



Legislation Text

File #: 17-325, Version: 1

TO: Mayor and Commissioners
FROM: R. Max Lohman, City Attorney
DATE: April 4, 2017

ORDINANCE NO. 10-17: AMENDING CHAPTER 118, "SOLICITORS AND PEDDLERS AND DISTRIBUTION OF HANDBILLS" (SECOND READING)

Recommended Action:

Motion to Approve Ordinance 10-17 on second reading.

Background:

This proposed ordinance amends the current Chapter 118, section 118.13 "Hours of Solicitation" of the City of Delray Beach's Code of Ordinances. In its current state, section 118.13 is not in compliance with established case law addressing a municipality's ability to place curfew restrictions on commercial transactions. Specifically, the permissible hours of solicitation are not in accord with legal precedent. Various courts, including the United States Supreme Court and federal courts, have invalidated ordinances that placed unconstitutional curfew restrictions on commercial speech. This proposed ordinance serves to comport the City's current ordinance with long-standing precedent relating to the regulation of commercial speech and the First Amendment.

Commercial speech that "does no more than propose a commercial transaction" is protected by the First Amendment. *Virginia Board of Pharmacy v. Virginia Citizens' Consumer Council*, 425 U.S. 748 (1976). However, commercial speech can be subject to time, place and manner restrictions provided that such restrictions are imposed without reference to the content of the speech, serve significant governmental interests and leave open ample alternative channels for communication of the information. See *Kortum v. Sink*, 54 So. 3d 1012 (Fla. 1st DCA 2010) (citations omitted). A four prong test, established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, is utilized to determine the constitutionality of restrictions on commercial speech. *Central Hudson*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980):

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than necessary to serve that interest.

Once it has been determined that the speech concerns lawful activity, the government has the burden of “identifying a substantial interest and justifying the challenged restriction.” *Kortum* at 1016 (citations omitted). While the privacy interests of residents and their ability to enjoy the quiet enjoyment of their homes have been upheld as significant interests protected by a municipality, interests in crime prevention and conservation of public resources may not be. See eg *Ohio Citizen Action v. City of Englewood*, 671 F. 3d 564 (6th Cir. 2012).

In drafting this change, ordinances from various municipalities were reviewed. While most established time limitations for solicitations similar to the proposed ordinance, others did not place any restrictions. Rather, the ordinance permitted residents to “protect” themselves from solicitors by placing “No Solicitation” signs on their property. The current chapter of the Code of Ordinances entitled “Solicitors and Peddlers and Distribution of Handbills” contains a similar provision as applied to the distribution of handbills, located in section 118.02, stating that a sign posted with the words “no solicitation” is deemed a request not to deliver handbills. Similar language could be added to this proposed amendment if the Commission deems such language necessary.