



March 8, 2013

Honorable President and Members  
of the City Council of Baltimore  
Room 409, City Hall  
100 N. Holliday Street  
Baltimore, Maryland 21202

Attn: Karen Randle, Executive Secretary

Re: City Council Bill No. 13-0186 – Soliciting - Prohibited Places

Dear President and City Council Members:

You have requested the advice of the Law Department regarding City Council Bill 13-0186. City Council Bill 186 amends the current soliciting law to prohibit a person from soliciting while the person is occupying or standing in or on any roadway, lane divider, or shoulder.

The Fourth Circuit Court of Appeals recently addressed the City of Charlottesville's solicitation ordinance in *Clatterbuck v. City of Charlottesville*, 2013 U.S. App. LEXIS 3651 (4<sup>th</sup> Cir). In *Clatterbuck*, the Court held that Charlottesville's law, which prohibited soliciting within a certain area near two streets in the downtown mall, had to be justified by evidence showing that there was no "censorial purpose" behind its enactment. The City's law defined soliciting as "request[ing] an immediate donation of money or other thing of value from another person, regardless of the solicitor's purpose or intended use of the money or other thing of value. A solicitation may take the form of, without limitation, the spoken, written, or printed word, or by other means of communication (for example: an outstretched hand, an extended cup or hat, etc)". This is almost identical to our law, which defines soliciting as "any act by which 1 person requests an immediate donation of money or other thing of value from another or others in person, regardless of the solicitor's purpose or intended use of the money or other thing of value. The solicitation may be oral, written, or by other means of communication." Art. 19, §47-1(c).

The *Clatterbuck* case turned on whether the regulation was content-based or content-neutral and the Court ultimately remanded for need of more evidence regarding the legislative purpose behind the law. Since the law regulated speech in a public forum, (streets in the downtown mall), the Court opined that the government could impose reasonable content-neutral time, place and manner restrictions which are narrowly tailored to serve a significant government interest. If, however, the law is content-based, it will only be upheld if it is the least restrictive means available to further a compelling government interest.

F/A



The most significant aspect of *Clatterbuck* is that the Court found that the definition of solicit (which is similar to ours and most solicitation laws) is not completely content-neutral. The Court seemed to create a gray area between content-based and content-neutral which it described as a “content distinction.” Citing a recent Fourth Circuit opinion concerning signs, the Court opined that **a content-based “distinction” might not require strict scrutiny if the City could prove that there was no “censorial intent to value some forms of speech over others to distort public debate, to restrict expression because of its message, its ideas, its subject matter, or to prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”** *Brown v. Town of Cary*, 2013 WL 221978, slip op. at 11. Charlottesville’s law, like our law, is violated only if the solicitation requests an immediate donation for something of value. Reversing the lower court, the Court found that this was a content-based “distinction” in the sense that if the request was not immediate, or for a signature (no value), for example, it was not a violation. This places an additional hurdle for solicitation laws to overcome. However, only if the City “has distinguished [speech] *because* of its content” will strict scrutiny be applied. Interestingly, the Court ruled that it was inappropriate for the lower court to consider the City Council meetings on the bill, because the matter was before it as a Motion to Dismiss.

Therefore, in the Fourth Circuit at least, after *Clatterbuck*, laws which define solicitation as requests for immediate donations for something of value must contain a statement of purpose and evidence of content-neutral justifications that can defeat allegations of “censorial intent.” The Court suggests some content-neutral justifications that might suffice: impeding traffic and safety concerns (immediate requests for donations of value require the citizen to reach for a wallet, making him more vulnerable to theft). In other words, the City must present evidence that the law was not enacted merely for the purpose of reducing the presence of beggars in certain areas. Once the law passes this test, the City must prove that it is narrowly tailored and leaves open alternate means of communication (tests that the *Clatterbuck* Court could not determine without further evidence). It should be noted that courts in other jurisdictions are inconsistent with regard to whether solicitation laws similar to ours and the law at issue in *Clatterbuck* are content-neutral or content-based.

#### **Restrictions in Public Fora Must Be Narrow And Justified By Content- Neutral Purpose:**

Restrictions on solicitation in public forums like streets and sidewalks must survive a higher level of scrutiny than restrictions in more limited forums like arenas and transit stations. Even a content-neutral regulation must be narrowly tailored to serve a significant government interest and “leave open ample alternative channels of communication” if it is in a public forum. Geographic limits to the restriction could help satisfy the “narrowly tailored” requirement. Our law already reflects an anticrime purpose in that it restricts begging/soliciting near places where citizens are most vulnerable (e.g. ATM’s and vehicles). The smaller the geographic limit surrounding these “danger



zones,” the more likely a court is to find that the restriction is narrowly tailored.

### **Street-Side Solicitation:**

The City’s current law prohibits solicitation “from any operator or occupant of a motor vehicle that is in traffic on a public street, whether in exchange for cleaning the vehicle’s windows or otherwise; or (5) from any operator or occupant of a motor vehicle on a public street in exchange for blocking, occupying, or reserving a public parking space or directing the occupant to a public parking space.” Art. 19, Sec. 47-4.

In *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9<sup>th</sup> Cir. 2011), day-laborer organizations challenged Redondo Beach’s anti-solicitation ordinance that bars individuals from “stand[ing] on a street or highway and solicit[ing], or attempt[ing] to solicit, employment, business, or contributions from an occupant of any motor vehicle.” Redondo Beach Municipal Code § 37.1601(a). As stated in the appeal to the Supreme Court (which IMLA joined), the decision is “amorphous” and leaves virtually no guidance as to what kind of regulation would satisfy the narrowly tailored requirement.

The Court seemed to rest its decision on the fact that there were other laws at the City’s disposal to combat the problems presented by street-side solicitation:

*“The City has various other laws at its disposal that would allow it to achieve its stated interests while burdening little or no speech. The City need only enforce laws against jaywalking, Cal. Veh. Code § 21954, stopping in traffic alongside a red-painted curb,<sup>8</sup> id. § 22500(c), and stopping a car “so as to obstruct the normal movement of traffic,” id. § 22651(b). Or the City could enforce its own ordinances that provide that “[n]o person shall stand in any roadway, other than in a safety zone or in a crosswalk, if such action interferes with the lawful movement of traffic[,]” and “[n]o pedestrian shall stop or stand on a sidewalk except as near as is physically possible to the building line or the curb line at any place in the Central Traffic District or any business district.” Redondo Beach Municipal Code §§ 3-7.1004, .1005. Even under the intermediate scrutiny “time, place, and manner” analysis, we cannot ignore the existence of these readily available alternatives.*

*As the Supreme Court has explained in the analogous commercial speech context, “if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable.”*

It remains to be seen whether other courts will adopt this “less burdensome alternative” approach to anti-solicitation laws. The *Clatterbuck* opinion does not seem to adopt this approach (although that case did not focus on street-side solicitation, the court could’ve applied this test to the solicitation ordinance in general, but didn’t). Nevertheless, when amending our own law, an awareness of existing, overlapping laws could assist in making the restrictions narrowly tailored.

## Conclusion

Unfortunately, decisions across the country over the past few years have not clarified this rather murky area of First Amendment law. However, recent decisions do provide some guidance: the smaller the geographic area of the restriction, the more likely to survive a narrowly tailored challenge (the area must be surrounding some place where the evil (crime or impeding traffic for example) is heightened), if there are “alternative” laws e.g. jaywalking, that do not impact speech that could target the same issue (traffic safety, for example) the court will be less likely to find that the law is narrowly tailored, defining solicitation as requesting something of value immediately (as most of these laws do) makes a “content distinction” which must be justified by a legislative purpose showing no “censorial intent.” The City Council, therefore, must focus on the safety concerns presented by panhandling. To this end, the Law Department recommends that a whereas clause be added to the bill to describe the City’s safety concerns surrounding this activity.

Assuming that the whereas clause will satisfy the court’s concerns regarding content distinction and significant governmental purpose, the law must also “leave open ample alternative channels of communication. Clearly, under the this bill solicitation in areas other than the streets is not prohibited so ample alternative means of communicating the need for donations is left open.

Finally, current City law already prohibits the activity contemplated by this bill. Article 19, Sec. 47-4(4) makes it unlawful for any person to engage in soliciting “from any operator or occupant of a motor vehicle that is in traffic on a public street, whether in exchange for cleaning the vehicle’s windows or otherwise.” This bill is therefore not necessary to prohibit solicitation from vehicles.

Subject to the inclusion of a “whereas clause” stating the public safety purpose of the bill, Accordingly, the Law Department approves City Council Bill 13-01865 for form and legal sufficiency.

Sincerely yours,



Elena R. DiPietro  
Chief Solicitor

cc: George A. Nilson, City Solicitor  
Angela Gibson, City Council Liaison, Mayor’s Office  
Hilary Ruley  
Victor Tervala



**AMENDMENTS CITY COUNCIL BILL 13-0186**

1. On page 1, in the appropriate line insert:

WHEREAS, the City of Baltimore is concerned for the safety of pedestrians and motorists on its streets/

WHEREAS, an increasing number of persons are soliciting donations from vehicles that are being operated on the public streets;

WHEREAS, this practice puts the persons soliciting in danger of injury if their presence is not noticed by the motorist/

WHEREAS, this practice places the motorist at risk for an accident due to the distraction caused by persons walking in traffic; and

WHEREAS, the flow of traffic is impede when persons walk from vehicle to vehicle seeking donations;