



## LEGISLATIVE MEMORANDUM

TO: Mayor and City Council

FROM: City Attorney's Office

SUBJECT: Amendments to Chapter 112 of the City Code

DATE: February 12, 2024

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This legislative memorandum serves as a brief background on the proposed amendments to Chapter 112 of the City's Code of Ordinances ("Code"), which regulates and addresses door-to-door solicitation, and outlines some of the legal considerations and rationales behind the changes.

In August of 2023, Moxie Pest Control Florida, LLC ("Plaintiff") filed a Complaint and Request for Declaratory Judgement in the U.S. District Court for the Southern District of Florida against the City alleging, *inter alia*, that aspects of the City's door-to-door solicitation ordinance are unconstitutional and in violation of Plaintiff's First Amendment rights vis-à-vis commercial speech. Plaintiff seeks several remedies including statutory attorney's fees, injunctive relief, and declaratory relief. Allegations in the Complaint include an impermissible restriction on commercial speech in the form of a curfew that prohibits solicitation after 4:00 p.m., a fingerprinting requirement for permit applicants that was accompanied by a background check, and lastly, the contention that the City was enforcing homeowner's associations' private restrictions on door-to-door solicitation with no statutory authority.

The leading U.S. Supreme Court case on this issue lays out a four-prong test in determining whether governmental regulation on commercial speech is justifiable. For commercial speech to come under the protection of the First Amendment, (1) it at least must concern lawful activity and not be misleading, (2) it must be determined whether the asserted governmental interest to be served by the restriction on commercial speech is substantial, if both of these prongs are met, then (3) it must be decided whether the regulation directly advances the government interest asserted, and (4) whether or not it is more extensive than is necessary to serve that

interest. Simply put, the governmental restriction must be narrowly tailored to the objective it is trying to advance and be the least restrictive means in doing so.

After many consultations with outside counsel, shade sessions with Council in accordance with Florida's Sunshine Law, and court-mandated settlement discussions which were mediated by the Federal Magistrate assigned to the matter, the Federal Magistrate, as mediator, proposed a settlement to resolve the dispute between the parties, which Plaintiff has accepted. A component of that proposed settlement are amendments to Chapter 112 of the Code. The intent behind the proposed amendments is twofold. First, amending Chapter 112 in the manner proposed will update and align our Code with both current developing U.S. Supreme Court precedent as well as developments in state law and statutes. Second, the proposed amendments will settle Plaintiff's active litigation against the City, which will save the City substantial time and resources.

The most notable change is the extension of the hours of permitted door-to-door solicitation from the original 10:00 a.m. to 4:00 p.m., to the expanded time of 8:00 a.m. to 8:00 p.m. Court-mandated settlement conferences and extensive review of the relevant case law indicated that courts throughout the country have found permissible solicitation restrictions range between the hours of 7:00 p.m. to 9:00 p.m., with most finding it reasonable at 8:00 p.m. A smaller number of Courts found that 5:00 p.m. and 6:00 p.m. was reasonable, but those unique determinations were supported by specific local data and evidentiary considerations to satisfy the third and fourth prongs of the judicial test mentioned above. While the City falls within the 11<sup>th</sup> Circuit U.S. Court of Appeals, there are no controlling cases within the circuit settling this issue, and the 8:00 p.m. time restriction is most defensible to future challenges on restriction of commercial speech based on developing national case law and is also the time that advances the settlement of Plaintiff's litigation with the City. Settlement considerations notwithstanding, the rationale behind the proposed 8 p.m. curfew is simple. The proposed curfew balances the interests of commercial speech in the form of door-to-door solicitation against the City's interest of preserving its residents' privacy, peace, and tranquility in the home by splitting the twenty-four (24) hour day in half.

A key safety qualification here is that door-to-door solicitors will still need to obtain a permit from the City to engage in such conduct. The application process and permitting requirement has remained unchanged, keeping the authority with the City to fully vet any individual applying for a permit and the ability to deny a permit should the circumstances necessitate. This process balances the need for government regulation in the area of door-to-door solicitation for the safety and privacy of residents, while not being more extensive than necessary to achieve that interest by still having a process for which permits are issued. This keeps the City in line with the balancing test set forth by the Supreme Court when regulating the commercial

speech. Additionally, residents still have the option of turning those solicitors away, conspicuously posting no solicitation signs on their property, or contacting the authorities in the rare case that a solicitor disregards a resident's request to leave their property.

Importantly, what remains intact and unchanged in the ordinance after the settlement of the Moxie litigation is concluded are the City's fingerprinting requirements for the permitting of door-to-door solicitation. This aspect of the ordinance is intended to pre-emptively address safety concerns about the individuals that are permitted to solicit door-to-door within the City. The fingerprinting requirements are the only comprehensive and most accurate way to establish a person's identity and criminal history. The requirement of fingerprints for a background check also combats the growing concern of identity theft and the ability of individuals with a driver's license or social security number from representing themselves as someone they are not.

It also gives the Police Department, the permitting authority in this case, the ability to review a nationally checked criminal history report generated by the Florida Department of Law Enforcement to ensure a well-informed decision is made to issue a permit for solicitation. Fingerprinting is the most accurate way to establish a person's identity and thus, the only reliable way for the City to ensure that those with the permission to solicit door-to-door are exactly who they purport to be. This requirement is the only reliable way for the City to advance the governmental interest of safety for its residents, while also balancing and recognizing the need to permit commercial speech. An important nuance to note with fingerprinting is that it also proves to be the least restrictive means to achieve the government interest, as the City is not the vehicle by which a background check is run for fingerprinting. Individual applicants are the ones tasked with submitting their fingerprints for a background check to the Florida Department of Law Enforcement. This gives the ability for an applicant to "opt-out" of submitting an application should they feel that it is not in their best interest, and as a result, the City has not accessed any personal information about that applicant with respect to a background check.

Other changes within in the ordinance are such that keep in line with statutory changes of soliciting and peddling under Florida State Statutes. Definitions were removed along with sections that did not apply to this ordinance any longer.

Lastly, the ability for the enforcement of "No Soliciting" signs on residential property placed by residents also remains in effect under 112.06. This portion of the ordinance does not allow solicitor to enter onto a property without prior consent of an owner or occupant where a sign or some form of notice is placed on the property stating or indicating that the owner or occupants do not desire persons engaged in soliciting or similar activity on their property.