Birch Horton Bittner & Cherot
a professional corporation

MEMORANDUM

TO: **MAYOR AND COUNCIL MEMBERS**
CITY OF KODIAK

CC: **AIMÉE KNIAZIOWSKI, CITY MANAGER**

FROM: **THOMAS F. KLINKNER**

RE: **CONSTITUTIONALITY OF ORDINANCE NUMBER 1341**

FILE NO.: **505,786.86**

DATE: **NOVEMBER 8, 2016**

1. Introduction and Summary Conclusion.

In the spring of 2015, the City asked us for advice regarding options for strengthening ordinances prohibiting loitering and other public nuisance type violations, in response to a growing problem with a small number of the homeless, indigent, and inebriate population who spent their days and sometimes nights in Kodiak's downtown area in public spaces like sidewalks and parks where they engaged in intimidating and offensive behavior. In response, we cautioned that as advocacy for the homeless and other marginal groups has intensified, some laws of this type have become subject to successful constitutional challenge. Nonetheless, we identified several measures to address the conduct that concerned the City, which had been upheld by courts in other jurisdictions. After deliberation, the Council adopted these measures in Ordinance Number 1341 ("Ordinance 1341") on January 28, 2016, which became effective on March 2, 2016.

In a letter dated July 1, 2016, addressed to Mayor Branson, the American Civil Liberties Union of Alaska ("ACLU") challenged the constitutionality of three provisions enacted by Ordinance 1341:

- The prohibition of aggressive panhandling in KCC 8.20.040, as a violation of the rights to free speech and association under the U.S. and Alaska Constitutions;

- The prohibition of obstructing pedestrians or vehicles in KCC 8.20.030 on the ground of vagueness; and

- The prohibitions of sitting or lying on public sidewalks during specified hours in KCC 8.20.050 and camping in public places in KCC 8.20.050 as violations of the prohibition against cruel and unusual punishment in the Eighth Amendment to the U. S. Constitution.

In response, we have revisited our analysis of the constitutionality of Ordinance 1341 in light of the authorities that the ACLU correspondence cited. As a result, we have concluded as follows:

- Free speech protection for panhandling has evolved since our earlier analysis, making it likely that the prohibition of aggressive panhandling in KCC 8.20.040 would be subject to a successful constitutional challenge;

- The prohibition of obstructing pedestrians or vehicles in KCC 8.20.030 should withstand a constitutional challenge on the ground of vagueness; and

- Although there is some authority to the contrary, the prohibitions of sitting or lying on public sidewalks during specified hours in KCC 8.20.050 and camping in public places in KCC 8.20.050 should withstand a challenge on the ground that they violate the prohibition against cruel and unusual punishment in the 8th Amendment to the U. S. Constitution.

We explain the reasons for these conclusions below.

2. <u>Aggressive Panhandling</u>.

KCC 8.20.040 prohibits "aggressive panhandling."[1] It describes "aggressive panhandling" as panhandling accompanied by any of the following: (i) touching the solicited person without the solicited person's consent; (ii) panhandling a person who is standing in line and waiting to be admitted to a commercial or public establishment; (iii) blocking the path of a person being solicited, or the entrance to any building or vehicle; (iv) persisting in closely following or approaching a person, after the person solicited has informed the solicitor by words or conduct that such person does not want to be solicited or does not want to give money or any other thing of value to the solicitor; (v) making any statement, gesture, or other communication which would cause a reasonable person to be fearful or coerced to make a donation; or (vi) panhandling in a group of two or more persons.

Restrictions of speech that are based on the content of the message are presumptively invalid under the First Amendment to the U.S. Constitution, and will be upheld only if shown to further a compelling interest and narrowly tailored to achieve

[1] The ordinance defines "panhandling" as "any solicitation made in person in which a person requests an immediate donation of money or other gratuity from another person ... under circumstances where a reasonable person would understand that the transaction is in substance a donation."

that interest.[2] However, before the summer of 2015 there was substantial authority supporting the view that the regulation of aggressive panhandling was not related to the content of the speech involved, and so was not subject to this rigorous standard for validity.[3] This analysis validating restrictions on aggressive panhandling was undermined by a decision of the U.S. Supreme Court in the summer of 2015.[4] Under that decision, no regulation of speech that is based on the content of the message that the speaker conveys can be considered content-neutral, thus making all such regulations subject to the presumption of invalidity referred to above. Subsequent federal court decisions consistently have invalidated aggressive panhandling ordinances as content-based regulation of speech.[5] While these decisions recognize that restrictions on aggressive panhandling serve an important public safety interest, they conclude that this interest may be served as well by the enforcement of existing laws that apply to the non-expressive elements of aggressive panhandling, such as assault, stalking, and coercion.[6]

3. Obstructing Passage of Pedestrians or Vehicles.

KCC 8.20.030 prohibits walking, standing, sitting, lying, or placing an object in a public place "in such a manner as to block rightful passage by another person or a vehicle, or to require another person or a driver of a vehicle to take evasive action to avoid physical contact." The section states that it does not apply to "lawful picketing, parades or use of a public place in accordance with a permit issued by the City." The ACLU asserts that KCC 8.20.030 is unconstitutionally vague.

An ordinance that does not implicate expressive conduct protected by the First Amendment "is unconstitutionally vague when: (1) it does not give adequate notice of the prohibited conduct, or (2) its language is so imprecise as to encourage arbitrary enforcement."[7] The ACLU supports its vagueness argument with hypothetical applications of KCC 8.20.030 to innocent everyday activity:

---

[2] *Thayer v. City of Worcester*, 144 F.Supp.3d 218, 233 (D. Mass. 2015).

[3] *E.g., Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), *vacated, Thayer v. City of Worcester*, 135 S.Ct. 2887 (2015).

[4] *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015). *Reed* invalidated a municipal sign ordinance that categorized signs for regulation based on the type of message that the signs contained, for example, signs directing passers-by to a special event, as opposed to supporting a political campaign.

[5] *Browne v. City of Grand Junction*, 136 F.Supp.3d 1276 (D. Col. 2015); *McLaughlin v. Lowell*, 140 F.Supp.3d 177 (D. Mass. 2015); *Thayer v. City of Worcester*, 144 F.Supp.218 (D. Mass. 2015).

[6] *E.g., McLaughlin*, 140 F.Supp.3d at 193.

[7] *Haggblom v. City of Dillingham*, 191 P.3d 991, 997 (Alaska 2008).

> Any time one person's intended path crosses another's one or both of them will presumably take evasive action to avoid collision. A pair of friends having an intense discussion run afoul of the law if they pay insufficient attention to the paths of other people in their vicinity, forcing others to evade them. A person who stops on the sidewalk to talk on a cell phone breaks the law if another must change her path to avoid bumping into him.[8]

However, "even an ordinance that fails to give adequate notice of every type of prohibited conduct 'may still be sustained (1) if the offense charged falls squarely within its prohibitions and (2) if a construction may be placed upon the [ordinance] so that its reach may be reasonably understood in the future.'"[9] The application of KCC 8.20.030 readily could be confined to the purposeful obstructing of others' passage, and so meets these criteria. Moreover, an ordinance will not be invalidated merely because it has the potential for arbitrary enforcement—there must be evidence of a history of its arbitrary application.[10] There is no such history with regard to KCC 8.20.030.

4. Lying or Sitting on Sidewalks; Camping.

KCC 8.20.050 prohibits sitting or lying on public sidewalks during specified hours, except for specified permitted purposes. KCC 8.20.060 prohibits camping[11] in all public places, except those that are specifically designated for camping by the appropriate governmental authority. The ACLU asserts that these ordinances "can violate constitutional prohibitions against inflicting cruel and unusual punishment when they are applied to homeless people."[12]

In making this assertion, the ACLU relies principally on *Jones v. City of Los Angeles*,[13] a case that held that the Eighth Amendment right to be free from cruel and unusual punishment prohibited enforcement of a City of Los Angeles ordinance that

---

[8] July 1, 2016, letter to Mayor Branson, 8.

[9] *Haggblom*, 191 P.3d at 997, quoting *Summers v. Anchorage*, 589 P.2d 863, 867-868 (Alaska 1979). *See also, Roulette v. City of Seattle*, 97 F.3d 300, 306 (9th Cir. 1996) (ordinance prohibiting sitting or lying on sidewalks would be constitutional as applied to individuals or groups of people sitting or lying across a sidewalk in such a way as to prevent others from passing).

[10] *Haggblom*, 191 P.3d at 998.

[11] For this purpose, KCC 8.20.010 defines "camping" as "sleeping or otherwise being in a temporary shelter, tent or sleeping bag out-of-doors, sleeping atop or covered by materials such as a bedroll, cardboard or newspapers out-of-doors, or cooking over an open flame or fire out-of-doors."

[12] July 1, 2016, letter to Mayor Branson, 9, citing prohibitions on cruel and unusual punishment in Alaska Const. art. I, § 12 and U.S. Const. amend. VIII.

[13] 444 F.3d 1118 (9th Cir. 2006).

prohibited sitting, lying, or sleeping on public streets and sidewalks. There are several reasons why the decision in *Jones* does not invalidate KCC 8.20.050 and 8.20.060. First, that decision is not binding precedent because the decision was vacated under the terms of the parties' settlement agreement.[14] Second, that decision addressed the validity of the Los Angeles ordinance under the specific facts that had been presented to the court, none of which have been shown to be present in the City.[15]

A subsequent U.S. District Court decision in California declined to follow the holding in *Jones*, instead deciding that a City of Sacramento ordinance prohibiting camping was directed at the act of camping rather than the status of being homeless, even though the persons challenging the ordinance in fact were homeless.[16] In my opinion, this decision is better reasoned than the decision in *Jones*, and a court reviewing the constitutionality of KCC 8.20.050 and 8.20.060 is more likely to follow that reasoning than the reasoning in the *Jones* decision.

I am available to discuss my recommendations with you, the Mayor, and Council at your request.

TFK/lcj

---

[14] 505 F.3d 1006 (9th Cir. 2007); *See, Lehr v. City of Sacramento*, 624 F.Supp.2d 1218, 1225-1226 (E.D. Cal. 2009).

[15] The decision in Jones was based on an extensive record regarding the plight of the homeless in the "Skid Row" area of downtown Los Angeles, including evidence of the circumstances of each of the named plaintiffs, and evidence of a large insufficiency in the number of available places in homeless shelters in the area.

[16] *Lehr*, 624 F.Supp.2d at 1226-1234.