

# OFFICE OF THE CITY ATTORNEY

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## Legal Opinion 2017-011

**TO:** Police Chief Mike Brady; Assistant Police Chief Scott Hoffman; Police Captain Mike Colyer; Police Captain Chris Odlin; Police Captain Richard Stepper; Police Department Office Manager Laurie Clark; Police Lieutenant Scott Brodie

**CC:** Mayor John Engen; Dale Bickell; Ginny Merriam; Department Attorney

**FROM:** Jim Nugent, City Attorney

**DATE** April 13, 2017

**RE:** Legality of persons who are not blocking ingress or egress to a building, nor obstructing passage of pedestrians on public sidewalks soliciting contributions while on public sidewalks

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### **FACTS:**

There have been inquiries concerning the legality of a person who is not blocking ingress or egress to a building, nor obstructing the passage of pedestrians on a public sidewalk being able to solicit contributions while on the public sidewalk.

### **ISSUE(S):**

If a person is not blocking ingress or egress to a building and is not obstructing pedestrian passage on a public sidewalk, may the person solicit contributions while on the public sidewalk?

### **CONCLUSION(S):**

Public sidewalks may serve as public forums for expressions of free speech. As long as the person is not blocking ingress or egress into a building, nor obstructing passage of pedestrians on the public sidewalk, the person may solicit contributions while on the sidewalk. However, the conduct of the person must not violate the City of Missoula's Aggressive Solicitation ordinance. Protected free speech may occur on public sidewalks since public sidewalks serve as public forums according to the courts. Several Courts have invalidated local government attempted regulation of free speech expressive activity occurring on public sidewalk public forums. See *United States v. Grace*, 461 U.S. 171, 182, 103 S.Ct. 1702, 75 L.Ed. 2d 736 (1983).

## **LEGAL DISCUSSION:**

Montana's motor vehicle and pedestrian highway safety and traffic laws are set forth in title 61 Montana Code Annotated (MCA). The purpose of Montana's traffic laws includes in the public interest: promoting public safety, health, and welfare and to reduce traffic deaths, injuries and property losses. See section 61-2-101 MCA. Title 61, chapter 8 MCA is entitled "TRAFFIC REGULATION". Part 5 of title 61, chapter 8, MCA is entitled "PEDESTRIAN TRAFFIC". This part includes section 61-8-507 MCA entitled "PEDESTRIAN SOLICITING RIDES, BUSINESS, OR CONTRIBUTIONS". Section 61-8-507 MCA states:

"61-8-507. PEDESTRIAN SOLICITING RIDES, BUSINESS, OR CONTRIBUTIONS. (1) A person may not stand on a roadway for the purpose of soliciting a ride. (2) A PERSON MAY NOT STAND ON A HIGHWAY FOR THE PURPOSE OF SOLICITING employment, business, or CONTRIBUTIONS FROM THE OCCUPANT OF A VEHICLE unless the solicitation is authorized by the proper jurisdictional authority." (*Emphasis added*).

Note that public sidewalks are not identified within section 61-8-507 MCA as a location where solicitation of contributions is prohibited. Pursuant to the rules of statutory construction (interpretation), the interpreter may not insert language into a law that the legislature did not include. See Section 1-2-101, MCA. However, if a person is on a public sidewalk soliciting contributions and enters into the highway, street or roadway to collect a solicitation from an occupant of a vehicle, the person is potentially creating a public safety, health and general welfare danger or hazard as well as the person is violating section 61-8-507 MCA that prohibits solicitation of contributions on a highway.

The statutory definition of "highway" in title 61, chapter 8 MCA is defined in subsection 61-8-102(2)(i) MCA as follows: "'Highway' has the meaning provided in 61-1-101, but includes ways that have been or are later dedicated to public use."

The subsection 61-8-102(2)(i) MCA cross referenced to statutory definition is subsection 61-1-101(27) MCA which defines "highway" as follows:

"(27) 'Highway' or 'public highway' means the entire width between the boundary lines of every publicly maintained way when any part of the publicly maintained way is open to the use of the public for purposes of vehicular travel."

Note that the statutory definitions of "highway" focus on maintained ways for "vehicular travel". Public sidewalks are not included in the statutory definition of "highway" so being on a public sidewalk soliciting contributions does not violate section 61-8-507 MCA. The Montana motor vehicle traffic regulation definition of "sidewalk" focuses on the portion of street intended "for use by pedestrians". Subsection 61-8-102(2)(x) MCA defines "sidewalk" as meaning

“(x) ‘Sidewalk’ means the portion of a street that is between the curb lines or the lateral lines of a roadway and adjacent property lines and THAT IS INTENDED FOR USE BY PEDESTRIANS”. (*Emphasis added*)

The portion between the curb lines and the adjacent property lines “that is intended for use by pedestrians” is not the vehicular travel area that is the subject of section 61-8-507 MCA.

As long as the person on a public sidewalk is not violating the City of Missoula’s Aggressive Solicitation ordinance, not blocking ingress or egress to a building and not obstructing passage of pedestrians on a public sidewalk, the person may solicit contributions while on the public sidewalk. Further, law enforcement may not require such a person to move along or relocate, merely because someone does not want them at that public sidewalk location.

Courts have long considered public streets and public parks to be traditional public forums for free speech expression. See *Bays v. City of Fairborn Ohio*, 668 F.3d 814, 2012 U.S.App. LEXIS 2807, (6<sup>th</sup> circuit, Ohio). With respect to a person soliciting while on a public sidewalk, any attempt to regulate free speech expression must be reasonable as to any time, place and manner restrictions, such as for public safety purposes, as well as must be uniformly neutrally enforced against everyone. “A major criterion for a valid time, place and manner restriction is that the restriction may not be based upon the content or subject matter of the speech.” *Bays*, supra. Any attempt to regulate the message/signage that the person might possess during the solicitation must be content neutral and uniformly applied to everyone. For example, the public sidewalk sandwich board signs must be treated the same as any person individually soliciting with respect to time, place, manner and content neutrality. See *Bays* supra.

The United States Supreme Court has made it clear that an individual’s speech is protected even if it does “not meet standards of acceptability” from the potential audience’s view. See *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S. Ct. 1575, 29 L.Ed.2d 1(1971). *Bays*, supra. The United States Supreme Court has explained that a municipal regulation is impermissibly content based if it “applies to particular speech because of the topic discussed or the idea or message expressed”. *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2227(2015) Thus, city police cannot stop/prohibit a solicitation for contribution message; but not stop/prohibit a sidewalk sandwich board sign advertising the sale of teas or jewelry, etc. at the same location. Disagreement with the message or conduct present on a public sidewalk public forum is not an acceptable legal basis to require the person to stop, relocate or move along.

### **CONCLUSION(S):**

Public sidewalks may serve as public forums for expressions of free speech. As long as the person is not blocking ingress or egress into a building, nor obstructing passage of pedestrians on the public sidewalk, the person may solicit contributions while on the sidewalk. However, the conduct of the person must not violate the City of Missoula’s Aggressive Solicitation ordinance. Protected free speech may occur on public sidewalks since public sidewalks serve as public forums according to the courts. Several Courts have invalidated local government attempted regulation of free speech expressive activity occurring on public sidewalk public forums. See *United States v. Grace*, 461 U.S. 171, 182, 103 S.Ct. 1702, 75 L.Ed. 2d 736 (1983).

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