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IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY

DEREK VOLKART,
Plaintiff
vs.
CITY OF MEDFORD,
an Oregon Municipal Corporation,
Defendant

CASE NUMBER: 08-1030-E1

ORDER

COPY

PLAINTIFF Derek Volkart makes a facial challenge to the constitutional validity of Medford Municipal Code § 5.258. Plaintiff asserts that the ordinance violates Article I, Section 8, of the Oregon Constitution.

This Court has previously denied Defendant's motion to dismiss. That motion asserted that there was actually no case or controversy between Defendant and Plaintiff because Plaintiff had not been charged with violating the challenged statute. The motion also asserted that the matter is not properly before the Court for declaratory judgment pursuant to ORS 28.010 because more appropriate remedies exist for Plaintiff. Defendant urged Plaintiff to attempt to overturn the statute through the initiative or referendum process. Relying primarily on Marks v. City of Roseburg, 65 Or App 102 (1983), this Court denied Defendant's motion.

The matter then came before the Court on cross-motions for summary judgment. Each party briefed and argued their motion before this Court. After argument, but before this Court rendered its decision, the Oregon Supreme Court decided State v Johnson, 345 Or 190 (2008). In Johnson, the Supreme Court reversed the conviction of the defendant under ORS 166.065(1)(a)(B), the abusive speech provision of the state's criminal harassment statute. In Johnson, the Court accepted as proven that defendant, who was angry, began tailgating the alleged

1 victims and, through a sound-amplification system, shouted various obscene and
2 racist epithets at the victims, accompanied by extremely rude gestures, and that
3 this activity lasted about five minutes. In ruling that the challenged section of the
4 harassment statute was overbroad on its face and a violation of Article 1, Section 8,
5 of the Oregon Constitution, the Court noted that:

6 "Harassment and annoyance are among common reactions to seeing or
7 hearing gestures or words that one finds unpleasant. Words or gestures that
8 cause only that kind of reaction, however, cannot be prohibited in a free
9 society, even if the words or gestures occur publicly and are insulting,
abusive, or both." Johnson at 196.

10 Evidently Defendant realized that § 5.258 of the Municipal Code could not
11 withstand a constitutional challenge under a Johnson analysis. The Medford City
12 Council amended § 5.258 in January of 2009.

13 The matter came before the Court again on February 9, 2009, for oral
14 argument on Defendant's second motion to dismiss. Defendant asserted that the
15 amendment to the challenged section of the Municipal Code made the previous
16 challenge by Plaintiff moot.

17 Plaintiff replied that the challenged ordinance had two kinds of prohibitions,
18 regulating both "conduct" and "location". Plaintiff conceded that the conduct aspect
19 of the statute as rewritten withstood an Article 1, Section 8, challenge. However,
20 Plaintiff asserts that the other aspect of the statute regulating where solicitation is
21 prohibited is constitutionally infirm.

22 As originally drafted, § 5.258 was somewhat convoluted, interspersing
23 definitions between prohibitions.¹ As amended, the statute is more so.²

24 I conclude that, as amended, Subsection (2)(b)(ii) is constitutionally valid,
25 even though inartfully written. This subsection defines abusive solicitation as
26 solicitation being conducted in a manner that:

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1 ". . . intentionally, recklessly or knowingly, with the effect of either placing
2 the solicited person in reasonable apprehension of imminent physical harm,
3 or with the effect of provoking or likely to provoke an imminent violent or
 disorderly response from the person being solicited."

4 This is language taken directly from Johnson.

5 It then goes on to list five specific forms of conduct which a person may not
6 engage in if done in a manner described by the above-quoted language. The five
7 listed actions or conduct seem unnecessary and limiting. Under Johnson, if a
8 person was to engage in any of the five listed actions, they would be within their
9 constitutional rights if not accompanied by conduct that reasonably placed another
10 person in imminent fear of physical harm or provoked an imminent violent or
11 disorderly response.

12 Plaintiff asserts that, even as amended, Subsections (2)(b)(i) and (3) of the
13 ordinance, regarding locations where solicitation is prohibited, violate Article 1,
14 Section 8, of the Oregon Constitution. This Court agrees.

15 Using State v. Robertson, 293 Or 402 (1982), analysis, I conclude that the
16 challenged ordinance as a whole focuses on the content of speech rather than on
17 proscribing the pursuit or accomplishment of forbidden results.

18 The challenged sections of the statute attempt to proscribe "solicitation" in
19 certain enumerated situations or locations. Subsections (2)(b)(i) and (3) of the
20 ordinance prohibit "solicitation", which is defined by Subsection (2)(a) as "an in-
21 person request made to obtain an immediate donation of money or other item of
22 value", at six different locations.

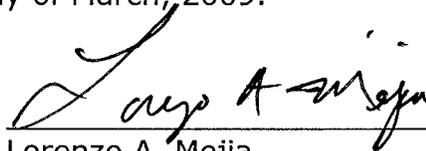
23 This is a content based, as opposed to a content neutral, regulation of
24 locations where a certain type of speech is prohibited. As the Oregon Supreme
25 Court has made clear, a statute that restricts the situs of expression based on the
26 content of the message violates Article 1, Section 8. Outdoor Media Dimensions v.
27 Dept. of Transportation, 340 Or 275, 292-299 (2006).

28 That the location restrictions of § 5.258 are content based is made even

1 more obvious by comparing it with § 5.282 of the City Code.³ Section 5.282 makes
2 it a violation to attempt to sell anything of value at a private residence when the
3 owner or occupant has posted a "NO SOLICITORS" sign at the primary entrance.
4 Subsections (2)(b)(i) and (3)(a) of the challenged ordinance make it a crime to ask
5 for a donation at a private residence without first getting permission to ask for the
6 donation.

7 Based on the above, this Court concludes that the prohibitions and
8 regulations of speech contained in § 5.258(2)(b)(i) violate Article 1, Section 8, of
9 the Oregon Constitution. The Court grants Plaintiff's motions for summary
10 judgment and injunctive relief. Plaintiff's attorney shall prepare a judgment
11 consistent with this opinion.

12 IT IS SO ORDERED this 19 day of March, 2009.

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15 Lorenzo A. Mejia
16 Circuit Court Judge

17 c: Justin M. Thorp, Attorney for Plaintiff
18 John R. Huttli, Attorney for Defendant
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¹ **5.258 Prohibited Solicitation** - Original Version

Purpose. It is the intent of this Chapter to impose reasonable place and manner limitations on solicitation, as defined herein, in order to protect the safety of the general public against abusive solicitation while respecting the constitutional right of free speech. This ordinance balances protecting free expression with providing public safety protection, protecting the public's vehicular and pedestrian movement from being impeded by solicitors, and protecting a captive audience from solicitors.

(1) Abusive Solicitation. No person shall engage in abusive solicitation as defined in this section. A person shall not be deemed to be in violation of this section when he or she passively displays a sign unless that person takes action to obtain and/or retrieve an item of value from another person caused by the sign being displayed.

(2) Definitions. The following words or phrases as used in this Chapter shall have the following meanings:

(a) "Solicitation" means an in-person request made to obtain an immediate donation of money or other item of value.

(b) "Abusive Solicitation" means to do one or more of the following while engaging in solicitation or immediately thereafter. Each of the following constitutes abusive solicitation:

(1) Continuing to solicit once the person being solicited has declined the request; (2) Blocking or impeding the passage of the person solicited; (3) Following the person solicited by proceeding behind, ahead or alongside of him or her after the person solicited has declined the request; (4) Touching the solicited person without the solicited person's consent; (5) Using words, gestures, and/or actions which are threatening and inherently likely to provoke an immediate violent response from the person solicited; (6) Engaging in solicitation activity in any of the prohibited places specified in Subsection 3.

(3) Locations Where Solicitation is Prohibited. Solicitation shall be prohibited when the person solicited is in any of the following locations:

(a) Private property without the permission of the property owner or other person lawfully in possession of such property or other person with lawful authority to manage such property;

(b) At any intersection controlled by an electronic traffic control device;

(c) Within fifty feet of an automated teller or financial institution;

(d) Public transportation vehicles or facilities;

(e) Public parking lots or structures;

(f) A queue of five or more persons waiting to gain admission to a place, or event, to purchase an item or admission ticket.

(4) Penalties. Any violation of the provisions of this ordinance constitutes a misdemeanor.

(5) Severance. If any section, sentence, clause, or phrase of this ordinance is held invalid or unconstitutional by any court of competent jurisdiction, it shall in no way effect the validity of any remaining portions of this law.

(6) Effective date of this ordinance shall be January 1, 2008.

² **5.258 Prohibited Solicitation** – Amended Version

Purpose. It is the intent of this Chapter to impose reasonable place and manner limitations on solicitation, as defined herein, in order to protect the safety of the general public against abusive solicitation while respecting the constitutional right of free speech. This ordinance balances protecting free expression with providing public safety protection, protecting the public's vehicular and pedestrian movement from being impeded by solicitors, and protecting a captive audience from solicitors.

(1) Abusive Solicitation. No person shall engage in abusive solicitation as defined in this section. A person shall not be deemed to be in violation of this section when he or she passively displays a sign unless that person takes action to obtain and/or retrieve an item of value from another person caused by the sign being displayed.

(2) Definitions. The following words or phrases as used in this Chapter shall have the following meanings:

(a) "Solicitation" means an in-person request made to obtain an immediate donation of money or other item of value.

(b) "Abusive Solicitation" means (i) engaging in solicitation activity in any of the prohibited places specified in Subsection 3 or (ii) engaging in conduct, including but not limited to the following listed conduct, intentionally, recklessly or knowingly, with the effect of either placing the solicited person in reasonable apprehension of imminent physical harm, or with the effect of provoking or likely to provoke an imminent violent or disorderly response from the person being solicited:

(1) Continuing to solicit once the person being solicited has declined the request;

(2) Blocking or impeding the passage of the person solicited;

(3) Following the person solicited by proceeding behind, ahead or alongside of him or her after the person solicited has declined the request;

(4) Touching the solicited person without the solicited person's consent;

(5) Using words, gestures, and/or actions which are offensive or threatening.

(3) Locations Where Solicitation is Prohibited. Solicitation shall be prohibited when the person solicited is in any of the following locations:

(a) Private property without the permission of the property owner or other person lawfully in possession of such property or other person with lawful authority to manage such property;

(b) At any intersection controlled by an electronic traffic control device;

(c) Within fifty feet of an automated teller or financial institution;

(d) Public transportation vehicles or facilities;

(e) Public parking lots or structures;

(f) A queue of five or more persons waiting to gain admission to a place, or event, to purchase an item or admission ticket.

³ **5.282 Solicitation in Violation of Signs**

(1) Any owner or occupant of a private residence may post a plainly visible sign at its principal entrance bearing the words "NO SOLICITORS" in letters at least one and one-half inches in height.

(2) Any person who solicits at a private residence where a sign is posted in accordance with subsection (1) of this section is guilty of a violation.

(3) The term "solicit" as used in this section means to go on the premises of a private residence for the purpose of selling anything of value without having been requested or invited to do so by an occupant of such premises.

[Added Ord. No. 6241, Nov. 17, 1988; Amd. Ord. No. 2000-45, March 16, 2000.]

(4) Penalties. Any violation of the provisions of this ordinance constitutes a misdemeanor.

(5) Severance. If any section, sentence, clause, or phrase of this ordinance is held invalid or unconstitutional by any court of competent jurisdiction, it shall in no way effect the validity of any remaining portions of this law.

(6) Effective date of this ordinance shall be January 1, 2008.

[Added, Ord. No. 2007-235, Nov. 1, 2007; Amd. Ord. No. 2009-08, Jan. 9, 2009.]