

IN THE COUNTY COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA  
COUNTY CRIMINAL DIVISION

STATE OF FLORIDA,  
Plaintiff,

v.

MARK A. BRUNE,  
Defendant.

Case No.: 2011 CO 20636  
Division: 2

ERNEST LEE MAGAHA  
CLERK OF DISTRICT COURT  
ESCAMBIA COUNTY, FL  
2011 MAR 28 P 3:29  
COUNTY CRIMINAL DIVISION  
FILED & RECORDED

**DEFENDANT'S MOTION TO DISMISS**

Defendant, MARK A. BRUNE, pursuant to Florida Rule of Criminal Procedure 3.190(b) moves to dismiss the charges pending against him and any information charging him with a violation of Escambia County, Florida, Code of Ordinances, § 86-251 *et seq.* ("Panhandling Ordinance") and find the Panhandling Ordinance unconstitutional in violation of the Florida Constitution and the U.S. Constitution:

**Background**

According to the Escambia County Sheriff's Arrest Report (No. ECSO 11 ARR 002356), a Sheriff's deputy arrested Mr. Brune on February 1, 2011, on the charge of violating the Panhandling Ordinance. A complete copy of the Panhandling Ordinance is attached as Exhibit 1. The Sheriff's deputy affirms that Mr. Brune was standing on the concrete median on Davis Highway (near the intersection of I-10) "holding a sign soliciting for funds from motorist driving by."

The Sheriff's deputy affirms that she saw Mr. Brune step off of the concrete median and into the roadway. These are the predicate facts, in the deputy's opinion, that justified the arrest.

**Freedom of Speech**  
**(Facial & As-Applied Challenge)**

The Panhandling Ordinance regulates speech. It proscribes orally "asking for an immediate donation of money or other thing value." §86-252 (proscribing soliciting); §86-251(f) (defining "soliciting"). As applied through its enforcement, it proscribes written speech and signs "asking for an immediate donation of money or other thing value."

As a regulation on speech, it must comply with First Amendment to the U.S. Constitution and Article I, Section 4, of the Florida Constitution. *See Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 628-32 (1980); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977) ("[O]ur cases long have protected speech even though it is in the form of . . . a solicitation to pay or contribute money") (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)); *Ledford v. State*, 652 So.2d 1254, 1256 (Fla. 2d DCA 1995) (holding that "begging is communication entitled to some degree of First Amendment protection"); *see also Berger v. City of Seattle*, 569 F.3d 1029, 1050 (9th Cir. 2009) ("Speech that solicits funds is protected by the First Amendment.").

Because the Panhandling Ordinance regulates speech, it is the State's burden to justify the restriction. *Clark v. Community For Creative Non-Violence*, 468 U.S. 228, 293 n. 5 (1984) (“[I]t is common to place the burden upon the Government to justify impingements on First Amendment interests”); *see also Thompson v. Western State Med. Ctr.*, 535 U.S. 357, 373 (2002) (requiring the government to justify its restriction of commercial speech).

The county ordinance largely, if not exclusively, regulates speech on the county's sidewalks and roads, which are traditional public forums. §86-252. As applied, it regulates speech on a county's road and median. Yet, “members of the public retain strong free speech rights when they venture into public streets and parks, which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Pleasant Grove City, Utah v. Summum*, 129 S.Ct. 1125, 1132 (2009) (citations omitted).

The county ordinance singles out “asking for an immediate donation of money” for punishment as distinct from other speech. Therefore, it is a content-based regulation. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642-643 (1994). “As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content

based.” *Id.* at 643; *see also Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2723-24 (2010) (finding that the regulation is content based because “whether [the plaintiffs] may do [as they desire] under [the regulation] depends on what they say”); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (holding that a regulation was content-based because, in order to enforce it, “the administrator must necessarily examine the content of the message that is conveyed”).

As a content-based restriction on speech in a traditional public forum, it is subject to strict scrutiny and “must be narrowly tailored to promote a compelling [g]overnment interest.” *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

The board of county commissioners’ justifications for the ordinance in their legislative findings are not narrowly tailored to promote a compelling interest. § 86-251 (indicating the legislative findings); *see Ledford v. State*, 652 So.2d 1254, 1256 (Fla. 2d DCA 1995) (holding “protecting citizens from annoyance is not a ‘compelling’ reason to restrict speech in a traditionally public forum”); *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1569-70 (11th Cir. 1993) (ruling the government’s “interests in aesthetics and traffic safety cannot justify” a content-based restriction); *ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 797 n. 14 (9th

Cir. 2006) (“Although our cases indicate that protecting the local merchant economy is a substantial government interest, we question whether this interest could ever be compelling.”) (citing *Bock v. Westminster Mall Co.*, 819 P.2d 55, 61 (Colo.1991) (“Economic necessity, however, cannot provide the cover for government-supported infringements of speech.”)). Accordingly, the Panhandling Ordinance does not pass strict scrutiny.

Failing strict scrutiny, the Panhandling Ordinance is both facially and as-applied an unconstitutional restriction of free speech.

### **Due Process (As-Applied Challenge)**

The Fourteenth Amendment to the U.S. Constitution and Article I, Section 9, of the Florida Constitution require due process of law. Vague regulations violate the requirement of due process. *U.S. v. Williams*, 553 U.S. 285, 304 (2008) (“Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment.”).<sup>1</sup> A regulation is vague if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *Id.* The Panhandling Ordinance as applied to Mr. Brune does both.

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<sup>1</sup> The Fourteenth Amendment’s due process clause protect persons from enforcement of vague state laws.

The Panhandling Ordinance proscribes “soliciting.” § 86-252. Yet, it exempts from the definition of “soliciting” “asking for an immediate donation of money” through means of a written expressions, e.g. “standing or sitting with a sign.” *See* § 86-251(F) (“Soliciting shall not include passively standing or sitting with a sign or other indication that one is seeking donations without addressing the request to any specific person.”). The Panhandling Ordinance does not proscribe entering the roadway. Indeed, entering into the roadway is neither an element of the Panhandling Ordinance nor does it bear on whether a person violated this Panhandling Ordinance.

However, as applied to Mr. Brune, the Panhandling Ordinance proscribes holding a sign stating that the sign holder needs help and entering the roadway to collect a donation. *See* Arrest Report, *supra*. As applied, the Panhandling Ordinance is vague because it does not provide “fair notice” that it will be enforced in this manner. No person of ordinary intelligence would believe that the Panhandling Ordinance—that permits a person to stand with a sign “asking for ... money” and does not proscribe entering the roadway—would be enforced against a person for doing just that. Furthermore, the Panhandling Ordinance as applied authorizes seriously discriminatory enforcement by permitting Sheriff deputies to enforce it against any person who has not, by a plain reading of the text of the ordinance, violated it. Therefore, as applied to Mr. Brune, the Panhandling

Ordinance is unconstitutionally vague.

WHEREFORE, Defendant Brune moves the Court to find that the Panhandling is a facial and as-applied unconstitutional restriction of free speech and an unconstitutionally vague regulation as applied and dismiss the charges against him.

I HEREBY CERTIFY that a true copy of the foregoing has been provided by hand delivery on March 28, 2011, to the Office of the State Attorney, 190 Governmental Center, Pensacola, Florida 32502.

**Respectfully Submitted,**



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*Counsel for Defendant*

Escambia County  
Clerk's Original  
3/5/2007/5:35pm

ORDINANCE NO. 2007- 8

AN ORDINANCE OF ESCAMBIA COUNTY, FLORIDA CREATING A NEW CHAPTER 86, ARTICLE VIII, SECTIONS 86-250 THROUGH 86-253 OF THE ESCAMBIA COUNTY CODE OF ORDINANCES; PROVIDING FOR DEFINITIONS RELATING TO SOLICITING, BEGGING OR PANHANDLING IN CERTAIN AREAS OR UNDER CERTAIN CIRCUMSTANCES; PROHIBITING SOLICITING, BEGGING OR PANHANDLING IN CERTAIN PUBLIC PLACES; PROHIBITING AGGRESSIVE SOLICITING, BEGGING OR PANHANDLING; ESTABLISHING A PROHIBITION ON SOLICITING, BEGGING OR PANHANDLING WITHIN 500 FEET OF THE INTERSECTION OF TWO ARTERIAL ROADS IN ANY COMMUNITY REDEVELOPMENT AREA; ESTABLISHING PENALTIES; PROVIDING FOR SEVERABILITY; PROVIDING FOR INCLUSION IN THE CODE; PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, Escambia County wishes to protect the well-being of its citizens and visitors and, when necessary, to provide substantive outreach services to those in need; and,

WHEREAS, Escambia County has a legitimate interest in promoting the safety and convenience of its citizens on public streets: and,

WHEREAS, Escambia County has a substantial interest in providing a safe, pleasant environment and eliminating nuisance activities in the County's redevelopment areas and in making the public areas of the County safe and inviting for visitors, residents and businesses; and,

WHEREAS, the protection of the County's redevelopment areas from activities which may adversely impact the County's efforts to rid those areas of their economic and social liabilities is a County priority as defined by ch. 163, Fla. Stat.; and,

EXHIBIT 1

Verified By: *Atanvia*  
Date: *3/6/2007*



WHEREAS, the County wants to continue to attract businesses to, and retain current businesses in the redevelopment areas.

NOW THEREFORE BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF ESCAMBIA COUNTY, FLORIDA:

**Section 1.** Chapter 86, Article VIII, Sections 86-250 through 86-253 are hereby created to read as follows:

**ARTICLE VIII, CHAPTER 86 SOLICITING, BEGGING OR PANHANDLING**

**Section 86-250     LEGISLATIVE FINDINGS.**

The Board of County Commissioners hereby make the following legislative findings:

1. Studies have shown that soliciting, begging or panhandling has a negative impact on the attraction of businesses to the area as well as the ability to retain existing businesses; and,
2. Studies have shown that soliciting, begging or panhandling causes a sense of fear and intimidation, particularly at night, on roadways or in confined areas; and,
3. Studies have shown that soliciting, begging or panhandling contributes to the negative perception of those areas where it occurs, which discourages shoppers and visitors and contributes to the lack of enjoyment of public places within those areas.

**Section 86-251     DEFINITIONS.**

- A. Arterial roadway means a roadway providing service which is relatively continuous and of relatively high traffic volume, long trip

length, and high operating speed. In addition, every United States numbered highway is an arterial road.

- B. Begging means for purposes of this section only, the same as soliciting, below.
- C. Community outreach services means a public or private services provider that offers residential, rehabilitative, medical or social services assistance, including but not limited to mental health treatment, drug or alcohol rehabilitation or homeless assistance services for individuals in need thereof. One example of an entity that can help individuals access such services.
- D. Community Redevelopment Areas means those areas of the County the Board of County Commissioners has found to be areas of slum and blight as set forth in §§ 163.330 – 163.463, Fla. Stat. Escambia County's Community Redevelopment Areas include the Barrancas Redevelopment Area, Brownsville Redevelopment Area, Englewood Redevelopment Area, Palafox Redevelopment Area and Warrington Redevelopment Area and these areas are set forth in the map made a part of this ordinance. The Board of County Commissioners may establish additional Community Redevelopment Areas pursuant to sections 163.330 – 163.463, Florida Statutes.
- E. Panhandling means for purposes of this section only, the same as soliciting, below.

- F. Soliciting means for purposes of this section only, any request made in person on a street, sidewalk, or public place, asking for an immediate donation of money or other thing of value, including the purchase of an item or service for an amount far exceeding its value, under circumstances where a reasonable person would understand that the purchase is a donation. Soliciting shall not include passively standing or sitting with a sign or other indication that one is seeking donations without addressing the request to any specific person.

**Section 86-252**     **SOLICITING, BEGGING OR PANHANDLING PROHIBITED IN CERTAIN AREAS OR UNDER CERTAIN CIRCUMSTANCES.**

It shall be unlawful for any person to solicit, beg or panhandle in the unincorporated areas of Escambia County in the following areas or under the following circumstances:

- A. On any day after sunset, or before sunrise; or
- B. When either the panhandler or the person being solicited is located at any of the following locations:
  - 1. At a bus stop.
  - 2. In any public transportation vehicle.
  - 3. In any public transportation facility.
  - 4. In a vehicle which is parked or stopped on a public street or alley.
  - 5. In a sidewalk café.

6. Within 20 feet from any ATM machine or entrance to a bank.
  7. Within 20 feet of a public toilet facility.
  8. From any operator of a motor vehicle that is in traffic on a public street; provided, however, that this prohibition shall not apply to services rendered in connection with emergency repairs requested by the owner or passengers of such vehicle; or
- C. In an aggressive manner, to include any of the following:
1. Touching the solicited person without the solicited person's consent.
  2. Panhandling a person while such person is standing in line and waiting to be admitted to a commercial establishment.
  3. Blocking the path of a person being solicited, or the entrance to any building or vehicle.
  4. Following behind, ahead or alongside a person who walks away from the panhandler after being solicited.
  5. Using profane or abusive language, either during the solicitation or following a refusal to make a donation, or making any statement, gesture, or other communication which would cause a reasonable person to be fearful or feel compelled.
  6. Panhandling in a group of two (2) or more persons; or

- D. Within 500 feet of the intersection of two arterial roads in any Community Redevelopment Area (CRA). The intersections of two arterial roads that fall within a Community Redevelopment Area in the unincorporated areas of Escambia County are:

*Arterial/Arterial Intersections Located in  
Community Redevelopment Areas*

Warrington Redevelopment Area

US98 (SR 30) and Navy Blvd (SR 295)  
New Warrington Rd. (SR 295) and Navy Blvd. (SR 30)  
New Warrington Rd. (SR 295) and Chief's Way (SR 294)  
Navy Blvd. (SR 295) and Chief's Way (SR 294)  
Gulf Beach Hwy. (SR 292) and Navy Blvd. (SR 295)  
Gulf Beach Hwy. (SR 292) and Fairfield Dr. (SR 727)

Palafox Redevelopment Area

Fairfield Dr. (SR 295) and Pace Blvd. (SR 292)  
Palafox St. (SR 95) and Brent Lane (SR 296)  
"W" St. (CR 453) and Beverly Pkwy. (SR 296)  
Pace Blvd. (SR 292) and Palafox St. (SR 95)  
Fairfield Dr. (SR 295) and Palafox St. (SR 95)  
Fairfield Dr. (SR 295) and "W" St. (CR 453)

Englewood Redevelopment Area

Fairfield Dr. (SR 295) and "W" St. (CR 453)  
Fairfield Dr. (SR 295) and Pace Blvd. (SR 292)

Barrancas Redevelopment Area

None

Brownsville Redevelopment Area

New Warrington Rd. (SR 295) and Mobile Hwy. (SR 10A)  
Mobile Hwy. (SR 10A) and "W" St. (CR 453)  
Fairfield Dr. (SR 727) and New Warrington Rd. (SR 295)  
New Warrington Rd. (SR 295) and Mobile Hwy. (SR 10A)-Interchange Overpass  
Lillian Hwy. (SR 298) and New Warrington Rd. (SR 295)  
Lillian Hwy. (SR 298) and New Warrington Rd. (SR 295)-Interchange Overpass

**Note:** Some intersections are listed in two CRA's since some of their boundaries are adjacent.

**Section 86-253     PENALTIES.**

Any person convicted of violating this section shall be prosecuted in the same manner as a misdemeanor in the second degree, and upon conviction shall be punished by a fine not to exceed five hundred dollars (\$500.00) or imprisonment in the county jail, not to exceed sixty (60) days or by both such fine and imprisonment.

In addition, the officer issuing a citation under this section may elect to contact community outreach services, such as United Way's First Call for Help, in order to determine whether a referral can be made or services offered to assist the individual cited. In the event the officer is unable to contact community outreach services at the time of the officer's contact with the person accused of violating this section, the officer may supply the person with information sufficient for the person to make such contact at a later time.

**Section 2.     SEVERABILITY.**

It is declared the intent of the Board of County Commissioners that if any subsection, clause, sentence, provision or phrase of this Ordinance is held to be invalid or unconstitutional by a Court of competent jurisdiction, such invalidity or unconstitutionality shall not be so construed as to render invalid or unconstitutional the remaining provisions of this Ordinance.

**Section 3. INCLUSION IN THE CODE.**

It is the intention of the Board of County Commissioners that the provisions of this Ordinance shall become and be made a part of the Escambia County Code; and that the sections of this Ordinance may be renumbered or relettered and the word "ordinance" may be changed to "section," "article," or such other appropriate word or phrase in order to accomplish such intentions.

**Section 4. EFFECTIVE DATE.**

This Ordinance shall become effective upon its filing with the Department of State.

DONE AND ENACTED this 5th day of March, 2007.

BOARD OF COUNTY COMMISSIONERS  
ESCAMBIA COUNTY, FLORIDA

By: *Kevin W. White*  
Kevin W. White, Chairman

ATTEST: ERNIE LEE MAGAHA  
Clerk of the Circuit Court

Date Executed



By: *Ernie Lee Magaha*  
Deputy Clerk

*March 6, 2007*

This document approved as to form and legal sufficiency

By: *[Signature]*  
Title *Deputy County Attorney*  
Date *3/5/07*

ENACTED: March 5, 2007  
FILED WITH DEPARTMENT OF STATE: March 9, 2007  
EFFECTIVE: March 9, 2007