JANUARY 2016 LAW REVIEW

DOWNTOWN PANHANDLING ORDINANCE UNCONSTITUTIONAL

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The November 12, 2015 on-line edition of *Statelines*, a publication from the Pew charitable trusts, contained an article by Teresa Wiltz entitled "Anti-Panhandling Laws Spread, Face Legal Challenges." As described in the article: "Many cities—and even some states—increasingly are cracking down on panhandling, driven in large part by the unlikely combination of thriving downtowns and the lingering effects of the Great Recession." The article notes that these "panhandling bans have faced legal challenges on First Amendment grounds."

http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/11/12/anti-panhandling-laws-spread-face-legal-challenges?hd&utm_campaign=2015-11-16%20Stateline%20Weekly&utm_medium=email&utm_source=Eloqua

One such legal challenge cited in the *Statelines* article involved the City of Lowell, Massachusetts. The City of Lowell opinion from the federal district court described herein illustrates the significant constitutional law challenges surrounding enactment of these ant-panhandling laws. Increased panhandling activity in downtown areas, including public parks, is a topic of growing concern among city officials. In many locales, urban core areas have large public/private partnership parks that act as redevelopment and revitalization anchors. As described in the City of Lowell opinion, the significant governmental interest in urban redevelopment and revitalization is not sufficient compelling to allow restrictions that effectively ban the First Amendment rights of panhandling individuals in these downtown areas.

SPEECHLESS PANHANDLING

In the case of *McLaughlin v. City of Lowell*, 2015 U.S. Dist. LEXIS 144336 (Dist. Mass. 10/23/2015), plaintiffs, two homeless men, challenged a city ordinance that prohibited "all vocal panhandling" in Lowell's downtown, as well as "aggressive panhandling behaviors citywide."

Plaintiffs regularly panhandled in Lowell, Massachusetts, including the Downtown Historic District, requesting money that they use for, among other things, food, medicine, and shelter. Plaintiffs wanted to continue asking passersby for donations in Lowell's public places and believe they have a constitutional right to do so. In their complaint, plaintiffs alleged the ordinance violated their First Amendment right to freedom of speech.

Since the City enacted the ordinance, plaintiffs have avoided panhandling downtown because they have been afraid of arrest. Plaintiffs petitioned the federal district court to declare the Lowell panhandling ordinance unconstitutional and issue a permanent injunction against its enforcement.

The challenged ordinance was enacted in response to a belief among City officials, residents and local stakeholders that panhandling had become more common and more aggressive.

The ordinance defined "panhandling" as "the solicitation of any item of value through a request for an immediate donation." Panhandling under the ordinance also included the "sale of an item

for an inflated amount, such that a reasonable person would understand it to be in substance a donation." The ordinance, however, permitted panhandling that "involves only 'passively' standing, sitting, or performing music."

> These passive panhandlers may hold a sign asking for a donation, but may not make any "vocal request" except in response to an inquiry. These restrictions cover an extensive area — some 400 acres - which include some of the most trafficked areas in the City and a number of important government sites.

PANHANDLING CONSTITUTIONAL PROTECTION?

As noted by the federal district court, "begging is a form of solicitation" that is protected by the First Amendment. Similarly, the court found panhandling as defined in the challenged ordinance was "expressive activity within the scope of the First Amendment."

> Solicitations of money by organized charities are within the protection of the First Amendment. This protection extends to those soliciting funds on their own behalf. People who panhandle may communicate important political or social messages in their appeals for money, explaining their conditions related to veteran status, homelessness, unemployment and disability, to name a few.
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> Plainly, a sign reading "Sober," or "Two children," conveys a message about who is deserving of charitable support, just as a sign reading "God bless," expresses a religious message.

Moreover, the federal court acknowledged "[p]anhandling is an expressive act regardless of what words, if any, a panhandler speaks."

> Courts have consistently recognized the protected, expressive nature of panhandling… Even the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance.

As described by the court, Lowell had argued that that "modern" panhandling lacks the expressive quality deserving protection under the First Amendment.

> The City contends that the panhandlers of today are not the "lone needy person" whose acts might "keep the issues of poverty and/or homelessness in the public eye." Rather, it claims, they represent a "raucous alternative culture," both "festive and sinister," engaged in "a war on the public sentiment."

The federal district court rejected the City's argument. In the opinion of the court, "[w]hether or not there has been a transformation of the culture of panhandling, the raucous presentation of the visions of alternative cultures in the public sphere is at the heart of the First Amendment."

Further, the court noted that the "First Amendment clearly limits how panhandling may be regulated."

> The Downtown Panhandling provisions regulate speech in public fora, where the

> government's power to regulate speech is most constrained. Sidewalks and parks, both of which are covered by the Downtown provisions, are quintessential public fora.
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> In public fora, a regulation is subject to stricter scrutiny if it is content-based than if it is a content-neutral time, place or manner regulation, because a content-based regulation raises a very serious concern that the government is using its power to tilt public debate in a direction of its choosing.

Accordingly, the federal district court would determine whether the challenged ordinance "applies to particular speech because of the topic discussed or the idea or message expressed," in this case panhandling.

> A law targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter. If a law is content-based on its face, it is immaterial whether the government had a benign motive, content-neutral justification, or 'lack of animus toward the ideas contained' in the regulated speech.

Applying these principles to the challenged ordinance, the federal district court found the "Downtown provisions are plainly content-based." Specifically, the court found "[t]he 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 matter."

> On its face, the Ordinance distinguishes solicitations for immediate donations from all others. A person could vocally request that passersby in the Historic District make a donation tomorrow, but not today (a distinction that may be of great import to someone seeking a meal and a bed tonight). He could ask passersby to sign a petition, but not a check.

Further, the federal district court noted, "a regulation is content-based if it requires enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." In this particular instance, the court found enforcement of Lowell's Downtown panhandling regulations was necessarily content-based.

> Under the provisions, a police officer would have to listen to a person's solicitation and determine whether he was asking for an immediate donation before finding a violation. Moreover, this inquiry into content would always be necessary. Even where a person was sitting in the Historic District with a sign reading "Hungry and homeless" and speaking to every stranger who walked by, the police officer would still have to determine whether those conversations were prohibited "vocal request[s]" for money. Neither a pleasant "good morning" nor an aggressive political diatribe unrelated to a solicitation would be impermissible, while a "please give," or an "I'm a veteran" would be.

Accordingly, the federal district court concluded "[t[he Downtown panhandling provisions are thus content-based not only linguistically but also in their invitation to content-based enforcement choices."

COMPELLING TOURISM INTEREST?

Having found “the Downtown provisions are content-based,” the federal district court acknowledged constitutional regulations "must be the least restrictive means of achieving a compelling state interest." As noted by the court, content-based regulations are “presumptively invalid.” Applying an “exacting standard” of strict scrutiny analysis, the federal court would first identify “the compelling interest to which a regulation must be tailored” to be achieved.

In this particular interest, the stated purpose of the Downtown provisions for the City of Lowell was to pursue “tourism and economic development.” Specifically, the preamble to the challenged ordinance provided as follows:

> Tourism is one of Lowell's most important economic industries; and The Downtown Historic District is essential for the Lowell tourism experience; and The City has a compelling interest in providing a safe, pleasant environment and eliminating nuisance activity within the Downtown Historic District; and Solicitation, begging or panhandling substantially burdens tourism within the Downtown Historic District.

In the opinion of the federal district court, “[f]ostering economic revitalization in a challenging urban area like Lowell is undoubtedly a critical task for city policymakers.” Moreover, the federal court found the pursuit of tourism and economic development “may rise to the level of a significant, indeed a substantial, government interest sufficient to justify content-neutral regulations.”

> A vibrant downtown economy can help provide jobs to the unemployed, reduce crime and improve public safety, and provide tax revenue for essential public services, including those that help the homeless and other panhandlers.

In response, however, plaintiffs claimed, “the City failed to establish that panhandling actually harmed business or tourism downtown” because the City’s evidence amounted to “anecdotes and hearsay.” As described by the federal court, the City had “the burden of showing that the harms it seeks to mitigate are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." That being said, the court acknowledged that a court owes "substantial deference to a legislature's predictions about the effect of its policies, given its institutional capacity to gather information and the fact that it is not obligated to prepare that information into record form.”

In the case of tourism and economic development, the federal district court noted “the promotion of tourism and business has never been found to be a compelling government interest for the purposes of the First Amendment.” As a result, the court did “not need to decide definitively the issue whether the evidence supporting harm to business or tourism downtown by panhandling is sufficient.” The federal district court, therefore, concluded “tourism promotion” was not “a sufficiently important interest to allow content-based restrictions on speech affecting it to survive strict scrutiny.”

In the opinion of the court, “tourism promotion” was a “highly open textured and inadequately developed” to effectively “eviscerate limitations on content-based speech regulation.” In this particular instance, the court found “[t]he mechanism by which Lowell's ban on panhandling

downtown would promote tourism flies in the face of the First Amendment."

While acknowledging "economic revitalization might be important," the federal district court noted that the First Amendment "does not allow the sensibilities of some to trump the speech rights of others."

> The First Amendment does not permit a city to cater to the preference of one group, in this case tourists or downtown shoppers, to avoid the expressive acts of others, in this case panhandlers, simply on the basis that the privileged group does not like what is being expressed. It is core First Amendment teaching that on streets and sidewalks a person might be "confronted with an uncomfortable message" that they cannot avoid; this "is a virtue, not a vice."

PUBLIC SAFETY AFTERTHOUGHT

In addition to the tourism and business justification provided in the preamble to the challenged ordinance, the City also claimed "the Downtown provisions serve the compelling government interest of public safety." Plaintiffs did not contest the City's point that the government had a compelling interest in public safety generally. However, in this particular instance, plaintiffs contended that the City's public safety rationalization for the Downtown provisions was a post-hoc (i.e. after the fact) argument initially raised in the course of litigation. The federal district court agreed.

> The purpose of the ordinance was authoritatively set forth in its preamble… which was duly enacted by the City Council along with the Ordinance. It is undisputed that only tourism and nuisance abatement (with a passing reference to an associated "safe" environment) were included in that original preamble.

As noted by the court, "after-the-fact explanations cannot help a law survive strict [judicial] scrutiny" in an attempt to establish the constitutionality of an otherwise unconstitutional governmental regulation.

> The City, having officially put forward its reasons for the Downtown Panhandling provisions, cannot add to those reasons in litigation. The Downtown Panhandling provisions were passed to promote tourism, not public safety as such, and consequently do not further a compelling state interest. They therefore cannot survive strict scrutiny under the First Amendment.

AGGRESSIVE PANHANDLING

As noted by the federal district court, "[t]he Aggressive Panhandling provisions are governed by the same First Amendment framework as are the Downtown Panhandling provisions." In the opinion of the court, "[t]he Aggressive Panhandling provisions regulate expressive conduct that is protected by the First Amendment." Moreover, like the Downtown provisions, the court found the Aggressive Panhandling provisions were similarly content-based regulations.

> An aggressive, perhaps disconcerting and indeed frightening, panhandler still conveys messages related to need and deprivation or, in the City's characterization, about the alternative lifestyle of panhandling. And as with the

> Downtown provisions, these are content-based regulations of activity in public fora. The same definition of "panhandling" is employed in both, regulating only requests for immediate donations…
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> [T]his definition, on its face, distinguishes between some solicitations and others based on the content of that solicitation. A person following someone to ask for a donation would be treated as illegally panhandling under the Aggressive Panhandling provisions, whereas someone following another asking for a petition signature would be permitted to continue exercising such a right to political expression.

Having found the Aggressive Panhandling provisions to be content-based, the federal district court then considered whether these regulations were "the least restrictive means for achieving a compelling state interest." Unlike the less than compelling interest in tourism for the Downtown Panhandling provisions, the court found "the Aggressive Panhandling provisions were enacted in furtherance of a compelling state interest: public safety." As characterized by the court, public safety is "the heart of government's function." Moreover, plaintiffs conceded that "preventing "truly aggressive behavior," such as unwanted touching, is a compelling interest."

Accordingly, given the existence of a compelling state interest in public safety, the issue before the federal district court was "whether the Aggressive Panhandling provisions are properly fashioned" to achieve this goal of public safety.

In this particular instance, plaintiffs had contended the Aggressive Panhandling provisions were not the least restrictive means available for achieving the goal of public safety. In so doing, plaintiffs claimed the City had "failed to try a less speech-restrictive alternative — better enforcing existing laws, such as disorderly conduct or assault — before enacting the Aggressive Panhandling Ordinances." According to plaintiffs, the City needed to "show the failure of a stepped-up approach to the enforcement of existing laws before it could constitutionally enact an anti-panhandling ordinance."

As noted by the federal district court, "the justification for a restriction on speech cannot simply allege without evidence that other approaches 'do not work,' nor is it enough to say that a speech restriction would be easier to enforce." That being said, the court acknowledged the First Amendment did not require the City to have "exhausted every enforcement strategy and demonstrated failure before passing the Ordinance." On the contrary, the court found the City could simply "demonstrate that alternative measures that burden substantially less speech would fail to achieve the government interests." According to the court, the City could "accomplish this either by trying or adequately explaining why it did not try alternative approaches."

In this particular instance, the federal court found the City had clearly "attempted to use existing enforcement techniques and yet still plausibly contends that it has a public safety problem." According to the court, the City was indeed "free to try new approaches to protecting public safety, including by passing an ordinance prohibiting aggressive panhandling, so long as that ordinance satisfies the requirements of the First Amendment." In the opinion of the federal court, this particular ordinance was unconstitutional because it selectively targeted individuals who were generally homeless based on the content of their speech while engaging in panhandling.

BAN ON FIGHTING WORDS

In this particular instance, the court found the aggressive panhandling provisions banned panhandling "while using fighting words," i.e., language likely to incite persons to commit violent acts. As noted by the court, "fighting words themselves are not protected by the First Amendment." As a result, the court acknowledged that the City had the unquestionable power to regulate fighting words. That being said, consistent with the First Amendment, the federal district court found the City could not "create a special ban on fighting words uttered in connection with the protected speech of panhandling."

> Selectivity of this sort creates the possibility, indeed, more than a mere possibility in the case of Lowell's ordinance, that the city is seeking to handicap the expression of particular ideas…
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> The City may not deem criminal activity worse because it is conducted in combination with protected speech, and it certainly may not do so in order to send a message of public disapproval of that speech on content based grounds.

In the opinion of the federal district court, aggressive panhandling behavior involving fighting words could have been punished under other generally applicable criminal laws, like assault and battery. Moreover, the court found the City had not "demonstrated that public safety requires harsher punishments for panhandlers than others who commit assault or battery or other crimes."

As characterized by the court, the aggressive panhandling provisions would allow enforcement officials the option to seek an additional penalty on a panhandler who commits assault or obstructs the sidewalk. In so doing, the City would impose increased criminal liability for assaultive behavior by those engaged in particular expressive acts, i.e., panhandling.

In addition to "fighting words," the Aggressive Panhandling provisions also prohibited "panhandling in a group of two or more in an 'intimidating' manner." The federal court characterized this category of aggressive panhandling as "non-criminal, allegedly coercive behaviors." Moreover, the court found this prohibition against intimidating group panhandling "singles out for punishment expression conducted by multiple people rather than alone." As noted by the federal district court, "[b]urdening the expression of those who join their voices together infringes upon not only the First Amendment's protection of speech, but also of assembly."

> Lowell may not forbid panhandlers whose activity is otherwise permissible from expressing themselves together without satisfying strict scrutiny. In the absence of record evidence that panhandling in a group of two or more is a greater threat to public safety than panhandling alone — or that "intimidating" group panhandling is more dangerous than "intimidating" solo panhandling — such scrutiny cannot be satisfied.

As a result, the federal district court found the Aggressive Panhandling provisions, as well as the Downtown Panhandling provisions of the City of Lowell ordinance both violated the First Amendment. Accordingly, the federal district court granted summary judgment in favor of the plaintiffs, declaring the Lowell panhandling ordinance unconstitutional and issuing a permanent injunction against its enforcement.

SEE ALSO: Brother, Can You Spare A Dime? Panhandling In Public Parks And Places James C. Kozlowski. *Parks & Recreation*. Dec 1999. Vol. 34, Iss . 12

http://cehdclass.gmu.edu/jkozlows/lawarts/12DEC99.pdf

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