

CITY OF SANTA BARBARA

INTEROFFICE MEMORANDUM

TO: City Council Subcommittee on Homelessness and Community Relations
Frank Mannix, Deputy Chief of Police
Sue Gray, Community Development Program Supervisor II

FROM: Stephen P. Wiley, City Attorney

DATE: Thursday, February 12, 2009

SUBJECT: Proposed Draft Revisions to City Aggressive Panhandling Ordinance/"Stay Away" Probation Orders

1. The Concept of Abusive Solicitation. As mentioned during the recent Subcommittee's meetings, one suggestion for changes to the Municipal Code is to enact new City regulations restricting the concept of "abusive panhandling" particularly within certain limited areas of the City such as along parts of State Street. This would be similar to the approach taken by the city of Santa Monica in making revisions to their Municipal Code in the fall of 2008 as it applies to Santa Monica's Third Street Mall. In order to be clear with the public about what is being suggested, the City Attorney's office recommended that the Subcommittee's report be revised to insert the following sentence:

"Solicitation would be specifically defined so that it would not include a person who only seeks donations without addressing his or her solicitation to any specific person (such as through the use of a sign asking for donations), other than in response to an inquiry by that person."

This would make it clear that any person who is begging or soliciting without the use of a verbal request or demand directed at a particular person (such as someone who simply sits on a bench holding a sign asking "please help") would not be violating any laws. This is because such non-verbal or "passive" begging is likely to be considered by the courts as the exercise of First Amendment rights. As such, it would be unregulated by the proposed City ordinance as is the case under the current Municipal Code. This would be true regardless of where the person was sitting or standing or walking and it would be true without regard to where the non-verbal solicitation takes place. It would also be true without regard to whether the person was within 25 feet of an ATM or a bus stop or sitting on a street bench or in proximity to a sidewalk dining area. In short, for reasons relating to the need to have a clearly constitutional ordinance under First Amendment case law, the City would restrict only improper "conduct" which is coupled with a direct verbal solicitation. Moreover, these restrictions on what would be called "abusive panhandling" would only apply in a very limited area of the City. Silent begging is not now and would not be regulated at all within the City so long as the beggar is begging on public property which allows the presence of the public.

2. The "Stay Away" Order as a Condition of Probation. During the Subcommittee's recent meetings to finalize their report, the City Attorney's office also explained some of the day to day enforcement technicalities which would constitutionally apply to any City program to use "Stay Away" orders as a condition of a criminal probation. Consequently, while such orders are probably legal and constitutional if carefully structured and properly administered, the need to observe these legal requirements may mean that these 'stay away' orders will offer only a limited benefit in our local context.

These requirements relate directly to both constitutional mandates and practical enforcement realities. According to the Los Angeles County District Attorney's office, their "Stay Away Order" program (used in LA's 5th Street "Skid Row" Corridor) has achieved some "success;" however, this success has apparently occurred in the narrow context of the extremes of Los Angeles' skid row area and, thus, it reflects LA's particular situation. We suspect that, given the constitutional/legal limitations of such a program, the type of success LA has experienced may not be fully transferable to Santa Barbara, particularly within the lower Milpas area.

For example, the Los Angeles County DA's office acknowledges that "stay away" probation orders will only work for those persons who are on "formal" probation for felony drug sale offenses - i.e., for a probation which is supervised by the county probation department. However, as the SBPD has pointed out, it is unlikely that Santa Barbara has a significant number of convicted felony drug offenders frequenting the lower Milpas area and even more unlikely that many of these individuals are on "supervised" or "formal" probation. Furthermore, with the recent voter approved statewide propositions mandating drug treatment and drug diversion programs for those persons arrested for the personal possession of small amounts of illegal drugs, we believe that it is unlikely many of the people who currently frequent the lower Milpas area will actually have felony convictions.

Further, as even the Los Angeles program acknowledged, constitutional requirements mandate that such "Stay Away" orders contain a very large exception for those probationers who have a "nexus to the stay away area." In other words, this type of program would be required to exempt those persons who claim a "nexus" to the designated stay away area, such as those individuals who say they live in the area or who assert that they need to enter the area for the purposes of treatment, shelter, a meal, or to look for work. As a result, it could be extremely simple for a person to establish a lawful "nexus to the area" and to, thereby, avoid violating any "Stay Away" order probation condition.

Finally, the proposed "Stay Away" order program assumes that the District Attorney's office and the County Probation Department will be willing to request a "Stay Away" order be issued and that the local Superior judges will agree to impose and strictly enforce such orders. Consequently, the success of a "Stay Away" order program will require a firm commitment on the part of the judges, the DA's office and County Probation and the level of this commitment will need to be a subject of discussions with these agencies.

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Please feel free to contact me if the City Attorney's office can be of any further help with respect to explaining or expanding upon any of the other points made in the Subcommittee's report.

cc: Don Olson, CAO Special Projects Manager
Dave Gustafson, Asst. Comm. Dev. Dir/H&R Mgr