

*Failed 7/8/03*

Submitted by: Assemblymember Sullivan  
Prepared by: Department of Assembly  
For reading: May 13, 2003

ANCHORAGE, ALASKA  
AO NO. 2003-57(S-1)

1 AN ORDINANCE OF THE ANCHORAGE MUNICIPAL ASSEMBLY ENACTING A NEW  
2 CHAPTER 24.45 ESTABLISHING PUBLIC SAFETY REQUIREMENTS FOR SOLICITING  
3 BUSINESS OR CONTRIBUTIONS AND PROHIBITING THE DISTRIBUTION OF  
4 LITERATURE FROM WITHIN STREET OR HIGHWAY RIGHTS-OF-WAY.

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6  
7 THE ANCHORAGE ASSEMBLY ORDAINS

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9 Section 1. That Anchorage Municipal Code Title 24 is amended by enactment of a new  
10 Chapter 24.45 to read as follows:

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12 Chapter 24.45 PUBLIC SAFETY REQUIREMENTS FOR SOLICITING  
13 BUSINESS OR CONTRIBUTIONS FROM WITHIN STREET  
14 OR HIGHWAY RIGHTS-OF-WAY.

15  
16 24.45.010 Solicitations Prohibited.

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18 A. It is unlawful for any person to enter upon any part of the right-of way of any public  
19 street or highway in the municipality for the purpose of directing, diverting, enticing,  
20 or inducing any motorist into any place of business or for the purpose of hawking,  
21 touting, soliciting, or for the purpose of soliciting or collecting contributions for any  
22 person or organization or advertising for any place of business by handbill, word of  
23 mouth, signal, portable sign, or any other media delivered, addressed, or directed to  
24 any motorist upon such street or highway.

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26 24.45.020 Permit Requirements.

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28 A. However, notwithstanding the above, a permit for an activity prohibited by  
29 AMC 24.45.010 on the right-of way shall be issued by the traffic engineer, provided  
30 the applicant meets the following criteria:

31  
32 1. The applicant shall provide a plan for review and comment by the traffic  
33 engineer, which plan will maximize the safety of the applicant's representatives, as  
34 well as the motoring public, at the locations where the solicitation will take place.  
35 The applicant shall pay a permit fee in the amount of \$100 to the municipality. The  
36 traffic engineer may impose reasonable safety requirements.

1           2.    The applicant shall indicate in specific detail the location of such solicitation,  
2           together with the hours thereof, not to exceed twenty-four (24) hours in any forty-  
3           eight (48) consecutive hour period.

4  
5           3.    The applicant shall provide:

6                   a.       An indemnification and hold harmless agreement in favor of the  
7                   municipality in a form satisfactory to the municipal attorney;

8                   b.       A certificate of insurance listing the municipality as an additional  
9                   insured in the amount of ~~1-million~~ five hundred thousand dollars  
10                  (\$500,000).

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12  
13           4.    The Municipal Risk Manager shall review the application to determine if  
14           insurance additional to that required in subsection 24.45.020.A.3.b is required,  
15           based on the risk of the activity.

16  
17           5.    No person under the age of sixteen (16) years shall participate in any  
18           solicitation in the right-of-way pursuant to a permit granted under this section.

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20           6.    All solicitation shall occur during daylight hours only.

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22           B.    The traffic engineer may decline to issue subsequent permits to any individual or  
23           group violating the parameters of a previously issued permit or violating any  
24           requirements of this section, any other municipal ordinance or state statute.

25  
26           C.    During active solicitation, at least one solicitor at each location shall be in  
27           possession of a copy of the authorizing permit and shall display the copy to any  
28           law enforcement officer upon request. All solicitors shall possess picture  
29           identification and wear a high visibility safety vest.

30  
31           D.    Permits issued pursuant to this section shall be for a specific time period not to  
32           exceed twenty-four (24) hours in any forty-eight (48) consecutive hour period.

33  
34           E.    No individual or group shall be granted more than two permits per calendar year.

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36           F.    For purposes of this section only, the term "right-of-way" shall be deemed to  
37           include all portions of any public roadway normally available for use by motor  
38           vehicles and all medians or traffic islands within such roadways, and shall include  
39           up to 2 feet of the area adjacent to the roadway. This section does not apply to  
40           State streets and highways subject to AS 19.25.075-180.

**24.45.030**      **Distribution of literature prohibited.**

- A. No person shall stand on any part of the right-of-way of any highway or street located within the municipality for the purpose of distributing any printed or written literature to the occupants of any vehicle.

**24.45.040**      **Penalty.**

- A. Soliciting in the right-of-way without a valid permit issued pursuant to this section shall be punished by a fine not exceeding fifty dollars (\$50.00) for a first offense and two hundred fifty dollars (\$250.00) for a second or subsequent offense.

**24.45.050**      **Relationship of this chapter to State law.**

No provision of this chapter shall be interpreted as authorizing an activity that would conflict with the provisions of Alaska statutes sections 19.25.075-19.25.180.

Section 2: This ordinance shall become effective immediately upon its passage and approval.

PASSED AND APPROVED by the Anchorage Assembly this      day of \_\_\_\_\_  
2003

\_\_\_\_\_  
Chair

\_\_\_\_\_  
Municipal Clerk

## BOARD OF COUNTY COMMISSIONERS

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## MEMORANDUM

Date: June 25, 2001

Board of County Commissioners

From: Rebecca M. Kert, Assistant County Attorney *RMK*Request by the Muscular Dystrophy Association to  
allow for solicitation on county roads.

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At the June 20, 2001, Board of County Commissioners' Meeting, a representative from the Muscular Dystrophy Association ("MDA") appeared at Public Comment, and requested the Board to either issue a temporary permit to the MDA to allow it to solicit on county roads in unincorporated Hillsborough County, or to amend the solicitation ordinance to allow for such a permit. The Board asked the County Administrator and the County Attorney to review this request and report back to the Board at the Land Use Meeting on June 26, 2001.

On June 22, 2001, the MDA sent materials to the office of the County Attorney to assist in this review. The materials included a fact sheet on the MDA and the fire fighter/MDA history, endorsement letters, safety procedures for solicitation, a statement of the responsibilities of the fire fighters, and a copy of their insurance certificate. (see attached).

ORDINANCE 91-24: Prohibition of Distribution and Solicitation on County Roads

Hillsborough County Ordinance 91-24 regulates solicitation on county roads in unincorporated Hillsborough County. The Ordinance prohibits any person from displaying advertising, distributing material, or soliciting any contributions from the occupant of a motor

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vehicle.<sup>1</sup> The Ordinance also prohibits distributing material or soliciting contributions from within four feet of the edge of a road.<sup>2</sup>

Notably, this restriction only applies to county roads in the unincorporated area of the County, and thus does not apply within the City of Tampa or on state or federal roads in the unincorporated area. Examples of some of the roads where the Ordinance does not apply are State Road 60, Dale Mabry Highway, and Hillsborough Avenue. Attached is a list of non-county roads within unincorporated Hillsborough County where solicitation is not prohibited.

In the Ordinance, the Board made a finding that the complete prohibition was the least restrictive means necessary to prevent the harms identified in the Ordinance and protect public health, safety and welfare.

The stated purpose of Ordinance 91-24 is to protect the health, safety and general welfare of the citizens of Hillsborough County, to assure the free, orderly, uninterrupted movement of motorized vehicles on Hillsborough County roads, promote traffic safety, and provide for safety in the interest of both occupants of motorized vehicles located on Hillsborough County roads and distributors and solicitors. H.C. Ordinance 91-24. Section 2.

The Board made several findings, including that the acts prohibited in the Ordinance created a public safety hazard, that the activities impeded the normal, orderly and safe flow of traffic, that the State had issued 714,647 decals for passenger vehicles in Hillsborough County in the previous one year period, and that in 1990, the Metropolitan Planning Organization determined that over 29% of the major arterial roads in Hillsborough County carried more traffic than they were designed to handle.

At the public hearing for the adoption of Ordinance 91-24, the Board heard from representatives from the Hillsborough County Sheriff's Office. The deputies presented testimony that the prohibited acts caused distractions to motorists, unsafe pedestrian movement within travel lanes, and sudden stoppage or slow-down of traffic. The deputies also testified that in 1990 there were 178 traffic fatalities and 15,500 traffic accidents that were investigated in the unincorporated area of Hillsborough County. At public comment

<sup>1</sup> "No person shall be upon or go upon any road for the purpose of displaying advertising of any kind or distributing materials or goods or soliciting business or charitable contributions of any kind from the occupant of any motorized vehicle located on public roads of Hillsborough County." H.C. Ordinance 91-24, Section 5(1).

<sup>2</sup> "No person shall be within four (4) feet of the edge of the road for the purpose of distributing materials or goods or soliciting business or charitable contributions of any kind from the occupant of any motorized vehicle located on public roads of Hillsborough County." H.C. Ordinance 91-24, Section 5(2).

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several citizens spoke in support and opposition, representing charities, vendors, and citizens. Specifically, a representative from the MDA spoke in opposition to the Ordinance.

### LEGAL CHALLENGE TO ORDINANCE 91-24

In 1992, two members of the International Society for Krishna Consciousness, Inc. sued Hillsborough County in federal court, challenging the constitutionality of Ordinance 91-24. Nelson v. Hillsborough County, Case No. 92-1709-CIV. The federal court upheld the Ordinance because it found the "Ordinance serves the significant governmental interest of protecting the public safety and ensuring the orderly flow of traffic by restricting interactions between individuals and motor vehicles on roads open to traffic." (Nelson v. Hillsborough County, Final Order).

Moreover, the federal court found the Ordinance narrowly tailored to this interest. Finally, the federal court found that Ordinance 91-24 left open ample alternative channels of communication, noting that the Ordinance does not restrict distribution to and solicitation from pedestrians, door-to-door canvassing, telephone solicitations or direct mail. The federal court also recognized that the Ordinance does not apply to streets in the City of Tampa, and streets closed to traffic.

When an ordinance regulates speech in a traditional public forum, a court would review such an ordinance under a strict scrutiny level of review. To be upheld, the ordinance would have to be directed to a compelling government interest and narrowly tailored to address the government's interest. Strict scrutiny is a very high standard of review, and very few ordinances are found constitutional if subject to this level of review.<sup>3</sup>

However, if an ordinance regulates speech in a traditional public forum, but is content-neutral, the regulation will be upheld if it serves a significant government interest, is narrowly tailored, and allows for ample alternative channels of communication. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)(cites omitted.) An ordinance is content neutral if it does not make distinctions based on the content of the expression. Because Ordinance 91-24 is a complete ban with no distinctions based on the content of the expression, Ordinance 91-24 was found to be content neutral when it was challenged in federal court.

### SPECIAL EXCEPTION

<sup>3</sup> See Special Programs, Inc. v. Courier, 923 F.Supp. 851, 854 (USDC Va. 1996) ("In order to pass strict scrutiny, the statute must be narrowly tailored to address a compelling government interest. As one might expect, few statutes can withstand this test.")

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One of the requests the MDA made to the Board was to consider granting the MDA a special exception for a temporary permit to allow them to conduct a fundraising operation. Ordinance 91-24 does not provide for special exceptions or variances to an individual group. Any special exception could be subject to constitutional challenges. A court may find such exceptions to be content-based, and therefore raise the level of scrutiny of the Ordinance to "strict scrutiny." If the Ordinance were interpreted to allow for such exceptions, the Ordinance may also be in violation of the First Amendment for allowing such exceptions with "unbridled discretion," or with no set standards. Moreover, such a special exception may be a violation of the Equal Protection Clause, as an unconstitutional legislative classification.

#### AMENDMENT TO ORDINANCE 91-24

In the alternative, the Muscular Dystrophy Association has asked the County to amend Ordinance 91-24, to allow them to conduct their fund drive. The Board could amend the Ordinance in three ways.

First, the Board could remove the prohibition of solicitation from the Ordinance, thus allowing for all solicitation. However, as the purpose of the ordinance is to promote public safety, the removal of the prohibition of solicitation would not further that purpose.

Second, the Board could amend the Ordinance to provide for an exemption. The Muscular Dystrophy Association has suggested two possible exemptions (see attached.) One would provide an exemption for "sworn public safety officers...[soliciting] contributions for a charitable project officially adopted by their bargaining agents." The other, similar, exemption is for "a firefighter or a volunteer firefighter soliciting donations for a charitable program."

Facially, such exemptions appear to be based on the government's significant interest in traffic safety, and not on the content of the speech. However, any legislative classification that impinges upon the exercise of one's First Amendment rights may be subject to strict scrutiny.<sup>4</sup> No case law directly reviews this proposed language. However, as it is unconstitutional for the County to favor one kind of speech over another, it may be unconstitutional for the County to delegate this ability to a single group, like public safety officers. That is, unless all groups were able to use public safety officers or firefighters to solicit, such an exemption may be seen as content based.

Third, the Board could create a permitting process, which would require that an applicant met certain criteria for the issuance of a permit. Such a permitting process would need to establish clear criteria, as well as designate an entity to receive and review the applications, and issue

<sup>4</sup> Special Programs, Inc. v. Courier, 923 F.Supp. 851, 855 (USDC E.D. Va. 1996).

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the permits. Any permitting or licensing scheme would have to be written to ensure that any criteria for the permit was content neutral, aimed at a significant government interest and narrowly tailored. In addition, a court would review a licensing scheme to ensure that it contained reasonable time limits on the decision maker, and that it did not allow for "unbridled discretion" of the decision maker.<sup>5</sup>

Some requirements which have been imposed by other local governments include requiring insurance or a bond, requiring an approved traffic plan, limitations on the age of participants, and requirements of colored and reflective clothing. Again, each requirement must be narrowly tailored to the significant governmental interest of traffic safety. Further, any requirement which allowed for discretion on the issuance of the permit could be found to be an unconstitutional prior restraint.

As mentioned above, attached is the safety procedures for the MDA's fund raiser. These procedures include requirements that only sworn safety officials participate, restrictions on age, requirements for reflective vests, requirements that collections take place during daylight hours and at intersections, and that vehicles with banners and lights be at all intersections to provide notice to vehicles. These requirements are designed to promote safety during the fund raiser.

However, some courts have found that solicitation in the roadway cannot be made safe.<sup>6</sup>

### CONCLUSION

In summary, Hillsborough County Ordinance 91-24 currently prohibits solicitation only on county roads, and does not prohibit solicitation on roads located in the City of Tampa, or on state or federal roads. This Ordinance was upheld in federal court in 1992 because it did not contain any exceptions, and it is unlikely that a court would uphold the granting of a special exception.

#### OPTIONS FOR THE MDA:

1. The MDA may conduct the fund raising activities on roads located in the City of Tampa, and on state and federal roads in the County.
2. The MDA may request a special exemption to Ordinance 91-24 from the Board. This option is not recommended. The Ordinance does not contain any

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<sup>5</sup> American Charities v. Pinellas County, 32 F.Supp.2d 1308, 1325-6 (USDC, M.D. Fla. 1998).

<sup>6</sup> See, e.g., International Soc'y for Krishna Consciousness, Inc. v. City of Baton Rouge, 876 F.2d 494, 498 (5<sup>th</sup> Cir. 1989); ACORN v. City of Phoenix, 798 F.2d 1260, 1270 (9<sup>th</sup> Cir. 1986).



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- procedure for granting a special exemption and the granting of a special exemption would be found unconstitutional.
3. The MDA may request the Board to amend the Ordinance to remove the section which bans solicitation. This option is not recommended unless the Board makes a finding that the prohibition on solicitation no longer furthers the governmental interest of public safety.
  4. The MDA may request the Board to amend the Ordinance to create a permitting process, with requirements narrowly tailored to the significant government interest of public safety on county roads. The permitting process would have to be equally available to all groups, and could not be limited to only charitable organizations. The Ordinance could include several of the safety requirements recommended by the MDA, such as restrictions on the age of participants, requirements for reflective vests, requirements for insurance and that collections take place during daylight hours and at intersections. The permitting process could include requirements for some type of safety training for participants. However, it is not recommended to exempt only public safety officials from the prohibitions in the Ordinance, because this may unconstitutionally vest one group with the ability to choose who may fundraise on county roads. As there would be no way to ensure that the public safety officials did not choose the individual or groups they agree to solicit for on the basis of content, this may be unconstitutional.

cc: Emeline Acton, County Attorney  
James J. Porter, Chief, Assistant County Attorney  
Pamela Blackburn, Muscular Dystrophy Association