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MEMORANDUM

TO: Mayor Lewis Pucket
Sanna Henderson, City Commissioner
David Knowles, City Commissioner
John Christian, City Commissioner
Bill Polk, City Commissioner

FROM: Mark A. Brionez, Esquire

DATE: September 14, 2009

RE: Constitutionality of Ordinances Regulating Begging, Sleeping Outdoors, and Vagrancy

The purpose of this memorandum is to address some of the constitutional issues regarding ordinances, which regulate or ban begging, sleeping outdoors, and vagrancy.

I. Regulating Begging/Panhandling: While there is no constitutional right to shelter, there may be some constitutional protection for the rights of beggars. Solicitation by organized charities is fully protected speech under the First Amendment of our Constitution. However, courts are split on whether First Amendment protection afforded to charitable solicitation also protects begging and panhandling. Courts that deem begging less deserving of full First Amendment protection distinguish between begging and charitable solicitation on the ground that passers by experience begging as intimidating and threatening in a way they do not experience solicitations from organized charities. These courts find that the essence of begging is not communication, but rather the transfer of money. Accordingly, these courts apply a relatively lenient standard against laws that are designed to protect the passerby. Other courts see no significant distinction between the two activities and hold that the First Amendment protects begging just as it does charitable solicitation.

The government's ability to restrict First Amendment activity depends upon the nature of the forum involved. Hence, forum analysis is very important in cases addressing the regulation of begging and/or panhandling. Under forum based analysis, regulation of speech on government property that has traditionally been available for public expression, such as streets and parks, is

subject to the highest scrutiny and such regulations survive only if they are narrowly drawn to achieve a compelling governmental interest. In case of property which is not traditionally considered a public forum, but which has been deliberately set aside by governmental locale for expressive conduct, the standard applicable to regulation of speech is comparable to the standard governing regulation of speech on government property traditionally available for public expression, under which such regulations survive only if they are narrowly drawn to achieve a compelling governmental interest. With regard to all public property, other than that traditionally available for public expression and that deliberately set aside by governmental locale for expressive conduct, the government may regulate First Amendment conduct as long as its regulations are reasonable and viewpoint neutral.

Government property does not become a “public forum” for First Amendment purposes simply because members of the public may come and go at will. The government, just as private property owners, may maintain property under its control for use to which it is lawfully dedicated. Regulation of expressive activity on public property deemed not to be a public forum is subject only to limited First Amendment review. In such cases, the regulation must be reasonable and not designed to prohibit the activity merely because of disagreement with the views expressed. In cases where governmental property is considered to be a public forum for purposes of the First Amendment, local governments may regulate activities on the public forum by placing reasonable time, place, and manner restrictions on the regulation which: (1) are content neutral; (2) are narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication.

The main inquiry in determining content neutrality for purposes of First Amendment free speech analysis, as it relates to regulating non public forums, is whether government is regulating speech because of disagreement with its message or whether the government is regulating the speech based on a purely content neutral basis. Hence, governmental aim is the controlling consideration and government’s regulation of expressive conduct is “content neutral” if it is justified without reference to content of regular speech. In cases where the government attempts to regulate speech on a traditional public forum then the test will require that the government have a compelling government interest and that the regulation is narrowly tailored. A regulation is “narrowly tailored” for purposes of First Amendment free speech analysis, as long as it promotes significant governmental interest that would be less effectively accomplished without it.

As is apparent from the rules governing the regulation of First Amendment free speech, the first step in any analysis is to determine whether the regulation will apply to a public or non public forum. If the regulation on begging is intended to apply to areas within the city that are traditionally considered non public forums then the City can regulate begging so long as the regulation is content neutral. However, if the City intends on regulating begging in traditional public forums then the City may do so by placing reasonable time, place, and manner restrictions on the regulation which: (1) are content neutral; (2) are narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication.

A number of Florida courts have held that a total ban on begging throughout a city is unconstitutional. However, there have been begging regulations that have been held constitutional. While the Florida cases seem to be inconsistent and at times, unclear, what is clear is that a governmental interest is not compelling for purposes of suppressing potential First Amendment speech if its purpose is merely to protect citizens from annoyance. However, Florida courts have found the following to be compelling governmental interests for purposes of regulating begging:

- (1) protecting beaches from nuisances and prohibiting unreasonable interferences with the “flow, recreation, enjoyment, and privacy of persons on sand beaches”;
- (2) providing citizens with a safe environment in which recreational opportunity can be maximized;
- (3) eliminating nuisance activity on beaches and providing patrons with a pleasant environment in which to recreate; and
- (4) improving the safety, economic viability and aesthetics of a beach.

In the cases where courts have found the begging regulations to be constitutional, the courts have found that the city had a compelling governmental interest in protecting tourism. The court also found that regulation on begging was narrowly tailored so as to serve the compelling governmental interest.

In case of regulations promulgated by the City of Leesburg, it would be wise to limit any ban on begging to certain areas within the city limits as opposed to an outright ban throughout the entire city. The regulation would need to serve some compelling governmental interest and be narrowly tailored. For instance, the city could choose to ban begging throughout historic downtown area, from 8:00 A.M. to 8:00 P.M. to promote tourism, encourage economic viability, and maintain the aesthetics the historic downtown area. A second option for the city to consider would be to regulate any potential First Amendment speech rights by enacting a narrowly tailored permit system, which provides for strict guidelines and definite standards closely related to a permissible municipal interest.

II. Regulating Sleeping Outdoors. The act of sleeping outdoors in a public place, absent expressive conduct, is not constitutionally protected. Nevertheless, city ordinances prohibiting sleeping in public places have been found to be overbroad as applied to homeless persons to the extent they result in homeless persons being arrested for harmless, inoffensive conduct that they are forced to perform in public places. Further, city ordinances prohibiting sleeping in automobiles in public places have been found to be unconstitutionally overbroad and vague. In other cases, courts have found that ordinances making it unlawful to sleep during the nighttime in one’s motor vehicle on public, semipublic, or private property was not vague or overbroad as applied to those who engage in that activity.

Most cases brought against local governments by individuals are brought under the Equal Protection clause of the Constitution and allege that the local government has enacted an ordinance regulating sleeping outdoors that unconstitutionally infringes on their fundamental rights. In those cases, courts have found that homeless persons are not a suspect class, nor is sleeping out-of-doors

a fundamental right. As such, the courts have held that if the ordinance does not infringe upon a fundamental right or target a suspect class, equal protection claims relating to it are judged under the rational basis test, which means the ordinance must be rationally related to the achievement of a legitimate government purpose.

The rational basis test applied by courts in addressing equal protection claims is applied in two steps. The first step in determining whether legislation survives rational-basis scrutiny is identifying a legitimate governmental purpose. The second step of rational-basis scrutiny asks whether a rational basis exists for the enacting governmental body to believe that the legislation would further the hypothesized purpose. The proper inquiry is concerned with the existence of a conceivable rational basis, not whether that basis was actually considered by the legislative body. As long as reasons for the legislative classification may have been considered to be true, and the relationship between the classification and the goal is not so attenuated as to render the distinction arbitrary or irrational, the legislation survives rational-basis scrutiny.

In the event the City decides to proceed with regulating sleeping outdoors, it should do so in a manner similar to the City of Orlando's regulation. The City of Orlando enacted Section 43.52 of the City Code, which prohibits "camping" on public property, or on private property without permission. The ordinance is defined to include, among other things, "sleeping out-of-doors." This ordinance was challenged by a homeless person as violating his equal protection, due process, and Eight Amendment rights. The court in that case held that the ordinance prohibiting camping on public property, or on private property without permission, which included sleeping outdoors, was rationally related to the city's interest in promoting aesthetics, sanitation, public health and safety, and did not violate equal protection, due process, or Eight Amendment rights of the homeless.

III. Regulating Vagrancy. Ordinarily, vagrancy may be defined, retrained and punished under ordinance, by virtue of municipal police power, by force of a general grant of power or a constitutional authority to exercise all powers of self-government, or by reason of express or necessarily implied charter or statutory authorization. Vagrancy statutes have been held to be unconstitutional due to many factors, including being void for vagueness and/or overbreadth. In other jurisdictions, vagrancy ordinances have been upheld as not being unconstitutionally vague in their terms and applications. An ordinance incorporating, by reference, a vagrancy statute so overbroad as to include lawful behavior or conduct within its sweep is unconstitutional on its face. However, a vagrancy ordinance with substantially the same provisions as a statute, except that the penalty of the ordinance is smaller, has been held valid. Vagrancy ordinances are subject to constitutional provisions and are often challenged under the Due Process clause of the Constitution.

Florida courts have been inconsistent in their application of constitutional law to vagrancy ordinances that prohibit loitering. Specifically, the Florida Supreme Court has held that a number of municipal ordinances prohibiting loitering were unconstitutional under the Due Process clause. In ruling the loitering ordinances unconstitutional, the Court found that the First Amendment and Florida Constitution protect rights of persons to associate with whom they please and to assemble with others for social purposes. Further, both federal and state constitutional provisions protecting rights of persons to express themselves protect not only speech and written word, but also conduct

intended to communicate. As such, when lawmakers attempt to restrict or burden fundamental and basic constitutional rights, laws must not only be directed toward a legitimate purpose, but they must be drawn as narrowly as possible. In other words, the laws cannot be so broad that they prohibit constitutionally protected conduct as well as unprotected conduct; nor may the laws be so vague that a person of normal intelligence would not know by reading the law what it prohibits.

In ruling that the city ordinances banning loitering were invalid and unconstitutional, the Court found that in many cases, municipal ordinances limit the rights of individuals to engage in noncriminal activity, give law enforcement unfettered discretion in applying and enforcing the ordinance, and punish innocent activities. However, other Florida Courts have found that ordinances which proscribe loitering that threaten public safety or threaten a breach of the peace can generally withstand constitutional attack. Thus, a District Court in the state of Florida has held that a Lee County ordinance, which limited enforcement to any unreasonable hindrance of pedestrians or vehicles and provided for notice either in the form of a warning by law enforcement officers or posting of a no loitering sign was constitutionally valid.

The Florida Supreme Court has held that §856.021, Florida Statutes, which makes it “unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity,” was constitutional. Despite this ruling, other Florida courts have stricken down ordinances which incorporated or emulated §856.021, Florida Statutes. For instance, the City of Daytona enacted an ordinance, which read: “It shall be unlawful for any person to commit, within the limits of the city, any act which is recognized by the Florida Statutes as a misdemeanor, and the commission of such act is hereby forbidden.” The particular statute that was incorporated into the city’s code dealt with vagrants, rogues, vagabonds, idle or dissolute persons. The court in this case struck down the ordinance and held that the ordinance that incorporated by reference the statute providing that persons wandering or strolling around from place to place without any lawful purpose or object was unconstitutionally vague.

In another case, a court struck down a vagrancy ordinance from the City of Jacksonville and found that the ordinance was void for vagueness, both in the sense that it failed to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden by statute, and because it encouraged arbitrary and erratic arrests and convictions. The court also found that all persons are entitled to be informed of what the local government commands and forbids. Therefore, ordinances enacted to regulate vagrancy must be specific in the actions that are forbidden and must not punish purely innocent and harmless behavior.

Given the inconsistent application of constitutional law by Florida courts, the only certainty is that §856.021, Florida Statutes, is constitutional and can be used by the City to regulate loitering throughout city limits. In the event the city chooses to regulate loitering through municipal ordinance then any such ordinance would need to be specific in proscribing loitering that threatens public safety or a breach of the peace. Additionally, the ordinance would need to be narrowly tailored and directed toward a legitimate governmental interest. This would prevent the ordinance from being struck down by a court due to vagueness or overbreadth. My recommendation to the

City with regard to any proposed ordinance would be to tailor the ordinance in the same fashion as the Lee County ordinance. The Lee County ordinance that was challenged as violating the Due Process clause was held to be constitutional because the ordinance: (1) did not give police officers discretion, but, rather, limited enforcement to any unreasonable hindrance of pedestrians or vehicles; and (2) did not purport to penalize person's status or past conduct and did not contain a catchall provisions which would cause problems of vagueness or overbreadth but provided for reasonable notice to the public of conduct that it proscribed by requiring either prior warning by law enforcement officers or a posting of a "no loitering" sign. Thus, the ordinance was narrowly tailored and directed toward a legitimate governmental interest.