of solicitors and the implications of their activities on others.]

V. Regulation of Panhandling, Begging, Charitable and Political Solicitation in Areas with Specific Personal Safety and Privacy Concerns

(a) *Regulated locations*. Both "passive" and "aggressive" panhandling, begging, charitable and political solicitation activities are regulated in the following areas that give rise to specific personal safety and privacy concerns as defined in part II of this ordinance:

a) Areas with heightened personal security concerns as previously defined; and

b) Areas with heightened privacy considerations as previously defined.

(b) Panhandling, begging, charitable and political solicitation shall not be conducted in areas defined as involving heightened personal security or heightened privacy considerations except as provided for in section III (b)(i) (exempting certain conduct from regulation as aggressive panhandling, begging, or charitable or political solicitation).

(c) Penalties.

[As noted in Note 5 above, it may be appropriate to create heightened penalties for aggressive panhandling in these sensitive areas]

VI. Panhandling, Begging, Charitable Protection of Public Access and Vehicular Safety on Traffic Medians and on High Volume and High Speed Highways

(a) Areas regulated.

Areas regulated by this section include those defined as "areas with heightened public safety concerns" as defined in section II (d) of this Ordinance.

(b) *Findings.* The City Council finds as follows:

1. *Public Safety.* Both aggressive and passive begging, panhandling, charitable or political solicitation on small traffic medians (under 8 square feet in size) and traffic medians located on high speed and high volume traffic corridors as identified in this ordinance give rise to an increased risk of injury to solicitors on medians, traffic congestion, and traffic accidents that may affect drivers or solicitors.
2. *Alternative Sites.* This ordinance provides ample alternative sites for passive begging, panhandling, charitable and political solicitation in areas that do not give rise to enhanced public safety concerns or personal privacy and security concerns.
3. *Evidence.* The City Council has undertaken and reviewed careful studies to identify areas in which small traffic medians may make put solicitors at risks, and high speed and high volume traffic corridors in order to assure that these regulations are grounded in appropriate governmental concerns, are narrowly tailored, and allow alternative avenues for communication.

(c) Prohibitions

1. *Generally*. Both passive and aggressive begging, panhandling, charitable and political solicitation shall be restricted in "areas with heightened public safety concerns" as defined in subsection (a).
2. *Exceptions*. The City Council may identify limited periods each year in which these prohibitions should not be enforced as a result of particularly pressing governmental concerns related to such activities.
    a. *Charitable initiatives*. The Council may designate up to two days a year as days on which these prohibitions shall not apply in order to allow effective solicitation for designated charities.
    b. *Election activities*. The Council may designate up to 5 days a year as days on which these prohibitions shall not apply in order to allow effective political communications in connection with local, state, and federal elections.
    c. *Accommodations*. In the event that the City Council designates days as exceptions from this ordinance's requirements, it shall also adopt a documented public safety plan to reduce risks to public safety that might otherwise arise.
    d. *Comparable treatment*. To the extent that the City Council adopts exceptions to the prohibitions set forth in section VI(c)(1), relating to charitable initiatives and election activities, such exceptions shall extend to all parties otherwise covered by the provisions of this ordinance relating to begging, panhandling, charitable and political solicitation.

VII. *Penalties*

[This model ordinance does not address penalties, since penalties would need to be integrated with those applicable under other local ordinances. Note that there are opportunities to specify differing penalties for different offenses under this ordinance. Note 5 above suggests, for example, the possibility of enhanced penalties for aggressive panhandling in sensitive areas. Enhanced penalties might also be appropriate for recidivists. Some public policy advisers have suggested that a possible penalty for solicitors on probation would be to prohibit them from soliciting in particularly desirable locations. Because of the importance of local judgments on such matters, this draft model ordinance does not attempt to set out options for penalties.]

VIII. *Severability*

[Include severability provision that would allow provisions not struck down to remain intact].

U.S. Department of Justice
Office of Community Oriented Policing Services

Problem-Oriented Guides for Police
Problem-Specific Guides Series
No. 13

Panhandling

by
Michael S. Scott

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Guide No. 13

Panhandling

Michael S. Scott

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About the Problem-Specific Guides Series

The *Problem-Specific Guides* summarize knowledge about how police can reduce the harm caused by specific crime and disorder problems. They are guides to prevention and to improving the overall response to incidents, not to investigating offenses or handling specific incidents. The guides are written for police–of whatever rank or assignment–who must address the specific problem the guides cover. The guides will be most useful to officers who

- **Understand basic problem-oriented policing principles and methods.** The guides are not primers in problem-oriented policing. They deal only briefly with the initial decision to focus on a particular problem, methods to analyze the problem, and means to assess the results of a problem-oriented policing project. They are designed to help police decide how best to analyze and address a problem they have already identified. (An assessment guide has been produced as a companion to this series and the COPS Office has also published an introductory guide to problem analysis. For those who want to learn more about the principles and methods of problem-oriented policing, the assessment and analysis guides, along with other recommended readings, are listed at the back of this guide.)

- **Can look at a problem in depth.** Depending on the complexity of the problem, you should be prepared to spend perhaps weeks, or even months, analyzing and responding to it. Carefully studying a problem before responding helps you design the right strategy, one that is most likely to work in your community. You should not blindly adopt the responses others have used; you must decide whether they are appropriate to your local

situation. What is true in one place may not be true elsewhere; what works in one place may not work everywhere.

- **Are willing to consider new ways of doing police business.** The guides describe responses that other police departments have used or that researchers have tested. While not all of these responses will be appropriate to your particular problem, they should help give a broader view of the kinds of things you could do. You may think you cannot implement some of these responses in your jurisdiction, but perhaps you can. In many places, when police have discovered a more effective response, they have succeeded in having laws and policies changed, improving the response to the problem.

- **Understand the value and the limits of research knowledge.** For some types of problems, a lot of useful research is available to the police; for other problems, little is available. Accordingly, some guides in this series summarize existing research whereas other guides illustrate the need for more research on that particular problem. Regardless, research has not provided definitive answers to all the questions you might have about the problem. The research may help get you started in designing your own responses, but it cannot tell you exactly what to do. This will depend greatly on the particular nature of your local problem. In the interest of keeping the guides readable, not every piece of relevant research has been cited, nor has every point been attributed to its sources. To have done so would have overwhelmed and distracted the reader. The references listed at the end of each guide are those drawn on most heavily; they are not a complete bibliography of research on the subject.

- **Are willing to work with other community agencies to find effective solutions to the problem.** The police alone cannot implement many of the responses discussed in the guides. They must frequently implement them in partnership with other responsible private and public entities. An effective problem-solver must know how to forge genuine partnerships with others and be prepared to invest considerable effort in making these partnerships work.

These guides have drawn on research findings and police practices in the United States, the United Kingdom, Canada, Australia, New Zealand, the Netherlands, and Scandinavia. Even though laws, customs and police practices vary from country to country, it is apparent that the police everywhere experience common problems. In a world that is becoming increasingly interconnected, it is important that police be aware of research and successful practices beyond the borders of their own countries.

The COPS Office and the authors encourage you to provide feedback on this guide and to report on your own agency's experiences dealing with a similar problem. Your agency may have effectively addressed a problem using responses not considered in these guides and your experiences and knowledge could benefit others. This information will be used to update the guides. If you wish to provide feedback and share your experiences it should be sent via e-mail to **cops_pubs@usdoj.gov**.

For more information about problem-oriented policing, visit the Center for Problem-Oriented Policing online at www.popcenter.org or via the COPS website at www.cops.usdoj.gov. This website offers free online access to:

- the *Problem-Specific Guides* series,
- the companion *Response Guides* and *Problem-Solving Tools* series,
- instructional information about problem-oriented policing and related topics,
- an interactive training exercise, and
- online access to important police research and practices.

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The *Problem-Oriented Guides for Police* are very much a collaborative effort. While each guide has a primary author, other project team members, COPS Office staff and anonymous peer reviewers contributed to each guide by proposing text, recommending research and offering suggestions on matters of format and style.

The principal project team developing the guide series comprised Herman Goldstein, professor emeritus, University of Wisconsin Law School; Ronald V. Clarke, professor of criminal justice, Rutgers University; John E. Eck, associate professor of criminal justice, University of Cincinnati; Michael S. Scott, assistant clinical professor, University of Wisconsin Law School; Rana Sampson, police consultant, San Diego; and Deborah Lamm Weisel, director of police research, North Carolina State University.

Karin Schmerler, Rita Varano and Nancy Leach oversaw the project for the COPS Office. Megan Tate Murphy coordinated the peer reviews for the COPS Office. Suzanne Fregly edited the guides. Research for the guides was conducted at the Criminal Justice Library at Rutgers University under the direction of Phyllis Schultze by Gisela Bichler-Robertson, Rob Guerette and Laura Wyckoff.

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The Problem of Panhandling

This guide addresses the problem of panhandling.† It also covers nearly equivalent conduct in which, in exchange for donations, people perform nominal labor such as squeegeeing (cleaning) the windshields of cars stopped in traffic, holding car doors open, saving parking spaces, guarding parked cars, buying subway tokens, and carrying luggage or groceries.

† "Panhandling," a common term in the United States, is more often referred to as "begging" elsewhere, or occasionally, as "cadging." "Panhandlers" are variously referred to as "beggars," "vagrants," "vagabonds," "mendicants," or "cadgers." The term "panhandling" derives either from the impression created by someone holding out his or her hand (as a pan's handle sticks out from the pan) or from the image of someone using a pan to collect money (as gold miners in the American West used pans to sift for gold).

The guide begins by describing the panhandling problem and reviewing factors that contribute to it. It then identifies a series of questions that might help you in analyzing your local problem. Finally, it reviews responses to the problem, and what is known about those responses from evaluative research and police practice.

Generally, there are two types of panhandling: passive and aggressive. Passive panhandling is soliciting without threat or menace, often without any words exchanged at all–just a cup or a hand held out. Aggressive panhandling is soliciting coercively, with actual or implied threats, or menacing actions. If a panhandler uses physical force or extremely aggressive actions, the panhandling may constitute robbery.

Isolated incidents of passive panhandling are usually a low police priority.[1] In many jurisdictions, panhandling is not even illegal. Even where it is illegal, police usually tolerate passive panhandling, for both legal and practical reasons.[2] Courts in some jurisdictions have ruled that passive panhandling is constitutionally protected activity. Police can reasonably conclude that, absent citizen complaints, their time is better spent addressing more serious problems. Whether panhandling and other forms of street disorder cause or contribute to more serious crime–the broken windows

thesis–is hotly debated, but the debate is as yet unsettled.[3] Panhandling becomes a higher police priority when it becomes aggressive or so pervasive that its cumulative effect, even when done passively, is to make passersby apprehensive.[4] Panhandling is of greater concern to merchants who worry that their customers will be discouraged from patronizing their business. Merchants are most likely to call police when panhandling disrupts their commerce.[5,†]

† Business owners who work on site are most likely to call police. Employees, especially younger employees, are less likely to do so because they have less at stake if panhandling disrupts business (Goldstein 1993).

Police must also be concerned with the welfare of panhandlers who are vulnerable to physical and verbal assault by other panhandlers, street robbers[††] or passersby who react violently to being panhandled.[6] Panhandlers often claim certain spots as their own territory, and disputes and fights over territory are not uncommon.[7]

†† In one study, 50 percent of panhandlers claimed to have been mugged within the past year (Goldstein 1993).

Broadly speaking, public policy perspectives on panhandling are of two types–the sympathetic view and the unsympathetic view. The sympathetic view, commonly but not unanimously held by civil libertarians and homeless advocates, is that panhandling is essential to destitute people's survival, and should not be regulated by police.[8] Some even view panhandling as a poignant expression of the plight of the needy, and an opportunity for the more fortunate to help.[9] The unsympathetic view is that panhandling is a blight that contributes to further community disorder and crime, as well as to panhandlers' degradation and deterioration as their underlying problems go unaddressed.[10] Those holding this view believe panhandling should be heavily regulated by police.

People's opinions about panhandling are rooted in deeply held beliefs about individual liberty, public order and social

responsibility. Their opinions are also shaped by their actual exposure to panhandling–the more people are panhandled, the less sympathetic they are toward panhandlers.[11] While begging is discouraged on most philosophical grounds and by most major religions, many people feel torn about whether to give money to panhandlers.[12] Some people tolerate all sorts of street disorder, while others are genuinely frightened by it. This tension between opposing viewpoints will undoubtedly always exist. This guide takes a more neutral stance: without passing judgment on the degree of sympathy owed to panhandlers, it recognizes that police will always be under some pressure to control panhandling, and that there are effective and fair ways to do so.

Related Problems

Panhandling and its variants are only one form of disorderly street conduct and street crime about which police are concerned. Other forms–not directly addressed in this guide–include:

- disorderly conduct of day laborers;
- disorderly conduct of public inebriates (e.g., public intoxication, public drinking, public urination and defecation, harassment, intimidation, and passing out in public places);
- disorderly conduct of transients/homeless (e.g., public camping, public urination and defecation, and sleeping on sidewalks and benches, and in public libraries);
- disorderly youth in public places;
- harassment (usually sexual) of female pedestrians;
- pickpocketing;
- purse snatching;
- robbery at automated teller machines (ATMs);
- trash picking (for food or to salvage aluminum cans and bottles);

- unlicensed street entertainment;† and
- unlicensed street vending (also referred to as illegal peddling).

† In some instances, there is a fine distinction between panhandlers who use brief entertainment as part of their solicitation and more-accomplished street musicians, jugglers, mimes, and other skilled entertainers.

Some of these other forms of disorderly street conduct may also be attributable to panhandlers, but this is not necessarily so. These problems overlap in various ways, and a local analysis of them will be necessary to understand how they do.

Factors Contributing to Panhandling

Understanding the factors that contribute to your panhandling problem will help you frame your own local analysis questions, determine good effectiveness measures, recognize key intervention points, and select appropriate responses.

Whether Panhandling Intimidates Passersby

Panhandling intimidates some people, even causing some to avoid areas where they believe they will be panhandled.[13] One-third of San Franciscans surveyed said they gave money to panhandlers because they felt pressured, and avoided certain areas because of panhandling; nearly 40 percent expressed concern for their safety around panhandlers.[14] But most studies conclude that intentional aggressive panhandling is rare, largely because panhandlers realize that using aggression reduces their income, and is more likely to get them arrested or otherwise draw police attention to them.[15]

Whether panhandling intimidates passersby depends, of course, on how aggressive or menacing the panhandler is, but it also depends on the context in which panhandling occurs. In other words, an act of panhandling in one context might

not be intimidating, but the same behavior in a different context might.[16] Among the contextual factors that influence how intimidating panhandling is are:

- the time of day (nighttime panhandling is usually more intimidating than daytime panhandling);
- the ease with which people can avoid panhandlers (panhandling is more likely to intimidate motorists stuck in traffic than it is those who can drive away);
- the degree to which people feel especially vulnerable (for example, being panhandled near an ATM makes some people feel more vulnerable to being robbed);
- the presence of other passersby (most people feel safer when there are other people around);
- the physical appearance of the panhandler (panhandlers who appear to be mentally ill, intoxicated or otherwise disoriented are most likely to frighten passersby because their conduct seems particularly unpredictable); [17]
- the reputation of the panhandler (panhandlers known to be aggressive or erratic are more intimidating than those not known to be so);
- the characteristics of the person being solicited (the elderly tend to be more intimidated by panhandlers because they are less sure of their ability to defend themselves from attack);
- the number of panhandlers (multiple panhandlers working together are more intimidating than a lone panhandler); and
- the volume of panhandling (the more panhandlers present in an area, the more intimidating and bothersome panhandling will seem).

Who the Panhandlers Are

Typically, relatively few panhandlers account for most complaints to police about panhandling.[18] The typical profile of a panhandler that emerges from a number of studies is that of an unemployed, unmarried male in his 30s or 40s, with substance abuse problems, few family ties, a high school

education, and laborer's skills.[19] Some observers have noted that younger people–many of whom are runaways or otherwise transient–are turning to panhandling.[20,†] A high percentage of panhandlers in U.S. urban areas are African-American.[21] Some panhandlers suffer from mental illness, but most do not.[22] Many panhandlers have criminal records, but panhandlers are nearly as likely to have been crime victims as offenders.[23] Some are transient, but most have been in their community for a long time.[24]

Contrary to common belief, panhandlers and homeless people are not necessarily one and the same. Many studies have found that only a small percentage of homeless people panhandle, and only a small percentage of panhandlers are homeless.[26,††]

Most studies conclude that panhandlers make rational economic choices–that is, they look to make money in the most efficient way possible.[27] Panhandlers develop their "sales pitches," and sometimes compete with one another for the rights to a particular sales pitch.[28] Their sales pitches are usually, though not always, fraudulent in some respect. Some panhandlers will admit to passersby that they want money to buy alcohol (hoping candor will win them favor), though few will admit they intend to buy illegal drugs.[29] Many panhandlers make it a habit to always be polite and appreciative, even when they are refused. Given the frequent hostility they experience, maintaining their composure can be a remarkable psychological feat.[30] Panhandlers usually give some consideration to their physical appearance: they must balance looking needy against looking too offensive or threatening.[31]

† In many less-developed countries, children commonly beg to support themselves and their families, a phenomenon less common in the United States and other more highly developed countries.

†† Definitions of homelessness vary, but at a minimum, most studies have found that few panhandlers routinely sleep outdoors at night. See, however, Burke (1998) for evidence that a high percentage of the panhandlers in Leicester, England, have been homeless.

Kip Kellogg

Some panhandlers hope that candor will increase donations. Here, a panhandler's donation box reveals that the money will be spent on beer as well as on food.

Most panhandlers are not interested in regular employment, particularly not minimum-wage labor, which many believe would scarcely be more profitable than panhandling.[32] Some panhandlers' refusal to look for regular employment is better explained by their unwillingness or inability to commit to regular work hours, often because of substance abuse problems. Some panhandlers buy food with the money they receive, because they dislike the food served in shelters and soup kitchens.[33]

Who Gets Panhandled and Who Gives Money to Panhandlers

In some communities, nearly everyone who routinely uses public places has been panhandled.† Many who get panhandled are themselves people of modest means. Wealthy citizens can more readily avoid public places where panhandling occurs, whether consciously, to avoid the nuisances of the street, or

† Ninety percent of San Franciscans surveyed reported having been panhandled within the past year (Kelling and Coles 1996).

merely because their lifestyles do not expose them to public places. Estimates of the percentage of people who report that they give money to panhandlers range from 10 to 60 percent.[34] The percentage of college students who do so (between 50 and 60 percent) tends to be higher than that of the general population. There is some evidence that women and minorities tend to give more freely to panhandlers.[35] Male-female couples are attractive targets for panhandlers because the male is likely to want to appear compassionate in front of the female.[36] Panhandlers more commonly target women than men,[37] but some find that lone women are not suitable targets because they are more likely to fear having their purses snatched should they open them to get change.[38] Conventioneers and tourists are good targets for panhandlers because they are already psychologically prepared to spend money.[39] Diners and grocery shoppers are good targets because dining and grocery shopping remind them of the contrast between their relative wealth and panhandlers' apparent poverty. Regular panhandlers try to cultivate regular donors; some even become acquaintances, if not friends.

Where and When Panhandling Commonly Occurs

Panhandlers need to go where the money is. In other words, they need to panhandle in communities and specific locations where the opportunities to collect money are best–where there are a lot of pedestrians or motorists, especially those who are most likely to have money and to give it.[40] Panhandling is more common in communities that provide a high level of social services to the needy, because the same citizens who support social services are also likely to give money directly to panhandlers; panhandlers are drawn to communities where both free social services and generous passersby are plentiful.[41] With respect to specific locations, panhandlers prefer to panhandle where passersby cannot

readily avoid them, although doing so can make passersby feel more intimidated.[42]

Among the more common, specific panhandling locations are the following:

- near ATMs, parking meters and telephone booths (because ATM users, motorists and callers are less likely to say they do not have any money to give);
- near building entrances/exits and public restrooms with a lot of pedestrian traffic;
- on or near college campuses (because students tend to be more sympathetic toward panhandlers);
- near subway, train and bus station entrances/exits (because of high pedestrian traffic, and because public transportation users are likely to be carrying cash to buy tickets or tokens);
- on buses and subway trains (because riders are a "captive audience");
- near places that provide panhandlers with shade and shelter from bad weather (such as doorways, alcoves and alleys in commercial districts);
- in front of convenience stores, restaurants and grocery stores (because panhandlers' claims to be buying food or necessities for them or their children seem more plausible, and because shoppers and diners often feel especially fortunate and generous);
- at gas stations (because panhandlers' claims that they need money for gas or to repair their vehicle seem more plausible);
- at freeway exits/entrances (because motorists will be stopped or traveling slowly enough to be able to give money);
- on crowded sidewalks (because it is easier for panhandlers to blend in with the crowd should the police appear);
- at intersections with traffic signals (because motorists will be stopped); and
- near liquor stores and drug markets (so the panhandlers do not have to travel far to buy alcohol or drugs).[43]

There are typically daily, weekly, monthly, and seasonal patterns to panhandling; that is, panhandling levels often follow fairly predictable cycles, which vary from community to community. For example, panhandling may increase during winter months in warm-climate communities as transients migrate there from cold-weather regions. Panhandling levels often drop around the dates government benefits are distributed, because those panhandlers who receive benefits have the money they need. Once that money runs out, they resume panhandling.[44] Panhandling on or near college campuses often follows the cycles of students' going to and coming from classes.[45] There are usually daily lulls in panhandling when those panhandlers who are chronic inebriates or drug addicts go off to drink or take drugs. Regular panhandlers keep fairly routine schedules, typically panhandling for four to six hours a day.[46]

Economics of Panhandling

Most evidence confirms that panhandling is not lucrative, although some panhandlers clearly are able to subsist on a combination of panhandling money, government benefits, private charity, and money from odd jobs such as selling scavenged materials or plasma.[47] How much money a panhandler can make varies depending on his or her skill and personal appeal, as well as on the area in which he or she solicits. Estimates vary from a couple of dollars (U.S.) a day on the low end, to $20 to $50 a day in the mid-range, to about $300 a day on the high end.[48] Women–especially those who have children with them–and panhandlers who appear to be disabled tend to receive more money.[49] For this reason, some panhandlers pretend to be disabled and/or war veterans. Others use pets as a means of evoking sympathy from passersby. Panhandlers' regular donors can account for up to half their receipts.[50]

Panhandlers spend much of their money on alcohol, drugs and tobacco, although some money does go toward food, transportation and toiletries.[51] Panhandlers rarely save any money, partly because they risk having it stolen, and partly because their primary purpose is to immediately buy alcohol or drugs.[52]

Economic, Social and Legal Factors That Influence Panhandling Levels

Broad economic, social and legal factors influence the overall level of panhandling, as well as community tolerance of it.[53] Tolerance levels appear to have declined significantly during the 1990s, at least in the United States, leading to increased pressure on police to control panhandling.

The state of the economy, at the local, regional and even national level, affects how much panhandling occurs. As the economy declines, panhandling increases. As government benefit programs become more restrictive, panhandling increases.[54] At least as important as economic factors, if not more so, are social factors. The stronger the social bonds and social network on which indigent people can rely for emotional and financial support, the less likely they are to panhandle.[55] Thus, the weakening of social bonds throughout society affects the indigent most negatively. As substance abuse levels rise in society, as, for example, during the crack epidemic, so too do panhandling levels. As the skid rows in urban centers are redeveloped, the indigent people who live there move to areas where their panhandling is less tolerated. As people with mental illnesses are increasingly released into the community, often without adequate follow-up care, panhandling also increases. Where there are inadequate detoxification and substance-abuse treatment facilities, panhandling is high.[56] As courts strike down laws that

authorize police to regulate public disorder, and as police are less inclined to enforce such laws, panhandling flourishes.[57] Arrest and incarceration rates may also affect panhandling levels: convicted offenders often have difficulty getting jobs after release, and some inevitably turn to panhandling.[58]

Understanding Your Local Problem

The information provided above is only a generalized description of panhandling. You must combine the basic facts with a more specific understanding of your local problem. Analyzing the local problem carefully will help you design a more effective response strategy.

Asking the Right Questions

The following are some critical questions you should ask in analyzing your particular panhandling problem, even if the answers are not always readily available. Your answers to these and other questions will help you choose the most appropriate set of responses later on.

Complainants and Donors

(Surveys of citizens and beat police officers will likely be necessary to gather information about complaints and complainants, as well as about donors. Most complaints about panhandling are not formally registered with police.)

- To what extent does panhandling bother or intimidate others? How many complaints do police receive?[†] Do a few people account for many complaints, or do many people complain? Are complaints filed with other organizations (business/neighborhood associations)?
- Who are the complainants? Merchants? Shoppers? Workers? Students?
- Does panhandling alter people's behavior and routines (e.g., do people avoid certain areas or stores)?
- What are the particular complaints? That panhandlers act aggressively, or that all panhandling is bothersome?
- What do complainants suggest should be done to control panhandling?

† Analyzing calls for service related to panhandling is important, but it can be time-consuming because, in many police agencies, such calls are classified under broad categories such as "disturbance" or "suspicious person," categories that encompass a wide range of behavior. It might be worthwhile to develop more-specific call categories, so future problem analysis will be easier.

- What percentage of passersby give money to panhandlers?
- Why do people say they give money to panhandlers? What do they believe the panhandlers use the money for?

Panhandlers

(Surveys of suspected panhandlers, data from agencies that serve the needy, and discussions with beat police officers can help you answer the following questions. This information can help you determine whether there are clusters of panhandlers with similar characteristics. Different responses might be warranted for different types of panhandlers.)

- How many panhandlers are in the area? How many are regulars? How many are occasional?
- What is known about the regular panhandlers? What is their age, race, gender, family status, employment status, and employment history? Are they substance abusers? Do they suffer from mental illness? Do they have criminal records or a history of criminal victimization? Where do they live (in shelters, private homes, on the streets)?
- How many of the panhandlers are transient? How many are new to the area? How many are longtime residents?
- Do the panhandlers know about and use social services in the area (e.g., shelters, soup kitchens, job training, substance abuse treatment)?

Location/Time

- Where does panhandling commonly occur? In parks, plazas and squares? On sidewalks? Near ATMs? Near public transportation stops and stations?
- What, specifically, makes certain locations especially attractive or unattractive to panhandlers?
- When is panhandling most prevalent? Are there daily, weekly, monthly, or seasonal cycles to it?

Current Response

- How has the panhandling problem previously been handled in your jurisdiction? How is it currently handled? Is the current response adequate and appropriate?
- What laws currently regulate panhandling? Are those laws adequate and/or constitutional?
- Do the police arrest panhandlers? If so, on what charges? How are the charges processed? Are panhandlers prosecuted? If so, what is the typical sentence?
- How do other criminal justice officials (prosecutors, judges, probation officers) view the panhandling problem?

Measuring Your Effectiveness

Measurement allows you to determine to what degree your efforts have succeeded, and suggests how you might modify your responses if they are not producing the intended results. You should take measures of your problem *before* you implement responses, to determine how serious the problem is, and *after* you implement them, to determine whether they have been effective. All measures should be taken in both the target area and the surrounding area. (For more detailed guidance on measuring effectiveness, see the companion guide to this series, *Assessing Responses to Problems: An Introductory Guide for Police Problem-Solvers.*)

The following are potentially useful measures of the effectiveness of responses to panhandling:

- number of complaints filed with police about panhandling;
- number of complaints filed with other organizations or people (e.g., neighborhood/business associations, elected officials) about panhandling;
- levels of concern expressed about panhandling (from surveys);

- number of known chronic panhandlers (based on complaints, contacts and arrests);
- costs of police response to panhandling complaints;
- evidence that panhandling has been displaced to other areas, or is resulting in an increase in other forms of nuisance behavior or crime (e.g., trash scavenging, shoplifting, theft from autos, purse snatching, prostitution, drug dealing);† and
- indicators of the economic health of the area beset with panhandling (e.g., property vacancy rates, shoppers' presence, commerce levels, tax receipts, private-security expenditures).

† Lankenau (1999) asserts that most panhandlers will likely turn to other illegitimate ways to make money, rather than find regular employment or enter treatment programs. Duneier (1999) states that some panhandlers see crime as one of the few viable alternatives to panhandling.

Responses to the Problem of Panhandling

Your analysis of your local problem should give you a better understanding of the factors contributing to it. Once you have analyzed your local problem and established a baseline for measuring effectiveness, you should consider possible responses to address the problem.

The following response strategies provide a foundation of ideas for addressing your particular problem. These strategies are drawn from a variety of research studies and police reports. Several of these strategies may apply to your community's problem. It is critical that you tailor responses to local circumstances, and that you can justify each response based on reliable analysis. In most cases, an effective strategy will involve implementing several different responses. Law enforcement responses alone are seldom effective in reducing or solving the problem. Do not limit yourself to considering what police can do: give careful consideration to who else in your community shares responsibility for the problem and can help police better respond to it.

General Considerations for an Effective Response Strategy

Most researchers and practitioners seem to agree that the enforcement of laws prohibiting panhandling plays only a part in controlling the problem.[59] Public education to discourage people from giving money to panhandlers, informal social control and adequate social services (especially alcohol and drug treatment) for panhandlers are the other essential components of an effective and comprehensive response.

Panhandling, like many other forms of street disorder, is controlled more through informal means than through formal enforcement.† Panhandlers, merchants, passersby, social workers, and police beat officers form an intricate social network of mutual support and regulation. They all have something to gain by cooperating with one another (and, consequently, to lose by not cooperating with one another). Panhandlers obviously gain money, food and some social interaction from their activity; they risk losing them if they act too disorderly. Merchants will usually tolerate some panhandling, though seldom directly in front of their businesses. Some merchants even give panhandlers food or hire them to do odd jobs such as wash store windows. Passersby gain freedom from the harassment and intimidation of persistent and menacing panhandlers, along with the positive feelings they experience from truly voluntary charity. Social workers are more likely to be able to help those street people who are not frequently arrested for panhandling. Police beat officers can cultivate panhandlers as informants, helping the officers stay current with what is happening on the street.

† Goldstein's (1993) study of panhandling in New Haven, Conn., provides an excellent example of how panhandling is controlled through informal means. Duneier's (1999) study of New York City street vendors, scavengers and panhandlers also provides an exceptional example of informal social control on the street.

Enforcement Responses

Whether or not you emphasize enforcement of laws that regulate panhandling, it is important that the laws be able to survive legal challenge. Police should have valid enforcement authority to bolster other responses they use, including issuing warnings to panhandlers.[60] Laws that prohibit aggressive panhandling or panhandling in specified areas are more likely to survive legal challenge than those that prohibit all panhandling. If enforcement of panhandling laws will be a key component of your strategy, and if you think the

panhandling laws you rely on are vulnerable to legal challenge (or if you want to draft a new panhandling law), you should consult legal counsel to help you draft and propose new legislation. There are a number of model panhandling ordinances[61] and legal commentaries on the constitutionality of panhandling laws[62] in the literature. See Appendix B for a list and brief summary of some of the leading cases on the constitutionality of panhandling and laws that regulate it.

Warning panhandlers and ordering them to "move along" are perhaps the most common police responses to panhandling.[63] Many police beat officers develop working relationships with regular panhandlers; they use a mix of formal and informal approaches to keeping panhandling under control.[64] Most officers do not view panhandling as a serious matter, and are reluctant to devote the time necessary to arrest and book offenders.[65] Moreover, even when they have the authority to issue citations and release the offenders, most officers realize that panhandlers are unlikely to either appear in court or pay a fine.[66] Prosecutors are equally unlikely to prosecute panhandling cases, typically viewing them as an unwise use of scarce prosecutorial resources.[67]

Panhandler arrests are rare,[68,†] but when they occur, this is the typical scenario: An officer issues a panhandler a summons or citation that sets a court date or specifies a fine. The panhandler fails to appear in court or fails to pay the fine. A warrant is issued for the panhandler's arrest. The police later arrest the panhandler after running a warrant check during a subsequent encounter. The panhandler is incarcerated for no more than a couple of days, sentenced to time already served by the court, and released.[69]

† Goldstein (1993) estimated that police made arrests for panhandling in only about 1 percent of all police-panhandler encounters.

Because prosecutors and judges are unlikely to view isolated panhandling cases as serious matters, it is advisable to prepare and present to the court some background information on panhandling's overall impact on the community. A problem-impact statement can help prosecutors and judges understand the overall negative effect the seemingly minor offense of panhandling is having on the community.[70] In the United Kingdom, police can apply to the courts for an "antisocial behavior order" against individuals or groups as one means of controlling their persistent low-level offending.[71] Violations of the orders can result in relatively severe jail sentences.[†] It is unknown how effective the orders have been in controlling panhandling.

1. Prohibiting aggressive panhandling. Laws that prohibit *aggressive* panhandling are more likely to survive legal challenge than laws that prohibit *all* panhandling, and are therefore to be encouraged.[72] A growing number of jurisdictions have enacted aggressive-panhandling laws, most within the past 10 years.[††] Enforcing aggressive-panhandling laws can be difficult, partly because few panhandlers behave aggressively, and partly because many victims of aggressive panhandling do not report the offense to police or are unwilling to file a complaint. Police can use proactive enforcement methods such as having officers serve as decoys, giving panhandlers the opportunity to panhandle them aggressively.[73] Some agencies have provided officers with special legal training before enforcing aggressive-panhandling laws.[74] Enforcing other laws panhandlers commonly violate–those regarding drinking in public, trespassing, disorderly conduct, etc.–can help control some aspects of the panhandling problem.

† British antisocial behavior orders are similar in some respects to American restraining and nuisance abatement orders.

†† Among the jurisdictions to have enacted aggressive-panhandling laws are the states of Hawaii and California, and the cities of San Francisco; Seattle; Minneapolis; Albuquerque, N.M.; Atlanta; Baltimore; Cincinnati; Dallas; Tulsa, Okla.; and Washington, D.C.

Police need not heavily enforce aggressive-panhandling laws in order to control panhandling; the informal norms among most panhandlers discourage aggressive panhandling anyway.[75] Panhandlers exercise some influence over one another's behavior, to minimize complaints and keep police from intervening.[76] Enforcing aggressive-panhandling laws can serve to reinforce the informal norms because aggressive panhandling by the few makes panhandling less profitable for others.[77]

Aggressive-panhandling laws typically include the following specific prohibitions:

- confronting someone in a way that would cause a reasonable person to fear bodily harm;
- touching someone without his or her consent;
- continuing to panhandle or follow someone after he or she has refused to give money;
- intentionally blocking or interfering with the safe passage of a person or vehicle;
- using obscene or abusive language toward someone while attempting to panhandle him or her; and
- acting with intent to intimidate someone into giving money.[78]

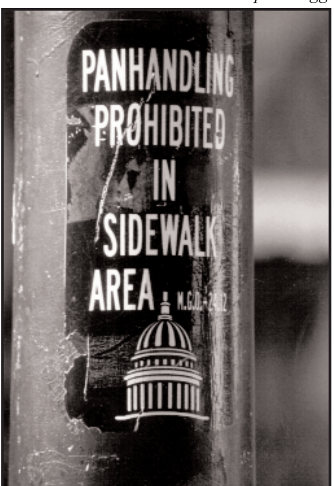
2. Prohibiting panhandling in specified areas. Many courts have held that laws can restrict where panhandling occurs. Panhandlers are increasingly being prohibited from panhandling:

- near ATMs;
- on public transportation vehicles and near stations and stops;

• near business entrances/exits;
• on private property, if posted by the owner; and
• on public beaches and boardwalks.[79]

One legal commentator has proposed a novel approach to regulating panhandling: zoning laws that would strictly prohibit panhandling in some areas, allow limited panhandling in other areas, and allow almost all panhandling in yet other areas.[80] The literature does not report any jurisdiction that has adopted this approach as a matter of law, though clearly, police officers informally vary their enforcement depending on community tolerance levels in different parts of their jurisdiction.

Kip Kellogg



Some communities prohibit panhandling in specified areas.

3. Prohibiting interference with pedestrians or vehicles. Some jurisdictions have enacted laws that specifically prohibit impeding pedestrians' ability to walk either by standing or by lying down in the way. Enforcement can be difficult where such laws require police to establish the panhandler's intent to

obstruct others. The city of Seattle drafted a law that eliminated the need to establish intent, and that law survived a legal challenge.[81] Where panhandling occurs on roads, as car window-washing usually does, enforcing laws that prohibit interfering with motor vehicle traffic can help control the problem.[82]

4. Banning panhandlers from certain areas as a condition of probation. Because panhandling's viability depends so heavily on good locations, banning troublesome panhandlers from those locations as a condition of probation, at least temporarily, might serve to discourage them from panhandling and, perhaps, compel them to consider legitimate employment or substance abuse treatment.[83] Convicted panhandlers might also be temporarily banned from publicly funded shelters.[84] Alternatively, courts could use civil injunctions and restraining orders to control chronic panhandlers' conduct, although actual use of this approach does not appear in the literature.[85] Obviously, police will require prosecutors' endorsements and judicial approval to advance these sorts of responses.

5. Sentencing convicted panhandlers to appropriate community service. Some jurisdictions have made wide use of community service sentences tailored to the particular offender and offense.[86] For example, officers in St. Louis asked courts to sentence chronic panhandlers to community service cleaning the streets, sidewalks and alleys in the area where they panhandled.[87]

6. Requiring panhandlers to obtain solicitation permits. Some cities, including Wilmington, Del., and New Orleans, have at some time required panhandlers and window washers to obtain solicitation permits, just as permits are required from street vendors and others who solicit money in public.[88,†]

† Licensing schemes for beggars reportedly have existed in England as far back as 1530 (Teir 1993). The Criminal Justice Legal Foundation (1994) has published guidance on drafting laws enabling permit systems, though the language seems designed to inhibit panhandling, rather than allow it.

Little is known about the effectiveness of such permit schemes.

Public Education Responses

7. Discouraging people from giving money to panhandlers, and encouraging them to give to charities that serve the needy. In all likelihood, if people stopped giving money to panhandlers, panhandling would cease.[89] Public education campaigns are intended to discourage people from giving money to panhandlers. They typically offer three main arguments: 1) panhandlers usually use the money to buy alcohol and drugs, rather than goods and services that will improve their condition; 2) giving panhandlers small amounts of money is insufficient to address the underlying circumstances that cause them to panhandle; and 3) social services are available to meet panhandlers' food, clothing, shelter, health care, and employment needs. Some people do not understand the relationship between panhandling and substance abuse, or are unaware of available social services, however obvious these factors may seem to police.[90] Public education messages have been conveyed via posters, pamphlets, movie trailers, and charity collection points.[91] A poster campaign was an important element of the New York City Transit Authority's effort to control subway panhandling.[92] In Nashville and Memphis, Tenn., special parking meters were used as collection points for charities that serve the needy.[93] Some police officers have invested a lot of their own time making personal appeals to discourage people from giving money to panhandlers.[94] Some cities, such as Evanston, Ill., have hired trained civilians to make such appeals.[95] Not everyone will be persuaded by the appeals; some will undoubtedly perceive them as uncaring.

Signs and flyers, such as this one from Madison, Wis., have been used effectively to discourage people from giving money to panhandlers.

8. Using civilian patrols to monitor and discourage panhandling. In Baltimore, a business improvement district group hired police-trained, uniformed, unarmed civilian public-safety guides to intervene in low-level disorder incidents, and to radio police if their warnings were not heeded.[96] Portland, Ore., developed a similar program,[97] as did Evanston.[98]

9. Encouraging people to buy and give panhandlers vouchers, instead of money. Some communities have instituted programs whereby people can buy and give panhandlers vouchers redeemable for food, shelter, transportation, or other necessities, but not for alcohol or tobacco.† Typically, a private nonprofit organization prints and sells the vouchers and serves as the broker between buyers and merchants. Some vouchers are printed in a way that makes them difficult to counterfeit. Vouchers are often accompanied with printed information about where they can be redeemed and what social services are available to the needy. Window signs and flyers are commonly used to advertise voucher programs. There is some risk, however, that panhandlers will exchange the vouchers for money through a black market,[99] or that few people will buy the vouchers, as has been reported in some jurisdictions.[100]

† The earliest reported program was in Los Angeles. Other cities where voucher programs have been instituted include Berkeley, Santa Cruz and San Francisco, Calif.; Nashville; Memphis; New Haven; Portland, Ore.; Chicago; Seattle; Boulder, Colo.; New York; and Edmonton, Alberta (Ellickson 1996; *New York Times* 1993; *Wall Street Journal* 1993). Some communities have considered and rejected voucher programs (Evanston Police Department 1995).

Situational Responses

10. Modifying the physical environment to discourage panhandlers from congregating in the area. Among the environmental features conducive to or facilitating panhandling are the following: access to water (for drinking, bathing and filling buckets for window washing); restrooms; unsecured garbage dumpsters (for scavenging food and sellable materials); and places to sit or lie down, protected from the elements. These physical features can be modified to discourage panhandling.[101] Police in Santa Ana, Calif., as part of a larger effort to control aggressive panhandling, persuaded business owners to modify many physical features of their property, to make it less attractive to panhandlers, without inconveniencing customers.[102] A number of police efforts to address broader problems related to transient encampments–problems that included panhandling–entailed

removing the transients from the encampments and referring them to social service agencies.[103]

11. Regulating alcohol sales to chronic inebriates who panhandle in the area. Because many panhandlers are chronic inebriates, and because they spend so much of their panhandling money on alcohol, enforcing laws that prohibit alcohol sales to intoxicated people or chronic inebriates is one means of discouraging panhandling in the area. Several police agencies have reported using this approach in their efforts to control panhandling and other problems related to chronic inebriates.[104] Alternatively, merchants might be persuaded to change their sales practices to discourage panhandlers from shopping at their stores (e.g., by eliminating such products as fortified wine or not selling single containers of beer).

12. Controlling window-washing materials. Several police agencies have reported on ways to control how squeegee men/panhandlers acquire, store and use window-washing materials. Santa Ana police asked nearby businesses to remove an outdoor water fountain that squeegee men were using to fill their buckets.[105] Vancouver, British Columbia, police discovered where squeegee men stored their buckets and squeegees, and had property owners secure the storage places. They also had gas station owners engrave their squeegee equipment with identifying marks to deter theft by panhandlers.[106]

13. Promoting legitimate uses of public places to displace panhandlers. Police in Staffordshire, England, encouraged the municipal authority to promote street musicians in public places where panhandlers abounded, as one means to discourage panhandlers from begging in the area.[107] The underlying logic was that passersby would likely notice the distinction between those who solicit money in

exchange for something pleasant, and those who panhandle but offer nothing in return. Passersby would theoretically be less inclined to give money to panhandlers, thereby discouraging panhandling. Similarly, the New York/New Jersey Port Authority promoted new and attractive businesses in the Manhattan bus terminal as part of a larger strategy to reduce crime and disorder, including panhandling. Complaints about panhandling in the terminal declined by one-third over a four-year period.[108]

Social Services/Treatment Response

14. Providing adequate social services and substance abuse treatment to reduce panhandlers' need to panhandle. To address some of the underlying problems of many panhandlers (e.g., substance abuse, lack of marketable skills, mental illness, inadequate housing), police may need to advocate new social services, or help coordinate existing services.[109] Police can be and have long been instrumental in advocating and coordinating social services for panhandlers, and in referring people to those services.[110] Fontana, Calif., police coordinated a highly successful program that provided panhandlers and other transients with a wide range of health care, food, job training, and housing placement services. They offered treatment as an alternative to enforcement; they enforced laws regulating street disorder, including panhandling, and transported those willing to accept treatment to the social service center.[111] New York/New Jersey Port Authority police did likewise in helping to control panhandling and other forms of crime and disorder in the Port Authority bus terminal in New York City.[112]

Short-term substance-abuse treatment programs, however, are not likely to be effective for most panhandlers–their addictions are too strong–and most who participate in short-

term programs quickly revert to their old habits.[113] Unfortunately, long-term programs cost more than most communities are willing to spend. Police could advocate the most chronic offenders' being given priority for long-term treatment programs, or the courts could mandate such programs.[114] Some social service outreach efforts target those people identified as causing the most problems for the community.[115] In Madison, Wis., detoxification workers even took to the streets to proactively monitor the conduct of their most difficult clients. Some panhandlers will, of course, refuse social service and treatment offers because they are unwilling to make the lifestyle changes usually required to stay in the programs.[116]

† See Teir (1993) for a discussion of the long history of laws prohibiting and regulating begging.

Response With Limited Effectiveness

15. Enforcing laws that prohibit all panhandling. Many laws that prohibit all panhandling were written long ago and are vaguely and broadly worded: consequently, they are unlikely to survive a legal challenge.† About half of the states and over a third of major cities in America have laws that prohibit all or some forms of panhandling.[117]

Appendix A: Summary of Responses to Panhandling

The table below summarizes the responses to panhandling, the mechanism by which they are intended to work, the conditions under which they ought to work best, and some factors you should consider before implementing a particular response. It is critical that you tailor responses to local circumstances, and that you can justify each response based on reliable analysis. In most cases, an effective strategy will involve implementing several different responses. Law enforcement responses alone are seldom effective in reducing or solving the problem.

Response No.	Page No.	Response	How It Works	Works Best If…	Considerations
Enforcement Responses					
1.	20	Prohibiting aggressive panhandling	Subjects the most offensive panhandlers to criminal penalties; reinforces informal rules of conduct among panhandlers	…the law can survive legal challenge, and panhandlers are clearly informed of what constitutes legal vs. illegal conduct	Enforcement is difficult because few panhandlers are intentionally aggressive; officers should be properly trained to make aggressive-panhandling charges
2.	21	Prohibiting panhandling in specified areas	Restricts panhandling in areas where it is most likely to disrupt commerce and be intimidating	…the law can survive legal challenge, panhandlers are clearly informed of where they cannot panhandle, and enforcement is consistent	Costs associated with properly posting areas where panhandling is prohibited

Response No.	Page No.	Response	How It Works	Works Best If…	Considerations
3.	22	Prohibiting interference with pedestrians or vehicles	Restricts conduct that commonly disrupts commerce and intimidates pedestrians; deals directly with window washing by denying window washers access to motorists	…the law can survive legal challenge, and enforcement is consistent	Proving intent to interfere with pedestrians can be difficult
4.	23	Banning panhandlers from certain areas as a condition of probation	Denies panhandlers access to areas where panhandling is profitable	…panhandlers are clearly informed of where they cannot go, and police officers are informed of which panhandlers are banned from the area	Requires the cooperation of prosecutors, judges and probation officials
5.	23	Sentencing convicted panhandlers to appropriate community service	Tailors the punishment to the offense; makes the offender consider the impact panhandling has on the community	…the community service is meaningful and properly supervised	Requires the cooperation of prosecutors, judges and corrections officials
6.	23	Requiring panhandlers to obtain solicitation permits	Discourages panhandling through procedural requirements that many panhandlers are unlikely to follow; allows for easier enforcement (no witnesses are required)	…police officers are informed of the permit requirement and consistently enforce it	May be viewed as unfair by the public; little is known about how effective this approach is

Response No.	Page No.	Response	How It Works	Works Best If…	Considerations
Public Education Responses					
7.	24	Discouraging people from giving money to panhandlers, and encouraging them to give to charities that serve the needy	Decreases the supply of money to panhandlers and, consequently, lowers the level of panhandling	…the message that adequate social services are available is credible, and the message is heavily promoted	May require new investments in social services to make the message credible; advertising and promoting the message incurs costs
8.	25	Using civilian patrols to monitor and discourage panhandling	Increases the level of official monitoring and intervention	…civilian patrollers are properly trained and supported by police	Salary, training and equipment costs
9.	26	Encouraging people to buy and give panhandlers vouchers, instead of money	Restricts panhandlers' ability to buy alcohol and drugs	…supported by merchants and the community	Start-up and administrative costs for the program; a black market may allow panhandlers to convert vouchers to cash, undermining the program; people may not buy vouchers
Situational Responses					
10.	26	Modifying the physical environment to discourage panhandlers from congregating in the area	Discourages panhandlers from soliciting in an area by making it less comfortable to do so	…private (and public) property owners understand how the environment can contribute to panhandling	Requires property owners' cooperation; costs of making environmental changes; some risk that changes will also make the area less attractive for legitimate users
11.	27	Regulating alcohol sales to chronic inebriates who panhandle in the area	Forces panhandlers to travel farther to buy alcohol, thereby potentially displacing them from the area	…liquor license holders understand the rationale for liquor law enforcement, and enforcement is consistent	Will not address panhandlers who are not chronic inebriates, including drug addicts

Response No.	Page No.	Response	How It Works	Works Best If…	Considerations
12.	27	Controlling window-washing materials	Makes window washing (squeegeeing) more difficult	…property owners cooperate in efforts to control the use of the materials	Costs (usually modest) of modifying the environment or securing the materials
13.	27	Promoting legitimate uses of public places to displace panhandlers	Discourages people from giving money to panhandlers by encouraging them to give to legitimate street solicitors	…passersby approve of and support legitimate street solicitors	May attract more people to an area, making it more attractive to panhandlers
Social Services/Treatment Response					
14.	28	Providing adequate social services and substance abuse treatment to reduce panhandlers' need to panhandle	Removes panhandlers' excuses for panhandling; undermines the rationale for giving money to panhandlers; addresses the underlying problems that cause some people to panhandle	…there are outreach efforts to identify and serve panhandlers who will benefit from social services, especially the most chronic offenders; substance-abuse treatment programs are sufficiently long-term to be effective; panhandling enforcement is consistent, to motivate panhandlers to seek legitimate aid; and social services and police efforts are coordinated	May require substantial new investments in social services if the community is lacking them
Response With Limited Effectiveness					
15.	29	Enforcing laws that prohibit all panhandling			Unlikely to survive legal challenge

Appendix B: Selected Court Cases on Panhandling

The following are some notable U.S. court cases addressing the constitutionality of panhandling and laws that regulate it. You should consult local legal counsel to determine the state of the law in your jurisdiction.

Berkeley Community Health Project v. Berkeley, 902 F. Supp. 1084 (N.D. Cal. 1995) and 966 F. Supp. 941 (N.D. Cal. 1997). Struck down an ordinance that, among other restrictions, banned begging at night. The city subsequently deleted that provision from the ordinance, leaving only an ATM restriction intact.

Blair v. Shanahan, 775 F. Supp. 1315 (N.D. Cal. 1991). Struck down a ban on accosting people to beg. The decision was subsequently vacated, 919 F. Supp. 1361 (N.D. Cal. 1996).

C.C.B. v. State, 458 So. 2d 47 (Fla. Dist. Ct. App. 1984). Struck down a total ban on begging in public.

Carreras v. City of Anaheim, 768 F. 2d 1039, 1046 (9th Cir. 1985). Held that the California Constitution is broader than the U.S. Constitution in protecting speech; struck down begging ordinances.

Chad v. Fort Lauderdale, 861 F. Supp. 1057 (S.D. Fla. 1994). Upheld a ban on begging on the beach and boardwalk.

City of Seattle v. Webster, 802 P. 2d 1333 (Wash. 1990), cert. denied, 111 S. Ct. 1690 (1991). Upheld an ordinance banning sidewalk obstruction.

Doucette v. Santa Monica, 995 F. Supp. 1192 (C.D. Cal. 1996). Upheld time, place and manner restrictions on begging.

Greater Cincinnati Coalition for the Homeless v. City of Cincinnati, 56 F. 3d 710, 714 (6th Cir. 1995). Cites evidence that the enforcement of an anti-begging ordinance reduced the incidence of begging.

Loper v. New York City Police Department, 999 F. 2d 699 (2d Cir. 1993). Struck down a ban on loitering for the purposes of begging on city streets.

Los Angeles Alliance for Survival v. City of Los Angeles, 157 F. 3d 1162 (9th Cir. 1998). Struck down an aggressive-begging ordinance. The California Supreme Court subsequently overturned the lower court's ruling on the constitutionality of the ordinance, sending the case back to the federal district court.

State ex rel. Williams v. City Court of Tucson, 520 P. 2d 1166 (Ariz. Ct. App. 1974). Upheld a loitering-for-the-purposes-of-begging ordinance.

Ulmer v. Municipal Court for Oakland-Piedmont Judicial District, 55 Cal. App. 3d 263, 127 Cal. Rpt. 445 (1976). Upheld a ban on begging that was later struck down by the Blair court.

Young v. New York City Transit Authority, 903 F. 2d 146 (2d Cir. 1990). Upheld a ban on begging in the subway.

Endnotes

[1] Cosgrove and Grant (1997).

[2] Burke (2000).

[3] Kelling and Coles (1996, 1994); Kozlowski (1999); Leoussis (1995); Harcourt (1998); Skogan (1990).

[4] Kelling and Coles (1996, 1994); Ellickson (1996); Vancouver Police Department (1999); Fontana Police Department (1998).

[5] Cosgrove and Grant (1997); Lankenau (1999); Goldstein (1993); Fontana Police Department (1998); Manning (2000).

[6] Burke (1998); Goldstein (1993); Teir (1993); Lankenau (1999); St. Petersburg Police Department (1997); Manning (2000).

[7] Goldstein (1993); Vancouver Police Department (1999).

[8] See Ammann (2000); Barta (1999); Burns (1992); Hershkoff position in Hershkoff and Conner (1993); Lankenau (1999); Munzer (1997); Harcourt (1998).

[9] Munzer (1997).

[10] See Kelling and Coles (1996); Ellickson (1996); Burke (2000); Teir (1998, 1993); Conner position in Hershkoff and Conner (1993); Criminal Justice Legal Foundation (1994).

[11] Wilson (1991).

[12] Ellickson (1996).

[13] Kelling and Coles (1996); Ellickson (1996).

[14] Kelling and Coles (1996).

[15] Burke (2000); Lankenau (1999).

[16] Kelling and Coles (1996, 1994); Kelling (1999).

[17] Goldstein (1993).

[18] Ellickson (1996); Goldstein (1993); University of Wisconsin-Madison Department of Police and Security (1997); St. Petersburg Police Department (1997); Alexandria Police Department (1995); Evanston Police Department (1995); Sampson and Scott (2000) (Fort Pierce, Fla., case study); Higdon and Huber (1987) (Dundalk project); Manning (2000).

[19] Burke (1998); Stark (1992); Lankenau (1999); Luckenbach and Acosta (1993); Evanston Police Department (1995, n.d.); Goldstein (1993); Santa Ana Police Department (1993); *Chicago Tribune* (1994); Manning (2000).

[20] Burke (1998).

[21] Lankenau (1999); Goldstein (1993); Luckenbach and Acosta (1993); Evanston Police Department (1995); Duneier (1999).

[22] Goldstein (1993); Cosgrove and Grant (1997); Ellickson (1996); Burke (1998); Luckenbach and Acosta (1993).

[23] Goldstein (1993); Luckenbach and Acosta (1993); New York City Police Department (1994); St. Petersburg Police Department (1997); *Chicago Tribune* (1994); Evanston Police Department (n.d.); Higdon and Huber (1987) (Dundalk project); Manning (2000).

[24] Goldstein (1993); St. Petersburg Police Department (1997); University of Wisconsin-Madison Department of Police and Security (1997).

[25] Ellickson (1996); Stark (1992); Goldstein (1993).

[26] Ellickson (1996); Teir (1998); Goldstein (1993); Fontana Police Department (1998); Chicago Tribune (1994); Manning (2000).

[27] Stark (1992).

[28] Burke (1998); Lankenau (1999).

[29] Stark (1992).

[30] Lankenau (1999); Goldstein (1993).

[31] Lankenau (1999); Goldstein (1993).

[32] Goldstein (1993); Ellickson (1996).

[33] Goldstein (1993); Luckenbach and Acosta (1993).

[34] Ellickson (1996); Kelling and Coles (1996); Butterfield (1988).

[35] Burns (1992).

[36] Stark (1992).

[37] Wilson (1991).

[38] Stark (1992).

[39] Stark (1992); St. Petersburg Police Department (1997).

[40] Ellickson (1996); Burke (1998); Stark (1992); Lankenau (1999); Goldstein (1993); Duneier (1999).

[41] Ellickson (1996); Fontana Police Department (1998); University of Wisconsin-Madison Department of Police and Security (1997); Santa Ana Police Department (1993).

[42] Leoussis (1995).

[43] Stark (1992); Seattle Police Department (2000); Sampson and Scott (2000) (Fort Pierce case study).

[44] Goldstein (1993).

[45] University of Wisconsin-Madison Department of Police and Security (1997).

[46] Goldstein (1993).

[47] Goldstein (1993); Burke (1998); Luckenbach and Acosta (1993); Evanston Police Department (n.d.); Ellickson (1996); Stark (1992); Duneier (1999).

[48] Ellickson (1996); Mabry (1994); Goldstein (1993); Luckenbach and Acosta (1993); Manning (2000); Duneier (1999).

[49] Burns (1992).

[50] Lankenau (1999); Goldstein (1993).

[51] Burke (1998); Lankenau (1999); Goldstein (1993); Luckenbach and Acosta (1993).

[52] Stark (1992); Goldstein (1993).

[53] Burke (1998); Ellickson (1996).

[54] Burke (1998).

[55] Ellickson (1996).

[56] Stark (1992).

[57] Kelling and Coles (1996, 1994); Teir (1993).

[58] Ellickson (1996).

[59] Goldstein (1993); Cosgrove and Grant (1997); Ellickson (1996); Evanston Police Department (1995).

[60] Ellickson (1996); Goldstein (1993).

[61] Teir (1993); Center for the Community Interest (1996); Criminal Justice Legal Foundation (1994).

[62] Kelling and Coles (1996); Barta (1999); Ellickson (1996); Delmonico (1996); Kozlowski (1999); Leoussis (1995); Mabry (1994); Mitchell (1994); Nichols (1997); Teir (1998, 1993); Walston (1999); Hershkoff and Conner (1993); Munzer (1997).

[63] Leoussis (1995).

[64] Kelling and Coles (1996); Ellickson (1996).

[65] Goldstein (1993).

[66] Santa Ana Police Department (1993); Little (1992).

[67] Cosgrove and Grant (1997); Goldstein (1993).

[68] New York City Police Department (1994); Cosgrove and Grant (1997); Ellickson (1996); Burke (1998); Leoussis (1995); Teir (1993); Goldstein (1993).

[69] Ammann (2000).

[70] St. Petersburg Police Department (1997); Vancouver Police Department (1999); Higdon and Huber (1987) (Dundalk project); Savannah Police Department (1995).

[71] Bland and Read (2000).

[72] Kelling and Coles (1996); Kelling (1999).

[73] Savannah Police Department (1995).

[74] Kelling and Coles (1996) (discussing Seattle's response to panhandling); Santa Ana Police Department (1993); Felson et al. (1996).

[75] Ellickson (1996); Lankenau (1999); Goldstein (1993).

[76] Goldstein (1993).

[77] Burke (2000); Delmonico (1996).

[78] Kelling and Coles (1996).

[79] Kelling and Coles (1996); Cosgrove and Grant (1997); Ellickson (1996); Mabry (1994); Teir (1998); Kozlowski (1999) (citing a Fort Lauderdale law).

[80] Ellickson (1996); see Munzer (1997) for a critique of Ellickson's zoning proposal.

[81] Kelling and Coles (1996) (citing a Seattle law).

[82] Vancouver Police Department (1999); New York City Police Department (1994).

[83] University of Wisconsin-Madison Department of Police and Security (1997).

[84] Teir (1993).

[85] Ellickson (1996).

[86] Ammann (2000); Harcourt (1998).

[87] Heimberger (1992).

[88] Cosgrove and Grant (1997); Ellickson (1996); Mabry (1994); Ybarra (1996); Santa Ana Police Department (1993).

[89] Ellickson (1996).

[90] Manning (2000).

[91] Ellickson (1996); Luckenbach and Acosta (1993); Santa Ana Police Department (1993); Vancouver Police Department (1999); Evanston Police Department (1995); Higdon and Huber (1987); Manning (2000); Cosgrove and Grant (1997).

[92] Barta (1999); Harcourt (1998).

[93] Ellickson (1996).

[94] University of Wisconsin-Madison Department of Police and Security (1997); Sampson and Scott (2000) (Fort Pierce case study).

[95] Evanston Police Department (1995).

[96] Kelling and Coles (1996).

[97] Nkrumah (1998); Egan (1993).

[98] Evanston Police Department (1995).

[99] Goldstein (1993).

[100] Egan (1993).

[101] Burns (1992); Green Bay Police Department (1999); Vancouver Police Department (1999); Sampson and Scott (2000) (Fort Pierce case study); Felson et al. (1996); Duneier (1999).

[102] Santa Ana Police Department (1993).

[103] Sampson and Scott (2000) (Fort Pierce and San Diego case studies); Santa Ana Police Department (1993); Kelling and Coles (1996) (discussion of San Francisco's Operation Matrix).

[104] Seattle Police Department (2000); Alexandria Police Department (1995); Green Bay Police Department (1999); Higdon and Huber (1987) (Dundalk project).

[105] Santa Ana Police Department (1993).

[106] Vancouver Police Department (1999).

[107] Manning (2000).

[108] Felson et al. (1996).

[109] Stark (1992).

[110] Bittner (1967); Kelling and Coles (1994); Burke (1998); Goldstein (1993); Little (1992); Sampson and Scott (2000) (Fort Pierce case study); Fontana Police Department (1998); Higdon and Huber (1987) (Dundalk project); Manning (2000); Felson et al. (1996).

[111] Fontana Police Department (1998).

[112] Felson et al. (1996).

[113] Goldstein (1993).

[114] Manning (2000).

[115] University of Wisconsin-Madison Department of Police and Security (1997); Manning (2000).

[116] Manning (2000); Goldstein (1993); Stark (1992); Kelling and Coles (1994); Evanston Police Department (1995).

[117] Leoussis (1995); Teir (1998, 1993).

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About the Author

Michael S. Scott

Michael S. Scott is the director of the Center for Problem-Oriented Policing, Inc. and clinical assistant professor at the University of Wisconsin-Madison Law School. He was formerly chief of police in Lauderhill, Fla.; served in various civilian administrative positions in the St. Louis Metropolitan, Ft. Pierce, Fla., and New York City police departments; and was a police officer in the Madison, Wis., Police Department. Scott developed training programs in problem-oriented policing at the Police Executive Research Forum (PERF), and is a judge for PERF's Herman Goldstein Award for Excellence in Problem-Oriented Policing. He was the 1996 recipient of the Gary P. Hayes Award for innovation and leadership in policing. Scott holds a law degree from Harvard Law School and a bachelor's degree from the University of Wisconsin-Madison.

Recommended Readings

- ***A Police Guide to Surveying Citizens and Their Environments***, Bureau of Justice Assistance, 1993. This guide offers a practical introduction for police practitioners to two types of surveys that police find useful: surveying public opinion and surveying the physical environment. It provides guidance on whether and how to conduct cost-effective surveys.

- ***Assessing Responses to Problems: An Introductory Guide for Police Problem-Solvers***, by John E. Eck (U.S. Department of Justice, Office of Community Oriented Policing Services, 2001). This guide is a companion to the *Problem-Oriented Guides for Police* series. It provides basic guidance to measuring and assessing problem-oriented policing efforts.

- ***Conducting Community Surveys***, by Deborah Weisel (Bureau of Justice Statistics and Office of Community Oriented Policing Services, 1999). This guide, along with accompanying computer software, provides practical, basic pointers for police in conducting community surveys. The document is also available at www.ojp.usdoj.gov/bjs.

- ***Crime Prevention Studies***, edited by Ronald V. Clarke (Criminal Justice Press, 1993, et seq.). This is a series of volumes of applied and theoretical research on reducing opportunities for crime. Many chapters are evaluations of initiatives to reduce specific crime and disorder problems.

- ***Excellence in Problem-Oriented Policing: The 1999 Herman Goldstein Award Winners.*** This document produced by the National Institute of Justice in collaboration with the Office of Community Oriented Policing Services and the Police Executive Research Forum provides detailed reports of the best submissions to the annual award program that recognizes exemplary problem-oriented responses to various community problems. A similar publication is available for the award winners from subsequent years. The documents are also available at www.ojp.usdoj.gov/nij.

- ***Not Rocket Science? Problem-Solving and Crime Reduction***, by Tim Read and Nick Tilley (Home Office Crime Reduction Research Series, 2000). Identifies and describes the factors that make problem-solving effective or ineffective as it is being practiced in police forces in England and Wales.

- ***Opportunity Makes the Thief: Practical Theory for Crime Prevention***, by Marcus Felson and Ronald V. Clarke (Home Office Police Research Series, Paper No. 98, 1998). Explains how crime theories such as routine activity theory, rational choice theory and crime pattern theory have practical implications for the police in their efforts to prevent crime.

- ***Problem Analysis in Policing***, by Rachel Boba (Police Foundation, 2003). Introduces and defines problem analysis and provides guidance on how problem analysis can be integrated and institutionalized into modern policing practices.

- ***Problem-Oriented Policing***, by Herman Goldstein (McGraw-Hill, 1990, and Temple University Press, 1990). Explains the principles and methods of problem-oriented policing, provides examples of it in practice, and discusses how a police agency can implement the concept.

- ***Problem-Oriented Policing and Crime Prevention***, by Anthony A. Braga (Criminal Justice Press, 2003). Provides a through review of significant policing research about problem places, high-activity offenders, and repeat victims, with a focus on the applicability of those findings to problem-oriented policing. Explains how police departments can facilitate problem-oriented policing by improving crime analysis, measuring performance, and securing productive partnerships.

- ***Problem-Oriented Policing: Reflections on the First 20 Years***, by Michael S. Scott (U.S. Department of Justice, Office of Community Oriented Policing Services, 2000). Describes how the most critical elements of Herman Goldstein's problem-oriented policing model have developed in practice over its 20-year history, and proposes future directions for problem-oriented policing. The report is also available at www.cops.usdoj.gov.

- ***Problem-Solving: Problem-Oriented Policing in Newport News,*** by John E. Eck and William Spelman (Police Executive Research Forum, 1987). Explains the rationale behind problem-oriented policing and the problem-solving process, and provides examples of effective problem-solving in one agency.

- ***Problem-Solving Tips: A Guide to Reducing Crime and Disorder Through Problem-Solving Partnerships*** by Karin Schmerler, Matt Perkins, Scott Phillips, Tammy Rinehart and Meg Townsend. (U.S. Department of Justice, Office of Community Oriented Policing Services, 1998) (also available at www.cops.usdoj.gov). Provides a brief introduction to problem-solving, basic information on the SARA model and detailed suggestions about the problem-solving process.

- ***Situational Crime Prevention: Successful Case Studies***, Second Edition, edited by Ronald V. Clarke (Harrow and Heston, 1997). Explains the principles and methods of situational crime prevention, and presents over 20 case studies of effective crime prevention initiatives.

- ***Tackling Crime and Other Public-Safety Problems: Case Studies in Problem-Solving***, by Rana Sampson and Michael S. Scott (U.S. Department of Justice, Office of Community Oriented Policing Services, 2000) (also available at www.cops.usdoj.gov). Presents case studies of effective police problem-solving on 18 types of crime and disorder problems.

- ***Using Analysis for Problem-Solving: A Guidebook for Law Enforcement***, by Timothy S. Bynum (U.S. Department of Justice, Office of Community Oriented Policing Services, 2001). Provides an introduction for police to analyzing problems within the context of problem-oriented policing.

- ***Using Research: A Primer for Law Enforcement Managers***, Second Edition, by John E. Eck and Nancy G. LaVigne (Police Executive Research Forum, 1994). Explains many of the basics of research as it applies to police management and problem-solving.

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- **Assessing Responses to Problems: An Introductory Guide for Police Problem-Solvers.** John E. Eck. 2002. ISBN: 1-932582-19-3

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Other Related COPS Office Publications

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- **Bringing Victims into Community Policing.** The National Center for Victims of Crime and the Police Foundation. 2002.
- **Call Management and Community Policing.** Tom McEwen, Deborah Spence, Russell Wolff, Julie Wartell, Barbara Webster. 2003
- **Crime Analysis in America.** Keith Nicholls, PhD., Timothy C. O'Shea, PhD. 2003
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- **The COPS Collaboration Toolkit: How to Build, Fix, and Sustain Productive Partnerships.** Gwen O. Briscoe, Ph.D., Anna T. Laszlo, Tammy A. Rinehart. 2001.
- **The Law Enforcement Tech Guide: How to plan, purchase and manage technology (successfully!).** Kelly J. Harris, William H. Romesburg. 2002.
- **Theft From Cars in Center City Parking Facilities - A Case Study.** Ronald V. Clarke, Herman Goldstein. 2003.

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1100 Vermont Avenue, N.W.
Washington, D.C. 20530

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Panhandling and Solicitation After *Reed*

NC MUNICIPAL LAWYERS' MIDYEAR MEETING: 3/23/17

PROFESSOR JUDITH WEGNER & UNC LAW STUDENT MATT NORCHI

1

Overview

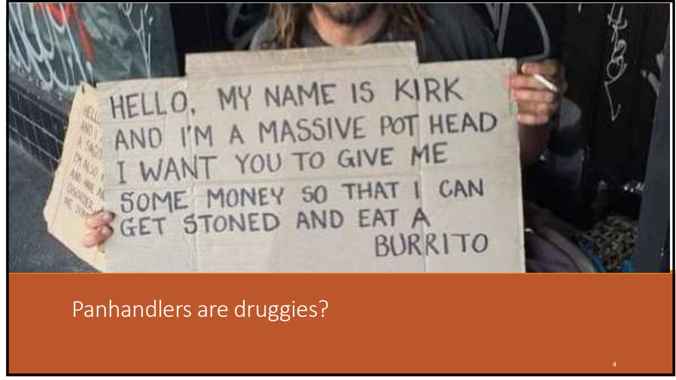
- **Panhandlers and Panhandling** (Wegner)
- **Evolving Law**
  - Case Law Prior to *Reed* (Norchi)
  - *Reed v. Town of Gilbert* and its Implications (Norchi)
  - Post-Reed Developments (Wegner)
- **Model Ordinance** (Wegner)
- **Questions and Comments**? (Norchi & Wegner)

2

Panhandling and panhandlers…

When I say "panhandling" what images come to mind?

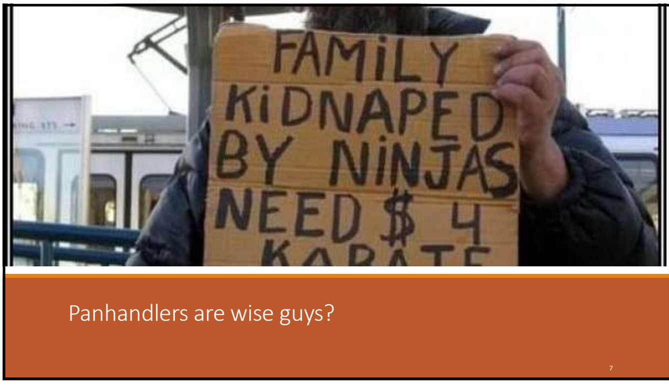
3



Panhandlers are druggies?

Kickstarter request to fund film on panhandler, "Red Light Larry…

Hard luck story…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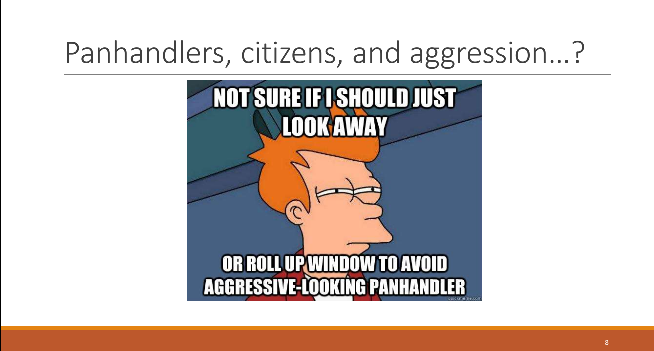
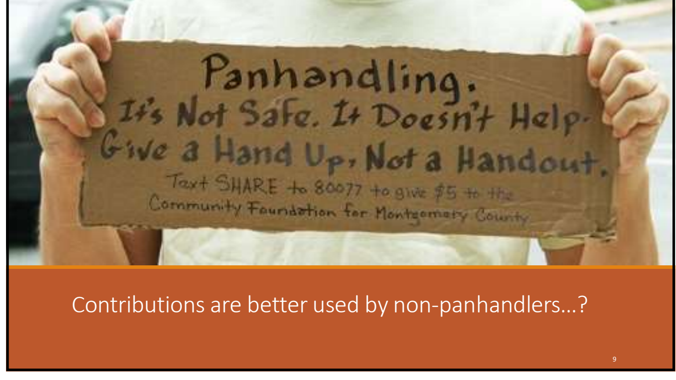
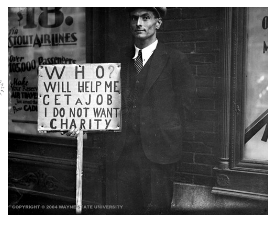
Panhandlers are wise guys?


Panhandlers, citizens, and aggression…?
NOT SURE IF I SHOULD JUST
LOOK AWAY
OR ROLL UP WINDOW TO AVOID
AGGRESSIVE-LOOKING PANHANDLER


Panhandling.
It's Not Safe. It Doesn't Help.
Give a Hand Up, Not a Handout.
Text SHARE to 80077 to give $5 to the
Community Foundation for Montgomery County
Contributions are better used by non-panhandlers…?

Compare Panhandling in Days Past?



10

Brother, can you spare a dime…?

They used to tell me I was building a dream
And so I followed the mob
When there was earth to plow or guns to bear
I was always there right on the job.

They used to tell me I was building a dream
With peace and glory ahead
Why should I be standing in line
Just waiting for bread?

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Why regulate panhandling?

- *Reduce homelessness*
- *Address public concerns about disorder, security, and safety*
- *Limit public begging*
- *Maintain clean and orderly view-scapes*
- *Protect traffic safety*
- *Reduce adverse effects on business*

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Some Connections: Why Panhandle?

THE GOOD

- Lost job
- Lost savings
- Lost home
- Health problems
- Can raise more funds than
  - if paying work not available
  - If work full-time at minimum wage job
- If are homeless and have no other place to be or things to do

THE BAD AND THE UGLY

- Mental health problems
  - Including growing number of veterans with PTSD and brain injuries?
- Substance abuse?
- "Scam artists"/ "lazy louts"?
- Recidivists?

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Panhandling and Poverty…

2017 POVERTY GUIDELINES FOR THE 48 CONTIGUOUS STATES AND THE DISTRICT OF COLUMBIA	
PERSONS IN FAMILY/HOUSEHOLD	POVERTY GUIDELINE
For families/households with more than 8 persons, add $4,180 for each additional person.	
1	$12,060
2	$16,240
3	$20,420
4	$24,600
5	$28,780
6	$32,960

Full time work at federal minimum wage ($7.25/hour) yields $15,080 per year
Student experiment in Oregon: Panhandling yields $11.10/hour v. $8.95 state minimum wage over 12 day period (2014)

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Panhandling and Homelessness

National Law Center on Poverty and Homelessness: Housing Not Handcuffs (2016): **Increasing criminalization of homelessness**… how and why?

- Camping in public
- Sleeping in public
- Lying down or sitting in public
- Loitering, loafing, vagrancy
- Begging in public
- Living in vehicles
- Food sharing bans

- See appendix A to program manuscript for 2016 survey of urban practices

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And now, for something completely different … a (legal) perspective…

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First Amendment Coverage?

Is panhandling "speech" covered by the First Amendment? If so, why?

- ***Village of Schaumburg v. Citizens for a Better Environment*** (US 1980 (Charitable solicitation involves speech and is protected by the First Amendment)
- ***Secretary of State of Maryland v. Joseph Munson Co.*** (1984) held strict scrutiny applies to content-based regulations of charitable solicitations
- **Numerous lower court cases have treated panhandling/asking for alms as similarly protected** although the SCOTUS has not ruled on that precise point
- **Banning panhandling categorically throughout a jurisdiction is therefore impermissible:** *Loper (2nd Cir. 1993) (NYC ban on loitering); Speet (MI 2013) (Michigan state statute criminalizing begging in public places unconstitutional on its face)*

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First Amendment: What is the Relevant Analysis?

- **Content-based regulation of speech**: (ban "begging" orally or with sign)

**Traditional test: (Strict scrutiny)

Compelling government interest, regulation necessary to achieve that objective & narrowly tailored to employ least restrictive means; presumption against constitutionality

- **Regulation of conduct associated with speech ("speech plus"):**

**Traditional test (*O'Brien*) (burning draft cards) (intermediate scrutiny):

Is government action within government's constitutional power?; Does it further an important or substantial government interest? Is it unrelated to suppression of free expression? Is the incidental restriction on First Amendment freedom no greater than essential in furtherance of government interest?

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First Amendment Analysis: Cont.

- **Regulation of speech and conduct through "forum" analysis**

Test if "public forum," content-neutral, & "time, place and manner" restriction: ***McCullen v. Coakley* (US 2014) (buffers on sidewalks adjacent to abortion clinics fails): if public forum, must justify regulation without reference to content; show significant government interest, narrowly tailored, ample alternative channels of communication

****Compare I*nternational Society for Krishna Consciousness, Inc. v. Lee*** (US 1992): airport terminal and literature distribution; Kennedy, J. concurrence

- **Captive Audience doctrine:** still in flux

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Important Pre-*Reed* Panhandling Cases

- **Content-based regulation invalid**
  - ***Clatterbuck v. City of Charlottesville*** *(D. VA. 2013, 2015) (prohibition on solicitation of immediate donations on mall struck down, based on conclusion that ordinance was content-based)*
- **Regulation of speech + conduct**
  - ***Reynolds v. Middleton*** *(4th Cir. 2015): evidence required to support ban on solicitation on county roadways was insufficient*
  - ***Gresham v. Peterson*** *(7th Cir. 2000): upholding Indianapolis regulation of "aggressive panhandling"*

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Important pre-*Reed* Cases re Panhandling (Cont.)

- **Public Forum Analysis**
  - **Areas that are clearly public forums**
  - **Areas that may be something other than public forums**
  - **Overall approaches:** *Gresham v. Peterson* (7th Cir. 2000)
- **Captive Audience Analysis**
  - ***Young v. NY Transit Authority*** (2d Cir. 1990) (upholding ban on panhandling on subway
  - ***McCulloch v. Coakley*** (US 2014) (striking down 35 foot abortion clinic buffer zones as overly broad where likely less restrictive alternatives)

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Reed v. Town of Gilbert (US 2015)

Town sign code: (temporary, noncommercial signs, but broader implications?)
- Sign permit required, except for “temporary directional signs for qualifying event,” “political signs,” “ideological signs”
- Temporary directional signs could be put in right of way, could be put up 12 hours before event, and had to be taken down 1 hour afterward

Good News Community Church:
- 17 temporary signs announcing services at schools
- Town said in violation of sign ordinance since church did not take down between services
- Church said 1st Amendment violation since temporary sign requirements “content based”

9th Circuit
- Held reasonable “time, place, manner” restrictions; not content-based re message
- Narrowly tailored to address concern re safety and aesthetics; even though political and ideological signs not as significantly constrained in terms of period for posting
- Ample alternative means of communication

US Supreme Court: favoring political and ideological messages v. church/directional?

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Reed Decision: Majority

9-0 agreement on result, but differences in rationale; Scalia now gone

Resolved circuit split re content-neutral:
- Consider purpose and whether justified before seeing if strict scrutiny met (was distinction being made because of content or based on content) (4th Cir. and others)? OR
- Does message on sign determine how regulated and if so is it content-based (absolutist)? **(so held)**

Thomas majority opinion (with Roberts, Scalia, Kennedy, Alito & Sotomayor)
- If you have to read the sign, then not content neutral (absolutist approach); don't consider function/purpose of regulation; if content-based, subject to strict scrutiny (compelling government interest, least restrictive means then required)
- Speaker-based or event-based signs also content-based
- Content-neutral still okay (e.g. time, place, matter)

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Reed Concurrences: Do They Now Control?

Alito concurring (with Kennedy and Sotomayor) (so that's three votes):
- Gives some observations re **what should be okay**
  - Regulations on size and location such as on-building v. free-standing, lighted v. unlighted, fixed messages and electronic signs with changing messages, placement of signs on commercial and residential property, total number of signs allowed per mile of roadway
  - Government speech re government's own signs okay
  - Distinctions between on-premises and office premises okay; imposing time restrictions on signs advertising a one-time event (seems to treat as content neutral?)

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Reed Concurrences… More

Breyer & Kagan each concurring and asking questions (2 more votes)
- **Breyer**: Concern that will water down strict scrutiny; would treat content discrimination as a factor in burden/benefit balancing
- **Kagan**: why had to go so far (could not have survived intermediate scrutiny)

Bigger questions (courts go wild):
- Does 1st Amendment now relate to any economic regulation???

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Reed: Implications

Categories of signs not allowed?

Content neutrality redefined and decided on face
- Does regulation on its face distinguish based on message a speaker conveys
- Defines regulated speech by function or purpose
- Cannot be justified without reference to content of speech or adoption because of disagreement with message conveyed
- Strict scrutiny applies: what justifications satisfy?

Regulation of time, place, manner still okay

Can still regulate commercial speech v. noncommercial?

Can regulate billboards? (Federal highways?)

On-premises v. off-premises distinctions still permissible?

Regulation of temporary political signs?

Can content-based regulations ever survive strict scrutiny?

Is core concern really about treating religious activity as the same as political?

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Reading *Reed:* Scholarly Commentary

Harvard L. Rev., Note (129 Harv. L. Rev. 1981, May 2016) (posted)
- Pivotal question is whether content-based or content-neutral
- **On its face, *Reed* concerns speech, not conduct**
  - *Note:* SCOTUS granted review of case involving "surcharge" or "discount" for card fees; also case on disparaging trademarks (*Slant*)
  - Does *Reed* affect commercial speech analysis (didn't say so)?
  - *Reed* seemed focused on treatment of *noncommercial* speech? Implications?
  - Content analysis should be treated in context (signage, not something else)
  - Can signs (and other regulations) still be content-neutral with a less stringent test?

Lauriello, *Panhandling Regulation after Reed v. Town of Gilbert* 116 *Colum. L. Rev. 1105* (2016)
- Note categories: bans, location, "aggressive," types of "solicitation," captive audiences

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Key Questions Going Forward

- How **broadly** should *Reed* analysis apply in contexts other than sign regulation?
- **How will SCOTUS treat this precedent** in the future given **splintered Court** and Scalia's death?
- How might First Amendment analysis apply **where content-based and content-neutral distinctions remain confusing**?
- How does **"speech plus" doctrine** apply to panhandling involving both speech and conduct (aggressive panhandling)?
- How does **public forum, content-neutral, time/place/manner doctrine apply** to panhandling regulations going forward?

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Case Law Since *Reed: First Circuit*

- **Thayer v. City of Worcester, MA**
  - **Ordinances:** Prohibiting aggressive panhandling and walking/using signs on traffic medians (affected panhandlers & electioneering)
  - **Court of Appeals Decision** (1st Cir. 2014 pre-Reed): as to preliminary injunction, upheld as "**content-neutral**" "time, place, manner" regulation of public forums; intermediate scrutiny; adequate evidence
  - **On Remand (D. MA 2015):**
    - Prohibition on aggressive begging, panhandling, solicitation was **content based** and subject to strict scrutiny; did not use least restrictive means (could handle under state criminal statutes)
    - Prohibition on soliciting any person in public after dark was **substantially overbroad**
    - Restriction on pedestrian use of traffic medians and roadways was **content-neutral** and had to be narrowly tailored to serve government's legitimate, content-neutral interests failed because it was **not narrowly tailored** (in light of 1st Circuit decision in Cutting)

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Case Law After *Reed*: 1st Cir. (Cont.)

- ***Cutting v. Portland, ME*** (1st Cir. 2015) (post-*Reed*)
  - **Ordinance**: prohibited all standing, sitting, staying, driving, or parking on median strips anywhere in the city
  - **Court of Appeals Decision**: content-neutral time/place/manner restriction as to public forums, but failed intermediate scrutiny because was not well-tailored (applied everywhere in city)

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Case Law After *Reed:* 1st Cir. (Cont.)

- ***McLaughlin v. Lowell, MA*** (D. MA 2015) (post-*Reed*)
  - **Ordinance:** banned vocal panhandling in city's downtown, aggressive panhandling, intimidating panhandling in groups of two or more, panhandling within 20 feet of designated areas or as to those standing in line
  - **District Court Decision:** ban on vocal panhandling was **content-based** and not furthered by compelling governmental interest (in absence of solid evidence; promoting tourism and economic development not "**compelling" governmental interests**; public safety & preventing coercion are compelling interests but were post-hoc justifications only); "aggressive" panhandling could be **addressed under state law** and there was insufficient proof of why local provisions were needed; also insufficient proof of why panhandling in **certain locales** should be deemed "aggressive"

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Case Law Since Reed: *Norton* and 7th Circuit

- ***Norton v. City of Springfield, Illinois***
  - ***Facts:***
    - Panhandling (defined as **"oral request for immediate donation of money")** banned in **city historic district** (2% of area but included most of shopping, entertainment, governmental buildings
    - **Exemption**: signs were permitted and oral requests to send money later was permitted there
    - **Rationale:** requests for money, particularly at night, with no other bystanders could be perceived as a threat
  - **Original decision** (7th Cir. 2014): was not content-based discrimination (defined as barring speech because of ideas expressed or barring because government disagrees)
  - **Decision after remand by SCOTUS** (7th Cir. 2015): based on *Reed*, was **content-based** discrimination (between asking for money now or in the future); held invalid

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Other Case Law Since *Reed*: Federal

- **Federal District Courts elsewhere**
  - **Browne v. City of Grand Junction, CO** (D. Colo. 2015) (post-*Reed*)
    - **Ordinance**: comprehensive ordinance including ban on panhandling at night, where "panhandling" defined to mean: "knowingly approach, accost or stop another person in a public place and solicit that person, whether by spoken words, bodily gestures, written signs or other means, for money, employment or other thing of value;' also panhandling near sidewalk cafes, public parking garage, ATMs, bus stops; also panhandling near streets/highways)
    - **Held:** content-based and failed strict scrutiny; used "sledgehammer not scalpel"; no challenge against "aggressive panhandling" and that provision not struck down

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Other Case Law Since *Reed*: Federal:

- **Homeless Helping Homeless, Inc. v. City of Tampa** (M.D. FL, 2016)
  - **Tampa Ordinances**: prohibited solicitation of payments by express/implied threat, continuing after being refused, impeding free movement; solicitation in designated areas (defined downtown, bus stop, ATM, sidewalk café); challenged focused on aspects focusing on limiting panhandling in designated areas
  - **Ruling:** regulated time/place/manner in public forum, but was "content-based"; city had conceded that no "compelling governmental interest" so invalidated (why concession?)
- **Left Field Media LLC v. City of Chicago** (7th Cir. 2016): city can limit peddling on sidewalks adjacent to Wrigley Field where narrow passage and congestion; *Reed* not applicable since was content neutral time, place, manner regulation

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Other Case Law Since *Reed*: State Cases

- ***City of Lakewood, Utah v. Willis*** (UT 2016) (en banc)
  - **Ordinance:** local ordinance prohibited panhandling and solicitation of money or goods as a charity but not more generally for voters or customers); applied to on-/off-ramps major roadways, overpasses, intersections of major arterials or islands on principal arterials
  - **Holding:** ordinance subject to strict scrutiny since only targeted panhandlers, failed to justify broad application
- ***Champion v. Commonwealth*** (KY 2017, still unpublished)
  - **Ordinance:** prohibited all begging and solicitation of alms on public streets and intersections anywhere in the county
  - **Holding:** treated as content-based (even if facially content-neutral, was aimed at panhandlers particularly); strict scrutiny applied; failed adequately to justify based on traffic safety or management; over- and under-inclusive

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Emerging Trends re Ordinances

- **Continuing regulation of "aggressive panhandling" post *Reed***
- **Significantly increased efforts to limit panhandling on traffic medians**
- **Evolving efforts to regulate other areas as "public": e.g. adjacent to ATMs, bus stops, performance venues, sidewalk cafes**
  - Clear ACLU priority to challenge criminalization of homelessness by litigation
  - Includes but is not limited to concerns about panhandling in traffic medians
- Efforts by some regulating jurisdictions **to pair enforcement efforts with efforts to facilitate housing and jobs for homeless individuals/panhandlers** (e.g. Maine)
- Think carefully: See
  - https://cops.usdoj.gov/html/cd_rom/inaction1/pubs/Panhandling.pdf
  - National Law Center on Homelessness and Poverty, https://www.nlchp.org/

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Crafting a Model Ordinance

Some fundamental questions…

- **Why are you acting and what problems that you are trying to address?**
- **What burden of proof will you be required to carry?**
- **How might you proceed to gather evidence to guide proposed government action?**
- **How can you frame the ordinance in a way that is understandable to lay people?**
- **How should you structure the ordinance?**
- **How might communities and policymakers who believe that panhandling is closely related to homelessness proceed?**
- **How might communities and policymakers avoid wasting time on unsustainable ordinances?**

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Model Ordinance: Scope

- Ordinance addresses range of topics to justify stance that *Reed's* claim of "content-based" regulation is inapplicable
- Matters covered include
  - Panhandling/begging
  - Charitable solicitation
  - Political solicitation/electioneering
- City council members might be inclined to regulate panhandling separately, but the approach proposed will significantly enhance likelihood of upholding ordinance; it is important to help policymakers see that similar conduct should be regulated in a similar manner

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Model Ordinance: Purpose, Findings, Evidence

- **Essential to articulate purpose, findings and evidence to guide judicial review**
- **Draft language is careful to**
  - Reference positive First Amendment considerations (protecting speech, clarification)
  - Reference significant/compelling governmental concerns and related evidence
  - Reference findings (that should be based on previously developed evidence)
  - Preliminary notes in manuscript reference strategies for developing evidence, particularly those recommended by the Center for Problem-Oriented Policing

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Model Ordinances: Definitions

- **Covers panhandling, begging, charitable solicitation, electioneering** to reduce risk of ordinance's being treated as "content-based"; if not content-based, possible that intermediate scrutiny rather than strict scrutiny will apply
- **Defines** begging, panhandling, charitable and political solicitation
- **Includes specific definitions regarding**
  - **Aggressive** begging, panhandling, charitable or political solicitation (widely prohibited)
  - **Passive** begging, panhandling, charitable or political solicitation (protected in some instances)
  - Areas with heightened **personal security/privacy concerns**
  - High traffic areas (including pedestrian traffic such as in historic areas) and traffic medians with **traffic congestion/public safety concerns;** note that tourism itself not enough

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A Policy Matrix ... what do you think?

Type of conduct	Regulations Apply	Penalty
Passive (written or oral) in non-designated areas	Non-designated areas (no showing of personal security/privacy or public safety/traffic)	None
Passive in Sensitive Protected Areas (personal security/privacy) OR could create disincentive for aggressive panhandling in such areas by imposing a "most severe" penalty in such cases	Designated areas with higher personal security/privacy concerns (ATMs, bus stops, congested sidewalks, etc.)	Moderate (drafted in this fashion) Most severe if aggressive panhandling in such areas? (could revise accordingly if desired)
Passive in Dangerous Areas (relates to public safety/traffic congestion)	Traffic medians that are too small or designated high volume/high speed traffic area	Moderate
Aggressive (defined)	Everywhere in jurisdiction	Severe

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Model Ordinance: Passive Panhandling

- **Defined:** sign or oral/vocal only
- **Widely permissible except**
  - **Not in areas of heightened concern:** private security or privacy (may be debatable)
  - **Not in designated public safety areas:** small traffic medians or high speed/high volume highways (signs and activity create hazards even without aggressive behavior)

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Model Ordinance: Aggressive Panhandling

- Draft reflects synthesis of range of municipal ordinances
- Note that some **state legislatures** are defining "aggressive solicitation" on a state-wide level (e.g. Arizona, AZ Rev Stat § 13-2914 (2015))
- **Proposed definition includes** (avoid vagueness, be concrete)
  - Confronting, accosting, touching,
  - Continuing when refused
  - Obscene or abusive language
  - Intentionally blocking/interfering with passage
  - Forcing oneself upon company of another
  - Acting with intent to intimidate
  - Other similar actions

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Model Ordinance: Sensitive Areas

- **Drafting Choices:**
  - **Captive audience** doctrine too undeveloped and potentially problematic
  - Instead **focus on areas where heightened concerns** re personal security, personal privacy and public safety are particularly pertinent
    - **Personal security**: nighttime access to public parking, building entrances, public events venues, commercial or historical areas where significant congestion, other areas where congestion raises security concerns
    - **Privacy concerns:** ATMs, sidewalk cafes, other areas where close proximity of concern
    - **Public safety:** commercial/historic districts where congested sidewalks; traffic medians on high traffic/high speed corridors

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Model Ordinances: Traffic Medians

- **Need studies** to support claims of safety concerns regarding activities on traffic medians
- **Recent efforts**: **how jurisdictions justify regulation** of acts on traffic medians
  - **Narrow and "domed" medians v. larger and flat medians**: Colorado Springs, Colorado
  - **High speed and high volume roads where risks are greater**: Madison, WI
- **Common questions**:
  - What about firefighters "fill the boot" campaigns? Possible one day jubilee for all?
  - What about electioneering/campaigning? Need to treat similar conduct equally to assert "content-neutral" claims
  - What about asserting that some medians are not "public forums": uphill battle likely
  - Best approach: focus very clearly on safety: size of median, traffic volume and speed, related congestion: don't just claim it, prove it!

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Model Ordinance: What's Not There

- **No ban on panhandling/solicitation at night**: do you need it?
- **No ban on "fraudulent" panhandling/solicitation**: could you prove it?
- **No directives re penalties**: depends on local circumstances, public service obligations better than fines, link between limits on panhandling sites and probation may be appropriate incentive
- **No recommendation re permits** (difficult to implement and may be overly broad)
- **No attempt to address other solid strategies (see sources suggesting non-enforcement strategies) (e.g. pp. 17-30 of** https://cops.usdoj.gov/html/cd_rom/inaction1/pubs/Panhandling.pdf)
- **No suggestion to urge citizens NOT to give to panhandlers but to give to homelessness organizations** (some places are trying this solution, including using parking-meter like collection mechanisms)

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What do you think?

- **What concerns and regulatory strategies** are you seeing in your jurisdiction?
- **Will city councils be willing to consider comprehensive approaches** to "solicitation" that includes not only panhandling but charitable solicitation and electioneering?
- What **changes do you think are needed to improve the proposed model ordinance?**
- **What other insights would you like to offer on related topics?**

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Conclusion

Thanks for inviting us to speak with you:

- *Matt Norchi, UNC Law JD expected, 2018; MRP expected 2019 (norchi@live.unc.edu) (municipal and land use planning attorney par excellence in training) (hire this man!)
- *Judith Welch Wegner, Burton Craige Professor Emerita, Judith_Wegner@unc.edu (moving to Massachusetts in fall 2017, but always there for you and yours!)
  - Judith wishes to give thanks to her many colleagues, friends, former students and mentors within the NC municipal law bar; no one could have been blessed with better friends; keep your eyes on the prize and contact Judith at any time for pro bono help (or for a free Cape Cod vacation on Nantucket Island, MA once our addition to my great aunt's house is complete)

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Ethics: Board Conflicts and Civility, and the Role of the Attorney

Template for a Roles and Expectations Discussion with Your Board

Advance preparation

The purpose of the session is to clarify roles and expectations in order to strengthen the effectiveness of the governing team. To prepare for the group discussion, reflect on the following questions:

For Board Members:

- What are your expectations of yourself and other members of this Board in order to serve and represent the residents of [City] effectively?
- What are your expectations of the City Manager? Of the Attorney? Of the Clerk?
- What are your expectations of the Mayor? Of liaisons to committees?

For Manager, Attorney, and Clerk:

- What are your expectations of the Board in order to perform your job effectively?

Group discussion

For each role, group members:

1. write their expectations individually (one expectation per Post-it, as many as they want), and post them on flip charts;
2. discuss the expectations, asking clarifying questions and sharing examples as needed;
3. agree on a shared list of expectations that they will abide by and support.

Time needed for discussion: approximately two hours, more if there is a high level of misunderstanding and conflict among board members.

After the Election: How Do Governing Boards Become Effective Work Groups?
Author(s): Margaret S. Carlson and Anne S. Davidson
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After the Election: How Do Governing Boards Become Effective Work Groups?

Margaret S. Carlson and Anne S. Davidson

In terms of group effectiveness, governing boards face a basic dilemma as soon as members take office. City councils and county commissions are not formed the way most effective work groups are formed. They are elected as individuals, not selected for their complementary skills, knowledge, or experience. Often, they have no clear work task that unites them. They may disagree fundamentally about the role of government and consequently, their role as elected officials. Yet despite these differences, virtually all of the principles of group dynamics apply to a governing board. Issues such as leadership, role definition, and conflict management all contribute to the effectiveness or ineffectiveness of board members' work with one another, with the manager, and with the community they guide.

We believe that inattention to and ineffective management of the elements of group effectiveness are primary sources of unnecessary board conflict. We have found that by addressing these elements early in their development, boards can eliminate much unproductive communication that increases animosity, destroys trust, and makes it more difficult for the board to address substantive issues. This article identifies some of the factors that make group development more challenging for city and county boards than for other groups; explains the importance of setting group norms for working together in the early stage of a board's development; and describes an intervention we often use to help a board establish an effective working relationship. By developing a shared understanding of both the role of the board and a set of expectations among board members, presiding officials, and managers, we have helped a number of elected officials and managers avoid potential conflicts and resolve existing ones.

Special Issues in City-County Boards That Make Effective Group Development More Challenging

Governing boards fit the conventional definition of a work group and thus are subject to the same principles of group dynamics as are other groups (Hackman 1987).

1. They have boundaries, interdependence among members, and differentiation of members' roles. This means that it is possible to distinguish members from nonmembers, even if membership changes over time.
2. They have one or more tasks to perform, and the group collectively is held responsible for the product.

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3. They operate within an organizational context, so the group must manage relationships with other individuals and groups in a larger social system.

While the principles of group dynamics clearly apply to governing boards, there are special circumstances surrounding their work that do increase the challenges these boards face in becoming effective groups. In this section, we describe some issues that frequently come into play when we attempt to help a governmental board apply the principles of group effectiveness.

- John Carver (1990) points out that although governmental boards have much in common with for-profit and nonprofit boards, they are more likely to be bound by legal requirements in terms of both composition and process. They also differ "in how much public scrutiny they receive, a factor that produces differences in the amount of posturing involved in board dynamics" (1990, 5). Carver contends that many governmental boards have strong, long-established traditions that make it very difficult for them to apply modern management principles.

- Boards often do not see themselves as groups. Consequently, it never occurs to them to spend time on group development. On many boards, the chairperson is seen as the sole member responsible for "group dynamics," which implies keeping the group on track, giving everyone a chance to speak, and moving efficiently through the agenda. Carver and Carver argue that "board members expect too much of the chairperson, for example, when they ask him or her to save the board from being held hostage by its most controlling member.... If the board as a whole does not accept responsibility for the governance process, the best the chairperson can achieve is superficial discipline" (1996, 3).

The notion that every member of the board shares responsibility for group effectiveness is entirely consistent with our research on and experience with groups. However, the process of electing board members individually (often by wards or districts) makes it unlikely that board members will see themselves as group members who share equal responsibility for effectiveness. In communities where the mayor or county commission chair is elected separately, the notion of the chair as being responsible for the group may be further reinforced.

- Boards who want to work on group development often are faced with negative public perceptions about the value of this work. Boards that take group development seriously generally try to schedule time away from interruptions to have meaningful and open discussions about how to improve their effectiveness. Yet the media—and consequently, the public—often view retreats and special work sessions as pleasure junkets at public expense. At best, these discussions are perceived as a waste of board members' time.

- "Sunshine" and open meetings laws often have the unintended consequence of making it more difficult for board members to discuss issues related to their personal behavior, past ineffectiveness, and attitudes toward one another. It is generally difficult to address aspects of group culture without specific examples of occasions when norms and expectations were violated. Since retreats and work sessions are open meetings that may be attended by the press, some members may be reluctant to hold discussions at a level of specificity that allows the most difficult interpersonal issues to be resolved.

- Contentious political campaigns may turn board members against one another even before they are sworn in. Research on organizations (see McKnight, Cummings, and Chervany 1998) suggests that in many cases, people begin new relationships with high levels of initial trust in one another. In other words, they assume all the other members are well intentioned, reasonable people working for the good of the organization as a whole. Until an individual proves differently, he or she is accorded respect and granted

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serious consideration for opinions, ideas, and suggestions. The campaign process that is required to earn a seat on a governing board often encourages attacks on the past performance of that board and/or the manager. Candidates frequently promise to make drastic changes, if elected. Such behavior may create cynicism and a self-fulfilling prophecy that board members may be unable to work together. Thus, the election process is rarely conducive to a board with high levels of initial trust.[1] As a result, many governmental boards must begin the group development process at a much more difficult starting place than the average organizational work group.

• Board members are often elected based on a track record of community involvement and service on other boards and task forces. These individuals have a known history prior to being elected to a city council or county commission and often may have an allegiance to particular special interest groups, neighborhoods, or minority positions. Other board members may assume, sometimes incorrectly, that the intention of a board member is to drive the agenda of groups that the member previously served rather than focus on balancing the needs of the entire community. Again, the initial atmosphere is more likely to be one of distrust rather than trust.

• Board members are, in fact, frequently conflicted about their need to represent a particular constituency versus their need to deal with the "big picture." As Houle (1989) points out, the first efforts of many board members are at least partially self-interested and tied to special purposes for which they were elected. The new board member discovers later, "perhaps with consternation, that the inside viewpoint is not the same as the outside one; often, indeed, it is so different that the desire to carry out an electoral promise is lost" (1989, 28). This dynamic may contribute to fear of public indignation or possible legal attack, conflict among different jurisdictions, and apprehension about the chances of being reelected. While some work teams experience similar tension about representing others versus speaking for themselves, the issue seldom reaches the complexity of that faced by boards.

• The formal voting process required of governing boards as they reach decisions is often antithetical to open discussion of group process and structure issues. Experienced board members and managers tell us that they begin to feel that "as long as [they] have the votes, who cares?" They are encouraged to think and act in ways that will assure them of votes ahead of time. Many of the methods involve behaviors that some consider to be at best, a system of "good old boy" tradeoffs and at worst, manipulative and underhanded. For example, a member formerly in the minority and now in the majority on a bipartisan board told us that even when he understands and supports the interests of the other side, he is tempted to vote against them just to "show them how it feels for a change." A culture of arguing, of winning and losing, and of refusing to share relevant information develops. It is then difficult to discuss expectations and past communication problems at a level of depth that allows a group to separate conflict based on "getting even" from deeply held values and differences worthy of exploration and debate.

• The turnover rate among elected officials is much higher than on most other types of boards. As many local governments face the intense pressures of rapid growth, increasingly complex social problems, intense pressure from special interest groups, and divisive electoral processes, long-time board members increasingly are choosing to step down. Many board members with whom we work in North Carolina cite increasing difficulties of managing public and family life, which means it is unlikely that they see public office as a long-term part of their community contribution. It seems less and less likely that many members will serve term after term. Coupled with the fact that the av-

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erage tenure for city managers nationally is now 5.9 years,[2] it is difficult for governmental boards and their chief executives to have a sense of commitment to one another and to long-term growth together. Some of the deepest levels of group development are probably impractical and unlikely under such conditions.

Although these factors may make effective group development more challenging for governing boards than for other groups, we believe the solution is *not* to avoid group process issues. Our strategy is to encourage board members soon after they take office to begin discussing how they want to work together as a group. The early period in a board's development is a critical time for establishing group norms.

Importance of the Early Period in a Board's Development

Because a governing board fits the definition of a work group (whether or not the board defines itself as such), it follows that a board is subject to the principles of group development. Several theorists have emphasized the importance of a group's initial interactions in "setting the tone" for the group's work. Although some theories of group development suggest that a period of time must pass after a group's inception before the group can establish its norms (see Tuckman 1965), more recent research indicates that norms may be established very early in a group's lifespan. In her "punctuated equilibrium" model, Gersick (1988) found that (a) a framework for behavioral patterns emerges at a group's initial meeting and (b) there are few significant shifts in the group's approach to its work, until the group reaches the midpoint of its intended duration or project.

In one of the most comprehensive models of group formation and development, Schein (1988) posits that new group members initially demonstrate self-oriented behavior, which reflects the concerns that any new member of a group might experience. Before members can begin to pay more attention to each other and to the task(s) facing them, their personal concerns need to be resolved. Concerns include:

1. *intimacy*—"Who am I to be?"
2. *control and influence*—"Will I be able to control and influence others?"
3. *needs and goals*—"Will the group goals include my own needs?"
4. *acceptance and intimacy*—"Will I be liked and accepted by the group?"

Working through these initial concerns is important, because members will remain preoccupied with their own issues until they find a role that is comfortable for them and until the group develops norms about goals, influence, and intimacy. Given the special issues that make group development particularly challenging for city or county boards, self-oriented behavior may be even more pronounced as a new group of elected officials begins its work together. The board typically consists of a mix of incumbents and newcomers, which may accentuate new members' concerns about control and influence. Members may have information from other board members' campaigns that suggests that they will have difficulty accomplishing their desired goals because of opposition or competing goals of other members.

It is important to recognize that the board is essentially a new group, even if only one member changes. Each member has a new relationship with that person, which changes the dynamics of the entire group. Schein states that "every group must go through some growing pains while members work on these issues and find their place. If the formal structure does not permit such growth, the group never becomes a real group capable of group effort. It remains a collection of individuals held together by a formal structure" (1988, 47). We believe this early work is critical for governing boards because in the absence of group discussion and clarification of

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these issues, much of a group's energy continues to be devoted to individual coping responses instead of to the job at hand. In extreme cases, board members can develop self-fulfilling prophecies about their early conflicts; instead of seeing these issues as a natural part of a group's development, they may view the difficulties as evidence that "this board will never be able to work together." This interpretation, in turn, could reduce their motivation to work through group process problems as they arise, thereby increasing the likelihood that the group will remain ineffective.

Intervention Methodology

Despite the challenges facing governing boards and the managers who work with them, we believe that boards can apply the principles of effective group development. In doing so, they can significantly reduce the level of unproductive conflict among board members. Included in "unproductive conflict" are differences rooted in a desire to get even, frustration with the mayor or chair for "not leading," personal antagonisms based on assumptions people have made about each other, and suspicion based on failure of individuals to explain the reasons behind their decisions or behavior.

A basic intervention we have used with a number of boards and managers to improve their working relationships is agreeing on roles and expectations for working together. This is simply an initial step in cultivating an atmosphere that makes possible a more open exchange of ideas and feelings. It helps boards reserve their energy for difficult, substantive issues rather than getting stuck over and over again on lesser problems. Although the intervention in no way eliminates all conflict or lessens the complexity of serving on a governing board, we believe it teaches board members valuable skills for communicating productively when there are fundamental differences.

Why Intervene on Roles and Expectations?

Whenever there are new board members, new presiding officials, or new managers, explicitly discussing roles and expectations can be helpful. By "role," we mean the cluster of activities that individuals perform in a particular position. In a group setting, a role is often thought of as the cluster of activities that *others expect* individuals to perform in their position (Hellriegel, Slocum, and Woodman 1983). As Schwarz (1994) observes, the set of behaviors associated with a role should be consistent and not dependent on the characteristics of the particular individual filling the role. However,

> [i]n practice, the role a person plays results from a combination of the formally defined role, the individual's personality, the person's understanding of the role, the expectations that others have for that role, and the interpersonal relationships that the person has with others in the group. This means that different people may fill the same role somewhat differently. Consequently, group members need to clarify their roles. (1994, 31)

During the intervention, we commonly use "role" to refer to the more formally designed duties and statutory responsibilities an individual should carry out. By "expectations," we refer to the ways in which the person assuming the role and others expect that individual to behave while engaged in formal duties. For example, it is normally part of the formal role of the mayor to preside at meetings. It may be an expectation of the group that, while presiding, the mayor will limit the time each board member or citizen may speak on an issue.

New board members in particular may be confused about the formal role and function of the council or commission. For example, it is not uncommon during campaigns for candidates to promise to change the city school system—a function over which the board to which the candidate seeks election has no authority. Clarifying the role of the

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board as a whole can help clear up any confusion regarding the powers of a council or commission.

Even more common, board members and managers have differing expectations about how they and others will behave in their roles. Each assumes that similar expectations are shared. In a roles and expectations discussion recently facilitated by Institute of Government faculty, city council members said they expected their mayor to "keep board meetings on course," "use the gavel readily," and "keep peace and harmony." The mayor, however, said his expectations of council members included "avoid grandstanding," "exhibit professional behavior," "show respect for council members," "don't take cheap shots at other council members or city staff," and "quit asking the mayor to referee."

While these may seem like small differences, they frequently begin a process of increasing dissatisfaction with a mayor, board chair, or manager. Subsequent actions, seen through the subjective lens of "not performing your role as you should," are often negatively interpreted. Before long there is an escalating cycle: each party assumes that the other is not fulfilling expectations, and further assumes that as a result, information cannot be shared openly and differences cannot be discussed candidly. The relationship becomes increasingly strained. The inability to concur on how a role should be carried out is viewed as confirmation that the group cannot discuss difficult issues. Over time, serious communication gaps develop that ultimately lead to deep division and open conflict. The roles and expectations intervention is designed to prevent this negative spiral from developing while helping new groups learn good communication skills.

It is also helpful for experienced board members to periodically review roles and expectations. Using self-critiques, the group can measure effectiveness by tracking how well it is fulfilling agreed-upon roles and expectations. Roles and expectations may also shift and change, depending on the issues facing the group and the length of time the board has been together. It is not unusual for board members initially to develop relatively basic expectations of one another, such as "come prepared to meetings," "review everything in your packet," or "work closely and interactively with the manager and through her with the staff." As the group develops more sophisticated process skills, expectations may address more complex group issues, such as "we will respect our differences, separating differences in communication style and preferred ways of participating from fundamental values differences." The group may even create a conflict-management process for dealing with fundamental differences. Thus, reviewing roles and expectations is a good investment because it can foster continued growth.

Using a Group Effectiveness Model

We base our intervention methodology on the group effectiveness model described in Schwarz (1994) and Carlson (1998). Recognizing that group effectiveness has several components, the model uses three criteria to assess how a group functions:

1. The group delivers services and/or products that meet or exceed the performance standards of the people who receive or review them. It is not sufficient for a group to evaluate and be satisfied with its own work. The customers—those who receive the products or services—must decide whether the output is acceptable. For local government boards, citizens of the community typically make this determination.
2. The group functions in a way that maintains or enhances the ability of its members to work together in the future. Although some groups may come together for just one task, most groups—including governing boards—must work together over time, and it is important to maintain productive relationships in order to avoid "burning out" after a particularly stressful problem or issue.

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3. On balance, the group experience satisfies rather than frustrates the personal needs of group members. Most work groups are not (explicitly) concerned with meeting members' needs; they exist to accomplish a task or set of tasks. However, people do hope to meet certain individual needs through the group experience; for example, the need for achievement or recognition. If this does not happen, they are not likely to continue their contributions to the group.

Our experience is that governing boards, and indeed most groups, focus their attention on the first criterion and neglect the second and third. At best, they may recognize the importance of group and individual maintenance functions after group performance begins to suffer. We believe it is important to attend to all three criteria because they work together, especially over time. A city council may be functioning well by the first criterion; for example, it may pass a budget that increases law enforcement services and holds the current tax rate—both of which are important to the voters. However, by the second and third criteria, the council may be suffering: for example, members may blame one another for delays in accomplishing the group's work and may avoid subcommittee assignments because working relationships are strained. Because the criteria of the model are interdependent, the quality of a group's product will likely be affected if all the criteria are not met.

Three factors contribute to a group's ability to meet all three criteria for effectiveness: organizational context, group structure, and group process (Schwarz 1994). These factors and their constituent elements interact to create a complex system (see Figure 1). We will not describe the model in detail here; the relevant point to emphasize for the purpose of this article is that the model can be used to support initial group development as well as to diagnose and remedy specific group problems. The model provides a "checklist" of elements that are needed for effective group functioning, and it can be extremely helpful for group members (and those who work with them) to study the model to determine what needs strengthening for the group to do its work.

A primary reason why the roles and expectations intervention is so useful to boards in their early stages of development is that this discussion provides a point of departure for other elements in the group effectiveness model. As depicted in Figure 1, "clearly defined roles" is the fourth element in the Group Structure factor of the model. As discussed, role clarification is essential to effective board functioning.

However, a discussion of roles and expectations for how board members will work with one another, with the presiding official, and with the manager quickly leads to consideration of factors associated with group structure and process. As board members list their expectations, they may include items such as "I expect other members to talk to me directly when they have a problem with something I've done." This expectation relates to how members will communicate and manage conflict, which affects the Group Process portion of the model. Or a member may state, "I expect others to think about an issue before the meeting, but keep an open mind—don't make your decision until the board has thoroughly discussed it." This begins to establish norms for how the group will make its decisions.

Although some elements may best be discussed in the context of a specific issue or decision (e.g., sufficient time to complete a task), many apply to the group's work as a whole. We have found that an initial discussion of roles and expectations seems to be a manageable way for a group to establish norms about many aspects of its process and structure. In a sense, this intervention structure follows the logic of Fisher and Ury's recommendation (1981) to "separate the people from the problem." Instead of becoming mired in untested inferences about the meaning of

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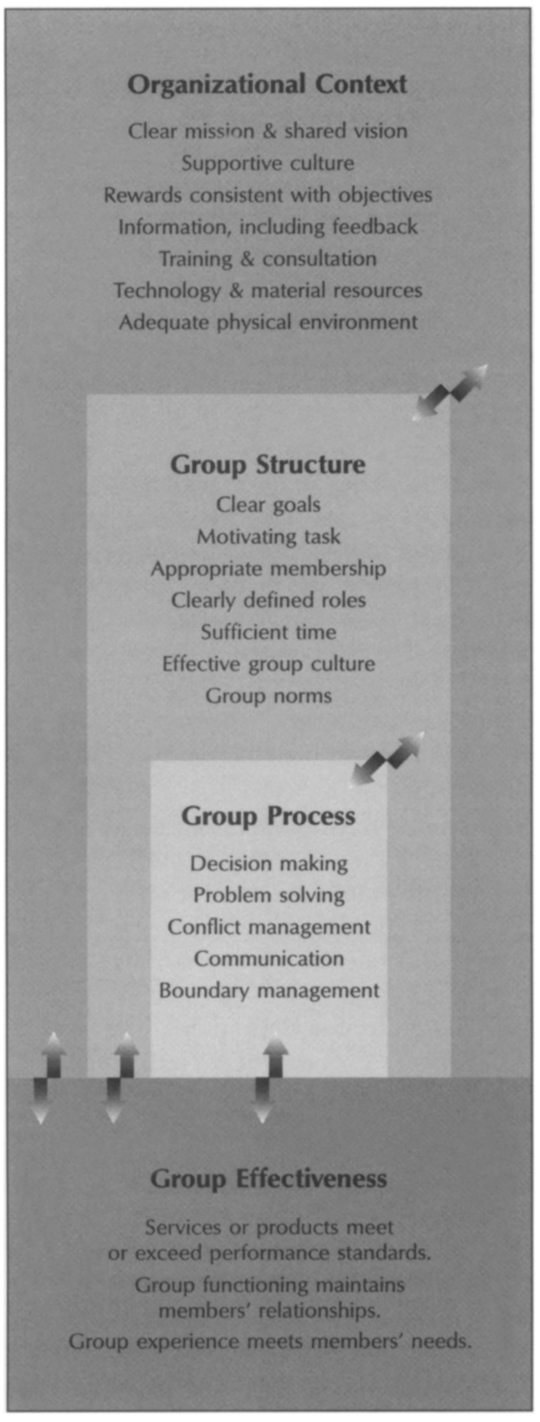
Figure 1: Group Effectiveness Model



From Margaret S. Carlson, A Model for Improving a Group's Effectiveness. *Popular Government* 63 (Summer 1998): 39. The figure was adapted from Roger M. Schwarz, *The Skilled Facilitator: Practical Wisdom for Developing Effective Groups.* San Francisco: Jossey-Bass, 1994. Reprinted with permission.

specific events or exchanges between board members, an open discussion of roles and expectations helps a board begin to think more broadly about how it wants to function.

Steps of the Intervention

For the roles and expectations intervention, we have developed a format that contains six key steps (see Figure 2).

Step 1. Explain core values. As facilitators, we are guided by three core values: valid information, free and informed choice, and internal commitment to the choice (Argyris 1970; Argyris and Schon 1974; Schwarz 1994). "Valid information" means that people share all information relevant to an issue, using specific examples to help others understand and determine for themselves whether the information is true (Schwarz 1994). "Free and informed choice" means that people can define their own objectives and methods for achieving them, basing these choices on valid information. "Internal commitment to the choice" means that people feel responsible for the decisions they make and will work to see that they are implemented. The three values are highly interdependent. It is unlikely that groups or individuals will commit deeply to decisions unless those decisions are based on valid information and free and informed choice.

The core values serve two purposes: they guide effective facilitator behavior, and they guide effective group behavior (Schwarz 1994). When we work with a board, we share these core values and explain how they guide our behavior as facilitators. For example, we will not make decisions for the group, but we will share our observations about the group's decision process and allow the group to choose how it wants to proceed. We also share our belief that these core values underlie effective group behavior; we invite the group to adopt them for the roles and expectations discussion, but—consistent with the value of free and informed choice—the group makes the decision about whether or

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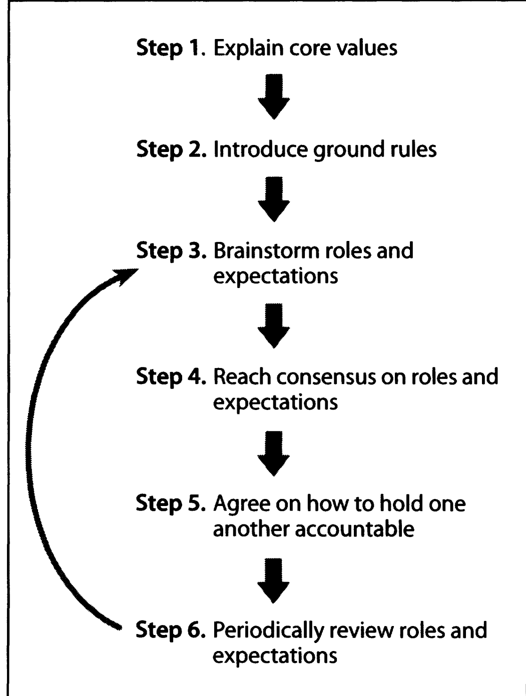
Figure 2: Steps of the Intervention



not it wishes to act according to these values. Frequently, groups do adopt the core values or ground rules based on these core values (see Step 2) as part of their expectations of one another. Thus, introducing the values and modeling them in our facilitation teaches a board about key principles of group effectiveness.

Step 2. Introduce ground rules. A group may find the explanation of the core values helpful, but these values are somewhat abstract and give little concrete guidance about how to communicate effectively. We employ a set of ground rules to help a group discuss its issues productively. These ground rules were developed by Schwarz (1994; 1995) and are based on the three values previously discussed. Examples of ground rules include test assumptions and inferences; share all relevant information; focus on interests, not positions; be specific and use examples; keep the discussion focused; and explain the reasons behind your statements, questions, and actions. Because these ground rules are specific strategies for creating effective group processes, we briefly describe them for the group and ask if members are willing to use them during the roles and expectations discussion. In most cases, boards agree to use the ground rules. However, even if the group decides not to adopt them, we as facilitators use the ground rules as a guide for diagnosing and intervening on group members' behavior. Frequently, groups like the concept of the ground rules and include an expectation such as "each of us shares all relevant information and how we obtained it" in their agreements with one another.

Step 3. Brainstorm roles and expectations. In the third step of the intervention, group members generate a list of expectations for how board members, the presiding official, and (frequently) the manager will behave in their respective roles. We use a prompt such as "I expect other board members (the mayor, the manager) to. . . ." and ask group members to complete the sentence with statements that reflect their expectations for these individuals.

During the planning session for the roles and expectations discussion, the group identifies the relevant parties to include in the discussion. Almost certainly, the list will include board members and the presiding official; typically, the group also lists the manager or chief administrator. Beyond this, some groups will include the attorney, clerk, or others who report directly to the governing board. We usually suggest an order that moves from general to specific; i.e., list expectations that apply to all board members first, then to the presiding official, manager, etc. This helps avoid redundancy and allows group members to make reference to earlier statements when considering other roles. However, the group makes the final decision on the order of the discussion; for example, if the relationship between the board and manager has been particularly strained, the group may opt to begin with a discussion of expectations for the manager's role.

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Step 4. Reach consensus on roles and expectations. In this step, the group members first examine the list of expectations in detail and ask one another to clarify or explain particular items. It is at this stage that we are most active as facilitators, helping group members to test assumptions and inferences they may be making about others' comments or motives, to share the reasoning behind their statements, and to identify the interests underlying their positions.

Next, group members reach consensus about which items remain on the list and the wording of each. Because the expectations are essentially agreements about how group members wish to work together, it is particularly important to reach consensus at this stage of the discussion; there is nothing officially "binding" about the agreements except group members' commitment to them, so buy-in by all members is vital. At this stage, we usually ask each member if he or she can fully support all of the expectations. If the list is more than a few items long, we often check for consensus with each person about each item on the list. While this may seem laborious, it often brings to light hesitations or concerns which seldom surface when board members concede to an overall question addressed to the group, such as "can everyone support statement number two?" Ultimately, the group develops a shared list of expectation statements that are fully supported by every member of the group.

Step 5. Agree on how to hold one another accountable. Agreeing to support a role description and list of expectations is only the first half of the commitment. To change group dynamics, board members must agree to hold themselves and other group members accountable for the degree to which they behave consistently with their shared expectations.

We have found that a good final question for a group's first roles and expectations discussion is, "What do you want to do if group members are not adhering to the expectations you have agreed on today?" Typically, group members respond that they would like to be told if others observe them acting in a way that is inconsistent with the group's expectations; however, they are reluctant to point out inconsistencies observed in other members. The group often recognizes that it faces a potential bind (i.e., everyone wants to receive feedback, but no one is willing to give it), which elicits an even deeper, more valuable discussion of the group's norms and values. As facilitators, we help group members reframe their thinking about giving feedback to each other. Rather than construing feedback as "constructive criticism" at best, or unkindness at worst, the group realizes that the fairest thing each member can do for one another is to openly discuss perceived inconsistencies. At a much deeper level, the group begins to value creating valid information over saving face.

Step 6. Periodically review roles and expectations. In addition to holding one another accountable and providing feedback, the board should periodically review the list of roles and expectations to critique group functioning and revise as necessary. The list can serve as a useful self-assessment tool as board members review their statements and decide what to keep, what to change, and whether or not the group as a whole is operating in a manner that is consistent with its expectations. Even during a group's first roles and expectations discussion, it can be helpful to ask members to imagine reviewing the group's list a year later. This exercise helps the group determine which expectations may need additional clarification or discussion.

A number of the boards we have worked with for several years begin their annual planning retreats by reviewing their roles and expectations list and rating themselves on their performance of each. Members may realize that an expectation that seemed important a year ago was actually designed to deal with a problem that no longer exists. For example, one board dropped the expectation "When you make an inference as a result of what is

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said in the paper or by other public sources, check it out with the person quoted." During review at the end of one year, board members agreed that they consistently did this as part of their agreement to test inferences and assumptions. The group no longer needed a separate expectation about doing this specifically for items publicly stated or published. Members felt a genuine sense of accomplishment at their progress in becoming a more effective group.

What Specific Results Are Achieved?

In writing about board roles, Carver and Carver argue that "carefully designing areas of board job performance will profoundly channel the interpersonal process of a board. For example, job design influences the types of conflict that will be experienced and whether members will follow a commonly proclaimed discipline or their individual disciplines" (1996, 3). Carver and Carver cite benefits of clarified roles as "depersonalizing subsequent struggles when different individuals have opposing views about the appropriateness of an issue for board discussion" and as lessening "jockeying for power, control of the group through negativism, and diversion of the board into unrelated topics" (1996, 3). We share their view of the value of role clarification; however, it is difficult to quantify the outcomes of this type of intervention. One of the challenges in assessing the intervention's value arises from our belief that it is best to work with a board as early in its development as possible. If we do this, the board will have little or no time to form unproductive norms; therefore, a "before and after" test of group functioning would not be possible. If the group's subsequent interactions appear to be generally effective, we can speculate that the intervention contributed to the group's functioning, but it is certainly more difficult to measure the absence of a particular behavior (e.g., unproductive conflict) than its presence.

Despite the difficulty in measuring the effect of a roles and expectations intervention, we do have some data to indicate that boards find it to be valuable. We conclude each of our sessions with a group self-critique, in which the group identifies what went well and what members would like to do differently. In approximately 35 roles and expectations interventions that we have facilitated over the past five years, all of the boards reported that the discussion was very useful, and well over half invited us back to facilitate a similar discussion when board membership changed. We have also received information attesting to the lasting effect of this intervention; for example, a mayor recently said to one of us, "That discussion at our retreat four years ago about having conversations outside of board meetings was really a turning point for us; we still refer back to it." Comments such as these add credence to our view that boards achieve substantive, lasting results from these discussions.

Future Research

Our lack of quantitative data measuring the effect of these interventions points clearly to one avenue for future research. We plan to collect information on boards that have engaged in discussion of roles and expectations early in their development and to compare them to boards that have not had this type of early intervention.

We would also like to refine our definition of a "new" group. Although we believe—and have witnessed—that the addition of just one new member can profoundly change the dynamics of a board, it is also possible for a board to retain key norms and values even as its membership changes. What are some of the factors that determine whether a board is able to continue to develop effectively as a group in the face of frequent member turnover? If there is not an expectation that the group will stay intact for more than two years, will this affect the depth of the group norms that are established?

Local government boards are confronted with such complex community issues today

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that they cannot afford to devote their energies and attention to intraboard conflict that does not increase their capacity to address substantive problems. We believe that the early intervention described here can help a board turn its attention to resolving the *community's* issues rather than its own.

Margaret S. Carlson *is an assistant professor of public management and government at the Institute of Government, University of North Carolina at Chapel Hill. Her areas of specialization include group facilitation, conflict resolution, and performance evaluation. Evaluation of the chief administrator's performance and development of effective groups are among her research interests.*

Anne S. Davidson *is a lecturer at the Institute of Government, University of North Carolina at Chapel Hill. She specializes in organization development, group facilitation, and change management. Her research interests include the development of self-managing teams and learning organizations.*

Together and individually, the authors have designed and facilitated sessions for city councils, county commissioners, management teams, and many other groups. They have also taught facilitation workshops for a variety of organizations.

Notes

1. For purposes of this discussion, we are using Rousseau et al.'s definition of trust (1998): "Trust is a psychological state comprising the intention to accept vulnerability based on positive expectations of the intentions or behavior of another."
2. This is the national mean "number of years in current position" from the International City/County Management Association's 1996 State of the Profession survey. We thank Sebia Clark, ICMA Research Assistant, for providing this data.

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State and Local Government Review
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After the Election: How Do Governing Boards Become Effective Work Groups?

Margaret S. Carlson and Anne S. Davidson

In terms of group effectiveness, governing boards face a basic dilemma as soon as members take office. City councils and county commissions are not formed the way most effective work groups are formed. They are elected as individuals, not selected for their complementary skills, knowledge, or experience. Often, they have no clear work task that unites them. They may disagree fundamentally about the role of government and consequently, their role as elected officials. Yet despite these differences, virtually all of the principles of group dynamics apply to a governing board. Issues such as leadership, role definition, and conflict management all contribute to the effectiveness or ineffectiveness of board members' work with one another, with the manager, and with the community they guide.

We believe that inattention to and ineffective management of the elements of group effectiveness are primary sources of unnecessary board conflict. We have found that by addressing these elements early in their development, boards can eliminate much unproductive communication that increases animosity, destroys trust, and makes it more difficult for the board to address substantive issues. This article identifies some of the factors that make group development more challenging for city and county boards than for other groups; explains the importance of setting group norms for working together in the early stage of a board's development; and describes an intervention we often use to help a board establish an effective working relationship. By developing a shared understanding of both the role of the board and a set of expectations among board members, presiding officials, and managers, we have helped a number of elected officials and managers avoid potential conflicts and resolve existing ones.

Special Issues in City-County Boards That Make Effective Group Development More Challenging

Governing boards fit the conventional definition of a work group and thus are subject to the same principles of group dynamics as are other groups (Hackman 1987).

1. They have boundaries, interdependence among members, and differentiation of members' roles. This means that it is possible to distinguish members from nonmembers, even if membership changes over time.
2. They have one or more tasks to perform, and the group collectively is held responsible for the product.

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3. They operate within an organizational context, so the group must manage relationships with other individuals and groups in a larger social system.

While the principles of group dynamics clearly apply to governing boards, there are special circumstances surrounding their work that do increase the challenges these boards face in becoming effective groups. In this section, we describe some issues that frequently come into play when we attempt to help a governmental board apply the principles of group effectiveness.

• John Carver (1990) points out that although governmental boards have much in common with for-profit and nonprofit boards, they are more likely to be bound by legal requirements in terms of both composition and process. They also differ "in how much public scrutiny they receive, a factor that produces differences in the amount of posturing involved in board dynamics" (1990, 5). Carver contends that many governmental boards have strong, long-established traditions that make it very difficult for them to apply modern management principles.

• Boards often do not see themselves as groups. Consequently, it never occurs to them to spend time on group development. On many boards, the chairperson is seen as the sole member responsible for "group dynamics," which implies keeping the group on track, giving everyone a chance to speak, and moving efficiently through the agenda. Carver and Carver argue that "board members expect too much of the chairperson, for example, when they ask him or her to save the board from being held hostage by its most controlling member.... If the board as a whole does not accept responsibility for the governance process, the best the chairperson can achieve is superficial discipline" (1996, 3).

The notion that every member of the board shares responsibility for group effectiveness is entirely consistent with our research on and experience with groups. However, the process of electing board members individually (often by wards or districts) makes it unlikely that board members will see themselves as group members who share equal responsibility for effectiveness. In communities where the mayor or county commission chair is elected separately, the notion of the chair as being responsible for the group may be further reinforced.

• Boards who want to work on group development often are faced with negative public perceptions about the value of this work. Boards that take group development seriously generally try to schedule time away from interruptions to have meaningful and open discussions about how to improve their effectiveness. Yet the media—and consequently, the public—often view retreats and special work sessions as pleasure junkets at public expense. At best, these discussions are perceived as a waste of board members' time.

• "Sunshine" and open meetings laws often have the unintended consequence of making it more difficult for board members to discuss issues related to their personal behavior, past ineffectiveness, and attitudes toward one another. It is generally difficult to address aspects of group culture without specific examples of occasions when norms and expectations were violated. Since retreats and work sessions are open meetings that may be attended by the press, some members may be reluctant to hold discussions at a level of specificity that allows the most difficult interpersonal issues to be resolved.

• Contentious political campaigns may turn board members against one another even before they are sworn in. Research on organizations (see McKnight, Cummings, and Chervany 1998) suggests that in many cases, people begin new relationships with high levels of initial trust in one another. In other words, they assume all the other members are well intentioned, reasonable people working for the good of the organization as a whole. Until an individual proves differently, he or she is accorded respect and granted

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serious consideration for opinions, ideas, and suggestions. The campaign process that is required to earn a seat on a governing board often encourages attacks on the past performance of that board and/or the manager. Candidates frequently promise to make drastic changes, if elected. Such behavior may create cynicism and a self-fulfilling prophecy that board members may be unable to work together. Thus, the election process is rarely conducive to a board with high levels of initial trust.[1] As a result, many governmental boards must begin the group development process at a much more difficult starting place than the average organizational work group.

- Board members are often elected based on a track record of community involvement and service on other boards and task forces. These individuals have a known history prior to being elected to a city council or county commission and often may have an allegiance to particular special interest groups, neighborhoods, or minority positions. Other board members may assume, sometimes incorrectly, that the intention of a board member is to drive the agenda of groups that the member previously served rather than focus on balancing the needs of the entire community. Again, the initial atmosphere is more likely to be one of distrust rather than trust.

- Board members are, in fact, frequently conflicted about their need to represent a particular constituency versus their need to deal with the "big picture." As Houle (1989) points out, the first efforts of many board members are at least partially self-interested and tied to special purposes for which they were elected. The new board member discovers later, "perhaps with consternation, that the inside viewpoint is not the same as the outside one; often, indeed, it is so different that the desire to carry out an electoral promise is lost" (1989, 28). This dynamic may contribute to fear of public indignation or possible legal attack, conflict among different jurisdictions, and apprehension about the chances of being reelected. While some work teams experience similar tension about representing others versus speaking for themselves, the issue seldom reaches the complexity of that faced by boards.

- The formal voting process required of governing boards as they reach decisions is often antithetical to open discussion of group process and structure issues. Experienced board members and managers tell us that they begin to feel that "as long as [they] have the votes, who cares?" They are encouraged to think and act in ways that will assure them of votes ahead of time. Many of the methods involve behaviors that some consider to be at best, a system of "good old boy" tradeoffs and at worst, manipulative and underhanded. For example, a member formerly in the minority and now in the majority on a bipartisan board told us that even when he understands and supports the interests of the other side, he is tempted to vote against them just to "show them how it feels for a change." A culture of arguing, of winning and losing, and of refusing to share relevant information develops. It is then difficult to discuss expectations and past communication problems at a level of depth that allows a group to separate conflict based on "getting even" from deeply held values and differences worthy of exploration and debate.

- The turnover rate among elected officials is much higher than on most other types of boards. As many local governments face the intense pressures of rapid growth, increasingly complex social problems, intense pressure from special interest groups, and divisive electoral processes, long-time board members increasingly are choosing to step down. Many board members with whom we work in North Carolina cite increasing difficulties of managing public and family life, which means it is unlikely that they see public office as a long-term part of their community contribution. It seems less and less likely that many members will serve term after term. Coupled with the fact that the av-

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erage tenure for city managers nationally is now 5.9 years,[2] it is difficult for governmental boards and their chief executives to have a sense of commitment to one another and to long-term growth together. Some of the deepest levels of group development are probably impractical and unlikely under such conditions.

Although these factors may make effective group development more challenging for governing boards than for other groups, we believe the solution is *not* to avoid group process issues. Our strategy is to encourage board members soon after they take office to begin discussing how they want to work together as a group. The early period in a board's development is a critical time for establishing group norms.

Importance of the Early Period in a Board's Development

Because a governing board fits the definition of a work group (whether or not the board defines itself as such), it follows that a board is subject to the principles of group development. Several theorists have emphasized the importance of a group's initial interactions in "setting the tone" for the group's work. Although some theories of group development suggest that a period of time must pass after a group's inception before the group can establish its norms (see Tuckman 1965), more recent research indicates that norms may be established very early in a group's lifespan. In her "punctuated equilibrium" model, Gersick (1988) found that (a) a framework for behavioral patterns emerges at a group's initial meeting and (b) there are few significant shifts in the group's approach to its work, until the group reaches the midpoint of its intended duration or project.

In one of the most comprehensive models of group formation and development, Schein (1988) posits that new group members initially demonstrate self-oriented behavior, which reflects the concerns that any new member of a group might experience. Before members can begin to pay more attention to each other and to the task(s) facing them, their personal concerns need to be resolved. Concerns include:

1. *intimacy*—"Who am I to be?"
2. *control and influence*—"Will I be able to control and influence others?"
3. *needs and goals*—"Will the group goals include my own needs?"
4. *acceptance and intimacy*—"Will I be liked and accepted by the group?"

Working through these initial concerns is important, because members will remain preoccupied with their own issues until they find a role that is comfortable for them and until the group develops norms about goals, influence, and intimacy. Given the special issues that make group development particularly challenging for city or county boards, self-oriented behavior may be even more pronounced as a new group of elected officials begins its work together. The board typically consists of a mix of incumbents and newcomers, which may accentuate new members' concerns about control and influence. Members may have information from other board members' campaigns that suggests that they will have difficulty accomplishing their desired goals because of opposition or competing goals of other members.

It is important to recognize that the board is essentially a new group, even if only one member changes. Each member has a new relationship with that person, which changes the dynamics of the entire group. Schein states that "every group must go through some growing pains while members work on these issues and find their place. If the formal structure does not permit such growth, the group never becomes a real group capable of group effort. It remains a collection of individuals held together by a formal structure" (1988, 47). We believe this early work is critical for governing boards because in the absence of group discussion and clarification of

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these issues, much of a group's energy continues to be devoted to individual coping responses instead of to the job at hand. In extreme cases, board members can develop self-fulfilling prophecies about their early conflicts; instead of seeing these issues as a natural part of a group's development, they may view the difficulties as evidence that "this board will never be able to work together." This interpretation, in turn, could reduce their motivation to work through group process problems as they arise, thereby increasing the likelihood that the group will remain ineffective.

Intervention Methodology

Despite the challenges facing governing boards and the managers who work with them, we believe that boards can apply the principles of effective group development. In doing so, they can significantly reduce the level of unproductive conflict among board members. Included in "unproductive conflict" are differences rooted in a desire to get even, frustration with the mayor or chair for "not leading," personal antagonisms based on assumptions people have made about each other, and suspicion based on failure of individuals to explain the reasons behind their decisions or behavior.

A basic intervention we have used with a number of boards and managers to improve their working relationships is agreeing on roles and expectations for working together. This is simply an initial step in cultivating an atmosphere that makes possible a more open exchange of ideas and feelings. It helps boards reserve their energy for difficult, substantive issues rather than getting stuck over and over again on lesser problems. Although the intervention in no way eliminates all conflict or lessens the complexity of serving on a governing board, we believe it teaches board members valuable skills for communicating productively when there are fundamental differences.

Why Intervene on Roles and Expectations?

Whenever there are new board members, new presiding officials, or new managers, explicitly discussing roles and expectations can be helpful. By "role," we mean the cluster of activities that individuals perform in a particular position. In a group setting, a role is often thought of as the cluster of activities that *others expect* individuals to perform in their position (Hellriegel, Slocum, and Woodman 1983). As Schwarz (1994) observes, the set of behaviors associated with a role should be consistent and not dependent on the characteristics of the particular individual filling the role. However,

> [i]n practice, the role a person plays results from a combination of the formally defined role, the individual's personality, the person's understanding of the role, the expectations that others have for that role, and the interpersonal relationships that the person has with others in the group. This means that different people may fill the same role somewhat differently. Consequently, group members need to clarify their roles. (1994, 31)

During the intervention, we commonly use "role" to refer to the more formally designed duties and statutory responsibilities an individual should carry out. By "expectations," we refer to the ways in which the person assuming the role and others expect that individual to behave while engaged in formal duties. For example, it is normally part of the formal role of the mayor to preside at meetings. It may be an expectation of the group that, while presiding, the mayor will limit the time each board member or citizen may speak on an issue.

New board members in particular may be confused about the formal role and function of the council or commission. For example, it is not uncommon during campaigns for candidates to promise to change the city school system—a function over which the board to which the candidate seeks election has no authority. Clarifying the role of the

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board as a whole can help clear up any confusion regarding the powers of a council or commission.

Even more common, board members and managers have differing expectations about how they and others will behave in their roles. Each assumes that similar expectations are shared. In a roles and expectations discussion recently facilitated by Institute of Government faculty, city council members said they expected their mayor to "keep board meetings on course," "use the gavel readily," and "keep peace and harmony." The mayor, however, said his expectations of council members included "avoid grandstanding," "exhibit professional behavior," "show respect for council members," "don't take cheap shots at other council members or city staff," and "quit asking the mayor to referee."

While these may seem like small differences, they frequently begin a process of increasing dissatisfaction with a mayor, board chair, or manager. Subsequent actions, seen through the subjective lens of "not performing your role as you should," are often negatively interpreted. Before long there is an escalating cycle: each party assumes that the other is not fulfilling expectations, and further assumes that as a result, information cannot be shared openly and differences cannot be discussed candidly. The relationship becomes increasingly strained. The inability to concur on how a role should be carried out is viewed as confirmation that the group cannot discuss difficult issues. Over time, serious communication gaps develop that ultimately lead to deep division and open conflict. The roles and expectations intervention is designed to prevent this negative spiral from developing while helping new groups learn good communication skills.

It is also helpful for experienced board members to periodically review roles and expectations. Using self-critiques, the group can measure effectiveness by tracking how well it is fulfilling agreed-upon roles and expectations. Roles and expectations may also shift and change, depending on the issues facing the group and the length of time the board has been together. It is not unusual for board members initially to develop relatively basic expectations of one another, such as "come prepared to meetings," "review everything in your packet," or "work closely and interactively with the manager and through her with the staff." As the group develops more sophisticated process skills, expectations may address more complex group issues, such as "we will respect our differences, separating differences in communication style and preferred ways of participating from fundamental values differences." The group may even create a conflict-management process for dealing with fundamental differences. Thus, reviewing roles and expectations is a good investment because it can foster continued growth.

Using a Group Effectiveness Model

We base our intervention methodology on the group effectiveness model described in Schwarz (1994) and Carlson (1998). Recognizing that group effectiveness has several components, the model uses three criteria to assess how a group functions:

1. The group delivers services and/or products that meet or exceed the performance standards of the people who receive or review them. It is not sufficient for a group to evaluate and be satisfied with its own work. The customers—those who receive the products or services—must decide whether the output is acceptable. For local government boards, citizens of the community typically make this determination.
2. The group functions in a way that maintains or enhances the ability of its members to work together in the future. Although some groups may come together for just one task, most groups—including governing boards—must work together over time, and it is important to maintain productive relationships in order to avoid "burning out" after a particularly stressful problem or issue.

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3. On balance, the group experience satisfies rather than frustrates the personal needs of group members. Most work groups are not (explicitly) concerned with meeting members' needs; they exist to accomplish a task or set of tasks. However, people do hope to meet certain individual needs through the group experience; for example, the need for achievement or recognition. If this does not happen, they are not likely to continue their contributions to the group.

Our experience is that governing boards, and indeed most groups, focus their attention on the first criterion and neglect the second and third. At best, they may recognize the importance of group and individual maintenance functions after group performance begins to suffer. We believe it is important to attend to all three criteria because they work together, especially over time. A city council may be functioning well by the first criterion; for example, it may pass a budget that increases law enforcement services and holds the current tax rate—both of which are important to the voters. However, by the second and third criteria, the council may be suffering: for example, members may blame one another for delays in accomplishing the group's work and may avoid subcommittee assignments because working relationships are strained. Because the criteria of the model are interdependent, the quality of a group's product will likely be affected if all the criteria are not met.

Three factors contribute to a group's ability to meet all three criteria for effectiveness: organizational context, group structure, and group process (Schwarz 1994). These factors and their constituent elements interact to create a complex system (see Figure 1). We will not describe the model in detail here; the relevant point to emphasize for the purpose of this article is that the model can be used to support initial group development as well as to diagnose and remedy specific group problems. The model provides a "checklist" of elements that are needed for effective group functioning, and it can be extremely helpful for group members (and those who work with them) to study the model to determine what needs strengthening for the group to do its work.

A primary reason why the roles and expectations intervention is so useful to boards in their early stages of development is that this discussion provides a point of departure for other elements in the group effectiveness model. As depicted in Figure 1, "clearly defined roles" is the fourth element in the Group Structure factor of the model. As discussed, role clarification is essential to effective board functioning.

However, a discussion of roles and expectations for how board members will work with one another, with the presiding official, and with the manager quickly leads to consideration of factors associated with group structure and process. As board members list their expectations, they may include items such as "I expect other members to talk to me directly when they have a problem with something I've done." This expectation relates to how members will communicate and manage conflict, which affects the Group Process portion of the model. Or a member may state, "I expect others to think about an issue before the meeting, but keep an open mind—don't make your decision until the board has thoroughly discussed it." This begins to establish norms for how the group will make its decisions.

Although some elements may best be discussed in the context of a specific issue or decision (e.g., sufficient time to complete a task), many apply to the group's work as a whole. We have found that an initial discussion of roles and expectations seems to be a manageable way for a group to establish norms about many aspects of its process and structure. In a sense, this intervention structure follows the logic of Fisher and Ury's recommendation (1981) to "separate the people from the problem." Instead of becoming mired in untested inferences about the meaning of

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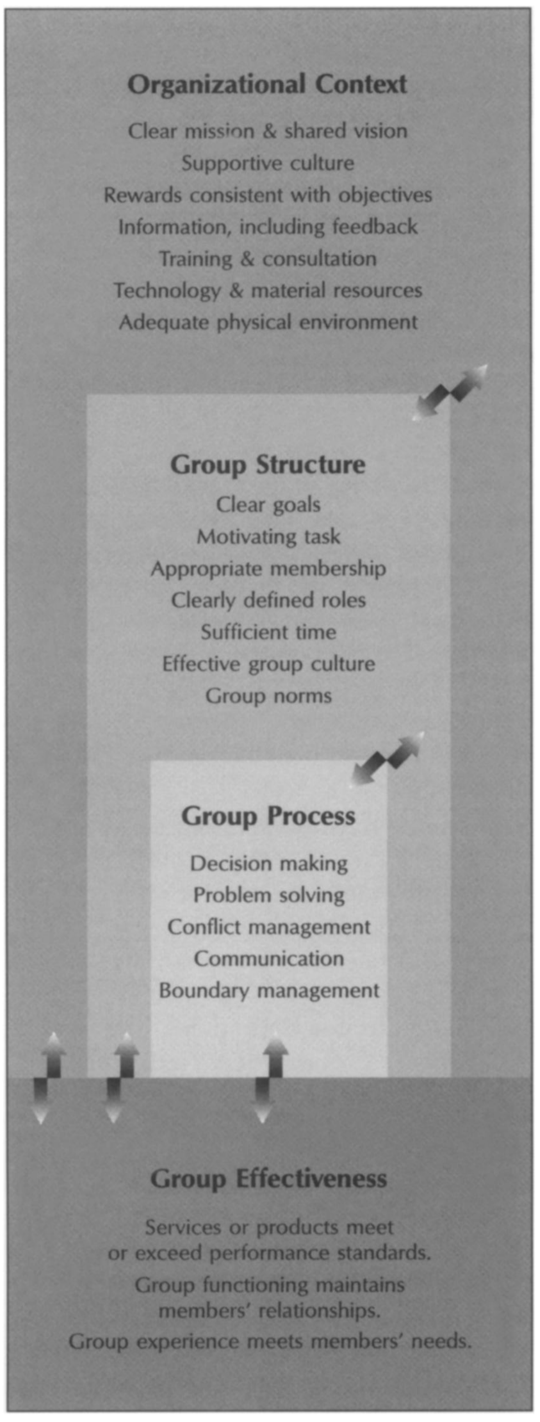
Figure 1: Group Effectiveness Model



From Margaret S. Carlson, A Model for Improving a Group's Effectiveness. *Popular Government* 63 (Summer 1998): 39. The figure was adapted from Roger M. Schwarz, *The Skilled Facilitator: Practical Wisdom for Developing Effective Groups*. San Francisco: Jossey-Bass, 1994. Reprinted with permission.

specific events or exchanges between board members, an open discussion of roles and expectations helps a board begin to think more broadly about how it wants to function.

Steps of the Intervention

For the roles and expectations intervention, we have developed a format that contains six key steps (see Figure 2).

Step 1. Explain core values. As facilitators, we are guided by three core values: valid information, free and informed choice, and internal commitment to the choice (Argyris 1970; Argyris and Schon 1974; Schwarz 1994). "Valid information" means that people share all information relevant to an issue, using specific examples to help others understand and determine for themselves whether the information is true (Schwarz 1994). "Free and informed choice" means that people can define their own objectives and methods for achieving them, basing these choices on valid information. "Internal commitment to the choice" means that people feel responsible for the decisions they make and will work to see that they are implemented. The three values are highly interdependent. It is unlikely that groups or individuals will commit deeply to decisions unless those decisions are based on valid information and free and informed choice.

The core values serve two purposes: they guide effective facilitator behavior, and they guide effective group behavior (Schwarz 1994). When we work with a board, we share these core values and explain how they guide our behavior as facilitators. For example, we will not make decisions for the group, but we will share our observations about the group's decision process and allow the group to choose how it wants to proceed. We also share our belief that these core values underlie effective group behavior; we invite the group to adopt them for the roles and expectations discussion, but—consistent with the value of free and informed choice—the group makes the decision about whether or

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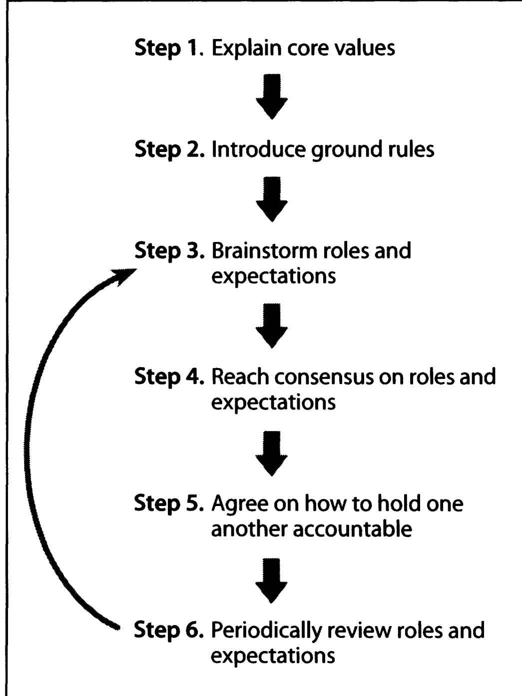
Figure 2: Steps of the Intervention



not it wishes to act according to these values. Frequently, groups do adopt the core values or ground rules based on these core values (see Step 2) as part of their expectations of one another. Thus, introducing the values and modeling them in our facilitation teaches a board about key principles of group effectiveness.

Step 2. Introduce ground rules. A group may find the explanation of the core values helpful, but these values are somewhat abstract and give little concrete guidance about how to communicate effectively. We employ a set of ground rules to help a group discuss its issues productively. These ground rules were developed by Schwarz (1994; 1995) and are based on the three values previously discussed. Examples of ground rules include test assumptions and inferences; share all relevant information; focus on interests, not positions; be specific and use examples; keep the discussion focused; and explain the reasons behind your statements, questions, and actions. Because these ground rules are specific strategies for creating effective group processes, we briefly describe them for the group and ask if members are willing to use them during the roles and expectations discussion. In most cases, boards agree to use the ground rules. However, even if the group decides not to adopt them, we as facilitators use the ground rules as a guide for diagnosing and intervening on group members' behavior. Frequently, groups like the concept of the ground rules and include an expectation such as "each of us shares all relevant information and how we obtained it" in their agreements with one another.

Step 3. Brainstorm roles and expectations. In the third step of the intervention, group members generate a list of expectations for how board members, the presiding official, and (frequently) the manager will behave in their respective roles. We use a prompt such as "I expect other board members (the mayor, the manager) to...." and ask group members to complete the sentence with statements that reflect their expectations for these individuals.

During the planning session for the roles and expectations discussion, the group identifies the relevant parties to include in the discussion. Almost certainly, the list will include board members and the presiding official; typically, the group also lists the manager or chief administrator. Beyond this, some groups will include the attorney, clerk, or others who report directly to the governing board. We usually suggest an order that moves from general to specific; i.e., list expectations that apply to all board members first, then to the presiding official, manager, etc. This helps avoid redundancy and allows group members to make reference to earlier statements when considering other roles. However, the group makes the final decision on the order of the discussion; for example, if the relationship between the board and manager has been particularly strained, the group may opt to begin with a discussion of expectations for the manager's role.

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Step 4. Reach consensus on roles and expectations. In this step, the group members first examine the list of expectations in detail and ask one another to clarify or explain particular items. It is at this stage that we are most active as facilitators, helping group members to test assumptions and inferences they may be making about others' comments or motives, to share the reasoning behind their statements, and to identify the interests underlying their positions.

Next, group members reach consensus about which items remain on the list and the wording of each. Because the expectations are essentially agreements about how group members wish to work together, it is particularly important to reach consensus at this stage of the discussion; there is nothing officially "binding" about the agreements except group members' commitment to them, so buy-in by all members is vital. At this stage, we usually ask each member if he or she can fully support all of the expectations. If the list is more than a few items long, we often check for consensus with each person about each item on the list. While this may seem laborious, it often brings to light hesitations or concerns which seldom surface when board members concede to an overall question addressed to the group, such as "can everyone support statement number two?" Ultimately, the group develops a shared list of expectation statements that are fully supported by every member of the group.

Step 5. Agree on how to hold one another accountable. Agreeing to support a role description and list of expectations is only the first half of the commitment. To change group dynamics, board members must agree to hold themselves and other group members accountable for the degree to which they behave consistently with their shared expectations.

We have found that a good final question for a group's first roles and expectations discussion is, "What do you want to do if group members are not adhering to the expectations you have agreed on today?" Typically, group members respond that they would like to be told if others observe them acting in a way that is inconsistent with the group's expectations; however, they are reluctant to point out inconsistencies observed in other members. The group often recognizes that it faces a potential bind (i.e., everyone wants to receive feedback, but no one is willing to give it), which elicits an even deeper, more valuable discussion of the group's norms and values. As facilitators, we help group members reframe their thinking about giving feedback to each other. Rather than construing feedback as "constructive criticism" at best, or unkindness at worst, the group realizes that the fairest thing each member can do for one another is to openly discuss perceived inconsistencies. At a much deeper level, the group begins to value creating valid information over saving face.

Step 6. Periodically review roles and expectations. In addition to holding one another accountable and providing feedback, the board should periodically review the list of roles and expectations to critique group functioning and revise as necessary. The list can serve as a useful self-assessment tool as board members review their statements and decide what to keep, what to change, and whether or not the group as a whole is operating in a manner that is consistent with its expectations. Even during a group's first roles and expectations discussion, it can be helpful to ask members to imagine reviewing the group's list a year later. This exercise helps the group determine which expectations may need additional clarification or discussion.

A number of the boards we have worked with for several years begin their annual planning retreats by reviewing their roles and expectations list and rating themselves on their performance of each. Members may realize that an expectation that seemed important a year ago was actually designed to deal with a problem that no longer exists. For example, one board dropped the expectation "When you make an inference as a result of what is

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said in the paper or by other public sources, check it out with the person quoted." During review at the end of one year, board members agreed that they consistently did this as part of their agreement to test inferences and assumptions. The group no longer needed a separate expectation about doing this specifically for items publicly stated or published. Members felt a genuine sense of accomplishment at their progress in becoming a more effective group.

What Specific Results Are Achieved?

In writing about board roles, Carver and Carver argue that "carefully designing areas of board job performance will profoundly channel the interpersonal process of a board. For example, job design influences the types of conflict that will be experienced and whether members will follow a commonly proclaimed discipline or their individual disciplines" (1996, 3). Carver and Carver cite benefits of clarified roles as "depersonalizing subsequent struggles when different individuals have opposing views about the appropriateness of an issue for board discussion" and as lessening "jockeying for power, control of the group through negativism, and diversion of the board into unrelated topics" (1996, 3). We share their view of the value of role clarification; however, it is difficult to quantify the outcomes of this type of intervention. One of the challenges in assessing the intervention's value arises from our belief that it is best to work with a board as early in its development as possible. If we do this, the board will have little or no time to form unproductive norms; therefore, a "before and after" test of group functioning would not be possible. If the group's subsequent interactions appear to be generally effective, we can speculate that the intervention contributed to the group's functioning, but it is certainly more difficult to measure the absence of a particular behavior (e.g., unproductive conflict) than its presence.

Despite the difficulty in measuring the effect of a roles and expectations intervention, we do have some data to indicate that boards find it to be valuable. We conclude each of our sessions with a group self-critique, in which the group identifies what went well and what members would like to do differently. In approximately 35 roles and expectations interventions that we have facilitated over the past five years, all of the boards reported that the discussion was very useful, and well over half invited us back to facilitate a similar discussion when board membership changed. We have also received information attesting to the lasting effect of this intervention; for example, a mayor recently said to one of us, "That discussion at our retreat four years ago about having conversations outside of board meetings was really a turning point for us; we still refer back to it." Comments such as these add credence to our view that boards achieve substantive, lasting results from these discussions.

Future Research

Our lack of quantitative data measuring the effect of these interventions points clearly to one avenue for future research. We plan to collect information on boards that have engaged in discussion of roles and expectations early in their development and to compare them to boards that have not had this type of early intervention.

We would also like to refine our definition of a "new" group. Although we believe—and have witnessed—that the addition of just one new member can profoundly change the dynamics of a board, it is also possible for a board to retain key norms and values even as its membership changes. What are some of the factors that determine whether a board is able to continue to develop effectively as a group in the face of frequent member turnover? If there is not an expectation that the group will stay intact for more than two years, will this affect the depth of the group norms that are established?

Local government boards are confronted with such complex community issues today

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that they cannot afford to devote their energies and attention to intraboard conflict that does not increase their capacity to address substantive problems. We believe that the early intervention described here can help a board turn its attention to resolving the *community's* issues rather than its own.

Margaret S. Carlson *is an assistant professor of public management and government at the Institute of Government, University of North Carolina at Chapel Hill. Her areas of specialization include group facilitation, conflict resolution, and performance evaluation. Evaluation of the chief administrator's performance and development of effective groups are among her research interests.*

Anne S. Davidson *is a lecturer at the Institute of Government, University of North Carolina at Chapel Hill. She specializes in organization development, group facilitation, and change management. Her research interests include the development of self-managing teams and learning organizations.*

Together and individually, the authors have designed and facilitated sessions for city councils, county commissioners, management teams, and many other groups. They have also taught facilitation workshops for a variety of organizations.

Notes

1. For purposes of this discussion, we are using Rousseau et al.'s definition of trust (1998): "Trust is a psychological state comprising the intention to accept vulnerability based on positive expectations of the intentions or behavior of another."
2. This is the national mean "number of years in current position" from the International City/County Management Association's 1996 State of the Profession survey. We thank Sebia Clark, ICMA Research Assistant, for providing this data.

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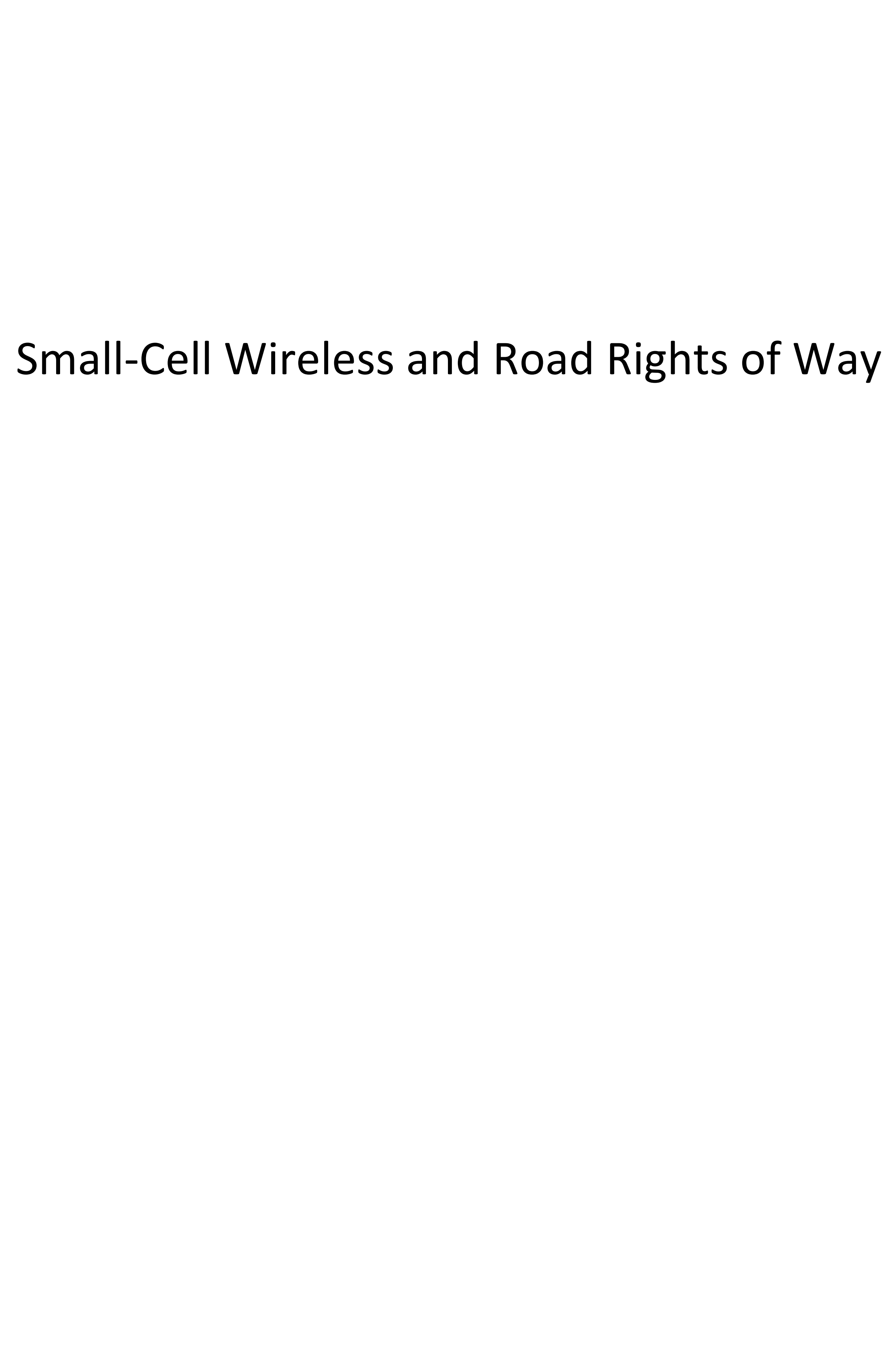
Small-Cell Wireless and Road Rights of Way



A Selection of Laws and Other Documents Regarding Wireless Facilities
Compiled by Lisa Glover, March 2017

Federal Laws and Documents
47 USC § 224 – Pole Attachments
47 USC § 253 – Removal of Barriers to Entry
47 USC § 332(c)(7) – Preservation of Local Zoning Authority
47 USC § 1455 – Wireless Facilities Deployment (aka Eligible Facilities Requests)
FCC Declaratory Ruling 09-099 – aka "Shot Clock Order"
FCC Report and Order 14-153 – aka "Section 6409 Order"
FCC Docket No. 16-421 – Link to materials in the Mobilitie Petition for Declaratory Ruling case
Smart Communities Siting Coalition filing (large download)
Town of Cary filing (also attached)

State Laws
NCGS Chapter 160A, Article 19, Part 3E – Wireless Telecommunications Facilities
160A-400.50 – Purpose and Compliance with Federal Law
160A-400.51 – Definitions
160A-400.51A – Local Authority
160A-400.52 – Construction of New Wireless Support Structures or Substantial Modifications
160A-400.53 – Collocation and Eligible Facilities Requests of Wireless Support Structures
NCGS § 62-350 – Pole Attachments
NCGS § 160A-296 – Establishment and Control of Streets; Center and Edge Lines
House Bill 310 – Wireless Telecommunications Infrastructure Siting

School of Government and NC League of Municipalities Resources:
Wireless Telecommunication Facilities and Zoning (SOG 2012)
"Can We Top Off Our Tower?" (SOG 2013)
City Authority to Regulate Wireless Telecommunications HB 664 Cell Tower Deployment Act (S.L. 2013-185) (NCLM 2013)

1. Request to Construct New Pole (not utility pole or streetlight) with Wireless Facilities or Substantially Modify Pole with Wireless Facilities

Regulatory Shot Clock	Summary of Applicable Federal and State Law
150 days after application filed (federal law; no state mandate)	Municipality as Regulator: Federal - Section 332(c)(7) applies. State - Falls under 160A-400.52 and is treated the same as review of a traditional cell tower. Municipality can review (1) "aesthetics, landscaping, land-use based location priorities, structural design, setbacks, and fall zones" and (2) information regarding "an identified public safety, land development or zoning issue," including whether other approved structures can "reasonably be used;" whether residential, historic, or scenic areas can be served from outside the area; and that the height is "necessary to provide the applicant's designed service." Can also require applicants to evaluate collocation. See statute for more details, including limits on fees that may be charged. Once built, can be replaced in kind without municipal review and is subject to future "eligible facilities requests." When Located in Municipal ROW: Can review as encroachment request (160A-296(a)(6)) and can deny request. See statute for limits on fees. Can likely veto future eligible facilities requests.
HB310: Not specified	With HB310: Under new 160A-400.55, not subject to zoning review or approval if located in municipal ROW and: • Does not "obstruct or hinder the usual travel or public safety . . . or obstruct legal use . . . by other utilities" • Does not exceed greater of 50 feet in height or 10 feet in height above tallest existing utility pole (as of July 1, 2017) within 500 feet of new pole If height limits aren't met, may not prohibit new pole if it complies "with all applicable zoning requirements." So can still have some zoning requirements for very large poles? Applicants "shall comply" with "undergrounding requirements" in areas zoned for single-family residential (with conditions). Can charge for use of municipal ROW; fee shall not exceed "direct and actual costs of managing" ROW and shall not exceed charge "imposed" on municipal utilities (which means fee to use ROW will most likely be $0).

Regulatory Shot Clock	Summary of Applicable Federal and State Law
	Silent as to what happens in NCDOT ROW. New 136-189.3A added to give NCDOT some authority; no discussion of height. Municipality may not prohibit or regulate collocation of small wireless facilities "except as expressly provided in this Part." (160A-400.54) Removes all proprietary authority and all authority to regulate in NCDOT ROW?

2. Request to Construct New or Replace Existing Streetlight and Include Wireless Facilities

Regulatory Shot Clock	Summary of Applicable Federal and State Law
150 days after application is filed (federal law) HB310: Not specified	Municipality as Regulator: Federal - Section 332(c)(7) applies. If streetlight is being replaced, FCC Order states that Section 6409 does NOT apply. State – Not clear. By definition, new streetlight is not a new wireless support structure (160A-400.52) but is also not a collocation or eligible facilities request (160A-400.53). Fall back to general language of 160A-400.51A which gives authority to regulate siting of wireless facilities? NC Pole Attachment statute does not apply because there is no existing pole to "request to utilize." When Municipality is the Utility: Appear to have discretion acting in proprietary capacity. When Duke Energy (or other) will "own" the Streetlight: Extent of municipal "ownership" interest in streetlights is not clear, but Duke has taken the position that municipal approval is required to attach to or replace streetlight (and presumably to put up a new streetlight as well). With HB310: Same as HB310 analysis for situation 1 above.

3. Request to Attach Wireless Facilities to Existing Utility Pole (including streetlights) with No Existing Wireless Facilities

Regulatory Shot Clock	Summary of Applicable Federal and State Law
45 days after application is complete (state law) 150 days after application is filed (federal law)	Municipality as Regulator: Federal - Section 332(c)(7) applies. State - Appears to be a collocation under 160A-400.53, but no review standards given. Municipality may regulate based on considerations of "land use, public safety, and zoning considerations, including aesthetics, landscaping, structural design, setbacks, and fall zones." 160A-400.51A. Pole (and base equipment) become entitled to future approvals of "eligible facilities requests." When Municipality is the Utility: NC Pole Attachment statute applies. Municipality acting in proprietary capacity can only deny request if there is insufficient capacity or for safety/engineering reasons. When Located in Municipal ROW: Can review as encroachment request (160A-296(a)(6)) and can deny request. See statute for limits on fees. Can likely veto future eligible facilities requests. When Utility Pole is a Duke Energy (or other) Streetlight: Extent of municipal "ownership" interest in streetlights is not clear; also not clear whether municipal interest rises to level of "control" required to trigger NC Pole Attachment statute. Duke Energy current position is that municipal approval is required to attach to or replace streetlight. If Pole Attachment statute does not apply, Municipality can deny and can deny future "eligible facilities requests" given proprietary interest.
HB310: 60 days (from application or from date complete? Not clear)	With HB310 Same analysis as HB310 analysis for situation 1 above, except exemption from zoning review applies only if antenna extends more than 10 feet above height of existing pole or exceeds height of new pole that would be permitted under 160A-400.55 (see above discussion). In addition, under 160A-400.54, may require applicant to obtain building permit; may deny application only if does not meet building code. Building permit deemed approved if not denied in 60 days; can "batch" unlimited number of sites into one application.

	Building permit application fee capped at $100 for first 5 facilities in one batch and $50 for each additional facility (with other limitations as well). Can charge recurring max $20 annual fee for use of ROW for each pole (under 160A-400.55). Municipality may not prohibit or regulate collocation of small wireless facilities "except as expressly provided in this Part." Removes all proprietary authority, even if municipality is the utility that owns the pole? Not clear if this supersedes Pole Attachment statute.

4. Request to Attach Wireless Facilities to Existing Utility Pole (including streetlights) with Existing Wireless Facilities

Regulatory Shot Clock	Summary of Applicable Federal and State Law
45 days after application is complete (state law) 60 days after application is filed (federal eligible facilities request) 90 days after application is filed (federal, not eligible facilities request)	<u>Municipality as Regulator</u>: Federal - Existing pole may be a "base station" under federal law, and therefore applicant may be entitled to approval of Section 6409 "eligible facilities request" if criteria are met. State - Appears to be a collocation (160A-400.53). Municipality may regulate based on considerations of "land use, public safety, and zoning considerations, including aesthetics, landscaping, structural design, setbacks, and fall zones." 160A-400.51A. Pole (and base equipment) become entitled to future approvals of "eligible facilities requests." <u>When Municipality is the Utility</u>: NC Pole Attachment statute applies. Municipality acting in proprietary capacity can only deny request if there is insufficient capacity or for safety/engineering reasons. <u>When Located in Municipal ROW</u>: Can review as encroachment request (160A-296(a)(6)) and can deny request. See statute for limits on fees. Can likely veto future eligible facilities requests. <u>When Utility Pole is a Duke Energy (or other) Streetlight</u>: Extent of municipal "ownership" interest in streetlights is not clear; also not clear whether municipal interest rises to level of "control" required to trigger NC Pole Attachment Statute. Duke Energy current position is that municipal approval is required to attach to or replace streetlight. If Pole Attachment statute does not apply, municipality can deny and can deny future "eligible facilities requests" given proprietary interest.

HB310: 60 days (from application or from date complete? Not clear)	With HB310: Same as HB310 analysis for situation 3 above.

5. Request to Attach Wireless Facilities to Existing Traffic Signal Poles (assume no existing wireless facilities)

Regulatory Shot Clock	Summary of Applicable Federal and State Law
150 days after application is complete (substantial modification) 45 days after application is complete (not a substantial modification) 90 days (if pole attachment statute applies) HB310: 60 days (from application or from date complete? Not clear)	Municipality as Regulator: If attachment is a substantial modification, 160A-400.52 applies (see above for analysis). If attachment is not a substantial modification, 160A-400.53 applies (see above for analysis). Municipal Traffic Signal: Not clear if poles are subject to NC Pole Attachment Statute. If it applies, municipality can only deny if insufficient capacity or for safety/engineering reasons. If Pole Attachment statute does not apply, municipality can deny request and can deny future eligible facilities requests. With HB310: Same as HB310 analysis for situation 3 above. Note that this may mean municipality has no authority to deny attachments to its own traffic signal poles and no authority to charge any meaningful fee for use of traffic signal poles.

Before the
FEDERAL COMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies	)	WT Docket No. 16-421
	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	

COMMENTS OF CARY, NORTH CAROLINA

These Comments are filed by Cary, North Carolina in response to the Public Notice, released December 22, 2016, in the above-entitled proceeding. Cary, by its counsel, filed comments in WT Docket 16-421 as part of the Smart Communities local government coalition.[1] Cary files these additional comments in support of the Bureau's goal of achieving a data driven process that "accord[s] greater weight to systematic data" versus "merely anecdotal evidence."[2] Cary believes that the systematic data provided in this proceeding will document that there is no predicate for Commission action.

INTRODUCTION

Cary, North Carolina ("Cary") urges the Commission to exercise caution as it works to enable the widespread deployment of small cell infrastructure throughout the nation. Cary opposes a federal one-size-fits all preemption of local siting authority, and asks the Commission to consider carefully the many differences between communities that necessitate local decisions: variation in state statute, geographic challenges, climate variations, size, budgetary and staff resources, aesthetic character, the type and amount of existing infrastructure, and more. Including local government creates opportunities to maximize public benefit, complement existing public infrastructures and the services that local governments provide, and help create smarter cities. Small cell technology can improve services that are critical to everyday life such as water, sewer, street maintenance, and street lighting, and many more. For this to occur we believe that the experts in cities managing these systems need to be at the table. We ask the Commission to avoid placing any further restrictions on cities as they collaborate with their local wireless carriers and infrastructure providers to integrate this very new technology, and very new approach to infrastructure development, into their planning and zoning processes in a way that preserves, enhances, and protects the finite rights-of-way belonging to their residents.

Cary has grown from approximately 8,000 residents in 1970 to more than 160,000 today, and is now known as one of the best mid-sized communities in the nation to live and work, to find a home or start a

[1]Comments of Smart Communities (filed March 8, 2017).

[2]Public Notice at 9.

business, and to raise a family or retire. Cary is located in the heart of the Research Triangle Region of North Carolina, located adjacent to Raleigh and a short drive from Durham and Chapel Hill. The entire region is growing rapidly and was estimated to have a population of over two million people in 2015.

As stated in the Cary Community Plan[3], the new comprehensive plan for Cary adopted on January 24, 2017:

> Technology will play an increasingly important role in future communities by promoting economic development and enhancing consumer choices by diversifying modes of communication, improving efficiency in services and utility through the smart grid, and extending high speed internet access. Google has announced plans to install a fiber-optic networks in select cities across the United States, which boasts internet speeds up to 100 times faster than traditional broadband. In January 2015 Google selected Cary as one of its next communities for fiber deployment and in June 2015 construction began on its fiber network in the Triangle. AT&T's gigabit speed service update also provides a fiber-optic network within the town. In addition to deploying smart water meters to all of its customers through the Aquastar Program, Cary is a municipal participant in the North Carolina Next Generation Network, a regional initiative focused on stimulating the deployment of next generation broadband networks primarily focused on business and education in North Carolina.

Cary specifically adopted a policy as part of the Cary Community Plan that states:

> Support the provision of high speed and affordable communication services – such as digital and wireless – for businesses and community members throughout Cary.
>
> The intent of this policy is to allow for the provision of high quality, affordable, and competitive communication services for personal and business use by working with providers to expand fiber networks, advocating for efficient delivery of services on behalf of local consumers, and continuing to be an active member in the NC Next Generation Network. The intent of this policy also provides support for wireless technologies.

Every major wireless provider in the country currently serves Cary. Wireless coverage in Cary is exceptional due to its central location the Triangle Region. There are many vertical assets (monopoles, water tanks, buildings, stealth towers, etc.) located in Cary where wireless carrier antennas are installed.

Cary owns two monopoles and four water tanks upon which Verizon, AT&T, Sprint, Clearwire, T-Mobile, and Cricket Wireless currently have multiple antennas. Cary has collaborated with carriers on these sites since 1996 to provide the best wireless service to Cary's citizens. Cary's staff also utilizes wireless and wired services from three of these carriers, so it's in Cary's best interest to assist with the expansion of these networks. Cary has additional facilities, parks, and vertical infrastructure available for wireless service expansion.

[3] The Cary Community Plan is available on the Cary website: http://www.townofcary.org/projects-initiatives/cary-community-plan

To date, Cary has received only one complete application for a small cell facility (by Fibertech) which is being processed now and is likely to be approved in the very near future. Mobilitie mailed five applications to the Town in 2016 that were not submitted according to Town requirements, were not accompanied by the required application fee, and were woefully incomplete. The Town issued a Notice of Incompleteness for each application; the applications were not resubmitted. Since that time, Mobilitie, as well as T-Mobile, Verizon, Sprint and AT&T, have all expressed varying levels of interest in installing small cell facilities and Cary staff are in regular communication with each entity.

CARY PRACTICES DO NOT PROHIBIT OR HAVE THE EFFECT OF PROHIBITING PROVISION OF SERVICE

State laws such as N.C. Gen. Stat. §160A, Article 16A, effectively prevent North Carolina municipalities from directly providing broadband and wireless communications services to the community; therefore, cities and towns in North Carolina must rely even more heavily on the business decisions of private entities to fill this gap. In the last five years alone, Cary has approved twelve (12) telecommunication tower plans and eighteen (18) colocations on existing towers. All of these towers and colocations are located outside of the right-of-way. One of the telecommunication towers was a Town project on Town property; the others were constructed by private parties and/or utility companies on private property. In addition to those approvals, Cary has permitted at least twenty (20) colocations on the town-owned water tanks and monopoles mentioned above.

As briefly noted above, Cary has been diligently working with Fibertech, Mobilitie, T-Mobile, Verizon, and AT&T to discuss and begin the siting and application process for small cell and other facilities. While Fibertech has filed the only complete small cell application to date, Fibertech and Mobilitie have indicated they would like to each install around twenty sites in the near future. Cary is actively working with both entities to understand their requirements, and identify opportunities for maximum benefit. This new technology requires cities to determine how to apply or amend existing ordinances and procedures to facilitate introduction of the new technology to the community. Cary's original telecommunications ordinances were drafted at a time when wireless providers were focused on constructing traditional towers, and those ordinances have been amended over the years to make the permitting process easier and more predictable for wireless providers, while still protecting the public's interest.

This can be seen over the last several years with the construction of stealth towers in west and south Cary where wireless coverage was previously lacking. These structures would not have been possible under the original ordinance due to land availability, setbacks, and zoning requirements. During 2011, many workshops were held with Cary staff, representatives from wireless carriers, and citizens, to develop recommendations for amendments to the ordinance to help accommodate these structures. The Town is similarly willing to engage all interested parties in discussion regarding deployment of small cell and other new technologies.

Finally, Cary charges very minimal fees to review applications for wireless infrastructure. All application fees are cost-based, but are not set at a level that would enable full cost-recovery to the Town. There are no recurring charges for use of Town-owned right-of-way.

CITIES HAVE A PUBLIC DUTY TO MANAGE THE RIGHTS-OF-WAY

In North Carolina, municipalities and the North Carolina Department of Transportation share responsibility for protecting and regulating the use of the public right-of-way. In general, NCDOT maintains streets located outside of municipalities and the interstates and other similar routes that run through municipalities, while municipalities generally maintain the thoroughfares, collectors, and local streets within their boundaries.[4] Cary currently maintains 470 miles of streets.

Streets Are For Everyone

Although commonly considered space for vehicles, streets and the public right-of-way are for everyone. In general, Cary's collectors and thoroughfares are designed to include five-foot sidewalks on both sides of the street to allow safe and comfortable walking for everyone, including those with disabilities; local streets may only include sidewalks on one side. For all street types, sidewalks are typically separated from the roadway by a five-foot grass buffer. Typically the right-of-way extends only one foot behind the sidewalk.

Water and sewer infrastructure, natural gas, electricity, and telecommunications facilities may also be present in the right-of-way, some located above-ground and some below-ground. As the community grows, demand for placement in the right-of-way increases. This raises safety concerns for pedestrians and motorists. Cary discourages location of new facilities above-ground.

Pedestrians, especially those that are disabled, need adequate space on the sidewalk to safely travel to their destinations. Proper placement of new facilities in the right-of-way is therefore crucial to ensuring pedestrian access is not comprised.

For vehicles, clear recovery zone compliance is important since fixed objects within the right-of-way can lead to an increase in the severity of crashes. As noted in AASHTO's "A Policy on Geometric Design on Highways and Streets", 6th Edition, pages 2-83 and 2-84:

> Crashes involving single vehicles running off the road constitute more than one-half of all fatal crashes on freeways and other roadway types. When a vehicle leaves the roadway, the driver no longer has the ability to fully control the vehicle. Any object in or near the path of the vehicle becomes a potential contributing factor to crash severity. The concept of a forgiving roadside should not be independently applied to each design element but rather as a comprehensive approach to highway design.
>
> * * *

[4] For public streets in Cary, there are three major street types: thoroughfares, collectors, and local streets. Thoroughfares are larger streets that form the backbone of the transportation system in Cary, providing mobility to travel around Cary. Thoroughfares are designed to focus on mobility more than access. Local streets perform the opposite function; they are smaller, slower speed, and feature more driveways and intersections in order to provide access to businesses and homes. Collectors balance the two functions of access and mobility and provide linkages between local streets and thoroughfares. In the hierarchical street system, collectors collect traffic from local streets and distribute to thoroughfares. *See* Cary Community Plan, Chapter 7, MOVE.

> Basic to the concept of the forgiving roadside is the provision of a clear recovery area. The unobstructed, traversable area beyond the edge of the traveled way known as the "clear zone" is for the recovery of errant vehicles.

Streetlights, utility poles, and traffic signal poles are frequently hit by vehicles. Antennas placed on new or existing structures in the right-of-way may continue to transmit even if the pole has been knocked to the ground. Power levels may exceed public exposure limits to those nearby. Further, intersection sight distance can become an issue if new facilities block a driver's view of oncoming traffic.

Cary also reviews requests to install facilities in the right-of-way to ensure that new facilities will not compromise existing town-owned water, sewer, fiber, and other infrastructure (including the streets and sidewalks themselves) during construction or when built. New facilities must also be able to "fit" safely within the right-of-way, whether above- or below-ground, in relation to all the infrastructure already located there. Finally, Cary must ensure that new wireless facilities do not interfere with public safety communication channels. An intermode/interference study is a standard requirement for new antenna installations on Town-owned infrastructure (water tanks and monopoles). Any impacts to public safety communication channels from new installations could be dangerous and would be costly to correct.

Finally, while some wireless carriers have touted the desirability of small cell service in emergency situations as a public benefit, small cell sites generally do not have generators. It would be difficult to supply temporary generators at each site due to the available ground space in the right-of-way and the number of proposed locations. Tower sites located outside of the right-of-way have larger battery back-ups and typically have adequate ground space to install generators if needed.

Cary recognizes that small cell and other technologies offer opportunities to enhance the existing critical pieces of infrastructure in the right-of-way. To maximize these opportunities, we need the individuals who manage these systems daily to be fully vested in these new technologies, and we must be permitted to balance the benefits of the new technologies against their potential impacts to the right-of-way.

Cary's Emphasis on Aesthetics Has Been a Large Part of its Appeal to Residents and Businesses

Cary is well-known as a community that offers a very high quality of life for its residents and workers. That quality of life is created in part by the many public and private amenities offered in the community, such as beautiful parks and greenways, recreation activities, access to first-rate health care, and abundant choices for shopping, dining, and services. Our high quality of life is also often defined in terms of our Town's aesthetics, attention to community appearance, and the high quality of public and private development in our community. Historically, Cary's major employers – as well as new large businesses relocating to Cary – have recognized the value and costs of meeting Cary's development standards, in order to sustain and reinforce the prestige of their companies' Cary locations.

Cary has required the placement of underground utilities for most new development for the last twenty-plus years. As described elsewhere in these comments, Cary has incentivized placement of stealth telecommunications towers to lessen visual impacts on the community. Cary is therefore concerned about the negative impacts that may result from new above-ground installations, especially those located in or near the public's right-of-way and those that may be subject to Section 6409.

CARY IS WORKING PROACTIVELY TO DEPLOY WIRELESS INFRASTRUCTURE

As discussed above, Cary supports the provision of high speed and affordable communication services – such as digital and wireless – for businesses and community members throughout Cary and to support our smart city initiatives. To that end, Cary amended its Land Development Ordinance ("LDO") in 2012 with input and support from wireless carriers to reduce set-back requirements for stealth towers and structures and convert requirements from (in many situations) governing board approvals of towers to administrative approvals. This helped facilitate carriers receiving approval for and installing sites in areas with poor service and capacity (primarily areas in west and south Cary).

In the summer of 2016, Cary again amended the LDO to clarify antenna placement on structures and to permit that both inside and outside the right-of-way. As noted elsewhere in these comments, Cary is actively working with Fibertech, Mobilitie, and others to find pathways to expedite reviews and speed deployment.

While not directly related to wireless service provision, since 2014 Cary has been proactively working with Google, AT&T, and Time Warner to effectuate their roll-out of gigabit fiber. Cary approved the placement of four Google fiber huts on Town property, and has negotiated Master Encroachment Agreements with all three entities that simplifies the permit application and approval process for encroachments into Town-owned right-of-way. This approach could be similarly employed for small cell facilities.

INDUSTRY SHOULD DO MORE VOLUNTARILY TO IMPROVE WIRELESS SITING

While Cary has developed a good working relationship with the entities that routinely submit applications for new telecommunications towers or colocations, we do still experience issues with submittals. For wireless carrier installations on Town-owned monopoles and water tanks, subcontractors have used old, unapproved plans or have not installed equipment according to the approved plan; construction schedules have not been followed; submittal information (plans, structural analysis, and interference study) may not match, leading to resubmittal and multiple reviews; and carriers sometimes delay installation once approval is granted.

As noted above, Mobilitie mailed five applications to the Town for installation of 120' towers in the right-of-way. The Town was forced to respond with a Notice of Incompleteness for each application. In general, each application was confusing and ambiguous, as it was not clear exactly what type of facility was proposed. All five locations were purported to be for sites located in Town-owned right-of-way, but only two of the five were actually located in or near Town right-of-way. The Town prepared a detailed list of review comments that was approximately 17 pages long for each application. Some comments were procedural, as the applications were not submitted electronically and with the required review fee. Other comments were substantive, noting that it appeared the requested installation was in fact located outside of the right-of-way on private property. Town staff spent many hours reviewing the applications and compiling comments; because the applications were not property filed, no application fee was collected and Mobilitie received a "free" review.

In recent months, Mobilitie has reached out to Cary in an effort to understand the proper submittal and review process and to work with Cary on siting facilities. These efforts are very much appreciated, but do not ameliorate Cary's concerns regarding placement of new wireless infrastructure in the public's right-of-way.

CONCLUSION

Cary would like to thank the Commission for its efforts to better understand the work being done at the local government level to ensure safe, responsible deployment of wireless infrastructure and to enhance the use of cutting edge technology in government. We strongly urge the Commission to consider our comments, as well as those submitted by communities across the country, before taking any action that may adversely affect the public's rights-of-way and may unintentionally limit collaboration between smart city partners.

Respectfully submitted,
Cary, North Carolina

By: Dan Ault
Assistant Town Manager/Chief Innovation Officer
Town of Cary
316 N. Academy Street
Cary, NC 27513
dan.ault@townofcary.org

Small Cell Infrastructure in the Right of Way (and other places, too)

Lisa Glover · March 2017

How Does My iPhone Work?

Cellular phone A calls cellular phone B.

Cellular phone A scans for best cell.

Switch verifies cellular phone A is a valid subscriber. Checks for available voice channel.

MTSO

Cellular A

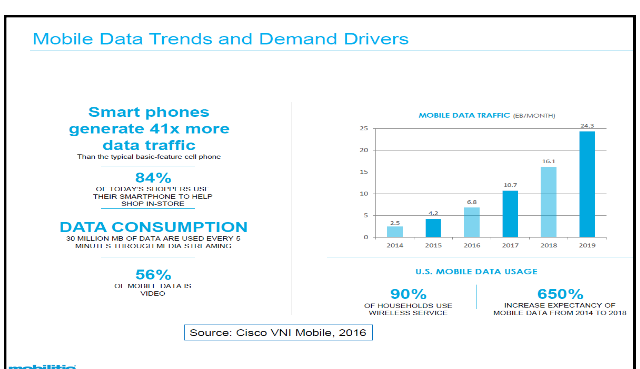
Scans for cellular phone B globally.

Switch verifies "B" is a valid subscriber; Verifies voice channel for "B"; Checks no features actives; Checks both cellular phones to voice channels and establishes voice path; Monitors both phones during call for hand off requirements or release.

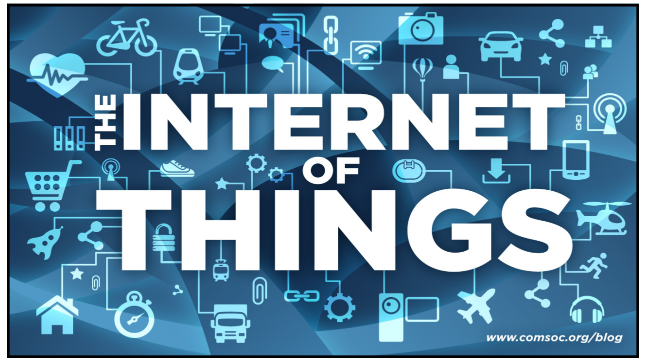
Locates cellular phone B's strongest cell.

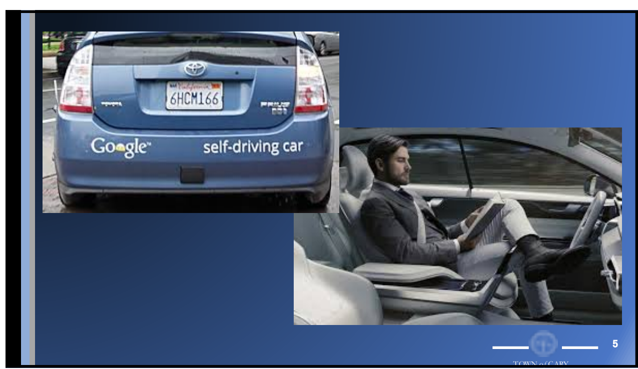
Cellular B

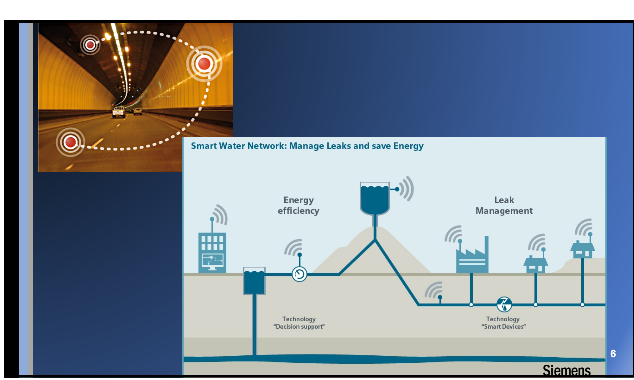
Mobile Data Trends and Demand Drivers



Source: Cisco VNI Mobile, 2016


THE INTERNET OF THINGS
www.comsoc.org/blog


6HCM166
Google
self-driving car
5

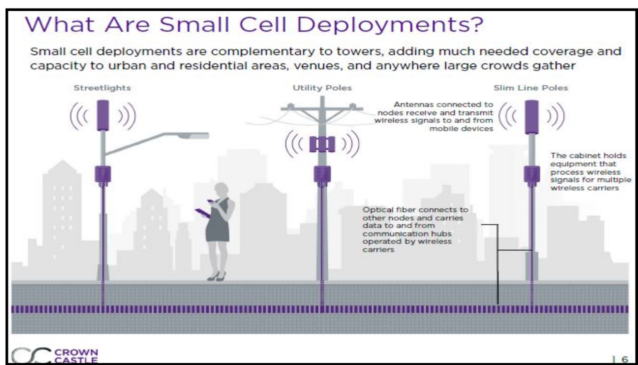

Smart Water Network: Manage Leaks and save Energy
Energy efficiency
Leak Management
Technology "Decision support"
Technology "Smart Devices"
6
Siemens

Why Aren't Traditional Towers Enough?

According to the Industry, there is not enough:

- Coverage
  - Need to improve poor signals (in-building; terrain issues)
- Capacity
  - Need to improve data speeds in "hot spots"

Another Theory: Towers are Expensive!

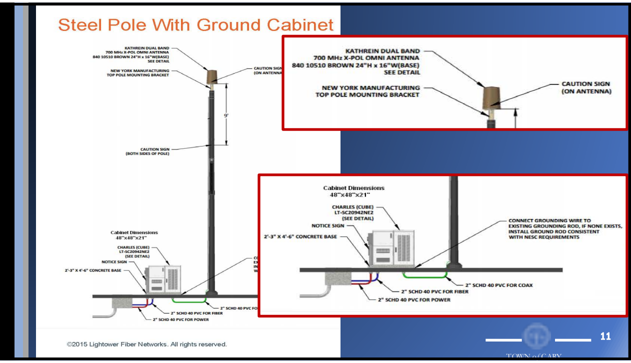


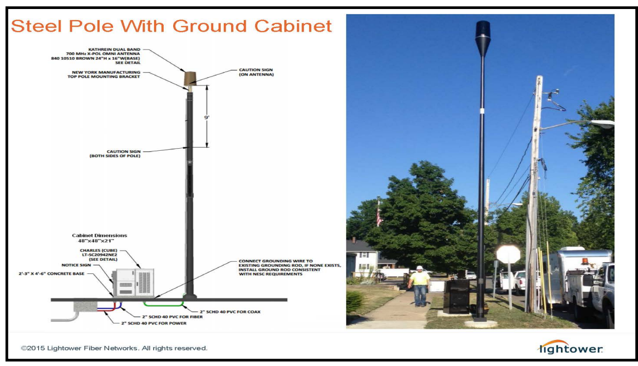
Small Cell Wireless Facilities

- "Small" because serve a small area & small number of customers
- Can be as tall as traditional tower
- Support structure + antenna + radio units + power supply + backhaul
- Radio & power supply may be structure-mounted or ground-mounted
- Usually serves only one carrier
- What about DAS (Distributed Antenna System)?
  - Numerous antennas connected to a central hub (usually by fiber)
  - May accommodate more than one carrier

A Little More Terminology

- Wireless Service Providers or Carriers:
  - Verizon, Sprint, AT&T, T-Mobile
- Wireless Facilities Providers:
  - Mobilitie, Fibertech/Lightower, Crown Castle
- Backhaul: Connecting the wireless facility to the network
  - Can be wired (fiber) or wireless (antenna, microwave)




Steel Pole With Ground Cabinet
KATHREIN DUAL BAND
700 MHz X-POL OMNI ANTENNA
840 10510 BROWN 24"H x 16"W(BASE)
SEE DETAIL
NEW YORK MANUFACTURING
TOP POLE MOUNTING BRACKET
CAUTION SIGN
(ON ANTENNA)
9'
CAUTION SIGN
(BOTH SIDES OF POLE)
Cabinet Dimensions
48"x48"x21"
CHARLES (CUBE)
LT-SC20942NE2
(SEE DETAIL)
NOTICE SIGN
2'-3" X 4'-6" CONCRETE BASE
CONNECT GROUNDING WIRE TO
EXISTING GROUNDING ROD, IF NONE EXISTS,
INSTALL GROUND ROD CONSISTENT
WITH NESC REQUIREMENTS
2" SCHD 40 PVC FOR COAX
2" SCHD 40 PVC FOR FIBER
2" SCHD 40 PVC FOR POWER
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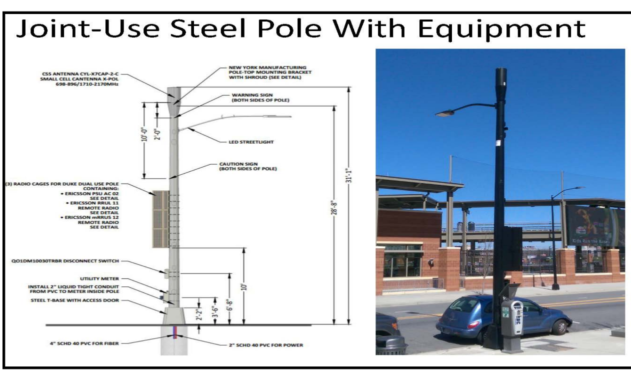
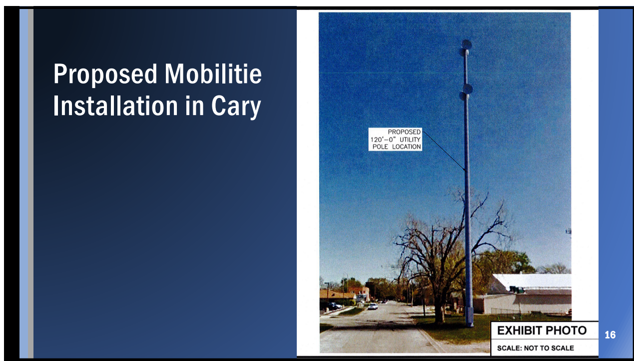
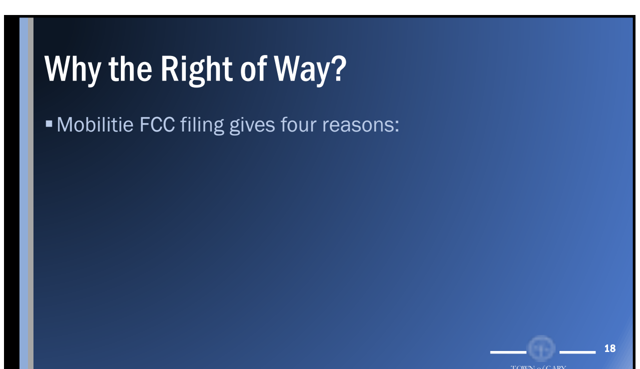
lightower


Joint-Use Steel Pole With Equipment
CSS ANTENNA CYL-X7CAP-2-C
SMALL CELL CANTENNA X-POL
698-896/1710-2170MHz
NEW YORK MANUFACTURING
POLE-TOP MOUNTING BRACKET
WITH SHROUD (SEE DETAIL)
WARNING SIGN
(BOTH SIDES OF POLE)
LED STREETLIGHT
CAUTION SIGN
(BOTH SIDES OF POLE)
10'-0"
2'-0"
(3) RADIO CAGES FOR DUKE DUAL USE POLE
CONTAINING:
• ERICSSON PSU AC 02
SEE DETAIL
• ERICSSON RRUL 11
REMOTE RADIO
SEE DETAIL
• ERICSSON mRRUS 12
REMOTE RADIO
SEE DETAIL
QO1DM10030TRBR DISCONNECT SWITCH
UTILITY METER
INSTALL 2" LIQUID TIGHT CONDUIT
FROM PVC TO METER INSIDE POLE
STEEL T-BASE WITH ACCESS DOOR
31'-1"
28'-8"
10'
6'-8"
3'-6"
2'-2"
4" SCHD 40 PVC FOR FIBER
2" SCHD 40 PVC FOR POWER

EXISTING PHOTOGRAPHIC VIEW
PROPOSED PHOTOGRAPHIC SIMULATION
(PROPOSED CABLES NOT SHOWN)
FOR PERMITTING PURPOSES ONLY
CARY, NC
35.78777",-78.84685"
PEC UTILITES
Fibertech networks
UC/SYNERGETIC
21 OXFORD RD
MANSFIELD, MA 02048
FIBERTECH SMALL CELL
PHOTOSIM
REVISIONS
5


Proposed Mobilitie Installation in Cary
PROPOSED
120'-0" UTILITY
POLE LOCATION
EXHIBIT PHOTO
SCALE: NOT TO SCALE
16

Mobilitie-type pole
Not Stealth
Dallas Arboretum
17


Why the Right of Way?
Mobilitie FCC filing gives four reasons:
18

Why the Right of Way?

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  - “[M]ost people live and work adjacent to a street or highway”

TOWN of CARY

Why the Right of Way?

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  - Densification will require “potentially millions” of sites; ROW is “the optimal (if not the only) way to deploy” those new sites

TOWN of CARY

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TOWN of CARY

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  - Essential locations for backhaul and transport, which rely on wireless and fiber “and thus need access to streets and highways”
  - Using the ROW “reduces the transaction costs providers incur to negotiate with private landowners for access to individual buildings”

22

Do Municipalities Have to Allow Small Cell Facilities in the Right of Way?

NO (not yet)

23

What Law Do I Need to Know?

- Federal Laws
  - 47 USC § 253 – Removal of Barriers to Entry
  - 47 USC § 332(c)(7) – Preservation of Local Zoning Authority
  - 47 USC § 1455 (aka Section 6409) – Eligible Facilities Requests
- Federal Communications Commission Orders
  - 2009 “Shot Clock Order”
  - 2014 “Section 6409 Order”
  - 2017 Potential New Order? In Re: Petition for Declaratory Ruling by Mobilitie, LLC

24

Mobilitie Petition for Declaratory Ruling

- Filed November 15, 2016
- Three requests related to charges imposed for use of ROW
- FCC issued Public Notice requesting comments
- Comments filed by Cary, Smart Communities Siting Coalition, 800+ others March 8, 2017
- Reply comments due April 7, 2017

25

Mobilitie Petition for Declaratory Ruling

Three Requests:

- Charges for use of ROW limited to recouping costs of issuing permits and managing ROW
- Charges do not exceed those imposed on other providers for similar access
- Charges previously imposed on others must be made available

26

What Law Do I Need to Know?

- State Laws
  - NCGS § 160A-400.50 et seq – Wireless Telecommunications Facilities
  - NCGS § 62-350 – Pole Attachments
  - NCGS § 160A-296 – Establishment & Control of Streets

27

What Law Do I Need to Know?

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2017

H | HOUSE BILL 310 | 1

Short Title:	Wireless Communications Infrastructure Siting.	(Public)
Sponsors:	Representatives Saine, Torbett, and Wray (Primary Sponsors). *For a complete list of sponsors, refer to the North Carolina General Assembly web site.*	
Referred to:	Energy and Public Utilities, if favorable, Finance	

March 13, 2017

28

Section 253 – Removal of Barriers to Entry

"No State or local statute or regulation, or other . . . requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

29

Section 253 – Removal of Barriers to Entry

"Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."

30

Section 332(c)(7) – "Preservation of Local Zoning Authority" (a misnomer)

"Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a . . . local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities"

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Section 332(c)(7)

- Applies only to placement, construction, or modification of "personal wireless service facilities"
  - Defined as facilities used for common carrier services
  - Does it apply to placement, construction, modification of towers, structures?
  - Does it apply to "spec" wireless facilities providers?

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Section 332(c)(7)(B) – "Limitations"

The regulation of the placement, construction, and modification of personal wireless services facilities shall not:

- Unreasonably discriminate among providers
  - Can't treat AT&T differently from Verizon
- Prohibit or have the effect of prohibiting provision of service
  - If local regulations result in "significant gaps" in service coverage, courts have found that to be a prohibition of service

33

Section 332(c)(7)(B) – "Limitations"

- Local government must act within a reasonable period of time
  - DOES NOT APPLY IF ACTING IN PROPRIETARY CAPACITY: e.g., entering into lease, license, or other agreements to place equipment on local government property – including municipal ROW (??)
  - FCC established "Shot Clocks" in 2009, 2014 for regulatory actions

34

Shot Clocks

- Must act on new facilities requests within 150 days (no "deemed granted" remedy, however – applicant must sue within 30 days)
- May be tolled by mutual agreement
- Clock starts running when application is filed (not when complete)
- Municipality must file "Notice of Incompleteness" within 30 days

35

"Notice of Incompleteness"

- Must notify applicant of deficiencies within 30 days of receipt of application
  - What if application not submitted pursuant to local requirements?
- Notice must identify the code provision, ordinance, application instruction, or other publically stated procedure that requires the missing information to be submitted
- After applicant responds to Notice, must notify applicant within 10 days if requested information remains incomplete. Cannot add new items to the list!

36

Section 332(c)(7)(B) – "Limitations"

- May not regulate based on RF emissions if the facilities comply with FCC RF regulations
- Denial must be in writing and supported by substantial evidence in a written record
  - The denial and the written decision should be essentially contemporaneous
  - Sounds like the standard for a quasi-judicial case!

37

Section 6409 – Eligible Facilities Request

Local governments "may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station."

38

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Section 6409 – Eligible Facilities Request

- Includes collocation, removal, or replacement of transmission equipment on existing APPROVED towers or base stations
  - Tower must have been built for primary purpose of supporting antennas
  - Base stations must already be supporting or housing communication equipment
- Must act within 60 days or request is deemed granted upon applicant notification to municipality
  - Can be tolled by Notice of Incompleteness

40

What is an Eligible Facilities Request?

- Modification that does not substantially change the physical dimensions of a tower or base station
- Towers outside the ROW:
  - Increase height by <10% or one antenna array
  - Increase width <20 feet or less than width of tower
- All base stations and towers in the ROW:
  - Increase height <10% or <10 feet
  - Increase width <6 feet
  - Adding ground cabinets <10% larger than existing ground cabinets

41

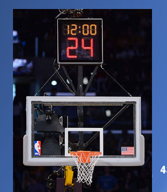
What is NOT an Eligible Facilities Request?

- Building a new tower
- Excavating or deploying outside the current site
- Any modification that defeats the concealment elements of the tower or base station
- Any modification that does not comply with terms of original siting approval of the tower or base station

42

Summary So Far:

- Can't prohibit provision of service
- Can't "unreasonably" discriminate among providers
- Shot Clocks
- Notice of Incompleteness
- Denial in writing
- Potential for eligible facilities requests



43

44

Pole Attachment Statute?

- NCGS § 62-350
- Appears to apply only to municipalities that are an electric utility
  - May require municipality to allow collocation on utility poles unless there is insufficient capacity or there are safety or engineering reasons that cannot be remedied by reengineering the facilities
- Federal statute does not apply to municipalities but does require Duke, AT&T, etc to allow access to their poles

45

NCGS 160A-296: Today

- Duty to keep streets "free from unnecessary obstructions"
- Have power "to regulate the use of the public streets"
- Have power "to regulate . . . and prohibit digging in the streets . . . or placing therein or thereon any . . . poles"
- May charge uniform, competitively neutral, and nondiscriminatory fees

46

NCGS 160A-296: July 1, 2017

- New provision applicable to businesses that provide:
  - Piped natural gas
  - Telecommunications services taxed under NCGS 105-164.4
  - Video programming taxed under NCGS 105-164.4
  - Electricity
- May only charge fees:
  - To recover difference between ROW management expenses and distributions under NCGS Chapter 105, Article 5 (sales & use tax)
  - Pursuant to pole attachment agreements

47

Installations in Municipal ROW

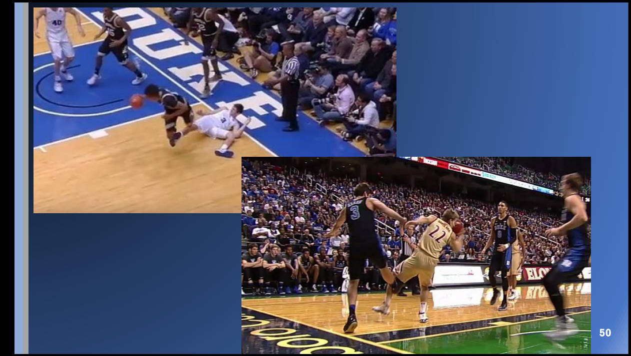
- Does a municipality have a regulatory or proprietary interest in the ROW? Or is it both?
- Does it matter if ROW is owned in fee simple, by easement, or was dedicated?
- If proprietary, municipality can deny requests to place wireless facilities in the ROW and can deny future eligible facilities requests for existing facilities
- FCC specifically declined to weigh in on this issue in 2014 Section 6409 Order

48

NCGS §§ 160A-400.50 et seq

- Requires that placement, construction, and modification of "wireless communications facilities" be in conformity with Sections 332 and 6409 and with FCC rules
- Applies to "a city's actions, as a regulatory body"
- Adopted before FCC Section 6409 Order
- Terminology, requirements not consistent with Section 6409
  - Slightly different definition of "eligible facilities request" and other terms makes it hard to reconcile federal/state law
  - Shot clocks are different

49



50

Five Scenarios for Wireless in the ROW

- Build new pole with wireless facilities
- Build new (or replace) streetlight; include wireless facilities
- Attach wireless facilities to existing pole
- Attach wireless facilities to existing pole that already has wireless facilities on it
- Attach wireless facilities to a traffic signal pole

Analysis based on federal and state requirements, guidance in FCC orders

51

New Pole (not utility pole or streetlight)

- Example: Mobilitie request for 120' poles; can range from 30' to 120'
- Mobilitie has indicated plans for 900 sites in NC
- Statewide filings of nearly identical applications in 2016

52

New Pole (not utility pole or streetlight)

- Treat like a traditional cell tower, no matter what the height
- Current municipal zoning ordinance may work if it reflects requirements of NCGS 160A-400.52
  - Does it "zone" the ROW (explicitly or implicitly)?
  - Does it have ROW setbacks for traditional towers? They may preclude location of new poles in the ROW.
  - Can have height limits, require or encourage stealth, etc.
- If approved, become subject to future "eligible facilities requests"

53

New Pole (not utility pole or streetlight)

- If located in NCDOT ROW, NCDOT requires encroachment permit
- If located in municipal ROW, municipality can require encroachment permit
  - Remember the fiber "backhaul" and boxes will be in the ROW too
  - Current encroachment ordinance may work as-is or with tweaks
  - New provision on fees goes into effect July 1 (NCGS 160A-296)
  - Can municipality say no, or veto future eligible facilities requests?

54

New or Replacement Streetlight

- Not clear what provisions of state law apply
  - State definition of "wireless support structure" excludes utility poles and streetlights
- Municipality has proprietary interest in streetlights and can say no
  - Clear interest when municipality is the electric utility
  - Duke Energy takes position that municipality must approve new or replacement streetlights
- Likely not subject to future eligible facilities request: would defeat concealment elements
  - Make sure any approval is predicated on concealment

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Attach to Existing Pole

Example:
Fibertech

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Existing Pole; No Existing Wireless Facilities

- Collocation under 160A-400.53: can have zoning regulations regarding setbacks, aesthetics
  - Require stealth?
- Dueling shot clocks:
  - 150 days after filing or 45 days after complete application filed; whichever is shorter
- If approved, subject to future eligible facilities requests
- If located in municipal ROW, can require encroachment permit
  - Can municipality say no, or veto future eligible facilities requests?

58

Existing Pole; No Existing Wireless Facilities

- Pole Attachment statute applies to municipal utilities
  - Requires approval unless safety/engineering reasons
- If collocating on a Duke Energy streetlight:
  - Not clear if Pole Attachment statute applies
  - Duke requires municipal approval

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Existing Pole with Existing Wireless Facilities

- You probably don't have these in your ROW yet
- Section 6409 may apply – could be an eligible facilities request that must be approved if criteria are met
  - If not, appears to be collocation under state law
  - Shot clock varies from 45 – 90 days
- Pole Attachment statute applies to municipal utilities
- Duke Energy requires municipal approval
- If located in municipal ROW, can require encroachment permit
  - Can municipality say no, or veto future eligible facilities requests?

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Attach to Existing Traffic Signal Poles

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Attach to Existing Traffic Signal Poles

- Traffic signal poles likely do not have existing wireless facilities on them. Unless:
  - There is communications equipment on the poles, such as cameras that stream wireless signals
- Not clear if Pole Attachment statute applies to municipal poles
  - If not, municipality as "owner" can deny request and can deny eligible facilities requests
- NCDOT poles: regulate through zoning? 160A, Article 19 applies to construction and use of state buildings.

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Where Does This Leave Municipalities Today?

- Remember: Cannot prohibit or have effect of prohibiting service or discriminate among similarly situated entities
- Can regulate new poles and attachment to poles through zoning
  - Consider updates to regulations: setbacks, height, stealth
  - Don't forget the equipment boxes
- Can require encroachment permits if in municipal ROW
  - Be careful about fees
- If you are a municipal electric utility – Pole Attachment statute may force you to permit attachments to your poles

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Where Does This Leave Municipalities Today?

- Consider possibility of future eligible facilities requests
  - Must approve if in NCDOT ROW
  - Not clear if can deny if in municipal ROW
- Duke Energy has said it will not approve use of its streetlights without municipal concurrence
- Is streetlight replacement the best option?
  - Relatively stealthy
  - Likely not qualified for future eligible facilities requests
  - Unresolved issues: downed poles; liability; final approved design from Duke?

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House Bill 310

- Filed March 9, 2017
- Passed first reading March 13, 2017
- Sent to Energy & Public Utilities; then Finance
- Proposed effective date July 1, 2017
- Similar legislation filed in other states
  - 2017 Florida
  - 2016 California (defeated)
- "Companion" to Mobilitie FCC filing

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House Bill 310

Analysis that follows is based on March 13, 2017 version of the bill

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House Bill 310 - Findings

- Wireless facilities "instrumental" to provision of emergency services and to increasing access to advanced technology
- Wireless providers "must" have access to ROW
- Small cells often deployed "most effectively" in the ROW
- "Expeditious processes" are "essential"

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House Bill 310 – Brief Summary

- Applies to "small wireless facilities"
  - Size-based definition but excludes "concealment elements," "ground-based enclosures," and other items from calculation
- Removes ability to regulate small wireless facilities through zoning, both inside and outside of ROW, except in very limited circumstances
  - Areas zoned "exclusively for single-family residential use" get some protection. Is there any such area?
- If located in municipal ROW, not clear if municipality can say "no" or condition use of ROW

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Why Object to FCC Action or HB 310?

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Why Object to FCC Action or HB 310?

- ROW is for the benefit of the entire public
  - True "utilities" are regulated and required to provide service to all
  - No guarantee this will help bridge the "digital divide" or help with emergency response
  - Why subsidize one segment of one for-profit industry?
- Additional structures & devices in ROW lead to:
  - Increased safety risks – clear recovery zone obstructions
  - Negative impacts on adjacent property – aesthetics, property values
  - Increased costs for maintenance, expansion of streets
  - Limitations on access for pedestrians, people with disabilities

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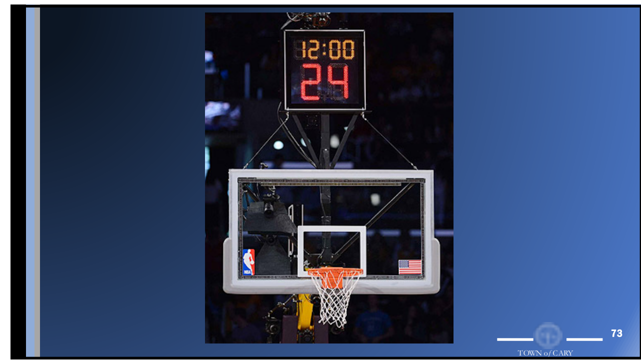

House Bill 310

- Amends Chapter 136 to authorize NCDOT to issue permits for collocation and for new poles
  - No standards given, except “reasonable and nondiscriminatory”
  - Applications are deemed approved if NCDOT doesn’t act within 60 days of receipt
- Amends existing NCGS 160A-400.50 et seq
  - Defines “wireless infrastructure provider” to specifically include entities like Mobilitie

House Bill 310 – New NCGS § 160A-400.54

- Applies to collocation of small wireless facilities – inside and outside of ROW
- Municipality may only regulate collocation as “expressly provided”
- No moratoriums allowed
- Prohibits most regulation through zoning; allows municipality to require building permits

House Bill 310 – New NCGS § 160A-400.54

- Small wireless facilities shall be classified as "permitted uses" and not subject to zoning review if collocated:
  - In municipal ROW; or
  - Not in ROW and not on property zoned "exclusively for single-family residential use"
- So can regulate, through zoning, collocation on property zoned exclusively for single-family residential use (if that exists!)

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House Bill 310 – New NCGS § 160A-400.54

- Municipality can require building permit
  - If permit is of general applicability and does not apply exclusively to wireless facilities
  - Notice of Incompleteness within 10 days
  - Deemed approved if not denied within 60 days (of receipt?)
  - May only deny if does not meet building code

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House Bill 310 – New NCGS § 160A-400.54

- Applicant can batch applications for multiple sites into one permit
- Can charge building permit application fee
  - Lots of limitations; essentially caps cost at $100 for first 5 facilities in a batch plus $50 for any additional facilities in a batch
- Can require construction to start within 1 year; cannot mandate completion date
- Cannot require applicant to reserve fiber, conduit, or pole space for municipality

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House Bill 310 – New NCGS § 160A-400.55

- This section applies only to activities in municipal ROW
- Applies to construction of new poles and to collocation
  - Overlaps with new 160A-400.54
- May charge for use of ROW - but not really
  - Only if municipality charges public or municipal utilities for similar uses of ROW
  - Limited to $20 per year per pole for collocations

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House Bill 310 – New NCGS § 160A-400.55

- New poles and collocation in municipal ROW not subject to zoning if:
  - Provider completes application
  - Facilities "do not obstruct or hinder the usual travel or public safety . . . or obstruct legal use . . . by other utilities"
  - New poles do not exceed greater of 10' taller than poles within 500' (as of July 1, 2017) or 50' above ground level
  - New antennas do not extend more than 10' above poles (as of July 1, 2017) or above height permitted for new pole
  - Need to inventory all poles in municipal ROW by July 1??

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House Bill 310 – New NCGS § 160A-400.55

- If new poles or collocations exceed those height limits, it appears municipality can regulate through zoning
- Applicants "shall comply" with undergrounding requirements in areas zoned for single-family residential use
  - Doesn't say "exclusively" this time
  - Requirements cannot be discriminatory with respect to type of utility
  - Cannot prohibit replacement of existing structures

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House Bill 310 – Other New Provisions

- Disputes regarding fees or charges go to the Utilities Commission
  - Municipality must allow the placement of the facility pending resolution of the dispute
- Cannot regulate design/installation/etc of small wireless facilities located indoors or at stadiums or athletic facilities (unless owned by municipality)
- Cannot require indemnification, naming of additional insured

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TOWN of CARY

House Bill 310 – Prospects for Passage?

NC LEAGUE OF MUNICIPALITIES
Good government. Great hometowns.

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Questions?

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Legislative Update