JOINT MEETING OF THE
TEMPLE CITY COUNCIL
&
CITY OF TEMPLE EMPLOYEE BENEFITS TRUST
MUNICIPAL BUILDING
2 NORTH MAIN STREET
3rd FLOOR – CONFERENCE ROOM

THURSDAY, NOVEMBER 7, 2019

3:30 P.M.

AGENDA

CITY OF TEMPLE EMPLOYEE BENEFITS TRUST

1. 2019-9866-R: Consider adopting a resolution authorizing a one-year renewal term to the City's agreement with Scott and White Health Plan for the provision of Medicare supplement insurance for over age 65 City of Temple retirees and establishing the rates for this type of insurance.

ADJOURN THE CITY OF TEMPLE EMPLOYEE BENEFITS TRUST MEETING AND CONVENE THE WORKSHOP OF THE TEMPLE CITY COUNCIL:

I. PUBLIC COMMENTS

Citizens who desire to address the Council on any matter listed on the Workshop Agenda may sign up to do so prior to this meeting. Public comments will be received during this portion of the meeting. Please limit comments to three minutes. No discussion or final action will be taken by the City Council.

II. WORK SESSION

1. Discuss, as may be needed, Regular Meeting agenda items for the meeting posted for Thursday, November 7, 2019.

2. Discuss possible amendments to the City's Code of Ordinances, Chapter 26 "Peddlers, Solicitors and Itinerant Vendors."

3. Discuss possible amendments to the City's Code of Ordinances, Chapter 24 "Noise."

4. Discuss the Neighborhood Planning Districts.

5. Discuss the status of various right-of-way acquisitions.

   Pursuant to Texas Government Code Section 551.072, the City Council may meet in closed session to deliberate the purchase, exchange, lease or value of real property if deliberation in an open meeting would have a detrimental effect on the position of the governmental body in negotiations with a third person.

The City Council reserves the right to discuss any items in executive (closed) session whenever permitted by the Texas Open Meetings Act.

5:00 P.M.

MUNICIPAL BUILDING

2 NORTH MAIN STREET
CITY COUNCIL CHAMBERS – 2ND FLOOR
TEMPLE, TX

TEMPLE CITY COUNCIL
REGULAR MEETING AGENDA

I. CALL TO ORDER

1. Invocation

2. Pledge of Allegiance

II. PUBLIC COMMENTS

Citizens who desire to address the Council on any matter may sign up to do so prior to this meeting. Public comments will be received during this portion of the meeting. Please limit comments to three minutes. No discussion or final action will be taken by the City Council.

III. PROCLAMATIONS & SPECIAL RECOGNITIONS

3. Recognize November 8th as Arbor Day.

4. Recognize Keep Temple Beautiful for receiving the Governor's Community Achievement Award.

IV. CONSENT AGENDA

All items listed under this section, Consent Agenda, are considered to be routine by the City Council and may be enacted by one motion. If discussion is desired by the Council, any item may be removed from the Consent Agenda at the request of any Councilmember and will be considered separately.

5. Consider adopting a resolution approving the Consent Agenda items and the appropriate resolutions and ordinances for each of the following:

Minutes

(A) October 17, 2019 Special & Regular Called Meeting
(B) October 24, 2019 Special Called Meeting
(C) October 25, 2019 Special Called Meeting

Contracts, Leases, & Bids

(D) 2019-9867-R: Consider adopting a resolution authorizing a one-year extension to the professional services agreement with McGriff, Seibels & Williams, Inc. of Addison for employee benefits consulting services, in the annual amount of $75,000.

(E) 2019-9868-R: Consider adopting a resolution authorizing a professional services agreement with Kasberg, Patrick, & Associates, LP, of Temple to develop schematic and final design for electrical requirements at the Martin Luther King Festival Grounds, in the amount of $96,200.

(F) 2019-9869-R: Consider adopting a resolution authorizing a professional services agreement with Kasberg, Patrick, & Associates, LP, of Temple to develop schematic and final design for the East/West Gate project, in the amount of $292,800.

(G) 2019-9870-R: Consider adopting a resolution to authorize a professional services agreement with Kasberg, Patrick & Associates, LP, for Industrial Park Site Grading designs within the Temple Reinvestment Zone Industrial Park, in the amount of $98,810.

(H) 2019-9871-R: Consider adopting a resolution authorizing a professional services agreement with Kasberg, Patrick & Associates, LP, for schematic and final designs for 24th Street from Central Avenue to Avenue C, in the amount of $147,900.

(I) 2019-9872-R: Consider adopting a resolution authorizing a professional services agreement with Kasberg, Patrick & Associates, LP, for services required to develop the Utility Schematic Design and Concept Plan for the Crestview District Neighborhood Plan, in an amount not to exceed $92,600.

(J) 2019-9873-R: Consider adopting a resolution authorizing a professional services agreement with Kasberg, Patrick & Associates, LP, for services required to develop the Utility Schematic Design and Concept Plan for the Historic District Neighborhood Plan, in an amount not to exceed $74,200.

(K) 2019-9874-R: Consider adopting a resolution authorizing a professional services agreement with Kasberg, Patrick & Associates, LP, for services required to develop a concept design for the North Art District, generally north of Bellaire to Lower Troy Road to Killen Lane, in an amount not to exceed $142,850.

(L) 2019-9875-R: Consider Adopting a resolution authorizing a professional services agreement with Kasberg, Patrick, & Associates, LP, for services required to design the Blackland Road Extension and Utility Improvements and the Knob Creek Wastewater Improvements, in the amount of $678,485.

(M) 2019-9876-R: Consider adopting a resolution authorizing a multiyear services agreement for propane delivery services with Star Tex Propane, Inc. of Waco at a per gallon markup of 45¢ over market and, in an estimated annual amount of $45,000 based on recent market rates.

(N) 2019-9877-R: Consider adopting a resolution authorizing an agreement with the Bill Messer, PC for legislative lobbying services.

(O) 2019-9878-R: Consider adopting a resolution authorizing a construction contract with Texas Pride Utilities, LLC, of Houston, for services to replace a sewer line between 2nd and 4th Streets from Central Avenue to Avenue C and replace a water main from Central Avenue to Avenue A, in the amount of $469,163.

(P) 2019-9879-R: Consider adopting a resolution authorizing a Memorandum of Understanding between The Texas A&M Engineering Extension Service, a member of The Texas A&M University System and the City of Temple regarding the participation of Temple Fire and Rescue personnel in hosting a regional area fire training schools.

(Q) 2019-9880-R: Consider amending Resolution No. 2019-9850-R, adopted on October 3, 2019, to consolidate all current utility fees into one resolution, align the resolution with current City practices, update language, and authorize the City Manager to make temporary exceptions to the rate class thresholds to account for start-up operations.

(R) 2019-9881-R: Consider adopting a resolution authorizing the renewal of the Emergency Management Performance Grant for FY 2019, which funds a portion of the administration cost for Emergency Management for the City of Temple, in the amount of $33,369.56.

(S) 2019-9882-R: Consider adopting a resolution authorizing the rejection of the bids received for on-site fuel services on September 5, 2019.

(T) 2019-9883-R: Consider adopting a resolution authorizing the expenditure of funds for seven multiyear agreements for FY 2020, in an estimated amount of $7,246,578.

(U) 2019-9884-R: Consider authorizing payment of the Consolidated Water Quality Assessment Fee to the Texas Commission on Environmental Quality for operations of Temple's wastewater treatment plants, in the cumulative amount of $104,988.54.

(V) 2019-9885-R: Consider adopting a resolution authorizing the purchase of two cardiac monitor/defibrillators from Stryker Medical of Chicago, IL, in the amount of $76,837.34.

(W) 2019-9886-R: Consider adopting a resolution authorizing a BuyBoard purchase and installation of lighting control systems at Crossroads Park from Musco Sports Lighting, LLC of Oskaloosa, Iowa, in the amount of $410,000.

Ordinances – Second & Final Reading

(X) 2019-4999: SECOND & FINAL READING – FY-19-23-ZC: Consider adopting an ordinance authorizing a Conditional Use Permit and its site plan to allow a recreational vehicle (RV) park within Lot 10 of the Bellaire Commercial subdivision, addressed as 4425 North General Bruce Drive.

(Y) 2019-5000: SECOND & FINAL READING – FY-19-27-ZC: Consider adopting an ordinance authorizing a Planned Development-General Retail with a Development/ Site Plan for a self-storage facility on 5.204 +/- acres, addressed as 9335 State Highway 317.

(Z) 2019-5001: SECOND & FINAL READING – FY-19-28-ZC: Consider adopting an ordinance authorizing a Conditional Use Permit to allow for an office warehouse, with a Site Plan, in the Temple Winnelson Subdivision, addressed as 1801 North 3rd Street and 1605 North 3rd Street.

(AA) 2019-5002: SECOND & FINAL READING – Consider adopting an ordinance designating 102 East Central Avenue, Temple 76501, legally described as Lot 2 and part of Lot 1, Block 15 Original Town of Temple, Bell County, Texas as City of Temple Tax Abatement Reinvestment Zone Number 40 for commercial/industrial tax abatement.

Misc.

(BB) 2019-9887-R: Consider adopting a resolution authorizing continued utilization of the JP Morgan Chase Bank N.A. commercial card program through August 31, 2021, as procured by the City of Fort Worth.

(CC) 2019-9888-R: Consider adopting a resolution establishing rates for Medicare supplement insurance for over age 65 City of Temple retirees and authorizing the City's contribution for calendar year 2020.

(DD) 2019-9889-R: Consider adopting a resolution authorizing budget amendments for fiscal year 2019-2020.

V. REGULAR AGENDA

ORDINANCES – FIRST READING / PUBLIC HEARING

6. 2019-5003: FIRST READING – PUBLIC HEARING: Consider adopting an ordinance authorizing an amendment and adopting the Tax Increment Financing Reinvestment Zone No. 1 Financing and Project Plans adjusting expenditures for years FY 2019-2023.

7. 2019-5004: FIRST READING – PUBLIC HEARING: Consider adopting an ordinance amending Chapter 26, "Peddlers, Solicitors and Itinerant Vendors," of the City of Temple's Code of Ordinances.

8. 2019-5005: FIRST READING – PUBLIC HEARING – FY-19-29-ZC: Consider adopting an ordinance authorizing a Conditional Use Permit with a Site Plan to allow for the sale of beer and wine for on-premise consumption of less than 10% of total revenue at 10148 West Adams Avenue.

9. 2019-5006: FIRST READING – PUBLIC HEARING – FY-19-30-ZC: Consider adopting an ordinance authorizing a rezoning from Two-Family to Planned Development-Neighborhood Service with a development/ site plan for a specialty coffee shop, located at 1617 West Avenue R.

10. 2019-5007: FIRST READING – PUBLIC HEARING – FY-19-31-ZC: Consider an ordinance adopting a rezoning from Agricultural zoning district to Single Family-Two on 0.942 +/- acres addressed as 3707 West Nugent Avenue.

11. 2019-5008: FIRST READING – PUBLIC HEARING – FY-19-32-ZC: Consider adopting an ordinance authorizing a rezoning from Agricultural zoning district to Planned Development Temple Medical and Educational zoning district, T-South Transect, with a development/site plan on 23.069 +/- acres, located east of South 5th Street and south of West Blackland Road.

12. 2019-5009: FIRST READING – PUBLIC HEARING – FY-19-33-ZC: Consider adopting an ordinance authorizing a rezoning from Agricultural zoning district to Urban Estates zoning district, on 3.16 +/- acres, addressed as 1709 West FM 93.

RESOLUTIONS

13. 2019-9890-R: Consider adopting a resolution authorizing change order #11 with Emerson Construction Company, Inc. of Temple for construction of roadway and landscaping improvements on the north side of Avenue B from 3rd Street to 1st Street and 1st Street from Avenue A to Central Avenue, in the amount of $1,340,729.53.

14. 2019-9891-R: Consider adopting a resolution authorizing a Tax Abatement Agreement with Turner Behringer Temple One, LLC which will cover increases in the taxable value of real property located at 102 East Central Avenue, Temple 76501.

15. 2019-9892-R: Consider adopting a resolution appointing Kathryn Davis as City Attorney and setting compensation for the position.

APPOINTMENTS

16. 2019-9893-R: Consider adopting a resolution appointing one member to serve as the City's representative on the Board of Directors of the Tax Appraisal District of Bell County for a two-year term.

The City Council reserves the right to discuss any items in executive (closed) session whenever permitted by the Texas Open Meetings Act.

I hereby certify that a true and correct copy of this Notice of Meeting was published to the City of Temple's website at 11:25 AM, November 4, 2019. This notice was posted in a public place at 11:35 AM, this same day.

Stacy Borgeson

City Secretary, TRMC

SPECIAL ACCOMMODATIONS: *Persons with disabilities who have special communication or accommodation needs and desire to attend this meeting should notify the City Secretary's Office by mail or telephone 48 hours prior to the meeting date.*

EMPLOYEE BENEFITS TRUST AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Tara Raymore, Director of Human Resources

ITEM DESCRIPTION: Consider adopting a resolution authorizing a one-year renewal term to the City's agreement with Scott and White Health Plan for the provision of Medicare supplement insurance for over age 65 City of Temple retirees and establishing the rates for this type of insurance.

STAFF RECOMMENDATION: Adopt the resolution as presented in the item description.

ITEM SUMMARY: Previously the Trustees of the City of Temple Employee Benefits Trust authorized an agreement with Scott and White Health Plan (SWHP) for the provision of Medicare supplement insurance for over age 65 City of Temple retirees. City policy requires that when retirees turn 65, if they are eligible, they must enroll in a Medicare supplement plans offered through the City in order to receive the City's contribution. These rates are not available until the Fall of each year, at this time the Trust is being asked to authorize a 1-year renewal to the agreement with SWHP and to adopt Medicare supplement rates for retirees for 2020. The rates for Medicare supplement insurance run from January 1st through December 31st of each year.

The Personnel Policies and Procedures Manual states that the City will pay an amount established during the budget process for Medicare supplement insurance for Medicare eligible retirees who have at least 25 years of continuous service with the City of Temple. On November 3, 2016, the City received proposals for Group Medicare Supplement and Prescription Drug Benefits. The Request for Proposals (RFP) indicated that the contract would be for a one-year term with the option for four 1- year renewals. SWHP was the only respondent to the RFP in 2016.

For 2020, SWHP is offering five SeniorCare Advantage Health Maintenance Organization (HMO) plans and two SeniorCare Advantage Preferred Provider Organization (PPO) plans, which include prescription drug benefits. SWHP will also offer a dental plan through the MetLife PDP Plus Network.

Staff is recommending that the City continue to fund monthly the Medicare supplement insurance for each eligible retiree at the lesser of the following: 50% of the Medicare supplement insurance plan cost with a maximum contribution of $102. The dental plan cost will be paid by the retiree only.

The new monthly premium recommendations for 2020 are as follows:

Plan	Description	Monthly Premium	City's Contribution	Retiree's Contribution
A	SeniorCare HMO Select – With RX	$0.00	$0.00	$0.00
B	SeniorCare HMO Preferred – No Rx	$90.00	$45.00	$45.00
C	SeniorCare HMO Preferred – With Rx	$131.00	$ 65.50	$65.50
D	SeniorCare HMO Premium – No RX	$199.00	$99.50	$99.50
E	SeniorCare HMO Premium – With RX	$241.00	$102.00	$139.00
F	SeniorCare PPO Basic – With Rx	$36.00	$18.00	$18.00
G	SeniorCare PPO Platinum – With Rx	$136.00	$68.00	$68.00
H	SeniorCare HMO Dental	$0.00	$0.00	$0.00
I	SeniorCare PPO Dental – Basic (with Plan F above)	$20.00	$0.00	$20.00
J	SeniorCare PPO Dental – Platinum (with Plan G above)	$0.00	$0.00	$0.00

FISCAL IMPACT: Budgeted amount: $166,471 in account 110-2700-515-1231*
Estimated amount for FY 2020: $90,576**

*Budgeted amount includes funding for all retirees' insurance. This includes retiree medical insurance for those under 65.

**Maximum contribution during FY 2020 for the new plan costs calculated as $102 x 74 Medicare eligible retirees (as of 10/01/19) x 9 months (Jan - Sept) = $67,932; the number of retirees could change over the course of the year. The cost incurred for the Medicare Supplemental insurance from October through December is estimated to be $22,644.

ATTACHMENTS:
Resolution

RESOLUTION NO. 2019-9866-R

A RESOLUTION OF THE CITY OF TEMPLE, TEXAS, EMPLOYEE BENEFITS TRUST, AUTHORIZING A ONE-YEAR RENEWAL TO THE CITY'S AGREEMENT WITH SCOTT AND WHITE HEALTH PLAN FOR THE PROVISION OF MEDICARE SUPPLEMENT INSURANCE FOR OVER AGE 65 CITY OF TEMPLE RETIREES; ESTABLISHING THE RATES FOR THIS TYPE OF INSURANCE; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, previously the Trustees of the City of Temple Employee Benefits Trust authorized an Agreement with Scott and White Health Plan (SWHP) for the provision of Medicare supplement insurance for over age 65 City of Temple retirees - City policy requires that when retirees turn age 65, if they are eligible, they must enroll in a Medicare supplement plan offered through the City in order to receive the City's contribution;

Whereas, these rates are not available until the Fall of each year, and therefore Staff recommends the Trust authorize a 1-year renewal to the agreement with SWHP and recommends the Trust adopt substitute Medicare supplement rates for retirees for 2020 - these rates for Medicare supplement insurance run from January 1st through December 31st of each year;

Whereas, the City's Personnel Policies and Procedures Manual states that the City will pay an amount established during the budget process for Medicare supplement insurance for Medicare eligible retirees who have at least 25 years of continuous service with the City of Temple;

Whereas, on November 3, 2016, the City received proposals for Group Medicare Supplement and Prescription Drug Benefits - the Request for Proposals (RFP) indicated that the contract would be for a one-year term with the option for four additional one-year renewals;

Whereas, for fiscal year 2020, SWHP is offering three SeniorCare Advantage Health Maintenance Organization (HMO) plans, and two SeniorCare Advantage Preferred Provider Organization (PPO) plans which include prescription drug benefits - SWHP will also continue to offer a dental plan through MetLife PDP Plus Network;

Whereas, Staff recommends the City continue to fund monthly the Medicare supplement insurance for each eligible retiree at the lesser of the following rates: 1) 50% of the Medicare supplement insurance plan cost, or 2) $102;

Whereas, the dental plan will be paid by the retiree only;

Whereas, the new monthly premium recommendations for 2020 are as follows:

Plan	Description	Monthly Premium	City's Contribution	Retiree's Contribution
A	SeniorCare HMO Select – With RX	$0.00	$0.00	$0.00
B	SeniorCare HMO Preferred – No Rx	$90.00	$45.00	$45.00
C	SeniorCare HMO Preferred – With Rx	$131.00	$ 65.50	$65.50
D	SeniorCare HMO Premium – No RX	$199.00	$99.50	$99.50
E	SeniorCare HMO Premium – With RX	$241.00	$102.00	$139.00
F	SeniorCare PPO Basic – With Rx	$36.00	$18.00	$18.00
G	SeniorCare PPO Platinum – With Rx	$136.00	$68.00	$68.00
H	SeniorCare HMO Dental	$0.00	$0.00	$0.00
I	SeniorCare PPO Dental – Basic (with Plan F above)	$20.00	$0.00	$20.00
J	SeniorCare PPO Dental – Platinum (with Plan G above)	$0.00	$0.00	$0.00

Whereas, Staff recommends the Employee Benefits Trust authorize a one-year renewal term to the City's Agreement with Scott and White Health Plan for the provision of Medicare supplemental insurance for over age 65 City of Temple retirees, and establish the rates for this type of insurance;

Whereas, funds for substitute Medicare supplement insurance are budgeted in Account No. 110-2700-515-1231 for fiscal year 2020; and

Whereas, the City of Temple Employee Benefits Trust has considered the matter and deems it in the public interest to authorize this action.

NOW THEREFORE BE IT RESOLVED BY THE CITY OF TEMPLE, TEXAS, EMPLOYEE BENEFITS TRUST, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the Trust, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City of Temple Employee Benefits Trust authorizes a one-year renewal term to the City's Agreement with Scott and White Health Plan for the provision of Medicare supplement insurance for over age 65 City of Temple retirees, and establishes the rates for this type of insurance, as set forth in Exhibit 'A' attached hereto and incorporated for all purposes.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November**, 2019.

CITY OF TEMPLE, TEXAS,
EMPLOYEE BENEFITS TRUST

_____
TIMOTHY A. DAVIS, Trustee

ATTEST:

_____
Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

_____
Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Lacy Borgeson, City Secretary

ITEM DESCRIPTION: Approve Minutes:

(A) October 17, 2019 Special and Regular Called Meeting
(B) October 24, 2019 Special Called Meeting
(C) October 25, 2019 Special Called Meeting

STAFF RECOMMENDATION: Approve minutes as presented in item description.

ITEM SUMMARY: Copies of minutes are enclosed for Council review.

FISCAL IMPACT: N/A

ATTACHMENTS:
October 17, 2019 Special & Regular Called Meeting Minutes / Video
October 24, 2019 Special Called Meeting Minutes
October 25, 2019 Special Called Meeting Minutes

TEMPLE CITY COUNCIL

OCTOBER 17, 2019

The City Council of the City of Temple, Texas conducted a meeting on Thursday, October 17, 2019 a 4:00 PM, at the Municipal Building, 2 North Main Street, in the 3rd Floor Conference Room.

PRESENT:

Councilmember Susan Long
Councilmember Jessica Walker
Councilmember Wendell Williams
Mayor Pro Tem Judy Morales
Mayor Timothy A. Davis

I. PUBLIC COMMENTS

No one signed up to speak.

II. WORK SESSION

1. Discuss, as may be needed, Regular Meeting agenda items for the meeting posted for Thursday, October 17, 2019.

ITEM 9 on the regular agenda was briefly discussed. Brian Chandler presented the proposed changes to address Council's concerns with some assurance of compatibility standards. The homeowner/developer much choose two of the following architectural standards:
(1) Gable roofs; (2) Front Porch; (3) Minimum of 30% windows on the front; (4) Exposed rafters or other roof elements; (5) Contrasting paint colors; (6) Front wainscot; and (7) Garage, side or rear parking.

They must also choose at least two of the following landscaping standards: (1) Frond yard sod; (2) Front yard tree; and (3) Front Landscape foundation bed.

Ms. Myers reminded the Council that the City cannot impose or regulate building materials. This was prohibited at the last Legislative Session.

Councilmember Walker inquired on backdoor standards?

Mr. Chandler noted this is not a zoning standard.

Mr. Olson noted a backdoor is not required per building standards.

At approximately 4:24 p.m., Mayor Davis announced that the City Council would enter into an executive session to discuss items 2 and 3.

Present were Councilmember Long, Councilmember Walker, Councilmember Williams, Mayor Pro Tem Morales, Mayor Davis, Brynn Myers, Kayla Landeros, Traci Barnard, Lacy Borgeson, Erin Smith, David Olson, Don Bond, Richard Wilson, Christina Demirs, and Charla Thomas.

2. **Discuss various Economic Development Agreements. Executive Session - Texas Government Code Section 551.087, Deliberation Regarding Economic Development Negotiations - The City Council may meet in executive session to discuss or deliberate regarding commercial or financial information that the Committee has received from a business prospect that the Committee seeks to have locate, stay or expand in or near the City and with which the City is conducting economic development negotiations or to deliberate the offer of a financial or other incentive to a business prospect who seeks to locate, stay, or expand in or near the City.**

3. **Discuss the status of various right-of-way acquisitions. Pursuant to Texas Government Code Section 551.072, the City Council may meet in closed session to deliberate the purchase, exchange, lease or value of real property if deliberation in an open meeting would have a detrimental effect on the position of the governmental body in negotiations with a third person.**

At approximately 4:53 p.m., Mayor Davis adjourned the executive session with no final action.

The City Council of the City of Temple, Texas conducted a Regular Meeting on Thursday, October 17, 2019 at 5:00 PM in the Council Chambers, Municipal Building, 2nd Floor, 2 North Main Street.

Present:

Councilmember Susan Long
Councilmember Jessica Walker
Mayor Pro Tem Judy Morales
Councilmember Wendell Williams
Mayor Timothy A. Davis

I. CALL TO ORDER

1. Invocation

Pastor Paul Alexander, Church of the Living God voiced the Invocation.

2. Pledge of Allegiance

Jinger Pajestka, President of Rotary Club Temple South, led the Pledge of Allegiance.

II. PUBLIC COMMENTS

Alan Lytle, 504 B Paseo Del Plata, concerned with item N on the consent agenda related to the amendment to the agreement with Turner Behringer Temple One, LLC for the redevelopment of the Hawn Hotel, Arcadia Theater, and the Public Services Building. Mr. Lytle explained that it didn't appear as though there has been much progress over the last nine months; and now they are requesting mone money. they will be back to akse fo rmore.

Mayor Davis explained that the developer is wating on additional information from the State with regards to grants that are needed. It is anticipated that work will begin in the near future.

Ms. Landeros noted the contract timeline is three years from conveyance of the property, and the City still owns the property while the developer does their due diligence. Once they are ready to move forward the City will then convey the property.

Tom Hughes, 1228 Bridgestone Drive, addressed the Council will regards to the enforcement of on-street parkikng violations. Mr. Hughes explained that he submitted a complaint via Track Temple and was referred to the Temple Police Department. He noted the Police Department did come out to the assess the complaint which was regarding a vehicle that was parked on the street for at least 17 days. Mr. Hughes stated that the officer that came out told him that the vehicle was secured and was legally parked. How will the 48-hours be enforced? This is clearly a city code violation. Mr. Hughes noted there isn't a current policy as to how to enforce the code. Is there a procedure that can be created to deal with this issue?

III. PROCLAMATIONS & SPECIAL RECOGNITIONS

3. Recognize October 24th as World Polio Day.

Jinger Pajestka, President of Rotary Club Temple, accepted the proclamation.

IV. CONSENT AGENDA

4. Consider adopting a resolution approving the Consent Agenda items and the appropriate resolutions and ordinances for each of the following:

(A) September 5, 2019 Special & Regular Called Meeting

(B) September 9, 2019 Special Called Meeting

(C) September 19, 2019 Special & Regular Called Meeting

(D) October 3, 2019 Special & Regular Called Meeting

(E) 2019-9851-R: Consider adopting a resolution authorizing the acquisition of a drainage easement and a temporary construction easement necessary for the construction of the Azalea Drainage project in an estimated amount of $12,342.

(F) 2019-9852-R: Consider adopting a resolution authorizing a Developer Participation Agreement with Short Term Lending GP, Inc. to construct a sanitary sewer line extension and wastewater collection system improvements as part of the development of the Hillside Village subdivision, Prairie Ridge subdivision, and future Temple Independent School District school site in the not to exceed amount of $1,482,289.63.

(G) 2019-9853-R: Consider adopting a resolution authorizing a contract with PrimeSpec Construction LLC, of Liberty Hill, for construction services required to rehabilitate Water Treatment Plant Clarifier #4 in the amount of $433,480.

(H) 2019-9854-R: Consider Adopting a resolution authorizing a contract with Kasberg, Patrick, & Associates, LP for professional services required to design the Little River Basin Wastewater Improvements and Hartrick Bluff Waterline in the amount of $420,410, as well as, declare an official intent to reimburse the expenditures with the issuance of 2020 Utility Revenue Bonds.

(I) 2019-9855-R: Consider adopting a resolution authorizing the following related to utility supplies needed for FY2020:

1. **Award a purchase agreement for five bid sections to Core and Main of Belton, in the estimated annual amount of $25,329.39; and**

2. **Reject the bids received for ten of the independent bid sections.**

(J) 2019-9856-R: Consider adopting a resolution authorizing the following agreements for the procurement of natural gas for the compressed natural gas fueling station:

1.

A memorandum of agreement with The Energy Market Exchange of Waco for consulting services related to the procurement of natural gas and ongoing energy consulting services at a cost of $.05 per MMBtu; and

2. **Execution of an agreement with Constellation NewEnergy – Gas Division, LLC for the supply of natural gas from November 2019 through October 2020 for the City's CNG fueling station at a rate of the monthly Houston Ship Channel published rate plus 16.5¢ per MMBtu.**

(K) 2019-9857-R: Consider adopting a resolution authorizing an agreement for a cloud-based human capital management platform with the purchase of timeclocks from Ceridian HCM, Inc. of Chicago, Illinois, in the amount of $375,982.

(L) 2019-9858-R: Consider adopting a resolution authorizing the purchase of equipment to upgrade 56 existing school flasher systems from Consolidated Traffic Controls, Inc of Arlington, in the amount of $122,192.

(M) 2019-9859-R: Consider adopting a resolution approving change order #6 with Choice Builders, LLC of Temple to provide enhancements at the Crossroads Park detention pond in the amount of $398,810.

(N) 2019-9860-R: Consider adopting a resolution authorizing an amendment to the Economic Development Agreement with Turner Behringer Temple One, LLC for the redevelopment of the Hawn Hotel, Arcadia Theater, and Public Services Building.

(O) 2019-9861-R: Consider adopting a resolution granting an easement to Atmos Energy Corporation to construct aboveground gas pipeline facilities as part of the replacement of an existing gas pipeline.

(P) 2019-4997: SECOND & FINAL READING – FY-19-26-ZC: Consider adopting an ordinance authorizing a rezoning on 137.028 acres of land with a site/development plan from Agricultural zoning district to Planned Development-Single Family Two on 114 +/- acres; Planned Development-General Retail on 2 +/- acres, and General Retail on 21 +/- acres, located southeast of the intersection of Barnhardt Road and Old State Highway 95 (Little River Road) and west of South State Highway 95.

(Q) 2019-4998: SECOND & FINAL READING – Consider adopting an ordinance authoring an amendment and adopting the Tax Increment Financing Reinvestment Zone No. 1 Financing and Project Plans to align with the 2030 Master Plan which includes appropriating bond proceeds, adjusting tax revenues, allocating funding for future debt service, operating expenditures and public improvements for years FY 2019-2062.

(R) 2019-9862-R: Consider adopting a resolution authorizing the cancellation of the January 2, 2020 City Council meeting.

(S) 2019-9863-R: Consider adopting a resolution authorizing budget amendments for fiscal year 2019-2020.

Motion by Councilmember Jessica Walker adopt the Consent Agenda as presented by Staff, seconded by Mayor Pro Tem Judy Morales.

Motion passed unanimously.

V. REGULAR AGENDA

ORDINANCES

5. 2019-4999: FIRST READING – PUBLIC HEARING – FY-19-23-ZC: Consider adopting an ordinance authorizing a Conditional Use Permit and its site plan to allow a recreational vehicle (RV) park within Lot 10 of the Bellaire Commercial subdivision, addressed as 4425 North General Bruce Drive.

Mark Baker, Senior Planner presented this case. The subject property is located on the north side of HK Dodgen Loop and catty-cornered to the Buc-ee's. This is a proposal for a recreational vehicle park, it does require a conditional use permit, and the underlying zoning is Light Industrial District. This will be known as the Bellair Junction RV Park, and done in a 1950's motor-lodge theme. Mr. Baker noted the following items to be part of the proposed development, (1) 117 spaces of that 88 back-in and 29 pull-in; (2) picnic table at each space; (3) two additional parking spaces per RV space for a total of three spaces to include the RV space; (4) park and picnic area with crushed granite trails within the park; (5) playground with splash-pad water feature; (6) two fences dog park areas; (7) separate showers, bathroom, laundry facilities; (8) two-story combination admin building with store and coffee bar, host-residence; (9) landscaping one 2" dbh tree per stand with 25-foot spacing between trees; (10) fencing combination of 4-foot

chain-link and masonry wall along the loop and railroad side.

Additionally, each space will have full sewer available, eliminating the need for a dump station.

This was reviewed by the Development Review Committee and deemed complete on August 22, 2019.

The property is subject to Chapter 31, of the Code of Ordinances, which regulates recreational vehicle parks. This is the second RV Park to be reviewed under the 2018 amendments which prohibits permanent occupancy (no more than six months in any 12-month period); and does required specific development and infrastructure standards.

The development is also in compliance with section 3.5.4 of the Unified Development Code, which address compatibility adequate utilities, lighting, and landscaping; and nuisance prevention.

The subject property is Light-Industrial and the existing uses within the surrounding area are primarily service in nature. The use requires a the conditional use permit, and it is compatible with the allowed uses in both the Light-Industrial and the Commercial zoning districts.

The Future Land Use Map identifies this property as Suburban Commercial, and to be appropriate for retail and service uses. RV Parks are permitted with a conditional use permit in the both General Retail and Light-Industrial. The Conditional Use Permit process includes conditions to ensure compatibility. Mr. Baker noted that there is existing water and sewer for the site.

There were nine public notices mailed out to the surrounding property owners within 200-feet. Three of which were returned in favor of the RV Park, and none in opposition.

Planning and Zoning Commission heard this case on September 16, 2019, and voted 7/0 to recommend approval of the requested Conditional Use Permit subject to the four conditions presented by Staff.

Staff is requesting approval of the request with four conditions:
(1) substantial compliance to Development/Site Plan;
(2) compliance to the Chapter 31 - Code of Ordinances, "Recreational Vehicle Parks";
(3) landscaping one 2" dbh tree per RV space at 25-Foot intervals; and

(4) the Director of Planning and Development is authorized to make minor revisions to the Development/Site Plan.

Mayor Davis declared the public hearing open with regards to agenda item 5, and asked if anyone wished to address this item. There being none, Mayor Davis declared the public hearing closed.

Motion by Mayor Pro Tem Judy Morales adopt the ordinance as presented on first reading by staff, with second and final reading set for November 7, 2019, seconded by Councilmember Wendell Williams.

Motion passed unanimously.

6. 2019-5000: FIRST READING – PUBLIC HEARING – FY-19-27-ZC: Consider adopting an ordinance authorizing a Planned Development-General Retail with a Development/ Site Plan for a self-storage facility on 5.204 +/- acres, addressed as 9335 State Highway 317.

Mark Baker, Senior Planner presented this case to the Council. The subject property is located on the east side of State Highway 317 just north of Prairie View Road. The request is to allow a combination climate-controlled and outside temperature self-storage facility. The area will consist of 83,350 square feet of storage capacity; ten separate buildings; as well as uncovered RV and boat storage within the overhead electrical easement.

The Development Review Committee reviewed the site plan on August 15, 2019, and the Final Plat is scheduled for October 24th, 2019.

Mr. Baker noted the subdivision plat is required prior to development; and will address off-site detention and a minimum of six-foot sidewalk/trial.

As a Planned Development this is a flexible overlay zoning district designed to respond to unique development proposals, special design considerations and land use transitions by allowing evaluation of land use relationships to surrounding areas through Development / Site Plan approval.

The base zoning will remain General Retail; and the Site Plan is binding and compliance to conditions is required.

Mr. Baker noted the zoning is General Retail which is intended

for retail and service uses. Self-storage is considered to be a commercial use. The subject property fronts along a major arterial and therefore the use is compatible with surrounding General Retail and supports future residential development. This development will have a low impact to utilities and traffic generation.

The property sets within two different designations, Agricultural/Rural and Suburban Commercial. The Future Land Use Map identifies Agricultural / Rural to be intended for areas with reduced infrastructure or to protect farming and ranching activities; and Suburban Commercial to be appropriate for office and retail uses. Mr. Baker noted this location is a transition from agricultural to retail uses.

Water is available to the subject property, and sewer will be through on-site septic.

The project is in compliance with the Thoroughfare Plan and Trails. State Highway 317 is an arterial, and access is provided with a restricted right-in/right-out lane, and TxDOT does not anticipate any improvements for this section of the Highway. Sidewalk and Trails will be discussed during the review of the subdivision plat.

Mr. Baker explained the that site plan is proposed for 83,350 SF of storage space within ten buildings. Each building will range from 3,800 SF to 14,000 SF; a new wrought-iron fence along 317 frontage; new 6-foot high wood fence for the other three boundaries; eight parking spaces; uncovered boat and RV storage within the 100-foot overhead electrical easement; and off-site detention (to be addressed with the Plat). The project exceeds the landscaping requirements, with the minimum requirement at 5% and the plan to be 13% of the site landscaped.

There were four notices sent out to the property owners within 200-feet. Zero notices were returned in favor or disagreement.

Planning and Zoning Commission heard this case on September 16, 2019, and voted 7/0 to recommend approval of the rezoning per Staff's recommendations.

Staff recommends approval of the rezoning with the following six conditions:
(1) Site is developed with a self-storage facility or any permitted use within the General Retail district;
(2) Subdivision plat is provided prior to building permit;
(3) Substantial compliance to the development/site plan;

(4) The Director of Planning and Development is authorized to approve minor modifications to the development/site plan (including possible trail in lieu of sidewalk);
(5) Significant changes require review by the Planning and Zoning Commission and City Council; and
(6) State Highway 317-facing facades of the six exterior buildings include at least three of the following architectural elements: (a) combination of two different materials {one as a base material at least three-feet in height}; (b) windows {real or faux}; (c) a parapet at least three-feet tall; (d) structural awnings; and (e) front roof gables.

Councilmember Williams inquired on the location of the detention pond?

Mr. Baker noted it would be addressed during the review process of the plat, but it was originally proposed for on-site, and then moved to be adjacent to the property.

Mayor Davis declared the public hearing open with regards to agenda item 6, and asked if anyone wished to address this item. There being no further comments, Mayor Davis declared the public hearing closed.

Motion by Councilmember Wendell Williams adopt the ordinance as presented on first reading by staff, with second and final reading set for November 7, 2019, seconded by Mayor Pro Tem Judy Morales.

Motion passed unanimously.

7. 2019-5001: FIRST READING – PUBLIC HEARING – FY-19-28-ZC: Consider adopting an ordinance authorizing a Conditional Use Permit to allow for an office warehouse, with a Site Plan, in the Temple Winnelson Subdivision, addressed as 1801 North 3rd Street and 1605 North 3rd Street.

Jason Deckman, City Planner presented this case to the Council. The subject property is in North Temple along 3rd Street. Temple Winnelson Company currently operates a plumbing supply business at 1801 North 3rd Street. They purchased a lot at 1605 North 3rd Street to expand their business; and the lot is currently zoned General Retail which will require an office warehouse to obtain a Conditional Use Permit. The property is located within the 1st and 3rd Overlay District and is subject to increased requirements for landscaping, frontage, and screening. An Appeal to Standards of the 1st and

3rd Overlay was approved in June 2018 with an approved site plan (resolution 2018-9180-R).

The new building will be 24,096 SF, with offices, showroom space, and a conference room. Entrances to the west and loading area to the east off of 1st Street. Parking was the primary item that was discussed during the Development Review process. There are 38 total parking spaces shown; they will have adequate parking taken as a whole but not if you look at each individual property. This was agreed upon, in order to accommodate the landscaping standards.

There will be a new six-foot sidewalk along 3rd Street; there's an existing four-foot sidewalk that will continue on 1st Street; and shrubs and trees will be placed along the front of the project. A drainage channel is proposed between the two lots.

The development is compliant with both the Future Land Use Plan and the Thoroughfare Plan. The Future Land Use Plan identifies this as Auto-Urban Commercial; and is located between a collector and a major arterial. Utilities are available on site with an eight-inch water line and a six-inch and ten-inch sewer line that runs through both lots.

Twenty-two notices were mailed out to property owners within 200-feet of the property. One notice was returned in favor, and zero in opposition.

The Planning and Zoning Commission heard this case on September 16, 2019, and voted 6/0 with one abstention to recommend approval of the Conditional User Permit subject to conditions set out by Staff.

Staff recommends approval of the Conditional Use Permit to allow for an office warehouse, with a Site Plan at 1801 North 3rd Street and 1605 North 3rd Street with the following three conditions:
(1) substantial compliance to the Development/Site Plan;
(2) pave parking spaces on both lots as depicted in the Site Plan; and
(3) that the Director of Planning and Development be authorized to approve minor changes to the Development/Site Plan.

Mayor Pro Tem Morales inquired on what types of screening will be acceptable.

Mr. Deckman explained that a retaining wall and solid fence would be installed to screen the residence that are directly to the South of 1st Street.

Councilmember Walker asked that would be the same for 3rd Street. Will there be an issue with the razor wire and the location being so close to the school?

Mr. Deckman stated he believed that would be an open fence. Don't believe the wire is an issue.

Mr. Chandler, Director of Planning addressed the Council. He noted that on the 3rd Street side is a motel and screening is not required. He added that the razor wire will be reviewed.

Mayor Davis asked if the traffic has been addressed with delivery trucks and buses.

Mr. Deckman noted this was not discussed as an issue, but can be reviewed.

Mayor Davis declared the public hearing open with regards to agenda item 7, and asked if anyone wished to address this item. There being none, Mayor Davis declared the public hearing closed.

Motion by Councilmember Susan Long adopt the ordinance as presented on first reading by staff, with second and final reading set for November 7, 2019, seconded by Councilmember Jessica Walker.

Motion passed unanimously.

8. 2019-5002: FIRST READING – PUBLIC HEARING – Consider adopting an ordinance designating 102 East Central Avenue, Temple 76501, legally described as Lot 2 and part of Lot 1, Block 15 Original Town of Temple, Bell County, Texas as City of Temple Tax Abatement Reinvestment Zone Number 40 for commercial/industrial tax abatement.

Kayla Landeros, City Attorney presented this item to the Council. Texas Tax Code Chapter 312 allows the Council to designate an area of the City as a tax abatement reinvestment zone if the designation will likely contribute to the retention or expansion of primary employment; or to attract major investment in the zone that would be a benefit to the property and that will contribute to the economic development of the City.

In addition to and required by Chapter 312, the Council has adopted standards for tax abatements, and can consider the designation and authorize a tax abatement if at least two of the

following criteria are met:
(1) the project involves a minimum increase in property value of 300% for construction of a new facility or 50% for expansion of an existing facility;
(2) the project makes a substantial contribution to redevelopment efforts or strategic economic development programs;
(3) the project has high visibility, image impact, or is of a significantly higher level of development quality; and/or
(4) the project stimulates desired concentrations of employment or commercial activity.

The proposed zone will be #40, and will consist of 0.577 acres at 102 East Central Avenue. This property is historically referred to as the Sears Building or the Public Services Building. This project is related the redevelopment of the Hawn and Arcadia Building. The estimated capital investment for just the Sears building is $4,500,000. Staff believes that the proposed project meets the various criteria in the City's standards for tax abatement (1) the project makes a substantial contribution to the redevelopment efforts or strategic economic development programs; (2) has high visibility, image impact, or is a significantly higher level of development quality; and (3) stimulates desired concentrations of employment or commercial activity. The propose project will also expand the employment base, attract major investments, and contribute to economic development in the City as required by the Chapter 312.

Mayor Davis declared the public hearing open with regards to agenda item 8, and asked if anyone wished to address this item.

Mayor Davis explained that the $6M investment to the $12M investment is the developer putting more in.

Mr. Lytle, expressed his concerns that the Group has already estimated incorrectly by alot. By the time its done we'll have half-finished buildings again and no new economic growth.

Mayor Davis noted that that was discussed in workshop earlier with regards to the City taking back half-finished buildings. This will be addressed in the agreement to ensure it doesn't happen. The jump from $6M to $12M is not a misestimation, but them adding the Sears Building at $4.5M to the project; originally it was just the Hawn and the Arcadia.

Dan Kacir, 1304 North 1st Street addressed the Council with concerns for parking.

Ms. Landeros noted that as part of the EDA the developer will be conveyed one parking lot just north of the Hawn and Arcadia and then they will lease a parking lot from the City that is across 4th Street. There will be dedicated parking to the development.

There being no further comments, Mayor Davis declared the public hearing closed.

Motion by Mayor Pro Tem Judy Morales adopt the ordinance as presented on first reading by staff, with second and final reading set for November 7, 2019, seconded by Councilmember Jessica Walker.

Motion passed unanimously.

9. **2019-4996: SECOND & FINAL READING – FY-19-25-ZC: Consider adopting an ordinance authorizing an amendment to Ordinance 2001-2750, related to an existing Planned Development-Single Family Three condition to allow single family development or redevelopment by right without site plan approval subject to existing Single Family Three setbacks and building permit requirements.**

Lynn Barrett, Assistant Director of Planning presented a brief update to this case. At the last meeting, October 3, 2019 the Council expressed concerns regarding the desire to have an architectural design approval process or higher standards within this 62-lot area. This area is along Avenue D, Avenue C, Avenue B and Avenue A, and between South 10th Street and South 12th Street. This was a 2001 planned development that required all development and redevelopment to have site plan approval for each project to include single-family. Staff is recommending that the single-family development within that 62-lot area be allowed without the site plan approval from Planning and Zoning, and the Council. Staff has added some additional architectural and landscape standards as requested for this area.

The developer would need to choose at least two of the following architectural standards:
(1) Gable roofs;
(2) Front Porch;
(3) Minimum of 30% windows on the front;
(4) Exposed rafters or other roof elements;
(5) Contrasting paint colors;
(6) Front wainscot; and/or
(7) Garage, side, or rear parking.

The developer must choose at least two of the following landscaping standards:
(1) Front yard sod;
(2) Front yard tree; and/or
(3) Front landscape foundation bed.

Staff recommends approval of amending the PD SF-3 Conditions to allow single family development or redevelopment by right without site plan approval subject to existing SF-3 setbacks and building permit requirements on existing lots in accordance with the architectural and landscape standards as presented.

Motion by Councilmember Susan Long adopt the ordinance as presented on second and final reading by staff, seconded by Mayor Pro Tem Judy Morales.

Motion passed unanimously.

RESOLUTIONS

10. **2019-9864-R: FY-19-66-PLT: Consider adopting a resolution approving the Final Plat of Westward LTD Subdivision Replat No. One, a 4.426 +/- acre, residential subdivision with a developer-requested exception to Unified Development Code Section 8.2.1.E, regarding minimum curve radius of a local street, addressed as 4305 South 31st Street.**

Tammy Lyerly, City Planner presented this case to the Council. The subject property is located along the east edge of the retail center that fronts South 31st Street. Access to this site will be by Calle Olmo in the Spanish Southwest neighborhood. The Development Review Committee reviewed the Plat on July 25, 2019; and deemed administratively complete on September 12, 2019. There are exceptions the Unified Development Code Section 8.2.1 regarding the minimum curve radius of a local street (Calle De Bronce) and therefore the Council is the final authority.

The minimum allowed curve radius to the centerline of a local street is 200-feet. Calle De Bonce proposes street centerline radius of 30-feet for curves C5 and C12. During the Development Review Committee meeting, staff had no objects to the requested exception.

Water will be provided through a 6-inch water line; and sewer will be provided through a 6-inch sanitary sewer line. Drainage will be to Tract A.

Planning and Zoning Commission voted 7/0 to recommend approval of the Final Plat as presented by the Staff.

Staff is recommending approval of the Final Plat of Westward LTD Subdivision Replat No. 1 (FY-19-66-PLT) with the developer requested exceptions to the UDC.

Motion by Councilmember Wendell Williams adopt the resolution as presented by staff, seconded by Councilmember Jessica Walker.

Motion passed unanimously.

11. 2019-9865-R: Consider adopting a resolution appointing one member representing the RZ No. 1 Board of Directors to the Airport Advisory Board to fill an unexpired term through September 1, 2021.

Mayor Davis noted that it was recommended that John Mayo be appointed to represent the Reinvestment Zone.

Motion by Councilmember Jessica Walker appoint John Mayo to fill the unexpired term to the Airport Advisory Board as the Reinvestment Zone No. Board of Directors representative for a term ending September 1, 2021, seconded by Councilmember Wendell Williams.

Motion passed unanimously.

_____
Timothy A. Davis, Mayor

ATTEST:

_____
Lacy Borgeson
City Secretary

SPECIAL MEETING OF THE TEMPLE CITY COUNCIL

OCTOBER 24, 2019

The City Council of the City of Temple, Texas conducted a special called meeting on Thursday, October 24, 2019 a 9:00 AM, at the Municipal Building, 2 North Main Street, in the 3rd Floor Conference Room.

Present:

Councilmember Susan Long
Councilmember Jessica Walker
Mayor Pro Tem Judy Morales
Councilmember Wendell Williams
Mayor Timothy A. Davis

I. PUBLIC COMMENTS

No one signed up to speak.

II. EXECUTIVE SESSION

Mayor Davis announced that the City Council would enter into an executive session with no final action.

1. **Discuss the employment, duties, and work plans of the City Attorney, Finance Director, City Judge, and the City Manager.**
   Texas Government Code § 551.074 – The City Council will meet in executive session to discuss the hiring process, appointment, employment, and duties of the City Attorney, Finance Director, City Judge, and the City Manager. No final action will be taken.

At approximately 4:15 Mayor Davis adjourned the executive session of the Temple City Council with no final action.

_____
Timothy A. Davis

ATTEST:

_____
Lacy Borgeson
City Secretary

SPECIAL MEETING OF THE TEMPLE CITY COUNCIL

OCTOBER 25, 2019

The City Council of the City of Temple, Texas conducted a special called meeting on Friday, October 25, 2019 a 9:00 AM, at the Municipal Building, 2 North Main Street, in the 3rd Floor Conference Room.

Present:

Councilmember Susan Long
Councilmember Jessica Walker
Mayor Pro Tem Judy Morales
Councilmember Wendell Williams
Mayor Timothy A. Davis

I. PUBLIC COMMENTS

No one signed up to speak.

II. EXECUTIVE SESSION

Mayor Davis announced that the Council would met in executive session with no final action.

1. **Discuss the employment, duties, and work plans of the City Attorney, Finance Director, City Judge, and the City Manager.**
   Texas Government Code § 551.074 – The City Council will meet in executive session to discuss the hiring process, appointment, employment, and duties of the City Attorney, Finance Director, City Judge, and the City Manager. No final action will be taken.

At approximately 2:40 p.m., Mayor Davis adjourned the executive session of the Temple City Council with no final action.

_____
Timothy A. Davis

ATTEST:

_____
Lacy Borgeson
City Secretary

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Tara Raymore, Director of Human Resources

ITEM DESCRIPTION: Consider adopting a resolution authorizing a one-year extension to the professional services agreement with McGriff, Seibels & Williams, Inc. of Addison for employee benefits consulting services, in the annual amount of $75,000.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: Approval of this item will provide for a one-year extension to the employee benefits consulting services agreement with McGriff, Seibels & Williams, Inc. (MSW) commencing January 1, 2020.

MSW was selected through a request for proposal process in 2017 as the most qualified firm to provide employee benefits consulting services. MSW assists City Staff by evaluating, and optimizing employee insurance options, developing product specifications and negotiating with vendors, creating employee benefits reports, and providing general employee benefits administrative assistance. City Staff has been very pleased with the services provided by MSW over the initial two-year term of the agreement, and accordingly, Staff is recommending the renewal of the agreement with MSW.
The two-year agreement authorized by City Council on December 7, 2017, included the option to renew the agreement for three additional one-year periods. This is first renewal with two available one-year extensions remaining.

FISCAL IMPACT: Funding for the employee benefits consulting agreement with McGriff, Seibels & Williams in the amount of $75,000, is available in the following accounts:

	110-2700-515-2616	240-4400-551-2616	292-2900-534-2616	520-5000-535-2616	Total
Consultant Budget	$ 62,175	$ 2,190	$ 1,635	$ 9,000	$ 75,000
McGriff, Seibels & Williams, Inc.	(62,175)	(2,190)	(1,635)	(9,000)	(75,000)
Remaining Consultant Funds	**$ -**	**$ -**	**$ -**	**$ -**	**$ -**

Funding will be proposed in future year budgets to account for the employee benefits consulting services agreement.

ATTACHMENTS:
Resolution

RESOLUTION NO. 2019-9867-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A ONE-YEAR RENEWAL TO A PROFESSIONAL SERVICES AGREEMENT WITH MCGRIFF, SEIBELS & WILLIAMS, INC. OF ADDISON, TEXAS IN THE ANNUAL AMOUNT OF $75,000, FOR EMPLOYEE BENEFITS CONSULTING SERVICES; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, McGriff, Seibels & Williams, Inc. (MSW) was selected through a request for proposal process in 2017 as the most qualified firm to provide employee benefits consulting services - MSW assists Staff by evaluating and optimizing employee insurance options, developing product specifications and negotiating with vendors, creating employee benefits reports, and providing general employee benefits administrative assistance;

Whereas, the two-year agreement authorized by City Council on December 7, 2017, included the option to renew the agreement for three additional one-year periods - this is the first renewal with two available one-year renewals remaining commencing January 1, 2020;

Whereas, Staff has been very pleased with the services provided by MSW over the initial two-year term of the agreement and recommends Council authorize a one-year renewal to a professional services agreement with McGriff, Seibels & Williams, Inc. of Addison, Texas in the annual amount of $75,000, for employee benefits consulting services;

Whereas, funding for this agreement is available in the following accounts:

Account No. 110-2700-515-2616; Account No. 240-4400-551-2616;
Account No. 292-2900-534-2616; Account No. 520-5000-535-2616; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the City Manager, or her designee, after approval as to form by the Interim City Attorney, to execute a one-year renewal to a professional services agreement with McGriff, Seibels & Williams, Inc. of Addison, Texas in the annual amount of $75,000, for employee benefits consulting services.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November,** 2019.

THE CITY OF TEMPLE, TEXAS

_____

TIMOTHY A. DAVIS, Mayor

ATTEST:

_____

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

_____

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW

Kevin Beavers, CPRP, Director of Parks and Recreation

ITEM DESCRIPTION: Consider adopting a resolution authorizing a professional services agreement with Kasberg, Patrick, & Associates, LP, of Temple to develop schematic and final design for electrical requirements at the Martin Luther King Festival Grounds, in the amount of $96,200.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: This agreement will provide schematic design, design surveying, civil design, electrical design, and coordination with Oncor electrical delivery. This design will provide a plan that allows the current overhead electrical service to go underground and strategically place transformers that are less noticeable. This plan will also design connections to the Sunglo and the staff and storage building as well. Services provided are as follows:

• Schematic design	$	16,800
• Design surveys		7,900
• Civil design		28,400
• Electrical design		38,900
• Oncor coordination		4,200
TOTAL	**$**	**96,200**

These design services will take approximately nine months to complete from the issuance of the Notice to Proceed. Funding for construction of the project is the Reinvestment Zone No. 1 Financing and Project Plan in FY 2021.

The Reinvestment Zone No. 1 Board recommended approval of this purchase at their October 23, 2019 Board meeting.

FISCAL IMPACT: Funding is available in the Reinvestment Zone No. 1 Financing and Project Plan, line 403, account 795-9500-531-6569, project 101588, to develop schematic and final design for electrical requirements at the Martin Luther King Festival Grounds as shown below.

Project Budget	$	100,000
Encumbered/Committed to Date		-
KPA Professional Services Agreement		(96,200)
Remaining Project Funds	**$**	**3,800**

ATTACHMENTS:
KPA Proposal
Resolution

KASBERG, PATRICK & ASSOCIATES, LP
CONSULTING ENGINEERS
Texas Firm F-510

Temple
One South Main Street
Temple, Texas 76501
(254) 773-3731

RICK N. KASBERG, P.E.
R. DAVID PATRICK, P.E., CFM
THOMAS D. VALLE, P.E.
GINGER R. TOLBERT, P.E.
ALVIN R. "TRAE" SUTTON, III, P.E., CFM
JOHN A. SIMCIK, P.E., CFM

Georgetown
1008 South Main Street
Georgetown, Texas 78626
(512) 819-9478

October 10, 2019

Mr. Kevin Beavers, CPRP
Parks and Recreation Director
2 North Main St, Suite 201
City of Temple, Texas 76501

Re: City of Temple
MLK Festival Grounds Electrical Design Project

Dear Mr. Beavers:

At the request of the City of Temple Reinvestment Zone #1 (TRZ), we are submitting this Proposal for the above referenced project. This project will develop Schematic and Final Design for the electrical requirements for the MLK Festival Grounds. The final product will be full Construction Documents and Specifications for the project.

The work to be performed by KPA under this contract consists of providing planning, and engineering services for design of the MLK Festival Grounds area between 4th Street, MLK Boulevard, Avenue B and the BNSF Railroad. The timeframe for design of the project is nine (9) months from the Notice to Proceed.

KPA will perform all work and prepare all deliverables in accordance with the latest version of the City of Temple specifications, standards and manuals.

KPA Architects will perform quality control and quality assurance (QA/QC) on all deliverables associated with the project.

The following services will be performed:

A. SCHEMATIC DESIGN
   a. Develop a schematic concept for electrical design within the MLK Festival Grounds including horizontal layout.
   b. Coordinate with City Staff on locations and power requirements for the MLK Festival Grounds including the SUNGLO Building and the Staff & Storage Building.
   c. Coordinate with ONCOR to locate switch gear and transformers.

B. DESIGN SURVEYING
   a. After the schematic design phase is complete with horizontal layout, switch gear location(s) and transformer(s) locations established, Topographic Surveys for Engineering Design will be released.

b. Data collection shall consist of surveying all elements of the project to complete the design requirements.

C. CIVIL DESIGN

a. Develop final layout for conduit, connections, switch gear and transformers.
b. Prepare plan and profile design for all common trench including establishing requirements and coordination with ONCOR and all communications elements as required.
c. Prepare design for all switch gear locations and coordinate with ONCOR.
d. Prepare design for all transformer locations and coordinate with ONCOR.
e. Prepare design for connections to the SUNGLO and Staff & Storage Buildings.
f. Design roadway crossings and repair to irrigation, vegetation and two course surface treatment areas.
g. Prepare final specifications and plans for the Civil Design.

D. ELECTRICAL DESIGN

a. Develop final design for conduit, connections, service connections, panels, etc.
b. Design and coordinate electrical loading for the project area.
c. Coordinate with ONCOR.
d. Design connections for switch gear and transformers.
e. Prepare design for connections to the SUNGLO and Staff & Storage Buildings.
f. Prepare final specifications and plans for the Electrical Design.

The following scope of work for the MLK Festival Grounds Electrical Design Project can be completed for the lump sum price of $96,200. Below is a breakdown of project costs. We are pleased to submit this proposal and look forward to the benefit it will bring the City of Temple.

Schematic Design	$	16,800.00
Design Surveys	$	7,900.00
Civil Design	$	28,400.00
Electrical Design	$	38,900.00
ONCOR Coordination	$	4,200.00
TOTAL	**$**	**96,200.00**

Sincerely,

R. David Patrick, P.E., CFM

xc: File

ATTACHMENT "C"

Charges for Additional Services

City of Temple
MLK Festival Grounds Electrical Design Project

POSITION	MULTIPLIER	SALARY COST/RATES
Principal	2.4	$ 75.00 – 95.00/hour
Project Manager	2.4	60.00 – 75.00/hour
Project Engineer	2.4	50.00 – 60.00/hour
Engineer-in-Training	2.4	40.00 – 50.00/hour
Engineering Technician	2.4	35.00 – 50.00/hour
CAD Technician	2.4	30.00 – 50.00/hour
Clerical	2.4	15.00 – 30.00/hour
Expenses	1.1	actual cost
Computer	1.0	15.00/hour
Survey Crew	1.1	125.00 – 160.00/hour
Registered Public Surveyor	1.0	130.00/hour
On-Site Representative	2.1	30.00 – 40.00/hour

RESOLUTION NO. 2019-9868-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A PROFESSIONAL SERVICES AGREEMENT WITH KASBERG, PATRICK AND ASSOCIATES, LP OF TEMPLE, TEXAS IN THE AMOUNT OF $96,200, TO DEVELOP A SCHEMATIC AND FINAL DESIGN FOR ELECTRICAL REQUIREMENTS AT THE MARTIN LUTHER KING FESTIVAL GROUNDS; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, this agreement will provide schematic design, design surveying, civil design, electrical design, and coordination with ONCOR electrical delivery as well as a plan that allows the current overhead electrical service to go underground and strategically place transformers that are less noticeable - this plan will also design connections to the Sunglo and the Staff and storage building as well;

Whereas, the Reinvestment Zone No. 1 Board recommended approval of this professional services agreement at its October 23, 2019 Board meeting;

Whereas, Staff recommends Council authorize a professional services agreement with Kasberg, Patrick and Associates, LP of Temple, Texas in the amount of $96,200, to develop a schematic and final design for electrical requirements at the Martin Luther King Festival Grounds;

Whereas, funding is available in the Reinvestment Zone No. 1 Financing and Project Plan, Line 403, Account No. 795-9500-531-6569, Project No. 101588; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the City Manager, or her designee, after approval as to form by the Interim City Attorney, to execute a professional services agreement with Kasberg, Patrick and Associates, LP of Temple, Texas, in the amount of $96,200, to develop a schematic and final design for electrical requirements at the Martin Luther King Festival Grounds.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November,** 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW

Kevin Beavers, CPRP, Director of Parks and Recreation

ITEM DESCRIPTION: Consider adopting a resolution authorizing a professional services agreement with Kasberg, Patrick, & Associates, LP, of Temple to develop schematic and final design for the East/West Gate project, in the amount of $292,800.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: This agreement will provide planning, engineering, and landscape architecture for the TXDOT right-of-way areas at the I-35 interchange to include areas on the east and west side of the Interstate. Services provided are as follows:

• Design surveying	$ 28,600
• Geotechnical investigations	18,900
• Civil design	48,900
• Structural design	29,600
• Electrical design	28,900
• Landscaping	124,300
• TXDOT coordination	13,600
TOTAL	**$ 292,800**

These design services will take approximately 10 months to complete from the issuance of the Notice to Proceed. Funding for construction of the project is the Reinvestment Zone No. 1 Financing and Project Plan in FY 2022.

The Reinvestment Zone No. 1 Board recommended approval of this purchase at their October 23, 2019 Board meeting.

FISCAL IMPACT: Funding is available in the Reinvestment Zone No. 1 Financing and Project Plan, line 603, account 795-9500-531-6319, project 101978, to develop schematic and final design for the area between Central and Adams Avenue and Highway 36 and FM 2305 at Interstate 35 as shown below.

Project Budget	$	380,000
Encumbered/Committed to Date		(59,700)
KPA Professional Services Agreement		(292,800)
Remaining Project Funds	**$**	**27,500**

ATTACHMENTS:
KPA Proposal
Conceptual Drawing
Resolution

KASBERG, PATRICK & ASSOCIATES, LP
CONSULTING ENGINEERS
Texas Firm F-510

Temple
One South Main Street
Temple, Texas 76501
(254) 773-3731

RICK N. KASBERG, P.E.
R. DAVID PATRICK, P.E., CFM
THOMAS D. VALLE, P.E.
GINGER R. TOLBERT, P.E.
ALVIN R. "TRAE" SUTTON, III, P.E., CFM
JOHN A. SIMCIK, P.E., CFM

Georgetown
1008 South Main Street
Georgetown, Texas 78626
(512) 819-9478

October 10, 2019

Mr. Kevin Beavers, CPRP
Parks and Recreation Director
2 North Main St, Suite 201
City of Temple, Texas 76501

Re: City of Temple
East / West Gateway Project

Dear Mr. Beavers:

At the request of the City of Temple Reinvestment Zone #1 (TRZ), we are submitting this Proposal for the above referenced project. This project will develop Schematic and Final Design for area between Central Avenue and Adams Avenue at Interstate 35. The final product will be full Construction Documents and Specifications for the project.

The work to be performed by KPA and Covey Landscape Architects under this contract consists of providing planning, landscape architecture and engineering services for design of the area in TxDOT rights-of-way between Central Avenue and Adams Avenue at Interstate 35 for gateway features and landscape amenities in conjunction with improvements on Interstate 35. The areas to be designed is ~58,000 square feet on the east side of the interstate and ~121,000 square feet on the west side. Also included in the design are the four corner areas of the intersection of Interstate 35 at Central Avenue and Adams Avenue. An exhibit is included with this proposal for reference. The timeframe for design of the project is ten (10) months from the Notice to Proceed. The timeframe will be dependent on TXDOT coordination and review comments.

KPA and Covey Landscape Architects will perform all work and prepare all deliverables in accordance with the latest version of the City of Temple specifications, standards and manuals.

KPA and Covey Landscape Architects will perform quality control and quality assurance (QA/QC) on all deliverables associated with the project.

The following services will be performed:

A. DESIGN SURVEYING
   a. Topographic Surveys for Engineering and Landscape Design.
   b. Data collection shall consist of surveying all elements of the project to complete the design requirements. Elements shall include roadways, curb and gutter, existing streetscape amenities, etc.

B. GEOTECHNICAL INVESTIGATIONS
   a. Roadway – Geotechnical field data will be taken for the project for signage, retaining walls and art structures.
   b. A final report of the subsurface investigations will be completed for the project.
   c. Traffic Control will be required for these activities and will be supplied with this contract.

C. CIVIL DESIGN
   a. Site grading for all sites will be accomplished. Utilization of the design surveys will produce existing surfaces for each area of the project. Proposed surfacing will be accomplished to develop an existing to proposed surface digital terrain model for use in design and construction of the project. Specifications will be developed for development of fill.
   b. Existing utilities will be identified and included in the final construction documents for the project. Design shall include relocations, if required and connections for irrigation and other elements for the project.
   c. Pedestrian access will be developed and incorporated into the project in conjunction with existing infrastructure meeting the requirements of the Americans with Disability Act and the Texas Department of Licensing and Regulation.
   d. Review and design drainage for the proposed elements to existing conveyances.
   e. Develop sight distance requirements based on the design speeds for Central Avenue and Adams Avenue. Exhibits will be developed to illustrate the proposed improvements and required sight distance triangles.

D. STRUCTURAL DESIGN
   a. Based on the data produced in the geotechnical investigations, structural design will be developed for the proposed retaining walls on the project.
   b. Based on the data produced in the geotechnical investigations, structural design will be developed for the proposed architectural signage on the project.
   c. Based on the data produced in the geotechnical investigations, structural design will be developed for the proposed art on the project

E. ELECTRICAL DESIGN
   a. Coordinate the requirements for the project with Oncor to develop service locations and connections.
   b. Design electrical loading, connections, geometry, conduit, wiring and circuits for lighting within all areas for the design.

c. Design electrical loading, connections, geometry, conduit, wiring and circuits for signs within all areas for the design.
d. Design electrical loading, connections, geometry, conduit, wiring and circuits for art within all areas for the design.
e. Design electrical loading, connections, geometry, conduit, wiring and circuits for walls within all areas for the design

F. LANDSCAPE ARCHITECTURE
a. Based on the Concept Design all landscaping will be designed for the Construction Documents and Specifications. Vegetation type species and size will be developed in incorporated based on the Concept Design.
b. Based on the Concept Design all materials will be selected and designed for the Construction Documents and Specifications.
c. Lighting for the defined areas, signage and art will be designed and integrated into the project.
d. Irrigation will be developed and specified within the Construction Documents and Specifications in accordance with defined requirements coordinated with the City of Temple Parks Department.

G. TXDOT COORDINATION
a. Coordinate with the Belton Area Office, Waco District Office and Austin State Office on drainage elements of the project in conjunction with TxDOT infrastructure.
b. Coordinate with the Belton Area Office, Waco District Office and Austin State Office on sight distance for the project in conjunction with TxDOT infrastructure.
c. Coordinate with the Belton Area Office, Waco District Office and Austin State Office on the landscape design and elements for the project in conjunction with TxDOT infrastructure.
d. Review Construction Documents and Specifications with the Belton Area Office, Waco District Office and Austin State Office.

The following scope of work for the East / West Gateway project can be completed for the lump sum price of $292,800. Below is a breakdown of project costs. We are pleased to submit this proposal and look forward to the benefit it will bring the City of Temple.

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Design Surveys	$	28,600.00
Geotechnical Investigations	$	18,900.00
Civil Design	$	48,900.00
Structural Design	$	29,600.00
Electrical Design	$	28,900.00
Landscape Architecture Design	$	124,300.00
TxDOT Coordination	$	13,600.00
TOTAL	**$**	**292,800.00**

Sincerely,

R. David Patrick, P.E., CFM

Ronnie Stafford, PLA

xc: File

ATTACHMENT "C"

Charges for Additional Services

City of Temple
East / West Gateway Project

POSITION	MULTIPLIER	SALARY COST/RATES
Principal	2.4	$ 75.00 – 95.00/hour
Project Manager	2.4	60.00 – 75.00/hour
Project Engineer/ Landscape Architect	2.4	50.00 – 60.00/hour
Engineer-in-Training	2.4	40.00 – 50.00/hour
Engineering Technician	2.4	35.00 – 50.00/hour
CAD Technician	2.4	30.00 – 50.00/hour
Clerical	2.4	15.00 – 30.00/hour
Expenses	1.1	actual cost
Computer	1.0	15.00/hour
Survey Crew	1.1	125.00 – 160.00/hour
Registered Public Surveyor	1.0	130.00/hour
On-Site Representative	2.1	30.00 – 40.00/hour

I-35 Gateway *East-West Downtown Gateway*

covey
landscape architects

RESOLUTION NO. 2019-9869-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A PROFESSIONAL SERVICES AGREEMENT WITH KASBERG, PATRICK AND ASSOCIATES, LP OF TEMPLE, TEXAS IN THE AMOUNT OF $292,800, TO DEVELOP A SCHEMATIC AND FINAL DESIGN FOR THE EAST/WEST GATE PROJECT; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, this agreement will provide planning, engineering, and landscape architecture for the Texas Department of Transportation right of way areas at the Interstate 35 interchange to include areas on the east and west side of the Interstate – referred to as the East/West Gate Project;

Whereas, the Reinvestment Zone No. 1 Board recommended approval of this professional services agreement at its October 23, 2019 Board meeting;

Whereas, Staff recommends Council authorize a professional services agreement with Kasberg, Patrick and Associates, LP of Temple, Texas in the amount of $292,800, to develop a schematic and final design for the East/West Gate Project;

Whereas, funding is available in the Reinvestment Zone No. 1 Financing and Project Plan, Line 603, Account No. 795-9500-531-6319, Project No. 101978; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the City Manager, or her designee, after approval as to form by the Interim City Attorney, to execute a professional services agreement with Kasberg, Patrick and Associates, LP of Temple, Texas, in the amount of $292,800, to develop a schematic and final design for the East/West Gate Project.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November,** 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

11/07/19
Item #5(G)
Consent Agenda

DEPT./DIVISION SUBMISSION & REVIEW:
Don Bond, P.E., CFM, Public Works Director
Richard Wilson, P.E., CFM, City Engineer

ITEM DESCRIPTION: Consider adopting a resolution to authorize a professional services agreement with Kasberg, Patrick & Associates, LP, for Industrial Park Site Grading designs within the Temple Reinvestment Zone Industrial Park, in the amount of $98,810.

STAFF RECOMMENDATION: Adopt resolution as presented in Item Description.

ITEM SUMMARY: This project will develop grading plans for Site 20, Site 21, Site 40, Site 64, and Enterprise Park, covering approximately 374 acres, within the Temple Reinvestment Zone (TRZ) Industrial Park that will increase the number of "shovel ready" sites. A proposed surface model will be developed for each grading plan that will include final import and export material data. This data will then be analyzed with upcoming projects in the TRZ to incorporate the use of the import and export material to create a unified benefit to the upcoming TRZ projects near the Industrial Park. See the attached engineer's proposal and project maps for further details.

On October 23, 2019, the Reinvestment Zone No. 1 Board approved to recommend that Council authorize this professional services agreement.

Time required for design is 180 calendar days from the notice to proceed.

FISCAL IMPACT: Funding is available in the Reinvestment Zone No. 1 Financing and Project Plan, line 104, account 795-9500-531-6772, project 102166, for Industrial Park Site Grading designs as shown below.

Project Budget	$	100,000
Encumbered/Committed to Date		-
KPA Professional Services Agreement		(98,810)
Remaining Project Funds	**$**	**1,190**

ATTACHMENTS:
Engineer's Proposal
Project Maps
Resolution

KASBERG, PATRICK & ASSOCIATES, LP
CONSULTING ENGINEERS
Texas Firm F-510

Temple
One South Main Street
Temple, Texas 76501
(254) 773-3731

RICK N. KASBERG, P.E.
R. DAVID PATRICK, P.E., CFM
THOMAS D. VALLE, P.E.
GINGER R. TOLBERT, P.E.
ALVIN R. "TRAE" SUTTON, III, P.E., CFM
JOHN A. SIMCIK, P.E., CFM

Georgetown
1008 South Main Street
Georgetown, Texas 78626
(512) 819-9478

October 10, 2019

Mr. Richard Wilson, P.E., CFM
3210 E. Avenue H
Building A
Temple, Texas 76501

Re: City of Temple
Industrial Park Site Grading

Dear Mr. Wilson:

At the request of the City of Temple and the City of Temple Reinvestment Zone #1 (TRZ), we are submitting this proposal for the above referenced project. This project will develop site grading within the Temple Reinvestment Zone Industrial Park to achieve a higher level of "shovel ready" sites.

The work to be performed by KPA under this contract consists of providing planning and engineering services for design of site grading within the Industrial Park. The specific sites that will be designed for site grading are Site 20, Site 21, Site 40, Site 64, and Enterprise Park. Exhibits are attached to this proposal for reference. The timeframe for design of the project is six (6) months from the Notice to Proceed.

The purpose of the scope of work as described in this proposal is to develop a higher level of "shovel ready" sites within the Temple Reinvestment Zone Industrial Park. The identified sites will be designed to a proposed grading to achieve a maximum site slope of ~3.5%. The project will utilize existing aerial data for vertical geometry information. The data will be gathered from the City of Temple aerial data and TNRIS (Texas Natural Resources Information System). The most accurate and definable data will be utilized. Any existing topographic survey data will be utilized to confirm surface elevations. All survey data will be incorporated into each site. All sites will develop an existing digital terrain model (DTM) for the existing surface and design a proposed surface model to achieve the desired site conditions. All sites will develop a final import and export quantity for material in cubic yards. This data will be analyzed with upcoming projects in the Temple Reinvestment Zone to incorporate the use of import or export material to create a unified benefit to the projects within the Temple Reinvestment Zone Industrial Park.

KPA will perform quality control and quality assurance (QA/QC) on all deliverables associated with the project.

The following sites will be designed for site grading:

1) SITE 20
   i) Location – At the Industrial Rail Park north of Loop 363 and west of Site 21
   ii) Size - ~26 Acres

2) SITE 21
   i) Location – At the Industrial Rail Park north of Loop 363 and west of the BNSF Railroad.
   ii) Size - ~27 Acres.

3) SITE 40
   i) Location – North of Moores Mill Road and west of IH-35.
   ii) Size - ~177 Acres.

4) SITE 64
   i) Location – Includes a portion of Site 64 south of Moores Mill Road and west of the BNSF Railroad.
   ii) Size - ~100 Acres.

5) ENTERPRISE PARK
   i) Location – North of Eberhardt Road, east of Industrial Boulevard, west of Enterprise Road and south of Lucius McCelvey.
   ii) Size - ~44 Acres.

The following scope of work for the Industrial Park Site Grading project can be completed for the lump sum price of $98,810. Below is a breakdown of project costs. We are pleased to submit this proposal and look forward to the benefit it will bring the City of Temple.

Site 20		$	6,910.00
Site 21		$	7,900.00
Site 40		$	46,400.00
Site 64		$	25,700.00
Enterprise Park		$	11,900.00
	TOTAL	**$**	**98,810.00**

Sincerely,

R. David Patrick, P.E., CFM

xc: File

ATTACHMENT "C"

Charges for Additional Services

City of Temple
Industrial Park Site Grading

POSITION	MULTIPLIER	SALARY COST/RATES
Principal	2.4	$ 75.00 – 95.00/hour
Project Manager	2.4	60.00 – 75.00/hour
Project Engineer	2.4	50.00 – 60.00/hour
Engineer-in-Training	2.4	40.00 – 50.00/hour
Engineering Technician	2.4	35.00 – 50.00/hour
CAD Technician	2.4	30.00 – 50.00/hour
Clerical	2.4	15.00 – 30.00/hour
Expenses	1.1	actual cost
Computer	1.0	15.00/hour
Survey Crew	1.1	125.00 – 160.00/hour
Registered Public Surveyor	1.0	130.00/hour
On-Site Representative	2.1	30.00 – 40.00/hour

City of Temple

NORTH

0 100 200

GRAPHIC SCALE IN FEET

Exist. Tracks

Exist. Tracks

WILSONART RD

HK DODGEN LOOP 363

Central Pointe

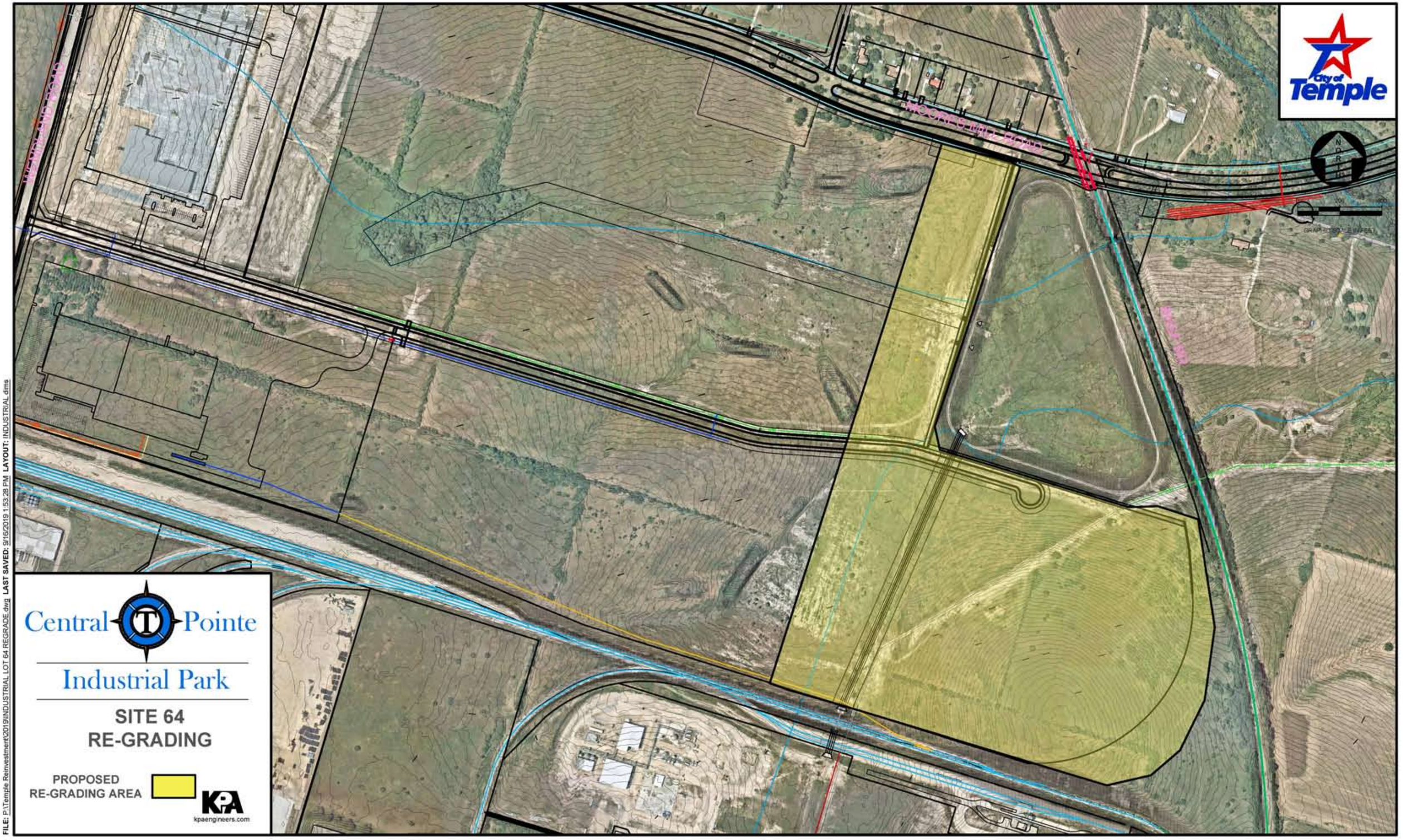
Industrial Park

SITES 20 AND 21
RE-GRADING

PROPOSED
RE-GRADING AREA

KPA
kpaengineers.com

FILE: \\kpa-gtfs-01\Projects\Temple Reinvestment\2019\INDUSTRIAL LOT 40 REGRADE.dwg LAST SAVED: 9/16/2019 5:10:59 PM LAYOUT: INDUSTRIAL dims



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City of Temple

NORTH

0 100 200

GRAPHIC SCALE IN FEET

INDUSTRIAL BLVD.

LUCIUS MCCELVEY

ENTERPRISE ROAD

EBERHARDT ROAD

Central Pointe

Industrial Park

ENTERPRISE PARK RE-GRADING

PROPOSED RE-GRADING AREA

KPA

kpaengineers.com

RESOLUTION NO. 2019-9870-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A PROFESSIONAL SERVICES AGREEMENT WITH KASBERG, PATRICK AND ASSOCIATES, LP OF TEMPLE, TEXAS IN THE AMOUNT OF $98,810, FOR INDUSTRIAL PARK SITE GRADING DESIGNS WITHIN THE TEMPLE REINVESTMENT ZONE INDUSTRIAL PARK; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, this project will develop grading plans for Site 20, Site 21, Site 40, Site 64, and Enterprise Park, covering approximately 374 acres, within the Industrial Park that will increase the number of "shovel ready" sites - a proposed surface model will be developed for each grading plan that will include final import and export material data which will then be analyzed with upcoming projects in the Temple Reinvestment Zone (TRZ) to incorporate the use of the import and export material to create a unified benefit to the upcoming TRZ projects near the Industrial Park;

Whereas, the Reinvestment Zone No. 1 Board recommended approval of this professional services agreement at their October 23, 2019 Board meeting;

Whereas, Staff recommends Council authorize a professional services agreement with Kasberg, Patrick and Associates, LP of Temple, Texas in the amount of $98,810, for Industrial Park Site Grading designs within the Temple Reinvestment Zone Industrial Park;

Whereas, funding is available in the Reinvestment Zone No. 1 Financing and Project Plan, Line 104, Account No. 795-9500-531-6772, Project No. 102166; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the City Manager, or her designee, after approval as to form by the Interim City Attorney, to execute a professional services agreement with Kasberg, Patrick and Associates, LP of Temple, Texas in the amount of $98,810, for Industrial Park Site Grading designs within the Temple Reinvestment Zone Industrial Park.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November,** 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:
Don Bond, P.E., CFM, Public Works Director
Richard Wilson, P.E., CFM, City Engineer

ITEM DESCRIPTION: Consider adopting a resolution authorizing a professional services agreement with Kasberg, Patrick & Associates, LP, for schematic and final designs for 24th Street from Central Avenue to Avenue C, in the amount of $147,900.

STAFF RECOMMENDATION: Adopt resolution as presented in Item Description.

ITEM SUMMARY: The schematic and final design for 24th Street from Central Avenue to Avenue C will follow the concepts of the Ferguson Park Neighborhood Plan created in 2019 to explore options for development of a revised corridor street section including elements such as landscaping, signage, monuments, and pedestrian and bike amenities. The schematic design will include roadway sections, alignments, utility improvements, and pedestrian enhancements. The schematic design phase will then lead to the final design, including documents ready for bidding and construction.

Consultant services recommended under this contract include the following tasks and costs:

Design Surveys	$ 7,200
Geotechnical Investigations	9,000
Archaeological & Environmental	6,800
24th St Schematic Civil Design	57,200
24th St Schematic Landscape Design	30,300
Electrical Design	14,600
Utility Design	18,600
Project Phasing & Cost Estimates	4,200
TOTAL	**$ 147,900**

Time required for design is nine months from the notice to proceed and receipt of all necessary rights-of-entry. Funding for right-of-way is budgeted in FY 2021 and funding for construction is budgeted in FY 2022.

On October 23, 2019, the Reinvestment Zone No. 1 Board approved recommending the professional services agreement for authorization by Council.

FISCAL IMPACT: Funding is available in the Reinvestment Zone No. 1 Financing and Project Plan, line 414, account 795-9500-531-6512, project 102168, for schematic and final designs for 24th Street from Central Avenue to Avenue C as shown below.

Project Budget	$	148,500
Encumbered/Committed to Date		-
KPA Professional Services Agreement		(147,900)
Remaining Project Funds	**$**	**600**

ATTACHMENTS:
Engineer's Proposal
Project Map
Resolution

KASBERG, PATRICK & ASSOCIATES, LP
CONSULTING ENGINEERS
Texas Firm F-510

Temple
One South Main Street
Temple, Texas 76501
(254) 773-3731

RICK N. KASBERG, P.E.
R. DAVID PATRICK, P.E., CFM
THOMAS D. VALLE, P.E.
GINGER R. TOLBERT, P.E.
ALVIN R. "TRAE" SUTTON, III, P.E., CFM
JOHN A. SIMCIK, P.E., CFM

Georgetown
1008 South Main Street
Georgetown, Texas 78626
(512) 819-9478

October 10, 2019

Mr. Richard Wilson, P.E., CFM
3210 E. Avenue H
Building A
Temple, Texas 76501

Re: City of Temple
24th Street (Central Avenue to Avenue C)
Schematic and Final Design

Dear Mr. Wilson:

At the request of the City of Temple and the City of Temple Reinvestment Zone #1 (TRZ), we are submitting this proposal for the above referenced project. This project will develop Schematic Design and Final Design for 24th Street from Central Avenue to Avenue C.

The work to be performed by KPA under this contract consists of providing planning and engineering services for design of 24th Street from Central Avenue to Avenue C. The project shall follow the concepts of the Ferguson Park Neighborhood Plan created in 2019. The timeframe for design of the project is nine (9) months from the Notice to Proceed and any required rights-of-entry.

The purpose of the scope of work as described in this proposal is to develop schematic design and final design for 24th Street from Central Avenue to Avenue C. The schematic designs will explore options for development of a revised corridor street section in conjunction with the Ferguson Park Neighborhood Plan. Elements for pedestrian, bike and vehicular mobility will be explored as well as beautification elements such as landscaping, signage, monuments, etc. The final product will be a design for the full extents of project and include design for amenities such as pedestrian and bike access, landscaping, signage, etc. The schematic design portion will develop schematic roadway sections, alignments, utility improvements, pedestrian enhancements, etc. developed and vetted during the Ferguson Park Neighborhood Plan. The schematic design phase will be the genesis for final design plans producing documents ready for bidding and construction.

KPA will perform all work and prepare all deliverables in accordance with the latest version of AASHTO regulations and City of Temple specifications, standards and manuals.

KPA will perform quality control and quality assurance (QA/QC) on all deliverables associated with the project.

The following services will be performed:

1) FIELD SURVEYING FOR 24th STREET FROM CENTRAL AVENUE TO AVENUE C
   a) Topographic Surveys for Engineering and Landscape Design.
      i) Data collection shall consist of surveying all elements of the project to complete the design requirements. Elements shall include roadways, curb and gutter, existing streetscape amenities, existing property corners, etc.

2) GEOTECHNICAL INVESTIGATIONS
   a) Roadway – Geotechnical field data will be taken for the length of the project every 500 feet to establish the subsurface conditions. Boring logs will be established for inclusion in the final report. Borings will be 5 to10 feet in depth. Traffic loading will be based on City of Temple criteria.
   b) A final report of the subsurface investigations and geotechnical design for the roadway will be completed for the project.
   c) Traffic Control will be required for these activities and will be supplied with this contract.

3) ENVIRONMENTAL INVESTIGATIONS
   a) Prepare Phase I Site Assessment for the length of the project in accordance with the procedures included in ASTM E 1527-05.
   b) A full report of all findings will be completed with a recommendation. If additional investigations are required which are not a part of this proposal, a contract amendment will be required.
   c) Traffic Control will be required for these activities and will be supplied with this contract.
   d) At this time there are not any expected submittal or review fees by state or federal agencies and therefore no fees of this kind are included in the proposal.

4) ARCHAEOLOGICAL INVESTIGATIONS
   a) Complete field investigations in accordance with regulatory requirements to clear the length of the project not currently cleared for archaeological review with the State of Texas.
   b) A full report of all findings will be completed with a recommendation. If additional investigations are required which are not a part of this proposal, a contract amendment will be required. The finding will be submitted to the Texas Historical Commission for review and clearance of the project.
   c) Traffic Control will be required for these activities and will be supplied with this contract.
   d) At this time there are not any expected submittal or review fees by state or federal agencies and therefore no fees of this kind are included in the proposal.

5) SCHEMATIC DESIGN 24th STREET FROM CENTRAL AVENUE TO AVENUE C
   a) Roadway Alignment – Roadway alignment will be developed for the schematic design utilizing a 35 mile per hour design speed. For schematic design, only horizontal alignment will be developed. The alignment will be in coordination with the concepts from the Ferguson Park Neighborhood Plan.

b) Property Owner Research – After the centerline alignment has been established, property owner research will be conducted along the route. Information will be derived from Bell County Property records via Bell CAD. All information from Bell Cad will be inventoried and illustrated for the project in a separate exhibit and in spreadsheet format.
c) Utilities – Based on the centerline alignment and the City of Temple Utility Master Plans, general utility alignments will be developed with sizes based on the current Master Plan recently completed. Utilities will be illustrated in plan view only and in a general location.
d) Roadway Section and Rights of Way – Roadway sections will be developed for the project as well as schematic rights-of-way requirements. The roadway section will be based off of soil information obtained in the Geotechnical Investigations and data from previous projects in the vicinity. Schematic right-of-way requirements will be established based on the roadway sections and general topography.
e) Drainage – Schematic drainage design will include a general assessment of drainage requirements and major drainage conveyance.
f) Connections – Connections will be established based on aerial data. Connections will be schematically designed for:
    (1) Central Avenue
    (2) Ferguson Park
    (3) Avenue A
    (4) Avenue B
    (5) Avenue C
g) Ferguson Park – Schematic design for connections and revision for traffic flow and parking will be developed. All elements of design requirements will be considered in the schematic design.
h) Schematic Plans – Based on the criteria listed above, Schematic Design Plans will be developed for the section for 24th Street from Central Avenue to Avenue C. Plans will be on 11x17 at 1":40' scale.
i) Develop schematic design for landscaping for the project.
j) Incorporate Ferguson Park Neighborhood Plan amenities into the schematic design.
k) Prepare exhibits illustrating schematic landscape design.
l) Prepare exhibits illustrating Ferguson Park Neighborhood Plan amenities in conjunction with proposed landscaping improvements.
m) OPCs – Based on the Schematic Design Plans, OPCs for the project will be created. Review of potential phasing will be concluded and the OPCs will be broken down into phases, as applicable.

6) <u>FINAL DESIGN FOR 24th STREET FROM CENTRAL AVENUE TO AVENUE C</u>
a) Roadway Design
    i) Develop final typical Sections for the project.
    ii) Finalize plan & profile drawings for the project.
    iii) Finalize intersection and connection layouts for the project.
    iv) Develop typical driveway designs and summarize driveway features including material type and geometric design. Driveways shall be replaced with HMAC or concrete, conforming to existing. Profiles for each driveway will be completed to illustrate the connection with proposed infrastructure and existing private access. All access facilities will meet the requirements of the City of Temple criteria.

v) Develop various details, as required, for pavement, curb, riprap, etc.

b) Drainage Design
   i) Develop final designs for all cross-drainage structures within the project limits. All cross-drainage structures shall be illustrated in plan profile sheets as well as detail sheets in the 100% plans. Grading to existing ground elevations shall be detailed as well as elevations for flow lines and headwalls. Hydraulic grade lines for the 4% and 1% annual chance storm (25-year and 100-year) events shall be illustrated in the profile views. Designs for conveyance to reduce erosion shall be completed and detailed in the plans.
   ii) Develop final designs for the storm water collection system for the curb-and gutter portion of the project. Flow lines shall be detailed as well as hydraulic grade lines for the 4% and 1% annual chance storm (25-year and 100-year) events. All drainage infrastructure shall be designed and presented in the drawings in plan and profile.
   iii) Design storm water conveyance to existing streams and channel ways. Design shall include conveyance for positive drainage and shall check current water surface elevations to proposed water surface elevations after project completion.
   iv) Determine potential utility conflicts based on final design for the project area. Existing utility locations shall be illustrated in the drainage plan profile sheets.
   v) Develop final drainage easement requirements for the project area. Layouts for drainage easements shall be prepared for review with the City. Details will be provided for the production of metes and bounds for acquisition.
   vi) Prepare Hydraulic Data Sheets as appropriate reflecting the results of the hydraulic analyses and designs for proposed cross road culverts and storm sewer systems.
   vii) Develop summary of final quantities for all drainage infrastructure and prepare OPCs based on current bid data.
   viii) Coordinate with the City of Temple to review the final drainage design, phasing for the project, utility conflicts and relocations. All comments and direction shall be incorporated into final designs.
   ix) Storm Water Pollution Prevention Plans (SW3P) - Develop SW3P to minimize potential impact to receiving waterways. The SW3P shall include quantities, type and locations of erosion control devices and any required permanent erosion control measures in accordance with the City of Temple Policy.

c) Utilities
   i) Prepare plan and profile for water line for the project as shown in the City of Temple Water Master Plan
   ii) Call out fittings, hydrants, valves, etc. on the plan profile sheets.
   iii) Prepare details for water utilities. Details shall be in accordance with current City of Temple standards.
   iv) Develop summary of final quantities for all utility infrastructure and prepare OPCs based on current bid data.
   v) Develop final plan and profile for the gravity fed wastewater to connect to the existing City of Temple system.
   vi) Prepare details for all wastewater improvements.

d) Signage & Markings
   i) Signing and Markings Layouts - Prepare signing and pavement markings layouts for the full roadway sections. The layouts shall include signing and striping, roadway layout, centerline with stationing, existing signs to remain, to be removed or to be relocated,

proposed signs and proposed permanent markings including pavement markings, object markers and delineation. Details shall be in accordance with TMUTCD,

ii) Sign Details - Prepare details for signs included in the Project.
iii) Intersection Layouts - Prepare detailed signing and striping layouts at intersections

e) Landscape Design
   i) Compete final design of landscape amenities for the project.
   ii) Complete final design for street and intersection enhancements for the project.
   iii) Develop material and color palates for the project.
   iv) Complete irrigation development for the project.
f) Miscellaneous Design
   i) Traffic Control Plans TCP, Detours and Sequence of Construction - A detailed TCP shall be developed including sequence of construction and the existing and proposed traffic control devices (including signs, barricades, pavement markings, etc.). The TCP shall be based on phasing construction to allow traffic flow. The TCP shall also include the design of temporary drainage, if required, throughout the construction process to ensure positive flow during construction. TCP shall be based on the TMUTCD and the latest Standards. Plan sheets shall include:
   ii) Traffic control layout for each phase of construction
   iii) Advance Warning Signs
   iv) TCP Phasing Overview Layout
   v) Any necessary miscellaneous drawings relevant to traffic control
   vi) Illumination and Electric
   vii) Develop final conduit layout for future installation of street lighting.
   viii) Coordinate with Oncor for final layout for the project.
   ix) OPCs - Prepare detailed construction OPCs.
   x) General Notes and Specifications – Prepare project specific general notes including standard notes for City of Temple.
   xi) Bid Proposal- Prepare the project bid proposal that shall include the following:
      (1) General Notes
      (2) Standard and Special Specifications
      (3) Bid Form
      (4) Miscellaneous Drawings - Prepare the following miscellaneous drawings:
      (5) Title Sheet / Index of Sheets
      (6) Project Layout

The following scope of work for the 24th Street from Central Avenue to Avenue C Schematic and Final Design project can be completed for the lump sum price of $147,900. Below is a breakdown of project costs. We are pleased to submit this proposal and look forward to the benefit it will bring the City of Temple.

Design Surveys		$	7,200.00
Geotechnical Investigations		$	9,000.00
Archaeological & Environmental Investigations		$	6,800.00
Avenue C Civil Design		$	57,200.00
Avenue C Schematic Landscape Design		$	30,300.00
Eletrical Design		$	14,600.00
Utility Design		$	18,600.00
Project Phasing and Cost Estimates		$	4,200.00
	TOTAL	**$**	**147,900.00**

Sincerely,

R. David Patrick, P.E., CFM

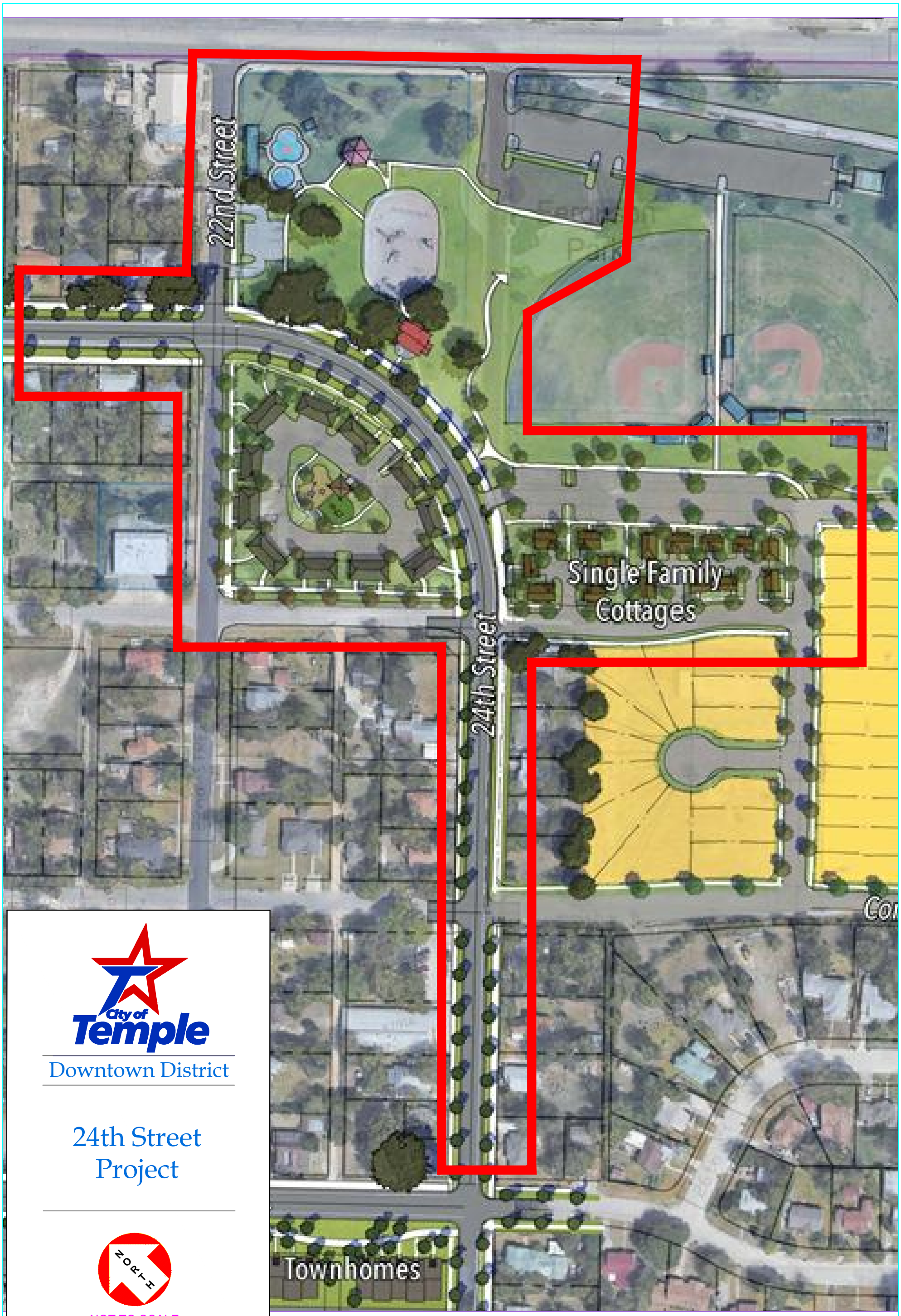
xc: File

ATTACHMENT "C"

Charges for Additional Services

City of Temple
24th Street from Central Avenue to Avenue C
Schematic Design and Final Design

POSITION	MULTIPLIER	SALARY COST/RATES
Principal	2.4	$ 75.00 – 95.00/hour
Project Manager	2.4	60.00 – 75.00/hour
Project Engineer	2.4	50.00 – 60.00/hour
Engineer-in-Training	2.4	40.00 – 50.00/hour
Engineering Technician	2.4	35.00 – 50.00/hour
CAD Technician	2.4	30.00 – 50.00/hour
Clerical	2.4	15.00 – 30.00/hour
Expenses	1.1	actual cost
Computer	1.0	15.00/hour
Survey Crew	1.1	125.00 – 160.00/hour
Registered Public Surveyor	1.0	130.00/hour
On-Site Representative	2.1	30.00 – 40.00/hour



City of Temple

Downtown District

24th Street Project

NORTH

NOT TO SCALE

KASBERG, PATRICK & ASSOCIATES, LP
CONSULTING ENGINEERS
TEMPLE, TEXAS 76501
Firm Registration No. F-510

RESOLUTION NO. 2019-9871-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A PROFESSIONAL SERVICES AGREEMENT WITH KASBERG, PATRICK AND ASSOCIATES, LP OF TEMPLE, TEXAS IN THE AMOUNT OF $147,900, FOR SCHEMATIC AND FINAL DESIGNS FOR 24TH STREET, FROM CENTRAL AVENUE TO AVENUE C; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, the schematic and final design for 24th Street from Central Avenue to Avenue C will follow the concepts of the Ferguson Park Neighborhood Plan created in 2019 to explore options for development of a revised corridor street section including elements such as landscaping, signage, monuments, and pedestrian and bike amenities - the schematic design will include roadway sections, alignments, utility improvements, and pedestrian enhancements which will then lead to the final design, including documents ready for bidding and construction;

Whereas, the Reinvestment Zone No. 1 Board recommended approval of this professional services agreement at their October 23, 2019 Board meeting and Staff recommends Council authorize a professional services agreement with Kasberg, Patrick and Associates, LP of Temple, Texas in the amount of $147,900, for schematic and final designs for 24th Street from Central Avenue to Avenue C;

Whereas, funding is available in the Reinvestment Zone No. 1 Financing and Project Plan, Line 414, Account No. 795-9500-531-6512, Project No. 102168; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the City Manager, or her designee, after approval as to form by the Interim City Attorney, to execute a professional services agreement with Kasberg, Patrick and Associates, LP of Temple, Texas in the amount of $147,900, for schematic and final designs for 24th Street from Central Avenue to Avenue C.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November,** 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Kelly Trietsch Atkinson, Senior Neighborhood Planner

ITEM DESCRIPTION: Consider adopting a resolution authorizing a professional services agreement with Kasberg, Patrick & Associates, LP, for services required to develop the Utility Schematic Design and Concept Plan for the Crestview District Neighborhood Plan, in an amount not to exceed $92,600.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: Work to be performed under this contract consists of planning, landscape architecture and engineering services to develop the Utility Schematic Design, Concept Plan, and final Neighborhood Plan document for the Crestview District Neighborhood. The planning studies will consist of identifying neighborhood characteristics through community meetings and events, data collection, and multi-modal connectivity. The final product will be a complete neighborhood plan document for the Crestview District Neighborhood to include the following:

I. Introduction
II. Community Vision and Guiding Principles
III. Neighborhood Context: Challenges and Opportunities
IV. Goals, Strategies, Actions
V. Projects (Utilities, connectivity, parks, landscape design, etc.)
VI. Implementation Timeline

Consultant services recommended under this contract include the following tasks and costs:

Water Schematic Design	$ 37,800
Wastewater Schematic Design	28,700
Neighborhood and Community Leader Meetings	6,800
Concept Design	19,300
TOTAL	**$ 92,600**

Timeframe for design is six months from the Notice to Proceed.

FISCAL IMPACT: Funding for the contract with Kasberg, Patrick and Associates, LP, for professional services required to develop the Utility Schematic Design and Concept Plan for the Crestview District Neighborhood Plan in an amount not to exceed $92,600 is available in project 102190 as follows:

	365-3400-531-6974	561-5200-535-6974	Total
Project Budget	$ 26,100	$ 66,500	$ 92,600
Encumbered/Committed to Date	-	-	-
KPA Professional Services Agreement	(26,100)	(66,500)	(92,600)
Remaining Project Funds	**$ -**	**$ -**	**$ -**

ATTACHMENT:
Engineer's Proposal
Resolution

KASBERG, PATRICK & ASSOCIATES, LP
CONSULTING ENGINEERS
Texas Firm F-510

Temple
One South Main Street
Temple, Texas 76501
(254) 773-3731

RICK N. KASBERG, P.E.
R. DAVID PATRICK, P.E., CFM
THOMAS D. VALLE, P.E.
GINGER R. TOLBERT, P.E.
ALVIN R. "TRAE" SUTTON, III, P.E., CFM
JOHN A. SIMCIK, P.E., CFM

Georgetown
1008 South Main Street
Georgetown, Texas 78626
(512) 819-9478

October 16, 2019

Ms. Kelly T. Atkinson
Senior Neighborhood Planner
City of Temple
2 North Main Street, Suite 102
Temple, Texas 76501

Re: City of Temple
Crestview Neighborhood District
Utility Schematic Design and Concept Plan

Dear Ms. Atkinson:

At the request of the City of Temple, we are submitting this proposal for the above referenced project. This project will develop water and wastewater schematic design for the Crestview Neighborhood District as well as a full concept design.

The work to be performed by KPA and Covey Landscape Architects under this contract consists of providing planning and engineering services for design of the project described above to include water and wastewater schematic design and conceptual design for the Crestview Neighborhood District. This project will encompass the area from Avenue H to Avenue N and from the BNSF Railroad to Doshier Farm Wastewater Treatment Plant. An exhibit of the area is included for your use. The timeframe for design of the project is six (6) months from the Notice to Proceed, pending scheduling of the Neighborhood and Community Leader Meetings.

The purpose of the scope of work as described in this proposal is to develop schematic design for the water and wastewater utilities for the Crestview Neighborhood District to improve the infrastructure for water delivery to the area and review wastewater infrastructure. These efforts will be in conjunction with the recently completed Water and Wastewater Master Plans. The Concept Design will explore options for improvements to the Crestview Neighborhood to enhance the District. Elements for park and greenspace features, pedestrian, bike and vehicular mobility will be explored as well as beautification elements such as intersection enhancements, landscaping, signage, monuments, etc. The final product will be a conceptual design for the full extents of project and include Concept and Schematic Design for amenities such as pedestrian and bike access, landscaping, signage, connectivity etc.

KPA will perform all work and prepare all deliverables in accordance with the latest version of AASHTO regulations and City of Temple specifications, standards and manuals.

KPA and Covey Landscape Architects will perform quality control and quality assurance (QA/QC) on all deliverables associated with the project.

The following services will be performed:

1) SCHEMATIC UTILITY DESIGN

a) Water Infrastructure
   i) Data for existing water infrastructure will be collected for the Crestview Neighborhood District. All data will be checked for accuracy with the information available. Location of the water infrastructure will be developed by mapping.
   ii) Working in conjunction with the Water Master Plan, a review of the existing infrastructure will be conducted. Items such as fire flow, looped infrastructure, aged infrastructure, etc. will be identified.
   iii) Water modeling of the Crestview Neighborhood District will be conducted to identify areas of needed improvements.
   iv) Schematic design for proposed improvements will identify infrastructure to enhance the water delivery to the Crestview Neighborhood District.
   v) Based on the water schematic design, phasing for the proposed improvements will be completed. Water exhibit(s) will be prepared to illustrate the proposed improvements and phasing.
   vi) Based on the phasing concepts, opinions of probable cost will be developed for all phases to enhance the water infrastructure for the Crestview Neighborhood District.

b) Wastewater Infrastructure
   i) Data for existing wastewater infrastructure will be collected for the Crestview Neighborhood District. All data will be checked for accuracy with the information available. Location of the wastewater infrastructure will be developed by mapping.
   ii) Working in conjunction with the Wastewater Master Plan, a review of the existing infrastructure will be conducted. Items such as capacity, connectivity of infrastructure, aged infrastructure, etc. will be identified.
   iii) Wastewater modeling of the Crestview Neighborhood will be conducted to identify areas of needed improvements.
   iv) Schematic design for proposed improvements will identify infrastructure to enhance the wastewater capacity of the Crestview Neighborhood District.
   v) Based on the wastewater schematic design, phasing for the proposed improvements will be completed. Wastewater exhibit(s) will be prepared to illustrate the proposed improvements and phasing.
   vi) Based on the phasing concepts, opinions of probable cost will be developed for all phases to enhance the wastewater infrastructure for the Crestview Neighborhood District

2) PLANNING AND CONCEPT DESIGN STUDIES FOR THE CRESTVIEW NEIGHBORHOOD DISTRICT

a) Neighborhood Meeting – Attend and gather community input data from the Neighborhood Meeting. Supplies and accessories for the meeting will be supplied.
b) Community Leader Meetings – Organize and attend community leader meetings to gather input and insight to the assets, needs and opportunities within the District.
c) Data Collection – Obtain and review any existing data from the City and other entities that may have record documents and are allowed to release the information. The facilities within the defined project area and immediate surrounding area will be reviewed and documented.
d) Develop initial concept designs for the Crestview Neighborhood District. Existing infrastructure and amenities will be analyzed.
e) Identify streetscape concepts for the project limits.
f) Develop full Concept Design Plan for the Crestview Neighborhood District within the project limits to include:
    i) Streetscape amenities that will complement and enhance the full Concept Design.
    ii) Pedestrian Facilities to enhance the mobility for the District.
    iii) Develop lighting concepts for pedestrian safety and beautification.
    iv) Develop potential way finding elements.
    v) Develop park and greenspace options and amenities.
g) Explore options for enhancements within the design corridor. Enhancements will include:
    i) Potential Improvements to Draughon Park.
    ii) Connectivity / Conjunction with Meridith-Dunbar Elementary School Facility.
    iii) Concepts for City of Temple owned property.
    iv) Concepts for Knob Creek as an asset.
    v) Concepts for enhancement and sustainability of neighborhoods.
    vi) Analyze potential Strategic Investment Zones.
    vii) Concepts for pedestrian mobility.
    viii)Concepts for building standards and streetscapes.
h) A model of the final design amenities will be developed.
i) Cost estimates and phasing options for implementing the Concept Design will be developed.

The following scope of work for the Crestview Neighborhood District Utility Schematic Design and Concept Plan Project can be completed for the lump sum price of $92,600. Below is a breakdown of project costs. We are pleased to submit this proposal and look forward to the benefit it will bring the City of Temple.

Water Schematic Design		$	37,800.00
Wastewater Schematic Design		$	28,700.00
Neighborhood and Community Leader Meetings		$	6,800.00
Concept Design		$	19,300.00
	TOTAL	**$**	**92,600.00**

Sincerely,

R. David Patrick, P.E., CFM
KPA Engineers

Travis Crow, PLA
Covey Landscape Architects

xc: File

ATTACHMENT "C"

Charges for Additional Services

City of Temple
Crestview Neighborhood District
Utility Schematic Design and Concept Plan

POSITION	MULTIPLIER	SALARY COST/RATES
Principal	2.4	$ 75.00 – 95.00/hour
Project Manager	2.4	60.00 – 75.00/hour
Project Engineer	2.4	50.00 – 60.00/hour
Engineer-in-Training	2.4	40.00 – 50.00/hour
Engineering Technician	2.4	35.00 – 50.00/hour
CAD Technician	2.4	30.00 – 50.00/hour
Clerical	2.4	15.00 – 30.00/hour
Expenses	1.1	actual cost
Computer	1.0	15.00/hour
Survey Crew	1.1	125.00 – 160.00/hour
Registered Public Surveyor	1.0	130.00/hour
On-Site Representative	2.1	30.00 – 40.00/hour

RESOLUTION NO. 2019-9872-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A PROFESSIONAL SERVICES AGREEMENT WITH KASBERG, PATRICK AND ASSOCIATES, LP OF TEMPLE, TEXAS IN AN AMOUNT NOT TO EXCEED $92,600, TO DEVELOP THE UTILITY SCHEMATIC DESIGN AND CONCEPT PLAN FOR THE CRESTVIEW DISTRICT NEIGHBORHOOD PLAN; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, work to be performed under this contract consists of planning, landscape architecture and engineering services to develop the Utility Schematic Design, Concept Plan, and final Neighborhood Plan document for the Crestview District Neighborhood - the planning studies will consist of identifying neighborhood characteristics through community meetings and events, data collection, and multi-modal connectivity;

Whereas, the final product will be a complete neighborhood plan document for the Crestview District Neighborhood;

Whereas, Staff recommends Council authorize a professional services agreement with Kasberg, Patrick and Associates, LP of Temple, Texas in an amount not to exceed $92,600, to develop the Utility Schematic Design and Concept Plan for the Crestview District Neighborhood Plan;

Whereas, funding for this professional services agreement is available in Account No. 365-3400-531-6974 and Account No. 561-5200-535-6974, Project No. 102190; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the City Manager, or her designee, after approval as to form by the Interim City Attorney, to execute a professional services agreement with Kasberg, Patrick and Associates, LP of Temple, Texas in an amount not to exceed $92,600, to develop the Utility Schematic Design and Concept Plan for the Crestview District Neighborhood Plan.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November,** 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Kelly Trietsch Atkinson, Senior Neighborhood Planner

ITEM DESCRIPTION: Consider adopting a resolution authorizing a professional services agreement with Kasberg, Patrick & Associates, LP, for services required to develop the Utility Schematic Design and Concept Plan for the Historic District Neighborhood Plan, in an amount not to exceed $74,200.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: Work to be performed under this contract consists of planning, landscape architecture and engineering services to develop the Utility Schematic Design, Concept Plan, and final Neighborhood Plan document for the Historic District Neighborhood. The planning studies will consist of identifying neighborhood characteristics through community meetings and events, data collection, and multi-modal connectivity. The final product will be a complete neighborhood plan document for the Historic District Neighborhood to include the following:

I. Introduction
II. Community Vision and Guiding Principles
III. Neighborhood Context: Challenges and Opportunities
IV. Goals, Strategies, Actions
V. Projects (Utilities, connectivity, parks, landscape design, etc.)
VI. Implementation Timeline

Consultant services recommended under this contract include the following tasks and costs:

Water Schematic Design	$ 29,100
Wastewater Schematic Design	22,000
Neighborhood and Community Leader Meetings	8,200
Concept Design	14,900
TOTAL	**$ 74,200**

Timeframe for design is six months from the Notice to Proceed.

FISCAL IMPACT: Funding for the contract with Kasberg, Patrick and Associates, LP, for professional services required to develop the Utility Schematic Design and Concept Plan for the Historic District Neighborhood Plan in an amount not to exceed $74,200 is available in project 102191 as follows:

	365-3400-531-6974	561-5200-535-6974	Total
Project Budget	$ 23,100	$ 51,100	$ 74,200
Encumbered/Committed to Date	-	-	-
KPA Professional Services Agreement	(23,100)	(51,100)	(74,200)
Remaining Project Funds	**$ -**	**$ -**	**$ -**

ATTACHMENT:
Engineer's Proposal
Resolution

KASBERG, PATRICK & ASSOCIATES, LP
CONSULTING ENGINEERS
Texas Firm F-510

Temple
One South Main Street
Temple, Texas 76501
(254) 773-3731

RICK N. KASBERG, P.E.
R. DAVID PATRICK, P.E., CFM
THOMAS D. VALLE, P.E.
GINGER R. TOLBERT, P.E.
ALVIN R. "TRAE" SUTTON, III, P.E., CFM
JOHN A. SIMCIK, P.E., CFM

Georgetown
1008 South Main Street
Georgetown, Texas 78626
(512) 819-9478

October 25, 2019

Ms. Kelly T. Atkinson
Senior Neighborhood Planner
City of Temple
2 North Main Street, Suite 102
Temple, Texas 76501

Re: City of Temple
Historic Neighborhood District
Utility Schematic Design and Concept Design / Final Plan Document

Dear Ms. Atkinson:

At the request of the City of Temple, we are submitting this proposal for the above referenced project. This project will develop water and wastewater schematic design for the Historic Neighborhood District as well as a full concept design with a final plan document.

The work to be performed by KPA and Covey Landscape Architects under this contract consists of providing planning and engineering services for design of the project described above to include water and wastewater schematic design and conceptual design for the Historic Neighborhood District. This project will encompass the area from West French Street to West Nugent Avenue and from the BNSF Railroad to 3rd Street. An exhibit of the area is included for your use. The timeframe for design of the project is six (6) months from the Notice to Proceed, pending scheduling of the Neighborhood and Community Leader Meetings.

The purpose of the scope of work as described in this proposal is to develop schematic design for the water and wastewater utilities for the Historic Neighborhood District to improve the infrastructure for water delivery to the area and review wastewater infrastructure. These efforts will be in conjunction with the recently completed Water and Wastewater Master Plans. The Concept Design will explore options for improvements to the Historic Neighborhood to enhance the District. Elements for park and greenspace features, pedestrian, bike and vehicular mobility will be explored as well as beautification elements such as intersection enhancements, landscaping, signage, monuments, etc. The final product will be a conceptual design for the full extents of project and include Concept and Schematic Design for amenities such as pedestrian and bike access, landscaping, signage, connectivity etc. with a final plan document. Through this process, the City will develop a long range plan for the Historic Neighborhood District to include City CIP Projects, private investment, economic development. Etc.

A strong emphasis will be placed on improving the quality of life for the Historic Neighborhood District.

KPA will perform all work and prepare all deliverables in accordance with the latest version of City of Temple regulations, specifications, standards and manuals.
KPA and Covey Landscape Architects will perform quality control and quality assurance (QA/QC) on all deliverables associated with the project.

The following services will be performed:

1) SCHEMATIC UTILITY DESIGN

a) Water Infrastructure
   i) Data for existing water infrastructure will be collected for the Historic Neighborhood District. All data will be checked for accuracy with the information available. Location of the water infrastructure will be developed by mapping.
   ii) Working in conjunction with the Water Master Plan, a review of the existing infrastructure will be conducted. Items such as fire flow, looped infrastructure, aged infrastructure, etc. will be identified.
   iii) Water modeling of the Historic Neighborhood District will be conducted to identify areas of needed improvements.
   iv) Schematic design for proposed improvements will identify infrastructure to enhance the water delivery to the Historic Neighborhood District.
   v) Based on the water schematic design, phasing for the proposed improvements will be completed. Utility exhibit(s) will be prepared to illustrate the proposed improvements and phasing.
   vi) Based on the phasing concepts, opinions of probable cost will be developed for all phases to enhance the water infrastructure for the Historic Neighborhood District.
b) Wastewater Infrastructure
   i) Data for existing wastewater infrastructure will be collected for the Historic Neighborhood District. All data will be checked for accuracy with the information available. Location of the wastewater infrastructure will be developed by mapping.
   ii) Working in conjunction with the Wastewater Master Plan, a review of the existing infrastructure will be conducted. Items such as capacity, connectivity of infrastructure, aged infrastructure, etc. will be identified.
   iii) Wastewater modeling of the Historic Neighborhood will be conducted to identify areas of needed improvements.
   iv) Schematic design for proposed improvements will identify infrastructure to enhance the wastewater capacity of the Historic Neighborhood District.
   v) Based on the wastewater schematic design, phasing for the proposed improvements will be completed. Utility exhibit(s) will be prepared to illustrate the proposed improvements and phasing.
   vi) Based on the phasing concepts, opinions of probable cost will be developed for all phases to enhance the wastewater infrastructure for the Historic Neighborhood District.

2) PLANNING AND CONCEPT DESIGN STUDIES / FINAL PLAN FOR THE HISTORIC NEIGHBORHOOD DISTRICT

a) Neighborhood Meeting – Attend and gather community input data from the Neighborhood Meeting. Supplies and accessories for the meeting will be supplied.
b) Community Leader Meetings – Organize and attend community leader meetings to gather input and insight to the assets, needs and opportunities within the District.
c) Data Collection – Obtain and review any existing data from the City and other entities that may have record documents and are allowed to release the information. The facilities within the defined project area and immediate surrounding area will be reviewed and documented.
d) Develop the Historic Neighborhood District Overview to include: Name, Location Boundaries, Context (socioeconomic, physical characteristics, etc.).
e) Develop desktop research to evaluate zoning, existing land use, characteristics such as average lot size and type of structures, residential, commercial, connectivity, trends in recent re-zonings, etc.
f) Implement field study to gather qualitative data from surveys, photography, etc. to acquaint the design team with the planning and document observations.
g) In conjunction with City Staff, obtain or develop project investments and previous plans and/or reports from the planning area, and all CIPs (recent investments, designed-unfunded, funded-incomplete, or planned with no identified funding source).
h) Stakeholder Mapping - Understand neighborhood 'power dynamics' (facilitators & challengers)
i) Develop initial concept designs for the Historic Neighborhood District. Existing infrastructure and amenities will be analyzed.
j) Identify streetscape concepts for the project limits.
k) Develop full Concept Design Plan for the Historic Neighborhood District within the project limits to include:
    i) Streetscape amenities that will complement and enhance the full Concept Design.
    ii) Pedestrian Facilities to enhance the mobility for the District.
    iii) Develop lighting concepts for pedestrian safety and beautification.
    iv) Develop potential way finding elements.
    v) Develop park and greenspace options and amenities.
l) Explore options for enhancements within the design corridor. Enhancements will include:
    i) Potential Improvements to Optimist Park.
    ii) Connectivity / Conjunction with Downtown Temple including Santa Fe Plaza.
    iii) Concepts for City of Temple owned property, if any.
    iv) Concepts for connection and monumentation to 3rd Street.
    v) Concepts for enhancement and sustainability of the District.
    vi) Concepts for pedestrian mobility.
    vii) Concepts for building standards and streetscapes.
m) A model of the final design amenities will be developed.
n) Cost estimates and phasing options for implementing the Concept Design will be developed.

The following scope of work for the Historic Utility Schematic Design and Concept Design / Final Plan Document can be completed for the lump sum price of $74,200. Below is a breakdown of project costs. We are pleased to submit this proposal and look forward to the benefit it will bring the City of Temple.

Water Schematic Design		$	29,100.00
Wastewater Schematic Design		$	22,000.00
Neighborhood and Community Leader Meetings		$	8,200.00
Concept Design		$	14,900.00
	TOTAL	**$**	**74,200.00**

Sincerely,

R. David Patrick, P.E., CFM
KPA Engineers

xc: File

ATTACHMENT "C"

Charges for Additional Services

City of Temple
Historic Neighborhood District
Utility Schematic Design and Concept Design Final Plan Document

POSITION	MULTIPLIER	SALARY COST/RATES
Principal	2.4	$ 75.00 – 95.00/hour
Project Manager	2.4	60.00 – 75.00/hour
Project Engineer/Landscape Architect	2.4	50.00 – 60.00/hour
Engineer-in-Training	2.4	40.00 – 50.00/hour
Engineering Technician	2.4	35.00 – 50.00/hour
CAD Technician	2.4	30.00 – 50.00/hour
Clerical	2.4	15.00 – 30.00/hour
Expenses	1.1	actual cost
Computer	1.0	15.00/hour
Survey Crew	1.1	125.00 – 160.00/hour
Registered Public Surveyor	1.0	130.00/hour
On-Site Representative	2.1	30.00 – 40.00/hour

RESOLUTION NO. 2019-9873-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A PROFESSIONAL SERVICES AGREEMENT WITH KASBERG, PATRICK AND ASSOCIATES, LP OF TEMPLE, TEXAS IN AN AMOUNT NOT TO EXCEED $74,200, TO DEVELOP THE UTILITY SCHEMATIC DESIGN AND CONCEPT PLAN FOR THE HISTORIC DISTRICT NEIGHBORHOOD PLAN; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, work to be performed under this contract consists of planning, landscape architecture and engineering services to develop the Utility Schematic Design, Concept Plan, and final Neighborhood Plan document for the Historic District Neighborhood - the planning studies will consist of identifying neighborhood characteristics through community meetings and events, data collection, and multi-modal connectivity;

Whereas, the final product will be a complete neighborhood plan document for the Historic District Neighborhood;

Whereas, Staff recommends Council authorize a professional services agreement with Kasberg, Patrick and Associates, LP of Temple, Texas in an amount not to exceed $74,200, to develop the Utility Schematic Design and Concept Plan for the Historic District Neighborhood Plan;

Whereas, funding for this professional services agreement is available in Account No. 365-3400-531-6974 and Account No. 561-5200-535-6974, Project No. 102191; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the City Manager, or her designee, after approval as to form by the Interim City Attorney, to execute a professional services agreement with Kasberg, Patrick and Associates, LP of Temple, Texas in an amount not to exceed $74,200, to develop the Utility Schematic Design and Concept Plan for the Historic District Neighborhood Plan.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November,** 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Erin Smith, Assistant City Manager

ITEM DESCRIPTION: Consider adopting a resolution authorizing a professional services agreement with Kasberg, Patrick & Associates, LP, for services required to develop a concept design for the North Art District, generally north of Bellaire to Lower Troy Road to Killen Lane, in an amount not to exceed $142,850.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: Work to be performed under this contract consists of planning, landscape architecture and engineering services for the design of the North Art District, located generally north of Bellaire to Lower Troy Road to Killen Lane. The design will include streetscape design, lighting, pedestrian access, potential building and façade improvements, modeling, gateway enhancements, marketing renderings and estimates.

The following deliverables will be created:

- Data Collection
- Initial Concept Design
- Mayborn Center Concept Design
- CAC Concept Design
- Connectivity Concept Design
- Parking Concept Design
- Pedestrian and Bike Facilities
- Utility Concept Design
- Hotel / Conference Concept Design
- Light Concept and Planning
- Project Phasing and Cost Estimates
- Rendering and Deliverables

The Reinvestment Zone No. 1 Board recommended approval of this contract at their October 23, 2019 Board meeting.

Timeframe for design is 10 months from the Notice to Proceed.

FISCAL IMPACT: Funding is available in the Reinvestment Zone No. 1 Financing and Project Plan, line 606, account 795-9500-531-6310, project 102169, to develop a concept design for the North Art District, generally north of Bellaire to Lower Troy Road to Killen Lane as shown below.

Project Budget	$	150,000
Encumbered/Committed to Date		-
KPA Professional Services Agreement		(142,850)
Remaining Project Funds	**$**	**7,150**

ATTACHMENT:
Proposal
Exhibit
Resolution

KASBERG, PATRICK & ASSOCIATES, LP
CONSULTING ENGINEERS
Texas Firm F-510

Temple
One South Main Street
Temple, Texas 76501
(254) 773-3731

RICK N. KASBERG, P.E.
R. DAVID PATRICK, P.E., CFM
THOMAS D. VALLE, P.E.
GINGER R. TOLBERT, P.E.
ALVIN R. "TRAE" SUTTON, III, P.E., CFM
JOHN A. SIMCIK, P.E., CFM

Georgetown
1008 South Main Street
Georgetown, Texas 78626
(512) 819-9478

October 10, 2019

Mrs. Erin Smith, AICP
Assistant City Manager
City of Temple
2 N Main Street
Temple, Texas 76501

Re: City of Temple
North Art District Concept Design

Dear Mrs. Smith:

At the request of the City of Temple Reinvestment Zone #1 (TRZ), we are submitting this proposal for the above referenced project. This project will develop Concept Design for the North Art District. The North Art District is generally north of Bellaire to Lower Troy Road to Killen Lane. The final product will be full Concept Designs of the project, including marketing renderings and cost estimates.

The work to be performed by KPA and Covey Landscape Architects under this contract consists of providing planning, landscape architecture and engineering services for design of the project described above to include streetscape design, lighting, pedestrian access, potential building and façade improvements, modeling, gateway enhancements, marketing renderings and estimates. The timeframe for design of the project is ten (10) months from the Notice to Proceed.

KPA and Covey Landscape Architects will perform all work and prepare all deliverables in accordance with the latest version of the City of Temple specifications, standards and manuals.

KPA will perform quality control and quality assurance (QA/QC) on all deliverables associated with the project.

The following services will be performed:

I. PLANNING AND CONCEPT DESIGN STUDIES

A. Data Collection – Obtain and review any existing data from the City and other entities that may have record documents and are allowed to release the information. The facilities within the project scope of work will be reviewed and documented.

B. Review and identify solutions for developing a cohesive design of the project limits to integrate the Frank W. Mayborn Civic and Convention Center, Cultural Activities Center, Interstate 35 connections and gateways, the Bellaire Neighborhood District, Gateway to 31st Street, etc.

C. Review and develop options for developing a cohesive synergy in the corridor.
D. Explore opportunities for potential hotel/conference center infrastructure.
E. Develop options for pedestrian and bike mobility through the corridor limits.
F. Coordinate with Oncor, AT&T, Spectrum, Grande Communications and the City of Temple to explore utility options.
G. Coordinate with TxDOT and City Staff for improvements for mobility within the corridor.
H. Meet with City Staff, the Temple Reinvestment Zone Project Committee and stakeholders to review and discuss options generated in the investigation phase.
I. Concept Design
    1. Based on the input received from the investigation phase and meetings with City Staff, the Temple Reinvestment Zone Project Committee and stakeholders, develop a Concept Plan for a cohesive design of the project limits to integrate the all elements of the North Art District.
    2. Explore water and wastewater needs within the corridor.
    3. Develop options for required parking to support the future growth in the corridor.
    4. Based on the input received from the investigation phase and meetings with City Staff, the Temple Reinvestment Zone Project Committee and stakeholders, develop a Concept Plan for a cohesive lighting system will be developed.
    5. Based on the input received from the investigation phase and meetings with City Staff, the Temple Reinvestment Zone Project Committee and stakeholders, develop a Concept Plan for pedestrian and bike mobility through the corridor limits.
    6. Develop conceptual designs for buildings within the corridor.
    7. Based on the input received from the investigation phase and meetings with City Staff, the Temple Reinvestment Zone Project Committee and stakeholders, develop a Concept Plan for amenity design that will enhance the corridor.

J. Renderings of the elements will be created to illustrate and promote the vision for the corridor. A maximum of six (6) renderings will be completed.
K. Develop potential project phasing for implementation of the project.
L. Develop Cost Estimates for all phases of the project.

II. DELIVERABLES

A. Deliverables will include:
- Model of the corridor to include all concepts as described in the Scope of Work.
- Marketing Renderings with views of the project and amenities.
- Proposed project phasing.
- Project cost estimates by phase.
- Electronic copies of all deliverables will be provided.

The following scope of work for the North Art District Concept Design can be completed for the lump sum price of $142,850. Below is a breakdown of project costs. We are pleased to submit this proposal and look forward to the benefit it will bring the City of Temple.

Data Collection	$	4,300.00
Initial Concept Design	$	10,600.00
Mayborn Center Concept Design	$	17,400.00
CAC Concept Design	$	14,900.00
Connectivity Concept Design	$	7,400.00
Parking Concept Design	$	10,400.00
Pedestrian and Bike Facilities	$	14,250.00
Utility Concept Design	$	6,300.00
Hotel / Confernce Concept Design	$	25,100.00
Light Concept and Planning	$	4,900.00
Project Phasing and Cost Estimates	$	8,900.00
Renderings and Deliverables	$	18,400.00
TOTAL	**$**	**142,850.00**

Sincerely,

R. David Patrick, P.E., CFM

xc: File

ATTACHMENT "C"

Charges for Additional Services

City of Temple
North Art District Concept Design

POSITION	MULTIPLIER	SALARY COST/RATES
Principal	2.4	$ 75.00 – 95.00/hour
Project Manager	2.4	60.00 – 75.00/hour
Project Engineer/ Landscape Architect	2.4	50.00 – 60.00/hour
Engineer-in-Training	2.4	40.00 – 50.00/hour
Engineering Technician	2.4	35.00 – 50.00/hour
CAD Technician	2.4	30.00 – 50.00/hour
Clerical	2.4	15.00 – 30.00/hour
Expenses	1.1	actual cost
Computer	1.0	15.00/hour
Survey Crew	1.1	125.00 – 160.00/hour
Registered Public Surveyor	1.0	130.00/hour
On-Site Representative	2.1	30.00 – 40.00/hour

P:\Temple ReInvestment\2017\17-107 2030 Master Plan\CAD\Exhibits\MAYBOURN TO TC_2019 II.dwg

RESOLUTION NO. 2019-9874-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A PROFESSIONAL SERVICES AGREEMENT WITH KASBERG, PATRICK AND ASSOCIATES, LP OF TEMPLE, TEXAS IN AN AMOUNT NOT TO EXCEED $142,850, TO DEVELOP A CONCEPT DESIGN FOR THE NORTH ART DISTRICT, GENERALLY NORTH OF BELLAIRE TO LOWER TROY ROAD TO KILLEN LANE; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, work to be performed under this contract consists of planning, landscape architecture and engineering services for the design of the North Art District, located generally north of Bellaire to Lower Troy Road to Killen Lane - the design will include streetscape design, lighting, pedestrian access, potential building and façade improvements, modeling, gateway enhancements, marketing renderings and estimates;

Whereas, the Reinvestment Zone No. 1 Board recommended approval of this professional services agreement at its October 23, 2019 Board meeting;

Whereas, Staff recommends Council authorize a professional services agreement with Kasberg, Patrick and Associates, LP of Temple, Texas in an amount not to exceed $142,850, to develop a concept design for the North Art District, generally north of Bellaire to Lower Troy Road to Killen Lane;

Whereas, funding is available in the Reinvestment Zone No. 1 Financing and Project Plan, Line 606, Account No. 795-9500-531-6310, Project No. 102169; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the City Manager, or her designee, after approval as to form by the Interim City Attorney, to execute a professional services agreement with Kasberg, Patrick and Associates, LP of Temple, Texas, in an amount not to exceed $142,850, to develop a concept design for the North Art District, generally north of Bellaire to Lower Troy Road to Killen Lane.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November,** 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:
Don Bond, P.E., CFM, Public Works Director
Richard Wilson, P.E., CFM, City Engineer

ITEM DESCRIPTION: Consider Adopting a resolution authorizing a professional services agreement with Kasberg, Patrick, & Associates, LP, for services required to design the Blackland Road Extension and Utility Improvements and the Knob Creek Wastewater Improvements, in the amount of $678,485.

STAFF RECOMMENDATION: Adopt resolution as presented in the item description.

ITEM SUMMARY: On October 17, 2019 Council authorized a Developer Participation Agreement with Short Term Lending GP, Inc. to construct a sanitary sewer line extension and wastewater collection system improvements as part of the development of the Hillside Village subdivision, the Prairie Ridge Subdivision, and the future Temple Independent School District school site. The City agreed to contract directly with a consultant for the design. The Design services include the extension of Blackland Road from Old Highway 95 to Highway 95 including improvements to the connecting portion of Old Highway 95, extending a 12-Inch water main along the new roadway, and wastewater improvements in the Knob Creek Basin including a new trunk main, a lift station, and force main. The design also includes the extension of the existing Knob Creek trunk main and the abandonment of the Action World lift station. See the attached project map and engineer's proposal for more details.

Consultant services recommended under this professional services agreement that includes final design, easement document generation, and bidding services are broken down as follows:

Blackland Road Extension (Roadway & Drainage)	$340,400
Blackland Road Waterline Improvements (Utility)	24,000
Blackland Road Wastewater Improvements (Utility)	191,715
Knob Creek Trunk Improvements (Utility)	122,370
Total	**$678,485**

Time required for design is 270 calendar days from the notice to proceed and receipt of all necessary rights-of-entry. The engineer's preliminary opinion of probable cost for construction of the Blackland Road Extension and Waterline Improvements is $4,700,000, $1,482,290 for the Blackland Road Wastewater Improvements, and $635,000 for the Knob Creek Trunk Improvements.

FISCAL IMPACT: A budget adjustment is being presented to Council for approval to appropriate funding for the contract with Kasberg, Patrick, & Associates, LP, for professional services required to design the Blackland Road Extension and Utility Improvements and the Knob Creek Wastewater Improvements in the amount of $678,485. Funding will be available as follows:

	Blackland Road Extension 102024		Knob Creek Trunk Sewer 102188	Blackland Road Wastewater 102189	Total
	365-3400-531-6998	561-5200-535-6998	561-5400-535-6631	561-5400-535-6998	
Project Budget	$ 470,000	$ 65,000	$ -	$ -	$ 535,000
Budget Adjustment	-	-	132,000	230,000	362,000
Encumbered/Committed to Date	-	-	-	-	-
KPA Professional Services Agreement	(340,400)	(24,000)	(122,370)	(191,715)	(678,485)
Remaining Project Funds	**$ 129,600**	**$ 41,000**	**$ 9,630**	**$ 38,285**	**$ 218,515**

The FY 2020 business plan includes funding for construction of the Blackland Road Extension and Water Line in the amount of $4,300,000 in FY 2021 with Certificate of Obligation Bonds and $400,000 in FY 2021 with Utility Revenue Bonds for a total of $4,700,000.

Additionally, the FY 2020 business plan includes funding for construction of the Blackland Road Wastewater Improvements in the amount of $1,482,290 and the Knob Creek Trunk Improvements in the amount of $635,000 in FY 2021 with Utility Revenue Bonds.

ATTACHMENTS:
Engineer's Proposal
Project Map
Budget Adjustment
Resolution

KASBERG, PATRICK & ASSOCIATES, LP
CONSULTING ENGINEERS
Texas Firm F-510

Temple
One South Main Street
Temple, Texas 76501
(254) 773-3731

RICK N. KASBERG, P.E.
R. DAVID PATRICK, P.E., CFM
THOMAS D. VALLE, P.E.
GINGER R. TOLBERT, P.E.
ALVIN R. "TRAE" SUTTON, III, P.E., CFM
JOHN A. SIMCIK, P.E., CFM

Georgetown
1008 South Main Street
Georgetown, Texas 78626
(512) 819-9478

October 30, 2019

Mr. Richard Wilson, P.E.
3210 E. Avenue H
Building A
Temple, Texas 76501

Re: City of Temple, Texas
Blackland Road Extension Improvements

Dear Mr. Wilson:

This letter proposal is for final design of roadway, drainage, water and wastewater improvements as well as bidding, rights-of-way and easement documents. Also included with this proposal is an associated Letter of Map Revision (LOMR) with the Federal Emergency Management Agency (FEMA) for the Knob Creek Drainage System for the Blackland Road Improvements Project as well as design of a portion of the Knob Creek Trunk Sewer and abandonment of the Action World Lift Station. The Blackland Road Improvements Project includes approximately 4,600 linear feet of roadway improvements with associated drainage, culvert crossing of the Knob Creek Drainage Basin, 3,100 linear feet of 12" waterline, 5,000 linear feet of 8" to 10" gravity sewer, 5,800 linear feet of force main and a lift station. The Knob Creek Trunk Sewer portion includes approximately 5,400 linear feet of 8" gravity sewer and abandonment of the Action World Lift Station. These improvements are shown on the attached Exhibit A.

Our preliminary opinion of probable construction costs are $4,700,000 for the Blackland Road Extension Improvements, $1,400,000 for the Blackland Road Wastewater Improvements and $635,000 for Knob Creek Trunk Sewer and Action World LS abandonment. This proposal includes final design, rights-of-way and easement documents, geotechnical bores for the roadway improvements and the lift station and environmental, archeological and Waters of US assessments.

In order for us to provide the services required for completion of the final design, rights-of-way and easement documents, the following not-to-exceed lump sum amounts will be applicable:

Blackland Road Extension Improvements		
A. Design Surveys	$	10,530.00
B. Final Design Roadway		206,700.00
C. Final Design Drainage		62,100.00
D. Final Design - Waterline		24,000.00
E. Knob Creek Letter of Map Revision		19,500.00
F. Geotechnical Bores and Design for Roadway		16,800.00
G. Environmental/Archeological/Waters of US		10,530.00
H. Rights-of-Way / Easement Documents		6,240.00
I. Bidding		8,000.00
Sub-Total	**$**	**364,400.00**
Blackland Road Wastewater Improvements		
A. Design Surveys	$	19,270.00
B. Final Design - Gravity Wastewater and Force Main		86,400.00
C. Final Design – Lift Station		27,000.00
D. Electrical Design – Lift Station		16,500.00
E. Geotechnical Bores for Lift Station		6,380.00
F. Environmental/Archeological/Waters of US		19,255.00
G. Rights-of-Way / Easement Documents		11,410.00
H. Bidding		5,500.00
Sub-Total	**$**	**191,715.00**
Knob Creek Trunk Sewer and Action World LS Abandonment		
A. Design Surveys	$	15,275.00
B. Final Design		53,900.00
C. Environmental/Archeological/Waters of US		35,420.00
D. Easement Documents		10,275.00
E. Bidding (if needed for separate bid)		7,500.00
Sub-Total	**$**	**122,370.00**
TOTAL	**$**	**678,485.00**

Exhibit B provides a more detailed breakdown and description of the tasks included in our Scope of Services.

KPA will begin work once a written notice to proceed is received in our office and right of entry has been obtained by the City. The Contract Documents and Specifications will be completed within a 270 calendar day period. We are available to address any questions or comments that you may have about this proposal.

Sincerely,

Ginger R. Tolbert

Ginger R. Tolbert, P.E.
GRT/

Exhibit B – Scope of Services

City of Temple
Blackland Road Extension Improvements
Kasberg, Patrick & Associates, LP
October 30, 2019

I. BASIC SERVICES

The basic services for the preparation of plans and specifications for the Project will include:

A. Design Surveys

1. Field Surveys for design purposes including horizontal and vertical control and any other field surveying services during final design.

B. Final Design

1. Prepare construction drawings and specifications showing the character and extent of the project. The construction plans will be drawn on 11-inch by 17-inch sheets (half-scale). The 11x17 prints will be used for bidding purposes and for field copies. The 11x17 prints will also be used for record drawings. This proposal includes ten (10) sets of 11x17 prints for bidding purposes;
2. Prepare plan and profile drawings of roadway improvements;
3. Prepare roadway typical sections;
4. Prepare roadway cross sections;
5. Prepare plan and profile drawings of drainage improvements;
6. Prepare plan and profile drawings of waterline improvements;
7. Prepare plan and profile drawings of gravity wastewater and force mains;
8. Prepare signage and striping plan sheets;
9. Prepare traffic control and phasing sheets;
10. Prepare erosion control sheets;
11. Prepare plans and specifications for the lift station, including coordination with Oncor, instrumentation and SCADA, path study and provisions for generator or portable;
12. Prepare and submit documents to TCEQ for Approval;
13. Basic documents related to construction contracts will be provided by the City. These will include contract agreement forms, general conditions and supplementary conditions, invitations to bid, instructions to bidders, insurance and bonding requirements and other contract-related documents. KPA will provide the technical specifications and bid schedule for the project documents;
14. Progress meetings with City Staff for status reports and plan reviews;
15. Prepare a revised opinion of probable total project costs based on the final drawings and specifications.

C. Bidding (2 bid packages, if required)

1. Provide final opinion of probable construction cost, sealed by Project Engineer/Manager;
2. Assist in soliciting bidders;
3. Monitor status/number of bidders on plan holders list;
4. Answer potential bidders' questions;
5. Conduct pre-bid conference;
6. Prepare addenda as required;
7. Attend bid opening;
8. Tabulate bids and recommend contract award.

II. SPECIAL SERVICES

A. Letter of Map Revision

1. KPA will develop modeling for the tributary of Knob Creek to develop a Letter of Map Revision for the Zone A Flood Hazzard mapping within and around the roadway project area.
2. Submittals to FEMA will be developed with comments addressed and model analysis comments inserted.

B. Environmental/Archeological Services/Waters of US

1. KPA will utilize Terracon Consulting Engineers & Scientists to perform the Phase I Environmental Investigation including a report to explain the findings and recommendations for further action, if any;
2. Terracon will also provide Archeological Services. Archival research shall be performed in the electronic and mapping files of the Texas Historical Commission (THC) Atlas Sites database, the Texas Archeological Research Laboratory (TARL) and/or any other relevant archives for information on previous cultural resource investigations conducted and previously recorded sites and historic properties recorded in the vicinity of the project's Area of Potential Effect (APE). The results of this research shall be presented in a final report.
3. Terracon will assess on-site water bodies, drainage ways and wetlands to determine jurisdiction from the USACE.
4. Terracon will perform investigations for endangered species.
5. All elements for Archeological and Environmental investigations will clear the extension of Blackland Road Extension as well as the required utility improvements.

C. Rights-of-Way and Easement Documents

1. KPA will utilize Turley Associates to perform surveys and prepare rights-of-way and easement documents for each parcel.
2. Rights-of-way and easement Documents will include field note descriptions and sketches for each property;
3. Our services do not include obtaining right of entry and acquisition of easements from impacted property owners, therefore, the cost for these services are not included in our proposal.

D. Geotechnical Investigation

1. KPA will utilize Langerman Foster Engineering Company (LFE) to perform the investigation to include two bores at the lift station site;
2. KPA will utilize Langerman Foster Engineering Company (LFE) to perform the investigation to include bores approximately every 500 feet for the roadway improvements with an associated design for the paving section.

BLACKLAND ROAD

KASBERG, PATRICK & ASSOCIATES, LP
CONSULTING ENGINEERS
TEMPLE, TEXAS 76501
Firm Registration No. F-510

City of Temple

NORTH

0 250 500

HORIZONTAL SCALE IN FEET

LEGEND

- FEMA 100YR FLOOD PLAIN
- FUTURE WW
- PROPOSED WW
- PROPOSED WL
- PROPOSED WW
- PROPOSED FM

ACTION WORLD LIFT STATION (To Be Abandoned)

OLD HWY 95

Cypress St.

Dogwood Ln.

Sycamore St.

Barnhardt Road

Blackland Road

PROPOSED MASTER PLAN KNOB CREEK TRUNK

PROPOSED 10" WASTEWATER LINE

PROPOSED 8" FORCE MAIN LINE

PROPOSED 12" WATER LINE

PROPOSED BLACKLAND RD. EXTENSION

FUTURE MASTER PLAN KNOB CREEK TRUNK

PROPOSED CANYON CREEK LIFT STATION

36 TEXAS

95 TEXAS

SOUTH HIGHWAY 95

FILE: P:\Temple\2019\Blackland to I-14\CAD\BASE\Working-OPT2 (6-10-19).dwg LAST SAVED: 10/29/2019 2:19:40 PM LAYOUT: OVERALL EXHIBIT (22X34) (2)

FY 2020

BUDGET ADJUSTMENT FORM

Use this form to make adjustments to your budget. All adjustments must balance within a Department.

Adjustments should be rounded to the nearest $1.

ACCOUNT NUMBER	PROJECT #	ACCOUNT DESCRIPTION	+ INCREASE		- DECREASE	
561-5400-535-66-31	**102188**	Knob Crk Truck & Action World LS Abndm	132,000			
561-5400-535-69-98	**102189**	Canyon Ck / Blackland WW Ext (Hillside Vllgs. CSA)	230,000			
561-5400-535-69-41	**101081**	Leon River Interceptor, Phase II			33,000	
561-5100-535-69-59	**101615**	WTP - Raw Water Intake Recoating			250,000	
561-5200-535-68-13	**101997**	North Outer Loop Water Line			79,000	
TOTAL.....			$ 362,000		$ 362,000	

EXPLANATION OF ADJUSTMENT REQUEST- Include justification for increases AND reason why funds in decreased account are available.

Reallocate available funding from existing bond projects to fund the design of the Knob Creek Trunk and Action World Lift Station abandonment as well as the wastewater extension related to the Canyon Creek / Blackland WW Extension.

DOES THIS REQUEST REQUIRE COUNCIL APPROVAL? [X] Yes [ ] No

DATE OF COUNCIL MEETING 11/07/19

WITH AGENDA ITEM? [X] Yes [ ] No

Department Head/Division Director	Date	[ ] Approved [ ] Disapproved
Finance	Date	[ ] Approved [ ] Disapproved
City Manager	Date	[ ] Approved [ ] Disapproved

Revised form - 10/27/06

RESOLUTION NO. 2019-9875-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A PROFESSIONAL SERVICES AGREEMENT WITH KASBERG, PATRICK AND ASSOCIATES, LP OF TEMPLE, TEXAS IN THE AMOUNT OF $678,485, TO DESIGN THE BLACKLAND ROAD EXTENSION AND UTILITY IMPROVEMENTS AND THE KNOB CREEK WASTEWATER IMPROVEMENTS; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, on October 17, 2019 Council authorized a Developer Participation Agreement with Short Term Lending GP, Inc. to construct a sanitary sewer line extension and wastewater collection system improvements as part of the development of the Hillside Village subdivision, the Prairie Ridge Subdivision, and the future Temple Independent School District school site - the City agreed to contract directly with a consultant for the design;

Whereas, the design services include the extension of Blackland Road from Old Highway 95 to Highway 95, including improvements to the connecting portion of Old Highway 95, extending a 12-inch water main along the new roadway, and wastewater improvements in the Knob Creek Basin including a new trunk main, a lift station, and force main - the design also includes the extension of the existing Knob Creek trunk main and the abandonment of the Action World lift station;

Whereas, Staff recommends Council authorize a professional services agreement with Kasberg, Patrick and Associates, LP of Temple, Texas in the amount of $678,485, to design the Blackland Road Extension and Utility Improvements and the Knob Creek Wastewater Improvements- such professional services will include final design, easement document generation, and bidding services;

Whereas, a budget adjustment is being presented to Council for approval to appropriate funding for this professional services agreement in Account No. 365-3400-531-6998, Account No. 561-5200-535-6998, Project No. 102024, Account No. 561-5400-535-6631, Project No. 102188, and Account No. 561-5400-535-6998, Project No. 102189;

Whereas, the fiscal year 2020 business plan includes funding for construction of the Blackland Road Extension and Water Line in the amount of $4,300,000 in fiscal year 2021 with Certificate of Obligation Bonds and $400,000 in fiscal year 2021 with Utility Revenue Bonds for a total of $4,700,000;

Whereas, the fiscal year 2020 business plan includes funding for construction of the Blackland Road Wastewater Improvements in the amount of $1,482,290 and the Knob Creek Trunk Improvements in the amount of $635,000 in fiscal year 2021 with Utility Revenue Bonds; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the City Manager, or her designee, after approval as to form by the City Attorney, to execute a professional services agreement with Kasberg, Patrick and Associates, LP of Temple, Texas, in the amount of $678,485, to design the Blackland Road Extension and Utility Improvements and the Knob Creek Wastewater Improvements.

Part 3: The City Council authorizes an amendment to the fiscal year 2020 budget, substantially in the form of the copy attached hereto as Exhibit 'A.'

Part 4: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November,** 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Belinda Mattke, Director of Purchasing & Facility Services

ITEM DESCRIPTION: Consider adopting a resolution authorizing a multiyear services agreement for propane delivery services with Star Tex Propane, Inc. of Waco at a per gallon markup of 45¢ over market and, in an estimated annual amount of $45,000 based on recent market rates.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: Authorization of this services agreement with Star Tex Propane, Inc. will provide for the delivery of propane to eight propane tanks, three City-owned tanks and five leased tanks. The City currently utilizes propane at four locations: Central Service Center (four leased 1,000-gallon tanks used for facility heating and filling propane-fueled vehicles; estimated annual usage is 15,000 gallons); Fire Station No. 7 (one leased 1,000-gallon tank used for heating and cooking; estimated annual usage of 1,500 gallons); Fire Station No. 8/Fire Training Center (two City-owned 1,000-gallon tanks used for heating and cooking; estimated annual usage of 6,000 gallons); and Fire Training Drill Field (one City-owned 2,000-gallon tank used for fire props; estimated annual usage of 1,500 gallons).

On October 15, 2019, the City received three proposals for propane delivery services: Star Tex Propane, Inc of Waco; Amerigas L.P. of Clifton; and Ferrellgas of Temple. The proposed pricing received from the three companies is included on the attached tabulation of proposals received.

A proposal evaluation committee was formed to review the three proposals. The committee is unanimously recommending a services agreement with the City's incumbent vendor, Star Tex Propane, Inc. (Star Tex). Star Tex is offering the lowest price based on them not proposing any additional fees other than the markup on the propane commodity cost. In addition, City Staff has been very pleased with the service and responsiveness of Star Tex for the past nine years.

The Texas Railroad Commission regulates the propane industry, and per their regulations, propane companies are prohibited from delivering propane into a tank owned by another company. Accordingly, and since the city currently leases five of its eight tanks, the proposed services agreement is for a 57-month term commencing on January 1, 2020 and ending on September 30, 2024, with the option for three additional two-year renewal periods if agreeable to the City and Star Tex Propane.

FISCAL IMPACT: Propane is purchased on an as-needed basis. Departments have budgeted for propane in the adopted FY 2020 Budget. The estimated annual expenditure for propane based on historical expenditures and recent market values is $45,000.

ATTACHMENTS:
Tabulation of Proposals Received
Resolution

Tabulation of Proposals Received
on October 15, 2019 @ 2:00 pm
Propane Delivery Services
RFP No. 13-09-20

	Offerors		
	Star Tex Propane Inc. Waco, TX	**Amerigas L.P. Clifton, TX**	**Ferrellgas Temple, TX**
Description			
Annual Lease Rate per 1,000-gallon Tank (Including Delivery and Installation)	$0.00 / Each	$0.00 / Each	$1.00 / Each
Annual Lease Rate per 500-gallon Tank (Including Delivery and Installation)	$0.00 / Each	$0.00 / Each	$1.00 / Each
Purchase Price for a 1,000 Gallon Tank (Including Delivery and Installation)	$3,500.00 / Each	$0.00 / Each	$2,615.55 / Each
Purchase Price for a 500 Gallon Tank (Including Delivery and Installation)	$1,900.00 / Each	$0.00 / Each	$1,527.75 / Each
Mark-Up per Gallon for Propane Delivered to **Leased** Tank Basis for Mark-Up:	$0.45 / Gallon	$0.65 / Gallon	$0.45 / Gallon
Assuming fuel was delivered to a **Leased** tank during the week of September 30, 2019 - October 4, 2019, the Cost per Gallon charged	$1.01 / Gallon (based on Mt. Belvieu)	$1.28 / Gallon	$1.05 / Gallon (based on Basing Point/Logical Daily Cost)
Mark-Up per Gallon for Propane Delivered to **City-Owned** Tank Basis for Mark-up:	$0.45 / Gallon	$0.45 / Gallon	$0.45 / Gallon
Assuming fuel was delived to a **City-Owned** tank during the week of September 30, 2019 - October 4, 2019, the Average Cost per Gallon charged.	$1.01 / Gallon (based on Mt. Belvieu)	$1.08 / Gallon	$1.05 / Gallon (based on Basing Point/Logical Daily Cost)
Please list any fees that will be added to the fuel invoice (e.g. hazmat, fuel recovery, delivery). The City will not pay any additional fees unless specifcally listed. Please list fee type and rate.	No Additional Fees	Fuel Recovery Fee - $120.00 / Labor Hour	Haz-Mat Fee - $12.99 Fuel Recovery Fee - $6.99
Exceptions	No	No	No
Credit Check Authorization	Yes	Yes	Yes-Not Signed

Recommended for Council Award

RESOLUTION NO. 2019-9876-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A MULTI-YEAR SERVICES AGREEMENT WITH STAR TEX PROPANE, INC. OF WACO, TEXAS FOR PROPANE DELIVERY SERVICES AT A MARKUP OF 45¢ OVER MARKET, AND IN AN ESTIMATED ANNUAL AMOUNT OF $45,000, BASED ON RECENT MARKET STUDIES; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, this services agreement with Star Tex Propane, Inc. (Star Tex) will provide for the delivery of propane to eight propane tanks, three City-owned tanks and five leased tanks - the City currently utilizes propane at four locations: Central Service Center (four leased 1,000-gallon tanks used for facility heating and filling propane-fueled vehicles; estimated annual usage is 15,000 gallons); Fire Station No. 7 (one leased 1,000-gallon tank used for heating and cooking; estimated annual usage of 1,500 gallons); Fire Station No. 8/Fire Training Center (two City-owned 1,000-gallon tanks used for heating and cooking; estimated annual usage of 6,000 gallons); and Fire Training Drill Field (one City-owned 2,000-gallon tank used for fire props; estimated annual usage of 1,500 gallons);

Whereas, on October 15, 2019, the City received three proposals for propane delivery services with Star Tex Propane, Inc. (Star Tex) offering the lowest price based on not proposing any additional fees other than the markup on the propane commodity cost;

Whereas, the Texas Railroad Commission regulates the propane industry, and per their regulations, propane companies are prohibited from delivering propane into a tank owned by another company - since the City currently leases 5 of its 8 tanks, the proposed services agreement is for a 57-month term commencing on January 1, 2020 and ending on September 30, 2024, with the option for three additional two-year renewal periods if agreeable to the City and Star Tex Propane;

Whereas, Staff has been pleased with the services provided by Star Tex Propane for the past nine years, believes the pricing offered is still a good value to the City, and recommends Council authorize a multi-year services agreement;

Whereas, each department that uses propane has budgeted for the purchase of propane in their individual departmental accounts; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the City Manager, or his designee, after approval as to form by the City Attorney, to execute a multi-year services agreement with Star Tex Propane, Inc. of Waco, Texas, in an estimated annual amount of $45,000, for propane delivery services.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

_____
TIMOTHY A. DAVIS, Mayor

ATTEST:

_____
Lacy Borgeson
City Secretary

ATTEST:

_____
Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT. /DIVISION SUBMISSION & REVIEW:
Brynn Myers, City Manager
Kayla Landeros, Interim City Attorney

ITEM DESCRIPTION: Consider adopting a resolution authorizing an agreement with the Bill Messer, PC for legislative lobbying services.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: The City has engaged the services of Bill Messer, PC (formerly known as the Texas Lobby Group) for the past several years for state legislative consulting services. Bill Messer, PC monitors and engages in negotiations on behalf of the City related to legislative items of interest to the City as well as assists in the communication of the City's position on legislative items to members of the Legislature and other Texas agencies.

The term of the agreement is one year and will begin retroactively on October 1, 2019 and continue through September 30, 2020. Fees associated with this contract shall not exceed $66,000

FISCAL IMPACT: The fee with Bill Messer, PC for lobbying services is $5,500 per month. Funding in the amount of $66,000 is appropriated in account 110-1000-511-2616 to fund the agreement with Bill Messer, PC through September 30, 2020.

ATTACHMENTS:
Resolution

RESOLUTION NO. 2019-9877-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING AN AGREEMENT WITH BILL MESSER, PC, FOR LEGISLATIVE LOBBYING SERVICES; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, the City has engaged the services of Bill Messer, PC (formerly known as the Texas Lobby Group) for the past several years for state legislative consulting services;

Whereas, Bill Messer, PC monitors and engages in negotiations on behalf of the City related to legislative items of interest to the City, as well as assists in the communication of the City's position on legislative items to members of the Legislature and other Texas agencies;

Whereas, the term of the Agreement is for one year beginning retroactively on October 1, 2019 and continuing through September 30, 2020 - fees associated with this Agreement shall not exceed $66,000;

Whereas, funding is appropriated for this Agreement in Account No. 110-1000-511-2616; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the City Manager, or her designee, after approval as to form by the Interim City Attorney, to execute an Agreement with Bill Messer, PC, for legislative lobbying services, in an amount not to exceed $66,000.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:
Don Bond, P.E., CFM, Public Works Director
Richard Wilson, P.E., CFM, City Engineer

ITEM DESCRIPTION: Consider adopting a resolution authorizing a construction contract with Texas Pride Utilities, LLC, of Houston, for services to replace a sewer line between 2nd and 4th Streets from Central Avenue to Avenue C and replace a water main from Central Avenue to Avenue A, in the amount of $469,163.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: Development interest in downtown Temple necessitates robust utility infrastructure to support new renovations, vertical construction, and associated flatwork improvements. The water and wastewater lines in the alley between 2nd and 4th Street are aged, deteriorated and require replacement to support proposed downtown improvements. See attached project map for reference. In December 2014, Council authorized professional services with Clark & Fuller, PLLC (C&F) to design, bid, and administer construction phase services for these improvements.

Six bids were received on October 2nd with bids ranging from $469,163 to $955,220 (see bid tabulation). The engineer's opinion of probable cost was $453,818.25. C&F has evaluated the bids and recommends awarding construction to Texas Pride Utilities in their attached recommendation letter. The proposed timeline for construction is 165 calendar days from the Notice to Proceed.

FISCAL IMPACT: Funding for the construction contract with Texas Pride Utilities, LLC for services to replace a sewer line between 2nd and 4th Streets from Central Avenue to Avenue C and replace a water main from Central Avenue to Avenue A in the amount of $469,163 is available in account 520-5900-535-6521, project 101186, as follows:

Project Budget	$	584,795
Encumbered/Committed to Date		(85,001)
Construction Award - Texas Pride Utilities, LLC		(469,163)
Remaining Project Funds Available	**$**	**30,631**

ATTACHMENTS:
Recommendation Letter
Bid Tabulation
Project Map
Resolution

CLARK&FULLER
CIVIL ENGINEERING • DESIGN • PLANNING

215 North Main Street
Temple, Texas 76501
(254) 899-0899
Fax (254) 899-0901
www.clark-fuller.com
Firm Registration No: F-10384

October 15, 2019

City of Temple
Sharon Carlos, P.E.
3210 E. Ave H, Bldg A
Temple, Texas 76501

Re: City of Temple Wastewater and Water Main Replacement 2nd and 4th from Avenue C to Central Avenue

Dear Ms. Carlos,

On October 2nd , we received six (6) bids for the City of Temple Wastewater and Water Main Replacement 2nd and 4th from Avenue C to Central Avenue Project. We have reviewed each of the bids for accuracy and completeness. Texas Pride Utilities, LLC submitted a Bid totaling $ 469,163.00 making them the apparent low bidder. *Please see the enclosed Bid Tabulation Sheet and Bid Schedule Breakout for detailed information.*

The engineer's final opinion of probable cost for this project is $ 453,818.25.

Our firm has no previous experience working with Texas Pride Utilities, LLC. Therefore, we contacted numerous entities on the list of references provided by Texas Pride Utilities, LLC. and everyone had positive comments. Several stated that Texas Pride Utilities, LLC. responded in a timely fashion to construction problems and worked with project personnel to complete the project on time. When asked if Texas Pride Utilities, LLC. were the low bidder on their next project all would recommend them.

We are recommending that you award the contract to Texas Pride Utilities, LLC. We believe, through documentation and personal verbal contact with the contractor's list of provided references, that Texas Pride Utilities, LLC is qualified and is capable of providing the new utility improvements as required in this project.

Please advise us as to which contractor you select.

Sincerely,

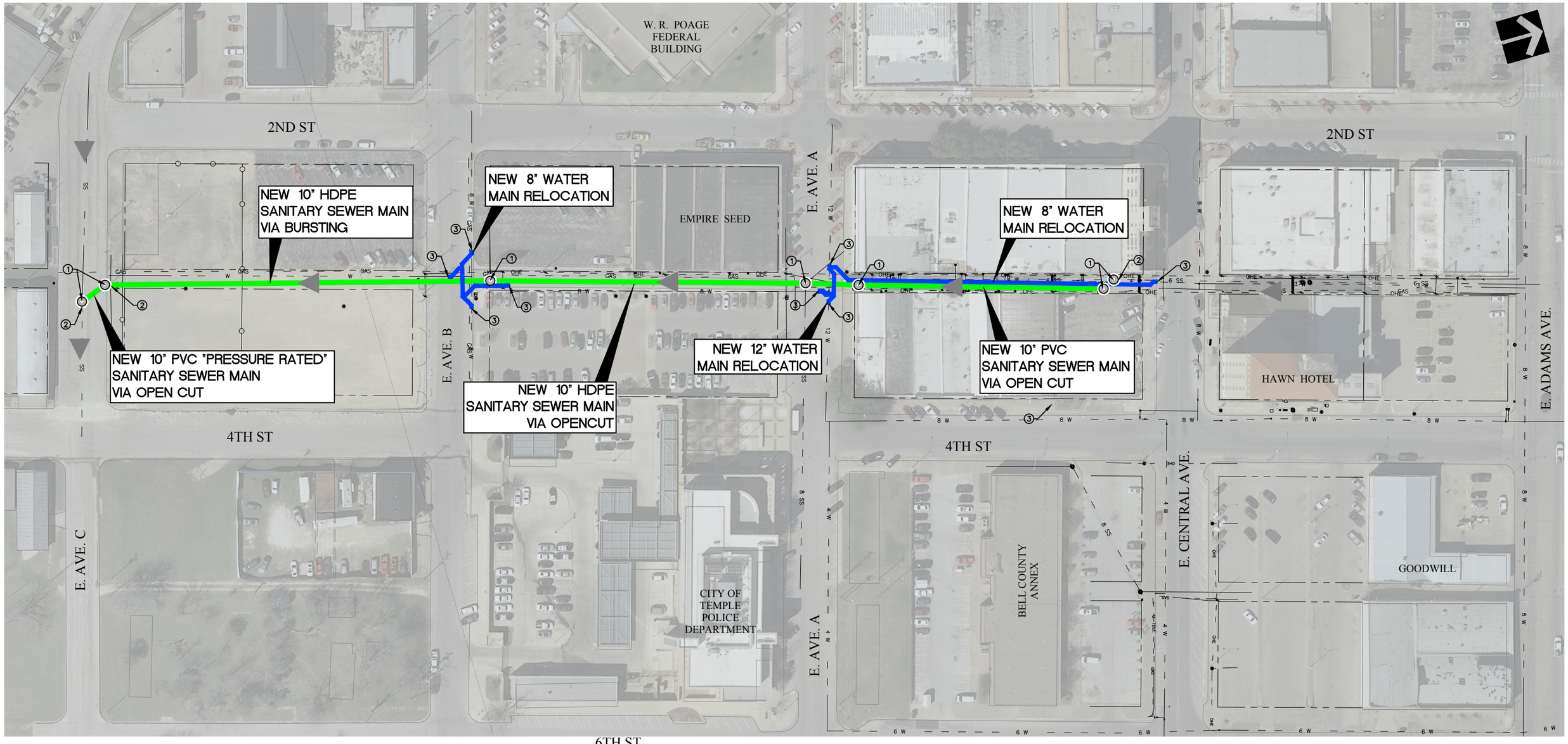
Monty Clark, P.E., CPESC

City of Temple

Wastewater and Water Main Replacement 2nd and 4th From Avenue C to Central Avenue

Bid Date: October 2, 2019

				TTG Utilities, LP		All - Tex Utilities, LLC		Texas Pride Utilities, LLC		Patin Construction, LLC		Bell Contractors INC.		A&S Underground, LLC	
No.	**Item Description**	**Est. Quan.**	**UOM**	**Unit Price**	**Total Cost**	**Unit Price**	**Total Cost**	**Unit Price**	**Total Cost**	**Unit Price**	**Total Cost**	**Unit Price**	**Total Cost**	**Unit Price**	**Total Cost**
1	Site R.O.W. Preparation & Clearing	11	STA	$ 500.00	$ 5,500.00	$ 500.00	$ 5,500.00	$ 1,000.00	$ 11,000.00	$ 20,000.00	$ 220,000.00	$ 1,099.39	$ 12,093.29	$ 1,323.00	$ 14,553.00
2	Mobilization, Bonds, Permits, & Insurance	100%	LS	$ 22,500.00	$ 22,500.00	$ 25,000.00	$ 25,000.00	$ 10,000.00	$ 10,000.00	$ 45,000.00	$ 45,000.00	$ 17,566.19	$ 17,566.19	$ 27,640.00	$ 27,640.00
3	(4 Copies) and Implement a Traffic Control Plan	100%	LS	$ 19,850.00	$ 19,850.00	$ 100.00	$ 100.00	$ 4,500.00	$ 4,500.00	$ 7,500.00	$ 7,500.00	$ 10,097.55	$ 10,097.55	$ 15,525.00	$ 15,525.00
4	Implement a Trench Safety Plan	100%	LS	$ 3,750.00	$ 3,750.00	$ 5.00	$ 5.00	$ 3,500.00	$ 3,500.00	$ 5,000.00	$ 5,000.00	$ 1,299.88	$ 1,299.88	$ 5,786.00	$ 5,786.00
5	Implement a Storm Water Pollution Prevention Plan	100%	LS	$ 4,000.00	$ 4,000.00	$ 1,000.00	$ 1,000.00	$ 3,000.00	$ 3,000.00	$ 5,000.00	$ 5,000.00	$ 4,543.75	$ 4,543.75	$ 5,384.00	$ 5,384.00
6	Pothole, Excavate and Locate Existing Utilities	100%	LS	$ 7,850.00	$ 7,850.00	$ 3,000.00	$ 3,000.00	$ 4,600.00	$ 4,600.00	$ 50,000.00	$ 50,000.00	$ 8,795.10	$ 8,795.10	$ 17,538.00	$ 17,538.00
7	Saw cut, Remove, and Replace Existing HMAC Pavement Section	1290	SY	$ 36.00	$ 46,440.00	$ 9.50	$ 12,255.00	$ 55.00	$ 70,950.00	$ 55.00	$ 70,950.00	$ 44.82	$ 57,817.80	$ 45.00	$ 58,050.00
8	Saw cut, Remove, and Replace Existing Reinforced Curb and Gutter	60	LF	$ 44.50	$ 2,670.00	$ 100.00	$ 6,000.00	$ 40.00	$ 2,400.00	$ 75.00	$ 4,500.00	$ 22.50	$ 1,350.00	$ 42.00	$ 2,520.00
9	Saw cut, Remove, and Replace Existing Reinforced Concrete Valley Gutter	80	LF	$ 63.50	$ 5,080.00	$ 65.00	$ 5,200.00	$ 40.00	$ 3,200.00	$ 100.00	$ 8,000.00	$ 43.26	$ 3,460.80	$ 106.00	$ 8,480.00
10	Saw cut, Remove, and Replace Existing Reinforced Concrete Pavement Section	10	SY	$ 176.25	$ 1,762.50	$ 300.00	$ 3,000.00	$ 120.00	$ 1,200.00	$ 100.00	$ 1,000.00	$ 240.00	$ 2,400.00	$ 121.00	$ 1,210.00
11	Saw cut, Remove, and Replace Existing Reinforced Concrete Sidewalk	13.5	SY	$ 159.00	$ 2,146.50	$ 250.00	$ 3,375.00	$ 80.00	$ 1,080.00	$ 100.00	$ 1,350.00	$ 180.00	$ 2,430.00	$ 121.00	$ 1,633.50
12	Demolish and Remove Existing Sanitary Sewer Manhole	6	EA	$ 800.00	$ 4,800.00	$ 2,500.00	$ 15,000.00	$ 6,000.00	$ 36,000.00	$ 3,000.00	$ 18,000.00	$ 967.54	$ 5,805.24	$ 1,361.00	$ 8,166.00
13	New 4' Diameter Precast Eccentric Concrete Manhole with Heavy Duty 32" Ring and Lid Assembly	5	EA	$ 3,975.00	$ 19,875.00	$ 7,000.00	$ 35,000.00	$ 6,800.00	$ 34,000.00	$ 5,500.00	$ 27,500.00	$ 4,061.56	$ 20,307.80	$ 5,212.00	$ 26,060.00
14	New 4' Diameter Reinforced Concrete Flat Top Manhole with Heavy Duty 32" Ring and Lid Assembly	1	EA	$ 3,425.00	$ 3,425.00	$ 8,000.00	$ 8,000.00	$ 7,000.00	$ 7,000.00	$ 6,000.00	$ 6,000.00	$ 3,578.79	$ 3,578.79	$ 4,133.00	$ 4,133.00
15	Connection to Existing Sanitary Sewer Main	8	EA	$ 1,200.00	$ 9,600.00	$ 1,000.00	$ 8,000.00	$ 800.00	$ 6,400.00	$ 10,000.00	$ 80,000.00	$ 1,011.51	$ 8,092.08	$ 2,251.00	$ 18,008.00
16	New internal Drop Connection	3	EA	$ 1,650.00	$ 4,950.00	$ 3,000.00	$ 9,000.00	$ 2,400.00	$ 7,200.00	$ 5,000.00	$ 15,000.00	$ 1,539.51	$ 4,618.53	$ 1,112.00	$ 3,336.00
17	New 10" HDPE DR 13.5 Sanitary Sewer Main via Bursting Methods	401	LF	$ 140.65	$ 56,400.65	$ 90.00	$ 36,090.00	$ 70.00	$ 28,070.00	$ 200.00	$ 80,200.00	$ 99.24	$ 39,795.24	$ 136.50	$ 54,736.50
18	New10" PVC SDR 26 Class 160 "Pressure Rated" Sanitary Sewer Main	683.5	LF	$ 139.00	$ 95,006.50	$ 150.00	$ 102,525.00	$ 98.00	$ 66,983.00	$ 120.00	$ 82,020.00	$ 153.89	$ 105,183.82	$ 86.00	$ 58,781.00
19	New 6" Sanitary Sewer Service and Service Connection	16	EA	$ 1,750.00	$ 28,000.00	$ 3,000.00	$ 48,000.00	$ 1,600.00	$ 25,600.00	$ 2,500.00	$ 40,000.00	$ 1,837.10	$ 29,393.60	$ 2,971.00	$ 47,536.00
20	ALL SANITARY SEWER TESTING per TCEQ and City of Temple Requirements and Contract Documents	100%	LS	$ 6,150.00	$ 6,150.00	$ 3,500.00	$ 3,500.00	$ 1,600.00	$ 1,600.00	$ 5,000.00	$ 5,000.00	$ 4,397.55	$ 4,397.55	$ 5,750.00	$ 5,750.00
21	Connection to Existing Water Main	8	EA	$ 2,450.00	$ 19,600.00	$ 3,500.00	$ 28,000.00	$ 2,400.00	$ 19,200.00	$ 5,000.00	$ 40,000.00	$ 1,747.40	$ 13,979.20	$ 2,306.00	$ 18,448.00
22	New 12" PVC C900 DR18 Water Main	50	LF	$ 134.25	$ 6,712.50	$ 250.00	$ 12,500.00	$ 120.00	$ 6,000.00	$ 200.00	$ 10,000.00	$ 137.07	$ 6,853.50	$ 98.00	$ 4,900.00
23	New 8" PVC C900 DR18 Water Main	512	LF	$ 109.25	$ 55,936.00	$ 175.00	$ 89,600.00	$ 90.00	$ 46,080.00	$ 100.00	$ 51,200.00	$ 99.53	$ 50,959.36	$ 95.00	$ 48,640.00
24	New 16" Steel Pipe Encasement	20	LF	$ 125.00	$ 2,500.00	$ 500.00	$ 10,000.00	$ 180.00	$ 3,600.00	$ 250.00	$ 5,000.00	$ 110.53	$ 2,210.60	$ 156.00	$ 3,120.00
25	New 12"x8" MJ Tee	2	EA	$ 1,225.00	$ 2,450.00	$ 3,000.00	$ 6,000.00	$ 1,200.00	$ 2,400.00	$ 1,500.00	$ 3,000.00	$ 927.59	$ 1,855.18	$ 911.00	$ 1,822.00
26	New 8"x8" MJ Tee	2	EA	$ 900.00	$ 1,800.00	$ 2,000.00	$ 4,000.00	$ 1,000.00	$ 2,000.00	$ 1,000.00	$ 2,000.00	$ 616.30	$ 1,232.60	$ 717.00	$ 1,434.00
27	New 12" MJ Gate Valve	1	EA	$ 2,750.00	$ 2,750.00	$ 3,500.00	$ 3,500.00	$ 3,200.00	$ 3,200.00	$ 5,000.00	$ 5,000.00	$ 2,551.75	$ 2,551.75	$ 2,729.00	$ 2,729.00
28	New 8" MJ Gate Valve	7	EA	$ 1,650.00	$ 11,550.00	$ 2,200.00	$ 15,400.00	$ 2,800.00	$ 19,600.00	$ 2,500.00	$ 17,500.00	$ 1,438.62	$ 10,070.34	$ 1,544.00	$ 10,808.00
29	New 12" MJ 45 Degree Bend	4	EA	$ 1,050.00	$ 4,200.00	$ 1,700.00	$ 6,800.00	$ 1,000.00	$ 4,000.00	$ 1,000.00	$ 4,000.00	$ 910.58	$ 3,642.32	$ 789.00	$ 3,156.00
30	New 8" MJ 45 Degree Bend	20	EA	$ 675.00	$ 13,500.00	$ 1,000.00	$ 20,000.00	$ 800.00	$ 16,000.00	$ 750.00	$ 15,000.00	$ 477.10	$ 9,542.00	$ 483.00	$ 9,660.00
31	New 8"x4" MJ Reducer	1	EA	$ 625.00	$ 625.00	$ 1,000.00	$ 1,000.00	$ 800.00	$ 800.00	$ 500.00	$ 500.00	$ 430.30	$ 430.30	$ 269.00	$ 269.00
32	Water Service and Connection to existing Domestic Water Service	14	EA	$ 1,050.00	$ 14,700.00	$ 1,500.00	$ 21,000.00	$ 1,200.00	$ 16,800.00	$ 2,000.00	$ 28,000.00	$ 1,363.14	$ 19,083.96	$ 785.00	$ 10,990.00
33	ALL WATER MAIN TESTING per TCEQ and City of Temple Requirements and Contract Documents	100%	LS	$ 4,000.00	$ 4,000.00	$ 2,000.00	$ 2,000.00	$ 1,200.00	$ 1,200.00	$ 2,000.00	$ 2,000.00	$ 3,998.77	$ 3,998.77	$ 2,975.00	$ 2,975.00
TOTAL BID					**$ 490,079.65**		**$ 549,350.00**		**$ 469,163.00**		**$ 955,220.00**		**$ 469,436.89**		**$ 503,777.00**



LEGEND

- NEW SANITARY SEWER MAIN VIA OPEN CUT
- DIRECTIONAL FLOW ARROW
- NEW SANITARY SEWER MANHOLE
- NEW WATER MAIN

KEYED NOTES ①

1. NEW 4' DIAMETER ECCENTRIC MANHOLE
2. CONNECTION TO EXISTING SANITARY SEWER MAIN
3. CONNECTION TO EXISTING WATER MAIN

CITY OF TEMPLE
WASTEWATER AND WATER MAIN REPLACEMENT
2ND & 4TH FROM
AVENUE C TO CENTRAL AVENUE

CLARK&FULLER
CIVIL ENGINEERING • DESIGN • PLANNING
215 North Main Street, Temple, TX 76501
254.899.0899 www.clark-fuller.com F-10384

9-3-19
STATE OF TEXAS
MONTY L. CLARK
90894
LICENSED
PROFESSIONAL ENGINEER

City of Temple

RESOLUTION NO. 2019-9878-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A CONSTRUCTION CONTRACT WITH TEXAS PRIDE UTILITIES, LLC, OF HOUSTON, TEXAS IN THE AMOUNT OF $469,163, TO REPLACE A SEWER LINE BETWEEN 2ND AND 4TH STREETS FROM CENTRAL AVENUE TO AVENUE C AND REPLACE A WATER MAIN FROM CENTRAL AVENUE TO AVENUE A; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, development interest in downtown Temple necessitates robust utility infrastructure to support new renovations, vertical construction, and associated flatwork improvements - the water and wastewater lines in the alley between 2nd and 4th Streets are aged, deteriorated and require replacement to support proposed downtown improvements;

Whereas, in December 2014, Council authorized a professional services agreement with Clark & Fuller, PLLC to design, bid, and administer construction phase services for these improvements - six bids were received on October 2, 2019 ranging from $469,163 to $955,220 with Texas Pride Utilities, LLC offering the lowest price;

Whereas, Staff recommends Council authorize a construction contract with Texas Pride Utilities, LLC, of Houston, Texas in the amount of $469,163, to replace a sewer line between 2nd and 4th Streets from Central Avenue to Avenue C and replace a water main from Central Avenue to Avenue A;

Whereas, funding for this construction contract is available in Account No. 520-5900-535-6521, Project No. 101186; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the City Manager, or her designee, after approval as to form by the Interim City Attorney, to execute a construction contract with Texas Pride Utilities, LLC, of Houston, Texas in the amount of $469,163, to replace a sewer line between 2nd and 4th Streets from Central Avenue to Avenue C and replace a water main from Central Avenue to Avenue A.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November,** 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Mitch Randles, Fire Chief

ITEM DESCRIPTION: Consider adopting a resolution authorizing a Memorandum of Understanding between The Texas A&M Engineering Extension Service, a member of The Texas A&M University System and the City of Temple regarding the participation of Temple Fire and Rescue personnel in hosting a regional area fire training schools.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: This agreement is to facilitate a relationship between Texas A&M Engineering Extension Service (TEEX), a member of The Texas A&M University System, and the City of Temple Fire and Rescue Department. Temple Fire and Rescue in cooperation with TEEX will host a regional fire training school on February 7-9 and February 21-23, 2020 at the Temple Fire and Rescue Training center which is located on Airport Road in the City of Temple. During this regional training school, a variety of basic and advanced fire, rescue and command training classes will be provided for various fire department personnel from around the Temple area.

This training will be funded by both students attending the training classes and grants obtained by individual departments from TEEX. Instructors will be both Temple fire and rescue members as well as other recognized experts.

Use of the Temple Fire and rescue training facility will be reimbursed per the current rental fee schedule based on the hours of facility usage and replacement of expendable supplies used.

FISCAL IMPACT: The FY 2019 event brought approximately 40 students at $125 per student. Revenue generated from student tuition fees for the two events scheduled in FY 2020 is estimated at $10,000 and will be recognized in account 110-0000-442-1630, Fire Department Revenue. This revenue will be utilized to offset costs associated with instructors, reimburse expenses related to the training facility per the current rental fee schedule, and replenish expendable supplies used.

ATTACHMENTS:
Memorandum of understanding
Resolution

TEXAS A&M ENGINEERING TEEX EXTENSION SERVICE

TEEX Contract #_25-110965_

AREA SCHOOL
MEMORANDUM OF UNDERSTANDING
(MOU)

This Memorandum of Understanding (MOU) is entered into by and between the Texas A&M Engineering Extension Service (TEEX) and Temple Fire Department. for the following effort:

Dates of Area School:	February 7th to 9th & 21st to 23rd, 2020

I. **STATEMENT OF WORK**: The intent or scope of this document is intended to protect and safeguard the attendees, instructors, school officials, property owners, the Texas A&M Engineering Extension Service (TEEX) staff and Texas A&M University System. Both parties agree to work cooperatively to plan and conduct the above referenced Area School.

II. **RESPONSIBILITIES:**

A. **Area School Planning**

1. TEEX shall work cooperatively with officials of the area school to plan and conduct a planning meeting a minimum of one hundred twenty (120) days prior to the Area School.
2. Area School Officials shall host the planning meeting where all aspects of the Area School (i.e. school fees, class offerings, instructor assignments and equipment needs, etc.) will be agreed upon.
3. TEEX staff attending the planning meeting will work with the area school planners on the Area School announcement template draft. Items that cannot be completed must be assigned as action items with target completion dates in order to finalize the flyer announcement within 15 days.
4. Area School Officials shall ensure the requirement of 15 enrolled students for any National Fire Academy course being delivered at the Area School.

B. **Area School Advertising**

1. Area School Officials will review the TEEX area school flyer announcement proof(s) and have any corrections to the TEEX Extension liaison within five (5) days from the receipt of the proof. TEEX will ensure that the announcement has been proofed and is correct. An area school host must sign-off on the final flyer announcement (email acceptable).
2. TEEX shall send out the appropriate Area School announcement to the appropriate region of the state to facilitate the best attendance of the school.
3. TEEX shall ensure that the Area School announcement is posted on the TEEX/ESTI Extension website.
4. Area Schools should not solely rely on TEEX advertisement of Area Schools. A second Area School Announcement (the original TEEX announcement or a locally created announcement) shall be sent out by the hosting Area School Official at a minimum of thirty (30) days prior to the date of the school. Departments or Organizations hosting area Schools may choose to advertise in other means (i.e. Email, State Firemen's and Fire Marshals' Association, District Meetings) to facilitate student numbers.

C. **Area School Operations**

1. TEEX staffing will consist of at least one (1) facilitator / liaison and at least one (1) safety person.
2. TEEX may choose to assign TEEX staff members to serve as additional liaisons for the school. TEEX will evaluate each area school on a case by case basis.
3. All requests for TEEX instructors must be made through the TEEX Extension liaison for the school.
4. TEEX will ensure issuance of certificates to all students and instructors who have successfully completed the course objectives of the Area School. Certificates will be available online through the Student Portal within 1 week when possible.
5. TEEX at its discretion may alter, suspend or terminate any operation that is determined to be detrimental or in direct violation of any TEEX or TAMUS policy, procedure, process or for any act not considered within generally accepted safety practices and principles of the Fire/Rescue Service.

6. TEEX may require EMS Medical Unit stand-by on location depending on the type of training operations being conducted. At minimum an EMS responder and medical kit will be on location. ICS 206 form will be maintained.
7. TEEX shall require all local safety regulations to be adhered to.(I.E. CFR, OSHA, TCFP, NFPA, Texas RRC, GLO)
8. TEEX may inspect the location/facilities of all schools and document any deficiency's that must be repaired or replaced prior to the school start date.
9. TEEX shall require a qualified lead safety person on site to oversee the safety of the school. TEEX will approve this individual. Assistant Safety Officers may be required for projects/classes as appropriate.
10. TEEX will monitor course deliveries as appropriate.
11. All Instructors shall meet prior to the start of each day or night activity. The TEEX Extension liaison will be notified of the date, time and location so they may attend.
12. Area School Instructors shall conduct project safety analysis (PSA) and walk through for each project prior to use.
13. An incident command structure with appropriate documentation is required.
14. The TEEX Extension liaison shall be notified immediately of any accidents or issues impacting operations or safety. Documentation of said issue or accident may be required. As appropriate, a review for mitigation actions will be conducted.
15. All participants are required to fill out TEEX registration forms / Participant Information Form.
16. TEEX requires student evaluation forms from all participants who participate in training.
17. Area School Officials shall ensure:
    a) NFPA 1403 (Standard on Live Fire Training Evolutions) is being adhered to at all times by the Instructors, students and staff.
    b) Safety Officers should have completed relevant training
    c) NFPA 1851 (Standard on Selection, Care, and Maintenance of Protective Ensembles for Structural and Proximity Fire Fighting) is adhered to at all times, specifically gear inspection.
    d) Refilling of SCBA cylinders should be by use of a documented certified breathing air compressor delivering Grade D or better air.

D. Area School Instructors

1. All Instructors should be evaluated in regard to safety and course delivery.
2. All Instructors shall fill out a TEEX registration form to receive credit or CEU's.
3. TEEX Extension liaison may verify instructor qualifications and may assist Area School Officials in the placement of instructors. Area School Officials will be responsible for obtaining qualified Instructors and submit required documentation of qualifications to the assigned TEEX Extension liaison for approval.
4. Area School Officials will ensure all Lead Instructors possess an NFPA 1041 Instructor I Certification from the State Firemen's and Fire Marshals' Association or the Texas Commission on Fire Protection, IFSAC, the NPQB – Pro Board or any recognized State Training Agency.
5. Area School Officials will ensure that quality professional and personal demeanors of all instructors are maintained at all times during any official activities of the Area School.

III. Post-Responsibilities

A. Area School After Action Review

1. An after action review will be held post-area school to discuss any concerns or improvements for the area school.

B. Area School Attendance

1. Area School Officials and the TEEX Extension liaison will review attendance of both students and instructors.
2. Sub-standard attendance will be studied for methods to improve.
3. Sub-standard attendance for three consecutive schools may require TEEX to terminate co-sponsor of the area school.

IV. TERMS OF AGREEMENT: This MOU shall begin as of the date of the last signature, and terminate 90 days from the last date of Area School, unless terminated by either party. Both parties reserve the right to terminate this MOU for reasonable cause or if it is determined the objective of the project cannot be accomplished. A party wishing to terminate this MOU must notify the other party in writing fifteen (15) days in advance. No monetary payment is due under this Agreement.

If this Agreement is not signed by all parties and returned to both parties within 60 days of date of the first signature below, then this Agreement will be null and void and of no further effect.

V. **GOVERNING LAW:** The terms and conditions of this MOU and performance hereunder shall be construed in accordance with the laws of the State of Texas.

VI. **EXPORT CONTROLS**: TEEX is subject to United States laws and regulations controlling the export of technical data, computer software, and other commodities, and its obligations under this Agreement are contingent on compliance with applicable laws and regulations. The transfer of certain technical data and commodities may require a license from the cognizant agency of the United States Government or written assurances by Customer that Customer will not export data or commodities to certain countries without advance approval of that agency. TEEX neither represents that a license will not be required nor that, if required, it will be issued. Customer shall comply with all applicable export laws and regulations and may not export or allow the export or re-export of commodities or technical data in violation of those laws or regulations. If Customer discloses to TEEX any subject technology that is subject to export control, Customer shall alert TEEX in writing before disclosure, at which time TEEX shall advise Customer if TEEX desires to take receipt of the export-controlled materials.

VII. **EXPORT COMPLIANCE:** Customer certifies that none of its Representatives participating in the Purpose is a "restricted party" as listed on the Denied Persons List, Entity List, and Unverified List (U.S. Department of Commerce), the Debarred Parties Lists (U.S. Department of State), the Specially Designated Nationals and Blocked Persons List (U.S. Department of Treasury), or any similar governmental lists. However, Customer shall provide TEEX with names and citizenship information for all of Customer's Representatives participating in the Purpose for purposes of additional due diligence.

VIII. **PROHIBITION ON CONTRACTS WITH COMPANIES BOYCOTTING ISRAEL:** To the extent that Texas Government Code, Chapter 2270 applies to this Agreement, the PROVIDER certifies it does not and will not, during the performance of this contract, boycott Israel. PROVIDER acknowledges this Agreement may be terminated if this certification is inaccurate.

VIX. **CERTIFICATION REGARDING BUSINESS WITH CERTAIN COUNTRIES AND ORGANIZATIONS:** Pursuant to Subchapter F, Chapter 2252, Texas Government Code, PROVIDER certifies it is not engaged in business with Iran, Sudan, or a foreign terrorist organization. PROVIDER acknowledges this Agreement may be terminated if this certification is inaccurate.

X. **CONFLICT OF INTEREST:** By executing this Agreement, PROVIDER and each person signing on behalf of PROVIDER certifies, and in the case of a sole proprietorship, partnership or corporation, each party thereto certifies as to its own organization, that to the best of their knowledge and belief, no member of The A&M System or The A&M System Board of Regents, nor any employee, or person, whose salary is payable in whole or in part by The A&M System, has direct or indirect financial interest in the award of this Agreement, or in the services to which this Agreement relates, or in any of the profits, real or potential, thereof.

THE UNDERSIGNED PARTIES BIND THEMSELVES TO THE FAITHFUL PERFORMANCE OF THIS Memorandum Of Understanding.

For the Customer:		Texas A&M Engineering Extension Service:	
By:	_____	By:	[signature]
Name:	_____	Name:	R. Charles Todd
Title:	_____	Title:	Associate Agency Director/CFO
Date:	_____	Date:	10-17-18

RESOLUTION NO. 2019-9879-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A MEMORANDUM OF UNDERSTANDING BETWEEN THE TEXAS A&M ENGINEERING EXTENSION SERVICE, A MEMBER OF THE TEXAS A&M UNIVERSITY SYSTEM, AND THE CITY OF TEMPLE FOR PARTICIPATION IN HOSTING A REGIONAL AREA FIRE TRAINING SCHOOL; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, Temple Fire and Rescue, in cooperation with Texas A&M Engineering Extension Service (TEEX), will host a regional fire training school on February 7-9 and February 21-23, 2020 at the Temple Fire and Rescue Training center which is located on Airport Road in the City of Temple;

Whereas, during this training, a variety of basic and advanced fire, rescue and command training classes will be provided for various fire department personnel from around the Temple area;

Whereas, this training will be funded by both students attending the training classes, and grants obtained by individual departments from TEEX, and instructors will be both Temple Fire and Rescue members as well as other recognized experts;

Whereas, Staff recommends Council authorize a Memorandum of Understanding between the Texas A&M Engineering Extension Service, a member of the Texas A&M University System, and the City of Temple for participation in hosting a regional area fire training school;

Whereas, the use of the Temple Fire and Rescue training facility will be reimbursed per the contract rental fee schedule based on the hours of facility usage and replacement of expendable supplies;

Whereas, revenue generated from student tuition fees from the two events scheduled in fiscal year 2020 will be recognized in Account No. 110-0000-442-1630, and will be utilized to offset costs associated with instructors, facility usage, and to replenish expendable supplies used; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the City Manager, or her designee, after approval as to form by the Interim City Attorney, to enter into a Memorandum of Understanding between the Texas A&M Engineering Extension Service, a member of the Texas A&M University System, and the City of Temple, regarding participation in hosting a regional area fire training schools.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:
Traci L. Barnard, Director of Finance
Kayla Landeros, Interim City Attorney
Amanda Rice, Deputy City Attorney

ITEM DESCRIPTION: Consider amending Resolution No. 2019-9850-R, adopted on October 3, 2019, to consolidate all current utility fees into one resolution, align the resolution with current City practices, update language, and authorize the City Manager to make temporary exceptions to the rate class thresholds to account for start-up operations.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: On October 3, 2019, the City Council adopted Resolution 2019-9850-R, which amended specific utility system fees. These amended fees went into effect on October 4, 2019. Upon further review, Staff recommends amending Resolution 2019-9850-R in an effort to align the utility system fee resolution with current practices and terms and amended Chapter 38 of the City of Temple's Code of Ordinances, update reference to wholesale customers located outside the City, and create an exception for rate class thresholds to account for start-up operations. The proposed amendments:

- Align the current utility system rate resolution with current City practices and terms by:
  - Establishing minimum service charges, regardless of consumption or production;
  - Updating references to Class A and Class B customers to residential and non-residential customers, respectively;
  - Replacing the term "Winter Water Average" with the term "Winter Quarter Average;"
  - Removing the term "sewer system" from "Service Charges" section, Subsection (a), "Rates;"
  - Remove former names of service charges from the Service Charge Chart located in the "Service Charges" Section;
- Add an extra trip fee of $25 for additional City connection trips as provided under Sections 38-36 and 38-46, Article IV, "Billing and Customer Service," of recently amended Chapter 38 of the City of Temple's Code of Ordinances;
- Update "Rates for Water Service" section, Subsection (b), "Customers outside the City," by replacing specific references to wholesale customers and wholesale customer rates with a general reference to wholesale customers and wholesale contracted rates to provide the Utility Business Office with the authority to charge contracted rates for wholesale customers in the event there are changes to these customers or contracted rates; and
- Provide the City Manager the authority to make temporary exceptions to the rate class thresholds established by the proposed resolution to account for start-up operations.

FISCAL IMPACT: No changes to fees are being proposed, only the consolidation of all current utility fees into one resolution.

ATTACHMENTS:
Resolution

RESOLUTION NO. 2019-9880-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AMENDING RESOLUTION 2019-9850-R RELATED TO UTILITY SYSTEM FEES TO BE EFFECTIVE ON NOVEMBER 8, 2019; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, the City engaged the services of NewGen Strategies & Solutions, LLC ("NewGen") to develop a six-year cost of service study (fiscal year 2020 – fiscal year 2025) - as part of the analysis and development of the six-year revenue requirement, NewGen reviewed and analyzed the following:

- Historical and projected trends with regards to operations and maintenance costs, debt service, capital improvements, water usage, and wastewater (sewer) flows;
- Fixed versus variable costs of the system;
- Consumption and rainfall data in order to 'normalize' the revenue requirement for 'wet' and 'dry' years; and
- Inflation adjustments for labor, benefits, chemicals, electricity, and all other operating costs;

Whereas, one of the key elements of the study was to develop the revenue requirement for a six-year Capital Improvement Program to construct, replace, or rehabilitate numerous components in the City of Temple distribution and collection systems and address additional staffing needs for the operations and maintenance of the system and other operations and maintenance costs of the system;

Whereas, Article IV, of Chapter 38, of the City's Code of Ordinances, specifically Sections 38-31(b) and (c), states that the City is authorized to create classes of utility customers, including, but not limited to, commercial, residential, and industrial classes, and authorizes the City Council to set utility service rates by resolution, which may vary based on class of customer;

Whereas, this proposed rate structure amendment includes the creation of a Large Volume User class for water rates and two tiers of Industrial Class customers for wastewater rates and the distinction between residential and non-residential customers for wastewater rates;

Whereas, a Large Volume User for water rates will be defined as a customer that maintains a use of 50 MG or greater of water per month;

Whereas, an Industrial Class wastewater customer will be delineated as follows:

- Tier I Industrial Class customers are those that produce less than 10 MG of wastewater per month;
- Tier II Industrial Class customers are those that produce 10 MG or greater of wastewater per month;

Whereas, new start-up operations moving into the City have the potential of consuming

or producing large volumes of water in the future;

Whereas, the amended water and wastewater services rates provided for in this resolution were formulated to support the revenue requirement;

Whereas, the proposed rate structure meets the estimated revenue requirement for fiscal year 2020 of $42,110,469 – the current rate model and revenue requirement for fiscal year 2021 – fiscal year 2025 includes rate adjustments;

Whereas, the rate model will be updated annually to determine if future rate adjustments will be required to support the revenue requirement; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS:

Part 1: Findings. All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The following utility system fees and rates are hereby adopted by the City of Temple, Texas and replace any previously adopted resolution regulating the same:

WATER AND WASTEWATER (SEWER) TAP FEES

(a) **Rates.** The following charges shall be made and collected by the City for each water and wastewater tap connection furnished and made by it:

Tap Size	Current Rates		Plus Costs
	Full Short	Full Long	
Water			
¾″	$390.00	$1,150.00	
1″	410.00	1,170.00	
1½″	450.00	1,210.00	(a)
2″	490.00	1,240.00	(a)
3″	960.00	3,240.00	(b)
>3″	320.00 *	1,080.00 *	(b)
Wastewater			
4″	420.00	1,180.00	(c)
6″	500.00	1,260.00	(c)

* Per Inch

(a) plus the cost of meter;

(b) plus the cost of meter and materials required to complete the tap;

(c) plus the cost of materials required to complete the tap.

(b) **Changeover fee.** A $50 changeover fee, but no tap fee, will be charged for replacing a smaller meter (3/4" x 5/8") with a full 3/4" meter.

(c) **Fire taps**. All connections for fire protection systems sprinklers shall be charged at the rate of two hundred dollars ($200.00) per inch of tap for short connections and three hundred dollars ($300.00) per inch of tap for long connections.

(d) **Stand-by charge.** A "stand-by" charge shall be assessed on each fire protection connection. This charge shall be two dollars ($2.00) per inch per month.

(e) **Taps made by utility contractors**. The charge for connecting a private water or service line to a short or long tap made by a utility contractor within a platted subdivision shall be one-half (1/2) the amount charged when the City makes a *short* tap of the same type and diameter.

(f) **Subsurface taps.**

(1) *Boring Accomplished by City Crews.* When a tap requires the City, acting through its own crews or its employees, to bore or go under an existing improved public street, right-of-way, railroad right-of-way, public utility easements, other improved public property, or private property in order to make a connection, charges for long connections requiring such boring will be the standard tap fee plus fifteen dollars ($15.00) per each foot of bore in dirt and twenty dollars ($20.00) per each foot of bore in rock.

(2) *Boring Accomplished by Contractors.* When the City hires a private party or private party contractor other than the City to bore or go under existing streets, right-of-ways, railroad right-of-ways, public utility easements, other improved public property, or private property in order to make a connection, the charge for a private party bore will be the standard tap fee plus the actual cost to the City of the bore.

RATES FOR WATER SERVICE

(a) **Rates.** The rates for utility services furnished by the City's waterworks system shall be as follows:

IN-CITY WATER SERVICE RATE SCHEDULE		
	Meter Size (inches)	**Effective Meter Rates**
Minimum Bill / Minimum Service Charge for the First 2,000	**5/8" x 3/4"**	$ 10.00
	1"	16.00
	1 ½"	20.00
	2"	64.00
	3"	128.00
	4"	200.00

Gallons of Water Consumed*	**6”**	640.00
	8”	1,120.00
	10"	1,120.00

IN-CITY STRAIGHT VOLUMETRIC RATE SCHEDULE FOR CONSUMPTION ABOVE 2,000 GALLONS	
Volumetric	**Effective Rates**
Large Volume User	$ 3.20**
All Other Classes	3.70**

* The minimum service charge applies if no water is consumed.
** per thousand gallons

(b) **Customers outside the City.** City wholesale customers located outside of the City shall be billed for consumption at their contracted rate. All other customers residing outside the City limits shall be billed 1.25 times the in-City water service rates.

RATES FOR WASTEWATER (SEWER) SERVICE

(a) **Definitions.**

(1) "*Winter Billing Period"* means the period of service for which customers are billed in January, February, and March.

(2) *"Winter Quarter Average"* means the average of a customer's actual monthly water consumption reported on the bills sent to the customer in January, February, and March.

(b) **Rates.**

The rates for utility services furnished by the City's wastewater system shall be as follows:

IN-CITY WASTEWATER SERVICE RATE SCHEDULE	
Minimum Bill / Minimum Service Charge for the First 2,000 Gallons of Wastewater Produced*	**Effective Rates**
Industrial Class – Tier I	$ 16.00
Industrial Class – Tier II	16.00
All Other Classes	16.00

IN-CITY STRAIGHT VOLUMETRIC RATE SCHEDULE FOR PRODUCTION ABOVE 2,000 GALLONS	
Volumetric	**Effective Rates**
Industrial Class – Tier I	$ 5.50**
Industrial Class – Tier II	4.50**
All Other Classes	5.50**

* The minimum service charge applies if no wastewater is produced.

** per thousand gallons

(c) **Customers residing outside the City.** Customers residing outside of the City limits shall be billed at 1.25 times the in-City wastewater service rates.

(d) **Wastewater charges based on actual water consumption.**

(1) When a customer with residential utility service has a separate water meter for an irrigation system, charges for wastewater service will be based on the customer's actual monthly water consumption during the billing period, excluding separately metered water consumed solely for irrigation.

(2) Every customer with non-residential utility service shall be billed for wastewater service on the basis of actual monthly water consumption during the billing period, excluding any separately metered water consumed solely for irrigation.

(e) **Wastewater charges based on billing winter quarter average.**

(1) When a customer with residential wastewater service does not have a separate water meter for an irrigation system, charges for wastewater service shall be based on the customer's winter quarter average. At the conclusion of the Winter Billing Period, the

City will calculate the customer's new winter quarter average and use the new winter quarter average to calculate wastewater charges billed from May of the current year through April of the following year.

(2) Customers who transfer water service to a different location will transfer their winter quarter average with their service.

(3) The Utility Business Office shall assume a winter quarter average of 6,000 gallons for any winter quarter average for which a billing history of water service from the City is not available.

(4) It is the intent of this Resolution that charges for wastewater service bear a reasonable relation to the actual amount of wastewater discharged by the customer. In exceptional circumstances, when the procedures established in this Section for calculating monthly service charges do not produce a reasonable estimate of actual discharge, the City reserves the right to use an alternate method.

(5) The Utility Business Office may adjust a customer's winter quarter average to deduct extraordinary consumption resulting from a leak or other unusual circumstances. Requests for adjustments must be supported by documentation such as an invoice for plumbing repair or an affidavit explaining the reason for the unusual consumption.

RATES FOR START-UP OPERATIONS

Start-up operations. The City Manager is authorized to make temporary exceptions to the rate class thresholds established by this Resolution to account for start-up operations.

DEPOSITS

(a) **Deposits.** The deposits for City utility accounts shall be as follows:

Residential Service		**Non-residential Service**	
All meters	$75.00	5/8" Meter	$ 115.00
		1" Meter	170.00
		1 1/2" Meter	200.00
		2" Meter	450.00
		3" Meter	550.00
		4" Meter	650.00
		6" Meter	850.00
		8" Meter	1,200.00
		10" Meter	2,500.00
		Fire Hydrant Meter	600.00

(b) **Waiver.** The deposit for a 6" or larger meter may be waived in connection with an economic development agreement within an enterprise zone.

SERVICE CHARGES

(a) **Rates.** The rates *per occurrence* for various services furnished by the City's Utility Business Office shall be as follows:

Service	Charge
(1) ***Rereading water meter***	$ 25.00
(2) ***Processing returned item***	30.00
(3) ***Ten (10) day cleanup service (flat fee, which includes up to 2,000 gallons of water)***	35.00
(4) ***New account fee or transfer fee***	
During business hours	25.00
After business hours	65.00
(5) ***Extra trip fee***	25.00
(6) ***Non-payment fee***	30.00
(7) ***After hours reconnect***	40.00
(8) ***Unauthorized use of water***	125.00
(9) ***Broken meter fee***	75.00
(10) ***Broken lock charge***	45.00
(11) ***Pulled meter fee***	75.00
(12) ***Remove service line***	500.00
(13) ***Testing water meters for accuracy***	
⅝" meter	30.00
1" meter	40.00
1½" meter	45.00
2" meter	50.00
3" meter & larger	actual cost

PENALTIES

Penalties. The penalty for delinquent payment of utility services invoices is a minimum fee of $5.00 or 5% of the current bill, whichever is greater.

Part 3: The new utility system fees will take effect on November 8, 2019.

Part 4: It is hereby officially found and determined that the meeting at which this Resolution is passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the ____ day of November 2019.

THE CITY OF TEMPLE, TEXAS

Timothy A. Davis, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Mitch Randles, Fire Chief

ITEM DESCRIPTION: Consider adopting a resolution authorizing the renewal of the Emergency Management Performance Grant for FY 2019, which funds a portion of the administration cost for Emergency Management for the City of Temple, in the amount of $33,369.56.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: The request is for approval of the renewal of the Emergency Management Performance Grant for FY 2019. This grant is funded by the Governors Department of Emergency Management (GDEM) to pay for a portion of the administration cost for Emergency Management for the City of Temple.

Temple Fire & Rescue recommends approval of the renewal of this grant by City Council.

FISCAL IMPACT: The grant will reimburse the City for a maximum of 50% of the salary and benefit expenditures related to emergency management. The EMPG program has awarded the City of Temple $33,369.56 for FY 2019.

ATTACHMENTS:
Award Letter
Resolution

TDEM
THE TEXAS A&M UNIVERSITY SYSTEM

October 10, 2019

Timothy Davis
City of Temple
2 N. Main St., Ste. 103
Temple, TX 76501-7649

Grant No.EMT-2019-EP-00005

Dear Mayor Davis:

Congratulations, on behalf of the Texas Division of Emergency Management (TDEM), your application for financial assistance submitted under the Federal Fiscal Year (FFY) 2019 Emergency Management Performance Grants (EMPG) has been approved in the amount of **$33,369.56.** As a condition of this grant, you are required to contribute a cost match in the amount of **$33,369.56.**

The period of performance for your FFY 2019 EMPG grant is October 1, 2018 - March 31, 2020. This period of performance reflects a 6 month PROGRAMMATIC EXTENSION ONLY to complete and close out your FFY 2019 grant year.

Before you receive any of the federal funds awarded to you, you must establish acceptance of the award. By accepting this award, you are acknowledging and accepting the terms and conditions of your award, as well as the task requirements outlined in the FY 2019 Local Emergency Management Performance Grant (EMPG) Guide, located on line at https://tdem.texas.gov/emergency-management-performance-grant/. This grant award must be signed and dated below by your jurisdiction's "Authorized Official" indicated on the "Designation of EMPG Grant Officials" form (TDEM 17B) and returned within 45 days from date received to TDEM.EMPG@tdem.texas.gov. Failure to return documentation to TDEM within 45 days may result in reallocation of funds.

The 2019 Terms and Conditions are enclosed for your review. Due dates are outlined in the "EMPG Application Timeline" and can be found at https://tdem.texas.gov/emergency-management-performance-grant/.

If you have any questions, please contact the EMPG Unit Chief Lisa Resendez at Lisa.Resendez@tdem.texas.gov or 512-424-7511/512-574-1473 or your District Coordinator.

W. Nim Kidd, MPA, CPA
Chief-Texas Division of Emergency Management
Vice Chancellor for Disaster and Emergency Services
Texas A&M University System

Recipient Signatory Official: Date:

_____ _____

RESOLUTION NO. 2019-9881-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING THE RENEWAL OF THE EMERGENCY MANAGEMENT PERFORMANCE GRANT FOR FISCAL YEAR 2019 IN THE AMOUNT OF $33,369.56, WHICH FUNDS A PORTION OF THE ADMINISTRATION COSTS FOR EMERGENCY MANAGEMENT FOR THE CITY OF TEMPLE; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, the Emergency Management Performance Grant (EMPG) is funded through the Governor's Department of Emergency Management and pays for a portion of the administration costs for Emergency Management for the City of Temple;

Whereas, the grant will reimburse the City for a maximum of 50% of the salary and benefit expenditures related to emergency management - the EMPG program has awarded the City of Temple $33,369.56 for fiscal year 2019;

Whereas, Temple Fire & Rescue recommends Council authorize the renewal of the Emergency Management Performance Grant for fiscal year 2019; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the renewal of the Emergency Management Performance Grant for fiscal year 2019 in the amount of $33,369.56, which funds a portion of the administration costs for Emergency Management for the City of Temple.

Part 3: The City Council accepts any funds that may be received for this grant, and authorizes the City Manager, after approval as to form by the Interim City Attorney, to execute any documents which may be necessary for this grant.

Part 4: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Belinda Mattke, Director of Purchasing & Facility Services

ITEM DESCRIPTION: Consider adopting a resolution authorizing the rejection of the bids received for on-site fuel services on September 5, 2019.

STAFF RECOMMENDATION: Adopt resolution as presented in the item description.

ITEM SUMMARY: On September 5, 2019, the City received two bids for the purchase of on-site fuel services (gasoline and diesel) for the City's fuel tanks located at Sammons Golf Links, Draughon-Miller Central Texas Regional Airport, and Crossroads Recycling Center, as well as three generators located at the Water Treatment Plants. Upon receipt and evaluation of the bids received on September 5, 2019, it was determined the bids received were not a good value based on inadequate competition. Accordingly, Staff is requesting that Council reject all bids received for on-site fuel services on September 5, 2019, which will allow Staff to resolicit bids. Based on communication with fuel supply vendors, Staff believes the competition can be enhanced by re-bidding.

Per the Local Government Code §252.043(f), the governing body is the designated authority to reject any and all bids.

FISCAL IMPACT: There is no fiscal impact related to this item. Departments have budgeted for on-site fuel services in several accounts in the adopted FY 2020 Budget.

ATTACHMENTS:
Resolution

RESOLUTION NO. 2019-9882-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING THE REJECTION OF THE BIDS RECEIVED FOR ON-SITE FUEL SERVICES ON SEPTEMBER 5, 2019; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, on September 5, 2019, the City received two bids for the purchase of on-site fuel services (gasoline and diesel) for the City's fuel tanks located at Sammons Golf Links, Draughon-Miller Central Texas Regional Airport, and Crossroads Recycling Center, as well as three generators located at the Water Treatment Plants - upon receipt and evaluation of the bids received on September 5, 2019, it was determined the bids received were not a good value based on inadequate competition;

Whereas, per the Local Government Code §252.043(f), the governing body is the designated authority to reject any and all bids;

Whereas, Staff recommends Council reject all bids received for on-site fuel services on September 5, 2019, which will allow Staff to resolicit bids - based on communication with fuel supply vendors, Staff believes the competition can be enhanced by re-bidding; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: Findings. All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council rejects the bids received for on-site fuel services on September 5, 2019.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:
Traci Barnard, Director of Finance
Belinda Mattke, Director of Purchasing & Facility Services

ITEM DESCRIPTION: Consider adopting a resolution authorizing the expenditure of funds for seven multiyear agreements for FY 2020, in an estimated amount of $7,246,578.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: Over the past few years, Council has independently authorized seven different multiyear agreements for various services and products in which a non-appropriation clause was not included in the executed contract. A Texas municipality may enter into multiyear agreements, but there must be a specific appropriation for the contract each year. If the multiyear contract includes a non-appropriation clause in the contract, annual authorization to expend the funds is not required as long as the adopted Budget includes an appropriation. However, if the contract does not include a non-appropriation clause, Council must authorize expenditure of the funds annually.

The following multiyear agreements do not have a non-appropriation clauses. Accordingly, Staff is requesting Council authorization to expend the funds that are designated in the adopted FY 2020 Budget for each of the specified services or products.

Vendor	Estimated Annual Expenditure	Service or Product
Waste Management of Texas	$2,447,623	Operation & Maintenance of Landfill / Tipping Fees
Brazos River Authority	$1,625,488	Operation & Maintenance of Doshier Farm Wastewater Treatment Plant and all Lift Stations
Brazos River Authority	$1,866,813	Operation & Maintenance of the Temple-Belton Wastewater Treatment Plant
Bell County Auditor's Office (Bell County Communications)	$1,027,567	911 Service
Bell County Health District	$171,189	Food Protection & Environmental Services
Yamaha Motor Corporation USA	$55,218	Lease of Golf Cart Fleet
Crossroads Holdings, Inc.	$52,680	Lease of Recycling Facility (thru 3/31/20)

FISCAL IMPACT: Funding for the multiyear agreements in the estimated amount of $7,246,578 has been appropriated in the FY 2020 Operating Budget.

ATTACHMENTS:
Resolution

RESOLUTION NO. 2019-9883-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING THE EXPENDITURE OF FUNDS FOR SEVEN MULTIYEAR AGREEMENTS IN AN ESTIMATED AMOUNT OF $7,246,578, FOR FISCAL YEAR 2020; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, over the past few years, Council has independently authorized seven different multiyear agreements for various services and products in which a non-appropriation clause was not included in the executed contract;

Whereas, a Texas municipality may enter into multiyear agreements, but there must be a specific appropriation for the contract each year - if the multiyear contract includes a non-appropriation clause in the contract, annual authorization to expend the funds is not required as long as the adopted budget includes an appropriation;

Whereas, if the contract does not include a non-appropriation clause, Council must authorize expenditure of the funds annually;

Whereas, the following multiyear agreements do not have a non-appropriation clause and Staff recommends Council authorize Staff to expend the funds that are designated in the adopted fiscal year 2020 budget for each of these specified services or products:

Vendor	**Estimated Annual Expenditure**	**Service or Product**
Waste Management of Texas	$2,447,623	Operation & Maintenance of Landfill/Tipping Fees
Brazos River Authority	$1,625,488	Operation & Maintenance of Doshier Farm Wastewater Treatment Plant and all Lift Stations
Brazos River Authority	$1,866,813	Operation & Maintenance of the Temple-Belton Wastewater Treatment Plant
Bell County Auditor's Office (Bell County Communications)	$1,027,567	911 Service
Bell County Health District	$171,189	Food Protection & Environmental Services
Yamaha Golf Car Company	$55,218	Lease of Golf Cart Fleet
Crossroads Holdings, Inc.	$52,680	Lease of Recycling Facility (through 3/31/20)

Whereas, funding for the multiyear agreements has been appropriated in the fiscal year 2020 Operating Budget; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the expenditure of funds for nine multiyear agreements in an estimated amount of $7,246,578 for fiscal year 2020 as outlined below:

Vendor	Estimated Annual Expenditure	Service or Product
Waste Management of Texas	$2,447,623	Operation & Maintenance of Landfill/Tipping Fees
Brazos River Authority	$1,625,488	Operation & Maintenance of Doshier Farm Wastewater Treatment Plant and all Lift Stations
Brazos River Authority	$1,866,813	Operation & Maintenance of the Temple-Belton Wastewater Treatment Plant
Bell County Auditor's Office (Bell County Communications)	$1,027,567	911 Service
Bell County Health District	$171,189	Food Protection & Environmental Services
Yamaha Golf Car Company	$55,218	Lease of Golf Cart Fleet
Crossroads Holdings, Inc.	$52,680	Lease of Recycling Facility (through 3/31/20)

Part 3: The City Council authorizes the City Manager, or her designee, after approval as to form by the Interim City Attorney, to execute any documents that may be necessary to expend these funds.

Part 4: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:
Don Bond, P.E., Director of Public Works
Kenton Moffett, P.E., Assistant Director of Public Works

ITEM DESCRIPTION: Consider authorizing payment of the Consolidated Water Quality Assessment Fee to the Texas Commission on Environmental Quality for operations of Temple's wastewater treatment plants, in the cumulative amount of $104,988.54.

STAFF RECOMMENDATION: Recommend payment of TCEQ fees as presented in item description.

ITEM SUMMARY: The Texas Commission on Environmental Quality (TCEQ) requires wastewater permit holders within the State of Texas to pay a Consolidated Water Quality (CWQ) Fee annually. This fee provides for general revenue in support of TCEQ's existing water program activities.

This year, the TCEQ CWQ fee associated with permitted operations of the Doshier WWTP and Temple-Belton WWTP is $46,096.14 and $58,892.40, respectively. Payment of these fees are due within 30 days of receipt of the invoice and must be paid promptly.

FISCAL IMPACT: The total amount to be paid to TCEQ is $104,988.54. Funding is available in account 520-5500-535-2616 to fund the City of Temple's portion of the Consolidated Water Quality fees in the amount of $92,203.

The City of Belton will be billed for their pro rata share of the TCEQ CWQ fee for the Temple-Belton WWTP in the amount of $12,785.54 based on the Percentage of Flow for Allocation of 21.71% (per the BRA FY 2020 TBP Operating Budget).

ATTACHMENTS:
Invoices
Resolution

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

INVOICE

COMPANY: CITY OF TEMPLE
ACCOUNT: 23006494

DETACH BOTTOM PORTION AND RETURN ORIGINAL COUPON WITH PAYMENT

ACCOUNT NO.	INCLUDES PAYMENTS THROUGH:	COLL COST RECOVERY	LATE FEES	BALANCE DUE
23006494	OCT17,19	0.00	0.00	46,096.14

INVOICE DATE	INVOICE NO.	DESCRIPTION	AMOUNT	BALANCE
OCT31,19	CWQ0059838	PERMIT 0010470002 FY20 PERMIT	46,096.14	46,096.14

Please return the original coupon with payment. For questions concerning calculations or site location, please call 512-239-4671.

46,096.14

See REVERSE SIDE for Explanation of Charges and TCEQ Contact Telephone Numbers.

PLEASE PAY THIS AMOUNT
INCLUDE ACCOUNT NUMBER ON CHECK

TCEQ VIPP Form AR41A 02-17-2011

OCT17,19

DETACH THIS PORTION AND RETURN WITH CHECK OR MONEY ORDER PAYABLE TO:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

ACCOUNT NO.	BALANCE DUE
23006494	46,096.14

☐ CHECK HERE IF YOUR ADDRESS HAS CHANGED.
PLEASE INDICATE ADDRESS CHANGE ON BACK

INVOICES NOT PAID WITHIN 30 DAYS OF INVOICE DATE WILL ACCRUE PENALTIES

CITY OF TEMPLE

3210 E AVENUE H BLDG A STE 130

TEMPLE TX 76510

0023006494 1533360 00046096141031194

PAYMENT INFORMATION

INVOICES NOT PAID BY DUE DATE WILL ACCRUE PENALTIES

DETACH PAYMENT COUPON FROM BOTTOM OF FORM AND RETURN WITH PAYMENT IN THE ENVELOPE ENCLOSED.

Your check, certified check or money order should be made payable to the **Texas Commission on Environmental Quality.** Please include your account number on your check to ensure that payment is properly credited. You may also pay this account in full by credit card or electronic check using the following internet address: ***www.tceq.texas.gov/epay/***

If you think your billing is wrong, or if you need more information about a transaction, please address your questions to:

Texas Commission on Environmental Quality
Financial Administration Division, MC-214
P.O. Box 13088
Austin, Texas 78711-3088

In your correspondence, please give us the following information:

1. **Your name and account number**
2. **The dollar amount of the suspected error**
3. **The date and reference number of the transaction(s) in question**
4. **Description of the suspected error**

The payment due date is 30 days from the invoice date. Penalty and interest charges assessed will be adjusted for fees not due. Failure to pay by the due date may result in return or denial of applications for licenses, permits, registrations, and certifications.

***** For technical questions, please call the telephone number on the front of bill. For accounting questions, please call: *****

Petroleum Storage Tank Fees	**(UST & AST)**	**512/239-0366**
Waste Fees	**(VCP, ILP, RLA, FTA)**	**512/239-0548**
	(HWG, NWG, HWF, NWF)	**512/239-0343**
	(SWD, WMS, SWM)	**512/239-0366**
	(WMB, BLP, SDP, WTR)	**512/239-0366**
	(TOX, T2M, T2NM, T2PE)	**512/239-0366**
Water Fees	**(GPS, GPW, PHS, RAF)**	**512/239-0355**
	(BWM, CRW, RGR, STX)	**512/239-0355**
	(CWQ, WQA, WWI, WWIR, EAP)	**512/239-0355**
	(WUF)	**512/239-0366**
Air Fees	**(AEF, EIF, EIT)**	**512/239-0366**
Admin Penalties	**(CAV, DCP, WDV, WQV, QWV, BPF2)**	**512/239-0548**
Dry Cleaning Fees	**(DCR)**	**512/239-0343**

TCEQ VIPP FORM AR41A1 02-17-2011

EXPLANATION OF CHARGES

The basis for each charge is identified by the facility, permit, application or other appropriate activity. The state fiscal year **(FY)** and the quarter of the year **(QTR)** to which the payment will be credited are shown where applicable. Delinquent fees are subject to a penalty of 5% per month for the first two months after the due date, after which an interest charge for CY 2019 of 6.5% per annum will be assessed.

In accordance with Government Code 2107.003(d), collection costs up to 30% may be assessed.

TCEQ understands the account party may be a debtor in a pending bankruptcy proceeding. The portion of this invoice, if any, that represents pre-petition fees due is sent for informational purposes only and is not an attempt to recover a claim against the debtor. TCEQ will file an appropriate proof of claim with the bankruptcy court for such pre-petition fees. Any post-petition fees due and owing as shown on this invoice should be paid in accordance with this invoice.

IMPORTANT: TO CHANGE A BILLING ADDRESS FOR A GPS OR GPW FEE (SEE INVOICE DESCRIPTION ON FRONT SIDE), CALL 512/239-4671 FOR GPW & CALL 512/239-3700 OR EMAIL SWPERMIT@TCEQ.TEXAS.GOV FOR GPS

PLEASE INDICATE BILLING ADDRESS CHANGE BELOW

Address: _____

City: _____

State & Zip Code: _____

Phone: ( ) FAX: ( )

(Note: TO CHANGE ACCOUNT NAME,)
(A CORE DATA FORM MUST BE SUBMITTED.)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
PO BOX 13089
AUSTIN TX 78711-3089

Account Receivable No.: 23006494
Billing Customer: CITY OF TEMPLE

Permit/Registration No.: WQ0010470002
Customer Name: CITY OF TEMPLE

Facility/Site Name: DOSHIER FARM WWTP
Authorization Type: PUB DOM WW

Flow:

Sum of Contaminated Flow Limit:	7.5
Sum of Uncontaminated Flow Limit:	0
Total Flow Assessment:	$6375

Pollutants:

Sum of Oxygen Demand (lbs/day):	626
Sum of Suspended Solids (lbs/day):	938.25
Sum of Ammonia (lbs/day):	188
Sum of Heat (temperature):	0
Total Pollutants Fee Assessment:	$26283.75

Facility Indicators used to determine the total assessment:

Aquaculture:	NO	
Stormwater Only:	NO	$0
Stormwater Fee:	NO	$0
EPA Facility Classification:	MAJOR	$2000
Facility Toxic Rating:	0	$0
Facility Disposal Method:	DISCHARGE	0% Reduction
Facility Operational Status:	ACTIVE	0% Reduction
Multiplier:	1.33	

Total Permit Fee: $46096.14

Extension data used to determine the fee assessment:

Extension Name	Uncontam Flow	Contam Flow	Oxygen Demand	TSS	Ammonia	Heat
14744 OTFL001 TPDES	0	7.5	626	938.25	188	0
	0	0	0	0	0	0

Total Assessment: $46096.14

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

INVOICE

COMPANY: CITY OF TEMPLE
ACCOUNT: 23006789

DETACH BOTTOM PORTION AND RETURN ORIGINAL COUPON WITH PAYMENT

ACCOUNT NO.	INCLUDES PAYMENTS THROUGH:	COLL COST RECOVERY	LATE FEES	BALANCE DUE
23006789	OCT17,19	0.00	0.00	58,892.40

INVOICE DATE	INVOICE NO.	DESCRIPTION	AMOUNT	BALANCE
OCT31,19	CWQ0060356	PERMIT 0011318001 FY20 PERMIT	58,892.40	58,892.40

Please return the original coupon with payment. For questions concerning calculations or site location, please call 512-239-4671.

58,892.40

See REVERSE SIDE for Explanation of Charges and TCEQ Contact Telephone Numbers.

PLEASE PAY THIS AMOUNT
INCLUDE ACCOUNT NUMBER ON CHECK

TCEQ VIPP Form AR41A 02-17-2011

OCT17,19

DETACH THIS PORTION AND RETURN WITH CHECK OR MONEY ORDER PAYABLE TO:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

ACCOUNT NO.	BALANCE DUE
23006789	58,892.40

☐ CHECK HERE IF YOUR ADDRESS HAS CHANGED.
PLEASE INDICATE ADDRESS CHANGE ON BACK

INVOICES NOT PAID WITHIN 30 DAYS OF INVOICE DATE WILL ACCRUE PENALTIES

CITY OF TEMPLE
PUBLIC WORKS DIRECTOR
3210 E AVENUE H BLDG A

TEMPLE TX 76501-8402

0023006789 1533360 00058892401031190

PAYMENT INFORMATION

INVOICES NOT PAID BY DUE DATE WILL ACCRUE PENALTIES

DETACH PAYMENT COUPON FROM BOTTOM OF FORM AND RETURN WITH PAYMENT IN THE ENVELOPE ENCLOSED.

Your check, certified check or money order should be made payable to the **Texas Commission on Environmental Quality.** Please include your account number on your check to ensure that payment is properly credited. You may also pay this account in full by credit card or electronic check using the following internet address: ***www.tceq.texas.gov/epay/***

If you think your billing is wrong, or if you need more information about a transaction, please address your questions to:

Texas Commission on Environmental Quality
Financial Administration Division, MC-214
P.O. Box 13088
Austin, Texas 78711-3088

In your correspondence, please give us the following information:

1. **Your name and account number**
2. **The dollar amount of the suspected error**
3. **The date and reference number of the transaction(s) in question**
4. **Description of the suspected error**

The payment due date is 30 days from the invoice date. Penalty and interest charges assessed will be adjusted for fees not due. Failure to pay by the due date may result in return or denial of applications for licenses, permits, registrations, and certifications.

***** For technical questions, please call the telephone number on the front of bill. For accounting questions, please call: *****

Petroleum Storage Tank Fees	**(UST & AST)**	**512/239-0366**
Waste Fees	**(VCP, ILP, RLA, FTA)**	**512/239-0548**
	(HWG, NWG, HWF, NWF)	**512/239-0343**
	(SWD, WMS, SWM)	**512/239-0366**
	(WMB, BLP, SDP, WTR)	**512/239-0366**
	(TOX, T2M, T2NM, T2PE)	**512/239-0366**
Water Fees	**(GPS, GPW, PHS, RAF)**	**512/239-0355**
	(BWM, CRW, RGR, STX)	**512/239-0355**
	(CWQ, WQA, WWI, WWIR, EAP)	**512/239-0355**
	(WUF)	**512/239-0366**
Air Fees	**(AEF, EIF, EIT)**	**512/239-0366**
Admin Penalties	**(CAV, DCP, WDV, WQV, QWV, BPF2)**	**512/239-0548**
Dry Cleaning Fees	**(DCR)**	**512/239-0343**

TCEQ VIPP FORM AR41A1 02-17-2011

EXPLANATION OF CHARGES

The basis for each charge is identified by the facility, permit, application or other appropriate activity. The state fiscal year **(FY)** and the quarter of the year **(QTR)** to which the payment will be credited are shown where applicable. Delinquent fees are subject to a penalty of 5% per month for the first two months after the due date, after which an interest charge for CY 2019 of 6.5% per annum will be assessed.

In accordance with Government Code 2107.003(d), collection costs up to 30% may be assessed.

TCEQ understands the account party may be a debtor in a pending bankruptcy proceeding. The portion of this invoice, if any, that represents pre-petition fees due is sent for informational purposes only and is not an attempt to recover a claim against the debtor. TCEQ will file an appropriate proof of claim with the bankruptcy court for such pre-petition fees. Any post-petition fees due and owing as shown on this invoice should be paid in accordance with this invoice.

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PLEASE INDICATE BILLING ADDRESS CHANGE BELOW

Address: _____

City: _____

State & Zip Code: _____

Phone: ( ) FAX: ( )

(Note: TO CHANGE ACCOUNT NAME,)
(A CORE DATA FORM MUST BE SUBMITTED.)

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY
PO BOX 13089
AUSTIN TX 78711-3089

Account Receivable No.: 23006789
Billing Customer: CITY OF TEMPLE

Permit/Registration No.: WQ0011318001
Customer Name: CITY OF TEMPLE

Facility/Site Name: TEMPLE BELTON WWTP
Authorization Type: PUB DOM WW

Flow:

Sum of Contaminated Flow Limit:	10
Sum of Uncontaminated Flow Limit:	0
Total Flow Assessment:	$8500

Pollutants:

Sum of Oxygen Demand (lbs/day):	834
Sum of Suspended Solids (lbs/day):	1251
Sum of Ammonia (lbs/day):	167
Sum of Heat (temperature):	0
Total Pollutants Fee Assessment:	$33780

Facility Indicators used to determine the total assessment:

Aquaculture:	NO	
Stormwater Only:	NO	$0
Stormwater Fee:	NO	$0
EPA Facility Classification:	MAJOR	$2000
Facility Toxic Rating:	0	$0
Facility Disposal Method:	DISCHARGE	0% Reduction
Facility Operational Status:	ACTIVE	0% Reduction
Multiplier:	1.33	

Total Permit Fee: $58892.4

Extension data used to determine the fee assessment:

Extension Name	Uncontam Flow	Contam Flow	Oxygen Demand	TSS	Ammonia	Heat
	0	0	0	0	0	0
11535 OTFL 001 TPDES	0	10	834	1251	167	0

Total Assessment: $58892.4

RESOLUTION NO. 2019-9884-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING PAYMENT OF THE CONSOLIDATED WATER QUALITY ASSESSMENT FEE TO THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY FOR OPERATION OF THE CITY OF TEMPLE'S WASTEWATER TREATMENT PLANTS, IN THE CUMULATIVE AMOUNT OF $104,988.54; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, the Texas Commission on Environmental Quality (TCEQ) requires wastewater permit holders within the State of Texas to pay a Consolidated Water Quality (CWQ) assessment fee annually – this fee provides for general revenue in support of TCEQ's existing water program activities;

Whereas, this year, the TCEQ CWQ fee associated with permitted operations of the Doshier Wastewater Treatment Plant and the Temple-Belton Wastewater Treatment Plant is in the amount of $46,096.14 and $58,892.40, respectively;

Whereas, payment of these fees is due within 30 days of receipt of the invoice and must be paid promptly;

Whereas, funding for the Consolidated Water Quality assessment fee is available in Account No. 520-5500-535-2616;

Whereas, the City of Belton will be billed for its pro rata share of the Consolidated Water Quality assessment fees based on the Percentage of Flow for an allocation of 21.71% (per the Brazos River Authority fiscal year 2020 Temple-Belton Wastewater Treatment Plan Operating Budget); and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes payment of the Consolidated Water Quality Assessment Fee to the Texas Commission on Environmental Quality for operation of the City of Temple's wastewater treatment plants, in the cumulative amount of $104,988.54.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Mitch Randles, Fire Chief

ITEM DESCRIPTION: Consider adopting a resolution authorizing the purchase of two cardiac monitor/defibrillators from Stryker Medical of Chicago, Illinois, in the amount of $76,837.34.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: Authorization of this purchase will provide for the purchase of two cardiac monitors/defibrillators to replace two units that have reached the end of their useful life. Cardiac monitor/defibrillators have a life expectancy of five to seven years. Currently two of the Fire Department's 14 monitors/defibrillators are 12 years old (purchased 2007).

Cardiac monitors/defibrillators are a vital part of the Fire Department's first response responsibilities. The monitors/defibrillators are used for the early recognition of heart attack, as well as other cardiac related problems. In addition, the monitors/defibrillators allow for the early activation of the heart cath lab.

Staff is requesting the purchase of two 12-lead cardiac monitors/defibrillators from Stryker Medical, the sole source provider of the Lifepak 15 V4. Currently, Baylor Scott & White and AMR, the City's contracted emergency medical transport service, all use the Stryker cardiac defibrillators/monitors. It is important that all emergency medical service providers within the City use the same type of cardiac defibrillators/monitors in order to provide a seamless stream medical service.

The proposal from Stryker Medical, in the net amount of $68,837.34 includes a trade-in allowance of $8,000 for the two cardiac monitors/defibrillators that have reached the end of their useful life.

FISCAL IMPACT: A budget adjustment is being presented to Council for approval to appropriate the trade in value to be received for the two cardiac monitors/defibrillators in the amount of $8,000. Funding for the purchase of two cardiac monitor/defibrillators from Stryker Medical, in the amount of $76,837.34 is available in for project 102066 as follows:

	110-2230-522-6211	110-5900-522-6211	Total
Project Budget	$ 8,000	$ 70,000	$ 78,000
Encumbered/Committed to Date	-	-	-
Cardiac Monitors/Defibrillators - Physio-Control, Inc.	(8,000)	(68,837)	(76,837)
Remaining Project Funds	**$ -**	**$ 1,163**	**$ 1,163**

ATTACHMENTS:
Budget Adjustment
Resolution

FY 2020

BUDGET ADJUSTMENT FORM

Use this form to make adjustments to your budget. All adjustments must balance within a Department.

Adjustments should be rounded to the nearest $1.

ACCOUNT NUMBER	PROJECT #	ACCOUNT DESCRIPTION	+ INCREASE		- DECREASE	
110-0000-461-04-24		Sale of Fixed Assets / Sale of Assets	8,000			
110-2230-522-62-11	102066	Capital Equipment / Instruments/Special Equipment	8,000			
TOTAL.....			$ 16,000		$ -	

EXPLANATION OF ADJUSTMENT REQUEST- Include justification for increases AND reason why funds in decreased account are available.

To appropriate the trade in value of two cardiac monitors/defibrillators that have reached the end of their useful lives, in the amount of $8,000 to apply to the purchase of two cardiac monitors/defibrillators, project 102066, with the total cost being $68,837.34 from Physio-Control, Inc.

DOES THIS REQUEST REQUIRE COUNCIL APPROVAL? [X] Yes [ ] No

DATE OF COUNCIL MEETING 11/7/2019

WITH AGENDA ITEM? [X] Yes [ ] No

Department Head/Division Director	Date	[ ] Approved [ ] Disapproved
Finance	Date	[ ] Approved [ ] Disapproved
City Manager	Date	[ ] Approved [ ] Disapproved

Revised form - 10/27/06

RESOLUTION NO. 2019-9885-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING THE PURCHASE OF TWO CARDIAC MONITOR/DEFIBRILLATORS IN THE AMOUNT OF $76,837.34, FROM STRYKER MEDICAL OF CHICAGO, ILLINOIS; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, this purchase of two cardiac monitors/defibrillators will replace two units that have reached the end of their useful life - cardiac monitor/defibrillators have a life expectancy of 5-7 years and two of the Fire Department's 14 monitors/defibrillators are 12 years old (purchased in 2007);

Whereas, cardiac monitors/defibrillators are a vital part of the Fire Department's first response responsibilities - these monitors/defibrillators are used for the early recognition of a heart attack, as well as other cardiac related problems, and allow for the early activation of the heart cath lab;

Whereas, Staff recommends Council authorize the purchase of two 12-lead cardiac monitors/defibrillators from Stryker Medical (Stryker), a sole source provider of the Lifepak 15 V4 in the amount of $76,837.34;

Whereas, currently, Baylor Scott & White and AMR, the City's contracted emergency medical transport service, all use the Stryker cardiac defibrillators/monitors and it is important that all emergency medical service providers within the City use the same type of cardiac defibrillators/monitors in order to provide seamless stream medical services;

Whereas, the proposal received from Stryker includes a trade-in allowance of $8,000 for the two cardiac monitors/defibrillators that have reached the end of their useful life;

Whereas, a budget adjustment is being presented to Council for approval to appropriate the trade-in value to be received for the four cardiac monitors/defibrillators in the amount of $8,000 - funding for the purchase of the four cardiac monitors/defibrillators is available in Account No. 110-5900-522-6211, Project No. 102066; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the purchase of two cardiac monitor/defibrillators in the total amount of $76,837.34, from Stryker Medical of Chicago, Illinois, and authorizes the City Manager, or her designee, after approval as to form by the Interim City Attorney, to execute any documents that may be necessary for this purchase.

Part 3: The City Council authorizes an amendment to the fiscal year 2020 budget, substantially in the form of the copy attached hereto as Exhibit 'A.'

Part 4: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW

Kevin Beavers, CPRP, Director of Parks and Recreation

ITEM DESCRIPTION: Consider adopting a resolution authorizing a BuyBoard purchase and installation of lighting control systems at Crossroads Park from Musco Sports Lighting, LLC of Oskaloosa, Iowa, in the amount of $410,000.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: Staff is recommending adding LED lights for two soccer fields and one multipurpose field at Crossroads Park. This addition will expand the number of lighted practice fields in our inventory.

This system allows staff to enter scheduling information as well as control and monitor athletic field lights from anywhere, via the web or a smart phone.

The system will help prevent lights from being left on by accident or staff traveling from field to field to physically turn lights on and off for rentals.

This system is currently installed at the Mean Joe Green Football Field, fields at Scott & White, West Temple, Miller, and Freedom Park, and the new Crossroads baseball and softball fields as well as the tennis courts.

BuyBoard has awarded Musco Sports Lighting, LLC contract #592-19, which staff is recommending using for this purchase. Contracts awarded through BuyBoard have been competitively procured and meet the statutory procurement requirements for Texas municipalities.

The lighting control systems at Crossroads Park will take approximately six to eight weeks for delivery of materials to the job site. It will take approximately an additional month to install.

The Reinvestment Zone No. 1 Board recommended approval of this purchase at their October 23, 2019 Board meeting.

FISCAL IMPACT: Funding is available in the Reinvestment Zone No. 1 Financing and Project Plan, line 207, account 795-9500-531-6867, project 101005, for the purchase and installation of lighting control systems at Crossroads Park from Musco Sports Lighting, LLC in the amount of $410,000 as shown below.

Project Budget	$	425,000
Encumbered/Committed to Date		-
Musco Sports Lighting, LLC		(410,000)
Remaining Project Funds	**$**	**15,000**

ATTACHMENTS:
Musco Proposal
Resolution

Quote

Project: Temple Crossroads Soccer Phase 2
Temple, TX
Ref: 187797
Date: October 11, 2019

BuyBoard
Master Project: 196290, **Contract Number:** 592-19, **Expiration:** 09/30/2020
Commodity: Parks and Recreation Equipment and Field Lighting Products and Installation

All purchase orders should note the following:
BuyBoard purchase – Contract Number: 592-19

Quotation Price – Materials Delivered to Job Site and Installation

- ***(LED) Soccer Fields 13 and 14 (six poles) – .....$ 410,000***

(Also included light directed to field 15 from back of shared poles from field 14)

Sales tax (if applicable) is not included.
Pricing furnished is effective for 60 days unless otherwise noted and is considered confidential.

Light-Structure System with Total Light Control – TLC for LED™ technology

Guaranteed Lighting Performance
- Guaranteed light levels of 30fc and uniformity of 2:1 for fields 13 and 14

Light-Structure System Description
- Pre-cast concrete bases with integrated lightning grounding
- Galvanized steel poles
- Factory wired and tested remote electrical component enclosures
- Pole length, factory assembled wire harnesses
- Factory wired poletop luminaire assemblies
- Factory aimed and assembled luminaires
- UL Listed assemblies

Control Systems and Services
- Control-Link® Control and Monitoring system to provide remote on/off and dimming (high/medium/low) control and performance monitoring with 24/7 customer support

Operation and Warranty Services
- Reduction of energy and maintenance costs by 40% to 85% over typical 1500W metal halide equipment
- Support from Musco's Lighting Services Team – over 170 Team members dedicated to operating and maintaining your lighting system – plus a network of 1800+ contractors
- Product assurance and warranty program that covers materials and onsite labor, eliminating 100% of your maintenance costs for 25 years

Installation Services Provided

See scope of work below.

Payment Terms

Musco's Credit Department will provide payment details.

Email or fax a copy of the Purchase Order to Musco Sports Lighting, LLC:

Musco Sports Lighting, LLC
Attn: Amanda Hudnut
Fax: 800-374-6402
Email: musco.contracts@musco.com

All purchase orders should note the following:
BuyBoard purchase – Contract Number: 592-19

Delivery Timing

6 - 8 weeks for delivery of materials to the job site from the time of order, submittal approval, and confirmation of order details including voltage, phase, and pole locations.

Due to the built-in custom light control per luminaire, pole locations need to be confirmed prior to production. Changes to pole locations after the product is sent to production could result in additional charges.

Notes

Quote is based on:

- Shipment of entire project together to one location.
- 480 Volt, 3 Phase electrical system requirement to be confirmed prior to production.
- Structural code and wind speed = 2012 IBC, 115 mi/h, Exposure C, Importance Factor 1.
- Owner is responsible for getting electrical power to the site, coordination with the utility, and any power company fees.
- Includes supply and installation of Musco system per attached scope of work.
- Confirmation of pole locations prior to production.
- 340' x 240' fields

Thank you for considering Musco for your lighting needs. Please contact me with any questions or if you need additional details.

Brant Troutman
Musco Sales Representative
Musco Sports Lighting, LLC
Phone: 512-914-9500
E-mail: brant.troutman@musco.com

Temple Crossroads Soccer Phase 2
Fields 13, 14 (F & G)
Temple, TX
Turnkey Scope of Work

Customer Responsibilities:

1. Complete access to the site for construction using standard 2 wheel drive rubber tire equipment.
2. Locate existing underground utilities not covered by your local utilities. i.e. water lines, electrical lines, irrigation systems and sprinkler heads. Musco or Subcontractor will not be responsible for repairs to unmarked utilities.
3. Locate and mark field reference points per Musco supplied layout. (e.g. home plate, center of FB field)
4. Customer to pay for extra costs associated with foundation excavation in non-standard soils (rock, caliche, high water table, collapsing holes, etc.). Soils defined in the geotechnical report-Terracon #96155181.
5. Customer responsible for any necessary power company fees and requirements.
6. Customer responsible for all permitting fees (payment). Contractor will obtain the required permitting.
7. Customer to provide area on site for disposal of spoils from foundation excavation and dumpsters.
8. Provide sealed Electrical Plans. (If required)

Musco Responsibilities:

1. Provide required poles, fixtures, foundations, electrical enclosures and control cabinets.
2. Provide layout of pole locations and aiming diagram.
3. Provide Project Management as required.
4. Soils defined in the geotechnical report- Terracon #96155181.
5. Musco shall provide Performance and Payment Bonds in an amount equal to the total amount of bid. (**Only if Required, Not included in quote)**

Musco Subcontractor Responsibilities General:

1. Provide equipment and materials to off load equipment at jobsite per scheduled delivery.
2. Provide storage containers for material, (including electrical components enclosures), as necessary and waste disposal.
3. Provide adequate security to protect Musco delivered products from theft, vandalism or damage during the installation.
4. Obtain any required permitting.
5. Confirm the existing underground utilities and irrigation systems have been located and are clearly marked so as to avoid damage from construction equipment. Repair any such damage during construction.
6. 1 hour comprehensive burn of all lights on each zone.
7. Keep all heavy equipment off of playing fields when possible. Repair damage to grounds which exceeds that which would be expected. Indentations caused by heavy equipment traveling over dry ground would be an example of expected damage. Ruts and sod damage caused by equipment traveling over wet grounds would be an example of damage requiring repair.
8. Provide startup and aiming as required to provide complete and operating sports lighting system.

Musco Subcontractor Responsibilities – Foundations, Poles and Fixtures:

1. Mark and confirm pole locations per the aiming drawing provided. If there are any issues, immediately notify your Musco Project Manager.
2. Provide materials and equipment to install (6) LSS foundations for fields 13 & 14 as specified on Layout and per the stamped foundation drawings, if applicable.
3. Remove spoils to owner designated location at jobsite.
4. Provide materials and equipment to assemble Musco fixtures, electrical enclosures, poles and pole harnesses.
5. Provide equipment and materials to erect (6) LSS poles for fields 13 & 14 and aim utilizing the pole alignment beam.

Musco Subcontractor Responsibilities – Electrical:

1. Provide materials and equipment to install new electrical service panels as required.
2. Provide as built drawings on completion of installation, **(if required).**

***Note-all underground conduit to the poles has been installed.**

Musco Subcontractor Responsibilities – Core Control System:

1. Provide equipment and materials to install (1) Lighting Contactor Cabinet(s) and terminate all necessary wiring.
2. Provide a dedicated 120v 20amp controls circuit or a step down transformer for 120v control circuit if not available.
3. Provide a dedicated 20amp breaker connected to all available phases for powerline communication.
4. Check all Zones to make sure they work in both auto and manual mode.
5. Contractor will commission Control Link by contacting Control Link Central at (877-347-3319).

RESOLUTION NO. 2019-9886-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING THE PURCHASE AND INSTALLATION OF LIGHTING CONTROL SYSTEMS IN THE AMOUNT OF $410,000, FROM MUSCO SPORTS LIGHTING, LLC OF OSKALOOSA, IOWA, FOR THREE FIELDS AT CROSSROADS PARK; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, Staff is recommending adding LED lights for two soccer fields and one multipurpose field at Crossroads Park - this addition will expand the number of lighted practice fields in our inventory;

Whereas, this system allows Staff to enter scheduling information as well as control and monitor athletic field lights from anywhere, via the web or a smart phone which will help prevent lights from being left on by accident or Staff traveling from field to field to physically turn lights on and off for rentals;

Whereas, this system is currently installed at the Mean Joe Green Football Field, fields at Scott & White, West Temple, Miller, and Freedom Parks, and the new Crossroads baseball and softball fields as well as the tennis courts;

Whereas, Musco Sports Lighting, LLC, has been awarded BuyBoard Contract No. 512-16 and Staff recommends using this BuyBoard contract for this purchase - contracts awarded by BuyBoard have been competitively procured and comply with the statutory requirements for Texas municipalities;

Whereas, the Reinvestment Zone No. 1 Board recommended approval of this purchase at their October 23, 2019 Board meeting;

Whereas, Staff recommends Council authorize the purchase of lighting control systems in the amount of $410,000, from Musco Sports Lighting, LLC of Oskaloosa, Iowa, for three fields at Crossroads Park;

Whereas, funding for this purchase is available in the Reinvestment Zone No. 1 Financing and Project Plan, Line 207, Account No. 795-9500-531-6867, Project No. 101005; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the purchase of lighting control systems in the amount of $410,000, from Musco Sports Lighting, LLC of Oskaloosa, Iowa, for three fields at Crossroads Park, and authorizes the City Manager, or her designee, after approval as to form by the Interim City Attorney, to execute any documents that may be necessary for this purchase.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./ DIVISION SUBMISSION REVIEW:

Mark Baker, Principal Planner

ITEM DESCRIPTION: SECOND & FINAL READING – FY-19-23-ZC: Consider adopting an ordinance authorizing a Conditional Use Permit and its site plan to allow a recreational vehicle (RV) park within Lot 10 of the Bellaire Commercial subdivision, addressed as 4425 North General Bruce Drive.

PLANNING & ZONING COMMISSION RECOMMENDATION: At its September 16, 2019, meeting, the Planning & Zoning Commission voted 7 to 0 to recommend approval of the conditional use permit per staff's recommendation.

STAFF RECOMMENDATION: Staff recommends approval of the requested Conditional Use Permit and its site plan with the following conditions:

1. Substantial compliance to the site plan attached as Exhibit A and building renderings attached as Exhibit B;
2. Compliance to Chapter 31, Code of Ordinances;
3. A minimum of one tree per RV stand (2-inch diameter at breast height / dbh) placed at a minimum 25-foot spacing; and
4. Director of Planning & Development, with consultation by the DRC, authorization to approve minor changes to the site plan and civil plan set including but not limited to: overall site layout, landscaping, water, sewer layout and or changes of proposed amenities.

ITEM SUMMARY: The applicant, Temple Belaire North LLC is pursuing a Conditional Use Permit (CUP) to allow a recreational vehicle park (RV) with 117 RV stands (RV camping space or stall) on Lot 10, Bellaire Commercial subdivision which consists of approximately 16.812 +/- acres. This proposed Bellaire Junction RV park is the 2nd proposed RV park under the revised Chapter 31 – Code of Ordinances which was updated per Ord. 2018-4915. The 1st park is the Briar Flat RV park at 14220 State Highway 317 which was approved for 72 RV stands in June 2018.

A summary of the Bellaire Junction RV park, to be built in a single phase is as follows:

- Provisions for 117 individual concrete RV/ trailer stands (88 back-in & 29 pull through)
- Site plan detail for each stand site provides parking for two separate individually parked vehicles (three total including RV)
- Direct connect sewer for all RV stands (no park dump station proposed)

- Vehicle circulation by 20-foot wide one-way direction private internal roads
- Three separate dumpster container enclosures
- Park and picnic areas with crushed limestone trails
- Playground area with a splash-pad water feature
- Separate bathrooms and shower facilities
- Laundry facility
- Two separate dog park areas
- Shade structures
- Two-story administrative office building with front desk, store and coffee bar (1st floor) and host residence (2nd floor) – building footprint approximately1,500 square feet
- Landscaping providing one (2-inch diameter at breast height / dbh) tree per RV stand, spaced at 25-foot intervals
- 41-foot wide primary access entry from Loop 363 providing for one inbound lane and two outbound lanes
- 6-foot tall concrete wall along Loop 363 frontage and adjacent to railroad tracks to provide noise reduction

CHAPTER 31 – CODE OF ORDINANCES (RECREATIONAL VEHICLE PARKS):
The development of recreational vehicle (RV) parks is provided for by Chapter 31 – Code of Ordinances. Provisions allow for their development with a density not to exceed seven units per acre, as well as circulation standards, landscaping, setbacks, facilities for water and sewage as well as other amenities. According to Section 31-15, the length of stay at an RV park is not to exceed six months in any 12-month period. Any length of stay beyond the maximum of six months is considered permanent and is prohibited. The proposed RV park appears to be in compliance with Chapter 31 – Code of Ordinances, however confirmation will be made with the review of the building plans.

CONDITIONAL USE PERMIT REVIEW CRITERIA (UDC Section 3.5.4 (A-G):
The proposed RV park through the conditional use permit review process is in compliance with conditional use permit review criteria as provided for in UDC Section 3.5.4 (A-G). A table summarizing compliance criteria has been attached.

COMPREHENSIVE PLAN COMPLIANCE: The proposed rezoning relates to the following goals, objectives or maps of the Comprehensive Plan and Sidewalk and Trails Plan:

Future Land Use Map (FLUM) (CP Map 3.1)
The subject property is within the Suburban Commercial Future Land Use Map (FLUM) designation. The suburban Commercial designation is appropriate for office and retail service uses and would support underlying office and retail service use zoning (O-1, NS & GR). The existing light industrial (LI) zoning is not consistent. However, since a Conditional Use Permit is required for an RV park both within the GR & LI district, if approved, compliance should be considered. Therefore, if the conditional use permit is approved, the request is considered to be in **compliance** with the Future Land Use Map.

Thoroughfare Plan (CP Map 5.2)
The subject property fronts and will take direct access from Loop 363, a TxDOT maintained expressway on the Thoroughfare Plan. Physical entry into the park will be made from an access gate setback approximately 144.5 feet back from the edge of TxDOT ROW. TxDOT is supportive of the proposed RV park but is requiring the preparation of a traffic impact analysis (TIA).

Availability of Public Facilities (CP Goal 4.1)
Water is available from an 8-inch water line within Loop 363. A 12-inch sewer line within an existing 30-foot wide wastewater easement is available on the western boundary of the property.

Temple Trails Master Plan Map and Sidewalks Ordinance
No trails have been identified on Trails Master Plan. Since Loop 363 is an expressway, no sidewalks are required.

The Development Review Committee reviewed the site plan for the RV park on August 22, 2019. No issues were identified.

PUBLIC NOTICE: Nine notices of the Planning and Zoning Commission public hearing were sent out to property owners within 200-feet of the subject property, as required by State law and City Ordinance. As of Tuesday, October 8, 2019, at 9:00 AM, three notices, from the same property owner in agreement have been returned.

The newspaper printed notice of the public hearing on September 5, 2019, in accordance with state law and local ordinance.

FISCAL IMPACT: Not applicable.

ATTACHMENTS:
Narrative Letter
Site plan, water, sewer and electrical service plans & drainage civil set (Exhibit A)
Facility amenities, building elevations, floor plans & wall details (Exhibit B)
Conditional Use Permit Review Criteria Table (UDC 3.5.4 (A-G)
Photos
Maps
Returned Property Notices
P&Z Excerpts (September 16, 2019)
Ordinance

“Bellaire Junction **RV Park**”

Idea Page

Step back in time to a slower pace, and simpler lifestyle.

Enjoy the vibrant, colorful and vintage styled RV Resort that embraces iconic structures and sense of space from the 1960s.

This resort will be reminiscent of many of our childhoods, and a familiar trend of retro design to the younger generation.

Will exude fun and playground, and inviting for all to visit.


Twister


AUSTIN
MOTEL
CELEBRATING
71 YRS
SINCE 1938
THANK YOU


MOTEL
66
KINGS INN

“Bellaire **Junction” RV Park**

Playground Idea Page

- The owners of the new RV Park have decided to implement a 1960’s/Route 66 theme throughout the park. The 1964 Route 66 movie followed two young men traversing the United States and all of the events and consequences surrounding their journey.

- Since most RV owners embraced a simpler life and lifestyle, as well as travel from one end of the continent to the other, it seemed appropriate to celebrate this era in our new park.
- Playground will consist of vintage style equipment:
- Teeter Totters
- Rocket ships
- Slides
- Classic swings
- Monkey bars
- Meeri-go-round

Bright colors and shiny objects with a shade structure.

“Bellaire **Junction RV Park”**

Splash pad Idea Page

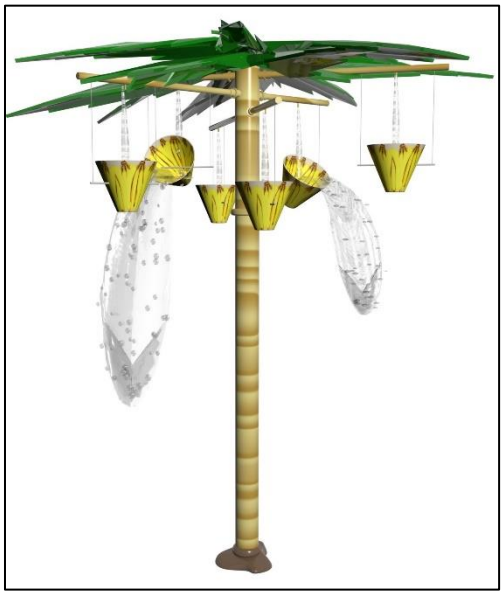
The owners of the new RV Park have decided to implement a 1960’s/Route 66 theme throughout the park. The 1964 Route 66 movie followed two young men traversing the United States and all of the events and consequences surrounding their journey.

Keeping with the whimsical and carefree theme, and creating a family play area for the residences of the RV Park, a Splash Pad will be a part of the overall complex.

Splash Pad will consist of retro styled organic objects such as:

- Tot Mushroom Dome
- Misting Palm
- Cactus Water Shower
- Banana Bucket
- Bubblers
- Sprays

Bright colors and shiny objects with minimal shade structure.



“Bellaire **Junction RV Park”**

Shade Structures Idea Page

Although there are areas of the park that are naturally covered with shade, the park owners have chosen to construct additional shade structures in strategic areas for the safety and comfort of their users.

Due to the eclectic style of the playground, the design may require multiple shade structures, but the majority of the playground area will be covered in some fashion, to be determined. Sporadic picnic tables and park benches will be scattered within the public recreational spaces, and there will be covered seating areas in the dog parks. The Splash Pad will remained uncovered for the most part.

There will be two Dog Parks on the premises with shaded seated areas, agility work out areas, doggy drinking fountains and other park necessities.

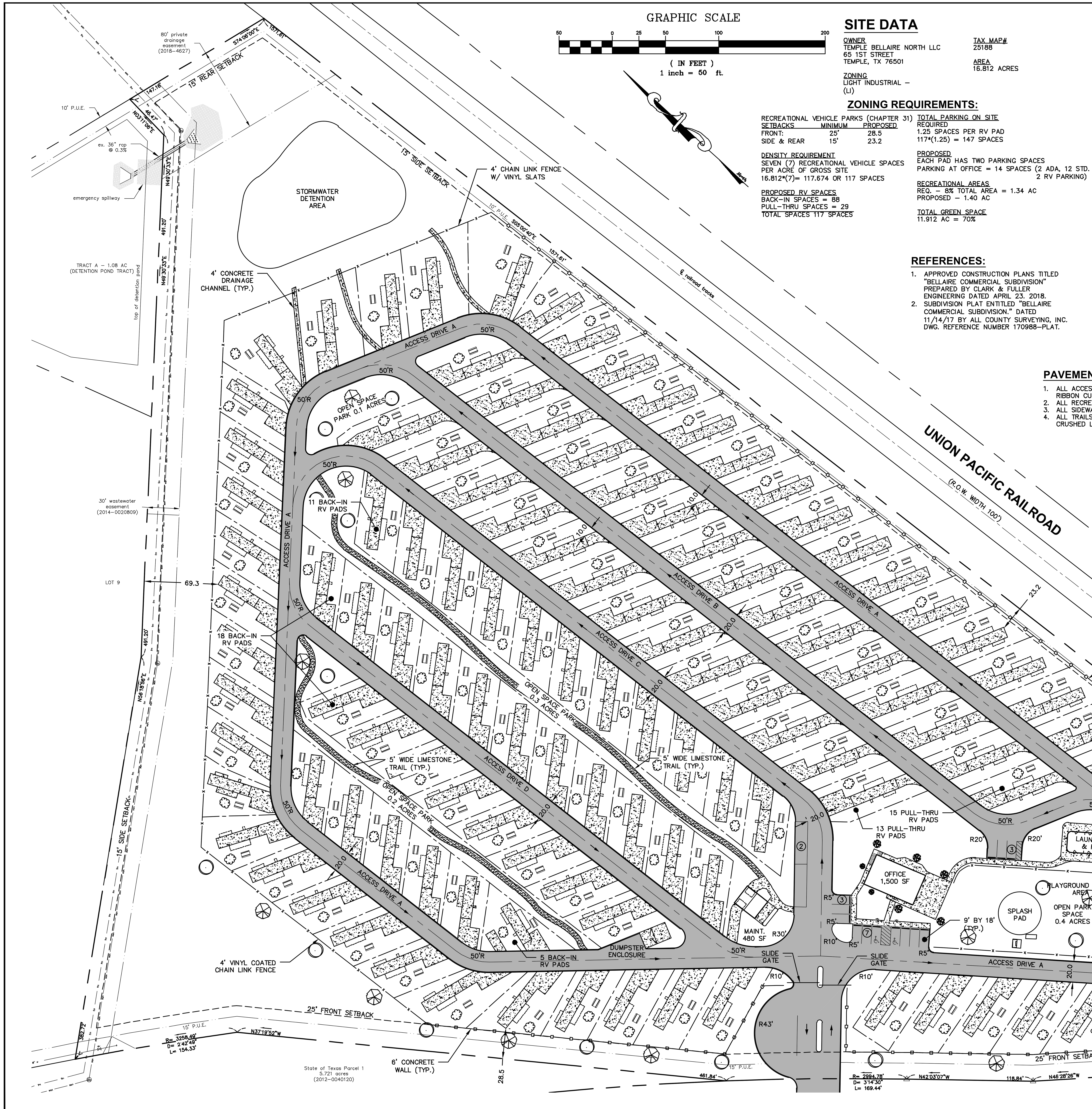
“Bellaire **Junction RV Park”**

Dog Parks Idea Page

Astro Junction will be a pet friendly resort, and the owners welcome travelers and residents to bring their dogs out for exercise in one of the dog parks on site.

There will be two Dog Parks on the premises with shaded seated areas, agility work out areas, doggy drinking fountains and other park necessities. The parks will be fenced for a lease-free experience for you and your dog to get outside, enjoy some fresh air together and let your dog cut loose.

There will also be crushed granite walking trails throughout the park allowing for additional exercise and outdoor recreation.



SITE DATA

OWNER
TEMPLE BELLAIRE NORTH LLC
65 1ST STREET
TEMPLE, TX 76501

TAX MAP#
25188

AREA
16.812 ACRES

ZONING
LIGHT INDUSTRIAL -
(LI)

ZONING REQUIREMENTS:

RECREATIONAL VEHICLE PARKS (CHAPTER 31)

SETBACKS	MINIMUM	PROPOSED
FRONT:	25'	28.5
SIDE & REAR	15'	23.2

DENSITY REQUIREMENT
SEVEN (7) RECREATIONAL VEHICLE SPACES PER ACRE OF GROSS SITE
16.812*(7)= 117.674 OR 117 SPACES

PROPOSED RV SPACES
BACK-IN SPACES = 88
PULL-THRU SPACES = 29
TOTAL SPACES 117 SPACES

TOTAL PARKING ON SITE
REQUIRED
1.25 SPACES PER RV PAD
117*(1.25) = 147 SPACES

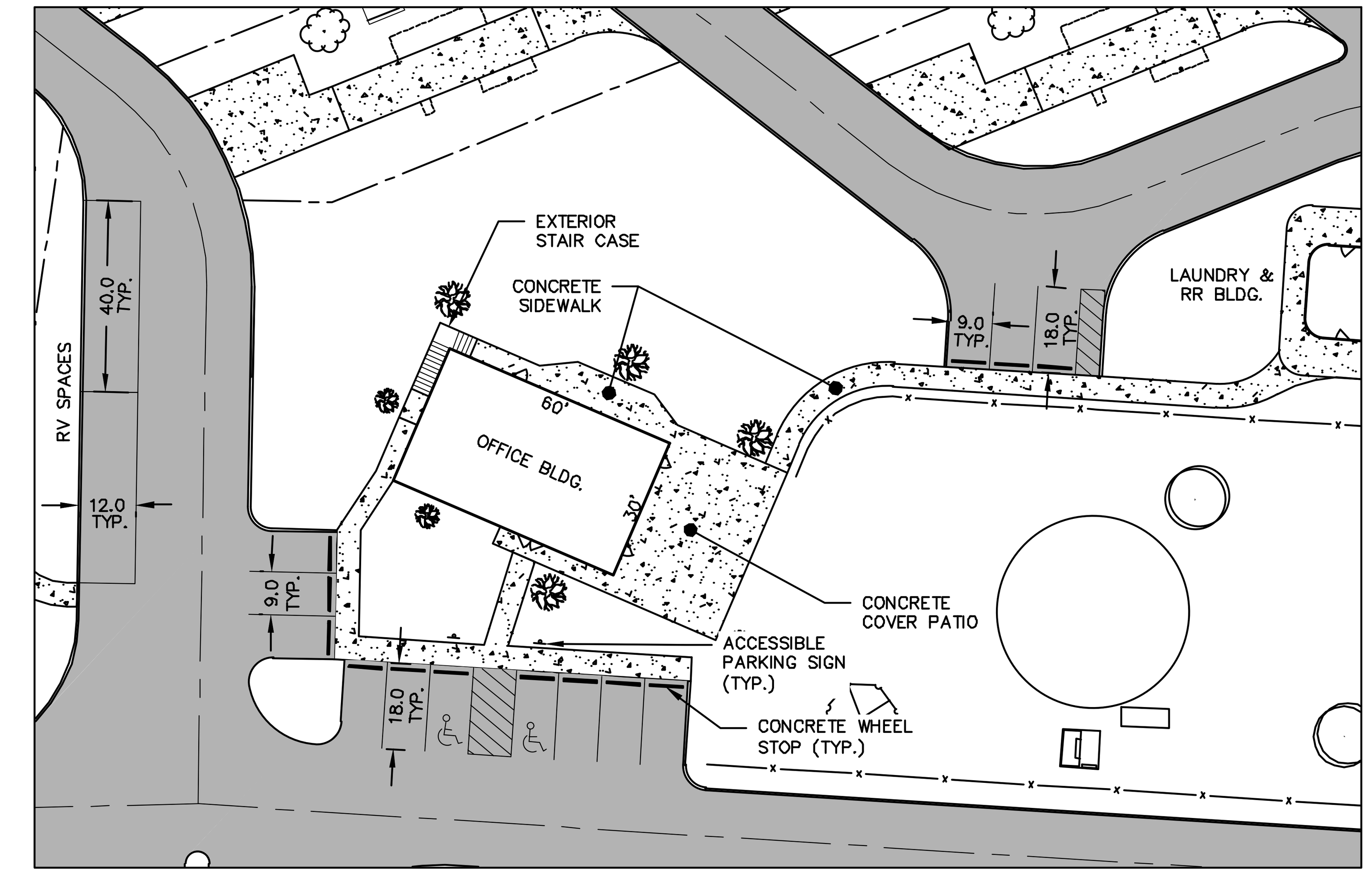
PROPOSED
EACH PAD HAS TWO PARKING SPACES
PARKING AT OFFICE = 14 SPACES (2 ADA, 12 STD. 2 RV PARKING)

RECREATIONAL AREAS
REQ. - 8% TOTAL AREA = 1.34 AC
PROPOSED - 1.40 AC

TOTAL GREEN SPACE
11.912 AC = 70%

REFERENCES:

1. APPROVED CONSTRUCTION PLANS TITLED "BELLAIRE COMMERCIAL SUBDIVISION" PREPARED BY CLARK & FULLER ENGINEERING DATED APRIL 23. 2018.
2. SUBDIVISION PLAT ENTITLED "BELLAIRE COMMERCIAL SUBDIVISION." DATED 11/14/17 BY ALL COUNTY SURVEYING, INC. DWG. REFERENCE NUMBER 170988-PLAT.



SERVICE BUILDINGS DETAIL

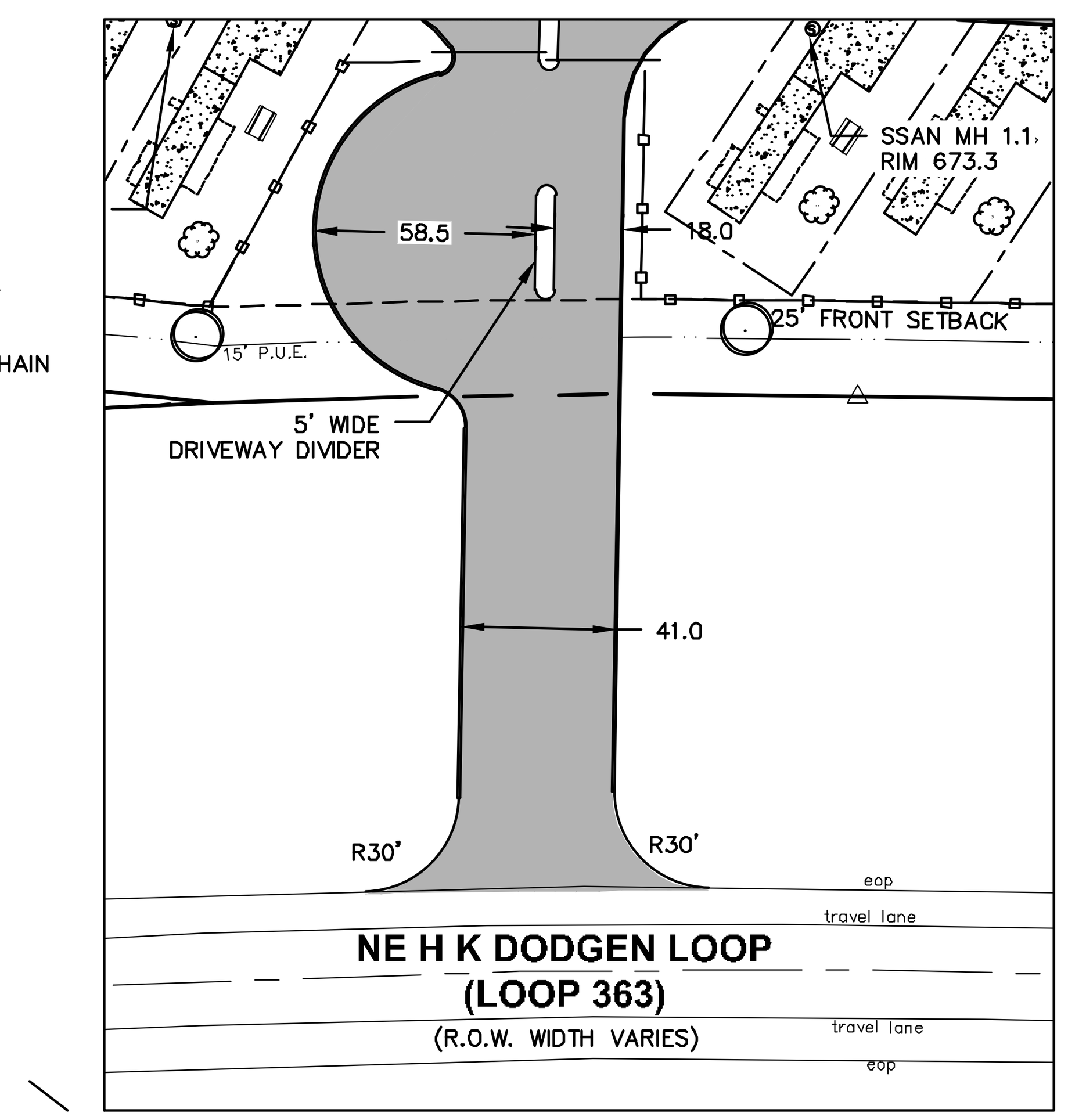
1" = 20'

PAVEMENT & WALKWAY NOTES

1. ALL ACCESS ROADWAYS WILL BE ASPHALT WITH 6" RIBBON CURB FOR EDGE PROTECTION.
2. ALL RECREATIONAL VEHICLE SITES WILL BE CONCRETE.
3. ALL SIDEWALKS AROUND BUILDINGS WILL BE CONCRETE.
4. ALL TRAILS THROUGHOUT THE RV PARK WILL BE CRUSHED LIMESTONE.

LEGEND

- ASPHALT
- CONCRETE PAD AND SIDEWALKS
- LIMESTONE TRAIL
- CONCRETE WALL
- VINYL COATED CHAIN LINK FENCE



ENTRANCE DETAIL

1" = 50'

No.	Revisions and Descriptions	By	Date
1	REVISED PER OWNER COMMENTS	JPJ	9/16/19

Project Title:
RV PARK - LOT 10
BELLAIRE COMMERCIAL SUBDIVISION
CITY OF TEMPLE, BELL COUNTY

Drawing Title:
SITE PLAN

Drawn By: JPJ
Checked By: TJF
Scale: 1" = 50'
Date: 6/2019

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Engineering, Architecture, Surveying, P.C.
5250 S 31st St, Temple, Texas 76502 254-771-2054
Corporate Office: The Culver Road Armory, 145 Culver Road, Suite 160, Rochester, New York 14620 585-381-9250
TBPE Firm Number: F-10615
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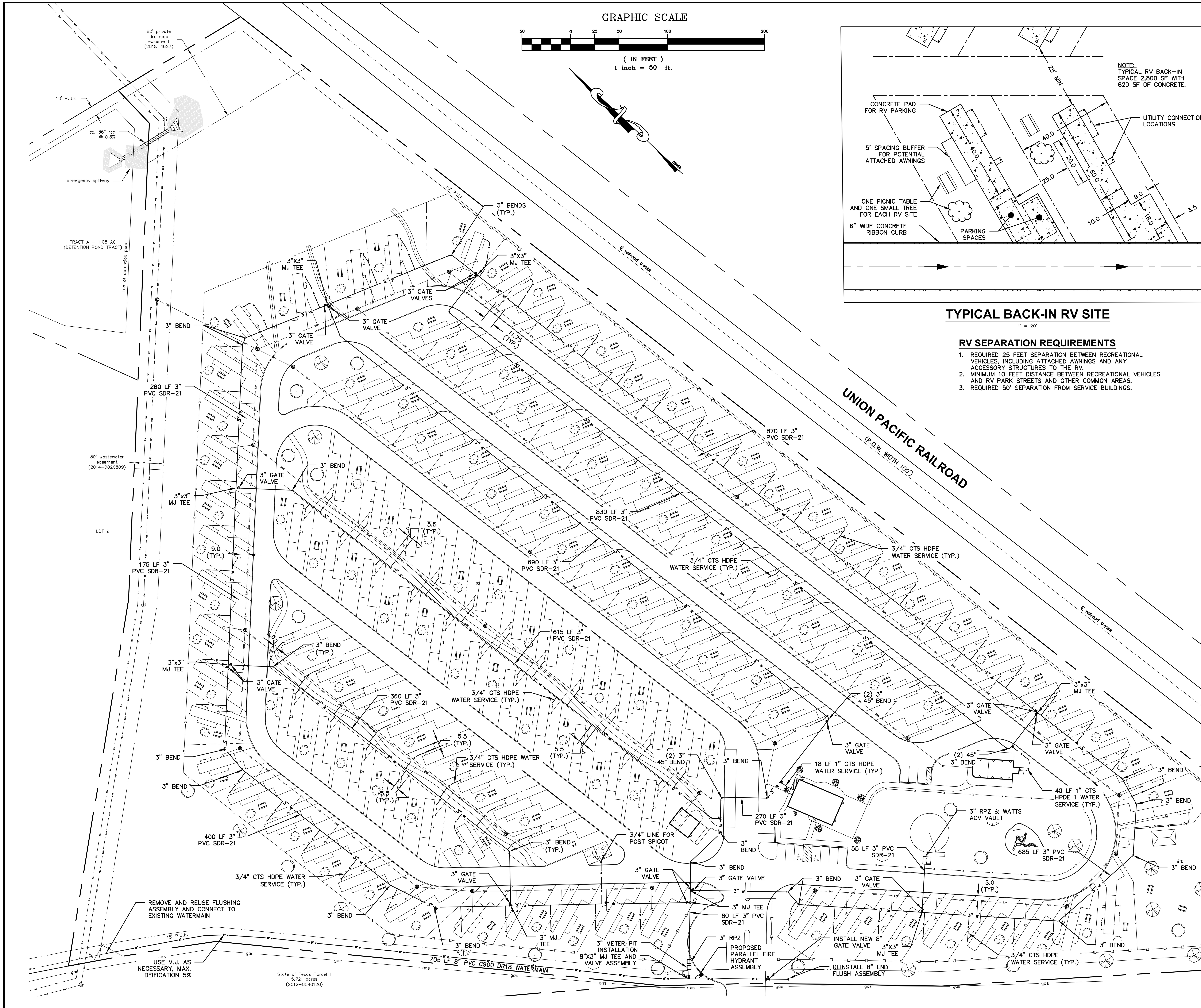
Sheet No. G-1
1 of 6
Project No. 4613.19001



TYPICAL BACK-IN RV SITE

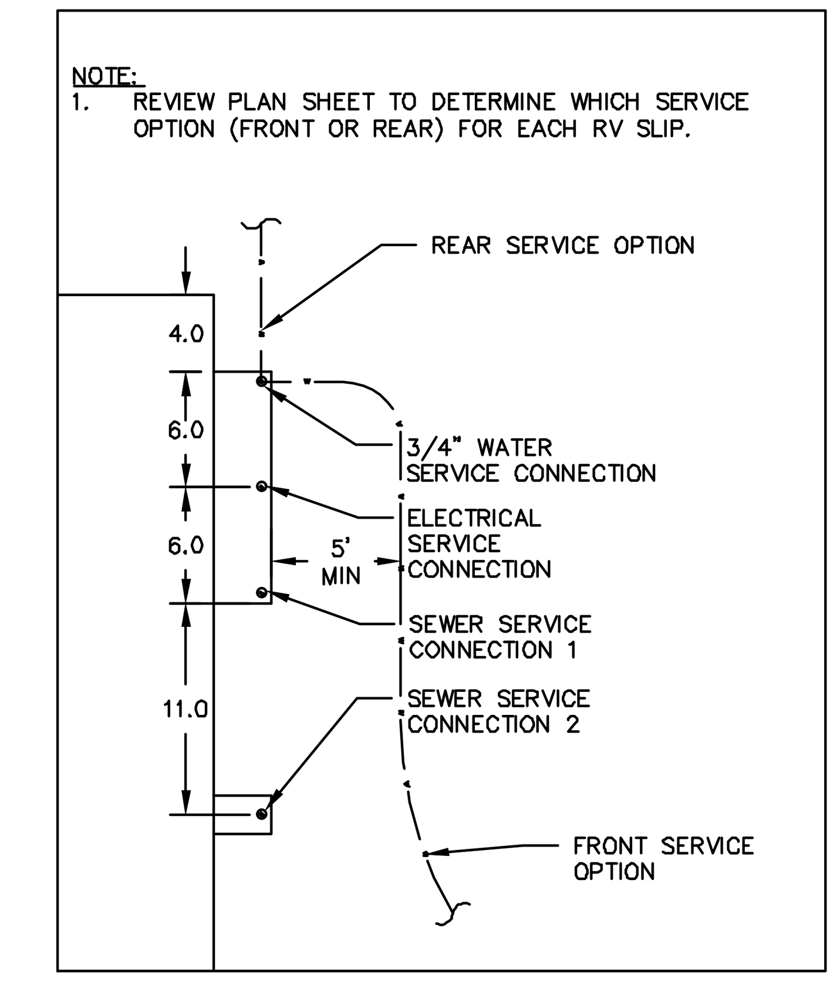
1" = 20'

RV SEPARATION REQUIREMENTS

1. REQUIRED 25 FEET SEPARATION BETWEEN RECREATIONAL VEHICLES, INCLUDING ATTACHED AWNINGS AND ANY ACCESSORY STRUCTURES TO THE RV.
2. MINIMUM 10 FEET DISTANCE BETWEEN RECREATIONAL VEHICLES AND RV PARK STREETS AND OTHER COMMON AREAS.
3. REQUIRED 50' SEPARATION FROM SERVICE BUILDINGS.

RV PARK WATER SUPPLY/SERVICE NOTES

1. ALL RV PARK WATERMAIN SIZES SHOWN ON THE PLANS ARE CONCEPTUAL AND SUBJECT TO CHANGE PRIOR TO FINAL SITE PLAN SUBMITTAL.
2. ALL WATER PIPING, FIXTURES, AND OTHER EQUIPMENT SHALL BE CONSTRUCTED AND MAINTAINED IN ACCORDANCE WITH STATE AND LOCAL REGULATIONS AND REQUIREMENTS.
3. EVERY RECREATIONAL VEHICLE SITE SHALL BE PROVIDED WITH AN INDIVIDUAL BRANCH SERVICE LINE DELIVERING SAFE, PURE, AND POTABLE WATER. HTE OUTLET OF THE BRANCH SERVICE LINE SHALL TERMINATE ON THE LEFT SIDE OF THE SITE OF THE RECREATIONAL VEHICLE AS SHOWN ON THE RV WATER SERVICE DETAIL.
4. WATER SERVICES LINES TO EACH RECREATIONAL VEHICLE SITE SHALL BE SIZED TO PROVIDE A MINIMUM OF EIGHT (8) GALLONS PER MINUTE (GPM) AT THE POINT OF CONNECTION WITH THE RECREATIONAL VEHICLE DISTRIBUTION SYSTEM.
5. THE INDIVIDUAL BRANCH SERVICE LINE SHALL BE 3/4" CTS HDPE PIPE. NO RIGID PIPE MAY BE USED. FITTINGS AT EITHER END SHALL BE OF A QUICK DISCONNECT TYPE NOT REQUIRING ANY SPECIAL TOOLS.



RV WATER SERVICE DETAIL

N.T.S.

No.	Revisions and Descriptions	By	Date
1	REVISED PER OWNER COMMENTS	JPJ	9/16/19

Project Title: RV PARK - LOT 10 BELLAIRE COMMERCIAL SUBDIVISION CITY OF TEMPLE, BELL COUNTY

Drawing Title: WATER SERVICE PLAN

Drawn By: JPJ
Checked By: TJF
Scale: 1" = 50'
Date: 6/2019

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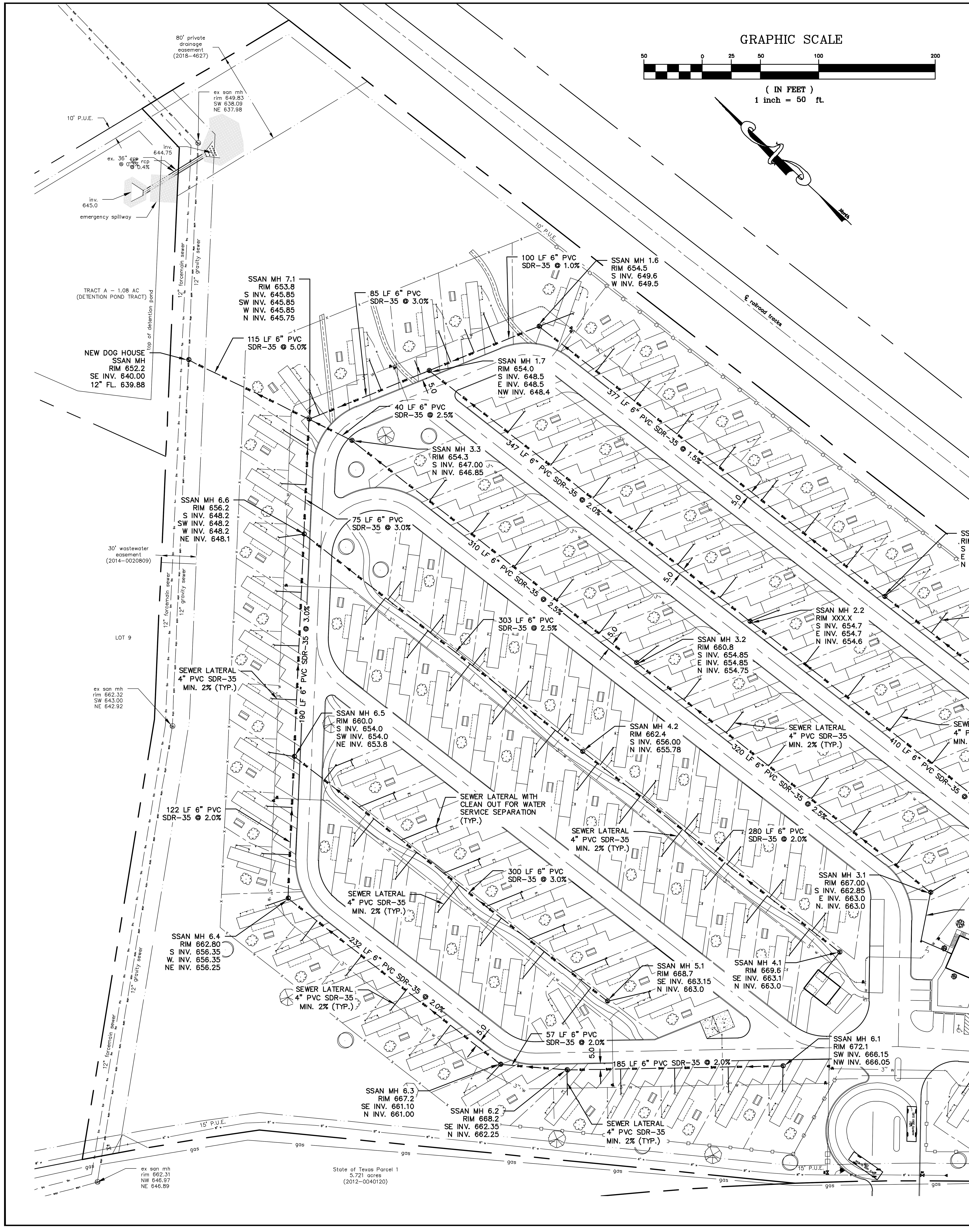
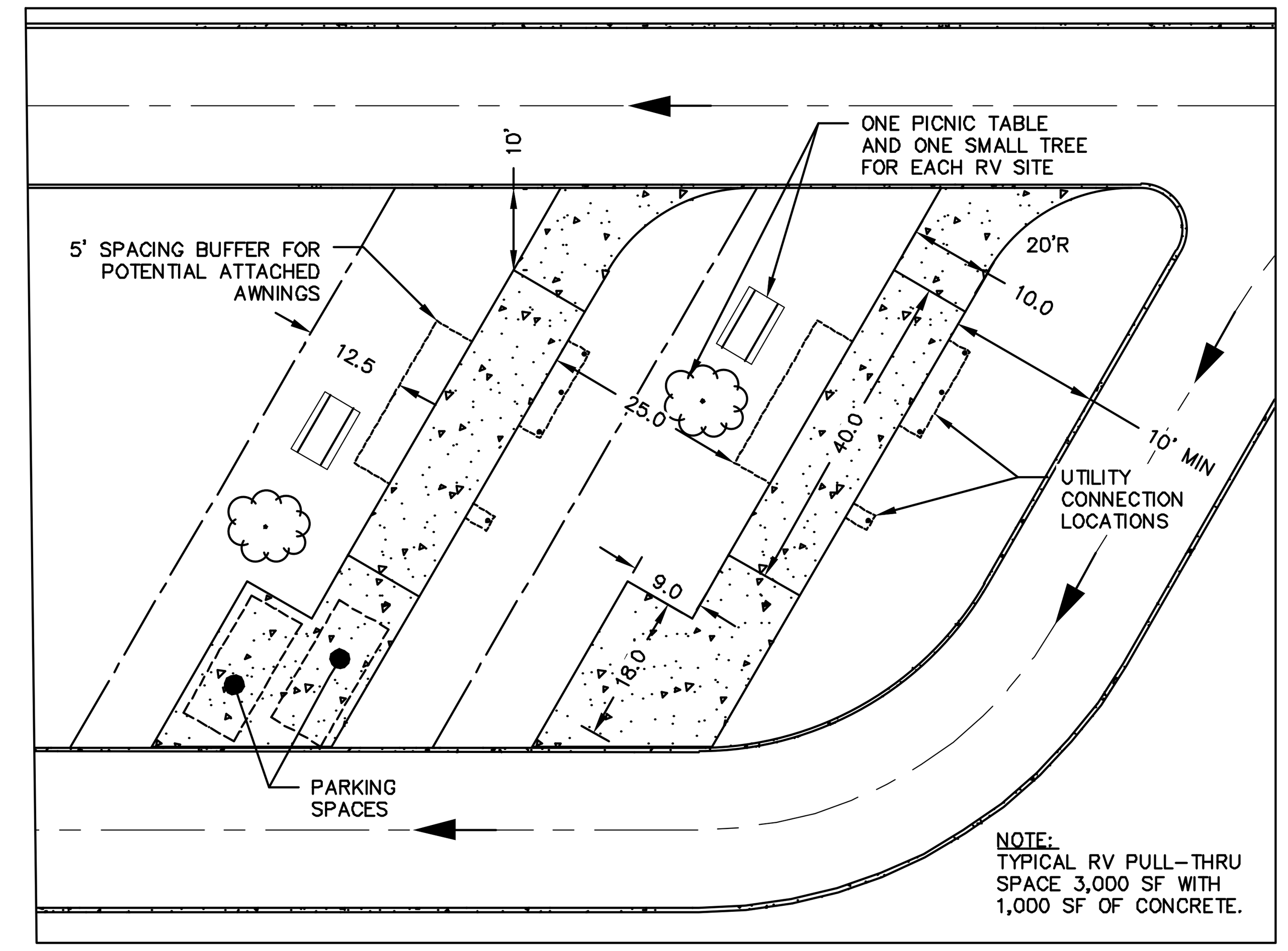
Project No. 4613.19001





TYPICAL PULL-THRU RV SITE

1' = 20'

RV PARK ELECTRICAL DESIGN NOTES

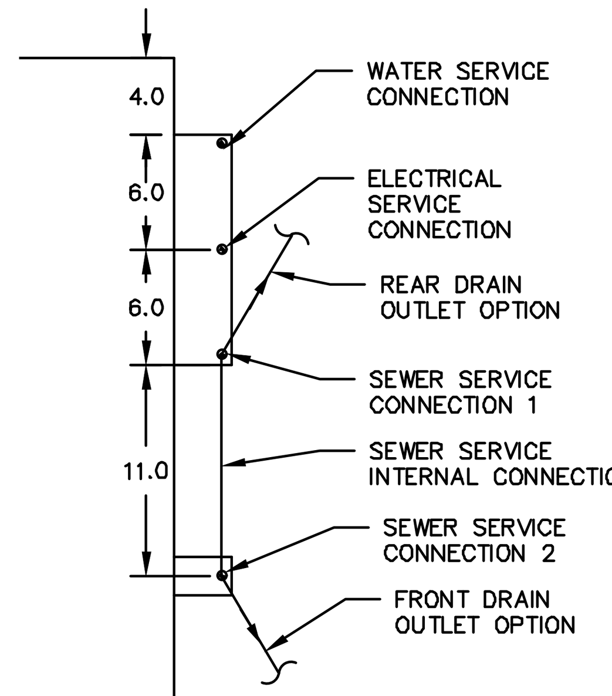
1. UNDERGROUND MEDIUM VOLTAGE ELECTRICAL DISTRIBUTION INFRASTRUCTURE, INCLUDING TRANSFORMERS WILL BE PROVIDED BY THE LOCAL ELECTRICAL UTILITY THROUGHOUT THE RV PARK GROUNDS.
2. AN ELECTRICAL DISTRIBUTION RACK WILL BE PROVIDED FOR APPROXIMATELY EVERY (8) RV SITES. THIS ELECTRICAL DISTRIBUTION RACK WILL CONSIST OF THE FOLLOWING: (2) 2" STEEL PIPE VERTIAL SUPPORTS SET IN AT LEAST 24" DEEP CONCRETE FOOTINGS, (2) 2" GALVANIZED UNISTRUT BRACKETS FOR HORIZONTAL SUPPORT WELDED TO VERTICAL SUPPORTS, (1) ELECTRICAL UTILITY METER, (1) 120/240V, 1-PHASE, 3-WIRE, 400A PANELBOARD, NEMA 3R RATED WITH (8) 175A, 2-POLE CIRCUIT BREAKERS – ONE TO FEED EACH RV SITE.
3. AT EACH RV SITE, PROVIDE (1) 120/240V, 1-PHASE, 3-WIRE PEDESTAL ELECTRICAL BOX IN A NEMA 34 RAINPROOF ENCLOSURE WITH THE FOLLOWING: (1) 14-50R AMP PLUG, (1) TT30R 30 AMP PLUG, (1) 20R2GFI, 20A PLUGS, UTILITY METER, TAMPER PROOF SEALS WITH ¾", 1" AND 1-1/2" KNOCK-OUTS.
4. LIGHTING FOR INTERIOR ROADWAYS SHALL BE PROVIDED VIA SINGLE HEAD LED, FULL CUTTOFF, 100% DOWNWARE PROJECTION FIXTURES WITH HOUSESIDE SHIELDS MOUNTED TO 24'-0" TALL ROUND TAPERERED COMPOSITE POLES DIRECT BURIED 4'-0" BELOW FINISHED GRADE. LED LIGHT FIXTURE LUMEN OUTPUT TO BE DETERMINED WITH LAYOUT. THE GOAL OF THE SITE LIGHTING IS NO MINIMIZE LIGHT POLLUTION BOTH INTO THE SKY AND ONTO ADJACENT RV SITES.
5. AT EACH GENERAL USE BUILDING ON SITE, PROVIDE (1) 120/240V, 1-PHASE, 3-WIRE ELECTRICAL SERVICE TO FEED THE BUILDING. INTERIOR LIGHTING AND RECEPTACLE LAYOUTS PROVIDED TO MEET APPLICABLE CODES AND END USER NEEDS.

RV PARK SANITARY SEWER NOTES

1. ALL SANITARY SEWER PIPE SIZES, INVERTS AND SLOPES SHOWN ON THE PLANS ARE CONCEPTUAL AND SUBJECT TO CHANGE PRIOR TO FINAL SITE PLAN SUBMITTAL.
2. ALL MANHOLES AND/OR CLEANOUTS SHALL BE PROVIDED AS REQUIRED IN THE CODE OF ORDINANCES, AND TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ) REGULATIONS. MANHOLES AND CLEANOUTS SHALL BE ACCESSIBLE AND BROUGHT TO GRADE.
3. EACH RECREATIONAL VEHICLE SITE SHALL HAVE TWO (2) SEWER CONNECTIONS TO ENSURE SHORTEST POSSIBLE DISTANCE BETWEEN THE RECREATIONAL VEHICLE OUTLET AND THE SEWER DRAIN CONNECTION.
4. EACH SEWER CONNECTION SHALL BE PROVIDED WITH A HOUSE TRAP.
5. SEWER LATERALS OVER THIRTY (30) FEET SHALL BE PROPERLY VENTED AND PROVIDED WITH A CLEANOUT BROUGHT TO GRADE.
6. DRAIN CONNECTION SHALL BE SLOPE CONTINUOUSLY DOWNWARD AND FORM NO TRAPS. ALL PIPE AND CONNECTIONS SHALL BE INSTALLED AND MAINTAINED GAS AND WATER TIGHT.
7. ALL MATERIALS USED FOR SEWER CONNECTIONS SHALL BE SEMI-RIGID, CORROSIVE RESISTANT, NONABSORDENT, AND DURABLE. THE INNER SURFACE SHALL BE SMOOTH.
8. EFFLUENT FROM THE SPRAY PAD WILL DISCHARGE TO RETICULATION SYSTEM WHICH IS WATER QUALITY MONITORING SYSTEM (WQMS).

NOTE:

1. SEWER SERVICE INTERNAL CONNECTION SHALL BE 4" PVC SDR-35 AND SLOPE MINIMUM 2% TOWARDS DOWNSTREAM SEWER CONNECTION.
2. SEWER CONNECTION SHALL BE 4" IN DIAMETER AND EXTEND ABOVE GRADE 3" TO 6". EACH INLET SHALL BE PROVIDED WITH A GASOTIGHT SEAL WHEN CONNECTED TO A RECREATIONAL VEHICLE AND HAVE A GAS-TIGHT PLUG FOR USE WHEN NOT IN SERVICE.
3. REVIEW PLAN SHEET TO DETERMINE WHICH DRAIN OPTION (FRONT OR REAR) FOR EACH RV SLIP.



RV SEWER SERVICE DETAIL

N.T.S.

SANITARY SEWER SIZING

EACH RECREATIONAL VEHICLE SLIP EQUALS SIX (6) DRAINAGE FIXTURE UNITS.

TOTAL RV SLIPS 117, 117*(6)= 702 DFU

LAUNDRY AND RESTROOM BUILDING
SIX (6) WATER CLOSET, 6*(6) = 36 DFU
SIX (6) WASH SINKS, 6(2) = 12 DFU
SIX (6) SHOWERS, 6*(3) = 18 DFU
THREE (3) LAUNDRY 6*(2) = 12 DFU
TOTAL DRAINAGE FIXTURE UNITS = 78 DFU

OFFICE BUILDING
FOUR (4) WATER CLOSET, 4*(6) = 24 DFU
FOUR (4) WASH SINKS, 6(2) = 12 DFU
TWO (2) SHOWERS, 2*(3) = 6 DFU
ONE (1) KITCHEN SINK 1*(2) = 2 DFU
TOTAL DRAINAGE FIXTURE UNITS = 44 DFU

TOTAL PARK DFU – 824 DFU

PER SECTION 710 "DRAINAGE SYSTEM SIZING" TABLE 710.1(1) "BUILDING DRAINS AND SEWERS"

6" DIAMETER PIPE AT 4% – DFU = 1,000

No.	Revisions and Descriptions	By	Date
1	REVISED PER OWNER COMMENTS	JPJ	9/16/19

Project Title: RV PARK - LOT 10
BELLAIRE COMMERCIAL SUBDIVISION
CITY OF TEMPLE, BELL COUNTY

Drawing Title: SEWER SERVICE PLAN & ELECTRICAL NOTES

Drawn By: JPJ
Checked By: TJF
Scale: 1" = 50'
Date: 6/2019

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Sheet No. G-3

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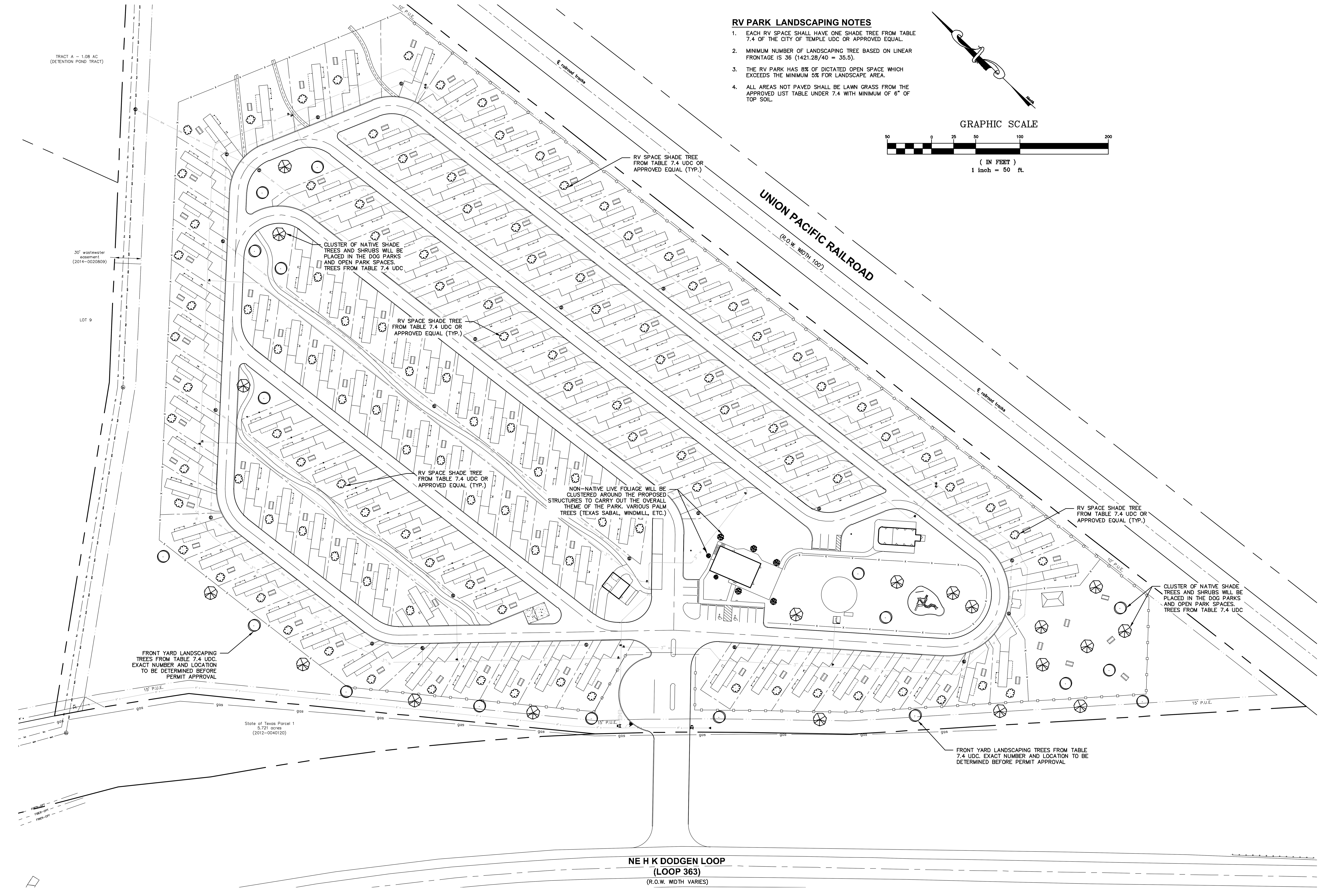
Project No. 4613.19001

N:\4613.19001.000\dwg\Site\RV Park Base (Final).dwg, 9/16/2019 9:19:15 AM, jjandis

RV PARK LANDSCAPING NOTES

1. EACH RV SPACE SHALL HAVE ONE SHADE TREE FROM TABLE 7.4 OF THE CITY OF TEMPLE UDC OR APPROVED EQUAL.
2. MINIMUM NUMBER OF LANDSCAPING TREE BASED ON LINEAR FRONTAGE IS 36 (1421.28/40 = 35.5).
3. THE RV PARK HAS 8% OF DICTATED OPEN SPACE WHICH EXCEEDS THE MINIMUM 5% FOR LANDSCAPE AREA.
4. ALL AREAS NOT PAVED SHALL BE LAWN GRASS FROM THE APPROVED LIST TABLE UNDER 7.4 WITH MINIMUM OF 6" OF TOP SOIL.



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Project Title:
RV PARK - LOT 10
BELLAIRE COMMERCIAL SUBDIVISION
CITY OF TEMPLE, BELL COUNTY

Drawing Title:
CONCEPT LANDSCAPING PLAN

Drawn By: JPJ
Checked By: TJF
Scale: 1" = 50'
Date: 6/2019

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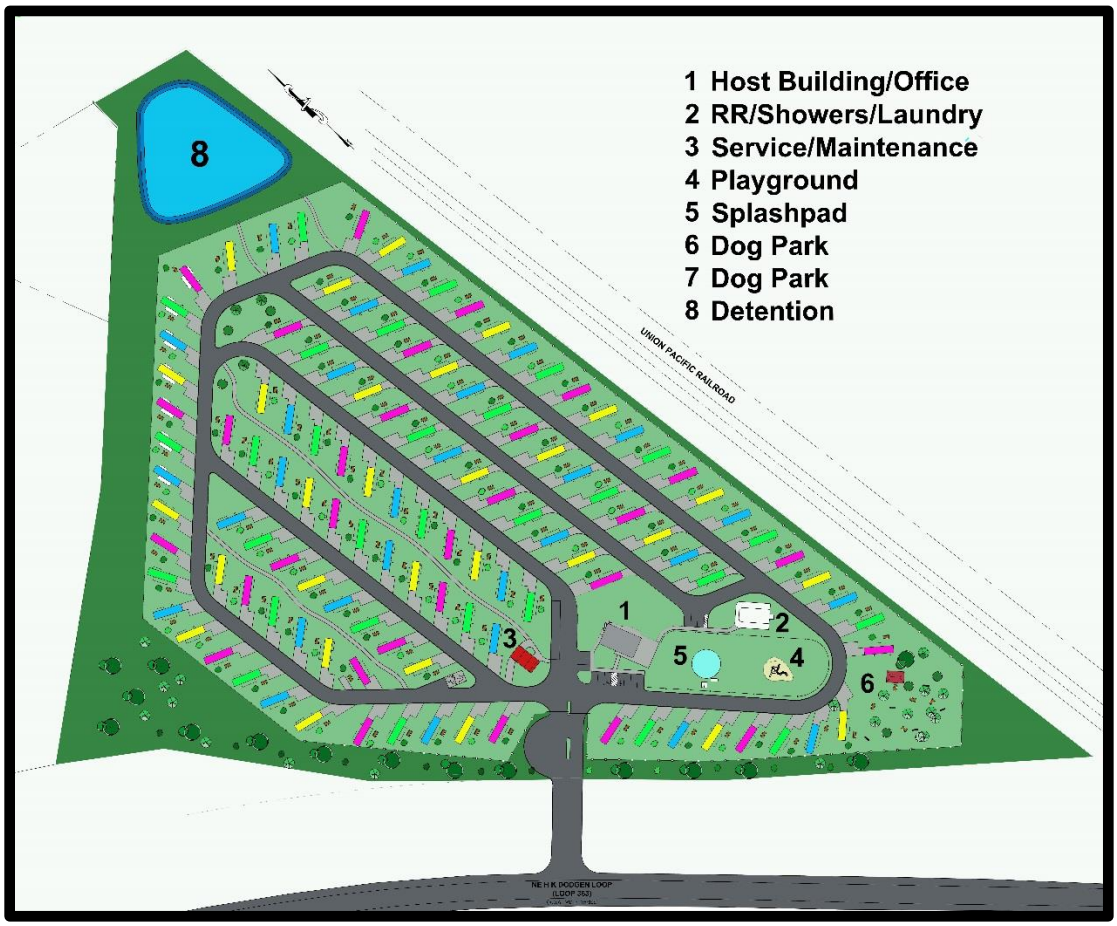
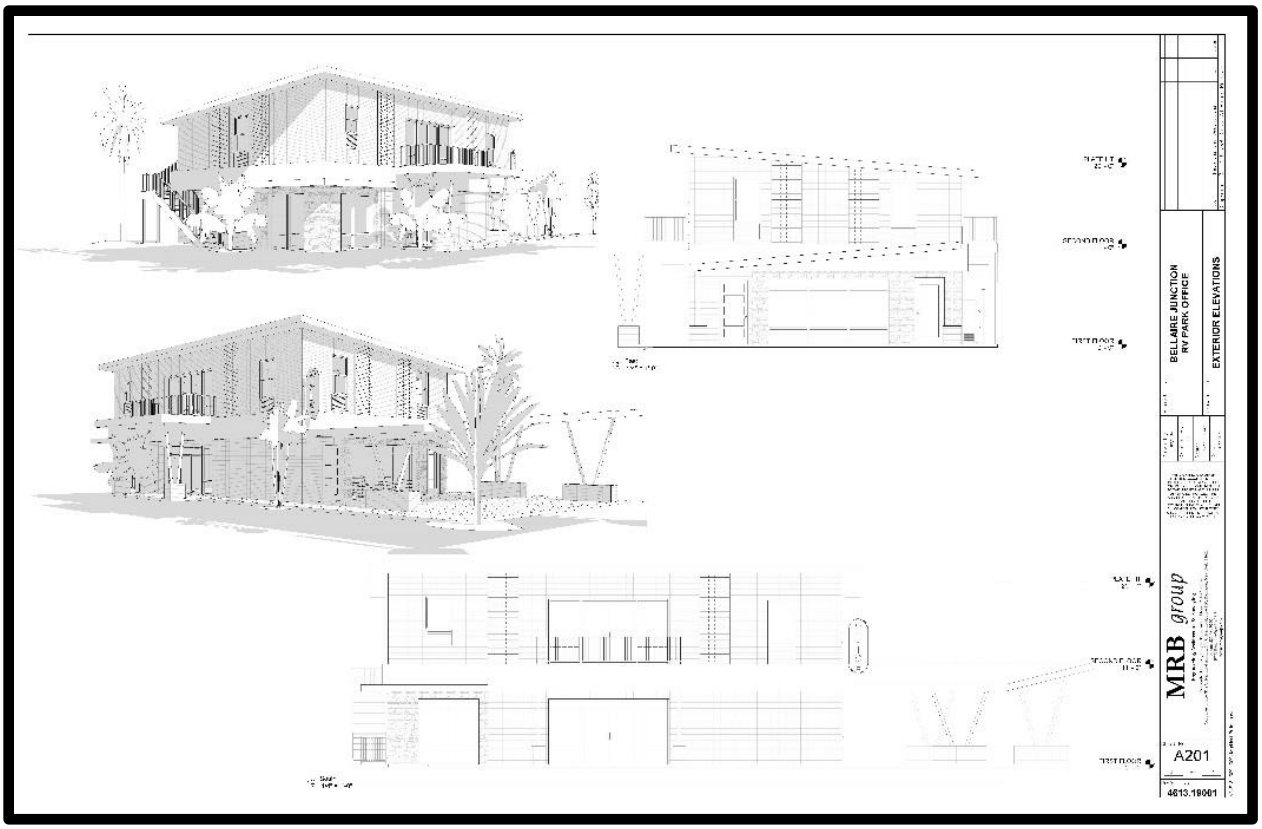
Project No. 4613.19001

RV Park Site Renderings, Building Elevations, Floorplan & Wall Details



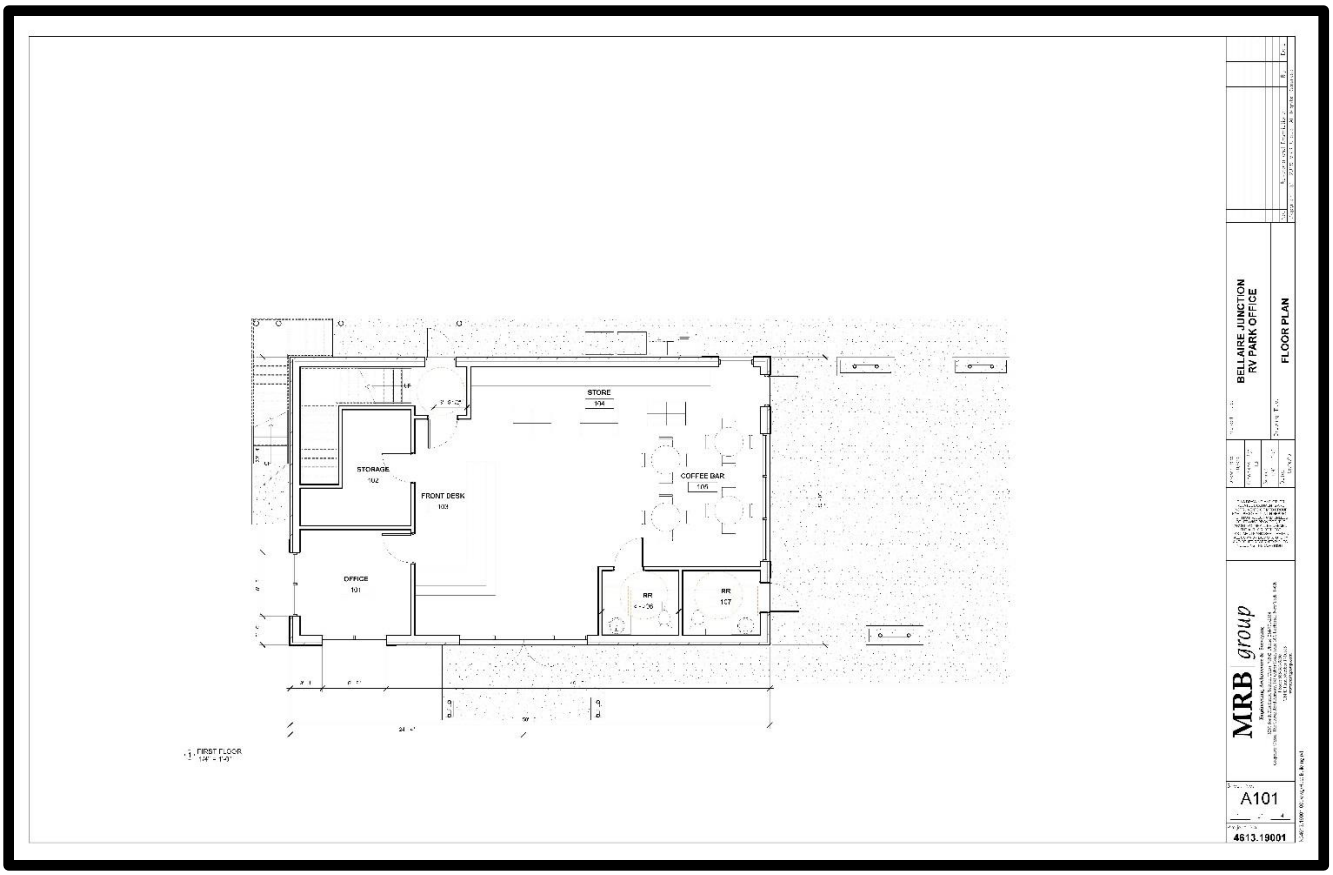
Site Plan Rendering

Host Building Color Elevation

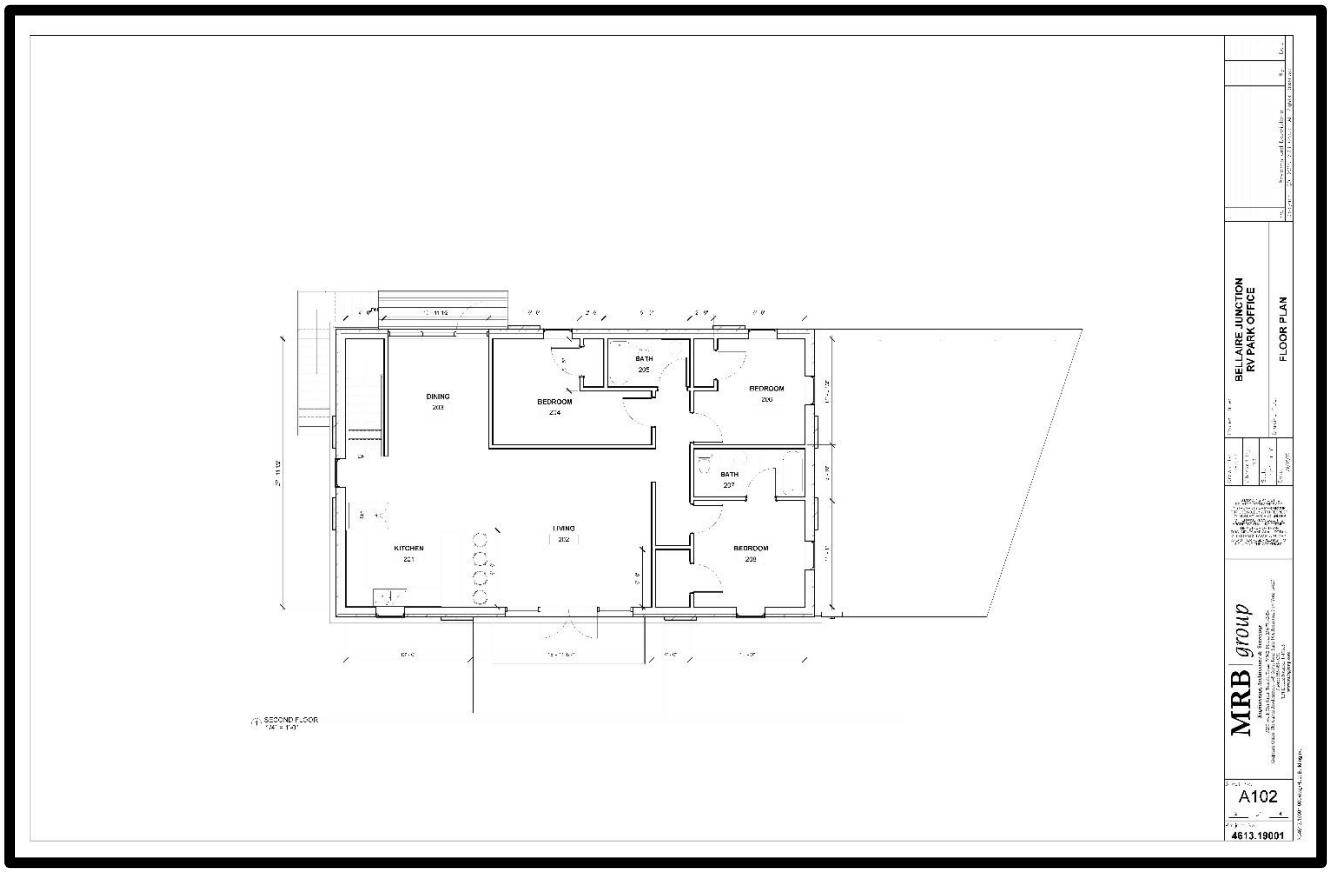


Host Building Elevation (1 of 2)

Host Building Elevation (2 of 2)

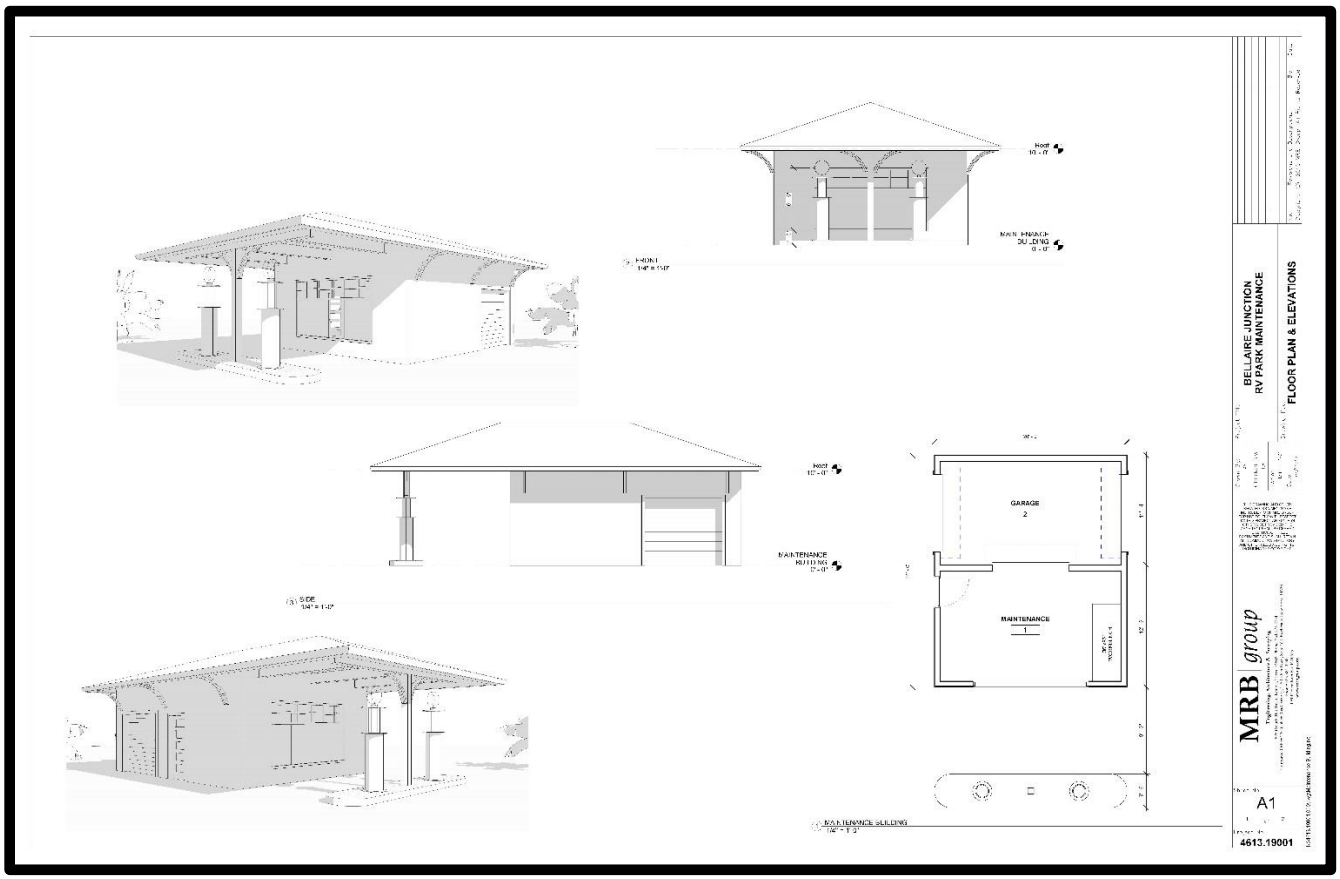


Host Building Floor Plan (1 of 2)

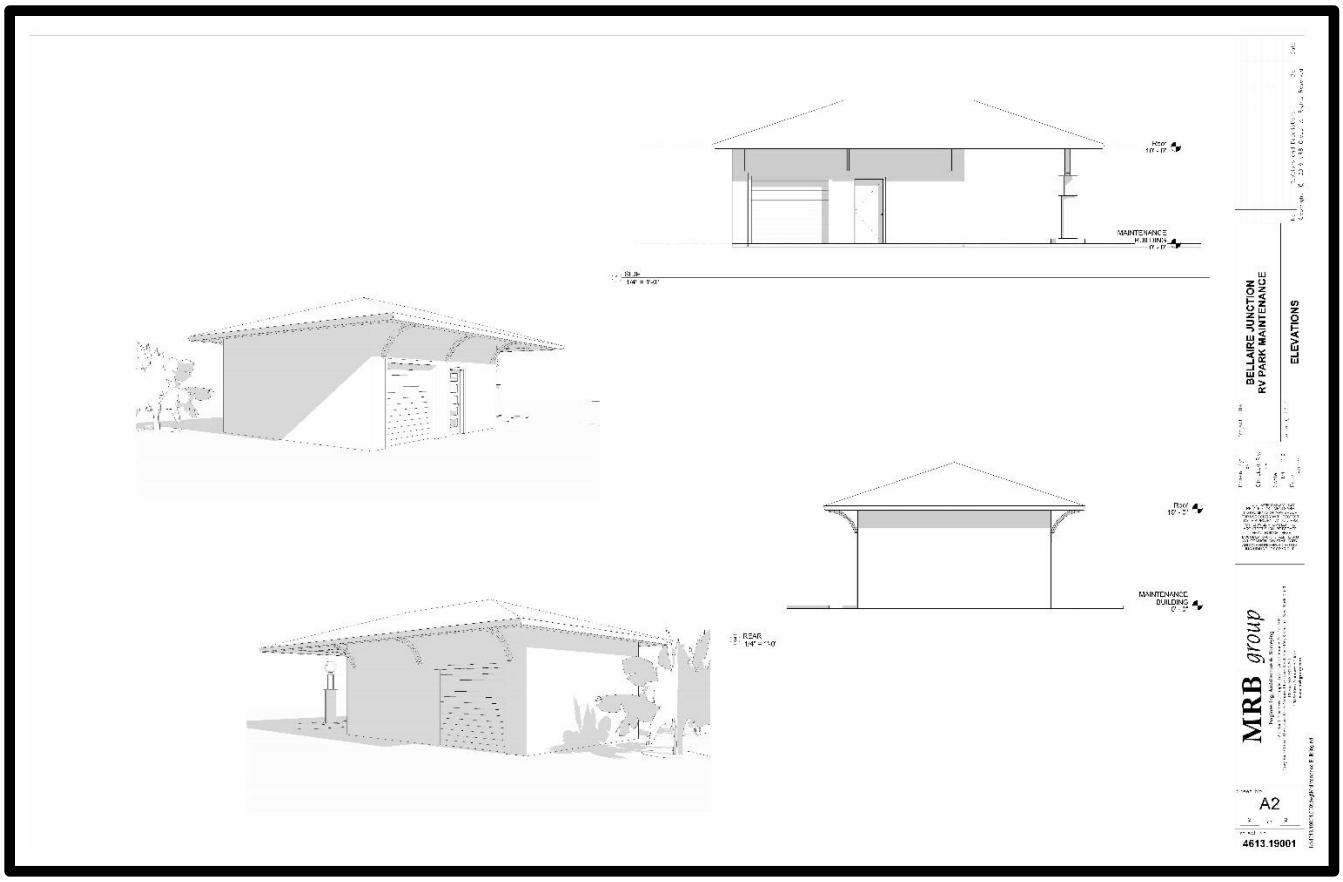


Host Building Floor Plan (2 of 2)

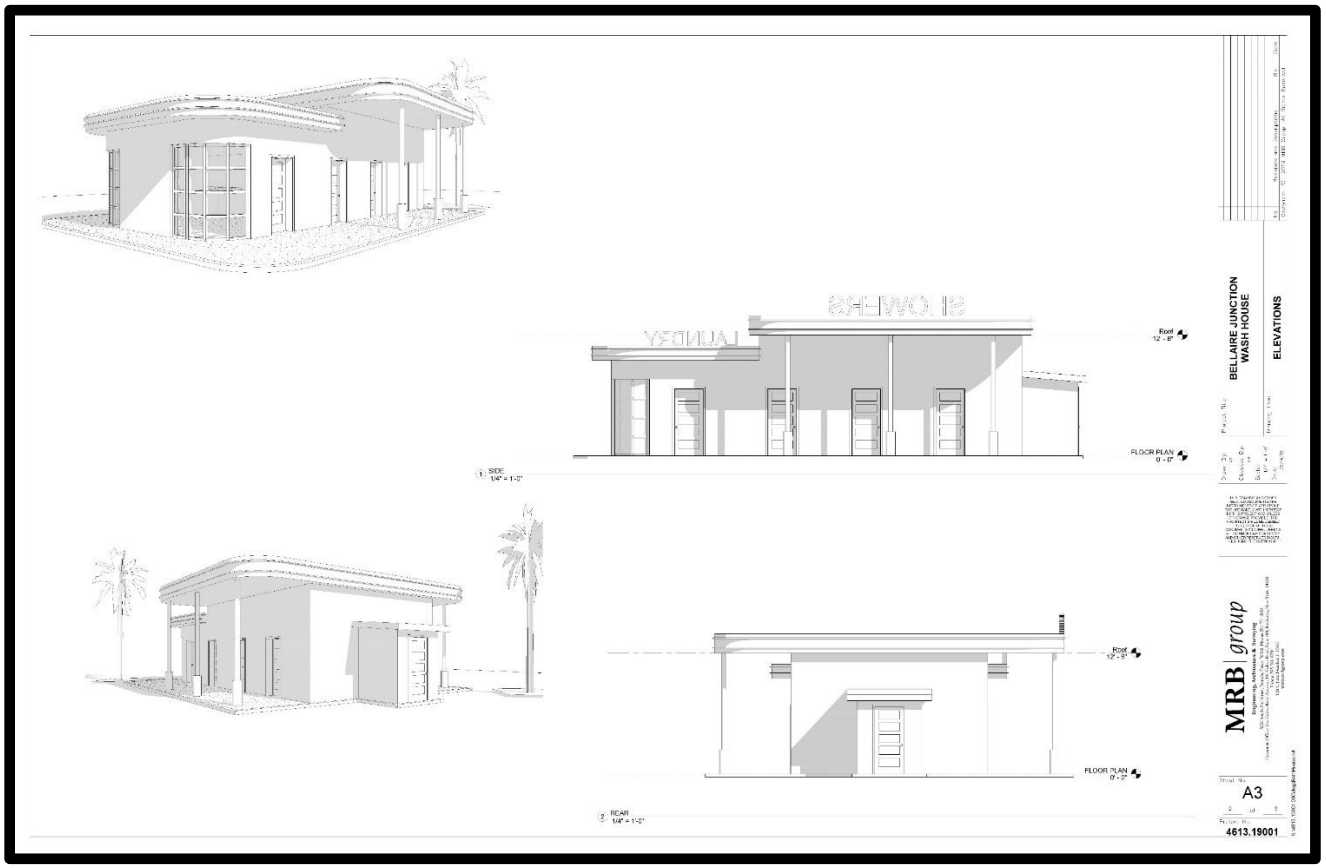
Maintenance Building Color Elevations



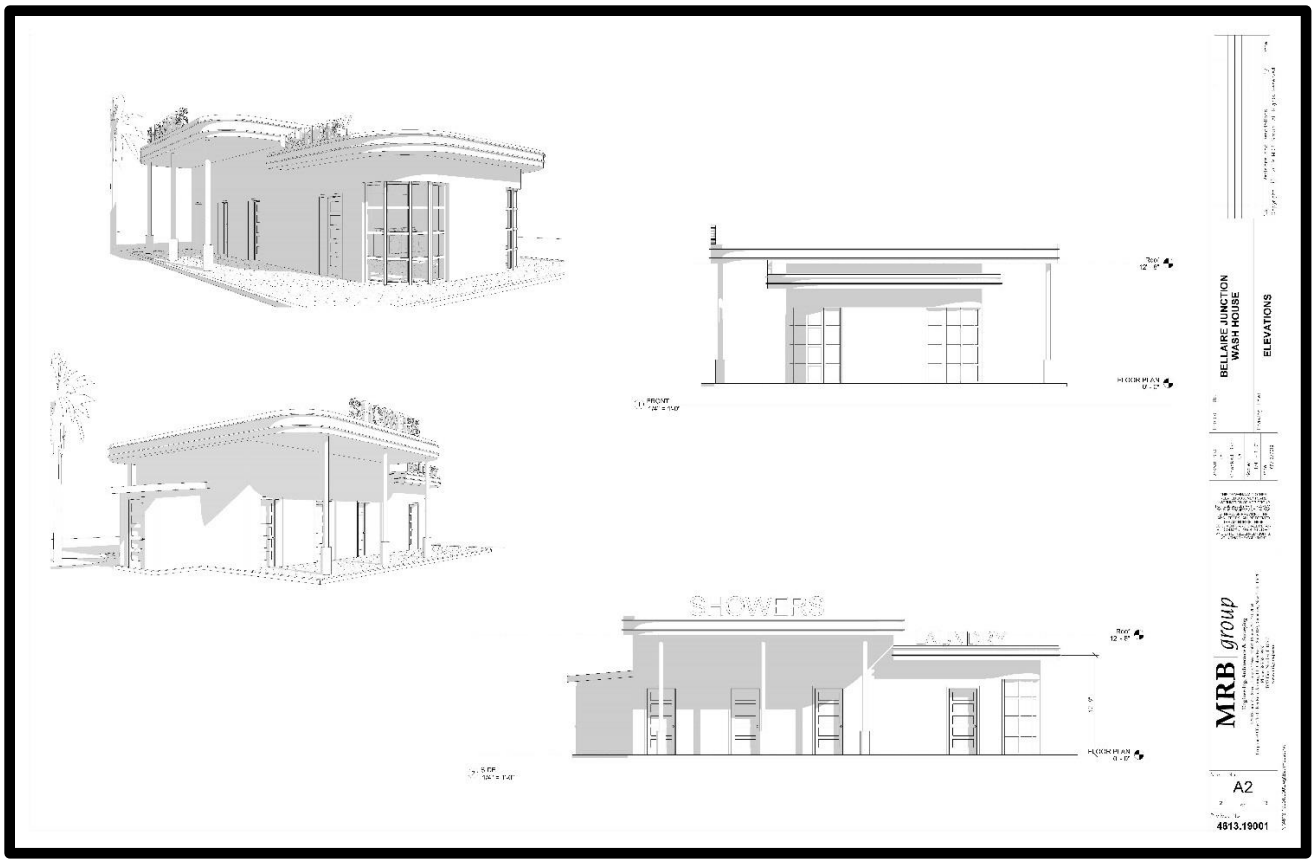
Maintenance Building Elevations (1 of 2)



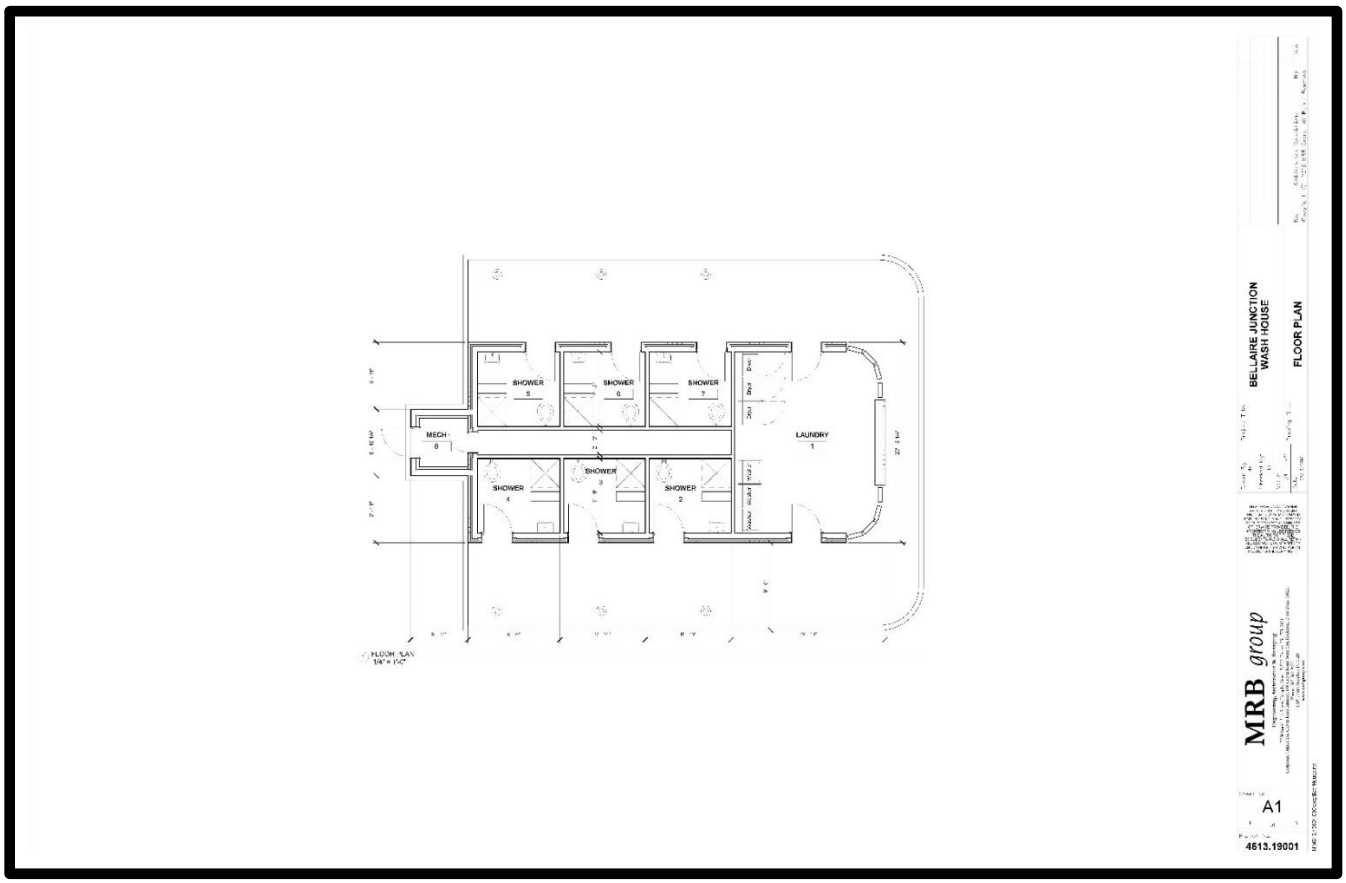
Maintenance Building Elevations (2 of 2)



Laundry & Shower Facility Elevations (1 of 2)



Laundry & Shower Facility Elevations (2 of 2)



Laundry & Shower Facility Floor Plan

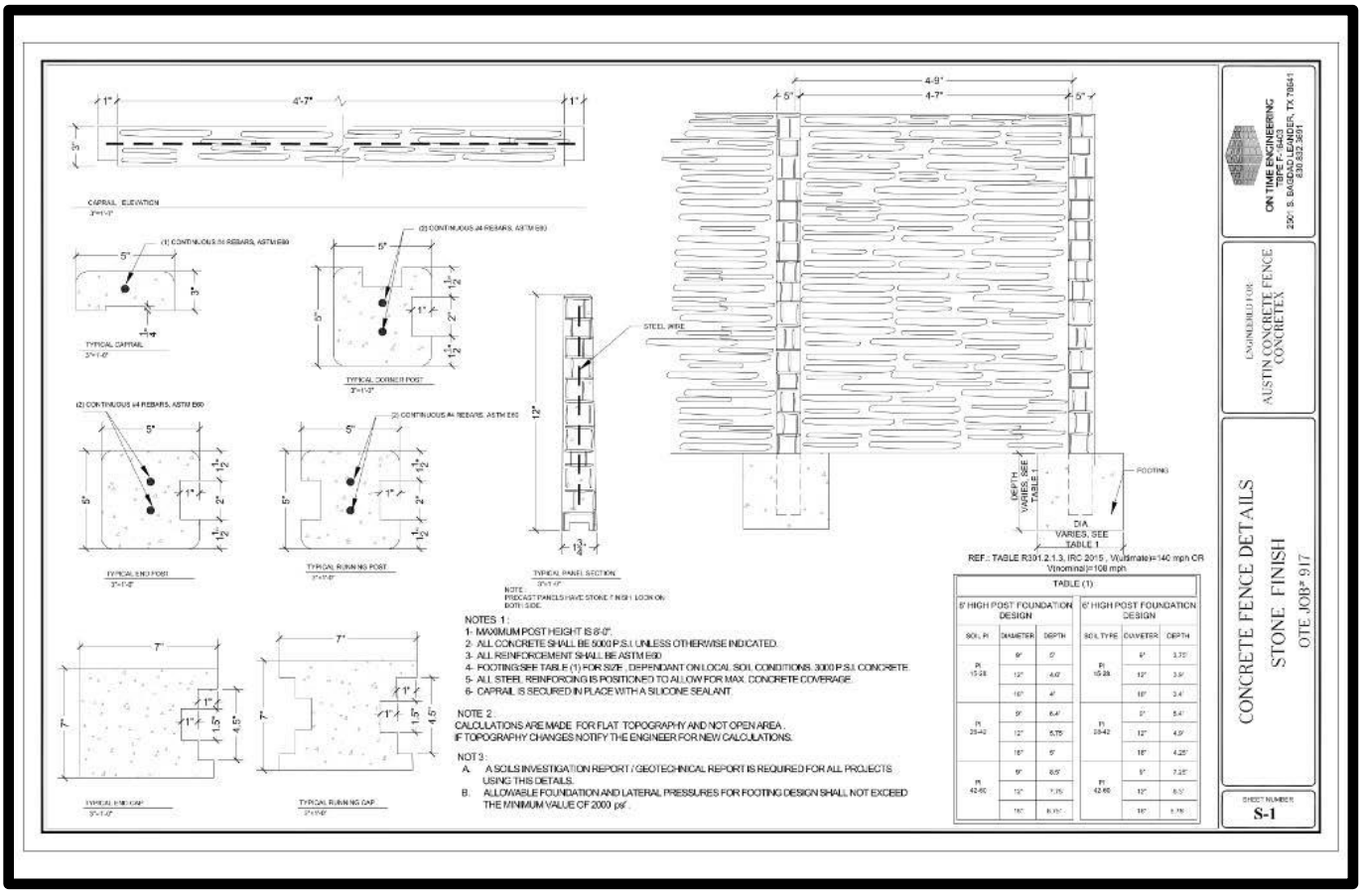
Laundry & Shower Facility (Day)

Laundry & Shower Facility (Night)

Signage (Day)

Signage (Night)

Chain-Link Fence Detail



6-Foot High Concrete Wall Detail

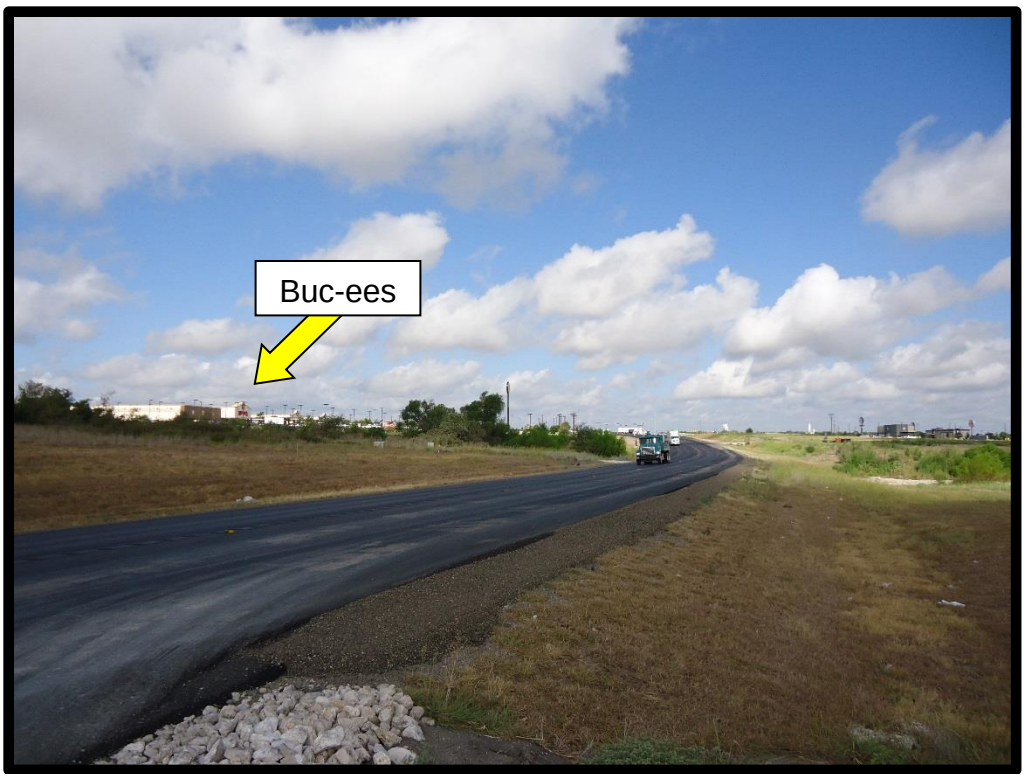
Planned Development Criteria and Compliance Summary

UDC Code Section 3.5.4 (A-G)	Yes/No	Discussion / Synopsis
A. The conditional use is compatible with and not injurious to the use and enjoyment of the property , and does not significantly diminish or impair property values within the immediate area.	**YES**	It is fully anticipated that the site plan will conform to the requirements of Chapter 31 - Recreational Vehicle Parks as well as all other UDC and City code requirements. The development of the site will provide a needed use in the immediate area and is not anticipated to diminish or impair property values in the immediate area.
B. The establishment of the conditional use does not impede normal and orderly development and improvement of surrounding vacant property.	**YES**	It is not anticipated that development of this property will impede the normal and orderly development of the surrounding property.
C. Adequate utilities, access roads, drainage, and other necessary to support facilities have been or will be provided.	**YES**	Adequacies of support facilties will be further reviewed during submittal of the subdivision plat. Facilities for water, sewer and electrical are concurrently being reviewed with the Conditional Use Permit application and Building Permit.
D. The design, location and arrangement of all driveways and parking spaces provide for the safe and convenient movement of vehicular and pedestrian traffic without adversely affecting the general public or adjacent development.	**YES**	The site plan, which will be attached to the Ordinance for the Conditional Use Permit, provides for RV/trailer stand location as well as individual vehicle parking, one-way and two-way traffic circulation, an office, playground areas, dumpster locations, bathroom facilities and access from Loop 363. Additional provisions for stormwater detention are also provided for within the north portion of the tract. No issues related to design, location or arrangement of the aforementioned have been identified with the review of the Conditional Use Permit as it relates to Chapter 31 of the Code of Ordinances (Recreational Vehicle Parks). A more detailed review will be conducted with the review of the building plans.
E. Adquate nuisance prevention measures have been or will be taken to prevent or control offensive odors, fumes, dust, noise and vibration.	**YES**	The proposed site plan has demenstrated that adequate nuisance measures have been taken into account. A 6-foot concrete wall is proposed along the boundary adjacent to the railroad tracks to provide for noise reduction.
F. Directional lighting is provided so as not to disturb or adversely affect neighboring properties.	**YES**	All exterior and directional lighting is required to meet the provisions of UDC 7.1 and specifically 7.1.8 with regard to glare. Compliance for exterior lighting will be addressed with the review of the building plans.
G. There is sufficient landscaping and screening to insure harmony and compatibility with adjacent property.	**YES**	The site plan provides for 1 (2" diameter at breast height - dbh) tree per RV stand (stall). Trees will be spaced a minimum of 25 feet to reduce overcrowding of tree species. Compliance to landscape standards and plant specie selection will be confirmed by the review of the building plans.

Site & Surrounding Property Photos

Site: Undeveloped (LI)

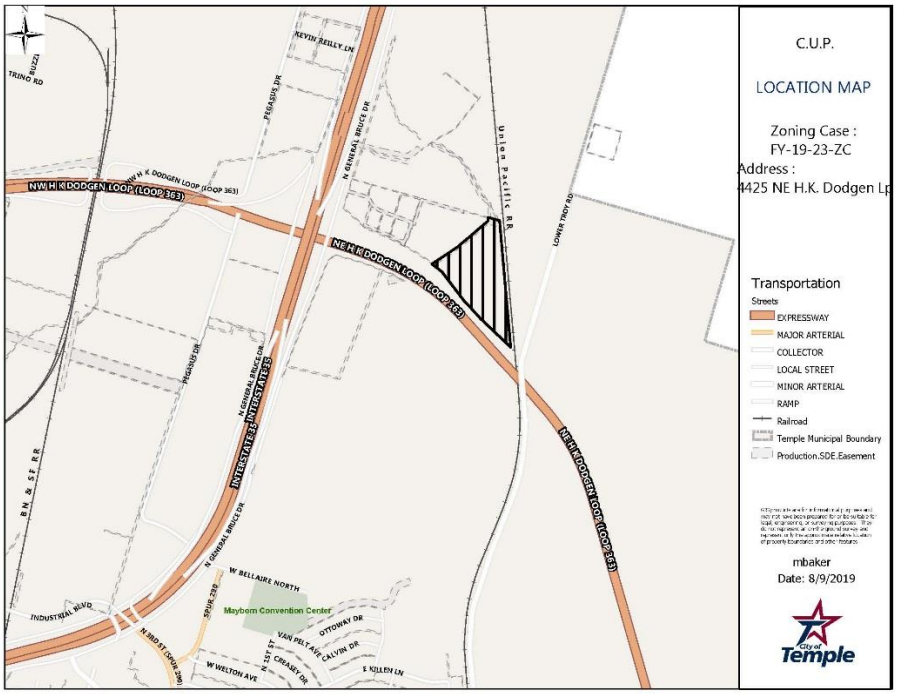
South: Undeveloped – Looking across Loop 363 (C & LI)



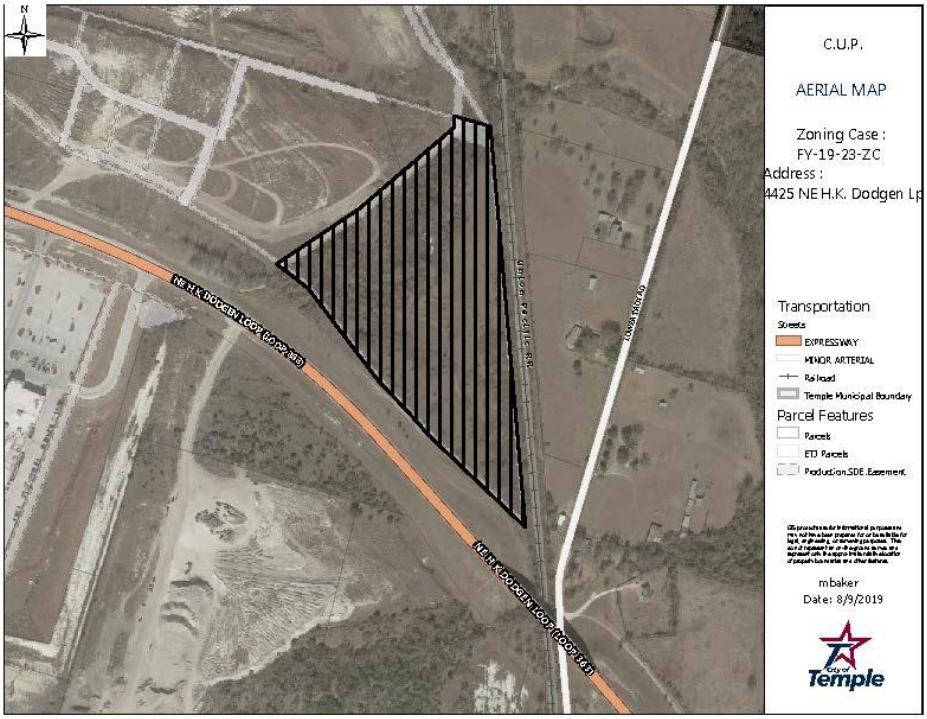
West: Scattered Retail & Service Uses (C & PD-C)

West: Scattered Retail & Service Uses (C & PD-C)

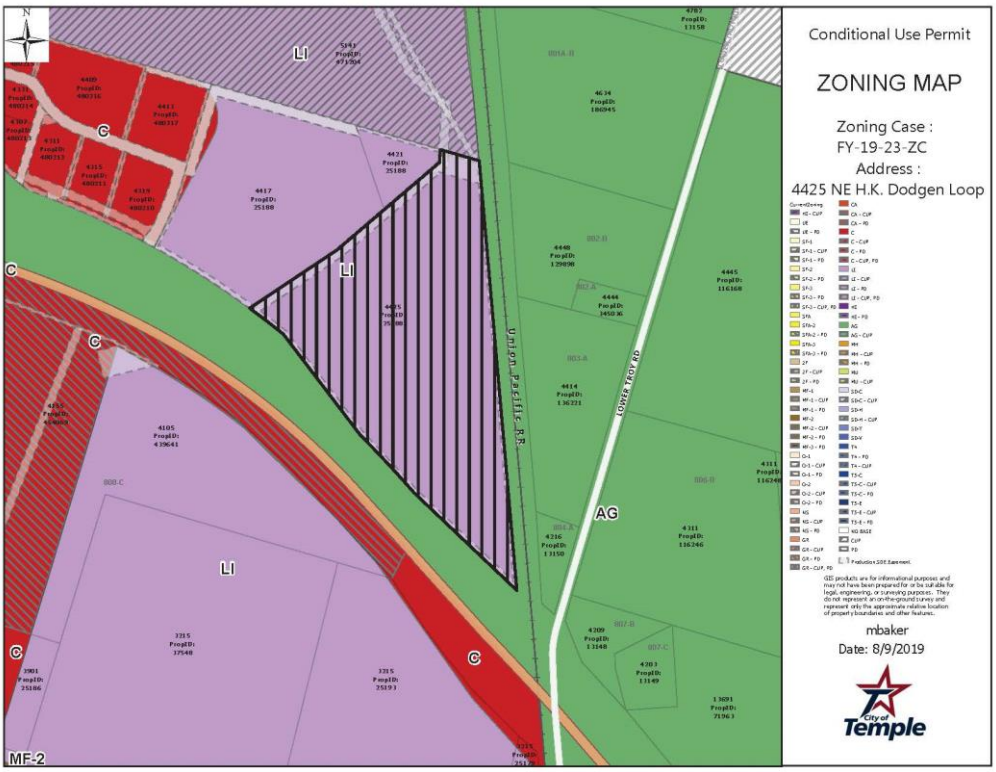
Maps



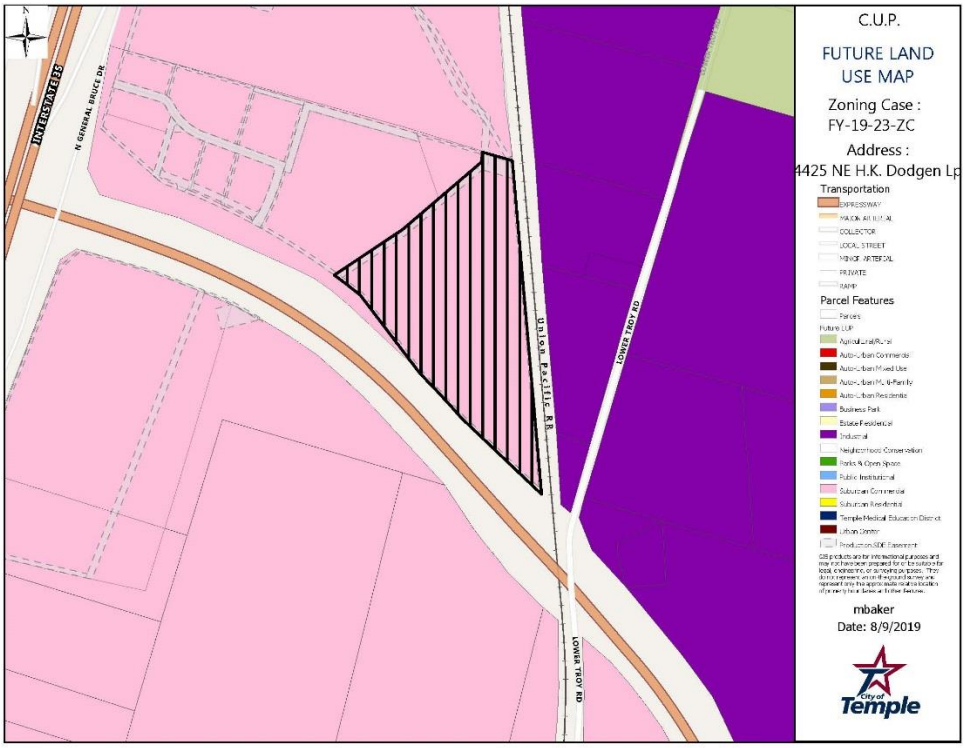
Location Map



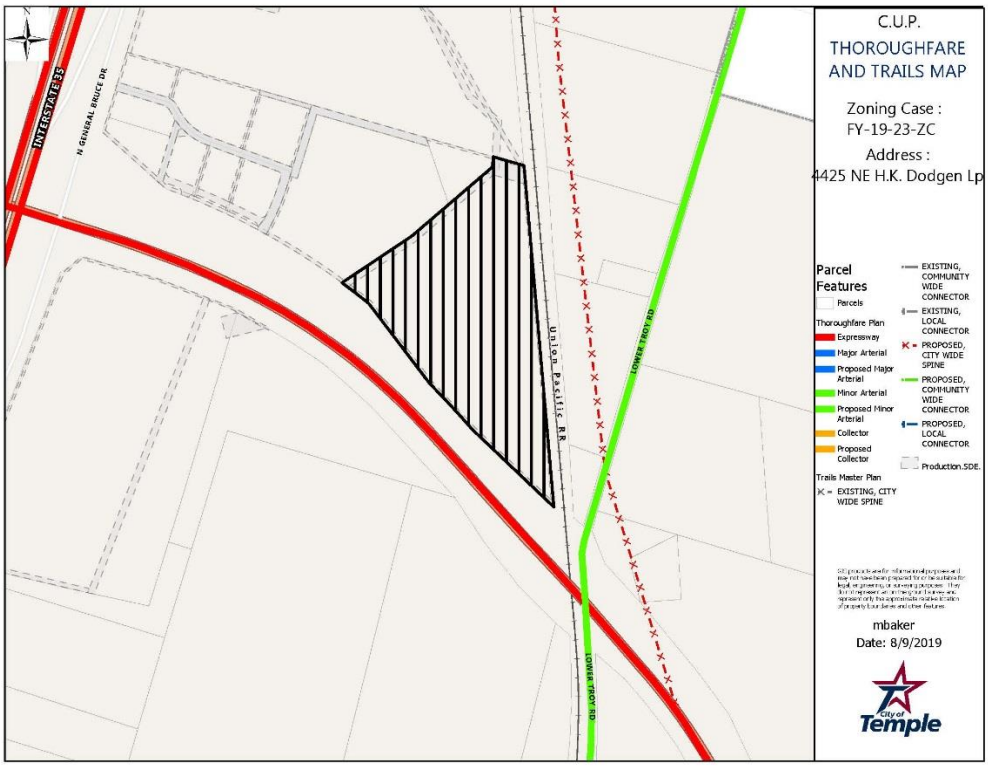
Aerial Map



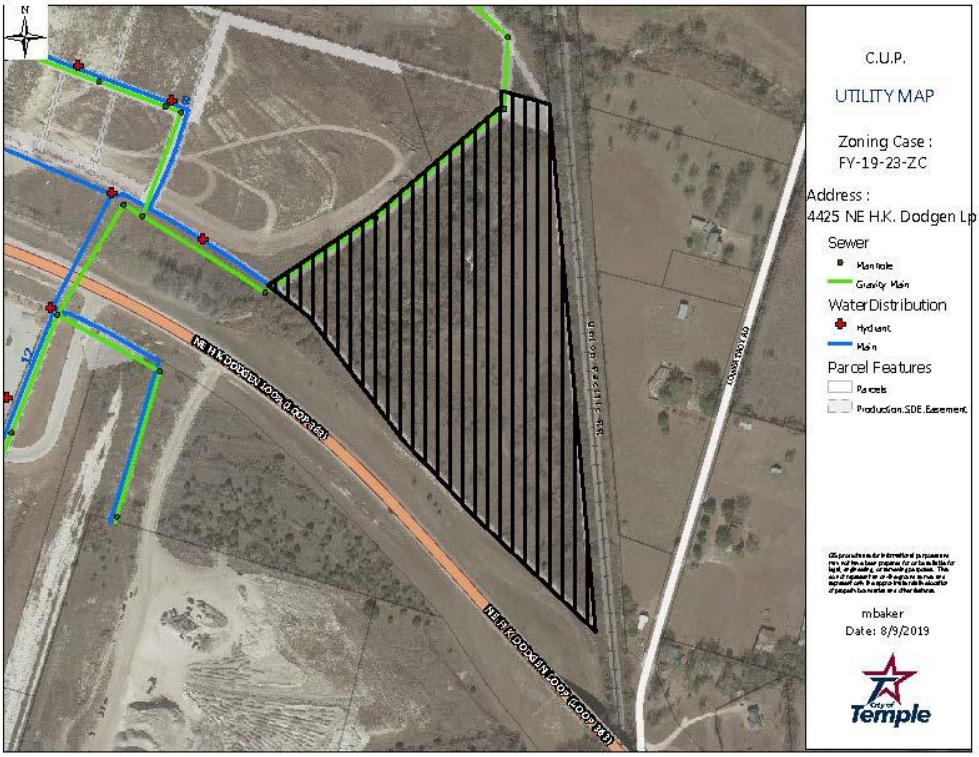
Zoning Map



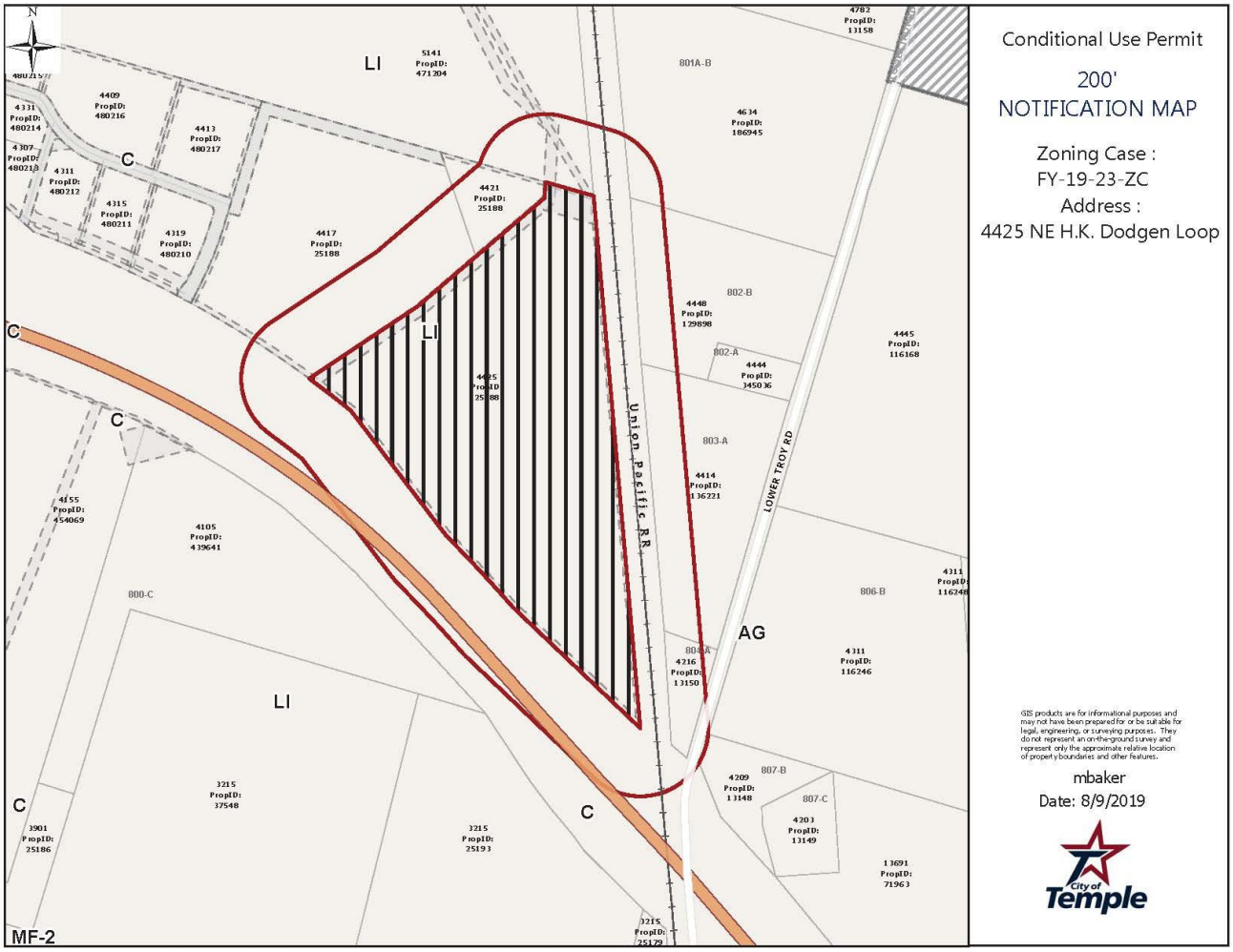
Future Land Use Map



Thoroughfare & Trails Map



Utility Map



Notification Map

Represents 3 Separate Properties

RESPONSE TO PROPOSED REZONING REQUEST CITY OF TEMPLE

RECEIVED
SEP 13 2019
CITY OF TEMPLE
PLANNING & DEVELOPMENT

25188
MAYBORN, FRANK ENTERPRISES INC
PO BOX 6114
TEMPLE, TX 76503-6114

Zoning Application Number: FY-19-23-ZC **Case Manager: Mark Baker**

Location: 4425 N General Bruce Drive

The proposed rezoning is the area shown in hatched marking on the attached map. Because you own property within 200 feet of the requested change, your opinions are welcomed. Please use this form to indicate whether you are in favor of the possible rezoning of the property described on the attached notice, and provide any additional comments you may have.

I (X) **agree** ( ) **disagree with this request**

Comments:

_____

_____

_____

_____

_____ Anyse Sue Mayborn, President
Signature **Print Name**

_____ **(Optional)**
Provide email and/or phone number if you want Staff to contact you

If you would like to submit a response, please email a scanned version of this completed form to the Case Manager referenced above, mbaker@templetx.gov, or mail or hand-deliver this comment form to the address below, no later than **September 16, 2019.**

City of Temple
Planning Department
2 North Main Street, Suite 102
Temple, Texas 76501

Number of Notices Mailed: 9 Date Mailed: September 4, 2019

***OPTIONAL**: Please feel free to email questions or comments directly to the Case Manager or call us at 254.298.5668.*

EXCERPTS FROM THE

PLANNING & ZONING COMMISSION MEETING

MONDAY, SEPTEMBER 16, 2019

ACTION ITEMS

Item 2: **FY-19-23-ZC –** Hold a public hearing to discuss and recommend action on a Conditional Use Permit (LI-CUP) and its site plan to allow a recreational vehicle (RV) park within Lot 10 of the Bellaire Commercial subdivision, addressed as 4425 N General Bruce Drive.

Mr. Mark Baker, Principal Planner, stated this item is scheduled to go forward to City Council for first reading on October 17, 2019 and second reading on November 7, 2019.

Location and Aerial Map shown.

The Belaire Junction Recreational Vehicle (RV) Park incorporates a 1950's motor-lodge theme design with the following provisions:

- Picnic table at each stand
- Two additional parking spaces per stand for separate vehicles (three spaces total)
- Park and picnic areas with crushed granite trails within the park
- Playground with splash-pad water feature
- Dog park area
- Separate showers/bathroom/laundry facility
- Two-story combination administration building/host residence—1500 square feet
- Landscaping—One (2-inch diameter at breast height (dbh) tree per stand (twenty-five foot spacing between trees)
- Fencing—combination of four inch chain-link and masonry wall

Proposed facilities rendering, map, and signage shown.

Site plan revisions and service building with entry/return lane details shown.

Conditional Use Permit (CUP)

1. Subject to Chapter 31-Code of Ordinances-Recreational Vehicle Parks

    a. Second RV Park reviewed under the 2018 Chapter Revisions

    b. Specific development and infrastructure standards for RV parks

c. Prohibits permanent occupancy—No more than six months in any twelve-month period—found in Compliance

2. Unified Development Code (UDC) Section 3.5.4 (AG)—found in Compliance

a. Planned Development Criteria for:

1. Compatible, non-injurious or diminished value in area:

2. Does not impede orderly development of the area;

3. Adequacy of utilities and other needed facilities;

4. Nuisance prevention

5. Adequacy of Lighting

6. Adequacy of landscaping

Zoning Map shown and found to be compatible with uses allowed in both the surrounding zoning districts.

Future Land Use Map shown and found to be in compliance.

Existing Water and sewer map shown and found to be in compliance.

Water is available through an eight-inch line through Loop 363 and sewer will be supplied with a twelve-inch line through the North side of the property.

Site and area photos shown.

Nine notices were mailed in accordance with all state and local regulations with three responses returned in agreement and zero notices returned in disagreement.

Compliance Summary is shown and found to be in compliance in all three areas.

Staff recommends approval of the request for a Conditional Use Permit (CUP) to allow a recreational vehicle park, subject to four conditions:

1. Substantial compliance to Development/Site Plan (Exhibit A)

2. Compliance to Chapter 31—Code of Ordinances

3. Landscaping one (two-inch dbh) tree per RV stand at twenty-five-foot intervals

4. Director of Planning and Development authorization to minor changes to Development/Site Plan

Commissioner Fettig discussed the details regarding available sewer on this property.

Speaker, Mike Beavers, 5101 FM 439, Belton, Texas explained that all buildings will have direct connect sewer features throughout the property similar to a city residential subdivision. He stated that there will not be a dump station, it is not needed. He also stated that this facility will not be built in phases, but totally completed before opening.

Vice-Chair Ward opened the public hearing.

There being no speakers, the public hearing was closed.

Commissioner Wright made a motion to approve Item 2, **FY-19-23-ZC**, per staff recommendation, and Commissioner Castillo made a second.

Motion passed: (7:0)
Chair Langley and Commissioner Marshall absent

ORDINANCE NO. 2019-4999
(FY-19-23-ZC)

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A CONDITIONAL USE PERMIT WITH A SITE PLAN TO ALLOW A RECREATIONAL VEHICLE PARK WITHIN LOT 10 OF THE BELLAIRE COMMERCIAL SUBDIVISION, ADDRESSED AS 4425 NORTH GENERAL BRUCE DRIVE, TEMPLE, TEXAS; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, the applicant, Temple Belaire North LLC is pursuing a Conditional Use Permit (CUP) to allow a Recreational Vehicle (RV) park with 117 RV stands on lot 10, Bellaire Commercial subdivision which consists of approximately 16.812 acres;

Whereas, the Planning and Zoning Commission of the City of Temple, Texas, after due consideration to the planned development conditions, recommends approval of the requested Conditional Use Permit, subject to the following conditions:

1. Substantial compliance with the site plan attached as Exhibit A and building renderings attached as Exhibit B;
2. Compliance to Chapter 31, Code of Ordinances;
3. A minimum of 1 tree per RV stand (2-inch diameter at breast height) placed at a minimum 25-foot spacing;
4. Director of Planning & Development, with consultation by the Development Review Committee, has the authorization to approve minor changes to the site plan and civil plan set including but not limited to the overall site layout, landscaping, water, sewer layout or changes of proposed amenities; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Ordinance as if copied in their entirety.

Part 2: The City Council approves a Conditional Use Permit with a Site Plan to allow a Recreational Vehicle Park within lot 10 of the Bellaire Commercial subdivision, addressed as 4425 N. General Bruce Drive.

Part 3: The City Council approves the Site Development Plan which is attached hereto as Exhibit A and made a part hereof for all purposes.

Part 4: The City Council directs the Director of Planning to make the necessary changes to the City Zoning Map.

Part 5: It is hereby declared to be the intention of the City Council that the sections, paragraphs, sentences, clauses, and phrases of this ordinance are severable and, if any phrase, clause, sentence, paragraph or section of this ordinance should be declared invalid by the final judgment or decree of any court of competent jurisdiction, such invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance, since the same would have been enacted by the City Council without the incorporation in this ordinance of any such phrase, clause, sentence, paragraph or section.

Part 6: This Ordinance shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Temple, Texas, and it is accordingly so ordained.

Part 7: It is hereby officially found and determined that the meeting at which this Ordinance was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED on First Reading and Public Hearing on the **17th** day of **October,** 2019.

PASSED AND APPROVED on Second Reading on the **7th** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

_____
TIMOTHY A. DAVIS, Mayor

ATTEST:

_____
Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

_____
Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION REVIEW:

Mark Baker, Principal Planner

ITEM DESCRIPTION: SECOND & FINAL READING – FY-19-27-ZC: Consider adopting an ordinance authorizing a Planned Development-General Retail with a Development/Site Plan for a self-storage facility on 5.204 +/- acres, addressed as 9335 State Highway 317.

PLANNING & ZONING COMMISSION RECOMMENDATION: At its September 16, 2019, meeting, the Planning & Zoning Commission voted 7 to 0 to recommend approval per staff's recommendation.

STAFF RECOMMENDATION: Based on the following analysis and reasons that:

1. The proposed Development/Site Plan has demonstrated compliance with the provisions of the Planned Development Criteria as required by UDC Section 3.4.5;
2. The self-storage facility is compatible with the anticipated development of this section of State Highway 317; and
3. The proposed self-storage facility will provide adequate buffering and screening with consideration to future uses.

Staff recommends approval of the requested Planned Development, subject to the following conditions:

1. That the 5.204 +/- acre site may be developed with a self-storage facility as shown and further described by Exhibits A & B of the rezoning Ordinance or any permitted use within the General Retail (GR) district;
2. That a subdivision plat is recorded prior to issuance of a building permit;
3. That eight provided parking spaces is acceptable to accommodate the proposed use;
4. That the Director of Planning & Development may be authorized discretion to approve minor modifications to the City Council-approved development plan for the 5.204 +/- acre tract, including but not limited to, screening, buffering, landscaping and minor modifications to the overall site layout;
5. Significant changes to the Development/Site Plan require review by the Planning & Zoning Commission and City Council; and
6. That the State Highway 317-facing facades of the six (or exterior) buildings include at least three of the following architectural elements:
    a. Combination of two different materials (one as a base material at least 3-feet in height)
    b. Windows (real or faux)
    c. A parapet at least 3-feet tall

d. Structural awnings
e. Front roof gables

ITEM SUMMARY: The applicant, Clark and Fuller, on behalf of Bryan Burke, requests a rezoning from General Retail to Planned Development-General Retail (PD-GR) to allow for a self-storage facility on 5.204 +/- acres. The facility will include a combination of indoor climate controlled and ambient (outdoor) temperature storage units along with uncovered boat and RV storage within the overhead electrical easement on the eastern side of the 5.204 +/- acres. Brazos Electric has been advised of the proposed uncovered boat and RV storage within the easement and no response has been received. The self-storage facility is proposed to provide for approximately 83,350 square feet of storage space.

Self-storage building layout for the 5.204 +/- acres is proposed with ten buildings providing for a total 83,350 square feet of storage space. Square footages and footprint sizes described as follows:

- One (1) 20' x 190' buildings (3,800 SF)
- Two (2) 20' x 200' buildings (4,000 SF each)
- One (1) 30' x 170' building (5,100 SF)
- One (1) 30' x 200' building (6,000 SF)
- One (1) 60' x 130' building (7,800 SF)
- One (1) 70' x 165' building (11,550 SF)
- Two (2) 70' X 200' buildings (14,000 SF)
- One (1) 70' X 200' building (13,100 SF of storage space & 900 SF of office space)

Planned Development: UDC Section 3.4.1 defines a Planned Development as:

> "A flexible overlay zoning district designed to respond to unique development proposals, special design considerations and land use transitions by allowing evaluation of land use relationships to surrounding areas through development plan approval."

As a Planned Development, per UDC Sec.3.4.3A, a Development Plan (Exhibit A) is subject to review and approval by City Council as part of the rezoning. As opposed to a standard rezoning, conditions of approval can be included into the rezoning Ordinance with a binding Development/ Site Plan. The submitted Development/ Site Plan provides the boundaries of the tract, the layout for the proposed building footprints, parking and traffic circulation areas within the 5.204 +/- acre tract.

Individual storage unit sizes have not been finalized and will require a market study undertaken by the applicant. Therefore, it is reasonable to expect that final building location and size may require adjustment. The applicant understands that substantial changes to the site plan require the Development/ Site Plan to be reviewed by the Planning & Zoning Commission and City Council and agrees with the proposed conditions.

Screening / Buffering: Screening and buffering will be incorporated into the design by the combined use of fencing, landscaping and building location. A 6-foot wrought-iron fence will be provided along the State Highway 317 frontage and a 6-foot high solid wood fence is proposed along the other three boundaries.

Landscaping: The Development/ Site Plan shows landscaping provided behind the existing sidewalk. Landscape Plan reflects the addition of ten trees with a 2-inch diameter at breast height (dbh), specifically Lacy Oak and Arizona Cypress. The use of native turf will be provided in perimeter locations as well as for the detention basin. Compliance with landscape requirements will be made with the review of the building permit.

Exterior Building Materials: Exterior building facades that are adjacent to and face State Highway 317 will use stone materials for the bottom 4-feet with the rest to stucco. Materials will be in compliance with building code and State requirements and will be confirmed during the building plan review process.

Circulation: Due to site distance, access to the self-storage facility is proposed by a restricted right-in right-out turning median. While supportive, discussion and final design is on-going with TxDOT.

The self-storage facility by itself is not expected to generate significant traffic impacts. According to the Institute of Traffic Engineers Peak Generation Rates (9th Edition), a peak-hour trip rate of 0.26 per 1,000 square feet of storage is generated. Therefore, 83,350 square feet of storage is anticipated to generate a total 21.67 peak-hour trips. In comparison, the adjacent shell gasoline station generates 13.87 peak hour trips per fueling station alone. Further, a convenience market and gasoline station combined generate 50.92 peak hour trips per 1,000 square feet of floor area.

Parking: Per UDC Section 7.5.4B, parking for self-storage (mini storage) is provided at the rate of one space per two employees or one space 5,000 square feet of gross floor area, whichever is greater. Based on 83,350 square feet of total storage floor area, 17 parking spaces are required. There are eight parking spaces provided. However, it is anticipated that the proposed maximum of two employees at any one time will be sufficient with the proposed eight parking spaces. The reduced number of parking spaces is acceptable and is proposed as a condition of the Planned Development.

In accordance with UDC Section 3.4.5, in determining whether to approve, approve with conditions or deny a Planned Development application, the Planning & Zoning Commission and City Council must consider specific criteria. While more detailed discussion can be found throughout this report, a synopsis entitled “Planned Development Criteria and Compliance Summary” is attached.

The proposed Planned Development with a base-zoning of General Retail (GR) allows for a wide range of uses, both permitted by right and with an approved conditional use permit (CUP). Uses which include, but are not limited to, are provided in an attached table.

SURROUNDING PROPERTY AND USES: An attached table provides Zoning, Future Land Use Plan (FLUP) designations, and current land uses surrounding the subject property.

COMPREHENSIVE PLAN COMPLIANCE: The proposed rezoning relates to the following goals, objectives or maps of the Comprehensive Plan and Sidewalk and Trails Plan:

Future Land Use Map (FLUM) (CP Map 3.1)
According to the 2008 - City of Temple Comprehensive Plan, the subject property, is within both the Agricultural/ Rural and Suburban Commercial designations of the Future Land Use Map (FLUM). The Agricultural/ Rural designation is intended for those areas within the City that do not have adequate

facilities or to protect active farm or ranch uses. Reconsideration of the Map classification may be warranted with the Comprehensive Plan update.

The Suburban Commercial designation is appropriate for office and retail service uses such as those found in the office (O-1 & O-2) and Neighborhood Service (NS) districts. While a self-storage facility requires a minimum Commercial (C) zoning, the individual use within the General Retail (GR) zoning can be evaluated on a "case by case" basis.

As a Planned Development however, the project can be conditioned to be more compatible. Therefore, with adequate buffering, screening and FLUM reconsideration, the proposed self-storage facility is in **partial compliance** with the Future Land Use Plan.

Thoroughfare Plan (CP Map 5.2)
The property has frontage along State Highway 317 which is identified by the Thoroughfare Plan as a major arterial. Primary access to the facility is proposed by a restricted right-in / right-out driveway entrance which has not been finalized with TxDOT.

Availability of Public Facilities (CP Goal 4.1)
Availability of water is from either a 16-inch waterline across State Highway 317 or from the extension of 2-inch waterline adjacent to the Shell gas station. Waste water will be from on-site septic. Utilities will be addressed during the review of the subdivision plat.

Temple Trails Master Plan Map and Sidewalks Ordinance
According to the Trails Master Plan Map, a proposed Community-Wide Connector Trail is located in State Highway 317. Since State Highway 317 is a major arterial, a minimum 6-foot sidewalk is required. However, according to TxDOT there are some slope constraints along this section of State Highway 317 that may make sidewalk placement problematic. The trail and sidewalk will be further addressed during the platting stage.

SUBDIVISION PLAT: A subdivision plat will be required prior to any development. The plat will evaluate the drainage, detention and septic considerations for the site.

DEVELOPMENT REVIEW COMMITTEE (DRC): As required by UDC Section 3.4.2B, the Development/ Site plan for the proposed self-storage was reviewed by the DRC on August 15, 2019. Drainage was not reviewed by Public Works but will be reviewed during the subdivision plat process.

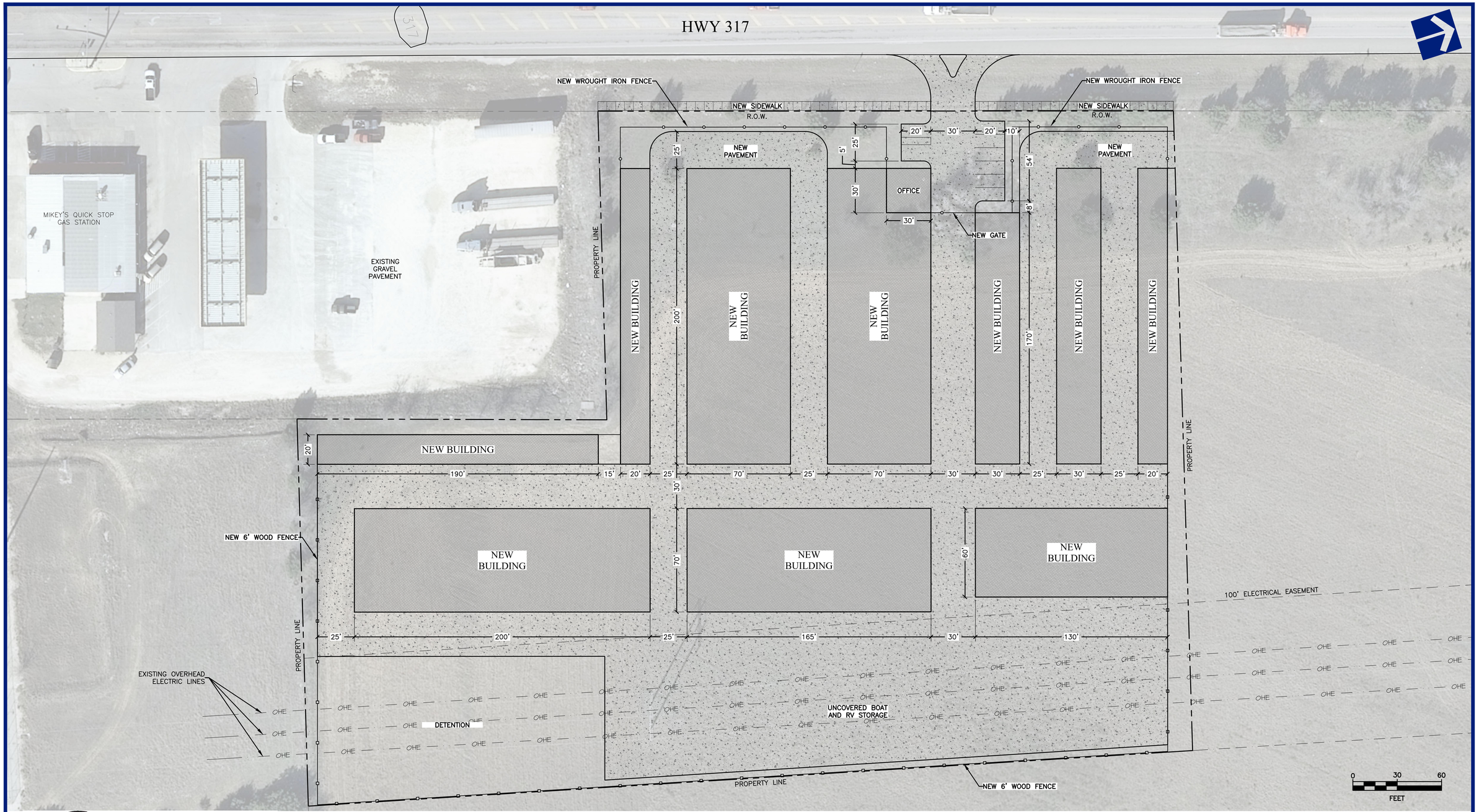
DEVELOPMENT REGULATIONS: The following table shows the current dimensional standards and the proposed standards. Both current and proposed standards are reflective of the underlying base-General Retail zoning district. Setbacks would be applicable to non-residential buildings.

PUBLIC NOTICE: Owners of four properties within 200-feet of the subject property, were sent notice of the public hearing as required by State law and City Ordinance. As of Tuesday October 8, 2019, at 9:00 AM, no notices have been received.

The newspaper printed notice of the public hearing on September 5, 2019, in accordance with state law and local ordinance.

FISCAL IMPACT: Not applicable.

ATTACHMENTS:
Development/ Site Plan (Exhibit A)
Landscape Plan (exhibit B)
Topographic/ Utility Plan
Planned Development Criteria and Compliance Summary Table (UDC Section 3.4.5)
Photos
Tables
Maps
P&Z Excerpts (September 16, 2019)
Ordinance



CLARK&FULLER
CIVIL ENGINEERING • DESIGN • PLANNING
215 North Main Street, Temple, TX 76501
254.899.0899 www.clark-fuller.com F-10384

317 SELF STORAGE
TEMPLE, TEXAS

9-4-19

STATE OF TEXAS
JUSTIN B. FULLER
100183
LICENSED
PROFESSIONAL ENGINEER

NOT FOR CONSTRUCTION

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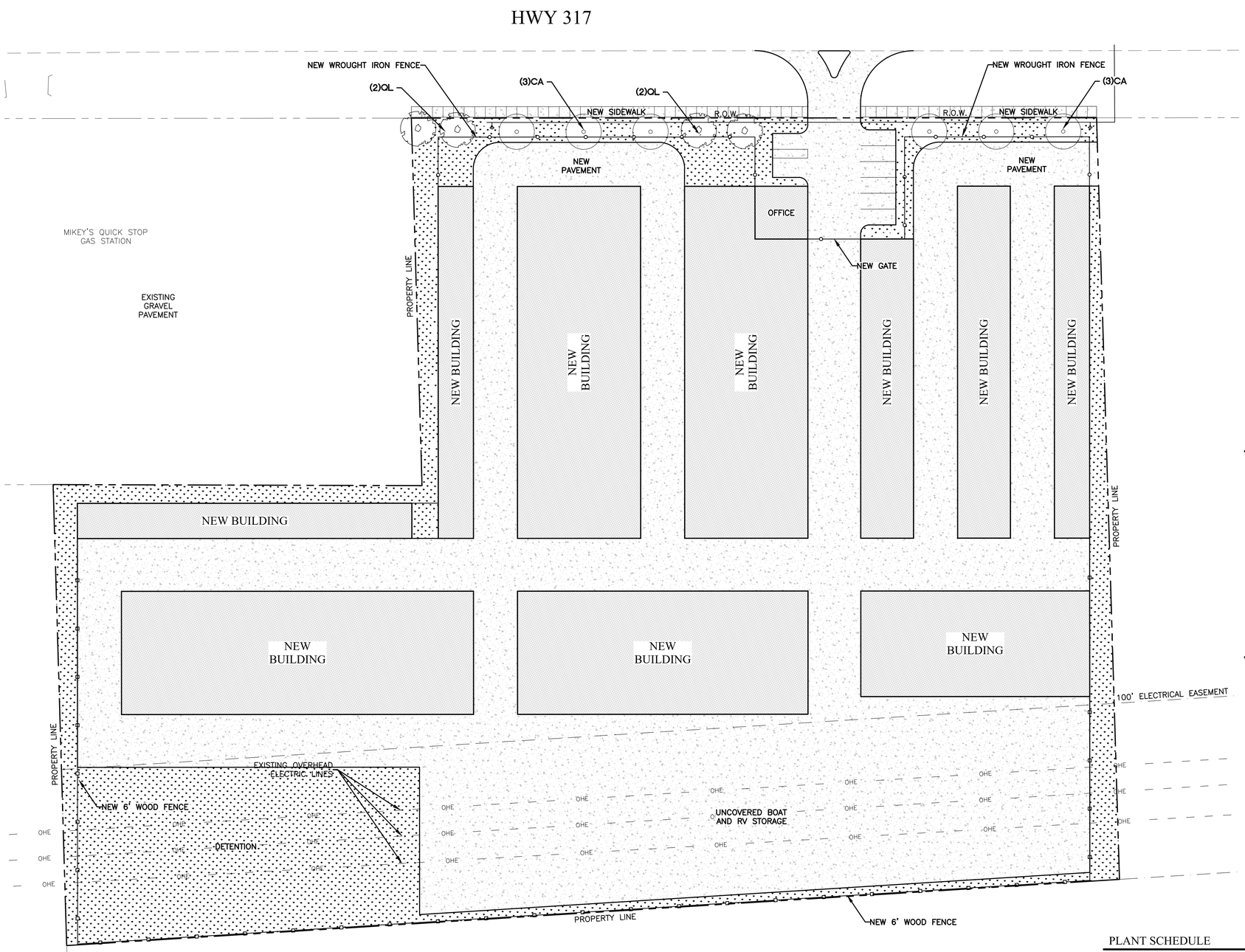

OVERALL LANDSCAPE TOTALS

TOTAL LANDSCAPE MITIGATION & REQUIRED AREA:

LANDSCAPE AREA	39,449.88	SF
OVERALL SITE	226,691.10	SF
TOTAL LANDSCAPE	17.4%	

GENERAL LANDSCAPE REQUIREMENTS:

MINIMUM OF 60% OF ALL REQUIRED TREES SHALL EVERGREEN

1 TREE (OR 3 SHRUBS) PER 40' LF PUBLIC FRONTAGE

389 LF = 10 TREES / COMBO LARGE & SMALL TREES

PROVIDED CANOPY TREES 10

LANDSCAPE NOTES

1. COORDINATE LOCATION OF TREES WITH OWNER PRIOR TO INSTALLATION.
2. NO REQUIRED LANDSCAPING SHALL BE PLANTED IN SUCH A MANNER AS TO ADVERSELY AFFECT DRAINAGE OR UTILITY EASEMENTS. TREES WITH A MAXIMUM MATURE HEIGHT GREAT ENOUGH TO INTERFERE WITH OVERHEAD POWER LINES SHALL NOT BE PLANTED BELOW OVERHEAD POWER LINES. NO TREE SHALL BE PLANTED WITHIN FIVE (5) FEET OF ANY EXISTING UTILITY POLE, GUY WIRE OR PAD MOUNTED TRANSFORMER.
3. ALL LANDSCAPED AREAS SHALL BE IRRIGATED BY AN AUTOMATIC SPRINKLER SYSTEM THAT IS DESIGNED AND INSTALLED BY A LICENSED IRRIGATION PROFESSIONAL.
4. ALL AREAS NOT COVERED BY IMPERVIOUS SURFACES SHALL HAVE NEW GRASS SOD, GRASS SEEDING, MULCH, WASHED GRAVEL, ROCK, SAND OR OTHER DECORATIVE COVERS.
5. PRIOR TO BEGINNING CONSTRUCTION, LANDSCAPE CONTRACTOR SHALL COORDINATE THE TYPE OF NEW GRASS, TREES, AND SHRUBBERY WITH OWNER.
6. ALL PLANT MATERIAL SHALL BE MAINTAINED IN A HEALTHY AND GROWING CONDITION AS IS APPROPRIATE FOR THE SEASON.
7. ALL LANDSCAPE MATERIALS SHALL BE INSTALLED ACCORDING TO AMERICAN NURSERY AND LANDSCAPE ASSOCIATION (AN&LA) STANDARDS.
8. ALL IRRIGATION SYSTEMS SHALL BE DESIGNED AND SEALED IN ACCORDANCE WITH THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY (TCEQ) AND SHALL BE PROFESSIONALLY INSTALLED. NO IRRIGATION SHALL BE REQUIRED FOR UNDISTURBED NATURAL AREAS OR UNDISTURBED EXISTING TREES.
9. ALL TREES SHALL BE THE CALIPER SIZE NOTED IN THE PLANT SCHEDULE.

PLANT SCHEDULE

SYM	QTY	BOTANICAL NAME	COMMON NAME	SIZE	NOTES
CANOPY TREES					
QL	4	QUERCUS LACEYI	LACEY OAK	2" CAL.	SPECIMEN QUALITY
CA	6	CUPRESSUS ARIZONICA	ARIZONA CYPRESS	2" CAL.	SPECIMEN QUALITY

0 30 60
FEET

LEGEND

LACEY OAK

ARIZONA CYPRESS

NEW NATIVE TURF WITH 4" SANDY LOAM TOPSOIL

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317 SELF STORAGE
NEW SITE DEVELOPMENT

TEMPLE, TEXAS

SITE LANDSCAPING PLAN

DRAWING STATUS

THESE DRAWINGS WERE PREPARED UNDER THE AUTHORITY OF JUSTIN B. FULLER P.E. 100183, CLARK & FULLER, PLLC FIRM NO: F-10384.

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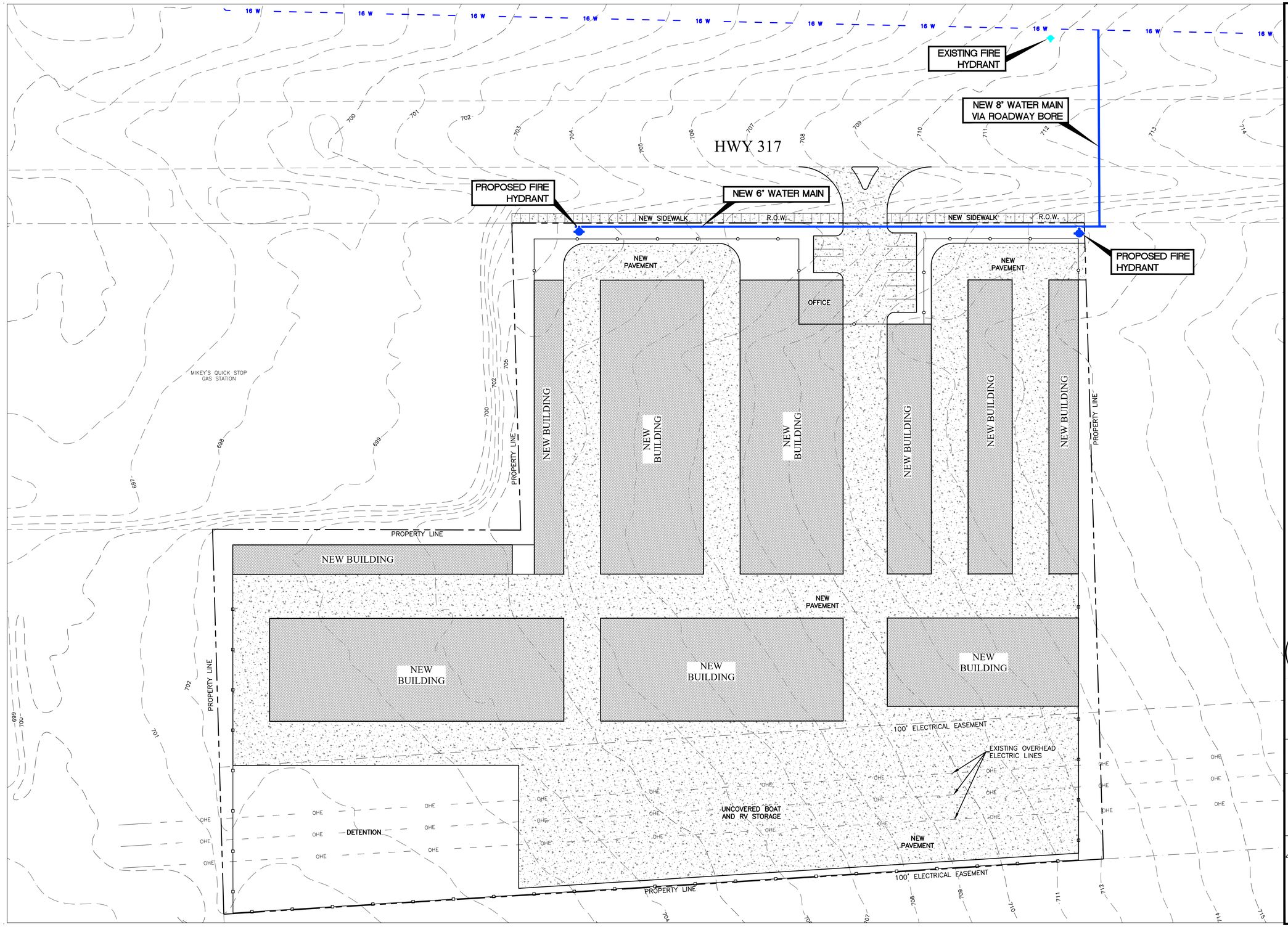
☐ FOR CONSTRUCTION
FINAL DRAWINGS

STATE OF TEXAS
JUSTIN B. FULLER
100183
LICENSED PROFESSIONAL ENGINEER
9-4-19

Designed	JBF
Drafted	ECB
Project No	191998.00
Plot Date	9-4-19

3



0 30 60
FEET

LEGEND:

- NEW 4' DIA. ECCENTRIC MANHOLE WITH 32" HEAVY DUTY LID ASSEMBLY
- SANITARY SEWER DIRECTIONAL FLOW ARROW
- PROPOSED 8" PVC SDR 26 SANITARY SEWER MAIN
- EXISTING SANITARY SEWER MANHOLE
- EXISTING SANITARY SEWER MAIN
- NEW STANDARD FIRE HYDRANT
- PROPOSED C900 PVC DR18 WATER MAIN
- EXISTING FIRE HYDRANT
- EXISTING WATER MAIN

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317 SELF STORAGE
NEW SITE DEVELOPMENT

TEMPLE, TEXAS

TOPOGRAPHIC AND UTILITY MAP

DRAWING STATUS

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FINAL DRAWINGS

9-4-19
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Designed	JBF
Drafted	ECB
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Plot Date	9-4-19

2

Planned Development Criteria and Compliance Summary

UDC Code Section 3.4.5 (A-J)	Yes/No	Discussion / Synopsis
A. The Plan Complies with all provisions of the Design and Development Standards Manual, this UDC and other Ordinances of the City.	**YES**	It is fully anticipated that the development / site plan attached with the rezoning ordinance will conform to all applicable provisions of the UDC as well as to dimensional, developmental and design standards adopted by the City for non-residential development.
B. The environmental impact of the development relating to the preservation of existing natural resources on the site and the impact on natural resources of the surrounding impacts and neighborhood is mitigated.	**YES**	Drainage and other related engineering will be addressed through the platting process. No impacts to existing natural resources on the property have been identified.
C. The development is in harmony with the character, use and design of the surrounding area.	**YES**	The project site is propsoed as a self storage facility with uncovered boat and RV storage on the eastern portion of the property. As a Planned Development it is proposed with landscaping and a wrought iron fence along the SH 317 frontage as well as a 6-foot high wood fence on the remaining three property boundaries. With the exception of the Shell fueling station and convenience store to the south, the surrounding area is undeveloped. However, the property to the east is zoned SF-2 but undeveloped. The 6-foot wood fence will reduce visual impacts of the self storage if the SF-2 property is developed in the future.
D. Safe and efficient vehicular and pedestrian circulation systems are provided.	**YES**	Vehicular access was addressed by the review of the subdivision plat which will require TxDOT review. The development/ site plan shows a new sidewalk with the TxDOT ROW of SH 317. No circulation issues have been identified.
E. Off-street parking and loading facilities are designed to ensure that all such spaces are usable and are safely and conveniently arranged.	**YES**	There are 8 parking spaces proposed which exceeds the 1 space per 2 employee required per UDC 7.5 and is acceptable. A condition of the Planned Development provides for the adequacy of 8 spaces.
F. Streets are designed with sufficient width and suitable grade and location to accommodate prospective traffic and to provide access for firefighting and emergency equipment to buildings.	**YES**	No streets are proposed by this planned development. Access to the site will be provided by a proposed driveway which requires TxDOT approval. Access will be reviewed during the review of the final plat.
G. Streets are coordinated so as to compose a convenient system consistent with the Thoroughfare Plan of the City.	**YES**	Compliance and consistancy with the Thoroughfare Plan has been reviewed with the Planned Development and wil be confirmed with the review of the final plat. No issues are anticipated.
H. Landscaping and screening are integrated into the overall site design: **1. To provide adequate buffers to shield lights, noise, movement or activities from adjacent properties when necessary.** **2. To complement the design and location of buildings.**	**YES**	Landscaping requirements will be finalized during the building permit stage. A Landscape Plan (Exhibit) will be attached to the Planned Development Ordinance. The Landscape Plan reflects the use of ten (10) trees of 2" diameter at breast height (dbh) along the SH 317 frontage as well as turf in other areas along the property perimeter and detention basin. Compliance will be made with the review of the building plans. A condition of approval provides flexibility to the Director of Planning & Development to make minor adjustment for landscaping, buffering and screening as warranted to address buffering and screening requirements.
I. Open space areas are designed to ensure that such areas are suitable for intended recreation and conservation uses.	**YES**	No Parkland dedication fees are required for this Planned Development. No parkland dedication fees are required with the subdivsion plat since the plat is non-residential.
J. Water, drainage, wastewater facilities, garbage disposal and other utilities necessary for essential services to residents and occupants are provided.	**YES**	Water will be provided by the City of Temple. Wastewater will be provided by on-site septic. Drainage facilities as well as other utilties will be addressed with the review of the plat and will be finalized by the review of Construction documents. To date, no issues have been identified. Detention is proposed in the south eastern corner of the property.

Site & Surrounding Property Photos

Site: Undeveloped (GR)

Site: Undeveloped (GR)

South: Adjacent Shell Fueling Station & Convenience Store (GR)

South: Shell Fueling Station & Convenience Store (Closeup)(GR)

West: Undeveloped (AG)

Tables

Permitted & Conditional Uses Table for General Retail District

Use Type	General Retail (GR)
Agricultural Uses	Farm, Ranch or Orchard
Residential Uses	Single Family Residence (Detached & Attached) Family or Group Home Duplex Townhouse Home for the Aged
Retail & Service Uses	Most Retail & Service Uses Alcoholic Beverage Sales, off-premise consumption, package Store (CUP)
Commercial Uses	Plumbing Shop Upholstery Shop Kennel without Veterinary Hospital (CUP) Indoor Flea Market
Industrial Uses	Temporary Asphalt & Concrete Batching Plat (CUP) Laboratory, medical, dental, scientific or research Recycling collection location
Recreational Uses	Park or Playground Beer & Wine (On Premise Consumption) < 75%
Educational & Institutional Uses	Cemetery (CUP) Place of Worship Social Svc. Shelter (CUP) Child Care Hospital
Vehicle Service Uses	Auto Leasing, Rental Auto Sales - New & Used (Outside Lot) Car Wash Vehicle Servicing (Minor)
Restaurant Uses	With & Without Drive-In
Overnight Accommodations	Hotel or Motel
Transportation Uses	Emergency Vehicle Service Helistop

Surrounding Property Uses

	Surrounding Property & Uses		
Direction	**FLUP**	**Zoning**	**Current Land Use**
Site	**Agricultural/Rural & Suburban Commercial**	**GR**	**Undeveloped**
North	**Agricultural/Rural**	**GR**	**Undeveloped**
South	**Suburban Commercial**	**PD-GR & AG**	**Shell Gas Station & Retail Uses**
East	**Agricultural/Rural & Suburban Commercial**	**SF-2**	**Undeveloped**
West	**Suburban Commercial**	**AG**	**Undeveloped**

Comprehensive Plan Compliance

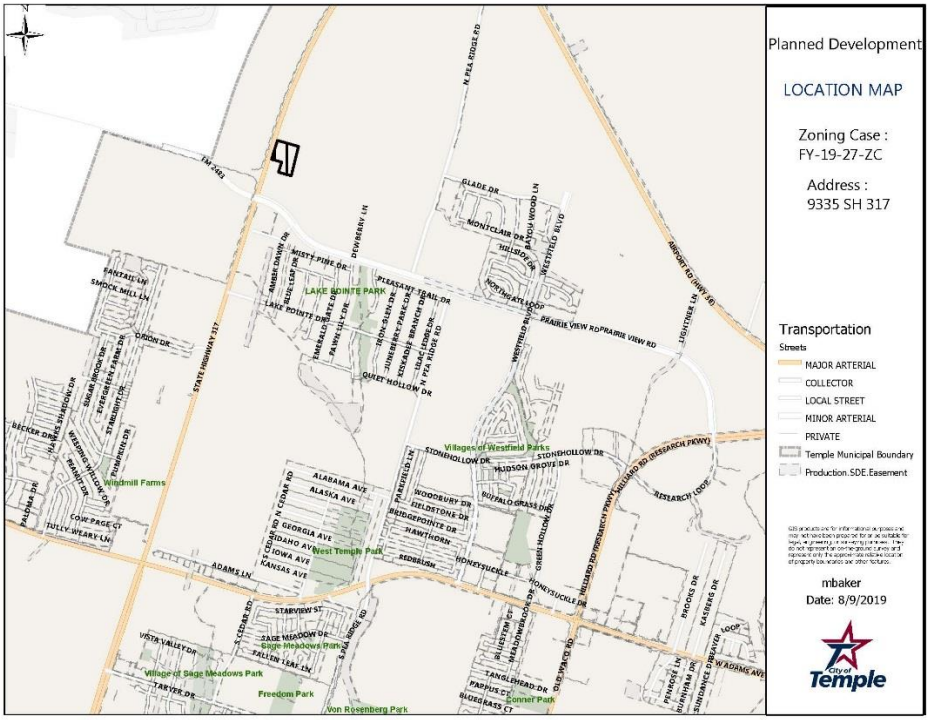
Document	Policy, Goal, Objective or Map	Compliance?
CP	**Map 3.1 - Future Land Use Map**	**PARTIAL**
CP	**Map 5.2 - Thoroughfare Plan**	**YES**
CP	**Goal 4.1 - Growth and development patterns should be consistent with the City's infrastructure and public service capacities**	**YES**
STP	**Temple Trails Master Plan Map and Sidewalks Ordinance**	**YES**
CP = Comprehensive Plan STP = Sidewalk and Trails Plan		

Dimensional Standards (UDC Section 4.5)

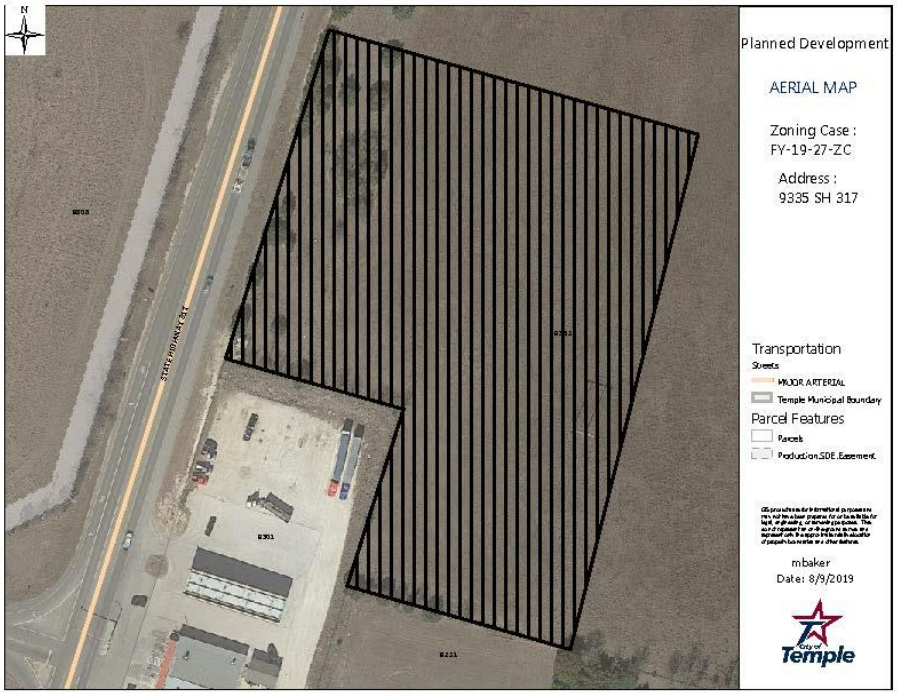
	(GR) Non-Residential
Minimum Lot Size	N/A
Minimum Lot Width	N/A
Minimum Lot Depth	N/A
Front Setback	15 Feet
Side Setback	10 Feet
Side Setback (Corner)	10 Feet
Rear Setback	0 Feet
Max Building Height	3 Stories

Hour Trip Rates Table (8th Ed. ITE Manual)		
Use	**Trip Rate Calc. Factor**	**Calculated Peak Hour Trip Rate**
Mini Warehousing	0.26 (Per 1,000 S.F.) @ 83,350	21.67 Trips
Convenience Market with Gasoline Pumps	50.92 (Per 1,000 S.F)	N/A
Gasoline Station	13.87 (Per Fueling Station)	N/A
Single Family Detached Residence	1.00 (Per DU)	N/A

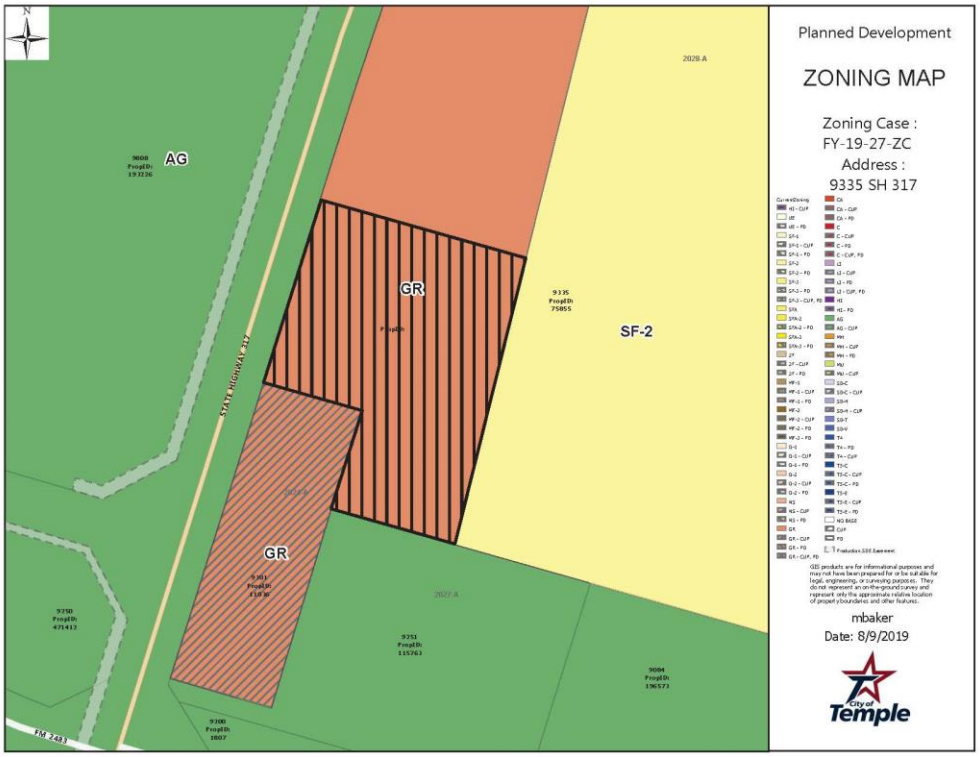
Maps



Location Map



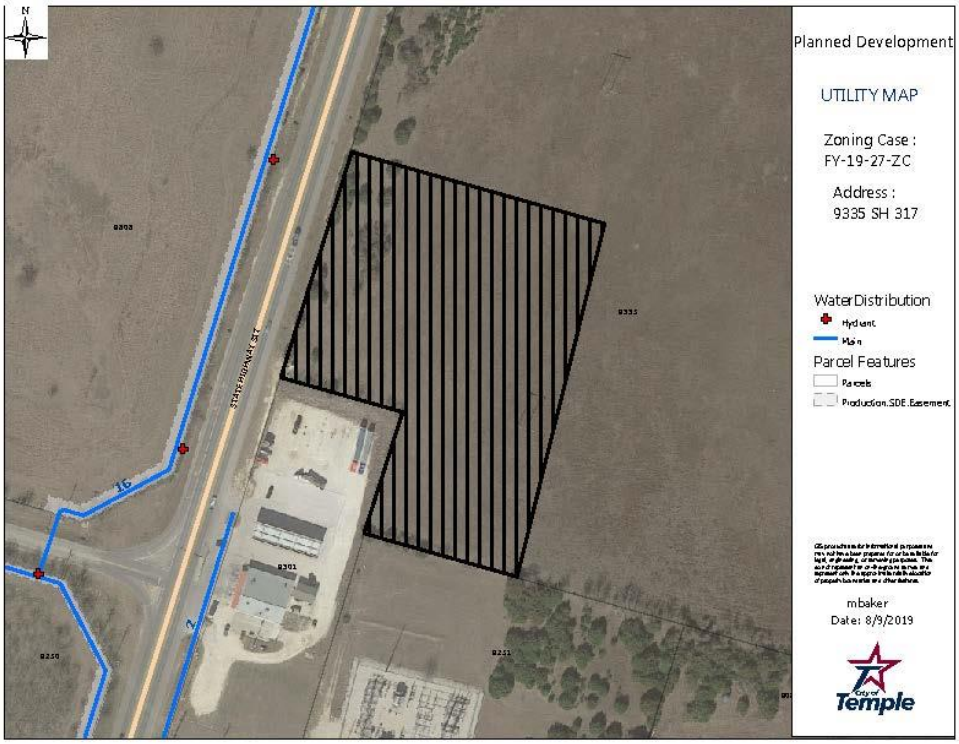
Aerial Map



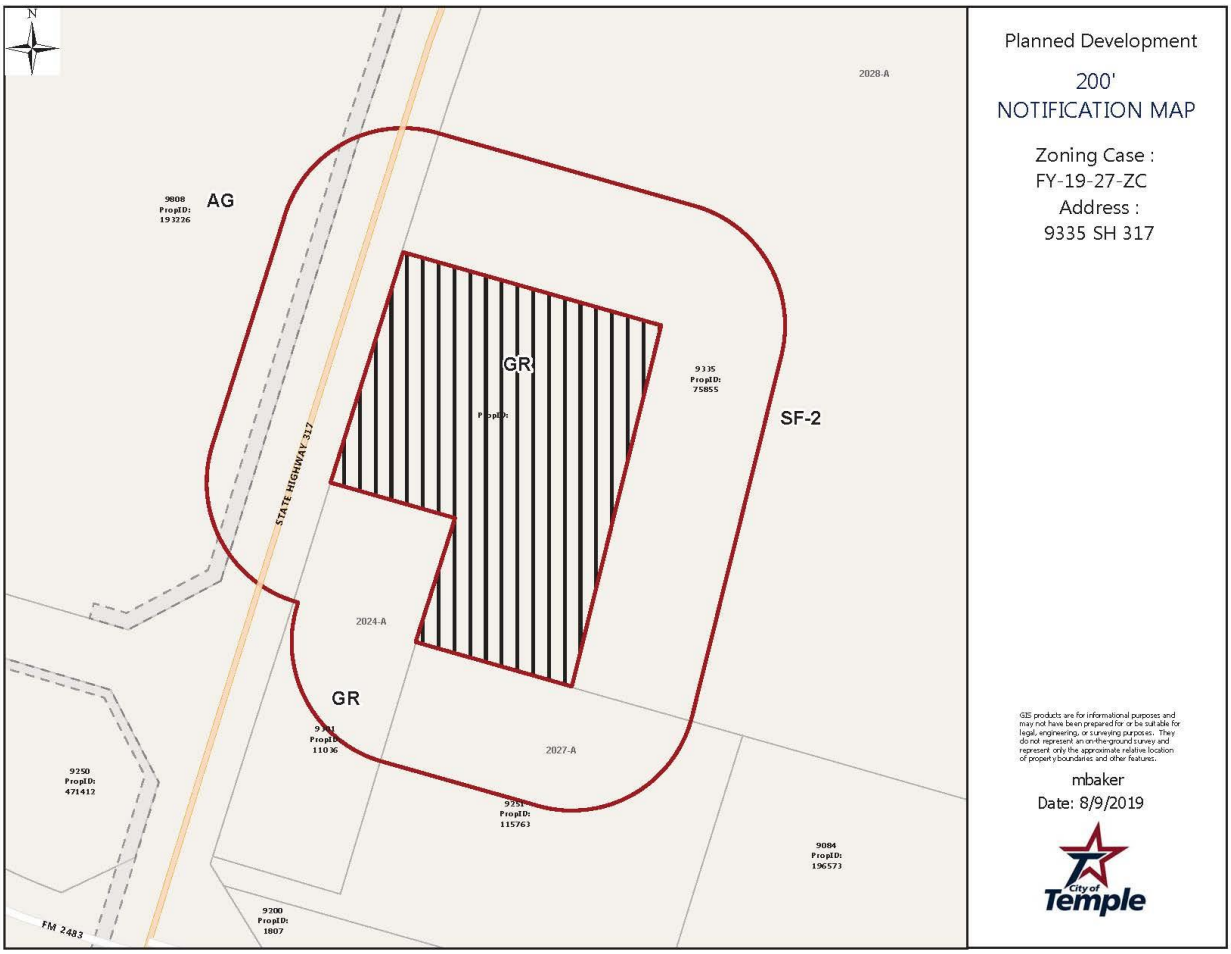
Zoning Map

Future Land Use Map

Thoroughfare & Trails Map



Utility Map



Notification Map

EXCERPTS FROM THE

PLANNING & ZONING COMMISSION MEETING

MONDAY, SEPTEMBER 16, 2019

ACTION ITEMS

Item 3: **FY-19-27-ZC –** Hold a public hearing to discuss and recommend action for a rezoning from General Retail (GR) to Planned Development-General Retail (PDGR) with a development/site plan for a self-storage facility with uncovered boat and RV storage on 5.204 +/- acres, addressed as 9335 State Highway 317.

Mr. Baker stated this item is scheduled to go forward to City Council for first reading on October 17, 2019 and second reading on November 7, 2019.

This rezoning is to allow a combination climate-controlled and outside temperature self-storage facility with ten separate buildings for uncovered RV and boat storage within overhead electrical easement.

A subdivision plat will be required prior to development of property.

The Development Review Committee (DRC) reviewed this case on August 15, 2019.

Planned Development (PD) UDC Section 3.4:

- A Planned Development is a Flexible Overlay Zoning District designed to respond to unique development proposals, special design considerations and land use transitions by allowing evaluation of land use relationships to surrounding areas through Development/Site Plan approval.

This item is found to be in compliance with the Planned Development, UDC, Section 3.4 Criteria Table.

Zoning Map is shown and found in compliance.

Future Land Use Map is shown and found in partial compliance.

Existing water and sewer map is shown and found in compliance.

Thoroughfare Plan and Trails Map shown and found in compliance.

Site and area photos are shown.

Charts of typical General Retail (GR) uses and PD standards are shown.

Site Plan with details is shown.

Landscape plan with details is shown.

Public Access and Parking Plan is shown.

Four notices were mailed in accordance with all state and local regulations with zero notices returned in agreement and zero notices returned in disagreement.

Compliance Summary is shown.

Staff recommends approval of the request for a rezoning from GR district to PD-GR district allowing for a self-storage facility subject to the following six conditions:

1. That the 5.204 +/- acre site may be developed with a self-storage facility as shown and further described by Exhibits A & B of the rezoning Ordinance or any permitted use within the General Retail (GR) district;
2. That a subdivision plat is recorded prior to issuance of a building permit;
3. That eight (8) provided parking spaces is acceptable to accommodate the proposed use;
4. That the Director of Planning & Development may be authorized discretion to approve minor modifications to the City Council-approved development plan for the 5.204 +/- acre tract, including but not limited to, screening, buffering, landscaping and minor modifications to the overall site layout;
5. Significant changes to the Development/ Site Plan require review by the Planning & Zoning Commission and City Council
6. That the SH 317-facing facades of the six (6) (or exterior) buildings include at least 3 of the following architectural elements:
    a. Combination of 2 different materials (one as a base material at least 3-feet in height)
    b. Windows (real or faux)
    c. A parapet at least 3-feet tall
    d. Structural awnings
    e. Front roof gables

Vice-Chair Ward opened the public hearing.

There being no speakers, the public hearing was closed.

Commissioner Alaniz made a motion to approve Item 3, **FY-19-27-ZC**, per staff recommendation, and Commissioner Armstrong made a second.

Motion passed: (7:0)
Chair Langley and Commissioner Marshall absent

ORDINANCE NO. 2019-5000
(FY-19-27-ZC)

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A REZONING FROM GENERAL RETAIL ZONING DISTRICT TO PLANNED DEVELOPMENT GENERAL RETAIL ZONING DISTRICT WITH A DEVELOPMENT/SITE PLAN FOR A SELF-STORAGE FACILITY ON APPROXIMATELY 5.204 ACRES; ADDRESSED AS 9335 STATE HIGHWAY 317; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, the applicant, Clark & Fuller, on behalf of Bryan Burke, requests a rezoning from General Retail zoning district to Planned Development General Retail zoning district to allow for a self-storage facility on approximately 5.204 acres located at 9335 State Highway 317;

Whereas, the facility will include a combination of indoor climate controlled and ambient (outdoor) temperature storage units along with uncovered boat and RV storage within the overhead electrical easement on the eastern side of the approximately 5.204 acres - the self-storage facility is proposed to provide for approximately 83,350 square feet of storage space;

Whereas, the Planning and Zoning Commission of the City of Temple, Texas, recommends approval of the rezoning from General Retail zoning district to Planned Development General Retail with a Development/Site Plan for a self-storage facility on approximately 5.204 acres, addressed as 9335 State Highway 317, as outlined on the Development/Site Plan attached hereto as Exhibit 'A,' and made a part hereof for all purposes, and subject to the following conditions:

1. the approximately 5.204-acre site may be developed with a self-storage facility as shown and further described by Exhibits A & B of the rezoning Ordinance or any permitted use within the General Retail district;
2. a subdivision plat is recorded prior to issuance of a building permit;
3. eight parking spaces will be provided to accommodate the proposed use;
4. the Director of Planning & Development may be authorized discretion to approve minor modifications to the Council approved development plan for the approximately 5.204-acre tract, including but not limited to, screening, buffering, landscaping and minor modifications to the overall site layout;
5. significant changes to the Development/Site Plan will require review by the Planning & Zoning Commission and City Council;
6. the State Highway 317-facing facades of the six (or exterior) buildings include at least 3 of the following architectural elements:
    a. combination of 2 different materials (one as a base material at least 3-feet in height);
    b. windows (real or faux);
    c. a parapet at least 3-feet tall;
    d. structural awnings; and
    e. front roof gables;

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Ordinance as if copied in their entirety.

Part 2: The City Council approves of the rezoning from General Retail to Planned Development General Retail with a Development/Site Plan for a self-storage facility on approximately 5.204 acres, addressed as 9335 State Highway 317, and outlined on the Development/Site Plan attached hereto as Exhibit 'A,' and made a part hereof for all purposes.

Part 3: The City Council approves the Development/Site Plan made a part hereof for all purposes.

Part 4: The City Council directs the Director of Planning to make the necessary changes to the City Zoning Map.

Part 5: It is hereby declared to be the intention of the City Council that the sections, paragraphs, sentences, clauses, and phrases of this ordinance are severable and, if any phrase, clause, sentence, paragraph or section of this ordinance should be declared invalid by the final judgment or decree of any court of competent jurisdiction, such invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance, since the same would have been enacted by the City Council without the incorporation in this ordinance of any such phrase, clause, sentence, paragraph or section.

Part 6: This ordinance shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Temple, Texas, and it is accordingly so ordained.

Part 7: It is hereby officially found and determined that the meeting at which this Ordinance was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED on First Reading and Public Hearing on the **17th** day of **October,** 2019.

PASSED AND APPROVED on Second Reading on the **7th** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

_____
TIMOTHY A. DAVIS, Mayor

ATTEST:

_____
Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

_____
Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION REVIEW:

Jason Deckman, Planner

ITEM DESCRIPTION: SECOND & FINAL READING – FY-19-28-ZC: Consider adopting an ordinance authorizing a Conditional Use Permit to allow for an office warehouse, with a Site Plan, in the Temple Winnelson Subdivision, addressed as 1801 North 3rd Street and 1605 North 3rd Street.

PLANNING & ZONING COMMISSION RECOMMENDATION: During its September 16, 2019, meeting, the Planning & Zoning Commission voted 6 to 0 (with 1 abstaining) to recommend approval per staff's recommendation.

STAFF RECOMMENDATION: Based on the following analysis that:

1. The request is compatible with surrounding uses;
2. The request complies with the Future Land Use Map and Thoroughfare Map;
3. Public facilities are available to serve the property; and
4. Demonstrated compliance with the CUP review criteria in UDC Section 3.5.4.

Staff recommends approval of the Conditional Use Permit subject to the following conditions:

1. Substantial compliance with the building footprint and lot layout depicted by Site Plan attached as Exhibit A;
2. That paved and striped parking spaces will accessible from both lots via a connecting driveway as shown on the Site Plan; and
3. That the Director of Planning may be authorized to approve minor changes to the Site Plan, which may include but are not limited to: building footprint configuration, exterior building materials, and landscaping.

ITEM SUMMARY: Temple Winnelson Company currently operates a plumbing supply business at 1801 North 3rd Street. The company acquired the adjacent lot at 1605 North 3rd and is developing that property in order to expand the existing business. The UDC does not describe any specific performance standards for approval and the review criteria in UDC Sec. 3.5.4 will be applied.

BACKGROUND: An office warehouse is permitted in the General Retail zoning district with a Conditional Use Permit. The proposed building measures 24,096 square feet. It will contain 5,242 square feet of offices, conference rooms, and showroom area, with the remaining 18,854 square feet dedicated to warehouse space.

Parking is shown on the attached Site Plan. Eighteen spaces are shown on each lot, for a total of 36. A minimum of 29 spaces would be required, with 21 of them on the southern lot. Staff identified that the parking layout shown on the south lot does not meet a strict reading of the required parking ratios for office and warehouse uses. However, a connecting driveway links the two lots, and taken as a whole, the site plan exceeds the minimum required parking spaces. In consideration of the overall plan, staff has determined that this meets the parking standards in UDC Section 7.5. A condition of approval will be that all parking areas must be paved, and all spaces must be striped.

The proposed Conditional Use Permit has demonstrated compliance to the seven Review Criteria as set forth in UDC Section 3.5.4 (A-G). The site plan as submitted is substantially the same as was presented during the 1st and 3rd Overlay appeal to standards. The proposed landscaping and sidewalks to be constructed as part of this project will enhance the streetscape and will not diminish property values in the surrounding area. The site plan addresses access to public streets as well as internal circulation. A brief summary of each item is provided in the attached table. If the Conditional Use Permit is approved by City Council, the attached site plan will be included as Exhibit A with the ordinance.

DEVELOPMENT REGULATIONS: The property is located in the 1st and 3rd Overlay Zoning District and is subject to additional requirements for landscaping, public frontage, and screening. These requirements were addressed in a previous appeal to standards that was approved by City Council on June 21, 2018. That resolution is attached to this report.

DEVELOPMENT REVIEW COMMITTEE (DRC): Members of the DRC reviewed the proposed conditional use permit and site plan. No major issues were identified during the review. The Fire Marshal has stated that fire protection requirements will be addressed in the construction permit.

PUBLIC NOTICE: Twenty-two notices of the public hearing were sent out to property owners within 200-feet of the subject property as required by State law and City Ordinance. One property notice was returned in agreement; a copy of the response letter is attached to this report.

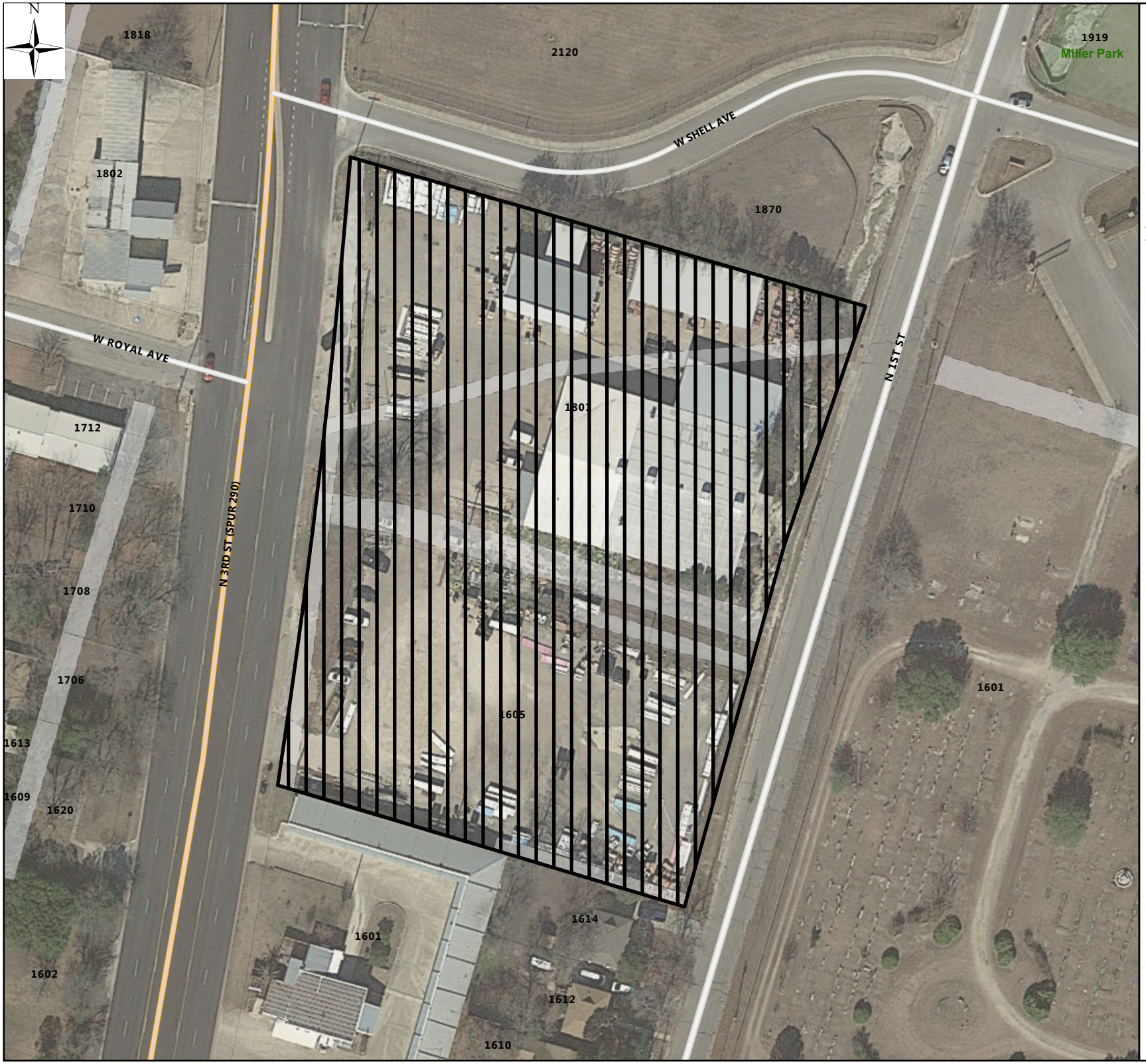
The newspaper printed notice of the public hearing on September 5, 2019, in accordance with state law and local ordinance.

FISCAL IMPACT: Not applicable.

ATTACHMENTS:
Site Plan (Exhibit A)
Maps
Conditional Use Permit Review Criteria Table (UDC Section 3.5.4 (A-G)
Site Photos
Appeal to Standards of 1st and 3rd Overlay District (Res. 2018-9180)
Returned Property Notice
Ordinance

EXHIBIT A

NORTH 3rd STREET
(Asphalt Surface)
NORTH 1st STREET
(Asphalt Surface)
CALLED 63.6 ACRES
TEMPLE CEMETERY CO.
Tax ID No. 115024
N 85°24'52" E 195.13'
N 76°14'36" E 155.91'
S 18°06'32" W 235.88'
S 17°00'4_" W 176.03'
N 73°14'35" W 249.85'
N 73°23'57" W 299.2_'
N 73°19'00" W 270.42'
237.05'
A – 414.84'
R – 5729.58'
C – 414.75'
B – N 06°29'56" E
D – 4°08'54"
10' Utility Easement
20' Drainage Easement
10' Sewer Easement – City of Temple Vol. 770, Pg. 510
Chain Link Fence
TS-2
60d Nail Set in Asphalt
N: 10,381,565.91
E: 3,234,153.86
Elev: 715.77
TS-1
100d Nail
N: 10,381,290.47
E: 3,234,434.26
Elev: 725.94
TBM 501
Cut Box set on NE Corner Headwall
Elev: 715.90
TBM 500
Cut Box set on SE Corner Sewer Vault
Elev: 716.89
CURB INLET 8501
Rim Elev=716.06
Inv Elev=713.06 Silted
CURB INLET 8500
Rim Elev=716.32
Inv Elev=710.75 (N)
MHW 9504
Rim Elev=715.69
Inv Elev=708.79 (W)
Inv Elev=708.65 (E)
MHW 9501
Rim Elev=716.83
Inv Elev=709.12 (S)
Inv Elev=708.04 (W)
Inv Elev=707.98 (NE)
MHW 9500
Rim Elev=719.36
Inv Elev=711.24 (W)
Inv Elev=711.08 (N)
MHW 9502
Rim Elev=716.88
Inv Elev=N/A (Filled with sewage)
FL 4' X 10' BOX CULVERT=710.33
JUST ONE CULVERT SEE ACS PHOTO 4008
FL 12" RCP=712.37
FL 42" RCP=710.62
FL 42" Steel Pipe=710.03
FL 42" Steel Pipe=710.05
FL 48" CMP=710.69
Storm Junction Box
36" OAK
Concrete Dock
Asphalt
Broken Asphalt & Gravel
Concrete
Conc. Approach
5/8" Iron Rod W/ "ACS" Cap Found
1/2" Iron Rod Found
1" Metal Pipe Found
CROSS SLOPE NOT TO EXCEED 1:50
MATCH EXISTING
FF=722.00
LOT 8, BLOCK 1 SUBDIVISION OF A. C. BUCHANAN LANDS Vol. 528, Pg. 439



CUP for Office Warehouse

AERIAL MAP

Zoning Case : FY-19-28-ZC

Address : 1605 & 1801 N 3RD ST

Transportation

Streets

- MAJOR ARTERIAL
- COLLECTOR
- LOCAL STREET
- Temple Municipal Boundary

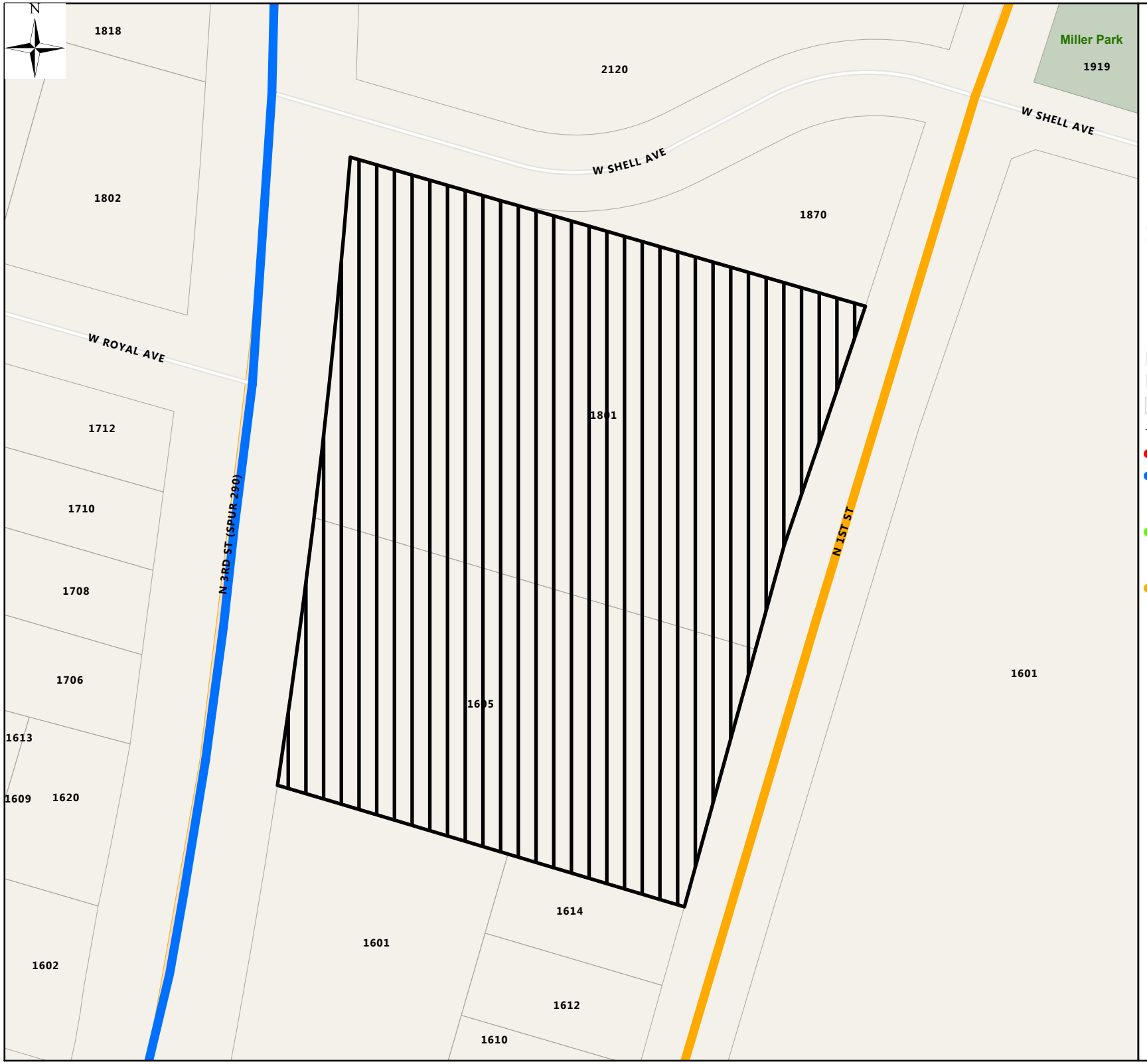
Parcel Features

- Parcels
- Easement

jdeckman

Date: 9/11/2019

City of Temple



CUP for Office Warehouse

THOROUGHFARE AND TRAILS MAP

Zoning Case : FY-19-28-ZC

Address : 1605 & 1801 N 3RD ST

Parcel Features

- Parcels

Thoroughfare Plan

- Expressway
- Major Arterial
- Proposed Major Arterial
- Minor Arterial
- Proposed Minor Arterial
- Collector
- Proposed Collector

Trails Master Plan

- EXISTING, CITY WIDE SPINE
- EXISTING, COMMUNITY WIDE CONNECTOR
- EXISTING, LOCAL CONNECTOR
- PROPOSED, CITY WIDE SPINE
- PROPOSED, COMMUNITY WIDE CONNECTOR
- PROPOSED, LOCAL CONNECTOR

jdeckman

Date: 9/11/2019

City of Temple

CUP for Office Warehouse

UTILITY MAP

Zoning Case :
FY-19-28-ZC

Address :
1605 & 1801 N 3RD ST

Sewer

- Manhole
- Gravity Main

WaterDistribution

- Hydrant
- Main

Parcel Features

- Parcels
- Easement

jdeckman
Date: 9/11/2019

City of Temple

CUP for Office Warehouse

FUTURE LAND USE MAP

Zoning Case : FY-19-28-ZC

Address : 1605 & 1801 N 3RD ST

Transportation

- EXPRESSWAY
- MAJOR ARTERIAL
- COLLECTOR
- LOCAL STREET
- MINOR ARTERIAL
- PRIVATE
- RAMP

Parcel Features

- Parcels

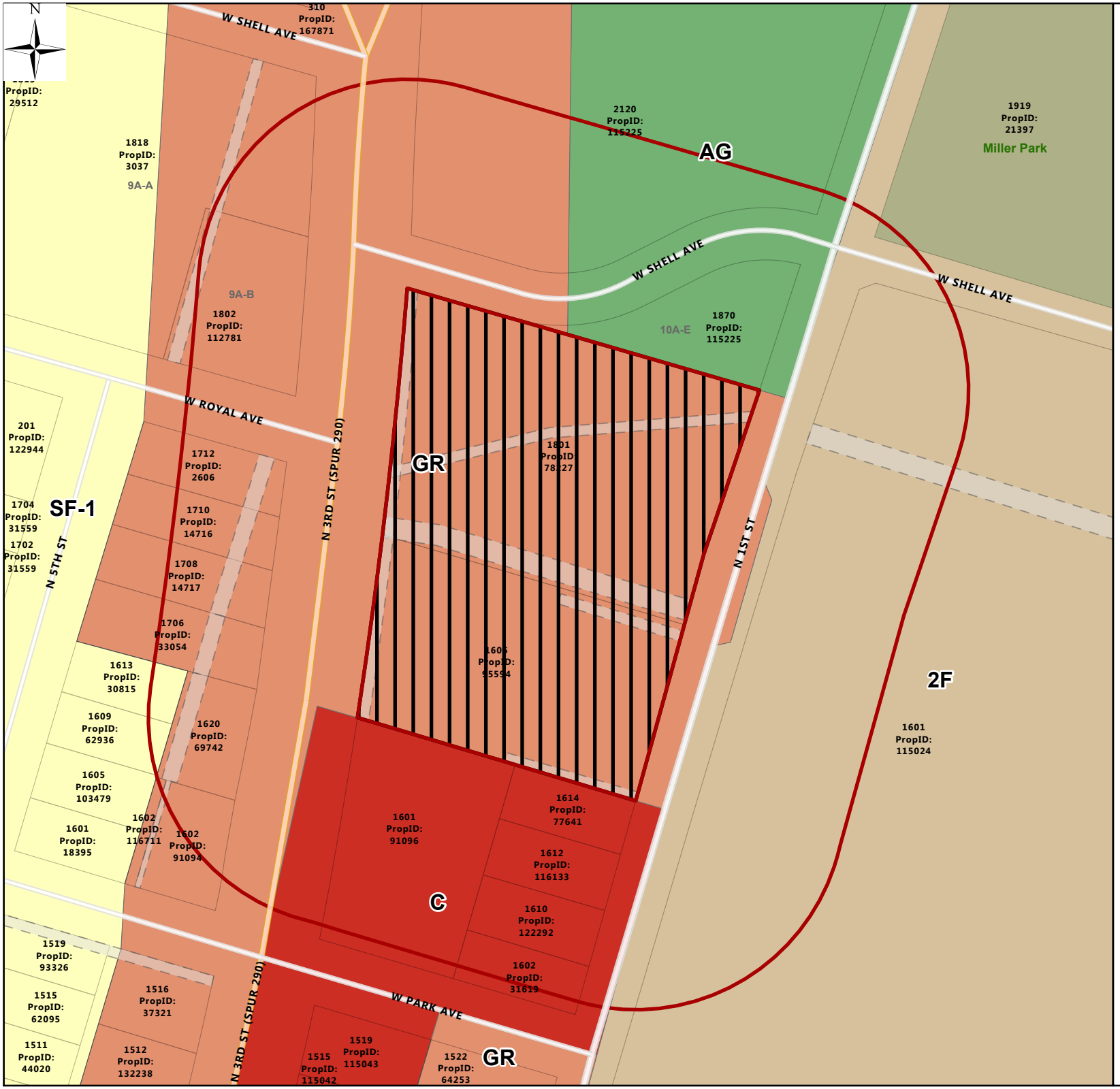
Future LUP

- Agricultural/Rural
- Auto-Urban Commercial
- Auto-Urban Mixed Use
- Auto-Urban Multi-Family
- Auto-Urban Residential
- Business Park
- Estate Residential
- Industrial
- Neighborhood Conservation
- Parks & Open Space
- Public Institutional
- Suburban Commercial
- Suburban Residential
- Temple Medical Education District
- Urban Center

jdeckman

Date: 9/11/2019

City of Temple



CUP for Office Warehouse
200'
NOTIFICATION MAP

Zoning Case :
FY-19-28-ZC

Address :
1605 & 1801 N 3RD ST

CurrentZoning		
HI - CUP	O-1	AG - CUP
UE	O-1 - CUP	MH
UE - PD	O-1 - PD	MH - CUP
SF-1	O-2	MH - PD
SF-1 - CUP	O-2 - CUP	MU
SF-1 - PD	O-2 - PD	MU - CUP
SF-2	NS	SD-C
SF-2 - PD	NS - CUP	SD-C - CUP
SF-3	NS - PD	SD-H
SF-3 - PD	GR	SD-H - CUP
SF-3 - CUP, PD	GR - CUP	SD-T
SFA	GR - PD	SD-V
SFA-2	GR - CUP, PD	T4
SFA-2 - PD	CA	T4 - PD
SFA-3	CA - CUP	T4 - CUP
SFA-3 - PD	CA - PD	T5-C
2F	C	T5-C - CUP
2F - CUP	C - CUP	T5-C - PD
2F - PD	C - PD	T5-E
MF-1	C - CUP, PD	T5-E - CUP
MF-1 - CUP	LI	T5-E - PD
MF-1 - PD	LI - CUP	NO BASE
MF-2	LI - PD	CUP
MF-2 - CUP	LI - CUP, PD	PD
MF-2 - PD	HI	Easement
MF-3 - PD	HI - PD	
	AG	

jdeckman
Date: 9/12/2019

City of Temple

UDC Code Section 3.5.4	Criteria met?	Discussion
A. The conditional use is compatible with and not injurious to the use and enjoyment of the property and does not significantly diminish or impair property values within the immediate area.	Yes	The proposed site development plan and new building will enhance the aesthetics of this property, particularly the frontage landscaping along N. 3rd Street.
B. The establishment of the conditional use does not impede normal and orderly development and improvement of surrounding vacant property.	Yes	Operation of an office warehouse will not impede development or improvements on the surrounding properties.
C. Adequate utilities, access roads, drainage, and other necessary support facilities have been or will be provided.	Yes	Public Works has determined that water and wastewater service to the property will be adequate and won't be negatively impacted. The property fronts onto a major arterial street.
D. The design, location and arrangement of all driveways and parking spaces provide for the safe and convenient movement of vehicular and pedestrian traffic without adversely affecting the general public or adjacent development.	Yes	The property will have two entrances onto N. 3rd and an additional delivery entrance on N. 1st. These connections will ensure adequate access and traffic circulation. Adequate parking is shown on the site plan with opportunity for circulation between both lots.
E. Adequate nuisance prevention measures have been or will be taken to prevent or control offensive odors, fumes, dust, noise, and vibration.	Yes	Staff does not anticipate that the proposed warehouse will create offensive odors, fumes, dust, noise, or vibration.
F. Directional lighting is provided so as not to disturb or adversely affect neighboring properties.	Yes	Any exterior lighting proposed will be required to meet the provisions of UDC 7.1.8 with regard to glare. Compliance for exterior lighting will be addressed during review of the building plans.
G. There is sufficient landscaping and screening to insure harmony and compatibility with adjacent property.	Yes	Landscaping has been addressed through standards of the 1st and 3rd Overlay District, to preserve existing trees and add landscape buffers. Compliance will be confirmed during review of the building permit.

Reference: City of Temple Unified Development Code

Existing warehouse, facing east from N 3rd St

View along N. 3rd St frontage, facing north

Site of new office warehouse, facing northwest from N. 1st St

Drainage channel between lots, facing west from N. 1st St,

RESOLUTION NO. 2018-9180-R

(PLANNING NO. FY-18-2-APL)

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING AN APPEAL OF STANDARDS TO SECTION 6.8 OF THE UNIFIED DEVELOPMENT CODE IN THE 1ST AND 3RD OVERLAY DISTRICT RELATED TO LANDSCAPING AND PUBLIC FRONTAGE STANDARDS FOR A NEW CONSTRUCTION WAREHOUSE AND SALES BUILDING LOCATED AT 1605 NORTH 3RD STREET; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, the applicant operates a plumbing supply business located at 1801 North 3rd Street and is expanding onto the lot to the south, located at 1605 North 3rd Street - the lot lacks landscaping and has other non-conforming features;

Whereas, the 1st and 3rd Overlay District was adopted in 2012 to primarily improve the streetscape, fencing and landscaping within these commercial corridors and the proposed improvements would address the intent of the code by creating an aesthetically pleasing streetscape while maximizing commercial use of the property;

Whereas, at its May 21, 2018 meeting, the Planning and Zoning Commission recommended unanimous approval - Staff recommends approval of the appeal as shown on Exhibit 'A' showing landscaping and public frontage standards for a new construction warehouse and sales building located at 1605 North 3rd Street; and

Whereas, the City Council has considered the matter and deems it in the public interest to approve this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 1: The City Council authorizes an appeal of the following standards of Section 6.8 of the Unified Development Code related to landscaping and public frontage standards for a new construction warehouse and sales building located at 1605 North 3rd Street:

1. Landscaping
   - Applicant proposes to landscape approximately 10% of the area of the subject property. Proposed improvements significantly increase the amount of landscaping where none currently exists. Additionally, the applicant proposes to add landscaping at 1801 N. 3rd.
   - **6.8.4:** Maximum impervious lot coverage for non-residential uses is 70%.
   - **6.8.8:** Minimum of 30% landscape area at 1 tree and 4 shrubs per 600 sq. ft.

2. Frontage depth
   - Applicant proposes to landscape area as shown on site plan. The subject property forms an angle to 3rd St. that conflicts with depth requirements.
   - Use the average depth along the frontage to calculate buffer width.
   - **6.8.6 B.4** establishes depth and sidewalk requirements for each public frontage type.

3. Sidewalk width on 1st Street
   - Applicant proposes to extend the existing 4' sidewalk along 1st Street. The proposed sidewalk matches the existing width and increases connectivity between Shell Avenue and residential property to the south. An existing drainage channel limits the width of the sidewalk. As illustrated on the site plan, the sidewalk will be constructed to the back of curb except where it is routed behind the existing overhead utility pole to connect with the existing sidewalk.
   - **6.8.6 B.4:** Code requires an 8' sidewalk, but Sec. 6.8.15 allows for consideration of an administrative exception for sidewalk width by the Planning Director, which was included in this application.

4. Street Tree spacing
   - Applicant proposes to match the 35' spacing in TMED and plant trees where space permits, per Staff recommendation. Trees are placed within frontage along both streets, and clustered on both sides of the entrance on 3rd Street. Applicant also proposes to preserve an existing large tree on their adjacent property at 1801 N. 3rd St.
   - Sixteen trees will be planted.
   - **6.8.6 C.1.a:** One tree per 25' linear street frontage is required. Trees must be planted in a regularly spaced pattern. Spacing of trees may be offset to allow a view corridor into the primary entry of a nonresidential use.

5. Sidewalk to primary entrance
   - Applicant does not show a sidewalk connection to the primary entrance on the site plan.
   - Pedestrians would have easy access along the entrance drive to the front door.
   - **6.8.6 E.6:** Sidewalks must connect to parking within the lot and to primary entrances of each nonresidential building.

6. Foundation Planting
   - Applicant proposes adding landscaping in other areas of the property where none currently exist.
   - **6.8.8 D.1:** Foundation plantings are required within a planting area a minimum of four feet in depth along 50% of the length of any façade visible to the public.

7. Loading areas requiring screening
   - Applicant proposes that a loading area will not have a wall or other screening device.
   - **6.8.12 D.4:** Loading areas must be enclosed on three sides by a wall or other screening device a minimum of eight feet in height.

Part 2: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **21st** day of **June,** 2018.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, MAYOR

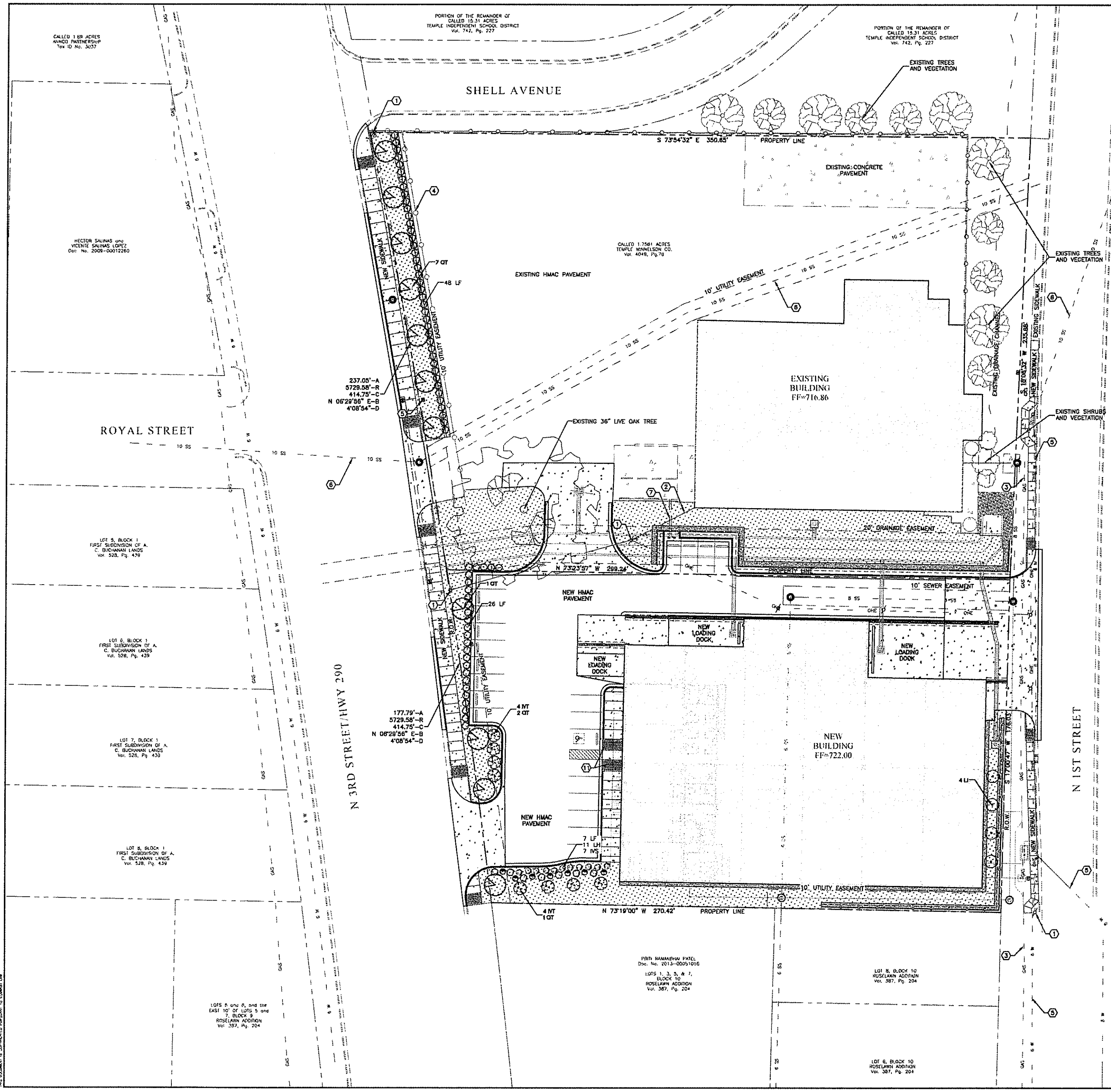
ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
City Attorney

EXHIBIT A



KEYED NOTES

1. CAUTION!!! EXISTING POWER POLE/LIGHT POLE
2. CAUTION!!! OVERHEAD ELECTRIC
3. CAUTION!!! EXISTING GAS MAIN/METER
4. EXISTING FENCING
5. EXISTING WATER MAIN/METER
6. EXISTING SANITARY SEWER
7. EXISTING STORM SEWER
8. NEW SANITARY SEWER SERVICE (REFER TO UTILITY SHEET FOR CONSTRUCTION)
9. NEW DOMESTIC WATER/FIRE SERVICE (REFER TO UTILITY SHEET FOR CONSTRUCTION)
10. NEW STORM SEWER (REFER TO UTILITY SHEET FOR CONSTRUCTION)
11. FURNISH AND INSTALL 1-HANDICAP SIDEWALK RAMP (PER TAS STANDARDS)
12. FURNISH AND INSTALL 1-TXDOT TYPE 10 HANDICAP RAMP (PER DETAILS)
13. FURNISH AND INSTALL 1-DOWELED CONNECTION TO EXISTING CURB AND GUTTER

PLANT LEGEND

- RED OAK
- CREPE MYRTLE
- YAUPON HOLLY
- DWARF YAUPON HOLLY
- TEXAS LANTANA
- TEXAS SAGE
- BERMUDA GRASS SOD GROUNDCOVER

PLANT SCHEDULE

SYM	QTY	BOTANICAL NAME	COMMON NAME	SIZE	NOTES
CANOPY TREES					
QT	11	QUERCUS TEXANA	RED OAK	3" CAL.	SPECIMEN QUALITY
ORNAMENTAL TREES					
LI	4	LAGERSTROEMIA INDICA	CREPE MYRTLE	2" CAL.	SPECIMEN QUALITY
IVT	8	ILEX VOMITORIA	YAUPON HOLLY	2" CAL.	SPECIMEN QUALITY
SHRUBS					
IVS	7	ILEX VOMITORIA 'NANA'	DWARF YAOPON HOLLY	3 GAL.	SPECIMEN QUALITY
LH	11	LANTANA HORRIDA	TEXAS LANTANA	3 GAL.	SPECIMEN QUALITY
LF	74	LEUCOPYLLUM FRUTESCENS	TEXAS SAGE	3 GAL.	SPECIMEN QUALITY

REQUIRED LANDSCAPING

1ST AND 3RD OVERLAY DISTRICT LANDSCAPE REQUIREMENTS (FRONTAGE TYPE C):

PUBLIC STREET FRONTAGE:

8' SIDEWALK-BACK OF CURB WITH 4' (OR GREATER) PLANTING STRIP AND BUFFER ZONE.

STREET TREES:
ONE TREE PER 25 LINEAR FEET OF STREET FRONTAGE. TREES MUST BE A SINGLE SPECIES. TREES MUST BE PLANTED A MINIMUM 12 FEET FROM BACK-OF-CURB IN THE REQUIRED PLANTING STRIP.

415 L.F. = 17 TREES REQUIRED - 1 EXISTING 36" LIVE OAK = 16 TREES REQUIRED

= 16 TREES PROVIDED

PLANTING AREA:
PUBLIC FRONTAGE PLANTING STRIP TYPE C - MUST BE PLANTED IN SOD OR EVERGREEN GROUNDCOVER.

PARKING LOT SCREENING:
ALL PARKING MUST BE SCREENED FROM PUBLIC RIGHT-OF-WAY A MINIMUM 36" IN HEIGHT.

PRIVATE PROPERTY LANDSCAPING:

A MINIMUM PERCENTAGE OF THE TOTAL AREA OF THE PRIVATE PROPERTY ON WHICH DEVELOPMENT, CONSTRUCTION, OR RECONSTRUCTION IS PROPOSED MUST BE DEDICATED TO LANDSCAPE AREA INCLUDING TREES, SHRUBS, GROUNDCOVER, SOD, OR OTHER LIVING PLANT MATERIAL.

MINIMUM REQUIRED LANDSCAPE AREA = 30%
1 TREE AND 4 SHRUBS PER 600 SQ. FT. LANDSCAPE AREA

TOTAL SITE AREA = 49,996.62

REQUIRED LANDSCAPE AREA
49,996.62 X 0.3 = 11,335.34 SQ FT

REQUIRED PLANTING

19 TREES
76 SHRUBS

LANDSCAPING AREA PROVIDED = 14,991 SQ FT

24 TREES PROVIDED
92 SHRUBS PROVIDED

FOUNDATION PLANTING ARE REQUIRED WITHIN A PLANTING AREA A MINIMUM OF 4 FEET IN DEPTH ALONG 50% OF ANY FACADE VISIBLE TO THE PUBLIC.

A MINIMUM OF 50% OF REQUIRED TREES MUST BE SELECTED FROM THE MEDIUM OR LARGE SIZE TREE LIST.
A MINIMUM OF 40% OF REQUIRED TREES MUST BE EVERGREEN SPECIES.

0 20 40
FEET

CLARK&FULLER
CIVIL ENGINEERING • DESIGN • PLANNING

Winsupply
3110 KETTERING BOULEVARD DAYTON, OHIO 45439

PROJECT NO.
55744

WINNELSON BUILDING TEMPLE, TEXAS

LANDSCAPE PLAN

LS1.1

RESPONSE TO PROPOSED REZONING REQUEST CITY OF TEMPLE

RECEIVED
SEP 13 2019
CITY OF TEMPLE
PLANNING & DEVELOPMENT

91096
PATEL, PRITI RAMANBHAI
4316 PATUXET DR
LAFAYETTE, IN 47909

Zoning Application Number: FY-19-28-ZC **Case Manager: Jason Deckman**

Location: 1801 North 3rd Street, and 1605 North 3rd Street

The proposed rezoning is the area shown in hatched marking on the attached map. Because you own property within 200 feet of the requested change, your opinions are welcomed. Please use this form to indicate whether you are in favor of the possible rezoning of the property described on the attached notice, and provide any additional comments you may have.

I (✓) **agree** ( ) **disagree with this request**

Comments: as long it does not cause any property damage on my property

Patel
Signature

PRITI PATEL
Print Name

(Optional)
Provide email and/or phone number if you want Staff to contact you

If you would like to submit a response, please email a scanned version of this completed form to the Case Manager referenced above, jdeckman@templetx.gov, or mail or hand-deliver this comment form to the address below, no later than **September 16, 2019.**

City of Temple
Planning Department
2 North Main Street, Suite 102
Temple, Texas 76501

Number of Notices Mailed: 22 Date Mailed: September 4, 2019

***OPTIONAL**: Please feel free to email questions or comments directly to the Case Manager or call us at 254.298.5668.*

ORDINANCE NO. 2019-5001
(FY-19-28-ZC)

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A CONDITIONAL USE PERMIT WITH A SITE PLAN TO ALLOW FOR AN OFFICE WAREHOUSE IN THE TEMPLE WINNELSON SUBDIVISION, ADDRESSED AS 1801 NORTH 3RD STREET AND 1605 NORTH 3RD STREET; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, Temple Winnelson Company currently operates a plumbing supply business at 1801 North 3rd Street - the company acquired the adjacent lot at 1605 North 3rd and is developing that property in order to expand the existing business;

Whereas, the Planning and Zoning Commission of the City of Temple, Texas, after due consideration to the planned development conditions, recommends approval of the requested Conditional Use Permit, subject to the following conditions:

1. Substantial compliance with the building footprint and lot layout depicted by Site Plan attached as Exhibit A;
2. That paved and striped parking spaces will be accessible from both lots via a connecting driveway as shown on the Site Plan; and
3. That the Director of Planning may be authorized to approve minor changes to the Site Plan, which may include but are not limited to: building footprint configuration, exterior building materials, and landscaping.

Whereas, the Unified Development Code (UDC) does not describe any specific performance standards for approval and the review criteria in UDC Sec. 3.5.4 will be applied; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Ordinance as if copied in their entirety.

Part 2: The City Council approves a Conditional Use Permit with a Site Plan to allow for an office warehouse in the Temple Winnelson Subdivision, addressed as 1801 North 3rd Street and 1605 North 3rd Street, subject to the following conditions:

1. Substantial compliance with the building footprint and lot layout depicted by the Site Plan attached as Exhibit A;
2. That paved and striped parking spaces will be accessible from both lots via a connecting driveway as shown on the Site Plan; and

3. That the Director of Planning may be authorized to approve minor changes to the Site Plan, which may include but are not limited to building footprint configuration, exterior building materials, and landscaping;

Part 3: The City Council approves the Site Development Plan which is made a part hereof for all purposes.

Part 4: The City Council directs the Director of Planning to make the necessary changes to the City Zoning Map.

Part 5: It is hereby declared to be the intention of the City Council that the sections, paragraphs, sentences, clauses, and phrases of this ordinance are severable and, if any phrase, clause, sentence, paragraph or section of this ordinance should be declared invalid by the final judgment or decree of any court of competent jurisdiction, such invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance, since the same would have been enacted by the City Council without the incorporation in this ordinance of any such phrase, clause, sentence, paragraph or section.

Part 6: This Ordinance shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Temple, Texas, and it is accordingly so ordained.

Part 7: It is hereby officially found and determined that the meeting at which this Ordinance was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED on First Reading and Public Hearing on the **17th** day of **October,** 2019.

PASSED AND APPROVED on Second Reading on the **7th** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

_____
TIMOTHY A. DAVIS, Mayor

ATTEST:

_____
Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

_____
Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Kayla Landeros, Interim City Attorney

ITEM DESCRIPTION: SECOND & FINAL READING – Consider adopting an ordinance designating 102 East Central Avenue, Temple 76501, legally described as Lot 2 and part of Lot 1, Block 15 Original Town of Temple, Bell County, Texas as City of Temple Tax Abatement Reinvestment Zone Number 40 for commercial/industrial tax abatement.

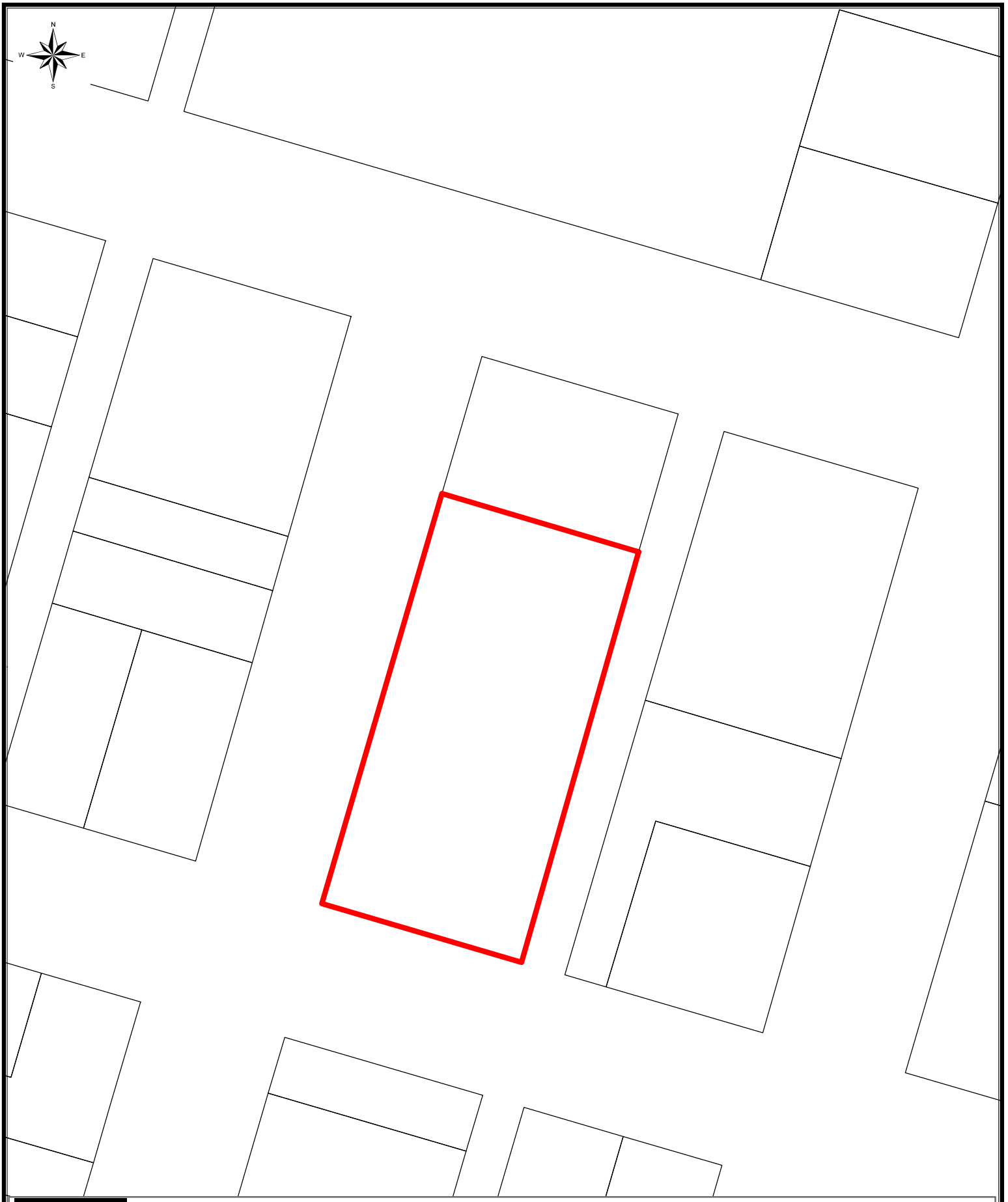
STAFF RECOMMENDATION: Conduct a public hearing and consider adopting an ordinance on first reading as presented in item description, and set the second and final reading for November 7, 2019, City Council meeting.

ITEM SUMMARY: The proposed ordinance designates 102 East Central Avenue, Temple 76501 as Tax Abatement Reinvestment Zone Number 40 for commercial/industrial tax abatement. The property tax identification number for the subject property is 21020.

The designation of a tax abatement reinvestment zone lasts for five years and is a prerequisite for entering into a tax abatement agreement with a future economic development prospect. We anticipate bringing a tax abatement agreement for proposed improvements to the property for Council's consideration at the November 7, 2019 meeting.

FISCAL IMPACT: None at this time.

ATTACHMENTS:
Map
Ordinance



Tax Abatement Zone #40

BellCAD ID: 21020
102 E Central Ave
Temple Original, Blk 15, Lot 2 & S 1/2 of 1 (Approx. 0.577ac)

ORDINANCE NO. 2019-5002

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, DESIGNATING 102 EAST CENTRAL AVENUE, TEMPLE 76501, LEGALLY DESCRIBED AS LOT 2 AND PART OF LOT 1, BLOCK 15 ORIGINAL TOWN OF TEMPLE, BELL COUNTY, TEXAS AS CITY OF TEMPLE TAX ABATEMENT REINVESTMENT ZONE NUMBER 40 FOR COMMERCIAL/INDUSTRIAL TAX ABATEMENT; ESTABLISHING THE BOUNDARIES THEREOF AND OTHER MATTERS RELATING THERETO; DECLARING FINDINGS OF FACT; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, the City Council of the City of Temple, Texas ("City"), desires to promote the development or redevelopment of a certain geographic area within its jurisdiction by creation of a reinvestment zone for commercial/industrial tax abatement, as authorized by Chapter 312 of the Texas Tax Code;

Whereas, the City held a public hearing as required, after publishing notice of such public hearing, and giving written notice to all taxing units overlapping the territory inside the proposed reinvestment zone;

Whereas, the City at such hearing invited any interested person, or his attorney, to appear and contend for or against the creation of the reinvestment zone, the boundaries of the proposed reinvestment zone, whether all or part of the territory described in the Ordinance calling such public hearing should be included in such proposed reinvestment zone, and the concept of tax abatement;

Whereas, the proponents of the reinvestment zone offered evidence, both oral and documentary, in favor of all of the foregoing matters relating to the creation of the reinvestment zone, and opponents of the reinvestment zone appeared to contest creation of the reinvestment zone; and

Whereas, Staff recommends designating 102 East Central Avenue, Temple 76501, legally described as Lot 2 and part of Lot 1, Block 15 Original Town of Temple, Bell County, Texas as City of Temple Tax Abatement Reinvestment Zone Number 40 for commercial/industrial tax abatement in order to promote economic development in the City.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS:

Part 1: Findings. All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Ordinance as if copied in their entirety.

Part 2: The City, after conducting such hearings and having heard such evidence and testimony has made the following findings and determinations based on the testimony presented to it:

A. That a public hearing on the adoption of the reinvestment zone has been properly called, held and conducted and that notices of such hearings have been published as required by law and mailed to all taxing units overlapping the territory inside the proposed reinvestment zone;

B. That the boundaries of the reinvestment zone (hereinafter "REINVESTMENT ZONE NUMBER FORTY") should be addressed as 102 East Central Avenue, Temple 76501, legally described as Lot 2 and part of Lot 1, Block 15 Original Town of Temple, Bell County, Texas, as described in the drawing attached as Exhibit "A."

C. That creation of REINVESTMENT ZONE NUMBER FORTY will result in benefits to the City and to the land included in the zone after the term of any agreement executed hereunder, and the improvements sought are feasible and practical.

D. That REINVESTMENT ZONE NUMBER FORTY meets the criteria for the creation of a reinvestment zone as set forth in Section 312.202 of the Code in that it is "reasonably likely as a result of the designation to contribute to the retention or expansion of primary employment or to attract major investment in the zone that would be a benefit to the property and that would contribute to the economic development of the City."

E. That REINVESTMENT ZONE NUMBER FORTY meets the criteria for the creation of a reinvestment zone as set forth in the City of Temple Guidelines and Criteria for granting tax abatement in reinvestment zones.

Part 3: Pursuant to Section 312.201 of the Code, the City hereby creates a reinvestment zone for commercial/industrial tax abatement at 102 East Central Avenue, Temple 76501, legally described as Lot 2 and part of Lot 1, Block 15 Original Town of Temple, Bell County, Texas, described by the drawing in Exhibit "A," attached hereto and such REINVESTMENT ZONE is hereby designated and shall hereafter be officially designated as TAX ABATEMENT REINVESTMENT ZONE NUMBER FORTY, City of Temple, Texas.

Part 4: The REINVESTMENT ZONE shall take effect on **November 7, 2019.**

Part 5: To be considered for execution of an agreement for tax abatement the commercial/industrial project shall:

A. Be located wholly within the Zone as established herein;

B. Not include property that is owned or leased by a member of the City Council of the City of Temple, Texas, or by a member of the Planning and Zoning Commission;

C. Conform to the requirements of the City's Zoning Ordinance, the criteria governing tax abatement previously adopted by the City, and all other applicable laws and regulations; and

D. Have and maintain all land located within the designated zone, appraised at market value for tax purposes.

Part 6: Written agreements with property owners located within the zone shall provide identical terms regarding duration of exemption and share of taxable real property value exempted from taxation.

Part 7: Written agreements for tax abatement as provided for by Section 312.205 of the Code shall include provisions for:

A. Listing the kind, number and location of all proposed improvements of the property;

B. Access to and inspection of property by municipal employees to ensure that the improvements or repairs are made according to the specification and conditions of the agreements;

C. Limiting the use of the property consistent with the general purpose of encouraging development or redevelopment of the zone during the period that property tax exemptions are in effect; and

D. Recapturing property tax revenue lost as a result of the agreement if the owner of the property fails to make the improvements as provided by the agreement.

Part 8: Severance clause. If any provision of this Ordinance or the application of any provision to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the Ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this Ordinance are declared to be severable.

Part 9: Effective date. This Ordinance shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Temple, Texas, and it is accordingly so ordained.

Part 10: Sunset provision. The designation of TAX ABATEMENT REINVESTMENT ZONE NUMBER FORTY shall expire five years from the effective date of this Ordinance. The designation of a tax abatement reinvestment zone may be renewed for periods not exceeding five years. The expiration of a reinvestment zone designation does not affect an existing tax abatement agreement authorized by the City Council.

Part 11: Open Meeting Act. It is hereby officially found and determined that the meeting at which this Ordinance was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meeting Act.

PASSED AND APPROVED on First Reading and Public Hearing on the **17th** day of **October**, 2019.

PASSED AND APPROVED on Second and Final Reading on the **7th** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

_____
TIMOTHY A. DAVIS, Mayor

ATTEST:

_____
Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

_____
Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Belinda Mattke, Director of Purchasing & Facility Services

ITEM DESCRIPTION: Consider adopting a resolution authorizing continued utilization of the JP Morgan Chase Bank N.A. commercial card program through August 31, 2021, as procured by the City of Fort Worth.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: The City has utilized the JP Morgan Chase commercial card program, commonly referred to within the City of Temple as a Purchasing Card or P-Card Program, under a Participation Agreement with JP Morgan Chase executed in February 2011. The JP Morgan Chase contract was procured by the City of Fort Worth, and as such, the City has a cooperative purchasing agreement with the City of Fort Worth which allows the City of Temple to utilize the JP Morgan Chase contract.

The City of Fort Worth originally entered into a contract with JP Morgan Chase in 2010, and through amendments to the agreement extended the contract until August 31, 2017, with the option to renew the agreement for up to two, two-year periods. On March 27, 2017, the City of Fort Worth exercised its option to renew the JP Morgan Chase contract for an additional two-year period, which expired on August 31, 2019. On April 15, 2019, the City of Fort Worth exercised its option to renew the JP Morgan Chase contract for the second additional two-year period, which has extended the JP Morgan Chase contract until August 31, 2021. This is the second and final renewal under this contract.

All City of Temple departments utilize the use of P-Cards to supplement and enhance the procurement of maintenance, repairs, travel, and miscellaneous operational expenses. The City currently has 336 P-Cards. For FY 2019, $4,253,409 of City purchases were procured using P-Cards.

Under the program, the City earns an annual rebate. The average annual rebate received for the last five years is $63,725 per year with the annual rebate received in November 2018 being $67,996.

The City has been pleased with the operation of the JP Morgan Chase commercial card program and the service received from JP Morgan Chase. In addition, an interface is already in place that allows for efficient weekly processing of P-Card transactions through the JP Morgan Chase system into the City's Naviline business operating system. Accordingly, it is staff's recommendation to continue utilizing of the JP Morgan Chase contract procured by the City of Fort Worth.

FISCAL IMPACT: There is no fiscal impact with respect to City expenditures. Annual rebates are paid to the City. The rebate is a variable percentage based on total annual dollars spent through the program. The P-Card rebate received for FY2019 was $67,996.

ATTACHMENTS:
Resolution

RESOLUTION NO. 2019-9887-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING CONTINUED UTILIZATION OF THE JP MORGAN CHASE BANK N.A. COMMERCIAL CARD PROGRAM THROUGH AUGUST 31, 2021, AS PROCURED BY THE CITY OF FORT WORTH; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, the City has utilized the JP Morgan Chase Bank N.A. (JP Morgan Chase) commercial card program, commonly referred to within the City of Temple as a "Purchasing Card" or "P-Card" program, under a Participation Agreement with JP Morgan Chase executed in February 2011;

Whereas, the JP Morgan Chase contract was procured by the City of Fort Worth, and as such, the City has a cooperative purchasing agreement with the City of Fort Worth which allows the City of Temple to utilize the JP Morgan Chase contract;

Whereas, the City of Fort Worth originally entered into a contract with JP Morgan Chase in 2010, and through amendments to the agreement, extended the contract until August 31, 2017, with the option to renew the agreement for up to two, two-year periods;

Whereas, on March 27, 2017, the City of Fort Worth exercised its option to renew the JP Morgan Chase contract for an additional two-year period, which expired August 31, 2019;

Whereas, on April 15, 2019, the City of Fort Worth exercised its option to renew the JP Morgan Chase contract for the second additional two-year period, which has extended the JP Morgan Chase contract until August 31, 2021 - this is the second and final renewal under this contract;

Whereas, all City of Temple departments utilize P-Cards to supplement and enhance the procurement of maintenance, repairs, travel, and miscellaneous operational expenses – the City currently has 336 P-Cards and during fiscal year 2019, $4,253,409 of City purchases were procured using P-Cards;

Whereas, under the program, the City earns an annual rebate - the annual rebate received in November 2018 was $67,996;

Whereas, the City has been pleased with the operation of the JP Morgan Chase commercial card program and the service received from JP Morgan Chase;

Whereas, besides the operation and services provided by JP Morgan Chase, an interface is already in place within the City of Temple that allows for efficient weekly processing of P-Card transactions through the JP Morgan Chase system into the City's Naviline business operating system;

Whereas, Staff recommends Council authorize the continued utilization of the JP Morgan Chase Bank N.A. commercial card program contract procured by the City of Fort Worth;

Whereas, there is no annual fee or transaction fee for P-Cards and annual rebates, which are a variable percentage based on total annual dollars spent, are paid directly to the City; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: Findings. All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the continued utilization of the JP Morgan Chase Bank N.A. commercial card program through August 31, 2021, as procured by the City of Fort Worth.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act

PASSED AND APPROVED this the **7th** day of **November,** 2019.

THE CITY OF TEMPLE, TEXAS

_____
TIMOTHY A. DAVIS, Mayor

ATTEST:

_____
Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

_____
Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Tara Raymore, Director of Human Resources

ITEM DESCRIPTION: Consider adopting a resolution establishing rates for Medicare supplement insurance for over age 65 City of Temple retirees and authorizing the City's contribution for calendar year 2020.

STAFF RECOMMENDATION: Adopt the resolution as presented in the item description.

ITEM SUMMARY: Previously the Trustees of the City of Temple Employee Benefits Trust authorized an agreement with Scott and White Health Plan (SWHP) for the provision of Medicare supplement insurance for over age 65 City of Temple retirees. City policy requires that when retirees turn 65, if they are eligible, they must enroll in a Medicare supplement plans offered through the City in order to receive the City's contribution. These rates are not available until the Fall of each year, at this time the Trust is being asked to authorize a one-year renewal to the agreement with SWHP and to adopt Medicare supplement rates for retirees for 2020. The rates for Medicare supplement insurance run from January 1st through December 31st of each year.

The Personnel Policies and Procedures Manual states that the City will pay an amount established during the budget process for Medicare supplement insurance for Medicare eligible retirees who have at least 25 years of continuous service with the City of Temple. On November 3, 2016, the City received proposals for Group Medicare Supplement and Prescription Drug Benefits. The Request for Proposals (RFP) indicated that the contract would be for a one-year term with the option for four one-year renewals. SWHP was the only respondent to the RFP in 2016.

For 2020, SWHP is offering five SeniorCare Advantage Health Maintenance Organization (HMO) plans and two SeniorCare Advantage Preferred Provider Organization (PPO) plans, which include prescription drug benefits. SWHP will also offer a dental plan through the MetLife PDP Plus Network.

Staff is recommending that the City continue to fund monthly the Medicare supplement insurance for each eligible retiree at the lesser of the following: 50% of the Medicare supplement insurance plan cost with a maximum contribution of $102. The dental plan cost will be paid by the retiree only.

The new monthly premium recommendations for 2020 are as follows:

Plan	Description	Monthly Premium	City's Contribution	Retiree's Contribution
A	SeniorCare HMO Select – With RX	$0.00	$0.00	$0.00
B	SeniorCare HMO Preferred – No Rx	$90.00	$45.00	$45.00
C	SeniorCare HMO Preferred – With Rx	$131.00	$ 65.50	$65.50
D	SeniorCare HMO Premium – No RX	$199.00	$99.50	$99.50
E	SeniorCare HMO Premium – With RX	$241.00	$102.00	$139.00
F	SeniorCare PPO Basic – With Rx	$36.00	$18.00	$18.00
G	SeniorCare PPO Platinum – With Rx	$136.00	$68.00	$68.00
H	SeniorCare HMO Dental	$0.00	$0.00	$0.00
I	SeniorCare PPO Dental – Basic (with Plan F above)	$20.00	$0.00	$20.00
J	SeniorCare PPO Dental – Platinum (with Plan G above)	$0.00	$0.00	$0.00

FISCAL IMPACT: Budgeted amount: $166,471 in account 110-2700-515-1231*
Estimated amount for FY 2020: $90,576**

* Budgeted amount includes funding for all retirees' insurance. This includes retiree medical insurance for those under 65.

** Maximum contribution during FY 2020 for the new plan costs calculated as $102 x 74 Medicare eligible retirees (as of 10/01/19) x 9 months (Jan - Sept) = $67,932; the number of retirees could change over the course of the year. The cost incurred for the Medicare Supplemental insurance from October through December is estimated to be $22,644.

ATTACHMENTS:
Resolution

RESOLUTION NO. 2019-9888-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, ESTABLISHING RATES FOR MEDICARE SUPPLEMENT INSURANCE FOR OVER AGE 65 CITY OF TEMPLE RETIREES AND AUTHORIZING THE CITY'S CONTRIBUTION FOR CALENDAR YEAR 2020; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, previously the Trustees of the City of Temple Employee Benefits Trust authorized an agreement with Scott and White Health Plan (SWHP) for the provision of Medicare supplement insurance for over age 65 City of Temple retirees;

Whereas, City policy requires that when retirees turn 65, if they are eligible, they must enroll in the substitute Medicare supplement plan offered through the City in order to receive the City's contribution - these rates are not available until the late Fall of each year;

Whereas, the Personnel Policies and Procedures Manual states that the City will pay an amount established during the budget process for substitute Medicare supplement insurance for Medicare eligible retirees who have at least twenty-five years of continuous service with the City of Temple;

Whereas, on November 3, 2016, the City received proposals for Group Medicare Supplement and Prescription Drug Benefits and the Request for Proposals (RFP) indicated the contract would be for a one-year term with the option for four 1-year renewals - SWHP was the only respondent to the RFP;

Whereas, for 2020, SWHP is offering three SeniorCare Advantage Health Maintenance Organization (HMO) plans and two SeniorCare Advantage Preferred Provider Organization (PPO) plans, which include prescription drug benefits - SWHP is also offering a dental plan through the MetLife PDP Plus Network;

Whereas, in 2011, the City Policy regarding contributions was amended to state that the City will pay a certain amount toward retiree insurance which will be determined each fiscal year - the fiscal year 2020 budget includes funding in the amount of $102 per month, per retiree for the cost of Medicare supplement insurance;

Whereas, Staff recommends Council authorize a per month, per retiree contribution to fund the Medicare supplement insurance at the lesser of the following: 1) 50% of the Medicare supplement insurance plan cost, or 2) $102;

Whereas, the fiscal year 2020 budget included funding in the amount of $102 per eligible employee to contribute towards the cost of substitute Medicare Supplemental insurance and those funds are available in Account No. 110-2700-515-1231; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNTY OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council establishes rates for substitute Medicare supplement insurance for over age 65 City of Temple retirees as set forth in Exhibit 'A' attached hereto and incorporated herein for all purposes and authorizes the City's contribution for calendar year 2020.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November,** 2019.

THE CITY OF TEMPLE, TEXAS

_____
TIMOTHY A. DAVIS, Trustee

ATTEST:

_____
Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

_____
Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Traci Barnard, Director of Finance

ITEM DESCRIPTION: Consider adopting a resolution authorizing budget amendments for fiscal year 2019-2020.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: This item is to recommend various budget amendments, based on the adopted FY 2019-2020 budget. The amendments will involve transfers of funds between contingency accounts, department and fund levels.

FISCAL IMPACT: The total amount of budget amendments is $1,163,177.

ATTACHMENTS:
Budget Amendments
Resolution

CITY OF TEMPLE

BUDGET AMENDMENTS FOR FY 2020 BUDGET

November 7, 2019

ACCOUNT #	PROJECT #	DESCRIPTION	APPROPRIATIONS Debit	APPROPRIATIONS Credit
260-2000-521-2110		Supplies / Office Supplies	$ 1,000	
260-2000-521-2221		Capital < $5,000 / Computer Equipment	$ 850	
260-2000-521-2514		Other Services / Travel & Training	$ 8,000	
260-2000-521-2616		Contracted Services / Professional	$ 49,919	
260-0000-431-0261		State Grants / State Grants		$ 59,769
		To appropriate funding awarded for the Victims of Crime Assistance Grant (VOCA) through the Criminal Justice Division (CJD) of the Governor's office in the amount of $59,769. The City will use the funds to continue expanding the crisis assistance program of the Temple Police Department.		
430-5700-580-7550		Payment to Defeasance Escrow Agent	$ 1,085,297	
430-5700-580-7312		Amortization & Bond Issue / Bond Issuance Cost	$ 13,506	
430-0000-354-0512		Reserved for Debt Service		$ 1,098,803
		To appropriate the 2019 Defeasance transaction closed on 10/17/19. This budget adjustment accounts for the amount paid to the defeasance escrow agent and the costs associated with the closing.		
110-1900-519-2223		Capital < $5,000 / Computer Software	$ 4,605	
110-1100-513-2223		Capital < $5,000 / Computer Software		$ 614
110-1200-515-2223		Capital < $5,000 / Computer Software		$ 614
110-3800-519-2223		Capital < $5,000 / Computer Software		$ 307
110-2700-515-2223		Capital < $5,000 / Computer Software		$ 307
110-6700-519-2223		Capital < $5,000 / Computer Software		$ 921
110-6600-519-2223		Capital < $5,000 / Computer Software		$ 614
110-3210-551-2514		Other Services / Travel & Training		$ 307
110-2310-540-2128		Supplies / Postage		$ 307
110-3400-531-2224		Capital < $5,000 / Communication Equipment		$ 307
110-2800-532-2514		Other Services / Travel & Training		$ 307
		To reallocate budgeted funding for Microsoft Licenses to be added to approved personnel included in the FY 20 Adopted Budget into Information Technology Services' budget.		
		TOTAL AMENDMENTS	**$ 1,163,177**	**$ 1,163,177**

GENERAL FUND	
Beginning **Contingency** Balance	$ -
Added to Contingency Sweep Account	-
Carry forward from Prior Year	-
Taken From Contingency	-
Net Balance of Contingency Account	$ -
Beginning **Judgments & Damages** Contingency	$ -
Added to Contingency Judgments & Damages from Council Contingency	-
Taken From Judgments & Damages	-
Net Balance of Judgments & Damages Contingency Account	$ -
Beginning **Compensation** Contingency	$ 506,197
Added to Compensation Contingency	-
Taken From Compensation Contingency	-
Net Balance of Compensation Contingency Account	$ 506,197
Net Balance Council Contingency	**$ 506,197**
Beginning Balance **Budget Sweep** Contingency	$ -
Added to Budget Sweep Contingency	-
Taken From Budget Sweep	-
Net Balance of Budget Sweep Contingency Account	$ -

CITY OF TEMPLE

BUDGET AMENDMENTS FOR FY 2020 BUDGET

November 7, 2019

ACCOUNT #	PROJECT #	DESCRIPTION	APPROPRIATIONS Debit	Credit
		WATER & WASTEWATER FUND		
		Beginning **Contingency** Balance		$ 100,000
		Added to Contingency Sweep Account		-
		Taken From Contingency		-
		Net Balance of Contingency Account		$ 100,000
		Beginning **Compensation** Contingency		$ 93,500
		Added to Compensation Contingency		-
		Taken From Compensation Contingency		-
		Net Balance of Compensation Contingency Account		$ 93,500
		Net Balance Water & Wastewater Fund Contingency		**$ 193,500**
		HOTEL/MOTEL TAX FUND		
		Beginning **Contingency** Balance		$ -
		Added to Contingency Sweep Account		-
		Carry forward from Prior Year		-
		Taken From Contingency		-
		Net Balance of Contingency Account		$ -
		Beginning **Compensation** Contingency		$ 19,500
		Added to Compensation Contingency		-
		Taken From Compensation Contingency		-
		Net Balance of Compensation Contingency Account		$ 19,500
		Net Balance Hotel/Motel Tax Fund Contingency		**$ 19,500**
		DRAINAGE FUND		
		Beginning **Contingency** Balance		$ 488,446
		Added to Contingency Sweep Account		-
		Carry forward from Prior Year		-
		Taken From Contingency		-
		Net Balance of Contingency Account		$ 488,446
		Beginning **Compensation** Contingency		$ 10,500
		Added to Compensation Contingency		-
		Taken From Compensation Contingency		-
		Net Balance of Compensation Contingency Account		$ 10,500
		Net Balance Drainage Fund Contingency		**$ 498,946**
		FED/STATE GRANT FUND		
		Beginning **Contingency** Balance		$ -
		Carry forward from Prior Year		-
		Added to Contingency Sweep Account		-
		Taken From Contingency		-
		Net Balance Fed/State Grant Fund Contingency		**$ -**

RESOLUTION NO. 2019-9889-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, APPROVING BUDGET AMENDMENTS TO THE 2019-2020 CITY BUDGET; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, on the 19th day of September, 2019, the City Council approved a budget for the 2019-2020 fiscal year; and

Whereas, the City Council deems it in the public interest to make certain amendments to the 2019-2020 City Budget.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: Findings. All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council hereby amends the 2019-2020 City Budget by adopting the budget amendments which are more fully described in Exhibit 'A,' attached hereto and made a part hereof for all purposes.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November,** 2019.

THE CITY OF TEMPLE, TEXAS

_____
TIMOTHY A. DAVIS, Mayor

ATTEST:

_____
Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

_____
Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Traci L. Barnard, Director of Finance

ITEM DESCRIPTION: FIRST READING – PUBLIC HEARING: Consider adopting an ordinance authorizing an amendment and adopting the Tax Increment Financing Reinvestment Zone No. 1 Financing and Project Plans adjusting expenditures for years FY 2019-2023.

STAFF RECOMMENDATION: Conduct a public hearing and adopt ordinance as presented in item description on first reading with second reading and final adoption for November 21, 2019.

ITEM SUMMARY: On October 9, 2019, the Reinvestment Zone No. 1 Project Committee met to review the projects in the Financing and Project Plans. The Corporate Hangar Phase IV infrastructure project was funded in FY 2023. A current corporate tenant at the Airport has requested to build a new corporate hangar. The area at the Airport designated for future corporate hangar development requires additional infrastructure improvements. These improvements include apron/taxiway, roadway, drainage and utilities. These improvements will allow for construction of additional corporate hangars in this area.

The Project Committee was able to reprioritize projects in the plan to move the funding for the Corporate Hangar Phase IV infrastructure project to FY 2020. The effect of the reprioritization was moving construction of the MKL Festival Fields Electric Construction and the Downtown Lighting Construction to FY 2021. These projects will be designed in FY 2020 and will be ready for construction in October 2020. The Draughon-Miller Regional Airport FBO Center and Parking Project originally funded in FY 2021 is being moved to FY 2022.

The Reinvestment Zone No. Board recommended approval of this amendment at their October 23, 2019 Board meeting.

FISCAL IMPACT: The proposed amendment allocates funding within the Financing and Project Plans as shown below:

Line #		FY 2020	FY 2021	FY 2022	FY 2023	Totals
	Temple Industrial Park					
105	Rail Park Receiving and Delivery Tract ROW	$ 265,000	$ (265,000)	$ -	$ -	$ -
	Bioscience Park/Crossroads Park					
207	Crossroads Park Soccer Lights	75,000	-	-	-	75,000
207	Crossroads Park Restrooms	(75,000)	-	-	-	(75,000)
	Downtown					
403	MLK Festival Fields Electric Construction	650,000	(650,000)	-	-	-
404	Downtown Lighting Construction	450,000	(450,000)	-	-	-
	Airport Park					
507	Draughon-Miller Regional Airport FBO Center & Parking	-	4,740,000	(4,740,000)	-	-
510	Corporate Hangar Phase IV	(1,500,000)	-	-	1,500,000	-
512	Clear Area Near Fire Station	172,500	-	-	-	172,500
	Public Improvements					
702	Land	-	-	750,000	(750,000)	-
	Net increase (decrease) in fund balance	**$ 37,500**	**$ 3,375,000**	**$(3,990,000)**	**$ 750,000**	**$ 172,500**

ATTACHMENTS:

Financing Plan
Summary Financing Plan with Detailed Project Plan
Summary - TRZ Master Plan Project Funding (2018 - 2025)
TRZ Master Plan Project Funding (2018 - 2025)
Ordinance

City of Temple, Texas

TIF Reinvestment Zone #1 Financing Plan

Financing Plan - 10/23/19 to Zone Board

FINANCING PLAN

	DESCRIPTION	Revised Y/E 9/30/19 Year 37	Y/E 9/30/20 Year 38	Y/E 9/30/21 Year 39	Y/E 9/30/22 Year 40	2023 41	2024 42	2025 43	2026 44	2027 45	2028 46	2029 47	2030 48
1	**"Taxable Increment"**	*$ 440,490,768*	*$ 489,919,085*	*$ 498,516,208*	*$ 568,662,049*	*$ 624,568,564*	*$ 694,628,664*	*$ 779,395,271*	*$ 909,059,564*	*$ 976,914,779*	*$ 995,713,886*	*$ 1,009,520,136*	*$ 1,025,968,886*
1	**FUND BALANCE, Begin**	$ 42,051,937	$ 8,510,146	$ 1,718,773	$ 5,145,370	$ 2,122,145	$ 4,628,269	$ 10,970,358	$ 2,666,908	$ 2,741,840	$ 2,519,975	$ 2,461,228	$ 2,497,060
2A	Adjustments to Debt Service Reserve - Tax Increment Revenue Bonds, Series 2018	-	-	-	-	-	-	-	-	-	-	-	-
2B	Adjustments to Debt Service Reserve - Tax Increment Taxable Revenue Bonds, Series 2019	-	-	-	-	-	-	-	-	-	-	-	-
3	**Fund Balance Available for Appropriation**	**$ 42,051,937**	**$ 8,510,146**	**$ 1,718,773**	**$ 5,145,370**	**$ 2,122,145**	**$ 4,628,269**	**$ 10,970,358**	**$ 2,666,908**	**$ 2,741,840**	**$ 2,519,975**	**$ 2,461,228**	**$ 2,497,060**
	SOURCES OF FUNDS:												
4	Tax Revenues	18,049,958	18,361,300	18,933,922	20,576,548	21,730,998	22,907,011	24,284,761	25,938,736	26,739,308	26,972,655	27,142,025	27,389,982
6	Allowance for Uncollected Taxes [1.5% of Tax Revenues]	(270,749)	(275,420)	(284,009)	(308,648)	(325,965)	(343,605)	(364,271)	(389,081)	(401,090)	(404,590)	(407,130)	(410,850)
8	Interest Income	240,000	240,000	30,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000
9	Interest Income-Bonds	300,000	-	-	-	-	-	-	-	-	-	-	-
10	Grant Funds	414,802	50,000	-	-	-	-	-	-	-	-	-	-
12	License Fee - Central Texas Railway	36,000	36,000	36,000	36,000	36,000	36,000	36,000	36,000	36,000	36,000	36,000	36,000
14	Other Revenues	625,000	625,000	-	-	-	-	-	-	-	-	-	-
15	Sale of land	-	-	-	-	-	-	-	-	-	-	-	-
17	Bond Proceeds	-	14,868,450	-	40,000,000	-	-	-	-	-	-	-	-
18	Bond Reoffering Premium, Underwriter's Discount & Cost of Issuance	-	-	-	-	-	-	-	-	-	-	-	-
20	**Total Sources of Funds**	**$ 19,395,011**	**$ 33,905,331**	**$ 18,715,913**	**$ 60,313,900**	**$ 21,451,033**	**$ 22,609,406**	**$ 23,966,490**	**$ 25,595,655**	**$ 26,384,218**	**$ 26,614,065**	**$ 26,780,895**	**$ 27,025,132**
25	**TOTAL AVAILABLE FOR APPROPRIATION**	**$ 61,446,948**	**$ 42,415,476**	**$ 20,434,686**	**$ 65,459,270**	**$ 23,573,178**	**$ 27,237,675**	**$ 34,936,847**	**$ 28,262,563**	**$ 29,126,058**	**$ 29,134,040**	**$ 29,242,123**	**$ 29,522,192**
	USE OF FUNDS:												
	DEBT SERVICE												
27	2009 Bond Refunding	1,485,000	-	-	-	-	-	-	-	-	-	-	-
28	2008 Bond Issue-Taxable {$10.365 mil}	1,241,173	1,237,744	1,241,670	1,242,422	-	-	-	-	-	-	-	-
29	Debt Service - 2011A Issue {Refunding}	915,950	2,497,800	2,497,550	2,494,950	-	-	-	-	-	-	-	-
30	Debt Service - 2012 Issue {Refunding}	77,650	80,050	77,250	78,750	-	-	-	-	-	-	-	-
31	Debt Service - 2013 Issue {$25.260 mil}	2,048,344	2,047,944	2,046,494	2,031,494	2,030,094	2,026,694	2,038,413	2,051,613	2,059,113	2,061,713	2,061,713	2,069,113
32	Debt Service - 2018 Issue {$24 mil}	1,439,967	1,336,000	1,287,000	1,305,000	2,086,750	2,089,000	2,088,750	2,086,000	2,090,750	2,087,500	2,086,500	2,087,500
33	Debt Service - 2019 Issue {$14.868 mil}	-	-	1,323,900	882,600	1,357,600	1,359,100	1,358,800	1,356,700	1,357,800	1,356,800	1,358,700	1,358,200
34	Debt Service - 2022 Issue {$40 mil}	-	-	-	-	3,437,188	3,911,250	4,022,000	4,023,500	4,025,750	4,023,500	4,021,750	4,025,250
35	Paying Agent Services	3,200	3,200	3,200	3,200	2,000	2,000	2,000	2,000	2,000	2,000	2,000	2,000
40	**Subtotal-Debt Service**	**7,211,284**	**7,202,738**	**8,477,064**	**8,038,416**	**8,913,632**	**9,388,044**	**9,509,963**	**9,519,813**	**9,535,413**	**9,531,513**	**9,530,663**	**9,542,063**
	OPERATING EXPENDITURES												
50	Prof Svcs/Proj Mgmt	179,265	146,400	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000
52	Legal/Audit	1,300	1,300	1,300	1,400	1,400	1,400	1,400	1,400	1,400	1,400	1,400	1,400
54	Zone Park Maintenance [mowing, utilities, botanical supplies]	720,000	528,600	560,600	660,600	677,600	704,600	704,600	704,600	704,600	704,600	704,600	704,600
56	Rail Maintenance	185,324	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000
58	Road/Signage Maintenance	440,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000
59	Transformation Team	499,501	715,439	639,784	639,784	639,784	647,784	639,784	639,784	639,784	639,784	639,784	639,784
60	Contractual Payments [TEDC - Marketing]	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000
61	TEDC-Operating	-	1,586,113	1,641,627	1,699,084	1,758,552	1,820,101	1,883,805	1,949,738	2,017,979	2,088,608	2,161,709	2,237,369
62	Strategic Investment Zone - Grants	525,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000
63	TISD-Reimbursement [per contract]	27,563	27,563	28,941	28,941	28,941	30,388	30,388	30,388	31,907	31,907	31,907	33,502
65	**Subtotal-Operating Expenditures**	**2,777,953**	**3,505,415**	**3,547,252**	**3,704,809**	**3,781,277**	**3,879,273**	**3,934,977**	**4,000,910**	**4,070,670**	**4,141,299**	**4,214,400**	**4,291,655**
70	**TOTAL DEBT & OPERATING EXPENDITURES**	**$ 9,989,237**	**$ 10,708,153**	**$ 12,024,316**	**$ 11,743,225**	**$ 12,694,909**	**$ 13,267,317**	**$ 13,444,940**	**$ 13,520,723**	**$ 13,606,083**	**$ 13,672,812**	**$ 13,745,063**	**$ 13,833,718**
80	**Funds Available for Projects**	**$ 51,457,711**	**$ 31,707,323**	**$ 8,410,370**	**$ 53,716,045**	**$ 10,878,269**	**$ 13,970,358**	**$ 21,491,908**	**$ 14,741,840**	**$ 15,519,975**	**$ 15,461,228**	**$ 15,497,060**	**$ 15,688,474**
	PROJECTS												
150	Temple Industrial Park	1,500,000	100,000	265,000	1,500,000	1,500,000	-	3,825,000	-	-	-	-	-
200	Corporate Campus Park	432,422	-	-	-	-	-	-	-	-	-	-	-
250	Bioscience Park/Crossroads Park	1,156,208	900,000	-	-	-	-	-	-	-	-	-	-
350	Outer Loop	16,202,026	-	-	28,625,000	-	-	-	-	-	-	-	-
400	Synergy Park	-	-	-	-	-	-	-	-	-	-	-	-
450	Downtown	18,235,792	21,795,550	3,000,000	7,298,900	1,500,000	2,000,000	5,000,000	-	-	-	-	-
500	TMED	886,997	-	-	3,000,000	-	-	-	-	-	-	-	-
550	Airport Park	2,002,400	1,713,000	-	4,740,000	-	-	-	-	-	-	-	-
650	Gateway Projects	2,531,720	5,480,000	-	3,430,000	1,500,000	-	10,000,000	-	-	-	-	-
750	Public Improvements	-	-	-	3,000,000	1,750,000	1,000,000	-	12,000,000	13,000,000	13,000,000	13,000,000	13,000,000
	Subtotal-Projects	42,947,565	29,988,550	3,265,000	51,593,900	6,250,000	3,000,000	18,825,000	12,000,000	13,000,000	13,000,000	13,000,000	13,000,000
	TOTAL USE OF FUNDS	$ 52,936,802	$ 40,696,703	$ 15,289,316	$ 63,337,125	$ 18,944,909	$ 16,267,317	$ 32,269,940	$ 25,520,723	$ 26,606,083	$ 26,672,812	$ 26,745,063	$ 26,833,718
800	**FUND BALANCE, End {Available for Appropriation}**	**$ 8,510,146**	**$ 1,718,773**	**$ 5,145,370**	**$ 2,122,145**	**$ 4,628,269**	**$ 10,970,358**	**$ 2,666,908**	**$ 2,741,840**	**$ 2,519,975**	**$ 2,461,228**	**$ 2,497,060**	**$ 2,688,474**

FINANCING PLAN

	DESCRIPTION	2031 49	2032 50	2033 51	2034 52	2035 53	2036 54	2037 55	2038 56	2039 57	2040 58
1	**"Taxable Increment"**	*$ 1,060,563,761*	*$ 1,071,169,399*	*$ 1,081,881,092*	*$ 1,092,699,903*	*$ 1,103,626,902*	*$ 1,114,663,171*	*$ 1,125,809,802*	*$ 1,137,067,900*	*$ 1,148,438,579*	*$ 1,159,922,965*
1	**FUND BALANCE, Begin**	$ 2,688,474	$ 2,617,880	$ 2,712,228	$ 2,474,944	$ 2,510,798	$ 2,719,481	$ 2,607,807	$ 2,671,275	$ 3,000,339	$ 2,504,066
2A	Adjustments to Debt Service Reserve - Tax Increment Revenue Bonds, Series 2018	-	-	-	-	-	-	-	2,090,750	-	-
2B	Adjustments to Debt Service Reserve - Tax Increment Taxable Revenue Bonds, Series 2019	-	-	-	-	-	-	-	-	-	-
3	**Fund Balance Available for Appropriation**	**$ 2,688,474**	**$ 2,617,880**	**$ 2,712,228**	**$ 2,474,944**	**$ 2,510,798**	**$ 2,719,481**	**$ 2,607,807**	**$ 4,762,025**	**$ 3,000,339**	**$ 2,504,066**
	SOURCES OF FUNDS:										
4	Tax Revenues	27,921,759	28,184,743	28,450,357	28,718,627	28,989,580	29,263,242	29,539,641	29,818,804	30,100,759	30,385,533
6	Allowance for Uncollected Taxes [1.5% of Tax Revenues]	(418,826)	(422,771)	(426,755)	(430,779)	(434,844)	(438,949)	(443,095)	(447,282)	(451,511)	(455,783)
8	Interest Income	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000
9	Interest Income-Bonds	-	-	-	-	-	-	-	-	-	-
10	Grant Funds	-	-	-	-	-	-	-	-	-	-
12	License Fee - Central Texas Railway	36,000	36,000	36,000	36,000	36,000	36,000	36,000	36,000	36,000	36,000
14	Other Revenues	-	-	-	-	-	-	-	-	-	-
15	Sale of land	-	-	-	-	-	-	-	-	-	-
17	Bond Proceeds	-	-	-	-	-	-	-	-	-	-
18	Bond Reoffering Premium, Underwriter's Discount & Cost of Issuance	-	-	-	-	-	-	-	-	-	-
20	**Total Sources of Funds**	**$ 27,548,933**	**$ 27,807,972**	**$ 28,069,602**	**$ 28,333,848**	**$ 28,600,736**	**$ 28,870,293**	**$ 29,142,546**	**$ 29,417,522**	**$ 29,695,248**	**$ 29,975,750**
25	**TOTAL AVAILABLE FOR APPROPRIATION**	**$ 30,237,406**	**$ 30,425,852**	**$ 30,781,829**	**$ 30,808,792**	**$ 31,111,535**	**$ 31,589,774**	**$ 31,750,353**	**$ 34,179,547**	**$ 32,695,587**	**$ 32,479,816**
	USE OF FUNDS:										
	DEBT SERVICE										
27	2009 Bond Refunding	-	-	-	-	-	-	-	-	-	-
28	2008 Bond Issue-Taxable {$10.365 mil}	-	-	-	-	-	-	-	-	-	-
29	Debt Service - 2011A Issue {Refunding}	-	-	-	-	-	-	-	-	-	-
30	Debt Service - 2012 Issue {Refunding}	-	-	-	-	-	-	-	-	-	-
31	Debt Service - 2013 Issue {$25.260 mil}	2,073,513	2,084,913	2,092,913	-	-	-	-	-	-	-
32	Debt Service - 2018 Issue {$24 mil}	2,090,250	2,089,500	2,090,250	2,087,250	2,090,500	2,089,500	2,089,250	2,089,500	-	-
33	Debt Service - 2019 Issue {$14.868 mil}	1,360,300	1,359,700	1,361,400	1,360,100	1,360,800	1,358,200	1,357,300	1,357,800	1,359,400	1,356,800
34	Debt Service - 2022 Issue {$40 mil}	4,023,500	4,026,500	4,023,750	4,025,250	4,025,500	4,024,250	4,026,250	4,026,000	4,023,250	4,022,750
35	Paying Agent Services	2,000	2,000	2,000	2,000	2,000	2,000	2,000	2,000	-	-
40	**Subtotal-Debt Service**	**9,549,563**	**9,562,613**	**9,570,313**	**7,474,600**	**7,478,800**	**7,473,950**	**7,474,800**	**7,475,300**	**5,382,650**	**5,379,550**
	OPERATING EXPENDITURES										
50	Prof Svcs/Proj Mgmt	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000
52	Legal/Audit	1,400	1,400	1,400	1,400	1,400	1,400	1,400	1,400	1,400	1,400
54	Zone Park Maintenance [mowing, utilities, botanical supplies]	704,600	704,600	704,600	704,600	704,600	704,600	704,600	704,600	704,600	704,600
56	Rail Maintenance	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000
58	Road/Signage Maintenance	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000
59	Transformation Team	839,784	839,784	839,784	839,784	839,784	839,784	839,784	839,784	839,784	839,784
60	Contractual Payments [TEDC - Marketing]	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000
61	TEDC-Operating	2,315,677	2,396,726	2,480,611	2,567,432	2,657,293	2,750,298	2,846,558	2,946,188	3,049,304	3,156,030
62	Strategic Investment Zone - Grants	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000
63	TISD-Reimbursement [per contract]	33,502	33,502	35,177	35,177	35,177	36,936	36,936	36,936	38,783	38,783
65	**Subtotal-Operating Expenditures**	**4,569,963**	**4,651,012**	**4,736,572**	**4,823,393**	**4,913,254**	**5,008,018**	**5,104,278**	**5,203,908**	**5,308,871**	**5,415,597**
70	**TOTAL DEBT & OPERATING EXPENDITURES**	**$ 14,119,526**	**$ 14,213,625**	**$ 14,306,885**	**$ 12,297,993**	**$ 12,392,054**	**$ 12,481,968**	**$ 12,579,078**	**$ 12,679,208**	**$ 10,691,521**	**$ 10,795,147**
80	**Funds Available for Projects**	**$ 16,117,880**	**$ 16,212,228**	**$ 16,474,944**	**$ 18,510,798**	**$ 18,719,481**	**$ 19,107,807**	**$ 19,171,275**	**$ 21,500,339**	**$ 22,004,066**	**$ 21,684,669**
	PROJECTS										
150	Temple Industrial Park	-	-	-	-	-	-	-	-	-	-
200	Corporate Campus Park	-	-	-	-	-	-	-	-	-	-
250	Bioscience Park/Crossroads Park	-	-	-	-	-	-	-	-	-	-
350	Outer Loop	-	-	-	-	-	-	-	-	-	-
400	Synergy Park	-	-	-	-	-	-	-	-	-	-
450	Downtown	-	-	-	-	-	-	-	-	-	-
500	TMED	-	-	-	-	-	-	-	-	-	-
550	Airport Park	-	-	-	-	-	-	-	-	-	-
650	Gateway Projects	-	-	-	-	-	-	-	-	-	-
750	Public Improvements	13,500,000	13,500,000	14,000,000	16,000,000	16,000,000	16,500,000	16,500,000	18,500,000	19,500,000	19,000,000
	Subtotal-Projects	13,500,000	13,500,000	14,000,000	16,000,000	16,000,000	16,500,000	16,500,000	18,500,000	19,500,000	19,000,000
	TOTAL USE OF FUNDS	$ 27,619,526	$ 27,713,625	$ 28,306,885	$ 28,297,993	$ 28,392,054	$ 28,981,968	$ 29,079,078	$ 31,179,208	$ 30,191,521	$ 29,795,147
800	**FUND BALANCE, End {Available for Appropriation}**	**$ 2,617,880**	**$ 2,712,228**	**$ 2,474,944**	**$ 2,510,798**	**$ 2,719,481**	**$ 2,607,807**	**$ 2,671,275**	**$ 3,000,339**	**$ 2,504,066**	**$ 2,684,669**

City of Temple, Texas

TIF Reinvestment Zone #1 Financing Plan

Financing Plan - 10/23/19 to Zone Board

FINANCING PLAN

	DESCRIPTION	2041 59	2042 60	2043 61	2044 62	2045 63	2046 64	2047 65	2048 66	2049 67	2050 68
1	**"Taxable Increment"**	*$ 1,171,522,195*	*$ 1,183,237,417*	*$ 1,195,069,791*	*$ 1,207,020,489*	*$ 1,219,090,694*	*$ 1,231,281,601*	*$ 1,243,594,417*	*$ 1,256,030,361*	*$ 1,268,590,664*	*$ 1,281,276,571*
1	**FUND BALANCE, Begin**	$ 2,684,669	$ 2,393,667	$ 2,775,040	$ 2,581,714	$ 2,505,397	$ 2,542,161	$ 2,692,025	$ 2,452,840	$ 2,320,184	$ 2,793,767
2A	Adjustments to Debt Service Reserve - Tax Increment Revenue Bonds, Series 2018	-	-	-	-	-	-	-	-	-	-
2B	Adjustments to Debt Service Reserve - Tax Increment Taxable Revenue Bonds, Series 2019	-	-	-	-	-	-	-	-	-	-
3	**Fund Balance Available for Appropriation**	**$ 2,684,669**	**$ 2,393,667**	**$ 2,775,040**	**$ 2,581,714**	**$ 2,505,397**	**$ 2,542,161**	**$ 2,692,025**	**$ 2,452,840**	**$ 2,320,184**	**$ 2,793,767**
	SOURCES OF FUNDS:										
4	Tax Revenues	30,673,154	30,963,652	25,935,982	26,179,109	26,424,666	26,672,679	26,923,172	27,176,171	27,431,699	27,689,782
6	Allowance for Uncollected Taxes [1.5% of Tax Revenues]	(460,097)	(464,455)	(389,040)	(392,687)	(396,370)	(400,090)	(403,848)	(407,643)	(411,475)	(415,347)
8	Interest Income	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000
9	Interest Income-Bonds	-	-	-	-	-	-	-	-	-	-
10	Grant Funds	-	-	-	-	-	-	-	-	-	-
12	License Fee - Central Texas Railway	36,000	36,000	36,000	36,000	36,000	36,000	36,000	36,000	36,000	36,000
14	Other Revenues	-	-	-	-	-	-	-	-	-	-
15	Sale of land	-	-	-	-	-	-	-	-	-	-
17	Bond Proceeds	-	-	-	-	-	-	-	-	-	-
18	Bond Reoffering Premium, Underwriter's Discount & Cost of Issuance	-	-	-	-	-	-	-	-	-	-
20	**Total Sources of Funds**	**$ 30,259,057**	**$ 30,545,197**	**$ 25,592,942**	**$ 25,832,422**	**$ 26,074,296**	**$ 26,318,589**	**$ 26,565,324**	**$ 26,814,528**	**$ 27,066,224**	**$ 27,320,435**
25	**TOTAL AVAILABLE FOR APPROPRIATION**	**$ 32,943,725**	**$ 32,938,864**	**$ 28,367,982**	**$ 28,414,136**	**$ 28,579,693**	**$ 28,860,750**	**$ 29,257,350**	**$ 29,267,369**	**$ 29,386,408**	**$ 30,114,202**
	USE OF FUNDS:										
	DEBT SERVICE										
27	2009 Bond Refunding	-	-	-	-	-	-	-	-	-	-
28	2008 Bond Issue-Taxable {$10.365 mil}	-	-	-	-	-	-	-	-	-	-
29	Debt Service - 2011A Issue {Refunding}	-	-	-	-	-	-	-	-	-	-
30	Debt Service - 2012 Issue {Refunding}	-	-	-	-	-	-	-	-	-	-
31	Debt Service - 2013 Issue {$25.260 mil}	-	-	-	-	-	-	-	-	-	-
32	Debt Service - 2018 Issue {$24 mil}	-	-	-	-	-	-	-	-	-	-
33	Debt Service - 2019 Issue {$14.868 mil}	-	-	-	-	-	-	-	-	-	-
34	Debt Service - 2022 Issue {$40 mil}	4,024,000	4,021,500	-	-	-	-	-	-	-	-
35	Paying Agent Services	-	-	-	-	-	-	-	-	-	-
40	**Subtotal-Debt Service**	**4,024,000**	**4,021,500**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**
	OPERATING EXPENDITURES										
50	Prof Svcs/Proj Mgmt	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000
52	Legal/Audit	1,400	1,400	1,400	1,400	1,400	1,400	1,400	1,400	1,400	1,400
54	Zone Park Maintenance [mowing, utilities, botanical supplies]	704,600	704,600	705,000	705,000	705,000	705,000	705,000	705,000	705,000	705,000
56	Rail Maintenance	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000
58	Road/Signage Maintenance	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000
59	Transformation Team	839,784	839,784	840,000	840,000	840,000	840,000	840,000	840,000	840,000	840,000
60	Contractual Payments [TEDC - Marketing]	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000
61	TEDC-Operating	3,266,491	3,380,818	3,499,147	3,621,617	3,748,374	3,879,567	4,015,352	4,155,889	4,301,345	4,451,892
62	Strategic Investment Zone - Grants	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000
63	TISD-Reimbursement [per contract]	38,783	40,722	40,722	40,722	42,758	42,758	42,758	44,896	44,896	44,896
65	**Subtotal-Operating Expenditures**	**5,526,058**	**5,642,324**	**5,786,269**	**5,908,739**	**6,037,532**	**6,168,725**	**6,304,510**	**6,447,185**	**6,592,641**	**6,743,188**
70	**TOTAL DEBT & OPERATING EXPENDITURES**	**$ 9,550,058**	**$ 9,663,824**	**$ 5,786,269**	**$ 5,908,739**	**$ 6,037,532**	**$ 6,168,725**	**$ 6,304,510**	**$ 6,447,185**	**$ 6,592,641**	**$ 6,743,188**
80	**Funds Available for Projects**	**$ 23,393,667**	**$ 23,275,040**	**$ 22,581,714**	**$ 22,505,397**	**$ 22,542,161**	**$ 22,692,025**	**$ 22,952,840**	**$ 22,820,184**	**$ 22,793,767**	**$ 23,371,014**
	PROJECTS										
150	Temple Industrial Park	-	-	-	-	-	-	-	-	-	-
200	Corporate Campus Park	-	-	-	-	-	-	-	-	-	-
250	Bioscience Park/Crossroads Park	-	-	-	-	-	-	-	-	-	-
350	Outer Loop	-	-	-	-	-	-	-	-	-	-
400	Synergy Park	-	-	-	-	-	-	-	-	-	-
450	Downtown	-	-	-	-	-	-	-	-	-	-
500	TMED	-	-	-	-	-	-	-	-	-	-
550	Airport Park	-	-	-	-	-	-	-	-	-	-
650	Gateway Projects	-	-	-	-	-	-	-	-	-	-
750	Public Improvements	21,000,000	20,500,000	20,000,000	20,000,000	20,000,000	20,000,000	20,500,000	20,500,000	20,000,000	21,000,000
	Subtotal-Projects	21,000,000	20,500,000	20,000,000	20,000,000	20,000,000	20,000,000	20,500,000	20,500,000	20,000,000	21,000,000
	TOTAL USE OF FUNDS	$ 30,550,058	$ 30,163,824	$ 25,786,269	$ 25,908,739	$ 26,037,532	$ 26,168,725	$ 26,804,510	$ 26,947,185	$ 26,592,641	$ 27,743,188
800	**FUND BALANCE, End {Available for Appropriation}**	**$ 2,393,667**	**$ 2,775,040**	**$ 2,581,714**	**$ 2,505,397**	**$ 2,542,161**	**$ 2,692,025**	**$ 2,452,840**	**$ 2,320,184**	**$ 2,793,767**	**$ 2,371,014**

City of Temple, Texas

TIF Reinvestment Zone #1 Financing Plan

Financing Plan - 10/23/19 to Zone Board

FINANCING PLAN

	DESCRIPTION	2051 69	2052 70	2053 71	2054 72	2055 73	2056 74	2057 75	2058 76	2059 77	2060 78	2061 79	2062 80
1	**"Taxable Increment"**	*$ 1,294,089,337*	*$ 1,307,030,230*	*$ 1,320,100,532*	*$ 1,333,301,538*	*$ 1,346,634,553*	*$ 1,360,100,899*	*$ 1,373,701,908*	*$ 1,387,438,927*	*$ 1,401,313,316*	*$ 1,415,326,449*	*$ 1,429,479,714*	*$ 1,443,774,511*
1	**FUND BALANCE, Begin**	$ 2,371,014	$ 3,046,955	$ 2,820,947	$ 2,689,941	$ 2,648,356	$ 2,695,147	$ 2,326,729	$ 2,536,848	$ 2,324,001	$ 2,684,002	$ 2,609,850	$ 2,599,521
2A	Adjustments to Debt Service Reserve - Tax Increment Revenue Bonds, Series 2018	-	-	-	-	-	-	-	-	-	-	-	-
2B	Adjustments to Debt Service Reserve - Tax Increment Taxable Revenue Bonds, Series 2019	-	-	-	-	-	-	-	-	-	-	-	-
3	**Fund Balance Available for Appropriation**	**$ 2,371,014**	**$ 3,046,955**	**$ 2,820,947**	**$ 2,689,941**	**$ 2,648,356**	**$ 2,695,147**	**$ 2,326,729**	**$ 2,536,848**	**$ 2,324,001**	**$ 2,684,002**	**$ 2,609,850**	**$ 2,599,521**
	SOURCES OF FUNDS:												
4	Tax Revenues	27,950,447	28,213,717	28,479,621	28,748,184	29,019,432	29,293,393	29,570,093	29,849,561	30,131,823	30,416,907	30,704,843	30,995,658
6	Allowance for Uncollected Taxes [1.5% of Tax Revenues]	(419,257)	(423,206)	(427,194)	(431,223)	(435,291)	(439,401)	(443,551)	(447,743)	(451,977)	(456,254)	(460,573)	(464,935)
8	Interest Income	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000	10,000
9	Interest Income-Bonds	-	-	-	-	-	-	-	-	-	-	-	-
10	Grant Funds	-	-	-	-	-	-	-	-	-	-	-	-
12	License Fee - Central Texas Railway	36,000	36,000	36,000	36,000	36,000	36,000	36,000	36,000	36,000	36,000	36,000	36,000
14	Other Revenues	-	-	-	-	-	-	-	-	-	-	-	-
15	Sale of land	-	-	-	-	-	-	-	-	-	-	-	-
17	Bond Proceeds	-	-	-	-	-	-	-	-	-	-	-	-
18	Bond Reoffering Premium, Underwriter's Discount & Cost of Issuance	-	-	-	-	-	-	-	-	-	-	-	-
20	**Total Sources of Funds**	**$ 27,577,190**	**$ 27,836,511**	**$ 28,098,427**	**$ 28,362,961**	**$ 28,630,141**	**$ 28,899,992**	**$ 29,172,542**	**$ 29,447,818**	**$ 29,725,846**	**$ 30,006,653**	**$ 30,290,270**	**$ 30,576,723**
25	**TOTAL AVAILABLE FOR APPROPRIATION**	**$ 29,948,204**	**$ 30,883,466**	**$ 30,919,374**	**$ 31,052,902**	**$ 31,278,496**	**$ 31,595,139**	**$ 31,499,271**	**$ 31,984,666**	**$ 32,049,847**	**$ 32,690,655**	**$ 32,900,121**	**$ 33,176,244**
	USE OF FUNDS:												
	DEBT SERVICE												
27	2009 Bond Refunding	-	-	-	-	-	-	-	-	-	-	-	-
28	2008 Bond Issue-Taxable {$10.365 mil}	-	-	-	-	-	-	-	-	-	-	-	-
29	Debt Service - 2011A Issue {Refunding}	-	-	-	-	-	-	-	-	-	-	-	-
30	Debt Service - 2012 Issue {Refunding}	-	-	-	-	-	-	-	-	-	-	-	-
31	Debt Service - 2013 Issue {$25.260 mil}	-	-	-	-	-	-	-	-	-	-	-	-
32	Debt Service - 2018 Issue {$24 mil}	-	-	-	-	-	-	-	-	-	-	-	-
33	Debt Service - 2019 Issue {$14.868 mil}	-	-	-	-	-	-	-	-	-	-	-	-
34	Debt Service - 2022 Issue {$40 mil}	-	-	-	-	-	-	-	-	-	-	-	-
35	Paying Agent Services	-	-	-	-	-	-	-	-	-	-	-	-
40	**Subtotal-Debt Service**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**
	OPERATING EXPENDITURES												
50	Prof Svcs/Proj Mgmt	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000
52	Legal/Audit	1,400	1,400	1,400	1,400	1,400	1,400	1,400	1,400	1,400	1,400	1,400	1,400
54	Zone Park Maintenance [mowing, utilities, botanical supplies]	705,000	705,000	705,000	705,000	705,000	705,000	705,000	705,000	705,000	705,000	705,000	705,000
56	Rail Maintenance	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000
58	Road/Signage Maintenance	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000
59	Transformation Team	840,000	840,000	840,000	840,000	840,000	840,000	840,000	840,000	840,000	840,000	840,000	840,000
60	Contractual Payments [TEDC - Marketing]	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000
61	TEDC-Operating	4,607,708	4,768,978	4,935,892	5,108,648	5,287,451	5,472,512	5,664,050	5,862,292	6,067,472	6,279,833	6,499,627	6,727,114
62	Strategic Investment Zone - Grants	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000
63	TISD-Reimbursement [per contract]	47,141	47,141	47,141	49,498	49,498	49,498	51,973	51,973	51,973	54,572	54,572	54,572
65	**Subtotal-Operating Expenditures**	**6,901,249**	**7,062,519**	**7,229,433**	**7,404,546**	**7,583,349**	**7,768,410**	**7,962,423**	**8,160,665**	**8,365,845**	**8,580,805**	**8,800,599**	**9,028,086**
70	**TOTAL DEBT & OPERATING EXPENDITURES**	**$ 6,901,249**	**$ 7,062,519**	**$ 7,229,433**	**$ 7,404,546**	**$ 7,583,349**	**$ 7,768,410**	**$ 7,962,423**	**$ 8,160,665**	**$ 8,365,845**	**$ 8,580,805**	**$ 8,800,599**	**$ 9,028,086**
80	**Funds Available for Projects**	**$ 23,046,955**	**$ 23,820,947**	**$ 23,689,941**	**$ 23,648,356**	**$ 23,695,147**	**$ 23,826,729**	**$ 23,536,848**	**$ 23,824,001**	**$ 23,684,002**	**$ 24,109,850**	**$ 24,099,521**	**$ 24,148,158**
	PROJECTS												
150	Temple Industrial Park	-	-	-	-	-	-	-	-	-	-	-	-
200	Corporate Campus Park	-	-	-	-	-	-	-	-	-	-	-	-
250	Bioscience Park/Crossroads Park	-	-	-	-	-	-	-	-	-	-	-	-
350	Outer Loop	-	-	-	-	-	-	-	-	-	-	-	-
400	Synergy Park	-	-	-	-	-	-	-	-	-	-	-	-
450	Downtown	-	-	-	-	-	-	-	-	-	-	-	-
500	TMED	-	-	-	-	-	-	-	-	-	-	-	-
550	Airport Park	-	-	-	-	-	-	-	-	-	-	-	-
650	Gateway Projects	-	-	-	-	-	-	-	-	-	-	-	-
750	Public Improvements	20,000,000	21,000,000	21,000,000	21,000,000	21,000,000	21,500,000	21,000,000	21,500,000	21,000,000	21,500,000	21,500,000	24,148,158
	Subtotal-Projects	20,000,000	21,000,000	21,000,000	21,000,000	21,000,000	21,500,000	21,000,000	21,500,000	21,000,000	21,500,000	21,500,000	24,148,158
	TOTAL USE OF FUNDS	$ 26,901,249	$ 28,062,519	$ 28,229,433	$ 28,404,546	$ 28,583,349	$ 29,268,410	$ 28,962,423	$ 29,660,665	$ 29,365,845	$ 30,080,805	$ 30,300,599	$ 33,176,244
800	**FUND BALANCE, End {Available for Appropriation}**	**$ 3,046,955**	**$ 2,820,947**	**$ 2,689,941**	**$ 2,648,356**	**$ 2,695,147**	**$ 2,326,729**	**$ 2,536,848**	**$ 2,324,001**	**$ 2,684,002**	**$ 2,609,850**	**$ 2,599,521**	**$ (0)**

TIF Reinvestment Zone #1

Summary Financing Plan with Detailed Project Plan

Project Plan - 10/23/19 - to Zone Board

SUMMARY FINANCING PLAN

		Revised 2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
1	**Beginning Available Fund Balance, Oct 1**	**$ 42,051,937**	**$ 8,510,146**	**$ 1,718,773**	**$ 5,145,370**	**$ 2,122,145**	**$ 4,628,269**	**$ 10,970,358**	**$ 2,666,908**	**$ 2,741,840**	**$ 2,519,975**	**$ 2,461,228**	**$ 2,497,060**
20	Total Sources of Funds	19,395,011	33,905,331	18,715,913	60,313,900	21,451,033	22,609,406	23,966,490	25,595,655	26,384,218	26,614,065	26,780,895	27,025,132
25	**Net Available for Appropriation**	**61,446,948**	**42,415,476**	**20,434,686**	**65,459,270**	**23,573,178**	**27,237,675**	**34,936,847**	**28,262,563**	**29,126,058**	**29,134,040**	**29,242,123**	**29,522,192**
50	Professional	179,265	146,400	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000	175,000
52	General Administrative Expenditures	1,300	1,300	1,300	1,400	1,400	1,400	1,400	1,400	1,400	1,400	1,400	1,400
54	Zone Park Maintenance [mowing, utilities, botanical supplies]	720,000	528,600	560,600	660,600	677,600	704,600	704,600	704,600	704,600	704,600	704,600	704,600
56	Rail Maintenance	185,324	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000
58	Road/Signage Maintenance	440,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000
59	Downtown Improvements {Transformation Team}	499,501	715,439	639,784	639,784	639,784	647,784	639,784	639,784	639,784	639,784	639,784	639,784
60	Contractual Payments (TEDC - Marketing)	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000	200,000
61	TEDC-Operating	-	1,586,113	1,641,627	1,699,084	1,758,552	1,820,101	1,883,805	1,949,738	2,017,979	2,088,608	2,161,709	2,237,369
62	Strategic Investment Zone - Grants	525,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000
63	TISD-Reimbursement [per contract]	27,563	27,563	28,941	28,941	28,941	30,388	30,388	30,388	31,907	31,907	31,907	33,502
27	Debt Service - 2009 Issue {Refunding}	1,485,000	-	-	-	-	-	-	-	-	-	-	-
28	Debt Service - 2008 Taxable Issue {$10.365 mil}	1,241,173	1,237,744	1,241,670	1,242,422	-	-	-	-	-	-	-	-
29	Debt Service - 2011A Issue {Refunding}	915,950	2,497,800	2,497,550	2,494,950	-	-	-	-	-	-	-	-
30	Debt Service - 2012 Issue {Refunding}	77,650	80,050	77,250	78,750	-	-	-	-	-	-	-	-
31	Debt Service - 2013 Issue {$25.260 mil}	2,048,344	2,047,944	2,046,494	2,031,494	2,030,094	2,026,694	2,038,413	2,051,613	2,059,113	2,061,713	2,061,713	2,069,113
32	Debt Service - 2018 Issue {$24 mil}	1,439,967	1,336,000	1,287,000	1,305,000	2,086,750	2,089,000	2,088,750	2,086,000	2,090,750	2,087,500	2,086,500	2,087,500
33	Debt Service - 2019 Issue {$14.868 mil}	-	-	1,323,900	882,600	1,357,600	1,359,100	1,358,800	1,356,700	1,357,800	1,356,800	1,358,700	1,358,200
34	Debt Service - 2022 Issue {$40 mil}	-	-	-	-	3,437,188	3,911,250	4,022,000	4,023,500	4,025,750	4,023,500	4,021,750	4,025,250
35	Paying Agent Services	3,200	3,200	3,200	3,200	2,000	2,000	2,000	2,000	2,000	2,000	2,000	2,000
75	**Total Debt & Operating Expenditures**	**9,989,237**	**10,708,153**	**12,024,316**	**11,743,225**	**12,694,909**	**13,267,317**	**13,444,940**	**13,520,723**	**13,606,083**	**13,672,812**	**13,745,063**	**13,833,718**
80	**Funds Available for Projects**	**$ 51,457,711**	**$ 31,707,323**	**$ 8,410,370**	**$ 53,716,045**	**$ 10,878,269**	**$ 13,970,358**	**$ 21,491,908**	**$ 14,741,840**	**$ 15,519,975**	**$ 15,461,228**	**$ 15,497,060**	**$ 15,688,474**

PROJECT PLAN

		Revised 2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
	TEMPLE INDUSTRIAL PARK:												
102	Rail Backage Road & Rail Improvements (E-W) GST Tract	1,500,000	-	-	-	-	-	-	-	-	-	-	-
103	Rail Backage Road (N-S) GST Tract	-	-	-	-	-	-	2,325,000	-	-	-	-	-
104	Industrial Park Grading	-	100,000	-	1,500,000	1,500,000	-	1,500,000	-	-	-	-	-
105	Rail Park Receiving and Delivery Tract ROW	-	-	265,000	-	-	-	-	-	-	-	-	-
106	Overlay Industrial Blvd	-	-	-	-	-	-	-	-	-	-	-	-
150	**Total Industrial Park**	**1,500,000**	**100,000**	**265,000**	**1,500,000**	**1,500,000**	**-**	**3,825,000**	**-**	**-**	**-**	**-**	**-**
	CORPORATE CAMPUS PARK:												
156	Corporate Campus Land	182,422	-	-	-	-	-	-	-	-	-	-	-
157	Mixed Use Master Plan	250,000	-	-	-	-	-	-	-	-	-	-	-
200	**Total Corporate Campus Park**	**432,422**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**
	BIOSCIENCE PARK/CROSSROADS PARK:												
207	Cross Roads Park @ Pepper Creek Trail	1,156,208	900,000	-	-	-	-	-	-	-	-	-	-
250	**Total Bio-Science Park**	**1,156,208**	**900,000**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**
	OUTER LOOP												
305	Outer Loop (IH 35 to Wendland) STAG grant {Little Elm Sewer}	793,072	-	-	-	-	-	-	-	-	-	-	-
305	Outer Loop (IH 35 to Wendland)	216,980	-	-	-	-	-	-	-	-	-	-	-
305	Outer Loop (IH 35 to Wendland) {bond funded}	500,000	-	-	15,825,000		-	-	-	-	-	-	-
310	Outer Loop (Wendland to McLane Pkwy)	412,059	-	-	-	-	-	-	-	-	-	-	-
310	Outer Loop (Wendland to McLane Pkwy) {bond funded}	-	-	-	12,800,000	-	-	-	-	-	-	-	-
315	Outer Loop (McLane Pkwy to Central Point Pkwy)	77,291	-	-	-	-	-	-	-	-	-	-	-
315	Outer Loop (McLane Pkwy to Central Point Pkwy) {bond funded}	8,198,918	-	-	-	-	-	-	-	-	-	-	-
316	Outer Loop Phase V (Poison Oak to Old Waco Road) {bond funded}	2,651,985	-	-	-	-	-	-	-	-	-	-	-
320	Outer Loop Phase VI (Old Waco Road to I35 South)	41,121	-	-	-	-	-	-	-	-	-	-	-
320	Outer Loop Phase VI (Old Waco Road to I35 South) {bond funded}	3,297,500	-	-	-	-	-	-	-	-	-	-	-
321	East Outer Loop {bond funded}	13,100	-	-	-	-	-	-	-	-	-	-	-
350	**Total Research Parkway**	**16,202,026**	**-**	**-**	**28,625,000**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**
	SYNERGY PARK:												
352	Entry Enhancement	-	-	-	-	-	-	-	-	-	-	-	-
400	**Total Synergy Park**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**

Summary Financing Plan with Detailed Project Plan

Project Plan - 10/23/19 - to Zone Board

SUMMARY FINANCING PLAN

		Revised 2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
	DOWNTOWN:												
401	Downtown Electric Master Plan	62,740	-	-	-	-	-	-	-	-	-	-	-
402	Downtown Lighting Master Plan	-	28,600	-	-	-	-	-	-	-	-	-	-
403	MLK Festival Fields Electric Design	-	100,000	650,000	-	-	-	-	-	-	-	-	-
404	Downtown Lighting	60,000	50,000	450,000	-	-	-	-	-	-	-	-	-
405	Santa Fe Plaza	3,973,119	-	-	-	-	-	-	-	-	-	-	-
405	Santa Fe Plaza {bond funded}	1,214,545	-	-	-	-	-	-	-	-	-	-	-
406	Downtown City Center/Hawn {bond funded}	2,050,000	-	-	-	-	-	-	-	-	-	-	-
406	Downtown City Center/Hawn	91,030	4,250,000	-	-	-	-	-	-	-	-	-	-
407	Santa Fe Market	2,503,251	-	-	-	-	-	-	-	-	-	-	-
408	1st Street (Avenue B to Central Avenue) and Avenue A (North 3rd to South 2nd)	38,107	-	-	-	-	-	-	-	-	-	-	-
409	1st Street from Avenue A to Avenue B	1,275,000	-	-	-	-	-	-	-	-	-	-	-
410	1st Street from Avenue A to Central Avenue {bond funded}	1,438,000	-	-	-	-	-	-	-	-	-	-	-
411	1st Street Parking Garage {bond funded}	-	6,068,450	-	-	-	-	-	-	-	-	-	-
411	1st Street Parking Garage	1,071,550	-	-	-	-	-	-	-	-	-	-	-
412	Central Ave/4th Street Parking Garage {bond funded}	-	8,800,000	-	-	-	-	-	-	-	-	-	-
412	Central Ave/4th Street Parking Garage	568,450	-	-	-	-	-	-	-	-	-	-	-
413	Avenue C from Main Street to 24th Street {bond funded}	2,641,593	-	-	-	-	-	-	-	-	-	-	-
413	Avenue C from Main Street to 24th Street	98,407	2,000,000	-	5,500,000	-	-	-	-	-	-	-	-
414	24th Street - Avenue C to Central Street Design	-	148,500	1,000,000	1,798,900	-	-	-	-	-	-	-	-
415	Central/Adams Corridor Concept Design {bond funded}	325,000	-	-	-	-	-	-	-	-	-	-	-
415	Central/Adams Corridor	-	-	-	-	1,500,000	2,000,000	-	-	-	-	-	-
416	3rd Street Corridor Enhancement	125,000	-	-	-	-	-	-	-	-	-	-	-
417	Downtown Corridor Enhancements	700,000	-	-	-	-	-	-	-	-	-	-	-
418	Festival Fields Buildings	-	-	750,000	-	-	-	-	-	-	-	-	-
419	Festival Fields Parking Lot	-	350,000	-	-	-	-	-	-	-	-	-	-
420	Library/City Hall Campus	-	-	150,000	-	-	-	5,000,000	-	-	-	-	-
450	**Total Downtown**	**18,235,792**	**21,795,550**	**3,000,000**	**7,298,900**	**1,500,000**	**2,000,000**	**5,000,000**	**-**	**-**	**-**	**-**	**-**
	TMED:												
458	Loop 363 Frontage Rd (UPRR to 5th TIRZ portion)	182,935	-	-	-	-	-	-	-	-	-	-	-
459	31st Street/Loop 363 Improvements	62,773	-	-	-	-	-	-	-	-	-	-	-
460	31st Street Monumentation {bond funded}	450,000	-	-	-	-	-	-	-	-	-	-	-
461	Veteran's Memorial Blvd. Phase II	118,500	-	-	3,000,000	-	-	-	-	-	-	-	-
462	TMED South 1st Street	72,789	-	-	-	-	-	-	-	-	-	-	-
500	**Total TMED**	**886,997**	**-**	**-**	**3,000,000**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**
	AIRPORT PARK:												
507	Taxiway for Hangars	1,075,000	-	-	-	-	-	-	-	-	-	-	-
510	Draughon-Miller Regional Airport FBO Center & Parking	2,340	-	-	4,740,000	-	-	-	-	-	-	-	-
510	Draughon-Miller Regional Airport FBO Center & Parking {bond funded}	440,000	-	-	-	-	-	-	-	-	-	-	-
511	Corporate Hangar Phase IV	16,740	1,500,000	-	-	-	-	-	-	-	-	-	-
511	Corporate Hangar Phase IV {bond funded}	5,820	-	-	-	-	-	-	-	-	-	-	-
512	Clear Area Near Fire Station	-	-	-	-	-	-	-	-	-	-	-	-
513	Tower Refurbishment	172,500	-	-	-	-	-	-	-	-	-	-	-
514	Demolition of Old Terminal Building	115,000	-	-	-	-	-	-	-	-	-	-	-
515	Fence Realignment & Gate	175,000	-	-	-	-	-	-	-	-	-	-	-
516	Airfield Lighting Grant Match	-	213,000	-	-	-	-	-	-	-	-	-	-
550	**Total Airport Park**	**2,002,400**	**1,713,000**	**-**	**4,740,000**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**
	GATEWAY PROJECTS:												
601	North 31st Street (Nugent to Central) Concept Design	400	-	-	-	-	-	-	-	-	-	-	-
602	North 31st Street (Nugent to Central)	2,216,170	5,010,000	-	-	-	-	-	-	-	-	-	-
603	East/West IH 35 Gateway	60,000	320,000	-	3,430,000	-	-	-	-	-	-	-	-
604	Downtown Neighborhoods Overlay	100,000	-	-	-	-	-	-	-	-	-	-	-
605	Adams & Central Avenue Bicycle & Pedestrian Improvements Design	155,150	-	-	-	-	-	-	-	-	-	-	-
606	Art District	-	150,000	-	-	1,500,000		10,000,000	-	-	-	-	-
650	**Total Gateway Projects**	**2,531,720**	**5,480,000**	**-**	**3,430,000**	**1,500,000**	**-**	**10,000,000**	**-**	**-**	**-**	**-**	**-**
	Public Improvements												
701	Public Improvements	-	-	-	-	1,000,000	1,000,000	-	12,000,000	13,000,000	13,000,000	13,000,000	13,000,000
702	Land Acquisition	-	-	-	3,000,000	750,000	-	-	-	-	-	-	-
750	**Total Public Improvements**	**-**	**-**	**-**	***3,000,000***	***1,750,000***	***1,000,000***	**-**	***12,000,000***	***13,000,000***	***13,000,000***	***13,000,000***	***13,000,000***
	Total Planned Project Expenditures	**42,947,565**	**29,988,550**	**3,265,000**	**51,593,900**	**6,250,000**	**3,000,000**	**18,825,000**	**12,000,000**	**13,000,000**	**13,000,000**	**13,000,000**	**13,000,000**
800	**Available Fund Balance at Year End**	**$ 8,510,146**	**$ 1,718,773**	**$ 5,145,370**	**$ 2,122,145**	**$ 4,628,269**	**$ 10,970,358**	**$ 2,666,908**	**$ 2,741,840**	**$ 2,519,975**	**$ 2,461,228**	**$ 2,497,060**	**$ 2,688,474**
	Reserve for Debt Service - Tax Increment Rev Bonds, Series 2018	**2,090,750**	**2,090,750**	**2,090,750**	**2,090,750**	**2,090,750**	**2,090,750**	**2,090,750**	**2,090,750**	**2,090,750**	**2,090,750**	**2,090,750**	**2,090,750**
	Total Fund Balance at Year End	**$ 10,600,896**	**$ 3,809,523**	**$ 7,236,120**	**$ 4,212,895**	**$ 6,719,019**	**$ 13,061,108**	**$ 4,757,658**	**$ 4,832,590**	**$ 4,610,725**	**$ 4,551,978**	**$ 4,587,810**	**$ 4,779,224**

SUMMARY TRZ MASTER PLAN PROJECT FUNDING (2018 - 2025)

Available for allocation	$ 82,206,256	$ 9,156,331	$ 23,197,178	$ 6,691,597	$ 48,570,675	$ 8,756,124	$ 9,342,089	$ 10,521,550	$ 198,441,799

	2018	2019	2020	2021	2022	2023	2024	2025	TOTAL
Temple Industrial Park	$ -	$ 1,500,000	$ 100,000	$ 265,000	$ 1,500,000	$ 1,500,000	$ -	$ 3,825,000	$ 8,690,000
Corporate Campus Park	2,331,393	250,000	-	-	-	-	-	-	2,581,393
Bioscience Park/Crossroads Park	5,564,692	-	900,000	-	-	-	-	-	6,464,692
Outer Loop	20,422,812	450,000	-	-	28,625,000	-	-	-	49,497,812
Downtown	37,076,794	1,698,000	21,795,550	3,000,000	7,298,900	1,500,000	2,000,000	5,000,000	79,369,244
TMED	6,327,387	-	-	-	3,000,000	-	-	-	9,327,387
Airport Park	2,929,513	1,539,700	1,713,000	-	4,740,000	-	-	-	10,922,213
Gateway	1,772,000	990,150	5,480,000	-	3,430,000	1,500,000	-	10,000,000	23,172,150
Public Improvements	-	-	-	-	3,000,000	1,750,000	1,000,000	-	5,750,000
MASTER PLAN PROJECT FUNDING	**$ 76,424,591**	**$ 6,427,850**	**$ 29,988,550**	**$ 3,265,000**	**$ 51,593,900**	**$ 6,250,000**	**$ 3,000,000**	**$ 18,825,000**	**$ 195,774,891**

	2018	2019	2020	2021	2022	2023	2024	2025	TOTAL
Favorable (Unfavorable) Balance	$ 5,781,665	$ 2,728,481	$ (6,791,373)	$ 3,426,597	$ (3,023,225)	$ 2,506,124	$ 6,342,089	$ (8,303,450)	$ 2,666,908
Cumulative Favorable (Unfavorable)	$ 5,781,665	$ 8,510,146	$ 1,718,774	$ 5,145,371	$ 2,122,145	$ 4,628,270	$ 10,970,358	$ 2,666,908	

TRZ MASTER PLAN PROJECT FUNDING (2018 - 2025)

Available for allocation	$ 82,206,256	$ 9,156,331	$ 23,197,178	$ 6,691,597	$ 48,570,675	$ 8,756,124	$ 9,342,089	$ 10,521,550	$ 198,441,799

Temple Industrial Park

Line #	Project Description	2018	2019	2020	2021	2022	2023	2024	2025	TOTAL
1	Rail Backage Road (E-W) GST Tract w/road connection to Wendland Design	-	378,600	-	-	-	-	-	-	378,600
2	Rail Backage Road (E-W) GST Tract w/road connection to Wendland Construction	-	1,121,400	-	-	-	-	-	-	1,121,400
3	Rail Backage Road (N-S) GST Tract Design	-	-	-	-	-	-	-	138,000	138,000
4	Rail Backage Road (N-S) GST Tract Construction	-	-	-	-	-	-	-	2,187,000	2,187,000
5	Industrial Park Grading Design	-	-	100,000	-	-	-	-	-	100,000
6	Industrial Park Grading Construction	-	-	-	-	1,500,000	1,500,000	-	1,500,000	4,500,000
7	Rail Park Receiving and Delivery Tract ROW	-	-	-	265,000	-	-	-	-	265,000
8	Overlay Industrial Blvd	-	-	-	-	-	-	-	-	-
	SUBTOTAL	**-**	**1,500,000**	**100,000**	**265,000**	**1,500,000**	**1,500,000**	**-**	**3,825,000**	**8,690,000**

Corporate Campus Park

Line #	Project Description	2018	2019	2020	2021	2022	2023	2024	2025	TOTAL
9	Pepper Creek Trail Hwy 36 to McLane Parkway Design	115,500	-	-	-	-	-	-	-	115,500
10	Pepper Creek Trail Hwy 36 to McLane Parkway Construction	1,465,893	-	-	-	-	-	-	-	1,465,893
11	Corporate Campus Land Acquisition	750,000	-	-	-	-	-	-	-	750,000
12	Mixed Use Master Plan	-	250,000	-	-	-	-	-	-	250,000
	SUBTOTAL	**2,331,393**	**250,000**	**-**	**-**	**-**	**-**	**-**	**-**	**2,581,393**

Bioscience Park/Crossroads Park

Line #	Project Description	2018	2019	2020	2021	2022	2023	2024	2025	TOTAL
13	Crossroads Park @ Pepper Creek Trail Design	100,602	-	-	-	-	-	-	-	100,602
14	Crossroads Park @ Pepper Creek Trail Construction	5,464,090	-	400,000	-	-	-	-	-	5,864,090
15	Crossroads Park Soccer Lights Design			5,000						5,000
16	Crossroads Park Soccer Lights Construction	-	-	420,000	-	-	-	-	-	420,000
17	Crossroads Park Restrooms	-	-	75,000	-	-	-	-	-	75,000
	SUBTOTAL	**5,564,692**	**-**	**900,000**	**-**	**-**	**-**	**-**	**-**	**6,464,692**

Outer Loop

Line #	Project Description	2018	2019	2020	2021	2022	2023	2024	2025	TOTAL
18	Outer Loop (IH35 to Wendland) Design	131,247	-	-	-	700,000	-	-	-	831,247
19	Outer Loop (IH35 to Wendland Ultimate) ROW	2,311,809	-	-	-	-	-	-	-	2,311,809
20	Outer Loop (IH35 to Wendland) Grant {Little Elm Sewer}	1,925,000	-	-	-	-	-	-	-	1,925,000
21	Outer Loop (IH35 to Wendland) Construction	-	-	-	-	15,125,000		-	-	15,125,000
22	Outer Loop (Wendland to McLane Pkwy) Design	-	-	-	-	800,000	-	-	-	800,000
23	Outer Loop (Wendland to Central Pt Pkwy) ROW	1,611,756	-	-	-			-	-	1,611,756
24	Outer Loop (Wendland to McLane Pkwy) Construction	-	-	-	-	12,000,000	-	-	-	12,000,000
25	Outer Loop (McLane to Central Pt Pkwy) Design	350,000	-	-	-	-	-	-	-	350,000
26	Outer Loop (McLane to Central Pt Pkwy) Construction	7,400,000	450,000	-	-	-	-	-	-	7,850,000
27	Outer Loop Phase V (Poison Oak to Old Waco Road) Design	600,000	-	-	-	-	-	-	-	600,000
28	Outer Loop Phase V (Poison Oak to Old Waco Road) ROW	2,220,000	-	-	-	-	-	-	-	2,220,000
29	Outer Loop Phase V (Poison Oak to Old Waco Road) Construction	-	-	-	-	-	-	-	-	-
30	Outer Loop Phase VI (Old Waco Road to I35 South) Design	1,250,000	-	-	-	-	-	-	-	1,250,000
31	Outer Loop Phase VI (Old Waco Road to I35 South) ROW	2,500,000	-	-	-	-	-	-	-	2,500,000
32	Outer Loop Phase VI (Old Waco Road to I35 South) Construction	-	-	-	-	-	-	-	-	-
33	East Outer Loop Schematic Design	123,000	-	-	-	-	-	-	-	123,000
34	East Outer Loop Construction	-	-	-	-	-	-	-	-	-
	SUBTOTAL	**20,422,812**	**450,000**	**-**	**-**	**28,625,000**	**-**	**-**	**-**	**49,497,812**

Synergy Park

Line #	Project Description	2018	2019	2020	2021	2022	2023	2024	2025	TOTAL
35	Entry Enhancement Design	-	-	-	-	-	-	-	-	-
36	Entry Enhancement Construction	-	-	-	-	-	-	-	-	-
37	Land Acquisition	-	-	-	-	-	-	-	-	-
	SUBTOTAL	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**	**-**

TRZ MASTER PLAN PROJECT FUNDING (2018 - 2025)

Downtown

Line #	Project Description	2018	2019	2020	2021	2022	2023	2024	2025	TOTAL
38	Santa Fe Plaza Design	641,969	-	-	-	-	-	-	-	641,969
39	Santa Fe Plaza ROW	2,697,363	-	-	-	-	-	-	-	2,697,363
40	Santa Fe Plaza Construction	10,420,000	-	-	-	-	-	-	-	10,420,000
41	TISD-Obligation per Contract	10,000,000	-	-	-	-	-	-	-	10,000,000
42	Downtown City Center/Hawn Design	600,000	-	-	-	-	-	-	-	600,000
43	Downtown City Center/Hawn Construction	1,600,000	-	4,250,000	-	-	-	-	-	5,850,000
44	Santa Fe Market Design	303,400	-	-	-	-	-	-	-	303,400
45	Santa Fe Market ROW	508,062	-	-	-	-	-	-	-	508,062
46	Santa Fe Market Construction	3,330,000	-	-	-	-	-	-	-	3,330,000
47	Downtown Electric Master Plan	75,000	-	-	-	-	-	-	-	75,000
48	Downtown Lighting Master Plan	-	-	28,600	-	-	-	-	-	28,600
49	MLK Festival Fields Electric Design	-	-	100,000	-	-	-	-	-	100,000
50	MLK Festival Fields Electric Construction	-	-	-	650,000	-	-	-	-	650,000
51	Downtown Lighting	60,000	-	-	-	-	-	-	-	60,000
52	Downtown Lighting Design	-	-	50,000	-	-	-	-	-	50,000
53	Downtown Lighting Construction	-	-	-	450,000	-	-	-	-	450,000
54	1st Street (Ave B to Central Ave) and Ave A (North 3rd to South 2nd) Design	296,000	-	-	-	-	-	-	-	296,000
55	1st Street from Avenue A to Avenue B Design	50,000	-	-	-	-	-	-	-	50,000
56	1st Street from Avenue A to Avenue B Construction	1,225,000	-	-	-	-	-	-	-	1,225,000
57	1st Street from Avenue A to Central Avenue Design	-	58,000	-	-	-	-	-	-	58,000
58	1st Street from Avenue A to Central Avenue Construction	1,380,000	-	-	-	-	-	-	-	1,380,000
59	1st Street Parking Garage Design	-	890,000	-	-	-	-	-	-	890,000
60	1st Street Parking Garage Construction Utility relocation	-	181,550	568,450	-	-	-	-	-	750,000
61	1st Street Parking Garage Construction {bond funded}	-	-	5,500,000	-	-	-	-	-	5,500,000
62	Central Ave/ 4th Street Parking Garage Design	-	568,450	300,000	-	-	-	-	-	868,450
63	Central Ave/ 4th Street Parking Garage Utility relocation	-	-	-	-	-	-	-	-	-
64	Central Ave/ 4th Street Parking Garage Construction	-	-	8,500,000	-	-	-	-	-	8,500,000
65	Avenue C from Main to MLK to 24th Street Design	640,000	-	300,000	-	200,000	-	-	-	1,140,000
66	Avenue C from Main to MLK to 24th Street ROW	2,100,000	-	-	-	-	-	-	-	2,100,000
67	Avenue C from Main to MLK to 24th Street Construction	-	-	1,700,000	-	5,300,000	-	-	-	7,000,000
68	24th Street - Avenue C to Central Street Design	-	-	148,500	-	98,900	-	-	-	247,400
69	24th Street - Avenue C to Central ROW	-	-	-	1,000,000	-	-	-	-	1,000,000
70	24th Street - Avenue C to Central Construction	-	-	-	-	1,700,000	-	-	-	1,700,000
71	Central/Adams Ave Corridor Concept Design	250,000	-	-	-	-	-	-	-	250,000
72	Central/Adams Ave Corridor ROW	75,000	-	-	-	-	-	-	-	75,000
73	Central/Adams Ave Corridor Construction	-	-	-	-	-	1,500,000	2,000,000		3,500,000
74	3rd Street Corridor Enhancement - United Way	125,000	-	-	-	-	-	-	-	125,000
75	Downtown Corridor Enhancement - Hawn Hotel	700,000	-	-	-	-	-	-	-	700,000
76	Festival Fields Parking Lot Design	-	-	40,000	-	-	-	-	-	40,000
77	Festival Fields Parking Lot Construction	-	-	310,000	-	-	-	-	-	310,000
78	Festival Fields Building Design	-	-	-	50,000	-	-	-	-	50,000
79	Festival Fields Buildings Construction	-	-	-	700,000	-	-	-	-	700,000
80	Library/City Hall Campus Visioning	-	-	-	150,000	-	-	-	-	150,000
81	Library/City Hall Campus Construction	-	-	-	-	-	-	-	5,000,000	5,000,000
	SUBTOTAL	**37,076,794**	**1,698,000**	**21,795,550**	**3,000,000**	**7,298,900**	**1,500,000**	**2,000,000**	**5,000,000**	**79,369,244**

TMED

Line #	Project Description	2018	2019	2020	2021	2022	2023	2024	2025	TOTAL
82	Loop 363 FR (UPRR to 5th TRZ Portion) Construction	182,935	-	-	-	-	-	-	-	182,935
83	31st Street (Loop 363 to Ave M) and Ave R (31st to 25th Street) Concept Design	130,000	-	-	-	-	-	-	-	130,000
84	31 Street Improvements Design	120,267	-	-	-	-	-	-	-	120,267
85	31 Street Improvements Construction	791,938	-	-	-	-	-	-	-	791,938
86	31st Street Monumentation Construction	450,000	-	-	-	-	-	-	-	450,000
87	Ave U TMED Ave. to 1st Construction	2,688,747	-	-	-	-	-	-	-	2,688,747
88	Veteran's Memorial Blvd. Phase II Design	118,500	-	-	-	550,000	-	-	-	668,500
89	Veteran's Memorial Blvd. Phase II ROW	-	-	-	-	1,000,000	-	-	-	1,000,000
90	Veteran's Memorial Blvd. Phase II Construction	-	-	-	-	1,450,000	-	-	-	1,450,000
91	TMED South 1st Street Design	120,000	-	-	-	-	-	-	-	120,000
92	TMED South 1st Street Construction	1,725,000	-	-	-	-	-	-	-	1,725,000
	SUBTOTAL	**6,327,387**	**-**	**-**	**-**	**3,000,000**	**-**	**-**	**-**	**9,327,387**

TRZ MASTER PLAN PROJECT FUNDING (2018 - 2025)

Airport Park

Line #	Project Description	2018	2019	2020	2021	2022	2023	2024	2025	TOTAL
93	Taxiway for Hangars {75 ft. width} Design	63,700	65,000	-	-	-	-	-	-	128,700
94	Taxiway for Hangars {75 ft. width} Construction	-	1,010,000	-	-	-	-	-	-	1,010,000
95	Corporate Hangar Phase II	262,263	-	-	-	-	-	-	-	262,263
96	Corporate Hangar Phase III	1,812,550	-	-	-	-	-	-	-	1,812,550
97	Draughon-Miller Regional Airport FBO Center & Parking Visioning	119,000	-	-	-	-	-	-	-	119,000
98	Draughon-Miller Regional Airport FBO Center & Parking Design	440,000	2,200	-	-	260,000	-	-	-	702,200
99	Draughon-Miller Regional Airport FBO Center & Parking Construction	-	-	-	-	4,480,000	-	-	-	4,480,000
100	Corporate Hangar Phase IV Design	100,000	-	130,000	-	-	-	-	-	230,000
101	Corporate Hangar Phase IV Design {bond funded}	132,000	-	-	-	-	-	-	-	132,000
102	Corporate Hangar Phase IV Construction	-	-	1,370,000	-	-	-	-	-	1,370,000
103	Clear Area Near Fire Station Design	-	-	-	-	-	-	-	-	-
104	Clear Area Near Fire Station Construction	-	-	-	-	-	-	-	-	-
105	Tower Refurbishment Design	-	22,500	-	-	-	-	-	-	22,500
106	Tower Refurbishment Construction	-	150,000	-	-	-	-	-	-	150,000
107	Demolition of Old Terminal Building Design	-	15,000	-	-	-	-	-	-	15,000
108	Demolition of Old Terminal Building Construction	-	100,000	-	-	-	-	-	-	100,000
109	Fence Realignment Design	-	24,000	-	-	-	-	-	-	24,000
110	Fence Realignment & Gate Construction	-	151,000	-	-	-	-	-	-	151,000
111	Airport Lighting Grant Match	-	-	213,000						213,000
	SUBTOTAL	**2,929,513**	**1,539,700**	**1,713,000**	**-**	**4,740,000**	**-**	**-**	**-**	**10,922,213**

Gateway Projects

Line #	Project Description	2018	2019	2020	2021	2022	2023	2024	2025	TOTAL
112	North 31st Street (Nugent to Central) Concept Design	212,000	-	-	-	-	-	-	-	212,000
113	North 31st Street (Nugent to Central) Land Acquisition	1,500,000	40,000	-	-	-	-	-	-	1,540,000
114	North 31st Street (Nugent to Central) Design	-	695,000	-	-	-	-	-	-	695,000
115	North 31st Street (Nugent to Central) Construction	-	-	5,010,000	-	-	-	-	-	5,010,000
116	East/West Gateway Design	60,000	-	320,000	-	245,000	-	-	-	625,000
117	East/West Gateway Construction	-	-	-	-	3,185,000	-	-	-	3,185,000
118	Downtown Neighborhoods Overlay	-	100,000	-	-	-	-	-	-	100,000
119	Adams & Central Avenue Bicycle & Pedestrian Improvements Design	-	155,150	-	-	-	-	-	-	155,150
120	Art District Concept Design	-	-	150,000	-	-	-	-	-	150,000
121	Art District Design	-	-	-	-	-	1,500,000	-	-	1,500,000
122	Art District Construction	-	-	-	-	-	-	-	10,000,000	10,000,000
	SUBTOTAL	**1,772,000**	**990,150**	**5,480,000**	**-**	**3,430,000**	**1,500,000**	**-**	**10,000,000**	**23,172,150**

Public Improvements

Line #	Project Description	2018	2019	2020	2021	2022	2023	2024	2025	TOTAL
123	Public Improvements - UNALLOCATED	-	-	-	-	-	1,000,000	1,000,000	-	2,000,000
124	Land Acquisition	-	-	-	-	3,000,000	750,000	-	-	3,750,000
	SUBTOTAL	**-**	**-**	**-**	**-**	**3,000,000**	**1,750,000**	**1,000,000**	**-**	**5,750,000**

	2018	2019	2020	2021	2022	2023	2024	2025	TOTAL
MASTER PLAN PROJECT FUNDING	**$ 76,424,591**	**$ 6,427,850**	**$ 29,988,550**	**$ 3,265,000**	**$ 51,593,900**	**$ 6,250,000**	**$ 3,000,000**	**$ 18,825,000**	**$ 195,774,891**

	2018	2019	2020	2021	2022	2023	2024	2025	TOTAL
Favorable (Unfavorable) Balance	**5,781,665**	**2,728,481**	**(6,791,373)**	**3,426,597**	**(3,023,225)**	**2,506,124**	**6,342,089**	**(8,303,450)**	**2,666,908**
Cumulative Favorable (Unfavorable)	**5,781,665**	**8,510,146**	**1,718,774**	**5,145,371**	**2,122,145**	**4,628,270**	**10,970,358**	**2,666,908**	

ORDINANCE NO. 2019-5003

AN ORDINANCE BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING AN AMENDMENT TO AND THE ADOPTION OF THE TAX INCREMENT FINANCING REINVESTMENT ZONE NO. 1 FINANCING AND PROJECT PLANS ADJUSTING EXPENDITURES FOR FISCAL YEARS 2019-2023; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE; DECLARING FINDINGS OF FACT; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, the City Council (the "Council") of the City of Temple, Texas, (the "City") created Reinvestment Zone Number One, City of Temple, Texas (the "Zone") by Ordinance No. 1457 adopted on September 16, 1982;

Whereas, the Council adopted a Project Plan and Reinvestment Zone Financing Plan for the Zone by Ordinance No. 1525 adopted on December 22, 1983, and thereafter amended such plans by Ordinance No. 1664 adopted on June 20, 1985, Ordinance No. 1719 adopted on November 21, 1985, Ordinance No. 1888 adopted on December 21, 1987, Ordinance No. 1945 adopted on October 20, 1988; Ordinance No. 1961 adopted on December 1, 1988; Ordinance No. 2039 adopted on April 19, 1990; Ordinance No. 91-2119 adopted on December 5, 1991; Ordinance No. 92-2138 adopted on April 7, 1992; Ordinance No. 94-2260 adopted on March 3, 1994; Ordinance No. 95-2351 adopted on June 15, 1995; Ordinance No. 98-2542 adopted on February 5, 1998; Ordinance No. 98-2582 adopted on November 19, 1998; Ordinance No. 99-2619 adopted on March 18, 1999; Ordinance No. 99-2629 adopted on May 6, 1999; Ordinance No. 99-2631 adopted on May 20, 1999; Ordinance No. 99-2647 adopted on August 19, 1999; Ordinance No. 99-2678 adopted on December 16, 1999; Ordinance No. 2000-2682 adopted on January 6, 2000; Ordinance No. 2000-2729 adopted on October 19, 2000; Ordinance No. 2001-2772 adopted on June 7, 2001; Ordinance No. 2001-2782 adopted on July 19, 2001; Ordinance No. 2001-2793 adopted on September 20, 2001; Ordinance No. 2001-2807 on November 15, 2001; Ordinance No. 2001-2813 on December 20, 2001; Ordinance No. 2002-2833 on March 21, 2002; Ordinance No. 2002-2838 on April 18, 2002; Ordinance No. 2002-3847 on June 20, 2002; Ordinance No. 2002-3848 on June 20, 2002; Ordinance No. 2002-3868 on October 17, 2002; Ordinance No. 2003- 3888 on February 20, 2003;Ordinance No. 2003-3894 on April 17, 2003; Ordinance No 2003-3926 on September 18, 2003; Ordinance No. 2004-3695 on July 1, 2004; Ordinance No. 2004-3975 on August 19, 2004; Ordinance No. 2004-3981 on September 16, 2004; Ordinance No. 2005-4001 on May 5, 2005; Ordinance No. 2005-4038 on September 15, 2005; Ordinance No. 2006-4051 on January 5, 2006; Ordinance No. 2006-4076 on the 18th day of May, 2006; Ordinance No. 2006-4118; Ordinance No. 2007-4141 on the 19th day of April, 2007; Ordinance No. 2007-4155 on July 19, 2007; Ordinance No. 2007-4172 on the 20th day of September, 2007; Ordinance No. 2007-4173 on October 25, 2007; Ordinance No. 2008-4201 on the 21st day of February, 2008; and Ordinance No. 2008-4217 the 15th day of May, 2008; Ordinance No. 2008-4242 the 21st day of August, 2008; Ordinance No. 2009-4290 on the 16th day of April, 2009; Ordinance No. 2009-4294 on the 21st day of May, 2009; Ordinance No. 2009-4316 on the 17th day of September, 2009; Ordinance No. 2009-4320 on the 15th day of October, 2009; Ordinance No. 2010-4338 on the 18th day of February, 2010; Ordinance No. 2010-4373 on the 19th day of August, 2010; Ordinance No. 2010-4405 on November 4, 2010; Ordinance No. 2011-4429 on March 17, 2011; Ordinance No. 2011-4455 on July 21, 2011;

Ordinance No. 2011-4477 on October 20, 2011; Ordinance No. 2012-4540 on June 21, 2012; and Ordinance No. 2012-4546 on July 19, 2012; Ordinance No. 2012-4554 on September 20, 2012; Ordinance No. 2012-4566 on November 15, 2012; Ordinance No. 2013-4595 on June 20, 2013; Ordinance No. 2014-4665 on May 15, 2014; Ordinance No. 2014-4676 on July 17, 2014; Ordinance No. 2014-4683 on September 18, 2014; Ordinance No. 2014-4695 on December 18, 2014; Ordinance No. 2015-4705 on April 16, 2015; Ordinance No. 2015-4734 on October 17, 2015; Ordinance No. 2016-4789 on July 21, 2016; Ordinance No. 2016-4809 on October 20, 2016; Ordinance No. 2017-4838 on April 20, 2017; Ordinance No. 2017-4851 on July 20, 2017; Ordinance No. 2017-4871 on October 19, 2017; Ordinance No. 2017-4881 on November 16, 2017; Ordinance No. 2018-4885 on January 18, 2018; Ordinance No. 2018-4908 on May 3, 2018; Ordinance No. 2018-4918 on June 21, 2018; Ordinance No. 2018-4931 on September 20, 2018; Ordinance No. 2018-4935 on October 18, 2018; Ordinance No. 2019-4998 on October 17, 2019; Ordinance No. _____ on November 21, 2019;

Whereas, the Board of Directors of the Zone has adopted an additional amendment to the Reinvestment Zone Financing and Project Plans for the Zone and forwarded such amendment to the Council for appropriate action;

Whereas, the Council finds it necessary to amend the Reinvestment Zone Financing and Project Plans for the Zone to include financial information as hereinafter set forth;

Whereas, the Council finds that such amendment to the Reinvestment Zone Financing and Project Plans is feasible and conforms to the Comprehensive Plan of the City, and that this action will promote economic development within the City of Temple; and

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS THAT:

Part 1: Findings. The statements contained in the preamble of this Ordinance are true and correct and are adopted as findings of fact hereby.

Part 2: Reinvestment Zone Financing and Project Plans. The City Council authorizes and adopts the amendment to the Tax Increment Financing Reinvestment Zone No. 1 Financing and Project Plans adjusting expenditures for fiscal years 2019-2023, attached hereto as Exhibits A and B.

Part 3: Plans Effective. The Financing Plan and Project Plans for the Zone heretofore in effect shall remain in full force and effect according to the terms and provisions thereof, except as specifically amended hereby.

Part 4: Severability. It is hereby declared to be the intention of the City Council that the sections, paragraphs, sentences, clauses and phrases of this Ordinance are severable and, if any phrase, clause, sentence, paragraph or section of this Ordinance should be declared invalid by the final judgment or decree of any court of competent jurisdiction, such invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this Ordinance, since the same would have been enacted by the City Council without the incorporation in this Ordinance of any such invalid phrase, clause, sentence, paragraph or section.

Part 5: Effective Date. This Ordinance shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Temple, Texas, and it is accordingly so ordained.

Part 6: Open Meetings. It is hereby officially found and determined that the meeting at which this Ordinance was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meeting Act.

PASSED AND APPROVED on First Reading and Public Hearing on the **7th** day of **November**, 2019.

PASSED AND APPROVED on Second Reading on the **21st** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

_____
TIMOTHY A. DAVIS, Mayor

ATTEST:

_____
Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

_____
Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:
Kayla Landeros, Interim City Attorney
Amanda Rice, Deputy City Attorney

ITEM DESCRIPTION: FIRST READING – PUBLIC HEARING: Consider adopting an ordinance amending Chapter 26, "Peddlers, Solicitors and Itinerant Vendors," of the City of Temple's Code of Ordinances.

STAFF RECOMMENDATION: Adopt ordinance on first reading as presented in the item description and conduct a public hearing. Second reading will be scheduled for November 21, 2019.

ITEM SUMMARY: In a continuing effort to review and update the City's Code of Ordinances, City Staff is proposing to amend Chapter 26 of the City of Temple's Code of Ordinances for the reasons and in the manner provided below:

- **"Aggressive Solicitation," Article I, Chapter 26 of the City's Code of Ordinances:**

  - Summary of proposed amendments: Staff recommends deleting the language currently found in Chapter 26, Article I and replacing it with the following Section 26-2:

    > "No person who is within a public roadway may solicit or sell or distribute any material to any occupant of any motor vehicle stopped on a public roadway in obedience to a traffic control signal light. However, a person, other than a person twelve years of age or younger, may solicit or sell or distribute material to the occupant of a motor vehicle on a public roadway at a traffic control signal light so long as he or she remains on the surrounding sidewalks and unpaved shoulders, and not in or on the roadway itself, including the medians and islands."

  - Recent case law from the Supreme Court of the United States has required cities across the nation to re-evaluate their ordinances regulating speech to ensure that these ordinances are content-neutral. See Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) and Thayer v. City of Worcester, 135 S. Ct. 2887 (2015) (Exhibits 1-2, respectively).

  - Many cities across the United States had adopted aggressive solicitation ordinances similar to Article I, Chapter 26 of the City's Code of Ordinances, but when challenged under *Reed*, courts found that the ordinances were content based restrictions on free speech within traditional public forums and therefore required strict scrutiny review, and the city ordinances did not survive this higher level of scrutiny. See Thayer v. City of Worcester, 144 F. Supp. 3d 218 (D. Mass. 2015); Norton v. City of Springfield, 806 F.3d 411 (7th Cir. 2015); and McLaughlin v. City of Lowell, 140 F.Supp.3d 177 (D. Mass. 2015) (Exhibits 3-5, respectively).

- If challenged, the City's Aggressive Solicitation provisions found in Article I, Chapter 26 of the City's Code of Ordinances, would most likely to be found unconstitutional.

- In the past, City Council has expressed their own concerns and concerns from citizens about the safety of pedestrians soliciting in the roadway at intersections to City Staff.

- City Council has requested City Staff to amend Article I, Chapter 26 of the City's Code of Ordinances to align it with recent case law and to protect pedestrian safety in the City's roadways at major intersections.

- City of Temple Police Department Data - Information on pedestrian crashes. See Exhibit 6 for further details.

  - ✓ In the City of Temple, police data shows that there were five crashes involving pedestrians in 2014. Seven people were injured in these crashes. Three of these crashes were intersection related.

  - ✓ In the City of Temple, police data shows that there were eight crashes involving pedestrians in 2015. Six people were injured in these crashes. Two people were killed in these crashes. One crash was intersection related.

  - ✓ In the City of Temple, police data shows that there were twenty-nine crashes involving pedestrians in 2016. Twenty-eight people were injured in these crashes. Two people were killed in these crashes. Six of these crashes occurred at intersections or were intersection-related.

  - ✓ In the City of Temple, police data shows that there were eighteen crashes involving pedestrians in 2017. Seventeen people were injured in these crashes. One person was killed in these crashes. Four of these crashes were intersection related.

  - ✓ In the City of Temple, police data shows that there were thirty crashes involving pedestrians in 2018. Thirty people were injured in these crashes. One person was killed in these crashes. Eleven of these crashes occurred at intersections or were intersection-related.

  - ✓ In the City of Temple, police data shows that there were nineteen crashes involving pedestrians in from January 1, 2019 through October 1, 2019. Nineteen people were injured in these crashes. Two people were killed in these crashes. Five of these crashes occurred at intersections or were intersection-related.

- According to the National Highway Traffic Safety Administration (NHTSA) and the Governors Highway Safety Association (GHSA), over the past decade there has been an increase in pedestrian fatalities due to motor vehicle crashes. See Exhibits 7 and 8, respectively. Pedestrian deaths increased by 35% between the years 2008 and 2017 (from 4,414 deaths in 2008 to 5,997 deaths in 2017). See Exhibit 8. In this same time period, GHSA reports that the combined number of all other traffic deaths declined by 6%, most likely due to enhancements in vehicle crashworthiness and crash avoidance technology, while in contrast, pedestrians remain susceptible to sustaining serious or fatal injuries when struck by a motor vehicle. *Id.*

- According to NHTSA, 5,977 pedestrians died in traffic crashes in the United States in 2017. See Exhibit 7. On average, a pedestrian was killed in a traffic crash every 88 minutes in 2017, accounting for 16% of all traffic fatalities. *Id*.

- GHSA estimates that the nationwide number of pedestrians killed in motor vehicle crashes in 2018 was 6,227, an increase of four percent from 2017. See Exhibit 8. This estimate represents the continuation of an increasing trend in pedestrian deaths going back to 2009 and would be the largest annual number of pedestrian fatalities in the U.S. since 1990. *Id.* GHSA reports that a possible contributing factor in the overall number of pedestrian fatalities could be the large growth in cell phone use, which can be a significant source of distraction for both drivers and pedestrians. *Id.*

- GHSA reports that there is an uneven distribution of pedestrian deaths among the states of the United States. *Id.* Five states (Arizona, California, Florida, Georgia, and Texas) accounted for almost half (46%) of all pedestrian deaths in 2018. *Id.* During January through June 2017, GHSA reports that Texas had the 3rd highest amount of pedestrian fatalities of the states, 266 pedestrian deaths. *Id.* Only California and Florida had more pedestrian deaths in this time period: 468 pedestrian deaths and 326 pedestrian deaths, respectively. *Id.* In the time period between January to June 2018, the GHSA estimates that Texas will continue to have the 3rd highest amount of pedestrian fatalities of the states, 298 pedestrian deaths, up 12% from 2017. *Id.* In comparison, California is estimated to have 432 pedestrian deaths, down by 8% from 2017, and Florida is estimated to have 330 pedestrian deaths, up 1% from 2017. *Id.*

- GHSA reports that 26% percent of pedestrian fatalities in 2017 occurred at intersections or in locations that were intersection-related. *Id.*

- City Staff has identified as a safety hazard for pedestrians attempting to interact with the drivers and passengers of vehicles at busy intersections within the City of Temple. This activity has included pedestrians leaving the edge of the curb and actively entering the roadway at intersections controlled by traffic signal lights.

- The practice of pedestrians interacting with the drivers and passengers of vehicles while the pedestrian is in the roadway has been identified by City Staff as being unsafe for both the pedestrians and for traffic in general.

- In the *International Society for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge*, 876 F.2d 494 (5th Cir. 1989) (Exhibit 9), the Fifth Circuit of the United States Court of Appeals addressed an ordinance that prohibited individuals from soliciting the occupants of vehicles while the individual was in the street or roadway, street or roadway shoulder, or neutral ground of any street or roadway. The Court discussed evidence of a "traffic death in which a news vendor was fatally injured while soliciting sales in a Baton Rouge street." *Id.* at 496. The Fifth Circuit further discussed evidence from an "expert in traffic engineering" that "established that the purpose of streets, highways, and roads was to move people and goods both safely and efficiently." *Id.* The expert further testified that "streets, highways, and roads are not designed for the purpose of soliciting funds." *Id.* The Fifth Circuit concluded that "[t]he direct personal solicitation from drivers distracts them from their primary duty to watch the traffic and potential hazards in the road, observe all traffic control signals or warnings, and prepare to move through the intersection." *Id.* at 498. The Fifth Circuit concluded the ordinance was "narrowly tailored to

serve the government's significant interest in regulating traffic flow and promoting roadway safety." *Id.* at 500.

- Don Bond, Public Works Director for the City of Temple, agrees that the purpose of modern streets, highways, and roads is to move people and goods safely and efficiently. Mr. Bond further agrees that modern streets, highways, and roads are not designed for pedestrians to interact with the occupants of vehicles on roadways. Mr. Bond states:

  "Signalized intersections have reached a point where significant usage warrants traffic controls to continue to move traffic safely and efficiently. Theses added signal lights require a portion of drivers' attention, in addition to that required by the pole-mounted signage and traffic at ground level. Hence, it is important not to compound the driver perspective with additional distractions at these busy roadway junctions."

- In *Houston Chronicle Publishing Co. v. City of League City, Texas*, 488 F.3d 613 (5th Cir. 2007) (Exhibit 10), the Fifth Circuit of the United States Court of Appeals discussed evidence offered by the City of League City, Texas demonstrating that newspaper street-vendors in cities near the City of League City had been seriously injured at intersections. The Court held that the City of League City ordinance that applied only at intersections controlled by traffic signal lights "is a reasonable means to narrowly tailor" the reach of the ordinance. *Id.* at 622. The Court explained: "Such intersections (those requiring traffic-signal lights) are generally the most heavily trafficked." *Id.* The Court then said: "Therefore, they are the most dangerous." *Id.* The Court concluded that the proscription of the ordinance "serves a compelling interest at the heart of the government's function: public safety." *Id.*

- In *Houston Chronicle Publishing Co. v. City of League City, Texas*, 488 F.3d 613, 616 (5th Cir. 2007), the Fifth Circuit of the United States Court of Appeals held that the plain language of the ordinance, quoted below, was "non-discriminatory and content-neutral:"

  No person who is within a public roadway may solicit or sell or distribute any material to the occupant of any motor vehicle stopped on a public roadway in obedience to a traffic control signal light. It is specifically provided, however, that a person, other than a person twelve years of age or younger, may solicit or sell or distribute material to the occupant of a motor vehicle on a public roadway so long as he or she remains on the surrounding sidewalks and unpaved shoulders, and not in or on the roadway itself, including the medians and islands.

- In the recent Supreme Court case of *McCullen v. Coakley,* 134 S. Ct. 2518 (2014) (Exhibit 11), the Supreme Court identified an ordinance prohibiting solicitation in roadways as one example of several "less intrusive means" for the government to address public safety risk. The ordinance that the Supreme Court described as a lesser intrusion provided: "No person shall solicit while walking on, standing on or going into any street or highway used for motor vehicle travel, or any area appurtenant thereto (including medians, shoulder areas, bicycle lanes, ramps and exit ramps." *Id.* at 2538 (quoting Boston, Mass., Municipal Code, ch. 16–41.2(d) (2013)).

- The City may impose reasonable time, place, and manner restrictions in a traditional public forum that further the City's significant public safety interests.

- The City desires only to promote public safety and does not wish to regulate the speech of any group or individual.

- City Staff finds that limiting the sale, solicitation, and distribution of materials to occupants of vehicles at intersections controlled by traffic signal lights by pedestrians in the roadway promotes the safety of not only pedestrians but also vehicular traffic and leaves open ample alternative channels of communication.

  - ✓ City Staff recommends that City Council remove all the language currently in Article I of Chapter 26 and replace this language with the language found to be content neutral in *Houston Chronicle Publishing Co. v. City of League City*, 488 F.3d 613 (5th Cir. 2007).

- **"License for Transient and Itinerant Peddlers and Vendors Selling in Residential Areas," Article II, Chapter 26 of the City's Code of Ordinances:**

  - **Summary of proposed amendments:** Staff recommends several amendments to Chapter 26, Article II, including:

  - ✓ Amending Article II from applying only to vendors who do not have a business in the business area of the City to applying to all persons wishing to door-to-door solicit within the City;
  - ✓ Amending this Article to remove any provision that prohibits an applicant from receiving a door-to-door solicitation license due to their criminal history;
  - ✓ Amending the fee section of the door-to-door solicitation article to remove specific fee amounts and to require City Council to set solicitation fees by resolution;
  - ✓ Setting a clear timeline for the City to complete an investigation as to the truth and accuracy of the information provided in a door-to-door solicitation license application;
  - ✓ Removing the Article's section that allows the Finance Director to refuse to grant an applicant a door-to-door solicitation license if the information or material the applicant provides to the Director is "unsatisfactory;"
  - ✓ Removing the section in the Article that requires a deposit or bond to be posted with the City as a prerequisite to receiving a door-to-door solicitation license;
  - ✓ Removing the exceptions to the door-to-door license requirement for farmers, dairymen, churches, service clubs, boy scouts, girl scouts, camp fire girls, non-profits, tax-exempt organizations and their representatives;
  - ✓ Adding a section to the Article that allows residents to prohibit solicitors from entering residents' property by the residents' posting of "no solicitation" signs;
  - ✓ Adding a provision to the Article that prohibits door-to-door solicitation before 9:00 a.m. or after 6:00 p.m., Central Time, during standard time and before 9:00 a.m. and after 7:00 p.m., Central Time, during daylight savings time without a prior invitation or request from the owners or occupants of such premises; and
  - ✓ Allowing the City Manager to appoint departments and directors to administer and enforce this Article at the City Manager's discretion.

  - Recent First Amendment case law from across the country has changed how cities may regulate door-to-door solicitors.

  - ✓ City Staff recommends updating this Article to bring it into alignment with current case law.

- In *Holy Spirit Ass'n for Unification of World Christianity v. Hodge*, 582 F. Supp. 592, 604 (N.D. Tex. 1984) (Exhibit 12), a city ordinance regulating door-to-door solicitation imposed higher fees on non-city residents wishing to solicit versus city residents. The court found "[t]he use of a municipal ordinance to discriminate between municipal residents and non-municipal residents in an area of fundamental rights [exercise of First Amendment rights through door-to-door proselytizing and solicitation of funds] violates the Privileges and Immunities Clause." *Id.*

  - ✓ City Staff recommends amending this Article from applying only to vendors who do not have a business in the business area of the City to applying to all persons wishing to door-to-door solicit within the City.

- In *Holy Spirit Ass'n for Unification of World Christianity v. Hodge*, 582 F. Supp. 592, 597 (N.D. Tex. 1984), the City of Amarillo authorized the denial of a door-to-door solicitation permit if the applicant or a person connected with the solicitation had been convicted of a crime involving moral turpitude. The court held that this provision was unconstitutional, stating that "persons with prior criminal records are not First Amendment outcasts." *Id.* at 598 (quoting *Fernandes v. Limmer*, 663 F.2d 619, 627 (5th Cir. 1981)).

  - ✓ City Staff recommends amending this Article to remove any provision that prohibits an applicant from receiving a door-to-door solicitation license due to their criminal history. City Staff also recommends adding provisions that would require an applicant to provide a full and complete statement of their criminal record and allow the City to revoke or deny a permit if this record is not complete and that would prohibit the City from licensing a person who has an active warrant or who is prohibited from soliciting at a proposed location under other local, state, or federal law (e.g. a person attempting to solicit at a location from which they are prohibited from under a protective order).

- Courts throughout the country have required cities to prove that any fees charged for a prior restraint in speech program, such as a door-to-door solicitation license, have to be reasonably related and used to cover the costs of the administration and enforcement of the prior restraint program. See *United Youth Careers, Inc. v. City of Ames*, 412 F. Supp. 2d 994, 1009 (S.D. Iowa 2006) (Exhibit 13), stating in reference to a $35 flat fee for an applicant for a door-to-door license that expired after 60 days, "While true that the city government may not exact a fee for the exercise of First Amendment freedoms, it is equally true that "there is nothing contrary to the Constitution in the charge of a fee limited . . . to meet the expense incident to the administration of the [ordinance] and to the maintenance of public order in the matter licensed"" (quoting *Cox v. New Hampshire,* 312 U.S. 569, 576-77 (1941)).

  - ✓ City Staff recommends removing specific fee amounts for license application fees from this Article and replacing these fee amounts with a provision requiring City Council to set license fees by resolution, adding an additional fee for replacement of licenses, removing the Article's requirement that the funds must be distributed into the City's general fund, and specifying in the Article that the fees imposed under the Article are to be used by the City only to defray the costs of the administration and enforcement of the Article.

- In *FW/PBS, Inc v. City of Dallas*, 493 U.S. 215, 228 (1990) (Exhibit 14), the Supreme Court held that "[t]he license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech." Courts across the country have used this holding to support ordinances that provide a quick turnaround for licenses for door-to-door solicitors and strike ordinances that provide indefinite time periods for door-to-door solicitation license issuances. See *La. Cleaning Sys. v. Cobb*, No. CV 14-2371, 2016 WL 843385, at *7 (W.D. La. Mar. 1, 2016) (Exhibit 15), finding that a delay of several months to grant a solicitation license to a commercial vacuum vendor most likely violated the vendor's free speech rights; and *Ass'n of Cmty. Orgs. for Reform Now v. Town of E. Greenwich*, 453 F. Supp. 2d 394, 412 (D.R.I. 2006) (Exhibit 16), finding that a five day turn around period to issue a solicitation permit that was in practice usually one to two days was constitutional, because it allowed the city time to verify the information on the solicitation application and the applicant's criminal history.

  - ✓ City Staff recommends setting a clear timeline in Article II that would require the City to complete an investigation as to the truth and accuracy of the information provided in a door-to-door solicitation license application within seven (7) days of the final completion of the application with an additional ten (10) days if the City has not completed a criminal history background check within the original seven (7) day period, and if this investigation is not completed within these time periods, require that the City issue a license to the applicant with the caveat that a license could be revoked if the City later finds that the application contains a material statement or information that was false, the person to be licensed has an active warrant or is prohibited from soliciting at the proposed location, or the applicant failed to provide the City with correct documentation from the Bell County Public Health District related to the solicited food or food product.

- In *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150–51 (1969) (Exhibit 17), the Supreme Court, in evaluating a parade ordinance found that the ordinance "as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience.' This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, *holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.*" (Italics added.)

  - ✓ City Staff recommends removing the Article's section that allows the Finance Director to refuse to grant an applicant a door-to-door solicitation license if the information or material they provide to the Director is "unsatisfactory" to the Director and removing the language from the Article that allows the City to deny a door-to-door solicitation license if the items the applicant proposes "to sell are of good quality and suitable to be sold to the general public," because the terms "unsatisfactory," "good quality," and "suitable to be sold to the general public" do not provide any narrow, objective, and definite standards to guide the Director.

- Courts throughout the country, relying on Supreme Court precedent, have found that licensing authorities may not impose insurance or deposit requirements upon First Amendment activities, finding that these types of requirements are akin to exacting a fee prior to allowing a person to exercise their constitutional rights and are therefore unconstitutional. See *United Youth Careers, Inc. v. City of Ames*, 412 F. Supp. 2d 994, 1010 (S.D. Iowa 2006) (Exhibit 13), finding that the city's requirement that a door-to-door canvasser obtain an insurance policy prior to the issuance of a permit to canvass " akin to exacting a fee from applicants prior to authorizing them to exercise their First Amendment rights" and unconstitutional; and *Holy Spirit Asso. for Unification of World Christianity v. Hodge*, 582 F. Supp. 592, 599 (N.D. Tex. 1984) (Exhibit 12), finding a fidelity bond requirement for a solicitor permit to be unconstitutional:

  > because it amounts to nothing more than the exaction of a fee for the exercise of First Amendment rights, a practice condemned by the Supreme Court. "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley v. Valeo*, 424 U.S. 1, 49, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976). *See Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 16 L. Ed. 2d 169, 86 S. Ct. 1079 (1966); *Jones v. City of Opelika*, 319 U.S. 103, 87 L. Ed. 1290, 63 S. Ct. 890 (1943); *Grosjean v. American Press Co.*, 297 U.S. 233, 80 L. Ed. 660, 56 S. Ct. 444 (1936). "Freedom of speech [must be] available to all, not merely those who can pay their own way." *Murdock v. Pennsylvania*, 319 U.S. 105, 111, 87 L. Ed. 1292, 63 S. Ct. 870 (1943) (daily licensing fee of $1.50 held to be an unconstitutional restriction on the free exercise of religious belief). *Cf. Collin v. Smith*, 578 F.2d 1197, 1207-09 (7th Cir. 1978), *cert. denied*, 439 U.S. 916, 58 L. Ed. 2d 264, 99 S. Ct. 291 (1978) (discussing requirement of insurance in order to obtain parade permit).

  - ✓ City Staff recommends removing the section in the Article that requires a deposit or bond to posted with the City as a prerequisite to receiving a door-to-door solicitation license.

- In *Jornaleros de Las Palmas v. City of League City*, 945 F. Supp. 2d 779, 797 (S.D. Tex. 2013) (Exhibit 18), the court considered Sec. 552.007(a) of the Texas Transportation Code that prohibited a person from standing in a roadway to solicit a ride, contribution, or business from someone in a vehicle but made an exemption to this prohibition if the person was soliciting for a charitable organization. The court held that this was a content-based restriction on free speech, found that the exception for charitable solicitation was not narrowly tailored to achieve the City's goal of promoting traffic safety and control, and struck down the statute as unconstitutional. *Id.* at 797-798.

  - ✓ City Staff recommends removing the exemptions to the door-to-door license requirement for farmers, dairymen, churches, service clubs, boy scouts, girl scouts, camp fire girls, non-profit, tax-exempt organizations and their representatives. These exemptions are content-based and do not further the City's goals of this Article which are to protect citizens' peaceful enjoyment of home and prevent crime.

- The Supreme Court has found it constitutional for cities' ordinances to allow homeowners to bar solicitors from their property by posting signs prohibiting solicitation. See *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168 (2002) (Exhibit 19); and *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 639 (1980) (Exhibit 20).

✓ City Staff recommends adding a section to the Article to allow residents to prohibit solicitors from entering residents' property by the residents' posting of "no solicitation" signs.

- The Supreme Court has found it constitutional for cities to limit solicitation at residences to reasonable hours that allow ample opportunity for solicitors to sell or canvass but that also protect residents' ability to rest in their homes. See *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 153 (1943) (Exhibit 21).

  ✓ City Staff recommends adding a provision to the Article that prohibits door-to-door solicitation before 9:00 a.m. or after 6:00 p.m., Central Time, during standard time and before 9:00 a.m. and after 7:00 p.m., Central Time, during daylight savings time without a prior invitation or request from the owners or occupants of such premises.

- Many cities throughout the country, including Texas, have the cities' local police department administer and enforce their cities' door-to-door solicitation ordinances. Police departments are better equipped than other city departments to run background checks on door-to-door license applicants, arrest individuals if they have outstanding warrants, issue trespass warnings and arrest individuals who trespass on property and enforce the provisions of a door-to-door solicitation ordinance on the ground.

  ✓ City Staff recommends removing the Director of Finance who is designated under the Article to enforce and administer this Article and allow the City Manager to appoint departments and directors, which may include the Temple Police Department and the Chief of Police, to administer and enforce this Article at the City Manager's discretion.

- Restructuring and Renaming Chapter

  - Chapter 26 of the City's Code of Ordinances is currently titled, "Peddlers, Solicitors and Itinerant Vendors." If the City Staff recommendations, discussed above, are adopted by City Council, the terms "peddlers" and "itinerant vendors" would be removed from this Chapter.

  ✓ City Staff recommends retitling this Chapter, "Solicitation."

  - Article I, Chapter 26 of the City's Code of Ordinances is currently titled, "Aggressive Solicitation." If the City Staff recommendations, discussed above, are adopted by City Council, the language in this Article will be replaced with a content-neutral language regulating solicitation in the roadways.

  ✓ City Staff recommends retitling current Article I, Chapter 26 of the City's Code of Ordinances to, "Solicitation in Roadways."

- Article II, Chapter 26 of the City's Code of Ordinances is currently titled, "License for Transient and Itinerant Peddlers and Vendors Selling in Residential Areas." If the City Staff recommendations, discussed above, are adopted by City Council, the term "transient and itinerant peddlers and vendors" will be removed from this Article.

✓ City Staff recommends retitling current Article II, Chapter 26 of the City's of Ordinances to "Door-to-Door Solicitation."

- The City is in the process of reviewing and revising chapters within the City's Code of Ordinances. In an effort to make each chapter revision uniform, City Staff has removed definitions from within individual articles or sections within the revised chapters and consolidated the definitions for each chapter at the beginning of the chapter.

✓ City Staff recommends:

  - Consolidating the definitions found throughout the Chapter in Article I and retitling this Article, "In General;" and

  - Renumbering the current Articles, I to II, to Articles II and III, respectively.

- In an effort to provide notice and clarity to citizens, each chapter revision brought before City Council includes provisions related to enforcement, including a criminal penalty and civil remedies provision. Chapter 26 currently does not address criminal penalties or civil remedies.

✓ City Staff recommends creating an Article IV titled, "Enforcement," that provides:

  - A criminal penalty for a person who violates a provision of Chapter 26 with a maximum fine of $500 upon conviction;

  - A civil remedy option that would allow the City to seek injunctions and other civil remedies for violations of Chapter 26 in a court of competent jurisdiction; and

  - A severability clause if any portion of the Chapter 26 is found to be unconstitutional.

FISCAL IMPACT: Fees related to Chapter 26 will be set by resolution after adoption of the ordinance.

ATTACHMENTS:
Current Chapter 26
Clean Draft of Proposed Amendments to Chapter 26
Exhibits 1-21
Ordinance (to be provided)

Chapter 26

PEDDLERS, SOLICITORS AND ITINERANT VENDORS

ARTICLE I. AGGRESSIVE SOLICITATION

ARTICLE II. LICENSE FOR TRANSIENT AND ITINERANT PEDDLERS AND VENDORS SELLING IN RESIDENTIAL AREAS

Chapter 26

PEDDLERS, SOLICITORS AND ITINERANT VENDORS

ARTICLE I. AGGRESSIVE SOLICITATION

Section 26-1. Intent to Prohibit Certain Kinds of Aggressive Solicitation.

The Council finds that:

(a) Solicitation in certain situations and locations is by its nature aggressive, and by its nature disturbing and disruptive to residents and businesses and contributes to the loss of access to and enjoyment of public places and to a sense of fear, intimidation and disorder.

(b) Similarly, certain forms of solicitation are aggressive, e.g., approaching or following pedestrians, repetitive soliciting despite refusals, the use of abusive or profane language to cause fear and intimidation, unwanted physical contact, or the intentional blocking of pedestrian and vehicular traffic, and contribute to the loss of access to and enjoyment of public places and to a sense of fear, intimidation and disorder.

(c) This ordinance is intended to protect citizens from the fear and intimidation accompanying certain kinds of solicitation, and not to limit a constitutionally protected activity.

Section 26-2. Definitions.

In this Article:

(a) AGGRESSIVE MANNER means:

(1) Touching the solicited person without the solicited person's consent;

(2) Blocking the path of a pedestrian or a person in vehicle, or the entrance to any building or vehicle when soliciting a person;

(3) Following behind, ahead or alongside a person who walks away from the panhandler after being solicited;

(4) 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 fear for his or her safety or feel compelled to donate.

(b) AUTOMATED TELLER MACHINE means a device, linked to a bank's account records, which is able to carry out banking transactions.

(c) AUTOMATED TELLER FACILITY means the area comprised of one or more automatic teller machines, and any adjacent space that is made available to banking customers.

(d) BANK includes a bank, savings bank, savings and loan association, credit union, trust company, or similar financial institution.

(e) BUS means a vehicle operated by the City or a transit authority for public transportation.

(f) CHECK CASHING BUSINESS means a person in the business of cashing checks, drafts, or money orders for consideration.

(g) PUBLIC AREA means an outdoor area which the public has access and includes, but is not limited to, a sidewalk, street, highway, park, parking lot, alleyway, pedestrian way, or the common area of a school, hospital, apartment house, office building, transport facility, or shop.

(h) SOLICIT means to request, by the spoken, written, or printed word, or by other means of communication an immediate donation or transfer of money or another thing of value from another person, regardless of the solicitor's purpose or intended use of the money or other thing of value, and regardless of whether consideration is offered.

Section 26-3. Aggressive solicitation prohibited.

(a) A person commits an offense if the person knowingly solicits in an aggressive manner in a public area.

(b) A person commits an offense if the person solicits:

(1) in a bus, at a bus station or stop, or at a facility operated by a transportation authority for passengers;

(2) within 25 feet of:

(A) an automated teller facility:
(B) the entrance or exit of a bank; or
(C) the entrance or exit of a check cashing business;

(3) at a marked crosswalk; or

(4) Solicits in a public place between the hours of 9 p.m. and 8 a.m.

Section 26-4. Culpable mental state.

A culpable mental state is not required, and need not be proved, for an offense under Section 26-3 (b)(1), (2), (3) and (4).

Section 26-5. Applicability to lawful demand for payment. This Article is not intended to proscribe a demand for payment for services rendered or goods delivered.

Sections 26-6 − 26-10 Reserved.

(Ordinance No. 2001-2804, 11-15-01)

ARTICLE II. LICENSE FOR TRANSIENT AND ITINERANT PEDDLERS AND VENDORS SELLING IN RESIDENTIAL AREAS

Sec. 26-11. Definitions.

For the purpose of interpreting this article, the following words and terms used herein are defined as follows:

Business area. The term "business area" shall mean any part of the area of the city included in Zones E, F, G and H, as defined and described in the zoning ordinance and map of the city and as amended from time to time.

Fixed place of business. The term "fixed place of business" shall mean a building or part thereof owned or leased by the person desiring to sell goods, wares or merchandise and in which such person actually maintains and operates his business in which he sells goods, wares or merchandise to the general public. The temporary renting by any person of a hotel room or a room in a rooming or boardinghouse shall not be sufficient to constitute a "fixed place of business" within the meaning of this article.

Goods, wares or merchandise. The term "goods, wares or merchandise" shall mean personal property of every kind and character, whether specifically mentioned herein or not, and shall include, but shall not be limited to, the following: Photographs, photographic service, pictures, coupons, tickets, written promises redeemable in money, goods or other things of value, seeds, coats, clothing, rugs, tapestries, shoes, shirts, furniture, stoves, hardware, cooking utensils, dress goods, groceries, medicines, clocks, lawn mowers, tools, cook stoves or ranges, carriages, washing machines, churns, panorama or view shows, musical instruments, magazines, newspapers, books, monuments, brushes, vacuum cleaners, aluminum ware, encyclopedias, almanacs, trees, shrubbery, fruit, vegetables, milk, food of all kinds, sewing machines, cosmetics, perfume, insect and pest control services (including the control of ants, insects, termites, carpet beetles and tree borers), and kitchen ware of all kinds.

Residential area. The term "residential area" shall mean any part of the area of the city included in Zones A, B, C and D, as defined and described in the zoning ordinance and map of the city and as amended from time to time.

Transient and itinerant peddler and vendor. The term "transient and itinerant peddler and vendor" shall mean any person who does not maintain a fixed place of business in a business area of the city and who sells or takes orders for the sale of goods, wares or merchandise in a residential area of the city without being first invited to do so by the purchaser thereof.

Sec. 26.12. Required.

It shall be unlawful for any person who is a transient and itinerant peddler and vendor to sell or take orders for the sale of any goods, wares or merchandise in any residential area of the city, without first having obtained a license to engage in such activity and which license is in full force and effect.

Sec. 26-13. Application--Generally.

Each person desiring to secure a license under the terms of this article shall file a written application with the Director of Finance, which application shall give the following information:

(1) The full name and post office address of the applicant.

(2) The state, county, city or town where the applicant has his permanent residence.

(3) The age, height, weight, complexion, color of hair and color of eyes of the applicant.

(4) A full and complete description of the goods, wares or merchandise which the applicant desires to sell.

(5) Whether or not the applicant has ever been convicted of a felony in any state or federal court, and if so, the nature of the offense, the name of the court, the date of each conviction and the time, if any, served under each conviction.

(6) The names and post office addresses of five (5) persons as references, with which the license board may communicate for information regarding the applicant.

Such application shall be signed and sworn to by the applicant and shall be filed by him in person with the Director of Finance.

Sec. 26-14. Same--Of corporation, firm or partnership.

If the application for a license under this article is filed by a corporation, firm or partnership with the intention of having various employees work under such license, the application shall be filed by an authorized official of the applicant. In such case, the

application shall give the pertinent information required in section 26-13 with respect to the applicant and, in addition thereto, the applicant shall furnish a list of all of its employees who will work under such license and shall certify that each of such employees is a bona fide employee of the applicant, whose activities under such license will be covered by the bond filed by the applicant as provided in this article. Such applicant shall be required to obtain only one license for all of its employees, but no employee of the applicant shall be allowed to work under such license until such employee has personally furnished to the Director of Finance the information about himself required by section 26-14 of all applicants, which shall be signed and sworn to by each such employee.

Sec. 26-15. Photographs required of applicant.

Each applicant for a license under this article shall file, with his application therefor, two (2) photographic likenesses of himself of an approximate size of one and one-half (1 1/2) by two (2) inches. Such photographs shall also be furnished by each employee of a corporation, firm or partnership required to file information by the provisions of section 26-15.

Sec. 26-16. Physical examination if applicant proposes to sell food.

If the applicant for a license under this article proposes to sell food or food products of any kind that are for human consumption, no license shall be granted to him until he shall have first been examined by the city health officer for contagious or communicable diseases, in addition to complying with all the other provisions of this article. The health officer shall furnish a certificate of his examination to the Director of Finance. If the certificate shows the applicant to be afflicted with any contagious or communicable disease, the Director of Finance shall refuse to issue the license applied for. If the certificate shows the applicant to be free of any contagious or communicable disease, the Director of Finance shall issue the license applied for if the applicant complies with all other provisions of this article.

Sec. 26-17. Fee.

Each individual applicant for a license under this article shall, at the time of filing his application, pay to the Director of Finance the sum of thirty dollars ($30.00) as a fee. Each applicant which is a corporation, firm, partnership or association which intends to have various employees work under its license shall pay to the Director of Finance a fee of thirty dollars ($30.00), together with an additional fee of five dollars ($5.00) for each employee who will work under its license.

The fees required by this section shall constitute the fees of the city to cover the cost of investigating the applicant and his goods, wares and merchandise and to cover amounts paid to members of the license board and the health officer, and the expense of publishing notices, the printing of application forms and licenses, and all other expenses incurred by the city in connection with the processing of such application and issuing the license.

All fees paid under this section shall be deposited to the general funds of the city.

Sec. 26-18. Investigation by Director of Finance and decision.

(a) The Director of Finance shall examine the applicant and shall review all information obtained from references furnished by the applicant in his application and shall consider all evidence for and against the issuance of the license in accordance with the requirements of this article. After the Director of Finance's investigation has been concluded, the Director of Finance shall file his decision in writing, reciting information he has received about the applicant and his business and describing the kind and quality of goods, wares or merchandise which the applicant proposes to sell, and either granting the license or denying same. A copy of said decision in writing shall be provided the applicant within ten (10) days of the Director of Finance's decision.

(b) If the Director of Finance finds, at the conclusion of his investigation, that the applicant is the person he represents himself to be and is not an enemy alien and has never been convicted of a felony and is not a fugitive from justice and that he has truly stated in his application the kind and quality of goods, wares and merchandise he proposes to sell are of good quality and suitable to be sold to the general public, and that the application for the license is required to be given under applicable laws, the Director of Finance shall issue a license to sell such goods, wares or merchandise in the residential areas of the city, provided the applicant has complied with all the provisions of this article.

(c) Should the Director of Finance find against the application on any of such matters at the conclusion of his investigation, he shall deny said license.

Sec. 26-19. Applicant's deposit or bond.

(a) *Required.* If the Director of Finance has decided that an applicant is entitled to a license applied for under this article, the applicant shall be given written notice of such decision immediately, and the applicant shall then file with the Director of Finance a deposit or bond in accordance with this section.

(b) *Amount.* If the applicant for a license under this article is an individual, the amount of the deposit or the sum of the bond to be filed under this section shall be five hundred dollars ($500.00). If such applicant is a corporation, firm or partnership, such deposit or bond shall be in the sum of one thousand dollars ($1,000.00).

(c) *Surety, conditions, approval, etc., of bond.* Any bond filed in accordance with this section shall be signed by a surety or bonding company incorporated under the laws of this state or authorized to do business in this state.

Such bond shall bind the principal and surety to pay to the city the sum prescribed in subsection (b) for the use and benefit of any citizen of the city who may be damaged or injured by reason of any false representation as to any goods, wares or merchandise sold to such person by the applicant after he has received his license, or by reason of the breach or failure of any guaranty or warranty made or given to any citizen of the city by the applicant in the sale of such goods, wares or merchandise or services. Such bond shall further provide that it is payable at Temple, Texas, and that it is for the use and benefit of every citizen of

the city and that, if any suit is filed by any citizen of the city against the applicant for false representations, fraud, breach of guaranty or warranty by reason of sales made under the license, the surety on such bond shall be made a party thereto and that any judgment rendered against the applicant in such suit shall also be rendered against the surety on the bond. Such bond shall be approved by the Director of Finance and shall be effective during the existence of the license.

(d) *Holding period, conditions and return of deposit.* If a cash deposit is made under this section, it shall be held for the term of the license and for ninety (90) days thereafter and such deposit shall be for the use and benefit of all the citizens of the city and shall be liable for the satisfaction of any and all claims established against the applicant by a court of competent jurisdiction for false representations, fraud, breach of warranty or breach of guaranty in the sale of goods, wares or merchandise or services under such license in favor of any citizen of the city. If the Director of Finance is not notified of a pending suit against the applicant before the expiration of ninety (90) days after the termination of the license, he shall return the deposit to the applicant. If the Director of Finance is notified of the pendency of such a suit before the expiration of ninety (90) days after the termination of the license, he shall hold an amount equal to the amount sued for out of such deposit until final judgment is rendered therein, returning the balance, if any on hand, to the applicant.

Sec. 26-20. Issuance; contents; effect; term; display.

(a) Upon the making of the deposit or the filing of the bond and the fulfillment of the other requirements of this article, and upon the favorable recommendation of the Director of Finance for the issuance of a license to an applicant, the Director of Finance shall issue to the applicant the license to sell the goods, wares or merchandise set forth in this application, and from and after the date of the issuance of such license, the applicant shall be authorized to sell the goods, wares or merchandise described in his application in the residential areas of the city for a period of one year from the date of such license. The license shall have the photograph of the applicant attached thereto and shall bear the name and other identifying data of the applicant upon the face of the license. The license shall be nontransferable and nonassignable and may be used only by the person to whom it is issued. The holder of the license shall show his license to any prospective purchaser of goods, wares or merchandise, when requested to do so.

(b) Only one license shall be issued to each applicant, but in the event the applicant is a corporation, firm or partnership, which will employ more than one person to work under such license, the Director of Finance will issue to each such employee who meets the requirements of this article, and who is approved by the Director of Finance, a separate permit, which shall be known as an employee's license, which shall state that it is issued under the license theretofore granted to the employer, giving the name of the employer and the number of the employer's license. Such employee's license shall authorize the employee to sell the goods, wares or merchandise of the employer in the residential areas of the city during the term of his employer's license. Such employee's license shall bear the photograph of the employee and shall contain his name and other identifying data, and it shall be nontransferable and nonassignable and may not be used by any person except the employee to whom it was issued, and he shall exhibit it to any prospective purchaser, when

requested to do so.

Sec. 26-21. Refusal of employee's license.

The Director of Finance shall have the right, without the hearing provided for in this article, to refuse to grant any employee of an applicant for a license under this article the right to work under such license, if any of the information or material furnished by the employee, as required by this article, is unsatisfactory to the Director of Finance. As soon as such employees have filed the information required by this article with the Director of Finance he shall file that information with the city secretary.

Sec. 26-22. Renewals.

The Director of Finance shall be authorized to renew licenses under this article for successive periods of one year each, without publishing a notice and without a public hearing, upon the payment by the applicant of a renewal fee of thirty dollars ($30.00), together with an employee's fee of five dollars ($5.00) for each employee of a firm, corporation, partnership or association, and upon the furnishing of the information to him required by this article in the case of an original application, and the furnishing of the bond or cash deposit in the same manner required for the original license, together with a certificate from the city health officer, when required by this article.

Sec. 26-23. Appeals from decisions of Director of Finance.

If the applicant for a license under this article is dissatisfied with any holding or finding of the Director of Finance, he shall have the right to appeal to the city council by filing a written notice of such appeal with the Director of Finance within ten (10) days after the making and filing of such decision by the Director of Finance. Upon the filing of such notice of appeal, the Director of Finance shall notify the city council that the same has been filed and shall immediately forward the application and all papers and data connected with the application in the possession of the Director of Finance to the city council, which shall hear such appeal at its next regular meeting held after the filing of the notice of appeal. The city council shall have the same powers and authority at the hearing of such appeal as is vested in the Director of Finance with respect to the granting or refusal of the license applied for.

Sec. 26-24. Records to be kept; Director of Finance to act as custodian of records.

The Director of Finance shall keep and maintain a complete file and record of all applications for licenses under this article and evidence submitted in support thereof by each applicant, and shall maintain a record of all such licenses issued.

Sec. 26-25. Compensation for health officer for services rendered under this article.

For services rendered in connection with the issuance of each original license under this article, the health officer, when required to make an examination of an applicant who proposes to sell food or food products in accordance with the provisions of this article, shall receive a fee of five dollars ($5.00) for each such examination, which shall be paid from the

fees paid by each applicant. Such fees shall not be paid to such officers for renewals of licenses. The health officer shall be paid a fee of five dollars ($5.00) for each employee he examines which shall be paid by the employee.

Sec. 26-26. Payment of expenses incurred under article.

All expenses and costs incurred by the city in connection with the processing of applications for licenses under this article shall be paid by the city out of the general funds of the city.

Sec. 26-27. Exemption from article.

This article shall not apply to farmers or dairymen who sell products raised or produced by them on their own farms or dairies, nor to churches, service clubs, boy scouts, girl scouts, camp fire girls, nonprofit, tax-exempt organizations, nor to members or representatives of any of such groups or organizations, when acting as representatives thereof.

Chapter 26

Solicitation

ARTICLE I. IN GENERAL

Sec. 26-1. Definitions.

For the purpose of interpreting this Article, the following words and terms used herein are defined as follows:

"BCPHD" means the Bell County Public Health District.

“City” means the City of Temple, Texas, the City Council of Temple, Texas, or its representatives, employees, agents, or designees.

"City Manager" means the City of Temple's city manager or their designee.

"City Secretary" means the City of Temple's city secretary or their designee.

"City of Temple Police Department" means the police department for the City of Temple, including the City of Temple's chief of police and the chief's designee.

"Curb" means the lateral lines of a roadway within the City whether constructed above grade or not, which are not intended for vehicular travel.

“Door-to-door solicitation” means going to one or more residences within the City in person or by agent for the purposes of soliciting, selling, or taking orders for merchandise or services for commercial purposes.

"Licensee" means an applicant or an applicant's agent who is issued a door-to-door solicitation license under Article III of this Chapter.

"Median" means that area or portion of a divided street, road, or highway within the City separating lanes of traffic of the street, road, or highway and includes the curb, if any, at the outer edge of the area.

“Merchandise” is used in its broadest sense and includes property of every kind and character.

“Not-for-profit solicitation” means either (1) requesting contributions or gifts of money, clothing, or any other valuable item for the support or benefit of a religion, creed, political cause, ideological position, or any other cause, charitable or non-profit organization, association, or corporation; or (2) proselytizing or

canvassing on behalf of a religion, creed, political cause, ideological position, or any other cause, charitable or non-profit organization, association, or corporation.

"Person" means any individual, partnership, co-partnership, firm, company, corporation, association, joint stock company, trust, estate, governmental entity, or any other legal entity or their legal representatives, agents, or assigns.

"Principal licensee" means the applicant for a license issued under Article III of this Chapter or the applicant's principal if the applicant is the agent of another.

"Public Roadway" means that portion of the public street, road, or highway which is improved, designed, or ordinarily used for vehicular travel, exclusive of the curb, berm, or shoulder.

“Services” is used in its broadest sense and includes any work done for the benefit of another person.

"Sidewalk" means the improved surface which is between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, and is improved and designed for or is ordinarily used for pedestrian travel.

ARTICLE II. SOLICITATION IN ROADWAYS

Sec. 26-2. Solicitation in roadways.

No person who is within a public roadway may solicit or sell or distribute any material to the occupant of any motor vehicle stopped on a public roadway in obedience to a traffic control signal light. However, a person, other than a person twelve years of age or younger, may solicit or sell or distribute material to the occupant of a motor vehicle on a public roadway at a traffic control signal light so long as he or she remains on the surrounding sidewalks and unpaved shoulders, and not in or on the roadway itself, including the medians and islands.

ARTICLE III. DOOR-TO-DOOR SOLICITATION

Sec. 26-3. License required.

(a) It is unlawful for any person, personally, by agent, or as the agent of another, to engage in door-to-door solicitation in the City without first having obtained a license as provided by this Article.

(b) It is an affirmative defense to this Section if the person was requested or invited by the owner or occupant of the residence at issue to solicit, sell, or take an order for such person’s merchandise or services.

Sec. 26-4. Application for license.

(a) Each person desiring to engage in door-to-door solicitation must submit a copy of a government issued identification and file a written application with the City Secretary, verified by the applicant as to the truthfulness of its contents, and containing the following information, as applicable:

(1) Business name, telephone number, physical address, mailing address, if different than the physical address, website address, and email address related to the merchandise or services;

(2) Applicant's name, physical address, mailing address if different than the physical address, telephone number, and email address;

(3) A brief description of the services or merchandise the applicant desires to solicit, sell, or take orders for;

(4) The dates the applicant will door-to-door solicit within the City limits;

(5) The hours the applicant proposes to door-to-door solicit, which must be within this Article's prescribed door-to-door solicitation times provided for in Sec. 26-16;

(6) Location and schedule of door-to-door solicitation;

(7) Number of agents the applicant will have door-to-door solicit a day;

(8) If a business or utilizing agents, the name of the local coordinator or manager and their telephone number and local address;

(9) The color, make, model, and license plate number of any vehicle to be used by the applicant or their agents during door-to-door solicitation;

(10) Whether the applicant, upon any sale or order, will demand, accept, or receive payment or deposit of money in advance of final delivery or rendition of the merchandise or services sold;

(11) Source of supply, location, and proposed method of delivery of merchandise to be sold;

(12) A full and complete statement of the applicant's criminal records, if any, including a detailed account of all arrests (regardless of conviction), charges filed (regardless of conviction), offenses committed, convictions, sentences received, time served, paroles or pardons received, and the date, place, and jurisdiction relating to each such item;

(13) The applicant's age, sex, height, weight, complexion, hair color, and eye color;

(14) Names, mailing addresses, and telephone numbers of five (5) natural persons to be used as character or business references, with whom the City may communicate for information regarding the applicant;

(15) Whether the applicant has engaged in door-to-door solicitation in other cities, and, if so, the names of the last three (3) such cities and the dates of the applicant's door-to-door solicitation activities in such cities;

(16) Two copies of a photograph of the applicant taken within the last six (6) months. The photograph must be printed on quality photo paper and be approximately one and one-half (1 1/2) by two (2) inches in size; it must be taken in full-face view directly facing the camera with both eyes open;

(17) If the applicant is the agent of another, the name, physical address, mailing address if different than the physical address, telephone number, and email address of the applicant's principal, if a natural person, or if the agent of a business, all the information required for a business under Subsection (a)(1), and credentials which were issued by the principal, which must set forth the extent of the applicant's authority to act for and bind the principal;

(18) If the applicant desires to engage in the door-to-door solicitation of food or food products, they must comply with Sec. 26-6, below, and provide to the City Secretary any documentation determined necessary by the City related to the food or food product issued to the applicant by the Bell County Public Health District (BCPHD), including, but not limited to, inspection reports, licenses, including food handler licenses, and permits;

(19) If the applicant is a minor, the parent or legal guardian's signature on the application; and

A. The parent or legal guardian of the minor must submit his or her government form of identification when the application is submitted;

(20) Any other information deemed necessary for the City, including, but not limited to, any of the above information related to the applicant's agents.

Sec. 26-5. Agent information.

(a) If an applicant for a license issued under this Article desires to use agents, including contractors and employees, to door-to-door solicit on their behalf, the applicant must provide the name, telephone number, physical address, government issued identification, two copies of a photograph for each agent that comply with the same requirements as provided by Sec. 26-4(16) for applicants, and the applicant's relationship to each agent with the applicant's filed application.

(b) It is unlawful for a person to allow, permit, require, utilize, employ, or have another person door-to-door solicit on the person's behalf without providing the above information as required in Subsection (a) to the City Secretary and obtaining a City issued license for the other person.

(c) It is unlawful for a person to door-to-door solicit on behalf of another person unless the other person has obtained a license to door-to-door solicit for the person from the City Secretary after providing the information required in Subsection (a) for such person.

Sec. 26-6. BCPHD requirements for food.

An applicant desiring to engage in the door-to-door solicitation or not-for-profit solicitation of food or food products of any kind for human consumption, including farm produce, prior to applying for a license under this Chapter or soliciting the food or food product within the City, must comply with any BCPHD requirements related to the food or food products, including, but not limited to, BCPHD requirements related to inspection, licensing, and permitting.

Sec. 26-7. Fees.

(a) Each applicant applying for a license under this Article must, at the time of filing their application, pay to the City Secretary an application fee. Each applicant that intends to have agents, including employees and contractors, work under their principal license may be required to pay an additional fee for each agent's license.

(b) The City Secretary may charge a licensee a fee to replace a previously issued license.

(c) The fees required by this Section may only be used by the City to defray the costs of administration and enforcement of this Article.

(d) Fees imposed under this Section will be set by City Council by resolution.

Sec. 26-8. Issuance of license.

(a) Except as otherwise provided by this Section, within seven (7) calendar days after an applicant has fully complied with the provisions of Sections 26-4 through 26-7, the City Secretary must issue the applicant a license, which must include a photograph of the applicant, to engage in door-to-door solicitation. If the applicant provided information as required Subsection 26-5(a) for an agent, the City Secretary must issue the applicant a license for each agent for which information was provided under such Subsection, which must include a photograph of the agent; provided, however, no license may be issued to an applicant or an applicant's agent if:

(1) The applicant’s application contains a material statement or information that is false in whole or in part;

(2) The person to be licensed has an active warrant;

(3) The person to be licensed is prohibited from soliciting at the proposed location(s) under other local, state, or federal law;

(4) The applicant failed to comply with Sec. 26-6 or provide the correct documentation related to the food or food product to the City Secretary under Sec. 26-4(18); or

(5) The person to be licensed has been convicted in municipal court of three (3) or more violations of any one (1) or more provisions of this Article within any twelve (12) month period.

(b) Except as otherwise provided by Subsection (c), below, if the City of Temple Police Department and City Secretary has not completed an investigation as to the truth and accuracy of the information provided in the license application within seven (7) calendar days after the applicant has fully complied with the provisions of Sections 26-4 through 26-7, the City Secretary must issue the applicant and applicant's agents a license as provided by Subsection (a); however, any license so issued will be subject to revocation upon completion of the investigation should the City of Temple Police Department or City Secretary find that a license may not be issued under Subsections (a)(1)-(5), above.

(c) If the City of Temple Police Department and the City Secretary has made a good faith effort to timely investigate an applicant's or an applicant's agent's criminal history within the seven (7) calendar day period prescribed under Subsection (a), but has not been able to complete the criminal history investigation within this period, the City may receive an additional ten (10) calendar days to complete the investigation. After this additional ten (10) day period, the City Secretary must issue the applicant and applicant's agents a license as provided by Subsection (a); however, any license so issued will be subject to revocation upon completion of the investigation should the City of Temple Police Department or City Secretary find that a license may not be issued under Subsections (a)(1)-(5), above.

Sec. 26-9. Term of license.

(a) A license issued under this Article will be valid for one (1) year from the date of issuance.

(b) The expiration date of the license will be stated on the license provided to the licensee.

(c) A person wishing to renew an expired or expiring license must apply for a new license as required by this Article.

Sec. 26-10. Denial and revocation of license and appeals.

(a) Any license issued under this Article may be revoked if:

(1) The licensee’s application contains a material statement or information that is false in whole or in part;

(2) The licensee has an active warrant;

(3) The licensee was prohibited from soliciting at the solicited locations under other local, state, or federal law;

(4) The licensee failed to comply with Sec. 26-6 or provide the correct documentation related to the food or food product to the City Secretary under Sec. 26-4(18); or

(5) The licensee has been convicted in municipal court of three (3) or more violations of any one (1) or more provisions of this Article within any twelve (12) month period.

(b) Revocation of any license issued to the principal licensee will automatically revoke the license of all agents of such licensee. Revocation of an agent's license will not revoke the principal licensee's license or any fellow agent's license.

(c) If an application is denied or a permit revoked, the City Secretary must within three (3) business days of the denial or revocation deliver personally or send a letter through the United States Postal Service notifying the applicant or licensee of the denial or revocation and providing the reasons for the denial or revocation.

(1) A notification letter sent under Subsection (c) will be deemed delivered on the day it was delivered personally or three (3) calendar days after the date the letter was deposited in the mail or given to the carrier.

(d) The applicant or licensee will have ten (10) calendar days from the date the notification letter is deemed delivered in which to file a written notice of appeal of the denial or revocation of the license with the City Secretary. If the tenth (10^{th}) calendar day falls on a weekend or City holiday, the tenth (10^{th}) day will fall on the following business day. Failure to file written notice of appeal within this period will result in the denial or revocation of the license to be final.

(e) In the event of the filing of a proper notice of appeal from a revocation issued under the provisions of this Article, then, until such appeal has been determined by the City Manager, such revocation order will be stayed.

(f) The appeal hearing for a properly filed appeal will be heard by the City Manager within ten (10) calendar days of the date the appeal was filed with the City Secretary. After holding the hearing on the denial or revocation, the City Manager must either sustain the denial or revocation or issue an order issuing or reinstating the license.

(g) A written petition for judicial review of the City Manager's decision (on the record of the hearing) must be filed with the Bell County Court within thirty (30) calendar days from the date of the City Manager's decision. Failure to file a timely written petition will result in the City Manager's hearing decision becoming final.

Sec. 26-11. Display of license.

(a) When engaged in door-to-door solicitation, the license required by this Article must be attached or hung on the licensee and their agents so that it is visible to the public and law enforcement officials.

(b) It is an offense under this Article if an individual fails to wear the license in a visible manner as described in Subsection (a).

Sec. 26-12. License not transferable.

A license issued under this Article is not transferable and does not give authority to anyone other than the person named thereon to engage in door-to-door solicitation.

Sec. 26-13. No solicitation signs.

(a) It is an offense under this Article for a person engaging or attempting to engage in door-to-door solicitation or not-for-profit solicitation to:

(1) Enter upon any private property where the property has clearly posted in the front yard a sign visible from public or private right-of-way indicating a prohibition against solicitation; or

A. Such sign need not exceed one square foot in size and must contain the phrase “no soliciting” or “no solicitors” in letters of at least two inches in height and be clearly visible to a reasonable person;

(2) Remain upon any private property where a notice in the form of a sign or sticker is placed upon any door or entrance way leading into a residence at which guests would normally enter indicating a prohibition against solicitation;

A. Such sign or sticker must contain the phrase “no soliciting” or “no solicitors” and be clearly visible to a reasonable person.

(b) It is an offense for any person to remove any no solicitation sign or sticker without the owner or occupant's express permission.

Sec. 26-14. False pretenses.

(a) It is an offense under this Article for any person to enter a private residence under false pretenses in order to engage in door-to-door solicitation.

(b) It is an offense to door-to-door solicit for a purpose other than that set out in the application upon which a license under this Article was issued.

Sec. 26-15. Refusing to leave upon request.

It is an offense under this Article for any person while engaged in door-to-door solicitation or not-for-profit solicitation to remain in a residence or on the premises thereof after the owner or occupant of the premises has requested such person to leave.

Sec. 26-16. No solicitation without invitation during certain time periods.

It is an offense under this Article for any person while engaged in door-to-door solicitation or not-for-profit solicitation to go to a residence within the City for such purpose before 9 a.m. or after 6:00 p.m., Central Time, during standard time, or before 9:00 a.m. or after 7:00 p.m., Central Time, during daylight savings time, without a prior invitation or request from the owners or occupants of such residence.

Sec. 26-17. Applicability.

The provisions of this Article are not applicable to salespersons calling upon or dealing with manufacturers, wholesalers, distributors, brokers, or retailers at their place of business and in the usual course of their business.

ARTICLE IV. ENFORCEMENT

Sec. 26-18. Penalty.

(a) Criminal penalty.

(1) Any person who violates any of the provisions of this Chapter will be guilty of a Class C misdemeanor and upon conviction will be fined an amount not to exceed five hundred dollars ($500.00) for each offense. Each day that a violation is committed constitutes a separate offense.

(2) A culpable mental state is hereby not required to prove an offense under this Article.

(3) A municipal court judge, in addition to imposing a fine, may suspend a license issued under this Chapter for a period not to exceed six (6) months if the licensee is convicted in the municipal court of a violation of any provision of this Article. Suspension of any such license issued to a principal licensee will automatically suspend the license of all agents of such licensee. If an agent's license is suspended, the suspension will not affect the validity of the principal licensee or any other agent's license. During any such period of a principal licensee's suspension, it is unlawful for the principal licensee or their agents on behalf of the principal licensee to engage in door-to-door solicitation within the City limits. During any such period of an agent's license suspension, it is unlawful for the agent to engage in door-to-door solicitation within the City limits.

(b) Civil remedy.

(1) The City may seek all available civil remedies in a court of competent jurisdiction for violations of this Chapter.

(c) The remedies provided for in this Section are not exclusive. The City may take any, all, or any combination of these remedies against a person who violates this Chapter.

Sec. 26-19. Severability.

If any section, subsection, sentence, clause, or phrase of this Chapter is for any reason held to be unconstitutional, such holding will not affect the validity of the remaining portions of this Chapter.

135 S.Ct. 2218
Supreme Court of the United States

Clyde REED, et al., Petitioners
v.
TOWN OF GILBERT, ARIZONA, et al.

No. 13–502.
|
Argued Jan. 12, 2015.
|
Decided June 18, 2015.

Synopsis
Background: Church and pastor seeking to place temporary signs announcing services filed suit claiming that town's sign ordinance, restricting size, duration, and location of temporary directional signs violated the right to free speech. The United States District Court for the District of Arizona, Susan R. Bolton, J., denied church's motion for preliminary injunction barring enforcement of ordinance. Church appealed. The United States Court of Appeals for the Ninth Circuit, M. Margaret McKeown, Circuit Judge, 587 F.3d 966, affirmed in part and remanded in part.On remand, the District Court, Bolton, J., 832 F.Supp.2d 1070, granted town summary judgment. Church and pastor appealed. The Court of Appeals, Callahan, Circuit Judge, 707 F.3d 1057, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Thomas, held that:

[1] sign code was subject to strict scrutiny, and

[2] sign code violated free speech guarantees.

Reversed and remanded.

Justice Alito filed concurring opinion in which Justices Kennedy and Sotomayor joined.

Justice Breyer filed opinion concurring in the judgment.

Justice Kagan filed opinion concurring in the judgment, in which Justices Ginsburg and Breyer joined.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (21)

[1] Constitutional Law
Viewpoint or idea discrimination
Constitutional Law
Content-Based Regulations or Restrictions

Under the First Amendment, a government, including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content. U.S.C.A. Const.Amend. 1.

23 Cases that cite this headnote

[2] Constitutional Law
Content-Based Regulations or Restrictions
Constitutional Law
Strict or exacting scrutiny; compelling interest test

Content-based laws, that is, those that target speech based on its communicative content, are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. U.S.C.A. Const.Amend. 1.

151 Cases that cite this headnote

[3] Constitutional Law
Content-Based Regulations or Restrictions

Government regulation of speech is "content based," and thus presumptively unconstitutional, if a law applies to particular speech because of the topic discussed or the idea or message expressed, and this commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys. U.S.C.A. Const.Amend. 1.

217 Cases that cite this headnote

[4] **Constitutional Law**
Strict or exacting scrutiny; compelling interest test

Constitutional Law
Strict or exacting scrutiny; compelling interest test

Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose, but both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny. U.S.C.A. Const.Amend. 1.

29 Cases that cite this headnote

[5] **Constitutional Law**
Governmental disagreement with message conveyed

Constitutional Law
Strict or exacting scrutiny; compelling interest test

Laws that, though facially content neutral, cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message the speech conveys, like those laws that are content based on their face, must satisfy strict scrutiny. U.S.C.A. Const.Amend. 1.

134 Cases that cite this headnote

[6] **Constitutional Law**
Temporary signs

Town's sign code, which subjected ideological signs to certain restrictions, subjected political signs to greater restrictions, and subjected temporary directional signs relating to events to even greater restrictions, was content based on its face, and thus was subject to strict scrutiny in free speech challenge by church seeking to place temporary signs announcing its services; any innocent motives on part of town did not eliminate danger of censorship, sign code singled out specific subject matter for differential treatment even if it did not target viewpoints within that subject matter, and sign code singled out signs bearing a particular message, i.e., the time and location of a particular event. U.S.C.A. Const.Amend. 1.

20 Cases that cite this headnote

[7] **Constitutional Law**
Content-Neutral Regulations or Restrictions

The crucial first step in the content-neutrality analysis in a free speech challenge is determining whether the law is content neutral on its face. U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[8] **Constitutional Law**
Strict or exacting scrutiny; compelling interest test

A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech. U.S.C.A. Const.Amend. 1.

40 Cases that cite this headnote

[9] **Constitutional Law**
Freedom of Speech, Expression, and Press

Constitutional Law
Censorship

Illicit legislative intent is not the sine qua non of a violation of the First Amendment's free speech guarantee, and a party opposing the government need adduce no evidence of an improper censorial motive. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[10] **Constitutional Law**
Strict or exacting scrutiny; compelling interest test

Although a content-based purpose may be sufficient in certain circumstances to show that a regulation of speech is content based and thus

subject to strict scrutiny, it is not necessary. U.S.C.A. Const.Amend. 1.

53 Cases that cite this headnote

[11] Constitutional Law
Strict or exacting scrutiny; compelling interest test

An innocuous justification cannot transform a facially content-based law regulating speech into one that is content neutral and thus subject to a lower level of scrutiny than strict scrutiny. U.S.C.A. Const.Amend. 1.

130 Cases that cite this headnote

[12] Constitutional Law
Content-Neutral Regulations or Restrictions

Constitutional Law
Strict or exacting scrutiny; compelling interest test

Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny in a free speech challenge. U.S.C.A. Const.Amend. 1.

41 Cases that cite this headnote

[13] Constitutional Law
Content-Based Regulations or Restrictions

Government discrimination among viewpoints, or the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker, is a more blatant and egregious form of content discrimination, but the First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. U.S.C.A. Const.Amend. 1.

49 Cases that cite this headnote

[14] Constitutional Law
Strict or exacting scrutiny; compelling interest test

A speech regulation targeted at specific subject matter is content based, and thus subject to strict scrutiny, even if it does not discriminate among viewpoints within that subject matter. U.S.C.A. Const.Amend. 1.

43 Cases that cite this headnote

[15] Constitutional Law
Content-Neutral Regulations or Restrictions

The fact that a speech-related distinction is speaker based does not automatically render the distinction content neutral and thus subject to a lower level of scrutiny than strict scrutiny. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[16] Constitutional Law
Strict or exacting scrutiny; compelling interest test

Because speech restrictions based on the identity of the speaker are all too often simply a means to control content, laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference. U.S.C.A. Const.Amend. 1.

11 Cases that cite this headnote

[17] Constitutional Law
Content-Neutral Regulations or Restrictions

The fact that a speech-related distinction is event based does not render it content neutral and thus subject to a lower level of scrutiny than strict scrutiny. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[18] Constitutional Law
Strict or exacting scrutiny; compelling interest test

Strict scrutiny requires the Government to prove that a restriction on speech furthers a compelling

interest and is narrowly tailored to achieve that interest. U.S.C.A. Const.Amend. 1.

62 Cases that cite this headnote

[19] Constitutional Law

Temporary signs

Municipal Corporations

Billboards, signs, and other structures or devices for advertising purposes

Town's content-based sign code, which subjected ideological signs to certain restrictions, subjected political signs to greater restrictions, and subjected temporary directional signs relating to events to even greater restrictions, did not survive strict scrutiny, and thus violated free speech guarantees; even if town had compelling government interests in preserving town's aesthetic appeal and traffic safety, sign code's distinctions were underinclusive, and thus were not narrowly tailored to achieve that end, in that temporary directional signs were no greater an eyesore than ideological or political ones, and there was no reason to believe that directional signs posed a greater threat to safety than ideological or political signs. U.S.C.A. Const.Amend. 1.

19 Cases that cite this headnote

[20] Constitutional Law

Freedom of Speech, Expression, and Press

A law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[21] Constitutional Law

Strict or exacting scrutiny; compelling interest test

Constitutional Law

Content-Neutral Regulations or Restrictions

Constitutional Law

Strict or exacting scrutiny; compelling interest test

Not all speech-related distinctions are subject to strict scrutiny, only content-based ones are; laws that are content neutral are instead subject to lesser scrutiny. U.S.C.A. Const.Amend. 1.

49 Cases that cite this headnote

***2221** *Syllabus* [*]

Gilbert, Arizona (Town), has a comprehensive code (Sign Code or Code) that prohibits the display of outdoor signs without a permit, but exempts 23 categories of signs, including three relevant here. "Ideological Signs," defined as signs "communicating a message or ideas" that do not fit in any other Sign Code category, may be up to 20 square feet and have no placement or time restrictions. "Political Signs," defined as signs "designed to influence the outcome of an election," may be up to 32 square feet and may only be displayed during an election season. "Temporary Directional Signs," defined as signs directing the public to a church or other "qualifying event," have even greater restrictions: No more than four of the signs, limited to six square feet, may be on a single property at any time, and signs may be displayed no more than 12 hours before the "qualifying event" and 1 hour after.

Petitioners, Good News Community Church (Church) and its pastor, Clyde Reed, whose Sunday church services are held at various temporary locations in and near the Town, posted signs early each Saturday bearing the Church name and the time and location of the next service and did not remove the signs until around ***2222** midday Sunday. The Church was cited for exceeding the time limits for displaying temporary directional signs and for failing to include an event date on the signs. Unable to reach an accommodation with the Town, petitioners filed suit, claiming that the Code abridged their freedom of speech. The District Court denied their motion for a preliminary injunction, and the Ninth Circuit affirmed, ultimately concluding that the Code's sign categories were content neutral, and that the Code satisfied the intermediate scrutiny accorded to content-neutral regulations of speech.

Held : The Sign Code's provisions are content-based regulations of speech that do not survive strict scrutiny. Pp. 2226 – 2233.

(a) Because content-based laws target speech based on its communicative content, they are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *E.g.,* *R.A.V. v. St. Paul,* 505 U.S. 377, 395, 112 S.Ct. 2538, 120 L.Ed.2d 305. Speech regulation is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E.g.,* *Sorrell v. IMS Health, Inc.,* 564 U.S. ——, —— – ——, 131 S.Ct. 2653, 2663–2664, 180 L.Ed.2d 544. And courts are required to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Id.,* at ——, 131 S.Ct., at 2664. Whether laws define regulated speech by particular subject matter or by its function or purpose, they are subject to strict scrutiny. The same is true for laws that, though facially content neutral, cannot be " 'justified without reference to the content of the regulated speech,' " or were adopted by the government "because of disagreement with the message" conveyed. *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661. Pp. 2226 – 2227.

(b) The Sign Code is content based on its face. It defines the categories of temporary, political, and ideological signs on the basis of their messages and then subjects each category to different restrictions. The restrictions applied thus depend entirely on the sign's communicative content. Because the Code, on its face, is a content-based regulation of speech, there is no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny. P. 2227.

(c) None of the Ninth Circuit's theories for its contrary holding is persuasive. Its conclusion that the Town's regulation was not based on a disagreement with the message conveyed skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99. Thus, an innocuous justification cannot transform a facially content-based law into one that is content neutral. A court must evaluate each question—whether a law is content based on its face and whether the purpose and justification for the law are content based—before concluding that a law is content neutral. *Ward* does not require otherwise, for its framework applies only to a content-neutral statute.

The Ninth Circuit's conclusion that the Sign Code does not single out any idea or viewpoint for discrimination conflates two distinct but related limitations that the First Amendment places on government ***2223** regulation of speech. Government discrimination among viewpoints is a "more blatant" and "egregious form of content discrimination," *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700, but "[t]he First Amendment's hostility to content-based regulation [also] extends ... to prohibition of public discussion of an entire topic," *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 530, 537, 100 S.Ct. 2326, 65 L.Ed.2d 319. The Sign Code, a paradigmatic example of content-based discrimination, singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter.

The Ninth Circuit also erred in concluding that the Sign Code was not content based because it made only speaker-based and event-based distinctions. The Code's categories are not speaker-based—the restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. And even if the sign categories were speaker based, that would not automatically render the law content neutral. Rather, "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference." *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 658, 114 S.Ct. 2445, 129 L.Ed.2d 497. This same analysis applies to event-based distinctions. Pp. 2227 – 2231.

(d) The Sign Code's content-based restrictions do not survive strict scrutiny because the Town has not demonstrated that the Code's differentiation between temporary directional signs and other types of signs furthers a compelling governmental interest and is narrowly tailored to that end. See *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 564 U.S. ——, ——, 131 S.Ct. 2806, 2817, 180 L.Ed.2d 664. Assuming that the Town has a compelling interest in preserving its aesthetic appeal and traffic safety, the Code's distinctions are highly underinclusive. The Town cannot

claim that placing strict limits on temporary directional signs is necessary to beautify the Town when other types of signs create the same problem. See *Discovery Network, supra,* at 425, 113 S.Ct. 1505. Nor has it shown that temporary directional signs pose a greater threat to public safety than ideological or political signs. Pp. 2231 – 2232.

(e) This decision will not prevent governments from enacting effective sign laws. The Town has ample content-neutral options available to resolve problems with safety and aesthetics, including regulating size, building materials, lighting, moving parts, and portability. And the Town may be able to forbid postings on public property, so long as it does so in an evenhanded, content-neutral manner. See *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 817, 104 S.Ct. 2118, 80 L.Ed.2d 772. An ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—*e.g.,* warning signs marking hazards on private property or signs directing traffic —might also survive strict scrutiny. Pp. 2232 – 2233.

707 F.3d 1057, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, ALITO, and SOTOMAYOR, JJ., joined. ALITO, J., filed a concurring opinion, in which KENNEDY and SOTOMAYOR, JJ., joined. BREYER, J., filed an opinion concurring in the judgment. KAGAN, J., filed an opinion concurring in the judgment, in which GINSBURG and BREYER, JJ., joined.

Attorneys and Law Firms

David A. Cortman, Lawrenceville, GA, for Petitioners.

***2224** Eric J. Feigin, Washington, DC, for the United States as amicus curiae, by special leave of the Court, supporting neither party.

Philip W. Savrin, Atlanta, GA, for Respondents.

Kevin H. Theriot, Jeremy D. Tedesco, Alliance Defending Freedom, Scottsdale, AZ, David A. Cortman, Counsel of Record, Rory T. Gray, Alliance Defending Freedom, Lawrenceville, GA, for Petitioner.

Philip W. Savrin, Counsel of Record, Dana K. Maine, William H. Buechner, Jr., Freeman Mathis & Gary, LLP, Atlanta, GA, for Respondents.

Opinion

Justice THOMAS delivered the opinion of the Court.

The town of Gilbert, Arizona (or Town), has adopted a comprehensive code governing the manner in which people may display outdoor signs. Gilbert, Ariz., Land Development Code (Sign Code or Code), ch. 1, § 4.402 (2005).[1] The Sign Code identifies various categories of signs based on the type of information they convey, then subjects each category to different restrictions. One of the categories is "Temporary Directional Signs Relating to a Qualifying Event," loosely defined as signs directing the public to a meeting of a nonprofit group. § 4.402(P). The Code imposes more stringent restrictions on these signs than it does on signs conveying other messages. We hold that these provisions are content-based regulations of speech that cannot survive strict scrutiny.

I

A

The Sign Code prohibits the display of outdoor signs anywhere within the Town without a permit, but it then exempts 23 categories of signs from that requirement. These exemptions include everything from bazaar signs to flying banners. Three categories of exempt signs are particularly relevant here.

The first is "Ideological Sign[s]." This category includes any "sign communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency." Sign Code, Glossary of General Terms (Glossary), p. 23 (emphasis deleted). Of the three categories discussed here, the Code treats ideological signs most favorably, allowing them to be up to 20 square feet in area and to be placed in all "zoning districts" without time limits. § 4.402(J).

The second category is "Political Sign[s]." This includes any "temporary sign designed to influence the outcome of an election called by a public body." Glossary 23.[2] The Code treats these signs less favorably than ideological signs. The Code allows the placement of political signs up to 16

square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and "rights-of-way." ***2225** § 4.402(I).[3] These signs may be displayed up to 60 days before a primary election and up to 15 days following a general election. *Ibid.*

The third category is "Temporary Directional Signs Relating to a Qualifying Event." This includes any "Temporary Sign intended to direct pedestrians, motorists, and other passersby to a 'qualifying event.' " Glossary 25 (emphasis deleted). A "qualifying event" is defined as any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization." *Ibid.* The Code treats temporary directional signs even less favorably than political signs.[4] Temporary directional signs may be no larger than six square feet. § 4.402(P). They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. *Ibid.* And, they may be displayed no more than 12 hours before the "qualifying event" and no more than 1 hour afterward. *Ibid.*

B

Petitioners Good News Community Church (Church) and its pastor, Clyde Reed, wish to advertise the time and location of their Sunday church services. The Church is a small, cash-strapped entity that owns no building, so it holds its services at elementary schools or other locations in or near the Town. In order to inform the public about its services, which are held in a variety of different locations, the Church began placing 15 to 20 temporary signs around the Town, frequently in the public right-of-way abutting the street. The signs typically displayed the Church's name, along with the time and location of the upcoming service. Church members would post the signs early in the day on Saturday and then remove them around midday on Sunday. The display of these signs requires little money and manpower, and thus has proved to be an economical and effective way for the Church to let the community know where its services are being held each week.

This practice caught the attention of the Town's Sign Code compliance manager, who twice cited the Church for violating the Code. The first citation noted that the Church exceeded the time limits for displaying its temporary directional signs. The second citation referred to the same problem, along with the Church's failure to include the date of the event on the signs. Town officials even confiscated one of the Church's signs, which Reed had to retrieve from the municipal offices.

Reed contacted the Sign Code Compliance Department in an attempt to reach an accommodation. His efforts proved unsuccessful. The Town's Code compliance manager informed the Church that there ***2226** would be "no leniency under the Code" and promised to punish any future violations.

Shortly thereafter, petitioners filed a complaint in the United States District Court for the District of Arizona, arguing that the Sign Code abridged their freedom of speech in violation of the First and Fourteenth Amendments. The District Court denied the petitioners' motion for a preliminary injunction. The Court of Appeals for the Ninth Circuit affirmed, holding that the Sign Code's provision regulating temporary directional signs did not regulate speech on the basis of content. 587 F.3d 966, 979 (2009). It reasoned that, even though an enforcement officer would have to read the sign to determine what provisions of the Sign Code applied to it, the " 'kind of cursory examination' " that would be necessary for an officer to classify it as a temporary directional sign was "not akin to an officer synthesizing the expressive content of the sign." *Id.,* at 978. It then remanded for the District Court to determine in the first instance whether the Sign Code's distinctions among temporary directional signs, political signs, and ideological signs nevertheless constituted a content-based regulation of speech.

On remand, the District Court granted summary judgment in favor of the Town. The Court of Appeals again affirmed, holding that the Code's sign categories were content neutral. The court concluded that "the distinctions between Temporary Directional Signs, Ideological Signs, and Political Signs ... are based on objective factors relevant to Gilbert's creation of the specific exemption from the permit requirement and do not otherwise consider the substance of the sign." 707 F.3d 1057, 1069 (C.A.9 2013). Relying on this Court's decision in *Hill v. Colorado,* 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), the Court of Appeals concluded that the Sign Code is content neutral. 707 F.3d, at 1071–1072. As the court explained, "Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed" and its "interests in regulat[ing] temporary signs are unrelated to the content of the sign." *Ibid.* Accordingly, the court believed that the Code was "content-neutral as that term

[has been] defined by the Supreme Court." *Id.,* at 1071. In light of that determination, it applied a lower level of scrutiny to the Sign Code and concluded that the law did not violate the First Amendment. *Id.,* at 1073–1076.

We granted certiorari, 573 U.S. ——, 134 S.Ct. 2900, 189 L.Ed.2d 854 (2014), and now reverse.

II

A

[1] **[2]** The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech." U.S. Const., Amdt. 1. Under that Clause, a government, including a municipal government vested with state authority, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. *R.A.V. v. St. Paul,* 505 U.S. 377, 395, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 115, 118, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991).

***2227** **[3]** **[4]** Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E.g., Sorrell v. IMS Health, Inc.,* 564 U.S. ——, —— – ——, 131 S.Ct. 2653, 2663–2664, 180 L.Ed.2d 544 (2011); *Carey v. Brown,* 447 U.S. 455, 462, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); *Mosley, supra,* at 95, 92 S.Ct. 2286. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. *Sorrell, supra,* at ——, 131 S.Ct., at 2664. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

[5] Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be " 'justified without reference to the content of the regulated speech,' " or that were adopted by the government "because of disagreement with the message [the speech] conveys," *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

B

[6] The Town's Sign Code is content based on its face. It defines "Temporary Directional Signs" on the basis of whether a sign conveys the message of directing the public to church or some other "qualifying event." Glossary 25. It defines "Political Signs" on the basis of whether a sign's message is "designed to influence the outcome of an election." *Id.,* at 24. And it defines "Ideological Signs" on the basis of whether a sign "communicat [es] a message or ideas" that do not fit within the Code's other categories. *Id.,* at 23. It then subjects each of these categories to different restrictions.

The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas. On its face, the Sign Code is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the Code to determine whether it is subject to strict scrutiny.

C

In reaching the contrary conclusion, the Court of Appeals offered several theories to explain why the Town's Sign Code should be deemed content neutral. None is persuasive.

1

The Court of Appeals first determined that the Sign Code was content neutral because the Town "did not adopt its regulation of speech [based on] disagree [ment] with the message conveyed," and its justifications for regulating temporary directional signs were "unrelated to the content of the sign." 707 F.3d, at 1071–1072. ***2228** In its brief to this Court, the United States similarly contends that a sign regulation is content neutral—even if it expressly draws distinctions based on the sign's communicative content—if those distinctions can be " 'justified without reference to the content of the regulated speech.' " Brief for United States as *Amicus Curiae* 20, 24 (quoting *Ward, supra,* at 791, 109 S.Ct. 2746; emphasis deleted).

[7] [8] [9] [10] [11] But this analysis skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face. A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). We have thus made clear that " '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,' " and a party opposing the government "need adduce 'no evidence of an improper censorial motive.' " *Simon & Schuster, supra,* at 117, 112 S.Ct. 501. Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

[12] That is why we have repeatedly considered whether a law is content neutral on its face *before* turning to the law's justification or purpose. See, *e.g., Sorrell, supra,* at ——– ——, 131 S.Ct., at 2663–2664 (statute was content based "on its face," and there was also evidence of an impermissible legislative motive); *United States v. Eichman,* 496 U.S. 310, 315, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990) ("Although the [statute] contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government's asserted *interest* is related to the suppression of free expression" (internal quotation marks omitted)); *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 804, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) ("The text of the ordinance is neutral," and "there is not even a hint of bias or censorship in the City's enactment or enforcement of this ordinance"); *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (requiring that a facially content-neutral ban on camping must be "justified without reference to the content of the regulated speech"); *United States v. O'Brien,* 391 U.S. 367, 375, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (noting that the statute "on its face deals with conduct having no connection with speech," but examining whether the "the governmental interest is unrelated to the suppression of free expression"). Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.

The Court of Appeals and the United States misunderstand our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content based on its face. That is incorrect. *Ward* had nothing to say about facially content-based restrictions because it involved a facially content-*neutral* ban on the use, in a city-owned music venue, of sound amplification systems not provided by the city. 491 U.S., at 787, and n. 2, 109 S.Ct. 2746. In that context, we looked to ***2229** governmental motive, including whether the government had regulated speech "because of disagreement" with its message, and whether the regulation was " 'justified without reference to the content of the speech.' " *Id.,* at 791, 109 S.Ct. 2746. But *Ward* 's framework "applies only if a statute is content neutral." *Hill,* 530 U.S., at 766, 120 S.Ct. 2480 (KENNEDY, J., dissenting). Its rules thus operate "to protect speech," not "to restrict it." *Id.,* at 765, 120 S.Ct. 2480.

The First Amendment requires no less. Innocent motives do not eliminate the danger of censorship presented by a facially

content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—*i.e.,* the "abridg[ement] of speech"—rather than merely the motives of those who enacted them. U.S. Const., Amdt. 1. " 'The vice of content-based legislation ... is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.' " *Hill, supra,* at 743, 120 S.Ct. 2480 (SCALIA, J., dissenting).

For instance, in *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), the Court encountered a State's attempt to use a statute prohibiting " 'improper solicitation' " by attorneys to outlaw litigation-related speech of the National Association for the Advancement of Colored People. *Id.,* at 438, 83 S.Ct. 328. Although *Button* predated our more recent formulations of strict scrutiny, the Court rightly rejected the State's claim that its interest in the "regulation of professional conduct" rendered the statute consistent with the First Amendment, observing that "it is no answer ... to say ... that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression." *Id.,* at 438–439, 83 S.Ct. 328. Likewise, one could easily imagine a Sign Code compliance manager who disliked the Church's substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services. Accordingly, we have repeatedly "rejected the argument that 'discriminatory ... treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.' " *Discovery Network,* 507 U.S., at 429, 113 S.Ct. 1505. We do so again today.

2

The Court of Appeals next reasoned that the Sign Code was content neutral because it "does not mention any idea or viewpoint, let alone single one out for differential treatment." 587 F.3d, at 977. It reasoned that, for the purpose of the Code provisions, "[i]t makes no difference which candidate is supported, who sponsors the event, or what ideological perspective is asserted." 707 F.3d, at 1069.

The Town seizes on this reasoning, insisting that "content based" is a term of art that "should be applied flexibly" with the goal of protecting "viewpoints and ideas from government censorship or favoritism." Brief for Respondents 22. In the Town's view, a sign regulation that "does not censor or favor particular viewpoints or ideas" cannot be content based. *Ibid.* The Sign Code allegedly passes this test because its treatment of temporary directional signs does not raise any concerns that the government is "endorsing or suppressing 'ideas or viewpoints,' " *id.,* at 27, and the provisions for political signs and ideological signs "are neutral as to particular ideas or viewpoints" within those categories. *Id.,* at 37.

[13] This analysis conflates two distinct but related limitations that the First ***2230** Amendment places on government regulation of speech. Government discrimination among viewpoints—or the regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker"—is a "more blatant" and "egregious form of content discrimination." *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). But it is well established that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 530, 537, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).

[14] Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. *Ibid.* For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed. See *Discovery Network, supra,* at 428, 113 S.Ct. 1505. The Town's Sign Code likewise singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter. Ideological messages are given more favorable treatment than messages concerning a political candidate, which are themselves given more favorable treatment than messages announcing an assembly of like-minded individuals. That is a paradigmatic example of content-based discrimination.

3

Finally, the Court of Appeals characterized the Sign Code's distinctions as turning on " 'the content-neutral elements of who is speaking through the sign and whether and when an

event is occurring.' " 707 F.3d, at 1069. That analysis is mistaken on both factual and legal grounds.

To start, the Sign Code's distinctions are not speaker based. The restrictions for political, ideological, and temporary event signs apply equally no matter who sponsors them. If a local business, for example, sought to put up signs advertising the Church's meetings, those signs would be subject to the same limitations as such signs placed by the Church. And if Reed had decided to display signs in support of a particular candidate, he could have made those signs far larger—and kept them up for far longer—than signs inviting people to attend his church services. If the Code's distinctions were truly speaker based, both types of signs would receive the same treatment.

[15] **[16]** In any case, the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral. Because "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content," *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 340, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010), we have insisted that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference," *Turner,* 512 U.S., at 658, 114 S.Ct. 2445. Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based. Likewise, a content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers. See *Citizens United, supra,* at 340–341, 130 S.Ct. 876. Characterizing a distinction ***2231** as speaker based is only the beginning—not the end—of the inquiry.

Nor do the Sign Code's distinctions hinge on "whether and when an event is occurring." The Code does not permit citizens to post signs on any topic whatsoever within a set period leading up to an election, for example. Instead, come election time, it requires Town officials to determine whether a sign is "designed to influence the outcome of an election" (and thus "political") or merely "communicating a message or ideas for noncommercial purposes" (and thus "ideological"). Glossary 24. That obvious content-based inquiry does not evade strict scrutiny review simply because an event (*i.e.,* an election) is involved.

[17] And, just as with speaker-based laws, the fact that a distinction is event based does not render it content neutral. The Court of Appeals cited no precedent from this Court supporting its novel theory of an exception from the content-neutrality requirement for event-based laws. As we have explained, a speech regulation is content based if the law applies to particular speech because of the topic discussed or the idea or message expressed. *Supra,* at 2226 – 2227. A regulation that targets a sign because it conveys an idea about a specific event is no less content based than a regulation that targets a sign because it conveys some other idea. Here, the Code singles out signs bearing a particular message: the time and location of a specific event. This type of ordinance may seem like a perfectly rational way to regulate signs, but a clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem "entirely reasonable" will sometimes be "struck down because of their content-based nature." *City of Ladue v. Gilleo,* 512 U.S. 43, 60, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (O'Connor, J., concurring).

III

[18] **[19]** Because the Town's Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, " 'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest,' " *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 564 U.S. ——, ——, 131 S.Ct. 2806, 2817, 180 L.Ed.2d 664 (2011) (quoting *Citizens United,* 558 U.S., at 340, 130 S.Ct. 876). Thus, it is the Town's burden to demonstrate that the Code's differentiation between temporary directional signs and other types of signs, such as political signs and ideological signs, furthers a compelling governmental interest and is narrowly tailored to that end. See *ibid.*

The Town cannot do so. It has offered only two governmental interests in support of the distinctions the Sign Code draws: preserving the Town's aesthetic appeal and traffic safety. Assuming for the sake of argument that those are compelling governmental interests, the Code's distinctions fail as hopelessly underinclusive.

Starting with the preservation of aesthetics, temporary directional signs are "no greater an eyesore," *Discovery Network,* 507 U.S., at 425, 113 S.Ct. 1505, than ideological or political ones. Yet the Code allows unlimited proliferation of larger ideological signs while strictly limiting the number, size, and duration of smaller directional ones. The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem.

***2232** The Town similarly has not shown that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not. The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.

[20] In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest. Because a " 'law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited,' " *Republican Party of Minn. v. White,* 536 U.S. 765, 780, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002), the Sign Code fails strict scrutiny.

IV

[21] Our decision today will not prevent governments from enacting effective sign laws. The Town asserts that an " 'absolutist' " content-neutrality rule would render "virtually all distinctions in sign laws ... subject to strict scrutiny," Brief for Respondents 34–35, but that is not the case. Not "all distinctions" are subject to strict scrutiny, only *content-based* ones are. Laws that are *content neutral* are instead subject to lesser scrutiny. See *Clark,* 468 U.S., at 295, 104 S.Ct. 3065.

The Town has ample content-neutral options available to resolve problems with safety and aesthetics. For example, its current Code regulates many aspects of signs that have nothing to do with a sign's message: size, building materials, lighting, moving parts, and portability. See, *e.g.,* § 4.402(R). And on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner. See *Taxpayers for Vincent,* 466 U.S., at 817, 104 S.Ct. 2118 (upholding content-neutral ban against posting signs on public property). Indeed, some lower courts have long held that similar content-based sign laws receive strict scrutiny, but there is no evidence that towns in those jurisdictions have suffered catastrophic effects. See, *e.g., Solantic, LLC v. Neptune Beach,* 410 F.3d 1250, 1264–1269 (C.A.11 2005) (sign categories similar to the town of Gilbert's were content based and subject to strict scrutiny); *Matthews v. Needham,* 764 F.2d 58, 59–60 (C.A.1 1985) (law banning political signs but not commercial signs was content based and subject to strict scrutiny).

We acknowledge that a city might reasonably view the general regulation of signs as necessary because signs "take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." *City of Ladue,* 512 U.S., at 48, 114 S.Ct. 2038. At the same time, the presence of certain signs may be essential, both for vehicles and pedestrians, to guide traffic or to identify hazards and ensure safety. A sign ordinance narrowly tailored to the challenges of protecting the safety of pedestrians, drivers, and passengers—such as warning signs marking hazards on private property, signs directing traffic, or street numbers associated with private houses—well might survive strict scrutiny. The signs at issue in this case, including political and ideological signs and signs for events, are far removed from those purposes. As discussed above, they are facially content based and are neither justified by traditional safety concerns nor narrowly tailored.

* * *

***2233** We reverse the judgment of the Court of Appeals and remand the case for proceedings consistent with this opinion.

It is so ordered.

Justice ALITO, with whom Justice KENNEDY and Justice SOTOMAYOR join, concurring.

I join the opinion of the Court but add a few words of further explanation.

As the Court holds, what we have termed "content-based" laws must satisfy strict scrutiny. Content-based laws merit this

protection because they present, albeit sometimes in a subtler form, the same dangers as laws that regulate speech based on viewpoint. Limiting speech based on its "topic" or "subject" favors those who do not want to disturb the status quo. Such regulations may interfere with democratic self-government and the search for truth. See *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 530, 537, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).

As the Court shows, the regulations at issue in this case are replete with content-based distinctions, and as a result they must satisfy strict scrutiny. This does not mean, however, that municipalities are powerless to enact and enforce reasonable sign regulations. I will not attempt to provide anything like a comprehensive list, but here are some rules that would not be content based:

Rules regulating the size of signs. These rules may distinguish among signs based on any content-neutral criteria, including any relevant criteria listed below.

Rules regulating the locations in which signs may be placed. These rules may distinguish between free-standing signs and those attached to buildings.

Rules distinguishing between lighted and unlighted signs.

Rules distinguishing between signs with fixed messages and electronic signs with messages that change.

Rules that distinguish between the placement of signs on private and public property.

Rules distinguishing between the placement of signs on commercial and residential property.

Rules distinguishing between on-premises and off-premises signs.

Rules restricting the total number of signs allowed per mile of roadway.

Rules imposing time restrictions on signs advertising a one-time event. Rules of this nature do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed. *

In addition to regulating signs put up by private actors, government entities may also erect their own signs consistent with the principles that allow governmental speech. See *Pleasant Grove City v. Summum,* 555 U.S. 460, 467–469, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). They may put up all manner of signs to promote safety, as well as directional signs and signs pointing out historic sites and scenic spots.

Properly understood, today's decision will not prevent cities from regulating signs in a way that fully protects public ***2234** safety and serves legitimate esthetic objectives.

Justice BREYER, concurring in the judgment.
I join Justice KAGAN's separate opinion. Like Justice KAGAN I believe that categories alone cannot satisfactorily resolve the legal problem before us. The First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate need for regulation than a simple recitation of categories, such as "content discrimination" and "strict scrutiny," would permit. In my view, the category "content discrimination" is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic "strict scrutiny" trigger, leading to almost certain legal condemnation.

To use content discrimination to trigger strict scrutiny sometimes makes perfect sense. There are cases in which the Court has found content discrimination an unconstitutional method for suppressing a viewpoint. *E.g., Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 828–829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); see also *Boos v. Barry,* 485 U.S. 312, 318–319, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (plurality opinion) (applying strict scrutiny where the line between subject matter and viewpoint was not obvious). And there are cases where the Court has found content discrimination to reveal that rules governing a traditional public forum are, in fact, not a neutral way of fairly managing the forum in the interest of all speakers. *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) ("Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say"). In these types of cases, strict scrutiny is often appropriate, and content discrimination has thus served a useful purpose.

But content discrimination, while helping courts to identify unconstitutional suppression of expression, cannot and should not *always* trigger strict scrutiny. To say that it is not an automatic "strict scrutiny" trigger is not to argue against

that concept's use. I readily concede, for example, that content discrimination, as a conceptual tool, can sometimes reveal weaknesses in the government's rationale for a rule that limits speech. If, for example, a city looks to litter prevention as the rationale for a prohibition against placing newsracks dispensing free advertisements on public property, why does it exempt other newsracks causing similar litter? Cf. *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993). I also concede that, whenever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual's ability to express thoughts and ideas that can help that individual determine the kind of society in which he wishes to live, help shape that society, and help define his place within it.

Nonetheless, in these latter instances to use the presence of content discrimination automatically to trigger strict scrutiny and thereby call into play a strong presumption against constitutionality goes too far. That is because virtually all government activities involve speech, many of which involve the regulation of speech. Regulatory programs almost always require content discrimination. And to hold that such content discrimination triggers strict scrutiny is to write a recipe for judicial management of ordinary government regulatory activity.

Consider a few examples of speech regulated by government that inevitably involve ***2235** content discrimination, but where a strong presumption against constitutionality has no place. Consider governmental regulation of securities, *e.g.,* 15 U.S.C. § 78*l* (requirements for content that must be included in a registration statement); of energy conservation labeling-practices, *e.g.,* 42 U.S.C. § 6294 (requirements for content that must be included on labels of certain consumer electronics); of prescription drugs, *e.g.,* 21 U.S.C. § 353(b)(4)(A) (requiring a prescription drug label to bear the symbol "Rx only"); of doctor-patient confidentiality, *e.g.,* 38 U.S.C. § 7332 (requiring confidentiality of certain medical records, but allowing a physician to disclose that the patient has HIV to the patient's spouse or sexual partner); of income tax statements, *e.g.,* 26 U.S.C. § 6039F (requiring taxpayers to furnish information about foreign gifts received if the aggregate amount exceeds $10,000); of commercial airplane briefings, *e.g.,* 14 CFR § 136.7 (2015) (requiring pilots to ensure that each passenger has been briefed on flight procedures, such as seatbelt fastening); of signs at petting zoos, *e.g.,* N.Y. Gen. Bus. Law Ann. § 399–ff(3) (West Cum. Supp. 2015) (requiring petting zoos to post a sign at every exit " 'strongly recommend[ing] that persons wash their hands upon exiting the petting zoo area' "); and so on.

Nor can the majority avoid the application of strict scrutiny to all sorts of justifiable governmental regulations by relying on this Court's many subcategories and exceptions to the rule. The Court has said, for example, that we should apply less strict standards to "commercial speech." *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N. Y.,* 447 U.S. 557, 562–563, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). But I have great concern that many justifiable instances of "content-based" regulation are noncommercial. And, worse than that, the Court has applied the heightened "strict scrutiny" standard even in cases where the less stringent "commercial speech" standard was appropriate. See *Sorrell v. IMS Health Inc.,* 564 U.S. ——, ——, 131 S.Ct. 2653, 2664, 180 L.Ed.2d 544 (2011) (BREYER, J., dissenting). The Court has also said that "government speech" escapes First Amendment strictures. See *Rust v. Sullivan,* 500 U.S. 173, 193–194, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991). But regulated speech is typically private speech, not government speech. Further, the Court has said that, "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *R.A.V. v. St. Paul,* 505 U.S. 377, 388, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). But this exception accounts for only a few of the instances in which content discrimination is readily justifiable.

I recognize that the Court could escape the problem by watering down the force of the presumption against constitutionality that "strict scrutiny" normally carries with it. But, in my view, doing so will weaken the First Amendment's protection in instances where "strict scrutiny" should apply in full force.

The better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of a justification. I would use content discrimination as a supplement to a more basic analysis, which, tracking most of our First Amendment cases, asks whether the regulation at issue works harm to First

Amendment interests that is disproportionate in light of ***2236** the relevant regulatory objectives. Answering this question requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so. See, *e.g.,* *United States v. Alvarez,* 567 U.S. ——, —— – ——, 132 S.Ct. 2537, 2551–2553, 183 L.Ed.2d 574 (2012) (BREYER, J., concurring in judgment); *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 400–403, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (BREYER, J., concurring). Admittedly, this approach does not have the simplicity of a mechanical use of categories. But it does permit the government to regulate speech in numerous instances where the voters have authorized the government to regulate and where courts should hesitate to substitute judicial judgment for that of administrators.

Here, regulation of signage along the roadside, for purposes of safety and beautification is at issue. There is no traditional public forum nor do I find any general effort to censor a particular viewpoint. Consequently, the specific regulation at issue does not warrant "strict scrutiny." Nonetheless, for the reasons that Justice KAGAN sets forth, I believe that the Town of Gilbert's regulatory rules violate the First Amendment. I consequently concur in the Court's judgment only.

Justice KAGAN, with whom Justice GINSBURG and Justice BREYER join, concurring in the judgment.

Countless cities and towns across America have adopted ordinances regulating the posting of signs, while exempting certain categories of signs based on their subject matter. For example, some municipalities generally prohibit illuminated signs in residential neighborhoods, but lift that ban for signs that identify the address of a home or the name of its owner or occupant. See, *e.g.,* City of Truth or Consequences, N. M., Code of Ordinances, ch. 16, Art. XIII, §§ 11–13–2.3, 11–13–2.9(H)(4) (2014). In other municipalities, safety signs such as "Blind Pedestrian Crossing" and "Hidden Driveway" can be posted without a permit, even as other permanent signs require one. See, *e.g.,* Code of Athens–Clarke County, Ga., Pt. III, § 7–4–7(1) (1993). Elsewhere, historic site markers —for example, "George Washington Slept Here"—are also exempt from general regulations. See, *e.g.,* Dover, Del., Code of Ordinances, Pt. II, App. B, Art. 5, § 4.5(F) (2012). And similarly, the federal Highway Beautification Act limits signs along interstate highways unless, for instance, they direct travelers to "scenic and historical attractions" or advertise free coffee. See 23 U.S.C. §§ 131(b), (c)(1), (c)(5).

Given the Court's analysis, many sign ordinances of that kind are now in jeopardy. See *ante,* at 2231 (acknowledging that "entirely reasonable" sign laws "will sometimes be struck down" under its approach (internal quotation marks omitted)). Says the majority: When laws "single[ ] out specific subject matter," they are "facially content based"; and when they are facially content based, they are automatically subject to strict scrutiny. *Ante,* at 2230, 2232 – 2233. And although the majority holds out hope that some sign laws with subject-matter exemptions "might survive" that stringent review, *ante,* at 2232 – 2233, the likelihood is that most will be struck down. After all, it is the "rare case[ ] in which a speech restriction withstands strict scrutiny." *Williams–Yulee v. Florida Bar,* 575 U.S. ——, ——, 135 S.Ct. 1656, 1666, —— L.Ed.2d —— (2015). To clear that high bar, the government must show that a content-based distinction "is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc.* ***2237** *v. Ragland,* 481 U.S. 221, 231, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987). So on the majority's view, courts would have to determine that a town has a compelling interest in informing passersby where George Washington slept. And likewise, courts would have to find that a town has no other way to prevent hidden-driveway mishaps than by specially treating hidden-driveway signs. (Well-placed speed bumps? Lower speed limits? Or how about just a ban on hidden driveways?) The consequence—unless courts water down strict scrutiny to something unrecognizable—is that our communities will find themselves in an unenviable bind: They will have to either repeal the exemptions that allow for helpful signs on streets and sidewalks, or else lift their sign restrictions altogether and resign themselves to the resulting clutter. *

Although the majority insists that applying strict scrutiny to all such ordinances is "essential" to protecting First Amendment freedoms, *ante,* at 2231, I find it challenging to understand why that is so. This Court's decisions articulate two important and related reasons for subjecting content-based speech regulations to the most exacting standard of review. The first is "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley,* 573 U.S. ——, —— – ——, 134 S.Ct. 2518, 2529, 189 L.Ed.2d 502 (2014) (internal quotation marks omitted). The second is to ensure that the government has

not regulated speech "based on hostility—or favoritism—towards the underlying message expressed." *R.A.V. v. St. Paul,* 505 U.S. 377, 386, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Yet the subject-matter exemptions included in many sign ordinances do not implicate those concerns. Allowing residents, say, to install a light bulb over "name and address" signs but no others does not distort the marketplace of ideas. Nor does that different treatment give rise to an inference of impermissible government motive.

We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any "realistic possibility that official suppression of ideas is afoot." *Davenport v. Washington Ed. Assn.,* 551 U.S. 177, 189, 127 S.Ct. 2372, 168 L.Ed.2d 71 (2007) (quoting *R.A.V.,* 505 U.S., at 390, 112 S.Ct. 2538). That is always the case when the regulation facially differentiates on the basis of viewpoint. See *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). It is also the case (except in non-public or limited public forums) when a law restricts "discussion of an entire topic" in public debate. *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 530, 537, 539–540, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980) (invalidating a limitation on speech about nuclear power). We have stated that "[i]f the marketplace of ideas is to remain free and open, governments must not be allowed to choose 'which issues are worth discussing or debating.' " *Id.,* at 537–538, 100 S.Ct. 2326 (quoting *Police Dept. of* ***2238** *Chicago v. Mosley,* 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972)). And we have recognized that such subject-matter restrictions, even though viewpoint-neutral on their face, may "suggest[ ] an attempt to give one side of a debatable public question an advantage in expressing its views to the people." *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 785, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978); accord, *ante,* at 2233 (ALITO, J., concurring) (limiting all speech on one topic "favors those who do not want to disturb the status quo"). Subject-matter regulation, in other words, may have the intent or effect of favoring some ideas over others. When that is realistically possible—when the restriction "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace"—we insist that the law pass the most demanding constitutional test. *R.A.V.,* 505 U.S., at 387, 112 S.Ct. 2538 (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991)).

But when that is not realistically possible, we may do well to relax our guard so that "entirely reasonable" laws imperiled by strict scrutiny can survive. *Ante,* at 2231. This point is by no means new. Our concern with content-based regulation arises from the fear that the government will skew the public's debate of ideas—so when "that risk is inconsequential, ... strict scrutiny is unwarranted." *Davenport,* 551 U.S., at 188, 127 S.Ct. 2372; see *R.A.V.,* 505 U.S., at 388, 112 S.Ct. 2538 (approving certain content-based distinctions when there is "no significant danger of idea or viewpoint discrimination"). To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.

And indeed we have done just that: Our cases have been far less rigid than the majority admits in applying strict scrutiny to facially content-based laws—including in cases just like this one. See *Davenport,* 551 U.S., at 188, 127 S.Ct. 2372 (noting that "we have identified numerous situations in which [the] risk" attached to content-based laws is "attenuated"). In *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), the Court declined to apply strict scrutiny to a municipal ordinance that exempted address numbers and markers commemorating "historical, cultural, or artistic event[s]" from a generally applicable limit on sidewalk signs. *Id.,* at 792, n. 1, 104 S.Ct. 2118 (listing exemptions); see *id.,* at 804–810, 104 S.Ct. 2118 (upholding ordinance under intermediate scrutiny). After all, we explained, the law's enactment and enforcement revealed "not even a hint of bias or censorship." *Id.,* at 804, 104 S.Ct. 2118; see also *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (applying intermediate scrutiny to a zoning law that facially distinguished among movie theaters based on content because it was "designed to prevent crime, protect the city's retail trade, [and] maintain property values ..., not to suppress

the expression of unpopular views"). And another decision involving a similar law provides an alternative model. In *City of Ladue v. Gilleo,* 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994), the Court assumed *arguendo* that a sign ordinance's exceptions for address ***2239** signs, safety signs, and for-sale signs in residential areas did not trigger strict scrutiny. See *id.,* at 46–47, and n. 6, 114 S.Ct. 2038 (listing exemptions); *id.,* at 53, 114 S.Ct. 2038 (noting this assumption). We did not need to, and so did not, decide the level-of-scrutiny question because the law's breadth made it unconstitutional under any standard.

The majority could easily have taken *Ladue* 's tack here. The Town of Gilbert's defense of its sign ordinance—most notably, the law's distinctions between directional signs and others—does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test. See *ante,* at 2231 – 2232 (discussing those distinctions). The Town, for example, provides no reason at all for prohibiting more than four directional signs on a property while placing no limits on the number of other types of signs. See Gilbert, Ariz., Land Development Code, ch. I, §§ 4.402(J), (P)(2) (2014). Similarly, the Town offers no coherent justification for restricting the size of directional signs to 6 square feet while allowing other signs to reach 20 square feet. See §§ 4.402(J), (P)(1). The best the Town could come up with at oral argument was that directional signs "need to be smaller because they need to guide travelers along a route." Tr. of Oral Arg. 40. Why exactly a smaller sign better helps travelers get to where they are going is left a mystery. The absence of any sensible basis for these and other distinctions dooms the Town's ordinance under even the intermediate scrutiny that the Court typically applies to "time, place, or manner" speech regulations. Accordingly, there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.

I suspect this Court and others will regret the majority's insistence today on answering that question in the affirmative. As the years go by, courts will discover that thousands of towns have such ordinances, many of them "entirely reasonable." *Ante,* at 2231. And as the challenges to them mount, courts will have to invalidate one after the other. (This Court may soon find itself a veritable Supreme Board of Sign Review.) And courts will strike down those democratically enacted local laws even though no one—certainly not the majority—has ever explained why the vindication of First Amendment values requires that result. Because I see no reason why such an easy case calls for us to cast a constitutional pall on reasonable regulations quite unlike the law before us, I concur only in the judgment.

All Citations

135 S.Ct. 2218, 192 L.Ed.2d 236, 83 USLW 4444, 15 Cal. Daily Op. Serv. 6239, 2015 Daily Journal D.A.R. 6831, 25 Fla. L. Weekly Fed. S 383

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The Town's Sign Code is available online at http://www. gilbertaz.gov/departments/development-service/planning-development/land-development-code (as visited June 16, 2015, and available in Clerk of Court's case file).

2 A "Temporary Sign" is a "sign not permanently attached to the ground, a wall or a building, and not designed or intended for permanent display." Glossary 25.

3 The Code defines "Right–of–Way" as a "strip of publicly owned land occupied by or planned for a street, utilities, landscaping, sidewalks, trails, and similar facilities." *Id.,* at 18.

4 The Sign Code has been amended twice during the pendency of this case. When litigation began in 2007, the Code defined the signs at issue as "Religious Assembly Temporary Direction Signs." App. 75. The Code entirely prohibited placement of those signs in the public right-of-way, and it forbade posting them in any location for more than two hours before the religious assembly or more than one hour afterward. *Id.,* at 75–76. In 2008, the Town redefined the category as "Temporary Directional Signs Related to a Qualifying Event," and it expanded the time limit to 12 hours before and 1 hour after the "qualifying event." *Ibid.* In 2011, the Town amended the Code to authorize placement of temporary directional signs in the public right-of-way. *Id.,* at 89.

* Of course, content-neutral restrictions on speech are not necessarily consistent with the First Amendment. Time, place, and manner restrictions "must be narrowly tailored to serve the government's legitimate, content-neutral interests." *Ward*

v. Rock Against Racism, 491 U.S. 781, 798, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). But they need not meet the high standard imposed on viewpoint- and content-based restrictions.

* Even in trying (commendably) to limit today's decision, Justice ALITO's concurrence highlights its far-reaching effects. According to Justice ALITO, the majority does not subject to strict scrutiny regulations of "signs advertising a one-time event." *Ante,* at 2233 (ALITO, J., concurring). But of course it does. On the majority's view, a law with an exception for such signs "singles out specific subject matter for differential treatment" and "defin[es] regulated speech by particular subject matter." *Ante,* at 2227, 2230 (majority opinion). Indeed, the precise reason the majority applies strict scrutiny here is that "the Code singles out signs bearing a particular message: the time and location of a specific event." *Ante,* at 2231.

135 S.Ct. 2887
Supreme Court of the United States

Robert THAYER, et al., petitioners,
v.
CITY OF WORCESTER, MASSACHUSETTS.

No. 14–428.
|
June 29, 2015.

Synopsis

Case below, 755 F.3d 60.

Opinion

Motion of Homeless Empowerment Project for leave to file a brief as *amicus curiae* granted. On petition for writ of certiorari to the United States Court of Appeals for the First Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the First Circuit for further consideration in light of *Reed v. Town of Gilbert,* 576 U.S. ——, 135 S.Ct. 2218, —— L.Ed.2d —— (2015).

All Citations

135 S.Ct. 2887 (Mem), 192 L.Ed.2d 918, 83 USLW 3251, 83 USLW 3922, 83 USLW 3928

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144 F.Supp.3d 218
United States District Court, D. Massachusetts.

Robert THAYER, Sharon Brownson, and Tracy Novick, Plaintiffs,
v.
CITY OF WORCESTER, Defendant.

CIVIL ACTION No. 13-40057-TSH
|
Signed November 9, 2015

Synopsis

Background: City residents who regularly panhandled in public areas and school committee member who regularly campaigned on traffic islands throughout city brought action against city challenging ordinances that prohibited panhandling and soliciting in an aggressive manner and restricted standing or walking on traffic islands or roadways. City and plaintiffs moved for summary judgment.

Holdings: The District Court, Hillman, D.J., held that:

[1] ordinance that made it unlawful for any person to beg, panhandle, or solicit any other person in an aggressive manner was content-based, and therefore subject to strict scrutiny;

[2] ordinance that restricted pedestrian use of traffic islands and roadways was content neutral, and thus was required to be narrowly tailored to serve the government's legitimate, content neutral interests;

[3] ordinance that prohibited soliciting any person in public after dark was substantially overbroad; and

[4] ordinance that prohibited aggressive panhandling was not the least restrictive means available to promote the safety and welfare of the public and was duplicative of existing criminal laws and therefore did not survive strict scrutiny;

[5] ordinance that restricted pedestrian use of traffic islands and roadways was not narrowly tailored to serve government's legitimate interest in public safety.

Residents' motion granted, and city's motion denied.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (17)

[1] Constitutional Law
Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising

Soliciting contributions is expressive activity that is protected by the First Amendment free speech clause. U.S. Const. Amend. 1.

Cases that cite this headnote

[2] Constitutional Law
Political speech, beliefs, or activity in general

Constitutional Law
Signs

Political speech involving holding up political signs and waving to passing motorists and pedestrians is speech which is afforded the strongest protection under the First Amendment free speech clause. U.S. Const. Amend. 1.

Cases that cite this headnote

[3] Constitutional Law
Justification for exclusion or limitation

Constitutional Law
Justification for exclusion or limitation

In a traditional or designated public forum, content-neutral restrictions on the time, place, and manner of expression must be narrowly tailored to serve some substantial governmental interest, and must leave open adequate alternative channels of communication in order to survive scrutiny under First Amendment free speech clause. U.S. Const. Amend. 1.

Cases that cite this headnote

[4] Constitutional Law
Freedom of Speech, Expression, and Press

Viewpoint-based restrictions on speech are prohibited, and any content-based restriction must satisfy strict scrutiny, but reasonable time,

place, and manner limitations are permissible under First Amendment free speech clause. U.S. Const. Amend. 1.

4 Cases that cite this headnote

[5] **Constitutional Law**
Viewpoint or idea discrimination

Constitutional Law
Content-Based Regulations or Restrictions

Under First Amendment free speech clause, a government, including a municipal government vested with state authority, has no power to restrict expression because of its message, its ideas, its subject matter, or its content. U.S. Const. Amend. 1.

Cases that cite this headnote

[6] **Constitutional Law**
Content-Based Regulations or Restrictions

Pursuant to First Amendment free speech clause, government regulation of speech is "content based" if a law applies to particular speech because of the topic discussed or the idea or message expressed; this requires a court to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys. U.S. Const. Amend. 1.

3 Cases that cite this headnote

[7] **Constitutional Law**
Content-Based Regulations or Restrictions

Constitutional Law
Strict or exacting scrutiny; compelling interest test

Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose, but both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny under First Amendment free speech clause. U.S. Const. Amend. 1.

Cases that cite this headnote

[8] **Constitutional Law**
Strict or exacting scrutiny; compelling interest test

Strict scrutiny must apply to evaluation of a law under First Amendment free speech clause if either the law is content based on its face, or the legislature's purpose or justification for enacting the law was content base: a law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech. U.S. Const. Amend. 1.

6 Cases that cite this headnote

[9] **Constitutional Law**
Content-Based Regulations or Restrictions

Illicit legislative intent is not the sine qua non of a violation of the First Amendment free speech clause and a party opposing the government need adduce no evidence of an improper censorial motive to show that a regulation is content based; an innocuous justification cannot transform a facially content-based law into one that is content neutral. U.S. Const. Amend. 1.

6 Cases that cite this headnote

[10] **Constitutional Law**
Content-Neutral Regulations or Restrictions

In evaluating a law under First Amendment free speech clause, for purposes of determining whether strict scrutiny applies, a court must first determine whether the law is content neutral on its face, and thereafter consider the purpose or justification behind its enactment. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[11] **Constitutional Law**
Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising

Constitutional Law

Begging or panhandling

Municipal Corporations

Prohibitory ordinances

City ordinance that made it unlawful for any person to beg, panhandle, or solicit any other person in an aggressive manner was content-based, and therefore subject to strict scrutiny under First Amendment free speech clause, in city residents' and school committee member's action against city challenging ordinance. U.S. Const. Amend. 1.

Cases that cite this headnote

[12] Constitutional Law

Streets and highways

Municipal Corporations

Mode of Use and Regulation Thereof in General

City ordinance that restricted pedestrian use of traffic islands and roadways was content neutral, and thus was required to be narrowly tailored to serve the government's legitimate interests, but did not need to be the least restrictive means to do so, in order to survive scrutiny under First Amendment free speech clause in city residents' and school committee member's action challenging ordinance, where ordinance did not seek to restrict a particular viewpoint or a specific subject matter, and city's motivation in enacting the ordinance was its fear of someone being hurt or injured. U.S. Const. Amend. 1.

Cases that cite this headnote

[13] Constitutional Law

Narrow tailoring requirement; relationship to governmental interest

In order for a content neutral ordinance to pass constitutional muster under First Amendment free speech clause, it must be narrowly tailored to serve the government's legitimate, content neutral interests, but need not be the least restrictive or least intrusive means of doing; so long as the means chosen are not substantially broader than necessary to achieve the government's interest the regulation will not be invalid simply because a court concludes the government's interest could be adequately served by some less-speech-restrictive alternative. U.S. Const. Amend. 1.

Cases that cite this headnote

[14] Constitutional Law

Streets and highways

Constitutional Law

Sidewalks

A city has a legitimate interest in promoting the safety and convenience of its citizens on public sidewalks and streets, for purposes of determining whether a content based law is narrowly tailored to serve a substantial government interest, as required to survive strict scrutiny under First Amendment free speech clause. U.S. Const. Amend. 1.

Cases that cite this headnote

[15] Constitutional Law

Begging or panhandling

Municipal Corporations

Prohibitory ordinances

City ordinance that prohibited soliciting any person in public after dark was substantially overbroad, and thus was not narrowly tailored to meet a compelling government interest, as required to survive strict scrutiny under First Amendment free speech clause in city residents' and school committee member's action challenging ordinance; city failed to cite any evidence or provide any meaningful argument to establish that such blanket prohibition on panhandling at night was necessary to advance public safety. U.S. Const. Amend. 1.

Cases that cite this headnote

[16] Constitutional Law

Begging or panhandling

Municipal Corporations

Prohibitory ordinances

City ordinance that prohibited aggressive panhandling was not the least restrictive means available to promote the safety and welfare of the

public and was duplicative of existing criminal laws and therefore did not survive strict scrutiny under First Amendment free speech clause in city residents' and school committee member's action challenging ordinance, despite fact that city cited evidence regarding number of instances of aggressive panhandling and the possibility that an individual known to aggressively panhandle may have been fatally struck by a motor vehicle while panhandling; evidence cited by city was insufficient to distinguish it from similar ordinances that failed to survive strict scrutiny. U.S. Const. Amend. 1.

Cases that cite this headnote

[17] **Constitutional Law**

Streets and highways

Municipal Corporations

Mode of Use and Regulation Thereof in General

City ordinance that restricted pedestrian use of traffic islands and roadways, which imposed serious burden on speech by prohibiting virtually all speech-related activity on traffic islands and roadways, was not narrowly tailored to serve government's legitimate interest in public safety, and thus did not pass constitutional muster under First Amendment free speech clause, where city did not establish the need for the sweeping ban it chose or consider which traffic islands and roadways actually demanded further safety measures. U.S. Const. Amend. 1.

Cases that cite this headnote

Attorneys and Law Firms

***221** Matthew Segal, Sarah R. Wunsch, American Civil Liberties Union, Kevin P. Martin, Mark E. Tully, Todd J. Marabella, Yvonne W. Chan, Goodwin Procter LLP, Boston, MA, for Plaintiffs.

David M. Moore, Wendy L. Quinn, City of Worcester Law Department, Worcester, MA, for Defendant.

MEMORANDUM OF DECISION AND ORDER

Hillman, D.J.

Background

In January of 2013, the City of Worcester ("City") adopted two ordinances aimed at controlling aggressive panhandling. Specifically, the City of Worcester Revised Ordinances of 2008, as amended through February 5, 2013 ("R.O.") ch. 9, § 16 ("Ordinance 9-16") make it "... unlawful for any person to beg, panhandle or solicit in an aggressive manner." R.O. ch. 13, § 77(a)("Ordinance 13-77," and together with Ordinance 9-16, the "Ordinances") prohibits standing or walking on a traffic island or roadway except for the purpose of crossing at an intersection or crosswalk, or entering or exiting a vehicle or "for some other lawful purpose." On May 31, 2013, the Plaintiffs, Robert Thayer ("Thayer"), Sharon Brownson ("Brownson") and Track Novick ("Novick") brought suit against the City seeking declaratory and injunctive relief and monetary damages. On October 24, 2013, I issued an Order denying Plaintiffs' motion for a preliminary injunction. *See Mem. of Dec. and Order on Pl's Mot. for Prel. Inj.* (Docket No. 32). Plaintiffs appealed the denial of their request for injunctive relief to the First Circuit, which affirmed my Order, except as to Ordinance 9-16's proscription on nighttime solicitation. *See* *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir.2014), *vacated, Thayer v. City of Worcester*, —— U.S. ——, 135 S.Ct. 2887, 192 L.Ed.2d 918 (2015). Plaintiffs then filed a petition for writ of certiorari seeking review in the Supreme Court of the United States. On June 29, 2015, the petition for writ of certiorari was granted, the judgement of the First Circuit was vacated and the matter remanded for further consideration in light of *Reed v. Town of Gilbert*, 576 U.S. ——, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). On July 14, 2015, the First Circuit subsequently vacated its opinion and judgment and remanded the matter to this Court. This Memorandum of Decision and Order addresses the City of Worcester's Motion for Summary Judgment (Docket No. 79) and Plaintiffs' Motion for ***222** Summary Judgment (Docket No. 82). For the reasons set forth below, judgement shall enter in favor of the Plaintiffs.

Standard of Review

Summary Judgment is appropriate where, "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Carroll v. Xerox Corp.*, 294 F.3d 231, 236 (1st Cir.2002) (citing Fed. R. Civ. P. 56(c)). " 'A "genuine" issue is one that could be resolved in favor of either party, and a "material fact" is one that has the potential of affecting the outcome of the case." *Sensing v. Outback Steakhouse of Florida, LLC*, 575 F.3d 145, 152 (1st Cir.2009) (quoting *Calero–Cerezo v. U.S. Dep't. of Justice*, 355 F.3d 6, 19 (1st Cir.2004)).

When considering a motion for summary judgment, the Court construes the record in the light most favorable to the nonmoving party and makes all reasonable inferences in favor thereof. *Sensing*, 575 F.3d at 153. The moving party bears the burden to demonstrate the absence of a genuine issue of material fact within the record. *Id.*, at 152. " 'Once the moving party has pointed to the absence of adequate evidence supporting the nonmoving party's case, the nonmoving party must come forward with facts that show a genuine issue for trial.' " *Id.* (citation to quoted case omitted). " '[T]he nonmoving party "may not rest upon mere allegations or denials of the [movant's] pleading, but must set forth specific facts showing that there is a genuine issue of material fact as to each issue upon which [s/he] would bear the ultimate burden of proof at trial." *Id.* (citation to quoted case omitted). The nonmoving party cannot rely on "conclusory allegations" or "improbable inferences". *Id.* (citation to quoted case omitted). " 'The test is whether, as to each essential element, there is "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." ' " *Id.* (citation to quoted case omitted). "Cross-motions for summary judgment require the district court to 'consider each motion separately, drawing all inferences in favor of each non-moving party in turn.' " *Green Mountain Realty Corp. v. Leonard*, 750 F.3d 30, 38 (1st Cir.2014)(citation to quoted case omitted).

Facts

Enactment of the Ordinances

The City is a municipal corporation incorporated under the laws of Massachusetts. In April 2004, the Worcester City Council ("City Council") asked the City Administration to "review ordinances adopted by other municipalities across the country to address proliferation of panhandling." In response, the City Manager [1] reported that "[c]ourts in other states have ruled that antipanhandling ordinances cannot prohibit peaceful begging," but that "Massachusetts has other statutes to deal with beggars who transgress peaceful limits." He further stated that the Worcester police "have been successful in removing panhandlers from shopping centers and other private property using the laws against trespassing." He also noted that the Worcester Chief of Police, Gary J. Gemme ("Chief Gemme"), "reports that the panhandlers stand stationary out of the traveled portion of the streets."

***223** In October 2004, the City Council again asked the City Manager "to update [it] regarding the implementation of a strategy to reduce the incidence of panhandling throughout the City of Worcester." In response, Chief Gemme sent a report to the City Manager as an "update regarding the implementation of a strategy to reduce the incidence of panhandling throughout the City of Worcester." In this letter, which the City Manager submitted to the City Council, Chief Gemme noted that "[l]aws should differentiate between *aggressive* and *all* [other] panhandling," such as "standing with a sign vs. going out in the roadway," and that the City "already [has] ... laws" applicable to the latter conduct and "they are enforced in Worcester."

At the time the letter was written, there were several statutes and local ordinances already in existence that could have been applied to aggressive solicitation. These included the following prohibitions:

> a. A law prohibiting the stopping of a vehicle or "accosting" the occupant of a vehicle for purposes of solicitation. *See* Mass. Gen. Laws ch. 85, § 17A ("Whoever, for the purpose of soliciting any alms, contribution or subscription or of selling any merchandise, except newspapers, or ticket of admission to any game, show, exhibition, fair, ball, entertainment or public gathering, signals a moving vehicle on any public way or causes the stopping of a vehicle thereon, or accosts any occupant of a vehicle stopped thereon at the direction of a police officer or signal man, or of a signal or device for regulating traffic, shall be punished by a fine of not more than fifty dollars.").

b. A law against disorderly conduct. *See* Mass. Gen. Laws ch. 272, § 53(b) ("Disorderly persons and disturbers of the peace, for the first offense, shall be punished by a fine of not more than $150. On a second or subsequent offense, such person shall be punished by imprisonment in a jail or house of correction for not more than 6 months, or by a fine of not more than $200, or by both such fine and imprisonment"); *see also* *Alegata v. Commonwealth*, 353 Mass. 287, 304, 231 N.E.2d 201 (1967) (disorderly person is one who "with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof ... (a) engages in fighting or threatening, or in violent or tumultuous behavior; or (b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or (c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.").

c. A law against assault and battery. *See* Mass. Gen. Laws ch. 265 § 13A(a) ("Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than 2 $^{1}/_{2}$ years in a house of correction or by a fine of not more than $1,000.").

d. A law against trespass. *See* Mass. Gen. Laws ch. 266, § 120 ("Whoever, without right enters or remains in or upon the dwelling house, buildings, boats or improved or enclosed land, wharf, or pier of another, or enters or remains in a school bus, as defined in section 1 of chapter 90, after having been forbidden so to do by the person who has lawful control of said premises, whether directly or by notice posted thereon, or in violation of a court order pursuant to section thirty-four B of chapter two hundred and eight or section three or four of chapter two hundred and nine A, shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days or both such fine and imprisonment.").

e. A law against the obstruction of streets, sidewalks, and crosswalks. *See* ***224** Worcester, Mass., Rev. Ordinances ch. 12, § 25(b) ("No person shall stand, or place any obstruction of any kind, upon any street, sidewalk or crosswalk in such a manner as to obstruct a free passage for travelers thereon.").

Over the next several years, the City Council continued to request updates on incidence of panhandling within the City. In March 2010, the City Council also asked the City Solicitor to report on "options for addressing the distinction between a panhandler, groups collecting funds with tag permits, and groups without permits."

In a July 17, 2012, report to the City Council, the City Manager indicated that while those panhandling were not necessarily homeless, there was a desire in the City to connect panhandlers with resources in the community: housing, medical services, food, etc. Drafts of the ordinances now under scrutiny were then proposed by the City Manager to the City Council as part of "a multi-faceted, community-wide response" involving a "mix of education, outreach, and enforcement" to reduce public safety issues in relation to aggressive panhandling and to ensure safer travel on the public ways, and in particular on City traffic islands and medians. Part of this broad-based response involved implementing an outreach program where workers would make contact with those panhandling in order to assess their needs and to connect the individuals with community-based resources. The City had previously engaged in "discussions regarding the implementation of a strategy to reduce the incidence of panhandling" within City limits. The City Manager submitted a letter from the City Solicitor, David M. Moore ("City Solicitor") which opined that "the [C]ity cannot legally prohibit peaceful panhandling that does not interfere with the movement of traffic or otherwise endanger public safety." The City Solicitor noted, however, that "certain methods of panhandling ... are currently regulated by state law," including laws against "disorderly conduct, trespass, and assault."

In the July 17, 2012 report, the City Manager described "passive" and "aggressive" panhandling as follows:

> Panhandling—or approaching pedestrians or drivers to beg for money or food—may be classified as either passive or aggressive. Passive panhandling is defined as "soliciting without threat or menace, often without any word exchanged, while aggressive panhandling is defined as soliciting coercively, with actual or implied threats, or menacing actions."

"Peaceful panhandling" was further described as "constitutionally protected speech under the First Amendment to the U.S. Constitution." The report also noted that "[w]hile peaceful begging is a protected activity, if the person's conduct transgresses those peaceful limits there are

other State statutes that deal with such behavior," which include laws prohibiting "trespass (i.e., private property/ businesses), assault and battery, disorderly conduct (so long as that conduct is tumultuous), and G.L. c. 85, § 17A." These laws remain in effect in Massachusetts and therefore, are available to prohibit the obstruction of traffic, prevent signaling, stopping, or accosting occupants of motor vehicles, or address other aggressive solicitation. The City Manager further reported that "Worcester Police were dispatched to 181 incidents between January 2011 and January 2012 in which there were reports of aggressive behavior by an individual who may have been involved in panhandling."

On October 30, 2012, the City Manager reported to the City Council about the City's non-legislative efforts to address the panhandling situation. Those efforts ***225** included employing outreach workers to discover reasons for panhandling so that a determination could be made as to what resources were needed and to connect those needing assistance with social service agencies. The City Manager noted that of the thirty-eight panhandlers that had been engaged by the outreach workers, sixteen individuals reported to be homeless, twenty had a history of mental health issues and approximately seventy-five percent had substance abuse issues. A majority of those individuals did express a desire to work with an outreach worker to obtain assistance. The City Manager proposed two ordinances for the City Council's consideration, both of which were intended to address the incidence of panhandling within the City: R.O. ch. 9, § 16, "an ordinance prohibiting aggressive begging, soliciting and panhandling in public places," and R.O. ch.13, § 77(a), "an ordinance relative to pedestrian safety." The City Council the requested opinions on the constitutionality of granting exemptions to certain speakers, such as nonprofit groups soliciting charitable donations. Of specific concern was the potential impact of the proposed ordinances on "Tag Days." Prior to the adoption of the Ordinances, nonprofit groups and organizations could apply to the City for permits allowing them to stand on traffic islands and "go out in the street" to solicit donations in public on a particular day. "Tag Day" fundraising efforts took place in the City for many years prior to the enactment of the Ordinances. Neither side cites to any reports that soliciting from motorists during Tag Days has resulted in any accidents or injury in the City. The City Council requested that the City Solicitor give an opinion on whether the "inclusion of a separate category of tag sales [sic] would impact on the constitutionality of controlling panhandling," as well as "whether it is legal to separate non-profit groups from panhandlers." In response to the City Council's request, the City Solicitor advised on November 7, 2012: "Allowing tag day solicitations while banning other solicitations would create a distinction based on the content of the speech or the nature of the speaker. This distinction would not survive scrutiny under the Constitution."

On November 13, 2012, the City Council requested further clarification from the City Solicitor regarding "whether the City Council would be able to waive the enforcement [of the Ordinances] to allow Social Service Agencies, Charitable Groups and baseball teams to conduct tag days" and to further report "any impact there would be if it was decided to have a waiver built into a Panhandling Ordinance." The City Solicitor did not respond to this request. At the January 3, 2013 City Council meeting, the question was asked as to whether there was "any way to pass these ordinances without them impacting Tag Days, for example." Councilors also inquired whether it would be possible to campaign from highly visible traffic islands if proposed R.O. ch.13, § 77(a) passed, "[f]or instance, [as] a political candidate standing in the middle of Newton Square or Lincoln Square." The City Solicitor responded to the City Council by stating that "there is an element of discretion introduced into the ordinance for the police officers to identify a problem with public safety or not, and if there is no problem with public safety, they would not tell anyone [on a traffic island], obviously, to move along." On January 29, 2013, the ordinances proposed by the City Manager were adopted as Ordinance 9-16 and Ordinance 13-77. The Ordinances, as adopted, were identical to the draft ordinances proposed by the City Manager in October 2012.

Why the Ordinances were Enacted

The City has acknowledged that "for the most part" police were able to address ***226** complaints of aggressive panhandling prior to adoption of the Ordinances. In adopting the Ordinances, the City Council relied on the City Manager's July 17, 2012 representation that 181 incidents of aggressive panhandling had been reported to the Worcester Police between January 2011 and January 2012—the vast majority of which occurred on private properties, such as convenience stores and gas stations. Although the City Manager's July 17, 2012 report describes 181 incidents occurring from January 2011 to January 2012, the records the City has produced include reports of 196 calls received during that time period, coded "PAN" (for "Panhandlers"). The City did not include incidents that did not appear to be related to panhandling. The City identified these incidents by extracting data "from

a query that was generated [using] key words such as panhandling, begging, [and] soliciting." Some of the incidents do not explicitly describe acts of solicitation or a person being present in the traveled portion of the roadway or on a traffic island. The records the City referenced during this time include incidents which would not constitute "aggressive" solicitation under Ordinance 9-16, or conduct now prohibited by Ordinance 13-77. For example, even though it bears the code DIP indicating "Disorderly Person," Incident No. 11/018893 indicates only a "report of a [white male] brown jacket, jeans, white sneakers and a hat panhandling outside" a Walgreens drug store and that an employee requested "him to be moved along." Incident No. 11/030920 describes a call from a 7/11 reporting a "[black male] 5'5 wearing a jean jacket and jeans outside the store begging customers for money." The majority of solicitation occurred on a set of "major" "desired intersections." Significantly, the City did not consider prohibiting panhandling only at specified major intersections.

The City was also concerned about the "undue influence and/or fear" caused by solicitation within 20 feet of the areas specified Ordinance 9-16 and therefore, enacted the 20 foot buffer zones. The City Manager testified in support of the buffer zone as follows:

> The situation, I think, is defined where being solicited in those situations where you're handling money, working to properly operate an ATM, working close to check cashing businesses where you're coming out with cash in your hands, that within that 20 feet, there would certainly be the potential for improper undue influence. It's that close. It's an immediate situation where having that engagement certainly could produce fear or—fear of coercion. And so 20-foot became what I would consider to be a reasonable distance for people to be able to engage in these types of activities without being coerced or put under improper or undue influence.

The City Manager could not provide any justification for the City's determination that 20 feet, rather than a smaller distance, was necessary to achieve its goals. Furthermore, Ordinance 9-16 prohibits all solicitation within 20 feet of any of the locations described therein, regardless of whether a solicitor intends to cause or is causing undue influence or fear. The City agreed that individuals are not necessarily "aggressive" if they are "selling T-shirts" "within 20 feet of a theater," "selling cookies" or "hotdog[s]" "within 20 feet of the entrance to a place of public assembly," or "holding a sign" seeking aid "within 20 feet of an outdoor seating area," yet all such activities are precluded by Ordinance 9-16.

The City acknowledges that not all solicitations within 20 feet of a designated location poses a public safety risk. For example, standing with a sign is an example of "passive" panhandling and is only aggressive if "coupled with other conduct that would potentially create a hazardous situation ***227** for motorists, pedestrians," such as "obstruct[ing] traffic." Without "another overt act of aggression," such passive solicitation within the 20-foot buffer zones does not pose a problem or implicate any safety interest. However, Ordinance 9-16 bars "passive" panhandling in the 20-foot buffer zone even if the panhandler does not engage in aggressive conduct. The City asserts that "imped[ing] access and egress" to the areas delineated in Ordinance 9-16 establishes an appropriate safety justification for prohibiting solicitation within 20 feet of these areas. For example, the City has an interest in preventing solicitors "from interfer[ing] with egress or ingress" to ATMs, theatres, mass transit stops or facilities because a person seeking donations may block the entrance or exit, creating an unwilling, "captive audience." However, the Ordinances do not prevent parties from "impeding access and egress" to the designated areas if they are *not* seeking an immediate donation of money or another thing of value, or offering to immediately exchange and/or sell any goods or services. For example, a person may engage in political advocacy near any of the designated areas or even lurk near an ATM for an extended period of time engaging in conversation with people entering and exiting," without violating Ordinance 9-16. Ordinance 9-16 also prohibits any solicitation from one half-hour before until one half hour after dark, regardless of whether that solicitation inspires alarm and fear, or whether it occurs in well-lit areas. The City enacted a categorical approach against solicitation during these time periods because it believed it would be too difficult to enforce a more targeted prohibition that focused on areas that are not well-lit. The City also acknowledges that solicitation at night is not, "[i]n and of itself," an aggressive act; rather, night-time solicitation is aggressive only if the solicitor also engages in further aggressive behavior.

As to Ordinance 13-77, the City has asserted that the "fear of someone being hurt and/or injured" drove its adoption, although it was unaware of any accidents or injuries caused by speech-related activities on City traffic islands. None of the witnesses who testified for the City was aware of any accidents or injuries caused by speech-related activities on traffic islands within City limits, nor was any witness aware of any calls or complaints made to police in response to people engaged in political campaigning or political issue advocacy from traffic islands. The City Manager testified at his deposition that about the safety interest in drafting Ordinance 13-77:

> A. Both tag days, as well as panhandling that had come off the public sidewalk and began to proliferate within the public way gave great rise to fear of someone being hurt and/or injured. And in this day and age of distracted driving being more—probably the most prevalent in our history, it was time to address it. Failing that, there was going to be a tragedy. And one tragedy would have been one tragedy too many.
>
> Q. Was there any particular incident that drove the drafting and the passing of the ordinance?
>
> A. It was the preponderance of incidents where complaints came in that tag days were walking the white lines of a divided street, where traffic signals were ignored, where aggressive panhandling, people that were unfortunately and horribly had physical challenges were trying to maneuver and negotiate between moving cars on the white lines, people that were standing unsteadily, soliciting on small islands meant to guide traffic, not meant to be a plaza or place to gather or stand. ...

As to whether existing laws were sufficient to address the concerns raised by the City Council, the City, through a police department ***228** witness testified that "the activity associated with aggressive panhandling didn't always fall squarely into an existing statute," and although there are laws that pertain to trespassing and disorderly conduct for instance, they could be difficult to enforce in a panhandling situation where "just the right circumstances had to give rise for charges to be imposed."

The Ordinances

Ordinance 9-16

The preamble to Ordinance 9-16 provides in relevant part, as follows:

> (a) *Declaration of Findings and Policy.*
>
> The city of Worcester, acting by and through its City Council, hereby makes the following findings:
>
> (1) The City of Worcester has a duty to protect the rights of all people to exercise their First Amendment rights safely. The City of Worcester has a compelling governmental interest in imposing certain reasonable time, place and manner regulations whenever potential First Amendment activities such as begging, solicitation and panhandling occur on streets, highways, sidewalks, walkways, plazas, and other public venues within the City;
>
> (2) This ordinance is not intended to limit any persons from exercising their constitutional right to solicit funds, picket, protest or engage in constitutionally protected activities. The provisions of this division are expressly established to most narrowly tailor any such restrictions to protect the First Amendment rights of all people within the City as well as the rights of non-participating people and their property, and to ensure the rights and safety of all people and/or property to the extent possible;
>
> (3) Persons approached by individuals asking for money, objects or other things of any value are particularly vulnerable to real, apparent or perceived coercion when such request is accompanied by or immediately followed or preceded with aggressive behavior ....
>
> (4) The City desires to respect a person's potential right to solicit, beg or panhandle while simultaneously protecting another's right to not be unduly coerced.
>
> (5) The City further finds that aggressive soliciting, begging or panhandling of persons within 20 feet of any outdoor seating area of any cafe, restaurant or other business, bank, automated teller machine, automated teller machine facility, check cashing business, mass transportation facility, mass transportation stop, or pay telephone also subjects people being solicited to improper and undue influence and/or fear and should not be allowed.

(6) Persons approaching other individuals in an aggressive manner asking for money, objects or other things of any value after dark in public places inspire alarm and fear, which coupled with the inherent difficulty of establishing identity should not be allowed.

(b) *Purpose and Intent.*

The public purpose of this ordinance is to protect the rights of all peoples to exercise their First Amendment rights as well as the people and/or property of those who chose to be non-participating.

Id., at (a)-(b).

Ordinance 9-16 makes it "unlawful for any person to beg, panhandle or solicit any other person in an aggressive manner," and provides that "[a]ny police officer observing any person violating this provision may request or order such person to cease and desist in such behavior and may arrest such person if they fail to comply with such request or order." The penalty for ***229** violating the ordinance is a fine of up to $50.00 "for each such day during which the violation is committed, continued or permitted, or that the Court may impose such community service as it shall determine in lieu of a monetary fine." *Id.*, at (d)-(e).

For purposes of Ordinance 9-16, the operative terms are defined as follow:

"*Beg*," "*begging*," or "*panhandling*" shall be synonymous and shall mean asking for money or objects of value with the intention that the money or object be transferred at that time and at that place.

"*Solicit*" or "*Soliciting*" shall include using the spoken, written, or printed word, bodily gestures, signs, or other means of communication with the purpose of obtaining an immediate donation of money or other thing of value the same as begging or panhandling and also include the offer to immediately exchange and/or sell any goods or services.

"*Aggressive manner*" shall mean:

(1) approaching or speaking to a person or following a person before during or after soliciting if that conduct is intended or is likely to cause a reasonable person to fear bodily harm to oneself or to another, or damage to or loss of property or otherwise to be intimidated into giving money or other thing of value;

(2) continuing to solicit from a person after the person has given a negative response to such soliciting;

(3) intentionally touching or causing physical contact with another person or their property without that person's consent in the course of soliciting;

(4) intentionally blocking or interfering with the safe or free passage of a pedestrian or vehicle by any means, including unreasonably causing a pedestrian or vehicle operator to take evasive action to avoid physical contact;

(5) using violent or threatening language and/or gestures toward a person being solicited, or toward their property, which are likely to provoke an immediate violent reaction from the person being solicited;

(6) following the person being solicited, with the intent of asking that person for money or other things of value;

(7) soliciting money from anyone who is waiting in line for tickets, for entry to a building or for any other purpose;

(8) soliciting in a manner with conduct, words or gestures intended or likely to cause a reasonable person to fear immediate bodily harm, danger or damage to or loss of property or otherwise be intimidated into giving money or any other thing of value;

(9) begging in a group of two or more persons in an intimidating fashion;

(10) soliciting any person within 20 feet of the entrance to or parking area of any bank, automated teller machine, automated teller machine facility, check cashing business, mass transportation facility, mass transportation stop, public restroom, pay telephone or theatre or place of public assembly, or of any outdoor seating area of any café, restaurant or other business;

(11) soliciting any person in public after dark, which shall mean the time from one-half hour before sunset to one-half hour after sunrise.

"Public place" shall mean a place to which the public has access, including, but not limited to: a place which a governmental entity has title, any street open to public use, bridge, sidewalk, walkway, driveway, parking lot, plaza, transportation facility, school, park, or playground, and the doorways and entrances to building and dwellings.

Id., at (c).

See R.O. ch. 13, § 1 (emphasis in original).

Ordinance 13-77

Ordinance 13-77 provides as follows:

> ***230** (a) Pedestrians shall obey the directions of police officers directing traffic. Whenever there is an officer directing traffic, or whenever there is a traffic control signal within three hundred feet of a pedestrian, no such pedestrian shall cross a way or roadway except at such controlled location. Pedestrian crossings shall be made within the limits of marked crosswalk and as hereinafter provided. **No person shall, after having been given due notice warning by a police officer, persist in walking or standing on any traffic island or upon the roadway of any street or highway, except for the purpose of crossing the roadway at an intersection or designated crosswalk or for the purpose of entering or exiting a vehicle at the curb or for some other lawful purpose. Any police officer observing any person violating this provision may request or order such person the remove themselves from such roadway or traffic island and may arrest such person if they fail to comply with such request or order.***
>
> (b) It shall be unlawful for any person to actuate a pedestrian control signal or to enter a crosswalk unless a crossing of the roadway is intended.

Id., at (a)-(b) (emphasis in original).

For purposes of Ordinance 13-77, the operative terms are defined as follows:

> *crosswalk*—that portion of a roadway ordinarily included within the prolongation or connection of curb lines and property lines at intersections, or any portion of a roadway clearly indicated for pedestrian crossing by lines on the road surface or by other markings or signs.
>
> *roadway*—that portion of a street or highway between the regularly established curb lines or that part improved and intended to be used for vehicular traffic.
>
> *traffic island*—**any area or space within a roadway which is set aside by the use of materials or paint for the purpose of separating or controlling the flow of traffic and which is not constructed or intended for use by vehicular traffic or by pedestrians, unless such area or space is marked or otherwise designated as a crosswalk.**

Enforcement of the Ordinances

As of the date that the City filed its motion for summary judgment, there had been thirty one arrests for violation of Ordinance 9-16. Groups have continued to engage in expressive activity on traffic islands and roadways in the City. For example:

> a. On October 3, 2013, supporters of City Council candidate Frederick C. Rushton were observed standing with campaign signs on the Newton Square rotary.
>
> b. On October 4, 2013, supporters of City Council candidate Peter Kush were observed standing with campaign signs on the Newton Square rotary.
>
> c. On October 17, 2013, supporters of City School Committee candidate Hilda Ramirez were observed standing with signs at that same location.
>
> d. On May 17, 2014, members of the Worcester Fire Department were observed standing on a traffic island to raise money for the Muscular Dystrophy Association of Massachusetts ("MDAM").

There is no evidence that the police were aware of any of these incidents, or that any of these incidents resulted in enforcement actions by the City or its police department. In 2013-2014, there were 30 incidents involving persons who were arrested for allegedly violating the Ordinances. In 22 of the 29 incidents ***231** (75.9%), the suspect was charged with at least one other offense in addition to alleged violation of the Ordinances. These other offenses included trespassing, drug possession, disorderly conduct, and disturbing the peace. Sixteen of the 29 arrests (55.2%) involved the same four individuals.

On February 25, 2015, Michael Gorham ("Gorham"), an individual known to exhibit frequent aggressive panhandling behavior was involved in a pedestrian accident. Gorham had been arrested nine times for aggressive panhandling, the most recent arrest occurring at about 2:00 p.m. on February 25, 2015, at the intersection of Chandler Street and Park Avenue in the City. At approximately 11:45 p.m. that same day, Gorham was struck by a motor vehicle while he was in the middle of Chandler Street, and at the time of the filing of the

City's motion was in critical condition (he has since died of his injuries).

The Plaintiffs

Thayer and Brownson are City residents. Thayer and Brownson are unemployed, and have been intermittently homeless for many years. They regularly stand in public areas in the City holding signs with messages asking passersby for help or money. They rely on donations they receive to supplement income from Social Security, Social Security Disability Insurance, and the Supplemental Nutrition Assistance Program that they share. Before the Ordinances were enacted, Thayer and Brownson also stood on City traffic islands holding signs soliciting help. While soliciting, Thayer and Brownson do not step into the street to signal vehicles, and do not approach a vehicle unless the vehicle has stopped and an occupant indicates that s/he wishes to make a donation. Since the passage of the Ordinances, Thayer has continued to hold a sign asking for aid on sidewalks in various locations throughout the City, including on the sidewalk at the corner of Park Avenue and Highland Street near the entrance to Elm Park, a place of public assembly under Ordinance 9-16. Thayer sometimes stands in public, holding his sign as it begins to get dark. Since the passage of the Ordinances, Thayer has been told on multiple occasions to "get out" and cease solicitation on the sidewalk near the entrance to Elm Park by Worcester police officers. After the passage of the Ordinances, while Thayer was holding his sign, police told him to stop soliciting, as there was "no more signing" allowed. More specifically, Thayer was told "we passed a new ordinance, there's no more signing in the City of Worcester." Thayer was also given written information by the police indicating that panhandling from traffic islands was now prohibited. Thayer no longer solicits from traffic islands, but would continue to do so if not for the Ordinances.

Since the passage of the Ordinances, Brownson has continued to stand in public areas in the City holding a sign asking for aid. Brownson sometimes stands in public, holding her sign, after dark as defined by Ordinance 9-16. In order to avoid violating Ordinance 13-77, Brownson no longer solicits from traffic islands. If not for this ordinance, Brownson would continue to solicit from traffic islands within the City. Thayer and Brownson both agreed that walking back and forth into the street can be dangerous. They also were familiar with Gorham, who had been arrested for aggressive panhandling. They agreed that his "obnoxious" and aggressive behavior warranted arrest, such as going out into traffic, and yelling at drivers, and Thayer stated, "I wouldn't want [him] coming up to my car."

Novick has been an elected member of the Worcester School Committee since 2009. In biennial elections before the passage ***232** of Ordinance 13-77, Novick regularly campaigned on traffic islands and rotaries throughout the City, along with many other local politicians. With the passage of Ordinance 13-77, Novick now fears that she would be fined or arrested if she were to campaign from traffic islands or median strips. If not for this ordinance, Novick would continue to campaign from traffic islands within the City. Novick and her supporters have held signs on sidewalks or other locations which do not violate Ordinance 13-77.

Discussion

What level of scrutiny to employ?

[1] **[2]** Soliciting contributions is expressive activity that is protected by the First Amendment. In *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), the United States Supreme Court struck down an ordinance prohibiting solicitations by charitable organizations that did not use at least seventy-five per cent of their revenues for charitable purposes. The Court reaffirmed that "charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes-that are within the protection of the First Amendment.... [S]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues, and ... without solicitation the flow of such information and advocacy would likely cease." *Id.* at 632, 100 S.Ct. 826; *see also* *United States v. Kokinda*, 497 U.S. 720, 725, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990)(solicitation is recognized form of speech protected by First Amendment); *Benefit v. City of Cambridge*, 424 Mass. 918, 922–23, 679 N.E.2d 184, 187–88 (1997)(same). Furthermore, it is black letter law that political speech of the type in which Ms. Novick seeks to engage, *i.e.*, she and her supporters holding up political signs and waving to passing motorists and pedestrians, is speech which is afforded the strongest protection under

the First Amendment. *See* *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021 (9th Cir.2009)(political speech is core First Amendment speech critical to function of our democratic system).

[3] **[4]** Because the activities in which the Plaintiffs seek to engage are protected speech, the Court's first task is to determine what level of judicial scrutiny to apply in this case. "The Supreme Court has established different levels of scrutiny for analyzing alleged First Amendment violations, depending on where the speech takes place. In this case, the Plaintiffs seek to engage in free expression in areas which have been recognized as traditional public forums, *i.e.* city sidewalks, streets, traffic islands and medians. *See* *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir.2015). "In a traditional or designated public forum, content-neutral restrictions on the time, place, and manner of expression must be narrowly tailored to serve some substantial governmental interest, and must leave open adequate alternative channels of communication." *New England Re'l Council of Carpenters v. Kinton*, 284 F.3d 9, 20 (1st Cir.2002). Moreover, "viewpoint-based restrictions are prohibited, and any content-based restriction must satisfy strict scrutiny, but reasonable time, place, and manner limitations are permissible." *Watchtower Bible and Tract Soc. of New York, Inc. v. Sagardia De Jesus*, 634 F.3d 3, 11 (1st Cir.2011).

Content-Based Versus Content-Neutral Speech

[5] "The First Amendment, applicable to the States through the Fourteenth ***233** Amendment, prohibits the enactment of laws 'abridging the freedom of speech' ... [A] government, including a municipal government vested with state authority, 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.' Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.

[6] **[7]** Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

[The Supreme Court] has also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be " 'justified without reference to the content of the regulated speech,' " or that were adopted by the government 'because of disagreement with the message [the speech] conveys,' Those laws, like those that are content based on their face, must also satisfy strict scrutiny.

[8] **[9]** **[10]** *Reed v. Town of Gilbert, Ariz.*, 573 U.S. ——, 135 S.Ct. 2218, 2226–27, 192 L.Ed.2d 236 (2015)(internal citations and citation to quoted authorities omitted). Thus, strict scrutiny must apply if either the law is content based on its face, *or* the legislature's purpose or justification for enacting the law was content base: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech ... " '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,' " and a party opposing the government "need adduce 'no evidence of an improper censorial motive.' Although 'a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary.' In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* at ——, 135 S.Ct. at 2228. Thus, the Court must first determines whether the law is content neutral on its face and thereafter, consider the purpose or justification behind its enactment. *Id.*

[11] As to Ordinance 9-16, a protracted discussion of this issue is not warranted as substantially all of the Courts which have addressed similar laws since *Reed* have found them to be content based and therefore, subject to strict scrutiny[2]. *See* *McLaughlin v. Lowell*, 140 F.Supp.3d 177, Civ.Act.No. 14–10270–DPW, 2015 WL 6453144 (D.Mass. Oct. 23, 2015); *Browne v. City of Grand Junction*, 136 F.Supp.3d 1276, Civ.Act.No. 14–cv–00809–CMA–KLM, 2015 WL 5728755

(D.Col. Sep. 30, 2015), *see also* *Norton v. City of Springfield*, 2015 WL 4714073 (7th Cir.2015)(remanding to district court to enjoin city's anti-panhandling ordinance in light of *Reed's* mandate that such ordinances be deemed content based); *but see* ***234** *Watkins v. City of Arlington*, 123 F.Supp.3d 856, 860, No. 4:14–CV–381–O, 2015 WL 4755523, at *1 (N.D.Tex. Aug. 12, 2015)(ordinance which regulates all interactions between pedestrians and the occupants of vehicles stopped at traffic lights is content neutral). Therefore, in order for Ordinance 9-16 to pass constitutional muster, the City must establish that it " 'furthers a compelling interest and is narrowly tailored to achieve that interest.' " *Reed*, 135 S.Ct. at 2231 (citation to quoted case omitted).[3] "This is an exacting standard. Content based regulations are 'presumptively invalid,' and it is the 'rare case' in which strict scrutiny is overcome." *McLaughlin*, 140 F.Supp.3d at 187–88, 2015 WL 6453144, at *5 (internal citation and citation to quoted cases omitted).

[12] **[13]** As to Ordinance 13-77, the regulation on its face is content neutral as it does not regulate a particular type of speech, that is, it does not seek to restrict a particular view point, nor does it target a specific subject matter. Looking next to the City's motivation, the City Council enacted the ordinance as the result of its "fear of someone being hurt and/or injured," *i.e.*, for public safety reasons. Thus, the ordinance cannot be said to be content based because its adoption was motivated by the City's disagreement with any particular message being conveyed. *See generally* *Cutting*, 802 F.3d at 84–86. Because Ordinance 13-77 regulates conduct deemed unsafe by the City in "an evenhanded content neutral manner," *see* *Reed*, 135 S.Ct. at 2223, I find that it is content neutral. In order for a content neutral ordinance to pass constitutional muster, it "must be narrowly tailored to serve the government's legitimate, content neutral interests but ... need not be the least restrictive or least intrusive means of doing so... So long as the means chosen are not substantially broader than necessary to achieve the government's interest ... the regulation will not be invalid simply because a court concludes the government's interest could be adequately served by some less-speech-restrictive alternative". *Ward v. Rock Against Racism*, 491 U.S. 781, 798–800, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

Whether Ordinance 9-16 Survives Strict Scrutiny

To determine whether Ordinance 9-16 is constitutional, the Court must first determine the compelling governing interest at stake. From the minutes of the City Council meetings, it is apparent that the primary concern of some councilors appeared to be that panhandling was a blight on the City which should be eliminated at all costs, while other councilors were clearly concerned with the safety and welfare of both those individuals engaged in solicitation as well as members of the public being solicited. The preamble to the ordinance attempts to justify the legislative balancing of the right to exercise First Amendment freedoms, against the rights of the City to impose reasonable time, place, and manner restrictions on panhandling. That preamble ***235** states that: "[p]ersons approached by individuals asking for money, objects or other things of any value are particularly vulnerable to real, apparent or perceived coercion when such request is accompanied by, or immediately followed or preceded with, aggressive behavior." *Ordinance 9-16*, at ¶ (a)(3). While this statement of purposes is somewhat self-serving, it does establish the ostensible reason for enacting the ordinance. It also is responsive to the City Manager's report that, from January 2011-January 2012, Worcester Police were dispatched to 181 incidents of aggressive behavior by individuals who may have been panhandling. Therefore, I find that the City's primary interest in enacting the ordinance was the safety and welfare of it citizens. As to Ordinance 13-77, the primary concern of the City Council appeared to be the safety and welfare of the public.

[14] The City has a legitimate interest in promoting the safety and convenience of its citizens on public sidewalks and streets. *See* *Madsen v. Women's Health Center*, 512 U.S. 753, 768, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994) ("State also has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks ..."); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981) (recognizing state interest in safety and convenience of citizens using public fora); *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) (recognizing state interest in safety and convenience on public roads); *Ayres v. City of Chicago*, 125 F.3d 1010, 1015 (7th Cir.1997) ("There are unquestionable benefits from regulating peddling,

First Amendment or otherwise, [including] ... the control of congestion."); *see also McLaughlin*, 140 F.Supp.3d at 191–92, 2015 WL 6453144 at *8(City of Lowell enacted aggressive panhandling provisions in furtherance of public safety which is a compelling state interest). Therefore, the question becomes whether the provisions of Ordinance 9-16 are narrowly tailored/least restrictive means available.

[15] Before considering the other provisions, I will address Ordinance 9-16's temporal solicitation ban which prohibits "soliciting any person in public after dark, which shall mean the time from one-half hour before sunset to one-half hour after sunrise." *R.O.*, ch. 9, § 16(e)(11). Upon Plaintiffs filing an appeal of my denial of their motion for preliminary injunction, the First Circuit duty panel entered an order temporarily enjoining enforcement of this provision. The panel that heard this case left the temporary restraining order in place after finding that the implicit finding by the duty panel that this provision should be stricken as substantially overbroad was "sound." *See* *Thayer*, 755 F.3d at n. 7. As to this provision, the City has not cited to any evidence or provided any meaningful argument to establish that a "blanket prohibition on panhandling at night is necessary to advance public safety." *Browne*, 136 F.Supp.3d at 1292–93, 2015 WL 5728755 at *12. Therefore, the Court agrees with the Plaintiffs that this provision cannot stand.

[16] If I were writing on a pristine page, I would be inclined to hold that at least some of the other categories of proscribed conduct targeted by Ordinance 9-16 are sufficiently restrictive for achieving the City's goal of promoting the safety and welfare of the public. However, two recent post-*Reed* decisions have addressed almost identical aggressive panhandling ordinances as those addressed in this case. Both cases involved evidence similar to that relied on by the City in this case [4] to ***236** justify enforcement of the aggressive panhandling provisions, and in both the courts found that the municipalities had failed to establish that similar provisions to the following (defined by Ordinance 9-16 to constitute "aggressive" panhandling) survived strict scrutiny. Their failure was because they were duplicative of existing criminal laws and/or they were not the least restrictive means of achieving the government's goal [5]:

(1) continuing to solicit from a person after the person has given a negative response to such soliciting;

(2) following the person being solicited, with the intent of asking that person for money or other things of value;

(3) soliciting money from anyone who is waiting in line for tickets, for entry to a building or for any other purpose; and

(4) soliciting any person within 20 feet of the entrance to or parking area of any bank, automated teller machine, automated teller machine facility, check cashing business, mass transportation facility, mass transportation stop, public restroom, pay telephone or theatre or place of public assembly, or of any outdoor seating area of any café, restaurant or other business.

See McLaughlin, 140 F.Supp.3d 177, 2015 WL 6453144; *Browne*, 136 F.Supp.3d 1276, 2015 WL 5728755 (challenged provisions of ordinance are over inclusive because they prohibit protected speech that poses no threat to public safety).

Additionally, in *McLaughlin*, Judge Woodlock of this Court, again on a record that mirrors this case, applying that same reasoning found restrictions on panhandling identical to the following provisions contained in Ordinance 9-16 to be unconstitutional [6]:

(1) approaching or speaking to a person or following a person before during or after soliciting if that conduct is intended or is likely to cause a reasonable person to fear bodily harm to oneself or to another, or damage to or loss of property or otherwise to be intimidated into giving money or other thing of value;

(2) using violent or threatening language and/or gestures toward a person being solicited, or toward their property, which are likely to provoke an immediate violent reaction from the person being solicited;

(3) intentionally blocking or interfering with the safe or free passage of a pedestrian or vehicle by any means, including unreasonably causing a pedestrian or vehicle operator to take evasive action to avoid physical contact;

(4) soliciting in a manner with conduct, words or gestures intended or likely to cause a reasonable person to fear immediate bodily harm, danger or damage to or loss of property or otherwise ***237** be intimidated into giving money or any other thing of value; and

(5) begging in a group of two or more persons in an intimidating fashion.

McLaughlin, 140 F.Supp.3d at 191–96, 2015 WL 6453144, at **8–11. There is no point in engaging a protracted discussion that in the end will parrot, *albeit* with nuances immaterial to the outcome, the comprehensive analyses of the *Browne* and *McLaughlin* opinions. Suffice to say that for the same reasons adopted by those courts, I find that the entirety of Ordinance 9-16 fails because it is not the least restrictive means available to protect the public and therefore, does not satisfy strict scrutiny. While I find that none of the provisions of Ordinance 9-16 can withstand strict scrutiny as written, the City and other municipalities have raised some legitimate concerns regarding aggressive panhandlers and public safety. Post *Reed*, municipalities must go back to the drafting board and craft solutions which recognize an individuals to continue to solicit in accordance with their rights under the First Amendment, while at the same time, ensuring that their conduct does not threaten their own safety, or that of those being solicited. In doing so, they must define with particularity the threat to public safety they seek to address, and then enact laws that precisely and narrowly restrict *only* that conduct which would constitute such a threat.

Whether Ordinance 13-77 Is Narrowly Tailored to Achieve A Compelling Government Interest

[17] In determining the constitutionality of Ordinances 13-77, once again, I am not writing on a pristine page. In a recent decision, the First Circuit addressed the constitutionality of a similar ordinance enacted in Portland, Maine [7]. As to that ordinance, the First Circuit noted that it "imposes 'serious burdens' on speech" and because it prohibits "virtually all activity on median strips an thus all speech on median strips... it is hard to imagine a median strip ordinance that could ban more speech." [8]. In terms of whether the ordinance was narrowly tailored, the First Circuit noted that the Portland ordinance restricted speech from all median strips throughout Portland, regardless of their size and character—considerations such as pedestrian and vehicular traffic patterns were not given any weight. The First Circuit went on to hold that neither the City of Portland's "interest in protecting people in the streets nor its interest in protecting people in the medians hold on medians holds up as a justification for the ordinance." *Cutting*, 802 F.3d at 89. More specifically, the court found that "[t]he ordinance is ... geographically over-inclusive with respect to the City [of Portland]'s concern that people lingering in all of [its] median strips—no matter which ones—pose a danger to those passing by." *Id.* Ordinance 13-77 suffers from the same infirmities. The City can point to specific medians and traffic islands as to which a pedestrian use should be prohibited in the interest of public safety (the traffic islands and/or medians in Kelly, Newton and Washington Squares come to mind). However, on this record, it has not established the need for the "sweeping ban ... it chose." *Cutting*, 802 F.3d at 92 " 'In short, the City has not shown that it seriously undertook to address the problem with ***238** less intrusive tools readily available to it.' Instead, it 'sacrific[ed] speech for efficiency,' and, in doing so, failed to observe the 'close fit between ends and means' that narrow tailoring demands." *Id.* (internal citation and citation to quoted case omitted). [9]

Given that I have found that the Ordinances must be stricken on the grounds that they unconstitutionally restrict speech, it is not necessary for me to address the Plaintiffs other legal challenges.

Conclusion

IT IS HEREBY ORDERED that:

1. the City of Worcester's Motion for Summary Judgment (Docket No. 79) is ***denied***; and

2. the Plaintiffs' Motion for Summary Judgment (Docket No. 82) is ***granted*** as follows [10]:

a. The City of Worcester Revised Ordinances of 2008, as amended through September 1, 2015 [11], ch. 9, § 16 (Aggressive Begging, Soliciting and Panhandling) is unconstitutional in its entirety; and

b. The following provision contained in City of Worcester Revised Ordinances of 2008, as amended through September 1, 2015, ch. 13, § 77(a)(Crossing Ways or Roadways) is unconstitutional:

No person shall, after having been given due notice warning by a

police officer, persist in walking or standing on any traffic island or upon the roadway of any street or highway, except for the purpose of crossing the roadway at an intersection or designated crosswalk or for the purpose of entering or exiting a vehicle at the curb or for some other lawful purpose. Any police officer observing any person violating this provision may request or order such person the remove themselves from such roadway or traffic island and may arrest such person if they fail to comply with such request or order.

All Citations

144 F.Supp.3d 218

Footnotes

1 Depending on the time frame being referenced, the "City Manager" was either Thomas Hoover or, his successor, Michael V. O'Brien, initially as acting and later as permanent City Manager. Because the identity of the person holding the office at the time of any given event is irrelevant to the disposition of the pending issues, I will refer generally to "City Manager" rather than specify the individual in office at the time.

2 Simply put, *Reed* mandates a finding that Ordinance 9-16 is content based because it targets anyone seeking to engage in a specific type of speech, *i.e.*, solicitation of donations.

3 As recently noted by another judge in this Court, in *McCullen v. Coakley*, —— U.S. ——, 134 S.Ct. 2518, 2530, 189 L.Ed.2d 502 (2014), the Supreme Court stated that in order to satisfy strict scrutiny, a law regulating speech "must be the least restrictive means of achieving a compelling state interest." *McLaughlin*, 186–88 F.Supp.3d at —— and n. 6, 2015 WL 6453144, at *5 and n. 6 (quoting *McCullen*, —— U.S. at ——, 134 S.Ct. at 2530). The Supreme Court has sometimes used the two formulations interchangeably and has not made clear "precisely what those standards mean relative to each other." *Id.*, at n. 6 (noting that the "narrowly tailored" standard is arguably more permissive). Because the Ordinances in this case would not survive regardless of the formulation used (assuming there is a distinction in their application), it is not necessary for me to resolve this issue and like the Supreme Court, I will make no attempt to distinguish between the two.

4 The City has cited stronger evidence in this case than was cited in *Browne* or *McLaughlin* to support its contention that anti-aggressive panhandling ordinances such as Ordinance 9-16 promote a compelling government interest, *i.e.*, public safety. However, the number of instances of aggressive panhandling cited by the City and the possibility that an individual known to aggressively panhandle *may* have been fatally struck by a motor vehicle while engaging in activity prohibited by the ordinance are insufficient to for the Court to find that Ordinance 9-16 withstands strict scrutiny.

5 Because, for example, existing laws are sufficient to address the targeted behavior, or because the prohibited conduct, which constitutes protected expression, is not necessarily intimidating or menacing and therefore, does not constitute a threat to public safety.

6 The ordinance at issue in the Browne case contained similar provisions, however, the plaintiffs in that case did not challenge any of the provisions which prohibited the panhandler from engaging in conduct that is threatening, coercive, obscene or causes a person to reasonably fear for his/her safety.

7 The Portland ordinance provided that: "No person shall stand, sit, stay, drive or park on a median strip ... except that pedestrians may use median strips only in the course of crossing from one side of the street to the other." Portland City Code § 25-16(b); *Cutting v. City of Portland, Maine*, 802 F.3d 79, 81–82 (1st Cir.2015).

8 While the Portland ordinance is limited to medians, Ordinance 13-77 also bans all such activity on traffic islands and in roadways.

9 Rather than regurgitate the First Circuit's entire opinion in *Cutting*, I will make the following brief observations. First, the court identified several other ways in which the Portland ordinance was not narrowly tailored to meet a compelling

government interest. Based on the record before me, the City has provided even less evidence and/or justification for the blanket ban on speech imposed by Ordinance 13-77 and therefore, most, if not all, of those same deficiencies exist with respect thereto. Additionally, the First Circuit provided a detailed road map as to how the City can modify Ordinance 13-77 to address pedestrian safety concerns by other, "less speech restrictive means"—while it again means going back to the drawing board, the opinion makes clear that this is an area that the City can regulate but that to do so will require it to essentially target specific traffic islands and medians based on location and pedestrian and vehicular traffic patterns.

10 "No permanent injunction is required in this case. Massachusetts assumes that its municipalities will 'do their duty when disputed questions have been finally adjudicated' and can 'rightly be expected to set an example of obedience to law.' " *McLaughlin*, 140 F.Supp.3d at 197, 2015 WL 6453144, at *12 (citation to quote case omitted).

11 At the time that this suit was filed, the amendments to the City of Worcester Revised Ordinances ran through February 5, 2013. The City of Worcester Revised Ordinances have further been amended as of September 1, 2015, however, the provisions at issue in this case remain unchanged in the most recent version.

806 F.3d 411
United States Court of Appeals,
Seventh Circuit.

Don NORTON and Karen Otterson, Plaintiffs–Appellants,
v.
CITY OF SPRINGFIELD, ILLINOIS, et al., Defendants–Appellees.

No. 13–3581.
|
Aug. 7, 2015.

Synopsis

Background: Plaintiffs cited for panhandling in violation of city ordinance filed action challenging the constitutionality of the ordinance. Plaintiffs moved for preliminary injunction. The United States District Court for the Central District of Illinois, Richard Mills, J., 2013 WL 5781663, denied motion. Plaintiffs appealed. The Court of Appeals, Easterbrook, Circuit Judge, affirmed, 768 F.3d 713.

Holding: On Petition for rehearing, the Court of Appeals, Easterbrook, Circuit Judge, held that city's anti-panhandling ordinance was not content-neutral, and thus violated free speech rights under the First Amendment.

Reversed and remanded.

Manion, Circuit Judge, filed concurring opinion.

West Headnotes (1)

[1] Constitutional Law
Begging or panhandling

Municipal Corporations
Prohibitory ordinances

City's anti-panhandling ordinance, which prohibited oral requests for immediate payment of money, but permitted signs requesting money and oral requests to send money later, was not content-neutral, and thus violated free speech rights under the First Amendment; speech regulation was content based on its face given that it targeted specific subject matter, even though it did not discriminate among viewpoints within that subject matter, and city did not contend that its ordinance was justified. U.S.C.A. Const.Amend. 1.

24 Cases that cite this headnote

Attorneys and Law Firms

***411** Mark G. Weinberg, Law Office of Mark G. Weinberg, Adele D. Nicholas, Chicago, IL, Matthew A. Brill, Noel E. Miller, Matthew Murchison, Latham & Watkins LLP, Washington, DC, for Plaintiffs–Appellants.

Steven C. Rahn, Matthew Robert Trapp, Office of the Corporation Counsel, Springfield, IL, for Defendants–Appellees.

Before EASTERBROOK, MANION, and SYKES, Circuit Judges.

Opinion

EASTERBROOK, Circuit Judge.

Our first decision in this appeal concluded that Springfield's anti-panhandling ordinance does not draw lines based on the content of anyone's speech. Because the litigants agreed that the ordinance's validity depends on this issue, we affirmed the district court's decision. 768 F.3d 713 (7th Cir.2014). We deferred consideration of the petition for rehearing until the Supreme Court decided *Reed v. Gilbert,* —— U.S. ——, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). Shortly after deciding *Reed,* the Court remanded *Thayer v. Worcester,* 755 F.3d 60 (1st Cir.2014), a panhandling-ordinance decision on which our first opinion ***412** had relied, for further consideration in light of *Reed.* —— U.S. ——, 135 S.Ct. 2887, ——L.Ed.2d —— (2015). At our request, the parties filed supplemental memoranda discussing *Reed*. We now grant the petition for rehearing and apply *Reed* to Springfield's ordinance.

As our first opinion explained, § 131.06 of Springfield's Municipal Code

> prohibits panhandling in its "downtown historic district"—less than 2% of the City's area but containing its principal shopping, entertainment, and governmental areas, including the Statehouse and many state-government buildings. The ordinance defines panhandling as an oral request for an immediate donation of money. Signs requesting money are allowed; so are oral pleas to send money later. Springfield evidently views signs and requests for deferred donations as less impositional than oral requests for money immediately, which some persons (especially at night or when no one else is nearby) may find threatening.

768 F.3d at 714. Plaintiffs contend that the ordinance's principal rule—barring oral requests for money now but not regulating requests for money later—is a form of content discrimination.

The panel disagreed with that submission for several reasons. We observed that the ordinance does not interfere with the marketplace for ideas, that it does not practice viewpoint discrimination, and that the distinctions that plaintiffs call content discrimination appear to be efforts to make the ordinance less restrictive, which should be a mark in its favor. We summed up: "The Court has classified two kinds of regulations as content-based. One is regulation that restricts speech because of the ideas it conveys. The other is regulation that restricts speech because the government disapproves of its message. It is hard to see an anti-panhandling ordinance as entailing either kind of discrimination." 768 F.3d at 717 (citations omitted). We classified the ordinance as one regulating by subject matter rather than content or viewpoint.

Reed understands content discrimination differently. It wrote that "regulation of speech is content based if a law applies to particular speech because of the topic discussed *or* the idea or message expressed." 135 S.Ct. at 2227 (emphasis added). Springfield's ordinance regulates "because of the topic discussed". The Town of Gilbert, Arizona, justified its sign ordinance in part by contending, as Springfield also does, that the ordinance is neutral with respect to ideas and viewpoints. The majority in *Reed* found that insufficient: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." 135 S.Ct. at 2228. It added: "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 2230.

Three Justices concurred only in the judgment in *Reed*. 135 S.Ct. at 2236–39 (Kagan, J., joined by Ginsburg & Breyer, JJ.). Like our original opinion in this case, these Justices thought that the absence of an effort to burden unpopular ideas implies the absence of content discrimination. But the majority held otherwise; that's why these three Justices wrote separately. The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.

Our observation, 768 F.3d at 717, that Springfield has attempted to write a narrowly ***413** tailored ordinance now pertains to the justification stage of the analysis rather than the classification stage. But Springfield has not contended that its ordinance is justified, if it indeed represents content discrimination. As we said at the outset, the parties have agreed that the ordinance stands or falls on the answer to the question whether it is a form of content discrimination. *Reed* requires a positive answer.

The judgment of the district court is reversed, and the case is remanded for the entry of an injunction consistent with *Reed* and this opinion.

MANION, Circuit Judge, concurring.

I join the opinion of the court in full, but write separately to underscore the significance of the Supreme Court's recent decision in *Reed v. Town of Gilbert,* which held that a speech regulation targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter. – — U.S. ——, 135 S.Ct. 2218, 2230, 192 L.Ed.2d 236 (2015). *Reed* injected some much-needed clarity into First Amendment jurisprudence and, in doing so, should

eliminate the confusion that followed from *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). While *Ward* is well-recognized as the Court's seminal time, place, and manner First Amendment case, it also described a standard for content-neutrality that was in tension with the Court's developing content-based regulation of speech doctrine. *Reed* resolved this uncertainty.

Ward stated that "[t]he principal inquiry in determining content neutrality ... is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." 491 U.S. at 791, 109 S.Ct. 2746. Over time, courts interpreted this statement to mean that it did not matter if a law regulated speakers based on what they said, so long as the regulation of speech was not imposed because of government disagreement with the message. Under this approach, if an ordinance was not viewpoint-based, then it was content-neutral. For example, a local government's decision to eliminate religious speech or abortion-related speech was considered content-neutral because it was not viewpoint-based—as, for instance, a regulation prohibiting "Christian speech" or "pro-life speech" was and remains. *Reed* eliminates this distinction. 135 S.Ct. at 2227 (concluding that a speech regulation is content-based if it prohibits the topic discussed or the idea or message expressed); *ante* at 412 ("*Reed* effectively abolishes any distinction between content regulation and subject-matter regulation."). On this point, *Reed* overrules *Ward.*

Reed saw what *Ward* missed—that topical censorship is still censorship. Rejecting the idea that the government may remove controversial speech from the marketplace of ideas by drafting a regulation to eliminate the topic, *Reed* now requires any regulation of speech implicating religion or abortion to be evaluated as content-based and subject to strict scrutiny, just like the aforementioned viewpoint-based restrictions covering more narrow contours of speech. 135 S.Ct. at 2228, 2230. Few regulations will survive this rigorous standard.

Because the court has faithfully applied *Reed* to the City's ordinance, I concur.

All Citations

806 F.3d 411

140 F.Supp.3d 177
United States District Court, D. Massachusetts.

Kenneth **MCLAUGHLIN** and Joshua Wood Plaintiffs,
v.
CITY OF **LOWELL** Defendant.

CIVIL ACTION NO. 14-10270-DPW
|
Signed October 23, 2015

Synopsis

Background: Panhandlers brought action against **city**, alleging that **city** ordinance banning vocal panhandling in **city's** downtown, and banning aggressive panhandling throughout **city**, violated their First Amendment right to freedom of speech and violated Due Process and Equal Protection clauses of Fourteenth Amendment, seeking declaration that ordinance was unconstitutional and a permanent injunction against its enforcement. Panhandlers and **city** cross-motioned for summary judgment.

Holdings: The District Court, Douglas P. Woodlock, J., held that:

[1] **city** sidewalks and parks were public fora;

[2] **city** ordinance banning vocal panhandling in **city's** downtown area was content-based restriction on speech;

[3] **city** ordinance banning vocal panhandling in **city's** downtown area did not further compelling government interest;

[4] **city** ordinance banning aggressive panhandling was content-based restriction on speech;

[5] provision of ordinance banning panhandling by means that were already criminalized could not survive strict scrutiny under First Amendment;

[6] provision of ordinance banning panhandling in group of two or more in intimidating manner could not survive strict scrutiny; and

[7] provision of ordinance prohibiting panhandling from persons waiting in line or within 20 foot buffer zone surrounding certain location was not least restrictive means available to further **city's** compelling interest.

Ordered accordingly.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (27)

[1] Assault and Battery
Nature and Elements of Assault and Battery

Causing a reasonable person to fear immediate bodily harm is "assault."

Cases that cite this headnote

[2] Constitutional Law
Begging or panhandling

"Panhandling," i.e., the solicitation of any item of value through a request for an immediate donation, is expressive activity within the scope of the First Amendment, regardless of what words, if any, a panhandler speaks. U.S. Const. Amend. 1.

Cases that cite this headnote

[3] Constitutional Law
Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising

Constitutional Law
Charities or religious organizations

Solicitations of money by organized charities are within the protection of the First Amendment, and that protection extends to those soliciting funds on their own behalf. U.S. Const. Amend. 1.

Cases that cite this headnote

[4] Constitutional Law
Sidewalks

Constitutional Law
Parks and forests

Municipal Corporations

Use of sidewalk

Municipal Corporations

Prevention of improper use or obstruction

City sidewalks and parks were public fora, and thus, under First Amendment, city's power to regulate speech on sidewalks and in parks was constrained. U.S. Const. Amend. 1.

Cases that cite this headnote

[5] Constitutional Law

Justification for exclusion or limitation

Under the First Amendment, in public fora, a regulation is subject to stricter scrutiny if it is content-based than if it is a content-neutral time, place or manner regulation, because a content-based regulation raises a very serious concern that the government is using its power to tilt public debate in a direction of its choosing. U.S. Const. Amend. 1.

2 Cases that cite this headnote

[6] Constitutional Law

Content-Based Regulations or Restrictions

Constitutional Law

Strict or exacting scrutiny; compelling interest test

In determining whether to apply strict scrutiny in analyzing a law under the First Amendment, a court must determine whether a law is content-based "on its face," based on whether it applies to particular speech because of the topic discussed or the idea or message expressed. U.S. Const. Amend. 1.

4 Cases that cite this headnote

[7] Constitutional Law

Content-Based Regulations or Restrictions

Constitutional Law

Strict or exacting scrutiny; compelling interest test

A law targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter, and thus subject to stricter scrutiny than if it is a content neutral, time, place, or manner regulation, under the First Amendment. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[8] Constitutional Law

Strict or exacting scrutiny; compelling interest test

If a law is content based on its face, it is subject to strict scrutiny, and it is immaterial whether the government had a benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech. U.S. Const. Amend. 1.

Cases that cite this headnote

[9] Constitutional Law

Begging or panhandling

Municipal Corporations

Prohibitory ordinances

City ordinances banning vocal panhandling, defined as solicitation of any item of value through a request for an immediate donation, in city's downtown area, was content-based restriction on speech, and thus subject to strict scrutiny under the First Amendment, since, on its face, ordinance distinguished solicitations for immediate donations from all others, and, in order to enforce ordinance, enforcement authorities would be required to examine the content of the message to determine whether a violation occurred. U.S. Const. Amend. 1.

3 Cases that cite this headnote

[10] Constitutional Law

Zoning and Land Use

To justify an ordinance that regulates speech under the "secondary effects doctrine," under which zoning ordinances meant to address not the content of speech but effects on crime, property values and other neighborhood characteristics can be evaluated as content-neutral regulations, a government must provide evidence demonstrating the effect of the speech

regulation on those secondary effects. U.S. Const. Amend. 1.

Cases that cite this headnote

[11] Constitutional Law
Begging or panhandling

Municipal Corporations
Prohibitory ordinances

Secondary effects doctrine, under which zoning ordinances which regulate speech and which are meant to address not content but effects on crime, property values, and other neighborhood characteristics can be evaluated as content-neutral regulations, did not apply to **city** ordinance banning vocal panhandling, defined as solicitation of any item of value through a request for an immediate donation, in **city's** downtown area, since ordinance targeted substantially, if not exclusively, content of panhandler's speech and not secondary effects that followed. U.S. Const. Amend. 1.

Cases that cite this headnote

[12] Constitutional Law
Strict or exacting scrutiny; compelling interest test

To survive strict scrutiny under the First Amendment, content-based regulations on free speech must be the least restrictive means of achieving a compelling state interest; this is an exacting standard, and content-based regulations are presumptively invalid. U.S. Const. Amend. 1.

3 Cases that cite this headnote

[13] Constitutional Law
Strict or exacting scrutiny; compelling interest test

Strict scrutiny analysis of content-based regulation begins by identifying the compelling interest to which a regulation must be tailored. U.S. Const. Amend. 1.

Cases that cite this headnote

[14] Constitutional Law
Property and Events

Fostering economic revitalization in a challenging urban area may rise to the level of a significant, indeed a substantial, government interest sufficient to justify content-neutral regulations on speech. U.S. Const. Amend. 1.

Cases that cite this headnote

[15] Constitutional Law
Inquiry into Legislative Judgment

A district court owes substantial deference to a legislature's predictions about the effects of its regulations on speech for purposes of determining whether the regulation survives strict scrutiny under the First Amendment. U.S. Const. Amend. 1.

Cases that cite this headnote

[16] Constitutional Law
Begging or panhandling

Municipal Corporations
Prohibitory ordinances

City's content-based ordinance banning vocal panhandling, defined as solicitation of any item of value through a request for an immediate donation, in **city's** downtown area, which was enacted with purpose of promoting tourism and business, did not further a compelling government interest, and thus could not survive strict scrutiny under the First Amendment, regardless of whether evidence was sufficient to support **city's** claim that panhandling harmed business or tourism in **city's** downtown. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[17] Constitutional Law
Strict or exacting scrutiny; compelling interest test

After-the-fact explanations for a regulation on speech cannot help a law survive strict scrutiny under the First Amendment. U.S. Const. Amend. 1.

Cases that cite this headnote

[18] **Constitutional Law**
Begging or panhandling

Municipal Corporations
Prohibitory ordinances

Even if purpose of **city's** content-based ordinance banning vocal panhandling, defined as solicitation of any item of value through a request for an immediate donation, in **city's** downtown area, was to promote public safety, ordinance was not least restrictive means necessary to promote public safety, as required for ordinance to survive strict scrutiny under First Amendment. U.S. Const. Amend. 1.

Cases that cite this headnote

[19] **Constitutional Law**
Begging or panhandling

Municipal Corporations
Prohibitory ordinances

City ordinance prohibiting aggressive panhandling, i.e., aggressive solicitation of any item of value through a request for an immediate donation, in all areas of **city**, was content-based regulation of activity in public fora, and thus subject to strict scrutiny under First Amendment; ordinance distinguished between some solicitations and others based on the content of that solicitation. U.S. Const. Amend. 1.

3 Cases that cite this headnote

[20] **Constitutional Law**
Strict or exacting scrutiny; compelling interest test

To meet the requirement of narrow tailoring in a free speech challenge to a content based regulation that serves a compelling government interest, the government's justification for the restriction cannot simply allege without evidence that other approaches do not work, nor is it enough to say that a speech restriction would be easier to enforce; the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government interest, and may accomplish this either by trying or adequately explaining why it did not try alternative approaches. U.S. Const. Amend. 1.

Cases that cite this headnote

[21] **Constitutional Law**
Begging or panhandling

Provision of **city's** content-based ordinance prohibiting panhandling, i.e., solicitation of any item of value through a request for an immediate donation, while using "fighting words," in all areas of **city**, violated First Amendment. U.S. Const. Amend. 1.

Cases that cite this headnote

[22] **Constitutional Law**
Begging or panhandling

Municipal Corporations
Prohibitory ordinances

Provision of **city** ordinance prohibiting panhandling, i.e., solicitation of any item of value through a request for an immediate donation, by means of act that was already criminalized, which included panhandling that was intended or likely to cause a reasonable person to fear bodily harm, i.e., assault, or panhandling while intentionally touching without that person's consent, i.e., battery, could not survive strict scrutiny under First Amendment; ordinance gave **city** law enforcement officials option to seek additional penalty on a panhandler who committed an assault or battery, one which might be exercised in addition to existing laws or instead of them, and subjected those who assaulted or committed battery while engaged in particular expressive acts to increased liability, whether in the form of stacked penalties or more flexibility, and hence more negotiating leverage, for law enforcement officials in their charging decisions. U.S. Const. Amend. 1.

Cases that cite this headnote

[23] **Constitutional Law**
Begging or panhandling
Municipal Corporations
Prohibitory ordinances

Provision of **city's** content-based ordinance prohibiting following a person and panhandling, i.e., soliciting any item of value through a request for an immediate donation, after a person has given a negative response, was not least restrictive means of achieving **city's** compelling interest, i.e., public safety, and thus could not survive strict scrutiny under First Amendment. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[24] **Constitutional Law**
Begging or panhandling
Municipal Corporations
Prohibitory ordinances

Provision of **city's** content-based ordinance prohibiting panhandling, i.e., solicitation of any item of value through a request for an immediate donation, in a group of two or more in an intimidating manner, based on **city's** compelling interest of promoting public safety, could not survive strict scrutiny under First Amendment; ordinance singled out for punishment expression conducted by multiple people rather than by one person, and panhandling in group of two or more was not greater threat to public safety than panhandling alone. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[25] **Constitutional Law**
Right of Assembly
Constitutional Law
Freedom of Speech, Expression, and Press

Burdening the expression of those who join their voices together infringes upon not only the First Amendment's protection of speech, but also of assembly. U.S. Const. Amend. 1.

Cases that cite this headnote

[26] **Constitutional Law**
Certainty and definiteness; vagueness

A statute is void for vagueness and violates the Due Process Clause of the Constitution 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. U.S. Const. Amend. 14.

Cases that cite this headnote

[27] **Constitutional Law**
Begging or panhandling
Municipal Corporations
Prohibitory ordinances

Provision of **city's** content based ordinance prohibiting panhandling, i.e., solicitation of any item of value through a request for an immediate donation, from anyone waiting in a line or within a 20 foot buffer zone surrounding banks, Automatic Teller Machines (ATM), check-cashing businesses, transit stops, public restrooms, pay telephones, theaters, any outdoor seating areas, or any parking areas associated with those facilities, failed to use least restrictive means available to further **city's** compelling interest of promoting public safety, and thus could not survive strict scrutiny under First Amendment; while it might be bothersome, and even in some sense more coercive, for a person to be panhandled when they cannot, or find it difficult to leave, it was not demonstrably more dangerous. U.S. Const. Amend. 1.

Cases that cite this headnote

Attorneys and Law Firms

***181** David J. Zimmer, Goodwin Procter LLP, San Francisco, CA, Matthew Segal, American Civil Liberties Union, Corrine L. Lusic, Eric Lawson, Geoffrey Kirsch, Jenny Zhang, Kevin P. Martin, Robert D. Carroll, Goodwin Procter LLP, Sarah R. Wunsch, Aclu of Massachusetts, Boston, MA, for Plaintiffs.

C. Michael Carlson, Christine P. O'Connor, Hannah B. Pappenheim, City of Lowell Law Department, Lowell, MA, for Defendant.

MEMORANDUM AND ORDER

DOUGLAS P. WOODLOCK, UNITED STATES DISTRICT JUDGE

The City of Lowell, Massachusetts, considers itself to have a problem with panhandling. Many officials, residents, and local stakeholders have come to believe that panhandling been becoming more common and that panhandlers have become more aggressive. In response, in 2013 the City passed an ordinance, Lowell Code § 222-15 ("the Ordinance"), to limit panhandling in the city; the Ordinance has since been amended twice. As it currently stands, the Ordinance bans all vocal panhandling in Lowell's downtown, and bans what are identified as aggressive panhandling behaviors citywide. This case presents a challenge to the Ordinance in the context of evolving case law from the Supreme Court and the First Circuit.

I. BACKGROUND

A. Factual Background

Plaintiffs are two [1] homeless men who have panhandled in Lowell, requesting money that they use for, among other things, food, medicine, and shelter. They have challenged the validity of Lowell's panhandling regulations under the federal Constitution, primarily as violative of their First Amendment right to freedom of speech, but also as violative of the Due Process and Equal Protection clauses of the Fourteenth Amendment. They wish to continue asking passersby for donations in Lowell's public places and believe they have a constitutional right to do so.

The Ordinance creates two basic categories of restrictions which can be characterized as the Downtown Panhandling ***182** provisions and the Aggressive Panhandling provisions. Both categories share a common definition of panhandling as the solicitation of any item of value through a request for an immediate donation. § 222-15(A). The sale of an item for an inflated amount, such that a reasonable person would understand it to be in substance a donation, also constitutes panhandling under the Ordinance. *Id*.

The Downtown Panhandling provisions were initially enacted by the Lowell City Council on November 12, 2013. These provisions ban all panhandling in the Downtown Lowell Historic District, although important exceptions exist. § 222-15(B)(1). As originally enacted, organized charities seeking donations for third parties—most iconically, the Salvation Army—were exempt and permitted to solicit in the Historic District. This exemption was removed on February 4, 2014; plaintiffs allege that was done in response to the threat of litigation. On March 3, 2015, a different exemption was inserted in the Downtown provisions, permitting panhandling that involves only "passively" standing, sitting, or performing music. *Id*. These passive panhandlers may hold a sign asking for a donation, but may not make any "vocal request" except in response to an inquiry. *Id*. These restrictions cover an extensive area—some 400 acres—which include some of the most trafficked areas in the City and a number of important government sites.

[1] The Aggressive Panhandling provisions were enacted on Feb. 4, 2014. These provisions prohibit panhandling "in an aggressive manner." § 222-15(B)(2). What constitutes "aggressive" panhandling is defined as any of ten activities. § 222-15(A)(1)-(10). These ten activities can be placed into three basic categories. One category includes provisions that are duplicative of existing sanctions but directed specifically at panhandling. The first provision criminalizes panhandling that is "intended or likely to cause a reasonable person to fear bodily harm to oneself," harm to another, or property damage. § 222-15(A)(1). Causing a reasonable person "to fear immediate bodily harm" is assault. *Commonwealth* v. *Gorassi*, 432 Mass. 244, 733 N.E.2d 106, 109–10 (2000). Accordingly, this provision creates a new offense of panhandling while committing assault. The eighth provision defining aggressive panhandling is also substantially identical to assault. § 222-15(A)(8). The third provision defining aggressive panhandling as "intentionally touching... without that person's consent," § 222-15(a)(8), is simply a restatement of the crime of battery, Mass. Gen. L. ch. 265 § 13A; *Commonwealth* v. *Burke*, 390 Mass. 480, 457 N.E.2d 622, 624 (1983), with the additional element of panhandling. The fourth provision, (§ 222-15(a)(4)), which deems aggressive panhandling that intentionally interferes with the passage of pedestrians or vehicles, appears to be duplicative, as the parties agree, of Lowell ordinances that make it illegal to "occupy or obstruct any sidewalk as to interfere with the convenient use of the same by pedestrians," § 243-20, and

that regulate pedestrians entering a roadway, § 266-138. *See also* 720 C.M.R. 9.09. The fifth provision, prohibiting panhandling using violent or threatening language or gestures likely to provoke an immediate violent reaction, § 222-15(a)(5), is somewhat distinct, although I will treat it alongside these duplicative provisions because it prohibits "fighting words," a category of speech that largely falls outside the First Amendment's protections. *Chaplinsky* v. *State of New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942) (holding that the Constitution does not protect words which "tend to incite an immediate breach of the peace").

***183** A second category of prohibited panhandling activities includes behaviors not otherwise criminal that **Lowell** contends are coercive panhandling techniques. There are three such provisions: continuing to panhandle from a person after that person has "given a negative response to such soliciting," § 222-15(A)(2); following a person with the intent of asking for money or things of value, § 222-15(A)(6); and panhandling in a group of two or more, in an "intimidating fashion" § 222-15(A)(9).

In a final category of panhandling activities, **Lowell** has deemed all panhandling performed in certain locations to be illegal aggressive panhandling. Panhandling from anyone who is waiting in line is banned. § 222-15(A)(7). Additionally, any panhandling within a twenty feet buffer zone around a bank, ATM, check-cashing business, mass transportation facility, public restroom, pay telephone, theater, or outdoor seating area, or around the parking lot for any of those facilities, is banned. § 222-15(A)(10).

There is no passive sign holding exception for the Aggressive Panhandling provisions; as a consequence, even sitting and holding a sign asking for donations is prohibited in these locations. Originally, the Aggressive Panhandling provisions only applied in the Downtown **Lowell** Historic District, but they were extended citywide on March 3, 2015.

Plaintiffs have regularly panhandled in **Lowell**, including in the Downtown Historic District. Neither considers himself ever to have panhandled aggressively, although they concede it is possible that they have panhandled in what are prohibited locations under the Ordinance. They have stated that, since the Ordinance was passed, they have avoided panhandling downtown because they have been afraid of arrest. They seek a declaration that the **Lowell** panhandling ordinance is unconstitutional and a permanent injunction against its enforcement.

B. Procedural History and Standard of Review

No part of the Ordinance has yet been enforced. Plaintiffs filed for a preliminary injunction when filing their complaint in February, 2014, but their motion for interlocutory injunctive relief was rendered moot by **Lowell**'s agreement to forbear from enforcement until the case was decided on the merits. Meanwhile, while governing case law has evolved, the **City** has considered refinements to the Ordinance. The current iteration of the Ordinance is the one which the **City** has chosen to defend. The parties have conducted discovery and have filed cross-motions for summary judgment regarding the current iteration of the Ordinance.

Under Rule 56, I may grant summary judgment only if there is no genuine dispute of material fact and if the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Carmona* v. *Toledo*, 215 F.3d 124, 132 (1st Cir.2000). Cross-motions for summary judgment "do not alter the basic Rule 56 standard." *Adria Int'l Grp., Inc* v. *Ferre Dev., Inc.*, 241 F.3d 103, 107 (1st Cir.2001). Rather, I must assess each motion for summary judgment independently and "determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed." *Id*. Because this is a facial attack on the constitutionality of a municipal ordinance, I find no material factual disputes and am able to decide the case on the basis of uncontested facts.

II. ANALYSIS

A. Panhandling as Protected Speech under the First Amendment

[2] **[3]** Panhandling, as defined by the Ordinance, is expressive activity within the ***184** scope of the First Amendment. Solicitations of money by organized charities are "within the protection of the First Amendment." *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). *See also* *Williams–Yulee* v. *Florida Bar*, —— U.S. ——, 135 S.Ct. 1656, 1664, 191 L.Ed.2d 570 (2015) ("We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity"). This protection extends to those soliciting funds on their own behalf. People who panhandle "may communicate important political or

social messages in their appeals for money, explaining their conditions related to veteran status, homelessness, unemployment and disability, to name a few." *Gresham* v. *Peterson*, 225 F.3d 899, 904 (7th Cir.2000). Plainly, a sign reading "Sober," or "Two children," conveys a message about who is deserving of charitable support, just as a sign reading "God bless," expresses a religious message.

Panhandling is an expressive act regardless of what words, if any, a panhandler speaks. Even "the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance." *Loper* v. *New York City Police Dep't*, 999 F.2d 699, 704 (2d Cir.1993). Courts have consistently recognized the protected, expressive nature of panhandling. *See, e.g.*, *Speet* v. *Schuette*, 726 F.3d 867, 875 (6th Cir.2013) ("begging is a form of solicitation that the First Amendment protects"); *Clatterbuck* v. *City of Charlottesville*, 708 F.3d 549, 553 (4th Cir.2013) ("the speech and expressive conduct that comprise begging merit First Amendment protection"); *Smith* v. *City of Fort Lauderdale, Fla.*, 177 F.3d 954, 956 (11th Cir.1999). Panhandling is not merely a minor, instrumental act of expression. In the words of the Massachusetts Supreme Judicial Court, at stake is "the right to engage fellow human beings with the hope of receiving aid and compassion." *Benefit* v. *City of Cambridge*, 424 Mass. 918, 679 N.E.2d 184, 190 (1997).

Lowell casts its argument that "modern" panhandling lacks the expressive quality deserving protection in language that demonstrates the opposite. The **City** contends that the panhandlers of today are not the "lone needy person" whose acts might "keep the issues of poverty and/or homelessness in the public eye." Rather, it claims, they represent a "raucous alternative culture," both "festive and sinister," engaged in "a war on the public sentiment."[2] Whether or not there has been a transformation of the culture of panhandling, the raucous presentation of the visions of alternative cultures in the public sphere is at the heart of the First Amendment. *Cf.* *Schaumburg*, 444 U.S. at 632, 100 S.Ct. 826. The First Amendment clearly limits how panhandling may be regulated.

B. The Downtown Panhandling Provisions

1. The Downtown Panhandling Ban and Strict Scrutiny

[4] **[5]** The Downtown Panhandling provisions regulate speech in public fora, ***185** where the government's power to regulate speech is most constrained. Sidewalks and parks, both of which are covered by the Downtown provisions, are quintessential public fora. *Cutting* v. *City of Portland, Me.*, 802 F.3d 79, 83–84 (1st Cir.2015). In public fora, a regulation is subject to stricter scrutiny if it is content-based than if it is a content-neutral time, place or manner regulation, because a content-based regulation "raises a very serious concern that the government is using its power to tilt public debate in a direction of its choosing." *Id.* at 84.

[6] **[7]** **[8]** As explained in the Supreme Court's opinion last term in *Reed* v. *Town of Gilbert, Ariz.*, —— U.S. ——, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015), a court must determine whether a law is content-based "on its face," based on whether it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. A law "targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 2230. If a law is content-based on its face, it is immaterial whether the government had a "benign motive, content-neutral justification, or 'lack of animus toward the ideas contained' in the regulated speech." *Id.* at 2228 (citing *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 429, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993)).

[9] The Downtown provisions are plainly content-based under current Supreme Court guidance. On its face, the Ordinance distinguishes solicitations for immediate donations from all others. A person could vocally request that passersby in the Historic District make a donation tomorrow, but not today (a distinction that may be of great import to someone seeking a meal and a bed tonight). He could ask passersby to sign a petition, but not a check. The **City**'s definition of panhandling targets a particular form of expressive speech—the solicitation of immediate charitable donations—d applies its regulatory scheme only to that subject matter.

Reed makes earlier cases, which had split over what forms of regulation of panhandling were content-based, of limited continuing relevance.[3] The Seventh Circuit ***186**

recognized this in litigation concerning a very similar ban on panhandling in the downtown historic district of Springfield, Illinois. *Norton* v. ***City*** *of Springfield, Ill.*, 768 F.3d 713 (7th Cir.2014) *on reh'g*, No. 13–3581, 612 Fed.Appx. 386, 2015 WL 4714073 (7th Cir. Aug. 7, 2015). [4] Before *Reed*, the court had held that the ban was content-neutral, on the grounds that it did not burden particular ideas or viewpoints. In the wake of *Reed*, the same panel reversed itself, holding that *Reed* required a finding that the ordinance is content-based on its face. That outcome is equally applicable here. [5]

While *Reed* may prove to refine First Amendment law materially, I find the Ordinance content-based for additional reasons based on other recent Supreme Court precedent. The Court has held that a regulation is content-based if it requires "enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *McCullen* v. *Coakley*, —— U.S. ——, 134 S.Ct. 2518, 2531, 189 L.Ed.2d 502 (2014) (quoting *F.C.C.* v. *League of Women Voters of California*, 468 U.S. 364, 383, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984)). This test reinforces the conclusion that **Lowell's** Downtown panhandling provisions are content-based regulations. Under the provisions, a police officer would have to listen to a person's solicitation and determine whether he was asking for an immediate donation before finding a violation. Moreover, this inquiry into content would always be necessary. Even where a person was sitting in the Historic District with a sign reading "Hungry and homeless" and speaking to every stranger who walked by, the police officer would still have to determine ***187** whether those conversations were prohibited "vocal request[s]" for money. Neither a pleasant "good morning" nor an aggressive political diatribe unrelated to a solicitation would be impermissible, while a "please give," or an "I'm a veteran" would be. The Downtown panhandling provisions are thus content-based not only linguistically but also in their invitation to content-based enforcement choices.

As a point of comparison, the First Circuit recently declared a Portland, Maine ordinance banning standing or sitting on median strips to be content-neutral. *Cutting*, 802 F.3d at 85. Although that ordinance had only been enforced against panhandlers, *id.* at 82, it was facially content-neutral: no message could be expressed from a median strip, whether a request for money or political advocacy. While the enforcement of the ordinance may have been content-based, the court found, the statute itself restricted speech "only on the basis of where such speech takes place." *Id.* at 85. **Lowell**'s ordinance, on its face, goes further and eschews such neutrality; the Ordinance applies only to requests for the immediate donation of money. Unlike the ordinance in *Cutting* (which was nevertheless struck down for violating the First Amendment), **Lowell**'s ordinance is subject to the most searching scrutiny.

[10] **[11]** **Lowell** argues that its ordinance can escape being treated as content-based pursuant to the "secondary effects" doctrine. Under this doctrine, zoning ordinances meant to address not the content of adult establishments but effects on crime, property values and other neighborhood characteristics can be evaluated as content-neutral regulations. ***City*** *of Los Angeles* v. *Alameda Books, Inc.*, 535 U.S. 425, 434, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (plurality opinion) (O'Connor, J.). To justify an ordinance on these grounds, however, a government must provide evidence—something better than "shoddy data"—demonstrating the effect of the speech regulation on those secondary effects. *Id.* at 438, 122 S.Ct. 1728. This doctrine does not justify **Lowell's** ordinance. Even putting aside the issue whether the doctrine applies at all outside the zoning context, *id.* at 448-49, 122 S.Ct. 1728 (Kennedy, J., concurring), **Lowell** has not provided the kind of reliable data needed to show that it is truly targeting secondary effects. More importantly, it is at least substantially, if not exclusively, targeting the content of panhandlers' speech, not any secondary effects that follow. *Cf.* *McCullen*, 134 S.Ct. at 2531–32 ("the Act would not be content neutral if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience.' "). Although the **City** floats the idea that panhandling contributes to a larger decline in police efficacy and public participation, it provides no meaningful evidence-based support for that contention. The **City** is primarily concerned with panhandlers' direct behavior: that panhandlers ask for money in numbers deemed too large, in locations too sensitive or in manners too aggressive. The secondary effects doctrine is entirely inapplicable to the Ordinance.

2. No Compelling Interest Supports the Downtown Ban

[12] Because the Downtown provisions are content-based, they "must be the least restrictive means of achieving a compelling state interest." *McCullen* v. *Coakley*, —— U.S. ——, 134 S.Ct. 2518, 2530, 189 L.Ed.2d 502 (2014). [6] This is an exacting ***188** standard. Content-based regulations are "presumptively invalid," *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), and it is the "rare case" in which strict scrutiny is overcome, *Williams–Yulee* v. *Florida Bar*, —— U.S. ——, 135 S.Ct. 1656, 1665, 191 L.Ed.2d 570 (2015).

[13] Strict scrutiny analysis of content-based regulation begins by identifying the compelling interest to which a regulation must be tailored. The interests originally pursued by the City of Lowell when it enacted the Downtown provisions—tourism and economic development—are set forth in the preamble to the Ordinance:

> Tourism is one of Lowell's most important economic industries; and
>
> The Downtown Historic District is essential for the Lowell tourism experience; and
>
> The City has a compelling interest in providing a safe, pleasant environment and eliminating nuisance activity within the Downtown Historic District; and Solicitation, begging or panhandling substantially burdens tourism within the Downtown Historic District.

[14] **[15]** Fostering economic revitalization in a challenging urban area like Lowell is undoubtedly a critical task for city policymakers and may rise to the level of a significant, indeed a substantial, government interest sufficient to justify content-neutral regulations. *See* *Smith* v. *City of Fort Lauderdale, Fla.*, 177 F.3d 954, 956 (11th Cir.1999) (promoting tourism and providing a "safe, pleasant environment" conceded by parties to be significant government interests); *Edwards* v. *D.C.*, 755 F.3d 996, 1002–03 (D.C.Cir.2014) (the protection of the tourism industry is "undoubtedly" a "substantial government interest"). A vibrant downtown economy can help provide jobs to the unemployed, reduce crime and improve public safety, and provide tax revenue for essential public services, including those that help the homeless and other panhandlers. [7]

***189** **[16]** However, the promotion of tourism and business has never been found to be a compelling government interest for the purposes of the First Amendment. *See* *Pottinger* v. *City of Miami*, 810 F.Supp. 1551, 1581 (S.D.Fla.1992) ("the City's interest in promoting tourism and business and in developing the downtown area are at most substantial, rather than compelling, interests"). I cannot conclude that tourism promotion is a sufficiently important interest to allow content-based restrictions on speech affecting it to survive strict scrutiny. Such a conclusion would permit a highly open textured and inadequately developed justification to eviscerate limitations on content-based speech regulation. [8]

The mechanism by which Lowell's ban on panhandling downtown would promote tourism flies in the face of the First Amendment. The First Amendment does not permit a city to cater to the preference of one group, in this case tourists or downtown shoppers, to avoid the expressive acts of others, in this case panhandlers, simply on the basis that the privileged group does not like what is being expressed. It is core First Amendment teaching that on streets and sidewalks a person might be "confronted with an uncomfortable message" that they cannot avoid; this "is a virtue, not a vice." *McCullen*, 134 S.Ct. at 2529. Just as speech cannot be burdened "because it might offend a hostile mob," *Forsyth Cnty., Ga.* v. *Nationalist Movement*, 505 U.S. 123, 135, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992), it cannot be burdened because it would discomfort comparatively more comfortable segments of society.

For First Amendment purposes, economic revitalization might be important, but it does not allow the sensibilities of ***190** some to trump the speech rights of others. *See also* *Roulette* v. *City of Seattle*, 97 F.3d 300, 308–09 (9th Cir.1996), *as amended on denial of reh'g and reh'g en banc* (Sept. 17, 1996) (Pregerson, J., dissenting) ("Seattle seeks economic preservation by ridding itself of social undesirables... a less than compelling governmental interest"); *Am. Civil Liberties Union of Idaho, Inc.* v. *City of Boise*, 998 F.Supp.2d 908, 917 (D.Idaho 2014) ("Business owners and residents simply not liking panhandlers in acknowledged public areas does not rise to a significant governmental interest."); *Benefit* v. *City of Cambridge*, 679 N.E.2d at 190 ("A listener's annoyance or offense at a particular type of communicative activity does not provide a basis for a law burdening that activity").

The City also suggests that the Downtown provisions serve the compelling government interest of public safety, arguing

both that promoting public safety is an independent purpose of the Ordinance and that it is a mechanism by which the Ordinance promotes tourism and business. Plaintiffs do not contest that protecting public safety and preventing coercion are compelling government interests. However, public safety serves as a post-hoc rationalization for the Downtown provisions. The purpose of the ordinance was authoritatively set forth in its preamble, quoted above, which was duly enacted by the **City** Council along with the Ordinance. It is undisputed that only tourism and nuisance abatement (with a passing reference to an associated "safe" environment) were included in that original preamble.

[17] **[18]** There is a dispute between the parties whether later depositions established public safety as an additional reason for the Ordinance. That dispute, however, is immaterial, because after-the-fact explanations cannot help a law survive strict scrutiny. This principle is firmly established for strict and even intermediate scrutiny under the Equal Protection Clause. *Shaw* v. *Hunt*, 517 U.S. 899, 908 n. 4, 116 S.Ct. 1894, 135 L.Ed.2d 207 (U.S.1996) (For strict scrutiny on the basis of racial classifications, "[t]o be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification, and the legislature must have had a strong basis in evidence to support that justification.") (internal citations omitted); *United States* v. *Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (For intermediate scrutiny on the basis of gender, "[t]he justification must be genuine, not hypothesized or invented post hoc in response to litigation."). The principle has also been extended to the First Amendment context. *Russell* v. *Lundergan–Grimes*, 784 F.3d 1037, 1052 (6th Cir.2015); *see also* *Yellowbear* v. *Lampert*, 741 F.3d 48, 59 (10th Cir.2014) (in RLUIPA context, where Congress "borrowed its language from First Amendment cases" applying strict scrutiny, "post-hoc rationalizations" cannot prove a compelling interest). The **City**, having officially put forward its reasons for the Downtown Panhandling provisions, cannot add to those reasons in litigation. The Downtown Panhandling provisions were passed to promote tourism, not public safety as such, and consequently do not further a compelling state interest.[9] ***191** They therefore cannot survive strict scrutiny under the First Amendment.

C. Aggressive Panhandling

1. The Aggressive Panhandling Ban and Strict Scrutiny

[19] The Aggressive Panhandling provisions are governed by the same First Amendment framework as are the Downtown Panhandling provisions. The Aggressive Panhandling provisions regulate expressive conduct that is protected by the First Amendment. An aggressive, perhaps disconcerting and indeed frightening, panhandler still conveys messages related to need and deprivation or, in the **City**'s characterization, about the alternative lifestyle of panhandling. And as with the Downtown provisions, these are content-based regulations of activity in public fora. The same definition of "panhandling" is employed in both, regulating only requests for immediate donations. As noted in the discussion of the Downtown Panhandling provisions in Section II.B. above, this definition, on its face, distinguishes between some solicitations and others based on the content of that solicitation. A person following someone to ask for a donation would be treated as illegally panhandling under the Aggressive Panhandling provisions, whereas someone following another asking for a petition signature would be permitted to continue exercising such a right to political expression. As content-based regulation, the Aggressive Panhandling provisions must be the least restrictive means for achieving a compelling state interest.

Unlike the Downtown Panhandling provisions, however, the Aggressive Panhandling provisions were enacted in furtherance of a compelling state interest: public safety. Plaintiffs do not contest that preventing "truly aggressive behavior," such as unwanted touching, is a compelling interest. Nor could they: public safety is "the heart of government's function." *Houston Chronicle Pub. Co.* v. ***City*** *of League* ***City****, Tex.*, 488 F.3d 613, 622 (5th Cir.2007). Given the existence of a compelling state interest, the question is whether the Aggressive Panhandling provisions are properly fashioned.

Plaintiffs offer a number of arguments as to why the Aggressive Panhandling provisions are not the least restrictive means available for achieving the goal of public safety. I address at the threshold one which applies to the provisions generally. Plaintiffs assert that **Lowell** has failed to try a less speech-restrictive alternative—better enforcing existing laws, such as disorderly conduct or assault—before enacting the Aggressive Panhandling Ordinances. Under *McCullen*, the justification for a restriction on speech cannot simply allege without evidence that other approaches "do not work," nor is it enough to say that a speech restriction

would be easier to enforce. *McCullen*, 134 S.Ct. at 2539–40. Plaintiffs accordingly argue that the **City** needs to show the failure of a stepped-up approach to the enforcement of existing laws before it could constitutionally enact an anti-panhandling ordinance.

[20] *McCullen*, however, does not require **Lowell** to have exhausted every enforcement ***192** strategy and demonstrated failure before passing the Ordinance. Rather, the **City** must "demonstrate that alternative measures that burden substantially less speech would fail to achieve the government interests." *Id.* at 2540. They may accomplish this either by trying or "adequately explain[ing] why it did not try" alternative approaches, *Cutting*, 802 F.3d at 91. In *McCullen*, the Court noted that Massachusetts had not identified a single prosecution brought under alternative laws in 17 years or any injunction issued since the 1990s. *McCullen*, 134 S.Ct. at 2539. Here, in contrast, plaintiffs concede that the **Lowell** Police Department responded to 827 calls coded as related to "panhandling/begging" over a period of three years and three months, applying existing laws in each case. While plaintiffs contest which of these calls actually concerned panhandling or actually required additional enforcement tools,[10] it is clear that the **City**, unlike the authorities in *McCullen*, has attempted to use existing enforcement techniques and yet still plausibly contends that it has a public safety problem. In *Cutting*, the First Circuit responded to the **city**'s claim that existing laws were inadequate not by requiring additional enforcement, but by suggesting more targeted forms of new legislation. *Cutting*, 802 F.3d at 92–93. **Lowell** is free to try new approaches to protecting public safety, including by passing an ordinance prohibiting aggressive panhandling, so long as that ordinance satisfies the requirements of the First Amendment. I turn to the ten forms of "aggressive panhandling" it has to date identified to determine whether any or all can survive strict scrutiny.

[21] I begin with the duplicative provisions of the definition of aggressive panhandling, and in particular with the ban on panhandling while using fighting words, § 222-15(A)(5). That provision is unconstitutional under the express holding of *R.A.V.* v. ***City*** *of St. Paul, Minn.*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). There, the Court considered a hate crimes ordinance which prohibited the display of a symbol that amounted to fighting words and which incited violence on the basis of race, religion, or gender. *Id.* at 380–81, 112 S.Ct. 2538. Although fighting words themselves are not protected by the First Amendment, *Chaplinsky*, 315 U.S. at 572, 62 S.Ct. 766, the Court nevertheless found the ordinance in question violated the First Amendment. As the Court explained, a municipality's power to ban speech "on the basis of *one* content element (*e.g.,* obscenity) does not entail the power to proscribe it on the basis of *other* content elements." *R.A.V.*, 505 U.S. at 386, 112 S.Ct. 2538. By banning only certain fighting words, on the basis of a separate form of content-based discrimination, the ordinance unconstitutionally "impose[d] special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391, 112 S.Ct. 2538. So too, here. The **City** unquestionably has the power to regulate fighting words, but it may not create a special ban on fighting words uttered in connection with the protected speech of panhandling. "Selectivity of this sort creates the possibility," indeed, more than a mere possibility in the case of **Lowell**'s ordinance, "that the **city** is seeking to handicap the expression of particular ideas." *Id.* at 394, 112 S.Ct. 2538.

***193** **[22]** The reasoning of *R.A.V.* extends beyond its direct application to fighting words and governs the other duplicative provisions, see § 222-15(A)(1),(3),(4),(8). Like panhandling banned under the Ordinance because it is also an assault or a battery, the behavior at issue in *R.A.V.* could have been punished under other, generally applicable criminal laws. *Id.* at 379–80. *R.A.V.* instructs that where a law prohibits behavior on the basis of expressive content—even if the underlying behavior may be prohibited constitutionally or already is prohibited—the decision to create an *additional* content-based prohibition must satisfy strict scrutiny. *Id.* at 395–96, 112 S.Ct. 2538 (identifying as "dispositive" whether "content discrimination" is necessary to achieve the **city**'s interests). The Ordinance gives **Lowell** law enforcement officials the option to seek an additional penalty on a panhandler who commits assault or obstructs the sidewalk, one which might be exercised in addition to existing laws or instead of them. It subjects those who assault while engaged in particular expressive acts to increased liability, whether in the form of stacked penalties or more flexibility, and hence more negotiating leverage, for law enforcement officials in their charging decisions.

The City has not demonstrated that public safety requires harsher punishments for panhandlers than others who commit assault or battery or other crimes. To the contrary, in its briefing the City justified these duplicative provisions on the grounds that they provide "a useful clarifying function for both the public and panhandlers," and serve a "hortatory function." *R.A.V.* specifically rejected such communicative justifications for content-specific criminal laws. The Court there addressed St. Paul's argument that "displaying the city council's special hostility" to the speech "singled out" could justify that ordinance, observing "[t]hat is precisely what the First Amendment forbids." *Id.* at 396, 112 S.Ct. 2538. The City may not deem criminal activity worse because it is conducted in combination with protected speech, and it certainly may not do so in order to send a message of public disapproval of that speech on content based grounds.

Next, I turn to the second category of actions that the Ordinance deems aggressive panhandling: those that constitute non-criminal, allegedly coercive behaviors. Specifically, these are continuing to panhandle from an individual who has already given a negative response to solicitations, § 222-15(A)(2), following a person with the intent of asking them for money, § 222-15(A)(6), and panhandling in a group of two or more in an "intimidating" manner, § 222-15(A)(9).

[23] The bans on following a person and panhandling after a person has given a negative response are not the least restrictive means available, for similar reasons. A panhandler who asks for change from a passerby might, after a rejection, seek to explain that the change is needed because she is unemployed or state that she will use it to buy food. These additional post-rejection messages do not necessarily threaten public safety; their explanations of the nature of poverty sit at the heart of what makes panhandling protected expressive conduct in the first place. Likewise, a panhandler might follow someone in order to convey a longer message. Both behaviors might be utilized where a promising target—someone who might want to hear a panhandler's message—walks by a panhandler without noticing him at all. If panhandling is truly valuable expressive speech, then panhandlers may have a right to more than one shot at getting their message across.

***194** Of course, a panhandler who refuses to leave someone alone after a clear rejection and who then follows that person over a great distance, perhaps to their car or past less-trafficked alleyways, might be a very real threat to public safety. But a less restrictive ordinance could target such threatening behaviors. Without suggesting that such approaches would in fact pass constitutional muster, *see* *Cutting*, 802 F.3d at 93, I note that an ordinance could give panhandlers some period of time or distance to follow people; it could require multiple or unequivocal statements that a person will specifically not donate rather than a mere "negative response;" or it could add a requirement that the behavior be intended to and, in fact, does harass or be perceived by a reasonable person as harassing. Other less restrictive means may also be available. In any event, giving panhandlers only one chance to convey their message, without following or following-up, is more restrictive than necessary. Defining these two behaviors as illegal aggressive panhandling fails to satisfy the least restrictive tailoring requirements of strict scrutiny of content-based regulations.

[24] As for the prohibition on panhandling in a group of two or more in an intimidating manner, § 222-5(A)(9), it is difficult to know even what it is that is proscribed; "intimidating" is left undefined. Perhaps the most plausible limiting interpretation of this provision is that "intimidating" group panhandling is that which rises to the level of assault, disorderly conduct, or some other conventionally illegal activity. Under this interpretation, however, the analysis concerning duplicative provisions, as developed above, governs and a ban would violate the First Amendment. An alternative interpretation in which "intimidating" was not merely duplicative would restrict more speech and require a stronger justification still.

[25] **[26]** Moreover, under any definition of "intimidating," this provision singles out for punishment expression conducted by multiple people rather than alone. Burdening the expression of those who join their voices together infringes upon not only the First Amendment's protection of speech, but also of assembly. *Coates* v. ***City*** *of Cincinnati*, 402 U.S. 611, 615, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971) (ordinance that prohibited three or more people assembling and behaving in "a manner annoying to persons passing by" unconstitutional due to vagueness, but also because it "violates the constitutional right of free assembly and association."). [11] Just as a city could not tell a pair of Mormon missionaries that they must knock on doors alone

***195** (much less tell only missionaries but not other door-to-door solicitors to work alone), **Lowell** may not forbid panhandlers whose activity is otherwise permissible from expressing themselves together without satisfying strict scrutiny. In the absence of record evidence that panhandling in a group of two or more is a greater threat to public safety than panhandling alone—or that "intimidating" group panhandling is more dangerous than "intimidating" solo panhandling—such scrutiny cannot be satisfied.

[27] The third category of "aggressive panhandling" provisions defines all panhandling in certain locations as aggressive and therefore prohibited. Panhandling from anyone waiting in line is considered aggressive. § 222-15(A)(7). Also prohibited is all panhandling within a 20 foot buffer zone surrounding the following locations: a bank, an ATM, a check-cashing business, a transit stop, a public restroom, a pay telephone, a theater, or any outdoor seating, as well as any parking area associated with these facilities. § 222-15(A)(10). In delineating these locations as closed off for panhandling, the **City** fails to use the least restrictive means available for protecting public safety. The locations where the **City** has prohibited panhandling are divided between those, like a bus stop or a line, where people are essentially captive audiences for panhandlers, and those, like near ATMs or public restrooms, where there is an elevated risk or fear of physical harm. The first set is not tailored to public safety at all; while it may be more bothersome, and even in some sense more coercive, for a person to be panhandled when they cannot, or find it difficult to leave, it is not demonstrably more dangerous. [12]

In contrast, those at a public restroom or in a parking lot might reasonably feel particularly vulnerable physically and those withdrawing money from an ATM might be at higher risk of being robbed or threatened. Restricting panhandling in those locations might satisfy the narrow tailoring requirement for content-neutral regulations. *See, e.g.*, *Gresham*, 225 F.3d at 906. Yet they are not the least restrictive means available to protect public safety. It is undisputed that these provisions prevent any solicitation of funds in these locations, even the silent and passive holding of a sign. And while the **City** claims that the choice to hold a sign near an ATM is "however slightly, a kind of provocation," it presents no meaningful argument and no record evidence to support that claim. The Aggressive Panhandling provisions could have created an exception for passive sign-holding, as the Downtown provisions did. The **City** could even have allowed for sign-holding in some locations and not others, perhaps on a sidewalk along the edge of a parking lot but not at a driver's door. An ordinance with a sign-holding exception would clearly restrict less speech, and ***196** would do so without any meaningful loss in public safety. [13]

Similarly, the location-based restrictions would prohibit organized charitable groups from soliciting immediate donations in buffer zones. While there is nothing inherently less threatening about someone raising money for a third-party as opposed to for themselves, it is clear that many organized groups seeking donations—firemen and Girl Scouts, for example—are not widely viewed as threats to public safety. Yet these groups would also be barred from operating near a parking lot or a bus stop, foreclosing, for example, traditional fundraising locations like sites outside a grocery store entrance.

Nor is a buffer zone always required to protect public safety. For example, the **City**'s concern about panhandling near the outdoor seating of a restaurant is, essentially, that restaurant patrons who cannot leave mid-meal will be pestered by panhandlers. Even if this concern touched on public safety rather than a business's customer experience, imposing a 20-foot buffer around the public seating area is not necessary. That buffer prohibits panhandling on the sidewalk, not panhandling from those in the outdoor seating area. No theory or evidence has been offered as to how pedestrians walking *near* an outdoor café are unusually threatened by panhandlers. While a buffer zone of some sort might be appropriate around some facilities, such as ATMs, the Ordinance imposes buffer zones uniformly. [14] In all these ways, **Lowell** might have enacted a less restrictive ordinance that was equally protective of public safety. The **City** failed to do so, and the location-based definitions of aggressive panhandling therefore fail to satisfy strict scrutiny.

III. CONCLUSION

For the reasons set forth above, I GRANT plaintiff's motion for summary ***197** judgment and DENY defendant's motion for summary judgment, [15] and declare:

Section 222-15 of the **City** of **Lowell** Code (the "Ordinance") is in its entirety violative of the United States Constitution [16] because

(A) The Downtown Panhandling provisions of the Ordinance are violative of the First Amendment of the United States Constitution; and

(B) The Aggressive Panhandling provisions of the Ordinance are violative of the First Amendment of the United States Constitution, in that none of the ten behaviors identified can be proscribed as they are through the Ordinance.

All Citations

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Footnotes

1 A third plaintiff was dismissed from this case in July 2015 after he failed without notice to appear for his deposition and plaintiffs' counsel notified the court they had been unable to reach or communicate with him despite numerous attempts to do so.

2 This language is deployed at the outset in the **City**'s memorandum of law in support of its motion for summary judgment, p. 1-4. In addition to demonstrating the expressive value of panhandling, the **City**'s fervent denunciation of the culture of panhandling also evidences the **City**'s content-based intent in enacting the Ordinance. As demonstrated below, however, I find the Ordinance to be content-based on its face and do not need to turn to issues of intent. If required to address intent, I would easily conclude that the **City**'s prohibition of panhandling was specifically intended to restrict the speech and expressive context of begging that is within First Amendment protection.

3 *Compare* *Clatterbuck* v. ***City*** *of Charlottesville*, 708 F.3d 549, 556 (4th Cir.2013) (finding a ban on requests for immediate donations content-based) with *ISKCON of Potomac, Inc.* v. *Kennedy*, 61 F.3d 949 (D.C.Cir.1995) (finding such a ban content-neutral). To the extent that *United States* v. *Kokinda*, 497 U.S. 720, 730, 110 S.Ct. 3115, 111 L.Ed.2d 571 (1990) and *International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678, 112 S.Ct. 2711, 120 L.Ed.2d 541 (1992), involving limitations on solicitations in *non-public* fora, might have been thought applicable to this case, they are refined by *Reed*. Justice Kennedy's concurrence in *Lee* deserves additional mention, given the **City**'s heavy reliance on it in the briefing now before me. Justice Kennedy wrote that a regulation prohibiting the solicitation of an immediate donation was constitutional and not content-based, because it prohibited only conduct rather than expression and because such solicitation carried with it a "risk of fraud and duress." *Id.* at 704–05, 112 S.Ct. 2711. I find the Sixth Circuit's decision not to follow this concurrence, which itself was drafted before *Reed*, persuasive:

> We decline to follow the reasoning in Part II of Justice Kennedy's concurrence in Lee for three reasons. First, to the extent that Part II of Justice Kennedy's concurrence argues that the "physical exchange of money" may be isolated from the act of solicitation, it runs contrary to *Schaumburg*'s holding that solicitation of charitable donations is "characteristically intertwined with informative and perhaps persuasive speech[.]" *Schaumburg*, 444 U.S. at 632, 100 S.Ct. 826. *Schaumburg* does not suggest that the physical exchange of money may be isolated; it is "intertwined" with speech that the First Amendment protects. Second, Part II of Justice Kennedy's concurrence is not *Lee*'s holding. And third, Justice Kennedy wrote Part II without another Justice joining him.

Speet v. *Schuette*, 726 F.3d 867, 876 (2013). Justice Kennedy's concurrence in *Lee* was, of course, not binding when written and has become less persuasive since *Reed*. It appears at this point clear that regulations of solicitation which single out the solicitation of the immediate transfer of funds for charitable purposes are content-based.

4 The Springfield ordinance, like **Lowell**'s, prohibited oral requests for immediate donations of money, while allowing signs requesting money or requests to send money later. *Norton* v. ***City*** *of Springfield, Ill.*, 768 F.3d 713, 714 (7th Cir.2014) *on reh'g*, No. 13–3581, 612 Fed.Appx. 386, 2015 WL 4714073 (7th Cir. Aug. 7, 2015).

5 I note, in the wake of *Reed*, the Supreme Court also vacated the First Circuit's decision in *Thayer* v. ***City*** *of Worcester*, 755 F.3d 60 (2014), a case concerning an anti-panhandling ordinance in Worcester, Massachusetts. The First Circuit had found the ordinance to be content-neutral, but the Supreme Court remanded that decision "for further

consideration in light of Reed." *Thayer* v. ***City*** *of Worcester, Mass.*, —— U.S. ——, 135 S.Ct. 2887, 192 L.Ed.2d 918 (2015). This disposition does not necessarily mean *Reed* requires a different outcome, but it does speak to the relevance of *Reed* in a case such as this one. Such an order summarily granting a petition for *certiorari*, vacating the decisions and remanding the case is not a "final determination on the merits," but rather "simply indicate[s] that, in light of 'intervening developments,' there [is] a 'reasonable probability' that the Court of Appeals would reject a legal premise on which it relied and which may affect the outcome of the litigation." *Tyler* v. *Cain*, 533 U.S. 656, 666 n. 6, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001) (citing *Henry* v. *Rock Hill*, 376 U.S. 776, 777, 84 S.Ct. 1042, 12 L.Ed.2d 79 (1964) (per curiam) and *Lawrence* v. *Chater*, 516 U.S. 163, 167, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996) (per curiam)). Thus, while the Supreme Court's action in *Thayer* does not require me to find that this ordinance is content-based, it does clarify that *Reed*, and not earlier cases concerning the regulation of solicitation, must be the starting point for the inquiry. As of this date, *Thayer* remains under advisement before Judge Hillman to whom the First Circuit ordered further remand. *Thayer* v. ***City*** *of Worcester*, No. 13-cv-40057 (D. Mass.) (*see* CM/ECF No. 106, Jul. 14, 2015)

6 In *Reed*, Justice Thomas framed the standard for strict scrutiny somewhat differently, as requiring "the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed* v. *Town of Gilbert, Ariz.*, —— U.S. ——, 135 S.Ct. 2218, 2231, 192 L.Ed.2d 236 (2015). In *McCullen*, Chief Justice Roberts distinguished the "least restrictive means" standard from the arguably more permissive "narrowly tailored" standard:

> "For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not burden substantially more speech than is necessary to further the government's legitimate interests. Such a regulation, unlike a content-based restriction of speech, need not be the least restrictive or least intrusive means of serving the government's interests. But the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."

McCullen v. *Coakley*, —— U.S. ——, 134 S.Ct. 2518, 2535, 189 L.Ed.2d 502 (2014) (internal citations omitted). The *McCullen* formulation appears more precise, but *Reed* is chronologically the last word on the subject. Over the years, the Supreme Court has not always distinguished between the two formulations. *See, e.g.,* *United States* v. *Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."). As a consequence, it is not only somewhat unclear which standard governs, but precisely what those standards mean relative to each other. Nevertheless, *McCullen* appears to lay out the contours of the tiers of scrutiny under the First Amendment. *See also* *Cutting*, 802 F.3d at 84 (1st Cir.2015) (distinguishing the "least restrictive means" test for strict scrutiny of content-based regulations and the "narrowly tailored" test for content-neutral regulations).

7 Plaintiffs assert that the **City** failed to establish that panhandling actually harmed business or tourism downtown, arguing that the **City**'s evidence amounts to anecdotes and hearsay. The **City** bears the burden of showing that the harms it seeks to mitigate "are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Asociacion de Educacion Privada de Puerto Rico, Inc.* v. *Garcia–Padilla*, 490 F.3d 1, 18 (1st Cir.2007) (quoting *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 644, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (plurality opinion)). In this regard, the courts owe "substantial deference" to a legislature's predictions about the effect of its policies, given its institutional capacity to gather information and the fact that it is not obligated to prepare that information into record form. *Turner Broad. Sys.*, 512 U.S. at 665–66, 114 S.Ct. 2445. At the summary judgment stage, I would be hesitant to hold that the legislature lacked a sufficient basis to believe that panhandling was impeding the downtown economy, even without rigorous data collection or analysis, where it conducted a public hearing and heard from stakeholders. In

any event, because I hold that tourism and business promotion are not compelling government interests, I do not need to decide definitively the issue whether the evidence supporting harm to business or tourism downtown by panhandling is sufficient.

8 Even if the promotion of business and tourism were a compelling government interest, the Downtown provisions are hardly the least restrictive means of promoting them. The restrictions have a large geographic sweep, covering essentially all of downtown **Lowell**, including the most trafficked areas where panhandlers could reach the most people. *See* *Cutting*, 802 F.3d at 89 (noting that the challenged ordinance encompassed a large number of spaces, including those that were most useful for plaintiffs' speech). And they flatly ban all vocal requests for money. *See* *Frisby* v. *Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) ("A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil."). I do not reach the issue of tailoring because I conclude there is no compelling interest against which the Downtown Panhandling provisions are to be measured. Nevertheless, it is apparent that the challenge of establishing a broad undifferentiated geographic (except for the label "Historic District") prohibition as the least restrictive means available would be an all but insurmountable hurdle for the **City**. Moreover, as the discussion in section II.C. of the Aggressive Panhandling provisions makes clear, the **City** has not surmounted that hurdle with its more narrowly defined approach to aggressive panhandling.

9 Even if public safety were a reason for the Downtown Panhandling provisions, strict scrutiny still would not be satisfied. The Downtown panhandling provisions are not close to the least restrictive means necessary to promote public safety —likely because they were never intended to serve that purpose. The Downtown Panhandling provisions ban all vocal requests for money, regardless of whether they are aggressive or not. A Salvation Army member who briefly stopped ringing his bell and instead asked for money verbally would be violating the Downtown Panhandling provisions, as would a panhandler who never raised her voice or lifted a hand. An ordinance which prohibits these people from soliciting donations, although they pose no recognized threat to public safety, is not narrowly tailored to the goal of public safety, much less the least restrictive means available to achieve that goal. Indeed, the subsequent enactment of the Aggressive Panhandling provisions clearly illustrates the mismatch between the Downtown Panhandling provisions and any public safety objectives: when concerned about public safety, **Lowell** addressed entirely different behaviors.

10 Plaintiffs contend that only 18 out of 827 phone calls could not be covered by existing laws and that therefore the Aggressive Panhandling provisions are an overreaction to a very small public safety problem. I simply note these numbers are contested without finding it necessary to resolve the dispute with precision.

11 As the reference to *Coates* demonstrates, this provision—like others in the Ordinance—raises serious due process concerns. A statute is void for vagueness and violates the Due Process Clause of the Constitution 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." *United States* v. *Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008). Where expression protected by the First Amendment might be limited, there is a heightened requirement for specificity. *Smith* v. *Goguen*, 415 U.S. 566, 573, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). While many of the **Lowell** Aggressive Panhandling provisions appear adequately defined, some are worrisomely vague, none more so than the prohibition on groups panhandling in an "intimidating" manner. Moreover, the history of the Ordinance raises the specter of discriminatory enforcement stilling or chilling the voices of homeless panhandlers, as opposed to organized charities. Nevertheless, I recognize that the void-for-vagueness doctrine is notoriously ill-defined. *See The Void-for-Vagueness Doctrine In the Supreme Court,* 109 U. PA. L. REV. 67, 70 (1960) ("What gives these decisions their pool-rack-hung-up appearance is their almost habitual lack of informing reasoning"); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 196 (1985) ("there is no yardstick of impermissible indeterminacy"). Courts have often let quite poorly-defined criminal statutes stand, although the vagueness doctrine has been applied with special force to "street-cleaning" ordinances that regulate loitering and disorderly conduct. *See* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 610-11 (1997). *See, e.g.,* *Papachristou* v. ***City*** *of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) (vagrancy); *Kolender* v. *Lawson*, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (loitering). Because I hold that the Ordinance in its several challenged dimensions violates the First Amendment, I do not need to reach this difficult due process issue.

12 The City does not refer to any record evidence suggesting that these locations are, indeed, dangerous. Rather, it relies on the bare assertion that the solicitation of money contains, inherently, an element of violence. Such a contention is in a great deal of tension with *Schaumburg* and its progeny.

13 Although I loathe to place too much evidence on this point, it bears noting—as illustrative of the unexamined character of this less restrictive alternative—that the mayor of Lowell, in his deposition, did not realize that even passive sign holding was prohibited in these buffer zones.

14 Plaintiffs also argue that the buffer zones could be smaller and therefore be less restrictive. It is of course true that a ten-foot buffer would restrict less speech than a twenty-foot buffer. Taking the "least restrictive means" test literally, there could be no reason to uphold a twenty-foot buffer: a nineteen and a half foot buffer would restrict less speech and surely sacrifice nothing in public safety. Yet this exercise in diminishing boundaries, which would whittle buffers down inch by inch, is not required by the First Amendment. The number of feet a buffer zone extends, even under strict scrutiny, is not "a question of constitutional dimension. ... it is a difference only in degree, not a less restrictive alternative in kind." *Burson* v. *Freeman*, 504 U.S. 191, 210, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992). If a buffer zone approach is constitutionally permissible in this case, these distances are likely sufficiently tailored, absent a showing that 20-foot buffers prevent entire categories of speech (as with the buffer zones in *McCullen*, which the court found to prevent "sidewalk counseling" in a manner that appeared compassionate and trustworthy, 134 S.Ct. at 2535), block off entire neighborhoods from panhandling, or otherwise are different in kind rather than degree from 10-foot buffers.

For similar reasons, I find plaintiff's argument that Lowell's ordinance is more restrictive than other anti-panhandling provisions across the country unpersuasive. Of course, the fact that the Ordinance might be "truly exceptional" is relevant in addressing the tailoring inquiry, in that it is illustrative of the seriousness of the burden on speech, *Cutting*, 802 F.3d at 87. However, plaintiffs cannot show that Lowell's ordinance is not the least restrictive means available to protect public safety simply by pointing to less restrictive ordinances elsewhere. Otherwise, the passage or repeal of an anti-panhandling ordinance in one city would enlarge or contract the First Amendment rights of panhandlers everywhere else.

15 Because no part of the Ordinance survives First Amendment scrutiny, I do not decide defendant's motion for summary judgment on plaintiffs' Fourteenth Amendment claims, which include both due process concerns, *see supra* note 11, and equal protection claims. Nevertheless, I note that plaintiffs' equal protection claims appear essentially coterminous with its First Amendment claims, because speech is a fundamental right. *See* *Speet* v. *Schuette*, 889 F.Supp.2d 969, 979 (W.D.Mich.2012) *aff'd*, 726 F.3d 867 (6th Cir.2013) ("the Equal Protection analysis largely duplicates the First Amendment analysis in this case... strict scrutiny applies."); *Police Dep't of City of Chicago* v. *Mosley*, 408 U.S. 92, 96, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) "[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."

Plaintiffs' additional equal protection theories would likely be unavailing, however. It would be difficult to show that this Ordinance rests on the "bare desire to harm a politically unpopular group." *City of Cleburne, Tex*. v. *Cleburne Living Center*, 473 U.S. 432, 446–47, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Rather, the City's interests in public safety and protecting tourism are not disputed. Moreover, the poor and homeless are not suspect classes. See *San Antonio Indep. Sch. Dist*. v. *Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); *Kreimer* v. *Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1269 n. 36 (3d Cir.1992).

16 No permanent injunction is required in this case. Massachusetts assumes that its municipalities will "do their duty when disputed questions have been finally adjudicated" and can "rightly be expected to set an example of obedience to law." *Commonwealth* v. *Town of Hudson*, 315 Mass. 335, 52 N.E.2d 566, 572 (1943). I share that expectation. Lowell has voluntarily refrained from enforcing the Ordinance while this litigation has been pending and I fully anticipate that it will acquiesce in this decision declaring the Ordinance unconstitutional without further formal coercive relief. *See also* *Steffel* v. *Thompson*, 415 U.S. 452, 467, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) (declaratory judgments were intended to provide an alternative to injunctions against state officials).

End of Document

Crash Year	Agency	City	Case ID	Crash Date	Crash Time	Contributing Factor(s)
2014	TPD	TEMPLE	14000702	5/28/14	717	No Data
2014	TPD	TEMPLE	14000884	7/7/14	1741	No Data
2014	TPD	TEMPLE	14001178	9/8/14	1624	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2014	TPD	TEMPLE	14001458	11/5/14	1757	No Data
2014	TPD	TEMPLE	14001757	12/27/14	1804	No Data
by year 2014						
2015	TPD	TEMPLE	15000152	1/31/15	2218	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2015	TPD	TEMPLE	15000330	3/6/15	2008	98 - OTHER (EXPLAIN IN NARRATIVE)
2015	TPD	TEMPLE	15000696	5/22/15	1433	No Data
2015	TPD	TEMPLE	15000880	6/24/15	419	No Data
2015	TPD	TEMPLE	15000982	7/13/15	1652	No Data
2015	TPD	TEMPLE	15001404	10/13/15	759	No Data
2015	TPD	TEMPLE	15001639	11/25/15	150	No Data
2015	TPD	TEMPLE	15001641	11/25/15	1151	No Data
by year 2015						
2016	TPD	TEMPLE	16000203	2/13/16	1500	0 - NONE
2016	TPD	TEMPLE	16000225	2/18/16	612	No Data
2016	TPD	TEMPLE	16000263	2/22/16	2024	No Data
2016	TPD	TEMPLE	16000354	3/11/16	1050	No Data
2016	TPD	TEMPLE	16000376	3/12/16	2140	PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEH
2016	TPD	TEMPLE	16000426	3/21/16	706	No Data
2016	TPD	TEMPLE	16000514	4/7/16	1550	98 - OTHER (EXPLAIN IN NARRATIVE)
2016	TPD	TEMPLE	16000544	4/12/16	823	LD RIGHT OF WAY - TO PEDESTRIAN; 59 - PEDESTRIA
2016	TPD	TEMPLE	16000555	4/15/16	1630	No Data
2016	TPD	TEMPLE	16000662	5/11/16	206	PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEH
2016	TPD	TEMPLE	16000697	5/18/16	949	0 - NONE
2016	TPD	TEMPLE	16000738	5/25/16	904	No Data
2016	TPD	TEMPLE	16000770	6/1/16	1556	0 - NONE
2016	TPD	TEMPLE	16000826	6/12/16	209	0 - NONE
2016	TPD	TEMPLE	16001126	7/28/16	2221	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2016	TPD	TEMPLE	16001208	9/2/16	603	0 - NONE
2016	TPD	TEMPLE	16001216	9/3/16	1604	20 - DRIVER INATTENTION
2016	TPD	TEMPLE	16001237	9/7/16	1940	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2016	TPD	TEMPLE	16001260	9/12/16	742	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2016	TPD	TEMPLE	16001301	9/19/16	714	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2016	TPD	TEMPLE	16001400	10/9/16	2213	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2016	TPD	TEMPLE	16001465	10/25/16	1549	98 - OTHER (EXPLAIN IN NARRATIVE)
2016	TPD	TEMPLE	16001578	11/12/16	1718	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2016	TPD	TEMPLE	16001581	11/12/16	2359	0 - NONE
2016	TPD	TEMPLE	16001606	11/17/16	1657	0 - NONE
2016	TPD	TEMPLE	16001682	12/1/16	731	98 - OTHER (EXPLAIN IN NARRATIVE)

2016	TPD	TEMPLE	16001739	12/11/16	2138	0 - NONE
2016	TPD	TEMPLE	16001780	12/19/16	1228	0 - NONE
2016	TPD	TEMPLE	16001838	12/31/16	1759	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
by year 2016						
2017	TPD	TEMPLE	17000048	1/13/17	647	98 - OTHER (EXPLAIN IN NARRATIVE)
2017	TPD	TEMPLE	17000113	1/25/17	1659	0 - NONE
2017	TPD	TEMPLE	17000288	2/26/17	1720	0 - NONE
2017	TPD	TEMPLE	17000304	3/1/17	2048	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2017	TPD	TEMPLE	17000483	3/29/17	1823	0 - NONE
2017	TPD	TEMPLE	17000699	5/8/17	2039	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2017	TPD	TEMPLE	17000750	5/17/17	1507	98 - OTHER (EXPLAIN IN NARRATIVE)
2017	TPD	TEMPLE	17000918	6/21/17	1508	67 - UNDER INFLUENCE - ALCOHOL
2017	TPD	TEMPLE	17001140	7/15/17	1900	98 - OTHER (EXPLAIN IN NARRATIVE)
2017	TPD	TEMPLE	17001240	8/26/17	508	0 - NONE
2017	TPD	TEMPLE	17001289	9/5/17	23	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2017	TPD	TEMPLE	17001368	9/25/17	2340	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2017	TPD	TEMPLE	17001403	10/3/17	650	98 - OTHER (EXPLAIN IN NARRATIVE)
2017	TPD	TEMPLE	17001466	10/17/19	1309	0 - NONE
2017	TPD	TEMPLE	17001511	10/28/17	1352	0 - NONE
2017	TPD	TEMPLE	17001555	11/3/17	1315	0 - NONE
2017	TPD	TEMPLE	17001599	11/15/17	1440	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2017	TPD	TEMPLE	17001682	12/8/17	1313	0 - NONE
by year 2017						
2018	TPD	TEMPLE	18000073	1/22/18	745	0 - NONE
2018	TPD	TEMPLE	18000083	1/23/18	640	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2018	TPD	TEMPLE	18000187	2/15/18	1708	98 - OTHER (EXPLAIN IN NARRATIVE)
2018	TPD	TEMPLE	18000199	2/18/18	1509	0 - NONE
2018	TPD	TEMPLE	18000289	3/9/18	1709	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2018	TPD	TEMPLE	18000302	3/12/18	1000	0 - NONE
2018	TPD	TEMPLE	18000412	4/5/18	1450	0 - NONE
2018	TPD	TEMPLE	18000446	4/13/18	1309	0 - NONE
2018	TPD	TEMPLE	18000574	5/9/18	1720	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2018	TPD	TEMPLE	18000579	5/10/18	1656	0 - NONE
2018	TPD	TEMPLE	18000598	5/14/18	1113	0 - NONE
2018	TPD	TEMPLE	18000728	6/9/18	1958	98 - OTHER (EXPLAIN IN NARRATIVE)
2018	TPD	TEMPLE	18000890	7/11/18	1208	0 - NONE
2018	TPD	TEMPLE	18000893	7/11/18	1424	0 - NONE
2018	TPD	TEMPLE	18000901	7/13/18	1731	0 - NONE
2018	TPD	TEMPLE	18000934	7/20/18	1750	0 - NONE
2018	TPD	TEMPLE	18000954	7/25/18	1848	0 - NONE
2018	TPD	TEMPLE	18001140	9/5/18	705	0 - NONE
2018	TPD	TEMPLE	18001171	9/13/18	846	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2018	TPD	TEMPLE	18001204	9/21/18	1728	0 - NONE
2018	TPD	TEMPLE	18001217	9/24/18	1245	0 - NONE
2018	TPD	TEMPLE	18001218	9/24/18	1311	0 - NONE
2018	TPD	TEMPLE	18001282	10/6/18	1946	98 - OTHER (EXPLAIN IN NARRATIVE)

2018	TPD	TEMPLE	18001284	10/7/18	1558	98 - OTHER (EXPLAIN IN NARRATIVE)
2018	TPD	TEMPLE	18001420	10/29/18	720	98 - OTHER (EXPLAIN IN NARRATIVE)
2018	TPD	TEMPLE	18001470	11/6/18	2002	98 - OTHER (EXPLAIN IN NARRATIVE)
2018	TPD	TEMPLE	18001500	11/14/18	1431	98 - OTHER (EXPLAIN IN NARRATIVE)
2018	TPD	TEMPLE	18001568	11/26/18	1913	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2018	TPD	TEMPLE	18001641	12/7/18	1756	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2018	TPD	TEMPLE	18001721	12/24/18	1752	0 - NONE
by year 2018						
2019	TPD	TEMPLE	19000020	1/5/19	1025	0 - NONE
2019	TPD	TEMPLE	19000219	2/13/19	1805	0 - NONE
2019	TPD	TEMPLE	19000243	2/17/19	1855	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2019	TPD	TEMPLE	19000342	3/11/19	2120	0 - NONE
2019	TPD	TEMPLE	19000398	3/22/19	1125	0 - NONE
2019	TPD	TEMPLE	19000432	3/27/19	2300	0 - NONE
2019	TPD	TEMPLE	19000511	4/12/19	1547	98 - OTHER (EXPLAIN IN NARRATIVE)
2019	TPD	TEMPLE	19000593	4/27/19	1748	0 - NONE
2019	TPD	TEMPLE	19000634	5/7/19	1638	16 - DISREGARD STOP SIGN OR LIGHT
2019	TPD	TEMPLE	19000692	5/17/19	1748	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2019	TPD	TEMPLE	19000728	5/27/19	1015	No Data
2019	TPD	TEMPLE	19000760	5/31/19	1748	No Data
2019	TPD	TEMPLE	19000779	6/5/19	2127	98 - OTHER (EXPLAIN IN NARRATIVE)
2019	TPD	TEMPLE	19000807	6/11/19	938	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2019	TPD	TEMPLE	19000852	6/21/19	1250	No Data
2019	TPD	TEMPLE	19000939	7/10/19	858	No Data
2019	TPD	TEMPLE	19000963	7/16/19	727	No Data
2019	TPD	TEMPLE	19001117	8/25/19	151	9 - PEDESTRIAN FAILED TO YIELD RIGHT OF WAY TO VEHICL
2019	TPD	TEMPLE	19001261	9/28/19	2105	No Data
by year *2019						

*partial year

Person Type	Person Age	I-leads # address prior to Apr 2017	Since CRIS contains poor addresses, I-leads address prior to April 2017 and webrm address from May 2017 to current are listed	Highway Number	Highway System
4 - PEDESTRIAN	64		S 1ST ST / W R AVE	290	STATE SPUR
4 - PEDESTRIAN	60	2200	S 31ST ST	290	STATE SPUR
4 - PEDESTRIAN	12	1800	STAGECOACH TRL	No Data	No Data
4 - PEDESTRIAN	40	4100	CHARTER OAK DR	817	ARM TO MARKE
4 - PEDESTRIAN	42	1617	CANYON CREEK DR	No Data	No Data
4 - PEDESTRIAN	20	4/2/11	W Adams Ave	2305	ARM TO MARKE
4 - PEDESTRIAN	75	4800	S 31ST ST	1741	ARM TO MARKE
4 - PEDESTRIAN	24		S 31ST ST / FOREST TRL	1741	ARM TO MARKE
4 - PEDESTRIAN	22	1706	S 31st St	1741	ARM TO MARKE
4 - PEDESTRIAN	57	000	N 2ND ST	53	STATE HIGHWA
4 - PEDESTRIAN	61	2401	S 31ST ST	No Data	No Data
4 - PEDESTRIAN	50	517	S 29TH ST	No Data	No Data
4 - PEDESTRIAN	76	3500	S GENERAL BRUCE DR	No Data	No Data
4 - PEDESTRIAN	5	602	S 19TH ST	No Data	No Data
4 - PEDESTRIAN	35	3000	PEGASUS DR	No Data	No Data
4 - PEDESTRIAN	69	5206	J I BRUCE DR	No Data	No Data
4 - PEDESTRIAN	70	1414	MARLANDWOOD RD	No Data	No Data
4 - PEDESTRIAN	54	600	S 1ST ST	290	STATE SPUR
4 - PEDESTRIAN	6	1638	CASE RD	No Data	No Data
4 - PEDESTRIAN	44	3111	S 31ST ST	No Data	No Data
4 - PEDESTRIAN	71	2401	S 31ST ST	No Data	No Data
4 - PEDESTRIAN	32	1314	W ADAMS AVE	No Data	No Data
4 - PEDESTRIAN	24	23411	SE H K DODGEN LOOP	190	US HIGHWAY
4 - PEDESTRIAN	66	701	E CENTRAL AVE	No Data	No Data
4 - PEDESTRIAN	46	3925	S GENERAL BRUCE DR	No Data	No Data
4 - PEDESTRIAN	64	2220	W D AVE	No Data	No Data
4 - PEDESTRIAN	2	3550	S GENERAL BRUCE DR	35	INTERSTATE
4 - PEDESTRIAN	56	214	S 3RD ST	No Data	No Data
4 - PEDESTRIAN	36	8	N 9TH ST	No Data	No Data
4 - PEDESTRIAN	24	3002	S 31ST ST	No Data	No Data
4 - PEDESTRIAN	7	1901	SW H K DODGEN LOOP	No Data	No Data
4 - PEDESTRIAN	12	8818	TARVER DR	No Data	No Data
4 - PEDESTRIAN	15		S 31ST ST / CANYON CR	1741	ARM TO MARKE
4 - PEDESTRIAN	33	1902	S 1ST ST	290	STATE SPUR
4 - PEDESTRIAN	7	4501	MIDWAY DR	No Data	No Data
4 - PEDESTRIAN	68	2401	S 31ST ST	1741	ARM TO MARKE
4 - PEDESTRIAN	28		S INTERSTATE 35 / MID	35	INTERSTATE
4 - PEDESTRIAN	61	3002	S 31ST ST	190	US HIGHWAY
4 - PEDESTRIAN	22	1901	S 1ST ST	290	STATE SPUR

4 - PEDESTRIAN	31		294	35	INTERSTATE
4 - PEDESTRIAN	34	3101	W ADAMS AVE	2305	ARM TO MARKE
4 - PEDESTRIAN	20	2401	S 31ST ST	1741	ARM TO MARKE
4 - PEDESTRIAN	56	6511	STATE HIGHWAY 317	317	TATE HIGHWA
4 - PEDESTRIAN	17	3813	DEER TRL	No Data	No Data
4 - PEDESTRIAN	8	9716	COW PAGE CT	No Data	No Data
4 - PEDESTRIAN	35		302	35	INTERSTATE
4 - PEDESTRIAN	2	612	E DOWNS AVE	No Data	No Data
4 - PEDESTRIAN	68	S 3rd St/W Ave H	n/a	No Data	No Data
4 - PEDESTRIAN	4	714 S Pea Ridge Rd	n/a	No Data	No Data
4 - PEDESTRIAN	23	2222 Curtis B Elliot Dr	n/a	No Data	No Data
4 - PEDESTRIAN	25	Buckeye Ln/Forest Trl	n/a	No Data	No Data
4 - PEDESTRIAN	28	2410 N I 35	n/a	35	INTERSTATE
4 - PEDESTRIAN	24	3100 SW H K Dodgen Lp	n/a	190	US HIGHWAY
4 - PEDESTRIAN	30	3604 SW H K Dodgen Lp	n/a	190	US HIGHWAY
4 - PEDESTRIAN	21	2885 Lorraine Ave	n/a	No Data	No Data
4 - PEDESTRIAN	17	3609 S 31st St	n/a	No Data	No Data
4 - PEDESTRIAN	61	3401 S 31st St	n/a	No Data	No Data
4 - PEDESTRIAN	69	3000 S 31st St	n/a	No Data	No Data
4 - PEDESTRIAN	51	S 57th St/Scott Blvd	n/a	No Data	No Data
4 - PEDESTRIAN	4	4233 S 31st St	n/a	1741	ARM TO MARKE
4 - PEDESTRIAN	42	3000 Pegasus Dr	n/a	No Data	No Data
4 - PEDESTRIAN	60	S 25th St/W Ave E	n/a	No Data	No Data
4 - PEDESTRIAN	51	1605 S 31st St	n/a	No Data	No Data
4 - PEDESTRIAN	50	601 Twin Oaks Dr	n/a	No Data	No Data
4 - PEDESTRIAN	19	E Houston Ave/N 8th St	n/a	No Data	No Data
4 - PEDESTRIAN	58	n/a	n/a	No Data	No Data
4 - PEDESTRIAN	77	1601 S 41st St	n/a	No Data	No Data
4 - PEDESTRIAN	53	12310 NW H K Dodgen Lp	n/a	363	STATE LOOP
4 - PEDESTRIAN	7	S 19th St/W Ave M	n/a	No Data	No Data
4 - PEDESTRIAN	72	S 1st St/ W Ave H	n/a	No Data	No Data
4 - PEDESTRIAN	88	2220 W Ave D	n/a	No Data	No Data
4 - PEDESTRIAN	34	entral Ave/N Martin Luther King J	n/a	No Data	No Data
4 - PEDESTRIAN	60	S 1st St/W Ave F	n/a	290	STATE SPUR
4 - PEDESTRIAN	5	S 1st St/W Ave U	n/a	No Data	No Data
4 - PEDESTRIAN	61	S 31st St/Scott Blvd	n/a	No Data	No Data
4 - PEDESTRIAN	31	3401 S 31st St	n/a	No Data	No Data
4 - PEDESTRIAN	6	1104 N 6th St	n/a	No Data	No Data
4 - PEDESTRIAN	79	4312 S 31st St	n/a	No Data	No Data
4 - PEDESTRIAN	19	1800 N 1st St	n/a	No Data	No Data
4 - PEDESTRIAN	89	802 E Adams Ave	n/a	36	TATE HIGHWA
4 - PEDESTRIAN	46	3111 S 31st St	n/a	No Data	No Data
4 - PEDESTRIAN	33, 17, 4,1	1500 Marlandwood Rd	n/a	No Data	No Data
4 - PEDESTRIAN	54	1720 Scott Blvd	n/a	No Data	No Data

4 - PEDESTRIAN	49	2219 S 57th St	n/a	No Data	No Data
4 - PEDESTRIAN	12	7807 Fieldstone Dr	n/a	No Data	No Data
4 - PEDESTRIAN	46	N Kegley Rd/W Adams Ave	n/a	2305	ARM TO MARKE
4 - PEDESTRIAN	39	000 S 1st St	n/a	53	TATE HIGHWAY
4 - PEDESTRIAN	79	2401 S 31st St	n/a	1741	ARM TO MARKE
4 - PEDESTRIAN	27	S 25t St/ W Ave M	n/a	No Data	No Data
4 - PEDESTRIAN	33	dams Ave/N Martin Luther King J	n/a	53	TATE HIGHWA
4 - PEDESTRIAN	18	1216 W Ave H	n/a	No Data	No Data
4 - PEDESTRIAN	26	3002 S 31st St	n/a	No Data	No Data
4 - PEDESTRIAN	35	N 49th St/W Adams Ave	n/a	2305	ARM TO MARKE
4 - PEDESTRIAN	54	2500 Scott Blvd	n/a	No Data	No Data
4 - PEDESTRIAN	33, 0	S 31st St/SW H K Dodgen Lp	n/a	190	US HIGHWAY
4 - PEDESTRIAN	53	1104 Terrace St	n/a	No Data	No Data
4 - PEDESTRIAN	12	2100 N 1st St	n/a	No Data	No Data
4 - PEDESTRIAN	42	1530 Marlandwood Rd	n/a	No Data	No Data
4 - PEDESTRIAN	17	S 33rd St/ W Ave T	n/a	No Data	No Data
4 - PEDESTRIAN	2	S 1st St/W Ave A	n/a	290	STATE SPUR
4 - PEDESTRIAN	70	3401 S 31st St	n/a	No Data	No Data
4 - PEDESTRIAN	62	E Adams Ave/N 20th St	n/a	No Data	No Data
4 - PEDESTRIAN	53	700 W Ave H	n/a	No Data	No Data
4 - PEDESTRIAN	6	616 N 2nd St	n/a	No Data	No Data
4 - PEDESTRIAN	39	400 Fryers Creek Dr	n/a	No Data	No Data
4 - PEDESTRIAN	71	Everton Dr/S 31st St	n/a	1741	ARM TO MARKE
4 - PEDESTRIAN	51, 34	2401 S 31st St	n/a	No Data	No Data
4 - PEDESTRIAN	33	1318 S 1st St	n/a	290	STATE SPUR
4 - PEDESTRIAN	59	3403 S 31st St	n/a	1741	ARM TO MARKE

Intersecting Highway Alpha Suffix	Intersecting Highway Number	Intersecting Highway System	Intersecting Street Name	Intersecting Street Number	Street Name
	190	US HIGHWAY	US0190	NO DATA	SS0290
No Data	No Data	No Data	SCOTT BLVD	NO DATA	SS0290
No Data	No Data	No Data	STAGECOACH TRL	NO DATA	LONGHORN TRL
No Data	No Data	No Data	N/A	NO DATA	FM0817
No Data	No Data	No Data	N/A	NO DATA	CANYON CREEK DR
No Data	No Data	No Data	N/A	NO DATA	FM2305
No Data	No Data	No Data	N/A	NO DATA	FM1741
No Data	No Data	No Data	N/A	NO DATA	FM1741
No Data	No Data	No Data	N/A	NO DATA	FM1741
No Data	No Data	No Data	N 2ND ST	NO DATA	SH0053
No Data	No Data	No Data	N/A	NO DATA	N LOOP ST
No Data	No Data	No Data	N/A	NO DATA	S 29TH ST
No Data	No Data	No Data	N/A	NO DATA	S GENERAL BRUCE DR
No Data	No Data	No Data	UNKNOWN	NO DATA	S 19TH ST
No Data	No Data	No Data	N/A	NO DATA	N GENERAL BRUCE DR
No Data	No Data	No Data	N/A	NO DATA	JI BRUCE DR
No Data	No Data	No Data	N/A	NO DATA	MARLANDWOOD RD
	53	STATE HIGHWAY	SH0053	NO DATA	SS0290
No Data	No Data	No Data	N/A	NO DATA	CASE RD
No Data	No Data	No Data	N/A	NO DATA	S 31ST ST
No Data	No Data	No Data	N/A	NO DATA	S 31ST ST
No Data	No Data	No Data	N/A	NO DATA	W ADAMS AVE
No Data	No Data	No Data	N/A	NO DATA	US0190
No Data	No Data	No Data	N/A	NO DATA	S 14TH ST
No Data	No Data	No Data	N/A	NO DATA	S GENERAL BRUCE DR
No Data	No Data	No Data	N/A	NO DATA	W D AVE
No Data	No Data	No Data	N/A	NO DATA	IH0035
No Data	No Data	No Data	N/A	NO DATA	S 5TH ST
No Data	No Data	No Data	N/A	NO DATA	N 9TH ST
No Data	No Data	No Data	N/A	NO DATA	S 31ST ST
No Data	No Data	No Data	N/A	NO DATA	N 31ST ST
No Data	No Data	No Data	N/A	NO DATA	TARVER RD
ET	190	US HIGHWAY	US0190	NO DATA	FM1741
No Data	No Data	No Data	N/A	NO DATA	SS0290
No Data	No Data	No Data	N/A	NO DATA	KING ARTHUR DR
No Data	No Data	No Data	N/A	NO DATA	FM1741
No Data	No Data	No Data	NOT REPORTED	NO DATA	IH0035
No Data	No Data	No Data	N/A	NO DATA	US0190
	190	US HIGHWAY	US0190	NO DATA	SS0290

No Data	No Data	No Data	NOT REPORTED	NO DATA	IH0035
No Data	No Data	No Data	N APACHE DR	NO DATA	FM2305
No Data	No Data	No Data	SCOTT BLVD	NO DATA	FM1741
No Data	No Data	No Data	N/A	NO DATA	SH0317
No Data	No Data	No Data	UNKNOWN	NO DATA	S 41ST ST
No Data	No Data	No Data	N/A	NO DATA	COW PAGE CT
No Data	No Data	No Data	N/A	NO DATA	IH0035
No Data	No Data	No Data	N KATY ST	NO DATA	E DOWNS AVE
No Data	No Data	No Data	N/A	NO DATA	W AVENUE H
No Data	No Data	No Data	N/A	NO DATA	S PEA RIDGE RD
No Data	No Data	No Data	N/A	NO DATA	S 34TH ST
No Data	No Data	No Data	N/A	NO DATA	BUCKEYE LN
No Data	No Data	No Data	N/A	NO DATA	IH0035
	35	INTERSTATE	IH0035	NO DATA	US0190
No Data	No Data	No Data	N/A	NO DATA	US0190
No Data	No Data	No Data	N/A	NO DATA	LORRAINE AVE
No Data	No Data	No Data	S 31ST ST	NO DATA	AZALEA DR
No Data	No Data	No Data	N/A	NO DATA	S 31ST ST
No Data	No Data	No Data	N/A	NO DATA	S 31ST ST
No Data	No Data	No Data	N/A	NO DATA	SCOTT BLVD
No Data	No Data	No Data	N/A	NO DATA	FM1741
No Data	No Data	No Data	N/A	NO DATA	PEGASUS DR
No Data	No Data	No Data	N/A	NO DATA	S 25TH ST
No Data	No Data	No Data	N/A	NO DATA	W AVENUE R
No Data	No Data	No Data	N/A	NO DATA	TWIN OAKS DR
No Data	No Data	No Data	N/A	NO DATA	N 8TH ST
No Data	No Data	No Data	N/A	NO DATA	S 31ST ST
No Data	No Data	No Data	N/A	NO DATA	W AVE P AVE
No Data	No Data	No Data	N/A	NO DATA	SL0363
No Data	No Data	No Data	UNKNOWN	NO DATA	W AVENUE M
No Data	No Data	No Data	S 1ST ST	NO DATA	W H AVE
No Data	No Data	No Data	N/A	NO DATA	W D AVE
No Data	No Data	No Data	E CENTRAL AVE	NO DATA	MARTIN LUTHER KING JR
	53	STATE HIGHWAY	SH0053	NO DATA	SS0290
No Data	No Data	No Data	N/A	NO DATA	S 1ST ST
No Data	No Data	No Data	SCOTT BLVD	NO DATA	S 31ST ST
No Data	No Data	No Data	N/A	NO DATA	S 31ST ST
No Data	No Data	No Data	UNKNOWN	NO DATA	S 6TH ST
No Data	No Data	No Data	N/A	NO DATA	S 31ST ST
No Data	No Data	No Data	N/A	NO DATA	N 1ST ST
No Data	No Data	No Data	N/A	NO DATA	SH0036
No Data	No Data	No Data	N/A	NO DATA	S 31ST ST
No Data	No Data	No Data	S 31ST ST	NO DATA	MARLANDWOOD RD
No Data	No Data	No Data	UNKNOWN	NO DATA	SCOTT BLVD

No Data	No Data	No Data	N/A	NO DATA	S 57TH ST
No Data	No Data	No Data	N/A	NO DATA	FIELDSTONE DR
No Data	No Data	No Data	N/A	NO DATA	FM2305
Y	290	STATE SPUR	SS0290	NO DATA	SH0053
ET	190	US HIGHWAY	US0190	NO DATA	FM1741
No Data	No Data	No Data	UNKNOWN	NO DATA	S 25TH ST
No Data	No Data	No Data	N/A	NO DATA	SH0053
No Data	No Data	No Data	N/A	NO DATA	W AVENUE H
No Data	No Data	No Data	N/A	NO DATA	S 31ST ST
No Data	No Data	No Data	N/A	NO DATA	FM2305
No Data	No Data	No Data	N/A	NO DATA	SCOTT BLVD
	1741	ARM TO MARKE	FM1741	NO DATA	US0190
No Data	No Data	No Data	N/A	NO DATA	S TERRACE ST
No Data	No Data	No Data	N/A	NO DATA	N 1ST ST
No Data	No Data	No Data	UNKNOWN	NO DATA	MARLANDWOOD RD
No Data	No Data	No Data	UNKNOWN	NO DATA	W AVENUE T
No Data	No Data	No Data	N/A	NO DATA	SS0290
No Data	No Data	No Data	N/A	NO DATA	S 31ST ST
No Data	No Data	No Data	UNKNOWN	NO DATA	S 20TH ST
No Data	No Data	No Data	N/A	NO DATA	W AVENUE H
No Data	No Data	No Data	N/A	NO DATA	N 6TH ST
No Data	No Data	No Data	N/A	NO DATA	FRYERS CREEK LN
ET	190	US HIGHWAY	US0190	NO DATA	FM1741
No Data	No Data	No Data	N/A	NO DATA	S 31ST ST
No Data	No Data	No Data	N/A	NO DATA	SS0290
No Data	No Data	No Data	N/A	NO DATA	FM1741

Street Number	Intersection Related (At Intersection Flag)	Total Crash	Crash Total Injury (Person) Count	Crash Death (Person) Count
NO DATA	INTERSECTION RELATED	1	1	0
NO DATA	INTERSECTION RELATED	1	1	0
4199	INTERSECTION RELATED	1	1	0
NO DATA	NON INTERSECTION	1	3	0
NO DATA	NON INTERSECTION	1	1	0
		5	**7**	**0**
4153	NON INTERSECTION	1	1	0
4752	NON INTERSECTION	1	0	1
NO DATA	DRIVEWAY ACCESS	1	2	0
NO DATA	NON INTERSECTION	1	1	0
98	INTERSECTION RELATED	1	1	0
NO DATA	NON INTERSECTION	1	1	0
367	DRIVEWAY ACCESS	1	0	0
NO DATA	NON INTERSECTION	1	0	1
		8	**6**	**2**
600	INTERSECTION RELATED	1	1	0
NO DATA	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
607	INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
0	DRIVEWAY ACCESS	1	1	0
NO DATA	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	0	1
2100	NON INTERSECTION	1	1	0
89	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
4097	INTERSECTION RELATED	1	1	0
2059	NON INTERSECTION	1	0	0
4698	NON INTERSECTION	1	1	0
2479	DRIVEWAY ACCESS	1	0	1
NO DATA	NON INTERSECTION	1	3	0
NO DATA	DRIVEWAY ACCESS	1	0	0
2099	INTERSECTION RELATED	1	1	0

NO DATA	NON INTERSECTION	1	2	0
NO DATA	INTERSECTION RELATED	1	1	0
2403	INTERSECTION	1	1	0
		29	**28**	**2**
NO DATA	NON INTERSECTION	1	1	0
0	INTERSECTION RELATED	1	1	0
9700	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	0	1
700	INTERSECTION RELATED	1	1	0
206	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
360	NON INTERSECTION	1	1	0
3399	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
NO DATA	INTERSECTION RELATED	1	1	0
NO DATA	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
1600	INTERSECTION RELATED	1	1	0
NO DATA	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
2971	NON INTERSECTION	1	1	0
4031	NON INTERSECTION	1	1	0
		18	**17**	**1**
NO DATA	NON INTERSECTION	1	1	0
508	NON INTERSECTION	1	1	0
NO DATA	DRIVEWAY ACCESS	1	1	0
NO DATA	NON INTERSECTION	1	1	0
806	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
1000	INTERSECTION RELATED	1	1	0
NO DATA	INTERSECTION RELATED	1	1	0
NO DATA	NON INTERSECTION	1	1	0
6	INTERSECTION RELATED	1	1	0
600	INTERSECTION RELATED	1	1	0
NO DATA	NON INTERSECTION	1	1	0
2403	INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	0	0
1000	INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
1878	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	0	0
NO DATA	NON INTERSECTION	1	1	0
1598	INTERSECTION RELATED	1	4	0
1700	INTERSECTION RELATED	1	1	0

NO DATA	NON INTERSECTION	1	1	0
7795	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
102	INTERSECTION RELATED	1	1	0
NO DATA	INTERSECTION	1	0	1
1300	INTERSECTION RELATED	1	1	0
440	NON INTERSECTION	1	1	0
		30	**30**	**1**
1292	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
2508	NON INTERSECTION	1	1	0
2505	NON INTERSECTION	1	0	1
NO DATA	INTERSECTION RELATED	1	2	0
1100	NON INTERSECTION	1	1	0
1766	NON INTERSECTION	1	1	0
1520	INTERSECTION RELATED	1	1	0
1697	INTERSECTION	1	1	0
0	NON INTERSECTION	1	1	0
NO DATA	NON INTERSECTION	1	1	0
100	INTERSECTION RELATED	1	1	0
818	NON INTERSECTION	1	0	1
635	NON INTERSECTION	1	1	0
400	NON INTERSECTION	1	1	0
2501	INTERSECTION RELATED	1	1	0
NO DATA	NON INTERSECTION	1	2	0
1300	NON INTERSECTION	1	1	0
3275	NON INTERSECTION	1	1	0
		19	**19**	**2**

← PEDESTRIAN SAFETY

How Pedestrians Can Walk Safely

And Tips for Drivers Sharing the Road

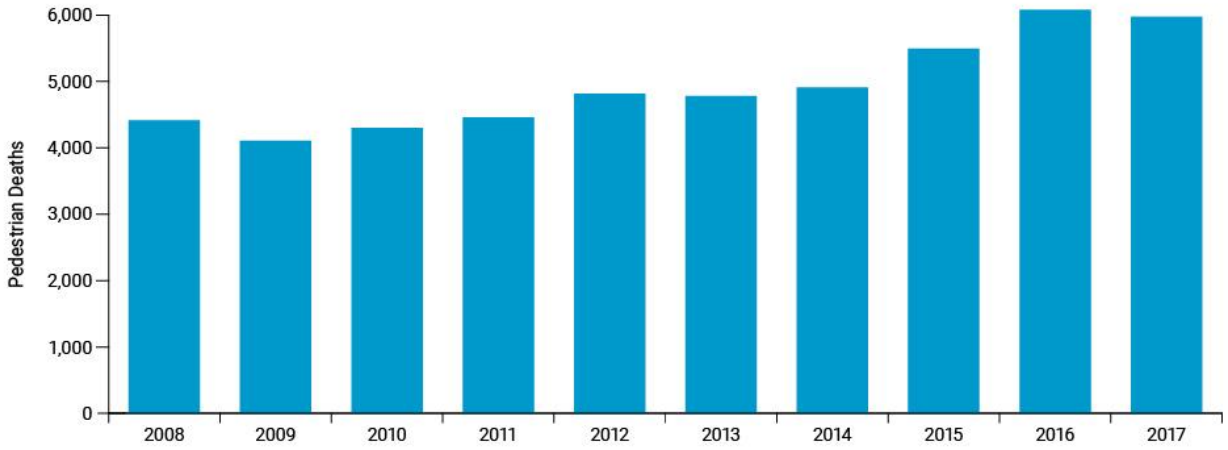
The number of pedestrians dying on America's roads appears to be on the rise. While final reporting and analysis of 2018 traffic deaths are still underway, early estimates by NHTSA point to pedestrian deaths increasing 4% over the previous year. On average, a pedestrian died every 88 minutes in 2017 — accounting for 16% of all traffic fatalities.

BY THE NUMBERS

RELATED

PEDESTRIANS TRAFFIC SAFETY FACTS 2017

Over the past decade, there's been an increase in pedestrian fatalities. Deaths increased 35% when comparing 2008 and 2017 fatalities.



DISTRACTIONS

Distractions can be a factor in pedestrian crashes. Walkers wearing headphones or using a cell phone might not hear a car horn, or miss a traffic signal at a crosswalk; and distracted drivers may not see a pedestrian. It's essential for both drivers and pedestrians to avoid distractions and be mindful of traffic laws.

ALCOHOL

> **RESOURCE**
>
> **TIPS FOR GETTING HOME SAFELY WITHOUT DRIVING**

While we know the dangers of driving drunk or high, it's important to understand that walking while impaired can be dangerous too. An estimated 33% of pedestrians 16 and older who were killed in 2017 were drunk.

NHTSA offers tips for getting home safely if you're impaired.

Safety Tips for Walkers and Drivers

Every day, millions of people use various forms of transportation to get around, and at some point everyone is a pedestrian. While out on the roads, keep these safety tips in mind every day.

Pedestrians

- Walk on a sidewalk or path when one is available. If no sidewalk or path is available, walk facing traffic and as far from cars as possible.
- Never assume drivers see you; they could be distracted or impaired. It's best to make eye contact with drivers to make sure you are seen, and to generally be aware of your surroundings – particularly when crossing the street.
- Always cross streets at marked crosswalks or signalized intersections whenever possible; this is where drivers expect pedestrians.
- If a marked crosswalk or intersection is not available, locate a well-lit area, wait for a gap in traffic that allows you enough time to cross safely, and continue to watch for traffic as you cross.
- Make yourself visible by wearing bright colored clothing during the day, and wear reflective materials (especially on arms, legs, and feet) or use a flashlight at night.

Drivers

- Look for pedestrians everywhere. Pedestrians may be walking in unexpected areas, or may be hard to see — especially at night, in poorly lit areas, or in bad weather.
- Follow pedestrian safety laws in your state or local area — always stop or yield for pedestrians in the crosswalk.
- Never pass vehicles stopped at a crosswalk. They might be stopped to allow pedestrians to cross the street.
- Stay alert where children may be present, like in school zones and neighborhoods.
- Slow down and carefully adhere to posted speed limits, particularly in urban and pedestrian-heavy areas. Speed is one of the most important factors in pedestrian crash survivability.

Pedestrian Safety

NHTSA offers more information and tips on staying safe when you walk and run.

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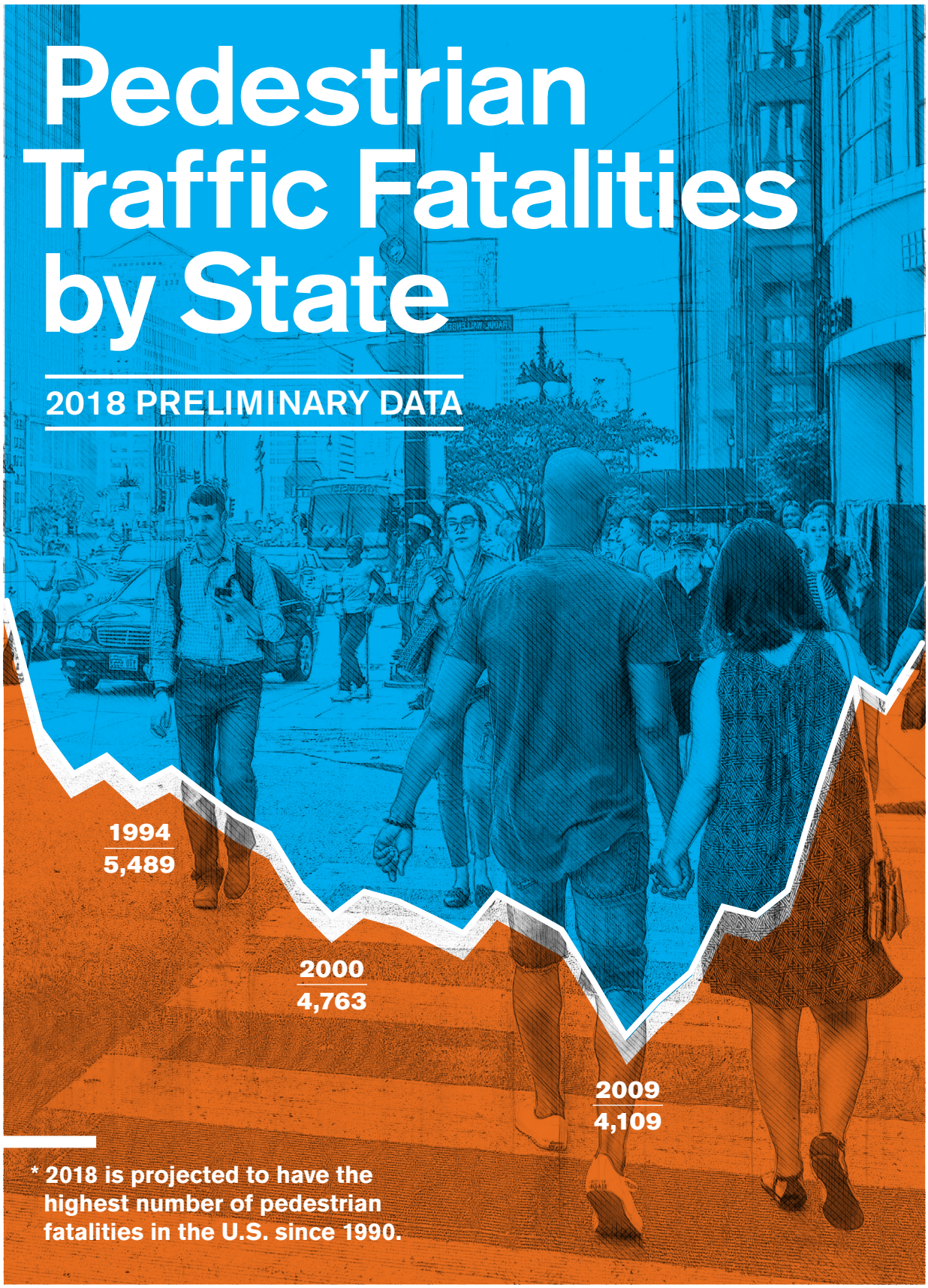
Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA



* 2018 is projected to have the highest number of pedestrian fatalities in the U.S. since 1990.

Pedestrian Traffic Fatalities by State

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ACKNOWLEDGEMENTS

Richard Retting, Sam Schwartz Consulting, researched and wrote the report.

Madison Forker, Communications Manager, GHSA, oversaw the report. Russ Martin, Director of Policy and Government Relations, GHSA, and Kara Macek, Senior Director of Policy and Programs, GHSA, edited the report.

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Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

EXECUTIVE SUMMARY

In recent years, the number of pedestrian fatalities in the United States has grown sharply. During the 10-year period from 2008 to 2017, the number of pedestrian fatalities increased by 35 percent (from 4,414 deaths in 2008 to 5,977 deaths in 2017); meanwhile, the combined number of all other traffic deaths declined by six percent. Along with the increase in the number of pedestrian fatalities, pedestrian deaths as a percentage of total motor vehicle crash deaths increased from 12 percent in 2008 to 16 percent in 2017.

Earlier studies by the Governors Highway Safety Association (GHSA), based on preliminary data reported by State Highway Safety Offices (SHSOs), were the first to predict recent increases in pedestrian fatalities. The present study, based on preliminary data from all 50 states and the District of Columbia (DC), found the alarming rise in pedestrian deaths observed in both 2015 and 2016 appears to have resumed in 2018, although at a lesser pace. For the first six months of 2018 GHSA found a three percent increase in the reported number of pedestrian fatalities compared with the first six months of 2017. However, after adjusting for anticipated underreporting in the preliminary state data and considering the historic trends in pedestrian fatalities during the first and second halves of the year, GHSA estimates the nationwide number of pedestrians killed in motor vehicle crashes in 2018 was 6,227, an increase of four percent from 2017. This projection represents a continuation of an increasing trend in pedestrian deaths going back to 2009 and would be the **largest annual number of pedestrian fatalities in the U.S. since 1990.**

GHSA estimates the nationwide number of pedestrians killed in motor vehicle crashes in 2018 was 6,227, an increase of four percent from 2017.

GHSA's latest analysis of preliminary pedestrian fatality data also indicates the following:

- States reported a range of changes in the number of pedestrian fatalities in the first half of 2018 compared with the same period in 2017:
  - 25 states (and DC) had increases in pedestrian fatalities;
  - 23 states had decreases; and
  - Two states remained the same.
- States differ widely in fatality numbers:
  - The estimated number of pedestrian deaths for the first half of 2018 ranged from one in New Hampshire to 432 in California.
  - Seven states (California, Florida, Texas, Georgia, Arizona, New York and North Carolina – in rank order) are each expected to have more than 100 pedestrian deaths – an increase of two states from 2017.
  - Five states (Arizona, California, Florida, Georgia and Texas) accounted for almost half – 46 percent – of all pedestrian deaths.
  - New Mexico had the highest rate of pedestrian deaths per resident population, while New Hampshire had the lowest.

- States use various combinations of engineering, enforcement and education countermeasures to address pedestrian safety, including targeted enforcement in conjunction with public outreach and education.

Many factors outside the control of state and local traffic safety officials contribute to annual changes in the number of pedestrian fatalities, including economic conditions, population growth, demographic changes, weather conditions, fuel prices, vehicle miles traveled and the amount of time people spend walking.

The increasing shift in U.S. vehicle sales away from passenger cars to light trucks (with light trucks generally causing more severe pedestrian impacts than cars) is also a factor. Although passenger cars are the largest category of vehicles involved in fatal pedestrian crashes, the number of pedestrian fatalities involving SUVs increased at a faster rate – 50 percent – from 2013 to 2017 compared to passenger cars, which increased by 30 percent.

Increases in pedestrian fatalities are occurring largely at night. From 2008 to 2017 the number of nighttime pedestrian fatalities increased by 45 percent, compared to a much smaller 11 percent increase in daytime pedestrian fatalities.

Additionally, increases in pedestrian fatalities may be linked to population growth in specific cities and states. For example, the 10 states with the highest population growth from 2017 to 2018 – Arizona, Colorado, Florida, Idaho, North Carolina, Nevada, South Carolina, Utah, Texas and Washington State – had an overall five percent increase in the number of pedestrian fatalities during the first six month of 2018 compared with the same period in 2017.[1]

Another possible factor contributing to the recent rise in the overall number of pedestrian fatalities could be the large growth in smartphone use over the past decade, which can be a significant source of distraction for all road users.

Despite the overall increase in pedestrian deaths, there is some good news in the 2018 preliminary data:

- Pedestrian fatalities during the first half of 2018 declined in 23 states compared with the same period in 2017.
- Six states (Alabama, Indiana, Michigan, Nevada, Oklahoma and Wisconsin) reported double-digit declines in both the number and percent change in pedestrian fatalities from the same period in 2017.
- Three states (Iowa, New Hampshire and Utah) reported two consecutive years of declining numbers of pedestrian fatalities.
- The number of pedestrian fatalities in the 10 largest cities declined 15 percent in 2017. The decline was especially sharp in New York city, providing evidence of local successes that may not be reflected in statewide data.

[1] https://www.census.gov/newsroom/press-releases/2018/estimates-national-state.html

Pedestrian Traffic Fatalities by State

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INTRODUCTION

Walking is the most basic, inexpensive and environmentally-friendly form of human transportation. Walking provides essential connections between residential, retail, and commercial land uses as well as access to public transit, especially in urban and suburban areas. But unfortunately, walking has become increasingly risky in recent years, whether walking the dog, traveling to work or school, exercising or simply taking a stroll.

During the 10-year period of 2008 to 2017, the number of pedestrian fatalities in the U.S. increased by 35 percent, from 4,414 deaths in 2008 to 5,977 deaths in 2017 (Figure 1 and Table 1). This translates into more than 1,500 additional pedestrian deaths in 2017 compared with 2008. At the same time that pedestrian deaths have been increasing, the number of all other traffic deaths combined decreased by six percent.

Table 1 **Pedestrian Fatalities and Percent of Total Traffic Fatalities, 2008 - 2017**

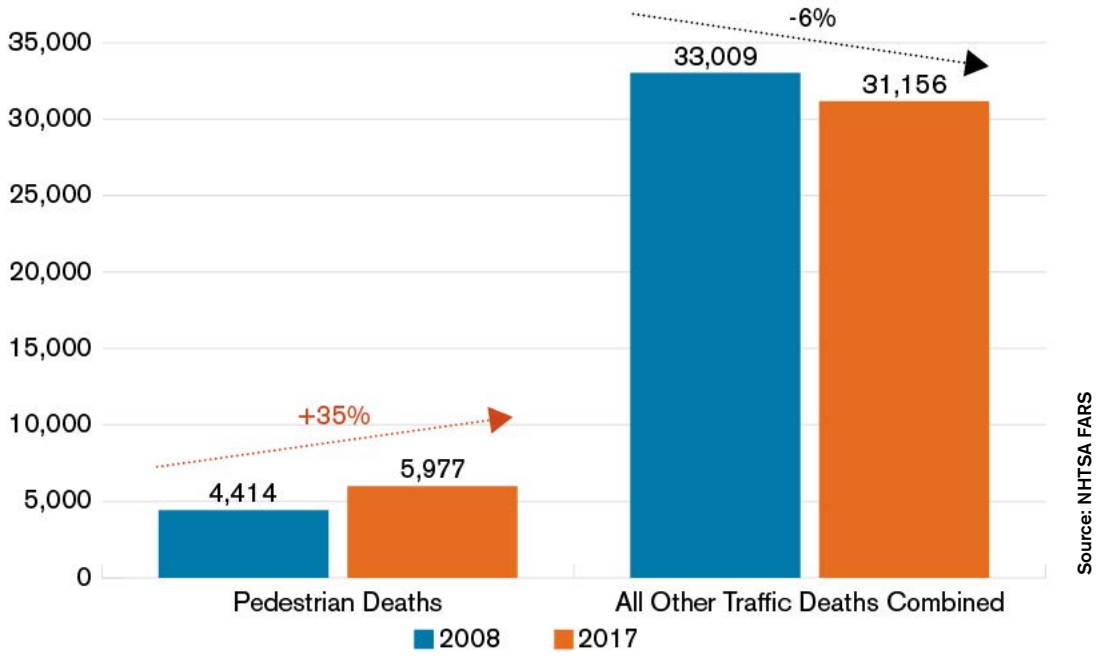
Year	Pedestrian Fatalities	All Other Traffic Fatalities Combined	Total Traffic Fatalities	Pedestrian Deaths as a Percent of Total Traffic Fatalities
2008	4,414	33,009	37,423	12%
2009	4,109	29,774	33,883	12%
2010	4,302	28,697	32,999	13%
2011	4,457	28,022	32,479	14%
2012	4,818	28,964	33,782	14%
2013	4,779	28,115	32,894	15%
2014	4,910	27,834	32,744	15%
2015	5,495	29,990	35,485	15%
2016	6,080	31,726	37,806	16%
2017	5,977	31,156	37,133	16%

Source: National Highway Traffic Safety Administration (NHTSA) Fatality Analysis Reporting System (FARS)

Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

Figure 1 **Numbers of U.S. Traffic Deaths in 2008 and 2017**



Source: NHTSA FARS

Along with the increase in the number of pedestrian fatalities, pedestrian deaths as a percentage of total motor vehicle crash deaths increased from 12 percent in 2008 to 16 percent in both 2016 and 2017. This is due to the simultaneous trends of increasing numbers of pedestrian deaths and general declines in the number of occupant fatalities. Declines in occupant deaths are attributed in part to steady enhancements in vehicle crashworthiness and crash avoidance technology, whereas by contrast, pedestrians remain just as susceptible to sustaining serious or fatal injuries when struck by a motor vehicle.

2018 PRELIMINARY PEDESTRIAN FATALITY DATA

Tables 2-4 demonstrate the number of pedestrian fatalities projected in each state for the first half of 2018, sorted by state (Table 2), percentage (Table 3) and number of fatalities (Table 4). The preliminary data provided by State Highway Safety Offices have been adjusted based on historical trends to achieve the most accurate projection.

Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

Table 2

Pedestrian Fatalities by State, Jan-June 2017 & 2018

Source: State Highway Safety Offices

Sorted by State

State	Jan-June 2017	Jan-June 2018 (Preliminary Adjusted)	% Change from 2017 to 2018	
			#	%
Alabama	59	40	-19	-32%
Alaska	7	5	-2	-29%
Arizona	112	125	+ 13	+ 12%
Arkansas	25	23	-2	-8%
California	468	432	-36	-8%
Colorado	37	34	-3	-8%
Connecticut	19	29	+ 10	+ 53%
Delaware	13	7	-6	-46%
DC	7	8	+ 1	+14%
Florida	326	330	+ 4	+1%
Georgia	101	133	+ 32	+ 32%
Hawaii	1	19	+ 18	+ 1800%
Idaho	7	4	-3	-43%
Illinois	67	80	+ 13	+ 19%
Indiana	61	42	-19	-31%
Iowa	10	9	-1	-10%
Kansas	12	16	+ 4	+ 33%
Kentucky	38	33	-5	-13%
Louisiana	69	77	+ 8	+ 12%
Maine	5	3	-2	-40%
Maryland	48	60	+ 12	+ 25%
Massachusetts	35	38	+ 3	+ 9%
Michigan	72	58	-14	-19%
Minnesota	18	14	-4	-22%
Mississippi	31	44	+ 13	+ 42%
Missouri	42	44	+ 2	+ 5%
Montana	5	6	+ 1	+ 20%
Nebraska	7	12	+ 5	+ 71%
Nevada	43	31	-12	-28%
New Hampshire	5	1	-4	-80%
New Jersey	67	73	+ 6	+ 9%
New Mexico	32	47	+ 15	+ 47%
New York	112	117	+ 5	+ 4%
North Carolina	83	102	+ 19	+23%
North Dakota	3	3	0	0%
Ohio	55	63	+ 8	+15%
Oklahoma	33	22	-11	-33%
Oregon	34	28	-6	-18%
Pennsylvania	64	90	+ 26	+ 41%
Rhode Island	10	4	-6	-60%
South Carolina	69	74	+ 5	+ 7%
South Dakota	2	5	+ 3	+ 150%
Tennessee	57	52	-5	-9%
Texas	266	298	+ 32	+ 12%
Utah	18	13	-5	-28%
Vermont	2	2	0	0%
Virginia	45	53	+ 8	+ 18%
Washington	46	44	-2	-4%
West Virginia	10	7	-3	-30%
Wisconsin	29	18	-11	-38%
Wyoming	3	4	+ 1	+ 33%
U.S. Total	2,790	2,876	+ 86	+ 3%

Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

Table 3

Pedestrian Fatalities by State, Jan - June 2017 & 2018

Source: State Highway Safety Offices

Sorted by Percentage Change

State	Jan-Jun 2017	Jan-Jun 2018 (Preliminary Adjusted)	Change from 2017 to 2018	
			#	%
Hawaii	1	19	+ 18	+ 1800%
South Dakota	2	5	+ 3	+ 150%
Nebraska	7	12	+ 5	+ 71%
Connecticut	19	29	+ 10	+ 53%
New Mexico	32	47	+ 15	+ 47%
Mississippi	31	44	+ 13	+ 42%
Pennsylvania	64	90	+ 26	+ 41%
Kansas	12	16	+ 4	+ 33%
Wyoming	3	4	+1	+ 33%
Georgia	101	133	+ 32	+ 32%
Maryland	48	60	+ 12	+ 25%
North Carolina	83	102	+ 19	+ 23%
Montana	5	6	+ 1	+ 20%
Illinois	67	80	+13	+ 19%
Virginia	45	53	+ 8	+ 18%
Ohio	55	63	+ 8	+ 15%
DC	7	8	+ 1	+ 14%
Arizona	112	125	+ 13	+ 12%
Louisiana	69	77	+ 8	+ 12%
Texas	266	298	+ 32	+ 12%
Massachusetts	35	38	+ 3	+ 9%
New Jersey	67	73	+ 6	+ 9%
South Carolina	69	74	+ 5	+ 7%
Missouri	42	44	+ 2	+ 5%
New York	112	117	+ 5	+ 4%
Florida	326	330	+ 4	+ 1%
North Dakota	3	3	0	0%
Vermont	2	2	0	0%
Washington	46	44	-2	-4%
Arkansas	25	23	-2	-8%
California	468	432	-36	-8%
Colorado	37	34	-3	-8%
Tennessee	57	52	-5	-9%
Iowa	10	9	-1	-10%
Kentucky	38	33	-5	-13%
Oregon	34	28	-6	-18%
Michigan	72	58	-14	-19%
Minnesota	18	14	-4	-22%
Nevada	43	31	-12	-28%
Utah	18	13	-5	-28%
Alaska	7	5	-2	-29%
West Virginia	10	7	-3	-30%
Indiana	61	42	-19	-31%
Alabama	59	40	-19	-32%
Oklahoma	33	22	-11	-33%
Wisconsin	29	18	-11	-38%
Maine	5	3	-2	-40%
Idaho	7	4	-3	-43%
Delaware	13	7	-6	-46%
Rhode Island	10	4	-6	-60%
New Hampshire	5	1	-4	-80%
U.S. Total	2,790	2,876	+ 86	+ 3%

Percentage Change Up

Percentage Change Down

Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

Sorted by Number of Fatalities

Table 4

Pedestrian Fatalities by State, Jan - June 2018

Source: State Highway Safety Offices

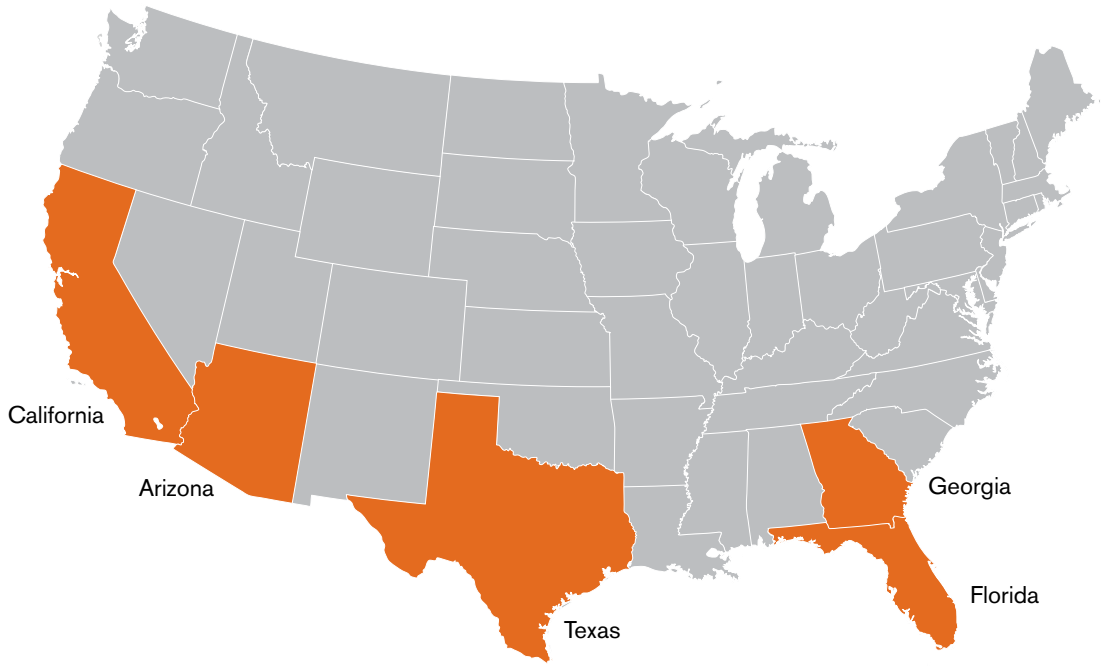
State	Pedestrian Fatalities (Preliminary Adjusted)
California	432
Florida	330
Texas	298
Georgia	133
Arizona	125
New York	117
North Carolina	102
Pennsylvania	90
Illinois	80
Louisiana	77
South Carolina	74
New Jersey	73
Ohio	63
Maryland	60
Michigan	58
Virginia	53
Tennessee	52
New Mexico	47
Mississippi	44
Missouri	44
Washington	44
Indiana	42
Alabama	40
Massachusetts	38
Colorado	34
Kentucky	33
Nevada	31
Connecticut	29
Oregon	28
Arkansas	23
Oklahoma	22
Hawaii	19
Wisconsin	18
Kansas	16
Minnesota	14
Utah	13
Nebraska	12
Iowa	9
DC	8
Delaware	7
West Virginia	7
Montana	6
Alaska	5
South Dakota	5
Idaho	4
Rhode Island	4
Wyoming	4
Maine	3
North Dakota	3
Vermont	2
New Hampshire	1
Total	2,876

Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

As illustrated in Figure 2, five states (Arizona, California, Florida, Georgia, and Texas) accounted for almost half – 46 percent – of all pedestrian deaths during the first six months of 2018. By comparison, these five states represented approximately 33 percent of the U.S. population according to the 2018 U.S. Census.

Figure 2 **5 States Comprising 46% of Pedestrian Deaths, Jan - June 2018**



Source: SHSOs

Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

Table 5

Pedestrian Fatalities by State per 100,000 Population, Jan - June 2018

Source: State Highway Safety Offices and U.S. Census Bureau

Table 5 shows the rate of pedestrian fatalities per 100,000 population by state for the first six months of 2018. New Mexico had the highest rate (2.26), while New Hampshire had the lowest (0.07). Twelve states and D.C. had pedestrian fatality rates of 1.0 or higher per 100,000 population.

Sorted by State

State	Pedestrian Fatalities per 100K Population
Alabama	0.82
Alaska	0.64
Arizona	1.74
Arkansas	0.78
California	1.09
Colorado	0.60
Connecticut	0.82
Delaware	0.73
DC	1.14
Florida	1.55
Georgia	1.27
Hawaii	1.36
Idaho	0.22
Illinois	0.63
Indiana	0.63
Iowa	0.28
Kansas	0.54
Kentucky	0.73
Louisiana	1.66
Maine	0.22
Maryland	1.00
Massachusetts	0.55
Michigan	0.59
Minnesota	0.25
Mississippi	1.46
Missouri	0.72
Montana	0.56
Nebraska	0.62
Nevada	1.01
New Hampshire	0.07
New Jersey	0.82
New Mexico	2.26
New York	0.60
North Carolina	0.98
North Dakota	0.39
Ohio	0.54
Oklahoma	0.56
Oregon	0.66
Pennsylvania	0.71
Rhode Island	0.40
South Carolina	1.46
South Dakota	0.57
Tennessee	0.77
Texas	1.04
Utah	0.41
Vermont	0.37
Virginia	0.62
Washington	0.59
West Virginia	0.39
Wisconsin	0.32
Wyoming	0.69
U.S. Average	0.88

Sorted by Fatality Rate

State	Pedestrian Fatalities per 100K Population
New Mexico	2.26
Arizona	1.74
Louisiana	1.66
Florida	1.55
Mississippi	1.46
South Carolina	1.46
Hawaii	1.36
Georgia	1.27
DC	1.14
California	1.09
Texas	1.04
Nevada	1.01
Maryland	1.00
North Carolina	0.98
Alabama	0.82
Connecticut	0.82
New Jersey	0.82
Arkansas	0.78
Tennessee	0.77
Kentucky	0.73
Delaware	0.73
Missouri	0.72
Pennsylvania	0.71
Wyoming	0.69
Oregon	0.66
Alaska	0.64
Indiana	0.63
Illinois	0.63
Nebraska	0.62
Virginia	0.62
Colorado	0.60
New York	0.60
Washington	0.59
Michigan	0.59
South Dakota	0.57
Montana	0.56
Oklahoma	0.56
Massachusetts	0.55
Ohio	0.54
Kansas	0.54
Utah	0.41
Rhode Island	0.40
North Dakota	0.39
West Virginia	0.39
Vermont	0.37
Wisconsin	0.32
Iowa	0.28
Minnesota	0.25
Maine	0.22
Idaho	0.22
New Hampshire	0.07
U.S. Average	0.88

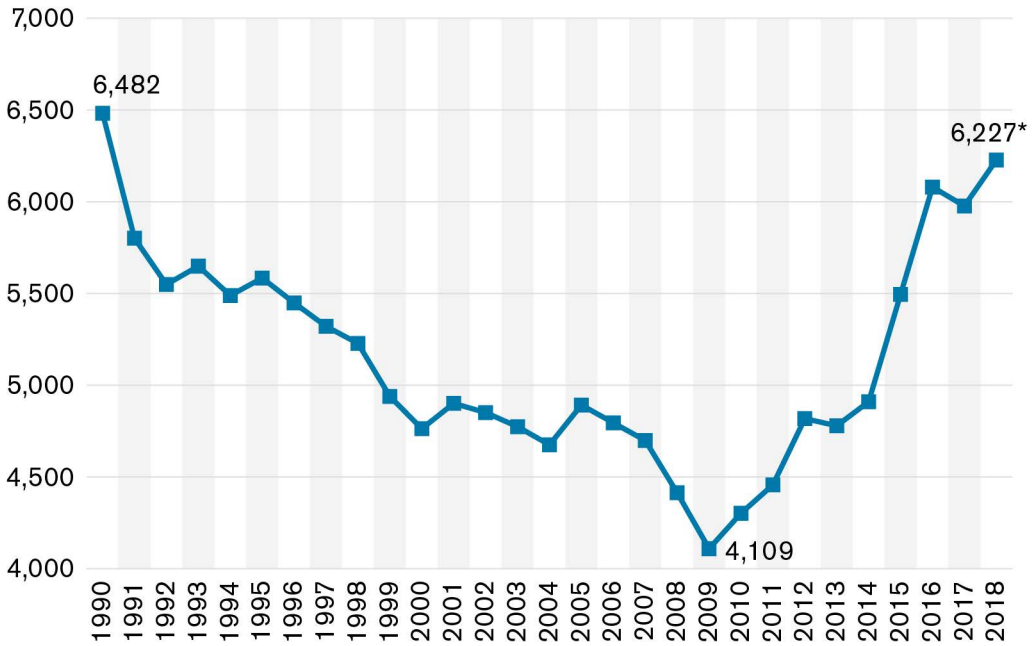
Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

Based on the preliminary number of pedestrian fatalities during the first six months of 2018 along with historic data regarding the annual numbers and proportions of pedestrian deaths that occurred during the first and second halves of the year, GHSA projects **there were 6,227 pedestrian fatalities in 2018, an estimated four (4) percent increase from 2017**.

As shown in Figure 3, the projected number of 6,227 pedestrian fatalities in 2018 represents a continuation of an increasing trend in pedestrian deaths going back to 2009 and would be the **largest annual number of pedestrian fatalities in the U.S. since 1990.**

Figure 3 **U.S. Pedestrian Fatalities: 1990 - 2018**



Source: SHSOs and FARS

* 2018 estimate based on preliminary data and historical trends

Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

2017 PEDESTRIAN FATALITY DATA

In addition to analyzing preliminary pedestrian fatality data for the first six months of 2018, GHSA also examined pedestrian fatality data for the most recent complete calendar year (2017) as published by NHTSA through FARS. The following crash factors were examined:

- Population
- Light Level
- Location
- Alcohol and Other Drugs
- Vehicle Type

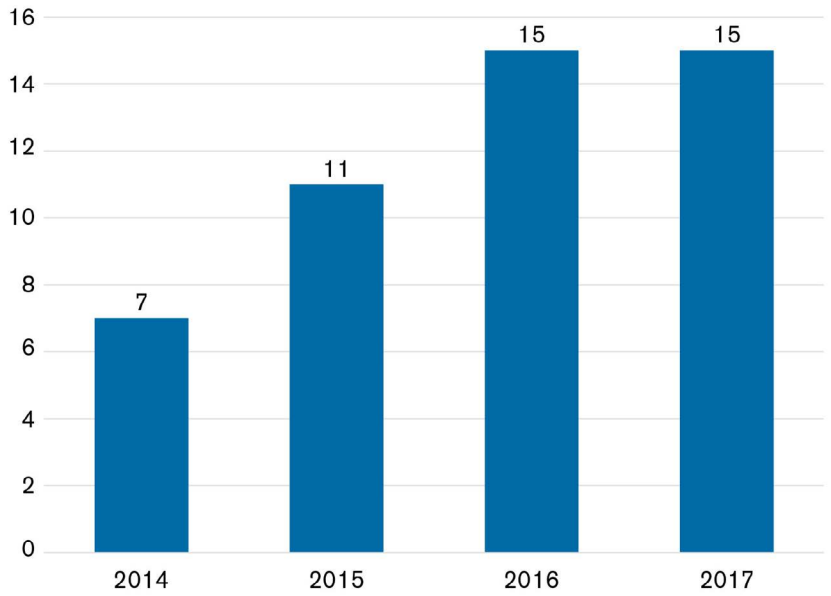
Population

Table 6 and Figures 4 through 15 provide analysis of the most recent pedestrian fatality data available from FARS.

Table 6 shows the rate of pedestrian fatalities per 100,000 population by state for 2017 based on the number of pedestrian fatalities reported by FARS and U.S. Census population data.

- New Mexico had the highest pedestrian fatality rate (3.53), while Minnesota had the lowest (0.75).
- Fifteen states had pedestrian fatality rates per 100,000 population greater than or equal to 2.0 in both 2017 and 2016. By comparison, 11 states had fatality rates this high in 2015, and 7 states had fatality rates this high in 2014 (Figure 4).

Figure 4 **Number of States with Fatality Rates ≥ 2.0 per 100,000 Population**



Source: SHSOs, FARS and U.S. Census Bureau

Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

Table 6

Pedestrian Fatalities by State per 100,000 Population, Jan - Dec 2017

Source: State Highway Safety Offices and U.S. Census Bureau

Sorted by State

State	Pedestrian Fatalities per 100K Population - 2017
Alabama	2.32
Alaska	1.89
Arizona	3.21
Arkansas	1.53
California	2.41
Colorado	1.64
Connecticut	1.29
Delaware	3.45
DC	1.58
Florida	3.14
Georgia	2.49
Hawaii	1.05
Idaho	0.93
Illinois	1.15
Indiana	1.61
Iowa	0.76
Kansas	1.17
Kentucky	2.67
Louisiana	2.48
Maine	1.50
Maryland	1.98
Massachusetts	1.08
Michigan	1.60
Minnesota	0.75
Mississippi	2.37
Missouri	1.65
Montana	1.33
Nebraska	1.04
Nevada	3.36
New Hampshire	0.89
New Jersey	2.07
New Mexico	3.53
New York	1.29
North Carolina	1.96
North Dakota	0.79
Ohio	1.24
Oklahoma	2.11
Oregon	1.78
Pennsylvania	1.17
Rhode Island	1.99
South Carolina	3.15
South Dakota	1.15
Tennessee	1.88
Texas	2.17
Utah	1.35
Vermont	1.28
Virginia	1.35
Washington	1.47
West Virginia	1.65
Wisconsin	1.00
Wyoming	1.04
U.S. Average	1.91

Sorted by Fatality Rate

State	Pedestrian Fatalities per 100K Population - 2017
New Mexico	3.53
Delaware	3.45
Nevada	3.36
Arizona	3.21
South Carolina	3.15
Florida	3.14
Kentucky	2.67
Georgia	2.49
Louisiana	2.48
California	2.41
Mississippi	2.37
Alabama	2.32
Texas	2.17
Oklahoma	2.11
New Jersey	2.07
Rhode Island	1.99
Maryland	1.98
North Carolina	1.96
Alaska	1.89
Tennessee	1.88
Oregon	1.78
Missouri	1.65
West Virginia	1.65
Colorado	1.64
Indiana	1.61
Michigan	1.60
DC	1.58
Arkansas	1.53
Maine	1.5
Washington	1.47
Utah	1.35
Virginia	1.35
Montana	1.33
Connecticut	1.29
New York	1.29
Vermont	1.28
Ohio	1.24
Kansas	1.17
Pennsylvania	1.17
Illinois	1.15
South Dakota	1.15
Massachusetts	1.08
Hawaii	1.05
Nebraska	1.04
Wyoming	1.04
Wisconsin	1.00
Idaho	0.93
New Hampshire	0.89
North Dakota	0.79
Iowa	0.76
Minnesota	0.75
U.S. Average	1.91

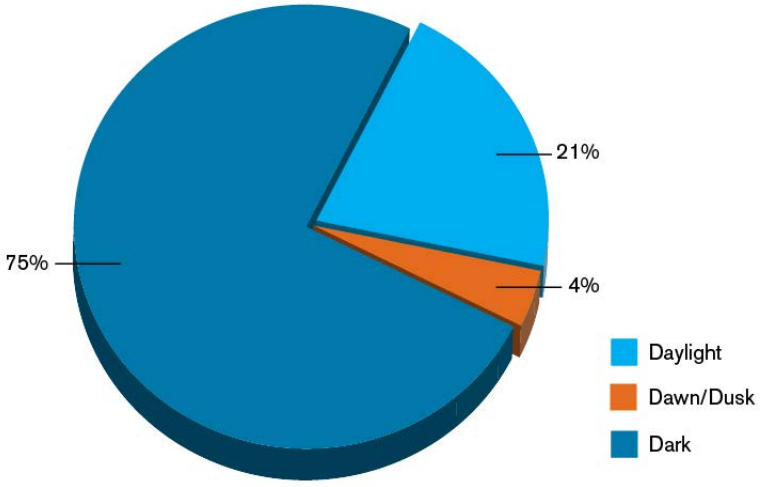
Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

Light Level

Darkness poses an especially high risk for those traveling by foot. On a national basis, about 75 percent of pedestrian fatalities in 2017 occurred after dark (Figure 5).

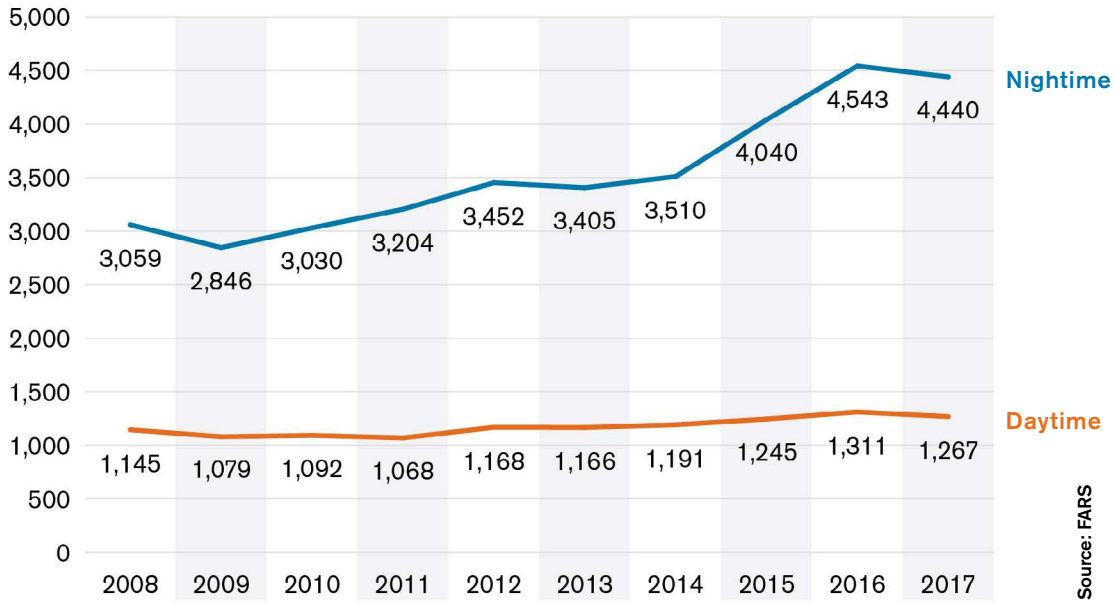
Figure 5 **2017 Pedestrian Fatalities by Light Level**



Source: FARS

Figures 6 and 7 show trends in the numbers of daytime and nighttime pedestrian fatalities. From 2008 to 2017 the number of nighttime pedestrian fatalities increased by 45 percent, compared to a much smaller 11 percent increase in daytime pedestrian fatalities. Over this 10-year period, nighttime crashes accounted for more than 90 percent of the total increase in pedestrian deaths.

Figure 6 **Number of Daytime and Nighttime Pedestrian Fatalities, 2008 - 2017**

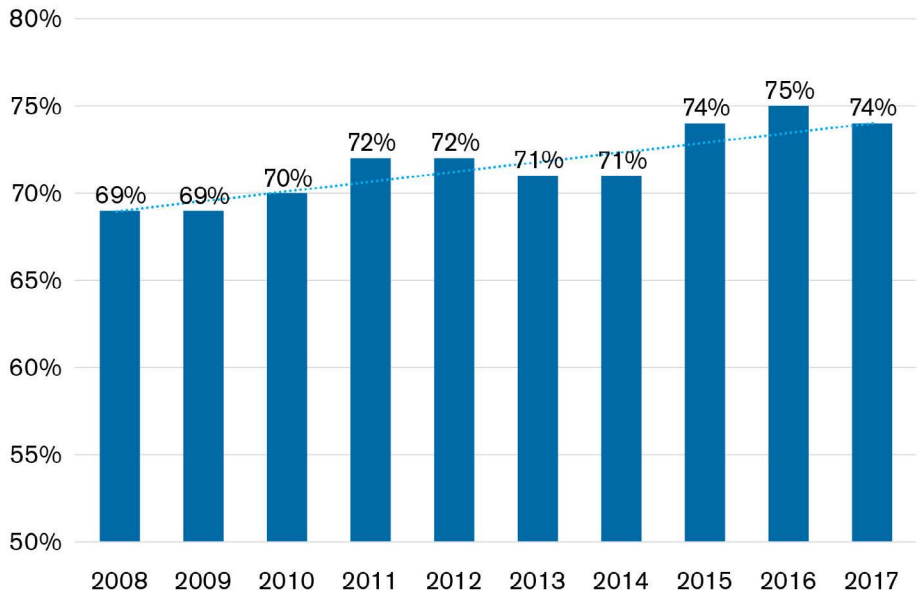


Source: FARS

Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

Figure 7 Percentage of All Pedestrian Fatalities that Occurred in the Dark, 2008-2017

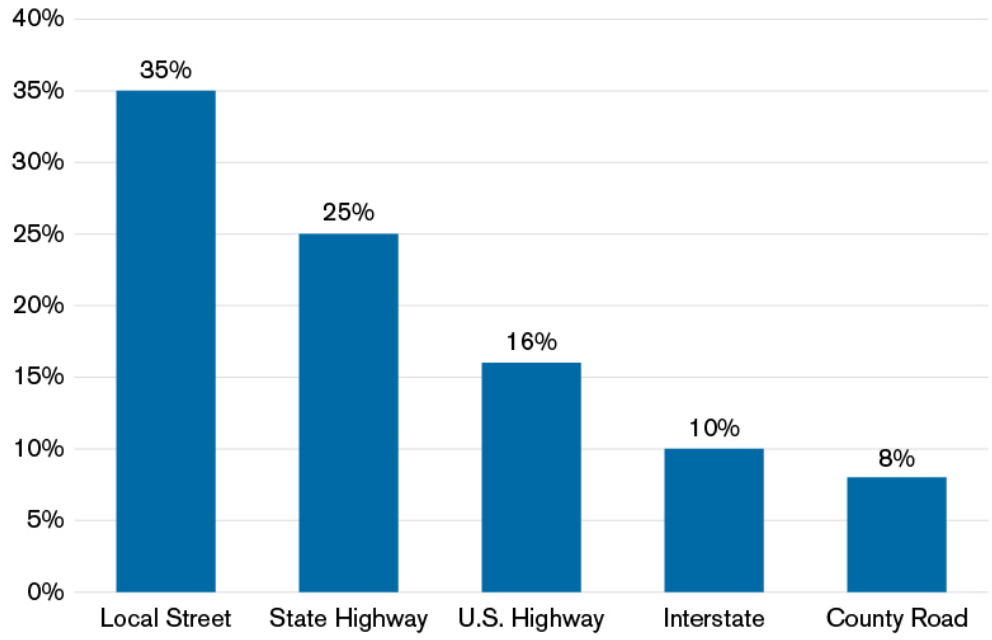


Source: FARS

Location

As illustrated in Figure 8, the largest category of roads on which pedestrian fatalities occurred in 2017 was local streets, followed by state highways. A surprisingly large number of pedestrian fatalities – ten percent of the total – occurred on Interstates. Some of the pedestrian fatalities on Interstates involve motorists who are struck while standing outside of their cars due to mechanical issues or minor crashes.

Figure 8 Pedestrian Fatalities by Roadway Type, 2017



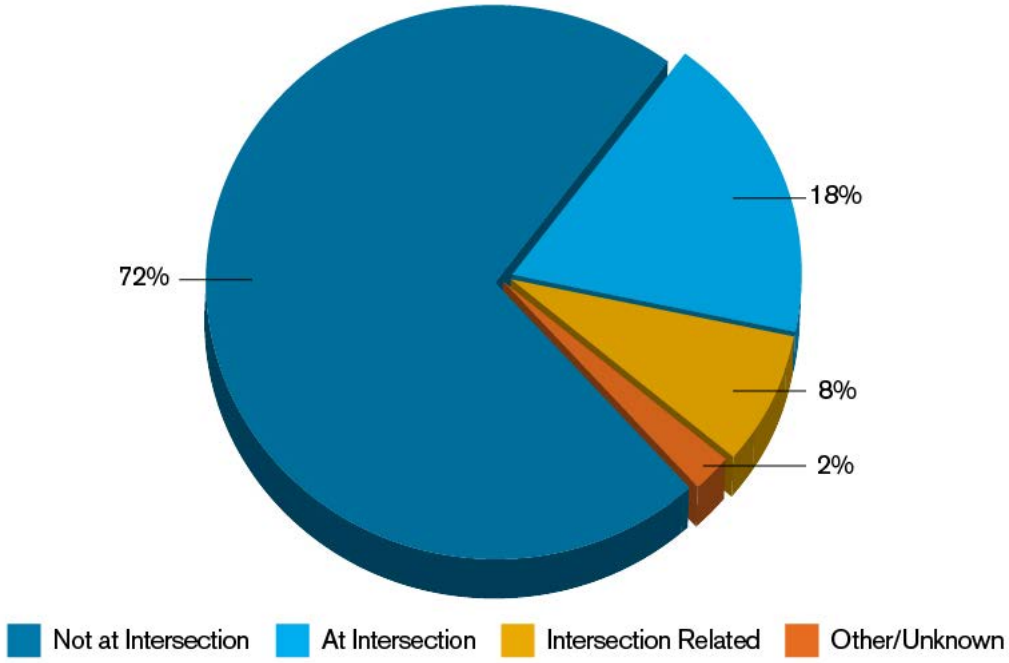
Source: FARS

Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

On a national basis, about 26 percent of pedestrian fatalities in 2017 occurred at intersections or were intersection-related (Figure 9). The majority of pedestrian fatalities occurred at non-intersection locations.

Figure 9 **2017 Pedestrian Fatality Locations**



Source: FARS

Pedestrian Traffic Fatalities by State

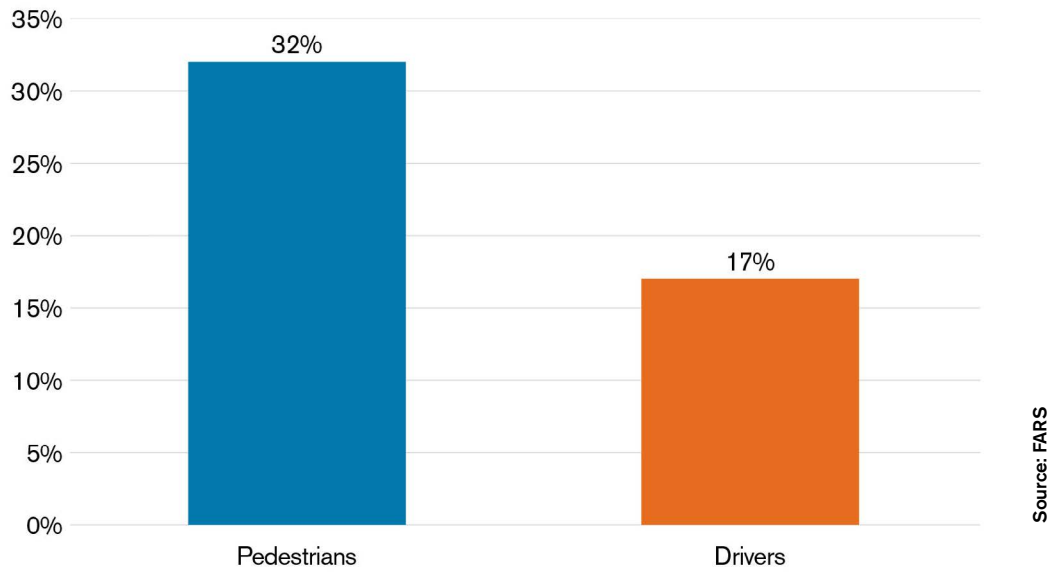
2018 PRELIMINARY DATA

Alcohol and Other Drugs

Alcohol impairment — for the driver and/or pedestrian — was reported in about half of traffic crashes that resulted in pedestrian fatalities in 2017. An estimated 32 percent of fatal pedestrian crashes involved a pedestrian with a Blood Alcohol Concentration (BAC) of 0.08 grams per deciliter (g/dL) or higher; an estimated 17 percent of drivers involved in these crashes had a BAC of 0.08 or higher (Figure 10).

Even in cases where the pedestrian's or driver's alcohol consumption may not be identified by police as a contributing factor to the crash, a pedestrian or driver with a BAC of .08 or higher has diminished faculties that could impact judgment, decision-making, and reaction time.

Figure 10 **Percent of Pedestrians and Drivers with BACs ≥ 0.08 g/dL in Fatal 2017 Pedestrian Crashes**

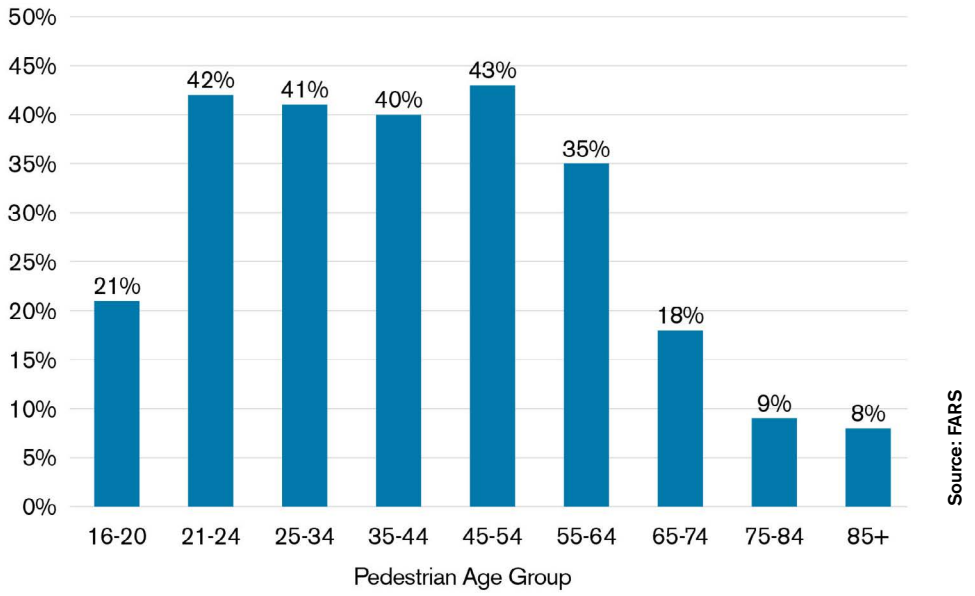


Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

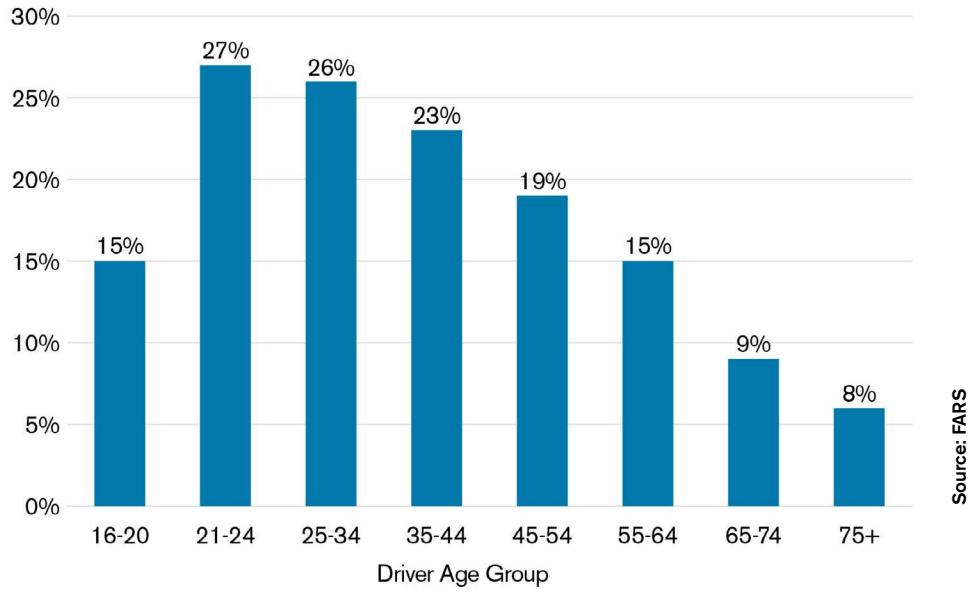
Figure 11 shows the percentage of pedestrians killed in traffic crashes with a BAC greater than or equal to 0.08, by age group. The percentage of fatally-injured pedestrians with high BACs is relatively stable for those within the 21 through 54 age groups.

Figure 11 **Alcohol Impairment for Pedestrians Killed in Traffic Crashes by Age Group in 2017**



For comparison, Figure 12 shows the percentage of drivers killed in traffic crashes with a BAC greater than or equal to 0.08, by age group. Unlike pedestrians, the percentage of fatally-injured drivers with high BACs is highest among young drivers of legal drinking age (21-24) and declines for each successive age group.

Figure 12 **Alcohol Impairment for Drivers Killed in Traffic Crashes by Age Group in 2017**



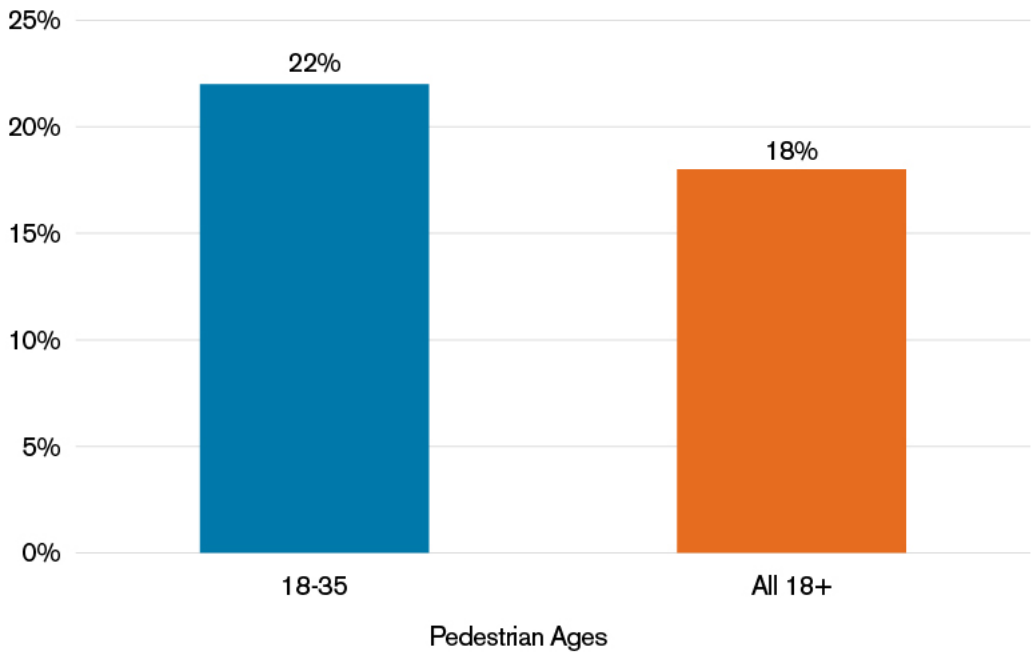
Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

In addition to alcohol, both drivers and pedestrians involved in traffic fatalities can be under the influence of other drugs, although the best available data is incomplete. For example, if alcohol is present, tests may not be administered for other drugs. Also, caution should be exercised in assuming that drug presence implies impairment. Drug tests do not necessarily indicate impairment at the time of the test. In some cases, drug presence can be detected for a period of days or weeks after ingestion.

Figure 13 shows the percent of (tested) fatally-injured pedestrians that had police-reported drug involvement for pedestrians ages 18-35 and for all those ages 18+. The most commonly-reported drug was methamphetamine. Because fatally-injured pedestrians that test positive for drugs can also have BACs greater than or equal to 0.08, combining the percentages in figures 10 and 13 would result in an overcount.

Figure 13 **Percent of (Tested) Fatally-Injured Pedestrians with Police-Reported Drug Involvement, 2017**



Source: FARS

Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

Vehicle Type

Figure 14 shows the number of pedestrians killed in single-vehicle crashes by vehicle type in 2017. The largest category of striking vehicles (42 percent of the total) was passenger cars.

Figure 14 **Number of Pedestrians Killed in Single-Vehicle Crashes by Vehicle Type in 2017**

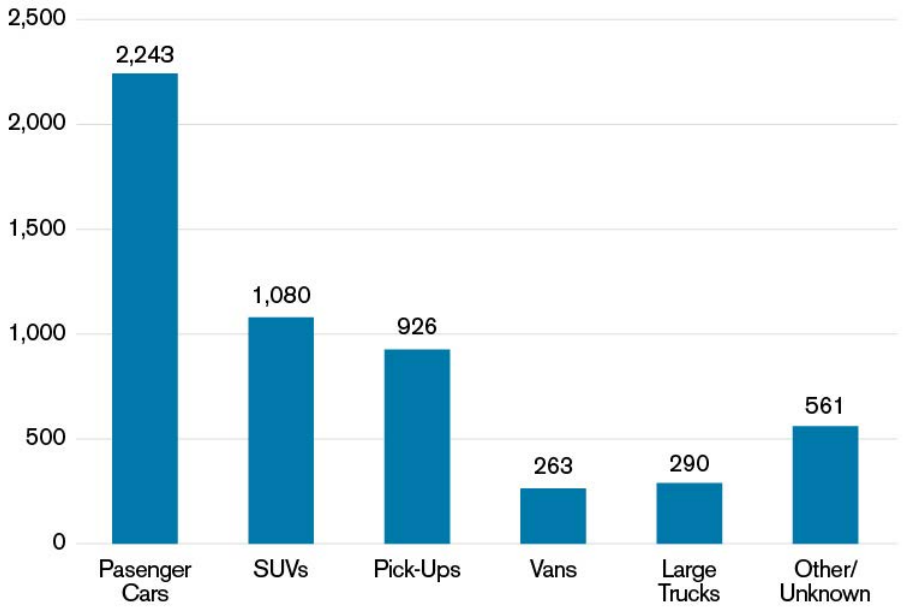
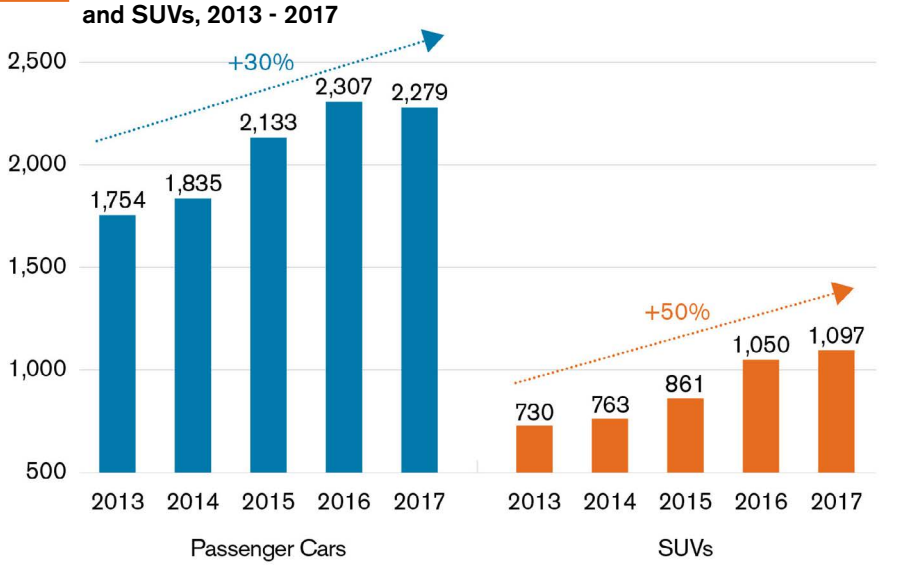


Figure 15 shows trends in the numbers of pedestrians killed in single-vehicle crashes involving passenger cars and SUVs from 2013 to 2017. Although passenger cars account for a larger number of pedestrian deaths, the number of pedestrian fatalities involving SUVs increased at a greater rate — 50 percent — during this 5-year period compared to passenger cars, which increased by 30 percent.

Figure 15 **Number of Pedestrians Killed in Single-Vehicle Crashes Involving Passenger Cars and SUVs, 2013 - 2017**



Pedestrian Traffic Fatalities by State

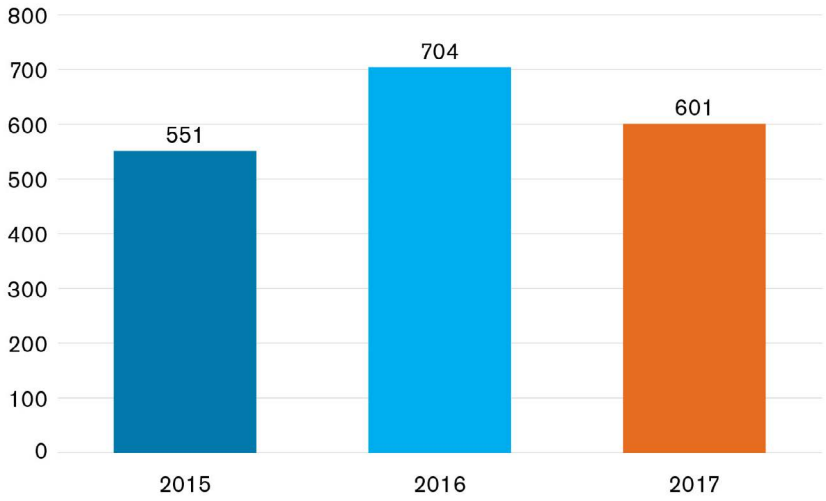
2018 PRELIMINARY DATA

WHAT ABOUT CITIES?

Because most pedestrian fatalities occur in urban areas, GHSA also examined changes in the number of pedestrian fatalities for the ten most populous U.S. cities.

The total number of pedestrian fatalities for the ten largest cities decreased by about 15 percent, from 2016 to 2017, but remained about 9 percent higher than in 2015 (Figure 16).

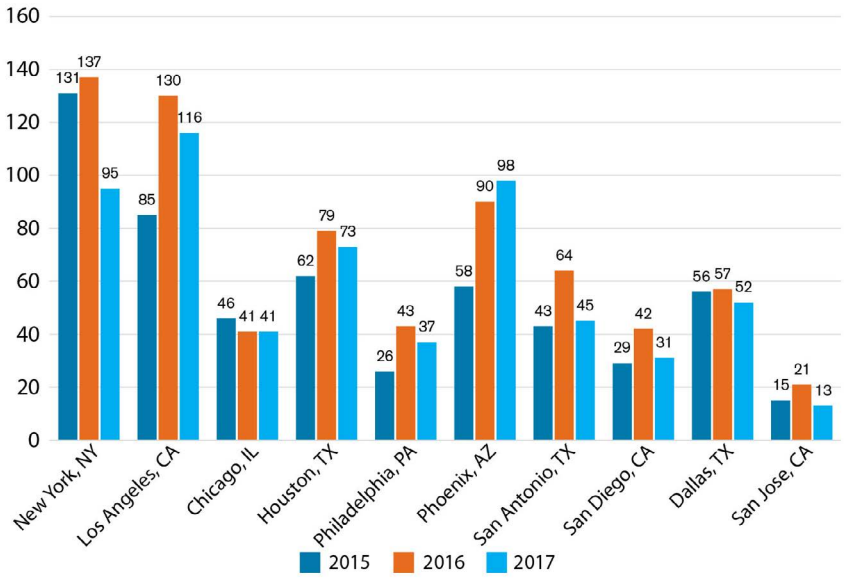
Figure 16 **Pedestrian Deaths in the 10 Largest U.S Cities – 2015 - 2017**



Source: FARS

Figure 17 shows the number of pedestrian fatalities for each of the ten largest cities in 2015, 2016, and 2017. Several cities had substantial reductions in pedestrian fatalities in 2017, including New York, Los Angeles, San Antonio and San Diego.

Figure 17 **Pedestrian Deaths in the 10 Largest U.S Cities – 2015 - 2017**



Source: FARS

EFFORTS TO REDUCE PEDESTRIAN FATALITIES AND INJURIES

Achieving robust and sustained progress toward reducing – and someday eliminating – pedestrian fatalities and injuries requires a comprehensive approach to pedestrian safety that combines:

- Enforcement;
- Engineering;
- Education; and
- Emergency medical response.

Programs should incorporate the latest advances in technology and best practices and must be tailored to the needs of state and local communities.

Federal Safety Programs and Resources

Federal government resources available to help states reduce pedestrian fatalities and serious injuries include the following:

Section 402. The State and Community Highway Safety Grant Program is the cornerstone of state behavioral highway safety strategies. It provides the greatest flexibility for states to target resources to meet their most pressing needs. Eighteen states responding to GHSA's questionnaire for this report indicated they currently use Section 402 funds to support pedestrian safety programs.

Pedestrian and Bicycle Safety Focus States and Cities. Since 2004, the Federal Highway Administration's (FHWA's) Safety Office has been working aggressively to reduce pedestrian deaths by focusing extra resources on the cities and states with the highest numbers of pedestrian fatalities and/or fatality rates. Part of this effort has included *How to Develop a Pedestrian Safety Action Plan,* which helps state and local officials know where to begin to address pedestrian safety issues.

Section 403. Under this program, NHTSA has conducted a series of education and enforcement efforts in pedestrian focus cities, including demonstration projects in Louisville, New York City, and Philadelphia. In addition, funds were awarded to the Safe States Alliance for a project on injury prevention for pedestrians.

Section 405. The FAST Act, enacted on December 15, 2015, created a new National Priority Safety Program, Section 405(h) Nonmotorized Safety, to provide approximately $70 million annually through Federal Fiscal Year (FFY) 2020 for eligible states to decrease pedestrian and bicyclist crash fatalities. Under the nonmotorized safety grant program, NHTSA awarded approximately $14 million to 22 states for FFY 2017, 23 states for FFY 2018, and has determined 25 states to be eligible for grants being awarded this year for FFY 2019. A state is eligible if its bicyclist and pedestrian fatalities exceed 15% of its total annual crash fatalities based on the most recent year of FARS data available. Funds may be used to train law enforcement officials on bicyclist/pedestrian traffic laws, for bicyclist/pedestrian safety enforcement of these laws, and for education campaigns promoting bicyclist/pedestrian traffic laws. Congress could provide states more flexibility in the kinds of programs these funds can be used for, such as public education on safe bicyclist and pedestrian practices generally, not just traffic laws, on the safe use of

infrastructure, to aggregate more data on non-motorized safety, and to expand programs to more classes of non-motorized road users.

- **Highway Safety Improvement Program (HSIP).** The goal of this program is to achieve a significant reduction in traffic fatalities and serious injuries on all public roads, including non-state-owned public roads and roads on tribal lands. The HSIP requires a data-driven, strategic approach to improving highway safety, focusing on the application of proven engineering countermeasures to significantly reduce fatal and serious-injury crashes. Although prior federal transportation legislation allowed HSIP funds to be spent on public education and law enforcement efforts – and several states leveraged this opportunity – this option was eliminated in the latest reauthorization bill.

What States Are Doing

SHSOs are committed to improving the safety of all road users by focusing on behavioral issues that lead to traffic crashes such as impaired, distracted and aggressive driving; seat belt use; child passenger, pedestrian, bicyclist and motorcyclist safety; and teen and older driver issues. SHSOs are typically tasked with addressing behavioral safety issues via education and enforcement initiatives. SHSOs administer federal highway safety grants (including Sections 402 and 405 as outlined above) and produce annual state Highway Safety Plans (HSPs) as required by the U.S. Department of Transportation. In some states, SHSOs are responsible for traffic records coordination and Safe Routes to School programs.

Many factors that contribute to pedestrian crashes are outside of the control of SHSOs. For example, traffic engineering considerations such as roadway design, traffic signal design, sidewalk construction, and street lighting fall under the purview of the engineering divisions of state and local DOTs. SHSOs work with their state DOT counterparts to align behavioral solutions with engineering efforts. SHSOs provided the following examples of strategies they and their partners employ to reduce pedestrian fatalities and serious injuries:

- Targeted law enforcement efforts.
  - For example, Massachusetts provided funding to 84 local police departments across the state to conduct overtime enforcement patrols aimed at reducing pedestrian and bicyclist injuries and fatalities.
- Public information campaigns.
  - For example, Connecticut introduced the “Watch for Me CT” campaign, which is a statewide educational community outreach campaign involving media components and community engagement in partnership with CT Children’s Medical Center.
- Educational outreach in high-risk areas.
  - For example, the Georgia Office of Highway Safety has grantees in cities with significant increases in pedestrian fatalities that are working on educational programs. These programs have been focused on areas where there are significant numbers of people who walk as a primary form of transportation.

- Safe Routes to School programs.
  - For example, Ohio DOT administers funding that can be used to improve the design of pedestrian facilities, such as the Safe Routes to School program, which provides $4 million annually to communities looking to improve the safety of K-8 students who walk or bike to school.
- Focusing enforcement in high-risk zones.
  - For example, the Delaware Office of Highway Safety partners with law enforcement agencies in high crash locations to educate pedestrians and give citations when necessary.
- Pedestrian safety assessments/road safety audits.
  - For example, New York State DOT is conducting pedestrian safety site evaluations at approximately 2,000 unsignalized midblock crosswalks and 2,400 signalized crosswalks on state-maintained routes in urban areas.
- Support for engineering countermeasures, including some that target high-risk pedestrian crossing intersections and corridors.
  - For example, Florida allocated $100 million to lighting improvements in 2,500 priority locations across the state to increase the visibility of pedestrians using the roadway at night.
- Adoption of Complete Streets policies, which direct transportation planners and engineers to routinely design and operate the entire right of way to enable safe access for all users, regardless of age, ability, or mode of transportation.
- Inclusion of pedestrian safety action items in Strategic Highway Safety Plans (SHSPs).

Every state is addressing pedestrian safety using a combination of engineering, education and enforcement. Specific SHSO-reported activities are provided in the Appendix. This list does not represent the full spectrum of activities happening across the country.

DISCUSSION

In recent years, pedestrian fatalities in the U.S. have risen at an alarming and unprecedented rate:

- During the 10-year period 2008-2017 the number of pedestrian fatalities increased by 35 percent, while the number of all other traffic deaths combined decreased by six percent.
- GHSA projects 6,227 pedestrians were killed in traffic crashes 2018, representing a four percent increase from 2017 and the largest annual number of pedestrian fatalities in the U.S. since 1990.
- Pedestrian deaths as a percent of total motor vehicle crash deaths increased from 12 percent in 2008 to 16 percent in both 2016 and 2017. Pedestrians now account for the largest proportion of traffic fatalities in more than 30 years.
- The number of states with pedestrian fatality rates >2.0 per 100,000 population more than doubled from seven in 2014 to 15 in both 2016 and 2017.

Many factors outside the control of traffic safety officials contribute to the observed year-to-year changes in the number of pedestrian fatalities, including economic conditions, population growth demographic change, weather, fuel prices, the amount of motor vehicle travel, and the amount of time people spend walking. Travel monitoring data published by FHWA indicates that motor vehicle travel on all roads and streets increased by 0.3 percent for the first half of 2018 as compared with the same period in 2017.[2] The increase in motor vehicle travel was smaller on non-interstate urban arterials (0.2 percent) and other urban roads (0.1 percent) where most pedestrian fatalities occur. Unfortunately, comparable exposure data for nationwide pedestrian activity is not available.

Other factors contributing to the recent rise in the overall number of pedestrian fatalities could include the increasing shift in U.S. vehicle sales away from passenger cars to light trucks (with light trucks generally causing more severe pedestrian impacts than cars), and the large growth in smartphone use (which can be a significant source of distraction for all road users).

Figure 18 shows U.S. retail sales (in thousands) of passenger cars and light trucks from 2008-2017, indicating a sharp increase in sales of light trucks accompanied by a decline in sales of passenger cars. Figure 19 shows a correspondingly steady increase in light trucks as a percent of total light vehicle sales.

Light trucks – as well as passenger cars – can be made safer by installing automatic emergency braking systems that can detect and brake for pedestrians. This technology uses information from forward-looking sensors to automatically apply or supplement the brakes when the system determines a pedestrian is in imminent danger of being struck. A recent study found that automatic emergency braking technology installed by one vehicle manufacturer was associated with a 35 percent reduction in the rate of likely pedestrian-related insurance claims.[3]

2 https://www.fhwa.dot.gov/policyinformation/travel_monitoring/18juntvt/

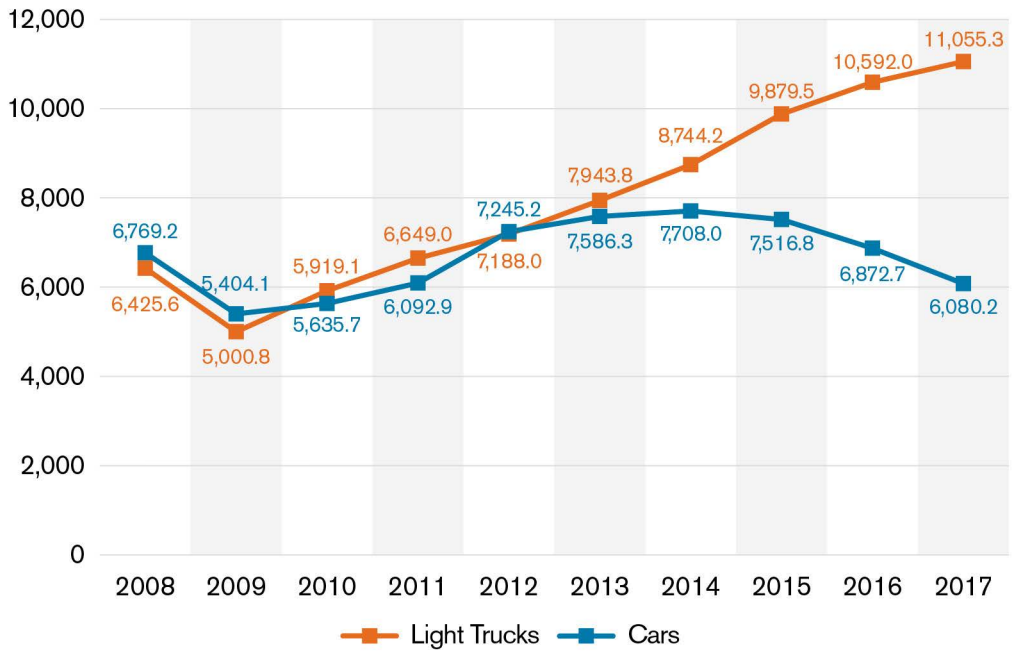
3 Insurance Institute for Highway Safety. 2018. Subaru crash avoidance system cuts pedestrian crashes Status Report, Vol. 53, No. 3 | May 8, 2018

https://www.fhwa.dot.gov/policyinformation/travel_monitoring/18juntvt/

Pedestrian Traffic Fatalities by State

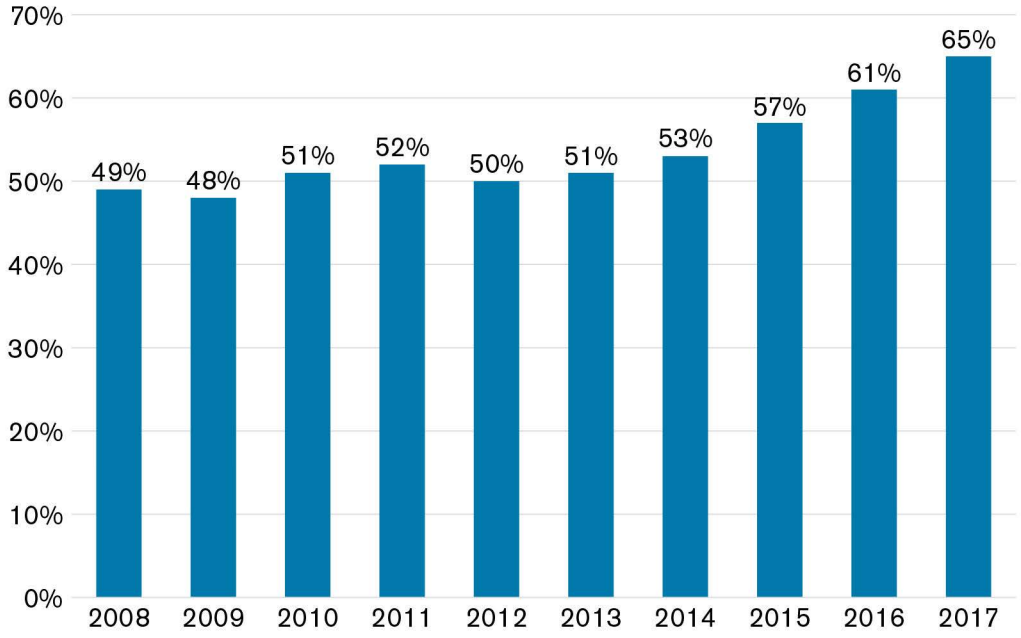
2018 PRELIMINARY DATA

Figure 18 Retail Sales (in thousands) of Passenger Cars and Light Trucks, 2008-2017



Source: U.S. Department of Commerce Bureau of Economic Analysis (BEA)

Figure 19 Light Trucks as a Percent of Total U.S. Light Vehicle Sales, 2008-2017



Source: U.S. Department of Commerce BEA

Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

Regarding cellphone use, the reported number of smartphones in active use in the U.S. more than quintupled from 2010 to 2017, and the amount of wireless data usage over this period increased by about 4,000 percent (Figures 21 and 22).[4]

Figure 21 **Number of Smartphones in Active Use**

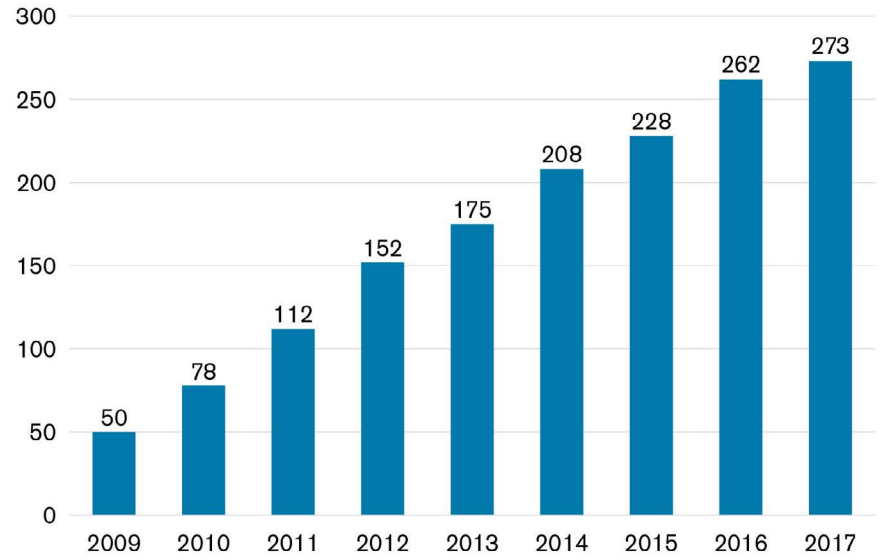
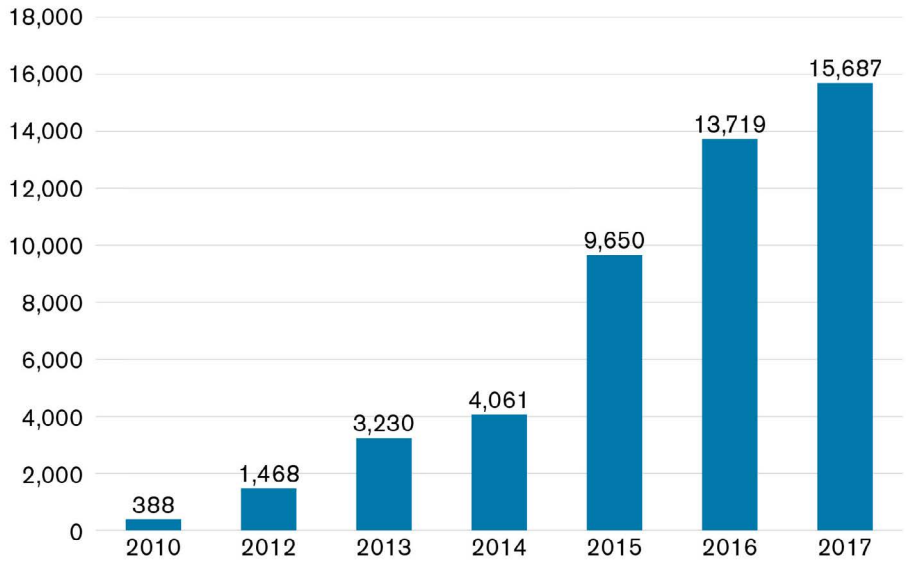


Figure 22 **Annual Wireless Data Traffic (Billions of MB)**



[4] Chakravarthy, B.; Anderson, C.L.; Ludlow, J.; Lotfipour, S.; and Vaca, F.E. 2010. The Relationship of Pedestrian Injuries to Socioeconomic Characteristics in a Large Southern California County. Traffic Injury Prevention 11/5.

Pedestrian Traffic Fatalities by State

2018 PRELIMINARY DATA

Analysis of data from the National Electronic Injury Surveillance data base shows the number of cell-phone-related Emergency Department visits is increasing in parallel with the prevalence of cell phone use in the United States.[5] Many of these injuries are sustained while the user is engaged in text messaging rather than conventional telephone conversation, and this trend appears to have contributed to a sharper increase in the number of incidents in recent years.

Although the surge in smartphone use coincides with a sharp rise in pedestrian fatalities during the same period, there is a lack of evidence to establish a definitive link. This may be due in part to the inability of police crash investigators to accurately capture momentary distraction caused by smartphones, many of which are mounted on vehicle dashboards and windshields.

That pedestrian deaths as a percent of total motor vehicle crash deaths have increased steadily in recent years (from 12 percent to 16 percent) could reflect, in part, the fact that passenger vehicles have become increasingly safer for vehicle occupants through design changes and supplemental safety equipment, thereby decreasing the chance of fatal injuries. Pedestrians, on the other hand, do not benefit from occupant-oriented vehicle crashworthiness improvements, and thus could account for an increasing share of total traffic fatalities. The movement toward equipping more vehicles with automatic braking and pedestrian detection technologies could help reduce pedestrian collisions.

The welcome decrease of 15 percent in pedestrian fatalities in the nation's 10 largest cities from 2016 to 2017 might be attributable in part to aggressive traffic safety initiatives such as **Vision Zero**, which has a principal aim of reducing the number of pedestrian and bicyclists fatalities, with the long-term goal of bringing these numbers to zero.

This report provides insights into crash factors documented in FARS that can help inform the efforts of state and local safety officials to reduce pedestrian fatalities. For example:

- About 75 percent of pedestrian fatalities occur after dark, and increases in pedestrian fatalities are occurring largely at night. From 2008 to 2017 the number of nighttime pedestrian fatalities increased by 45 percent, compared to a much smaller, 11 percent increase in daytime pedestrian fatalities. The growing prevalence of nighttime pedestrian fatalities suggests a need to prioritize engineering and enforcement countermeasures that can improve safety at night (e.g., improved street lighting, nighttime enforcement patrols).
- About 60 percent of pedestrian fatalities occur on local streets and state highways. Challenging crossing locations such as multilane urban arterials often have bus stops or land use patterns that require pedestrians to cross busy roads. Countermeasures such as rectangular rapid flashing beacons, curb extensions, and pedestrian refuge islands can improve pedestrian safety in these environments.
- Alcohol impairment is a major factor. An estimated 32 percent of fatal pedestrian crashes involved a pedestrian with a BAC of 0.08 or higher, and an estimated 17 percent of drivers involved in these crashes had a BAC of 0.08 or higher. Pedestrian safety can be addressed by conducting high visibility impaired driving enforcement in areas with robust nighttime pedestrian activity.
- The majority of pedestrian fatalities occur at non-intersection locations. Although it is impossible to make all non-intersection locations safe or suitable for pedestrian activity, there are

[5] Saltos, A.; Smith, D.; Schreiber, K.; Lichtenstein, S.; and Lichtenstein, R. 2015. Cell-Phone Related Injuries in the United States from 2000-2012Journal of Safety Studies ISSN 2377-3219 2015, Vol. 1, No. 1.

opportunities to improve pedestrian safety at midblock locations through speed enforcement and management along with increased street lighting.

- Pedestrians struck by a large SUV are twice as likely to die as those struck by car.[6] Design changes such as softer vehicle fronts, pedestrian detection systems, and replacing the blunt front ends of light trucks with sloping, more aerodynamic (car-like) designs can reduce the risk of pedestrian deaths in the event of a crash. In the short-run, local efforts to reduce speed limits and speeding in pedestrian zones can help reduce the severity of light truck-pedestrian crashes. As previously mentioned, the number of pedestrian fatalities involving SUVs increased by 50 percent from 2013 to 2017, significantly more than did passenger cars (which continue to be the largest category of vehicles involved in fatal pedestrian crashes).

Despite the overall increase in pedestrian deaths, there is some good news in the 2018 preliminary data. Twenty three states saw declines in pedestrian fatalities for the first half of 2018 compared to 2017, with six states reporting double-digit declines and three states reporting consecutive years of declines. Further, the sharp decrease in pedestrian fatalities in some cities suggests progress in urban centers that may not be reflected in state-level data.

SHSOs in all 50 states and territories continue to actively engage with their partners to implement a wide range of educational, enforcement and engineering initiatives aimed at reducing the numbers of pedestrian fatalities and serious injuries. Along with critical funding support provided through federal partners, states will continue to focus their efforts on effective countermeasures to reverse the trend of increasing pedestrian fatalities. In addition, some communities have seen a localized rise in pedestrian activism and pedestrian-centered safety planning, such as Vision Zero initiatives and the preparation of pedestrian action plans, while other communities lack this type of coordinated advocacy or planning.

The national footprint of pedestrian safety is not uniform, and there are many reasons for differing pedestrian fatality rates among states, including land use patterns, roadway designs, vehicle speeds, population density and demographics. The physical environment in which pedestrians walk has a profound influence on safety outcomes, and roadway design practices have been evolving over time to increasingly accommodate pedestrians, including those with disabilities. There is a significant time lag, however, in achieving roadway design improvements through roadway construction and land development projects.

[6] Lefler, D.E. and Gabler, H.C. 2004. The fatality and injury risk of light truck impacts with pedestrians in the United States. Accident Analysis & Prevention Volume 36, Issue 2, Pages 295-304.

Socioeconomic status (SES) – in particular, poverty – is another strong risk factor for pedestrian crashes. For example, Canadian researchers analyzed the influence of SES levels on rates of death from unintentional injury among Canadian children from 1971 to 1998 and found that for each unit change in income quintile, from highest to lowest, the risk of death from pedestrian collisions increased by 13 percent.[7] A California study found that pedestrian crashes are four times more frequent in poor neighborhoods and that neither age of the population, education, English language fluency, nor population density explained the effect of poverty.[8]

Although this pedestrian fatality analysis has focused on statewide data, pedestrian safety problems must also be considered on the local level, in the settings where pedestrian fatalities and serious injuries occur. States along with their local/regional partners should engage in robust data analyses and field assessments to identify high-risk corridors, allocate resources where they are most needed, and implement evidence-based pedestrian safety improvements on a systemic basis.

States should also continue to work with local law enforcement partners to address chronic driver violations that contribute to pedestrian crashes such as speeding, impaired driving and distracted driving.

Enhancing pedestrian safety is in all of our best interest: almost everyone is a pedestrian at some point in their day, whether just a short walk to the car, one's primary form of transportation or somewhere in between. As fatal pedestrian crashes have come to represent a higher percentage of all traffic deaths, it is clear that this issue needs to be a continued priority for states and their partners in the effort to reach zero fatalities. While improvements to infrastructure are essential, educational campaigns and law enforcement have crucial roles to play in supporting and bolstering pedestrian safety. Together, we can implement proven countermeasures to achieve our shared goals.

[7] Birken, C.S.; Parkin, P.C.; To, T.; and Macarthur, C. 2006. Trends in rates of death from unintentional injury among Canadian children in urban areas: influence of socioeconomic status. CMAJ 175(8).

[8] Chakravarthy, B.; Anderson, C.L.; Ludlow, J.; Lotfipour, S.; and Vaca, F.E. 2010. The Relationship of Pedestrian Injuries to Socioeconomic Characteristics in a Large Southern California County. Traffic Injury Prevention 11/5.

APPENDIX: WHAT STATES ARE DOING

Every state is addressing pedestrian safety using a combination of engineering, education and enforcement. Specific SHSO-reported activities are provided. This list does not represent the full spectrum of activities happening across the country.

Alaska

Engineers have adopted internal policies on the use of refuge islands and divided traffic ways when applicable to new road construction. Some jurisdictions have adopted the Complete Streets concept.

Arizona

Arizona law enforcement agencies concentrate on enforcement, education and awareness when it comes to pedestrian safety, focusing on the habits of the pedestrian and the driver. Pedestrians are reminded to walk on a sidewalk facing traffic, cross at intersections or within crosswalks, be visible at night by wearing light colors, and avoid distractions like cell phone use. Drivers are reminded to look for pedestrians everywhere, always stop for them in crosswalks, never pass vehicles stopped at a crosswalk, and slow down around pedestrians, especially in neighborhoods and school zones.

California

California has implemented proven countermeasures such as:

- Classroom and community group safety presentations;
- Positive reinforcement citations for children demonstrating safe pedestrian behavior;
- A Safetyville mock city to practice safe behavior;
- Walking school bus activities;
- Enforcement of safe driving behavior at crosswalks; and
- Efforts to educate the community on how to interact with new types of infrastructure.

In addition, Section 402 funds were used in Lancaster to purchase utility box wraps with pedestrian safety messaging, as well as for the Southern California Association of Governments to promote community outreach and traditional countermeasures.

Colorado

The Colorado Highway Safety Office funds two large metro pedestrian enforcement grants and one community education grant. The City and County of Denver has highlighted pedestrian safety in its Vision Zero plan.

Connecticut

Connecticut introduced the “Watch for Me CT” campaign, which is a statewide educational community outreach campaign that involves media components and community engagement in partnership with CT Children’s Medical Center. Section 402 funds were used for the “Watch for Me CT” campaign, law enforcement training and the development of public information and education rack cards.

The first non-motorized safety course for law enforcement was held in 2018.

A statewide signage project was recently completed to ensure pedestrian signage was up to date with current standards, including near schools and bus stops.

On the public information and education front, track cards were developed with CT laws and safe driving tips related to pedestrian safety.

Delaware

The Delaware Office of Highway Safety partners with enforcement agencies in high crash locations to educate pedestrians and give citations when necessary. Delaware DOT conducts roadway safety audits, performs roadway diets, adds pedestrian lighting and builds sidewalks, among other pedestrian safety measures. Section 402 funds are used for education and enforcement efforts, as well as paid media.

District of Columbia

DC employed improvements in infrastructure; development and implementation of safety plans (i.e. SHSP, Vision Zero); behavioral safety programs; and technology enhancements that have helped to control the rate of change of pedestrian fatalities. Section 402 funds were used to target outreach to smaller geographic areas by Ward and – even at a lower level – zip code to engage the community and understand their concerns.

Florida

Florida uses a combination of education, enforcement, engineering and emergency response countermeasures that are data-driven and context-sensitive to improve pedestrian safety.

- GIS maps are used to track the coordinated effort and to ensure that all elements work together comprehensively to ensure success.
- Behavioral components include enforcement as a first line of education during high visibility enforcement sweeps in areas with higher representation of pedestrian-involved traffic crashes, as well as paid media and grassroots activities to educate the public on traffic laws and provide safety tips and information.
- First responders are educated on the most common types of injuries sustained in crashes so they are prepared to provide the best possible response to crash victims. Additional education is provided in the trauma centers during the recovery process to crash victims, their families and friends.
- Engineering components include Complete Streets and context-sensitive solutions to ensure that pedestrians have safe and accessible routes. This is overlaid with enforcement advice to engineers on how a pedestrian or motorist may use the selected countermeasure to ensure the state is putting the right elements in the right places based on the context of the community.
- Florida allocated $100 million to lighting improvements in 2,500 priority locations across the state to increase the visibility of pedestrians using the roadway at night.

- Educational materials are developed based on the context of the community to ensure that all messages resonate with the state's diverse audiences. A new 4-hour classroom-based law enforcement training class was implemented in 2018, which all officers participating in high visibility pedestrian safety enforcement are required to attend.
- Florida engages "brand ambassadors" to share safety messages and shift the safety culture. More than 70 federal, state and local partners, stakeholders and safety advocates on Florida's Pedestrian and Bicycle Safety Coalition are committed to reducing fatalities with a goal of zero.

Florida uses a variety of funding sources to improve pedestrian safety, including 402 funds. For example, the University of South Florida Center for Urban Transportation Research (CUTR) was the subrecipient of a grant to implement a Florida Bicycle/Pedestrian educational paid media campaign, as well as a grant for facilitation and support of the functions of Florida's Comprehensive Pedestrian and Bicycle Safety Program and Coalition.

Georgia

The Georgia Office of Highway Safety has grantees in cities with significant increases in pedestrian fatalities that are working on educational programs. These programs have been focused on areas where there are significant numbers of people who walk as a primary form of transportation. Much of the focus has been on school children. Georgia is also increasing the number of crosswalks with audible directions and countdowns. With regard to Section 402 programs, the City of Macon had one of the highest per capita fatality rates for pedestrians. City leaders including the mayor, council, sheriff and school system have worked on educational programs for all pedestrians.

Hawaii

Hawaii continued educational presentations to remind drivers and pedestrians about pedestrian safety. The state also used NHTSA funds for pedestrian enforcement efforts focused on drivers and pedestrians. As for infrastructure, Hawaii began installing "gateway" treatments in the Nuuanu area of Oahu, and Hawaii DOT has begun to display traffic safety messages on Dynamic Message Signs on Oahu's highways. Section 402 funds are used for media, educational presentations and pedestrian enforcement.

Idaho

Idaho funds $2 million per year of bicycle and pedestrian infrastructure improvements and educational programs through the Transportation Alternatives Program. The Idaho Office of Highway Safety is working with the Idaho Walk and Bike Alliance to develop PSAs about walking and bicycling in Idaho.

Indiana

Indiana DOT is addressing pedestrian safety through emphasis on walkways, lighting, and audible signals. Section 402 funds are being used for a pedestrian and bicyclist safety program, and the agency will be implementing a new Stop Arm Violation Enforcement (SAVE) program to help enforcement focus on catching school bus stop arm violators to protect children getting on or off the school bus.

Kansas

Kansas' primary focus has been on education, including small mini-grants to a number of cities. The primary countermeasures have been education efforts, distribution of brochures and creation of radio advertising.

Louisiana

The Louisiana Highway Safety Commission (LHSC) funds behavioral programs that educate young people on the pedestrian laws and how to be safe when walking. This is accomplished through safety towns, bike rodeos, and one-on-one education. The Department of Transportation and Development (DOTD) initiated three new pedestrian and bicycle planning projects in different jurisdictions, kicked off a statewide analysis of pedestrian and bicyclist crashes to identify risk factors and influence countermeasure prioritization, and supported an MPO project that provided safety equipment to schools and shelters along with a data-driven media campaign encouraging "safe streets for everyone." From a broader perspective, DOTD has continued implementing its Complete Streets policy to ensure the safety and infrastructure needs of pedestrians are considered on every project.

LHSC has used 402 funds for behavioral projects to educate young people on ways to safely walk and increase their knowledge of Louisiana laws. The educational projects conduct classroom presentations, coordinate safety towns, administer pre- and post-tests to gauge knowledge change, and coordinate community outreach events. Another project utilizing 402 funds works with schools in the greater New Orleans area to develop travel safety plans that include pedestrian and bicycle safety. Students are taught about pedestrian safety through a curriculum and a safety town.

Maine

The Maine Bureau of Highway Safety, with Maine DOT and designated partners, conducts an extensive and targeted public education program and outreach campaign aimed at pedestrians and motor vehicle safety. Print materials for pedestrians and drivers are distributed to businesses and community centers in locations identified by Maine DOT. Maine uses multiple media venues to promote the "Heads Up! Safety is a Two-Way Street" campaign. Media efforts concentrate in the top 10 community clusters with the highest pedestrian fatality rates. The focus of the media campaign is to educate the walking and motoring public about pedestrian hazards.

Targeted enforcement serves to increase compliance with appropriate traffic laws by both pedestrians and motorists. Behavioral pedestrian safety initiatives require improvements in unsafe driver or pedestrian behaviors. Traffic enforcement focuses on the high pedestrian-motor vehicle crash locations across the State of Maine based on the past three years of data.

Maine currently has several programs approved in their Highway Safety Plan with 402 funding, including a planned activity for the "Heads Up! Safety is a Two-Way Street" educational and media campaign for pedestrians. It also has High Crash Pedestrian Community Law Enforcement Agencies as well a Targeted Pedestrian-Motor Vehicle Traffic Enforcement program.

Massachusetts

The Massachusetts Office of Highway Safety developed educational media messaging on pedestrian safety in collaboration with Massachusetts DOT (MassDOT). Additionally, Massachusetts provided funding to 84 local police departments across the state to conduct overtime enforcement patrols

aimed at reducing pedestrian and bicyclist injuries and fatalities. Subrecipients were also allowed to purchase equipment specifically for improving pedestrian and bicycle safety such as traffic cones, crosswalk signs, crosswalk markers and bicycle helmets. On the engineering front, MassDOT performed a safety evaluation of the improvement of 34 signalized intersections throughout the Commonwealth. Intersection improvements included signal equipment and timing upgrades; pedestrian, bicycle and ADA improvements; pavement resurfacing; and signage and pavement marking upgrades.

The majority of MassDOT's federally funded projects involve intersection improvements or redesigns to make roads safer for all users (motor vehicle occupants, motorcyclists, bicyclists and pedestrians). Through subrecipient WalkBoston, MassDOT also helped fund an engineering-centric project that worked with six communities with high incidence of pedestrian injuries and fatalities to develop strategies for improving their respective towns' walking environments.

Section 402 funds are used for pedestrian and bicycle media, including the initial launch of a "Scan the Street for Wheels and Feet" awareness campaign done in collaboration with MassDOT.

Michigan

Michigan is implementing a variety of measures to improve pedestrian safety, including law enforcement training and mobilization, public education, Road Safety Audits (RSAs), a Work Zone Mobility Manual featuring guidance on the treatment of pedestrians in work zones, Complete Streets policies and traffic control devices.

Over two years, Michigan used Section 402 funds to conduct a comprehensive pedestrian and bicyclist crash evaluation through Western Michigan University. A pedestrian and bicyclist safety statewide conference was held in May 2016, using 402 funds, to share the information and results of the 2016 Michigan Comprehensive Pedestrian and Bicycle Crash Evaluation Report.

Minnesota

Minnesota provided the following examples of pedestrian safety projects:

- *Evaluation of Sustained Enforcement, Education, and Engineering Measures on Pedestrian Crossings study, HumanFirst Lab, University of Minnesota*: The objective of this study is to review the City of St. Paul's effort to improve pedestrian safety and investigate whether a program similar to a NHTSA-supported study could be applied to changing the driving culture related to yielding to pedestrians and speed compliance on arterial and collector roads on a citywide basis.
- *Enforcing Pedestrian Laws*: More than one-fourth of pedestrian deaths occur in Hennepin County, and the majority within the city of Minneapolis. Minnesota crash data show that drivers made errors in judgment approximately half of the time, and the other half, the pedestrian made the error. Aiming to decrease the number of pedestrian fatalities, a grant was written with the Minneapolis Police Department and the Ramsey County Sheriff's Office to conduct HVE and increase the number of citations written to pedestrians and drivers.

Missouri

Limited applications of traffic calming are being implemented (speed humps, roundabouts, road diets, etc.). Enhanced signing, particularly at mid-block crossings, is frequently used to emphasize pedestrian

crossings. In addition, pedestrian countdown timers and audible pedestrian signals are being used at several signalized intersections. Behavioral solutions are more limited, but public awareness campaigns focused on keeping pedestrians safe have been conducted in St. Louis and Kansas City.

Montana

Pedestrian fatalities have represented approximately seven percent of all fatalities in Montana during the last five years. Montana's Comprehensive Highway Safety Plan requires that the Montana Department of Transportation (MDT) review fatalities on high-risk roads and fatalities and serious injuries per capita among older drivers and pedestrians annually to assess if action is needed. The Roadway Departure and Intersection Crashes emphasis area contains a strategy to "reduce and mitigate intersection crashes through data-driven problem identification and the use of best practices." Under this strategy, MDT has developed an implementation step to construct infrastructure improvements to mitigate intersection-related crashes. Examples include but are not limited to: turn lanes; signal phasing/timing; flashing yellow arrows; retroreflective backplates on signals; sight distance improvements; roundabouts or other intersection control improvements; pedestrian improvements, including improvements at midblock crossings; bicycle improvements; signal coordination and timing improvements; enhanced/improved lighting; or enhanced/improved signing.

MDT requires that during any construction project, pedestrian issues are reviewed to determine the best practice for the specific project.

Nevada

After having a record year in 2017 with 100 pedestrian fatalities statewide, the Nevada Office of Traffic Safety through the Zero Fatalities program launched an aggressive new Pedestrian Safety campaign in May of 2018. Nevada's campaign speaks to drivers and pedestrians, emphasizing the role of both in enhancing safety. The campaign is highly geo-targeted to the most dangerous roads, intersections and behaviors to best reach its audience and is primarily a paid media approach, complemented with public relations safety messages.

New Hampshire

The New Hampshire Highway Safety Office works directly with its local law enforcement partners to educate, message and enforce pedestrian and bicyclist safety laws on the state's roadways.

New Jersey

The primary activities being implemented include overtime enforcement and education funding to police departments. Both the State Pedestrian Fund and Section 402 funds are used to pay for overtime enforcement that target high pedestrian crash locations and provide pedestrian safety education materials for delivery to high-risk segments of the pedestrian population.

New Mexico

New Mexico has created "Look For Me" corridors, high crash risk travel corridors coupled with high frequency transit travel corridors throughout Albuquerque. Road Diets are being studied and implemented in parts of the city.

New York

The Governor's Traffic Safety Committee (GTSC), the New York State Department of Health (NYS DOH), and the NYS Department of Transportation (NYS DOT) are continuing to play key roles in pedestrian safety guided by the New York State Pedestrian Safety Action Plan (PSAP). The $110 million initiative identifies 20 "focus communities," which account for nearly 50 percent of all pedestrian crashes. The five-year plan calls for a variety of low-cost engineering improvements undertaken by NYS DOT, enforcement strategies organized by GTSC and educational/public information initiatives spearheaded by NYS DOH.

NYS DOT is conducting pedestrian safety site evaluations at approximately 2,000 unsignalized midblock crosswalks and 2,400 signalized crosswalks on state-maintained routes in urban areas. Improvements to crosswalk safety design and construction, consisting of proven countermeasures to reduce conflicts between pedestrians and vehicles, are also ongoing.

GTSC planned, promoted and coordinated two, six-hour pedestrian safety training workshops for law enforcement officers. Officers learned about the state's plan to address pedestrian injuries and fatalities, relevant vehicle and traffic laws, pedestrian crash issues and data. They were also given tools and strategies for the effective implementation of pedestrian education and enforcement countermeasures.

GTSC also conducted an annual pedestrian safety enforcement mobilization. GTSC worked with police agencies covering 20 designated PSAP "focus communities" to allocate a portion of their PTS grant to fund additional patrols during the high-visibility blitz, "Operation See! Be Seen!" Grantees were encouraged to issue warnings and educational materials prepared by the NYS DOH to pedestrians and drivers found violating safety laws during the first week of the campaign, and citations during the second week.

New York City has its own pedestrian safety initiative known as Vision Zero. Age-appropriate educational and outreach programs are provided at hundreds of schools and senior centers in target communities. Multi-language presentations are provided to parents at health centers, schools and public assistance centers. Outreach to schools includes meetings with principals and school staff and walking tours to identify issues around the locations. New York City's Department of Transportation also staffs street teams to engage with community residents and business owners in high-risk corridors.

North Carolina

The "Watch for Me NC" program grant supports training for law enforcement related to crosswalk and pedestrian traffic laws.

North Dakota

North Dakota DOT teamed up with local communities to plan, design and install temporary Active Transportation Demonstration Projects. These temporary demonstration projects help determine the public's desired types of long-term changes for safer streets. These demonstration projects included crosswalk enhancements in which nine communities participated. The projects are designed to make the intersections more pedestrian-friendly while keeping vehicular traffic moving.

Engineering measures include new or replaced pedestrian and bicyclist facilities, new bicycle lanes, new or replaced ADA measures, and pedestrian signage. The facilities are placed throughout the state where federal funding was requested and awarded along with local funding matches.

Law enforcement is also tasked with enforcing pedestrian right-of-way laws when they encounter violations.

Ohio

Ohio DOT (ODOT) developed materials for a statewide campaign around pedestrian safety in 2018, called "Your Move Ohio." Messages included "Yield to Pedestrians When Turning," "Look Out for Each Other," and "Slow Down, Watch for Pedestrians." The campaign included a statewide advertisement buy, social media page, development of materials for local communities, car magnets and distribution of flashing reflectors across the state. In addition, Ohio DOT and statewide partners are working to emphasize pedestrian safety within the novice Driver's Education Program. Statewide partners are creating supplemental materials on driver education emphasizing laws that keep pedestrians safe.

Regarding enforcement, ODOT facilitates a statewide active transportation network for partners and practitioners. Best practices for bicyclist and pedestrian safety are shared, including enforcement strategies. Within the scope of the Safe Routes to School Program, ODOT funds projects to improve student safety, including training and implementation of enforcement activities. At least four communities were awarded projects in 2018 that addressed enforcement in some way.

ODOT administers funding that can be used to improve the design of pedestrian facilities. For example, the Safe Routes to School program provides $4 million annually to communities looking to improve the safety for K-8 students to walk or bike to school. The Transportation Alternatives program provided roughly $27 million for projects in 2018, many of which supported bicycle and pedestrian facilities. The Highway Safety Improvement Program funds programs focused on improving roadway safety, for which pedestrian projects are eligible.

Through Section 402 funding, each Safe Communities program can direct programming based on local problem identification. Butler County, Franklin County and Hamilton County (which represent 28 percent of statewide pedestrian fatalities) have proposed pedestrian activities in their grants to address pedestrian issues. Butler, Franklin and Hamilton County Safe Communities will conduct evidence-based programs that will specifically address their pedestrian problem identification.

Oklahoma

The Oklahoma Highway Safety Office has supported a pilot project in Tulsa for the last three years to identify means and methods for improving pedestrian and bicyclist safety. This effort involves both enforcement and engineering concepts working together to identify and address the increasing number of pedestrian fatalities. The "Walk This Way" and "Everyone is a Pedestrian" programs have been used in both Tulsa and Oklahoma City, but not to any great extent yet. The DOT sponsors a bicyclist and pedestrian safety committee that makes recommendations for improved engineering assistance in roadway design. Several larger communities have added pavement markings and signage to better indicate bicycles are allowed on the main roadways unless other prohibited. Additionally, the use of a "3-foot buffer" is encouraged and in some cases mandated by local laws.

Oregon

The Oregon Department of Transportation (ODOT) re-released its PSA for the "Oregonian Crossing – Every Intersection is a Crosswalk" campaign in theatres and Facebook ads. Oregonian Crossing yard signs were also created and distributed to all regions. The new campaign "Oregonians Standout" was

also released to remind Oregonians to be visible to drivers. The state re-released the "Say What You See" back-to-school pedestrian safety PSA in September. An updated brochure on "What you need to know about Oregon Crosswalk Laws: A Driver's Guide" was created and translated in other languages to be distributed to local Department of Motor Vehicle offices and local police departments. Also, the state created a pocket "Driver's Field Guide to Sharing Oregon's Roads" which is also stocked at DMV offices and used in partnership with the state Driver Education Program.

Pedestrian Safety Enforcement (PSE) Operation overtime mini-grants were awarded to 28 local law enforcement agencies to do PSE operations statewide from April to September 2017. Non-funded law enforcement agencies also conducted their own PSE operations throughout the year.

In 2014, ODOT developed the Oregon Statewide Pedestrian and Bicycle Safety Implementation Plan. Oregon did a crash- and risk-based analysis with practitioners statewide to develop a list of systemic mitigation measures being implemented with HSIP funds. For 2017 statewide, ODOT continued to implement improved pedestrian crossings, including: installation of Rapid Flashing Beacons and Pedestrian Hybrid Beacons, using Leading Pedestrian Intervals, and upgrading and installing accessible pedestrian push buttons, sidewalks and curb ramps. ODOT has made it common practice to use advanced stop bars at signalized intersections as a pedestrian/bicyclist safety measure. Also, House Bill 2017 (Keep Oregon Moving) passed, approving funding of multiple transportation projects to include statewide pedestrian safety improvement and Safe Routes to School infrastructure in the coming years.

Pennsylvania

Pennsylvania law enforcement conduct targeted enforcement stings for motorists who fail to yield to pedestrians in crosswalks. The Pennsylvania Department of Transportation (PennDOT) website has a number of safety videos targeted at parents and children that are focused on walking safely to school. Packages of pedestrian safety cards have been distributed at numerous events. The state's district press and safety officers execute a range of other activities in support of pedestrian safety. From an engineering perspective, the state is focused on being more aggressive with road diets, bulb-outs, speed tables and raised intersections.

Rhode Island

Rhode Island has created a law enforcement pedestrian safety training, which all agencies requesting funding for pedestrian projects are required to attend. The training offers best practices, data and a review of pedestrian statutes and policies. A training course is also available for businesses and their employees, which offers some of the same information and data. Infrastructure measures include road diets and statewide mitigation programs focused on curves, signalized intersections and high-risk crosswalks.

South Carolina

The Office of Highway Safety and Justice Programs partnered with the South Carolina Highway Patrol to specifically target pedestrian and bicyclist safety issues through the Target Zero umbrella campaign. The Highway Patrol utilizes multiple avenues in its effort to educate the public about highway safety issues related to pedestrians, bicyclists and mopeds. Community Relations Officers give approximately 700 safety presentations a year, attend hundreds of safety fairs and give thousands of interviews on various topics, including the topic of vulnerable roadway users. Section 402 funds were used for a billboard campaign to supplement the Vulnerable Roadway Users (VRU) outreach efforts that had been used in the past. A sustained, redesigned VRU campaign is planned for spring 2019.

Texas

The state is conducting educational, training, outreach, research and engineering measures to address pedestrian safety. Some engineering efforts include: 1) safer places to walk along a roadway such as complete sidewalk networks; 2) safer places to cross a roadway such as intersection improvements including pedestrian signals, detection and crosswalks; and 3) Pedestrian Hybrid Beacons for mid-block crosswalks.

Section 402 funds are used to support the following projects:

- Pedestrian and bicyclist outreach
- Early child safety education focusing on pedestrians/bicyclists aged 5-10 years old
- Statewide pedestrian and motorist outreach and support to address pedestrian safety

Utah

Utah placed messaging on sidewalks and near public transportation informing people about pedestrian myths such as "pedestrians always have the right of way." They have also coordinated crosswalk enforcement mobilizations and encouraged each police department to reach out to their local media for coverage. Each of these mobilizations has been coupled with straightforward social media posts explaining laws. Utah is currently conducting a pilot study on advanced crosswalk signal timing giving pedestrians extra time to get out into the crosswalk while the lights are all red.

Utah has used 402 funds for local health departments to provide outreach by helping their communities with Green Ribbon Month and Walk to School days. As part of these projects, departments are also required to conduct pedestrian observational surveys to better understand behaviors in the communities they serve. The state also funded enforcement for school bus safety with officers riding on buses calling out vehicles who violate the red stop arm.

Vermont

Vermont efforts to reduce pedestrian crashes emphasize speed enforcement, lighting and markings of crosswalks, and safety education.

Virginia

In Virginia, the localities that receive highway safety funding to raise awareness of and enforce pedestrian safety laws include Arlington County, Fairfax County, Prince William County, Richmond City, Roanoke City, Salem City and Harrisonburg City. Additionally, Virginia's "Street Smart Regional Pedestrian and Bicycle Safety Program" focuses on promoting pedestrian and bicyclist safety and includes similar strategic enforcement engagements around the metropolitan Washington region. This public awareness and enforcement campaign aims at reducing the number of pedestrian and cyclist injuries and deaths in the Washington metropolitan area (including Northern Virginia). The campaign uses creative radio and television advertising in English and Spanish to reach drivers, pedestrians and cyclists, while targeting them through outdoor and transit advertising on bus shelters and bus sides. In addition, law enforcement and local, county and state agencies distribute handouts and tip cards to further spread awareness and educate drivers and pedestrians. Virginia also has several selective enforcement programs to address pedestrian safety. Section 402 funds support Working Towards Zero Pedestrian Deaths, including Street Smart Metro Washington, Share Virginia Roadways and selective enforcement.

Washington State

Many cities are implementing design features on roadways to enhance pedestrian safety, such as curb bulb-outs, protected left turn lanes, pedestrian crossing intervals for crosswalks and various traffic calming measures to slow drivers down.

The Washington Traffic Safety Commission supports several pilot projects on high visibility enforcement that couple public education and outreach with enforcement targeted to locations with histories of pedestrian fatalities and serious injuries.

The Washington State Legislature created a Pedestrian Safety Advisory Council (PSAC) to study the common causes of pedestrian crashes, which often center on the speed the driver was going and whether the driver or pedestrian were paying attention. The 2018 PSAC report was just submitted and it supports increased used of automated speed enforcement, increased data collection and analysis and strengthening and clarifying the state's vulnerable user law.

Section 402 funds are used to support several pilot projects working on high visibility enforcement, coupling public education and outreach with enforcement targeted to locations with histories of pedestrian fatalities and serious injuries.

Wisconsin

The Bureau of Transportation Safety (BOTS) hosted two Designing for Pedestrian Safety classes in Wisconsin, instructed by FHWA staff. This course provided resources and knowledge about behavioral and infrastructural design to engineers and planners to help increase pedestrian safety. Each course was held over two days, with 20 participants in each course. BOTS also held three Pedestrian and Bicyclist Safety Law Enforcement Trainings. The training is specifically designed to support law enforcement when addressing and enforcing pedestrian and bicycle safety.

In the summer of 2018, BOTS provided the Wisconsin Bike Federation a grant to increase pedestrian safety in Milwaukee, which has the highest rate of pedestrian crashes and fatalities in the state. The goal was to create strategic marketing and advertising that would advance safety messages to the forefront of motorists' and pedestrians' knowledge.

BOTS provided four Pedestrian/Bicycle High Visibility Enforcement Grants. This grant program reimbursed officers for overtime while conducting high visibility enforcement to reduce bicyclist and pedestrian crashes and fatalities. Each agency agreed to participate at a minimum of one HVE per week for three months. This minimum was identified from evidence-based, peer-reviewed research. In addition, all agencies were required to participate in the Pedestrian and Bicyclist Safety Law Enforcement Trainings that the Bureau conducted.

876 F.2d 494
United States Court of Appeals,
Fifth Circuit.

The INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF NEW ORLEANS, INC., Plaintiff–Appellant,
v.
CITY OF BATON ROUGE and Parish of East Baton Rouge, Defendants–Appellees.

No. 88–3381.
|
July 5, 1989.

Synopsis
Religious organization brought suit challenging constitutionality of municipal ordinance prohibiting solicitation of operators of motor vehicles. The United States District Court for the Middle District of Louisiana, John V. Parker, Chief Judge, 668 F.Supp. 527, held that ordinance did not violate free speech rights of members of religious organization, even if roadways were "public forum." Religious organization appealed. The Court of Appeals, Aldisert, Circuit Judge, sitting by designation, held that content-neutral ordinance which prohibited any person from soliciting business or charitable contributions from occupant of vehicle on any street or roadway did not violate First Amendment.

Affirmed.

West Headnotes (7)

[1] Federal Courts
Constitutional rights, civil rights, and discrimination in general

Whether nonsolicitation ordinance impermissibly infringed on organization's free speech rights was mixed question of law and fact, which Court of Appeals reviewed de novo. U.S.C.A. Const.Amend. 1.

4 Cases that cite this headnote

[2] Constitutional Law
Justification for exclusion or limitation

Government has only a very limited ability to restrict expressive activity in public forum. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[3] Constitutional Law
Justification for exclusion or limitation

Content-based regulation of free speech in public forum must be necessary to serve compelling state interest, and must be narrowly tailored to achieve that end. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[4] Constitutional Law
Narrow tailoring requirement; relationship to governmental interest

Constitutional Law
Existence of other channels of expression

Content-neutral regulations of time, place, and manner of expression are enforceable if they are narrowly tailored to serve significant government interest, and if they leave open ample alternative channels of communication. U.S.C.A. Const.Amend. 1.

15 Cases that cite this headnote

[5] Constitutional Law
Justification for exclusion or limitation

Complete ban on free expression may be imposed in nonpublic forum if prohibition is reasonable and content-neutral. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[6] Constitutional Law
Charities or religious organizations

Content-neutral ordinance which prohibited any person from soliciting business or charitable contributions from occupants of vehicles on any street or roadway was narrowly tailored to achieve municipality's legitimate interest in regulating flow of

traffic and did not impermissibly infringe on religious organization's free speech rights; ordinance did not prohibit solicitation of funds from pedestrians, door-to-door canvassing, or telephone solicitations. U.S.C.A. Const.Amend. 1.

27 Cases that cite this headnote

[7] Constitutional Law
Freedom of Speech, Expression, and Press

Overbreadth doctrine is exception to usual requirements of standing, whose limited purpose is to prevent invalid statute from inhibiting speech of third parties who are not before court. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

Attorneys and Law Firms

***494** J. Arthur Smith, III, Baton Rouge, La., for plaintiff-appellant.

W. Michael Stemmans, William R. Aaron, Asst. Parish Attys., Baton Rouge, La., for defendants-appellees.

Appeal from the United States District Court for the Middle District of Louisiana.

Before ALDISERT*, REAVLEY and HIGGINBOTHAM, Circuit Judges.

Opinion

***495** ALDISERT, Circuit Judge.

We are to decide whether an ordinance enacted by the City of Baton Rouge and the Parish of East Baton Rouge (city-parish) trenches upon first amendment rights and is, therefore, unconstitutional. The ordinance prohibits soliciting employment, business or charitable contributions from the occupants of any vehicle on any street or roadway.

The International Society for Krishna Consciousness of New Orleans, Inc., (ISKCON) appeals from the district court's denial of relief. 668 F.Supp. 527. ISKCON had sought a declaratory judgment and injunction against the city-parish to have the ordinance declared unconstitutional and to restrain the city from enforcing it. ISKCON contends that the ordinance is overly broad and that the city-parish failed in its duty to employ the least restrictive means of serving the municipality's interest in traffic flow and roadway safety. The appellees meet the argument head on. They argue the ordinance is narrowly tailored, that it is not substantially overbroad, and that it qualifies as the least restrictive means of achieving its goal of regulating traffic and protecting motorist and pedestrian safety. The district court held that the ordinance did not offend the constitution. We agree and will affirm.

Jurisdiction was proper in the district court under 28 U.S.C. § 1331. The appeal was timely filed under Rule 4(a) Fed.R.App.P. The appeal is from a final judgment and we have jurisdiction pursuant to 28 U.S.C. § 1291.

I.

The appellant society is part of the International Krishna Consciousness movement. The Society is a religious organization entitled to the protection of the first amendment. *Int'l Soc'y for Krishna Consciousness v. City of Houston,* 689 F.2d 541 (5th Cir.1982). Its adherents believe that in order to glorify God, and to enlighten the public generally, they must practice the ritual of Sankirtan, which requires them to publicly distribute religious literature and to solicit financial contributions to further their cause.

Victor Mistretta, the Society's president, testified that he had decided the Sankirtan ritual would be performed in Baton Rouge during the 1986 Christmas season. Several members of the Society were then dispatched from New Orleans to Baton Rouge to solicit donations at its busiest intersections. All were dressed in Santa Clause costumes. Mr. Mistretta testified that those who participated were carefully instructed regarding safety and told to stay on the sidewalk or neutral ground if at all possible. Krishna members who were soliciting donations at intersections were warned by Baton Rouge police officers that their activities violated a local ordinance, and that they would be arrested if they persisted. Although no arrests were actually made, the Society instituted this action in the United States district court for the Middle District of Louisiana.

The ordinance, section 96(b) of Title 11 of the Code of Ordinances of the City of Baton Rouge and Parish of East Baton Rouge, was enacted by the Baton Rouge city council in 1983. The preamble to the ordinance reads:

> WHEREAS, a problem has been identified with persons attempting to solicit rides, employment, business, or charitable contributions from the occupants of moving vehicles on certain city streets; and
>
> WHEREAS, this practice has been identified as being unsafe for both the person engaging in the solicitation and for traffic in general; and
>
> WHEREAS, the activity of soliciting rides, business, employment, or charitable contributions from the occupants of vehicles constitutes an impediment to the normal and safe flow of traffic in the City of Baton Rouge; and
>
> WHEREAS, this activity has in the past resulted in accidents one of which resulted in the death of the person engaged in the soliciting activity.

Section 96(b) provides:

> No person shall be upon or go upon any street or roadway or shall be upon or go ***496** upon any shoulder of any street or roadway nor shall any such person be upon or go upon any neutral ground of any street or roadway for the purpose of soliciting employment, business, or charitable contributions of any kind from the occupant of any vehicle.

The reasons for and the purpose of the ordinance were explained by the witnesses at the hearing. Richard Redd, legal advisor to the city's police department testified that the city-parish enacted the ordinance after a traffic death in which a news vendor was fatally injured while soliciting sales in a Baton Rouge street. Redd personally drafted the ordinance and said he could not envision drafting another ordinance that would achieve the desired intent, taking into account safety and traffic flow considerations.

James Webb, an expert in traffic engineering, established that the purpose of streets, highways, and roads was to move people and goods both safely and efficiently. He testified that streets, highways, and roads are not designed for the purpose of soliciting funds. He also testified that he could not envision another drafting scheme that would achieve the desired result and eliminate hazardous consequences and traffic problems.

The city-parish introduced into evidence a local newspaper dated December 13, 1986, displaying a front page photograph of a female wearing a Santa Claus costume standing beside a vehicle in a line of vehicles. The court found that both feet were planted firmly in the roadway, not on the neutral ground. The individual was identified by Mr. Mistretta as one of the Krishna members who did indeed solicit donations in Baton Rouge at that time.

The district court found as a fact that in Baton Rouge members of the sect solicit donations from occupants of motor vehicles that are temporarily stopped at traffic lights. Such donations are solicited only at high traffic times, and at the busiest intersections. R.E. 60–61.

II.

[1] Whether ISKCON's first amendment free speech rights have been infringed is a mixed question of law and fact. *Dunagin v. City of Oxford,* 718 F.2d 738, 748 n. 8 (5th Cir.1983), *cert. denied,* 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed.2d 855 (1984). The appropriate standard of review is de novo because the application of constitutional law to the facts of this case "requires subtle legal distinctions, a sense of history, and an ordering of conflicting rights, values and interests." *See id.* Appellate courts have "considerable leeway" in this context. *Id.* at 849 n. 8.

III.

The Society argues that public streets, sidewalks, and neutral grounds constitute public fora which may be freely used for purposes of assembly, communication, and discussion of public questions. The Supreme Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.,* 473 U.S. 788, 800, 105 S.Ct. 3439, 3448, 87 L.Ed.2d 567 (1985); *see also Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

In *Perry,* the court identified three types of fora: the traditional public forum, the public forum created by designation, and the non-public forum. Traditional public fora generally are those places which "by long tradition or by government fiat have been devoted to assembly and debate." *Perry,* 460 U.S. at 45, 103 S.Ct. at 954. Public sidewalks, streets, and parks have been recognized as traditional public fora 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." *Hague v. CIO,* 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed.2d 1423 (1939); *see also* ***497** *Frisby v. Schultz,* 487 U.S. 474, ——, 108 S.Ct. 2495, 2499–501, 101 L.Ed.2d 420 (June 27, 1988); *Perry,* 460 U.S. at 45, 103 S.Ct. at 954.

[2] **[3]** **[4]** The government's ability to permissibly restrict expressive activity in a public forum is very limited. *United States v. Grace,* 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736 (1983). "The appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content." *Frisby,* 487 U.S. at ——, 108 S.Ct. at 2500. Content-based regulation must be necessary to serve a compelling state interest and be narrowly drawn to achieve that end; content-neutral regulations of time, place, and manner of expression are enforceable if they are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *Perry,* 460 U.S. at 45, 103 S.Ct. at 955 (*cited in* *Frisby,* 487 U.S. at ——, 108 S.Ct. at 2500).

[5] When public property is not characterized as a public forum, the government "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry,* 460 U.S. at 46, 103 S.Ct. at 955. Indeed, a complete ban on free expression may be imposed in a non-public forum if the prohibition is reasonable and content-neutral. *See* *United States Postal Service v. Council of Greenburgh Civic Assoc's,* 453 U.S. 114, 132, 101 S.Ct. 2676, 2686, 69 L.Ed.2d 517 (1981).

Like the district court we will assume, without deciding, that the roadways and streets of Baton Rouge constitute a public forum. Thus, we decline the city-parish's invitation to rule that the streets are not public fora under the no-soliciting ordinance. Instead, we will examine the ordinance under the higher standard applicable to restrictions on expressive activity within a public forum.

IV.

[6] Where a public forum is involved, and the restriction is content-neutral, the regulation must be "narrowly tailored to serve a significant government interest," and "must leave open ample alternative channels of communication." *Perry,* 460 U.S. at 45, 103 S.Ct. at 955. We are satisfied that the ordinance at issue is "content-neutral."

The Baton Rouge ordinance applies even-handedly to every organization or individual, regardless of viewpoint, which attempts to solicit "employment, business or charitable contributions of any kind from the occupant of any vehicle" traveling on Baton Rouge streets. *See* *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 648–49, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981) (discussing content-neutral restriction). On its face, the ordinance is content-neutral. We now must inquire whether the ordinance meets the traffic flow and safety concerns expressed in the preamble, and whether those concerns represent a significant government interest.

A.

The Supreme Court has recognized the substantial risk of disruption in crowd or traffic control that may be presented by solicitation of contributions, as compared to other forms of expression. In *Heffron,* the Court upheld a state fair rule restricting solicitation of contributions and distribution of literature to stationary booths, although permitting individuals to wander through the fairgrounds to express ideas to the crowds. The Court found significant the fact that members of organizations were free to "orally propagate their views" throughout the fairgrounds, and that only solicitation, sales, and distribution were restricted to booths. *Id.* at 655, 101 S.Ct. at 2567. The Court thereby recognized a distinction between the purely communicative aspect of oral advocacy on the one hand, and the solicitation

of contributions, which can prove more disruptive of order and crowd flow, on the other hand. This is because solicitation and selling require "stopping [individuals] momentarily or for longer periods as money is given or exchanged for literature." ***498** *Id.* at 653, 101 S.Ct. at 2567. The Ninth Circuit, following *Heffron,* upheld a Phoenix ordinance substantially similar to the ordinance at issue in this case, in *Acorn v. City of Phoenix,* 798 F.2d 1260 (9th Cir.1986).

Similarly, we think that restrictions on solicitation are particularly appropriate in the context of assuring the free movement of vehicles and promoting traffic safety on city streets. The Baton Rouge ordinance is narrowly aimed at the disruptive nature of fund solicitation from the occupants of vehicles. Direct communication of ideas, including the distribution of literature to occupants in vehicles, is not restricted.

The preamble of the ordinance noted that the soliciting practice "has been identified as unsafe for both the person engaged in the solicitation and for traffic in general" and that "this activity has in the past resulted in accidents one of which resulted from the death of the person engaged in the soliciting activity." Testimony at trial supported this basis for passage of the statute. In *United States Labor Party v. Oremus,* 619 F.2d 683 (7th Cir.1980), the court also had before it a provision prohibiting solicitation from the occupants of vehicles. The court noted the "evident dangers of physical injury and traffic disruption that are present when individuals stand in the center of busy streets trying to engage drivers and solicit contributions from them." *Id.* at 688.

We are satisfied with the analysis of this problem set forth in *Acorn v. City of Phoenix:*

> Unlike oral advocacy of ideas, or even the distribution of literature, successful solicitation requires the individual to respond by searching for currency and passing it along to the solicitor. Even after the solicitor has departed, the driver must secure any change returned, replace a wallet or close a purse, and then return proper attention to the full responsibilities of a motor vehicle driver. The direct personal solicitation from drivers distracts them from their primary duty to watch the traffic and potential hazards in the road, observe all traffic control signals or warnings, and prepare to move through the intersection.

Acorn, 798 F.2d at 1269.

We determine that the government has demonstrated a significant safety interest justifying this regulation. We now turn to the question of whether the ordinance is narrowly tailored to serve that interest.

B.

Appellant argues that this ordinance is not narrowly tailored because it "sweeps within its ambit *all* streets and roadways within the Parish of East Baton Rouge." Br. for appellant at 16–17. Appellant contends that a more narrowly tailored ordinance would consider the speed of traffic, the width of the neutral ground, the presence or absence of stop signs and traffic lights, etc. *Id.* at 20.

We agree with the district court that "[t]his ordinance is narrowly drawn and aimed at the peculiarly disruptive nature of fund solicitation from occupants of vehicles causing delays and interference with vehicular traffic." Dist. ct. opin. at 9. The city traffic engineer testified that while solicitations are most hazardous during peak hours on major routes, solicitations on other routes carry other hazards, e.g., no sidewalks, narrow shoulders, open drainage ditches, etc. *Id.* at 3. The evidence supports the district court's conclusion that "there is no way that such activities can be made 'safe'." *Id.* at 9.

C.

The limited nature of this ordinance also leaves open ample alternative channels of communication. The ordinance prohibits only the solicitation of funds from occupants of motor vehicles. It does not prohibit solicitation of funds from pedestrians, door-to-door canvassing, or telephone solicitations. *See* *Acorn,* 798 F.2d at 1271 (finding substantially similar ordinance left open ample alternative

channels of communication). Nor does the ordinance restrict oral advocacy, distribution of literature, or other forms of communication and expression.

***499** As the Seventh Circuit noted in upholding a regulation prohibiting solicitations on postal service property:

> The distributed literature could adequately explain the organization, how to obtain a membership, and where to send any contribution. In this way, the organization could convey its message without disrup[tion] ... and the recipient would be free to read the message at a later time.

Nat'l Anti–Drug Coalition, Inc. v. Bolger, 737 F.2d 717, 726–27 (7th Cir.1984); *accord* *Acorn,* 798 F.2d at 1271.

We conclude that the ordinance is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication.

V.

This court's prior public forum cases are not inconsistent with this conclusion, and do not support appellant's argument. In *Fernandes v. Limmer,* 663 F.2d 619 (5th Cir.1981), we examined an ordinance governing literature distribution and fund solicitation in the Dallas–Fort Worth Airport Complex. We held that the regulation was not carefully tailored, in that it forbade all first amendment activity within the entire airport terminal area. We determined that this included areas in which the airport board had not shown a significant interest in pedestrian traffic control.

In *Beckerman v. City of Tupelo,* 664 F.2d 502 (5th Cir.1981), we struck down an ordinance authorizing the Chief of Police to deny a parade permit if he found that the parade would "probably cause injury to persons or property or provoke disorderly conduct or create a disturbance." *Id.* at 507. We found the ordinance to be overbroad, vague, and an impermissible prior restraint. We also found that certain provisions vested excessive discretion in a public official.

Finally, in *Dallas Acorn v. Dallas County Hospital District,* 670 F.2d 629 (5th Cir.1982), we stated that a hospital may forbid solicitation or leafletting on its grounds if that activity was basically incompatible with the hospital's normal activities. The court found the hospital's "no solicitation rule" unconstitutional because it was vague, and because it granted a hospital administrator unfettered discretion to allow or disallow the dissemination of literature based on content.

The ordinance in the case before us does not suffer from the constitutional deficiencies present in the cases we have just discussed. The Baton Rouge ordinance is also distinguishable from the similar ordinance struck down in *Acorn v. City of New Orleans,* 606 F.Supp. 16 (E.D.La.1984). The New Orleans ordinance prohibited solicitation from pedestrians as well as from occupants of vehicles, and included solicitation in the street even when streets were closed to vehicular traffic.

VI.

We now turn to the other contentions advanced by appellant, which, upon analysis, appear to be a combination, or at least a meld, of kindred, yet discrete, precepts of constitutional law—the notion of overbreadth, and the first amendment requirement that the government employ the least restrictive means to achieve its goals. For the sake of caution, and in an effort to respect fully the appellant's contentions, we will address each of these precepts in turn.

A.

[7] Appellant misconceives the nature of the overbreadth doctrine. In *Thornhill v. Alabama,* 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093 (1940), the Supreme Court held that a broadly-written statute may have such a deterrent effect on free expression that it should be subject to a facial challenge even by a party whose own conduct may be unprotected. In essence, this is an exception to the usual requirements of standing. The Court has since reiterated the limited purpose of this doctrine: "the underlying justification for the overbreadth exception [is] the interest in preventing an invalid statute from inhibiting the speech of third parties who are not before the Court." *City Council v. Taxpayers for* ***500** *Vincent,* 466 U.S. 789, 800, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984);

see also *Airport Comm'rs v. Jews for Jesus,* 482 U.S. 569, 574, 107 S.Ct. 2568, 2571–72, 96 L.Ed.2d 500 (1987). The cases make clear that "overbreadth" is not simply the converse of "narrowly tailored." In *Vincent,* the Court termed an overbreadth challenge "inappropriate" where "nothing in the record indicate[d] that the ordinance [would] have any different impact on any third parties' interests in free speech than it ha[d] on [appellants']." *Vincent,* 466 U.S. at 801, 104 S.Ct. at 2126.

In the present case, appellant has simply argued that the ordinance would inhibit the first amendment activities of other charitable and religious organizations in East Baton Rouge. As in *Vincent,* appellant here has not demonstrated that the conduct of these groups is "more likely to be protected by the First Amendment than their own...." *Id.* at 802, 104 S.Ct. at 2127. Here, too, it would be "inappropriate in this case to entertain an overbreadth challenge to the ordinance." *Id.*

B.

Finally, appellant argues that in enacting this ordinance, the city and parish of East Baton Rouge were required to use the least restrictive means of achieving their goal of traffic safety. Appellant here confuses the constitutional standard applicable to public forum cases affecting content-neutral regulation of speech, which is the case here, with the higher standard applicable to cases involving the free exercise of religion. Each of the cases cited by appellant in support of this argument involved a free exercise of religion claim. *See, e.g.,* *Thomas v. Review Board,* 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Callahan v. Woods,* 736 F.2d 1269 (9th Cir.1984). Even though this case involves a religious practice, the Supreme Court has specifically stated that ISKCON's solicitation here is not entitled to the higher protection extended to free exercise cases.

The Supreme Court instructs that ISKCON "has no special claim to First Amendment protection as compared to that of other religions who also distribute literature and solicit funds. None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process." *Heffron,* 452 U.S. at 652, 101 S.Ct. at 2566. To be sure, the Supreme Court has applied the least restrictive means test to equal protection and strict scrutiny cases, issues which are not relevant here. What we do have here can be simply stated. We have a challenge to a content-neutral regulation, and the Court has clearly explained what tests we must apply: the regulation must be "narrowly tailored to serve a significant government interest," and "must leave open ample alternative channels of communication." *Perry,* 460 U.S. at 45, 103 S.Ct. at 955. As we have concluded, the appellees have met this test.

VII.

We conclude that the district court did not err in denying injunctive and declaratory relief. The Baton Rouge ordinance is a reasonable regulation designed to preclude solicitation of occupants of vehicles temporarily stopped in traffic or at traffic lights. We are satisfied that the ordinance is narrowly tailored to serve the government's significant interest in regulating traffic flow and promoting roadway safety. The ordinance does not violate the first amendment. The judgment of the court is

AFFIRMED.

All Citations

876 F.2d 494, 58 USLW 2059

Footnotes

* Circuit Judge of the Third Circuit, sitting by designation.

582 F.Supp. 592
United States District Court,
N.D. Texas,
Amarillo Division.

HOLY SPIRIT ASSOCIATION FOR the **UNIFICATION** OF **WORLD CHRISTIANITY** and Edward O'Grady, et al., Plaintiffs,
v.
Jerry A. **HODGE**, Mayor of Amarillo, et al., Defendants.

Civ. A. No. CA–2–78–129.
|
March 8, **1984**.

Synopsis
Church and church members brought civil rights action challenging constitutionality of city ordinance regulating licensing of solicitations. On motion for summary judgment, the District Court, Mary Lou Robinson, J., held that: (1) ordinance was unconstitutional where, even though it established administrative appeal mechanism, it did not require prompt judicial proceedings or assurance that interim restraints would be of brief duration; (2) certain provisions establishing grounds for denying permits were unconstitutional because they were vague, or constituted cost-effectiveness evaluation or impermissible content-based regulation; and (3) certain disclosure and reporting provisions were unconstitutional where they had potential chilling effect on exercise of First Amendment rights.

Motion granted.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (29)

[1] Federal Civil Procedure
Proceedings in which judgment is authorized

Summary judgment is appropriate when law is challenged as facially inconsistent with First Amendment since whether ordinance is void on its face because it impinges upon constitutionally protected activities is legal, not factual, question. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[2] Constitutional Law
Licenses

Church members who had been arrested, charged, and convicted of violating city ordinance regulating licensing of solicitations had standing to file suit challenging constitutionality of the ordinance under the First Amendment. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[3] Constitutional Law
Licenses

Church whose members had been arrested, charged, and convicted of violating city ordinance regulating licensing of solicitations had standing to bring suit challenging constitutionality of the ordinance under the First Amendment where significant portion of its members' activities consisted of public place proselytizing and soliciting. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[4] Constitutional Law
Licenses and permits in general

City ordinance regulating licensing of solicitations was unconstitutional infringement on First Amendment rights of solicitors where, even though it established administrative appeal mechanism, it did not require institution of prompt judicial proceedings in which city bore burden of justifying its refusal to issue requested permit, assure interim restraint would be of brief duration, or guarantee swift, final judicial action. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[5] Municipal Corporations
Permits

City ordinance denying permit for solicitation if statements made in application are not true was constitutional. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[6] Municipal Corporations
Permits

City ordinance denying permit for solicitation on ground that any person connected with soliciting has been convicted of a crime involving moral turpitude was unconstitutional. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[7] Municipal Corporations
Permits

City ordinance denying permit for solicitation on ground that applicant has made false statements to any member of the public with regard to charitable solicitations campaign was unconstitutional where city solicitations board was given no guidance as to how to make such determinations. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[8] Municipal Corporations
Permits

City ordinance denying permit for solicitation on ground that applicant has made false statements in application or at hearing on application was constitutional. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[9] Municipal Corporations
Permits

City ordinance denying permit for solicitation on ground that applicant has publicly represented that permit is endorsement or recommendation of its cause was unconstitutional where city solicitations board was given no guidance as to how to make such determinations. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[10] Municipal Corporations
Permits

City ordinance denying permit for solicitation on ground that applicant has violated any of the terms of the permit was unconstitutional since denying permit for prior misconduct was impermissible without showing of direct, immediate, and irreparable damage. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[11] Constitutional Law
Solicitation; distribution of literature

City ordinance denying permit for solicitation based on cost-effectiveness evaluation of the campaign was unconstitutional infringement on free exercise rights of religious minorities. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[12] Municipal Corporations
Permits

City ordinance denying permit for solicitation on ground that applicant has failed to keep or observe any promise or representation with regard to allocation of funds solicited was unconstitutional. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[13] Constitutional Law
Licenses, permits, and certifications in general

Municipal Corporations
Permits

City ordinance denying permit for solicitation on ground that project was not being administered by local responsible board of directors or committee was unconstitutional since terms "local" and "responsible" were vague and since it discriminated against foreign citizens. U.S.C.A. Const. Art. 4, § 2, cl. 1; Amend. 1.

Cases that cite this headnote

[14] Constitutional Law

Licenses and permits in general

Municipal Corporations

Permits

City ordinance denying permit for solicitation unless paid promoters were adequately covered by fidelity bond was unconstitutional since it amounted to nothing more than exaction of fee for exercise of First Amendment rights and since phrase "adequately covered" was vague. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[15] Constitutional Law

Licenses and permits in general

Municipal Corporations

Permits

City ordinance denying permit for solicitation if, even though project was worthy, it did not present reasonably urgent need at particular time was unconstitutional where phrases "worthy" and "reasonably urgent" were vague and where it constituted impermissible content-based regulation of free speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[16] Constitutional Law

Content-Based Regulations or Restrictions

Constitutional Law

Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising

Constitutional Law

Charities or religious organizations

Municipality may not discriminate in regulation of expression on basis of content of that expression nor may municipality select which issues may be discussed or debated or which charities may solicit on basis of need. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[17] Constitutional Law

Licenses and permits in general

City ordinance denying permit for solicitation on ground that project duplicates work of existing governmental or nongovernmental agency constituted impermissible content-based regulation. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[18] Charities

Statutory regulations

Constitutional Law

Licenses and permits in general

Municipal Corporations

Permits

City ordinance denying permit for solicitation if project could be merged with other similar campaigns or processed through United Way campaign was unconstitutional where it constituted impermissible content-based regulation, where merger condition was unconstitutionally vague, and where it limited mode of expression to be used by solicitors. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[19] Constitutional Law

Licenses and permits in general

Municipal Corporations

Permits

City ordinance denying permit for solicitation if local quota for national agency exceeds city solicitation board's yardstick formula for determining fair share percentage for city to national total was unconstitutional where it was impermissible content-based regulation and where terms "fair" and "equitable" were vague in absence of any guidelines. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[20] Constitutional Law

Licenses and permits in general

Municipal Corporations

Permits

City ordinance denying permit for solicitation if timing would conflict with other existing approved drives was unconstitutional where, to extent that the conflict was determined by looking to substance of the appeal, it constituted impermissible content-based regulation of time, place, and manner and, to extent that conflict was determined by looking to factors other than content, it was vague. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[21] Municipal Corporations

Permits

City ordinance authorizing revocation of permit for solicitation for making false statements to the public concerning the campaign, for representing that permit was endorsement of the campaign, for violating terms of the permit, or violating any term of the ordinance was unconstitutional, although allowing revocation for making false statements in application for permit was constitutional. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[22] Constitutional Law

Records or Information

Municipal Corporations

Permits

City ordinance requiring applicant for permit for solicitation to disclose information of methods of handling and disbursing of funds and a certified, detailed and complete financial statement or audit of parent organization for last preceding fiscal year was unconstitutional where it failed to identify precisely what detailed information was required to be provided and where requirement to disclose information pertaining to all funds violated privacy rights of members of soliciting organization. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[23] Constitutional Law

Licenses and permits in general

City ordinance requiring applicant for permit for solicitation to state maximum percentage of funds collected which are to be used to pay expenses of solicitation and collection was unconstitutional as cost-effectiveness evaluation. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[24] Constitutional Law

Disclosure requirements

City ordinance requiring applicant for permit for solicitation to state names of all officers, directors or trustees present when decisions were made to disclose information required by the ordinance was unconstitutional where it was not related to any legitimate governmental interest and had potential chilling effect on First Amendment rights. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[25] Constitutional Law

Disclosure requirements

City ordinance requiring applicant for permit for solicitation to provide detailed and complete statement of funds collected during preceding year was unconstitutional where it impermissibly chilled and intruded on First Amendment rights by requiring on its face a statement of applicant's worldwide solicitations and fund distributions and was not reasonably related to city's legitimate interests. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[26] Constitutional Law

Licenses, permits, and certifications in general

Municipal Corporations

Permits

City ordinance requiring applicant for permit for solicitation to give full information by separate report with respect to any solicitors or supervisors who have been convicted of penal offense involving moral turpitude was unconstitutional since phrase “full information” was vague in failing to identify precisely what information was required to be included. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[27] **Municipal Corporations**
Permits

City ordinance requiring applicant for permit for solicitation to furnish statement from chief of police that applicant and persons working under him had been fingerprinted and photographed and found not to have been convicted of penal offense involving moral turpitude was constitutional on its face where it furthered city's interest of controlling abuse of privilege of soliciting by criminals posing as solicitors. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[28] **Municipal Corporations**
Permits

City ordinance requiring organizations issued permits for solicitation to furnish detailed reports showing amount of funds raised was constitutional where it promoted city's interest in preventing fraud. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[29] **Constitutional Law**
Licenses and permits in general

City ordinance requiring applicant for permit for solicitation to pay permit fee of $10 was unconstitutional where it imposed exaction on privilege of using public forum for constitutionally-protected purposes and where city failed to demonstrate link between fee and costs of licensing process. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

Attorneys and Law Firms

***595** Barry A. Fisher, Los Angeles, Cal., Thomas Griffith, Lubbock, Tex., for plaintiffs.

Joe Harlan, Gibson, Ochsner & Adkins, Merril Nunn, Amarillo, Tex., for defendants.

MEMORANDUM OPINION

MARY LOU ROBINSON, District Judge.

Plaintiffs are the **Holy Spirit** Association for the **Unification** of **World Christianity** (**Unification** Church), and Edward O'Grady, a member of the **Unification** Church, who wish to solicit funds in Amarillo, Texas. The Plaintiffs, by this action under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2101–02, seek to enjoin the enforcement of the Amarillo Code of Ordinances, Article 4, Division 2, §§ 13–66 through 13–79, which regulate the licensing of solicitations. Defendants are officials responsible for the implementation and enforcement of the ordinance. The case is before the Court on Plaintiffs' Motion for Summary Judgment.

The solicitations ordinance at issue is appended to this memorandum.

I. Propriety of Summary Judgment

[1] Summary judgment is appropriate when a law is challenged as facially inconsistent with the First Amendment since "whether an ordinance is void on its face because it impinges upon constitutionally protected activities is a legal, not a factual question...." ***Holy Spirit*** *Association for the* ***Unification*** *of* ***World Christianity*** *v. Alley,* 460 F.Supp. 346, 347 (N.D.Tex.1978). Plaintiffs have raised no challenges other than their facial ones.

II. Standing

"The essence of the standing inquiry is whether the parties seeking to invoke the Court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions.' " *Duke Power Co. v. Carolina Environmental Study Group,* 438 **U.S**. 59, 72, 98 S.Ct. 2620, 2629, 57 L.Ed.2d 595 (1978), quoting *Baker v. Carr,* 369 **U.S**. 186, 204, 82 S.Ct. 691, 703, 7

L.Ed.2d 663 (1962). This requirement of a "personal stake" must consist of "a 'distinct and palpable injury ...' to the plaintiff," *Duke Power, supra,* 438 U.S. at 72, 98 S.Ct. at 2629 quoting *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975), and "a 'fairly traceable' ***596** causal connection between the claimed injury and the challenged conduct," *Duke Power, supra,* 438 U.S. at 72, 98 S.Ct. at 2629, quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977). *See Larson v. Valente,* 456 U.S. 228, 238–39, 102 S.Ct. 1673, 1680, 72 L.Ed.2d 33 (1982).

[2] A personal stake in the outcome of the controversy has usually been assured in First Amendment cases by the fact that criminal proceedings have been previously instigated against the Plaintiff. *See, e.g., Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Cox v. Louisiana,* 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); *Kunz v. New York,* 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951). Here, Plaintiff O'Grady and other members of the Unification Church have been arrested, charged and convicted of violating the Amarillo ordinance on at least two occasions before this suit was filed. Thus, he has met the standing requirements of Article III. *Cf. United States v. Grace,* 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (plaintiff had standing to challenge constitutionality of statute forbidding picketing at Supreme Court building after twice being told to cease handing out leaflets on pain of arrest).

[3] The Unification Church has a personal stake in the outcome of this suit because a significant portion of its members' activities consists of door-to-door and public place proselytizing and solicitation of funds, the very acts the ordinance regulates. Since as demonstrated by Plaintiff O'Grady, the Unification Church's members would otherwise have standing to sue in their own right; the solicitation regulated is germane to the church's purpose; and only declaratory and equitable relief which does not require the participation of the church's individual members in the lawsuit is sought, the Unification Church has standing. *Hunt v. Washington State Apple Commission,* 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977).

Even if the Unification Church's own activities fell in an unprotected area, it would still have standing to challenge the ordinance by showing that it substantially abridges the First Amendment rights of other parties not before the Court, e.g., its members. *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 634, 100 S.Ct. 826, 834, 63 L.Ed.2d 73 (1980). As the Supreme Court explained in *Bigelow v. Virginia,* 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975):

> This "exception to the usual rules governing standing" reflects the transcendent value to all society of constitutionally protected expression. We give a [party] standing to challenge a statute on grounds that it is facially overbroad, regardless of whether his own conduct could be regulated by a more narrowly drawn statute, because of the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application."

Id. at 816, 95 S.Ct. at 2230 (citations omitted). Since O'Grady has met the case or controversy requirement of Article III, the Unification Church has standing under the exception.

III. The Right to Solicit, The Right to Regulate

The Supreme Court has recently succinctly summarized these conflicting rights:

> [C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular

> causes or for particular ***597** views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.

Village of Schaumburg, 444 **U.S**. at 632, 100 S.Ct. at 833. The first issue before this Court is whether the City of Amarillo has exercised its power to regulate solicitation in such a manner as not unduly to intrude upon the rights of free speech. *Id.* at 633, 100 S.Ct. at 834.

IV. Procedural Safeguards

[4] Plaintiffs charge that the permit system set up by §§ 13–66 to –79 is unconstitutional because it lacks the procedural safeguards required by the Supreme Court in *Freedman v. Maryland,* 380 **U.S**. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). This Court agrees.

In *Freedman* the Supreme Court held that Maryland's motion picture censorship statute unconstitutionally infringed on the First Amendment rights of exhibitors because it lacked the following procedural safeguards: (1) a requirement that the state initiate judicial action to restrain exhibition of the challenged film and bear the burden of proof in the judicial proceeding; (2) an assurance that the exhibitor will not be delayed from exhibiting the film while the state seeks protracted judicial review; and (3) a requirement that judicial review will be prompt.

While § 13–73 of the Amarillo Ordinance establishes an administrative appeal mechanism, the ordinance does not require: (1) the Solicitations Board to institute prompt judicial proceedings in which it bears the burden of justifying its refusal to issue the requested permit; (2) assurance that any interim restraint imposed pending judicial resolution on the merits will be of brief duration; and (3) a guarantee of swift, final judicial action. The lack of these safeguards in the ordinance renders the City of Amarillo's permit system constitutionally deficient. *Cf. Fernandes v. Limmer,* 663 F.2d 619, 628 (5th Cir.1981), *cert. dismissed,* 458 **U.S**. 1124, 103 S.Ct. 5, 73 L.Ed.2d 1395 (1982).

V. Discretion in the Board

Plaintiffs also allege that the permit system is unconstitutional because it vests discretion in the Solicitations Board to grant, deny or revoke permits without providing the Board with narrow and objective standards for exercising this discretion. The Supreme Court has plainly stated that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham,* 394 **U.S**. 147, 149, 150–51, 89 S.Ct. 935, 938–39, 22 L.Ed.2d 162 (1969). The grounds on which the Board may deny a permit will be analyzed *seriatim.*

[5] *§ 13–69(a).* This section authorizes the denial of a permit if "[o]ne or more of the statements made in the application are not true." It is constitutional. *Fernandes,* 663 F.2d at 629.

§ 13–69(b). This section authorizes denial of a permit if one of several grounds is met:

> (1) The applicant or person in charge of the charitable solicitation or in the case of soliciting for subscriptions or contracts for advertisements, books, magazines or periodicals, any person connected with such soliciting has been convicted in a court of competent jurisdiction of a crime involving moral turpitude; or
>
> (2) The applicant or such person has made or caused to be made false statements or misrepresentations to any member of the public with regard to the charitable solicitations campaign or other activities described in the permit; or
>
> (3) The applicant or such person has made or caused to be made false statements or misrepresentations in the application or at the hearing on the application; or
>
> ***598** (4) The applicant or such person has in any way publicly represented that the permit granted is an endorsement or recommendation of the cause for which the charitable solicitations campaign or solicitations for subscriptions or contracts, for advertisements, books, magazines or periodicals is being conducted; or
>
> (5) The applicant or such person has otherwise violated any of the terms of the permit or this division.

[6] The first ground is unconstitutional. *Fernandes,* 663 F.2d at 629–30. "Persons with prior criminal records are not First Amendment outcasts." *Id.*

[7] The second ground is unconstitutional. *Fernandes,* 663 F.2d at 629. The Solicitations Board is given no guidance as to how such determinations are to be made. As the Fifth Circuit has said, "[t]here are other means, such as penal laws, to prevent and punish frauds without intruding on the First Amendment freedoms." *Id.*

[8] The third ground is constitutional. *Fernandes,* 663 F.2d at 629. "Since gaining relevant information as to the applicant is proper, the falsification of such information is not constitutionally privileged." *Id.*

[9] The fourth ground is merely a variation on the theme of the second ground and is unconstitutional for the reasons stated above.

[10] The fifth ground is unconstitutional. Denying a permit for prior misconduct is impermissible, *Fernandes,* 663 F.2d at 632, "unless the government can show that the speech prohibited will 'surely result in direct, immediate, and irreparable damage.' " *Id.,* quoting *New York Times v. United States,* 403 U.S. 713, 730, 91 S.Ct. 2140, 2149, 29 L.Ed.2d 822 (1971).

[11] *§§ 13–69(c) & (d).* These sections authorize the denial of a permit if "[t]he applicant's actual solicitations cost in any charitable solicitation campaign conducted by it during any of the three (3) years immediately preceding the date of the application where a product was not sold, exceeded fifteen percent (15%) of the gross amount collected, and in a case where a product was sold, exceeded fifteen percent (15%) of the gross amount collected less the cost of the product," or if "[t]he expected fund raising expense of the applicant in the charitable solicitations campaign which application for permit is being made will exceed fifteen percent (15%) of the gross amount collected based upon accounting data concerning prior campaigns of the applicant and such other evidence as may be adduced at the hearing," respectively.

Both (c) and (d) are unconstitutional. *Village of Schaumburg,* 444 U.S. at 636–37, 100 S.Ct. at 835–36. "[A] cost-effectiveness evaluation on the free exercise rights of religious minorities ... cannot be justified." *Fernandes,* 663 F.2d at 631.

[12] *§ 13–69(e).* This section authorizes denial of a permit if the "[a]pplicant has failed to keep or observe any promise, agreement, representation or commitment with regard to the allocation of funds or methods of fund raising or solicitation made to the solicitations board in connection with any previous application." It is plainly unconstitutional. *Fernandes,* 663 F.2d at 632; *International Society for Krishna Consciousness v. Eaves,* 601 F.2d 809, 833 (5th Cir.1979); *Universal Amusement Co. v. Vance,* 587 F.2d 159, 165–66 (5th Cir.1978) (en banc), *aff'd,* 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980).

[13] *§ 13–69(f).* This section authorizes denial of a permit if "[i]n the case of charitable solicitations campaign [sic] that the project is not being administered by a local responsible board of directors or committee." It is unconstitutional for two reasons. One, the terms "local" and "responsible" are unconstitutionally vague because "men of common intelligence must necessarily guess at [their] meaning." *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). *See Hynes v. Mayor of Oradell,* 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976). Two, it impermissibly discriminates against non-Texas citizens in violation of the Privileges ***599** and Immunities Clause. U.S. Const. art. IV, § 2.

[14] *§ 13–69(i).* This section authorizes denial of a permit if any "[p]aid promoters of the petitioning organization are not adequately covered by a fidelity bond." It is unconstitutional because it amounts to nothing more than the exaction of a fee for the exercise of First Amendment rights, a practice condemned by the Supreme Court. "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley v. Valeo,* 424 U.S. 1, 49, 96 S.Ct. 612, 649, 46 L.Ed.2d 659 (1976). *See Harper v. Virginia State Bd. of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); *Jones v. City of Opelika,* 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290 (1943); *Grosjean v. American Press Co.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936). "[F]reedom of speech [must be] available to all, not

merely those who can pay their own way." *Murdock v. Pennsylvania,* 319 U.S. 105, 111, 63 S.Ct. 870, 874, 87 L.Ed. 1292 (1943) (daily licensing fee of $1.50 held to be an unconstitutional restriction on the free exercise of religious belief). *Cf. Collin v. Smith,* 578 F.2d 1197, 1207–09 (7th Cir.1978), *cert. denied,* 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978) (discussing requirement of insurance in order to obtain parade permit).

This section is also unconstitutional because the phrase "adequately covered" is unconstitutionally vague.

[15] **[16]** *§ 13–69(j).* This section authorized denial of a permit if "[i]n the case of a charitable solicitation campaign that while the project is worthy it does not present a reasonably urgent need at the particular time." It is unconstitutional. One, the phrases "worthy" and "reasonably urgent" are unconstitutionally vague. Two, denial of a permit on this ground would constitute impermissible content-based regulation of free speech. A municipality may not discriminate in the regulation of expression on the basis of the content of that expression. *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286, 2289, 33 L.Ed.2d 212 (1972). A municipality may not select which issues may be discussed or debated, or which charities may solicit, on the basis of "need".

[17] *§ 13–69(k).* This section authorizes denial of a permit if "[i]n the case of a charitable solicitations campaign, the project duplicates the work of an existing governmental or non-governmental agency." It is unconstitutional. As with § 31–69(j), it constitutes impermissible content-based regulation.

[18] *§ 13–69(l).* This section authorizes denial of a permit if "[t]he project is of such a nature that it can be merged with other similar campaigns or it can be merged or processed through the annual United Way campaign." It is unconstitutional. One, as with §§ 13–69(j) & (k), it constitutes impermissible content-based regulation. Two, the phrase "of such a nature that it can be merged with other similar campaigns" is unconstitutionally vague. Three, it is an unconstitutional limitation of the mode of expression which may be used by the Plaintiffs. "The privilege of free speech carries with it freedom of choice as to the mode of expression that may be employed." 16 C.J.S. *Constitutional Law* § 213(1), at 1091 (1956). *Cf. Schneider v. New Jersey,* 308 U.S. 147, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.")

[19] *§ 13–69(m).* This section authorizes denial of a permit "[i]f the appeal emanates from a national agency, the local quota exceeds the 'yardstick formula' adopted by the city's solicitation board as Amarillo's equitable share of the organization's ***600** national goal based on indices which will be adopted by the city's solicitation board, as showing the fair share percentage for Amarillo to the national total." It is unconstitutional because it is impermissible content-based regulation. Further, "fair" and "equitable" shares are unconstitutionally vague terms in this context because the board has been given no guidelines for determining what is fair or equitable.

[20] *§ 13–69(n).* This section authorizes denial of a permit if "[t]he timing of the appeal will conflict with other existing approved drives." It is unconstitutional. While "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired ..., [a] major criterion for a valid time, place and manner restriction is that the restriction 'may not be based upon either the content or subject matter of speech.' " *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640, 647–48, 101 S.Ct. 2559, 2563–64, 69 L.Ed.2d 298 (1981) quoting *Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530, 536, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980). A valid time, place, and manner regulation must also "serve a significant governmental interest." *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council,* 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976). To the extent that "conflict" is determined by looking to the substance of an appeal, this section constitutes impermissible content-based regulation.

To the extent that "conflict" is determined by looking to factors other than content, the term is unconstitutionally vague because it fails to provide "narrow, objective, and definite standards to guide the [Solicitations Board]." *Shuttlesworth,* 394 U.S. at 151, 89 S.Ct. at 938. The Supreme Court has "consistently condemned licensing

systems which vest in an administrative official discretion to grant or withhold a permit upon board criteria unrelated to proper regulation of public places." *Id.* at 153, 89 S.Ct. at 940, quoting *Kunz v. New York,* 340 **U.S**. 290, 293–94, 71 S.Ct. 312, 314–15, 95 L.Ed. 280 (1951).

[21] *§ 13–72.* This section authorized revocation of a permit:

> If, after notice and hearing, the solicitations board shall determine and make findings of fact that any permit holder or any agent or representative of a permit holder [1] is making or has made any false statements or misrepresentations to any member of the public with regard to the campaign of solicitations or other activities described in the permit, or [2] has made false statements or misrepresentations in the application or at the hearing on the application, or [3] has in any way publicly represented that the permit granted hereunder is an endorsement or recommendation of the cause for which the charitable solicitations campaign is being conducted, or [4] has violated any of the terms of the permit or [5] has otherwise violated any of the terms of this division....

The Supreme Court has recognized that an "uncontrolled power of revocation ... is but the converse of [a] system of prior licensing." *Jones v. City of Opelika,* 316 **U.S**. 584, 615 n. 5, 62 S.Ct. 1231, 1247 n. 5, 86 L.Ed. 1691 (1942) (Murphy, J., dissenting), *adopted per curiam as majority opinion,* 319 **U.S**. 103, 63 S.Ct. 890, 87 L.Ed. 1290 (1943). The grounds for revocation contained in § 13–72 are essentially the same as the grounds for denying a permit under § 13–69(b) and suffer the same constitutional infirmities. For the reasons discussed under § 13–69(b), *supra,* reasons [1], [3], [4] and [5] in § 13–72 are unconstitutional and reason [2] is constitutional.

VI. Disclosure & Reporting

The Plaintiffs have also asserted that the reporting and disclosure requirements of the ordinance, §§ 13–68.3 and –74, are unconstitutional because of their intrusive and chilling effect on the Plaintiffs' First Amendment rights of free exercise of religion, freedom of association, and privacy.

***601** In analyzing these claims, the Court bears in mind that "Plaintiffs' challenge to the Amarillo ordinance is entirely facial. Indeed, since Plaintiffs have exercised their prerogative not to apply for a permit before challenging the ordinance as an instrument of censorship, an issue of whether the statute [is] constitutional as applied cannot possibly arise." Plaintiffs' Memorandum in Support of Summary Judgment, at 6.

The Fifth Circuit recently considered similar challenges to a Houston solicitation ordinance and held that a municipality may require an entity such as the **Unification** Church "to register, identify its solicitors, and make disclosure reports concerning its solicitation of public funds without facially violating the First Amendment." *International Society for Krishna Consciousness v. City of Houston,* 689 F.2d 541, 551 (5th Cir.1982). The court went on to carefully delimit the features of the Houston ordinance which saved it from constitutional invalidity:

> There is not disclosure required except as it specifically relates to the raising of funds from the public. No membership lists are required; no names of contributors are sought; no information is asked about funds raised from members; nothing must be revealed regarding proselytizing of new members. Significantly, too, no dilemma is posed to an organization forcing it to decide whether to remain totally private or, by making public solicitations, reveal publicly all aspects of its operations. The internal operations of the organization, apart from its public solicitation, remain under the veil of privacy. All that is mandated is disclosure to the public

> about those funds which are solicited from the public.

Id. at 556. The Court finds, therefore, that, with the exception of the sections discussed below, § 13–68.3 is facially constitutional. *Compare* Amarillo Code § 13–68.3, *reprinted infra, with* Houston Code § 37–43, *reprinted in ISKCON v. Houston,* 689 F.2d at 559–60.

[22] *§ 13–68.3(d).* This section requires a permit applicant to disclose "detailed information of the methods of handling and disbursement of all funds and a certified detailed and complete financial statement or audit of the parent organization for the last preceding fiscal year," if the receipts of the Amarillo solicitation are transmitted to a parent organization for further disbursement. It is unconstitutional. One, the phrase "detailed information" is impermissibly vague because it fails to identify precisely what information must be provided in the permit application. *Cf.* § 31–68.3(k). Two, requiring information on the "handling and disbursement of *all* funds" on its face requires the disclosure of information relating to funds and operations far beyond solicitation in Amarillo. The requirement pierces the "veil of privacy" and explores fundraising from private entities, such as members. Three, the audit requirement, just as the fidelity bond requirement in § 13–69(i), exacts a fee for the exercise of First Amendment rights. Consequently, the requirement is unconstitutional because only those who can afford an audit may obtain a permit.

[23] *§ 13–68.3(i).* This section requires an applicant to state "the maximum percentage of funds collected which are to be used to pay such expenses of solicitation and collection." It is unconstitutional for the same reasons that §§ 13–69(c) & (d) are unconstitutional. This requirement of a self-imposed limit on expenses is merely another cost-effectiveness evaluation in disguise and an impermissible consideration in issuing a solicitation permit.

[24] *§ 13–68.3(j).* This section requires an applicant to state "[t]he names of all officers, directors or trustees present when the decisions were made in reference to [§§ 13–68.3(h) & (i)]." It is unconstitutional. The required information directly uncovers internal operations of the church and is not related to any legitimate governmental interest. The potential chilling effect on the exercise of the First Amendment rights of free speech, association and free exercise of religion is manifest, together with the invasion of privacy.

***602** **[25]** *§ 13–68.3(k).* The section requires an applicant to provide:

> A detailed and complete statement of the funds (if any) collected by the applicant during the preceding year from solicitations or other activities described in section 13–68, which were the same or substantially the same as those for which the applicant is seeking a permit, such statement to show the gross amount collected, all costs of collection or solicitation, and the final distribution thereof.

It is unconstitutional because, by requiring on its face a statement of an applicant's worldwide solicitations and fund distributions, it impermissibly chills and intrudes on the First Amendment rights of free speech, association and free exercise of religion, and invades the privacy rights of the **Unification** Church and its members. The requirement is not reasonably related to the City of Amarillo's legitimate interest in regulating solicitation to prevent fraud in Amarillo.

[26] *§ 13–68.3(o)(2).* This section requires an applicant to "give full information by separate report" with respect to any solicitors or supervisors who have been convicted of a penal offense involving moral turpitude. The phrase "full information" is unconstitutionally vague because it fails to identify precisely what information must be included in the separate report. *Cf.* Houston Code § 37–43(12), *reprinted in ISKCON v. Houston,* 689 F.2d at 560 (requiring a statement of "the nature of the offense, the State where the conviction occurred, and the year of such conviction").

[27] *§ 13–68.3(o)(4).* This section requires an applicant to furnish:

> A statement from the chief of the Amarillo Police Department or his representative that the applicant and the persons working under him, either in charge of soliciting or doing actual soliciting, have

> been fingerprinted, photographed, and according to department records and other sources, that none of such persons have been convicted of a penal offense involving moral turpitude.

The Court finds this section facially constitutional because it falls within a narrow exception to the per se invalidity of preregistration requirements in the First Amendment context. In *Martin v. City of Struthers,* 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), the Supreme Court noted that "[a] city can ... by identification devices control the abuse of the privilege [of soliciting] by criminals posing as canvassers." *Id.* at 148, 63 S.Ct. at 865. This echoes the Court's earlier comment in *Cantwell v. Connecticut,* that "[w]ithout doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." 310 U.S. 296 at 306, 60 S.Ct. 900 at 904, 84 L.Ed. 1213 (1940). The Court later distinguished the situations in which a preregistration requirement may be imposed:

> [A] requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.
>
> Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a *reasonable* registration or identification requirement may be imposed.

Thomas v. Collins, 323 U.S. 516, 540, 65 S.Ct. 315, 327, 89 L.Ed. 430 (1945) (emphasis added).

" 'Reasonableness' is, of course, a flexible term, it connotes and requires consideration of *all* relevant facts...." *Casey v. O'Bannon,* 536 F.Supp. 350, 352 (E.D.Pa.1982). There is no hard and fast rule governing what is, or is not, reasonable. A registration or identification requirement that is reasonable under one set of facts may be unreasonable under another. Since the Plaintiffs' challenge to the ordinance's constitutionality is strictly facial, the Court ***603** does not have before it the factual context necessary to determine the reasonableness of § 13–68.3(o)(4)'s registration and identification requirement. This section may be unconstitutional *as applied,* i.e., the Plaintiffs may be able to make a sufficient showing of chill and harassment,*cf. Buckley v. Valeo,* 424 U.S. 1, 72–74, 96 S.Ct. 612, 660–661, 46 L.Ed.2d 659 (1976); *NAACP v. Alabama,* 357 U.S. 449, 462, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958), but this question is not presented here.

[28] *§ 13–74.* This section requires:

> All persons or organizations issued permits ... [to] furnish to the solicitations board ... after the charitable solicitations campaign has been completed, a detailed report and financial statement showing the amount of funds raised by the charitable solicitations campaign, the amount expended in collecting such funds, including a detailed report of the wages, fees, commissions and expenses paid to any person in connection with such solicitation, and the disposition of the balance of the funds collected by the campaign .... The permit holder shall make available to the board as its representative for such purpose, all books, records and papers whereby the accuracy of the report required by this section may be investigated....

The first sentence is facially constitutional. *Cf.* Houston Code § 37–48, *reprinted in ISKCON v. Houston,* 689 F.2d at 541. The second sentence apparently grants the solicitations board broad investigative powers with regard to financial statements filed with the board. As the Supreme Court has recognized, "[e]fforts to promote disclosure of the finances of charitable organizations may also assist in preventing fraud by informing the public of the ways in which their contributions will be employed." *Village of Schaumburg,* 444 U.S. at 637–38, 100 S.Ct. at 836–37.

As an example of such an effort, the Court cited Ill. Rev.Stat. ch. 23, § 5102 (1977). Part of that statute requires charitable organizations to "maintain accurate and detailed books and records" which "shall be open to inspection at all reasonable times by the Attorney General or his duly authorized representative." *Id.* § 5102(f). This Court finds that requiring the permit holder to make available "all books, records and papers whereby the accuracy of the report ... may be investigated" is facially constitutional.

Requiring the permit holder to denominate the solicitations board "as its representative for such purpose," however, may not be. This status would enable the board to obtain information from third-party record holders such as banks without consulting the permit holder. In this case, the church would be deprived of any opportunity to assert possibly valid evidentiary privileges, *see, e.g.,* Tex.R.Evid. 505, and relevancy objections, and of the opportunity to redact any material made available such that any individual member's or contributor's financial transactions with the church would be eliminated. The resulting invasion of the church members' privacy of belief could be sufficient to make this part § 13–74 unconstitutional. As the Supreme Court has said, "the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.' " *Buckley v. Valeo,* 424 **U.S**. 1, 66, 96 S.Ct. 612, 657, 46 L.Ed.2d 659 (1976), quoting *California Bankers Ass'n v. Shultz,* 416 **U.S**. 21, 78–79, 94 S.Ct. 1494, 1525–1526, 39 L.Ed.2d 812 (1974) (Powell, J., concurring).

Here, though, as in *California Bankers,* the Plaintiffs' challenge to the statute on First Amendment grounds is premature because the solicitations board has not sought any material under the authority of § 13–74. "This Court, in the absence of a concrete fact situation in which competing constitutional and governmental interests can ***604** be weighed, is simply not in a position to determine whether an effort to compel disclosure of such records would or would not be barred...." *California Bankers,* 416 **U.S**. at 56, 94 S.Ct. at 1515. The Court, thus, does not find that § 13–74 is unconstitutional on its face.

VII. Permit Fees

[29] Plaintiffs attack § 13–68 as being nothing more than the exaction of a fee for the privilege of exercising First Amendment rights. The section provides that:

> No permits ... shall be issued until the required fees have been paid .... Any person, organization, society, association, corporation with a permanent residence or business address in Amarillo, Texas, seeking to conduct a charitable solicitation campaign ... shall pay a permit fee of ten dollars ($10.00). Any one else seeking to conduct a charitable solicitation campaign or anyone wishing to solicit subscriptions of contracts for advertisements, books, magazines or periodicals shall pay a permit fee of ten dollars ($10.00) for each individual engaging in such activities.

The Court must sustain Plaintiffs' facial challenge to this section. While, as discussed above, the exaction of a fee for the privilege of exercising a First Amendment right is unconstitutional, "[a] licensing fee to be used in defraying administrative costs is permissible, but only to the extent that the fees are necessary." *Fernandes,* 663 F.2d at 633 (citations omitted). This section shares the same three deficiencies that the DFW Airport ordinance at issue in *Fernandes* suffered:

(1) the ordinance imposes an exaction, moderate in amount, on the privilege of using a public forum for constitutionally protected purposes;

(2) the City of Amarillo has not demonstrated a link between the fee and the costs of the licensing process; and

(3) the ordinance conditions free exercise rights on an applicant's willingness and ability to pay.

Consequently, § 13–68 is unconstitutional on its face. (A second reason, not raised by the Plaintiffs, also compels this conclusion. The section imposes different fee requirements on Amarillo, as opposed to non-Amarillo residents, for the

exercise of First Amendment rights. The use of a municipal ordinance to discriminate between municipal residents and non-municipal residents in an area of fundamental rights violates the Privileges and Immunities Clause. U.S. Const. art. IV, § 2. *See* *United Building and Construction Trades Council v. Mayor of Camden,* 465 U.S. 208, 104 S.Ct. 1020, 1026, 79 L.Ed.2d 249 (1984). Indeed, the fee differential between city and non-city residents argues strongly that the amount of the fees is not related to the cost of processing a permit application.)

VIII. Conclusion

For the foregoing reasons, the Court finds that the Plaintiffs' Motion for Summary Judgment should be GRANTED. The Court will enter an injunction enjoining the officials charged with enforcing the permit requirements of the Amarillo solicitations ordinance from enforcing those requirements.

It is so ORDERED.

APPENDIX

ARTICLE IV. SOLICITORS; STREET PEDDLERS *

DIVISION 1. RESERVED †

Secs. 13–57—13–65. Reserved.

***605** DIVISION 2. SOLICITOR'S PERMIT ‡

Sec. 13–66. Amarillo Solicitations Board—Established.
The Amarillo Solicitations Board is hereby established, composed of nine (9) members who will serve without pay and who will be appointed by the city commission. Such board is charged with the responsibility of screening all applicants for permits under this division. The initial appointments are to be for staggered terms, with three (3) members appointed for a term of one (1) year, three (3) members for a term of two (2) years, and three (3) members for a term of three (3) years; thereafter, the term will be for three (3) years for all members. United Way and Better Business Bureau, both of Amarillo, will each be permitted to recommend the name of one member to the city commission. The executive director of each of said organizations may be appointed as "ex officio" members of the board without a vote. (Ord. No. 4143, § 1, 12–21–71; Ord. No. 4314, § 1, 12–11–73)

Sec. 13–67. Same—Organization.
The board will elect a chairman and a vice-chairman from its members. The city secretary shall serve as secretary to the board. The board will adopt rules and regulations for the conduct of its business. A majority of the board will be a quorum. No application for a permit to conduct a charitable solicitations campaign on the streets and in public places in the city will either be granted or refused without due notice and hearing. No such hearing will be held unless the applicant shall have been given at least ten (10) days' notice in writing of the date, time, place and purpose of such hearing. The board shall meet regularly on the third Tuesday of each month for the conduct of its business and at such additional times as the chairman or majority of the board members shall request a special meeting. (Ord. No. 4143, § 1, 12–21–71; Ord. No. 4695, § 1(a), 10–11–77; Ord. No. 4808, § 1, 9–5–78)

Sec. 13–68. Permit fees.
No permit under this division shall be issued until the required fees have been paid to the city secretary of the city. Any person, organization, society, association or corporation seeking to conduct a charitable solicitation campaign as defined in section 13–68.1 shall pay a nonrefundable permit fee of ten dollars ($10.00) for the purpose of processing the application. Anyone wishing to solicit subscriptions or contracts for advertisements, books, magazines or periodicals shall pay a nonrefundable permit fee of ten dollars ($10.00) for each individual engaging in such activities. (Ord. No. 4143, § 1, 12–21–71; Ord. No. 4695, § 1(b), 10–11–77; Ord. No. 4808, § 2, 9–5–78)

Sec. 13–68.1. Permit required.
As used in this division, the term "charitable solicitations campaign" means any course of conduct, including benefit dances, barbecues, etc., whereby any person, organization, society, association, corporation or church, religious society or other religious sect, group or order, or any agent, member or representative thereof solicits property or financial assistance of any kind, or sells, or offers to sell, any article, tag, service, emblem, publication, ticket, advertisement, subscription or anything of value on a plea or representation that such sale or solicitation or the proceeds therefrom are for a charitable, educational, patriotic, philanthropic or religious purpose. It

shall be unlawful to conduct any charitable solicitations campaign on the streets, in any public place, by house-to-house canvass, or by using the public streets to deliver or obtain anything of value in the city, unless the person, organization, society, association, corporation or church, religious society or other religious sect, group or order, or any agent, member or representative thereof conducting the same or responsible therefor shall have first obtained a permit in compliance with the terms of this ***606** division; provided, however, that the provisions hereof shall not apply to:

(a) Any organization which solicits funds solely from its own members or from its own assemblies not using public streets nor places for such purposes;

(b) The solicitation of advertising by daily or weekly newspapers, radio, television, yellow pages and outdoor advertising. (Ord. No. 4143, § 1, 12–21–71; Ord. No. 4523, § 1, 6–1–76; Ord. No. 4695, § 1(c), 10–11–77)

Sec. 13–68.2. Permit required for soliciting subscriptions or contracts for advertisements, books, magazines or periodicals.

It shall be unlawful for any person, persons, organizations or associations, without first securing a permit from the city's solicitation board as herein provided, to solicit for subscriptions or contracts for advertisements, books, magazines or periodicals. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–68.3. Application—Required; contents.

A permit to conduct a charitable solicitations campaign or to solicit for subscriptions or contracts for advertisements, books, magazines or periodicals on the streets or in any public place or by house-to-house campaign or by using the public streets to deliver or obtain anything of value in the city will be granted only after notice of the hearing upon application for such permit filed in duplicate with the city secretary not less than ten (10) days prior to the date of the hearing. Such application shall be sworn to by the applicant and shall contain the following information:

(a) The full name of the organization applying for a permit to solicit and the address of the headquarters in the city; if the organization is a chapter or other affiliate of an organization having its principal office outside the city, the name and address of the parent organization.

(b) The names and addresses of all officers and directors or trustees of the organization and the name and city of residence of all officers, directors or trustees of the parent organization, if any.

(c) The purpose or purposes for which the gross receipts derived from such solicitations or other activities are to be used.

(d) The name of the person or persons by whom the receipts of such solicitation shall be disbursed; if the receipts are transmitted to a parent organization for further disbursement, detailed information of the methods of handling and disbursement of all funds and a certified, detailed and complete financial statement or audit of the parent organization for the last preceding fiscal year.

(e) The name and address of the person or persons who will be in charge of conducting the charitable solicitations campaign or the solicitations for advertisement in books, magazines or periodicals.

(f) An outline of the method or methods to be used in conducting the charitable solicitations campaign or the solicitation for advertisements in books, magazines or periodicals.

(g) The period within which such charitable solicitations campaign shall be conducted, including the proposed dates for the beginning and ending of such campaign.

(h) The total amount of funds proposed to be raised together with an estimate of the amount of money to be retained and used locally.

(i) The amount of all salaries, wages, fees, commissions, expenses and costs to be expended or paid to anyone in connection with such campaign, together with the manner in which such wages, fees, commissions, expenses and costs are to be expended, and the maximum percentage of funds collected which are to be used to pay such expenses of solicitation and collection.

(j) Reserved.

(k) A detailed and complete statement of the funds (if any) collected by the applicant during the preceding year from solicitations or other activities described ***607** in section 13–68, which were the same or substantially the same as those for which the applicant is seeking a permit, such statement to show the gross amount collected, all costs of collection or solicitation, and the final distribution thereof.

(*l*) A full statement of the character and extent of the charitable, educational, patriotic or philanthropic work done by the applicant within the city during the last preceding year.

(m) If the applicant is a corporation, a copy of its charter or articles of incorporation from its state of incorporation; if the applicant is a foreign corporation, a copy of its certificate to do business in Texas.

(n) If the applicant is a charitable corporation or other organization, proof of its current status as an organization to which contributions are tax deductible for federal income tax purposes.

(*o*) The following information shall be obtained from the applicant for a permit to solicit for subscriptions or contracts, for advertisements, books, magazines or periodicals:

(1) Has any person who will either be in charge of solicitation or in charge of groups who solicit or who will do any soliciting ever been convicted of a penal offense involving moral turpitude?

(2) If "yes", give full information by separate report.

(3) If advertising is to be sold, list the name and type of publication, the rates, approximate number of pages, the amount of circulation, the page size, estimated printing costs, methods to be used in soliciting ads.

(4) A statement from the chief of the Amarillo Police Department or his representative that the applicant and the persons working under him, either in charge of soliciting or doing actual soliciting, have been fingerprinted, photographed, and according to department records and other sources, that none of such persons have been convicted of a penal offense involving moral turpitude. (Ord. No. 4143, § 1, 12–21–71; Ord. No. 4314, § 1(b), 12–11–73; Ord. No. 4695, § 1(d), (e), 10–11–77)

Sec. 13–69. Same—Notice of hearing.

Upon receipt of a proper application as provided in section 13–68, the secretary of the solicitations board will specify the time and place for hearing of said application, and such time for hearing shall be at least ten (10) days but not more than forty (40) days after the date on which the application is received. The secretary of the solicitations board shall notify the applicant of the time and place specified for hearing. In the absence of notice acknowledged by the applicant, the secretary of the solicitations board will give written notice to the applicant by depositing same in the United States mail in a sealed envelope with sufficient postage attached, addressed to applicant at the address shown on the application. Such mailed written notice shall be sufficient if deposited in the United States mail at least five (5) days prior to the date of the hearing. At the conclusion of the hearing on any such application, the solicitations board will authorize and direct the secretary of said board to issue the permit applied for unless the board finds from some reasonable evidence of probative value amounting to substantial evidence that:

(a) The application is not filled out in reasonable enough detail so that the board may make findings of fact on the subjects listed below within this section; or that one or more of the statements made in the application are not true.

(b) The applicant or person in charge of the charitable solicitation campaign or in the case of soliciting for subscriptions or contracts for advertisements, books, magazines or periodicals, any person connected with such soliciting has been convicted in a court of competent jurisdiction of a crime involving moral turpitude within the ten-year period immediately preceding the application ***608** or at any time if the criminal conviction arose out of a program or campaign to solicit funds, subscriptions or contracts for advertisements, books, magazines or periodicals, or that the applicant or such person has made or caused to be made any false statement or misrepresentations to any member of the public with regard to the charitable solicitations campaign or other activities described in the permit, or has made or caused to be made false statements or misrepresentations on the application or at the hearing on the application, or has in any way publicly represented that the permit granted hereunder is an endorsement or recommendation of the cause for which the charitable solicitation campaign or solicitations for subscriptions or contracts, for advertisements, books, magazines or periodicals is being conducted, or has otherwise violated any of the terms of the permit or this division.

(c) The applicant's cost of fund raising in any campaign conducted by it in the year immediately preceding the date of the application exceeded twenty-five (25) per cent of the gross amount collected. For the purpose of

this subsection "cost of fund raising" shall mean all costs including but not limited to promoter's fees and advertising expenses but excluding the cost of a product sold as a part of the campaign and excluding the cost of a dramatic, musical, educational or entertainment production presented as a part of the campaign. "Cost of product" means the cash price of the product plus freight charges. "Cost of dramatic, musical, educational or entertainment production" means speaker and/or performer expenses and building and/or space rentals.

(d) The expected cost of fund raising will exceed twenty-five (25) per cent of the gross amount collected. For purposes of this subsection, "cost of fund raising" shall be defined as in the next preceding subsection above.

(e) Applicant has failed to keep or observe any promise, agreement, representation or commitment with regard to the allocation of funds or methods of fund raising or solicitation made to the solicitations board in connection with any previous application.

(f) In the case of charitable solicitations campaign that the project is not being administered by a local responsible board of directors or committee.

(h) That children of under fourteen (14) years of age are being used to solicit for charitable purposes without being accompanied by a responsible adult or except where both of the following exist:

(1) The children are members of the organization for whose benefit the solicitation is made.

(2) All funds so solicited, less permissible costs, shall be expended solely for the direct benefit of the children locally.

(i) Paid promoters of the petitioning organization are not adequately covered by a fidelity bond.

(j) In the case of a charitable solicitation campaign that while the project is worthy it does not present a reasonably urgent need at the particular time.

(k) In case of a charitable solicitations campaign, the project duplicates the work of an existing governmental or nongovernmental agency.

(*l*) The project is of such a nature that it can be merged with other similar campaigns or it can be merged or processed through the annual United Way campaign.

(m) If the appeal emanates from a national agency, the local quota exceeds the "yardstick formula" adopted by the city's solicitation board as Amarillo's equitable share of the organization's national goal based on indices which will be adopted by the city's solicitation board, as showing the fair share percentage for Amarillo to the national total.

***609** (n) The timing of the appeal will conflict with other existing approved drives. (Ord. No. 4143, § 1, 12–21–71; Ord. No. 4314, § 1(c), (d), 12–11–73; Ord. No. 4808, § 3, 9–5–78)

Sec. 13–70. Issuance of permit.

Upon receipt of written authorization from the solicitations board as provided in section 13–69 above or upon notification of action by the city commission of the City of Amarillo in connection with any appeal from a decision of the solicitation board as provided in section 13–69, the secretary of the solicitations board will issue a permit to conduct a charitable solicitations campaign for solicitations for subscriptions or contracts for advertisements, books, magazines or periodicals for the period and in the manner authorized by the solicitations board or the city commission. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–70.1. Duration of permit.

The solicitations board shall determine from the application and the reasonable evidence the period during which the applicant shall be permitted to conduct its charitable solicitations campaign or solicitations for subscriptions or contracts for advertisements, books, magazines or periodicals; provided, however, that such period shall not exceed three (3) calendar months. Any extension of such period shall be granted only upon the filing of an application and after notice and hearing of the same kind and character as is required for the original permit. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–71. Permit nontransferrable.

Any permit hereunder shall be personal to the applicant and shall not be assigned or transferred to any other person, firm, corporation or association. Any such attempted assignment or transfer shall render the permit void. However, nothing in this section shall prohibit a permittee from using the number of solicitors and representatives specified in the permit. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–72. Revocation of permit.

If, after notice and hearing, the solicitations board shall determine and make findings of fact that any permit holder or any agent or representative of a permit holder is making or has made any false statements or misrepresentations to any member of the public with regard to the campaign of solicitations or other activities described in the permit, or has made false statements or misrepresentations in the application or at the hearing on the application, or has in any way publicly represented that the permit granted hereunder is an endorsement or recommendation of the cause for which the charitable solicitations campaign is being conducted, or has violated any of the terms of the permit or has otherwise violated the provisions of this division, then it shall be the duty of the solicitations board to revoke the permit; provided, however, that the permit holder shall be given at least twenty-four (24) hours' written notice that a hearing on the revocation is to be held, and provided, further, that such hearing on the revocation shall be conducted under the same rules as the hearing on the application. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–73. Appeal from a ruling of solicitations board.

Every applicant shall have the right to appeal to the city commission from a ruling of the solicitations board. Such appeal, if taken, must be in writing, addressed to the city commission, and filed with the city secretary within ten (10) days after the date of the decision or ruling appealed from. The city commission shall hold an open public hearing on such appeal at either a regular or special meeting of that body after giving notice of such hearing to the applicant as provided in section 13–70 for the original hearing. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–74. Reports to be filed.

All persons or organizations issued permits under this chapter shall furnish to the solicitations board within thirty (30) days after the charitable solicitations campaign has been completed, a detailed report and ***610** financial statement showing the amount of funds raised by the charitable solicitations campaign, the amount expended in collecting such funds, including a detailed report of the wages, fees, commissions and expenses paid to any person in connection with such solicitation, and the disposition of the balance of the funds collected by the campaign; provided, however, that the solicitations board may extend the time for the report required by this section for an additional period of thirty (30) days upon proof that the filing of the report within the time specified will work unnecessary hardship on the permit holder. The permit holder shall make available to the board as its representative for such purpose, all books, records and papers whereby the accuracy of the report required by this section may be investigated.

All financial statements and reports and all applications submitted by any applicant or permit holder hereunder, and all determinations, findings and rulings involving accounting procedures made by either the solicitations board or the city commission shall be prepared, made and interpreted in accordance with the accounting standards and practices set out in Standards of Accounting and Financial Reporting for Voluntary Health and Welfare Organizations, copyright 1964, National Health Council, National Social Welfare Assembly, which is incorporated herein by reference and a copy of which shall be maintained on file in the office of the city secretary of the City of Amarillo, Texas, and in the office of the secretary of the solicitations board. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–75. Agents and solicitors for charitable permit holders.

All persons to whom permits have been issued under this division shall furnish proper credentials to their agents and solicitors for such charitable solicitations campaign. Such credentials shall include the name of the permit holder, the date, a statement describing the holder's charitable, educational, patriotic or philanthropic activity, a description of the purpose of the solicitation, the signature of the permit holder or of the holder's chief executive officer, and the name, address, age, sex, and signature of the solicitor to whom such credentials are issued and the specific period of time during which the solicitor is authorized to solicit on behalf of the permit holder. No person shall solicit under any permit granted under this division without the credentials required by this section and a facsimile copy of the permit in his possession. The credentials and facsimile copy of the permit shall be shown upon request to all persons solicited and to any police officer of the city.

No agent or solicitor shall conduct or participate in any charitable solicitations campaign for subscriptions or contracts for advertisements, books, magazines or periodicals except under a valid permit issued in compliance with this division. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–75.1. Responsibility for acts of solicitors.

The recipient of a permit for a charitable solicitations campaign for solicitations for subscriptions or contracts for advertisements, books, magazines or periodicals shall be responsible for the acts of his authorized representatives in connection with such campaign. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–76. Certain methods of soliciting prohibited.
The following methods of solicitation are and shall be prohibited within the City of Amarillo:

(a) Reserved.

(b) Solicitation by means of coins or currency boxes or receptacles, except when the use of each box or receptacle in the solicitation is expressly authorized by the board. (Ord. No. 4143, § 1, 12–21–71; Ord. No. 4325, § A, 2–5–74)

Editor's note—Ord. No. 4325 repealed former subsection (a) pertaining to telephone solicitation.

Sec. 13–77. Public inspection of records.
All applications, records of hearing, permits or rulings of either the solicitations ***611** board or the city commission and all instruments filed in connection with any application or hearing shall be public records. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–78. Misrepresentation of information not specifically required.
It shall be unlawful for any person, firm, corporation or association, either with or without a permit, to misrepresent to the city solicitation board or any of its members in any manner any information required by this division by way of application or deemed necessary by the board to carry out the purpose of this division and not specifically covered by this division. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–79. Misrepresentation of information required by division.
It shall be unlawful for any person, firm, corporation or association, either with or without a permit, to misrepresent in any manner to any person or firm solicited, any information required by this division, including, but not limited to, the purpose of solicitation and the method of presentation. (Ord. No. 4143, § 1, 12–21–71)

All Citations

582 F.Supp. 592

Footnotes

* Cross references—Itinerant food establishments, §§ 10–42—10–46; itinerant restaurants, §§ 10–47—10–53; food peddlers, §§ 10–54—10–72.

† Editor's note - Ord. No. 4572, § 1, enacted Oct. 26, 1976, amended this Code by repealing former Div. 1, §§ 13-57-13-65, derived from Ord. No. 296, §§ 1-3,5, 3-14-16; Ord. No. 1197, §§ 1-4, 11-5-29; and Ord. No. 1462, §§ 1-7, 4-24-34.

‡ Editor's note - Formerly this division was derived from Ord. No. 1588, enacted August 12, 1941, as amended by Ord. No. 1740, enacted Sept. 21, 1948; and Ord. No. 3186, enacted July 7, 1959.

134 S.Ct. 2518
Supreme Court of the United States

Eleanor McCULLEN, et al., Petitioners
v.
Martha COAKLEY, Attorney General of Massachusetts, et al.

No. 12–1168.
|
Argued Jan. 15, 2014.
|
Decided June 26, 2014.

Synopsis

Background: Sidewalk counselors brought action against Massachusetts Attorney General, challenging constitutionality of revised Massachusetts statute, which made it a crime to knowingly stand on a public way or sidewalk within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions were performed. Following affirmance of denial of facial challenge, 571 F.3d 167, and following bench trial, the United States District Court for the District of Massachusetts, Joseph L. Tauro, J., 759 F.Supp.2d 133 and 844 F.Supp.2d 206, denied counselors' as-applied challenges. Counselors appealed. The United States Court of Appeals for the First Circuit, Selya, Circuit Judge, 708 F.3d 1, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

[1] statute was not content-based due to fact that it established buffer zones only at clinics that performed abortions;

[2] statute was not content-based due to fact that it exempted certain groups including clinic employees and agents; and

[3] statute was not narrowly tailored to serve significant governmental interest, and thus violated free speech guarantees.

Reversed and remanded.

Justice Scalia filed opinion concurring in the judgment, in which Justices Kennedy and Thomas joined.

Justice Alito filed opinion concurring in the judgment.

West Headnotes (21)

[1] Constitutional Law
Streets and highways

Constitutional Law
Sidewalks

Public ways and sidewalks occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[2] Constitutional Law
Nature and requisites

"Traditional public fora," which hold a special position in terms of First Amendment protection, are areas that have historically been open to the public for speech activities. U.S.C.A. Const.Amend. 1.

10 Cases that cite this headnote

[3] Abortion and Birth Control
Access, Interference, and Protests

Abortion and Birth Control
Crimes and prosecutions

Constitutional Law
Health Care Facilities

Constitutional Law
Particular offenses in general

Massachusetts statute, making it a crime to knowingly stand on a public way or sidewalk within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed, restricted access to traditional public fora and was, therefore, subject to First Amendment scrutiny, even though it said nothing

about speech on its face. U.S.C.A. Const.Amend. 1; M.G.L.A. c. 266, § 120E1/2(b).

10 Cases that cite this headnote

[4] Constitutional Law
Streets and highways

Constitutional Law
Sidewalks

Consistent with the traditionally open character of public streets and sidewalks, the government's ability to restrict speech in such locations is very limited. U.S.C.A. Const.Amend. 1.

12 Cases that cite this headnote

[5] Constitutional Law
Traditional Public Forum in General

The guiding First Amendment principle that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content applies with full force in a traditional public forum. U.S.C.A. Const.Amend. 1.

9 Cases that cite this headnote

[6] Constitutional Law
Justification for exclusion or limitation

As a general rule, in a traditional public forum the government may not selectively shield the public from some kinds of speech on the ground that they are more offensive than others. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[7] Constitutional Law
Justification for exclusion or limitation

Even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. U.S.C.A. Const.Amend. 1.

70 Cases that cite this headnote

[8] Constitutional Law
Strict or exacting scrutiny; compelling interest test

If a statute is not content neutral with respect to speech, then it must satisfy strict scrutiny, that is, it must be the least restrictive means of achieving a compelling state interest. U.S.C.A. Const.Amend. 1.

18 Cases that cite this headnote

[9] Constitutional Law
Necessity of Determination

Constitutional Law
Health Care Facilities

Supreme Court would consider whether Massachusetts statute establishing buffer zones around abortion clinics was content based and thus subject to strict scrutiny, in sidewalk counselors' free speech challenge, notwithstanding that Court ultimately would conclude that statute was not narrowly tailored; content-neutrality prong was logically antecedent to narrow-tailoring prong, it was not unusual for Court to proceed sequentially in applying constitutional test even when preliminary steps turned out to be dispositive, there was no reason to forgo ordinary order of operations in this case, Court was identifying less-restrictive alternative measures in course of discussing narrow-tailoring prong, and it would be odd to consider possible alternatives if they were presumptively unconstitutional. U.S.C.A. Const.Amend. 1; M.G.L.A. c. 266, § 120E1/2(b).

1 Cases that cite this headnote

[10] Constitutional Law
Health Care Facilities

Constitutional Law
Particular offenses in general

Massachusetts statute, making it a crime to knowingly stand on a public way or sidewalk within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions were performed, was not content-based, so as to be subject to strict scrutiny in free speech challenge, based on fact that it established buffer zones only at clinics that performed abortions; statute did not draw content-based distinctions on its face, statute did not require enforcement authorities to examine content of message conveyed in order to determine whether violation occurred, stated purposes of statute including public safety were content neutral, and, because statute was enacted in response to problem occurring only at abortion clinics, limited solution was warranted. U.S.C.A. Const.Amend. 1; M.G.L.A. c. 266, § 120E1/2(b).

28 Cases that cite this headnote

[11] Constitutional Law
Content-Based Regulations or Restrictions

A facially neutral law does not become content based, for purposes of a free speech challenge, simply because it may disproportionately affect speech on certain topics. U.S.C.A. Const.Amend. 1.

23 Cases that cite this headnote

[12] Constitutional Law
Content-Neutral Regulations or Restrictions

A regulation that serves purposes unrelated to the content of expression is deemed neutral, as opposed to content based, even if it has an incidental effect on some speakers or messages but not others; the question in such a case is whether the law is justified without reference to the content of the regulated speech. U.S.C.A. Const.Amend. 1.

23 Cases that cite this headnote

[13] Constitutional Law
Health Care Facilities

Constitutional Law
Particular offenses in general

Massachusetts statute, making it a crime to knowingly stand on a public way or sidewalk within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions were performed, was not content-based, so as to be subject to strict scrutiny in free speech challenge, based on fact that it exempted certain groups including clinic employees and agents, since exemption did not appear to be attempt to favor one side in abortion debate; exempted individuals were allowed inside buffer zones only to perform acts authorized by their employers, clinics did not authorize their employees to speak about abortion in buffer zones, and, assuming that escorts employed by clinic had expressed their views about abortion to women they were accompanying, such speech was beyond scope of their employment. U.S.C.A. Const.Amend. 1; M.G.L.A. c. 266, § 120E1/2(b).

3 Cases that cite this headnote

[14] Constitutional Law
Content-Neutral Regulations or Restrictions

For purposes of determining whether a statute is content neutral, an exemption from an otherwise permissible regulation of speech may represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people. U.S.C.A. Const.Amend. 1.

5 Cases that cite this headnote

[15] Constitutional Law
Invalidity as applied

Constitutional Law
Viewpoint or idea discrimination

A plaintiff generally cannot prevail on an as-applied challenge without showing that the law has in fact been, or is sufficiently likely to be, unconstitutionally applied to him; specifically, when someone challenges a law as viewpoint discriminatory but it is not clear from the face of the law which speakers will be allowed to speak, he must show that he was prevented

from speaking while someone espousing another viewpoint was permitted to do so. U.S.C.A. Const.Amend. 1.

16 Cases that cite this headnote

[16] Abortion and Birth Control
Access, Interference, and Protests

Abortion and Birth Control
Crimes and prosecutions

Constitutional Law
Health Care Facilities

Constitutional Law
Particular offenses in general

Constitutional Law
Government property, use of

Massachusetts statute, making it a crime to knowingly stand on a public way or sidewalk within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed, was not narrowly tailored to serve significant governmental interest and, thus, violated free speech guarantees; although government had significant interests in maintaining public safety on streets and sidewalks, as well as in preserving access to adjacent healthcare facilities, buffer zones imposed serious burdens on speech of sidewalk counselors, including making it substantially more difficult to distribute literature to arriving patients, Massachusetts had available to it a variety of other approaches that appeared capable of serving its interests, and Massachusetts had not seriously undertaken to address the problem with less intrusive tools readily available to it. U.S.C.A. Const.Amend. 1; M.G.L.A. c. 266, § 120E1/2(b).

9 Cases that cite this headnote

[17] Constitutional Law
Governmental disagreement with message conveyed

Constitutional Law
Narrow tailoring requirement; relationship to governmental interest

The requirement that a content neutral statute restricting speech be narrowly tailored to serve a significant governmental interest does not simply guard against an impermissible desire to censor, since the government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience; by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency. U.S.C.A. Const.Amend. 1.

50 Cases that cite this headnote

[18] Constitutional Law
Narrow tailoring requirement; relationship to governmental interest

For a content-neutral time, place, or manner regulation of speech to be narrowly tailored, it must not burden substantially more speech than is necessary to further the government's legitimate interests, but the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. U.S.C.A. Const.Amend. 1.

84 Cases that cite this headnote

[19] Constitutional Law
Narrow tailoring requirement; relationship to governmental interest

For purposes of determining whether a content neutral statute restricting speech is narrowly tailored to serve a significant governmental interest, the government has legitimate interests in ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services. U.S.C.A. Const.Amend. 1.

63 Cases that cite this headnote

[20] Constitutional Law
Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising

Handing out leaflets in the advocacy of a politically controversial viewpoint is the essence of First Amendment expression; no form of speech is entitled to greater constitutional protection. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[21] Constitutional Law

Narrow tailoring requirement; relationship to governmental interest

To meet the requirement of narrow tailoring in a free speech challenge to a content neutral statute, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. U.S.C.A. Const.Amend. 1.

41 Cases that cite this headnote

West Codenotes

Held Unconstitutional

M.G.L.A. c. 266, §§ 120E1/2(b–d)

****2522** *Syllabus* *

***464** In 2007, Massachusetts amended its Reproductive Health Care Facilities Act, which had been enacted in 2000 to address clashes between abortion opponents and advocates of abortion rights outside clinics where abortions were performed. The amended version of the Act makes it a crime to knowingly stand on a "public way or sidewalk" within 35 feet of an entrance or driveway to any "reproductive health care facility," defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." Mass. Gen. Laws, ch. 266, §§ 120E½(a), (b). The Act exempts from this prohibition four classes of individuals, including " employees or agents of such facility acting within the scope of their employment." § 120E½(b)(2). Another provision of the Act proscribes the knowing obstruction of access to an abortion clinic. § 120E½(e).

McCullen and the other petitioners are individuals who attempt to engage women approaching Massachusetts abortion clinics in "sidewalk counseling," which involves offering information about alternatives to abortion and help pursuing those options. They claim that the 35–foot buffer zones have displaced them from their previous positions outside the clinics, considerably hampering their counseling efforts. Their attempts to communicate with patients are further thwarted, they claim, by clinic "escorts," who accompany arriving patients through the buffer zones to the clinic entrances.

Petitioners sued Attorney General Coakley and other Commonwealth officials, seeking to enjoin the Act's enforcement on the ground that it violates the First and Fourteenth Amendments, both on its face and as applied to them. The District Court denied both challenges, and the First Circuit affirmed. With regard to petitioners' facial challenge, the First Circuit held that the Act was a reasonable "time, place, and manner" regulation under the test set forth in *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661.

Held : The Massachusetts Act violates the First Amendment. Pp. 2528 – 2541.

(a) By its very terms, the Act restricts access to "public way[s]" and "sidewalk[s]," places that have traditionally been open for speech activities ***465** and that the Court has accordingly labeled "traditional public fora," *Pleasant Grove City v. Summum,* 555 U.S. 460, 469, 129 S.Ct. 1125, 172 L.Ed.2d 853. The government's ability to regulate speech in such locations is "very limited." *United States v. Grace,* 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736. "[E]ven in a public forum," however, "the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information,' " *Ward, supra,* at 791, 109 S.Ct. 2746. Pp. 2528 – 2530.

(b) Because the Act is neither content nor viewpoint based, it need not be analyzed under strict scrutiny. Pp. 2530 – 2534.

****2523** (1) The Act is not content based simply because it establishes buffer zones only at abortion clinics, as opposed

to other kinds of facilities. First, the Act does not draw content-based distinctions on its face. Whether petitioners violate the Act "depends" not "on what they say," *Holder v. Humanitarian Law Project,* 561 U.S. 1, 27, 130 S.Ct. 2705, 177 L.Ed.2d 355, but on where they say it. Second, even if a facially neutral law disproportionately affects speech on certain topics, it remains content neutral so long as it is " 'justified without reference to the content of the regulated speech.' " *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 48, 106 S.Ct. 925, 89 L.Ed.2d 29. The Act's purposes include protecting public safety, patient access to healthcare, and unobstructed use of public sidewalks and streets. The Court has previously deemed all these concerns to be content neutral. See *Boos v. Barry,* 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333. An intent to single out for regulation speech about abortion cannot be inferred from the Act's limited scope. "States adopt laws to address the problems that confront them." *Burson v. Freeman,* 504 U.S. 191, 207, 112 S.Ct. 1846, 119 L.Ed.2d 5. There was a record of crowding, obstruction, and even violence outside Massachusetts abortion clinics but not at other kinds of facilities in the Commonwealth. Pp. 2526 – 2532.

(2) The Act's exemption for clinic employees and agents acting within the scope of their employment does not appear to be an attempt to favor one viewpoint about abortion over the other. *City of Ladue v. Gilleo,* 512 U.S. 43, 51, 114 S.Ct. 2038, 129 L.Ed.2d 36, distinguished. Given that some kind of exemption was necessary to allow individuals who work at the clinics to enter or remain within the buffer zones, the "scope of employment" qualification simply ensures that the exemption is limited to its purpose of allowing the employees to do their jobs. Even assuming that some clinic escorts have expressed their views on abortion inside the zones, the record does not suggest that such speech was within the scope of the escorts' employment. If it turned out that a particular clinic authorized its employees to speak about abortion in the buffer zones, that ***466** would support an as-applied challenge to the zones at that clinic. Pp. 2532 – 2534.

(c) Although the Act is content neutral, it is not "narrowly tailored" because it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Ward,* 491 U.S., at 799, 109 S.Ct. 2746. Pp. 2534 – 2540.

(1) The buffer zones serve the Commonwealth's legitimate interests in maintaining public safety on streets and sidewalks and in preserving access to adjacent reproductive healthcare facilities. See *Schenck v. Pro–Choice Network of Western N. Y.,* 519 U.S. 357, 376, 117 S.Ct. 855, 137 L.Ed.2d 1. At the same time, however, they impose serious burdens on petitioners' speech, depriving them of their two primary methods of communicating with arriving patients: close, personal conversations and distribution of literature. Those forms of expression have historically been closely associated with the transmission of ideas. While the Act may allow petitioners to "protest" outside the buffer zones, petitioners are not protestors; they seek not merely to express their opposition to abortion, but to engage in personal, caring, consensual conversations with women about various alternatives. It is thus no answer to say that petitioners can still be seen and heard by women within the buffer zones. If all that the women can see and hear are vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners' message. Pp. 2535 – 2537.

****2524** (2) The buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests. Subsection (e) of the Act already prohibits deliberate obstruction of clinic entrances. Massachusetts could also enact legislation similar to the federal Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248(a)(1), which imposes criminal and civil sanctions for obstructing, intimidating, or interfering with persons obtaining or providing reproductive health services. Obstruction of clinic driveways can readily be addressed through existing local traffic ordinances. While the Commonwealth contends that individuals can inadvertently obstruct access to clinics simply by gathering in large numbers, that problem could be addressed through a law requiring crowds blocking a clinic entrance to disperse for a limited period when ordered to do so by the police. In any event, crowding appears to be a problem only at the Boston clinic, and even there, only on Saturday mornings.

The Commonwealth has not shown that it seriously undertook to address these various problems with the less intrusive tools readily available to it. It identifies not a single prosecution or injunction against individuals outside abortion clinics since the 1990s. The Commonwealth responds that the problems are too widespread for individual ***467** prosecutions and injunctions to be effective. But again, the record indicates that the problems are limited principally to the Boston clinic on Saturday mornings, and the police there appear perfectly capable of singling out lawbreakers.

The Commonwealth also claims that it would be difficult to prove intentional or deliberate obstruction or intimidation and that the buffer zones accordingly make the police's job easier. To meet the narrow tailoring requirement, however, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. In any event, to determine whether someone intends to block access to a clinic, a police officer need only order him to move; if he refuses, then there is no question that his continued conduct is knowing or intentional. For similar reasons, the Commonwealth's reliance on *Burson v. Freeman,* 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5, is misplaced. There, the Court upheld a law establishing buffer zones outside polling places on the ground that less restrictive measures were inadequate. But whereas "[v]oter intimidation and election fraud" are "difficult to detect," *id.,* at 208, 112 S.Ct. 1846, obstruction and harassment at abortion clinics are anything but subtle. And while the police "generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process," *id.,* at 207, 112 S.Ct. 1846, they maintain a significant presence outside Massachusetts abortion clinics. In short, given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked. Pp. 2537 – 2540.

708 F.3d 1, reversed and remanded.

ROBERTS, C.J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined. ALITO, J., filed an opinion concurring in the judgment.

Attorneys and Law Firms

Mark L. Rienzi, Washington, DC, for Petitioners.

Jennifer Grace Miller, Boston, MA, for Respondents.

****2525** Ian H. Gershengorn, for the United States as amicus curiae, by special leave of the Court, supporting the respondents.

Edward C. DuMont, Todd C. Zubler, Matthew Guarnieri, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC, Jason D. Hirsch, Adriel I. Cepeda Derieux, Wilmer Cutler Pickering Hale and Dorr LLP, New York, NY, Mark L. Rienzi, Counsel of Record, The Catholic University of America, Columbus School of Law, Washington, DC, Michael J. DePrimo, Hamden, CT, Philip D. Moran, Salem, MA, for Petitioners.

Martha Coakley, Attorney General, Jennifer Grace Miller, Counsel of Record, Jonathan B. Miller, Sookyoung Shin, Assistant Attorneys General, Commonwealth of Massachusetts, Office of the Attorney General, Boston, MA, for Respondents.

Opinion

Chief Justice ROBERTS delivered the opinion of the Court.

***469** A Massachusetts statute makes it a crime to knowingly stand on a " public way or sidewalk" within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed. Mass. Gen. Laws, ch. 266, §§ 120E½(a), (b) (West 2012). Petitioners are individuals who approach and talk to women outside such facilities, attempting to dissuade them from having abortions. The statute prevents petitioners from doing so near the facilities' entrances. The question presented is whether the statute violates the First Amendment.

I

A

In 2000, the Massachusetts Legislature enacted the Massachusetts Reproductive Health Care Facilities Act, Mass. Gen. Laws, ch. 266, § 120E½ (West 2000). The law was designed ***470** to address clashes between abortion opponents and advocates of abortion rights that were occurring outside clinics where abortions were performed. The Act established a defined area with an 18–foot radius around the entrances and driveways of such facilities. § 120E½ (b). Anyone could enter that area, but once within it, no one (other than certain exempt individuals) could knowingly approach within six feet of another person—unless that person consented—"for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person." *Ibid.* A separate provision subjected to criminal punishment anyone who "knowingly obstructs, detains, hinders, impedes

or blocks another person's entry to or exit from a reproductive health care facility." § 120E½(e).

The statute was modeled on a similar Colorado law that this Court had upheld in *Hill v. Colorado,* 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). Relying on *Hill,* the United States Court of Appeals for the First Circuit sustained the Massachusetts statute against a First Amendment challenge. *McGuire v. Reilly,* 386 F.3d 45 (2004) (*McGuire II*), cert. denied, 544 U.S. 974, 125 S.Ct. 1827, 161 L.Ed.2d 724 (2005); *McGuire v. Reilly,* 260 F.3d 36 (2001) (*McGuire I*).

By 2007, some Massachusetts legislators and law enforcement officials had come to regard the 2000 statute as inadequate. At legislative hearings, multiple witnesses recounted apparent violations of the law. Massachusetts Attorney General Martha Coakley, for example, testified that protestors violated the statute "on a routine basis." App. 78. To illustrate this claim, she ****2526** played a video depicting protestors approaching patients and clinic staff within the buffer zones, ostensibly without the latter individuals' consent. Clinic employees and volunteers also testified that protestors congregated near the doors and in the driveways of the clinics, with the result that prospective patients occasionally retreated from the clinics rather than try to make their way to the clinic entrances or parking lots.

***471** Captain William B. Evans of the Boston Police Department, however, testified that his officers had made "no more than five or so arrests" at the Planned Parenthood clinic in Boston and that what few prosecutions had been brought were unsuccessful. *Id.,* at 68–69. Witnesses attributed the dearth of enforcement to the difficulty of policing the six-foot no-approach zones. Captain Evans testified that the 18–foot zones were so crowded with protestors that they resembled "a goalie's crease," making it hard to determine whether a protestor had deliberately approached a patient or, if so, whether the patient had consented. *Id.,* at 69–71. For similar reasons, Attorney General Coakley concluded that the six-foot no-approach zones were " unenforceable." *Id.,* at 79. What the police needed, she said, was a fixed buffer zone around clinics that protestors could not enter. *Id.,* at 74, 76. Captain Evans agreed, explaining that such a zone would "make our job so much easier." *Id.,* at 68.

To address these concerns, the Massachusetts Legislature amended the statute in 2007, replacing the six-foot no-approach zones (within the 18–foot area) with a 35–foot fixed buffer zone from which individuals are categorically excluded. The statute now provides:

> "No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines intersect the sideline of the street in front of such entrance, exit or driveway."

Mass. Gen. Laws, ch. 266, § 120E½(b) (West 2012).

A "reproductive health care facility," in turn, is defined as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." § 120E½(a).

***472** The 35–foot buffer zone applies only "during a facility's business hours," and the area must be "clearly marked and posted." § 120E½(c). In practice, facilities typically mark the zones with painted arcs and posted signs on adjacent sidewalks and streets. A first violation of the statute is punishable by a fine of up to $500, up to three months in prison, or both, while a subsequent offense is punishable by a fine of between $500 and $5,000, up to two and a half years in prison, or both. § 120E½(d).

The Act exempts four classes of individuals: (1) "persons entering or leaving such facility"; (2) "employees or agents of such facility acting within the scope of their employment"; (3) "law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment"; and (4) "persons using the public sidewalk or street right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility." § 120E½ (b)(1)-(4). The legislature also retained the separate provision from the 2000 version that proscribes the knowing obstruction of access to a facility. § 120E½(e).

****2527** B

Some of the individuals who stand outside Massachusetts abortion clinics are fairly described as protestors, who express their moral or religious opposition to abortion through signs and chants or, in some cases, more aggressive methods such as face-to-face confrontation. Petitioners take a different tack. They attempt to engage women approaching the clinics in what they call "sidewalk counseling," which involves offering information about alternatives to abortion and help pursuing those options. Petitioner Eleanor McCullen, for instance, will typically initiate a conversation this way: "Good morning, may I give you my literature? Is there anything I can do for you? I'm available if you have any questions." App. 138. If the woman seems receptive, McCullen will provide additional information. McCullen ***473** and the other petitioners consider it essential to maintain a caring demeanor, a calm tone of voice, and direct eye contact during these exchanges. Such interactions, petitioners believe, are a much more effective means of dissuading women from having abortions than confrontational methods such as shouting or brandishing signs, which in petitioners' view tend only to antagonize their intended audience. In unrefuted testimony, petitioners say they have collectively persuaded hundreds of women to forgo abortions.

The buffer zones have displaced petitioners from their previous positions outside the clinics. McCullen offers counseling outside a Planned Parenthood clinic in Boston, as do petitioners Jean Zarrella and Eric Cadin. Petitioner Gregory Smith prays the rosary there. The clinic occupies its own building on a street corner. Its main door is recessed into an open foyer, approximately 12 feet back from the public sidewalk. Before the Act was amended to create the buffer zones, petitioners stood near the entryway to the foyer. Now a buffer zone—marked by a painted arc and a sign—surrounds the entrance. This zone extends 23 feet down the sidewalk in one direction, 26 feet in the other, and outward just one foot short of the curb. The clinic's entrance adds another seven feet to the width of the zone. *Id.,* at 293–295. The upshot is that petitioners are effectively excluded from a 56–foot–wide expanse of the public sidewalk in front of the clinic. [1]

Petitioners Mark Bashour and Nancy Clark offer counseling and information outside a Planned Parenthood clinic in Worcester. Unlike the Boston clinic, the Worcester clinic sits well back from the public street and sidewalks. Patients enter the clinic in one of two ways. Those arriving on foot turn off the public sidewalk and walk down a nearly 54–foot–long private walkway to the main entrance. More ***474** than 85% of patients, however, arrive by car, turning onto the clinic's driveway from the street, parking in a private lot, and walking to the main entrance on a private walkway.

Bashour and Clark would like to stand where the private walkway or driveway intersects the sidewalk and offer leaflets to patients as they walk or drive by. But a painted arc extends from the private walkway 35 feet down the sidewalk in either direction and outward nearly to the curb on the opposite side of the street. Another arc surrounds the driveway's entrance, covering more than 93 feet of the sidewalk (including the width of the driveway) and extending across the street and nearly six feet onto the sidewalk on the opposite side. ****2528** *Id.,* at 295–297. Bashour and Clark must now stand either some distance down the sidewalk from the private walkway and driveway or across the street.

Petitioner Cyril Shea stands outside a Planned Parenthood clinic in Springfield, which, like the Worcester clinic, is set back from the public streets. Approximately 90% of patients arrive by car and park in the private lots surrounding the clinic. Shea used to position himself at an entrance to one of the five driveways leading to the parking lots. Painted arcs now surround the entrances, each spanning approximately 100 feet of the sidewalk parallel to the street (again, including the width of the driveways) and extending outward well into the street. *Id.,* at 297–299. Like petitioners at the Worcester clinic, Shea now stands far down the sidewalk from the driveway entrances.

Petitioners at all three clinics claim that the buffer zones have considerably hampered their counseling efforts. Although they have managed to conduct some counseling and to distribute some literature outside the buffer zones—particularly at the Boston clinic—they say they have had many fewer conversations and distributed many fewer leaflets since the zones went into effect. *Id.,* at 136–137, 180, 200.

The second statutory exemption allows clinic employees and agents acting within the scope of their employment to ***475** enter the buffer zones. Relying on this exemption, the Boston clinic uses "escorts" to greet women as they approach the clinic, accompanying them through the zones to the clinic entrance. Petitioners claim that the escorts sometimes thwart petitioners' attempts to communicate with patients by blocking petitioners from handing literature to patients, telling patients not to "pay any attention" or "listen to" petitioners, and disparaging petitioners as "crazy." *Id.,* at 165, 178.

C

In January 2008, petitioners sued Attorney General Coakley and other Commonwealth officials. They sought to enjoin enforcement of the Act, alleging that it violates the First and Fourteenth Amendments, both on its face and as applied to them. The District Court denied petitioners' facial challenge after a bench trial based on a stipulated record. 573 F.Supp.2d 382 (D.Mass.2008).

The Court of Appeals for the First Circuit affirmed. 571 F.3d 167 (2009). Relying extensively on its previous decisions upholding the 2000 version of the Act, see *McGuire II,* 386 F.3d 45; *McGuire I,* 260 F.3d 36, the court upheld the 2007 version as a reasonable "time, place, and manner" regulation under the test set forth in *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). 571 F.3d, at 174–181. It also rejected petitioners' arguments that the Act was substantially overbroad, void for vagueness, and an impermissible prior restraint. *Id.,* at 181–184.

The case then returned to the District Court, which held that the First Circuit's decision foreclosed all but one of petitioners' as-applied challenges. 759 F.Supp.2d 133 (2010). After another bench trial, it denied the remaining as-applied challenge, finding that the Act left petitioners ample alternative channels of communication. 844 F.Supp.2d 206 (2012). The Court of Appeals once again affirmed. 708 F.3d 1 (2013).

We granted certiorari. 570 U.S. ——, 133 S.Ct. 2857, 186 L.Ed.2d 907 (2013).

***476** II

[1] By its very terms, the Massachusetts Act regulates access to "public way[s]" and "sidewalk[s]." ****2529** Mass. Gen. Laws, ch. 266, § 120E½ (b) (Supp. 2007). Such areas occupy a "special position in terms of First Amendment protection" because of their historic role as sites for discussion and debate. *United States v. Grace,* 461 U.S. 171, 180, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983). These places—which we have labeled "traditional public fora"—" '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 v. Summum,* 555 U.S. 460, 469, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009) (quoting *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)).

It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," *FCC v. League of Women Voters of Cal.,* 468 U.S. 364, 377, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984) (internal quotation marks omitted), this aspect of traditional public fora is a virtue, not a vice.

[2] **[3]** In short, traditional public fora are areas that have historically been open to the public for speech activities. Thus, even though the Act says nothing about speech on its face, there is no doubt—and respondents do not dispute —that it restricts access to traditional public fora and is therefore subject to First Amendment scrutiny. See Brief for Respondents 26 (although "[b]y its terms, the Act regulates ***477** only conduct," it "incidentally regulates the place and time of protected speech").

[4] **[5]** **[6]** Consistent with the traditionally open character of public streets and sidewalks, we have held that the government's ability to restrict speech in such locations is "very limited." *Grace, supra,* at 177, 103 S.Ct. 1702. In particular, the guiding First Amendment principle that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" applies with full force in a traditional public forum. *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972). As a general rule, in such a forum the government may not "selectively ... shield the public from some kinds of speech on the ground that they are more offensive than

others." *Erznoznik v. Jacksonville,* 422 U.S. 205, 209, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975).

[7] We have, however, afforded the government somewhat wider leeway to regulate features of speech unrelated to its content. "[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " *Ward,* 491 U.S., at 791, 109 S.Ct. 2746 (quoting *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)). [2]

****2530** While the parties agree that this test supplies the proper framework for assessing the constitutionality of the Massachusetts Act, they disagree about whether the Act satisfies the test's three requirements.

***478** III

[8] Petitioners contend that the Act is not content neutral for two independent reasons: First, they argue that it discriminates against abortion-related speech because it establishes buffer zones only at clinics that perform abortions. Second, petitioners contend that the Act, by exempting clinic employees and agents, favors one viewpoint about abortion over the other. If either of these arguments is correct, then the Act must satisfy strict scrutiny—that is, it must be the least restrictive means of achieving a compelling state interest. See *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). Respondents do not argue that the Act can survive this exacting standard.

[9] Justice SCALIA objects to our decision to consider whether the statute is content based and thus subject to strict scrutiny, given that we ultimately conclude that it is not narrowly tailored. *Post,* at 2541 (opinion concurring in judgment). But we think it unexceptional to perform the first part of a multipart constitutional analysis first. The content-neutrality prong of the *Ward* test is logically antecedent to the narrow-tailoring prong, because it determines the appropriate level of scrutiny. It is not unusual for the Court to proceed sequentially in applying a constitutional test, even when the preliminary steps turn out not to be dispositive. See, *e.g., Bartnicki v. Vopper,* 532 U.S. 514, 526–527, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001); *Holder v. Humanitarian Law Project,* 561 U.S. 1, 25–28, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010) (concluding that a law was content based even though it ultimately survived strict scrutiny).

The Court does sometimes assume, without deciding, that a law is subject to a less stringent level of scrutiny, as we did earlier this Term in *McCutcheon v. Federal Election Commission,* 572 U.S. ——, ——, 134 S.Ct. 1434, 1445–1446, 188 L.Ed.2d 468 (2014) (plurality opinion). But the distinction between that case and this one seems clear: Applying any standard of review other than intermediate scrutiny in *McCutcheon*—the standard that was assumed to apply—would have required overruling a precedent. There ***479** is no similar reason to forgo the ordinary order of operations in this case.

At the same time, there is good reason to address content neutrality. In discussing whether the Act is narrowly tailored, see Part IV, *infra,* we identify a number of less-restrictive alternative measures that the Massachusetts Legislature might have adopted. Some apply only at abortion clinics, which raises the question whether those provisions are content neutral. See *infra,* at 2531 – 2532. While we need not (and do not) endorse any of those measures, it would be odd to consider them as possible alternatives if they were presumptively unconstitutional because they were content based and thus subject to strict scrutiny.

A

[10] The Act applies only at a "reproductive health care facility," defined as "a place, other than within or upon the grounds of a hospital, where abortions are ****2531** offered or performed." Mass. Gen. Laws, ch. 266, § 120E½(a). Given this definition, petitioners argue, "virtually all speech affected by the Act is speech concerning abortion," thus rendering the Act content based. Brief for Petitioners 23.

We disagree. To begin, the Act does not draw content-based distinctions on its face. Contrast *Boos v. Barry,* 485 U.S. 312, 315, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (ordinance prohibiting the display within 500 feet of a foreign embassy

of any sign that tends to bring the foreign government into " 'public odium' " or " 'public disrepute' "); *Carey v. Brown,* 447 U.S. 455, 465, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980) (statute prohibiting all residential picketing except "peaceful labor picketing"). The Act would be content based if it required "enforcement authorities" to "examine the content of the message that is conveyed to determine whether" a violation has occurred. *League of Women Voters of Cal., supra,* at 383, 104 S.Ct. 3106. But it does not. Whether petitioners violate the Act "depends" not "on what they say," *Humanitarian Law Project, supra,* at 27, 130 S.Ct. 2705, but simply on where they say it. Indeed, ***480** petitioners can violate the Act merely by standing in a buffer zone, without displaying a sign or uttering a word.

[11] **[12]** It is true, of course, that by limiting the buffer zones to abortion clinics, the Act has the "inevitable effect" of restricting abortion-related speech more than speech on other subjects. Brief for Petitioners 24 (quoting *United States v. O'Brien,* 391 U.S. 367, 384, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics. On the contrary, "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward, supra,* at 791, 109 S.Ct. 2746. The question in such a case is whether the law is " 'justified without reference to the content of the regulated speech.' " *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); emphasis deleted).

The Massachusetts Act is. Its stated purpose is to "increase forthwith public safety at reproductive health care facilities." 2007 Mass. Acts p. 660. Respondents have articulated similar purposes before this Court—namely, "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways." Brief for Respondents 27; see, *e.g.,* App. 51 (testimony of Attorney General Coakley); *id.,* at 67–70 (testimony of Captain William B. Evans of the Boston Police); *id.,* at 79–80 (testimony of Mary Beth Heffernan, Undersecretary for Criminal Justice); *id.,* at 122–124 (affidavit of Captain Evans). It is not the case that "[e]very objective indication shows that the provision's primary purpose is to restrict speech that opposes abortion." *Post,* at 2544.

We have previously deemed the foregoing concerns to be content neutral. See *Boos,* 485 U.S., at 321, 108 S.Ct. 1157 (identifying "congestion," "interference with ingress or egress," and "the need to protect ... security" as content-neutral concerns). ***481** Obstructed access and congested sidewalks are problems no matter what caused them. A group of individuals can obstruct clinic access and clog sidewalks just as much when they loiter as when they protest abortion or counsel patients.

To be clear, the Act would not be content neutral if it were concerned with undesirable ****2532** effects that arise from "the direct impact of speech on its audience" or "[l]isteners' reactions to speech." *Ibid.* If, for example, the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech. All of the problems identified by the Commonwealth here, however, arise irrespective of any listener's reactions. Whether or not a single person reacts to abortion protestors' chants or petitioners' counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks.

Petitioners do not really dispute that the Commonwealth's interests in ensuring safety and preventing obstruction are, as a general matter, content neutral. But petitioners note that these interests "apply outside every building in the State that hosts any activity that might occasion protest or comment," not just abortion clinics. Brief for Petitioners 24. By choosing to pursue these interests only at abortion clinics, petitioners argue, the Massachusetts Legislature evinced a purpose to "single[ ] out for regulation speech about one particular topic: abortion." Reply Brief 9.

We cannot infer such a purpose from the Act's limited scope. The broad reach of a statute can help confirm that it was not enacted to burden a narrower category of disfavored speech. See Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L.Rev. 413, 451–452 (1996). At the same time, however, "States adopt laws to address the problems that confront them. The First Amendment does not require States to regulate for problems that do not exist." *Burson v.* ***482** *Freeman,* 504 U.S. 191, 207, 112 S.Ct. 1846, 119 L.Ed.2d

5 (1992) (plurality opinion). The Massachusetts Legislature amended the Act in 2007 in response to a problem that was, in its experience, limited to abortion clinics. There was a record of crowding, obstruction, and even violence outside such clinics. There were apparently no similar recurring problems associated with other kinds of healthcare facilities, let alone with "every building in the State that hosts any activity that might occasion protest or comment." Brief for Petitioners 24. In light of the limited nature of the problem, it was reasonable for the Massachusetts Legislature to enact a limited solution. When selecting among various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more.

Justice SCALIA objects that the statute does restrict more speech than necessary, because "only one [Massachusetts abortion clinic] is known to have been beset by the problems that the statute supposedly addresses." *Post,* at 2544. But there are no grounds for inferring content-based discrimination here simply because the legislature acted with respect to abortion facilities generally rather than proceeding on a facility-by-facility basis. On these facts, the poor fit noted by Justice SCALIA goes to the question of narrow tailoring, which we consider below. See *infra,* at 2538 – 2540.

B

[13] Petitioners also argue that the Act is content based because it exempts four classes of individuals, Mass. Gen. Laws, ch. 266, §§ 120E½ (b)(1)-(4), one of which comprises "employees or agents of [a reproductive healthcare] facility acting within the scope of their employment." § 120E½(b)(2). This exemption, petitioners say, favors one side in the abortion debate and ****2533** thus constitutes viewpoint discrimination—an "egregious form of content discrimination," *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). In particular, petitioners argue ***483** that the exemption allows clinic employees and agents—including the volunteers who "escort" patients arriving at the Boston clinic—to speak inside the buffer zones.

[14] It is of course true that "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.' " *City of Ladue v. Gilleo,* 512 U.S. 43, 51, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994) (quoting *First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 785–786, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978)). At least on the record before us, however, the statutory exemption for clinic employees and agents acting within the scope of their employment does not appear to be such an attempt.

There is nothing inherently suspect about providing some kind of exemption to allow individuals who work at the clinics to enter or remain within the buffer zones. In particular, the exemption cannot be regarded as simply a carve-out for the clinic escorts; it also covers employees such as the maintenance worker shoveling a snowy sidewalk or the security guard patrolling a clinic entrance, see App. 95 (affidavit of Michael T. Baniukiewicz).

Given the need for an exemption for clinic employees, the "scope of their employment" qualification simply ensures that the exemption is limited to its purpose of allowing the employees to do their jobs. It performs the same function as the identical "scope of their employment" restriction on the exemption for "law enforcement, ambulance, fire-fighting, construction, utilities, public works and other municipal agents." § 120E½(b)(3). Contrary to the suggestion of Justice SCALIA, *post,* at 2546 – 2547, there is little reason to suppose that the Massachusetts Legislature intended to incorporate a common law doctrine developed for determining vicarious liability in tort when it used the phrase "scope of their employment" for the wholly different purpose of defining the scope of an exemption to a criminal statute. The limitation instead makes clear—with respect to both clinic ***484** employees and municipal agents—that exempted individuals are allowed inside the zones only to perform those acts authorized by their employers. There is no suggestion in the record that any of the clinics authorize their employees to speak about abortion in the buffer zones. The "scope of their employment" limitation thus seems designed to protect against exactly the sort of conduct that petitioners and Justice SCALIA fear.

Petitioners did testify in this litigation about instances in which escorts at the Boston clinic had expressed views about abortion to the women they were accompanying, thwarted petitioners' attempts to speak and hand literature to the women, and disparaged petitioners in various ways. See App. 165, 168–169, 177–178, 189–190. It is unclear from petitioners' testimony whether these alleged incidents

occurred within the buffer zones. There is no viewpoint discrimination problem if the incidents occurred outside the zones because petitioners are equally free to say whatever they would like in that area.

Even assuming the incidents occurred inside the zones, the record does not suggest that they involved speech within the scope of the escorts' employment. If the speech was beyond the scope of their employment, then each of the alleged incidents would violate the Act's express ****2534** terms. Petitioners' complaint would then be that the police were failing to *enforce* the Act equally against clinic escorts. Cf. *Hoye v. City of Oakland,* 653 F.3d 835, 849–852 (C.A.9 2011) (finding selective enforcement of a similar ordinance in Oakland, California). While such allegations might state a claim of official viewpoint discrimination, that would not go to the validity of the Act. In any event, petitioners nowhere allege selective enforcement.

[15] It would be a very different question if it turned out that a clinic authorized escorts to speak about abortion inside the buffer zones. See *post,* at 2549 (ALITO, J., concurring in judgment). In that case, the escorts would not seem to be ***485** violating the Act because the speech would be within the scope of their employment. [3] The Act's exemption for clinic employees would then facilitate speech on only one side of the abortion debate—a clear form of viewpoint discrimination that would support an as-applied challenge to the buffer zone at that clinic. But the record before us contains insufficient evidence to show that the exemption operates in this way at any of the clinics, perhaps because the clinics do not want to doom the Act by allowing their employees to speak about abortion within the buffer zones. [4]

We thus conclude that the Act is neither content nor viewpoint based and therefore need not be analyzed under strict scrutiny.

***486** IV

[16] **[17]** Even though the Act is content neutral, it still must be "narrowly tailored to serve a significant governmental interest." *Ward,* 491 U.S., at 796, 109 S.Ct. 2746 (internal quotation marks omitted). The tailoring requirement does not simply guard against an impermissible desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily "sacrific[ing] speech for efficiency." *Riley v.* ****2535** *National Federation of Blind of N. C., Inc.,* 487 U.S. 781, 795, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988).

[18] For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward,* 491 U.S., at 799, 109 S.Ct. 2746. Such a regulation, unlike a content-based restriction of speech, "need not be the least restrictive or least intrusive means of" serving the government's interests. *Id.,* at 798, 109 S.Ct. 2746. But the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.,* at 799, 109 S.Ct. 2746.

A

[19] As noted, respondents claim that the Act promotes "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways." Brief for Respondents 27. Petitioners do not dispute the significance of these interests. We have, moreover, previously recognized the legitimacy of the government's interests in "ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting ***487** a woman's freedom to seek pregnancy-related services." *Schenck v. Pro–Choice Network of Western N.Y.,* 519 U.S. 357, 376, 117 S.Ct. 855, 137 L.Ed.2d 1 (1997). See also *Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, 767–768, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). The buffer zones clearly serve these interests.

At the same time, the buffer zones impose serious burdens on petitioners' speech. At each of the three Planned Parenthood clinics where petitioners attempt to counsel patients, the zones carve out a significant portion of the adjacent public sidewalks, pushing petitioners well back from the clinics' entrances and driveways. The zones thereby compromise petitioners' ability to initiate the close, personal conversations that they view as essential to "sidewalk counseling."

For example, in uncontradicted testimony, McCullen explained that she often cannot distinguish patients from passersby outside the Boston clinic in time to initiate a conversation before they enter the buffer zone. App. 135. And even when she does manage to begin a discussion outside the zone, she must stop abruptly at its painted border, which she believes causes her to appear "untrustworthy" or "suspicious." *Id.,* at 135, 152. Given these limitations, McCullen is often reduced to raising her voice at patients from outside the zone—a mode of communication sharply at odds with the compassionate message she wishes to convey. *Id.,* at 133, 152–153. Clark gave similar testimony about her experience at the Worcester clinic. *Id.,* at 243–244.

These burdens on petitioners' speech have clearly taken their toll. Although McCullen claims that she has persuaded about 80 women not to terminate their pregnancies since the 2007 amendment, App. to Pet. for Cert. 42a, she also says that she reaches "far fewer people" than she did before the amendment, App. 137. Zarrella reports an even more precipitous decline in her success rate: She estimated having about 100 successful interactions over the years before the 2007 amendment, but not a single one since. ***488** *Id.,* at 180. And as for the Worcester clinic, Clark testified that "only one woman out of 100 will make the effort to walk across [the street] to speak with [her]." *Id.,* at 217.

****2536** The buffer zones have also made it substantially more difficult for petitioners to distribute literature to arriving patients. As explained, because petitioners in Boston cannot readily identify patients before they enter the zone, they often cannot approach them in time to place literature near their hands—the most effective means of getting the patients to accept it. *Id.,* at 179. In Worcester and Springfield, the zones have pushed petitioners so far back from the clinics' driveways that they can no longer even attempt to offer literature as drivers turn into the parking lots. *Id.,* at 213, 218, 252–253. In short, the Act operates to deprive petitioners of their two primary methods of communicating with patients.

The Court of Appeals and respondents are wrong to downplay these burdens on petitioners' speech. As the Court of Appeals saw it, the Constitution does not accord "special protection" to close conversations or "handbilling." 571 F.3d, at 180. But while the First Amendment does not guarantee a speaker the right to any particular form of expression, some forms—such as normal conversation and leafletting on a public sidewalk—have historically been more closely associated with the transmission of ideas than others.

[20] In the context of petition campaigns, we have observed that "one-on-one communication" is "the most effective, fundamental, and perhaps economical avenue of political discourse." *Meyer v. Grant,* 486 U.S. 414, 424, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988). See also *Schenck, supra,* at 377, 117 S.Ct. 855 (invalidating a "floating" buffer zone around people entering an abortion clinic partly on the ground that it prevented protestors "from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks"). And "handing out leaflets in the advocacy of a politically controversial viewpoint ***489** ... is the essence of First Amendment expression"; "[n]o form of speech is entitled to greater constitutional protection." *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 347, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995). See also *Schenck, supra,* at 377, 117 S.Ct. 855 ("Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment"). When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden. [5]

Respondents also emphasize that the Act does not prevent petitioners from engaging in various forms of "protest"—such as chanting slogans and displaying signs—outside the buffer zones. Brief for Respondents 50–54. That misses the point. Petitioners are not protestors. They seek not merely to express their opposition to abortion, but to inform women of various alternatives and to provide help in pursuing them. Petitioners believe that they can accomplish this objective only through personal, caring, consensual conversations. And for good reason: It is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm. While the record indicates that petitioners have been able to have a number of quiet ****2537** conversations outside the buffer zones, respondents have not refuted petitioners' testimony that the conversations have been far less frequent and far less successful since the buffer zones were instituted. It is thus no answer to say that petitioners can still be "seen and heard" by women within the buffer zones. *Id.,* at 51–53. If all that the women can see and hear are ***490** vociferous opponents of abortion, then the buffer zones have effectively stifled petitioners' message.

Finally, respondents suggest that, at the Worcester and Springfield clinics, petitioners are prevented from communicating with patients not by the buffer zones but by the fact that most patients arrive by car and park in the clinics' private lots. *Id.,* at 52. It is true that the layout of the two clinics would prevent petitioners from approaching the clinics' *doorways,* even without the buffer zones. But petitioners do not claim a right to trespass on the clinics' property. They instead claim a right to stand on the public sidewalks by the driveway as cars turn into the parking lot. Before the buffer zones, they could do so. Now they must stand a substantial distance away. The Act alone is responsible for that restriction on their ability to convey their message.

B

1

The buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests. At the outset, we note that the Act is truly exceptional: Respondents and their *amici* identify no other State with a law that creates fixed buffer zones around abortion clinics. [6] That of course does not mean that the law is invalid. It does, however, raise concern that the Commonwealth has too readily forgone options that could serve its interests just as well, without substantially burdening the kind of speech in which petitioners wish to engage.

That is the case here. The Commonwealth's interests include ensuring public safety outside abortion clinics, preventing harassment and intimidation of patients and clinic staff, and combating deliberate obstruction of clinic entrances. The Act itself contains a separate provision, subsection ***491** (e)—unchallenged by petitioners—that prohibits much of this conduct. That provision subjects to criminal punishment "[a]ny person who knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility." Mass. Gen. Laws, ch. 266, § 120E½(e). [7] If Massachusetts determines that broader prohibitions along the same lines are necessary, it could enact legislation similar to the federal Freedom of Access to Clinic Entrances Act of 1994 (FACE Act), 18 U.S.C. § 248(a)(1), which subjects to both criminal and civil penalties anyone who "by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services." Some dozen other States have done so. See Brief for State of New ****2538** York et al. as *Amici Curiae* 13, and n. 6. If the Commonwealth is particularly concerned about harassment, it could also consider an ordinance such as the one adopted in New York City that not only prohibits obstructing access to a clinic, but also makes it a crime "to follow and harass another person within 15 feet of the premises of a reproductive health care facility." N.Y.C. Admin. Code § 8–803(a)(3) (2014). [8]

***492** The Commonwealth points to a substantial public safety risk created when protestors obstruct driveways leading to the clinics. See App. 18, 41, 51, 88–89, 99, 118–119. That is, however, an example of its failure to look to less intrusive means of addressing its concerns. Any such obstruction can readily be addressed through existing local ordinances. See, *e.g.,* Worcester, Mass., Revised Ordinances of 2008, ch. 12, § 25(b) ("No person shall stand, or place any obstruction of any kind, upon any street, sidewalk or crosswalk in such a manner as to obstruct a free passage for travelers thereon"); Boston, Mass., Municipal Code, ch. 16–41.2(d) (2013) ("No person shall solicit while walking on, standing on or going into any street or highway used for motor vehicle travel, or any area appurtenant thereto (including medians, shoulder areas, bicycle lanes, ramps and exit ramps)").

All of the foregoing measures are, of course, in addition to available generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like.

In addition, subsection (e) of the Act, the FACE Act, and the New York City anti-harassment ordinance are all enforceable not only through criminal prosecutions but also through public and private civil actions for injunctions and other equitable relief. See Mass. Gen. Laws § 120E½(f); 18 U.S.C. § 248(c)(1); N.Y.C. Admin. Code §§ 8–804N.Y.C. Admin. Code §§ 8–804, 8–805. We have previously noted the First Amendment virtues of targeted injunctions as alternatives to broad, prophylactic measures. Such an injunction "regulates the activities, and perhaps the speech, of a group," but only "because of the group's past *actions* in the context of a specific dispute between real parties." *Madsen,* 512 U.S., at 762, 114 S.Ct. 2516 (emphasis added). Moreover, given the equitable nature of injunctive

relief, courts can tailor a remedy to ensure that it restricts no more speech than necessary. See, *e.g.,* *id.,* at 770, 114 S.Ct. 2516; *Schenck,* 519 U.S., at 380–381, 117 S.Ct. 855. In short, injunctive relief focuses on the precise individuals and the precise conduct causing a particular problem. The Act, by contrast, categorically excludes non-exempt ***493** individuals from the buffer zones, unnecessarily sweeping in innocent individuals and their speech.

The Commonwealth also asserts an interest in preventing congestion in front of abortion clinics. According to respondents, even when individuals do not deliberately obstruct access to clinics, they can inadvertently do so simply by gathering in large numbers. But the Commonwealth could address that problem through more targeted means. Some localities, for example, have ordinances that require crowds blocking a clinic entrance to disperse when ordered to do so by the police, and that forbid the individuals to reassemble within a certain distance of the clinic ****2539** for a certain period. See Brief for State of New York et al. as *Amici Curiae* 14–15, and n. 10. We upheld a similar law forbidding three or more people " 'to congregate within 500 feet of [a foreign embassy], and refuse to disperse after having been ordered so to do by the police,' " *Boos,* 485 U.S., at 316, 108 S.Ct. 1157 (quoting D.C.Code § 22–1115 (1938))—an order the police could give only when they " 'reasonably believe[d] that a threat to the security or peace of the embassy [was] present,' " 485 U.S., at 330, 108 S.Ct. 1157 (quoting *Finzer v. Barry,* 798 F.2d 1450, 1471 (C.A.D.C.1986)).

And to the extent the Commonwealth argues that even these types of laws are ineffective, it has another problem. The portions of the record that respondents cite to support the anticongestion interest pertain mainly to one place at one time: the Boston Planned Parenthood clinic on Saturday mornings. App. 69–71, 88–89, 96, 123. Respondents point us to no evidence that individuals regularly gather at other clinics, or at other times in Boston, in sufficiently large groups to obstruct access. For a problem shown to arise only once a week in one city at one clinic, creating 35–foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution.

The point is not that Massachusetts must enact all or even any of the proposed measures discussed above. The point is ***494** instead that the Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate.

2

Respondents have but one reply: "We have tried other approaches, but they do not work." Respondents emphasize the history in Massachusetts of obstruction at abortion clinics, and the Commonwealth's allegedly failed attempts to combat such obstruction with injunctions and individual prosecutions. They also point to the Commonwealth's experience under the 2000 version of the Act, during which the police found it difficult to enforce the six-foot no-approach zones given the "frenetic" activity in front of clinic entrances. Brief for Respondents 43. According to respondents, this history shows that Massachusetts has tried less restrictive alternatives to the buffer zones, to no avail.

We cannot accept that contention. Although respondents claim that Massachusetts "tried other laws already on the books," *id.,* at 41, they identify not a single prosecution brought under those laws within at least the last 17 years. And while they also claim that the Commonwealth "tried injunctions," *ibid.,* the last injunctions they cite date to the 1990s, see *id.,* at 42 (citing *Planned Parenthood League of Mass., Inc. v. Bell,* 424 Mass. 573, 677 N.E.2d 204 (1997); *Planned Parenthood League of Mass., Inc. v. Operation Rescue,* 406 Mass. 701, 550 N.E.2d 1361 (1990)). In short, the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective.

Respondents contend that the alternatives we have discussed suffer from two defects: First, given the "widespread" nature of the problem, it is simply not "practicable" to rely on individual prosecutions and injunctions. Brief for Respondents 45. But far from being "widespread," the ***495** problem appears from the record to be limited principally to the Boston clinic on Saturday mornings. Moreover, by their own account, the police appear perfectly capable of singling out lawbreakers. The legislative testimony preceding the 2007Act ****2540** revealed substantial police and video monitoring at the clinics, especially when large gatherings were anticipated. Captain Evans testified that his officers are so familiar with the scene outside the Boston clinic that they "know all the players down there." App. 69. And

Attorney General Coakley relied on video surveillance to show legislators conduct she thought was "clearly against the law." *Id.,* at 78. If Commonwealth officials can compile an extensive record of obstruction and harassment to support their preferred legislation, we do not see why they cannot do the same to support injunctions and prosecutions against those who might deliberately flout the law.

The second supposed defect in the alternatives we have identified is that laws like subsection (e) of the Act and the federal FACE Act require a showing of intentional or deliberate obstruction, intimidation, or harassment, which is often difficult to prove. Brief for Respondents 45–47. As Captain Evans predicted in his legislative testimony, fixed buffer zones would "make our job so much easier." App. 68.

[21] Of course they would. But that is not enough to satisfy the First Amendment. To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier. A painted line on the sidewalk is easy to enforce, but the prime objective of the First Amendment is not efficiency. In any case, we do not think that showing intentional obstruction is nearly so difficult in this context as respondents suggest. To determine whether a protestor intends to block access to a clinic, a police officer need only order him to move. If he refuses, then there is no question that his continued conduct is knowing or intentional.

***496** For similar reasons, respondents' reliance on our decision in *Burson v. Freeman* is misplaced. There, we upheld a state statute that established 100–foot buffer zones outside polling places on election day within which no one could display or distribute campaign materials or solicit votes. 504 U.S., at 193–194, 112 S.Ct. 1846. We approved the buffer zones as a valid prophylactic measure, noting that existing "[i]ntimidation and interference laws fall short of serving a State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections." *Id.,* at 206–207, 112 S.Ct. 1846 (quoting *Buckley v. Valeo,* 424 U.S. 1, 28, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (*per curiam*)). Such laws were insufficient because "[v]oter intimidation and election fraud are ... difficult to detect." *Burson,* 504 U.S., at 208, 112 S.Ct. 1846. Obstruction of abortion clinics and harassment of patients, by contrast, are anything but subtle.

We also noted in *Burson* that under state law, "law enforcement officers generally are barred from the vicinity of the polls to avoid any appearance of coercion in the electoral process," with the result that "many acts of interference would go undetected." *Id.,* at 207, 112 S.Ct. 1846. Not so here. Again, the police maintain a significant presence outside Massachusetts abortion clinics. The buffer zones in *Burson* were justified because less restrictive measures were inadequate. Respondents have not shown that to be the case here.

Given the vital First Amendment interests at stake, it is not enough for Massachusetts simply to say that other approaches have not worked. [9]

****2541** Petitioners wish to converse with their fellow citizens about an important subject on the public streets and sidewalks—sites that have hosted discussions about the issues of the day throughout history. Respondents assert undeniably ***497** significant interests in maintaining public safety on those same streets and sidewalks, as well as in preserving access to adjacent healthcare facilities. But here the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers. It has done so without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes. The Commonwealth may not do that consistent with the First Amendment.

The judgment of the Court of Appeals for the First Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, with whom Justice KENNEDY and Justice THOMAS join, concurring in the judgment.

Today's opinion carries forward this Court's practice of giving abortion-rights advocates a pass when it comes to suppressing the free-speech rights of their opponents. There is an entirely separate, abridged edition of the First Amendment applicable to speech against abortion. See, *e.g., Hill v. Colorado,* 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000); *Madsen v. Women's Health Center, Inc.,* 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994).

The second half of the Court's analysis today, invalidating the law at issue because of inadequate "tailoring," is certainly attractive to those of us who oppose an abortion-speech edition of the First Amendment. But think again. This is an opinion that has Something for Everyone, and the more significant portion continues the onward march of abortion-speech-only jurisprudence. That is the first half of the Court's analysis, which concludes that a statute of this sort is not content based and hence not subject to so-called strict scrutiny. The Court reaches out to decide that question unnecessarily—or at least unnecessarily insofar as legal analysis is concerned.

I disagree with the Court's dicta (Part III) and hence see no reason to opine on its holding (Part IV).

***498** I. The Court's Content–Neutrality Discussion Is Unnecessary

The gratuitous portion of today's opinion is Part III, which concludes—in seven pages of the purest dicta—that subsection (b) of the Massachusetts Reproductive Health Care Facilities Act is not specifically directed at speech opposing (or even concerning) abortion and hence need not meet the strict-scrutiny standard applicable to content-based speech regulations. [1] Inasmuch as Part IV holds that the Act is unconstitutional because it does not survive the lesser level of scrutiny associated with content-neutral "time, place, and manner" regulations, there is no principled ****2542** reason for the majority to decide whether the statute is subject to strict scrutiny.

Just a few months past, the Court found it unnecessary to "parse the differences between ... two [available] standards" where a statute challenged on First Amendment grounds "fail[s] even under the [less demanding] test." *McCutcheon v. Federal Election Comm'n,* 572 U.S. ——, ——, 134 S.Ct. 1434, 1446, 188 L.Ed.2d 468 (2014) (plurality opinion). What has changed since then? Quite simple: This is an abortion case, and *McCutcheon* was not. [2] By engaging in constitutional dictum here (and reaching the wrong result), the majority can preserve the ability of jurisdictions ***499** across the country to restrict antiabortion speech without fear of rigorous constitutional review. With a dart here and a pleat there, such regulations are sure to satisfy the tailoring standards applied in Part IV of the majority's opinion.

The Court cites two cases for the proposition that "[i]t is not unusual for the Court to proceed sequentially in applying a constitutional test, even when the preliminary steps turn out not to be dispositive." *Ante,* at 2530 (citing *Bartnicki v. Vopper,* 532 U.S. 514, 526–527, 121 S.Ct. 1753, 149 L.Ed.2d 787 (2001); *Holder v. Humanitarian Law Project,* 561 U.S. 1, 25–28, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010)). Those cases provide little cover. In both, there was no disagreement among the Members of the Court about whether the statutes in question discriminated on the basis of content. [3] There was thus little harm in answering the constitutional question that was "logically antecedent." *Ante,* at 2530. In the present case, however, content neutrality is far from clear (the Court is divided 5–to–4), and the parties vigorously dispute the point, see *ibid.* One would have thought that the Court would avoid the issue by simply assuming without deciding the logically antecedent point. We have done that often before. See, *e.g., Herrera v. Collins,* 506 U.S. 390, 417, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); *Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 222–223, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985); *Board of Curators of Univ. of Mo. v. Horowitz,* 435 U.S. 78, 91–92, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978).

The Court points out that its opinion goes on to suggest (in Part IV) possible alternatives that apply only at abortion clinics, which therefore "raises the question whether those ***500** provisions are content neutral." *Ante,* at 2530. Of course, the Court has no obligation to provide advice on alternative speech restrictions, and appending otherwise unnecessary constitutional pronouncements to such advice produces nothing but an impermissible advisory opinion.

****2543** By the way, there is dictum favorable to advocates of abortion rights even in Part IV. The Court invites Massachusetts, as a means of satisfying the tailoring requirement, to "consider an ordinance such as the one adopted in New York City that ... makes it a crime 'to follow and harass another person within 15 feet of the premises of a reproductive health care facility.' " *Ante,* at 2538 (quoting N.Y.C. Admin. Code § 8–803(a)(3) (2014)). Is it harassment, one wonders, for Eleanor McCullen to ask a woman, quietly and politely, two times, whether she will take literature or whether she has any questions? Three times? Four times? It seems to me far from certain that First Amendment rights can be imperiled by threatening jail time (only at "reproductive

health care facilit[ies],” of course) for so vague an offense as “follow[ing] and harass[ing].” It is wrong for the Court to give its approval to such legislation without benefit of briefing and argument.

II. The Statute Is Content Based and Fails Strict Scrutiny

Having eagerly volunteered to take on the level-of-scrutiny question, the Court provides the wrong answer. Petitioners argue for two reasons that subsection (b) articulates a content-based speech restriction—and that we must therefore evaluate it through the lens of strict scrutiny.

A. Application to Abortion Clinics Only

First, petitioners maintain that the Act targets abortion-related—for practical purposes, abortion-opposing—speech because it applies outside abortion clinics only (rather than outside other buildings as well).

***501** Public streets and sidewalks are traditional forums for speech on matters of public concern. Therefore, as the Court acknowledges, they hold a “ ‘special position in terms of First Amendment protection.’ ” *Ante,* at 2529 (quoting *United States v. Grace,* 461 U.S. 171, 180, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983)). Moreover, “the public spaces outside of [abortion-providing] facilities ... ha[ve] become, by necessity and by virtue of this Court's decisions, a forum of last resort for those who oppose abortion.” *Hill,* 530 U.S., at 763, 120 S.Ct. 2480 (SCALIA, J., dissenting). It blinks reality to say, as the majority does, that a blanket prohibition on the use of streets and sidewalks where speech on only one politically controversial topic is likely to occur—and where that speech can most effectively be communicated—is not content based. Would the Court exempt from strict scrutiny a law banning access to the streets and sidewalks surrounding the site of the Republican National Convention? Or those used annually to commemorate the 1965 Selma–to–Montgomery civil rights marches? Or those outside the Internal Revenue Service? Surely not.

The majority says, correctly enough, that a facially neutral speech restriction escapes strict scrutiny, even when it “may disproportionately affect speech on certain topics,” so long as it is “justified without reference to the content of the regulated speech.” *Ante,* at 2531 (internal quotation marks omitted). But the cases in which the Court has previously found that standard satisfied—in particular, *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), both of which the majority cites—are a far cry from what confronts us here.

Renton upheld a zoning ordinance prohibiting adult motion-picture theaters within 1,000 feet of residential neighborhoods, churches, parks, and schools. The ordinance was content neutral, the Court held, because its purpose was not to suppress pornographic speech *qua* speech but, ****2544** rather, to mitigate the “secondary effects” of adult theaters—including by “prevent[ing] crime, protect[ing] the city's retail ***502** trade, [and] maintain[ing] property values.” 475 U.S., at 47, 48, 106 S.Ct. 925. The Court reasoned that if the city “ ‘had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location.’ ” *Id.,* at 48, 106 S.Ct. 925 (quoting *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 82, n. 4, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (Powell, J., concurring in part)). *Ward,* in turn, involved a New York City regulation requiring the use of the city's own sound equipment and technician for events at a bandshell in Central Park. The Court held the regulation content neutral because its “principal justification [was] the city's desire to control noise levels,” a justification that “ ‘ha[d] nothing to do with [the] content’ ” of respondent's rock concerts or of music more generally. 491 U.S., at 792, 109 S.Ct. 2746. The regulation “ha[d] no material impact on any performer's ability to exercise complete artistic control over sound quality.” *Id.,* at 802, 109 S.Ct. 2746; see also *id.,* at 792–793, 109 S.Ct. 2746.

Compare these cases' reasons for concluding that the regulations in question were “justified without reference to the content of the regulated speech” with the feeble reasons for the majority's adoption of that conclusion in the present case. The majority points only to the statute's stated purpose of increasing “ ‘public safety’ ” at abortion clinics, *ante,* at 2531 (quoting 2007 Mass. Acts p. 660), and to the additional aims articulated by respondents before this Court—namely, protecting “ ‘patient access to healthcare ... and the unobstructed use of public sidewalks and roadways,’ ” *ante,* at 2531 (quoting Brief for Respondents 27). Really? Does a

statute become "justified without reference to the content of the regulated speech" simply because the statute itself and those defending it in court *say* that it is? Every objective indication shows that the provision's primary purpose is to restrict speech that opposes abortion.

I begin, as suggested above, with the fact that the Act burdens only the public spaces outside abortion clinics. One might have expected the majority to defend the statute's peculiar ***503** targeting by arguing that those locations regularly face the safety and access problems that it says the Act was designed to solve. But the majority does not make that argument because it would be untrue. As the Court belatedly discovers in Part IV of its opinion, although the statute applies to all abortion clinics in Massachusetts, only one is known to have been beset by the problems that the statute supposedly addresses. See *ante,* at 2538, 2539 – 2540. The Court uses this striking fact (a smoking gun, so to speak) as a basis for concluding that the law is insufficiently "tailored" to safety and access concerns (Part IV) rather than as a basis for concluding that it is not *directed* to those concerns at all, but to the suppression of antiabortion speech. That is rather like invoking the eight missed human targets of a shooter who has killed one victim to prove, not that he is guilty of attempted mass murder, but that *he has bad aim*.

Whether the statute "restrict[s] more speech than necessary" in light of the problems that it allegedly addresses, *ante,* at 2532 – 2533, is, to be sure, relevant to the tailoring component of the First Amendment analysis (the shooter doubtless did have bad aim), but it is also relevant—powerfully relevant—to whether the law is really directed to safety and access concerns or rather to the suppression of a particular type of speech. Showing that a ****2545** law that suppresses speech on a specific subject is so far-reaching that it applies even when the asserted non-speech-related problems are not present is persuasive evidence that the law is content based. In its zeal to treat abortion-related speech as a special category, the majority distorts not only the First Amendment but also the ordinary logic of probative inferences.

The structure of the Act also indicates that it rests on content-based concerns. The goals of "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways," Brief for Respondents 27, are already achieved by an earlier-enacted subsection of the statute, which provides criminal penalties for "[a]ny person who ***504** knowingly obstructs, detains, hinders, impedes or blocks another person's entry to or exit from a reproductive health care facility." § 120E½(e). As the majority recognizes, that provision is easy to enforce. See *ante,* at 2539 – 2540. Thus, the speech-free zones carved out by subsection (b) add nothing to safety and access; what they achieve, and what they were obviously designed to achieve, is the suppression of speech opposing abortion.

Further contradicting the Court's fanciful defense of the Act is the fact that subsection (b) was enacted as a more easily enforceable substitute for a prior provision. That provision did not exclude people entirely from the restricted areas around abortion clinics; rather, it forbade people in those areas to approach within six feet of another person *without that person's consent* "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such other person." § 120E½(b) (West 2000). As the majority acknowledges, that provision was "modeled on a ... Colorado law that this Court had upheld in *Hill*." *Ante,* at 2525. And in that case, the Court recognized that the statute in question was directed at the suppression of unwelcome speech, vindicating what *Hill* called "[t]he unwilling listener's interest in avoiding unwanted communication." 530 U.S., at 716, 120 S.Ct. 2480. The Court held that interest to be content neutral. *Id.,* at 719–725, 120 S.Ct. 2480.

The provision at issue here was indisputably meant to serve the same interest in protecting citizens' supposed right to avoid speech that they would rather not hear. For that reason, we granted a second question for review in this case (though one would not know that from the Court's opinion, which fails to mention it): whether *Hill* should be cut back or cast aside. See Pet. for Cert. i. (stating second question presented as "If *Hill* ... permits enforcement of this law, whether *Hill* should be limited or overruled"); 570 U.S. ——, 133 S.Ct. 2857, 186 L.Ed.2d 907 (2013) (granting certiorari without reservation). The majority ***505** avoids that question by declaring the Act content neutral on other (entirely unpersuasive) grounds. In concluding that the statute is content based and therefore subject to strict scrutiny, I necessarily conclude that *Hill* should be overruled. Reasons for doing so are set forth in the dissents in that case, see 530 U.S., at 741–765, 120 S.Ct. 2480 (SCALIA, J.); *id.,* at 765–790, 120 S.Ct. 2480 (KENNEDY, J.), and in the abundance of scathing academic commentary describing how *Hill* stands in contradiction to our First Amendment

jurisprudence.[4] ****2546** PROTECTING PEOPLE from speech they do not want to hear is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks.

One final thought regarding *Hill* : It can be argued, and it should be argued in the next case, that by stating that "the Act would not be content neutral if it were concerned with undesirable effects that arise from ... '[l]isteners' reactions to speech,' " *ante,* at 2531 – 2532 (quoting *Boos v. Barry,* 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (brackets in original)), and then holding the Act unconstitutional for being insufficiently tailored to safety and access concerns, the Court itself has *sub silentio* (and perhaps inadvertently) overruled *Hill*. The unavoidable implication of that holding is that protection against unwelcome speech cannot justify restrictions on the use of public streets and sidewalks.

B. Exemption for Abortion–Clinic Employees or Agents

Petitioners contend that the Act targets speech opposing abortion (and thus constitutes a presumptively invalid viewpoint-discriminatory restriction) for another reason ***506** as well: It exempts "employees or agents" of an abortion clinic "acting within the scope of their employment," § 120E½ (b)(2).

It goes without saying that "[g]ranting waivers to favored speakers (or ... denying them to disfavored speakers) would of course be unconstitutional." *Thomas v. Chicago Park Dist.,* 534 U.S. 316, 325, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002). The majority opinion sets forth a two-part inquiry for assessing whether a regulation is content based, but when it comes to assessing the exemption for abortion-clinic employees or agents, the Court forgets its own teaching. Its opinion jumps right over the prong that asks whether the provision "draw[s] ... distinctions on its face," *ante,* at 2531, and instead proceeds directly to the purpose-related prong, see *ibid.,* asking whether the exemption "represent[s] a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people," *ante,* at 2533 (internal quotation marks omitted). I disagree with the majority's negative answer to that question, but that is beside the point if the text of the statute—whatever its purposes might have been—"license[s] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V. v. St. Paul,* 505 U.S. 377, 392, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).

Is there any serious doubt that *abortion-clinic employees or agents* "acting within the scope of their employment" near clinic entrances may—indeed, often will—speak in favor of abortion ("You are doing the right thing")? Or speak in opposition to the message of abortion opponents —saying, for example, that "this is a safe facility" to rebut the statement that it is not? See Tr. of Oral Arg. 37–38. The Court's contrary assumption is simply incredible. And the majority makes no attempt to establish the further necessary proposition that abortion-clinic employees and agents do not engage in nonspeech activities directed to the suppression of antiabortion speech by hampering the efforts of counselors to speak to prospective clients. Are we to believe that a clinic ***507** employee sent out to "escort" prospective clients into the building would not seek to prevent a counselor like Eleanor McCullen ****2547** from communicating with them? He could pull a woman away from an approaching counselor, cover her ears, or make loud noises to drown out the counselor's pleas.

The Court points out that the exemption may allow into the speech-free zones clinic employees other than escorts, such as "the maintenance worker shoveling a snowy sidewalk or the security guard patrolling a clinic entrance." *Ante,* at 2533. I doubt that Massachusetts legislators had those people in mind, but whether they did is in any event irrelevant. Whatever other activity is permitted, so long as the statute permits speech favorable to abortion rights while excluding antiabortion speech, it discriminates on the basis of viewpoint.

The Court takes the peculiar view that, so long as the clinics have not specifically authorized their employees to speak in favor of abortion (or, presumably, to impede antiabortion speech), there is no viewpoint discrimination. See *ibid.* But it is axiomatic that "where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country[,] they are presumed to have been used in that sense unless the context compels to the contrary." *Standard Oil Co. of N.J. v. United States,* 221 U.S. 1, 59, 31 S.Ct. 502, 55 L.Ed. 619 (1911). The phrase "scope of employment" is a well-known common-law concept that includes "[t]he range of reasonable and foreseeable activities that an employee engages in while carrying out the employer's business." Black's Law Dictionary 1465 (9th ed. 2009). The employer need not specifically direct or sanction each aspect

of an employee's conduct for it to qualify. See Restatement (Second) of Agency § 229 (1957); see also Restatement (Third) of Agency § 7.07(2), and Comment *b* (2005). Indeed, employee conduct can qualify even if the employer specifically forbids it. See Restatement (Second) § 230. In any case, it is implausible that clinics would bar escorts from engaging in the ***508** sort of activity mentioned above. Moreover, a statute that forbids one side but not the other to convey its message does not become viewpoint neutral simply because the favored side chooses voluntarily to abstain from activity that the statute permits.

There is not a shadow of a doubt that the assigned or foreseeable conduct of a clinic employee or agent can include both speaking in favor of abortion rights and countering the speech of people like petitioners. See *post,* at 2549 (ALITO, J., concurring in judgment). Indeed, as the majority acknowledges, the trial record includes testimony that escorts at the Boston clinic "expressed views about abortion to the women they were accompanying, thwarted petitioners' attempts to speak and hand literature to the women, and disparaged petitioners in various ways," including by calling them " 'crazy.' " *Ante,* at 2528, 2533 (citing App. 165, 168–169, 177–178, 189–190). What a surprise! The Web site for the Planned Parenthood League of Massachusetts (which operates the three abortion facilities where petitioners attempt to counsel women), urges readers to "Become a Clinic Escort Volunteer" in order to "provide a safe space for patients by escorting them through protestors to the health center." Volunteer and Internship Opportunities, online at https://plannedparenthood volunteer.hire.com/viewjob.html?optlink—view=view–28592&ERForm ID=newjoblist&ERFormCode=any (as visited June 24, 2014, and available in Clerk of Court's case file). The dangers that the Web site attributes to "protestors" are related entirely to speech, not to safety or access. "Protestors," it reports, "hold signs, try to speak to patients entering the building, and distribute literature that can be misleading." *Ibid.* The "safe space" provided by escorts is protection from that speech.

****2548** Going from bad to worse, the majority's opinion contends that "the record before us contains insufficient evidence to show" that abortion-facility escorts have actually spoken in ***509** favor of abortion (or, presumably, hindered antiabortion speech) while acting within the scope of their employment. *Ante,* at 2534. Here is a brave new First Amendment test: Speech restrictions favoring one viewpoint over another are not content based unless it can be shown that the favored viewpoint has actually been expressed. A city ordinance closing a park adjoining the Republican National Convention to all speakers except those whose remarks have been approved by the Republican National Committee is thus not subject to strict scrutiny unless it can be shown that someone has given committee-endorsed remarks. For this Court to suggest such a test is astonishing. [5]

C. Conclusion

In sum, the Act should be reviewed under the strict-scrutiny standard applicable to content-based legislation. That standard requires that a regulation represent "the least restrictive means" of furthering "a compelling Government interest." *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) (internal quotation marks omitted). Respondents do not even attempt to argue that subsection (b) survives this test. See *ante,* at 2530. " Suffice it to say that if protecting people from unwelcome communications"—the actual purpose of the provision—"is a compelling state interest, the First Amendment is a dead letter." *Hill,* 530 U.S., at 748–749, 120 S.Ct. 2480 (SCALIA, J., dissenting).

III. Narrow Tailoring

Having determined that the Act is content based and does not withstand strict scrutiny, I need not pursue the inquiry conducted in Part IV of the Court's opinion—whether the statute is " 'narrowly tailored to serve a significant governmental interest,' " *ante,* at 2534 (quoting *Ward,* 491 U.S., at 796, 109 S.Ct. 2746 (internal quotation marks omitted)). I suppose I *could* do so, taking as a given the Court's erroneous content-neutrality conclusion in Part III; and if I did, I suspect I would agree with the majority that the legislation is not narrowly tailored to advance the interests asserted by respondents. But I prefer not to take part in the assembling of an apparent but specious unanimity. I leave both the plainly unnecessary and erroneous half and the arguably correct half of the Court's analysis to the majority.

* * *

The obvious purpose of the challenged portion of the Massachusetts Reproductive Health Care Facilities Act is to "protect" ****2549** prospective clients of abortion clinics

from having to hear abortion-opposing speech on public streets and sidewalks. The provision is thus unconstitutional root and branch and cannot be saved, as the majority suggests, by limiting its application to the single facility that has experienced the safety and access problems to which it is quite obviously not addressed. I concur only in the judgment that the statute is unconstitutional under the First Amendment.

Justice ALITO, concurring in the judgment.

***511** I agree that the Massachusetts statute at issue in this case, Mass. Gen. Laws, ch. 266, § 120E½(b) (West 2012), violates the First Amendment. As the Court recognizes, if the Massachusetts law discriminates on the basis of viewpoint, it is unconstitutional, see *ante,* at 2530, and I believe the law clearly discriminates on this ground.

The Massachusetts statute generally prohibits any person from entering a buffer zone around an abortion clinic during the clinic's business hours, § 120E½(c), but the law contains an exemption for "employees or agents of such facility acting within the scope of their employment." § 120E½ (b)(2). Thus, during business hours, individuals who wish to counsel against abortion or to criticize the particular clinic may not do so within the buffer zone. If they engage in such conduct, they commit a crime. See § 120E½ (d). By contrast, employees and agents of the clinic may enter the zone and engage in any conduct that falls within the scope of their employment. A clinic may direct or authorize an employee or agent, while within the zone, to express favorable views about abortion or the clinic, and if the employee exercises that authority, the employee's conduct is perfectly lawful. In short, petitioners and other critics of a clinic are silenced, while the clinic may authorize its employees to express speech in support of the clinic and its work.

Consider this entirely realistic situation. A woman enters a buffer zone and heads haltingly toward the entrance. A sidewalk counselor, such as petitioners, enters the buffer zone, approaches the woman and says, "If you have doubts about an abortion, let me try to answer any questions you may have. The clinic will not give you good information." At the same time, a clinic employee, as instructed by the management, approaches the same woman and says, "Come inside and we will give you honest answers to all your questions." The sidewalk counselor and the clinic employee expressed opposing viewpoints, but only the first violated the statute.

***512** Or suppose that the issue is not abortion but the safety of a particular facility. Suppose that there was a recent report of a botched abortion at the clinic. A nonemployee may not enter the buffer zone to warn about the clinic's health record, but an employee may enter and tell prospective clients that the clinic is safe.

It is clear on the face of the Massachusetts law that it discriminates based on viewpoint. Speech in favor of the clinic and its work by employees and agents is permitted; speech criticizing the clinic and its work is a crime. This is blatant viewpoint discrimination.

The Court holds not only that the Massachusetts law is viewpoint neutral but also that it does not discriminate based on content. See *ante,* at 2530 – 2533. The Court treats the Massachusetts law like one that bans all speech within the buffer zone. While such a law would be content neutral on its face, there are circumstances in which a law forbidding all speech at a particular location would not be content neutral in fact. Suppose, for example, that ****2550** a facially content-neutral law is enacted for the purpose of suppressing speech on a particular topic. Such a law would not be content neutral. See, *e.g., Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 645–646, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).

In this case, I do not think that it is possible to reach a judgment about the intent of the Massachusetts Legislature without taking into account the fact that the law that the legislature enacted blatantly discriminates based on viewpoint. In light of this feature, as well as the overbreadth that the Court identifies, see *ante,* at 2537 – 2539, it cannot be said, based on the present record, that the law would be content neutral even if the exemption for clinic employees and agents were excised. However, if the law were truly content neutral, I would agree with the Court that the law would still be unconstitutional on the ground that it burdens more speech than is necessary to serve the Commonwealth's asserted interests.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 The zone could have extended an additional 21 feet in width under the Act. Only the smaller area was marked off, however, so only that area has legal effect. See Mass. Gen. Laws, ch. 266, § 120E½(c).

2 A different analysis would of course be required if the government property at issue were not a traditional public forum but instead "a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." *Pleasant Grove City v. Summum,* 555 U.S. 460, 470, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009).

3 Less than two weeks after the instant litigation was initiated, the Massachusetts Attorney General's Office issued a guidance letter clarifying the application of the four exemptions. The letter interpreted the exemptions as not permitting clinic employees or agents, municipal employees or agents, or individuals passing by clinics "to express their views about abortion or to engage in any other partisan speech within the buffer zone." App. 93, 93–94. While this interpretation supports our conclusion that the employee exemption does not render the Act viewpoint based, we do not consider it in our analysis because it appears to *broaden* the scope of the Act—a criminal statute—rather than to adopt a " 'limiting construction.' " *Ward v. Rock Against Racism,* 491 U.S. 781, 796, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494, n. 5, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)).

4 Of course we do not hold that "[s]peech restrictions favoring one viewpoint over another are not content based unless it can be shown that the favored viewpoint has actually been expressed." *Post,* at 2548. We instead apply an uncontroversial principle of constitutional adjudication: that a plaintiff generally cannot prevail on an *as-applied* challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally *applied* to him. Specifically, when someone challenges a law as viewpoint discriminatory but it is not clear from the face of the law which speakers will be allowed to speak, he must show that he was prevented from speaking while someone espousing another viewpoint was permitted to do so. Justice SCALIA can decry this analysis as "astonishing" only by quoting a sentence that is explicitly limited to as-applied challenges and treating it as relevant to facial challenges. *Ibid.*

5 As a leading historian has noted:
"It was in this form—as pamphlets—that much of the most important and characteristic writing of the American Revolution appeared. For the Revolutionary generation, as for its predecessors back to the early sixteenth century, the pamphlet had peculiar virtues as a medium of communication. Then, as now, it was seen that the pamphlet allowed one to do things that were not possible in any other form." B. Bailyn, The Ideological Origins of the American Revolution 2 (1967).

6 *Amici* do identify five localities with laws similar to the Act here. Brief for State of New York et al. as *Amici Curiae* 14, n. 7.

7 Massachusetts also has a separate law prohibiting similar kinds of conduct at any "medical facility," though that law, unlike the Act, requires explicit notice before any penalty may be imposed. Mass. Gen. Laws, ch. 266, § 120E.

8 We do not "give [our] approval" to this or any of the other alternatives we discuss. *Post,* at 4. We merely suggest that a law like the New York City ordinance could in principle constitute a permissible alternative. Whether such a law would pass constitutional muster would depend on a number of other factors, such as whether the term "harassment" had been authoritatively construed to avoid vagueness and overbreadth problems of the sort noted by Justice SCALIA.

9 Because we find that the Act is not narrowly tailored, we need not consider whether the Act leaves open ample alternative channels of communication. Nor need we consider petitioners' overbreadth challenge.

* * *

1 To reiterate, the challenged provision states that "[n]o person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway" of such a facility or within an alternative rectangular area. Mass. Gen. Laws, ch. 266, § 120E½ (b) (West 2012). And the statute defines a "reproductive health care facility" as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." § 120E½(a).

2 The Court claims that *McCutcheon* declined to consider the more rigorous standard of review because applying it "would have required overruling a precedent." *Ante,* at 2530. That hardly distinguishes the present case, since, as discussed later

in text, the conclusion that this legislation escapes strict scrutiny does violence to a great swath of our First Amendment jurisprudence.

3 See *Bartnicki,* 532 U.S., at 526, 121 S.Ct. 1753 ("We agree with petitioners that § 2511(1)(c), as well as its Pennsylvania analog, is in fact a content-neutral law of general applicability"); *id.,* at 544, 121 S.Ct. 1753 (Rehnquist, C.J., dissenting) ("The Court correctly observes that these are 'content-neutral law[s] of general applicability' " (brackets in original)); *Humanitarian Law Project,* 561 U.S., at 27, 130 S.Ct. 2705 ("[Section] 2339B regulates speech on the basis of its content"); *id.,* at 45, 130 S.Ct. 2705 (BREYER, J., dissenting) ("[W]here, as here, a statute applies criminal penalties and at least arguably does so on the basis of content-based distinctions, I should think we would scrutinize the statute and justifications 'strictly' ").

4 "*Hill* ... is inexplicable on standard free-speech grounds [,] and ... it is shameful the Supreme Court would have upheld this piece of legislation on the reasoning that it gave." Constitutional Law Symposium, Professor Michael W. McConnell's Response, 28 Pepperdine L. Rev. 747 (2001). "I don't think [*Hill*] was a difficult case. I think it was slam-dunk simple and slam-dunk wrong." *Id.,* at 750 (remarks of Laurence Tribe). The list could go on.

5 The Court states that I can make this assertion "only by quoting a sentence that is explicitly limited to as-applied challenges and treating it as relevant to facial challenges." *Ante,* at 2534, n. 4. That is not so. The sentence in question appears in a paragraph immediately following rejection of the facial challenge, which begins: "It would be a very different question if it turned out that a clinic authorized escorts to speak about abortion inside the buffer zones." *Ante,* at 2534. And the prior discussion regarding the facial challenge points to the fact that "[t]here is no suggestion in the record that any of the clinics authorize their employees to speak about abortion in the buffer zones." *Ante,* at 2533. To be sure, the paragraph in question then goes on to concede only that the statute's constitutionality *as applied* would depend upon explicit clinic authorization. Even that seems to me wrong. Saying that voluntary action by a third party can cause an otherwise valid statute to violate the First Amendment as applied seems to me little better than saying it can cause such a statute to violate the First Amendment facially. A statute that punishes me for speaking unless *x* chooses to speak is unconstitutional facially and as applied, without reference to *x* 's action.

582 F.Supp. 592
United States District Court,
N.D. Texas,
Amarillo Division.

HOLY SPIRIT ASSOCIATION FOR the **UNIFICATION** OF **WORLD CHRISTIANITY** and Edward O'Grady, et al., Plaintiffs,
v.
Jerry A. **HODGE**, Mayor of Amarillo, et al., Defendants.

Civ. A. No. CA–2–78–129.
|
March 8, **1984**.

Synopsis
Church and church members brought civil rights action challenging constitutionality of city ordinance regulating licensing of solicitations. On motion for summary judgment, the District Court, Mary Lou Robinson, J., held that: (1) ordinance was unconstitutional where, even though it established administrative appeal mechanism, it did not require prompt judicial proceedings or assurance that interim restraints would be of brief duration; (2) certain provisions establishing grounds for denying permits were unconstitutional because they were vague, or constituted cost-effectiveness evaluation or impermissible content-based regulation; and (3) certain disclosure and reporting provisions were unconstitutional where they had potential chilling effect on exercise of First Amendment rights.

Motion granted.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (29)

[1] Federal Civil Procedure
Proceedings in which judgment is authorized

Summary judgment is appropriate when law is challenged as facially inconsistent with First Amendment since whether ordinance is void on its face because it impinges upon constitutionally protected activities is legal, not factual, question. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[2] Constitutional Law
Licenses

Church members who had been arrested, charged, and convicted of violating city ordinance regulating licensing of solicitations had standing to file suit challenging constitutionality of the ordinance under the First Amendment. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[3] Constitutional Law
Licenses

Church whose members had been arrested, charged, and convicted of violating city ordinance regulating licensing of solicitations had standing to bring suit challenging constitutionality of the ordinance under the First Amendment where significant portion of its members' activities consisted of public place proselytizing and soliciting. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[4] Constitutional Law
Licenses and permits in general

City ordinance regulating licensing of solicitations was unconstitutional infringement on First Amendment rights of solicitors where, even though it established administrative appeal mechanism, it did not require institution of prompt judicial proceedings in which city bore burden of justifying its refusal to issue requested permit, assure interim restraint would be of brief duration, or guarantee swift, final judicial action. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[5] Municipal Corporations
Permits

City ordinance denying permit for solicitation if statements made in application are not true was constitutional. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[6] Municipal Corporations
Permits

City ordinance denying permit for solicitation on ground that any person connected with soliciting has been convicted of a crime involving moral turpitude was unconstitutional. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[7] Municipal Corporations
Permits

City ordinance denying permit for solicitation on ground that applicant has made false statements to any member of the public with regard to charitable solicitations campaign was unconstitutional where city solicitations board was given no guidance as to how to make such determinations. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[8] Municipal Corporations
Permits

City ordinance denying permit for solicitation on ground that applicant has made false statements in application or at hearing on application was constitutional. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[9] Municipal Corporations
Permits

City ordinance denying permit for solicitation on ground that applicant has publicly represented that permit is endorsement or recommendation of its cause was unconstitutional where city solicitations board was given no guidance as to how to make such determinations. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[10] Municipal Corporations
Permits

City ordinance denying permit for solicitation on ground that applicant has violated any of the terms of the permit was unconstitutional since denying permit for prior misconduct was impermissible without showing of direct, immediate, and irreparable damage. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[11] Constitutional Law
Solicitation; distribution of literature

City ordinance denying permit for solicitation based on cost-effectiveness evaluation of the campaign was unconstitutional infringement on free exercise rights of religious minorities. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[12] Municipal Corporations
Permits

City ordinance denying permit for solicitation on ground that applicant has failed to keep or observe any promise or representation with regard to allocation of funds solicited was unconstitutional. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[13] Constitutional Law
Licenses, permits, and certifications in general

Municipal Corporations
Permits

City ordinance denying permit for solicitation on ground that project was not being administered by local responsible board of directors or committee was unconstitutional since terms "local" and "responsible" were vague and since it discriminated against foreign citizens. U.S.C.A. Const. Art. 4, § 2, cl. 1; Amend. 1.

Cases that cite this headnote

[14] Constitutional Law

Licenses and permits in general

Municipal Corporations

Permits

City ordinance denying permit for solicitation unless paid promoters were adequately covered by fidelity bond was unconstitutional since it amounted to nothing more than exaction of fee for exercise of First Amendment rights and since phrase "adequately covered" was vague. U.S.C.A. Const.Amend. 1.

3 Cases that cite this headnote

[15] Constitutional Law

Licenses and permits in general

Municipal Corporations

Permits

City ordinance denying permit for solicitation if, even though project was worthy, it did not present reasonably urgent need at particular time was unconstitutional where phrases "worthy" and "reasonably urgent" were vague and where it constituted impermissible content-based regulation of free speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[16] Constitutional Law

Content-Based Regulations or Restrictions

Constitutional Law

Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising

Constitutional Law

Charities or religious organizations

Municipality may not discriminate in regulation of expression on basis of content of that expression nor may municipality select which issues may be discussed or debated or which charities may solicit on basis of need. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[17] Constitutional Law

Licenses and permits in general

City ordinance denying permit for solicitation on ground that project duplicates work of existing governmental or nongovernmental agency constituted impermissible content-based regulation. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[18] Charities

Statutory regulations

Constitutional Law

Licenses and permits in general

Municipal Corporations

Permits

City ordinance denying permit for solicitation if project could be merged with other similar campaigns or processed through United Way campaign was unconstitutional where it constituted impermissible content-based regulation, where merger condition was unconstitutionally vague, and where it limited mode of expression to be used by solicitors. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[19] Constitutional Law

Licenses and permits in general

Municipal Corporations

Permits

City ordinance denying permit for solicitation if local quota for national agency exceeds city solicitation board's yardstick formula for determining fair share percentage for city to national total was unconstitutional where it was impermissible content-based regulation and where terms "fair" and "equitable" were vague in absence of any guidelines. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[20] Constitutional Law

Licenses and permits in general

Municipal Corporations

Permits

City ordinance denying permit for solicitation if timing would conflict with other existing approved drives was unconstitutional where, to extent that the conflict was determined by looking to substance of the appeal, it constituted impermissible content-based regulation of time, place, and manner and, to extent that conflict was determined by looking to factors other than content, it was vague. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[21] Municipal Corporations

Permits

City ordinance authorizing revocation of permit for solicitation for making false statements to the public concerning the campaign, for representing that permit was endorsement of the campaign, for violating terms of the permit, or violating any term of the ordinance was unconstitutional, although allowing revocation for making false statements in application for permit was constitutional. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[22] Constitutional Law

Records or Information

Municipal Corporations

Permits

City ordinance requiring applicant for permit for solicitation to disclose information of methods of handling and disbursing of funds and a certified, detailed and complete financial statement or audit of parent organization for last preceding fiscal year was unconstitutional where it failed to identify precisely what detailed information was required to be provided and where requirement to disclose information pertaining to all funds violated privacy rights of members of soliciting organization. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[23] Constitutional Law

Licenses and permits in general

City ordinance requiring applicant for permit for solicitation to state maximum percentage of funds collected which are to be used to pay expenses of solicitation and collection was unconstitutional as cost-effectiveness evaluation. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[24] Constitutional Law

Disclosure requirements

City ordinance requiring applicant for permit for solicitation to state names of all officers, directors or trustees present when decisions were made to disclose information required by the ordinance was unconstitutional where it was not related to any legitimate governmental interest and had potential chilling effect on First Amendment rights. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[25] Constitutional Law

Disclosure requirements

City ordinance requiring applicant for permit for solicitation to provide detailed and complete statement of funds collected during preceding year was unconstitutional where it impermissibly chilled and intruded on First Amendment rights by requiring on its face a statement of applicant's worldwide solicitations and fund distributions and was not reasonably related to city's legitimate interests. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[26] Constitutional Law

Licenses, permits, and certifications in general

Municipal Corporations

Permits

City ordinance requiring applicant for permit for solicitation to give full information by separate report with respect to any solicitors or supervisors who have been convicted of penal offense involving moral turpitude was unconstitutional since phrase “full information” was vague in failing to identify precisely what information was required to be included. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[27] **Municipal Corporations**
Permits

City ordinance requiring applicant for permit for solicitation to furnish statement from chief of police that applicant and persons working under him had been fingerprinted and photographed and found not to have been convicted of penal offense involving moral turpitude was constitutional on its face where it furthered city's interest of controlling abuse of privilege of soliciting by criminals posing as solicitors. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[28] **Municipal Corporations**
Permits

City ordinance requiring organizations issued permits for solicitation to furnish detailed reports showing amount of funds raised was constitutional where it promoted city's interest in preventing fraud. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[29] **Constitutional Law**
Licenses and permits in general

City ordinance requiring applicant for permit for solicitation to pay permit fee of $10 was unconstitutional where it imposed exaction on privilege of using public forum for constitutionally-protected purposes and where city failed to demonstrate link between fee and costs of licensing process. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

Attorneys and Law Firms

***595** Barry A. Fisher, Los Angeles, Cal., Thomas Griffith, Lubbock, Tex., for plaintiffs.

Joe Harlan, Gibson, Ochsner & Adkins, Merril Nunn, Amarillo, Tex., for defendants.

MEMORANDUM OPINION

MARY LOU ROBINSON, District Judge.

Plaintiffs are the **Holy Spirit** Association for the **Unification** of **World Christianity** (**Unification** Church), and Edward O'Grady, a member of the **Unification** Church, who wish to solicit funds in Amarillo, Texas. The Plaintiffs, by this action under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2101–02, seek to enjoin the enforcement of the Amarillo Code of Ordinances, Article 4, Division 2, §§ 13–66 through 13–79, which regulate the licensing of solicitations. Defendants are officials responsible for the implementation and enforcement of the ordinance. The case is before the Court on Plaintiffs' Motion for Summary Judgment.

The solicitations ordinance at issue is appended to this memorandum.

I. Propriety of Summary Judgment

[1] Summary judgment is appropriate when a law is challenged as facially inconsistent with the First Amendment since "whether an ordinance is void on its face because it impinges upon constitutionally protected activities is a legal, not a factual question...." ***Holy Spirit*** *Association for the* ***Unification*** *of* ***World Christianity*** *v. Alley,* 460 F.Supp. 346, 347 (N.D.Tex.1978). Plaintiffs have raised no challenges other than their facial ones.

II. Standing

"The essence of the standing inquiry is whether the parties seeking to invoke the Court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions.' " *Duke Power Co. v. Carolina Environmental Study Group,* 438 **U.S**. 59, 72, 98 S.Ct. 2620, 2629, 57 L.Ed.2d 595 (1978), quoting *Baker v. Carr,* 369 **U.S**. 186, 204, 82 S.Ct. 691, 703, 7

L.Ed.2d 663 (1962). This requirement of a "personal stake" must consist of "a 'distinct and palpable injury ...' to the plaintiff," *Duke Power, supra,* 438 U.S. at 72, 98 S.Ct. at 2629 quoting *Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975), and "a 'fairly traceable' ***596** causal connection between the claimed injury and the challenged conduct," *Duke Power, supra,* 438 U.S. at 72, 98 S.Ct. at 2629, quoting *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 261, 97 S.Ct. 555, 561, 50 L.Ed.2d 450 (1977). *See Larson v. Valente,* 456 U.S. 228, 238–39, 102 S.Ct. 1673, 1680, 72 L.Ed.2d 33 (1982).

[2] A personal stake in the outcome of the controversy has usually been assured in First Amendment cases by the fact that criminal proceedings have been previously instigated against the Plaintiff. *See, e.g., Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Cox v. Louisiana,* 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); *Kunz v. New York,* 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951). Here, Plaintiff O'Grady and other members of the Unification Church have been arrested, charged and convicted of violating the Amarillo ordinance on at least two occasions before this suit was filed. Thus, he has met the standing requirements of Article III. *Cf. United States v. Grace,* 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (plaintiff had standing to challenge constitutionality of statute forbidding picketing at Supreme Court building after twice being told to cease handing out leaflets on pain of arrest).

[3] The Unification Church has a personal stake in the outcome of this suit because a significant portion of its members' activities consists of door-to-door and public place proselytizing and solicitation of funds, the very acts the ordinance regulates. Since as demonstrated by Plaintiff O'Grady, the Unification Church's members would otherwise have standing to sue in their own right; the solicitation regulated is germane to the church's purpose; and only declaratory and equitable relief which does not require the participation of the church's individual members in the lawsuit is sought, the Unification Church has standing. *Hunt v. Washington State Apple Commission,* 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977).

Even if the Unification Church's own activities fell in an unprotected area, it would still have standing to challenge the ordinance by showing that it substantially abridges the First Amendment rights of other parties not before the Court, e.g., its members. *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 634, 100 S.Ct. 826, 834, 63 L.Ed.2d 73 (1980). As the Supreme Court explained in *Bigelow v. Virginia,* 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975):

> This "exception to the usual rules governing standing" reflects the transcendent value to all society of constitutionally protected expression. We give a [party] standing to challenge a statute on grounds that it is facially overbroad, regardless of whether his own conduct could be regulated by a more narrowly drawn statute, because of the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application."

Id. at 816, 95 S.Ct. at 2230 (citations omitted). Since O'Grady has met the case or controversy requirement of Article III, the Unification Church has standing under the exception.

III. The Right to Solicit, The Right to Regulate

The Supreme Court has recently succinctly summarized these conflicting rights:

> [C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular

> causes or for particular ***597** views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.

Village of Schaumburg, 444 **U.S**. at 632, 100 S.Ct. at 833. The first issue before this Court is whether the City of Amarillo has exercised its power to regulate solicitation in such a manner as not unduly to intrude upon the rights of free speech. *Id.* at 633, 100 S.Ct. at 834.

IV. Procedural Safeguards

[4] Plaintiffs charge that the permit system set up by §§ 13–66 to –79 is unconstitutional because it lacks the procedural safeguards required by the Supreme Court in *Freedman v. Maryland,* 380 **U.S**. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). This Court agrees.

In *Freedman* the Supreme Court held that Maryland's motion picture censorship statute unconstitutionally infringed on the First Amendment rights of exhibitors because it lacked the following procedural safeguards: (1) a requirement that the state initiate judicial action to restrain exhibition of the challenged film and bear the burden of proof in the judicial proceeding; (2) an assurance that the exhibitor will not be delayed from exhibiting the film while the state seeks protracted judicial review; and (3) a requirement that judicial review will be prompt.

While § 13–73 of the Amarillo Ordinance establishes an administrative appeal mechanism, the ordinance does not require: (1) the Solicitations Board to institute prompt judicial proceedings in which it bears the burden of justifying its refusal to issue the requested permit; (2) assurance that any interim restraint imposed pending judicial resolution on the merits will be of brief duration; and (3) a guarantee of swift, final judicial action. The lack of these safeguards in the ordinance renders the City of Amarillo's permit system constitutionally deficient. *Cf. Fernandes v. Limmer,* 663 F.2d 619, 628 (5th Cir.1981), *cert. dismissed,* 458 **U.S**. 1124, 103 S.Ct. 5, 73 L.Ed.2d 1395 (1982).

V. Discretion in the Board

Plaintiffs also allege that the permit system is unconstitutional because it vests discretion in the Solicitations Board to grant, deny or revoke permits without providing the Board with narrow and objective standards for exercising this discretion. The Supreme Court has plainly stated that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham,* 394 **U.S**. 147, 149, 150–51, 89 S.Ct. 935, 938–39, 22 L.Ed.2d 162 (1969). The grounds on which the Board may deny a permit will be analyzed *seriatim.*

[5] *§ 13–69(a).* This section authorizes the denial of a permit if "[o]ne or more of the statements made in the application are not true." It is constitutional. *Fernandes,* 663 F.2d at 629.

§ 13–69(b). This section authorizes denial of a permit if one of several grounds is met:

> (1) The applicant or person in charge of the charitable solicitation or in the case of soliciting for subscriptions or contracts for advertisements, books, magazines or periodicals, any person connected with such soliciting has been convicted in a court of competent jurisdiction of a crime involving moral turpitude; or
>
> (2) The applicant or such person has made or caused to be made false statements or misrepresentations to any member of the public with regard to the charitable solicitations campaign or other activities described in the permit; or
>
> (3) The applicant or such person has made or caused to be made false statements or misrepresentations in the application or at the hearing on the application; or
>
> ***598** (4) The applicant or such person has in any way publicly represented that the permit granted is an endorsement or recommendation of the cause for which the charitable solicitations campaign or solicitations for subscriptions or contracts, for advertisements, books, magazines or periodicals is being conducted; or
>
> (5) The applicant or such person has otherwise violated any of the terms of the permit or this division.

[6] The first ground is unconstitutional. *Fernandes,* 663 F.2d at 629–30. "Persons with prior criminal records are not First Amendment outcasts." *Id.*

[7] The second ground is unconstitutional. *Fernandes,* 663 F.2d at 629. The Solicitations Board is given no guidance as to how such determinations are to be made. As the Fifth Circuit has said, "[t]here are other means, such as penal laws, to prevent and punish frauds without intruding on the First Amendment freedoms." *Id.*

[8] The third ground is constitutional. *Fernandes,* 663 F.2d at 629. "Since gaining relevant information as to the applicant is proper, the falsification of such information is not constitutionally privileged." *Id.*

[9] The fourth ground is merely a variation on the theme of the second ground and is unconstitutional for the reasons stated above.

[10] The fifth ground is unconstitutional. Denying a permit for prior misconduct is impermissible, *Fernandes,* 663 F.2d at 632, "unless the government can show that the speech prohibited will 'surely result in direct, immediate, and irreparable damage.' " *Id.,* quoting *New York Times v. United States,* 403 U.S. 713, 730, 91 S.Ct. 2140, 2149, 29 L.Ed.2d 822 (1971).

[11] *§§ 13–69(c) & (d).* These sections authorize the denial of a permit if "[t]he applicant's actual solicitations cost in any charitable solicitation campaign conducted by it during any of the three (3) years immediately preceding the date of the application where a product was not sold, exceeded fifteen percent (15%) of the gross amount collected, and in a case where a product was sold, exceeded fifteen percent (15%) of the gross amount collected less the cost of the product," or if "[t]he expected fund raising expense of the applicant in the charitable solicitations campaign which application for permit is being made will exceed fifteen percent (15%) of the gross amount collected based upon accounting data concerning prior campaigns of the applicant and such other evidence as may be adduced at the hearing," respectively.

Both (c) and (d) are unconstitutional. *Village of Schaumburg,* 444 U.S. at 636–37, 100 S.Ct. at 835–36. "[A] cost-effectiveness evaluation on the free exercise rights of religious minorities ... cannot be justified." *Fernandes,* 663 F.2d at 631.

[12] *§ 13–69(e).* This section authorizes denial of a permit if the "[a]pplicant has failed to keep or observe any promise, agreement, representation or commitment with regard to the allocation of funds or methods of fund raising or solicitation made to the solicitations board in connection with any previous application." It is plainly unconstitutional. *Fernandes,* 663 F.2d at 632; *International Society for Krishna Consciousness v. Eaves,* 601 F.2d 809, 833 (5th Cir.1979); *Universal Amusement Co. v. Vance,* 587 F.2d 159, 165–66 (5th Cir.1978) (en banc), *aff'd,* 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980).

[13] *§ 13–69(f).* This section authorizes denial of a permit if "[i]n the case of charitable solicitations campaign [sic] that the project is not being administered by a local responsible board of directors or committee." It is unconstitutional for two reasons. One, the terms "local" and "responsible" are unconstitutionally vague because "men of common intelligence must necessarily guess at [their] meaning." *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). *See Hynes v. Mayor of Oradell,* 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976). Two, it impermissibly discriminates against non-Texas citizens in violation of the Privileges ***599** and Immunities Clause. U.S. Const. art. IV, § 2.

[14] *§ 13–69(i).* This section authorizes denial of a permit if any "[p]aid promoters of the petitioning organization are not adequately covered by a fidelity bond." It is unconstitutional because it amounts to nothing more than the exaction of a fee for the exercise of First Amendment rights, a practice condemned by the Supreme Court. "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley v. Valeo,* 424 U.S. 1, 49, 96 S.Ct. 612, 649, 46 L.Ed.2d 659 (1976). *See Harper v. Virginia State Bd. of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); *Jones v. City of Opelika,* 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290 (1943); *Grosjean v. American Press Co.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936). "[F]reedom of speech [must be] available to all, not

merely those who can pay their own way." *Murdock v. Pennsylvania,* 319 U.S. 105, 111, 63 S.Ct. 870, 874, 87 L.Ed. 1292 (1943) (daily licensing fee of $1.50 held to be an unconstitutional restriction on the free exercise of religious belief). *Cf. Collin v. Smith,* 578 F.2d 1197, 1207–09 (7th Cir.1978), *cert. denied,* 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978) (discussing requirement of insurance in order to obtain parade permit).

This section is also unconstitutional because the phrase "adequately covered" is unconstitutionally vague.

[15] **[16]** *§ 13–69(j).* This section authorized denial of a permit if "[i]n the case of a charitable solicitation campaign that while the project is worthy it does not present a reasonably urgent need at the particular time." It is unconstitutional. One, the phrases "worthy" and "reasonably urgent" are unconstitutionally vague. Two, denial of a permit on this ground would constitute impermissible content-based regulation of free speech. A municipality may not discriminate in the regulation of expression on the basis of the content of that expression. *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95, 92 S.Ct. 2286, 2289, 33 L.Ed.2d 212 (1972). A municipality may not select which issues may be discussed or debated, or which charities may solicit, on the basis of "need".

[17] *§ 13–69(k).* This section authorizes denial of a permit if "[i]n the case of a charitable solicitations campaign, the project duplicates the work of an existing governmental or non-governmental agency." It is unconstitutional. As with § 31–69(j), it constitutes impermissible content-based regulation.

[18] *§ 13–69(l).* This section authorizes denial of a permit if "[t]he project is of such a nature that it can be merged with other similar campaigns or it can be merged or processed through the annual United Way campaign." It is unconstitutional. One, as with §§ 13–69(j) & (k), it constitutes impermissible content-based regulation. Two, the phrase "of such a nature that it can be merged with other similar campaigns" is unconstitutionally vague. Three, it is an unconstitutional limitation of the mode of expression which may be used by the Plaintiffs. "The privilege of free speech carries with it freedom of choice as to the mode of expression that may be employed." 16 C.J.S. *Constitutional Law* § 213(1), at 1091 (1956). *Cf. Schneider v. New Jersey,* 308 U.S. 147, 163, 60 S.Ct. 146, 151, 84 L.Ed. 155 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.")

[19] *§ 13–69(m).* This section authorizes denial of a permit "[i]f the appeal emanates from a national agency, the local quota exceeds the 'yardstick formula' adopted by the city's solicitation board as Amarillo's equitable share of the organization's ***600** national goal based on indices which will be adopted by the city's solicitation board, as showing the fair share percentage for Amarillo to the national total." It is unconstitutional because it is impermissible content-based regulation. Further, "fair" and "equitable" shares are unconstitutionally vague terms in this context because the board has been given no guidelines for determining what is fair or equitable.

[20] *§ 13–69(n).* This section authorizes denial of a permit if "[t]he timing of the appeal will conflict with other existing approved drives." It is unconstitutional. While "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired ..., [a] major criterion for a valid time, place and manner restriction is that the restriction 'may not be based upon either the content or subject matter of speech.' " *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640, 647–48, 101 S.Ct. 2559, 2563–64, 69 L.Ed.2d 298 (1981) quoting *Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530, 536, 100 S.Ct. 2326, 2332, 65 L.Ed.2d 319 (1980). A valid time, place, and manner regulation must also "serve a significant governmental interest." *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council,* 425 U.S. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976). To the extent that "conflict" is determined by looking to the substance of an appeal, this section constitutes impermissible content-based regulation.

To the extent that "conflict" is determined by looking to factors other than content, the term is unconstitutionally vague because it fails to provide "narrow, objective, and definite standards to guide the [Solicitations Board]." *Shuttlesworth,* 394 U.S. at 151, 89 S.Ct. at 938. The Supreme Court has "consistently condemned licensing

systems which vest in an administrative official discretion to grant or withhold a permit upon board criteria unrelated to proper regulation of public places." *Id.* at 153, 89 S.Ct. at 940, quoting *Kunz v. New York,* 340 **U.S**. 290, 293–94, 71 S.Ct. 312, 314–15, 95 L.Ed. 280 (1951).

[21] *§ 13–72.* This section authorized revocation of a permit:

> If, after notice and hearing, the solicitations board shall determine and make findings of fact that any permit holder or any agent or representative of a permit holder [1] is making or has made any false statements or misrepresentations to any member of the public with regard to the campaign of solicitations or other activities described in the permit, or [2] has made false statements or misrepresentations in the application or at the hearing on the application, or [3] has in any way publicly represented that the permit granted hereunder is an endorsement or recommendation of the cause for which the charitable solicitations campaign is being conducted, or [4] has violated any of the terms of the permit or [5] has otherwise violated any of the terms of this division....

The Supreme Court has recognized that an "uncontrolled power of revocation ... is but the converse of [a] system of prior licensing." *Jones v. City of Opelika,* 316 **U.S**. 584, 615 n. 5, 62 S.Ct. 1231, 1247 n. 5, 86 L.Ed. 1691 (1942) (Murphy, J., dissenting), *adopted per curiam as majority opinion,* 319 **U.S**. 103, 63 S.Ct. 890, 87 L.Ed. 1290 (1943). The grounds for revocation contained in § 13–72 are essentially the same as the grounds for denying a permit under § 13–69(b) and suffer the same constitutional infirmities. For the reasons discussed under § 13–69(b), *supra,* reasons [1], [3], [4] and [5] in § 13–72 are unconstitutional and reason [2] is constitutional.

VI. Disclosure & Reporting

The Plaintiffs have also asserted that the reporting and disclosure requirements of the ordinance, §§ 13–68.3 and –74, are unconstitutional because of their intrusive and chilling effect on the Plaintiffs' First Amendment rights of free exercise of religion, freedom of association, and privacy.

***601** In analyzing these claims, the Court bears in mind that "Plaintiffs' challenge to the Amarillo ordinance is entirely facial. Indeed, since Plaintiffs have exercised their prerogative not to apply for a permit before challenging the ordinance as an instrument of censorship, an issue of whether the statute [is] constitutional as applied cannot possibly arise." Plaintiffs' Memorandum in Support of Summary Judgment, at 6.

The Fifth Circuit recently considered similar challenges to a Houston solicitation ordinance and held that a municipality may require an entity such as the **Unification** Church "to register, identify its solicitors, and make disclosure reports concerning its solicitation of public funds without facially violating the First Amendment." *International Society for Krishna Consciousness v. City of Houston,* 689 F.2d 541, 551 (5th Cir.1982). The court went on to carefully delimit the features of the Houston ordinance which saved it from constitutional invalidity:

> There is not disclosure required except as it specifically relates to the raising of funds from the public. No membership lists are required; no names of contributors are sought; no information is asked about funds raised from members; nothing must be revealed regarding proselytizing of new members. Significantly, too, no dilemma is posed to an organization forcing it to decide whether to remain totally private or, by making public solicitations, reveal publicly all aspects of its operations. The internal operations of the organization, apart from its public solicitation, remain under the veil of privacy. All that is mandated is disclosure to the public

> about those funds which are solicited from the public.

Id. at 556. The Court finds, therefore, that, with the exception of the sections discussed below, § 13–68.3 is facially constitutional. *Compare* Amarillo Code § 13–68.3, *reprinted infra, with* Houston Code § 37–43, *reprinted in ISKCON v. Houston,* 689 F.2d at 559–60.

[22] *§ 13–68.3(d).* This section requires a permit applicant to disclose "detailed information of the methods of handling and disbursement of all funds and a certified detailed and complete financial statement or audit of the parent organization for the last preceding fiscal year," if the receipts of the Amarillo solicitation are transmitted to a parent organization for further disbursement. It is unconstitutional. One, the phrase "detailed information" is impermissibly vague because it fails to identify precisely what information must be provided in the permit application. *Cf.* § 31–68.3(k). Two, requiring information on the "handling and disbursement of *all* funds" on its face requires the disclosure of information relating to funds and operations far beyond solicitation in Amarillo. The requirement pierces the "veil of privacy" and explores fundraising from private entities, such as members. Three, the audit requirement, just as the fidelity bond requirement in § 13–69(i), exacts a fee for the exercise of First Amendment rights. Consequently, the requirement is unconstitutional because only those who can afford an audit may obtain a permit.

[23] *§ 13–68.3(i).* This section requires an applicant to state "the maximum percentage of funds collected which are to be used to pay such expenses of solicitation and collection." It is unconstitutional for the same reasons that §§ 13–69(c) & (d) are unconstitutional. This requirement of a self-imposed limit on expenses is merely another cost-effectiveness evaluation in disguise and an impermissible consideration in issuing a solicitation permit.

[24] *§ 13–68.3(j).* This section requires an applicant to state "[t]he names of all officers, directors or trustees present when the decisions were made in reference to [§§ 13–68.3(h) & (i)]." It is unconstitutional. The required information directly uncovers internal operations of the church and is not related to any legitimate governmental interest. The potential chilling effect on the exercise of the First Amendment rights of free speech, association and free exercise of religion is manifest, together with the invasion of privacy.

***602** **[25]** *§ 13–68.3(k).* The section requires an applicant to provide:

> A detailed and complete statement of the funds (if any) collected by the applicant during the preceding year from solicitations or other activities described in section 13–68, which were the same or substantially the same as those for which the applicant is seeking a permit, such statement to show the gross amount collected, all costs of collection or solicitation, and the final distribution thereof.

It is unconstitutional because, by requiring on its face a statement of an applicant's worldwide solicitations and fund distributions, it impermissibly chills and intrudes on the First Amendment rights of free speech, association and free exercise of religion, and invades the privacy rights of the **Unification** Church and its members. The requirement is not reasonably related to the City of Amarillo's legitimate interest in regulating solicitation to prevent fraud in Amarillo.

[26] *§ 13–68.3(o)(2).* This section requires an applicant to "give full information by separate report" with respect to any solicitors or supervisors who have been convicted of a penal offense involving moral turpitude. The phrase "full information" is unconstitutionally vague because it fails to identify precisely what information must be included in the separate report. *Cf.* Houston Code § 37–43(12), *reprinted in ISKCON v. Houston,* 689 F.2d at 560 (requiring a statement of "the nature of the offense, the State where the conviction occurred, and the year of such conviction").

[27] *§ 13–68.3(o)(4).* This section requires an applicant to furnish:

> A statement from the chief of the Amarillo Police Department or his representative that the applicant and the persons working under him, either in charge of soliciting or doing actual soliciting, have

> been fingerprinted, photographed, and according to department records and other sources, that none of such persons have been convicted of a penal offense involving moral turpitude.

The Court finds this section facially constitutional because it falls within a narrow exception to the per se invalidity of preregistration requirements in the First Amendment context. In *Martin v. City of Struthers,* 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), the Supreme Court noted that "[a] city can ... by identification devices control the abuse of the privilege [of soliciting] by criminals posing as canvassers." *Id.* at 148, 63 S.Ct. at 865. This echoes the Court's earlier comment in *Cantwell v. Connecticut,* that "[w]ithout doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." 310 U.S. 296 at 306, 60 S.Ct. 900 at 904, 84 L.Ed. 1213 (1940). The Court later distinguished the situations in which a preregistration requirement may be imposed:

> [A] requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.
>
> Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a *reasonable* registration or identification requirement may be imposed.

Thomas v. Collins, 323 U.S. 516, 540, 65 S.Ct. 315, 327, 89 L.Ed. 430 (1945) (emphasis added).

" 'Reasonableness' is, of course, a flexible term, it connotes and requires consideration of *all* relevant facts...." *Casey v. O'Bannon,* 536 F.Supp. 350, 352 (E.D.Pa.1982). There is no hard and fast rule governing what is, or is not, reasonable. A registration or identification requirement that is reasonable under one set of facts may be unreasonable under another. Since the Plaintiffs' challenge to the ordinance's constitutionality is strictly facial, the Court ***603** does not have before it the factual context necessary to determine the reasonableness of § 13–68.3(o)(4)'s registration and identification requirement. This section may be unconstitutional *as applied,* i.e., the Plaintiffs may be able to make a sufficient showing of chill and harassment,*cf. Buckley v. Valeo,* 424 U.S. 1, 72–74, 96 S.Ct. 612, 660–661, 46 L.Ed.2d 659 (1976); *NAACP v. Alabama,* 357 U.S. 449, 462, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488 (1958), but this question is not presented here.

[28] *§ 13–74.* This section requires:

> All persons or organizations issued permits ... [to] furnish to the solicitations board ... after the charitable solicitations campaign has been completed, a detailed report and financial statement showing the amount of funds raised by the charitable solicitations campaign, the amount expended in collecting such funds, including a detailed report of the wages, fees, commissions and expenses paid to any person in connection with such solicitation, and the disposition of the balance of the funds collected by the campaign .... The permit holder shall make available to the board as its representative for such purpose, all books, records and papers whereby the accuracy of the report required by this section may be investigated....

The first sentence is facially constitutional. *Cf.* Houston Code § 37–48, *reprinted in ISKCON v. Houston,* 689 F.2d at 541. The second sentence apparently grants the solicitations board broad investigative powers with regard to financial statements filed with the board. As the Supreme Court has recognized, "[e]fforts to promote disclosure of the finances of charitable organizations may also assist in preventing fraud by informing the public of the ways in which their contributions will be employed." *Village of Schaumburg,* 444 U.S. at 637–38, 100 S.Ct. at 836–37.

As an example of such an effort, the Court cited Ill. Rev.Stat. ch. 23, § 5102 (1977). Part of that statute requires charitable organizations to "maintain accurate and detailed books and records" which "shall be open to inspection at all reasonable times by the Attorney General or his duly authorized representative." *Id.* § 5102(f). This Court finds that requiring the permit holder to make available "all books, records and papers whereby the accuracy of the report ... may be investigated" is facially constitutional.

Requiring the permit holder to denominate the solicitations board "as its representative for such purpose," however, may not be. This status would enable the board to obtain information from third-party record holders such as banks without consulting the permit holder. In this case, the church would be deprived of any opportunity to assert possibly valid evidentiary privileges, *see, e.g.,* Tex.R.Evid. 505, and relevancy objections, and of the opportunity to redact any material made available such that any individual member's or contributor's financial transactions with the church would be eliminated. The resulting invasion of the church members' privacy of belief could be sufficient to make this part § 13–74 unconstitutional. As the Supreme Court has said, "the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.' " *Buckley v. Valeo,* 424 **U.S**. 1, 66, 96 S.Ct. 612, 657, 46 L.Ed.2d 659 (1976), quoting *California Bankers Ass'n v. Shultz,* 416 **U.S**. 21, 78–79, 94 S.Ct. 1494, 1525–1526, 39 L.Ed.2d 812 (1974) (Powell, J., concurring).

Here, though, as in *California Bankers,* the Plaintiffs' challenge to the statute on First Amendment grounds is premature because the solicitations board has not sought any material under the authority of § 13–74. "This Court, in the absence of a concrete fact situation in which competing constitutional and governmental interests can ***604** be weighed, is simply not in a position to determine whether an effort to compel disclosure of such records would or would not be barred...." *California Bankers,* 416 **U.S**. at 56, 94 S.Ct. at 1515. The Court, thus, does not find that § 13–74 is unconstitutional on its face.

VII. Permit Fees

[29] Plaintiffs attack § 13–68 as being nothing more than the exaction of a fee for the privilege of exercising First Amendment rights. The section provides that:

> No permits ... shall be issued until the required fees have been paid .... Any person, organization, society, association, corporation with a permanent residence or business address in Amarillo, Texas, seeking to conduct a charitable solicitation campaign ... shall pay a permit fee of ten dollars ($10.00). Any one else seeking to conduct a charitable solicitation campaign or anyone wishing to solicit subscriptions of contracts for advertisements, books, magazines or periodicals shall pay a permit fee of ten dollars ($10.00) for each individual engaging in such activities.

The Court must sustain Plaintiffs' facial challenge to this section. While, as discussed above, the exaction of a fee for the privilege of exercising a First Amendment right is unconstitutional, "[a] licensing fee to be used in defraying administrative costs is permissible, but only to the extent that the fees are necessary." *Fernandes,* 663 F.2d at 633 (citations omitted). This section shares the same three deficiencies that the DFW Airport ordinance at issue in *Fernandes* suffered:

(1) the ordinance imposes an exaction, moderate in amount, on the privilege of using a public forum for constitutionally protected purposes;

(2) the City of Amarillo has not demonstrated a link between the fee and the costs of the licensing process; and

(3) the ordinance conditions free exercise rights on an applicant's willingness and ability to pay.

Consequently, § 13–68 is unconstitutional on its face. (A second reason, not raised by the Plaintiffs, also compels this conclusion. The section imposes different fee requirements on Amarillo, as opposed to non-Amarillo residents, for the

exercise of First Amendment rights. The use of a municipal ordinance to discriminate between municipal residents and non-municipal residents in an area of fundamental rights violates the Privileges and Immunities Clause. U.S. Const. art. IV, § 2. *See* *United Building and Construction Trades Council v. Mayor of Camden,* 465 U.S. 208, 104 S.Ct. 1020, 1026, 79 L.Ed.2d 249 (1984). Indeed, the fee differential between city and non-city residents argues strongly that the amount of the fees is not related to the cost of processing a permit application.)

VIII. Conclusion

For the foregoing reasons, the Court finds that the Plaintiffs' Motion for Summary Judgment should be GRANTED. The Court will enter an injunction enjoining the officials charged with enforcing the permit requirements of the Amarillo solicitations ordinance from enforcing those requirements.

It is so ORDERED.

APPENDIX

ARTICLE IV. SOLICITORS; STREET PEDDLERS *

DIVISION 1. RESERVED †

Secs. 13–57—13–65. Reserved.

***605** DIVISION 2. SOLICITOR'S PERMIT ‡

Sec. 13–66. Amarillo Solicitations Board—Established.
The Amarillo Solicitations Board is hereby established, composed of nine (9) members who will serve without pay and who will be appointed by the city commission. Such board is charged with the responsibility of screening all applicants for permits under this division. The initial appointments are to be for staggered terms, with three (3) members appointed for a term of one (1) year, three (3) members for a term of two (2) years, and three (3) members for a term of three (3) years; thereafter, the term will be for three (3) years for all members. United Way and Better Business Bureau, both of Amarillo, will each be permitted to recommend the name of one member to the city commission. The executive director of each of said organizations may be appointed as "ex officio" members of the board without a vote. (Ord. No. 4143, § 1, 12–21–71; Ord. No. 4314, § 1, 12–11–73)

Sec. 13–67. Same—Organization.
The board will elect a chairman and a vice-chairman from its members. The city secretary shall serve as secretary to the board. The board will adopt rules and regulations for the conduct of its business. A majority of the board will be a quorum. No application for a permit to conduct a charitable solicitations campaign on the streets and in public places in the city will either be granted or refused without due notice and hearing. No such hearing will be held unless the applicant shall have been given at least ten (10) days' notice in writing of the date, time, place and purpose of such hearing. The board shall meet regularly on the third Tuesday of each month for the conduct of its business and at such additional times as the chairman or majority of the board members shall request a special meeting. (Ord. No. 4143, § 1, 12–21–71; Ord. No. 4695, § 1(a), 10–11–77; Ord. No. 4808, § 1, 9–5–78)

Sec. 13–68. Permit fees.
No permit under this division shall be issued until the required fees have been paid to the city secretary of the city. Any person, organization, society, association or corporation seeking to conduct a charitable solicitation campaign as defined in section 13–68.1 shall pay a nonrefundable permit fee of ten dollars ($10.00) for the purpose of processing the application. Anyone wishing to solicit subscriptions or contracts for advertisements, books, magazines or periodicals shall pay a nonrefundable permit fee of ten dollars ($10.00) for each individual engaging in such activities. (Ord. No. 4143, § 1, 12–21–71; Ord. No. 4695, § 1(b), 10–11–77; Ord. No. 4808, § 2, 9–5–78)

Sec. 13–68.1. Permit required.
As used in this division, the term "charitable solicitations campaign" means any course of conduct, including benefit dances, barbecues, etc., whereby any person, organization, society, association, corporation or church, religious society or other religious sect, group or order, or any agent, member or representative thereof solicits property or financial assistance of any kind, or sells, or offers to sell, any article, tag, service, emblem, publication, ticket, advertisement, subscription or anything of value on a plea or representation that such sale or solicitation or the proceeds therefrom are for a charitable, educational, patriotic, philanthropic or religious purpose. It

shall be unlawful to conduct any charitable solicitations campaign on the streets, in any public place, by house-to-house canvass, or by using the public streets to deliver or obtain anything of value in the city, unless the person, organization, society, association, corporation or church, religious society or other religious sect, group or order, or any agent, member or representative thereof conducting the same or responsible therefor shall have first obtained a permit in compliance with the terms of this ***606** division; provided, however, that the provisions hereof shall not apply to:

(a) Any organization which solicits funds solely from its own members or from its own assemblies not using public streets nor places for such purposes;

(b) The solicitation of advertising by daily or weekly newspapers, radio, television, yellow pages and outdoor advertising. (Ord. No. 4143, § 1, 12–21–71; Ord. No. 4523, § 1, 6–1–76; Ord. No. 4695, § 1(c), 10–11–77)

Sec. 13–68.2. Permit required for soliciting subscriptions or contracts for advertisements, books, magazines or periodicals.

It shall be unlawful for any person, persons, organizations or associations, without first securing a permit from the city's solicitation board as herein provided, to solicit for subscriptions or contracts for advertisements, books, magazines or periodicals. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–68.3. Application—Required; contents.

A permit to conduct a charitable solicitations campaign or to solicit for subscriptions or contracts for advertisements, books, magazines or periodicals on the streets or in any public place or by house-to-house campaign or by using the public streets to deliver or obtain anything of value in the city will be granted only after notice of the hearing upon application for such permit filed in duplicate with the city secretary not less than ten (10) days prior to the date of the hearing. Such application shall be sworn to by the applicant and shall contain the following information:

(a) The full name of the organization applying for a permit to solicit and the address of the headquarters in the city; if the organization is a chapter or other affiliate of an organization having its principal office outside the city, the name and address of the parent organization.

(b) The names and addresses of all officers and directors or trustees of the organization and the name and city of residence of all officers, directors or trustees of the parent organization, if any.

(c) The purpose or purposes for which the gross receipts derived from such solicitations or other activities are to be used.

(d) The name of the person or persons by whom the receipts of such solicitation shall be disbursed; if the receipts are transmitted to a parent organization for further disbursement, detailed information of the methods of handling and disbursement of all funds and a certified, detailed and complete financial statement or audit of the parent organization for the last preceding fiscal year.

(e) The name and address of the person or persons who will be in charge of conducting the charitable solicitations campaign or the solicitations for advertisement in books, magazines or periodicals.

(f) An outline of the method or methods to be used in conducting the charitable solicitations campaign or the solicitation for advertisements in books, magazines or periodicals.

(g) The period within which such charitable solicitations campaign shall be conducted, including the proposed dates for the beginning and ending of such campaign.

(h) The total amount of funds proposed to be raised together with an estimate of the amount of money to be retained and used locally.

(i) The amount of all salaries, wages, fees, commissions, expenses and costs to be expended or paid to anyone in connection with such campaign, together with the manner in which such wages, fees, commissions, expenses and costs are to be expended, and the maximum percentage of funds collected which are to be used to pay such expenses of solicitation and collection.

(j) Reserved.

(k) A detailed and complete statement of the funds (if any) collected by the applicant during the preceding year from solicitations or other activities described ***607** in section 13–68, which were the same or substantially the same as those for which the applicant is seeking a permit, such statement to show the gross amount collected, all costs of collection or solicitation, and the final distribution thereof.

(*l*) A full statement of the character and extent of the charitable, educational, patriotic or philanthropic work done by the applicant within the city during the last preceding year.

(m) If the applicant is a corporation, a copy of its charter or articles of incorporation from its state of incorporation; if the applicant is a foreign corporation, a copy of its certificate to do business in Texas.

(n) If the applicant is a charitable corporation or other organization, proof of its current status as an organization to which contributions are tax deductible for federal income tax purposes.

(*o*) The following information shall be obtained from the applicant for a permit to solicit for subscriptions or contracts, for advertisements, books, magazines or periodicals:

(1) Has any person who will either be in charge of solicitation or in charge of groups who solicit or who will do any soliciting ever been convicted of a penal offense involving moral turpitude?

(2) If "yes", give full information by separate report.

(3) If advertising is to be sold, list the name and type of publication, the rates, approximate number of pages, the amount of circulation, the page size, estimated printing costs, methods to be used in soliciting ads.

(4) A statement from the chief of the Amarillo Police Department or his representative that the applicant and the persons working under him, either in charge of soliciting or doing actual soliciting, have been fingerprinted, photographed, and according to department records and other sources, that none of such persons have been convicted of a penal offense involving moral turpitude. (Ord. No. 4143, § 1, 12–21–71; Ord. No. 4314, § 1(b), 12–11–73; Ord. No. 4695, § 1(d), (e), 10–11–77)

Sec. 13–69. Same—Notice of hearing.

Upon receipt of a proper application as provided in section 13–68, the secretary of the solicitations board will specify the time and place for hearing of said application, and such time for hearing shall be at least ten (10) days but not more than forty (40) days after the date on which the application is received. The secretary of the solicitations board shall notify the applicant of the time and place specified for hearing. In the absence of notice acknowledged by the applicant, the secretary of the solicitations board will give written notice to the applicant by depositing same in the United States mail in a sealed envelope with sufficient postage attached, addressed to applicant at the address shown on the application. Such mailed written notice shall be sufficient if deposited in the United States mail at least five (5) days prior to the date of the hearing. At the conclusion of the hearing on any such application, the solicitations board will authorize and direct the secretary of said board to issue the permit applied for unless the board finds from some reasonable evidence of probative value amounting to substantial evidence that:

(a) The application is not filled out in reasonable enough detail so that the board may make findings of fact on the subjects listed below within this section; or that one or more of the statements made in the application are not true.

(b) The applicant or person in charge of the charitable solicitation campaign or in the case of soliciting for subscriptions or contracts for advertisements, books, magazines or periodicals, any person connected with such soliciting has been convicted in a court of competent jurisdiction of a crime involving moral turpitude within the ten-year period immediately preceding the application ***608** or at any time if the criminal conviction arose out of a program or campaign to solicit funds, subscriptions or contracts for advertisements, books, magazines or periodicals, or that the applicant or such person has made or caused to be made any false statement or misrepresentations to any member of the public with regard to the charitable solicitations campaign or other activities described in the permit, or has made or caused to be made false statements or misrepresentations on the application or at the hearing on the application, or has in any way publicly represented that the permit granted hereunder is an endorsement or recommendation of the cause for which the charitable solicitation campaign or solicitations for subscriptions or contracts, for advertisements, books, magazines or periodicals is being conducted, or has otherwise violated any of the terms of the permit or this division.

(c) The applicant's cost of fund raising in any campaign conducted by it in the year immediately preceding the date of the application exceeded twenty-five (25) per cent of the gross amount collected. For the purpose of

this subsection "cost of fund raising" shall mean all costs including but not limited to promoter's fees and advertising expenses but excluding the cost of a product sold as a part of the campaign and excluding the cost of a dramatic, musical, educational or entertainment production presented as a part of the campaign. "Cost of product" means the cash price of the product plus freight charges. "Cost of dramatic, musical, educational or entertainment production" means speaker and/or performer expenses and building and/or space rentals.

(d) The expected cost of fund raising will exceed twenty-five (25) per cent of the gross amount collected. For purposes of this subsection, "cost of fund raising" shall be defined as in the next preceding subsection above.

(e) Applicant has failed to keep or observe any promise, agreement, representation or commitment with regard to the allocation of funds or methods of fund raising or solicitation made to the solicitations board in connection with any previous application.

(f) In the case of charitable solicitations campaign that the project is not being administered by a local responsible board of directors or committee.

(h) That children of under fourteen (14) years of age are being used to solicit for charitable purposes without being accompanied by a responsible adult or except where both of the following exist:

(1) The children are members of the organization for whose benefit the solicitation is made.

(2) All funds so solicited, less permissible costs, shall be expended solely for the direct benefit of the children locally.

(i) Paid promoters of the petitioning organization are not adequately covered by a fidelity bond.

(j) In the case of a charitable solicitation campaign that while the project is worthy it does not present a reasonably urgent need at the particular time.

(k) In case of a charitable solicitations campaign, the project duplicates the work of an existing governmental or nongovernmental agency.

(*l*) The project is of such a nature that it can be merged with other similar campaigns or it can be merged or processed through the annual United Way campaign.

(m) If the appeal emanates from a national agency, the local quota exceeds the "yardstick formula" adopted by the city's solicitation board as Amarillo's equitable share of the organization's national goal based on indices which will be adopted by the city's solicitation board, as showing the fair share percentage for Amarillo to the national total.

***609** (n) The timing of the appeal will conflict with other existing approved drives. (Ord. No. 4143, § 1, 12–21–71; Ord. No. 4314, § 1(c), (d), 12–11–73; Ord. No. 4808, § 3, 9–5–78)

Sec. 13–70. Issuance of permit.

Upon receipt of written authorization from the solicitations board as provided in section 13–69 above or upon notification of action by the city commission of the City of Amarillo in connection with any appeal from a decision of the solicitation board as provided in section 13–69, the secretary of the solicitations board will issue a permit to conduct a charitable solicitations campaign for solicitations for subscriptions or contracts for advertisements, books, magazines or periodicals for the period and in the manner authorized by the solicitations board or the city commission. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–70.1. Duration of permit.

The solicitations board shall determine from the application and the reasonable evidence the period during which the applicant shall be permitted to conduct its charitable solicitations campaign or solicitations for subscriptions or contracts for advertisements, books, magazines or periodicals; provided, however, that such period shall not exceed three (3) calendar months. Any extension of such period shall be granted only upon the filing of an application and after notice and hearing of the same kind and character as is required for the original permit. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–71. Permit nontransferrable.

Any permit hereunder shall be personal to the applicant and shall not be assigned or transferred to any other person, firm, corporation or association. Any such attempted assignment or transfer shall render the permit void. However, nothing in this section shall prohibit a permittee from using the number of solicitors and representatives specified in the permit. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–72. Revocation of permit.

If, after notice and hearing, the solicitations board shall determine and make findings of fact that any permit holder or any agent or representative of a permit holder is making or has made any false statements or misrepresentations to any member of the public with regard to the campaign of solicitations or other activities described in the permit, or has made false statements or misrepresentations in the application or at the hearing on the application, or has in any way publicly represented that the permit granted hereunder is an endorsement or recommendation of the cause for which the charitable solicitations campaign is being conducted, or has violated any of the terms of the permit or has otherwise violated the provisions of this division, then it shall be the duty of the solicitations board to revoke the permit; provided, however, that the permit holder shall be given at least twenty-four (24) hours' written notice that a hearing on the revocation is to be held, and provided, further, that such hearing on the revocation shall be conducted under the same rules as the hearing on the application. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–73. Appeal from a ruling of solicitations board.

Every applicant shall have the right to appeal to the city commission from a ruling of the solicitations board. Such appeal, if taken, must be in writing, addressed to the city commission, and filed with the city secretary within ten (10) days after the date of the decision or ruling appealed from. The city commission shall hold an open public hearing on such appeal at either a regular or special meeting of that body after giving notice of such hearing to the applicant as provided in section 13–70 for the original hearing. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–74. Reports to be filed.

All persons or organizations issued permits under this chapter shall furnish to the solicitations board within thirty (30) days after the charitable solicitations campaign has been completed, a detailed report and ***610** financial statement showing the amount of funds raised by the charitable solicitations campaign, the amount expended in collecting such funds, including a detailed report of the wages, fees, commissions and expenses paid to any person in connection with such solicitation, and the disposition of the balance of the funds collected by the campaign; provided, however, that the solicitations board may extend the time for the report required by this section for an additional period of thirty (30) days upon proof that the filing of the report within the time specified will work unnecessary hardship on the permit holder. The permit holder shall make available to the board as its representative for such purpose, all books, records and papers whereby the accuracy of the report required by this section may be investigated.

All financial statements and reports and all applications submitted by any applicant or permit holder hereunder, and all determinations, findings and rulings involving accounting procedures made by either the solicitations board or the city commission shall be prepared, made and interpreted in accordance with the accounting standards and practices set out in Standards of Accounting and Financial Reporting for Voluntary Health and Welfare Organizations, copyright 1964, National Health Council, National Social Welfare Assembly, which is incorporated herein by reference and a copy of which shall be maintained on file in the office of the city secretary of the City of Amarillo, Texas, and in the office of the secretary of the solicitations board. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–75. Agents and solicitors for charitable permit holders.

All persons to whom permits have been issued under this division shall furnish proper credentials to their agents and solicitors for such charitable solicitations campaign. Such credentials shall include the name of the permit holder, the date, a statement describing the holder's charitable, educational, patriotic or philanthropic activity, a description of the purpose of the solicitation, the signature of the permit holder or of the holder's chief executive officer, and the name, address, age, sex, and signature of the solicitor to whom such credentials are issued and the specific period of time during which the solicitor is authorized to solicit on behalf of the permit holder. No person shall solicit under any permit granted under this division without the credentials required by this section and a facsimile copy of the permit in his possession. The credentials and facsimile copy of the permit shall be shown upon request to all persons solicited and to any police officer of the city.

No agent or solicitor shall conduct or participate in any charitable solicitations campaign for subscriptions or contracts for advertisements, books, magazines or periodicals except under a valid permit issued in compliance with this division. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–75.1. Responsibility for acts of solicitors.

The recipient of a permit for a charitable solicitations campaign for solicitations for subscriptions or contracts for advertisements, books, magazines or periodicals shall be responsible for the acts of his authorized representatives in connection with such campaign. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–76. Certain methods of soliciting prohibited.
The following methods of solicitation are and shall be prohibited within the City of Amarillo:

(a) Reserved.

(b) Solicitation by means of coins or currency boxes or receptacles, except when the use of each box or receptacle in the solicitation is expressly authorized by the board. (Ord. No. 4143, § 1, 12–21–71; Ord. No. 4325, § A, 2–5–74)

Editor's note—Ord. No. 4325 repealed former subsection (a) pertaining to telephone solicitation.

Sec. 13–77. Public inspection of records.
All applications, records of hearing, permits or rulings of either the solicitations ***611** board or the city commission and all instruments filed in connection with any application or hearing shall be public records. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–78. Misrepresentation of information not specifically required.
It shall be unlawful for any person, firm, corporation or association, either with or without a permit, to misrepresent to the city solicitation board or any of its members in any manner any information required by this division by way of application or deemed necessary by the board to carry out the purpose of this division and not specifically covered by this division. (Ord. No. 4143, § 1, 12–21–71)

Sec. 13–79. Misrepresentation of information required by division.
It shall be unlawful for any person, firm, corporation or association, either with or without a permit, to misrepresent in any manner to any person or firm solicited, any information required by this division, including, but not limited to, the purpose of solicitation and the method of presentation. (Ord. No. 4143, § 1, 12–21–71)

All Citations

582 F.Supp. 592

Footnotes

* Cross references—Itinerant food establishments, §§ 10–42—10–46; itinerant restaurants, §§ 10–47—10–53; food peddlers, §§ 10–54—10–72.

† Editor's note - Ord. No. 4572, § 1, enacted Oct. 26, 1976, amended this Code by repealing former Div. 1, §§ 13-57-13-65, derived from Ord. No. 296, §§ 1-3,5, 3-14-16; Ord. No. 1197, §§ 1-4, 11-5-29; and Ord. No. 1462, §§ 1-7, 4-24-34.

‡ Editor's note - Formerly this division was derived from Ord. No. 1588, enacted August 12, 1941, as amended by Ord. No. 1740, enacted Sept. 21, 1948; and Ord. No. 3186, enacted July 7, 1959.

412 F.Supp.2d 994
United States District Court,
S.D. Iowa,
Central Division.

UNITED YOUTH CAREERS, INC.
and LaVern Campbell, Jr., Plaintiffs,
v.
CITY OF AMES, IOWA, Defendant.

No. 4:04 CV 90460.
|
Jan. 27, 2006.

Synopsis

Background: Nonprofit religious group and member of group brought § 1983 First Amendment facial challenge against city solicitation ordinance. Member challenged former version of ordinance, under which he had been prosecuted. Group and member moved for partial summary judgment, and city cross-moved for summary judgment.

Holdings: The District Court, Pratt, J., held that:

[1] plaintiffs had standing;

[2] ordinance was not rendered improper prior restraint by its lack of express deadline for decision to issue or deny permit;

[3] former version violated First Amendment by precluding grant of permit if applicant had been convicted of fraud or violent crime;

[4] provision for revocation of license if holder was found to have made fraudulent statements in application constituted reasonable time, place and manner restriction;

[5] imposition of $35 for 60-day license comported with First Amendment; but

[6] requirement for $500,000 insurance policy was unreasonable and violated First Amendment; and

[7] lack of express provision for appeal of permit denial did not render ordinance unreasonable.

City's motion denied; group's and member's motion granted in part.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (18)

[1] Constitutional Law
Charities or religious organizations

Charitable fund-raising involves speech fully protected by First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[2] Constitutional Law
Freedom of Speech, Expression, and Press

Nonprofit religious group that engaged in solicitations for donations, and member of group engaged in such solicitations, had standing to facially challenge city's solicitation ordinance as violative of First Amendment's free speech clause, even though neither group nor member ever had attempted to comply with ordinance; both were directly affected by it. U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[3] Constitutional Law
Prior Restraints

Term "prior restraint" refers to administrative or judicial order forbidding certain communications when issued in advance of time that such communications are to occur. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[4] Constitutional Law
Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising

City solicitation ordinance, challenged on First Amendment grounds, would be analyzed as prior restraint, even though it did not authorize city officials' judgment about content of expressive

activity in question; ordinance constituted functional prior restraint, since it gave city officials power to deny use of forum in advance of actual expression. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[5] **Constitutional Law**
Prior Restraints
Constitutional Law
Prior restraints

No system of prior restraint may place unbridled discretion in hands of government official or agency, or fail to place limits on time within which decisionmaker must issue license. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[6] **Constitutional Law**
Justification for exclusion or limitation

Reasonable time, place or manner restrictions are recognized exception to First Amendment's general prohibition against prior restraints, especially in places not generally considered public fora. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[7] **Constitutional Law**
Licenses and Permits in General

To be valid restrictions on exercise of free speech, time, place and manner regulations: (1) must not delegate overly broad licensing discretion to government official, and must contain narrow, objective and definite standards to guide licensing authorities; (2) must be content-neutral; (3) must be narrowly tailored to serve significant governmental interest; and (4) must leave open ample alternative channels for communication. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[8] **Constitutional Law**
Licenses and permits in general
Municipal Corporations
Permits

City solicitation ordinance was not rendered an unconstitutional prior restraint under First Amendment by its lack of an express deadline for city officials to either issue or deny permit application; city's longstanding practice of making determination on application within 24 hours was sufficiently well understood and uniformly applied, so that ordinance was fairly susceptible to being read with consideration of such limit. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[9] **Constitutional Law**
Licenses and permits in general
Municipal Corporations
Permits

City solicitation ordinance was not rendered an unconstitutional prior restraint under First Amendment by fact that it contained no time limit within which city official had to act in revoking previously issued permit; revocation related to subsequent punishment, not prior restraint, and by ordinance's terms revocation had to be preceded by notice and opportunity to be heard. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[10] **Constitutional Law**
Licenses and permits in general
Municipal Corporations
Permits

City solicitation ordinance precluding granting of permit if applicant had been convicted of "any crime of fraud or violence to persons or property" violated First Amendment's Free Speech Clause; fact that no applicant ever had been denied permit on that basis did not validate provision, on theory that city's longstanding practice could be considered with text of ordinance, absent showing that city ever had granted permit to applicant who had criminal record. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[11] **Constitutional Law**
Licenses and permits in general
Municipal Corporations
Permits

City solicitation ordinance's requirement for revocation of license if holder was found to have made fraudulent statements in application or in conducting solicitations constituted reasonable time, place and manner restriction and thus comported with First Amendment; ordinance furnished clear guidelines for revocation and did not confer discretion to stray from guidelines, was narrowly tailored to further goal of protecting citizens from fraudulent solicitors, and did not unduly impinge on substantial amount of protected speech. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[12] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest

While regulation of time, place or manner of protected speech must be narrowly tailored to serve government's legitimate, content-neutral interests, it need not be least restrictive or least intrusive means of doing so. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[13] **Constitutional Law**
Licenses and permits in general
Municipal Corporations
Permits

City solicitation ordinance's imposition of $35 fee for 60-day license, for stated purpose of "costs of administration and enforcement," comported with First Amendment, given lack of any evidence that fee was unreasonable or that it was not used for purpose stated in ordinance. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[14] **Constitutional Law**
Licenses and permits in general
Municipal Corporations
Permits

City solicitation ordinance's requirement that permit applicant obtain $500,000 general liability/products liability insurance policy as condition of licensure was not sufficiently narrowly tailored to promote **city's** goal of protecting citizens from fraud, and thus was unreasonable time, place and manner restriction on solicitation and violated First Amendment; requirement was akin to exacting fee from applicants prior to their exercising free speech. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[15] **Constitutional Law**
Licenses and Permits in General

In order for licensing scheme that impinges First Amendment freedoms to be valid: (1) scheme must provide that licensor will, within specific brief time period, issue license or have burden of going to court to restrain protected activity; (2) any restraint imposed in advance of final judicial disposition on the merits must be limited to preservation of status quo for shortest fixed period compatible with sound judicial resolution; and (3) procedure must assure prompt final judicial decision to minimize any deterrent effect on expression protected by First Amendment and erroneous denial of license. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[16] **Constitutional Law**
Vendors in general
Municipal Corporations
Permits

City solicitation ordinance's lack of express provision for appeal of permit denial did not render it an unreasonable time, place, and manner restriction violative of First Amendment; unsuccessful applicant's right to initiate common-law certiorari proceeding under **Iowa** law constituted adequate safeguard, especially since ordinance was content-neutral

and provided clear guidance to city officials concerning issuance of peddler's permit. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[17] Injunction

Specificity, vagueness, overbreadth, and narrowly-tailored relief

Injunction must be narrowly tailored to provide only relief to which party seeking injunctive relief is entitled.

Cases that cite this headnote

[18] Statutes

Effect of Partial Invalidity; Severability

Unconstitutional provision of statute may be severed unless it is evident that legislature would not have enacted valid provisions independently of invalidated provision, or remaining valid provisions are not fully operative as a law.

Cases that cite this headnote

Attorneys and Law Firms

***996** William A Wickett, Patterson Lorentzen Duffield Timmons, Des Moines, IA, for Ames, Iowa, The City of, Defendant.

Robert A Wright, Jr, Wright & Wright, Robert A Wright, Jr, Wright & Wright, Des Moines, IA, for LaVern Campbell, United Youth Careers, Inc., Plaintiffs.

MEMORANDUM OPINION AND ORDER

PRATT, District Judge.

Before the Court are the following motions: Plaintiffs' Motion for Partial Summary ***997** Judgment (Clerk's No. 7); Defendant's Motion for Summary Judgment (Clerk's No. 19); and Plaintiffs' Motion to Strike Portions of the Affidavit of Karen Thompson (Clerk's No. 30). A hearing was held on December 15, 2005, and the matters are fully submitted.

I. FACTUAL BACKGROUND

On August 20, 2004, Plaintiffs filed a Petition for Declaratory Judgment, Injunctive Relief and Damages (Clerk's No. 1), alleging that Section 17.26 of the Ames, Iowa, City Municipal Code is unconstitutional on its face and as applied. Plaintiffs' Petition seeks a declaratory judgment that the ordinance is unconstitutional, injunctive relief, and damages pursuant to 42 U.S.C. § 1983. The facts in the present matter are undisputed.

United Youth Careers, Inc. ("UYC") is a non-profit Iowa corporation with its principal place of business in Des Moines, Iowa. Pls.' Statement of Undisputed Facts at 1. As stated in UYC's Articles of Incorporation, the purpose of UYC is:

1) Letting youngsters, seniors and handicapped youngsters and seniors have jobs and or counseling and training in regards to salesmanship;

2) Organizing activities and providing scholarships, bonuses, awards, and tutoring for youngsters exclusively;

3) Visitations and private counseling sessions for each individual youngster or senior educating against the use of drugs and or alcohol and geared specifically toward rehabilitation for victims of drug and or alcohol abuse;

4) Educating and religiously counseling in respect to the gospel of The Lord Jesus Christ for youngsters and seniors and encouraging church attendance.

Id. at 2. UYC offers its services to any and all underprivileged children and adults of Des Moines, Iowa's inner city, regardless of race or creed. *Id.* at 3. UYC provides these persons with employment training and employment based on the principles of a good work ethic, honesty, and integrity, as exemplified in the Christian faith. *Id.* Participants are rewarded for learning these principles with various activities, and children are provided with tutoring and counseling. *Id.*

UYC provides its services through donations solicited by door-to-door agents trained by UYC. *Id.* at 4. Kevin McGregor, an employee of UYC, is responsible for locating and training such persons and teaches them how to communicate information about UYC's purposes when soliciting donations. *Id.* at 5. On June 29, 2004, UYC had twenty persons soliciting donations. *Id.* at 4. Plaintiff, LaVern

Campbell, Jr. ("Campbell") is an adult individual residing in Polk County, Iowa. *Id.* at 17. On June 29, 2004, he was under contract with UYC and was one of the individuals soliciting donations for UYC in Ames, Iowa. *Id.* at 18.

The City of Ames, Iowa ("Ames"), is a municipal corporation, organized and existing under the laws of the State of Iowa, in Story County. *Id.* at 6. Ames has adopted an ordinance, codified at § 17.26, which reads in pertinent part as follows:

Sec. 17.26. PEDDLERS, SOLICITORS, AND TRANSIENT MERCHANTS.

(3) Each and every person engaged in residence to residence solicitation of gifts or donations who is not associated with a permanent office or home in the city where someone will receive and respond to inquiries for information and identification, shall first obtain and wear, in a manner plainly visible, a registration and identification badge issued by the City Clerk.

(4) For the purpose of registration each person as aforesaid shall provide to ***998** the City Clerk, or Clerk's designee the following:

(a) Their name, address, date of birth, social security number, height, weight, hair and eye color, and phone number, and if they do not have a permanent residence in this city, the residence and phone number where they reside permanently.

(h) If employed or working in association with a corporation, the state of its incorporation, whether it is authorized to do business in Iowa, and evidence that the corporation has designated a resident agent within 50 miles of the City upon whom legal service may be made and that the corporation will be responsible for the acts of its employees and or associates in the City; and that the corporation is covered by the insurance specified in item 14, below.

(i) A statement as to whether or not applicant has been convicted of any crime, misdemeanor, or violation of any municipal ordinance other than a traffic violation, the nature of the offense and the penalty imposed.

(j) The last municipalities, not exceeding three, where applicant has carried on activities for which registration is sought immediately preceding the date of application and the addresses from which such business was conducted in those cities.

(5) The City Clerk may refuse to register persons who fail to furnish complete or accurate information, and registration shall be invalidated if it is found that false information was provided. Registration shall be denied if the applicant has violated this ordinance, or had registration hereunder revoked or invalidated in the past six months; or if previously convicted of any crime of fraud or violence to persons or property.

(6) Each adult person shall produce a photograph-driver's license, or if they have no such license, a passport or other official photographic identification.

(7) The identification badge shall be of a distinctive logo and design to show clearly that it has been issued by the City of Ames and shall incorporate a photograph of the registrant taken at the Clerks' office or where the Clerk directs, at the time of the registration.

(9) The aforesaid registration badge shall be valid for sixty days from the date of issuance.

(10) No person shall engage in the activities described in Subsections (1) and (3) above, between the time of sunset and sunrise.

(11) Persons found to be acting in violation of this section shall be ordered by the police to cease immediately until in compliance with this section. Failure or refusal to obey such order shall be punishable as a misdemeanor.

(12) Persons obtaining the registration badge pursuant to this section shall pay such fee as the Ames City Council shall set, from time to time, to cover costs of administration and enforcement of the provisions of this section.

(13) The City Clerk may, after reasonable notice and opportunity for hearing, revoke any license issued under this division where the licensee, in

the application for the license or in the course of conducting his/her business has conducted the activity for which registered in an unlawful manner. Notice of the hearing for revocation of a license shall be given in writing, setting forth specifically the grounds of complaint, and the time and place of hearing.

(14) All applicants shall provide proof of general liability insurance including ***999** products liability in the amount of $500,000 combined single limits. A certificate of insurance shall be delivered to the **City** Clerk prior to the issuance of a license. The **City** of **Ames** and its employees shall be named as additional insureds against any liabilities that may arise in connection with the licensees.

(15) Violation of this section shall be a municipal infraction punishable by a penalty of $100 for person's first violation thereof and $200 for each repeat violation. Alternatively, violation of this section can be charged by a peace office of the **City** as a simple misdemeanor.

Pls.' App., Exh. A, at 13. On June 29, 2004, Campbell was criminally charged with violation of the ordinance. *Id.* at 18. Neither Campbell nor UYC, ever attempted to register with the **city** as required by the ordinance, despite apparent knowledge by UYC of the ordinance and its terms. [1]

On August 9, 2005, **Ames** enacted Amendments to § 17.26. Specifically, Subsections 5, 13, and 14 were repealed and replaced with the following revised subsections:

(5) The **City** Clerk shall, within five days of an application for registration being submitted, either issue the registration badge or a detailed explanation of why the application is not acceptable. The **City** Clerk shall refuse to register persons who fail to furnish complete or accurate information, and registration shall be invalidated if it is found that false information was provided. Registration shall be denied if the applicant has violated this ordinance, or had registration hereunder revoked or invalidated in the past six months.

(13) The **City** Clerk shall, after reasonable notice and opportunity for hearing, revoke any registration issued under this division where the registrant, in the application for the registration or in the course of conducting his/her activity, for which registered, has made statements constituting a fraudulent practice as defined by Subsection 714.8(6) Code of **Iowa**. Notice of the hearing for revocation of a registration shall be given in writing, specifically setting forth the grounds of the complaint and the time and place of the hearing.

(14) All applicants shall provide proof of general liability insurance including products liability in the amount of $500,000 combined single limits. A certificate of insurance shall be delivered to the **City** Clerk prior to the issuance of an identification badge. The **City** of **Ames** and its employees shall be named as additional insureds against any liabilities that may arise in connection with the registered activity.

Def.'s App. at 4.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, ***1000** show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material if the dispute over it might affect the outcome of the suit under the governing law. *Id.* The moving party has the burden of demonstrating the absence of a genuine issue of material fact. *See* *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson,* 477 U.S. at 248, 106 S.Ct. 2505. In meeting its burden, the moving party may support his or her motion with affidavits, depositions, answers to interrogatories, and admissions. *See* *Celotex,* 477 U.S. at 323, 106 S.Ct. 2548. Once the moving party has carried its burden, the nonmoving party must go beyond the pleadings and, by affidavits, depositions, answers to interrogatories, or admissions on file, designate the specific facts showing that there is a genuine issue for trial. *See* Fed.R.Civ.P. 56(e); *Celotex Corp.,* 477 U.S. at 322–323, 106 S.Ct. 2548; *Anderson,* 477 U.S. at 257, 106 S.Ct. 2505. In order to survive a motion for summary judgment, the nonmoving party must present sufficient evidence for a reasonable trier of

fact to return a verdict in his or her favor. *Id.* On a motion for summary judgment, a court is required to "view the evidence in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences." *See United States v. City of Columbia,* 914 F.2d 151, 153 (8th Cir.1990) (citing *Woodsmith Pub. Co. v. Meredith Corp.,* 904 F.2d 1244, 1247 (8th Cir.1990)). A court does not weigh the evidence or make credibility determinations. *See Anderson,* 477 U.S. at 252, 106 S.Ct. 2505. A court only determines whether there are any disputed issues and, if so, whether those issues are both genuine and material. *Id.*

In the present case, both sides have moved for summary judgment on the Plaintiff's claims. Particularly in the presence of competing cross motions for summary judgment, a court must keep in mind that summary judgment is not a paper trial. Accordingly, a "district court's role in deciding the motion is not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to believe." *Waldridge v. American Hoechst Corp.,* 24 F.3d 918, 920 (7th Cir.1994). In a motion for summary judgment this Court has but one task, to decide, based on the evidence of record as identified in the parties' moving and resistance papers, whether there is any material dispute of fact that requires a trial. *See id.* (citing *Anderson,* 477 U.S. at 249, 106 S.Ct. 2505 and 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2712 (3d ed.1998)). The parties then share the burden of identifying the evidence that will facilitate this assessment. *Waldridge,* 24 F.3d at 921.

The parties are in agreement that there exists no genuine issue of material fact on the present record. Accordingly, the only question to be determined at this juncture is whether Defendant's ordinance is facially unconstitutional, as alleged by the Plaintiffs. As this question is a purely legal one, summary judgment review is particularly appropriate. *See Village of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 634–35, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) (question of law involving no dispute about the characteristics of an ordinance is properly considered on summary judgment).

III. MOTION TO STRIKE

Defendant has offered two affidavits filed by Karen Thompson, a Deputy City Clerk in the Ames City Clerk's Office, in ***1001** support of its motion for summary judgment and in resistance to Plaintiffs' motion for summary judgment. Plaintiffs request that the Court strike paragraphs 3, 4, 5, 10, 11, and 13 of Thompson's first affidavit as irrelevant to Plaintiffs' facial attack on Defendant's ordinance. Plaintiffs also request that paragraphs 6, 7, 8, and 9 of the first affidavit be stricken as the matters contained in those paragraphs are not based on the personal knowledge of Thompson and because it is not shown that Thompson is competent to testify to the matters alleged therein. Defendant filed a resistance to Plaintiffs' motion, asserting that the first affidavit clearly establishes Thompson's personal knowledge and competence to testify as required by Federal Rule of Civil Procedure 56(e). Additionally, Defendant has filed a second affidavit by Thompson clearly stating that all information provided in both affidavits is based upon her personal knowledge. Defendant also argues that to the extent Plaintiffs claim that Thompson's testimony is irrelevant, it is not, as the facts expressed in Thompson's affidavit support Defendant's theory that it had uniformly applied practices and procedures that would defeat Plaintiffs' facial challenge to Defendant's ordinances under the reasoning set forth in *City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 770, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988) (stating that a well established practice may, in certain circumstances, define constitutional boundaries not apparent in a statute's text).

After careful review, the Court finds that there is ample information in the affidavits to conclude that the statements therein are based upon Thompson's personal knowledge and that she is competent to testify to such matters. Likewise, the Court concludes that the information in paragraphs 3, 4, 5, 10, 11 and 13 of Thompson's first affidavit are relevant and admissible for the purpose of supporting Defendant's arguments, discussed in further detail *infra,* that its ordinances are constitutional in light of *Lakewood.* Accordingly, Plaintiffs' Motion to Strike is denied.

IV. MOTIONS FOR SUMMARY JUDGMENT–LAW AND ANALYSIS

[1] **[2]** The First Amendment of the United States Constitution provides in pertinent part: "Congress shall make no law ... abridging the freedom of speech ...." U.S. Const. amend. I. The United States Supreme Court has repeatedly

found that charitable fund-raising involves speech fully protected by the First Amendment. *See* *Riley v. Nat'l Fed'n of the Blind of N.C.,* 487 U.S. 781, 796–97, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988); *Schaumburg,* 444 U.S. at 632, 100 S.Ct. 826 ("Prior authorities ... clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests-communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes-that are within the protection of the First Amendment."). In the present case, the parties agree that two ordinances must be evaluated. Campbell was arrested under the pre-amendment ordinance and challenges it as facially unconstitutional. The **City** of **Ames** amended that ordinance, thus making any challenge of it by **United Youth Careers** moot. UYC, maintains, however, that the amended ordinance is still defective to the point that it remains facially unconstitutional. As both Plaintiffs are personally affected by the ordinance, both may raise a facial challenge to its terms, Campbell to both the preamendment[2] and the amended ***1002** ordinance, and UYC to the amended ordinance, despite the fact that neither UYC nor Campbell have ever attempted to comply with the terms of either ordinance. *See* *Lakewood,* 486 U.S. at 755–56, 108 S.Ct. 2138 ("Recognizing the explicit protection accorded speech and the press in the text of the First Amendment, our cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a licence."). As to both the pre-amendment ordinance and the amended ordinance, Plaintiffs urge that each constitutes an impermissible prior restraint on protected speech, or in the alternative, an unreasonable burden on protected speech. Notably, while Plaintiffs' complaint asserts that Defendant's ordinances are unconstitutional both facially and as applied, the Plaintiffs' Motion for Partial Summary Judgment seeks only a ruling on the facial validity of the ordinances, and upon a finding that either ordinance is facially unconstitutional, an order enjoining Defendant from enforcing it.

A. *Law on Prior Restraints and Time, Place, Manner Restrictions*

Plaintiffs first argue that both ordinances effectively act as a prior restraint on protected First Amendment speech. Plaintiffs quote *American Target Adver., Inc. v. Giani,* 199 F.3d 1241, 1250 (10th Cir.2000) for the proposition that any law barring solicitation before complying with registration requirements "definitionally qualifies as a prior restraint." Pls.' Br. at 7. Thus, Plaintiffs argue, because they are barred from soliciting donations in **Ames** until they comply with the requirements of the ordinance, the **Ames** ordinance is, by definition, a prior restraint on protected speech and the Court should analyze it with "a heavy presumption against its constitutional validity." *Vance v. Universal Amusement Co.,* 445 U.S. 308, 317, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980) (per curiam); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963).

[3] The term "prior restraint" is "used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. **United** States,* 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993) (emphasis in original, citation omitted). Classic examples include "temporary restraining orders and permanent injunctions-*i.e.,* court orders that actually forbid speech activities ...." *Id.* Prior restraints on protected speech are particularly disfavored because "a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *S.E. Promotions, Ltd. v. Conrad,* 420 U.S. 546, 559, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975).

[4] Defendant points out that there are reasonable arguments both for and against a determination of whether the ordinances here at issue constitute prior restraints on protected speech. Some courts, like the Tenth Circuit Court of Appeals in *American Target,* have found that a statute barring speech until the speaker complies with the provisions of the statute constitutes a prior restraint. *Amer. Target,* 199 F.3d at 1250; *see also Int'l Soc. for Krishna Consciousness of Berkeley, Inc. v. Kearnes,* 454 F.Supp. 116, 119 (E.D.Cal.1978) ("An individual is totally restrained from solicitation if he does not have a permit ...we conclude that the ordinances ***1003** operate as a prior restraint on the exercise of speech."). Other courts, such as the Seventh Circuit, have applied prior restraint analysis only when the challenged regulation authorizes judgment about the content of the expressive activity. *See* *MacDonald v. **City** of Chicago,* 243 F.3d 1021, 1031–32 (7th Cir.2001) (discussing

in detail contradictory Supreme Court authority on the issue and discussing the Seventh Circuit's resolution of the issue by its holding in *Thomas v. Chicago Park Dist.,* 227 F.3d 921 (7th Cir.2000), which held that ordinances that concern themselves with the content of speech will be evaluated as prior restraints, while those that do not will be evaluated as time, place and manner restrictions). While the Eighth Circuit has never explicitly weighed in on the debate, it has stated that "any permit requirement gives 'public officials the power to deny use of a forum in advance of actual expression.' " *United States v. Kistner,* 68 F.3d 218, 221, n. 7 (8th Cir.1995) (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 783, n. 5, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). Clearly, this language would indicate that any permit scheme is functionally a prior restraint on expressive activity and that Defendant's ordinances are, therefore, prior restraints.

[5] A finding that Defendant's ordinances are prior restraints on free speech does not, however, dictate a finding that they are facially unconstitutional. Indeed, "[p]rior restraints are not unconstitutional per se." *S.E. Promotions,* 420 U.S. at 558, 95 S.Ct. 1239. Rather, there are "two evils" that will not be tolerated in such schemes. *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 225, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). First, no system of prior restraint may place " 'unbridled discretion in the hands of a government official or agency.' " *Id.* (quoting *Lakewood,* 486 U.S. at 757, 108 S.Ct. 2138). Second, "a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *Id.* at 226, 110 S.Ct. 596.

[6] Even upon a finding that an ordinance or permit scheme constitutes a prior restraint, "reasonable time, place, or manner restrictions are a recognized exception to the general prohibition against prior restraints." *Kistner,* 68 F.3d 218, 221, n. 7 (8th Cir.1995) (citing *Cmty. for Creative Non–Violence v. Turner,* 893 F.2d 1387, 1390 (D.C.Cir.1990)); *see also Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York,* 447 U.S. 530, 536, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980); *Ward,* 491 U.S. at 791, 109 S.Ct. 2746. This is particularly true when the speech regulated is conducted in a place not generally considered a public forum: "The State has a well-recognized interest in protecting a citizen's ability to cut off unwanted communications entering the home. While unwilling listeners in a public forum may have to avoid offensive speech 'by averting their eyes' or plugging their ears, the government may intercede with narrow, carefully targeted limits on speech when it intrudes into the privacy of the home." *Nat'l Fed'n of the Blind of Arkansas, Inc. v. Pryor,* 258 F.3d 851, 856 (8th Cir.2001). Indeed, "the essence of time, place, or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals," *Consol. Edison,* 447 U.S. at 536, 100 S.Ct. 2326, and therefore are subject to reasonable governmental controls.

[7] To be valid restrictions on the exercise of free speech, time, place, and manner regulations must not "delegate overly broad licensing discretion to a government official," *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992), and must contain narrow, objective, and definite ***1004** standards to guide licensing authorities. *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150–51, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). This requirement is relatively indistinguishable from the "unbridled discretion" requirement under prior restraint analysis. A permit requirement controlling the time, place, and manner of speech must also be content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication. *Ward,* 491 U.S. at 791, 109 S.Ct. 2746. Plaintiff concedes both that Defendant's ordinances are content-neutral and that they serve a substantial governmental interest, that is, protecting charities and the public from fraud.

In evaluating Defendant's ordinances, then, the Court is mindful that every licensing scheme is, by its very nature, a prior restraint on First Amendment expression, however, such schemes are still constitutionally valid if the restrictions imposed thereon comply with time, place, and manner restrictions and do not confer unbridled discretion on the licensing authority:

> [A] requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment. Once the speaker goes further, however, and

> engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed.

Thomas v. Collins, 323 U.S. 516, 540, 65 S.Ct. 315, 89 L.Ed. 430 (1945). Accordingly, the Court must evaluate whether the permit schemes here at issue comprise reasonable time, place, and manner regulations, or unreasonable regulations or prior restraints. The Court evaluates Defendant's ordinances with an "intermediate level of scrutiny" with regard to determining whether they are "narrowly drawn" to serve the Defendant's interest of protecting its citizenry from fraud. *See* *Turner Broad. Sys., Inc. v. Fed. Commc'n Comm'n,* 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).

B. *Plaintiffs' Challenges to Defendant's Ordinances*

1. *Lack of time restraint to issue or deny a permit.*

[8] Plaintiffs argue that Defendant's pre-amendment ordinance is constitutionally infirm because it does not contain a time limit within which the **Ames** **City** Clerk must issue or deny a permit. Plaintiff does not appear to dispute that Defendant's amended ordinance corrects this infirmity, requiring that: "The **City** Clerk shall, within five days of an application for registration being submitted, either issue the registration badge or a detailed explanation of why the application is not acceptable." Defendant concedes that the pre-amendment ordinance lacks a time frame in which the **City** Clerk must act to either grant or deny the permit, but urges that the lack of time constraints does not make the ordinance unconstitutional because the **City** Clerk's office had a long-standing practice of issuing or denying the permits within twenty-four hours of receipt of a completed application.

" 'It is settled by a long line of recent decisions of [the Supreme Court] that an ordinance which ... makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official-as by requiring a permit or license which may be granted or withheld in the discretion of such official-is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.' " ***1005** *FW/PBS,* 493 U.S. at 225, 110 S.Ct. 596 (quoting *Shuttlesworth,* 394 U.S. at 151, 89 S.Ct. 935). "The reasoning is simple: if the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted." *Forsyth County,* 505 U.S. at 131, 112 S.Ct. 2395. While certainly an argument could be made that the lack of time constraints in the ordinance constitutes "unbridled discretion," Plaintiffs argument of constitutional infirmity in this regard rests more soundly on the second impermissible prior restraint than in the notion of unbridled discretion.

The Supreme Court has held that "a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *Id.* at 226, 110 S.Ct. 596. This is because a lack of specific time restraints on the issuance of a license, like unbridled discretion, "creates the likelihood of arbitrary denials and the concomitant suppression of speech." *FW/PBS,* 493 U.S. at 223, 110 S.Ct. 596. Clearly then, the lack of a time limit on issuance or denial of a permit in the pre-amendment ordinance is of concern as it relates to prior restraint analysis. Despite this fact, Defendant argues that the **City** Clerk has in actual practice over the last ten years, issued a permit upon completion of documentation within twenty-four hours, except when the registrant requested the permit be issued at a later date. Thompson Aff. ¶ 4. This is sufficient under *Lakewood,* Defendant argues, to bring its ordinance within constitutional bounds despite the lack of an articulated time limit within the text of the ordinance. The *Lakewood* Court stated: "The doctrine [of forbidding unbridled discretion or lack of time restraints] requires that the limits the **city** claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *Lakewood,* 486 U.S. at 770, 108 S.Ct. 2138. Defendant relies on this language to conclude that, even presuming that the lack of time limits in the statute would give rise to a finding that it is facially unconstitutional, the defect is cured by the fact that the **city** has a "well-established practice" of issuing permits within twenty-four hours.

Defendant offers the affidavit of Karen Thompson, the Ames Deputy City Clerk, and an individual "heavily involved in the registration process required by [the ordinances at issue]." Thompson Aff. at 1. Thompson cannot recall a time during the last ten years that a registration badge was not issued under Defendant's ordinance "within 24 hours of the application when the registrant has provided all applicable information, paid the appropriate fee, and did not request that the issuance be delayed". *Id.* at 1–2. Further, Thompson states that the amended ordinance "will not substantively alter the way in which the City Clerk's office will handle solicitation registrations, as the amendments merely codified the actual practice of the Clerk's office." *Id.* at 2. The question then, is whether the pre-amendment ordinance, clearly containing an unconstitutional prior restraint on its face by virtue of the lack of time limits for approving or denying a permit application, is cured by the fact that, in practice, the City of Ames has always issued a permit within a short time after receipt of a completed application.

According to *Lakewood,* when a "well-understood and uniformly applied practice has developed that has virtually the force of a judicial construction, the state law is read in light of those limits. That rule applies even if the face of the statute might not otherwise suggest the limits imposed." *Lakewood,* 486 U.S. at 770, n. 11, 108 S.Ct. 2138 (citing *Poulos v. New* ***1006** *Hampshire,* 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105 (1953)). Additionally, the "Court will presume any narrowing construction or practice to which the law is 'fairly susceptible.' " *Id.* (citing *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975)). This provision in *Lakewood* has been interpreted to require municipalities to "demonstrate a pattern of behavior from which a plausible interpretation of a law may reasonably be inferred." *Wil–Kar, Inc. v. Village of Germantown,* 153 F.Supp.2d 982, **994** (E.D.Wis.2001); *see e.g., Ward,* 491 U.S. at 795, 109 S.Ct. 2746 (ruling that a statute on sound quality, though unconstitutional by a plain textual reading, was not subject to facial challenge where city authorities had a long practice of conferring with concert sponsors on the issue and thus had "interpreted the guideline in such a manner as to provide additional guidance to the officials charged with its enforcement").

On the record now before it, the Court concludes that the Defendant has sufficiently established that its longstanding practice of making a determination on a permit application within twenty-four hours is sufficiently well understood and uniformly applied to limit the terms of the pre-amendment ordinance to within constitutional bounds. The ordinance, therefore, is fairly susceptible to being read with consideration of such a limit. Accordingly, the pre-amendment ordinance is not an unconstitutional prior restraint due to the lack of time limits on approving or denying a permit application.

2. *Lack of time limit to revoke a permit after issuance.*

[9] Plaintiffs next argue that neither the pre-amendment ordinance nor the amended ordinance have time limits within which the City Clerk must act in revoking a previously issued permit. The lack of time limits on revocation in both the pre-amendment and the amended ordinance is not of substantial concern in a prior restraint analysis because no speech is chilled prior to the time that the permit is actually revoked. *See Jake's, Ltd., Inc. v. City of Coates,* 284 F.3d 884, 890 (8th Cir.2002) ("[L]icense revocation is necessarily less of a prior restraint than the initial licensing process."). American jurisprudence makes a firm distinction between prior restraints and subsequent punishments. *See Alexander,* 509 U.S. at 553–54, 113 S.Ct. 2766 ("[O]ur decisions have steadfastly preserved the distinction between prior restraints and subsequent punishments."). Thus, if it takes two days before revocation or two years, no speech has been unduly impinged by the lack of time restraints on revoking a permit issued under the ordinance. Moreover, both versions of the ordinance specifically require the City Clerk to provide notice and opportunity for a hearing before any revocation may actually occur. Accordingly, Plaintiffs' arguments in this regard are without merit.

3. *City Clerk's authority to deny the application of a person who fails to furnish complete or accurate information or to deny the application of a person previously convicted of certain crimes.*

[10] Plaintiffs contend that subsection (5) of the pre-amendment ordinance grants unbridled discretion to the City Clerk. Subsection (5) provides:

> The City Clerk may refuse to register persons who fail to furnish complete or accurate information, and registration shall be invalidated if it is found that false information was provided.

> Registration shall be denied if the applicant has violated this ordinance, or had registration hereunder revoked or invalidated in the past six months; or if previously ***1007** convicted of any crime of fraud or violence to persons or property.

§ 17.26(5) (pre-amendment). Specifically, Plaintiffs urge that persons convicted of crimes of fraud or violence to persons or property are not "First Amendment outcasts" and that denying a permit for prior misconduct is impermissible. Plaintiffs do not appear to challenge the amended ordinance in this regard as the amended ordinance does not provide for denial of a permit on the basis of previous convictions.

Defendant concedes that the pre-amendment ordinance contained this provision, but argues that the **City's** practice was not to deny permits on this basis. Defendant points to the affidavit of Karen Thompson, which notes that during the last ten years, she cannot recall a time when a registration badge was not issued once all requested information and the fee was provided. Notably, Thompson's affidavit does not articulate whether any individual with previous convictions ever applied for a license in the first instance. The Court is not inclined to presume that a practice of non-enforcement of a textual provision in the ordinance exists absent any evidence that the **City** Clerk was ever faced with this situation and felt compelled to issue a permit anyway. Accordingly, the Court cannot find that Defendant has shown a firmly established practice that should be given the force of judicial construction under *Lakewood* and concludes that this provision of the pre-amendment ordinance was unconstitutional. *See* *Holy Spirit Ass'n for Unification of World Christianity v. Hodge,* 582 F.Supp. 592, 597 (N.D.Tex.1984) (striking down a similar provision and noting that "[t]here are other means, such as penal laws, to prevent and punish frauds without intruding on the First Amendment freedoms." (quotation omitted)).

4. ***City*** *Clerk may revoke license if peddler has violated the ordinance or has made false statements in application or has solicited funds in an unlawful manner.*

Plaintiffs next object to § 17.26(13) of the pre-amendment ordinance, which provides that the **City** Clerk "*may,* after reasonable notice and opportunity for hearing, revoke any license issued under this division where the licensee, in the application for the license or in the course of conducting his/her business has conducted the activity for which registered in an unlawful manner." Plaintiffs claim that there is no guidance in the statute to assist the **City** Clerk in making such determinations, and that there are other less intrusive means to prevent fraud. Notably, this provision does not impinge on the issuance of the permit in the first place and thus, does not constitute a prior restraint within the meaning generally accorded that term. Clearly, the phrase "may," on its face, grants discretion to the **City** Clerk as to whether or not to enforce the provision. Karen Thompson, however, states that during the last ten years, no registration badge has ever been revoked pursuant to subsection 13. Thompson Aff. ¶ 5. As with the provision authorizing denial of a permit based on past criminal conduct, Defendant has not shown that the **City** was ever faced with an opportunity to exercise its discretion with regard to this provision. Thus, the Court cannot conclude that the discretion granted the **City** to determine what constitutes "unlawful" and to determine whether or not to revoke a license in any particular instance by virtue of the word "may," is brought within constitutional bounds due to a long history of lack of opportunity to exercise such discretion.

[11] **[12]** As to the amended ordinance, it requires, rather than permits, the **City** Clerk to revoke the registration of a licensee ***1008** (after reasonable notice and opportunity for hearing) who is found to have made statements "constituting a fraudulent practice as defined by [the **Iowa** Code]," either in the application process or in the course of collecting solicitations. On its face, the ordinance provides clear guidelines for when a permit must be revoked, and the **City** Clerk is without discretion to stray from those guidelines. Moreover, revoking the permit of persons engaged in specific activities codified by the **Iowa** Code as fraudulent is a reasonable restriction narrowly tailored to further the goal of the **City** of **Ames** in protecting its citizenry from unlawful or fraudulent solicitors. *See* *Holy Spirit,* 582 F.Supp. at 597–98 (finding constitutional a provision authorizing denial of a permit based on false statements in the application). As to Plaintiffs' argument that there are less intrusive means to prevent fraud, such as after-the-fact punishment, the Supreme Court has emphasized "that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so." *Ward,* 491 U.S. at 798, 109 S.Ct. 2746. "So long as the means chosen are not substantially broader than necessary to achieve the government's interest ... the regulation will not be invalid simply because a court

concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 799, 109 S.Ct. 2746. As to this provision, the amended ordinance is not broader than necessary and does not unduly impinge on a substantial amount of protected speech.

5. *$35.00 fee.*

[13] Plaintiffs object next to the requirement in both versions of the ordinance that applicants pay a $35.00 peddler's fee for a 60–day license. Subsection (12) provides that persons seeking a peddler's permit under the ordinance "shall pay such fee as the **Ames** **City** Council shall set, from time to time, to cover costs of administration and enforcement of the provisions" of the ordinance. Karen Thompson also states in her affidavit: "The $35.00 fee charged for registration under the ordinance goes towards the cost of administration and enforcement of the ordinance's provisions." Thompson Aff. at 2.

Plaintiffs cite *Holy Spirit* in support of the notion that a $35.00 fee constitutes an impermissible exaction of a fee. In *Holy Spirit,* the court found that a certain portion of a **city** ordinance was unconstitutional:

> This section authorizes denial of a permit if any "[p]aid promoters of the petitioning organization are not adequately covered by a fidelity bond." It is unconstitutional because it amounts to nothing more than the exaction of a fee for the exercise of First Amendment rights, a practice condemned by the Supreme Court. "The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley v. Valeo,* 424 U.S. 1, 49, 96 S.Ct. 612, 649, 46 L.Ed.2d 659 (1976). *See* *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); *Jones v. **City** of Opelika,* 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290 (1943); *Grosjean v. American Press Co.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936). "[F]reedom of speech [must be] available to all, not merely those who can pay their own way." *Murdock v. Pennsylvania,* 319 U.S. 105, 111, 63 S.Ct. 870, 874, 87 L.Ed. 1292 (1943) (daily licensing fee of $1.50 held to be an unconstitutional restriction on the free exercise of religious belief). *Cf.* *Collin* ***1009** *v. Smith,* 578 F.2d 1197, 1207–09 (7th Cir.1978), *cert. denied,* 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978) (discussing requirement of insurance in order to obtain parade permit).

Id. at 599. While true that the **city** government may not exact a fee for the exercise of First Amendment freedoms, it is equally true that "there is nothing contrary to the Constitution in the charge of a fee limited ... to meet the expense incident to the administration of the [ordinance] and to the maintenance of public order in the matter licensed." *Cox v. New Hampshire,* 312 U.S. 569, 576–77, 61 S.Ct. 762, 85 L.Ed. 1049 (1941).

Plaintiffs mostly seem to object to the fact that the fee charged only authorizes a permit for a period of sixty days, a limitation Plaintiffs deem illogical. Nonetheless, the ordinance on its face provides that the **City** Council shall set the fee for the purpose of covering "costs of administration and enforcement." Thompson's affidavit attests that the funds are actually used for that purpose. The record is devoid of evidence indicating that the fee is unreasonable or that it is not used for the purposes stated in the ordinance. The provision is, therefore, constitutional. *See* *Cox v. New Hampshire,* 312 U.S. at 576, 61 S.Ct. 762 (upholding license fee because it was not a fee, but a means to defray expenses incident to administration of the statute); *Murdock v. Pennsylvania,* 319 U.S. at 113–14, 63 S.Ct. 870 (striking down a fee where it was not a "nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question"); *Stonewall Union v. **City** of Columbus,* 931 F.2d 1130, 1136 (6th Cir.1991) (upholding $85.00 per day fee for parade permit and noting that more than a nominal fee is constitutionally permissible so long as the fee is "reasonably related to the expenses incident to the administration of the ordinance and to the maintenance of public safety and order.").

6. *Requirement of an insurance policy.*

Plaintiffs also object to subsection (14) of Defendant's ordinance, which requires applicants for a permit to provide proof of general liability and products liability insurance in the amount of $500,000.00, combined single limits, to the **Ames** **City** Clerk and naming **Ames** and its employees as additional insureds for purposes of any liabilities that may arise in connection with issuance of the permit. Plaintiffs again cite *Holy Spirit* for the proposition that the requirement is nothing more than the exaction of a fee for the exercise of First Amendment rights. While Plaintiffs also assert that

the requirement of insurance grants unbridled discretion to the City Clerk, the Court finds this proposition to be without merit. The guidelines imposed on the City Clerk are clear and not open to interpretation or the exercise of discretion.

[14] The question then, is whether the requirement that "[a]ll applicants shall provide proof of general liability insurance including products liability in the amount of $500,000 combined single limits," naming the City of Ames and its employees as additional insureds, is a reasonable restriction narrowly tailored to serve the City's significant governmental interest in protecting its citizenry from fraud or other harm by solicitors. The City claims that the "$500,000 proof of insurance is the only avenue available to the City to insure that those registrants that are allowed upon its streets have the financial ability to answer to its citizens for any such fraudulent or harmful conduct brought about by the solicitations." Def.'s Br. at 12–13. Defendant cites numerous cases where proof of insurance requirements have been upheld. For example, in *Gerritsen v. City of Los Angeles,* 994 F.2d 570, 578–79 (9th Cir.1993), potential users of a public park's bandstand and sound system were required ***1010** to post a bond for liability insurance to cover damages to equipment or liability from unanticipated effects of events in the bandstand on park visitors. *Id.* The provision was upheld because it was content-neutral, because it applied to every applicant, because it furthered a significant government interest in the protection of an expensive sound system, and because it was narrowly tailored to meet that goal and left open ample opportunities for other expressive speech. *Id.* at 579. Likewise, in *Sauk County v. Gumz,* 266 Wis.2d 758, 669 N.W.2d 509 (2003), the Court upheld a bond requirement to obtain a license to use a county open-air facility to indemnify the county from costs of clean-up.

Plaintiffs argue that the cited cases are inapposite and counter that requiring a $500,000 insurance policy, which includes products liability insurance, for door-to-door solicitors is not "tailored to place the least restriction on the Plaintiffs in the exercise of their First Amendment rights." Pl.'s Reply at 10. While reiterating that time, place, and manner regulations "need not be the least restrictive or least intrusive means" of regulating expressive activity, *Ward,* 491 U.S. at 798, 109 S.Ct. 2746, the Court agrees that the insurance requirement is not sufficiently narrowly tailored to avoid burdening substantially more speech than necessary to accomplish the City's goal of protecting its citizenry from fraud. The cases cited by Defendant are contextually different from the one at issue, dealing with insurance requirements for use of public facilities and for preservation of public assets. The City offers no real argument as to how a $500,000 insurance policy will serve to protect residents of Ames from fraud or harmful conduct of door-to-door solicitors other than to say that the insurance requirement ensures that solicitors are financially able to answer to its citizenry. In the Court's view, this is akin to exacting a fee from applicants prior to authorizing them to exercise their First Amendment rights. Additionally, the City does not even attempt to explain how a requirement of products liability insurance would protect the citizenry from persons merely soliciting donations for charitable purposes. The identification and screening requirement of the ordinance, as well as general criminal and civil liability measures that any harmful act may be subject to, diminish the need for the City to require such an onerous insurance policy from individuals engaged in protected speech. Accordingly, the Court finds that the insurance requirement is not sufficiently narrowly tailored to protect the interest claimed without infringing unnecessarily on protected speech. As such, it is unconstitutional.

7. *Lack of appeal procedure to contest conduct of the Ames City Clerk.*

Plaintiffs lastly complain that Defendant's ordinances lack sufficient avenues for judicial review of adverse actions in regard to the permit process. Indeed, neither the pre-amendment or the amended ordinance provide any method whereby an individual denied a permit, or who has had a permit revoked, may appeal that decision. Defendant argues that in cases where the "granting authority has little to no discretionary power, regulations have often been upheld as constitutional without any need for a built in appeal procedure with time limits." Def.'s Br. at 16. Thus, Defendant asserts, the fact that Iowa allows a common law certiorari proceeding based on the City Clerk's adverse decision is more than ample to satisfy constitutional requirements regarding an appeal procedure.

[15] The United States Supreme Court has made clear that certain procedural safeguards must be provided an applicant by a licensing scheme that impinges upon ***1011** First Amendment freedoms. In *Freedman v. State of Maryland,* 380 U.S. 51, 58–59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), the Court articulated the procedural safeguards that must be provided: The statute must provide that the licensor will, within a specific brief time period, issue the license or have the burden of going to court to restrain the protected

activity; any restraint imposed in advance of a final judicial disposition on the merits be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution; and the procedure must assure a prompt final judicial decision to minimize any deterrent effect on expression protected by the First Amendment and the erroneous denial of a license. *See* *Freedman,* 380 U.S. at 58–59, 85 S.Ct. 734. Thus, in order for a time, place, or manner regulation to be valid, it must not only contain adequate standards to guide the officials' decision, but it must also be subject to "effective judicial review." *Thomas v. Chicago Park Dist.,* 534 U.S. 316, 323, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002).

[16] The question in the context of the present proceedings, then, is whether the right to initiate a common law certiorari proceeding is constitutionally adequate absent any other right to appeal a contrary act of the **City** Clerk regarding a peddler's permit. Circuit Courts of Appeal have long been split on this precise issue. The Seventh Circuit Court of Appeals, for example, has held that common law certiorari is "good enough for a regulation of expressive activity when the regulation is not a form of censorship, that is, does not require or permit the regulatory authority to evaluate the content or message of the activity regulated." *Thomas v. Chicago Park Dist.,* 227 F.3d at 926; *see also* *Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth.,* 984 F.2d 1319, 1327 (1st Cir.1993) (judicial review adequate where applicant may appeal license denial in court); *Boss Capital, Inc. v. **City** of Casselberry,* 187 F.3d 1251, 1255 (11th Cir.1999) ("[F]or licensing ordinances, prompt judicial review only means access to prompt judicial review."). Other circuits, however, have interpreted prior Supreme Court jurisprudence on the issue of "effective judicial review" as requiring not just prompt access to judicial review, but a prompt determination on the merits. *See* *11126 Baltimore Blvd., Inc. v. Prince George's County, Md.,* 58 F.3d 988, 1000 (4th Cir.1995) (citing *FW/PBS,* 493 U.S.at 248, 110 S.Ct. 596 and *Freedman,* 380 U.S. at 58–60, 85 S.Ct. 734, amongst others, and noting that when "read in context, it is simply not reasonable to take [Justice O'Connor's] statements that there must be 'an avenue for' or 'the possibility of' 'prompt judicial review' to mean that mere access to judicial review is sufficient to satisfy this requirement"); *Nightclubs, Inc. v. **City** of Paducah,* 202 F.3d 884, 892 (6th Cir.2000) ("[T]his Circuit and a number of other circuits have held that a licensing scheme must reasonably ensure a prompt judicial determination, and not mere access to judicial review."); *Baby Tam & Co., Inc. v. **City** of Las Vegas.,* 154 F.3d 1097, 1101 (9th Cir.1998) (" 'prompt judicial review' means the opportunity for a prompt hearing and a prompt decision by a judicial officer"). The Supreme Court appears to have resolved this circuit split in *City of Littleton, Co. v. Z.J. Gifts D–4, L.L.C.,* 541 U.S. 774, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004). There, a Colorado zoning ordinance provided that denial of a license may be appealed to the state district court under the Colorado Rules of Civil Procedure. *Id.* at 774, 124 S.Ct. 2219. The Supreme Court appears to have concluded that a prompt judicial determination is required, noting that the "judicial review" safeguard is meant to prevent " 'undue delay,' which includes *judicial,* as well as *administrative,* delay." ***1012** *Id.* (emphasis in original). "A delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being 'issued within a reasonable period of time.' " *Id.* The Court went on to find that normal Colorado law satisfies the prompt judicial determination requirement:

> Colorado's ordinary "judicial review" rules suffice to assure a prompt judicial decision, as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly. And whether the courts do so is a matter normally fit for case-by-case determination rather than a facial challenge. Four considerations support this conclusion. First, ordinary court procedural rules and practices give reviewing courts judicial tools sufficient to avoid delay-related First Amendment harm. Indeed, courts may arrange their schedules to "accelerate" proceedings, and higher courts may grant expedited review. Second, there is no reason to doubt state judges' willingness to exercise these powers wisely so as to avoid serious threats of delay-induced First Amendment harm. And federal remedies would provide an additional safety valve in the event

> of any such problem. Third, the typical First Amendment harm at issue here differs from that at issue in *Freedman,* diminishing the need in the typical case for procedural rules imposing special decisionmaking time limits. Unlike in *Freedman,* this ordinance does not seek to censor material. And its licensing scheme applies reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials that an adult business may sell or display. These criteria are simple enough to apply and their application simple enough to review that their use is unlikely in practice to suppress totally any specific item of adult material in the community. And the criteria's simple objective nature means that in the ordinary case, judicial review, too, should prove simple, hence expeditious. Finally, nothing in *FW/PBS* or *Freedman* requires a **city** or State to place judicial review safeguards [at] all in the **city** ordinance that sets forth a licensing scheme.

Id. at 774–75, 124 S.Ct. 2219.

While the Court has concerns that common law certiorari will not provide the expedient and affordable review important in the present First Amendment context, *see* *Graff v. **City** of Chicago,* 9 F.3d 1309, 1340–41 (7th Cir.1993) (Cummings, J., dissenting) ("Common law certiorari is insufficient because it is much too slow and uncertain as a mechanism for safeguarding speech. It is an unfortunate fact of life in the modem court system that it may take years, and cost a plaintiff a great deal of money, before his complaint receives a hearing on the merits."), the high Court's decision in *Z.J. Gifts* dictates a finding that the normal review procedures available under **Iowa** law are adequate to safeguard the First Amendment protections of solicitors, particularly where, as here, the ordinances at issue are content-neutral and there exists clear guidance to licensing authorities on when a peddler's permit may or may not issue.[3] Accordingly, the Court must conclude that common law certiorari provides an adequate constitutional safeguard and that the ordinance is not facially unconstitutional on this basis.

C. *Injunctive Relief*

[17] **[18]** Upon a finding that a provision of an ordinance is facially unconstitutional, ***1013** the Court must enjoin those provisions that are inconsistent with constitutional principles. An injunction, however, must be narrowly tailored to provide only the relief to which Plaintiffs are entitled. *See* *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 502–03, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985) (stating this principle in the context of a statute not invalidated on its face). To accomplish this, the Court may enjoin the enforcement of certain provisions of an ordinance if they are severable, or may enjoin the ordinance as a whole. The standard for determining the severability of an unconstitutional provision is well established: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 687, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987). Ultimately, a constitutionally flawed provision cannot be severed "if the balance of the legislation is incapable of functioning independently." *Id.* at 684, 107 S.Ct. 1476. In this case, because the pre-amendment ordinance is no longer in effect, no purpose is served by injunctive relief.[4] The amended ordinance, however, is flawed with respect to the insurance requirement, a provision that clearly is severable from the remainder of the ordinance. Accordingly, the Defendant is enjoined from enforcing the insurance provision of the amended ordinance.

V. CONCLUSION

Plaintiffs' Motion to Strike (Clerk's No. 30) is DENIED. Defendant's Motion for Summary Judgment (Clerk's No. 19) is DENIED. Plaintiffs' Partial Motion for Summary Judgment (Clerk's No. 7) is GRANTED to the extent and for the reasoning articulated herein.

IT IS SO ORDERED.

All Citations

412 F.Supp.2d 994

Footnotes

1 Defendant's Statement of Undisputed Facts, paragraph 13, states: "**United** **Youth** **Careers**, Inc. was well aware of the Defendant's Ordinance prior to June of 2004 as Kenneth McGregor had contacted the **City** Clerk's office [o]n various occasions in regards to potential registration and such requirements". Plaintiffs filed a reply to Defendant's Statement of Undisputed Facts, but did not deny this paragraph, thus admitting it, pursuant to Local Rule 56.1(b), which provides: "The failure to respond, with appropriate citations to the appendix, to an individual statement of material fact constitutes an admission of that fact."

2 Because Campbell was arrested under the provisions of the pre-amendment ordinance and is still subject to criminal liability therefor, Defendant's assertion that Campbell's claim with regard to that ordinance is moot is without merit.

3 Naturally, the Court's reference to the ordinances containing clear guidance to issuing officials does not include those specific provisions the Court has found unconstitutional.

4 Were the ordinance in effect, however, the Court would enjoin enforcement of the insurance provision as well as the provision permitting the **City** Clerk to deny a license on the basis of certain, inadequately defined past criminal acts.

110 S.Ct. 596
Supreme Court of the United States

FW/**PBS**, INC., dba Paris Adult Bookstore II, et al., Petitioners
v.
CITY OF **DALLAS** et al.
M.J.R., INC., et al., Petitioners
v.
CITY OF **DALLAS**.
Calvin BERRY, III, et al., Petitioners
v.
CITY OF **DALLAS** et al.

Nos. 87–2012, 87–2051 and 88–49.
|
Argued Oct. 4, 1989.
|
Decided Jan. 9, **1990**.

Synopsis
Petitioners involved with adult entertainment industry adversely affected by zoning and licensing ordinance, sued for declaratory and injunctive relief. The United States District Court for the Northern District of Texas, Jerry Buchmeyer, J., 648 F.Supp. 1061, held ordinance was not violative of First or Fourth Amendments, and petitioners appealed. The Court of Appeals for the Fifth Circuit, 837 F.2d 1298,affirmed, and certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) petitioners could challenge facial validity of ordinance, on First Amendment prior restraint grounds; (2) ordinance's failure to provide reasonable period during which decision whether to issue license must be made, and to provide avenue for prompt judicial review of adverse decision, rendered licensing requirements unconstitutional as enforced against petitioners engaged in First Amendment activity; (3) petitioners lacked standing to challenge ordinance provisions barring persons residing with individuals whose licenses to conduct sexually oriented businesses had been denied or revoked, or prohibiting applicants for such licenses who were convicted of specified offenses or whose spouses were so convicted, from obtaining such licenses; (4) petitioners lacked standing to challenge ordinance denying licenses to applicants who were convicted of enumerated crimes; (5) **city** council did not violate due process rights of motel owners by declaring that motels renting rooms for less than ten hours were "sexually oriented businesses" subject to ordinance; and (6) determination that such motels were "sexually oriented businesses" did not impinge upon the freedom of association rights of occupants of rooms.

Affirmed in part, reversed in part, vacated in part, and remanded.

Justice Brennan concurred in judgment and filed opinion, in which Justices Marshall and Blackmun joined.

Justice White concurred in part and dissented in part and filed opinion, in which the Chief Justice joined.

Justice Stevens concurred in part and dissented in part and filed opinion.

Justice Scalia concurred in part and dissented in part and filed opinion.

Opinion on remand, 896 F.2d 864.

Procedural Posture(s): On Appeal.

West Headnotes (13)

[1] Constitutional Law
Licenses

Petitioners associated with sexually oriented businesses could raise facial constitutional challenge to **city** licensing ordinance applicable to such businesses, on First Amendment prior restraint grounds; ordinance vested "unbridled discretion" in licensor, as required for facial challenge, as there was no time limit during which licensing authority was required to act. (Per Justice O'Connor, with two Justices concurring and three Justices concurring in judgment). U.S.C.A. Const.Amend. 1.

315 Cases that cite this headnote

[2] Constitutional Law
Licenses

Petitioners associated with sexually oriented businesses had valid First Amendment interest in challenging ordinance requiring licensing of

such businesses, even though ordinance applied to some businesses that apparently were not protected by First Amendment, such as escort agencies and sexual encounter centers; ordinance largely targeted businesses purveying sexual explicit speech, which were conceded to be protected by First Amendment. (Per Justice O'Connor, with two Justices concurring and three Justices concurring in judgment). U.S.C.A. Const.Amend. 1.

127 Cases that cite this headnote

[3] Constitutional Law
Licenses and permits in general

Ordinance requiring license in connection with the operation of sexually oriented businesses, as enforced, was unconstitutional prior restraint on licensees' First Amendment rights; ordinance lacked necessary limitation on period of time during which licensor must make decision whether to issue license, during which status quo was maintained, and ordinance did not provide possibility for prompt judicial review in the event license was erroneously denied. (Per Justice O'Connor, with two Justices concurring and three Justices concurring in judgment). U.S.C.A. Const.Amend. 1.

401 Cases that cite this headnote

[4] Federal Courts
Presentation of Questions Below or on Review; Record; Waiver

Although neither party had raised issue of standing, and courts below had not passed on it, Supreme Court was required to consider whether owners of sexually oriented businesses had standing to challenge **city** ordinance regulating their activities; federal courts are under an independent obligation to examine their own jurisdiction.

813 Cases that cite this headnote

[5] Federal Civil Procedure
Pleading

Standing to sue cannot be inferred argumentatively from averments in pleadings but must affirmatively appear in record.

196 Cases that cite this headnote

[6] Federal Civil Procedure
Pleading

Party seeking exercise of jurisdiction in its favor has burden to allege facts demonstrating it is proper party to invoke judicial resolution of dispute.

456 Cases that cite this headnote

[7] Municipal Corporations
Proceedings concerning construction and validity of ordinances

Petitioners involved with sexual oriented businesses lacked standing to challenge municipal ordinance prohibiting issuance of license to conduct such businesses to applicant who has resided with individual whose license application has been denied or revoked within preceding 12 months; record did not reveal any petitioner who was living with individual whose license was denied or revoked during applicable period.

16 Cases that cite this headnote

[8] Municipal Corporations
Proceedings concerning construction and validity of ordinances

Petitioners involved with sexually oriented businesses lacked standing to challenge **city** ordinance which barred applicants who had been convicted of certain enumerated crimes as well as those whose spouses had been convicted of same crimes from obtaining license to operate such businesses, as no petitioner was member of affected class; although one petitioner alleged he had been convicted for enumerated crime and also that his wife was interested in opening sexually oriented business, **city** council had deleted by amendment crime of which husband was convicted from those enumerated under ordinance.

10 Cases that cite this headnote

[9] Municipal Corporations
Proceedings concerning construction and validity of ordinances

Petitioners involved with sexually oriented businesses lacked standing to challenge provision of **city** ordinance prohibiting person convicted of any of certain enumerated crimes from obtaining license to conduct such business; record showed only one party with potentially disabling criminal record, and record failed to indicate that five-year period following last conviction or release from confinement, whichever was later, during which prohibition was in effect, had not elapsed.

30 Cases that cite this headnote

[10] Municipal Corporations
Proceedings concerning construction and validity of ordinances

Requirement that evidence of standing to sue be contained in record was not satisfied when attorney for **city** in suit challenging ordinance denying persons convicted of crime license to operate sexually oriented businesses stated in oral argument that there were one or two petitioners that had their license denied based on criminal conviction.

9 Cases that cite this headnote

[11] Municipal Corporations
Proceedings concerning construction and validity of ordinances

Standing to challenge **city** ordinance prohibiting persons convicted of certain crimes from obtaining license to conduct sexually oriented businesses could not be established by **city's** affidavit stating that two licenses were revoked on grounds of prior conviction; affidavit could not be relied on because it was first introduced in Supreme Court proceedings and was not part of record of proceedings below.

15 Cases that cite this headnote

[12] Constitutional Law
Hotels, motels, and other lodging

The due process rights of motel owners were not violated when **city** adopted ordinance declaring that motels renting rooms for less than ten hours were sexually oriented businesses subject to regulation under ordinance covering such businesses, based only upon 1977 study by another **city** which allegedly considered only cursorily the effect of "adult" motels on surrounding neighborhoods; reasonableness of legislative judgment that motels offering short room rental periods fostered prostitution and that such type of criminal activity was what ordinance sought to suppress, combined with the study, was adequate to support determination that motels in question should be included in licensing scheme. U.S.C.A. Const.Amend. 14.

18 Cases that cite this headnote

[13] Constitutional Law
Freedom of Association

Assuming that motel owners had standing to claim that ordinance deeming motels permitting rental of rooms for less than ten hours as sexually oriented businesses and imposing ordinance regulations on such motels on grounds that ordinance violated their customers' constitutional right to freedom of association, such rights were limited to "traditional personal bonds" which have "played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs," and ordinance would not have discernible effect on such rights. U.S.C.A. Const.Amend. 1.

22 Cases that cite this headnote

****598 *215** *Syllabus* *

Respondent **city** of **Dallas** adopted a comprehensive ordinance regulating "sexually oriented businesses," which are defined to include "adult" arcades, bookstores, video stores, cabarets, motels, and theaters, as well as escort

agencies, nude model studios, and sexual encounter centers. Among other things, the ordinance requires that such businesses be licensed and includes civil disability provisions prohibiting certain individuals from obtaining licenses. Three groups of individuals and businesses involved in the adult entertainment industry filed separate suits challenging the ordinance on numerous grounds and seeking injunctive and declaratory relief. The District Court upheld the bulk of the ordinance but struck down several subsections, and the city subsequently amended the ordinance in conformity with the court's judgment. The Court of Appeals affirmed, holding, *inter alia,* that the ordinance's licensing scheme did not violate the First Amendment despite its failure to provide the procedural safeguards set forth in *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), and that its civil disability provisions and its provision requiring ****599** licensing for "adult motel owners" renting rooms for fewer than 10 hours were constitutional.

Held: The judgment is affirmed in part, reversed in part, and vacated in part, and the cases are remanded.

837 F.2d 1298, (CA 5 1988), affirmed in part, reversed in part, vacated in part, and remanded.

Justice O'CONNOR delivered the opinion of the Court with respect to Parts III and IV, concluding that:

1. No petitioner has shown standing to challenge (1) the ordinance's provision which prohibits the licensing of an applicant who has resided with an individual whose license application has been denied or revoked, or (2) the civil disability provisions, which disable for specified periods those who have been convicted of certain enumerated crimes, as well as those whose spouses have been so convicted. The record does not reveal ***216** that any petitioner was living with an individual whose application was denied or whose license was revoked. Moreover, although the record reveals one individual who potentially could be disabled under the spousal conviction provision, that person is not herself a license applicant or a party to this action. Even if she did have standing, however, her claim would now be moot, since the city council deleted from the statutory list the crimes of which her husband was convicted after the District Court ruled that the inclusion of such convictions was unconstitutional. Furthermore, although one party stated in an affidavit that he had been convicted of three enumerated misdemeanors, he lacked standing, since he failed to state when he had been convicted of the last misdemeanor or the date of his release from confinement and, therefore, has not shown that he is still within the ordinance's disability period. This Court cannot rely on the city's representations at oral argument that one or two of the petitioners had been denied licenses based on convictions, since the necessary factual predicate must be gleaned from the record below. Similarly, the city's affidavit indicating that two licenses were revoked for convictions is unavailing, since the affidavit was first introduced in this Court and is not part of the record, and, in any event, fails to identify the individuals whose licenses were revoked. Because the courts below lacked jurisdiction to adjudicate petitioners' claims, the Court of Appeals' judgment with respect to the disability provisions is vacated, and the court is directed to dismiss that portion of the suit. Pp. 607–610.

2. The ordinance's provision requiring licensing for motels that rent rooms for fewer than 10 hours is not unconstitutional. The motel owner petitioners' contention that the city has violated the Due Process Clause by failing to produce adequate support for its supposition that renting rooms for fewer than 10 hours results in increased crime or other secondary effects is rejected. As the Court of Appeals recognized, it was reasonable to believe that shorter rental time periods indicate that the motels foster prostitution, and that this type of criminal activity is what the ordinance seeks to suppress. The reasonableness of the legislative judgment, along with the Los Angeles study of the effect of adult motels on surrounding neighborhoods that was before the city council when it passed the ordinance, provided sufficient support for the limitation. Also rejected is the assertion that the 10–hour limitation places an unconstitutional burden on the right to freedom of association recognized in *Roberts v. United States Jaycees,* 468 U.S. 609, 618, 104 S.Ct. 3244, 3249, 82 L.Ed.2d 462. Even assuming that the motel owners have standing to assert the associational rights of motel patrons, limiting rentals to 10 hours will not have any discernible effect on the sorts of traditional personal bonds considered in *Roberts:* those that play a critical role in the Nation's culture and traditions by cultivating and transmitting shared ideals and beliefs. This Court ***217** will not consider the motel owners' privacy and commercial speech challenges, since those issues were ****600** not pressed or passed upon below. Pp. 610–611.

Justice O'CONNOR, joined by Justice STEVENS and Justice KENNEDY, concluded in Part II that the ordinance's licensing scheme violates the First Amendment, since it

constitutes a prior restraint upon protected expression that fails to provide adequate procedural safeguards as required by *Freedman, supra.* Pp. 603–607.

(a) Petitioners may raise a facial challenge to the licensing scheme. Such challenges are permitted in the First Amendment context where the scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad. Petitioners argue that the licensing scheme fails to set a time limit within which the licensing authority must act. Since *Freedman, supra,* 380 **U.S**. at 56–57, 85 S.Ct., at 737–38, held that such a failure is a species of unbridled discretion, every application of the ordinance creates an impermissible risk of suppression of ideas. Moreover, the businesses challenging the licensing scheme have a valid First Amendment interest. Although the ordinance applies to some businesses that apparently are not protected by the First Amendment—*e.g.,* escort agencies and sexual encounter centers—it largely targets businesses purveying sexually explicit speech which the **city** concedes for purposes of this litigation are protected by the First Amendment. While the **city** has asserted that it requires every business—regardless of whether it engages in First Amendment-protected speech—to obtain a certificate of occupancy when it moves into a new location or the use of the structure changes, the challenged ordinance nevertheless is more onerous with respect to sexually oriented businesses, which are required to submit to inspections—for example, when their ownership changes or when they apply for the annual renewal of their permits—whether or not they have moved or the use of their structures has changed. Pp. 603–604.

(b) *Freedman, supra,* at 58–60, 85 S.Ct., at 738–40, determined that the following procedural safeguards were necessary to ensure expeditious decisionmaking by a motion picture censorship board: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license. Thus, the license for a First Amendment-protected business must be issued in a reasonable period of time, and, accordingly, the first two *Freedman* safeguards are essential. Here, although ***218** the **Dallas** ordinance requires the chief of police to approve the issuance of a license within 30 days after receipt of an application, it also conditions such issuance upon approval by other municipal inspection agencies without setting forth time limits within which those inspections must occur. Since the ordinance therefore fails to provide an effective time limitation on the licensing decision, and since it also fails to provide an avenue for prompt judicial review so as to minimize suppression of speech in the event of a license denial, its licensing requirement is unconstitutional insofar as it is enforced against those businesses engaged in First Amendment activity, as determined by the court on remand. However, since the licensing scheme at issue is significantly different from the censorship system examined in *Freedman,* it does not present the grave dangers of such a system, and the First Amendment does not require that it contain the third *Freedman* safeguard. Unlike the *Freedman* censor, **Dallas** does not engage in presumptively invalid direct censorship of particular expressive material, but simply performs the ministerial action of reviewing the general qualifications of each license applicant. It therefore need not be required to carry the burden of going ****601** to court or of there justifying a decision to suppress speech. Moreover, unlike the motion picture distributors considered in *Freedman*—who were likely to be deterred from challenging the decision to suppress a particular movie if the burdens of going to court and of proof were not placed on the censor—the license applicants under the **Dallas** scheme have every incentive to pursue a license denial through court, since the license is the key to their obtaining and maintaining a business. *Riley v. National Federation of Blind of N.C., Inc.,* 487 **U.S**. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), is not dispositive of this litigation, since, although it struck down a licensing scheme for failing to provide adequate procedural safeguards, it did not address the proper scope of procedural safeguards with respect to such a scheme. Since the **Dallas** ordinance summarily states that its terms and provisions are severable, the Court of Appeals must, on remand, determine to what extent the licensing requirement is severable. Pp. 604–607.

Justice BRENNAN, joined by Justice MARSHALL and Justice BLACKMUN, although agreeing that the ordinance's licensing scheme is invalid as to any First Amendment-protected business under the *Freedman* doctrine, concluded that *Riley* mandates application of all three of the *Freedman* procedural safeguards, not just two of them. *Riley v. National Federation of Blind of N.C., Inc.,* 487 **U.S**. 781,

802, 108 S.Ct., at 2680, applied *Freedman* to invalidate a professional licensing scheme with respect to charity fundraisers who were engaged in First Amendment-protected activity, ruling that the scheme must require that the licensor —*i.e.,* the State, not the would-be fundraiser—either issue a license within a specified brief period *or go to court.* The principal opinion's grounds for declining ***219** to require the third *Freedman* safeguard—that the **Dallas** scheme does not require an administrator to engage in the presumptively invalid task of passing judgment on whether the content of particular speech is protected, and that it licenses entire businesses, not just individual films, so that applicants will not be inclined to abandon their interests—do not distinguish the present litigation from *Riley,* where the licensor was not required to distinguish between protected and unprotected speech, and where the fundraisers had their entire livelihoods at stake. Moreover, the danger posed by a license that prevents a speaker from speaking at all is not derived from the basis on which the license was purportedly denied, but is the unlawful stifling of speech that results. Thus, there are no relevant differences between the fundraisers in *Riley* and the petitioners here, and, in the interest of protecting speech, the burdens of initiating judicial proceedings and of proof must be borne by the **city**. Pp. 611–613.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and IV, in which REHNQUIST, C.J., and WHITE, STEVENS, SCALIA, and KENNEDY, JJ., joined, the opinion of the Court with respect to Part III, in which REHNQUIST, C.J., and WHITE, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Part II, in which STEVENS and KENNEDY, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL and BLACKMUN, JJ., joined, *post,* p. 611. WHITE, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C.J., joined, *post,* p. 614. STEVENS, J., *post,* p. 617, and SCALIA, J., *post,* p. 617, filed opinions concurring in part and dissenting in part.

Attorneys and Law Firms

John H. Weston argued the cause for petitioners in all cases. With him on the briefs for petitioners in No. 87-2051 were *G. Randall Garrou, Cathy E. Crosson,* and *Richard L. Wilson. Arthur M. Schwartz* filed briefs for petitioners in No. 87-2012. *Frank P. Hernandez* filed a brief for petitioners in No. 88-49. *Analeslie Muncy* argued the cause for respondents in all cases. With her on the brief were *Kenneth C. Dippel* and *Thomas P. Brandt.*†

† Briefs of *amici curiae* urging reversal were filed for the American Booksellers Association, Inc., et al. by *Michael A. Bamberger;* and for PHE, Inc., by *Bruce J. Ennis, Jr.,* and *Mark D. Schneider.*

Briefs of *amici curiae* urging affirmance were filed for the American Family Association, Inc., by *Peggy M. Coleman;* for the Children's Legal Foundation by *Alan E. Sears;* for the National Institute of Municipal Law Officers by *William I. Thornton, Jr., Frank B. Gummey III,* and *William H. Taube;* and for the **U**. **S**. Conference of Mayors et al by *Benna Ruth Solomon* and *Peter Buscemi.*

Bruce A. Taylor filed a brief for Citizens for Decency Through Law, Inc., as *amicus curiae.*

Opinion

***220** Justice O'CONNOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III, and IV, and an opinion with respect to Part II, in which Justice STEVENS and Justice KENNEDY join.

These cases call upon **us** to decide whether a licensing scheme in a comprehensive **city** ****602** ordinance regulating sexually oriented businesses is a prior restraint that fails to provide adequate procedural safeguards as required by *Freedman v. Maryland,* 380 **U.S**. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). We must also decide whether any petitioner has standing to address the ordinance's civil disability provisions, whether the **city** has sufficiently justified its requirement that motels renting rooms for fewer than 10 hours be covered by the ordinance, and whether the ordinance impermissibly infringes on the right to freedom of association. As this litigation comes to **us**, no issue is presented with respect to whether the books, videos, materials, or entertainment available through sexually oriented businesses are obscene pornographic materials.

I

On June 18, 1986, the **city** council of the **city** of **Dallas** unanimously adopted Ordinance No. 19196 regulating sexually oriented businesses, which was aimed at eradicating the secondary effects of crime and urban blight. The

ordinance, as amended, defines a "sexually oriented business" as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center." Dallas City Code, ch. 41A, Sexually Oriented Businesses § 41A–2(19) (1986). The ordinance regulates sexually oriented businesses through a scheme incorporating zoning, licensing, ***221** and inspections. The ordinance also includes a civil disability provision, which prohibits individuals convicted of certain crimes from obtaining a license to operate a sexually oriented business for a specified period of years.

Three separate suits were filed challenging the ordinance on numerous grounds and seeking preliminary and permanent injunctive relief as well as declaratory relief. Suits were brought by the following groups of individuals and businesses: those involved in selling, exhibiting, or distributing publications or video or motion picture films; adult cabarets or establishments providing live nude dancing or films, motion pictures, videocassettes, slides, or other photographic reproductions depicting sexual activities and anatomy specified in the ordinance; and adult motel owners. Following expedited discovery, petitioners' constitutional claims were resolved through cross-motions for summary judgment. After a hearing, the District Court upheld the bulk of the ordinance, striking only four subsections. See *Dumas v. Dallas*, 648 F.Supp. 1061 (ND Tex.1986). The District Court struck two subsections, §§ 41A–5(a)(8) and 41A–5(c), on the ground that they vested overbroad discretion in the chief of police, contrary to our holding in *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150–151, 89 S.Ct. 935, 938–939, 22 L.Ed.2d 162 (1969). See 648 F.Supp., at 1072–1073. The District Court also struck the provision that imposed a civil disability merely on the basis of an indictment or information, reasoning that there were less restrictive alternatives to achieve the city's goals. See *id.,* at 1075 (citing *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). Finally, the District Court held that five enumerated crimes from the list of those creating civil disability were unconstitutional because they were not sufficiently related to the purpose of the ordinance. See 648 F.Supp., at 1074 (striking bribery, robbery, kidnaping, organized criminal activity, and violations of controlled substances Acts). The city of Dallas subsequently ***222** amended the ordinance in conformity with the District Court's judgment.

The Court of Appeals for the Fifth Circuit affirmed. 837 F.2d 1298 (1988). Viewing the ordinance as a content-neutral time, place, and manner regulation under *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), the Court of Appeals upheld the ordinance against petitioners' facial attack on the ground that it is " 'designed to serve a substantial government interest' " and allowed for " 'reasonable alternative avenues of communication.' " ****603** 837 F.2d, at 1303 (quoting *Renton, supra,* at 47, 106 S.Ct., at 928). The Court of Appeals further concluded that the licensing scheme's failure to provide the procedural safeguards set forth in *Freedman v. Maryland, supra,* withstood constitutional challenge, because such procedures are less important when regulating "the conduct of an ongoing commercial enterprise." 837 F.2d, at 1303.

Additionally, the Court of Appeals upheld the provision of the ordinance providing that motel owners renting rooms for fewer than 10 hours were "adult motel owners" and, as such, were required to obtain a license under the ordinance. See §§ 41A–2(4), 41A–18. The motel owners attacked the provision on the ground that the city had made no finding that adult motels engendered the evils the city was attempting to redress. The Court of Appeals concluded that the 10–hour limitation was based on the reasonable supposition that short rental periods facilitate prostitution, one of the secondary effects the city was attempting to remedy. See 837 F.2d, at 1304.

Finally, the Court of Appeals upheld the civil disability provisions, as modified by the District Court, on the ground that the relationship between "the offense and the evil to be regulated is direct and substantial." *Id.,* at 1305.

We granted petitioners' application for a stay of the mandate except for the holding that the provisions of the ordinance regulating the location of sexually oriented businesses do not violate the ***223** Federal Constitution, 485 U.S. 1042, 108 S.Ct. 1605, 99 L.Ed.2d 919 (1988), and granted certiorari, 489 U.S. 1051, 109 S.Ct. 1309, 103 L.Ed.2d 578 (1989). We now reverse in part and affirm in part.

II

We granted certiorari on the issue whether the licensing scheme is an unconstitutional prior restraint that fails to provide adequate procedural safeguards as required by *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). Petitioners involved in the adult entertainment industry and adult cabarets argue that the licensing scheme fails to set a time limit within which the licensing authority must issue a license and, therefore, creates the likelihood of arbitrary denials and the concomitant suppression of speech. Because we conclude that the city's licensing scheme lacks adequate procedural safeguards, we do not reach the issue decided by the Court of Appeals whether the ordinance is properly viewed as a content-neutral time, place, and manner restriction aimed at secondary effects arising out of the sexually oriented businesses. Cf. *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 562, 95 S.Ct. 1239, 1248, 43 L.Ed.2d 448 (1975).

A

[1] **[2]** We note at the outset that petitioners raise a facial challenge to the licensing scheme. Although facial challenges to legislation are generally disfavored, they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad. See *City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 798, and n. 15, 104 S.Ct. 2118, 2125 n. 15, 80 L.Ed.2d 772 (1984). In *Freedman,* we held that the failure to place limitations on the time within which a censorship board decisionmaker must make a determination of obscenity is a species of unbridled discretion. See *Freedman, supra,* 380 U.S., at 56–57, 85 S.Ct., at 737–738 (failure to confine time within which censor must make decision "contains the same vice as a statute delegating excessive administrative discretion"). Thus, where a scheme creates a "[r]isk of delay," 380 U.S., at 55, 85 S.Ct., at 737, ***224** such that "every application of the statute create[s] an impermissible risk of suppression of ideas," ****604** *Taxpayers for Vincent, supra,* 466 U.S., at 798, n. 15, 104 S.Ct. at 2125 n. 15, we have permitted parties to bring facial challenges.

The businesses regulated by the city's licensing scheme include adult arcades (defined as places in which motion pictures are shown to five or fewer individuals at a time, see § 41A–2(1)), adult bookstores or adult video stores, adult cabarets, adult motels, adult motion picture theaters, adult theaters, escort agencies, nude model studios, and sexual encounter centers, §§ 41A–2(19) and 41A–3. Although the ordinance applies to some businesses that apparently are not protected by the First Amendment, *e.g.,* escort agencies and sexual encounter centers, it largely targets businesses purveying sexually explicit speech which the city concedes for purposes of these cases are protected by the First Amendment. Cf. *Smith v. California,* 361 U.S. 147, 150, 80 S.Ct. 215, 217, 4 L.Ed.2d 205 (1959) (bookstores); *Southeastern Promotions, Ltd. v. Conrad, supra* (live theater performances); *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (motion picture theaters); *Schad v. Mount Ephraim,* 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (nude dancing). As Justice SCALIA acknowledges, *post,* at 624, the city does not argue that the businesses targeted are engaged in purveying obscenity which is unprotected by the First Amendment. See Brief for Respondents 19, 20, and n. 8 ("[T]he city is not arguing that the ordinance does not raise First Amendment concerns.... [T]he right to sell this material is a constitutionally protected right ..."). See also *Miller v. California,* 413 U.S. 15, 23–24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Nor does the city rely upon *Ginzburg v. United States,* 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966), or contend that those businesses governed by the ordinance are engaged in pandering. It is this Court's practice to decline to review those issues neither pressed nor passed upon below. See *Youakim v. Miller,* 425 U.S. 231, 234, 96 S.Ct. 1399, 1401–02, 47 L.Ed.2d 701 (1976) *(per curiam).*

***225** The city asserted at oral argument that it requires every business—without regard to whether it engages in First Amendment-protected speech—to obtain a certificate of occupancy when it moves into a new location or the use of the structure changes. Tr. of Oral Arg. 49; see also App. 42, Dallas City Code § 51–1.104 (1988) (certificate of occupancy required where there is new construction or before occupancy if there is a change in use). Under the challenged ordinance, however, inspections are required for sexually oriented businesses whether or not the business has moved into a new structure and whether or not the use of the structure has changed. Therefore, even assuming the correctness of

the city's representation of its "general" inspection scheme, the scheme involved here is more onerous with respect to sexually oriented businesses than with respect to the vast majority of other businesses. For example, inspections are required whenever ownership of a sexually oriented business changes, and when the business applies for the annual renewal of its permit. We, therefore, hold, as a threshold matter, that petitioners may raise a facial challenge to the licensing scheme, and that as the suit comes to us, the businesses challenging the scheme have a valid First Amendment interest.

B

[3] While "[p]rior restraints are not unconstitutional *per se* ... [a]ny system of prior restraint ... comes to this Court bearing a heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd. v. Conrad, supra,* 420 U.S., at 558, 95 S.Ct., at 1246. See, *e.g., Lovell v. Griffin,* 303 U.S. 444, 451–452, 58 S.Ct. 666, 668–669, 82 L.Ed. 949 (1938); *Cantwell v. Connecticut,* 310 U.S. 296, 306–307, 60 S.Ct. 900, 904–905, 84 L.Ed. 1213 (1940); *Cox v. New Hampshire,* 312 U.S. 569, 574–575, 61 S.Ct. 762, 765, 85 L.Ed. 1049 (1941); *Shuttlesworth v. Birmingham,* 394 U.S., at 150–151, 89 S.Ct., at 938–939. Our cases addressing prior restraints have identified two evils that will not be tolerated ****605** in such schemes. First, a scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint ***226** and may result in censorship." *Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 757, 108 S.Ct. 2138, 2143, 100 L.Ed.2d 771 (1988). See *Saia v. New York,* 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948); *Niemotko v. Maryland,* 340 U.S. 268, 71 S.Ct. 328, 95 L.Ed. 280 (1951); *Kunz v. New York,* 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951); *Staub v. City of Baxley,* 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *Cox v. Louisiana,* 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965); *Shuttlesworth v. Birmingham, supra; Secretary of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). " 'It is settled by a long line of recent decisions of this Court that an ordinance which ... makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.' " *Shuttlesworth, supra,* 394 U.S., at 151, 89 S.Ct., at 938–39 (quoting *Staub, supra,* 355 U.S., at 322, 78 S.Ct. at 282).

Second, a prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible. *Freedman, supra,* 380 U.S., at 59, 85 S.Ct., at 739; *Vance v. Universal Amusement Co.,* 445 U.S. 308, 316, 100 S.Ct. 1156, 1161–62, 63 L.Ed.2d 413 (1980) (striking statute on ground that it restrained speech for an "indefinite duration"). In *Freedman,* we addressed a motion picture censorship system that failed to provide for adequate procedural safeguards to ensure against unlimited suppression of constitutionally protected speech. 380 U.S., at 57, 85 S.Ct., at 738. Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license. In *Riley v. National Federation of Blind of N.C., Inc.,* 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), this Court held that a licensing scheme failing to provide for definite limitations on the time within which the licensor must issue the license was constitutionally unsound, because the "delay compel[led] the speaker's silence." *Id.,* at 802, 108 S.Ct., at 2680. The failure to confine the time within which the licensor must make a decision "contains the same vice as a statute delegating ***227** excessive administrative discretion," *Freedman, supra,* 380 U.S., at 56–57, 85 S.Ct., at 737–738. Where the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion. A scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech.

Although the ordinance states that the "chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application," the license may not issue if the "premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the

building official as being in compliance with applicable laws and ordinances." § 41A–5(a)(6). Moreover, the ordinance does not set a time limit within which the inspections must occur. The ordinance provides no means by which an applicant may ensure that the business is inspected within the 30–day time period within which the license is purportedly to be issued if approved. The **city** asserted at oral argument that when applicants apply for licenses, they are given the telephone numbers of the various inspection agencies so that they may contact them. Tr. of Oral Arg. 48. That measure, obviously, does not place any limits ****606** on the time within which the **city** will inspect the business and thereby make the business eligible for the sexually oriented business license. Thus, the **city's** regulatory scheme allows indefinite postponement of the issuance of a license.

In *Freedman,* we determined that the following three procedural safeguards were necessary to ensure expeditious decisionmaking by the motion picture censorship board: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court. *Freedman, supra,* at 58–60, 85 S.Ct., at 738–740. ***228** Although we struck the licensing provision in *Riley v. National Federation of Blind of N.C., Inc., supra,* on the ground that it did not provide adequate procedural safeguards, we did not address the proper scope of procedural safeguards with respect to a licensing scheme. Because the licensing scheme at issue in these cases does not present the grave "dangers of a censorship system," *Freedman, supra,* at 58, 85 S.Ct., at 738–39, we conclude that the full procedural protections set forth in *Freedman* are not required.

The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied. See *Freedman, supra,* at 51, 85 S.Ct., at 734. See also *Shuttlesworth,* 394 **U.S.**, at 155, n. 4, 89 S.Ct., at 941, n. 4 (content-neutral time, place, and manner regulation must provide for "expeditious judicial review"); *National Socialist Party of America v. Skokie,* 432 **U.S.** 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977).

The Court in *Freedman* also required the censor to go to court and to bear the burden in court of justifying the denial.

> "Without these safeguards, it may prove too burdensome to seek review of the censor's determination. Particularly in the case of motion pictures, it may take very little to deter exhibition in a given locality. The exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation. The distributor, on the other hand, may be equally unwilling to accept the burdens and delays of litigation in a particular area when, without such difficulties, he can freely exhibit his film in most of the rest of the country...." 380 **U.S.**, at 59, 85 S.Ct., at 739.

***229** Moreover, a censorship system creates special concerns for the protection of speech, because "the risks of freewheeling censorship are formidable." *Southeastern Promotions,* 420 **U.S.**, at 559, 95 S.Ct., at 1246–47.

As discussed *supra,* the **Dallas** scheme does not provide for an effective limitation on the time within which the licensor's decision must be made. It also fails to provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial. We therefore hold that the failure to provide these essential safeguards renders the ordinance's licensing requirement unconstitutional insofar as it is enforced against those businesses engaged in First Amendment activity, as determined by the court on remand.

The Court also required in *Freedman* that the censor bear the burden of going to court in order to suppress the speech and the burden of proof once in court. The licensing scheme we examine today is significantly different from the censorship scheme examined in *Freedman.* In *Freedman,* the censor engaged in direct censorship of particular expressive ****607** material. Under our First Amendment jurisprudence, such regulation of speech is presumptively invalid and, therefore, the censor in *Freedman* was required to carry the burden of going to court if the speech was to be suppressed and of justifying its decision once in court. Under the **Dallas** ordinance, the **city** does not exercise discretion by passing judgment on the content of any protected speech. Rather, the **city** reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid. The Court in *Freedman* also placed the burdens on the

censor, because otherwise the motion picture distributor was likely to be deterred from challenging the decision to suppress the speech and, therefore, the censor's decision to suppress was tantamount to complete suppression of the speech. The license applicants under the **Dallas** scheme have much more at stake than did the motion picture distributor considered in *Freedman,* where only one film was censored. Because the ***230** license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court. Because of these differences, we conclude that the First Amendment does not require that the **city** bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court. Limitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review satisfy the "principle that the freedoms of expression must be ringed about with adequate bulwarks." *Bantam Books, Inc. v. Sullivan,* 372 **U.S**. 58, 66, 83 S.Ct. 631, 637, 9 L.Ed.2d 584 (1963).

Finally, we note that § 5 of Ordinance No. 19196 summarily states that "[t]he terms and provisions of this ordinance are severable, and are governed by Section 1–4 of CHAPTER 1 of the **Dallas City** Code, as amended." We therefore remand to the Court of Appeals for further determination whether and to what extent the licensing scheme is severable. Cf. *Lakewood v. Plain Dealer Publishing Co.,* 486 **U.S**., at 772, 108 S.Ct., at 2152 (remanding for determination of severability).

III

[4] We do not reach the merits of the adult entertainment and adult cabaret petitioners' challenges to the civil disability provision, § 41A–5(a)(10), and the provision disabling individuals residing with those whose licenses have been denied or revoked, § 41A–5(a)(5), because petitioners have failed to show they have standing to challenge them. See Brief for Petitioners in No. 87–2051, pp. 22–40, 44; Brief for Petitioners in No. 87–2012, pp. 12–20. Neither the District Court nor the Court of Appeals determined whether petitioners had standing to challenge any particular provision of the ordinance. Although neither side raises the issue here, we are required to address the issue even if the courts below have not passed on it, see *Jenkins v. McKeithen,* 395 **U.S**. 411, 421, 89 S.Ct. 1843, 1848–49, 23 L.Ed.2d 404 (1969), and even if the parties fail to raise the issue before ***231** **us**. The federal courts are under an independent obligation to examine their own jurisdiction, and standing "is perhaps the most important of [the jurisdictional] doctrines." *Allen v. Wright,* 468 **U.S**. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

> "[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it. *Mitchell v. Maurer,* 293 **U.S**. 237, 244 [55 S.Ct. 162, 165, 79 L.Ed. 338] (1934). See *Juidice v. Vail,* 430 **U.S**. 327, 331–332 [97 S.Ct. 1211, 1215–1216, 51 L.Ed.2d 376] (1977) (standing). 'And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it.' " ****608** *Bender v. Williamsport Area School Dist.,* 475 **U.S**. 534, 541, 106 S.Ct. 1326, 1331, 89 L.Ed.2d 501 (1986).

[5] **[6]** It is a long-settled principle that standing cannot be "inferred argumentatively from averments in the pleadings," *Grace v. American Central Ins. Co.,* 109 **U.S**. 278, 284, 3 S.Ct. 207, 210, 27 L.Ed. 932 (1883), but rather "must affirmatively appear in the record." *Mansfield C. & L.M.R. Co. v. Swan,* 111 **U.S**. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884). See *King Bridge Co. v. Otoe County,* 120 **U.S**. 225, 226, 7 S.Ct. 552, 552, 30 L.Ed. 623 (1887) (facts supporting Article III jurisdiction must "appea[r] affirmatively from the record"). And it is the burden of the "party who seeks the exercise of jurisdiction in his favor," *McNutt v. General Motors Acceptance Corp.,* 298 **U.S**. 178, 189, 56 S.Ct. 780, 785, 80 L.Ed. 1135 (1936), "clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *Warth v. Seldin,* 422 **U.S**. 490, 518, 95 S.Ct. 2197, 2215, 45 L.Ed.2d 343 (1975). Thus, petitioners in this case must "allege ... facts essential to show jurisdiction. If [they] fai[l] to make the necessary allegations, [they have] no standing." *McNutt, supra,* 298 **U.S**., at 189, 56 S.Ct., at 785.

The ordinance challenged here prohibits the issuance of a license to an applicant who has resided with an individual whose license application has been denied or revoked within ***232** the preceding 12 months. [1] The ordinance also has

a civil disability provision, which disables those who have been convicted of certain enumerated crimes as well as those whose spouses have been convicted of the same enumerated crimes. This civil disability lasts for two years in the case of misdemeanor convictions and five years in the case of conviction of a felony or of more than two misdemeanors within a 24–month period.[2] Thus, under the amended ordinance, ****609** once the disability ***233** period has elapsed, the applicant may not be denied a license on the ground of a former conviction.

[7] **[8]** Examination of the record here reveals that no party has standing to challenge the provision involving those residing with individuals whose licenses were denied or revoked. Nor does any party have standing to challenge the civil disability provision disabling applicants who were either convicted of the specified offenses or whose spouses were convicted.

First, the record does not reveal that any party before **us** was living with an individual whose license application was denied or whose license was revoked. Therefore, no party has standing with respect to § 41A–5(a)(5). Second, § 41A–5(a)(10) applies to applicants whose spouses have been convicted of any of the enumerated crimes, but the record reveals only one individual who could be disabled under this provision. An individual, who had been convicted under the Texas Controlled Substances Act, asserts that his wife was interested in opening a sexually oriented business. But the wife, although an officer of petitioner Bi–Ti Enterprises, Inc., ***234** is not an applicant for a license or a party to this action. See 12 Record, Evert Affidavit 3–6. Cf. *Bender,* 475 **U.S.**, at 548, and n. 9, 106 S.Ct., at 1335, and n. 9.

Even if the wife did have standing, her claim would now be moot. Her husband's convictions under the Texas Controlled Substances Act would not now disable her from obtaining a license to operate a sexually oriented business, because the **city** council, following the District Court's decision, deleted the provision disabling those with convictions under the Texas Controlled Substances Act or Dangerous Drugs Act. App.H. to Pet. for Cert. in No. 87–2012, p. 107. See *Hall v. Beals,* 396 **U.S.** 45, 48, 90 S.Ct. 200, 201–02, 24 L.Ed.2d 214 (1969).

[9] Finally, the record does not reveal any party who has standing to challenge the provision disabling an applicant who was convicted of any of the enumerated crimes. To establish standing to challenge that provision the individual must show both (1) a conviction of one or more of the enumerated crimes, and (2) that the conviction or release from confinement occurred recently enough to disable the applicant under the ordinance. See §§ 41A–5(a)(10)(A), (B). If the disability period has elapsed, the applicant is not deprived of the possibility of obtaining a license and, therefore, cannot be injured by the provision.

The only party who could plausibly claim to have standing to challenge this provision is Bill Staten, who stated in an affidavit that he had been "convicted of three misdemeanor obscenity violations within a twenty-four month period." 7 Record, Staten Affidavit 2. That clearly satisfies the first requirement. Under the ordinance, any person convicted of two or more misdemeanors "within any 24–month period," must wait five years following the last conviction or release from confinement, whichever is later, before a license may be issued. See § 41A–5(a)(10)(B)(iii). But Staten failed to state when he had been convicted of the last misdemeanor or the date of release from confinement and, thus, has failed "clearly to allege facts demonstrating that he is a proper ***235** party" to challenge the civil disability provisions. No other petitioner has alleged facts to establish standing, and the District Court made no factual findings that could support standing. Accordingly, we conclude that the petitioners lack standing to challenge the provisions. See *Warth,* 422 **U.S.**, at 518, 95 S.Ct., at 2215.

[10] **[11]** At oral argument, the **city's** attorney responded as follows when asked whether there was standing to challenge the civil disability provisions: "I believe that there are one or two of the Petitioners that have had their licenses denied based on criminal conviction." Tr. of Oral Arg. 32. See also Foster Affidavit 1 (affidavit filed by the **city** in its Response to Petitioner's Application for Recall and Stay of the Mandate stating that two licenses were *revoked* on the ****610** grounds of a prior conviction since the ordinance went into effect but failing to identify the licensees). We do not rely on the **city's** representations at argument as "the necessary factual predicate may not be gleaned from the briefs and arguments themselves," *Bender, supra,* 475 **U.S.**, at 547, 106 S.Ct., at 1334. And we may not rely on the **city's** affidavit, because it is evidence first introduced to this Court and "is not in the record of the proceedings below," *Adickes v. S.H. Kress & Co.,* 398 **U.S.** 144, 157, n. 16, 90 S.Ct. 1598, 1608, n. 16, 26 L.Ed.2d 142 (1970). Even if we could take into account the facts as alleged in the **city's** affidavit, it fails to identify the individuals whose licenses were revoked and, therefore, falls

short of establishing that any petitioner before this Court has had a license revoked under the civil disability provisions.

Because we conclude that no petitioner has shown standing to challenge either the civil disability provisions or the provisions involving those who live with individuals whose licenses have been denied or revoked, we conclude that the courts below lacked jurisdiction to adjudicate petitioners' claims with respect to those provisions. We accordingly vacate the judgment of the Court of Appeals with respect to those provisions with directions to dismiss that portion of the action. See *Bender, supra,* 475 U.S. at 549, 106 S.Ct., at 1335 (vacating judgment below on ***236** ground of lack of standing); *McNutt,* 298 U.S., at 190, 56 S.Ct., at 785 (same). [3]

IV

The motel owner petitioners challenge two aspects of the ordinance's requirement that motels that rent rooms for fewer than 10 hours are sexually oriented businesses and are, therefore, regulated under the ordinance. See § 41A–18(a). First, they contend that the city had an insufficient factual basis on which to conclude that rental of motel rooms for fewer than 10 hours produced adverse impacts. Second, they contend that the ordinance violates privacy rights, especially the right to intimate association.

[12] With respect to the first contention, the motel owners assert that the city has violated the Due Process Clause by failing to produce adequate support for its supposition that renting rooms for less than 10 hours results in increased crime or other secondary effects. They contend that the council had before it only a 1977 study by the city of Los Angeles that considered cursorily the effect of adult motels on surrounding neighborhoods. See Defendant's Motion for Summary Judgment, Vol. 2, Exh. 11. The Court of Appeals thought it reasonable to believe that shorter rental time periods indicate that the motels foster prostitution and that this type of criminal activity is what the ordinance seeks to suppress. See 837 F.2d, at 1304. Therefore, no more extensive studies were required than those already available. We agree with the Court of Appeals that the reasonableness of the legislative judgment, combined with the Los Angeles study, is adequate to support the city's determination that motels permitting room rentals for fewer than 10 hours should be included within the licensing scheme.

***237** **[13]** The motel owners also assert that the 10–hour limitation on the rental of motel rooms places an unconstitutional burden on the right to freedom of association recognized in *Roberts v. United States Jaycees,* 468 U.S. 609, 618, 104 S.Ct. 3244, 3250, 82 L.Ed.2d 462 (1984) ("Bill of Rights ... must afford the formation and preservation of certain kinds of highly personal relationships"). The city does not challenge the motel owners' standing to raise the issue whether the associational rights of their motel patrons have been violated. There can be little question that the motel owners have "a live controversy ****611** against enforcement of the statute" and, therefore, that they have Art. III standing. *Craig v. Boren,* 429 U.S. 190, 192, 97 S.Ct. 451, 454, 50 L.Ed.2d 397 (1976). It is not clear, however, whether they have prudential, *jus tertii* standing to challenge the ordinance on the ground that the ordinance infringes the associational rights of their motel patrons. *Id.,* at 193, 97 S.Ct., at 454–55. But even if the motel owners have such standing, we do not believe that limiting motel room rentals to 10 hours will have any discernible effect on the sorts of traditional personal bonds to which we referred in *Roberts.* Any "personal bonds" that are formed from the use of a motel room for fewer than 10 hours are not those that have "played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs." 468 U.S., at 618–619, 104 S.Ct., at 3249–3250. We therefore reject the motel owners' challenge to the ordinance.

Finally, the motel owners challenge the regulations on the ground that they violate the constitutional right "to be let alone," *Olmstead v. United States,* 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting), and that the ordinance infringes the motel owners' commercial speech rights. Because these issues were not pressed or passed upon below, we decline to consider them. See, *e.g., Rogers v. Lodge,* 458 U.S. 613, 628, n. 10, 102 S.Ct. 3272, 3281, n. 10, 73 L.Ed.2d 1012 (1982); *FTC v. Grolier Inc.,* 462 U.S. 19, 23, n. 6, 103 S.Ct. 2209, 2212, n. 6, 76 L.Ed.2d 387 (1983).

***238** Accordingly, the judgment below is affirmed in part, reversed in part, and vacated in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BRENNAN, with whom Justice MARSHALL and Justice BLACKMUN join, concurring in the judgment.

I concur in the judgment invalidating the **Dallas** licensing provisions, as applied to any First Amendment-protected business, because I agree that the licensing scheme does not provide the procedural safeguards required under our previous cases. [1] I also concur in the judgment upholding the provisions applicable to adult motels, because I agree that the motel owners' claims are meritless. I agree further that it is not necessary to reach petitioners' other First Amendment challenges. I write separately, however, because I believe that our decision two Terms ago in *Riley v. National Federation* ***239** *of Blind of N.C., Inc.,* 487 **U.S**. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), mandates application of all three of the procedural safeguards specified in *Freedman v. Maryland,* 380 **U.S**. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), not just two of them, and also to point out that Part III of Justice O'CONNOR's opinion reaches a question not necessary to the decision.

****612** I

In *Freedman v. Maryland, supra,* as Justice O'CONNOR notes, we held that three procedural safeguards are needed to "obviate the dangers of a censorship system": (1) any prior restraint in advance of a final judicial determination on the merits must be no longer than that necessary to preserve the status quo pending judicial resolution; (2) a prompt judicial determination must be available; and (3) the would-be censor must bear both the burden of going to court and the burden of proof in court. 380 **U.S**., at 58–59, 85 S.Ct., at 738–739. *Freedman* struck down a statute that required motion picture houses to submit films for prior approval, without providing any of these protections. Similar cases followed, *e.g., Teitel Film Corp. v. Cusack,* 390 **U.S**. 139, 88 S.Ct. 754, 19 L.Ed.2d 966 (1968) (invalidating another motion picture censorship ordinance for failure to provide adequate *Freedman* procedures); *Blount v. Rizzi,* 400 **U.S**. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971) (invalidating postal rules permitting restrictions on the use of the mails for allegedly obscene materials because the rules lacked *Freedman* safeguards); *Southeastern Promotions, Ltd. v. Conrad,* 420 **U.S**. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) (finding unconstitutional a **city's** refusal to rent municipal facilities for a musical because of its content, absent *Freedman* procedures).

We have never suggested that our insistence on *Freedman* procedures might vary with the particular facts of the prior restraint before **us**. To the contrary, this Court has continued to require *Freedman* procedures in a wide variety of contexts. In *National Socialist Party of America v. Skokie,* 432 **U.S**. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977), we held that even a court-ordered injunction must be stayed if appellate review is not expedited. ***240** *Id.,* at 44, 97 S.Ct., at 2206. And in *Vance v. Universal Amusement Co.,* 445 **U.S**. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980), we held that a general public nuisance statute could not be applied to enjoin a motion picture theater's future exhibition of films for a year, based on a presumption that such films would be obscene merely because prior films had been, when such a determination could be constitutionally made only in accordance with *Freedman* procedures. 445 **U.S**., at 317, 100 S.Ct., at 1162.

Two Terms ago, in *Riley,* this Court applied *Freedman* to a professional licensing scheme because the professionals involved, charity fundraisers, were engaged in First Amendment-protected activity. We held that, even if North Carolina's interest in licensing fundraisers was sufficient to justify such a regulation, it "must provide that the licensor 'will, within a specified brief period, either issue a license or go to court.' " 487 **U.S**., at 802, 108 S.Ct., at 2680, quoting and applying *Freedman, supra,* 380 **U.S**., at 59, 85 S.Ct., at 739. The North Carolina statute did not so provide, and we struck it down. 487 **U.S**., at 802, 108 S.Ct., at 2681.

In *Riley,* this Court, to be sure, discussed the failure of the North Carolina statute to set a time limit for actions on license applications, but it also held that the *licensor* must be required to go to court, not the would-be fundraiser. Because I see no relevant difference between the fundraisers in *Riley* and the bookstores and motion picture theaters in these cases, I would hold that the **city** of **Dallas** must bear the burden of going to court and proving its case before it may permissibly deny licenses to First Amendment-protected businesses.

Justice O'CONNOR bases her disinclination to require the third *Freedman* procedure on two grounds: the **Dallas** licensing scheme does not involve an administrator's passing judgment on whether the content of particular speech is

protected or not; and the Dallas scheme licenses entire businesses, not just individual films. Justice O'CONNOR finds the first distinction significant on the theory that our jurisprudence holds only that suppression of speech on the ostensible ground of *241 content is presumptively invalid. She finds the second significant because it anticipates that applicants with an entire **613 business at stake will pursue their interests in court rather than abandon them.

While Justice O'CONNOR is certainly correct that these aspects distinguish the facts before us from those in *Freedman,* neither ground distinguishes these cases from *Riley.* The licensor in *Riley* was not required to distinguish between protected and unprotected speech. He was reviewing applications to practice a particular profession, just as the city of Dallas is acting on applications to operate particular businesses. Similarly, the fundraisers in *Riley* had their entire livelihoods at stake, just as the bookstores and others subject to the Dallas ordinance. Nonetheless, this Court placed the burden of going to court on the State, not the applicant.[2] 487 U.S., at 802, 108 S.Ct. at 2680.

Moreover, I believe *Riley* was rightly decided for the same reasons that the limitation set forth in Justice O'CONNOR's opinion is wrong. The danger posed by a license that prevents a speaker from speaking at all is not derived from the basis on which that license was purportedly denied. The danger posed is the unlawful stifling of speech that results. As we said in *Freedman,* it is "the transcendent value of speech" that places the burden of persuasion on the State. 380 U.S., at 58, 85 S.Ct., at 738–739. The heavy presumption against prior restraints requires no less. Justice O'CONNOR does not, nor could she, contend that those administering this ordinance will always act according to their own law. Mistakes are inevitable; abuse is possible. In distributing the burdens of initiating judicial proceedings and proof, we are obliged *242 to place them such that we err, if we must, on the side of speech, not on the side of silence.

II

In Part III of the opinion, Justice O'CONNOR considers at some length whether petitioners have made an adequate showing of standing to bring their claims against the cohabitation and civil disability provisions of the licensing scheme. Were it of some precedential value, I would question this Court's reversal of the findings of both the District Court and the Court of Appeals[3] that petitioners had standing to bring their claims, where the basis for reversal is an affidavit that is at worst merely ambiguous. But because the discussion is wholly extraneous to the actual holding in this case, I write only to clarify that Part III is unnecessary to the decision and is pure dictum.

The first claim for which the Court fails to find a petitioner with standing—an unspecified objection to the provision denying a license to any applicant residing with someone whose own application has been denied or revoked within the past year—is not directly presented by the parties, was not reached by the court below, and is not among the questions on which certiorari was granted. The second claim for which the Court fails to find a petitioner with standing—petitioners' objection to the ordinance's civil disability provisions—is clearly before this Court, but consideration of this claim is rendered redundant by Justice O'CONNOR's holding in Part II.

The civil disability claim is an objection to that part of the licensing scheme which provides for denial or revocation of a license because of prior criminal convictions, on the **614 ground *243 that these provisions "impose an impermissible prior restraint upon protected expression." Brief for Petitioners FW/PBS, Inc., et al. 12.[4] Because the challenge is based solely on the First Amendment, a victory on the merits would benefit only those otherwise regulated businesses which are protected by the First Amendment.

But since the Court invalidates the application of the entire Dallas licensing scheme to any First Amendment-protected business under the *Freedman* doctrine, it is unnecessary to decide whether some or all of the same provisions are also invalid, as to First Amendment-protected businesses, on other grounds. Justice O'CONNOR recognizes this and wisely declines to reach petitioners' challenge to various requirements under the licensing scheme, other than the civil disability and cohabitation provisions, on the First Amendment ground that the ordinance impermissibly singles out persons and businesses engaged in First Amendment-protected activities for regulation.[5]

For reasons unexplained and inexplicable, the opinion separates the prior restraint and singling out claims and accords them different treatment. Perhaps, if the inquiry had reached the merits of the prior restraint claim, one could infer a motive to take the opportunity to offer guidance in an area of the law badly in need of it. But because the inquiry proceeds

no further than jurisdiction, no such explanation is available. Whatever the reason for including Part III, it is superfluous.

***244** Justice WHITE, with whom the Chief Justice joins, concurring in part and dissenting in part.

I join Parts I, III, and IV of the Court's opinion but do not agree with the conclusion in Part II that the **Dallas** ordinance must include two of the procedural safeguards set forth in *Freedman v. Maryland,* 380 **U.S**. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), in order to defeat a facial challenge. I would affirm the Fifth Circuit's holding that *Freedman* is inapplicable to the **Dallas** scheme.

The Court has often held that when speech and nonspeech elements "are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien,* 391 **U.S**. 367, 376, 88 S.Ct. 1673, 1678–79, 20 L.Ed.2d 672 (1968). See also *Clark v. Community for Creative Non–Violence,* 468 **U.S**. 288, 298–299, 104 S.Ct. 3065, 3071–3072, 82 L.Ed.2d 221 (1984); *Cox v. Louisiana,* 379 **U.S**. 559, 562–564, 85 S.Ct. 476, 479–481, 13 L.Ed.2d 487 (1965); *Adderley v. Florida,* 385 **U.S**. 39, 48, n. 7, 87 S.Ct. 242, 247, n. 7, 17 L.Ed.2d 149 (1966). Our cases upholding time, place, and manner restrictions on sexually oriented expressive activity are to the same effect. See *Renton v. Playtime Theatres, Inc.,* 475 **U.S**. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Young v. American Mini Theatres, Inc.,* 427 **U.S**. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). Time, place, and manner restrictions are not subject to strict scrutiny and are sustainable if they are content neutral, are designed to serve a substantial governmental interest, and do not unreasonably limit alternative means of communication. *Renton, supra,* 475 **U.S**., at 47, 106 S.Ct., at 928. See also ****615** *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 **U.S**. 640, 647–648, 101 S.Ct. 2559, 2563–2564, 69 L.Ed.2d 298 (1981); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.,* 425 **U.S**. 748, 771, 96 S.Ct. 1817, 1830, 48 L.Ed.2d 346 (1976). *Renton* and *Young* also make clear that there is a substantial governmental interest in regulating sexually oriented businesses because of their likely deleterious effect on the areas surrounding them and that such regulation, although focusing on a limited class of businesses involved in expressive activity, is to be treated as content neutral.

***245** Justice O'CONNOR does not suggest that the businesses involved here are immune from the kind of regulation sustained in *Young* and *Renton.* Neither is it suggested that the prerequisites for obtaining a license, such as certificates of occupancy and inspections, do not serve the same kind of a substantial governmental interest dealt with in those cases nor that the licensing system fails the test of content neutrality. The ordinance in no way is aimed at regulating what may be sold or offered in the covered businesses. With a license, operators can sell anything but obscene publications. Without one—without satisfying the licensing requirements—they can sell nothing because the **city** is justified in enforcing the ordinance to avoid the likely unfavorable consequences attending unregulated sexually oriented businesses.

Justice O'CONNOR nevertheless invalidates the licensing provisions for failure to provide some of the procedural requirements that *Freedman v. Maryland, supra,* imposed in connection with a Maryland law forbidding the exhibition of any film without the approval of a board of censors. There, the board was approving or disapproving every film based on its view of the film's content and its suitability for public viewing. Absent procedural safeguards, the law imposed an unconstitutional prior restraint on exhibitors. As I have said, however, nothing like that is involved here; the predicate identified in *Freedman* for imposing its procedural requirements is absent in these cases.

Nor is there any other good reason for invoking *Freedman.* The **Dallas** ordinance is in many respects analogous to regulations requiring parade or demonstration permits and imposing conditions on such permits. Such regulations have generally been treated as time, place, and manner restrictions and have been upheld if they are content neutral, serve a substantial governmental interest, and leave open alternative avenues of communication. *Cox v. New Hampshire,* 312 **U.S**. 569, 574–576, 61 S.Ct. 762, 765–766, 85 L.Ed. 1049 (1941); *Clark v. Community for Creative Non–Violence, supra,* 468 **U.S**., at 293–298, 104 S.Ct., at 3068–3071. The **Dallas** scheme regulates ***246** who may operate sexually oriented businesses, including those who sell materials entitled to First Amendment protection; but the ordinance does not regulate content and thus it is unlike the content-based prior restraints that this Court has typically scrutinized

very closely. See, *e.g., Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931); *National Socialist Party of America v. Skokie,* 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977); *Vance v. Universal Amusement Co.,* 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980); *Freedman v. Maryland, supra.*

Licensing schemes subject to First Amendment scrutiny, however, even though purporting to be time, place, and manner restrictions, have been invalidated when undue discretion has been vested in the licensor. Unbridled discretion with respect to the criteria used in deciding whether or not to grant a license is deemed to convert an otherwise valid law into an unconstitutional prior restraint. *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150–152, 89 S.Ct. 935, 938–939, 22 L.Ed.2d 162 (1969); *Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 757, 108 S.Ct. 2138, 2143, 100 L.Ed.2d 771 (1988); *Staub v. City of Baxley,* 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); *Niemotko v. Maryland,* 340 U.S. 268, 71 S.Ct. 328, 95 L.Ed. 280 (1951); *Kunz v. New York,* 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951);

****616** *Saia v. New York,* 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948). That rule reflects settled law with respect to licensing in the First Amendment context. But here there is no basis for invoking *Freedman* procedures to protect against arbitrary use of the discretion conferred by the ordinance before us. Here, the Court of Appeals specifically held that the ordinance did not vest undue discretion in the licensor because the ordinance provides sufficiently objective standards for the chief of police to apply. 837 F.2d 1298, 1305–1306 (CA5 1988). Justice O'CONNOR's opinion does not disturb this aspect of the Court of Appeals' decision, and because it does not, one arguably tenable reason for invoking *Freedman* disappears.

Additionally, petitioners' reliance on *Riley v. National Federation of Blind of N.C., Inc.,* 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), is misplaced. *Riley* invalidated a licensing requirement for professional fundraisers which prevented them from soliciting ***247** prior to obtaining a license, but which permitted nonprofessionals to solicit while their license applications were pending. We there held that a professional fundraiser was a speaker entitled to First Amendment protection and that because "the State's asserted power to license professional fundraisers carries with it (unless properly constrained) the power directly and substantially to affect the speech they utter," *id.,* at 801, 108 S.Ct., at 2670, the requirement was subject to First Amendment scrutiny to make sure that the licensor's discretion was suitably confined. *Riley* thus appears to be a straightforward application of the "undue-discretion" line of cases. The Court went on to say, however, that even assuming, as North Carolina urged, that the licensing requirement was a time, place, and manner restriction, *Freedman v. Maryland,* 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), required that there be provision for either acting on the license application or going to court within a specified brief period of time.

Contrary to the ordinance in these cases, the *Riley* licensing requirement was aimed directly at speech. The discretion given the licensors in *Riley* empowered them to affect the content of the fundraiser's speech, unless that discretion was suitably restrained. In that context, the Court invoked *Freedman.* That basis for applying *Freedman* is not present here, for, as I have said, the licensor is not vested with undue discretion.

Neither is there any basis for holding that businesses dealing in expressive materials have been singled out; all sexually oriented businesses—including those not involved in expressive activity such as escort agencies—are covered, and all other businesses must live up to the building codes, as well as fire and health regulations. Furthermore, the Court should not assume that the licensing process will be unduly prolonged or that inspections will be arbitrarily delayed. There is no evidence that this has been the case, or that inspections in other contexts have been delayed or neglected. Between the time of the District Court's judgment and that of the ***248** Fifth Circuit, Dallas granted some 147 out of 165 license requests, and none of the petitioners in making this facial challenge to the ordinance asserts that its license application was not promptly dealt with, that it was unable to obtain the required inspections promptly, or that it was unable to secure reasonably prompt review of a denial. Clearly the licensing scheme neither imposes nor results in a ban of any type of adult business.

I see no basis for invalidating this ordinance because it fails to include some prophylactic measures that will guard against highly speculative injuries. As Justice O'CONNOR notes in the course of refusing to apply one of the *Freedman*

procedural mandates, the licensing in these cases is required of sexually oriented businesses, enterprises that will have every incentive to pursue the license applications vigorously. *Ante,* at 606–607. The ordinance requires that an application be acted on within 30 ****617** days. Licensing decisions suspending or revoking a license are immediately appealable to a permit and license appeal board and are stayed pending that appeal. In addition, no one suggests that licensing decisions are not subject to immediate appeal to the courts. As I see it, there is no realistic prospect that the requirement of a license will have anything more than an incidental effect on the sale of protected materials.

Perhaps Justice O'CONNOR is saying that those who deal in expressive materials are entitled to special procedures in the course of complying with otherwise valid, neutral regulations generally applicable to all businesses. I doubt, however, that bookstores or radio or television stations must be given special breaks in the enforcement of general health, building, and fire regulations. If they must, why would not a variety of other kinds of businesses, like supermarkets and convenience stores that sell books and magazines, also be so entitled? I question that there is authority to be found in our cases for such a special privilege.

***249** For the foregoing reasons, I respectfully dissent from Part II of Justice O'CONNOR's opinion.

Justice STEVENS, concurring in part and dissenting in part.

As the Court explains in Part III of its opinion, it is not certain that any petitioner has standing to challenge the provisions of the licensing scheme that disqualify applicants who are themselves unqualified or who reside with, or are married to, unqualified persons. Given the breadth of those provisions, the assertions in the Staten and Foster affidavits, and the District Court's understanding of the relevant facts, however, I cannot join the decision to direct dismissal of this portion of the litigation. See *ante,* at 609–610. I would remand for an evidentiary hearing on the standing issues.

I join Parts I, II, and IV of Justice O'CONNOR's opinion. With respect to Justice SCALIA's proposed resurrection of *Ginzburg v. United States,* 383 **U.S**. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966), I have this comment. As I explained in my dissenting opinion in *Splawn v. California,* 431 **U.S**. 595, 602, 97 S.Ct. 1987, 1991–92, 52 L.Ed.2d 606 (1977), *Ginzburg* was decided before the Court extended First Amendment protection to commercial speech and cannot withstand our decision in *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.,* 425 **U.S**. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). If conduct or communication is protected by the First Amendment, it cannot lose its protected status by being advertised in a truthful and inoffensive manner. Any other result would be perverse,

> "Signs which identify the 'adult' character of a motion picture theater or of a bookstore convey the message that sexually provocative entertainment is to be found within.... Such signs ... provide a warning to those who find erotic materials offensive that they should shop elsewhere for other kinds of books, magazines, or entertainment. Under any sensible regulatory scheme, truthful description of subject matter that is pleasing to ***250** some and offensive to others ought to be encouraged, not punished." 431 **U.S**., at 604, 97 S.Ct., at 1992.

Justice SCALIA, concurring in part and dissenting in part.

I join Part I of the Court's opinion, Part III, holding that there is no standing to challenge certain portions of the **Dallas** ordinance, and Part IV, sustaining on the merits certain other portions. I dissent from the judgment, however, because I would affirm the Fifth Circuit's holding that the ordinance is constitutional in all respects before **us**.

I

Since this Court first had occasion to apply the First Amendment to materials treating of sex, some three decades ago, we have been guided by the principle that "sex and obscenity are not synonymous," ****618** *Roth v. United States,* 354 **U.S**. 476, 487, 77 S.Ct. 1304, 1310, 1 L.Ed.2d 1498 (1957). The former, we have said, the Constitution permits to be described and discussed. The latter is entirely unprotected, and may be allowed or disallowed by States or communities, as the democratic majority desires.

Distinguishing the one from the other has been the problem. Obscenity, in common understanding, is material that "treat[s] sex in a manner appealing to prurient interest," *id.,* at 488, 77 S.Ct., at 1311. But for constitutional purposes we have added other conditions to that definition, out of an abundance of concern that "the standards for judging obscenity safeguard the protection of freedom of speech and press for material

which does not treat sex in a manner appealing to prurient interest." *Ibid.* To begin with, we rejected the approach previously adopted by some courts, which would permit the banning of an entire literary work on the basis of one or several passages that in isolation could be considered obscene. Instead, we said, "the dominant theme of the material *taken as a whole* " must appeal to prurient interest. *Id.,* at 489, 77 S.Ct., at 1311 (emphasis added). We have gone on to add other conditions, which are reflected in the three-part test pronounced in *Miller v. California,* 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973):

> ***251** "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest ...; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

These standards' immediate purpose and effect—which, it is fair to say, have met with general public acceptance—have been to guarantee the access of all adults to such works of literature, once banned or sought to be banned, as Dreiser's An American Tragedy,[1] Lawrence's Lady Chatterley's Lover,[2] Miller's Tropic of Cancer and Tropic of Capricorn,[3] and Joyce's Ulysses,[4] and to many stage and motion picture productions of genuine dramatic or entertainment value that contain some sexually explicit or even erotic material.

Application of these standards (or, I should say, misapplication of them) has had another effect as well—unintended and most certainly not generally approved. The Dallas ordinance at issue in these cases is not an isolated phenomenon. It is one example of an increasing number of attempts throughout the country, by various means, not to withhold from the public any particular book or performance, but to prevent the erosion of public morality by the increasingly general appearance of what the Dallas ordinance delicately calls "sexually ***252** oriented businesses." Such businesses flourish throughout the country as they never did before, not only in New York's Times Square, but in much smaller communities from coast to coast. Indeed, as a case we heard last Term demonstrates, they reach even the smallest of communities via telephonic "dial-a-porn." *Sable Communications of California, Inc. v. FCC,* 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989).

While many communities do not object to such businesses, others do, and have sought to eliminate them. Attempts to do so by focusing upon the individual books, motion pictures, or performances that these businesses ****619** market are doomed to failure by reason of the very stringency of our obscenity test, designed to avoid any risk of suppressing socially valuable expression. Communities cannot close down "porn-shops" by banning pornography (which, so long as it does not cross the distant line of obscenity, is protected), just as Congress cannot eliminate specialized "dial-a-porn" telephone services by prohibiting individual messages that are "indecent" but not quite obscene. *Id.,* at 131, 109 S.Ct., at 2839. Consequently, communities have resorted to a number of other means, including stringent zoning laws, see *e.g., Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (ordinance adopting unusual zoning technique of requiring sexually oriented businesses to be dispersed rather than concentrated); *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986) (ordinance restricting theaters that show "adult" films to locations comprising about 5% of the community's land area, where the Court of Appeals had found no "commercially viable" sites were available), Draconian sanctions for obscenity which make it unwise to flirt with the sale of pornography, see *Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989) (state Racketeer Influenced and Corrupt Organizations (RICO) statute), and the ordinance we have before us today, a licensing scheme purportedly designed to assure that porn-shops are run by a better class of person. Not only are these oblique methods less than entirely effective in eliminating the ***253** perceived evil at which they are directed (viz., the very existence of sexually oriented businesses anywhere in the community that does not want them), but they perversely render less effective our efforts, through a restrictive definition of obscenity, to prevent the "chilling" of socially valuable speech. State RICO penalties for obscenity, for example, intimidate not just the porn-shop owner, but also the general bookseller who has been the traditional seller of new books such as Ulysses.

It does not seem to me desirable to perpetuate such a regime of prohibition by indirection. I think the means of rendering it unnecessary is available under our precedents and should be applied in the present cases. That means consists of recognizing that a business devoted to the sale of highly explicit sexual material can be found to be engaged in the

marketing of obscenity, even though each book or film it sells might, in isolation, be considered merely pornographic and not obscene. It is necessary, to be sure of protecting valuable speech, that we compel all communities to tolerate individual works that have only marginal communicative content beyond raw sexual appeal; it is not necessary that we compel them to tolerate businesses that hold themselves forth as specializing in such material. Because I think that **Dallas** could constitutionally have proscribed the commercial activities that it chose instead to license, I do not think the details of its licensing scheme had to comply with First Amendment standards.

II

The **Dallas** ordinance applies to any sexually oriented business, which is defined as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center." **Dallas** **City** Code § 41A–2(19) (1986). Operators of escort agencies and sexual encounter centers are not before **us**.

***254** "Adult bookstore or adult video store" is defined, *inter alia,* as a "commercial establishment which as one of its *principal business purposes* offers for sale or rental" books or other printed matter, or films or other visual representations, "which depict or describe 'specified sexual activities' or 'specified anatomical areas.' " § 41A–2(2)(A) (emphasis added). [5] "Adult motion picture theater" ****620** is defined as a commercial establishment where films "are *regularly* shown" that depict specified sexual activities or specified anatomical areas. § 41A–2(5) (emphasis added). [6] Other sexually oriented businesses are similarly defined as establishments that "regularly" depict or describe specified sexual activities or specified anatomical areas. [7] "Specified sexual activities" means

***255** "(A) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;

"(B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;

"(C) masturbation, actual or simulated; or

"(D) excretory functions as part of or in connection with any of the activities set forth in (A) through (C) above." § 41A–2(21).

Finally, "specified anatomical areas" means "human genitals in a state of sexual arousal." § 41A–2(20).

***256** As I shall discuss in greater detail presently, this ordinance is unusual in that it does not apply "work by work." It can reasonably be interpreted to restrict not sales of (or businesses that sell) any particular book, film, or entertainment, but only businesses ****621** that *specialize* in books, films, or entertainment of a particular type. That places the obscenity inquiry in a different, and broader, context. Our jurisprudence supports the proposition that even though a particular work of pornography is not obscene under *Miller,* a merchant who concentrates upon the sale of such works is engaged in the business of obscenity, which may be entirely prohibited and hence (*a fortiori*) licensed as required here.

The dispositive case is *Ginzburg v. United States,* 383 **U.S**. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966). There the defendant was convicted of violating the federal obscenity statute, 18 U.S.C. § 1461, by mailing three publications which our opinion assumed, see 383 **U.S**., at 465–466, 86 S.Ct., at 944–945, were in and of themselves not obscene. We nonetheless upheld the conviction, because the evidence showed "that each of the accused publications was originated or sold as stock in trade of the sordid business of pandering —'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.' " *Id.,* at 467, 86 S.Ct., at 945 (quoting *Roth v. United States,* 354 **U.S**., at 495–496, 77 S.Ct., at 1314–1315 (Warren, C.J., concurring)). Justice BRENNAN's opinion for the Court concluded that the advertising for the publications, which "stressed the [ir] sexual candor," 383 **U.S**., at 468, 86 S.Ct., at 946, "resolve[d] all ambiguity and doubt" as to the unprotected status of the defendants' activities. *Id.,* at 470, 86 S.Ct., at 947.

"The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content.... And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material in the courtroom was, in the ***257** circumstances, pretense or reality—whether it was the

> basis upon which it was traded in the marketplace or a spurious claim for litigation purposes. Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Certainly in a prosecution which, as here, does not necessarily imply suppression of the materials involved, the fact that they originate or are used as a subject of pandering is relevant to the application of the *Roth* test." *Id.,* at 470–471, 86 S.Ct., at 947.

We held one of the three publications in question to be, in the circumstances of its sale, obscene, despite the trial court's finding that only 4 of the 15 articles it contained "predominantly appealed to prurient interest and substantially exceeded community standards of candor," *id.,* at 471, 86 S.Ct., at 947; and another to be obscene despite the fact that it previously had been sold by its author to numerous psychiatrists, some of whom testified that they found it useful in their professional practice. We upheld the convictions because the petitioners had "deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed." *Id.,* at 472, 86 S.Ct., at 948.

In *Memoirs v. Attorney General of Massachusetts,* 383 **U.S**. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), decided the same day as *Ginzburg,* we overturned the judgment that a particular book was obscene, but, citing *Ginzburg,* made clear that this did not mean that all circumstances of its distribution would be constitutionally protected. We said:

> "On the premise, which we have no occasion to assess, that *Memoirs* has the requisite prurient appeal and is patently offensive, but has only a minimum of social value, the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected.... In this proceeding, however, the courts were asked to judge the obscenity of *Memoirs* in the abstract, and ***258** the declaration of obscenity was neither ****622** aided nor limited by a specific set of circumstances of production, sale, and publicity. All possible uses of the book must therefore be considered, and the mere risk that the book might be exploited by panderers because it so pervasively treats sexual matters cannot alter the fact ... that the book will have redeeming social importance in the hands of those who publish or distribute it on the basis of that value." 383 **U.S**., at 420–421, 86 S.Ct., at 978–979 (footnote omitted).

Ginzburg was decided before our landmark *Miller* decision, but we have consistently applied its holding post-*Miller.* See *Hamling v. United States,* 418 **U.S**. 87, 130, 94 S.Ct. 2887, 2914, 41 L.Ed.2d 590 (1974); *Splawn v. California,* 431 **U.S**. 595, 597–599, 97 S.Ct. 1987, 1989–**1990**, 52 L.Ed.2d 606 (1977); *Pinkus v. United States,* 436 **U.S**. 293, 303–304, 98 S.Ct. 1808, 1814–1815, 56 L.Ed.2d 293 (1978). Although *Ginzburg* narrowly involved the question whether particular publications were obscene, the foundation for its holding is that "the sordid business of pandering," *Ginzburg, supra,* 383 **U.S**., at 467, 86 S.Ct., at 945, is constitutionally unprotected—that the sale of material "solely to produce sexual arousal ... does not escape regulation because [the material] has been dressed up as speech, or in other contexts might be recognized as speech." 383 **U.S**., at 474, n. 17, 86 S.Ct., at 949, n. 17. But just as *Miller* established some objective criteria concerning what particular publications can be regarded as "appealing to the prurient interest," it impliedly established some objective criteria as to what stock-in-trade can be the raw material (so to speak) of pandering. Giving this limitation full scope, it seems to me that *Ginzburg,* read together with *Miller,* establishes at least the following: The Constitution does not require a State or municipality to permit a business that intentionally specializes in, and holds itself forth to the public as specializing in, performance or portrayal of sex acts, sexual organs in a state of arousal, or live human nudity. In my view that suffices to sustain the **Dallas** ordinance.

***259** III

In evaluating the **Dallas** ordinance under the principles I have described, we must of course give it the benefit of any "limiting construction [that] has been or could be placed" on its text. *Broadrick v. Oklahoma,* 413 **U.S**. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). Moreover, we cannot sustain the present facial attack unless the ordinance is "*substantially* overbroad," *id.,* at 615, 93 S.Ct., at 2918 (emphasis added), that is, "unless it reaches a substantial number of impermissible applications," *New York v. Ferber,* 458 **U.S**. 747, 771, 102 S.Ct. 3348, 3362, 73 L.Ed.2d 1113 (1982), "judged in relation to the statute's plainly legitimate sweep," *Broadrick, supra,* 413 **U.S**., at 615, 93 S.Ct., at 2918.

Favorably construed, the Dallas ordinance regulates only the business of pandering, as I have defined it above. It should be noted, to begin with, that the depictions, descriptions, and displays that cause any of the businesses before us to qualify as a "sexually oriented business" must be sexually explicit in more than a minor degree. What is at issue here is not the sort of nude photograph that might commonly appear on a so-called "pin-up calendar" or "men's magazine." The mere portrayal of the naked human body does *not* qualify unless (in the definition of adult cabaret, adult theater, and nude model studio) it is featured live. Qualifying depictions and descriptions do not include human genitals, but only human genitals in a state of sexual arousal, the fondling of erogenous zones, and normal or perverted sexual acts.

In addition, in order to qualify for regulation under the ordinance the business that provides such live nudity or such sexually explicit depictions or descriptions must do so "as one of its principal business purposes" (in the case of adult bookstores and adult video stores) or "regularly" (in the case of adult ****623** motion picture theaters, adult cabarets, and adult theaters). The adverb "regularly" can mean "constantly, continually, steadily, sustainedly," Roget's International Thesaurus § 135.7, p. 77 (4th ed. 1977), and also "in a ... methodical way," Webster's Third New International Dictionary 1913 (1981). I think it can reasonably be interpreted ***260** in the present context to mean a continuous presentation of the sexual material as one of the very objectives of the commercial enterprise. Similarly, the phrase "as one of its principal business purposes" can connote that the material containing the specified depictions and descriptions does not merely account for a substantial proportion of sales volume but is also intentionally marketed *as material of that character.*

All of the establishments at issue, therefore, share the characteristics that they offer (1) live nudity or hardcore sexual material, (2) as a constant, intentional objective of their business. But there is still more. With the single exception of "adult motion picture theater," the descriptions of all the establishments at issue contain some language that suggests a requirement that the business hold itself forth to the public precisely as a place where sexual stimulation of the described sort can be obtained. Surely it would be permissible to interpret the phrase "as one of its principal business purposes" in the definition of "adult bookstore or adult video store" to require such holding forth. A business can hardly have as a principal purpose a line of commerce it does not even promote. Likewise, the portion of the definitions of "adult cabaret" and "adult theater" which requires that they regularly "feature" the described sexual material suggests that it must not merely be there but must be promoted or marketed as such. The definition of nude model studio, while containing no such requirement, is subject to a defense which contains as one of its elements that the structure where the studio is located "has no sign visible from the exterior of the structure and no other advertising
that indicates a nude person is available
for viewing." Dallas City Code § 41A–21(d)(3)(A) (1986). Even the definitions of the two categories of enterprises not at issue in this case, "escort agencies" and "sexual encounter centers," contain language that arguably requires a "holding forth" (a "primary business purpose" requirement). Given these indications of the importance of "holding forth" contained ***261** in all except one of the definitions, it seems to me very likely—especially if that should be thought necessary to sustain the constitutionality of the measure—that the Dallas ordinance in all its challenged applications would be interpreted to apply only to businesses that not only (1) offer live nudity or hardcore sexual material, (2) as a constant and intentional objective of their business, but also (3) seek to promote it as such. It seems to me that any business that meets these requirements can properly be described as engaged in "the sordid business of pandering," and is not protected by the First Amendment. Indeed, even the first two requirements alone would suffice to sustain the ordinance, since it is most implausible that any enterprise which has as its constant intentional objective the sale of such material does not advertise or promote it as such; if a few such enterprises bent upon commercial failure should exist, they would certainly not be numerous enough to render the ordinance *substantially* overbroad.

The Dallas ordinance's narrow focus distinguishes these cases from *Schad v. Mount Ephraim,* 452 U.S. 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), in which we held unconstitutional a municipal ordinance that prohibited all businesses offering live entertainment, including but not limited to nude dancing. That ordinance was substantially overbroad because, on its face, it prohibited "a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments." *Id.,* at 65, 101 S.Ct., at 2181. The Dallas ordinance, however, targets only businesses engaged in unprotected activity.

****624** Even if it were possible to conceive of a business that could meet the above-described qualifications and yet be engaged in First Amendment activities rather than pandering, we do not invalidate statutes as overbroad on the basis of imagination alone. We have always held that we will not apply that "strong medicine" unless the overbreadth is both "real" and "substantial." *Broadrick v. Oklahoma,* 413 **U.S**., at 613, 615, 93 S.Ct., at 2916–17, 2917–18. I think we must sustain the current ordinance just as we sustained the statute at issue in *New York v. Ferber, supra,* ***262** which forbade the distribution of materials depicting minors in a "sexual performance." The state court had applied overbreadth analysis because of its "understandabl[e] concer[n] that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute." *Id.,* at 773, 102 S.Ct., at 3363. We said:

> "[W]e seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on 'lewd exhibition[s] of the genitals.' Under these circumstances, § 263.15 is 'not substantially overbroad and ... whatever overbreadth may exist should be cured through a case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied.' *Broadrick v. Oklahoma,* 413 **U.S**., at 615–616 [93 S.Ct., at 2917–2918]." *Id.,* 458 **U.S**., at 773–774, 102 S.Ct., at 3363.

The legitimate reach of the **Dallas** ordinance "dwarfs its arguably impermissible applications." *Id.,* at 773, 102 S.Ct., at 3363.

To reject the present facial attack upon the ordinance is not, of course, to deprive someone who is not engaged in pandering and who is somehow caught within its provisions (if that could possibly occur) from asserting his First Amendment rights. But that eventuality is so improbable, it seems to me, that no substantial quantity of First Amendment activity is anticipatorily "chilled." The Constitution is adequately safeguarded by conducting further review of this reasonable ordinance as it is applied.

Justice O'CONNOR's opinion correctly notes that respondents conceded that the *materials* sold are protected by the First Amendment. *Ante,* at 603. But they did not concede that the activity of pandering at which the **Dallas** ordinance is directed is constitutionally protected. They did not, to be ***263** sure, specifically argue *Ginzburg,* or suggest the complete proscribability of these businesses as a basis for sustaining their manner of licensing them. But we have often sustained judgments on grounds not argued—particularly in the area of obscenity law, where our jurisprudence has been, let **us** say, not entirely predictable. In *Ginzburg* itself, for example, the United States did not argue that the convictions could be upheld on the pandering theory the Court adopted, but only that the materials sold were obscene under *Roth.* Brief for United States in *Ginzburg v. United States,* O.T.1965, No. 42, p. 18. In *Mishkin v. New York,* 383 **U.S**. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966), one of the companion cases to *Ginzburg,* the State of New York defended the convictions under *Roth* and explicitly disagreed with those commentators who would determine obscenity by looking to the "intent of the disseminator," rather than "character of the material." Brief for Appellee in *Mishkin v. New York,* O.T.1965, No. 49, p. 45, and n. See also Brief for Appellee in *Memoirs v. Attorney General of Massachusetts,* O.T.1965, No. 368, p. 17 (defending convictions under *Roth* and *Manual Enterprises, Inc. v. Day,* 370 **U.S**. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962)). Likewise in *Roth,* where we held that the test for obscenity was appeal to prurient interest, 354 **U.S**., at 489, 77 S.Ct., at 1311, the United States had argued that ****625** obscenity was established if the material "constitutes a present threat to the morals of the average person in the community." Brief for United States in *Roth v. United States,* O.T.1956, No. 582, p. 100. And no one argued that the *Miller* Court should abandon the "utterly without redeeming social value" test of the *Memoirs* plurality, but the Court did so nevertheless. Compare 413 **U.S**., at 24–25, 93 S.Ct., at 2614–16, with Brief for Appellee in *Miller v. California,* O.T.1972, No. 70–73, pp. 26–27.

* * *

The mode of analysis I have suggested is different from the rigid test for obscenity that we apply to the determination whether a particular book, film, or performance can be banned. The regulation here is not directed to particular ***264** works or performance, but to their concentration, and the constitutional analysis should be adjusted accordingly. What Justice STEVENS wrote for the plurality in *American*

Mini Theatres is applicable here as well: "[W]e learned long ago that broad statements of principle, no matter how correct in the context in which they are made, are sometimes qualified by contrary decisions before the absolute limit of the stated principle is reached." 427 U.S., at 65, 96 S.Ct., at 2450. The prohibition of concentrated pornography here is analogous to the prohibition we sustained in *American Mini Theatres*. There we upheld ordinances that prohibited the concentration of sexually oriented businesses, each of which (we assumed) purveyed material that was not constitutionally proscribable. Here I would uphold an ordinance that regulates the concentration of sexually oriented material in a single business.

The basis of decision I have described seems to me the proper means, in Chief Justice Warren's words, "to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments." *Jacobellis v. Ohio,* 378 U.S. 184, 199, 84 S.Ct. 1676, 1684, 12 L.Ed.2d 793 (1964) (dissenting opinion). It entails no risk of suppressing even a single work of science, literature, or art—or, for that matter, even a single work of pornography. Indeed, I fully believe that in the long run it will expand rather than constrict the scope of permitted expression, because it will eliminate the incentive to use, as a means of preventing commercial activity patently objectionable to large segments of our society, methods that constrict unobjectionable activity as well.

For the reasons stated, I respectfully dissent.

All Citations

493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603, 58 USLW 4079

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Section 41A–5(a)(5) provides as follows: "The chief of police shall approve the issuance of a license ... unless he finds [that] ... [a]n applicant is residing with a person who has been denied a license by the city to operate a sexually oriented business within the preceding 12 months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding 12 months."

2 Sections 41A–5(a)(10), (b), and (c), as amended, provide as follows:
"The chief of police shall approve the issuance of a license ... unless he finds [that] ...
"(10) An applicant or an applicant's spouse has been convicted of a crime:
"(A) involving:
"(i) any of the following offenses as described in Chapter 43 of the Texas Penal Code:
"(aa) prostitution;
"(bb) promotion of prostitution;
"(cc) aggravated promotion of prostitution;
"(dd) compelling prostitution;
"(ee) obscenity;
"(ff) sale, distribution, or display of harmful material to minor;
"(gg) sexual performance by a child;
"(hh) possession of child pornography;
"(ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code:
"(aa) public lewdness;
"(bb) indecent exposure;
"(cc) indecency with a child;
"(iii) sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;
"(iv) incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code; or
"(v) criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;
"(B) for which:

"(i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;
"(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or
"(iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24–month period.
"(b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.
"(c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10) may qualify for a sexually oriented business license only when the time period required by Section 41A–5(a)(10)(B) has elapsed."

3 Petitioners also raise a variety of other First Amendment challenges to the ordinance's licensing scheme. In light of our conclusion that the licensing requirement is unconstitutional because it lacks essential procedural safeguards and that no petitioner has standing to challenge the residency or civil disability provisions, we do not reach those questions.

1 Justice SCALIA's opinion concurring in part and dissenting in part, purportedly grounded in my opinion in *Ginzburg v. United States,* 383 **U.S**. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966), does not persuade me otherwise. In *Ginzburg,* this Court held merely that, in determining whether a given publication was obscene, a court could consider as relevant evidence not only the material itself but also evidence showing the circumstances of its production, sale, and advertising. *Id.,* at 465–466, 86 S.Ct., at 944–945. The opinion concluded: "It is important to stress that this analysis simply elaborates the test by which the obscenity vel non of the material must be judged." *Id.,* at 475, 86 S.Ct., at 950. As Justice O'CONNOR's opinion makes clear, *ante* at 603–604, there is no "obscenity vel non" question in this case.
What *Ginzburg* did not do, and what this Court has never done, despite Justice SCALIA's claims, is to abrogate First Amendment protection for an entire category of speech-related businesses. We said in *Ginzburg* that we perceived "no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question." 383 **U.S**., at 474, 86 S.Ct., at 949. History has proved **us** right, I think, that the decision itself left First Amendment guarantees secure. Justice SCALIA's transmogrification of *Ginzburg,* however, is far from innocuous.

2 *Vance v. Universal Amusement Co.,* 445 **U.S**. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980), also involved censorship that threatened proprietors' entire businesses, rather than single films. This Court, notwithstanding, affirmed the Court of Appeals which had held that the statute was unconstitutional because it lacked the procedural safeguards required under *Freedman.* 445 **U.S**., at 314, 317, 100 S.Ct., at 1162.

3 Both the District Court and the Fifth Circuit, after finding that plaintiffs had standing to challenge the ordinance, reached the civil disability question. See 837 F.2d 1298, 1301, 1304–1305 (1988); *Dumas v. **Dallas**,* 648 F.Supp. 1061 (ND Tex.1986).

4 Petitioners M.J.R., Inc., et al. phrase the same objection slightly differently. They characterize license denial or revocation based on certain listed prior speech offenses as a "classic prior restraint of the type prohibited as facially unconstitutional under the rule of *Near v. Minnesota* [*ex rel. Olson*], 283 **U.S**. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931)," and they characterize license denial or revocation based on other listed prior offenses as "prior restraints which cannot withstand strict scrutiny and are therefore invalid under the first amendment." See Brief for Petitioners M.J.R., Inc., et al. 22, 33.

5 See Brief for Petitioners **FW/PBS**, Inc., et al. 21–24.

1 Held obscene in *Commonwealth v. Friede,* 271 Mass. 318, 171 N.E. 472 (1930).

2 Held obscene in *People v. Dial Press, Inc.,* 182 Misc. 416, 48 N.Y.S.2d 480 (N.Y.Magis.Ct.1944).

3 Held obscene in *United States v. Two Obscene Books,* 99 F.Supp. 760 (ND Cal.1951), aff'd *sub nom. Besig v. United States,* 208 F.2d 142 (CA9 1953).

4 Unsuccessfully challenged as obscene in *United States v. One Book Called "Ulysses,"* 5 F.Supp. 182 (SDNY 1933), aff'd, 72 F.2d 705 (CA2 1934).

5 "Adult Bookstore or Adult Video Store means a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:

"(A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe 'specified sexual activities' or 'specified anatomical areas'; or

"(B) instruments, devices, or paraphernalia which are designed for use in connection with 'specified sexual activities.' " **Dallas City** Code §§ 41A–2(2)(A), (B) (1986).

The regulation of businesses that sell the items described in subsection (B) raises no First Amendment question.

6 "Adult Motion Picture Theater means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of 'specified sexual activities' or 'specified anatomical areas.' " § 41A–2(5).

7 "(3) Adult Cabaret means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

"(A) persons who appear in a state of nudity; or

"(B) live performances which are characterized by the exposure of 'specified anatomical areas' or by 'specified sexual activities'; or

"(C) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of 'specified sexual activities' or 'specified anatomical areas.' "

. . . . .

"(6) Adult Theater means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or live performances which are characterized by the exposure of 'specified anatomical areas' or by 'specified sexual activities.'

. . . . .

"(12) Nude Model Studio means any place where a person who appears in a state of nudity or displays 'specified anatomical areas' is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration.

"(13) Nudity or a State of Nudity means:

"(A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast; or

"(B) a state of dress which fails to opaquely cover a human buttock, anus, male genitals, female genitals, or areola of the female breast." § 41A–2.

As to nude model studios, the ordinance further provides as a defense to prosecution that

"a person appearing in a state of nudity did so in a modeling class operated:

"(1) by a proprietary school licensed by the state of Texas; a college, junior college, or university supported entirely or partly by taxation;

"(2) by a private college or university which maintains and operates educational programs in which credits are transferrable to a college, junior college, or university supported entirely or partly by taxation; or

"(3) in a structure:

"(A) which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing; and

"(B) where in order to participate in a class a student must enroll at least three days in advance of the class; and

"(C) where no more than one nude model is on the premises at any one time." § 41A–21(d).

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United States District Court, W.D. Louisiana, Monroe Division.

LOUISIANA CLEANING SYSTEMS, et al
v.
Kevin **COBB**, Individually and as Sheriff of Franklin Parish

CIVIL ACTION NO. 14-2371
|
Signed March 1, 2016

Attorneys and Law Firms

Glenn Charles McGovern, Law Office of Glenn C. McGovern, Metairie, **LA**, for **Louisiana Cleaning** Systems, et al.

Timothy R. Richardson, Blake Joseph Arcuri, Usry Weeks & Matthews, New Orleans, **LA**, for Kevin **Cobb**, Individually and as Sheriff of Franklin Parish.

RULING

ROBERT G. JAMES, UNITED STATES DISTRICT JUDGE

***1** Plaintiffs Charles Nugent ("Nugent"), Kimberly Marie Zehr ("Zehr"), Isaiah Foster ("Foster"), Darrisha Walker ("Walker"), Corey Jamal Taylor ("Taylor"), and **Louisiana Cleaning** Systems, Inc. ("LCS") bring this suit against Defendant Sheriff Kevin **Cobb** ("Sheriff **Cobb**"), pursuant to 42 U.S.C § 1983, for alleged violations of Plaintiffs' First and Fourteenth Amendment rights.

Pending before the Court is Sheriff **Cobb**'s Motion for Summary Judgment on the qualified immunity issue. [Doc. No. 45]. For reasons set out below, the motion is GRANTED IN PART and DENIED IN PART.

I. FACTS

Plaintiffs in this matter are LCS; its owner, Nugent; and salespeople who work for LCS. LCS is a Kenner-based company that sells Kirby vacuum cleaners door to door. LCS' tactics generally include entering target locations in unmarked vans. Upon entry, several LCS salespeople disperse, going door to door and attempting to make sales. At the time of the events in question, LCS' sales force was made up of both black and white salespeople.

In July of 2013, Plaintiffs attempted to sell vacuum cleaners in Franklin Parish. According to Sheriff **Cobb**, multiple residents contacted the Sheriff's Department and complained of suspicious activity which included individuals walking in neighborhoods after being dropped off from an unmarked van, individuals knocking on doors at strange hours, individuals trying to enter the homes of residents, individuals refusing to leave after being asked to do so, and individuals failing to provide proper identification.

In her deposition testimony, one resident, Crystal Stephens ("Stephens"), describes an encounter with an LCS salesperson. The salesperson arrived at Stephens' home around 7:30 a.m. on a Sunday morning and sought entrance to conduct a demonstration. Stephens repeatedly refused, at one point telling the salesperson, "we have a no door-to-door soliciting ordinance in Gilbert." [Doc. No. 47-33, Stephens' Depo., p. 9]. The salesperson eventually left. Stephens later spoke to another resident, Beth Edwards ("Edwards"). [Doc. No. 47-33, Stephens Depo., p. 11]. Edwards confided that she had experienced a similar incident and had become concerned when an unmarked van arrived to pick up the salesperson who had attempted to sell to her. [Doc. No. 45-7, Declaration of Beth Edwards]. Stephens states that Edwards sent her a text saying "hey, the kirby vacuum lady came by here, too." [Doc. No. 47-33, Stephens Depo., p. 13]. After talking with Edwards, Stephens allegedly called the Sheriff's Department to complain. [1]

Despite Stephens' testimony, the Sheriff Department's complaint log reveals only three complaints. [Doc. No. 47-18]. Although somewhat unclear, it appears the recorded complaints did not come from Stephens.

***2** Around this time, Sheriff **Cobb** claims that an officer within the parish ran a background check on the LCS salespeople. The background checks revealed that some of the salespeople had criminal histories.

On July 28, 2013, after learning of this criminal history, Sheriff **Cobb** instructed Deputies Mulkay and Wilson to stop the van and detain Plaintiffs for a limited time, so that he could speak to Nugent about the complaints. Plaintiffs claim the deputies detained them for two hours while waiting for Sheriff

Cobb to arrive. Sheriff Cobb claims the stop and detention lasted ten minutes.

Once Sheriff Cobb arrived, Plaintiffs contend that he informed them that the occupational license permit to solicit "should never have been issued and you can stop back and get your $100 permit back." [Doc. No. 47-5, Nugent Affidavit]. He then allegedly informed Plaintiffs they had the right to sell in the Parish and they "could do what [they] want[ed], but this is going to keep happening." *Id.* Plaintiffs assumed that this comment meant they would continue to be harassed. Sheriff Cobb claims the comment carried no hostile undertones; he simply informed Plaintiffs that, if they continued to sell in the Parish, he would get more complaints and would have to respond to them. Then, Sheriff Cobb purportedly stated "even though you have legal documents to allow you to work here, we don't want you here." *Id*. However, Nugent admitted in his deposition that Sheriff Cobb did not actually prohibit Plaintiffs from selling in the parish. [2]

After his conversation with Nugent, Sheriff Cobb says that he instructed his deputies to follow the van in order to determine its next move. The van left, and the deputies followed it to the parish line. Plaintiffs claim, however, that Sheriff Cobb ordered the deputies to escort the van out of Franklin Parish.

***3** In December 2013, Sheriff Cobb maintains that an occupational license renewal application was mailed to Plaintiffs to renew their permit for 2014, but Plaintiffs did not submit the renewal application or the requisite renewal fee. Plaintiffs claim that Sheriff Cobb repeatedly delayed sending them an application for a permit. In support of that claim, they cite conversations between Crystal Nugent and Deputy Clerk Adrian Whitman ("Whitman"). [3] Whitman was a tax clerk that apparently had a role in the permit process. Crystal Nugent claims that she spoke to Whitman several times about a permit application in June 2014. Whitman informed her that Sheriff Cobb had not approved the request. Crystal Nugent asserts that she recorded these phone calls, the transcripts of which Plaintiffs repeatedly cite. [4]

Around the time Plaintiffs requested a license, Plaintiffs' counsel wrote to Sheriff Cobb, accusing him of prohibiting door-to-door sales in the community. The correspondence also suggested that Sheriff Cobb's stop and detention of Plaintiffs–which had occurred nearly 11 months prior–was illegal.

On June 12, 2014, Sheriff Cobb responded to Plaintiffs' counsel. Sheriff Cobb indicated that there was nothing to prohibit Plaintiffs from selling door to door in Franklin Parish. He recommended that the LCS salespeople change their methods or find another parish in which to solicit. The Sheriff further informed Plaintiffs that, in response to resident complaints, he had investigated their criminal histories, and invited Plaintiffs and Plaintiffs' counsel to meet with him to discuss the matter further.

Instead, Plaintiffs filed the instant lawsuit on July 24, 2014. [Doc. No. 1]. Plaintiffs essentially make three allegations: (1) Sheriff Cobb, both individually and in his capacity as Sheriff of Franklin Parish, violated Plaintiffs' First Amendment rights by harassing them, (2) Sheriff Cobb violated Plaintiffs' First Amendment rights by denying them an occupational license, and (3) Sheriff Cobb violated Plaintiffs' right to equal protection under the Fourteenth Amendment by enforcing a licensing ordinance that unconstitutionally discriminated against many commercial solicitors. [5] Later in the litigation, Plaintiffs brought a claim against Sheriff Cobb for allegedly violating their Fourteenth Amendment rights to equal protection by discriminating against them on the basis of race.

It is not entirely clear when Plaintiffs received the permit application, but in December 2014, Plaintiffs paid the requisite fee to have their permit reinstated. Sheriff Cobb then reinstated the permit.

On January 23, 2015, the parties agreed to entry of a preliminary injunction. Sheriff Cobb is prevented from harassing Plaintiffs, or in any way preventing them from engaging in door-to-door solicitation; Sheriff Cobb is to issue a valid 2015 occupational licence; and Plaintiffs are to leave the homes of potential customers upon being asked to do so. [Doc. No. 16, Consent Agreement on Issuance of Preliminary Injunction].

On August 11, 2015, trial in this matter was continued without date. On August 19, 2015, Sheriff Cobb filed a motion for summary judgment that was limited to the issue of qualified immunity. [Doc. No. 45]. Plaintiffs filed a memorandum in opposition. [Doc. No. 47].

II. LAW AND ANALYSIS

A. Summary Judgment Standard

***4** Under Federal Rule of Civil Procedure 56(a), "[a] party may move for summary judgment, identifying each claim or

defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The moving party bears the initial burden of informing the court of the basis for its motion by identifying portions of the record which highlight the absence of genuine issues of material fact. *Topalian v. Ehrmann*, 954 F.2d 1125, 1132 (5th Cir. 1992); *see also* Fed. R. Civ. P. 56(c)(1) ("A party asserting that a fact cannot be ... disputed must support the assertion by ... citing to particular parts of materials in the record ..."). A fact is "material" if proof of its existence or nonexistence would affect the outcome of the lawsuit under applicable law in the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute about a material fact is "genuine" if the evidence is such that a reasonable fact finder could render a verdict for the nonmoving party. *Id.*

If the moving party can meet the initial burden, the burden then shifts to the nonmoving party to establish the existence of a genuine issue of material fact for trial. *Norman v. Apache Corp.*, 19 F.3d 1017, 1023 (5th Cir. 1994). In evaluating the evidence tendered by the parties, the Court must accept the evidence of the nonmovant as credible and draw all justifiable inferences in its favor. *Anderson*, 477 U.S. at 255. However, "a party cannot defeat summary judgment with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence. Thus, Summary Judgment is appropriate if a reasonable jury could not return a verdict for the nonmoving party." *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)); *see also Ruiz v. Whirlpool, Inc.*, 12 F.3d 510, 513 (5th Cir. 1994) ("Testimony based on conjecture or speculation is insufficient to raise an issue of fact to defeat a summary judgment motion because 'there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. ... If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.' ").

B. Qualified Immunity Analysis

The Court employs a two-pronged inquiry to resolve questions of qualified immunity at summary judgment. "The first asks whether the facts, '[t]aken in the light most favorable to the party asserting the injury ... show the officer's conduct violated a [federal] right[.]' " *Tolan v. Cotton*, 134 S. Ct. 1861, 1865 (2014) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). "The second prong of the qualified-immunity analysis asks whether the right in question was 'clearly established' at the time of the violation." *Id*. (citing *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). "[U]nder either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan*, 134 S.Ct. at 1866 (citing *Brosseau v. Haugen*, 543 U.S. 194, 195 n. 2 (2004) (per curium)). "This is not a rule specific to qualified immunity; it is simply an application of the more general rule that a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' " *Id*. (quoting *Anderson*, 477 U.S. at 249).

Plaintiffs allege that Sheriff **Cobb**'s actions violated both their First Amendment right to free speech and Fourteenth Amendment right to equal protection. Each allegation is considered in turn.

1. Equal Protection Violation

Plaintiffs claim Sheriff **Cobb** harassed them because some of the salespeople were African-American. Sheriff **Cobb** argues that this claim lacks any evidentiary foundation—indeed, multiple LCS salespeople were white. Sheriff **Cobb** also asks the Court to dismiss the Equal Protection claim because Plaintiffs raised it for the first time in their pre-trial order.

***5** Raising a claim for the first time in a pretrial order is not grounds for dismissal. *See* *Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2003). However, lack of evidence is. In the absence of a facially-discriminatory action, Plaintiffs must introduce evidence of the state actor's discriminatory intent. *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1979).The Court cannot infer discriminatory animus because adverse actions were taken against African-Americans. In this case, **Cobb**'s actions were facially-neutral, and there is no other evidence that he acted with discriminatory animus.

Plaintiffs' only evidence of race discrimination comes from comments made by homeowners. Even assuming, *arguendo*,

that these homeowners made racially derogatory comments, a cause of action for race discrimination does not follow. Put simply, the homeowners are not state actors. *See* *American Mfrs. Mut. Ins. Co. v. Sulivan*, 526 U.S. 40, 50 (1999) ("Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful' ") (citations omitted). Because Plaintiffs fail to support their proposed race discrimination claim with any evidence of discriminatory animus by Sheriff **Cobb**, their race discrimination claim fails. To the extent Sheriff **Cobb** moves the Court to dismiss Plaintiffs' Equal Protection claim, his motion is GRANTED and that claim is DISMISSED WITH PREJUDICE.

2. First Amendment Violations

In effect, Plaintiffs bring two First Amendment claims. First, Plaintiffs maintain that Sheriff **Cobb** and his deputies harassed them and informed them that they were not welcome in the parish. Second, Plaintiffs claim that Sheriff **Cobb** violated their First Amendment rights by refusing to issue the company an application for a permit for several months.

a. Alleged Harassment

Plaintiffs claim that Sheriff **Cobb** violated their First Amendment right to free speech by informing them that they were not welcome in Franklin Parish, detaining their van for a prolonged period so that Sheriff **Cobb** could speak with Nugent, telling Plaintiffs that "this is going to keep happening" (which they interpreted to mean they would continually be harassed) if they continued to sell in the area, and following them to the Parish line.

Initially, it becomes important to determine the nature of the allegations. Plaintiffs appear to conceptualize their claims as actual violations of their affirmative rights to free speech. Sheriff **Cobb** analyzes the claims under a retaliation framework. The two theories are distinct. On the one hand, an affirmative violation of the First Amendment requires that state action actually deny engagement in protected speech. On the other hand, a First Amendment retaliation claim depends not on the denial of the constitutional right, but on the harassment the plaintiff received for exercising his rights. *See* *Bennett v. Hendrix*, 423 F.3d 1247, 1254 (11th Cir. 2005); *see also*, *Linneman v. City of Aberdeen*, CA No. MJG-12-2021, 2013 WL 3233526, at *7 (D. Md. June 25, 2013) ("a First Amendment Retaliation claim is viable even if the plaintiff is not actually deprived of a First Amendment right where 'conduct that tends to chill the exercise of constitutional rights might not itself deprive such rights' ") (citations omitted).

Here, Plaintiffs' claims are best conceptualized as First Amendment retaliation claims. *See* *Center for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 820 (6th Cir. 2007) (characterizing claim as one of free speech retaliation when anti-abortionist plaintiffs were detained by law enforcement officials for hours in relation to the graphic images on the sides of their trucks). There was no denial of Plaintiffs' free speech rights. As Nugent admits, Sheriff **Cobb** did not prohibit Plaintiffs from selling vacuum cleaners in the area. Rather, Plaintiffs believed Sheriff **Cobb** would order his deputies to harass them if they attempted to sell. Thus, with respect to the actions Sheriff **Cobb** allegedly took in July 2013, Plaintiffs have alleged a First Amendment retaliation claim.

***6** Prevailing on a First Amendment retaliation claim requires Plaintiffs to show:

1. They were engaged in a constitutionally protected activity;

2. That Sheriff **Cobb**'s conduct caused Plaintiffs to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and

3. That Sheriff **Cobb**'s adverse actions were substantially motivated by Plaintiffs' constitutionally protected activities.

Keenan v. Tejada, 290 F.3d 252, 257 (5th Cir. 2002).

Plaintiffs can at least introduce an issue of material fact as to these elements. Therefore, granting qualified immunity based on the first prong of the qualified immunity analysis is inappropriate.

First, as a general rule, the First Amendment protects door-to-door solicitation. *Watchtower Bible and Tract Soc. of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002). The parties' sparse briefing on the first element indicates acknowledgment that the element is met. Second, viewed in

a light most favorable to Plaintiffs and making all inferences in their favor, Sheriff **Cobb**'s actions were sufficient to chill a person of ordinary firmness from continuing to engage in door-to-door solicitation. *See* *Keenan*, 290 F.3d at 259 (finding inordinately long traffic stop chilled speech).

The parties dispute whether evidence exists showing Sheriff **Cobb** was substantially motivated by Plaintiffs' protected activity. Sheriff **Cobb** introduces declarations from multiple residents claiming that they called the Sheriff because of suspicious activities—not the door-to-door sale of vacuum cleaners. Further, he testifies in his own deposition that he received multiple calls and complaints describing suspicious activity, not door-to-door vacuum cleaner sales.

Nevertheless, Plaintiffs claim that the Franklin Parish Sheriff's complaint log, which contains an entry stating "advised they were selling vacuums" creates a dispute of material fact. [Doc. No. 47-18]. They also point to a portion of Stephens' deposition testimony in which she describes the text message conversation with Edwards discussing a "Kirby vacuum lady." [Doc. No. 47-33, Crystal Stephens Depo, p. 13]. According to Plaintiffs, this evidence entitles a reasonable juror to find Sheriff **Cobb**'s adverse actions were substantially motivated by an aversion to free speech.

Courts rarely resolve claims involving an actor's state of mind at summary judgment. *See* *Center for Bio-Ethical Reform, Inc*., 477 F.3d at 823 (noting summary judgment rarely appropriate in free speech retaliation cases); *see also* *International Shortstop, Inc. v. Rally's, Inc*., 939 F.2d 1257, 1265 (5th Cir. 1991) ("When state of mind is an essential element of the nonmoving party's claim, it is less fashionable to grant summary judgment because a party's state of mind is inherently a question of fact which turns on credibility"). That principle rings true in this case, and the Court finds the record raises inferences that preclude summary judgment. Given the additional evidence that at least one town within the parish may have banned door-to-door solicitation altogether, a reasonable juror could find that some complaints to Sheriff **Cobb** were as much about the door-to-door sales as the tactics used.

***7** Turning to the second prong of the analysis, the Court can deny qualified immunity only if "the law so clearly and unambiguously prohibited [Sheriff **Cobb**'s] conduct that 'every reasonable official would understand that what he is doing violates [the law]." *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011). "Existing precedent must have placed the statutory or constitutional issue beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011). "The *sine qua non* of the clearly-established inquiry is 'fair warning.' " *Morgan*, 659 F.3d at 373 (quoting *Hope*, 536 U.S. at 741). "In practice, this means that 'whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful action generally turns on the 'objective legal reasonableness' of the official's action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Atteberry v. Nocona General Hosp.*, 430 F.3d 245, 256 (5th Cir. 2005) (quoting *Anderson v. Creighton*, 483 U.S. at 635, 639 (1987)).

Applying those concepts to the instant facts, it is clearly established law that a state official may not retaliate against a private citizen because of his speech. *See* *Keenan*, 290 F.3d at 258. However, when the officer has probable cause to arrest the citizen, the law is less clear and courts are more hesitant to deny qualified immunity. *Id.* at 262. In this case, Sheriff **Cobb** claims he acted in good faith because he had probable cause to arrest at least one of the LCS salespeople for criminal trespass based on complaints he received from citizens.

However, the Court finds the record unclear on this issue. There are declarations from citizens which state that LCS salespeople would not leave their property after being asked to do so. But it is not clear when the residents made these complaints and whether they were communicated to Sheriff **Cobb**. If the complaints were not communicated to him, then Sheriff **Cobb** cannot rely on them to establish the reasonableness of his actions.

Moreover, other factual issues remain unsettled that preclude qualified immunity at this juncture. Plaintiffs have raised a genuine issue of material fact about the length of time they were detained and Sheriff **Cobb**'s statements during the stop. These questions could bear on the objective reasonableness of Sheriff **Cobb**'s actions.

For these reasons, to the extent Sheriff **Cobb** seeks qualified immunity based on the July 2013 stop, his motion for summary judgment is DENIED.

b. Alleged Denial of a License Application

Plaintiffs also aver that Sheriff **Cobb** violated their First Amendment right to free speech by denying them an occupational permit to conduct business in Franklin Parish for 2014. Specifically, Plaintiffs contend that Sheriff **Cobb** did not fax to them an application for a permit in 2014 despite numerous calls from Crystal Nugent. [Doc. No. 47, p. 6, Plaintiffs' Memorandum in Opposition]. Plaintiffs recorded the calls and resultant conversations with Deputy Whitman. In the transcripts, Whitman states that Sheriff **Cobb** had not approved or responded to the application request.

Sheriff **Cobb** argues that Plaintiffs have had a permit renewal application since 2013 and never paid the requisite fee. He also contends that, these facts, even if true, do not amount to a First Amendment violation because there is no First Amendment right to have a permit application faxed upon demand. Or, if there was a First Amendment violation, he lacked fair notice that his conduct would deprive Plaintiffs of their First Amendment rights.

Sheriff **Cobb**'s arguments on this issue are unavailing. "[T]he license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech." *FW/PBS, Inc v. City of Dallas*, 493 U.S. 215, 228 (1990). Implicit in that principle is that an *application* for the permit or license must be issued within a reasonable time as well to ensure that, if the permit is denied, prompt review is available. Sheriff **Cobb** insists that Plaintiffs received a permit renewal application in December 2013 in accordance with Franklin Parish policy, but Plaintiffs failed to complete the application. Yet, in his deposition testimony, Nugent denies receiving that permit application. Further, Plaintiffs paid the requisite fees in December 2014, but it is unclear when they received the application. If Plaintiffs did not receive the application until December 2014, there would have been an approximately six month period in which their speech was stifled because of an inability to complete an application. Viewing the record most favorably to Plaintiffs, the Court is presented with a situation where a group that sought a permit to solicit did not receive the application for months despite multiple requests and inconsistent with the normal policy of Franklin Parish.[6] Based on this record, a reasonable juror could infer that Plaintiffs' free speech rights were violated because Sheriff **Cobb** refused to issue a permit application for several months.

***8** Turning to the second prong of the qualified immunity analysis, it was clearly established in June 2014 that a public official should issue a decision on a permit application within a reasonable period of time. By implication, it was clearly established that a public official must issue the *application* for the permit within a reasonable period of time.

Further, unsettled factual issues prohibit a developed analysis into the reasonableness of Sheriff **Cobb**'s actions. Whether Sheriff **Cobb** knew about the application request, and whether LCS received an application renewal form at an earlier date, are issues the record fails to resolve. Thus, to the extent Sheriff **Cobb** seeks qualified immunity on the permit application issue, his motion for summary judgment is also DENIED.

III. CONCLUSION

For these reasons, to the extent Sheriff **Cobb** seeks qualified immunity on Plaintiffs' Equal Protection race discrimination claim, the motion is GRANTED and that claim is DISMISSED WITH PREJUDICE. The motion is otherwise DENIED.

All Citations

Not Reported in Fed. Supp., 2016 WL 843385

Footnotes

1 Sheriff **Cobb** also submits a declaration from Rhonda Gill ("Gill"). Gill, a Franklin Parish resident, claims that an LCS salesperson attempted to sell her a vacuum. Gill realized the salesperson had no credentials or mode of transportation and became nervous. An unmarked van appeared to pick up the salesperson. Gill claims that she then complained to the Sheriff's Department. [Doc. No. 45-8, Declaration of Rhonda Gill].

2 Nugent stated the following during his deposition:

> Q. Tell me how that conversation went.
>
> A. The Sheriff pulled me aside. He said, he walked me over [sic]. He told me that we're not wanted here. I said I have a permit. I've done everything you guys asked me. I'm following protocol, exactly what you want. How can you tell me I can't work. He said well, if you keep working, this is going to keep happening. We were already sitting there for easy, easy two hours. By the time the deputies ran information and then said to wait for the Sheriff, then the Sheriff

> talked to the deputies for a little while before he pulled me out. I said I don't understand. We have a permit. If you get a call, why don't you just tell them we have a permit. They are not calling saying we did anything wrong. They are just asking if we're legal. It doesn't matter. We'll come out every time. You should probably go somewhere else because you're not welcome here. I said I paid you for a permit. You took my money. He says well, you can go back and get your money back if you want to, but we don't want you here.
>
> Q. Did anyone get arrested?
>
> A. No.
>
> Q. Did the Sheriff tell you you could not do business there the next day?
>
> A. He didn't specifically say that. But he was very clear that we were going to be continued to be harassed if we worked.
>
> Q. Did he say he was going to harass you or did he say that they were going to be called and they would have to come out?
>
> A. He said this is going to keep happening, indicating we're going to keep stopping you, holding you up.
>
> [Doc. No. 47-35, Nugent Depo, p. 17].

3 Crystal Nugent is Charles Nugent's wife.

4 The transcript is actually dated June of 2013. For purposes of this motion however, the Court construes this as a typographical error and takes as credible Crystal Nugent's affidavit, in which she claims the conversation took place in June of 2014. *See* *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 412 (5th Cir. 2003) ("On summary judgment, all admissible evidence must be construed in favor of the non-movant").

5 The parties did not brief the constitutionality of the Parish's licensing requirements. Accordingly, the Court does not address it.

6 Plaintiffs claim that, in his deposition, Sheriff **Cobb** admitted telling Whitman to "hold off" on sending the application. Plaintiffs follow this statement with a citation to a portion of Sheriff **Cobb**'s deposition that is not in the record. The Court does not, therefore, consider that portion of Sheriff **Cobb**'s deposition testimony.

453 F.Supp.2d 394
United States District Court, D. Rhode Island.

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, Plaintiff,
v.
TOWN OF EAST GREENWICH, by and through its Town Council Members, Michael B. Isaacs, John M. McGurk, Mathias C. Wilkinson, Henry V. Boezi, and Kelly A. Petti, in their official capacities; its Chief of Police, David Desjarlais, in his official capacity; and its Finance Director, Thomas Mattos, in his official capacity, Defendants.

No. CIV.A. 06–208T.
|
Sept. 27, 2006.

Synopsis

Background: Advocacy group for door-to-door solicitors sued municipality, claiming that ordinance requiring permit and imposing 7 p.m. curfew violated First Amendment. Group moved for preliminary injunction barring enforcement.

Holdings: The District Court, Torres, Chief Judge, held that:

[1] permit requirement did not violate First Amendment rights of solicitors, and

[2] curfew did not violate First Amendment.

Motion denied.

West Headnotes (11)

[1] Civil Rights
Preliminary Injunction

Party seeking a preliminary injunction barring enforcement of a regulation, on grounds that it infringes on his First Amendment rights, is deemed likely to prevail on the merits unless the government establishes that the challenged regulation otherwise passes constitutional muster. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[2] Constitutional Law
Residences

While the First Amendment affords some protection to door-to-door canvassing, such canvassing is subject to reasonable regulation, especially in cases where the solicitation of money is involved. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[3] Constitutional Law
Residences

In determining whether ordinance regulating door-to-door solicitation violates First Amendment, courts are to consider nature of the speech, the type of regulation, the degree to which the regulation burdens speech, and the extent to which the regulation serves a substantial governmental interest. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[4] Constitutional Law
Charities or religious organizations

Charitable door-to-door solicitation may be subjected to reasonable regulation, without violating First Amendment. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[5] Constitutional Law
Residences

Validity under First Amendment right to free speech of a requirement, that permit be obtained prior to commencement of door-to-door solicitations, depends in part on whether government officials have unbridled discretion to deny a permit and thereby censor ideas with which they may disagree. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[6] Constitutional Law
Time, Place, or Manner Restrictions

First Amendment does not guarantee right to communicate one's views at all times and places or in any manner that may be desired and, therefore, even protected expression is subject to reasonable time, place, and manner restrictions. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[7] Constitutional Law
Strict or exacting scrutiny; compelling interest test

Even content-based burdens on speech may be constitutional when they are necessary to advance a compelling government interest. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[8] Constitutional Law
Residences

Under intermediate scrutiny standard, applicable to ordinance regulating door-to-door solicitation challenged on First Amendment grounds, ordinance (1) must serve sufficiently strong subordinating interest municipality is entitled to protect, (2) must be narrowly drawn to serve those interests without unnecessarily interfering with First Amendment freedoms, and (3) must be content-neutral. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[9] Constitutional Law
Residences

Municipal Corporations
Permits

Ordinance requiring permit in order to engage in door-to-door solicitations did not violate First Amendment rights of solicitors; grant was automatic once requested information was provided, requirement that background of solicitors and their sponsoring group be provided furthered important municipal interest in protecting residents from fraud, as it helped uncover solicitors with criminal records, ordinance discouraged prospective burglars posing as canvassers, and ordinance was narrowly drawn, applying to money solicitations only, and imposing delays in grant of permit that were not burdensome. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[10] Constitutional Law
Particular Issues and Applications

The right to privacy in one's home includes not only the right to be free from unreasonable searches and seizures but also the right to be free from unwanted and unwelcome intrusions.

Cases that cite this headnote

[11] Constitutional Law
Residences

Municipal Corporations
Prohibitory ordinances

Ordinance imposing 7 p.m. curfew on door-to-door solicitations was valid time, place and manner restriction on speech that did not violate First Amendment; curfew furthered important government interest in protecting privacy rights of residents, for whom period after 7 p.m. was valuable time of relaxation, had some value in preventing crime, and left open alternative channels of communication. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

***395 MEMORANDUM AND ORDER**

TORRES, Chief Judge.

Introduction

The Association of Community Organizations for Reform Now ("ACORN") ***396** brought this action to declare unconstitutional an ordinance of the Town of East Greenwich ("the Ordinance") that regulates door-to-door solicitation of funds. The case, now, is before the Court for consideration of ACORN's motion for a preliminary injunction prohibiting enforcement of that ordinance.

The issues presented are whether the Ordinance's requirement that solicitors first obtain a permit and/or its prohibition against solicitating after 7:00 p.m. violate ACORN's First Amendment right to freedom of expression. For the reasons hereinafter stated, I answer both questions in the negative and, therefore, deny the motion for a preliminary injunction.

Background Facts

I. *The Challenged Ordinance*

East Greenwich is a suburban community that consists primarily of private homes. Chapter 174 of the Town's Code of Ordinances regulates "Peddling and Soliciting." The Ordinance requires anyone who goes door-to-door for the purpose of soliciting funds to obtain a solicitor's permit. The Ordinance also prohibits such solicitation after 7:00 p.m. [1] In addition, the Ordinance allows residents who wish to prohibit door-to-door solicitation, entirely, to do so by posting a sign on their premises. [2]

A. *The Permit Requirement*

The Ordinance provides that, in order to obtain a permit, an application form must be filed with the police department at least five days before the proposed solicitation so that Town officials can verify the information contained in the application. *See* Code of Ordinances § 174–4(A). However, the police chief testified that, ordinarily, permits are issued within two days unless difficulties are encountered in obtaining verification.

Section 174–4 specifies the information that must be set forth in the application. In pertinent part, it provides:

§ 174–4. Application for permit.

A. ... The application required in this chapter shall contain the following information or, in lieu thereof, a detailed statement of the reason why such information cannot be furnished.

B. In the case of a charitable solicitation permit:

(1) The name, address or headquarters of the person applying for the permit.

(2) If the applicant is not an individual, the names and addresses of the applicant's principal officers and managers.

(3) The purpose for which such solicitation is to be made, and the use or disposition to be made of any receipts therefrom.

(4) The names and addresses of the person or persons in charge of conducting the solicitation, and the names and addresses of any persons who will conduct such solicitation, together with a statement as to whether or not any such person has been convicted of any crime involving ***397** moral turpitude, and if so, [sic] nature of the offense, the date of such conviction and the sentence imposed, if any.

(5) The dates upon which the permit is requested for use indicating, if applicable, the special event for which application is sought.

(6) The length of time for which the right to do business is desired and whether the applicant seeks a daily, special event, or weekly permit.

(7) The place and/or preferred designated area where the goods or property are proposed to be sold, or orders taken for the sale thereof is manufactured or produced, where such goods or products [sic] located at the time the application is filed, and the proposed method of delivery.

(8) An outline as to the method to be used in conducting the solicitation.

(9) The times when it is anticipated such solicitation will be made, giving the dates for the beginning and ending of such solicitation requested.

(10) The most recent copy of the annual report and/or registration form filed with the Director of the Department of Business Regulations [sic]

pursuant to the provisions of [R.I. Gen. Laws] 1956, § 5–53.1–1 *et seq.*

(11) If any representation is to be made in any solicitation that contributions are deductible pursuant to the provisions of the Internal Revenue Code of 1954, as the code has been, or may hereafter be, amended, a copy of the determination letter received by the organization from the Internal Revenue Service indicating that contributions made will be deductible as charitable contributions pursuant to the Internal Revenue Code of 1954.

(12) Copy of charter received from state of incorporation, if any, and tax-exempt number.

(13) A description of any cart, vehicle or other apparatus proposed for use in conjunction with the sale of goods or service.

The police chief testified that this information is used to determine, among other things, whether the organization on behalf of which the solicitation purportedly is being made actually exists; whether it has authorized the solicitation; and whether the individual solicitors have criminal records, any outstanding warrants, or any history of involvement in fraudulent schemes. Obviously, the information regarding the times of solicitation, the areas to be solicited, and a description of any vehicles to be used also would assist the police in monitoring compliance and responding to residents' inquiries about solicitors coming to their doors.

The Ordinance also requires payment of a modest application fee [3] but there appears to be some confusion as to what fee is applicable to charitable solicitation permits. Subsection 93–1(A) of the Town's Code of Ordinances prescribes a fee of $5.00 per day or $100.00 per year for "[d]oor-to-door solicitation" permits and a fee of $10.00 per day up to a maximum of $200.00 per year for "[h]awkers and peddlers." The police chief testified that the department's practice is to charge charitable organizations that are not selling food ***398** a one-time fee of $10.00 regardless of how many individual solicitors are involved.

The Ordinance does not vest Town officials with any discretion to deny a permit. On the contrary, section 174–5 requires that a permit be issued if the application form is properly completed and the applicable fee is paid. That section provides, in pertinent part:

§ 174–5. Issuance.

A. Charitable solicitations. Upon compliance with the provisions of § 174–5B, [4] the Police Chief shall issue a hawker's, peddler's and solicitor's permit to the applicant for the period requested, provided that the period shall not exceed one year from the date of issuance.

In fact, no application filed in accordance with the Ordinance's requirements has ever been denied. However, when the information contained in the application form raises concerns about possible fraud or criminal propensities of solicitors, action may be taken to address those concerns. For example, if a background check reveals that individual solicitors have been convicted of serious crimes, the organization is notified and those individual solicitors' names are left off of the list of solicitors that is appended to the permit in the hope that the omission will prompt residents approached by those individuals to question why. Moreover, if a background check reveals that there is an outstanding warrant for a solicitor, the solicitor is arrested.

B. *The Curfew Provision*

Before 2001, the Ordinance permitted door-to-door solicitation between 9:00 a.m. and 9:00 p.m., seven days per week. In 2001, the curfew was changed to 7:00 p.m. in response to residents' complaints.

II. *The Genesis of this Suit*

ACORN is an international organization that describes itself as a non-profit "citizens' lobby group," that advocates with respect to "social justice issues" on behalf of "low-income to moderate-income families."

ACORN is active in lobbying for or against passage of state laws on subjects of interest. It attempts to generate public support for its positions and to raise funds through telephone calls, mailings, small gatherings hosted by interested persons, and door-to-door canvassing. ACORN's door-to-door canvassing is conducted by professional solicitors whom ACORN hires and who are terminated if they do not meet fund-raising goals.

Two of ACORN's solicitors testified at the preliminary injunction hearing. Both stated that they had been doing house-to-house solicitation for ACORN in Rhode Island for approximately two months and that, in addition to soliciting contributions, they encourage residents to sign petitions,

write letters, and/or make phone calls supporting ACORN's positions. They also testified that ACORN preferred to solicit between 4:00 p.m.–9:00 p.m. because that's when it is most likely that people are at home.

Sometime before April 17, **2006**, ACORN decided to mount a door-to-door campaign in East Greenwich in order to raise money and generate support for passage of a bill pending in the Rhode Island General Assembly concerning homeowner loans. According to Jeffrey Partridge, ACORN's director of canvassing in Rhode Island, East Greenwich was targeted because ***399** it was in the district represented by House Minority Leader Robert Watson and, although ACORN didn't know Watson's position on the bill, it wanted to exert pressure on him to support it.

It's not clear how far in advance ACORN began planning its campaign in East Greenwich, but it didn't notify Town officials of its plans until April 17, **2006**, the day on which it intended to begin soliciting. On that date, Partridge sent a fax to the East Greenwich Police Department listing the names of ACORN's solicitors and including a map of the areas to be canvassed. However, according to Police Chief David Desjarlais, the faxed documents were illegible.

There is some dispute as to exactly what happened next, but it appears that someone in Chief Desjarlais' office called Mr. Partridge and told him that, in order to solicit funds, ACORN, first, would have to obtain a permit and that it could not conduct door-to-door solicitations after 7:00 p.m. In a subsequent telephone conversation, Chief Desjarlais told Partridge that, if ACORN did not solicit money, no permit would be required and the 7:00 p.m. curfew would not apply.

ACORN declined to file a permit application and, instead, commenced this suit.

III. *The Evidence Presented*

During the one-day hearing on ACORN's motion for a preliminary injunction, neither side presented much evidence beyond what, already, has been noted. Chief Desjarlais did testify about past incidents in which an individual posing as the representative of several charitable organizations went door-to-door soliciting contributions and in which another individual engaged in door-to-door canvassing stole a resident's car. Chief Desjarlais also testified that East Greenwich police respond to between twenty-five and thirty-five complaints of breaking and entering each year and that background checks of the individuals listed on solicitation permit applications frequently have revealed criminal records and/or outstanding warrants. In addition, he stated that the department receives resident complaints about solicitors and/or canvassers almost daily and that residents occasionally call asking why a solicitor's name does not appear on the permit he or she displays. However, Chief Desjarlais was unable to describe any differences in the Town's crime rate between 5:00 p.m. and 7:00 p.m. as compared to between 7:00 p.m. and 9:00 p.m.

The Preliminary Injunction Standard

The Supreme Court has said that "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing,* carries the burden of persuasion." *Mazurek v. Armstrong,* 520 U.S. 968, 972, 117 S.Ct. 1865, 1867, 138 L.Ed.2d 162, 167 (1997) (*per curiam*) (quoting 11A Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2948, pp. 129–30 (**2d** ed.1995)) (emphasis in original); *see also Wine & Spirits Retailers, Inc. v. Rhode Island,* 364 F.Supp.2d 172, 175 (**D.R.I**.2005) ("A preliminary injunction is considered an extraordinary remedy because it involves the granting of interim relief before the facts are fully developed by a full-blown trial on the merits."), *aff'd,* 418 F.3d 36 (1st Cir.2005).

In ruling on a motion for a preliminary injunction, a court must consider four factors:

> (1) the [movant's] likelihood of success on the merits; (2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, i.e., the hardship to the nonmovant if enjoined as contrasted with the hardship ***400** to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest.

Ross–Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 15 (1st Cir.1996) (citations omitted); *accord Rosario–*

Urdaz v. Rivera–Hernandez, 350 F.3d 219, 221 (1st Cir.2003) (citations omitted).

While the First Circuit has indicated that "[n]one of these criteria should be slighted," *Auburn News Co. v. Providence Journal Co.,* 659 F.2d 273, 277 (1st Cir.1981), it also has said that "[t]he '*sine qua non* ' of a preliminary injunction analysis is whether the plaintiff is likely to succeed on the merits of its claim," *SEC v. Fife,* 311 F.3d 1, 8 (1st Cir.2002) (quoting *Weaver v. Henderson,* 984 F.2d 11, 12 (1st Cir.1993)). This case provides an apt illustration of that point.

Here, the potential harm to ACORN if a preliminary injunction is not granted is of approximately the same magnitude as the potential harm to the residents of East Greenwich if the preliminary injunction is granted. Moreover, the public interest does not tip the scale in either direction because the public's interest in seeing that speech rights are not unduly burdened, on the one hand, and its interest in protecting the privacy rights of citizens and helping to prevent them from being victims of fraud or crime, on the other hand, are equally strong.

Analysis

ACORN claims that the permit requirement and the 7:00 p.m. curfew violate its First Amendment right to freedom of expression. ACORN also claims a violation of its Fourteenth Amendment right to equal protection because it alleges that the Ordinance is not enforced against other charitable organizations, but this Court need not consider that claim because ACORN has failed to present any evidence to support it.

East Greenwich argues that any burden on ACORN's speech rights is outweighed by the fact that the Ordinance furthers the Town's interests in preventing fraud, preventing other crimes, and protecting the privacy rights of its residents.

I. *Burden of Proof*

[1] The burden of proving entitlement to a preliminary injunction, including the burden of proving likelihood of ultimate success, is on the party seeking the injunction. *See Mazurek,* 520 U.S. at 972, 117 S.Ct. at 1867, 138 L.Ed.2d at 167 (citations omitted). However, in the case of alleged First Amendment violations, once the party seeking the injunction establishes that the challenged regulation infringes on his First Amendment rights, he is deemed likely to prevail on the merits unless the government establishes that the challenged regulation otherwise passes constitutional muster. *See Ashcroft v. ACLU,* 542 U.S. 656, 666, 124 S.Ct. 2783, 2791–92, 159 L.Ed.2d 690, 701 (2004) (citations omitted); *see United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 816, 120 S.Ct. 1878, 1888, 146 L.Ed.2d 865, 881 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.") (citations omitted); *see Clark v. Cmty. for Creative Non–Violence,* 468 U.S. 288, 294 n. 5, 104 S.Ct. 3065, 3069 n. 5, 82 L.Ed.2d 221, 227 n. 5 (1984).

Whether and to what extent empirical evidence is required in order to establish a governmental interest that justifies the infringement "will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 391, 120 S.Ct. 897, 906, 145 L.Ed.2d 886, 900 (2000). The Supreme ***401** Court has recognized that, even in the case of regulations that may burden speech,

> [t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51–52, 106 S.Ct. 925, 931, 89 L.Ed.2d 29, 40 (1986).

The First Circuit has not yet addressed the quantum of evidence that a municipality is required to present in order to justify regulation of door-to-door solicitation, in particular, and the circuits that have addressed the question are split. *Compare City of Watseka v. Ill. Pub. Action Council,* 796 F.2d 1547, 1555–56 (7th Cir.1986) (invalidating curfew provision, in part, because evidence regarding crime rate was based on statewide rather than local statistics and because

those statistics dealt with crimes committed after dark and not specifically with crimes committed during curfew hours of 5:00 p.m. to 9:00 p.m.), *aff'd,* 479 U.S. 1048, 107 S.Ct. 919, 93 L.Ed.2d 972 (1987) (mem.), *with* *Pa. Alliance for Jobs & Energy v. Council of Munhall,* 743 F.2d 182, 187 (3d Cir.1984) (upholding curfews imposed on door-to-door canvassing even though no detailed statistical evidence was presented, in part, because the fact "[t]hat unregulated canvassing poses a risk of crime is well known: 'burglars frequently pose as canvassers' ") (quoting *Martin v. City of Struthers,* 319 U.S. 141, 146, 63 S.Ct. 862, 864, 87 L.Ed. 1313 (1943)).

While the quantum of evidence required to establish that an ordinance regulating door-to-door solicitation serves a municipality's interest in preventing crime or protecting the privacy of residents may vary from case to case, there is no sound reason for requiring a municipality to present extensive statistical evidence in order to prove what, already, is common knowledge. It makes little sense to prohibit a municipality from enacting an ordinance reasonably calculated to protect its residents from crime and/or to preserve its residents' right to privacy until residents actually are harmed or until the municipality reinvents the wheel by conducting exhaustive studies or compiling detailed statistics to confirm what already is known. Both law and logic suggest that a municipality is entitled to rely on the experiences of its peers, "detailed findings" or evidentiary foundations contained in previous court decisions, and/or legislative findings of fact based upon legislators' personal experiences in the communities they serve. *See* *Renton,* 475 U.S. at 51–52, 106 S.Ct. at 931, 89 L.Ed.2d at 40; *see* *City of Erie v. Pap's A.M.,* 529 U.S. 277, 296–98, 120 S.Ct. 1382, 1395, 146 L.Ed.2d 265, 283 (2000) (O'Connor, J., for the plurality) (citations omitted).

II. *Likelihood of Success*

A. *Regulation of Door–to–Door Canvassing in General*

1. *Overview*

Door-to-door canvassing involves an element of conduct that implicates governmental concerns not triggered by some other kinds of expressive activity. Unlike speech in a public forum that, generally, takes place before an audience that chooses to be there, door-to-door canvassing may infringe on the privacy rights of other persons because it involves the uninvited entry upon private property inhabited by residents who may not welcome the intrusion nor wish to hear the message being communicated. *See, e.g.,* ***402** *Martin,* 319 U.S. at 144, 63 S.Ct. at 864, 87 L.Ed. at 1317 (canvassers, "whether selling pots or distributing leaflets, may lessen the peaceful enjoyment of a home ..."). Canvassing, especially when conducted during nighttime hours, also presents a risk of criminal activity that is not presented by many other forms of expression. *See, e.g., id.* ("burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later"). Moreover, when canvassing involves the solicitation of money, it creates a potential for fraud that is not present when speech, alone, is involved. *See* *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton,* 536 U.S. 150, 162, 122 S.Ct. 2080, 2087, 153 L.Ed.2d 205, 217 (2002) (a municipality's interest in regulating door-to-door canvassing is especially strong "when the solicitation of money is involved") (collecting cases).

[2] Because of these concerns, the Supreme Court consistently has recognized that "the prevention of fraud, the prevention of crime, and the protection of residents' privacy ... are important interests that [a municipality] may seek to safeguard through some form of regulation of solicitation activity," *see* *id.* at 164–65, 122 S.Ct. at 2089, 153 L.Ed.2d at 218–19; *see, e.g.,* *Village of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 636, 100 S.Ct. 826, 836, 63 L.Ed.2d 73, 87 (1980) (recognizing all three interests as "substantial"); *see, e.g.,* *Hynes v. Mayor of Oradell,* 425 U.S. 610, 616–19, 96 S.Ct. 1755, 1758–60, 48 L.Ed.2d 243, 250–52 (1976) (recognizing importance of municipality's interest in crime prevention and privacy protection) (citing *Martin,* 319 U.S. at 144, 63 S.Ct. 862, 87 L.Ed. 1313), and that a municipality's interest in regulating door-to-door canvassing is especially strong "when the solicitation of money is involved," *Watchtower,* 536 U.S. at 162, 122 S.Ct. at 2087, 153 L.Ed.2d at 217. Accordingly, it has become well-established that, while the First Amendment affords some protection to door-to-door canvassing, such canvassing is subject to reasonable regulation, especially in cases where the solicitation of money is involved. *See* *id.* at 162–63, 122 S.Ct. at 2087–88, 153 L.Ed.2d at 217; *see*

Schaumburg, 444 U.S. at 632, 100 S.Ct. at 833–34, 63 L.Ed.2d at 84.

2. *Striking a Balance*

[3] The touchstone for determining whether an ordinance regulating door-to-door canvassing passes constitutional muster is whether the ordinance strikes an appropriate "balance between [a municipality's] interests and the effect of the regulation[ ] on First Amendment rights." *Watchtower,* 536 U.S. at 163, 122 S.Ct. at 2088, 153 L.Ed.2d at 218; *see* *Schaumburg,* 444 U.S. at 633, 100 S.Ct. at 834, 63 L.Ed.2d at 85 (regulation must be done "in such a manner as not unduly to intrude upon the rights of free speech") (citation omitted); *see* *Hynes,* 425 U.S. at 619, 96 S.Ct. at 1760, 48 L.Ed.2d at 252 ("There is, of course, no absolute right under the Federal Constitution to enter on the private premises of another and knock on a door for any purpose, and the police power permits reasonable regulation for public safety.").

In attempting to strike that balance, courts have been influenced by a variety of factors including the nature of the speech, the type of regulation, the degree to which the regulation burdens speech and the extent to which the regulation serves a substantial governmental interest. *See generally* *Watchtower,* 536 U.S. at 161–63, 122 S.Ct. at 2087–88, 153 L.Ed.2d at 216–18 (discussing factors) (citations omitted); *see* ***403** *Schaumburg,* 444 U.S. at 628–32, 100 S.Ct. at 831–34, 63 L.Ed.2d at 81–85 (same) (citations omitted); *see* *id.* at 640–41, 100 S.Ct. at 838, 63 L.Ed.2d at 90 (Rehnquist, J., dissenting) (same) (citations omitted).

(a) *Nature or Value of the Speech*

[4] Historically, the level of First Amendment protection afforded to door-to-door canvassing has depended, in part, on whether the canvassing involves political or religious speech, on the one hand, or commercial speech, on the other hand. Ordinances regulating canvassing that involves nothing more than political advocacy or religious proselytizing have been subject to stricter scrutiny than ordinances regulating only the solicitation of money. *See, e.g.,* *Watchtower,* 536 U.S. at 165, 122 S.Ct. at 2089, 153 L.Ed.2d at 219 (noting that, if an ordinance requiring a permit for *all* door-to-door canvassers had "been construed to apply only to commercial activities and the solicitation of funds," it arguably would have passed muster as serving "the [municipality's] interest in protecting the privacy of its residents and preventing fraud"); *see, e.g.,* *Breard v. City of Alexandria,* 341 U.S. 622, 642–43, 71 S.Ct. 920, 932–33, 95 L.Ed. 1233, 1248 (1951) (upholding anti-canvassing ordinance because, *inter alia,* it only regulated commercial solicitation) (citation omitted).

The historical distinction between canvassing that involves only pure speech and canvassing that involves the solicitation of money has been somewhat blurred by the holding in *Schaumburg* that "charitable solicitation" is entitled to greater protection than "purely commercial speech" because it "is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes" and "without solicitation the flow of such information and advocacy would likely cease." 444 U.S. at 632, 100 S.Ct. at 833–34, 63 L.Ed.2d at 84–85. It is not clear whether *Schaumburg* meant to adopt a *per se* rule that applies to *all* "charitable solicitation" or whether the "charity" must show that the solicitation is, in fact, "intertwined" with the communication of a message or an idea. In any event, *Schaumburg* recognizes that even "charitable" solicitation "is undoubtedly subject to reasonable regulation." 444 U.S. at 632, 100 S.Ct. at 833–34, 63 L.Ed.2d at 84.

(b) *Type of Regulation*

[5] Regulations affecting protected speech are subject to a lesser level of scrutiny if they are content-neutral than if they are not. *See* *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 642, 114 S.Ct. 2445, 2459, 129 L.Ed.2d 497, 517 (1994) (content-based speech restrictions must survive strict scrutiny while laws that are content-neutral generally are subject to intermediate scrutiny) (citations omitted). The reason for the differing degrees of scrutiny is that "content-based burdens on speech raise[ ] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *See* *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116, 112 S.Ct. 501, 508, 116 L.Ed.2d 476, 487 (1991) (citation omitted). Thus, it is well-established that the validity of a permit requirement depends, in part, on whether government officials have unbridled discretion to deny a permit and thereby censor ideas with which they may disagree. *See* *Forsyth County v. Nat'list Movement,* 505 U.S. 123, 130–31, 112 S.Ct. 2395, 2401–02, 120 L.Ed.2d 101, 111–12 (1992) (citations omitted).

[6] Another important factor in assessing the constitutionality of an ordinance regulating door-to-door canvassing is whether it amounts to a complete ban or is ***404** merely a time, place, and manner restriction. As the Supreme Court has said, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired" and, therefore, even expression "protected by the First Amendment, [is] subject to reasonable time, place, and manner restrictions." *Heffron v. Int'l Soc'y for Krishna Consciousness,* 452 U.S. 640, 647, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298, 306 (1981) (citations omitted). The reason for the distinction is that, unlike an outright ban, a time, place, and manner restriction leaves the speaker free to communicate his message through other channels. *See Hill v. Colorado,* 530 U.S. 703, 726, 120 S.Ct. 2480, 2494, 147 L.Ed.2d 597, 617 (2000) (a time, place, and manner restriction is one that "does not entirely foreclose any means of communication") (citing *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)); *see United States v. Grace,* 461 U.S. 171, 177, 103 S.Ct. 1702, 1707, 75 L.Ed.2d 736, 743–44 (1983) (differentiating time, place, and manner restrictions from "absolute prohibition[s] on ... particular type[s] of expression") (citations omitted).

(c) *Degree to which Speech is Burdened*

The extent of the burden that a regulation imposes on speech is another factor that courts often consider in deciding whether the burden is outweighed by the governmental interested served. For example, in the case of laws governing election procedures, the magnitude of the burden imposed on speech determines the level of scrutiny to be applied. *See, e.g., Burdick v. Takushi,* 504 U.S. 428, 434, 112 S.Ct. 2059, 2063, 119 L.Ed.2d 245, 253–54 (1992) ("the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights ...") (citations omitted). In other cases, courts view the extent of the burden as a factor to be considered in deciding whether a regulation is narrowly tailored to achieve its goal. *See, e.g., FEC v. Beaumont,* 539 U.S. 146, 161–62, 123 S.Ct. 2200, 2210–11, 156 L.Ed.2d 179, 193–94 (2003) (citations omitted).

(d) *Extent to which Regulation Serves a Substantial Governmental Interest*

[7] The fact that a regulation may impose some burden on the exercise of speech rights does not necessarily render the regulation unconstitutional. Indeed, even content-based burdens may be constitutional when they are necessary to advance a compelling government interest. *See, e.g., Burson v. Freeman,* 504 U.S. 191, 198, 206, 112 S.Ct. 1846, 1851, 1855, 119 L.Ed.2d 5, 13–14, 19 (1992) (Blackmun, J., for the plurality) (ban on campaign picketing within specified distance of polling place upheld as necessary to prevent voter intimidation and maintain orderly elections).

Accordingly, one of the most significant factors in assessing the constitutionality of an ordinance regulating door-to-door canvassing and/or solicitation is the extent to which the regulation furthers the municipality's legitimate interests. *See, e.g., ACORN v. City of Phoenix,* 798 F.2d 1260, 1268–70 (9th Cir.1986) (upholding ban on entering public streets to solicit occupants of vehicles as a valid time, place, and manner restriction on speech because, *inter alia,* it directly promoted the government's interest in traffic safety). These interests include preventing fraud, preventing crime, and protecting the privacy rights of residents. *See, e.g., Watchtower,* 536 U.S. at 168–69, 122 S.Ct. at 2090–91, 153 L.Ed.2d at 222 (voiding canvassing permit requirement because, *inter alia,* it did not actually further the municipality's "important ***405** interests" in combating fraud, crime, and invasion of privacy) (citation omitted).

So long as a challenged law furthers a sufficiently important government interest and does not burden substantially more speech than is necessary, it may survive all but the most exacting of First Amendment tests. *See Ward,* 491 U.S. at 798–800, 109 S.Ct. at 2757–58, 105 L.Ed.2d at 680–81 (citations omitted).

3. *Permit Requirements*

The Supreme Court has not yet decided the level of scrutiny to which an ordinance regulating door-to-door solicitation is subject. *See Watchtower,* 536 U.S. at 164, 122 S.Ct. at 2088, 153 L.Ed.2d at 218 (finding it "unnecessary" to address the standard of review). Nor has it clearly articulated the standard of review applicable, in general, to permits that governmental officials have no discretion to deny. *See*

MacDonald v. City of Chicago, 243 F.3d 1021, 1029–32 (7th Cir.2001) (collecting cases), *cert. denied,* 534 U.S. 1113, 122 S.Ct. 919, 151 L.Ed.2d 884 (2002).

[8] However, in *Schaumburg,* the Supreme Court applied what amounted to a form of intermediate scrutiny to an ordinance providing that, in order to obtain a solicitation permit, a charity could not expend more than twenty-five percent of its funds for administrative costs. *See* 444 U.S. at 624, 636–37, 100 S.Ct. at 829, 836, 63 L.Ed.2d at 79, 87–88 (citations omitted). Thus, *Schaumburg* held that a permit requirement:

1. must serve "a sufficiently strong, subordinating interest that the [municipality] is entitled to protect;" and

2. must be "narrowly drawn ... to serve those interests without unnecessarily interfering with First Amendment freedoms."

Id. (citations omitted); *see also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.,* 487 U.S. 781, 787–89, 108 S.Ct. 2667, 2672–73, 101 L.Ed.2d 669, 683–84 (1988) (explaining test set forth in *Schaumburg*) (citations omitted); *see also Sec'y of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 960–61, 104 S.Ct. 2839, 2849, 81 L.Ed.2d 786, 798 (1984) (same) (citations omitted). Because ordinances that discriminate on the basis of content generally are subject to strict scrutiny, *see Turner Broad. Sys.,* 512 U.S. at 642, 114 S.Ct. at 2459, 129 L.Ed.2d at 517 (citations omitted), the *Schaumburg* test, presumably, includes a requirement of content-neutrality, as well.

Unlike the ordinance in *Schaumburg* that specified various grounds on which a permit could be denied, *see* 444 U.S. at 622–24, 100 S.Ct. at 828–29, 63 L.Ed.2d at 78–79, the East Greenwich Ordinance, in effect, provides for automatic issuance of permits. Therefore, there is no reason to subject the East Greenwich Ordinance to any greater level of scrutiny than the intermediate scrutiny applied in *Schaumburg.* Indeed, it is at least arguable that an ordinance that neither specifies grounds for denying a permit nor confers discretion on municipal officials to do so is merely a time, place, and manner restriction that is subject to a lesser degree of scrutiny. *See Hill,* 530 U.S. at 726, 120 S.Ct. at 2494, 147 L.Ed.2d at 617.

For purposes of intermediate scrutiny analysis, the narrowly drawn requirement differs from the "narrowly tailored" requirement applicable to strict scrutiny analysis. An ordinance does not fail the "narrowly drawn" test simply because there may be some less restrictive method by which the proffered governmental interest might be served. Thus, the Supreme Court has said that "we require the Government to employ the least restrictive means *only* when the forum is a public one ***406** and strict scrutiny applies." *United States v. Am. Library Ass'n, Inc.,* 539 U.S. 194, 207 n. 3, 123 S.Ct. 2297, 2305 n. 3, 156 L.Ed.2d 221, 233 n. 3 (2003) (Rehnquist, C.J., for the plurality) (emphasis added); *see Clark,* 468 U.S. at 299, 104 S.Ct. at 3072, 82 L.Ed.2d at 231 (observing that the narrow tailoring requirement of intermediate scrutiny analysis neither "assign[s] to the judiciary the authority to replace" other government decisionmakers nor "endow[s] the judiciary with the competence" to do so) (quoted, with approval, in *Ward,* 491 U.S. at 798, 109 S.Ct. at 2757, 105 L.Ed.2d at 680).

Since it is almost always possible to hypothesize a less restrictive alternative to any ordinance, a rigid "narrowly tailored" requirement would render virtually every ordinance regulating door-to-door solicitation unconstitutional because it always would be possible to conjure up an arguably less restrictive alternative. *Watseka,* 796 F.2d at 1564 (Coffey, J., dissenting) (quoting *Ill. State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 188–89, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979) (Blackmun, J., concurring)).

Such a requirement also would place courts, rather than elected officials, in the position of deciding which of two possible alternatives better serves a particular governmental purpose. That is a task that courts are ill-equipped to perform because "[t]he expertise of courts lies in determining whether an agency's decision is within the zone of constitutionality, not in choosing between options within that zone." *White House Vigil for the ERA Comm. v. Clark,* 746 F.2d 1518, 1531 (D.C.Cir.1984).

As the Supreme Court has stated, "[u]nder intermediate scrutiny, the Government may employ the means of its choosing so long as the ... regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, and does not burden substantially more speech than is necessary to further that interest."

Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 213–14, 117 S.Ct. 1174, 1198, 137 L.Ed.2d 369, 402–03 (1997) (citing *Turner Broad. Sys.,* 512 U.S. at 662, 114 S.Ct. at 2469, 129 L.Ed.2d 497; *Ward,* 491 U.S. at 799, 109 S.Ct. at 2758, 105 L.Ed.2d 661) (internal quotation marks omitted).

Of course, that does not mean that the availability of less restrictive alternatives is irrelevant in deciding whether an ordinance is "narrowly drawn." Clearly, the existence of less restrictive alternatives is a factor to be considered in determining whether the "narrowly drawn" requirement has been satisfied. *See id.* at 252–53, 117 S.Ct. at 1216–17, 137 L.Ed.2d at 427–28 (O'Connor, J., dissenting, joined by Scalia, Thomas, and Ginsburg, JJ.) (availability of less restrictive means, while not always fatal under intermediate scrutiny, remains relevant) (citations omitted); *accord Am. Library Ass'n,* 539 U.S. at 217–18, 123 S.Ct. at 2311–12, 156 L.Ed.2d at 240–41 (Breyer, J., concurring) (same) (citations omitted).

4. *Curfews*

Since "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired," even protected speech is "subject to reasonable time, place, and manner restrictions." *Heffron,* 452 U.S. at 647, 101 S.Ct. at 2564, 69 L.Ed.2d at 306 (citations omitted).

Curfews on door-to-door solicitation are classic time, place, and manner restrictions because, while they limit the times during which solicitation can occur, they do not completely foreclose it. *See Hill,* 530 U.S. at 726, 120 S.Ct. at 2494, 147 L.Ed.2d at 617 (time, place, and manner analysis applies "when a content-neutral regulation ***407** does not entirely foreclose any means of communication") (citing *Ward,* 491 U.S. at 798, 109 S.Ct. 2746, 105 L.Ed.2d 661); *see El Marocco Club, Inc. v. Fox,* 110 F.Supp.2d 54, 61 (**D.R.I**.2000).

Although the Supreme Court has not yet decided what test should be applied in determining whether such curfews are unconstitutional, it has recognized that a municipality "may ... fix reasonable hours when canvassing may be done," *Schneider v. New Jersey,* 308 U.S. 147, 165, 60 S.Ct. 146, 152, 84 L.Ed. 155, 166 (1939), and, may "regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience," *Cantwell v. Connecticut,* 310 U.S. 296, 306–07, 60 S.Ct. 900, 904, 84 L.Ed. 1213, 1219 (1940), or in order to protect residents "from annoyance, including intrusion upon the hours of rest," *see Martin,* 319 U.S. at 144, 63 S.Ct. at 864, 87 L.Ed. at 1317.

With respect to time, place, and manner restrictions, in general, the Supreme Court has held that they pass constitutional muster even when the speech takes place in a public forum as long as:

1. "the restrictions 'are justified without reference to the content of the regulated speech,' "
2. " 'they are narrowly tailored to serve a significant governmental interest;' " and
3. " 'they leave open ample alternative channels for communication of the information.' "

Ward, 491 U.S. at 791, 109 S.Ct. at 2753, 105 L.Ed.2d at 675 (quoting *Clark,* 468 U.S. at 293, 104 S.Ct. at 3069, 82 L.Ed.2d 221) (additional citations omitted); *see Heffron,* 452 U.S. at 647–49, 101 S.Ct. at 2564, 69 L.Ed.2d at 306–07 (citations omitted).

The "narrowly tailored" requirement, like the "narrowly drawn" requirement in intermediate scrutiny analysis, does not mean that the challenged ordinance must employ the "least restrictive" means possible to achieve its purpose. Indeed, both the Supreme Court and the First Circuit have expressly rejected a "least restrictive" means requirement. *See Ward,* 491 U.S. at 798–99, 109 S.Ct. at 2757–58, 105 L.Ed.2d at 680–81 (citations omitted); *see Nat'l Amusements, Inc. v. Town of Dedham,* 43 F.3d 731, 744 (1st Cir.1995) (quoting *Ward*); *see Knights of Columbus, Council # 94 v. Town of Lexington,* 272 F.3d 25, 33 (1st Cir.2001) (citations omitted). In *Ward,* the Court stated:

> [l]est any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

491 U.S. at 798–99, 109 S.Ct. at 2757–58, 105 L.Ed.2d at 680 (quoting *United States v. Albertini,* 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985)) (additional citation omitted); *see Nat'l Amusements,* 43 F.3d at 744 (quoting *Ward*).

The manifest purpose of the "ample alternative channels" requirement is to ensure that government does not disguise what, in effect, is a complete ban on speech as a mere time, place, and manner restriction that is subject to a more deferential standard of review. The mere fact that a regulation "diminishes the total quantity of ... speech" and "simultaneously curtails [a speaker's] opportunity to communicate ***408** with some [potential listeners]" does not establish the absence of alternative channels of communication. *Nat'l Amusements,* 43 F.3d at 745 (citing *Members of the City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 803, 104 S.Ct. 2118, 2127, 80 L.Ed.2d 772 (1984)). Rather, the critical inquiry is whether other modes of communication remain open through which the speaker can convey his message. *See Taxpayers for Vincent,* 466 U.S. at 812, 104 S.Ct. at 2132–33, 80 L.Ed.2d at 791–92 (citations omitted).

Because a municipality bears the burden of establishing that a challenged ordinance that burdens protected expression is constitutional, the municipality must identify alternative channels of communication that appear adequate to convey the speaker's message. However that does not mean that the municipality, as part of its initial showing, also, must negate every conceivable argument that might be made as to why those channels are inadequate. Such a requirement would impose an impossible burden on the municipality because the municipality, ordinarily, would have no way of knowing why a plaintiff might contend that particular channels of communication might not adequately serve the plaintiff's purposes. Since that information generally is exclusively, or at least more readily, available to the plaintiff, once the municipality has identified what appear to be adequate alternative channels, it is incumbent upon the plaintiff to explain why the proffered alternatives are inadequate. *See Ward,* 491 U.S. at 802, 109 S.Ct. at 2760, 105 L.Ed.2d at 683 (upholding limitations on the volume of music played during a presentation in a public park because "there has been no showing that the remaining avenues of communication are inadequate") (citations omitted); *see also Lawton v. Nyman,* 357 F.Supp.2d 428, 436 (**D.R.I**.2005) (the burden of presenting evidence to support a contention generally should fall upon the party to whom the evidence "is more readily available") (citing *Pidcock v. Sunnyland Am.,* 854 F.2d 443, 448 (11th Cir.1988)); *accord La Montagne v. Am. Convenience Prods., Inc.,* 750 F.2d 1405, 1409–10 (7th Cir.1984) (explaining that this principle animates the now-familiar burden-shifting analysis in employment discrimination cases) (citations omitted); *see* 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 301.06[1] (**2d** ed.**2006**) (acknowledging the "evidentiary consideration[ ]" of "allocating the burden of production to the party most likely to have access to the pertinent evidence") (citations omitted). Of course, once the plaintiff presents evidence that the proffered alternatives are inadequate, the burden shifts back to the municipality to rebut that showing.

B. *The East Greenwich Permit Requirement*

[9] ACORN claims that East Greenwich's permit requirement for door-to-door solicitation unconstitutionally burdens ACORN's freedom of expression, and that the burden is increased by allowing for a delay of up to five days before a permit is issued and by requiring an application fee in order to obtain a permit. The Town argues that the permit requirement passes constitutional muster because it serves the Town's interests in preventing fraud, preventing crime, and protecting the privacy of residents.

ACORN cannot and does not dispute the importance of the Town's proffered interests. Nor does ACORN dispute that the Ordinance is content-neutral. Rather, ACORN's challenge focuses on whether the permit requirement actually furthers the Town's proffered interests and whether it is "narrowly drawn" to further those interests "without unnecessarily interfering ***409** with First Amendment freedoms." *See Schaumburg,* 444 U.S. at 637, 100 S.Ct. at 836, 63 L.Ed.2d at 87–88 (citations omitted).

1. *Furtherance of the Town's Interests*

(a) *Fraud Prevention*

East Greenwich's permit requirement helps to serve the Town's interest in preventing fraud in several ways.

First, the permit requirement helps to prevent individuals from soliciting on behalf of non-existent charities and from

falsely posing as authorized representatives of legitimate charities. The information that must be provided on the application form enables police to confirm the existence of the entity on whose behalf the solicitation purportedly is being conducted as well as the authority of the solicitors to act on behalf of that entity.

The information on the application also helps police to determine whether individual solicitors have a history of involvement in fraudulent schemes and requiring solicitors to identify themselves is likely to deter solicitation by individuals who engage in fraudulent practices.

Furthermore, the permit requirement enables residents to identify solicitors who have not provided the required information and to obtain more information from the police about solicitors who have permits.

The utility of the permit process in helping to prevent fraud is best illustrated by contrasting it to the situation that would exist if any anonymous stranger to the community could go door-to-door soliciting funds. Incidents such as the one recounted by Chief Desjarlais, in which an individual falsely posing as a representative of a well-known charity went door-to-door soliciting contributions, would become more commonplace. That is precisely why the Supreme Court has said:

> [w]ithout doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.

Cantwell, 310 U.S. at 306, 60 S.Ct. at 904, 84 L.Ed. at 1219 (citations omitted).

(b) *Crime Prevention*

The Supreme Court has upheld permit requirements even for "those engaging in protected First Amendment activity because of a commonsense recognition that their existence both deters and helps detect wrongdoing." *See Watchtower,* 536 U.S. at 178–79, 122 S.Ct. at 2096, 153 L.Ed.2d at 228–29 (Rehnquist, C.J., dissenting) (citing *Thomas v. Chicago Park Dist.,* 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002)). More specifically, it has recognized that "burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later." *Martin,* 319 U.S. at 144, 63 S.Ct. at 864, 87 L.Ed. at 1317.

East Greenwich's permit requirement helps to prevent burglary because it is unlikely that a burglar would wish to identify himself by completing an application form or to call attention to himself by soliciting without a permit. Consequently, the permit requirement helps to deprive prospective burglars of at least one of the pretexts commonly used in facilitating their crimes.

Moreover, the background checks performed as part of the permit process enable police to identify solicitors with criminal records that may indicate a propensity to commit violent crimes as well as to ***410** monitor their activities and/or alert residents.

It is true that the Town did not make a very strong showing of a "special crime problem related specifically to door-to-door solicitation." *Cf. Watchtower,* 536 U.S. at 169, 122 S.Ct. at 2091, 153 L.Ed.2d at 221. The Town's evidence consisted primarily of Chief Desjarlais' testimony that his department receives between 25 and 35 complaints of breaking and entering each year, which he did not link specifically to house-to-house solicitation; an incident of fraud and a stolen car incident, both of which *did* involve door-to-door solicitors; and the fact that background checks often reveal that applicants have criminal records or outstanding warrants.

The absence of a demonstrable link between burglars and door-to-door solicitors is not surprising because, unless a burglar is apprehended and recognized by a resident, it would be virtually impossible to prove that he or she had been engaged in door-to-door solicitation. Indeed, arguing that the absence of any demonstrable link between burglaries and door-to-door solicitation somehow shows that the Ordinance does not serve the Town's interest in preventing crime misses the point because one of the justifications for the permit requirement as a means of combating crime is that it helps

a municipality to *prevent* burglaries by denying burglars the opportunity to pose as door-to-door solicitors.

In any event, given the fact that the Supreme Court has long recognized what common sense confirms is the increased risk of crime posed by unregulated door-to-door solicitation, *see, e.g., Hynes,* 425 U.S. at 618–19, 96 S.Ct. at 1759–60, 48 L.Ed.2d at 251–52 (citations omitted); *see, e.g., Martin,* 319 U.S. at 144, 63 S.Ct. at 864, 87 L.Ed. at 1317, it would make little sense to prohibit a municipality from regulating such activity until after it could conclusively prove that residents actually had been harmed.

It also may be true that the permit requirement does not guarantee the complete elimination of crime at residents' homes because burglars still may knock on residents' doors on pretenses other than solicitation of funds, *see Watchtower,* 536 U.S. at 169, 122 S.Ct. at 2091, 153 L.Ed.2d at 221, and violent crimes still may be committed by individuals not purporting to be solicitors. However, "[i]n order to survive intermediate scrutiny ... a law need not solve the crime problem, it need only further the interest in preventing crime." *Id.* at 179–80, 122 S.Ct. at 2096–97, 153 L.Ed.2d at 228 (Rehnquist, C.J., dissenting). Although the East Greenwich Ordinance will not eradicate *all* crime in the Town, the fact that it helps to prevent some crime is sufficient to establish that it serves an important municipal interest.

(c) *Protecting the Privacy of Residents*

It is difficult to see how the permit requirement serves the Town's interest in protecting the privacy of residents. Since the issuance of a permit is virtually automatic, the permit requirement seems unlikely to significantly reduce the number of unwanted knocks on residents' doors.

2. *The "Narrowly Drawn" Requirement*

As already noted, in deciding whether a permit requirement is "narrowly drawn," a court must determine whether it burdens substantially more speech than is necessary to further the government's important goals. *See Ward,* 491 U.S. at 798–800, 109 S.Ct. at 2757–58, 105 L.Ed.2d at 680–81 (citations omitted). This Court finds that the East Greenwich permit requirement is narrowly drawn because the burden of obtaining a permit is not an onerous one and the requirements are ***411** closely related to furthering the Town's interest in preventing fraud and other crimes.

A permit is required only when canvassing involves the solicitation of money, which is the type of canvassing that poses the greatest risk of fraud. Furthermore, while laws against fraud may enable a municipality to prosecute solicitors who engage in fraudulent practices *after* the fraud has been perpetrated, it is difficult to imagine how a municipality could effectively *prevent* its residents from being defrauded without requiring solicitors to obtain permits.

In addition, under the Ordinance, Town officials have no discretion to deny a permit. Obtaining a permit requires little more than completing an application form, which makes East Greenwich's Ordinance similar to the identification procedure recognized as constitutional in *Schneider, Cantwell*, and *Murdock v. Pennsylvania,* 319 U.S. 105, 113, 63 S.Ct. 870, 875, 87 L.Ed. 1292, 1299 (1943), and distinguishes it from the ordinance invalidated in *Schaumburg,* which completely banned solicitation by organizations that used more than a specified percentage of the funds raised to pay administrative expenses, *see* 444 U.S. at 624, 100 S.Ct. at 829, 63 L.Ed.2d at 79. In *Murdock,* the Court distinguished between "a registration system under which those going from house to house are required to give their names, addresses and other marks of identification to the authorities" and one that imposed unconstitutional requirements on the issuance of a license. *See* 319 U.S. at 113, 63 S.Ct. at 875, 87 L.Ed. at 1299.

Nor does completing the application or the fact that permits are not issued instantaneously impose any burden that is disproportionate to the Town's interest in preventing fraud and crime. The application calls for little more than the identities of the organization and individuals conducting the solicitation as well as where and how the solicitation is to be conducted. That information permits Town officials to verify the existence of the entity on whose behalf the solicitation purportedly is being conducted, to confirm the authority of the individual solicitors to act on behalf of that organization, and to determine whether the individual solicitors have criminal records or past involvement with fraudulent schemes. That information also enables police to monitor the solicitation activity and to respond more effectively to calls from residents who may wish to know something about the solicitors appearing at their doors.

The same may be said with respect to the delay between the time that an application is filed and the time that the

permit is issued. Some delay is inevitable in any permit process. Accordingly, courts have upheld the constitutionality of "waiting periods" if they are reasonably necessary to enable a governmental body to further its legitimate goals. *See, e.g.,* *A Quaker Action Group v. Morton,* 516 F.2d 717, 735 (D.C.Cir.1975) (approving two-day waiting period for permit to use national park lands within the District of Columbia because it "provide[d] the Park Service ample notice and time to process the application"); *see, e.g.,* *Powe v. Miles,* 407 F.2d 73, 84 (2d Cir.1968) (approving two-day advance notice requirement for demonstrations on state university campus because it "afford[ed] a desirable opportunity for the administration and the demonstrators to work out detailed methods for the conduct of the protest in a manner compatible with the legitimate interests of all") (citation omitted); *see, e.g.,* *Local 32B–32J, Serv. Employees Int'l Union, AFL–CIO v. Port Auth.,* 3 F.Supp.2d 413, 422 (S.D.N.Y.1998) (upholding one and one-half day waiting period on "expressive activity permits" for ***412** World Trade Center and Port Authority Bus Terminal property so that a sufficient police presence could be assembled to prevent disruptions during events).

Here, a delay is necessary in order to enable police to verify the information provided by the applicant and to perform background checks on the individual solicitors. While the Ordinance states that applications must be filed at least five days before the proposed solicitation, the evidence shows that, as a practical matter, permits, ordinarily, are issued within one or two days unless difficulties are encountered in verifying the information provided or in determining whether the individual solicitors have criminal records.

In addition, since the canvassing in this case involves solicitation of money, the delay appears to be far less burdensome than it might be in the case of canvassing that involves nothing more than the communication of ideas. Unlike purely communicative speech that sometimes may be spontaneous, fundraising presumably requires considerable advance planning and organization that takes place well before solicitation begins. Since that planning undoubtedly begins at least several days before the proposed solicitation, it appears that solicitors could minimize or completely eliminate any delay by filing an application when those plans are formulated rather than waiting until the day of the proposed solicitation.

With respect to the Town's application fee, it is true that an application fee requirement can impose an unconstitutional burden on protected expression when the fee is excessive or when it is unrelated to the advancement of the government's legitimate interest(s), but a fee that does satisfy those requirements is not unconstitutional. *See, e.g.,* *Forsyth County,* 505 U.S. at 136–37, 112 S.Ct. at 2404–05, 120 L.Ed.2d at 115 (citations omitted); *see, e.g.,* *Murdock,* 319 U.S. at 108–17, 63 S.Ct. at 872–77, 87 L.Ed. at 1295–1301 (citations omitted).

East Greenwich has not presented any evidence as to how it arrived at the application fee that it charges. In a trial on the merits, that omission would be fatal to the application fee provision in the Ordinance, but, at the preliminary injunction stage, the Court's task is to assess the likelihood that the Town, ultimately, will succeed in justifying the fee provision. Since it appears that, if anything, the nominal fee charged by the Town probably understates the expenses the Town incurs in processing permit applications and verfiying the information provided in them, it seems likely that the Town will be able to prove that the fee is narrowly drawn.

In short, because an application is a necessary part of any permit procedure, because some delay is necessary in processing the application, and because a municipality may charge a reasonable fee in order to defray the processing costs involved, these features do not render a permit requirement unconstitutional, *per se.* To hold otherwise would be tantamount to saying that permit requirements themselves are inherently unconstitutional, a proposition that flies in the face of well-established Supreme Court precedent recognizing the validity of permit requirements. *See, e.g.,* *Thomas,* 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (upholding permit requirement to regulate use of public park); *see, e.g.,* *Cox v. New Hampshire,* 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941) (upholding local parade permit requirement).

C. *The East Greenwich Curfew*

1. *Furtherance of the Town's Interests*

(a) *Protecting the Privacy of Residents*

It is well-established that every individual has a right to privacy, the essence of ***413** which is the right to be left alone. *See* *Katz v. United States,* 389 U.S. 347, 350,

88 S.Ct. 507, 510–11, 19 L.Ed.2d 576, 581 (1967) (citing Samuel Warren & Louis Brandeis, *The Right to Privacy,* 4 Harv. L.Rev. 193, 196 (1890)); *see, e.g., Galella v. Onassis,* 353 F.Supp. 196, 232 (S.D.N.Y.1972), *rev'd, in part, on other grounds,* 487 F.2d 986 (2d Cir.1973). That right is especially strong at an individual's home. *See Frisby v. Schultz,* 487 U.S. 474, 484, 108 S.Ct. 2495, 2502, 101 L.Ed.2d 420, 431 (1988) (" 'preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value' ") (quoting *Carey v. Brown,* 447 U.S. 455, 471, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980)).

[10] The right to privacy in one's home includes not only the right to be free from unreasonable searches and seizures but also the right to be free from unwanted and unwelcome intrusions. *See FCC v. Pacifica Found.,* 438 U.S. 726, 748, 98 S.Ct. 3026, 3040, 57 L.Ed.2d 1073, 1093 (1978) ("in the privacy of the home ... the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder") (citing *Rowan v. U.S. Post Office Dep't,* 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970)); *see Hynes,* 425 U.S. at 619, 96 S.Ct. at 1760, 48 L.Ed.2d at 252 ("[H]ome is one place where a man ought to be able to shut himself up in his own ideas if he desires. There he should be free not only from unreasonable searches and seizures but also from hearing uninvited strangers expound distasteful doctrines.") (quoting Zechariah Chafee, *Free Speech in the United States* 406 (1954)). Intrusions on an individual's right to privacy include uninvited knocks on the door and the need to confront and turn away unwelcome visitors. "A doorbell cannot be disregarded like a handbill. It takes several minutes to ascertain the purpose of a propagandist and at least several more to get rid of him." *Id.*

[11] Consequently, an individual's right to privacy in his or her home is an important factor in assessing the extent to which a municipality may regulate door-to-door solicitation. Indeed, there is no question that a municipality can enact ordinances that reasonably protect residents' privacy rights. *See Frisby,* 487 U.S. at 484–85, 108 S.Ct. at 2502, 101 L.Ed.2d at 432 ("a special benefit of the privacy all citizens enjoy within their own walls, *which the State may legislate to protect,* is an ability to avoid intrusions") (emphasis added); *see Munhall,* 743 F.2d at 186 ("The privacy of the home, and the obligation of government to protect that privacy, are entitled to particular solicitude from the courts.") (citations omitted).

East Greenwich's 7:00 p.m. curfew serves the Town's interest in protecting the privacy of its residents. The 7:00 p.m. curfew was adopted in response to complaints by residents regarding what, then, was a 9:00 p.m. curfew. Those complaints and the fact that the amendment was enacted by the Town's elected officials who, presumably, reflect the views of a majority of residents are powerful evidence that most residents consider solicitations between 7:00 p.m. and 9:00 p.m. to be unwelcome invasions of their privacy. There is nothing surprising about that because it doesn't require an elaborate survey or the testimony of thousands of residents to confirm that, between 7:00 p.m. and 9:00 p.m., many residents are either eating dinner, preparing for bed, or lounging in their pajamas and do not wish to be disturbed.

While the fact that a majority of residents may favor a 7:00 p.m. curfew cannot override any constitutional right that ACORN may have to solicit beyond that hour, it does indicate that solicitation after ***414** 7:00 p.m. infringes on the privacy rights of residents and that is a factor to be considered in determining whether the curfew is a reasonable means of protecting those rights. By the same token. while residents may be more likely to be at home between 4:00 p.m. and 9:00 p.m. than at other hours is a factor to be considered in determining the extent to which the curfew burdens ACORN's speech rights, it does not invalidate the 7:00 p.m. curfew any more than the fact that even more residents are likely to be at home at 1:00 a.m. would invalidate a midnight curfew.

(b) *Crime Prevention*

The Town's attempt to justify the 7:00 p.m. curfew as a means of preventing crime is somewhat undercut by its failure to present any evidence that the incidence of crime in East Greenwich is greater between the hours of 7:00 p.m. and 9:00 p.m. than it is before 7:00 p.m.

However, that failure is not fatal to the Town's contention because, as already noted, it is common knowledge that "burglars frequently pose as canvassers," *Martin,* 319 U.S. at 144, 63 S.Ct. at 864, 87 L.Ed. at 1317, and that crime rates increase during the nighttime hours, *see, e.g., Munhall,* 743 F.2d at 187 (upholding prohibitions against door-to-door canvassing in the evening despite lack of record evidence linking darkness to increased crime rates). The Town was

entitled to rely on what appears to be obvious and has been recognized by courts. *See* *Renton,* 475 U.S. at 51–52, 106 S.Ct. at 931, 89 L.Ed.2d at 40; *see* *Erie,* 529 U.S. at 296–98, 120 S.Ct. at 1395, 146 L.Ed.2d at 283 (O'Connor, J., for the plurality) (citations omitted).

(c) *Fraud Prevention*

The relationship between the 7:00 p.m. curfew and the Town's interest in preventing fraud is a different matter. Since fraud can be committed at any hour of the day or night, it is difficult to see how the curfew helps to prevent fraud.

2. *Narrow Tailoring*

Like the permit requirement, the curfew provision in the East Greenwich Ordinance does not burden ACORN's speech to any greater extent than is necessary to further the Town's interests in preventing crime and protecting residents' privacy. The 7:00 p.m. curfew does not ban door-to-door solicitation nor restrict, in any way, the message that may be conveyed. The curfew merely limits the times during which such solicitations may be made. It leaves ACORN free to conduct door-to-door solicitations between the hours of 9:00 a.m. and 7:00 p.m., seven days a week, as well as to solicit by other means. Furthermore, the curfew's prohibition applies only to those hours during which solicitation is most intrusive on residents' privacy and during which there is an increased risk of crime.

It is true that the Town did not present evidence of crime rates specifically between 7:00 p.m. and 9:00 p.m. However, saying that a municipality cannot establish a curfew for door-to-door solicitation unless it can identify a magic moment at which the crime rate suddenly spikes upward would impose an impossible burden that the Constitution does not require and it would place courts in the untenable position of being called upon to make metaphysical and increasingly finite distinctions as to the hour, minute, or second that separates a permissible curfew from one that is deemed unconstitutional. A court deciding that a 9:00 p.m. curfew is constitutional but that a 7:00 p.m. curfew is not, inevitably would be called upon to decide whether an 8:00 p.m. curfew passes muster and, if not, whether an 8:01 p.m. curfew does. Courts that paint with a broad constitutional brush are ill-equipped to draw such fine ***415** lines especially where the lines depend on factors that cannot be precisely measured. In the words of Judge Coffey:

> [m]unicipal governments, rather than courts, are knowledgeable of their community's [sic] crime problems and their citizens' desire for privacy; the decision as to where to draw the line to protect homeowners' privacy and to prevent crime should be left with the municipality, so long as the accommodation of the First Amendment rights of these three groups (speakers, willing, and unwilling audience members) are reasonably accommodated.

Watseka, 796 F.2d at 1582 (Coffey, J., dissenting).

ACORN argues that the curfew provision is not narrowly tailored to protect residents' privacy because the Ordinance permits residents who do not wish to be disturbed to post "No Solicitation" signs. That argument is based on the holding in *Watchtower, see* 536 U.S. at 168, 122 S.Ct. at 2091, 153 L.Ed.2d at 221 (citation omitted), but it is not convincing because *Watchtower* is readily distinguishable from this case.

Watchtower did not deal with a curfew provision; rather, the ordinance challenged in *Watchtower* prohibited canvassing without a permit and the municipality applied that prohibition not only to the solicitation of money but also to religious proselytizing. *See* 536 U.S. at 153–58, 122 S.Ct. at 2083–85, 153 L.Ed.2d at 211–14. Also, in finding that the ordinance was not narrowly tailored because residents' privacy could be adequately protected by posting "No Solicitation" signs, the *Watchtower* Court noted that, "[h]ad [the permit] provision been construed to apply only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the Village's interest in protecting the privacy of its residents and preventing fraud." 536 U.S. at 165, 168, 122 S.Ct. at 2089, 2091, 153 L.Ed.2d at 219, 221 (citation omitted).

Unlike the permit provision in *Watchtower,* the East Greenwich curfew does not entirely ban door-to-door solicitation; it merely limits the hours during which solicitation may be conducted. Moreover, the curfew applies

only to canvassing that involves the solicitation of money; it does not limit, in any way, what the *Watchtower* Court referred to as "door-to-door advocacy." *See* 536 U.S. at 153, 122 S.Ct. at 2083, 153 L.Ed.2d at 211.

Requiring residents to post "No Solicitation" signs in order to prevent uninvited solicitations after 7:00 p.m. would force them to ban even those solicitors that they might welcome before 7:00 p.m. or, alternatively, to create billboard-like signs that vary from house to house specifying the circumstances under which solicitors are or are not welcome. As the Supreme Court observed in *Breard:*

> [t]o the city council falls the duty of protecting its citizens against the practices deemed subversive of privacy and of quiet. A householder depends for protection on his city board rather than churlishly guarding his entrances with orders forbidding the entrance of solicitors. A sign would have to be a small billboard to make the differentiations between the welcome and unwelcome that can be written in an ordinance once cheaply for all homes.

341 U.S. at 640, 71 S.Ct. at 931, 95 L.Ed. at 1247.

3. *Ample Alternative Channels of Communication*

It seems clear that the East Greenwich ordinance leaves open alternative channels of communication through which ACORN can effectively communicate its message and/or solicit funds.

***416** As already noted, the curfew applies only to canvassing that involves the solicitation of money. It does not limit the hours during which ACORN may go door-to-door for the purpose of merely advocating the causes it supports.

Moreover, the curfew leaves ACORN free to solicit money between 9:00 a.m. and 7:00 p.m., seven days per week. Except for the testimony of ACORN's two solicitors that, based on their very limited experience soliciting door-to-door, "more" people are likely to be at home between 7:00 p.m. and 9:00 p.m. than at other hours, there is no evidence indicating that a 7:00 p.m. curfew appreciably diminishes the effectiveness of ACORN's door-to-door canvassing efforts.

Furthermore, the evidence shows that ACORN also solicits by telephone, through the mail, and at fundraising events. All of these methods remain open to it and there is nothing to prevent ACORN from soliciting in public places as well.

In short, the 7:00 p.m. curfew does not, in any way, limit the channels through which ACORN may communicate its message and the rather modest restriction that it places on the hours during which ACORN may solicit funds leaves ample alternative channels available for ACORN to continue doing so.

Conclusion

For all of the foregoing reasons, ACORN's motion for a preliminary injunction is hereby DENIED.

IT IS SO ORDERED.

All Citations

453 F.Supp.2d 394

Footnotes

1 Section 174–12 provides that: "[n]o person shall engage in door-to-door solicitations before the hour of 9:00 a.m. nor after the hour of 7:00 p.m."

2 Section 174–11, entitled "Soliciting at residences where sign displayed prohibited," provides that:
> [a]ny person residing in the Town may affix to the entrance of his residence a sign containing the legend "No Solicitation." Any person required to be licensed under the provisions of this chapter who shall make or attempt to make any solicitation or sale at a residence so marked shall be deemed to have violated the provisions hereof.

3 Subsection 174–4(D) provides that "[a]ll such applications shall be accompanied by the fee established by the Town Council. However, no fee shall be charged [sic] any hawker and peddler who is exempt from payment by state law."

4 This appears to be a typographical error. The application requirements applicable to charitable solicitation permits are contained in section 174–4(B).

89 S.Ct. 935
Supreme Court of the United States

Fred L. SHUTTLESWORTH, Petitioner,
v.
CITY OF BIRMINGHAM, ALA.

No. 42.
|
Argued Nov. 18, 1968.
|
Decided March 10, 1969.

Synopsis

Defendant was convicted of violating city ordinance making it an offense to participate in any parade, procession, or other public demonstration without first obtaining a permit from the city commission. The Recorder's Court of the City of Birmingham entered judgment of conviction, and the defendant appealed. The Circuit Court, on trial de novo, entered judgment of conviction, and the defendant appealed. The Court of Appeals, 43 Ala.App. 68, 180 So.2d 114, reversed the judgment, and the city brought certiorari. The Supreme Court, 281 Ala. 542, 206 So.2d 348, reversed the judgment of the Court of Appeals, and the defendant brought certiorari. The United States Supreme Court, Mr. Justice Stewart, held that fact, if true, that state Supreme Court's extraordinarily narrow construction of ordinance enabled the ordinance, otherwise invalid, to pass constitutional muster would not restore validity to conviction where administration of ordinance had led to denial or unwarranted abridgment of defendant's right of assembly and opportunities for communication of thought and discussion of public questions in public places.

Judgment reversed.

West Headnotes (17)

[1] Constitutional Law
Particular Issues and Applications

Law subjecting exercise of First Amendment freedoms to prior restraint of a license, without narrow, objective, and definite standards to guide licensing authority is unconstitutional. U.S.C.A.Const. Amend. 1.

344 Cases that cite this headnote

[2] Constitutional Law
Discretion in general

Ordinance which makes peaceful enjoyment of freedoms guaranteed by Constitution contingent upon uncontrolled will of an official, as by requiring a permit or license which may be granted or withheld in official's discretion, is an unconstitutional censorship or private restraint upon enjoyment of such freedoms. U.S.C.A.Const. Amend. 1.

182 Cases that cite this headnote

[3] Constitutional Law
Licenses and Permits in General

Person faced with an unconstitutional licensing law which purports to require a license as a prerequisite to exercise of right of free expression may ignore the law and engage with impunity in exercise of such right. U.S.C.A.Const. Amend. 1.

34 Cases that cite this headnote

[4] Municipal Corporations
Proceedings concerning construction and validity of ordinances

Fact that one subject to restraints of unconstitutional licensing ordinance has not yielded to its demands will not preclude him from having right to attack constitutionality of ordinance.

17 Cases that cite this headnote

[5] Municipal Corporations
Power to Control and Regulate

Municipality must, in interest of traffic regulation and public safety, exercise a great deal of control over use of public streets and sidewalks.

7 Cases that cite this headnote

[6] **Constitutional Law**
Parades
Constitutional Law
Protests and Demonstrations in General
Constitutional Law
Picketing

First and Fourteenth Amendments to Federal Constitution do not afford same kind of freedom to those who would communicate ideas by conduct, such as patrolling, marching, and picketing on streets and highways, as they do to those who communicate ideas by pure speech, but picketing and parading may constitute methods of expression entitled to First Amendment protection. U.S.C.A.Const. Amends. 1, 14.

63 Cases that cite this headnote

[7] **Municipal Corporations**
Power to Control and Regulate

Governmental authorities have duty and responsibility to keep streets open and available for movement.

6 Cases that cite this headnote

[8] **Municipal Corporations**
Title and rights of municipality in general
Municipal Corporations
Parks and Public Squares and Places

Streets and parks are held in trust for use of public.

2 Cases that cite this headnote

[9] **Constitutional Law**
Government property or facilities, use of
Constitutional Law
Source or nature of protected rights

Use of streets and public places is part of privileges, immunities, rights, and liberties of citizens. U.S.C.A.Const. Amends. 1, 14.

1 Cases that cite this headnote

[10] **Constitutional Law**
Source or nature of protected rights

United States citizen's privilege to use streets and parks for communication of views on national questions may be regulated in interest of all. U.S.C.A.Const. Amends. 1, 14.

3 Cases that cite this headnote

[11] **Constitutional Law**
Police powers; public purpose or welfare

United States citizen's privilege to use streets and parks for communication of views and national questions is relative, not absolute, and must be exercised in subordination to the general comfort and convenience and in countenance with peace and good order but must not, in guise of regulation, be abridged or denied. U.S.C.A.Const. Amends. 1, 14.

17 Cases that cite this headnote

[12] **Municipal Corporations**
Power to Control and Regulate
Municipal Corporations
Prevention of improper use or obstruction
Municipal Corporations
Grants of rights to use public property

Statute preventing serious interference with normal usage of streets and parks is valid, but licensing system which vests in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places is invalid. U.S.C.A.Const. Amends. 1, 14.

37 Cases that cite this headnote

[13] **Municipal Corporations**
Mode of Use and Regulation Thereof in General
Municipal Corporations
Processions and unusual noises and performances in streets

Municipal Corporations
Use of sidewalk

In regard to use of public streets and sidewalks, municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding potential effect of the activity on welfare, decency, or morals of community. U.S.C.A.Const. Amends. 1, 14.

4 Cases that cite this headnote

[14] Municipal Corporations
Offenses incident to travel

In determining validity of conviction under municipal licensing ordinance regulating parades, processions, and other public demonstrations and capable of being construed so that it would be constitutional, inquiry would be whether control of use of streets for a parade or procession was, in fact, exerted so that it did not deny or unwarrantedly abridge right of assembly and opportunities for communication of thought and discussion of public questions in public places. U.S.C.A.Const. Amend. 1.

17 Cases that cite this headnote

[15] Evidence
Records and decisions in other actions or proceedings

United States Supreme Court could properly, in subsequent litigation before the Supreme Court and between the same parties, take judicial notice of record in prior litigation formerly before the Supreme Court.

112 Cases that cite this headnote

[16] Municipal Corporations
Offenses incident to travel

Conviction for violating city ordinance making it an offense to participate in any parade, procession, or other public demonstration without a permit was invalid, where city authorities acting under ordinance had refused to permit a demonstration by defendant and others under any circumstances, even though state Supreme Court subsequently upheld ordinance by construing it to require issuance of permit if convenience of public use of streets or sidewalks was not unduly disturbed. U.S.C.A.Const. Amends. 1, 14.

101 Cases that cite this headnote

[17] Municipal Corporations
Offenses incident to travel

Fact, if true, that state Supreme Court's extraordinarily narrow construction of municipal licensing ordinance regulating parades, processions, or other public demonstrations enabled the ordinance, otherwise invalid, to pass constitutional muster would not restore validity to conviction for violation of ordinance, where, in regard to events leading up to conviction, administration of ordinance led to denial or unwarranted abridgment of defendant's right of assembly and opportunities for communication of thought and discussion of public questions in public places. U.S.C.A.Const. Amends. 1, 14.

26 Cases that cite this headnote

Attorneys and Law Firms

****937** ***148** Jack Greenberg, New York City, for petitioner.

Earl McBee, Birmingham, Ala., for respondent.

Opinion

Mr. Justice STEWART delivered the opinion of the Court.

The petitioner stands convicted for violating an ordinance of Birmingham, Alabama, making it an offense to participate in any 'parade or procession or other public demonstration' without first obtaining a permit from the City Commission. The question before us is whether that conviction can be squared with the Constitution of the United States.

On the afternoon of April 12, Good Friday, 1963, 52 people, all Negroes, were led out of a Birmingham church by three Negro ministers, one of whom was the petitioner, Fred L. Shuttlesworth. They walked in orderly fashion, two abreast for the most part, for four ***149** blocks. The purpose of

their march was to protest the alleged denial of civil rights to Negroes in the city of Birmingham. The marchers stayed on the sidewalks except at street intersections, and they did not interfere with other pedestrians. No automobiles were obstructed, nor were traffic signals disobeyed. The petitioner was with the group for at least part of this time, walking alongside the others, and once moving from the front to the rear. As the marchers moved along, a crowd of spectators fell in behind them at a distance. The spectators at some points spilled out into the street, but the street was not blocked and vehicles were not obstructed.

At the end of four blocks the marchers were stopped by the Birmingham police, and were arrested for violating s 1159 of the General Code of Birmingham. That ordinance reads as follows:

'It shall be unlawful to organize or hold, or to assist in organizing or holding, or to take part or participate in, any parade or procession or other public ****938** demonstration on the streets or other public ways of the city, unless a permit therefore has been secured from the commission.

'To secure such permit, written application shall be made to the commission, setting forth the probable number of persons, vehicles and animals which will be engaged in such parade, procession or other public demonstration, the purpose of which it is to be held or had, and the streets or other public ways over, along or in which it is desired to have or hold such parade, procession or other public demonstration. The commission shall grant a written permit for such parade, procession or other public demonstration, prescribing the streets or other public ways which may be used therefor, unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be ***150** refused. It shall be unlawful to use for such purposes any other streets or public ways than those set out in said permit.

'The two preceding paragraphs, however, shall not apply to funeral processions.'

The petitioner was convicted for violation of s 1159 and was sentenced to 90 days' imprisonment at hard labor and an additional 48 days at hard labor in default of payment of a $75 fine and $24 costs. The Alabama Court of Appeals reversed the judgment of conviction, holding the evidence was insufficient 'to show a procession which would require, under the terms of s 1159, the getting of a permit,' that the ordinance had been applied in a discriminatory fashion, and that it was unconstitutional in imposing an 'invidious prior restraint' without ascertainable standards for the granting of permits. 43 Ala.App. 68, 95, 83, 180 So.2d 114, 139, 127. The Supreme Court of Alabama, however, giving the language of s 1159 an extraordinarily narrow construction, reversed the judgment of the Court of Appeals and reinstated the conviction. 281 Ala. 542, 206 So.2d 348. We granted certiorari to consider the petitioner's constitutional claims, 390 U.S. 1023, 88 S.Ct. 1417, 20 L.Ed.2d 280.

[1] [2] [3] [4] There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade,' 'procession,'[1] or 'demonstration' on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience.' This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to ***151** the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.[2] 'It is settled by a long line of recent ****939** decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.' Staub v. City of Baxley, 355 U.S. 313, 322, 78 S.Ct. 277, 282, 2 L.Ed.2d 302. And our decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license.[3] 'The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands.' Jones v. City of Opelika, 316 U.S. 584, 602, 62 S.Ct. 1231, 1242, 86 L.Ed. 1691 (Stone, C.J., dissenting), adopted per curiam on rehearing, 319 U.S. 103, 104, 63 S.Ct. 890, 87 L.Ed. 1290.

***152 [5] [6] [7] [8] [9] [10] [11]** It is argued, however, that what was involved here was not 'pure speech,' but the use of public streets and sidewalks, over which a

municipality must rightfully exercise a great deal of control in the interest of traffic regulation and public safety. That, of course, is true. We have emphasized before this that 'the First and Fourteenth Amendments (do not) afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.' Cox v. Louisiana, 379 U.S. 536, 555, 85 S.Ct. 453, 464, 13 L.Ed.2d 471. 'Governmental authorities have the duty and responsibility to keep their streets open and available for movement.' Id., at 554—555, 85 S.Ct., at 464.

But our decisions have also made clear that picketing and parading may nonetheless constitute methods of expression, entitled to First Amendment protection. Cox v. Louisiana, supra; Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697; Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093. 'Whenever the title of streets and parks may rest, they 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. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.' Hague v. C.I.O., 307 U.S. 496, 515—516, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (opinion of Mr. Justice Roberts, joined by Mr. Justice Black).

****940 *153 [12] [13]** Accordingly, 'although (a) this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks, * * * we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places.' Kunz v. New York, 340 U.S. 290, 293—294, 71 S.Ct. 312, 315, 95 L.Ed. 280. See also Saia v. New York, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574; Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325, 328, 95 L.Ed. 267, 280. Even when the use of its public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community.

Understandably, under these settled principles, the Alabama Court of Appeals was unable to reach any conclusion other than that s 1159 was unconstitutional. The terms of the Birmingham ordinance clearly gave the City Commission extensive authority to issue or refuse to issue parade permits on the basis of broad criteria entirely unrelated to legitimate municipal regulation of the public streets and sidewalks.

It is said, however, that no matter how constitutionally invalid the Birmingham ordinance may have been as it was written, nonetheless the authoritative construction that has now been given it by the Supreme Court of Alabama has so modified and narrowed its terms as to render it constitutionally acceptable. It is true that in affirming the petitioner's conviction in the present case, the Supreme Court of Alabama performed a remarkable job of plastic surgery upon the face of the ordinance. The court stated that when s 1159 provided that the City Commission could withhold a permit whenever 'in its ***154** judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require,' the ordinance really meant something quite different:

'(We) do not construe this (language) as vesting in the Commission an unfettered discretion in granting or denying permits, but, in view of the purpose of the ordinance, one to be exercised in connection with the safety, comfort and convenience in the use of the streets by the general public. * * * The members of the Commission may not act as censors of what is to be said or displayed in any parade. * *

'* * * (We) do not construe s 1159 as conferring upon the 'commission' of the City of Birmingham the right to refuse an application for a permit to carry on a parade, procession or other public demonstration solely on the ground that such activities might tend to provoke disorderly conduct. * * *

'We also hold that under s 1159 the Commission is without authority to act in an arbitrary manner or with unfettered discretion in regard to the issuance of permits. Its discretion must be exercised with uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination.

A systematic, consistent and just order of treatment with reference to the convenience of public use of the streets and sidewalks must be followed. Applications for permits to parade must be granted if, after an investigation it is found that the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed.' 281 Ala., at 545—546, 206 So.2d, at 350—352.

[14] In transforming s 1159 into an ordinance authorizing no more than the ****941** objective and even-handed regulation ***155** of traffic on Birmingham's streets and public ways, the Supreme Court of Alabama made a commendable effort to give the legislation 'a field of operation within constitutional limits.' 281 Ala., at 544, 206 So.2d, at 350. We may assume that this exercise was successful, and that the ordinance as now authoritatively construed would pass constitutional muster.[4] It does not follow, however, that the severely narrowing construction put upon the ordinance by the Alabama Supreme Court in November of 1967 necessarily serves to restore constitutional validity to a conviction that occurred in 1963 under the ordinance as it was written. The inquiry in every case must be that stated by Chief Justice Hughes in Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049—whether control of the use of the streets for a parade or procession was, in fact, 'exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.' Id., at 574, 61 S.Ct., at 765.

In Cox the Court found that control of the streets had not been exerted unconstitutionally. There the Court was dealing with a parade-permit statute that was silent as to the criteria governing the granting of permits. In affirming the appellants' convictions for parading without a permit, the New Hampshire Supreme Court had construed the statute to require the issuance of a permit to anybody who applied, subject only to the power of the licensing authority to specify the 'time, place and manner' of the parade in order to accommodate competing ***156** demands for public use of the streets. This Court accepted the state court's characterization of the statute, and its assurance that the appellants "had a right, under the act, to a license to march when, where and as they did, if after a required investigation it was found that the convenience of the public in the use of the streets would not thereby be unduly disturbed, upon such conditions or charges in time, place and manner as would avoid disturbance." 312 U.S., at 576, 61 S.Ct., at 766. In affirming the New Hampshire judgment, however, this Court was careful to emphasize:

'There is no evidence that the statute has been administered otherwise than in the fair and nondiscriminatory manner which the state court has construed it to require.' Id., at 577, 61 S.Ct., at 766.

In the present case we are confronted with quite a different situation. In April of 1963 the ordinance that was on the book in Birmingham contained language that affirmatively conferred upon the members of the Commission absolute power to refuse a parade permit whenever they thought 'the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused.' It would have taken extraordinary clairvoyance for anyone to perceive that this language meant what the Supreme Court of Alabama was destined to find that it meant more than four years later; and, with First Amendment rights hanging in the balance, we would hesitate long before assuming that either the members of the Commission or the petitioner possessed any such clairvoyance at the time of the Good Friday march.

****942** **[15]** But we need not deal in assumptions. For, as the respondent in this case has reminded us, in assessing the constitutional claims of the petitioner, '(i)t is less than realistic to ignore the surrounding relevant circumstances. ***157** These include not only facts developed in the Record in this case, but also those shown in the opinions in the related case of Walker v. City of Birmingham (1946), 388 U.S. 307 (87 S.Ct. 1824, 18 L.Ed.2d 1210) * * *.'[5] The petitioner here was one of the petitioners in the Walker case, in which, just two Terms ago, we had before us a record showing many of the 'surrounding relevant circumstances' of the Good Friday march. As the respondent suggests, we may properly take judicial notice of the record in that litigation between the same parties who are now before us.[6]

[16] **[17]** Uncontradicted testimony was offered in Walker to show that over a week before the Good Friday march petitioner Shuttlesworth sent a representative to apply for a parade permit. She went to the City Hall and asked 'to see the person or persons in charge to issue permits, permits for parading, picketing, and demonstrating.' She was directed to Commissioner Connor, who denied her request in no uncertain terms. 'He said, 'No, you will not get a permit in Birmingham, Alabama to picket. I will picket you over to the

City Jail,' and he repeated that twice.' 388 U.S., at 317, n. 9, 325, 335, 339, 87 S.Ct., at 1830, 1834, 1839, 1841.

Two days later petitioner Shuttlesworth himself sent a telegram to Commissioner Connor requesting, on behalf of his organization, a permit to picket 'against the injustices of segregation and discrimination.' His request specified the sidewalks where the picketing would take place, and stated that 'the normal rules of picketing' would be obeyed. In reply, the Commissioner sent a wire stating that permits were the responsibility of the entire Commission rather than of a single Commissioner, and closing with the blunt admonition: 'I insist that you ***158** and your people do not start any picketing on the streets in Birmingham, Alabama.' Id., at 318, n. 10, 325, 335—336, 339—340, 87 S.Ct. at 1830, 1834, 1839—1840, 1841—1842. [7]

These 'surrounding relevant circumstances' make it indisputably clear, we think, that in April of 1963—at least with respect to this petitioner and his organization [8] —the city authorities thought the ordinance meant exactly what it said. The petitioner was clearly given to understand that under no circumstances would he and his group be permitted to demonstrate in Birmingham, not that a demonstration would be approved if a time and place were selected that would minimize traffic problems. There is no indication whatever that the authorities considered themselves obligated—as the Alabama Supreme Court more than four years later said that they were—to issue a permit 'if, after an investigation ****943** (they) found that the convenience of the public in the use of the streets or sidewalks would not thereby be unduly disturbed.'

This case, therefore, is a far cry from Cox v. New Hampshire, supra, where it could be said that there was ***159** nothing to show 'that the statute has been administered otherwise than in the * * * manner which the state court has construed it to require.' Here, by contrast, it is evident that the ordinance was administered so as, in the words of Chief Justice Hughes, 'to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought * * * immemorially associated with resort to public places.' The judgment is reversed.

Reversed.

Mr. Justice BLACK concurs in the result.

Mr. Justice MARSHALL took no part in the consideration or decision of this case.

Mr. Justice HARLAN, concurring.

The Alabama Supreme Court's opinion makes it clear that if petitioner Shuttlesworth had carried his efforts to obtain a parade permit to the highest state court, he could have required the city authorities to grant permission for his march, so long as his proposals were consistent with Birmingham's interest in traffic control. Thus, the difficult question this case presents is whether the Fourteenth Amendment ever bars a State from punishing a citizen for marching without a permit which could have been procured if all available remedies had been pursued.

The Court answers that a citizen is entitled to rely on the statutory construction adopted by the state officials who are on the front line, administering the permit scheme. If these officials construe a vague statute unconstitutionally, the citizen may take them at their word, and act on the assumption that the statute is void. The Court's holding seems to me to carry seeds of mischief that may impair the conceded ability of the authorities to regulate the use of public thoroughfares in the interests of ***160** all. The right to ignore a permit requirement should, in my view, be made to turn on something more substantial than a minor official's view of his authority under the governing statute.

Simply because an inferior state official indicates his view as to a statute's scope, it does not follow that the State's judiciary will come to the same conclusion. Situations do exist, however, in which there can be no effective review of the decision of an inferior state official. In the present case, for example, the decision of Commissioner Connor had the practical effect of the decision of a court of last resort. One week before the Good Friday march, Shuttlesworth learned from Connor that he, as Commissioner of Public Safety, would not issue parade permits, and that the marchers would have to apply to the entire City Commission. [1] But Birmingham's ordinances ****944** did not require a prompt decision by ***161** the City Commission. [2] Nor did the State of Alabama provide for a speedy court review of the denial of a parade permit. [3]

Given the absence of speedy procedures, the Reverend Shuttlesworth and his associates were faced with a serious dilemma when they received their notice from Mr. Connor. If they attempted to exhaust the administrative and judicial

remedies provided by Alabama law, it was almost certain that no effective relief could be obtained by Good Friday. Since the right to engage in peaceful and orderly political demonstrations is, under appropriate conditions, a fundamental aspect of the 'liberty' protected by the Fourteenth Amendment, see Stromberg v. California, 283 U.S. 359, 368—370, 51 S.Ct. 532, 535—536, 75 L.Ed. 1117 (1931); Hague v. C.I.O., 307 U.S. 496, 515—516, 59 S.Ct. 954, 963—964, 83 L.Ed. 1423 (1939) (opinion of Roberts, J.); Garner v. Louisiana, 368 U.S. 157, 201—203, 82 S.Ct. 248, 271—272, 7 L.Ed.2d 207 (1961) (opinion of Harlan, J.), the petitioner was not obliged to invoke procedures which could not give him effective relief. With fundamental rights at stake, he was entitled to adopt the more probable meaning of the ordinance and act on his belief that the city's permit regulations were unconstitutional.

***162** It may be suggested, however, that Shuttlesworth's dilemma was of his own making. He could have requested a permit months in advance of Good Friday, thereby allowing Alabama's administrative and judicial machinery the necessary time to operate fully before the date set for the march. But such a suggestion ignores the principle established. in Freedman v. Maryland, 380 U.S. 51, 58—61, 85 S.Ct. 734, 738—741, 13 L.Ed.2d 649 (1965), which prohibits the States from requiring persons to invoke unduly cumbersome and time-consuming procedures before they may exercise their constitutional right of expression. Freedman holds that if the State is to protect the public from obscene movies, it must afford exhibitors a speedy administrative or judicial right of review, lest 'the victorious exhibitor might find the most propitious opportunity for exhibition (passed).' Id., at 61, 85 S.Ct., at 740. The Freedman principle is applicable here. [4] The right to assemble peaceably ****945** to voice political protest is at least as basic as the right to exhibit a motion picture which may have some aesthetic value. Moreover, slow-moving procedures have a much more severe impact in the instant case ***163** than they had in Freedman. Though a movie exhibitor might suffer some financial loss if he were obliged to wait for a year or two while the administrative and judicial mills ground out a result, it is nevertheless quite likely that the public would ultimately see the film. In contrast, timing is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all. To require Shuttlesworth to submit his parade permit application months in advance would place a severe burden upon the exercise of his constitutionally protected rights. Cf. William v. Rhodes, 393 U.S. 23, 33, 89 S.Ct. 5, 11, 21 L.Ed.2d 24 (1968).

I do not mean to suggest that a State or city may not reasonably require that parade permit applications be submitted early enough to allow the authorities and the judiciary to determine whether the parade proposal is consistent with the important interests respecting the use of the streets which local authority may legitimately protect. But such applications must be handled on an expedited basis so that rights of political expression will not be lost in a maze of cumbersome and slow-moving procedures.

Neither the city of Birmingham nor the State of Alabama has established such expedited procedures. See nn. 2 and 3, supra. Indeed, the city's parade ordinance does not establish any procedure at all to govern the consideration of applications. Section 1159 of the City Code does not state when an application must be submitted if it is to be considered timely. The ordinance does not state how an application is to be submitted to the 'City Commission.' [5] Nor have ***164** regulations been published which would answer these questions. [6]

In the absence of any guidelines, the most that can fairly be asked of petitioner is that he make a good-faith effort to obtain a permit from the city authorities. Shuttlesworth so acted when he approached the city official most likely to have the authority to deal with permit applications in an expedited manner—Commissioner Connor was the member of the City Commission in charge of public safety. It was Connor, not Shuttlesworth, who broke off all discussions ****946** relating to the issuance of permits. After the Commissioner declared that he lacked the power to act, it was reasonable to believe that no public authority would act in time. Since neither the city nor the State provided sufficiently expedited procedures for the consideration of parade permits, petitioner Shuttlesworth cannot be punished for the exercise of his constitutionally protected right of political expression. [7]

On this basis I concur in the reversal of the judgment of the Alabama Supreme Court.

All Citations

394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162

Footnotes

1 Except funeral processions.

2 See Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; Schneider v. State, 308 U.S. 147, 163—165, 60 S.Ct. 146, 151—152, 84 L.Ed. 155; Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213; Largent v. Texas, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873; Jones v. City of Opelika, 316 U.S. 584, 600, 611, 62 S.Ct. 1231, 1240, 1245, 86 L.Ed. 1691 (Stone, C.J., dissenting) (Murphy, J., dissenting), vacated and previous dissenting opinions adopted per curiam, 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290; Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265; Tucker v. Texas, 326 U.S. 517, 66 S.Ct. 274, 90 L.Ed. 274; Saia v. New York, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574; Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280; Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325, 328, 95 L.Ed. 267, 280; Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098; Gelling v. Texas, 343 U.S. 960, 72 S.Ct. 1002, 96 L.Ed. 1359; Superior Films, Inc. v. Department of Education, etc., 346 U.S. 587, 74 S.Ct. 286, 98 L.Ed. 329; Staub v. City of Baxley, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302; Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471; Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225.

3 Lovell v. City of Griffin, 303 U.S., at 452—453, 58 S.Ct., at 669; Schneider v. State, 308 U.S., at 159, 165, 60 S.Ct., at 152; Largent v. Texas, 318 U.S., at 419, 422, 63 S.Ct., at 668, 669; Jones v. City of Opelika, 316 U.S., at 602, 62 S.Ct., at 1241, adopted per curiam on rehearing, 319 U.S., at 104, 63 S.Ct. 890; Staub v. City of Baxley, 355 U.S., at 319, 78 S.Ct., at 280; Freedman v. Maryland, 380 U.S. 51, 56—57, 85 S.Ct. 734, 737—738, 13 L.Ed.2d 649.

4 The validity of this assumption would depend upon, among other things, the availability of expeditious judicial review of the Commission's refusal of a permit. Cf. Poulos v. New Hampshire, 345 U.S. 395, 420, 73 S.Ct. 760, 773, 97 L.Ed. 1105 (Frankfurter, J., concurring in result); Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649. See also the concurring opinion of Mr. Justice HARLAN, post, p. 943.

5 Brief for Respondent 1—2.

6 National Fire Ins. Co. v. Thompson, 281 U.S. 331, 336, 50 S.Ct. 288, 290, 74 L.Ed. 881, and cases cited therein.

7 The legal and constitutional issues involved in the Walker case were quite different from those involved here. The Court recently summarized the Walker decision as follows:
'In that case, the Court held that demonstrators who had proceeded with their protest march in face of the prohibition of an injunctive order against such a march, could not defend contempt charges by asserting the unconstitutionality of the injunction. The proper procedure, it was held, was to seek judicial review of the injunction and not to disobey it, no matter how well-founded their doubts might be as to its validity.' Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 179, 89 S.Ct. 347, 350, 21 L.Ed.2d 325.

8 In Walker the petitioner made an offer of proof that parade permits had been issued to other groups by the city clerk at the request of the traffic bureau of the police department. 388 U.s,., at 325—326, 336, 340, 87 S.Ct., 1834—1835, 1840, 1842.

1 I agree with any Brother STEWART that we may properly take judicial notice of the evidence of record in Walker v. City of Birmingham, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967). See 9 J. Wigmore, Evidence s 2579, at 570 (3d ed. 1940); Butler v. Eaton, 141 U.S. 240, 11 S.Ct. 985, 35 L.Ed. 713 (1891); Craemer v. Washington, 168 U.S. 124, 18 S.Ct. 1, 42 L.Ed. 407 (1897). That record shows that in response to a request for permission to march on April 5 and 6, Mr. Connor replied by telegram on April 5:

'Under the provisions of the city code of the City of Birmingham, a permit to picket as requested by you cannot be granted by me individually but is the responsiboity (sic) of the entire commission. I insist that you and your people do not start any picketing on the streets in Birmingham, Alabama.
'Eugene 'Bill' Connor, Commissioner of Public Safety.'
See Walker v. Birmingham, No. 249, October Term, 1966, Transcript of Record 415. Mr. Connor's telegram was received in evidence at trial. See Transcript, supra, at 350.
I do not, however, find it appropriate to rely upon the slightly earlier episode detailed in my Brother STEWART'S opinion, ante, at 942, as the trial judge ruled the uncontradicted supporting testimony inadmissible. See Transcript, supra, at 355.

2 Section 1159 does not require the City Commission to act on an application within any fixed amount of time. Indeed, by the time Connor definitively declared that he could not issue parade permits, it is not all clear that petitioner could even have made a timely permit application to the City Commission at its only remaining regular session set before the scheduled Good Friday march. See General City Code of Birmingham s 21 (1944). While the 1964 City Code makes it clear that petitioner's permit application would have been considered out of time, see s 2—10, the 1944 Code, which was applicable in 1963, is not clear on this point.

3 Although Shuttlesworth could have petitioned for a writ of mandamus in the Alabama Circuit Court if the City Commission denied his application, that state court is not obliged to render a decision within any fixed period of time.

4 None of our past decisions have squarely considered whether parade licenses must be handled on an expedited basis. In Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941), the question was not argued. In Poulos v. New Hampshire, 345 U.S. 395, 73 S.Ct. 760, 97 L.Ed. 1105 (1953), Poulos' request for a permit to conduct religious services in a public park was refused by the Portsmouth City Council seven and one-half weeks before the first scheduled event. Since the time remaining was sufficient to obtain relief by way of mandamus, see 345 U.S., at 419—420, 73 S.Ct., at 773—774 (opinion of Mr. Justice Frankfurter), there was no need to consider whether the State had a constitutional obligation to provide a more rapid procedure. And, of course, those cases which struck down regulatory schemes which purported to issue licenses on the basis of unconstitutional standards did not reach the question presented here. See, e.g., Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938); Schneider v. State, 308 U.S. 147, 163—165, 60 S.Ct. 146, 151—152, 84 L.Ed. 155 (1939); Largent v. Texas, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873 (1943); Staub v. City of Baxley, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958).

5 It would be most remarkable if every parade application involving the march of 52 persons is considered in a plenary manner by the principal government body of a city so large as Birmingham. In fact, an offer of proof was made in the Walker proceedings that the City Commission had never passed on permit applications in the past, but had delegated the task to inferior officials. See Transcript, supra, n. 1, at 290. The proof was not admitted on the ground that it was irrelevant. Ibid.

6 At the trial in Walker v. City of Birmingham, the City Clerk, who kept records of the parade permits that had been granted, stated that no regulations had been issued to fill in the gaps left by the Ordinance. See Transcript, supra, n. 1, at 286.

7 I do not reach the question whether the principle followed in such cases as Lovell, Schneider, Largent, and Staub, see n. 4, supra, allowing persons to ignore entirely licensing schemes which unconstitutionally impinge on other forms of free expression, should be extended to cover 'parade' permit statutes involving, as they do, a particularly important state interest.

945 F.Supp.2d 779
United States District Court,
S.D. Texas,
Houston Division.

JORNALEROS DE LAS PALMAS, Plaintiff,
v.
CITY OF LEAGUE CITY, and Michael W. Kramm, in his Individual Capacity and Official Capacity as Chief of Police of League City, Defendants.

Civil Action No. H–11–2703.
|
May 17, 2013.

Synopsis

Background: Association of Latino day laborers filed § 1983 action against city and chief of police, seeking declaratory judgment that Texas pedestrian solicitation law, which was aggressively enforced against day laborers to prevent them from soliciting employment in city, was unconstitutional restraint on their First Amendment right to free speech, seeking permanent injunction preventing enforcement of law, and claiming retaliation in violation of First Amendment and race and national origin discrimination in violation of Fourteenth Amendment. Bench trial was held.

Holdings: The District Court, Stephen Wm. Smith, United States Magistrate Judge, held that:

[1] association had standing;

[2] law was facially overbroad and invalid under First Amendment;

[3] law as applied to laborers violated First Amendment;

[4] city retaliated against laborers for exercising protected speech;

[5] enforcement of law against laborers did not constitute discrimination based on race or national origin; and

[6] permanent injunctive relief was warranted.

Ordered accordingly.

West Headnotes (59)

[1] Evidence
Proceedings in other courts

Judicial notice would be taken of newspaper's lawsuit that resulted in agreed judgment and permanent injunction allowing newspaper vendors to solicit in medians and along rights of way without citation or arrest under Texas pedestrian solicitation law. V.T.C.A., Transportation Code § 552.007(a).

Cases that cite this headnote

[2] Associations
Actions by or Against Associations

An association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Cases that cite this headnote

[3] Associations
Actions by or Against Associations

The elements of associational standing address the constitutional requirements that members of the association would otherwise have standing to sue in their own right and that interests the association seeks to protect are germane to the organization's purpose, whereas, the requirement that neither the claim asserted nor the relief requested mandates the participation of individual members in the lawsuit is solely a concern of prudential standing. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

[4] Federal Civil Procedure

In general; injury or interest

Federal Civil Procedure

Causation; redressability

To establish Article III standing, a plaintiff must show: (1) he has suffered, or imminently will suffer, a concrete and particularized injury-in-fact, (2) the injury is fairly traceable to the defendant's conduct, and (3) a favorable judgment is likely to redress the injury. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

[5] Constitutional Law

Freedom of Speech, Expression, and Press

Chilling a plaintiff's speech is a constitutional harm sufficient to satisfy the injury-in-fact requirement for Article III standing. U.S.C.A. Const. Art. 3, § 2, cl. 1; U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[6] Federal Civil Procedure

In general; injury or interest

An arrest, or reasonable fear of imminent arrest, is an injury-in-fact sufficient for Article III standing. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

[7] Constitutional Law

Labor and Employment

Members of association of Latino day laborers suffered injury-in-fact sufficient for Article III standing, as required for association's standing to bring § 1983 suit on behalf of members seeking declaratory judgment that Texas pedestrian solicitation law was unconstitutional restraint on members' right to free speech by preventing them from soliciting employment while standing in roadway, where members had experienced chilling of their free speech rights due to citations, arrests, and fear of future arrests pursuant to police department's policy of aggressively enforcing solicitation law and trespassing statute against day laborers. U.S.C.A. Const. Art. 3, § 2, cl. 1; U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983; V.T.C.A., Penal Code § 30.05(a); V.T.C.A., Transportation Code § 552.007(a).

1 Cases that cite this headnote

[8] Associations

Actions by or Against Associations

It is not necessary to show that every member of an association has suffered an injury-in-fact in order for the association to have standing to sue on behalf of members.

Cases that cite this headnote

[9] Constitutional Law

Labor and Employment

Latino day laborer association members' injuries from chilling of their free speech rights due to citations and arrests were directly traceable to police department's policy of aggressively enforcing Texas pedestrian solicitation law to prevent members from soliciting employment while standing on public roadways, as required for association's standing to bring § 1983 suit on behalf of members challenging law on First Amendment free speech grounds, where policy led to increased warnings, citations, and arrests of day laborers for solicitation under law and for trespassing. U.S.C.A. Const. Art. 3, § 2, cl. 1; U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983; V.T.C.A., Penal Code § 30.05(a); V.T.C.A., Transportation Code § 552.007(a).

1 Cases that cite this headnote

[10] Constitutional Law

Labor and Employment

Latino day laborer association members' injuries from chilling of their free speech rights due to citations arrests, that were directly traceable to police department's policy of aggressively enforcing Texas pedestrian solicitation law to prevent members from soliciting employment while standing on roadways, were likely redressed by favorable judgment, as required

for association's standing to bring § 1983 suit on behalf of members challenging law on First Amendment free speech grounds, where declaring law unconstitutional and enjoining its enforcement would alleviate members' injuries. U.S.C.A. Const. Art. 3, § 2, cl. 1; U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983; V.T.C.A., Penal Code § 30.05(a); V.T.C.A., Transportation Code § 552.007(a).

Cases that cite this headnote

[11] Associations

Actions by or Against Associations

In analyzing whether an association has standing to bring suit on behalf of its members, the requirement that the interests the association seeks to protect are germane to the association's purpose is undemanding and requires mere pertinence between the litigation at issue and the organization's purpose.

Cases that cite this headnote

[12] Constitutional Law

Labor and Employment

Association of Latino day laborers' § 1983 action challenging constitutionality of Texas pedestrian solicitation law sought to protect interests germane to association's purpose, as required for association's standing to bring § 1983 suit on behalf of members, alleging that law constituted unconstitutional restraint on members' right to free speech by preventing them from soliciting employment while standing in roadway, where association was formed by members to learn about their rights in response to alleged police crackdown on day laborers. U.S.C.A. Const. Art. 3, § 2, cl. 1; U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983; V.T.C.A., Transportation Code § 552.007(a).

Cases that cite this headnote

[13] Associations

Actions by or Against Associations

So long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members under principles of associational standing.

Cases that cite this headnote

[14] Associations

Actions by or Against Associations

In analyzing associational standing, individual participation in a lawsuit is not required where the claim asserted and the relief requested affect the membership of the association as a whole.

Cases that cite this headnote

[15] Associations

Actions by or Against Associations

The prong of associational standing, providing that neither claim asserted nor relief requested required participation of individual members in the lawsuit, addresses matters of administrative convenience and efficiency.

Cases that cite this headnote

[16] Associations

Actions by or Against Associations

Civil Rights

Criminal law enforcement; prisons

Constitutional Law

Labor and Employment

Association of Latino day laborers' claim that Texas pedestrian solicitation law was unconstitutional restraint on members' right to free speech by preventing them from soliciting employment while standing on roadway, and claim for injunctive relief preventing enforcement of law, did not require participation of individual members in lawsuit, as required for association's standing to bring § 1983 suit on behalf of members, where

individual participation was not required due to claims asserted and relief requested affecting membership as whole, and such claims and relief were well-suited for associational standing. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983; V.T.C.A., Transportation Code § 552.007(a).

Cases that cite this headnote

[17] Civil Rights
Governmental Ordinance, Policy, Practice, or Custom

In order to state a claim against a municipality, pursuant to § 1983, a plaintiff must allege a constitutional violation resulting from a municipal custom or policy. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[18] Civil Rights
Governmental Ordinance, Policy, Practice, or Custom

In analyzing a § 1983 claim for municipality liability, an "official policy" includes a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[19] Civil Rights
Governmental Ordinance, Policy, Practice, or Custom

A "policymaker" for purposes of § 1983 municipal liability can be someone who takes the place of the governing body in a designated area of city administration. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[20] Constitutional Law
Facial invalidity

Constitutional Law
Facial challenges

Ordinarily, a party bringing a facial challenge to the constitutionality of a statute must establish that no set of circumstances exists under which the statute would be valid or that the statute lacks any plainly legitimate sweep; however, these standards do not govern facial attacks based on the First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[21] Constitutional Law
Substantial impact, necessity of

Under the First Amendment, a law may be invalidated as facially overbroad if a substantial number of its applications are unconstitutional, judged in relation to the law's plainly legitimate sweep. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[22] Constitutional Law
Overbreadth in General

To invalidate a law as facially overbroad, under the First Amendment, a plaintiff must describe arguable instances of the law's overbreadth, but need not introduce admissible evidence to that effect. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[23] Constitutional Law
Overbreadth

Where a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the state's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[24] **Constitutional Law**
Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising

Generally, solicitation constitutes protected expression under the First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[25] **Constitutional Law**
Government property, use of

Constitutional Law
Labor and Employment in General

Labor and Employment
Rights and Duties of Employers and Employees in General

Municipal Corporations
Processions and unusual noises and performances in streets

Latino day laborers' solicitation of employment from occupants of vehicles on public streets or highways constituted exercise of speech protected by First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[26] **Constitutional Law**
Government Property and Events

Protected speech is subject to a government's power to preserve the property under its control for the use to which it is lawfully dedicated; the permissible scope of such government regulation varies depending on the nature of the forum. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[27] **Constitutional Law**
Streets and highways

Constitutional Law
Sidewalks

Public streets and sidewalks occupy a special position in terms of First Amendment free speech protection. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[28] **Constitutional Law**
Streets and highways

Constitutional Law
Sidewalks

Under the First Amendment's protection for freedom of speech, the government may not prohibit all communicative activity in the quintessential public forums of public streets and sidewalks. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[29] **Constitutional Law**
Freedom of speech, expression, and press

When the government restricts speech, the government bears the burden of proving the constitutionality of its actions under the First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[30] **Constitutional Law**
Justification for exclusion or limitation

Constitutional Law
Streets and highways

In order to enforce a content-based restriction on speech in a traditional public forum such as a public street, the government must show that its regulation is necessary to serve a compelling state interest and narrowly drawn to achieve that end. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[31] **Constitutional Law**
Justification for exclusion or limitation

Constitutional Law
Streets and highways

The standard for enforcing a content-based restriction on free speech in a traditional public forum such as a public street is essentially the same as the strict scrutiny test governing Equal Protection Clause challenges to laws classifying persons in a manner that burdens their exercise

of fundamental rights. U.S.C.A. Const.Amends. 1, 5.

Cases that cite this headnote

[32] **Constitutional Law**
Content-Neutral Regulations or Restrictions
Constitutional Law
Content-Based Regulations or Restrictions

In analyzing a free speech claim, whether a statute is content-neutral is something that can be determined from the face of the statute; that is, if the statute describes speech by content, then it is content-based. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[33] **Constitutional Law**
Content-Based Regulations or Restrictions

In analyzing a First Amendment free speech claim, a statute's content-based purpose may be sufficient to show that the statute is content-based. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[34] **Automobiles**
Creation and definition of offenses; constitutional and statutory provisions
Constitutional Law
Government property, use of
Constitutional Law
Labor and Employment in General
Labor and Employment
Constitutional and statutory provisions
Municipal Corporations
Processions and unusual noises and performances in streets

Texas pedestrian solicitation law, prohibiting person from standing in roadway to solicit ride, contribution, employment, or business from occupant of vehicle, except to solicit charitable contribution, was facially overbroad and invalid, under First Amendment, as content-based restriction of speech in traditional public forum that was not narrowly drawn to achieve compelling state interest of traffic safety and control, but rather, created unnecessary risk of chilling free speech. U.S.C.A. Const.Amend. 1; V.T.C.A., Transportation Code § 552.007(a).

Cases that cite this headnote

[35] **Constitutional Law**
Content-Based Regulations or Restrictions
Constitutional Law
Strict or exacting scrutiny; compelling interest test

A content-based restriction on protected speech in a traditional public forum is presumptively invalid and may be upheld only if it satisfies the most exacting scrutiny. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[36] **Constitutional Law**
Strict or exacting scrutiny; compelling interest test

A content-based restriction on protected speech in a traditional public forum must be narrowly tailored to promote a compelling government interest, and if a less restrictive alternative would serve the government's purpose, the legislature must use that alternative. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[37] **Constitutional Law**
Narrow tailoring requirement; relationship to governmental interest
Constitutional Law
Existence of other channels of expression

If the regulation is a content-neutral restriction of the time, place, or manner of expression, the state's burden in satisfying the First Amendment is somewhat less: it must show the regulation to be narrowly tailored to serve a significant, but not necessarily compelling, government interest, and leave open ample alternative channels of communication. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[38] Constitutional Law
Exercise of police power; relationship to governmental interest or public welfare

In analyzing a free speech claim, public safety is a compelling interest at the heart of government's function. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[39] Constitutional Law
Freedom of Speech, Expression, and Press

A First Amendment as-applied claim is a challenge to the statute's application to the litigants' own expressive activities. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[40] Constitutional Law
Freedom of Speech, Expression, and Press

The underlying First Amendment free speech standard for an as-applied challenge is no different than the standard for a facial challenge. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[41] Constitutional Law
Government property, use of

Constitutional Law
Labor and Employment in General

Labor and Employment
Constitutional and statutory provisions

Municipal Corporations
Processions and unusual noises and performances in streets

Texas pedestrian solicitation law, prohibiting person from standing in roadway to solicit ride, contribution, employment, or business from occupant of vehicle, except to solicit charitable contribution, was applied by police officers in overbroad manner by enforcing law against Latino day workers in areas outside law's definition of roadway, in violation of their First Amendment right to free speech, and thus, officers' enforcement of law against day laborers was not narrowly tailored and did not allow ample alternative means for laborers to solicit employment in any public places. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983; V.T.C.A., Transportation Code § 552.007(a).

Cases that cite this headnote

[42] Constitutional Law
Commercial Speech in General

Commercial speech is not free from constitutional protection. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[43] Constitutional Law
Reasonableness; relationship to governmental interest

Regulations governing commercial speech that is neither misleading nor related to illegal activity must (1) seek to implement a substantial governmental interest, (2) directly advance that interest, (3) and extend only as far as necessary. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[44] Constitutional Law
Retaliation

The First Amendment prohibits adverse governmental action against a person for engaging in protected speech activity. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[45] Constitutional Law
Retaliation

To succeed on its First Amendment retaliation claim, pursuant to § 1983, plaintiff must prove: (1) defendants acted under color of state law, (2) plaintiff's members engaged in constitutionally protected activity, and (3) the exercise of protected speech activity

by plaintiff's members substantially motivated defendants' actions. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[46] **Constitutional Law**
Government property, use of
Constitutional Law
Labor and Employment in General
Labor and Employment
Enforcement procedures
Municipal Corporations
Processions and unusual noises and performances in streets

Police officers' actions under color of state law, by aggressively enforcing Texas pedestrian solicitation law to prevent Latino day laborers from soliciting employment while standing in roadway, and by enforcing trespassing laws against laborers in order to curtail their protected speech, constituted retaliation in violation of First Amendment, where officers singled out day laborers as special target for selective enforcement of laws, as other groups were allowed to solicit in roadway. U.S.C.A. Const.Amend. 1; V.T.C.A., Penal Code § 30.05(a); V.T.C.A., Transportation Code § 552.007(a).

1 Cases that cite this headnote

[47] **Constitutional Law**
Race, National Origin, or Ethnicity

In analyzing an Equal Protection claim, Latino men who speak Spanish are members of a protected class. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[48] **Constitutional Law**
Discrimination and Classification
Constitutional Law
Intentional or purposeful action requirement

A § 1983 claim of racial discrimination in violation of the Fourteenth Amendment equal protection clause requires plaintiff to prove not only that defendants' actions had a discriminatory impact, but also that defendants had the intent to discriminate. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[49] **Constitutional Law**
Intentional or purposeful action requirement

In analyzing an equal protection claim, actions may impact one group so disproportionately as to be evidence of discriminatory intent. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[50] **Civil Rights**
Weight and Sufficiency of Evidence

In analyzing an equal protection claim, circumstantial evidence, such as the historical background of the actions, departures from the normal procedural sequence of events, and legislative or administrative history, may be highly relevant to the issue of intent. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[51] **Constitutional Law**
Streets and highways
Constitutional Law
Labor, Employment, and Public Officials
Municipal Corporations
Processions and unusual noises and performances in streets

Police officers' enforcement of Texas pedestrian solicitation law and trespass laws against Latino day laborers to prevent them from soliciting employment while standing in roadway did not discriminate against laborers based on their race or national origin in violation of Equal Protection Clause, even though Latino men were disproportionately impacted by police officers' enforcement, where laborers were targeted based on their exercise of free speech in soliciting employment, rather than based on their race

or national origin. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; V.T.C.A., Penal Code § 30.05(a); V.T.C.A., Transportation Code § 552.007(a).

Cases that cite this headnote

[52] Injunction

Grounds in general; multiple factors

Plaintiff is entitled to permanent injunctive relief if (1) it has suffered an irreparable injury, (2) legal remedies are inadequate, (3) the balance of hardships weighs in favor of an injunction, and (4) the public interest would not be disserved by a permanent injunction.

Cases that cite this headnote

[53] Civil Rights

Injunction

In determining whether to grant permanent injunction, the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[54] Civil Rights

Injunction

Latino day laborers suffered irreparable harm from loss of First Amendment right to free speech by enforcement of Texas pedestrian solicitation law that violated First Amendment, as required for permanent injunction preventing enforcement of law that prevented laborers from soliciting employment while standing on roadway. U.S.C.A. Const.Amend. 1; V.T.C.A., Transportation Code § 552.007(a).

Cases that cite this headnote

[55] Injunction

Recovery of damages

In determining whether to grant a permanent injunction, a legal remedy may be deemed inadequate if plaintiff shows that a monetary award would be speculative because the amount of damage would be difficult or impossible to measure, or that effective legal relief can be secured only by a multiplicity of actions such that plaintiff would be required to pursue damages each time he was injured.

Cases that cite this headnote

[56] Civil Rights

Injunction

Latino day laborers' legal remedies were inadequate for their deprivation of right to free speech by enforcement of Texas pedestrian solicitation law that violated First Amendment by preventing them from soliciting employment while standing on public roadway, as required for permanent injunction preventing enforcement of law, since laborers would be forced into either foregoing their right to free speech or exercising that right and suing for damages each time they were deprived of free speech, and monetary award for each violation of free speech would be speculative due to difficulty of measuring amount of damages. U.S.C.A. Const.Amend. 1; V.T.C.A., Transportation Code § 552.007(a).

Cases that cite this headnote

[57] Civil Rights

Injunction

Balance of hardships weighed in favor of permanent injunction preventing enforcement of Texas pedestrian solicitation law that violated First Amendment, since any hardships faced by city and police chief from injunctive relief preventing law's enforcement were greatly outweighed by hardships faced by day laborers everyday when they were deprived of free speech by enforcement of law that prohibited them from soliciting employment while standing on roadway. U.S.C.A. Const.Amend. 1; V.T.C.A., Transportation Code § 552.007(a).

Cases that cite this headnote

[58] Civil Rights
Injunction

In determining whether to grant a permanent injunction, the public interest is always served by upholding the principles embodied in the First Amendment. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[59] Civil Rights
Injunction

Public interest supported grant of permanent injunction preventing enforcement of Texas pedestrian solicitation law that violated First Amendment, since permanent injunctive relief would serve public interest by helping to restore faith and confidence in justice system by all residents of city. U.S.C.A. Const.Amend. 1; V.T.C.A., Transportation Code § 552.007(a).

Cases that cite this headnote

West Codenotes

Held Unconstitutional

V.T.C.A., Transportation Code § 552.007(a).

Attorneys and Law Firms

***786** Marisa Bono, David G. Hinojosa, Mexican American Legal Defense and Educational Fund, San Antonio, TX, for Plaintiff.

Constance K. Acosta, Mark C. Watler, Arnold G. Polanco, Ross, Banks, May, Cron & Cavin, PC, Houston, TX, for Defendants.

787** ***Findings of Fact and Conclusions of Law

STEPHEN WM. SMITH, United States Magistrate Judge.

This case brought under 42 U.S.C. § 1983 was tried to the court on September 24–28, 2012. The parties consented to the jurisdiction of this magistrate judge for all purposes, including final judgment (Dkt. 18). At issue is League City's alleged policy of targeting day laborers and applying (and mis-applying) state laws to prevent them from soliciting employment in the city.

Plaintiff Jornaleros de Las Palmas, an association of League City day laborers, seeks declaratory and permanent injunctive relief, but not monetary damages. Plaintiff sues under § 1983 for a declaratory judgment that Texas Transportation Code § 552.007(a) is an unconstitutional restraint on its members' First Amendment rights to free speech, both on its face and as applied by defendants. Plaintiff also sues for retaliation in violation of the First Amendment and for race and national origin discrimination in violation of the Fourteenth Amendment.

Based on the evidence presented at trial and applicable law, the court makes the following findings of fact and conclusions of law. [1]

I. Findings of Fact

Background

1. Plaintiff is Jornaleros de Las Palmas, a group of day laborers living and working in League City, Texas. Tr. vol. 1 at 57–63, [2] 102–03; Tr. vol. 3 at 191, 197–98.

2. Defendants are City of League City and Michael Kramm, in his official capacity as Chief of Police of League City. [3]

3. League City has seen exponential growth in recent years, including a construction boom, which brought many day laborers to League City. Admissions of Fact (Dkt. 131), ¶ 2.

4. Most, if not all, day laborers in League City are Latino men. Tr. vol. 1 at 36, 85; P. Ex. 39 at 39; P. Ex. 40 at 62; P. Ex. 38 at 131.

5. Plaintiff's members and other day laborers in League City are generally hired as independent contractors by homeowners and small business contractors on a temporary basis to do construction, home improvement, and landscaping work. Tr. vol. 1 at 35; Tr. vol. 3 at 216–17.

6. The employment of day laborers is informal. Because the need for day laborers fluctuates and is seasonal, day laborers do not find work through traditional means, such as

advertising. Tr. vol. 1 at 33–36, 57, 99–101; Tr. vol. 3 at 193, 195.

7. Instead, day laborers show that they are available for work by gathering in public at known locations and gesturing by hand to passing vehicles, typically between the hours of 6:00 a.m. and noon. Tr. vol. 1 at 45–46, 99–101; Tr. vol. 3 at 158, 160, 192.

***788** 8. Before September 2009, Latino day laborers, including plaintiff's members, congregated without police interference at the following locations in League City: a designated day labor site located at the League City Police Department (LCPD) at 600 West Walker Street; the Big Star Food Mart (formerly known as the One Star Food Mart) located at 1195 East Main Street; the Briar Palms Apartments (formerly known as the Las Palmas Apartments) located at 1215 East Main Street; and the Shady Oaks Apartments located at 115 Texas Avenue. Dkt. 131, ¶¶ 11, 13; P. Ex. 38 at 100–01, 167; P. Ex. 40 at 117–18; Tr. vol. 1 at 31–32, 101–02, 201–03; Tr. vol. 2 at 54; Tr. vol. 3 at 196–97, 202–05; Tr. vol. 4 at 144, 216.

9. The LCPD site was for many years located off a dead-end street; by January 2008 the street had become a through-street. Tr. vol. 3 at 100–01; Tr. vol. 2 at 54; Tr. vol. 4 at 20.

10. The day labor solicitation area at the police station site was not on a roadway, and included benches, a bike rack, a lean-to for shade, and a portable restroom. Tr. vol. 2 at 127–28, 202; Tr. vol. 3 at 100–02, 204–06; P. Ex. 40 at 65–66; P. Ex. 55.

11. Potential contractors seeking laborers turned into the police station parking lot, out of the flow of traffic. Tr. vol. 3 at 102, 205; P. Ex. 55.

12. The Big Star convenience store site is located next to a laundromat at the corner of Reynolds Avenue and Main Street. D. Ex. 9(m); Tr. vol. 1 at 40–43; Tr. vol. 3 at 170, 207; Tr. vol. 4 at 33–34; Tr. vol. 5 at 36–37.

13. Main Street is one of the arteries that feeds from IH–45 into League City. Tr. vol. 5 at 150.

14. A fence runs along both Main and Reynolds, and partially encloses the private property abutting Reynolds. D. Ex. 9(m); Tr. vol. 1 at 43–44.

15. The corner of Reynolds and Main has a sidewalk along Main that separates the private property from the roadway, but no such sidewalk exists along Reynolds. D. Ex. 9(m); Tr. vol. 1 at 43; Tr. vol. 3 at 178–79; Tr. vol. 4 at 144; P. Ex. 40 at 47–49.

16. The fence along Reynolds, across from the convenience store, is set back several feet from the roadway and the area unenclosed by the fence slopes downward to the road itself. D. Ex. 9(m).

17. Day laborers congregated on the north side of Main, either along the sidewalk on Main, or in the ditch between the convenience store and the fence on Reynolds Avenue. Tr. vol. 1 at 43–44; Tr. vol. 3 at 178–79; Tr. vol. 4 at 144–46.

18. Day laborers also congregated in the parking lot adjoining Reynolds Avenue, on the side of the convenience store. Tr. vol. 4 at 144–46; Tr. vol. 3 at 178–79.

19. Because day laborers frequented the convenience store to purchase groceries and other goods, the store owner encouraged them to frequent his store. Tr. vol. 1 at 44–45; Tr. vol. 2 at 251–54; Tr. vol. 3 at 175–76; Tr. vol. 4 at 177; P. Ex. 49 at P–0187.

20. Day laborers at the Briar Palms and Shady Oaks sites were typically residents of those apartment complexes, and would wait to solicit work either on the public sidewalks or easements outside of the apartment complexes, or in the parking lots of the complexes with the owner's permission. Tr. vol. 3 at 203, 218; Tr. vol. 4 at 149; P. Ex. 40 at 144–45.

Change of Policy Towards Day Laborers

21. On August 20, 2009, Jez sent an email to all LCPD employees announcing that the police station day laborer site was ***789** being shut down, and that day laborers "may no longer assemble and solicit employment on municipal property." J. Ex. 16; Tr. vol. 2 at 127–29.

22. Prior to the shut down approximately twenty day laborers had been gathering daily at the police station site to solicit work. Tr. vol. 3 at 110, 115–16.

23. The site shutdown was precipitated not by traffic or safety concerns, but rather by an incident in which a female police officer, Sergeant Tamara Spencer, was subjected to "cat-calls"

from day laborers while walking from her car into the police station. Tr. vol. 5 at 96.

24. Upon hearing about Spencer's experience, then-Chief Michael Jez instructed Spencer to have the bike rack, trash cans and portable potty removed and to have the lean-to disassembled and removed if it was constructed and owned by the city. Tr. vol. 2 at 127–29; Tr. vol. 5 at 96; J. Ex. 16.

25. As Jez instructed, the police station site was disassembled and Officer James Gronseth issued three criminal trespass warnings to Latino day laborers at the police station site. P. Ex. 47 at LC–001311; P. Ex. 39 at 41–42, 45; P. Ex. 40 at 67–68.

26. On September 2, 2009, Jez issued Special Order 09–07, which was effective immediately and applied to all LCPD employees. Dkt. 131, ¶¶ 15–16; J. Ex. 1; J. Ex. 17.

27. The subject of Special Order 09–07 is "Day Laborers." Declaring that "there is no constitutional guarantee to assemble and routinely violate existing municipal or state statutes," the order directs LCPOs to "enforce ... solicitation in the roadway" against day laborers. J. Ex. 1.

28. Special Order 09–07 emphasizes that it "is a long-term approach and will be on-going." *Id.*

29. Under Special Order 09–07, officers are instructed

> in the course of normal duties, to regularly monitor known gathering locations and take appropriate action on all observed statutory violations. This includes aggressively citing or arresting, when circumstances warrant a custodial detention, motorists who stop in public roadways to solicit employment of day laborers, persons committing criminal trespassing, or persons found to be violating other order maintenance types of statutes. Officers will check known gathering locations multiple times throughout their tour of duty.

Id.

30. After Jez issued Special Order 09–07, the LCPD complied with its directive to prevent day laborers from congregating in public places to solicit work. Tr. vol. 4 at 156.

31. In accordance with Special Order 09–07, League City police officers began monitoring known day laborer gathering spots. Tr. vol. 2 at 140; Tr. vol. 3 at 20–24, 52, 88, 200–01; Tr. vol. 4 at 153, 156, 170; P. Ex. 39 at 24, 27, 34; P. Ex. 40 at 117–18.

32. As part of their patrol, police officers parked their squad cars near known gathering locations, regardless of whether day laborers were present. P. Ex. 40 at 135–36; Tr. vol. 1 at 48, 50; Tr. vol. 3 at 200–01; Tr. vol. 5 at 67.

33. Plaintiff's members walking in public were occasionally directed by officers to go inside, regardless of whether they were actually soliciting work at the time. Tr. vol. 1 at 52–53; Tr. vol. 3 at 216.

34. Officers also began warning, citing and arresting day laborers for violations of Texas Transportation Code § 552.007(a) ***790** and Texas Penal Code § 30.05(a). P. Ex. 40 at 96–97; Tr. vol. 4 at 47–61.

35. Officers repeatedly told day laborers, including plaintiff's members, that they were prohibited from soliciting work from sidewalks and public easements at the convenience store site, and that they would be arrested if they continued to do so. Tr. vol. 4 at 197–200; Tr. vol. 5 at 62.

36. The LCPD recorded many calls for service at known day laborer congregation locations over the years, including numerous calls to the "Lucky Chief" convenience store located at 1813 East Main. D. Ex. 16; D. Ex. 17.

37. The Lucky Chief business owner gave day laborers permission to be on the property because they "contributed to his sales." Tr. vol. 5 at 77–78.

38. It is not clear how many of the calls specifically related to day laborers, nor does the record show any specific property damage, injury, or loss of life attributed to day laborers. *See* D. Ex. 16; D. Ex. 17; Tr. vol. 5 at 71–72.

39. There is no evidence the number of calls for service was growing by August 2009, or that such calls motivated Jez to issue Special Order 09–07.

40. Traffic congestion was a problem in League City in 2009, but there is no evidence that day laborers specifically caused any traffic accidents at the locations where they gathered. *See* Tr. vol. 2 at 123–24; Tr. vol. 5 at 15–16.

41. There is no evidence that traffic congestion motivated Jez to issue Special Order 09–07.

42. Jez's "pet peeve" was day laborers, not Latinos in general. Tr. vol. 3 at 71–2, 73; P. Ex. 61.

43. Some lawmakers and citizens in League City were concerned about illegal immigration and its impact on the community in 2009. P. Ex. 44 at LC 0007; Tr. vol. 2 at 14–15.

44. Special Order 09–07 does not mention illegal immigration. J. Ex. 1.

45. There is no evidence that non-Latino day laborers were treated differently than Latino day laborers under Special Order 09–07.

Criminal Trespass Citations and Arrests

46. As a result of LCPD's Special Order 09–07 enforcement activities, there was a spike in arrests in late 2009 and 2010 for criminal trespassing at known gathering locations for day laborers. Tr. vol. 4 at 55–57.

47. The LCPD obtained powers of attorney (POAs) from business owners along the FM 518 corridor in order to enforce the state criminal trespass law, Texas Penal Code § 30.05(a), without first receiving a complaint. J. Ex. 2; P. Ex. 40 at 74, 96–99; P. Ex. 48; P. Ex. 78; Tr. vol. 2 at 230–31; Tr. vol. 3 at 59–60, 75–76; Tr. vol. 4 at 144, 151; Tr. vol. 5 at 38–41, 51.

48. POAs obtained in 2009 were part of LCPD's effort to prevent day laborers from soliciting. P. Ex. 40, at 73–74; Tr. vol. 3 at 73–77; Tr. vol. 5 at 38–42, 51; J. Ex. 2; P. Ex. 78.

49. "No trespassing" signs were put up inside and outside of the One Star convenience store. Tr. vol. 1 at 38–39.

50. The posted sign reads "se prohibe la entrada," which means "do not enter." There was no sign saying no soliciting or loitering in the parking lot. P. Ex. 49 at P–0187; Tr. vol. 3 at 206–07.

51. In 2009, of the total forty-five arrests for criminal trespass made by LCPD, twenty-seven occurred over the four-month period from issuance of Special Order 09–07 through the end of the year. J. Ex. 42 at LC–001758–59.

***791** 52. Of the 27 post-Special Order 09–07 arrests in 2009, 23 were of Latinos and over half were at known day laborer gathering locations. *Id.;* Tr. vol. 4 at 56.

53. In 2010, LCPD officers made a total of 27 arrests for criminal trespass; nine of those arrested are Hispanic. J. Ex. 42 at LC–001759–60; Tr. vol. 4 at 39–40, 57.

54. Between September 2009 and December 2010, LCPD officers gave hundreds of criminal trespass warnings; not all warning recipients were Hispanic. D. Ex. 22.

Solicitation Citations and Arrests

55. Prior to issuance of Special Order 09–07, it was LCPD practice not to enforce Texas Transportation Code § 552.007(a). This practice changed after Special Order 09–07 was issued. Tr. vol. 2, 139–40.

56. Texas Transportation Code § 552.007(a) prohibits certain forms of solicitation by pedestrians in a "roadway," which is defined as "the portion of a highway, other than the berm or shoulder, that is improved, designed, or ordinarily used for vehicular travel." TEX. TRANSP. CODE § 541.302(11).

57. LCPD officers (incorrectly) interpreted "roadway" for purposes of § 552.007(a) to include sidewalks, grassy areas, and essentially everything from "ditch line to ditch line." Tr. vol. 3 at 81; Tr. vol. 4 at 162–63; J. Ex. 19; J. Ex. 22.

58. From 2009 to 2011, only Latino males were cited and arrested for solicitation in League City, and most were day laborers. J. Ex. 41 at LC–001763–64; Tr. vol. 4 at 47–49.

59. It was common practice for LCPD officers to arrest a violator, instead of issuing a citation, if the suspect did not have proper identification. Tr. vol. 3 at 132–33.

60. In 2008, there were two arrests for solicitation. J. Ex. 41 at LC–001763–64.

61. From the issuance of the Special Order to December 31, 2009, the LCPD issued 11 citations for solicitation. The LCPD made one arrest in 2009, in May. J. Ex. 41 at LC–001763–64; J. Ex. 70 at LC–003935; Tr. vol. 4 at 49–50.

62. In 2010, the LCPD issued 64 citations and made 37 arrests for solicitation. J. Ex. 70 at LC–003935–36; Tr. vol. 4 at 50; J. Ex. 41 at LC–001763–64.

63. In 2011, the LCPD issued 28 citations and made 2 arrests for solicitation. J. Ex. 70 at LC–003937; Tr. vol. 4 at 49–50; J. Ex. 41 at LC–001764.

64. On February 5, 2010, Officer Murray led a sting operation that led to the mass arrest of 14 day laborers. Tr. vol. 2 at 140, 235–36; Tr. vol. 5 at 42–45, 70; P. Ex. 43; P. Ex. 45.

65. Officers drove a pick-up to the convenience store site where day laborers were soliciting work, communicated how many laborers they wanted, and arrested the laborers who entered their trucks. Tr. vol. 5 at 70; P. Ex. 43.

66. No police officer saw the day laborers soliciting in the actual roadway on this occasion. Tr. vol. 5 at 70; P. Ex. 43.

Special Order 09–07 Remains in Effect

67. League City police officers charged with enforcing Special Order 09–07 believe it is still in effect and continue to implement it. Tr. vol. 4 at 171; Tr. vol. 2 at 297; P. Ex. 40 at 118–19; P. Ex. 39 at 49–50; P. Ex. 38 at 145.

68. The LCPD's written directive system requires that a special order without a self-cancelling deadline, such as Special Order 09–07, be cancelled in writing by the Chief of Police. Tr. vol. 2 at 121, 288, 297; J. Ex. 3.

69. The Chief of Police has not cancelled Special Order 09–07 in writing, and officers have not been instructed not to ***792** enforce it. Tr. vol. 2 at 297; Tr. vol. 4 at 171; P. Ex. 38 at 168–69.

Solicitation by Non–Day Laborers

70. Solicitors other than day laborers were not targeted by Special Order 09–07. J. Ex. 1.

71. The LCPD permitted firemen and policemen in the City of League City to solicit in the roadway, including locations along FM518. P. Ex. 40 at 125–29; Tr. vol. 1 at 142; Tr. vol. 2 at 33–34, 159–61.

72. League City did not require firemen or policemen to follow Texas Transportation Code § 552.0071 by applying for permission before soliciting, and none have been cited or arrested for solicitation. P. Ex. 40 at 125–29; P. Ex. 41; J. Ex. 70.

73. Students and church organizations were also permitted to solicit without citation or arrest. *See* P. Ex. 63 at LC–043756, LC–058913; Tr. vol. 4 at 35–36.

[1] 74. Pursuant to an agreed permanent injunction entered in 2004, Houston Chronicle newspaper vendors were allowed to solicit in medians and along rights of way without citation or arrest under Texas Transportation Code § 552.007(a). Tr. Vol. 2 at 156, 211. [4]

Formation of Jornaleros de Las Palmas

75. In response to the 2009 police crackdown, a group of day laborers began to mobilize and organize, and named themselves Jornaleros de Las Palmas. Tr. vol. 1 at 56–61, 103–05; Tr. vol. 3 at 197–99.

76. Plaintiff's members sought and continue to seek work as day laborers in League City. Dkt. 131, ¶ 3.

77. The group met almost twice a week in 2009 and elected leaders. Tr. vol. 1 at 58; Tr. vol. 2 at 75–76; Tr. vol. 3 at 197–98; Tr. vol. 4 at 115–17.

78. The Jornaleros sought the help of Francisco Arguelles, an organizer at the Houston Interfaith Worker Justice Center, to assist in protecting their right to solicit employment from public spaces, and he eventually became a member of the group. Tr. vol. 1 at 62–63; Tr. vol. 3 at 198–99.

79. Arguelles coordinated a meeting on January 20, 2010, at the League City Police Department, with plaintiff's members, concerned community residents, and Jez regarding Special Order 09–07. Tr. vol. 1 at 67–69; Tr. vol. 2 at 148–50; Tr. vol. 3 at 208–12; Dkt. 131, ¶ 17.

80. At the meeting, the members expressed their concerns to Jez. Tr. vol. 2 at 148–50; Tr. vol. 3 at 208–12; Tr. vol. 4 at 116–17.

81. The members and community residents also sought Chief Jez's help in identifying a public site where day laborers could solicit work without fear of intimidation and arrest from the LCPD. Tr. vol. 2 at 148–50; Tr. vol. 3 at 211; Tr. vol. 4 at 118–19.

82. Jez refused to identify such a site, and warned members they would be arrested if they solicited work in the roadway or on public or private property. Dkt. 131, ¶ 17; Tr. vol. 2 at 148–50; Tr. vol. 3 at 210–11; Tr. vol. 4 at 116–19.

83. Jez informed the members that the only way that they could solicit day labor in League City was on private property with the owner's permission. Tr. vol. 4 at 118–19.

Injury to Plaintiff's Members

84. Since September 2009, League City has left no public space available for day ***793** laborers to congregate and solicit employment without fear of arrest. Tr. vol. 5 at 56–57, 150–51; Tr. vol. 4 at 149–50, 163; Tr. vol. 3 at 138, 140, 212; Tr. vol. 2 at 148–50; P. Ex. 40 at 120–21.

85. League City police officers continue to believe that soliciting day labor on public property in League City is unlawful and subjects day laborers to warning, citation, or arrest. Tr. vol. 5 at 150–51; Tr. vol. 4 at 163; Tr. vol. 3 at 81, 140; P. Ex. 40 at 120–21.

86. Plaintiff's members have been arrested as a result of implementation of Special Order 09–07. P. Ex. 45; J. Ex. 41; Tr. vol. 1 at 60–64; Tr. vol. 3 at 213–14.

87. In 2009, a member, known on the record as Amado AC, personally observed the arrest of some of his fellow day laborers while soliciting work on public property and in the parking lot of the convenience store despite being there with the owner's consent. Tr. vol. 1 at 56.

88. Around the same time, Amado AC was walking down the sidewalk when a League City officer told him to go back to his apartment. Tr. vol. 1 at 52–53.

89. On another occasion, Amado AC was inside the convenience store playing video games when an officer came in to remind him he could not be outside. Tr. vol. 1 at 48–51; D. Ex. 16 at 62.

90. As a result, Amado AC now rarely solicits day labor in public, even though he needs to do so to make financial ends meet. Tr. vol. 1 at 33, 56.

91. Emilio AY, another member, is scared to solicit work in League City for fear of arrest under the City's policy, although he desires to do so. Tr. vol. 1 at 101–02.

92. Door-to-door solicitation is not a viable alternative for day laborers, because such activity would likely generate fear and apprehension by homeowners and residents who did not know them. Tr. vol. 1 at 68–69.

93. Plaintiff's members live in fear of arrest when they are walking in public and even as consumers in private businesses. Tr. vol. 1 at 56, 101–02, 124; Tr. vol. 3 at 211–12, 215–16; Tr. vol. 4 at 199; Tr. vol. 5 at 67.

94. Plaintiff's members and other day laborers no longer solicit from public sidewalks or at the convenience store site, despite having permission to do so from the business owner. Tr. vol. 1 at 48–49, 107; Tr. vol. 3 at 188; Tr. vol. 5 at 101–02; P. Ex. 40 at 60–61; Tr. vol. 4 at 147.

95. If they did not fear citation, arrest, or harassment from the LCPD, plaintiff's members would solicit work in public in League City, and on private property where they have permission to do so. Tr. vol. 1 at 68, 107, 116.

II Conclusions of Law

Standing

[2] 1. *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), provides the relevant standard for associational standing:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are

> germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

[3] 2. The first two elements address constitutional requirements; the third is solely prudential. *Association of Amer. Phys. & Surg., Inc. v. Texas Med. Brd.,* 627 F.3d 547, 550 (5th Cir.2010).

***794** **[4]** 3. To establish standing, a plaintiff must show: (1) he has suffered, or imminently will suffer, a concrete and particularized injury-in-fact; (2) the injury is fairly traceable to the defendant's conduct; and (3) a favorable judgment is likely to redress the injury. *E.g., Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

[5] 4. Chilling a plaintiff's speech is a constitutional harm sufficient to satisfy the injury-in-fact requirement. *Houston Chron. Pub. Co. v. City of League City, Tex.,* 488 F.3d 613, 618 (5th Cir.2007).

[6] 5. An arrest, or reasonable fear of imminent arrest, is also an injury-in-fact. *Id.* (citing *Steffel v. Thompson,* 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974)).

[7] 6. The court has made factual findings that some of plaintiff's members have experienced a chilling of their free speech rights due to citations, arrests, and fear of future arrests. *See, supra,* ¶¶ 87–98.

[8] 7. It is not necessary to show that every member of an association has suffered an injury in fact. *Warth v. Seldin,* 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) (an association shows injury in fact when its members "or any one of them" suffer immediate or threatened injury).

[9] 8. The court's findings of fact establish that Special Order 09–07 lead to increased warnings, citations, and arrests of day laborers in League City for solicitation under Texas Transportation Code § 552.007(a) and trespassing under Texas Penal Code § 30.05(a). Thus, plaintiff's members' injuries are directly traceable to the challenged policy.

[10] 9. The court's findings of fact establish that Special Order 09–07 has not been rescinded, and that plaintiff's members continue to fear arrests. Thus, a favorable decision enjoining its enforcement and declaring Texas Transportation Code § 552.007(a) unconstitutional will alleviate the injury to plaintiff's members.

[11] 10. "The germaneness requirement is 'undemanding' and requires 'mere pertinence' between the litigation at issue and the organization's purpose." *Association of Amer. Phy. & Surg., Inc. (AAPS) v. Tex. Med. Brd.,* 627 F.3d 547, 551 n. 2 (5th Cir.2010).

[12] 11. Jornaleros de Las Palmas was formed by a group of Latinos who decided to organize more formally to learn about their rights in response to what they perceived as a police crackdown on day laborers.

12. The current lawsuit clearly seeks to protect interests germane to plaintiff's purpose.

[13] 13. As the Supreme Court explained in the seminal case *Warth v. Seldin,* 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975):

> [S]o long as the nature of the claim and of the relief sought does not make the individual participation of *each* injured party *indispensable* to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke this court's jurisdiction.

(emphasis added).

14. *Hunt,* which derived its three part test from Warth, does not hold that associational standing is destroyed if any participation by any member is required.

[14] 15. The Fifth Circuit has consistently recognized that individual participation is not required where "the claim asserted and the relief requested affect the ***795** membership as a whole." *Church of Scientology v. Cazares,* 638 F.2d

1272, 1276–80 (5th Cir.1981); *see also* *Gulf Restoration Network, Inc. v. Salazar,* 683 F.3d 158, 168 (5th Cir.2012) (claims of non-profit environmental groups challenging Department of Interior approval of drilling applications in wake of Deepwater Horizon spill "are not particular to any individual" and "are thus properly resolved in a group context"); *Familias Unidas v. Briscoe,* 619 F.2d 391, 398 n. 2 (5th Cir.1980) ("the declaratory relief sought, inuring as it would to the benefit of all members, is ideally suited to allowing 'associational standing.' ").

[15] 16. This prong of standing addresses "matters of administrative convenience and efficiency." *Id.* at 551 (citing *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.,* 517 U.S. 544, 557, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996)).

[16] 17. The claims asserted and the relief requested in this case are well-suited for associational standing.

Municipal policy

[17] 18. In order to state a claim against a municipality under 42 U.S.C. § 1983, a plaintiff must allege a constitutional violation resulting from a municipal custom or policy. *Monell v. New York Dep't of Soc. Serv.,* 436 U.S. 658, 690–94, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

[18] 19. An "official policy" includes "a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Webster v. City of Houston,* 735 F.2d 838, 841 (5th Cir.1984).

[19] 20. A policymaker for purposes of § 1983 municipal liability can be someone who takes the place of the governing body in a designated area of city administration. *Zarnow v. City of Wichita Falls,* 614 F.3d 161, 167 (5th Cir.2010) (citing *Webster,* 735 F.2d at 841).

21. League City has delegated policymaking authority for the LCPD to the Chief of Police. LEAGUE CITY, TEX., CODE OF ORDINANCES, ch. 2, art. III, § 2–87(a); Tr. vol. 2 at 116–17; Dkt. 131, ¶ 5.

22. Special Order 09–07 is a municipal policy for the purpose of plaintiff's 42 U.S.C. § 1983 claims against League City.

Facial Challenge to Tex. Transp. Code § 552.007(a)

[20] 23. Ordinarily, a party bringing a facial challenge to the constitutionality of a statute must establish that "no set of circumstances exists under which the Act would be valid," *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), or that the statute lacks any "plainly legitimate sweep." *Washington v. Glucksberg,* 521 U.S. 702, 740 n. 7, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (Stevens, J., concurring in judgments).

24. These standards do not govern facial attacks based on the First Amendment, however. *United States v. Stevens,* 559 U.S. 460, 130 S.Ct. 1577, 1587, 176 L.Ed.2d 435 (2010).

[21] 25. Under the First Amendment, a law may be invalidated as facially over-broad if "a substantial number of its applications are unconstitutional, judged in relation to the law's plainly legitimate sweep." *Id.* (quoting *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449 n. 6, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008)).

***796 [22]** 26. In such cases, the plaintiff must describe arguable instances of the law's over-breadth, but need not introduce admissible evidence to that effect. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,* 657 F.3d 936, 944 (9th Cir.2011) (*en banc*) (citing *Washington State Grange,* 552 U.S. at 449, n. 6, 128 S.Ct. 1184).

[23] 27. Where a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the state's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack. *Secretary of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947, 967–68, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984).

[24] **[25]** 28. In general, solicitation constitutes protected expression under the First Amendment. *International Society for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 677–78 (1992); *Village of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 632, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). In particular, day laborers such as those in League City are exercising their First Amendment freedom of speech when they solicit employment from occupants of vehicles on public streets or highways. *See Comite de Jornaleros de Redondo Beach,* 657 F.3d at 946.

[26] 29. Protected speech is subject to a government's power to preserve the property under its control for the use to which it is lawfully dedicated. *Greer v. Spock,* 424 U.S. 828, 836, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976). The permissible scope of this government regulation varies depending on the nature of the forum. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,* 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).

[27] **[28]** 30. Public streets and sidewalks occupy a special position in terms of First Amendment protection. *Snyder v. Phelps,* —— U.S. ——, 131 S.Ct. 1207, 1218, 179 L.Ed.2d 172 (2011); *United States v. Grace,* 461 U.S. 171, 180, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983). In these "quintessential" public forums, the government may not prohibit all communicative activity. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983).

[29] 31. When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 816, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000).

[30] **[31]** 32. In order to enforce a content-based restriction in a traditional public forum such as a public street, the government must show that its regulation is necessary to serve a compelling state interest and narrowly drawn to achieve that end. *Carey v. Brown,* 447 U.S. 455, 461, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). This standard is essentially the same as the strict scrutiny test governing Equal Protection Clause challenges to laws classifying persons in a manner that burdens their exercise of fundamental rights. *Id.* at 461–62, 100 S.Ct. 2286.

[32] **[33]** 33. Whether a statute is content-neutral is something that can be determined from the face of it; if the statute describes speech by content then it is content-based. *City of Los Angeles v. Alameda Books, Inc.,* 535 U.S. 425, 448, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (Kennedy, J., concurring). A content-based purpose may also be sufficient to show that a regulation is content-based. *Turner Broad.* ***797** *Sys., Inc. v. FCC,* 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994).

34. Texas Transportation Code § 552.007(a) reads:

> (a) A person may not stand in a roadway to solicit a ride, contribution, employment, or business from an occupant of a vehicle, except that a person may stand in a roadway to solicit a charitable contribution if authorized to do so by the local authority having jurisdiction over the roadway.

[34] 35. Section 552.007(a) of the Texas Transportation Code is a content-based restriction on protected speech, because it forbids some but not all solicitation by a person standing in a roadway. Only solicitation for "a ride, contribution, employment, or business from an occupant of a vehicle" is proscribed. Other forms of solicitation, such as seeking political votes, support for pending legislation or social causes, or membership in a church or other organization, may continue unabated. *See Comite de Jornaleros de Redondo Beach,* 657 F.3d at 953 (M. Smith, J., specially concurring) (construing a similar city ordinance to be content-based).

36. Section 552.007(a)'s prohibition includes non-commercial forms of solicitation (*e.g.,* a ride or a contribution) and so the validity of the statute is not governed by the Supreme Court's commercial speech case law. *Id.* at 945 n. 2.

37. Section 552.007(a) also contains an express exception for solicitation of charitable contributions if authorized by the local authority. On the basis of this exception, the Texas Attorney General has issued a formal opinion declaring this statute to be a content-based speech restriction. Tex. Att'y Gen. Op. DM–367, 1995 WL 758923 (1995).

38. League City has agreed to a permanent injunction prohibiting it from enforcing Section 552.007(a) against Houston Chronicle vendors. *Houston Chronicle Publishing Co. v. Sistrunk,* No. 03–CV–1587, 122nd Judicial District Court of Galveston County, Texas, Agreed Judgment and Permanent Injunction (Mar. 3, 2004). Thus, newspaper vendors represent another form of solicitation legally exempted from the statute's sweep.

[35] 39. As a content-based restriction on protected speech in a traditional public forum, Section 552.007(a) is presumptively invalid, *R.A.V. v. City of St. Paul,* 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), and may be upheld only if it satisfies "the most exacting scrutiny." *Turner Broad. Sys.,* 512 U.S. at 642, 114 S.Ct. 2445.

[36] **[37]** 40. The regulation must be narrowly tailored to promote a compelling government interest, and "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Group, Inc.,* 529 U.S. 803, 813, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). [5]

[38] 41. According to the City, the primary government interests in enforcing this statute against day laborers are to promote traffic safety and control. Public safety is a compelling interest at the heart ***798** of government's function. *See* *Houston Chronicle Publishing Co. v. City of League City,* 488 F.3d 613, 622 (5th Cir.2007) (rejecting a facial challenge to city ordinance making it unlawful for a person within a public roadway "to solicit or sell or distribute any material to the occupant of a vehicle stopped on a public roadway in obedience to a traffic control signal light.").

42. The League City ordinance (§ 78–39) upheld by the Fifth Circuit in *Houston Chronicle* is substantially dissimilar to the Texas statute at issue here. Unlike Section 552.007(a), that League City ordinance prohibits solicitation for any purpose, not just those enumerated in 552.007(a) ("a ride, contribution, employment, or business"); contains no express exception for charitable solicitation; and is narrowly tailored to prohibit solicitation only of a vehicle "stopped on a public roadway in obedience to a traffic control signal light." 488 F.3d at 616. Given these material differences, that holding of *Houston Chronicle* is not controlling here.

43. The defendants have not shown the statute to be narrowly tailored to achieve the stated goal of promoting traffic safety and control. For example, the law incorporates exceptions for certain types of roadway solicitation, which presumably pose an equal risk to public safety; it applies to all roadways, paved or not, and at all intersections, regardless of traffic flow; [6] and it applies to vehicles lawfully parked on the side of the road, as well as to vehicles passing on the street without slowing down.

44. The defendants have provided no credible evidence that day laborer solicitation ever caused any traffic accident in League City. *See, supra,* ¶ 40.

45. Finally, the defendants have not shown why other traffic laws which do not target speech are inadequate to serve the public's legitimate interest in traffic safety and control. *See, e.g.,* TEX. TRANS. CODE § 545.302.

46. In sum, Texas Transportation Code § 552.007(a) is a content-based restriction of speech in a traditional public forum, not narrowly drawn to achieve a compelling state interest. Because a substantial number of its applications are unconstitutional, the statute in all its applications creates an unnecessary risk of chilling free speech. The statute is thus facially over-broad and invalid under the First Amendment.

"As Applied" Challenge to Tex. Transp. Code § 552.007(a)

[39] 47. A First Amendment "as-applied" claim is a challenge to the statute's application to the litigants' own expressive activities. *See* *Members of City Council of City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 803, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

[40] 48. The underlying First Amendment standard for an as-applied challenge is no different than the standard for a facial challenge. *Citizens United v. Federal Election Comm'n,* 558 U.S. 310, 331, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).

[41] 49. League City police officers apply the law to plaintiff's members unconstitutionally by enforcing Section 552.007(a) in areas outside the law's definition of "roadway."

50. The definition of roadway for purposes of Transportation Code Title 7, Subtitle C (where § 552.007 appears) is limited to "the portion of a highway, other than the berm or shoulder, that is improved, ***799** designed, or ordinarily used for vehicular travel." TEX. TRANSP. CODE § 541.302(11). Under a plain reading of this definition, the "roadway" does not include an adjacent shoulder, berm, sidewalk, median, ditch, or public easement.

51. Defendants appear to rely on a broader definition of "roadway" found in one particular section of the Texas Transportation Code, entitled "Local Authorization for Solicitation By Pedestrian." TEX. TRANSP. CODE § 552.0071(g). By its terms, this definition of "roadway" applies to the charitable solicitations described and authorized by subsection (a) of Section 552.0071. It does not apply to the *prohibitions* on solicitation set out in § 552.007(a).

52. League City police officers consistently and mistakenly applied this over-broad definition of roadway when enforcing § 552.007(a) against day laborers. *See, supra,* ¶¶ 35, 60, 88.

53. League City police officers also selectively enforced § 552.007(a) by using it to prohibit solicitation by day laborers, but not by others. Special Order 09–07 is titled "Day Laborers" rather than "Pedestrians" or "Solicitors," and does not direct officers to monitor any other type of solicitation. As a result, officers allowed other groups, such as public employees, church groups, and youth groups, to solicit in places where day laborers were forbidden to do so. *See, supra,* ¶¶ 73–77.

[42] **[43]** 54. Defendants enforcement of § 552.007(a) against day laborers was not narrowly tailored, nor did it allow ample alternative means for them to solicit employment in League City. There are now no public places in League City where day laborers may solicit work without threat of law enforcement. Forcing plaintiff's members to exercise their First Amendment rights only upon dispensation from private property owners is not a meaningful alternative. *See Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 556, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975) ("Whether petitioner might have used some other, privately owned, theater in the city for the production is of no consequence."). [7]

55. For these reasons, plaintiff is entitled to a declaratory judgment that Texas Transportation Code § 552.007(a) is unconstitutional on its face and as applied to plaintiff's members.

First Amendment Retaliation

[44] 56. The First Amendment prohibits adverse governmental action against ***800** a person for engaging in protected speech activity. *Keenan v. Tejeda,* 290 F.3d 252, 258 (5th Cir.2002).

[45] 57. To succeed on its First Amendment retaliation claim, plaintiff must prove: (1) defendants acted under color of state law; (2) plaintiff's members engaged in constitutionally protected activity; and (3) the exercise of protected speech activity by plaintiff's members substantially motivated defendants' actions. *Rolf v. City of San Antonio,* 77 F.3d 823, 827 (5th Cir.1996).

[46] 58. Defendants unquestionably acted under color of state law when, pursuant to Special Order 09–07, they began aggressively enforcing state solicitation and trespassing laws against League City day laborers.

59. Special Order 09–07 was issued by police chief Michael Jez under color of state law.

60. Plaintiff's members engaged in constitutionally protected activity when soliciting work as day laborers.

61. Prior to the issuance of Special Order 09–07 in September 2009, the LCPD had a practice and custom not to enforce § 552.007(a). *See, supra,* ¶ 55.

62. Special Order 09–07 lead to a dramatic increase in citations and arrests of day laborers for trespassing and solicitation.

63. Special Order 09–07 singled out day laborers as a special target for enforcement of state trespass and solicitation laws.

64. State solicitation law was selectively enforced against day laborers, because other groups were allowed to solicit in the roadway without complying with the Texas Transportation Code. *See, supra,* ¶¶ 70–74.

65. Defendants' actions were motivated by an intent to curtail protected speech by plaintiff's members, and therefore constitute unlawful First Amendment retaliation. [8]

Fourteenth Amendment Racial Discrimination Claim

66. The Equal Protection clause of the Fourteenth Amendment prohibits racial discrimination in the enactment or enforcement of laws. U.S. Const. Amend. 14.

[47] 67. Plaintiff's members, Latino men who speak Spanish, are members of a protected class. *Hernandez v. State of Tex.* 347 U.S. 475, 477–78, 74 S.Ct. 667, 98 L.Ed. 866 (1954).

[48] 68. A § 1983 claim of racial discrimination in violation of the Fourteenth Amendment requires plaintiff to prove not only that defendants' actions had a discriminatory impact, but also that defendants had the intent to discriminate. *Village of Arlington Heights v. Metro. Housing Dev. Corp.,* 429 U.S. 252, 265–66, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

[49] **[50]** 69. Sometimes actions may impact one group so disproportionately as to be evidence of discriminatory intent. *Id.* Circumstantial evidence such as the historical background of the actions, departures from the normal procedural sequence of events, and legislative or administrative history, may also be highly relevant to the issue of intent. *Id.* at 266–68, 97 S.Ct. 555.

70. Latino men were disproportionately impacted by Special Order 09–07. However, it is undisputed that day laborers are almost exclusively Latino men, and this ***801** fact by itself does not demonstrate racial or ethnic animus.

[51] 71. The court concludes that League City day laborers were not targeted based on who they were, but on what they did—that is, exercise their right to free speech.

72. Plaintiff has not met its burden of proof under *Village of Arlington Heights* that defendants acted with intent to discriminate based on race or national origin.

73. Accordingly, plaintiff's Fourteenth Amendment racial and national origin discrimination claim should be denied.

Permanent Injunction

[52] 74. Plaintiff is entitled to permanent injunctive relief if (1) it has suffered an irreparable injury; (2) legal remedies are inadequate; (3) the balance of hardships weighs in favor of an injunction; and (4) the public interest would not be disserved by a permanent injunction. *eBay, Inc. v. MercExchange, LLC,* 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006).

[53] 75. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. *Elrod v. Burns,* 427 U.S. 347, 373–74, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

[54] 76. Plaintiff's members have suffered, and continue to suffer, a loss of their First Amendment right to solicit.

[55] 77. A legal remedy may be deemed inadequate if plaintiff shows that a monetary award would be speculative because the amount of damage would be difficult or impossible to measure, *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 585, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), or that effective legal relief can be secured only by a multiplicity of actions such that plaintiff would be required to pursue damages each time he was injured. *Symetra Life Ins. Co. v. Rapid Settlements, Ltd.,* 657 F.Supp.2d 795, 824 (S.D.Tex.2009).

[56] 78. If plaintiff is not afforded injunctive relief, plaintiff's members would be forced into the untenable position of either foregoing their constitutional right to solicit, or exercising that right and suing for damages each time they

are subjected to unconstitutional harassment, citation, arrest, or imprisonment.

79. A monetary award for each violation of a day laborer's First Amendment right to solicit would be speculative because the amount of damage would be difficult or impossible to measure.

80. For these reasons, plaintiff has no adequate remedy at law.

[57] 81. Any hardships faced by defendants from an injunction against enforcing Texas Transportation Code 552.007(a) are greatly outweighed by the hardships faced by plaintiff's members everyday when they are effectively deprived of First Amendment freedoms. This is especially true given the other legitimate means available to the defendants to ensure traffic and public safety in League City.

[58] 82. The public interest is always served by upholding the principles embodied in the First Amendment. *Cate v. Oldham,* 707 F.2d 1176, 1190 (11th Cir.1983).

[59] 83. A permanent injunction against enforcement of Texas Transportation Code 552.007(a) and against continued use of Special Order 09–07 would serve the public interest by helping to restore faith and confidence in the justice system by all residents of League City.

84. Based on these findings of fact and conclusions of law, plaintiff is entitled to a permanent injunction against enforcement ***802** of § 552.007(a) and directing that Special Order 09–07 be rescinded.

85. Having prevailed on its First Amendment claims, plaintiff is entitled to an award of its reasonable attorneys fees and costs in prosecuting those claims. 42 U.S.C. § 1988.

III. Conclusion and Order

To summarize, in 2009 League City began a campaign of aggressively enforcing the state's pedestrian solicitation law against day laborers. That law, Texas Transportation Code § 552.007(a), on its face is a content-based restriction on protected speech. As applied by League City, the law is even more restrictive, effectively eliminating the right to solicit on public sidewalks and other public property adjoining city streets. League City seeks to justify its campaign on the basis of public safety, but city records do not show a single traffic accident attributed to a day laborer. Even accepting traffic safety as a compelling governmental interest, however, League City has failed to justify a need to serve that interest through targeting and penalizing day labor solicitation. More effective means were readily at hand, such as directly targeting those who cause accidents and risk public safety without reference to their speech, as currently proscribed under the state's existing traffic and criminal laws. Laws that restrict more protected speech than necessary, like § 552.007(a), violate the First Amendment.

In accordance with the above findings of fact and conclusions of law, the court orders that judgment be issued in plaintiff's favor on its claims that Texas Transportation Code § 552.007(a) is unconstitutional on its face and as applied, and for First Amendment retaliation.

It is ordered that judgment be issued in defendants' favor denying plaintiff's Fourteenth Amendment discrimination claim.

It is further ordered that, within 21 days after entry of this order, plaintiff shall submit a proposed final judgment granting declaratory and permanent injunctive relief consistent with these findings and conclusions, as well as a detailed declaration of reasonable attorneys fees and expenses incurred in prosecuting its successful claims.

Defendants may file objections within 14 days thereafter.

All Citations

945 F.Supp.2d 779, 35 IER Cases 1323

Footnotes

1 To the extent any item designated as a finding of fact is actually a conclusion of law, it is adopted as such and vice versa.

2 Volumes 1–5 of the trial transcript are on the record at Dkts. 160, 162, 164, 166, and 168.

3 *See* Dkt. 174, substituting Kramm as defendant for prior Chief of Police Douglas Wologo. Wologo was substituted for original defendant, former Chief Michael Jez (Dkt. 39). Texas Governor Rick Perry was originally named as a defendant

in both his official and individual capacities, but the Texas Attorney General elected to file a motion to dismiss (Dkt. 7), which was granted (Dkt. 29), thereby leaving the defense of the challenged state statute to the municipal defendants.

4 The court takes judicial notice of *Houston Chronicle Publishing Co. v. Sistrunk,* No. 03–CV1587, 122nd Judicial District Court of Galveston County, Texas, Agreed Judgment and Permanent Injunction (Mar. 3, 2004).

5 If the regulation were a content-neutral restriction of the time, place or manner of expression, the state's burden is somewhat less: it must show the regulation to be narrowly tailored to serve a significant (not necessarily compelling) government interest, and leave open ample alternative channels of communication. *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). League City cannot meet even this lesser standard because it has left open no other adequate channels of communication for day laborers.

6 *Compare* League City ordinance § 78–39, forbidding solicitation from vehicles stopped at traffic control lights.

7 The result would be the same if the day laborers were engaged in purely commercial speech, as the defendants contend and the Ninth Circuit concluded in *Valle Del Sol Inc. v. Whiting,* 709 F.3d 808, 818–19 (9th Cir.2013) (enjoining enforcement of an Arizona anti-day labor solicitation ordinance). Commercial speech is not free from Constitutional protection. *Virginia State Brd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Regulations governing commercial speech that is neither misleading nor related to illegal activity must (1) seek to implement a substantial governmental interest, (2) directly advance that interest, (3) and extend only as far as necessary. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York,* 447 U.S. 557, 564–65, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). The court has already concluded that the interest proclaimed by the government here, traffic safety, is compelling, so there is no doubt it is also substantial. As discussed above, § 552.007(a) is much broader than is necessary to advance that interest. *See Sorrell v. IMS Health Inc.,* —— U.S. ——, 131 S.Ct. 2653, 2667–68, 180 L.Ed.2d 544 (2011) ("As in previous cases, however, the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied ... it is the state's burden to justify its content-based law as consistent with the First Amendment.... There must be a fit between the legislature's ends and the means chosen to accomplish those ends.").

8 Plaintiff does not challenge the constitutionality of Texas Penal Code § 30.05(a). The court cannot enjoin, indeed plaintiff does not even ask it to enjoin, enforcement of a legitimate penal statute such as Texas Penal Code § 30.05(a) as a remedy for alleged retaliation.

122 S.Ct. 2080
Supreme Court of the United States

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., et al., Petitioners,
v.
VILLAGE OF STRATTON et al.

No. 00-1737.
|
Argued Feb. 26, 2002.
|
Decided June 17, 2002.

Synopsis
Religious organizations brought action against village, seeking to enjoin village from enforcing ordinance regulating activities of solicitors and canvassers in village, on basis that ordinance interfered with exercise of free speech and free exercise rights protected by First Amendment. Organizations moved for preliminary injunction. The United States District Court for the Southern District of Ohio, Edmund A. Sargus, Jr., J., 61 F.Supp.2d 734, granted motion in part and denied in part, and made award of attorney fees under § 1988. Appeals were taken. The United States Court of Appeals for the Sixth Circuit, 240 F.3d 553, affirmed. Certiorari was granted. The United States Supreme Court, Justice Stevens, held that ordinance that required individuals to obtain a permit prior to engaging in door-to-door advocacy and to display the permit upon demand violated the First Amendment.

Reversed and remanded.

Justice Breyer filed a concurring opinion in which Justices Souter and Ginsburg joined.

Justice Scalia filed an opinion concurring in the judgment in which Justice Thomas joined.

Chief Justice Rehnquist filed a dissenting opinion.

West Headnotes (1)

[1] Constitutional Law
Charities or Religious Organizations

Municipal Corporations
Permits

Village ordinance that required individuals to obtain a permit prior to engaging in door-to-door advocacy and to display upon demand the permit, containing one's name, violated the First Amendment as it applied to religious proselytizing, anonymous political speech, and the distribution of handbills; ordinance necessarily resulted in surrender of anonymity of individuals supporting causes, permit requirement imposed an objective burden on some speech of citizens holding religious or patriotic views, a significant amount of spontaneous speech would have been effectively banned under the ordinance, and ordinance was not tailored to the village's interest in preventing fraud, the privacy of residents, and the prevention of crime. U.S.C.A. Const.Amend. 1.

164 Cases that cite this headnote

****2081 *150** *Syllabus* *

Respondent Village of Stratton (Village) promulgated an ordinance that, *inter alia,* prohibits "canvassers" from "going in and upon" private residential property to promote any "cause" without first obtaining a permit from the mayor's office by completing and signing a registration form. Petitioners, a society and a congregation of Jehovah's Witnesses that publish and distribute religious materials, brought this action for injunctive relief, alleging that the ordinance violates their First Amendment rights to the free exercise of religion, free speech, and freedom of the press. The District Court upheld most provisions of the ordinance as valid, content-neutral regulations, although it did require the Village to accept narrowing constructions of several provisions. The Sixth Circuit affirmed. Among its rulings, that court held that the ordinance was content neutral and of general applicability and therefore subject to intermediate scrutiny; rejected petitioners' argument that the ordinance is overbroad because it impairs the right to distribute pamphlets anonymously that was recognized in *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426; concluded that the Village's interests in protecting its

residents from fraud and undue annoyance and its desire to prevent criminals from posing as canvassers in order to defraud its residents were sufficient bases on which to justify the regulation; and distinguished this Court's earlier cases protecting the Jehovah's Witnesses ministry.

Held: The ordinance's provisions making it a misdemeanor to engage in door-to-door advocacy without first registering with the mayor and receiving a permit violate the First Amendment as it applies to religious proselytizing, anonymous political speech, and the distribution of handbills. Pp. 2086-2091.

(a) For over 50 years, this Court has invalidated on First Amendment grounds restrictions on door-to-door canvassing and pamphleteering by Jehovah's Witnesses. See, *e.g., Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292. Although those cases do not directly control the question at issue, they yield several themes that guide the Court. Among other things, ***151** those cases emphasize that the hand distribution of religious tracts is ages old and has the same claim as more orthodox practices to the guarantees of freedom of religion, speech, and press, *e.g., id.,* at 109, 63 S.Ct. 870; discuss extensively the historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas, *e.g., Schneider v. State (Town of Irvington),* 308 U.S. 147, 164, 60 S.Ct. 146, 84 L.Ed. 155, but recognize the legitimate interests a town may have in some form of regulation, particularly when the solicitation of money is involved, *e.g., Cantwell v. Connecticut,* 310 U.S. 296, 306, 60 S.Ct. 900, 84 L.Ed. 1213, or the prevention of burglary is a legitimate concern, *Martin v. City of Struthers,* 319 U.S. 141, 144, 63 S.Ct. 862, 87 L.Ed. 1313; make clear that there must be a balance between such interests and ****2082** the effect of the regulations on First Amendment rights, *e.g., ibid.;* and demonstrate that the Jehovah's Witnesses have not struggled for their rights alone, but for those many who are poorly financed and rely extensively upon this method of communication, see, *e.g., id.,* at 144-146, 63 S.Ct. 862, including nonreligious groups and individuals, see, *e.g., Thomas v. Collins,* 323 U.S. 516, 539-540, 65 S.Ct. 315, 89 L.Ed. 430. Pp. 2086-2088.

(b) The Court need not resolve the parties' dispute as to what standard of review to use here because the breadth of speech affected by the ordinance and the nature of the regulation make it clear that the Sixth Circuit erred in upholding it. There is no doubt that the interests the ordinance assertedly serves-the prevention of fraud and crime and the protection of residents' privacy-are important and that the Village may seek to safeguard them through some form of regulation of solicitation activity. However, the amount of speech covered by the ordinance raises serious concerns. Had its provisions been construed to apply only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the Village's interest in protecting its residents' privacy and preventing fraud. Yet, the Village's administration of its ordinance unquestionably demonstrates that it applies to a significant number of noncommercial "canvassers" promoting a wide variety of "causes." The pernicious effect of the permit requirement is illustrated by, *e.g.,* the requirement that a canvasser be identified in a permit application filed in the mayor's office and made available for public inspection, which necessarily results in a surrender of the anonymity this Court has protected. Also central to the Court's conclusion that the ordinance does not pass First Amendment scrutiny is that it is not tailored to the Village's stated interests. Even if the interest in preventing fraud could adequately support the ordinance insofar as it applies to commercial transactions and the solicitation of funds, that interest provides no support for its application to petitioners, to political campaigns, or to enlisting support for unpopular causes. The Village's ***152** argument that the ordinance is nonetheless valid because it serves the two additional interests of protecting residents' privacy and the prevention of crime is unpersuasive. As to the former, an unchallenged ordinance section authorizing residents to post "No Solicitation" signs, coupled with their unquestioned right to refuse to engage in conversation with unwelcome visitors, provides ample protection for unwilling listeners. As to the latter, it seems unlikely that the lack of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance, and, in any event, there is no evidence in the record of a special crime problem related to door-to-door solicitation. Pp. 2088-2091.

240 F.3d 553, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, in which SOUTER and GINSBURG, JJ., joined, *post,* p. 2091. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post,* p. 2092. REHNQUIST, C.J., filed a dissenting opinion, *post,* p. 2092.

Attorneys and Law Firms

Paul D. Polidoro, Brooklyn, NY, for petitioners.

Abraham Cantor, Concord, OH, for respondents.

David M. Gormley, Delaware, OH, for Ohio, et al., as amici curiae, by special leave of the Court, supporting the respondents.

Opinion

****2083** ***153** Justice STEVENS delivered the opinion of the Court.

Petitioners contend that a village ordinance making it a misdemeanor to engage in door-to-door advocacy without first registering with the mayor and receiving a permit violates the First Amendment. Through this facial challenge, we consider the door-to-door canvassing regulation not only as it applies to religious proselytizing, but also to anonymous political speech and the distribution of handbills.

I

Petitioner Watchtower Bible and Tract Society of New York, Inc., coordinates the preaching activities of Jehovah's Witnesses throughout the United States and publishes Bibles and religious periodicals that are widely distributed. Petitioner Wellsville, Ohio, Congregation of Jehovah's Witnesses, Inc., supervises the activities of approximately 59 members in a part of Ohio that includes the Village of Stratton (Village). Petitioners offer religious literature without cost to anyone interested in reading it. They allege that they do not solicit contributions or orders for the sale of merchandise or services, but they do accept donations.

Petitioners brought this action against the Village and its mayor in the United States District Court for the Southern ***154** District of Ohio, seeking an injunction against the enforcement of several sections of Ordinance No. 1998-5 regulating uninvited peddling and solicitation on private property in the Village. Petitioners' complaint alleged that the ordinance violated several constitutional rights, including the free exercise of religion, free speech, and the freedom of the press. App. 10a-44a. The District Court conducted a bench trial at which evidence of the administration of the ordinance and its effect on petitioners was introduced.

Section 116.01 prohibits "canvassers" and others from "going in and upon" private residential property for the purpose of promoting any "cause" without first having obtained a permit pursuant to § 116.03.[1] That section provides that any canvasser who intends to go on private property to promote a cause must obtain a "Solicitation Permit" from the office of the mayor; there is no charge for the permit, and apparently one is issued routinely after an applicant ***155** fills out a fairly detailed "Solicitor's Registration Form."[2] The canvasser is then authorized to go upon premises ****2084** that he listed on the registration form, but he must carry the permit upon his person and exhibit it whenever requested to do so by a police officer or by a resident.[3] The ordinance ***156** sets forth grounds for the denial or revocation of a permit,[4] but the record before us does not show that any application has been denied or that any permit has been revoked. Petitioners did not apply for a permit.

A section of the ordinance that petitioners do not challenge establishes a procedure by which a resident may prohibit solicitation even by holders of permits. If the resident files a "No Solicitation Registration Form" with the mayor, and also posts a "No Solicitation" sign on his property, no uninvited canvassers may enter his property, unless they are specifically authorized to do so in the "No Solicitation Registration Form" itself.[5] Only 32 of the Village's 278 residents ***157** filed such forms. Each of the forms in the record contains a list of 19 suggested exceptions;[6] on one form, a resident checked 17 exceptions, ****2085** thereby excluding only "Jehovah's Witnesses" and "Political Candidates" from the list of invited canvassers. Although Jehovah's Witnesses do not consider themselves to be "solicitors" because they make no charge for their literature or their teaching, leaders of the church testified at trial that they would honor "no solicitation" signs in the Village. They also explained at trial that they did not apply for a permit because they derive their authority to ***158** preach from Scripture.[7] "For us to seek a permit from a municipality to preach we feel would almost be an insult to God." App. 321a.

Petitioners introduced some evidence that the ordinance was the product of the mayor's hostility to their ministry, but the District Court credited the mayor's testimony that it had been designed to protect the privacy rights of the Village residents, specifically to protect them "from 'flim flam' con artists who prey on small town populations." 61 F.Supp.2d 734, 736

(S.D.Ohio 1999). Nevertheless, the court concluded that the terms of the ordinance applied to the activities of petitioners as well as to "business or political canvassers," *id.,* at 737, 738.

The District Court upheld most provisions of the ordinance as valid, content-neutral regulations that did not infringe on petitioners' First Amendment rights. The court did, however, require the Village to accept narrowing constructions of three provisions. First, the court viewed the requirement in § 116.03(b)(5) that the applicant must list the specific address of each residence to be visited as potentially invalid, but cured by the Village's agreement to attach to the form a list of willing residents. *Id.,* at 737. Second, it held that petitioners could comply with § 116.03(b)(6) by merely stating their purpose as "the Jehovah's Witness ministry." *Id.,* at 738. And third, it held that § 116.05, which limited canvassing to the hours before 5 p.m., was invalid on its face and should be replaced with a provision referring to "reasonable hours of the day." *Id.,* at 739. As so modified, the court held the ordinance constitutionally valid as applied to petitioners and dismissed the case.

***159** The Court of Appeals for the Sixth Circuit affirmed. 240 F.3d 553 (2001). It held that the ordinance was "content neutral and of general applicability and therefore subject to intermediate scrutiny." *Id.,* at 560. It rejected petitioners' reliance on the discussion of laws affecting both the free exercise of religion and free speech in *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), [8] because that "language was dicta ****2086** and therefore not binding." 240 F.3d, at 561. It also rejected petitioners' argument that the ordinance is overbroad because it impairs the right to distribute pamphlets anonymously that we recognized in *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995), reasoning that "the very act of going door-to-door requires the canvassers to reveal a portion of their identities." 240 F.3d, at 563. The Court of Appeals concluded that the interests promoted by the Village-"protecting its residents from fraud and undue annoyance"-as well as the harm that it seeks to prevent-"criminals posing as canvassers in order to defraud its residents"-though "by no means overwhelming," were sufficient to justify the regulation. *Id.,* at 565-566. The court distinguished earlier cases protecting the Jehovah's Witnesses ministry because those cases either involved ***160** a flat prohibition on the dissemination of ideas, *e.g., Martin v. City of Struthers,* 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), or an ordinance that left the issuance of a permit to the discretion of a municipal officer, see, *e.g., Cantwell v. Connecticut,* 310 U.S. 296, 302, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

In dissent, Judge Gilman expressed the opinion that by subjecting noncommercial solicitation to the permit requirements, the ordinance significantly restricted a substantial quantity of speech unrelated to the Village's interest in eliminating fraud and unwanted annoyance. In his view, the Village "failed to demonstrate either the reality of the harm or the efficacy of the restriction." 240 F.3d, at 572.

We granted certiorari to decide the following question: "Does a municipal ordinance that requires one to obtain a permit prior to engaging in the door-to-door advocacy of a political cause and to display upon demand the permit, which contains one's name, violate the First Amendment protection accorded to anonymous pamphleteering or discourse?" 534 U.S. 971, 122 S.Ct. 392, 151 L.Ed.2d 297 (2001); Pet. for Cert. i. [9]

II

For over 50 years, the Court has invalidated restrictions on door-to-door canvassing and pamphleteering. [10] It is more than historical accident that most of these cases involved First Amendment challenges brought by Jehovah's Witnesses, because door-to-door canvassing is mandated by their religion. As we noted in ***161** ****2087** *Murdock v. Pennsylvania,* 319 U.S. 105, 108, 63 S.Ct. 870 (1943), the Jehovah's Witnesses "claim to follow the example of Paul, teaching 'publickly, and from house to house.' Acts 20:20. They take literally the mandate of the Scriptures, 'Go ye into all the world, and preach the gospel to every creature.' Mark 16:15. In doing so they believe that they are obeying a commandment of God." Moreover, because they lack significant financial resources, the ability of the Witnesses to proselytize is seriously diminished by regulations that burden their efforts to canvass door-to-door.

Although our past cases involving Jehovah's Witnesses, most of which were decided shortly before and during World War II, do not directly control the question we confront today, they provide both a historical and analytical backdrop for consideration of petitioners' First Amendment claim that the breadth of the Village's ordinance offends the First Amendment. [11] Those cases involved petty offenses that raised constitutional questions of the most serious magnitude-questions that implicated the free exercise of religion, the freedom of speech, and the freedom of the press. From these decisions, several themes emerge that guide our consideration of the ordinance at issue here.

First, the cases emphasize the value of the speech involved. For example, in *Murdock v. Pennsylvania,* the Court noted that "hand distribution of religious tracts is an age-old form of missionary evangelism-as old as the history of printing presses. It has been a potent force in various religious movements down through the years .... This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. ***162** It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press." *Id.,* at 108-109, 63 S.Ct. 870.

In addition, the cases discuss extensively the historical importance of door-to-door canvassing and pamphleteering as vehicles for the dissemination of ideas. In *Schneider v. State (Town of Irvington),* 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), the petitioner was a Jehovah's Witness who had been convicted of canvassing without a permit based on evidence that she had gone from house to house offering to leave books or booklets. Writing for the Court, Justice Roberts stated that "pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people. On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the *free and unhampered* distribution of pamphlets strikes at the very heart of the constitutional guarantees." *Id.,* at 164, 60 S.Ct. 146 (emphasis added).

Despite the emphasis on the important role that door-to-door canvassing and pamphleteering has played in our constitutional tradition of free and open discussion, these early cases also recognized the interests a town may have in some form of regulation, particularly when the solicitation of money is involved. In *Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), the Court held that an ordinance requiring Jehovah's Witnesses to obtain a license before soliciting door to door was invalid because the issuance of the license depended on the exercise of discretion by a city official. Our opinion recognized that "a State may protect its ****2088** citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds ***163** for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." *Id.,* at 306, 60 S.Ct. 900. Similarly, in *Martin v. City of Struthers,* the Court recognized crime prevention as a legitimate interest served by these ordinances and noted that "burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later." 319 U.S., at 144, 63 S.Ct. 862. Despite recognition of these interests as legitimate, our precedent is clear that there must be a balance between these interests and the effect of the regulations on First Amendment rights. We "must 'be astute to examine the effect of the challenged legislation' and must 'weigh the circumstances and ... appraise the substantiality of the reasons advanced in support of the regulation.' " *Ibid.* (quoting *Schneider,* 308 U.S., at 161, 60 S.Ct. 146).

Finally, the cases demonstrate that efforts of the Jehovah's Witnesses to resist speech regulation have not been a struggle for their rights alone. In *Martin,* after cataloging the many groups that rely extensively upon this method of communication, the Court summarized that "[d]oor to door distribution of circulars is essential to the poorly financed causes of little people." 319 U.S., at 144-146, 63 S.Ct. 862.

That the Jehovah's Witnesses are not the only "little people" who face the risk of silencing by regulations like the Village's is exemplified by our cases involving nonreligious

speech. See, *e.g.,* *Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980); *Hynes v. Mayor and Council of Oradell,* 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976); *Thomas v. Collins,* 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945). In *Thomas,* the issue was whether a labor leader could be required to obtain a permit before delivering a speech to prospective union members. After reviewing the Jehovah's Witnesses cases discussed above, the Court observed:

> ***164** "As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly....
>
> . . . . .
>
> "If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." *Id.,* at 539-540, 65 S.Ct. 315.

Although these World War II-era cases provide guidance for our consideration of the question presented, they do not answer one preliminary issue that the parties adamantly dispute. That is, what standard of review ought we use in assessing the constitutionality of this ordinance. We find it unnecessary, however, to resolve that dispute because the breadth of speech affected by the ordinance and the nature of the regulation make it clear that the Court of Appeals erred in upholding it.

****2089** III

The Village argues that three interests are served by its ordinance: the prevention of fraud, the prevention of crime, ***165** and the protection of residents' privacy. We have no difficulty concluding, in light of our precedent, that these are important interests that the Village may seek to safeguard through some form of regulation of solicitation activity. We must also look, however, to the amount of speech covered by the ordinance and whether there is an appropriate balance between the affected speech and the governmental interests that the ordinance purports to serve.

The text of the Village's ordinance prohibits "canvassers" from going on private property for the purpose of explaining or promoting any "cause," unless they receive a permit and the residents visited have not opted for a "no solicitation" sign. Had this provision been construed to apply only to commercial activities and the solicitation of funds, arguably the ordinance would have been tailored to the Village's interest in protecting the privacy of its residents and preventing fraud. Yet, even though the Village has explained that the ordinance was adopted to serve those interests, it has never contended that it should be so narrowly interpreted. To the contrary, the Village's administration of its ordinance unquestionably demonstrates that the provisions apply to a significant number of noncommercial "canvassers" promoting a wide variety of "causes." Indeed, on the "No Solicitation Forms" provided to the residents, the canvassers include "Camp Fire Girls," "Jehovah's Witnesses," "Political Candidates," "Trick or Treaters during Halloween Season," and "Persons Affiliated with Stratton Church." The ordinance unquestionably applies, not only to religious causes, but to political activity as well. It would seem to extend to "residents casually soliciting the votes of neighbors," [12] or ringing doorbells to enlist support for employing a more efficient garbage collector.

The mere fact that the ordinance covers so much speech raises constitutional concerns. It is offensive-not only to ***166** the values protected by the First Amendment, but to the very notion of a free society-that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition. Three obvious examples illustrate the pernicious effect of such a permit requirement.

First, as our cases involving distribution of unsigned handbills demonstrate, [13] there are a significant number of persons who support causes anonymously. [14] "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre v. Ohio Elections Comm'n,* 514 U.S., at 341-342, 115 S.Ct. 1511. The requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection necessarily results in a surrender of that anonymity. ****2090** Although it is true, as the Court of Appeals suggested, see 240 F.3d, at 563, that persons who are known to the resident reveal their allegiance to a group or cause when they present themselves at the front door to advocate an issue or to deliver a handbill, the Court of Appeals erred in concluding that the ordinance does not implicate anonymity interests. The Sixth Circuit's reasoning is undermined by ***167** our decision in *Buckley v. American Constitutional Law Foundation, Inc.,* 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999). The badge requirement that we invalidated in *Buckley* applied to petition circulators seeking signatures in face-to-face interactions. The fact that circulators revealed their physical identities did not foreclose our consideration of the circulators' interest in maintaining their anonymity. In the Village, strangers to the resident certainly maintain their anonymity, and the ordinance may preclude such persons from canvassing for unpopular causes. Such preclusion may well be justified in some situations-for example, by the special state interest in protecting the integrity of a ballot-initiative process, see *ibid.,* or by the interest in preventing fraudulent commercial transactions. The Village ordinance, however, sweeps more broadly, covering unpopular causes unrelated to commercial transactions or to any special interest in protecting the electoral process.

Second, requiring a permit as a prior condition on the exercise of the right to speak imposes an objective burden on some speech of citizens holding religious or patriotic views. As our World War II-era cases dramatically demonstrate, there are a significant number of persons whose religious scruples will prevent them from applying for such a license. There are no doubt other patriotic citizens, who have such firm convictions about their constitutional right to engage in uninhibited debate in the context of door-to-door advocacy, that they would prefer silence to speech licensed by a petty official.

Third, there is a significant amount of spontaneous speech that is effectively banned by the ordinance. A person who made a decision on a holiday or a weekend to take an active part in a political campaign could not begin to pass out handbills until after he or she obtained the required permit. Even a spontaneous decision to go across the street and urge a neighbor to vote against the mayor could not lawfully be implemented without first obtaining the mayor's permission. ***168** In this respect, the regulation is analogous to the circulation licensing tax the Court invalidated in *Grosjean v. American Press Co.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936). In *Grosjean,* while discussing the history of the Free Press Clause of the First Amendment, the Court stated that " '[t]he evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.' " *Id.,* at 249-250, 56 S.Ct. 444 (quoting 2 T. Cooley, Constitutional Limitations 886 (8th ed.1927)); see also *Lovell v. City of Griffin,* 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

The breadth and unprecedented nature of this regulation does not alone render the ordinance invalid. Also central to our conclusion that the ordinance does not pass First Amendment scrutiny is that it is not tailored to the Village's stated interests. Even if the interest in preventing fraud could adequately support the ordinance insofar as it applies to commercial transactions and the solicitation of funds, that interest provides no support for its application to petitioners, to political campaigns, or to enlisting support for unpopular causes. The Village, however, argues that the ordinance is nonetheless valid because it serves the two additional interests of protecting the privacy of the resident and the prevention of crime.

****2091** With respect to the former, it seems clear that § 107 of the ordinance, which provides for the posting of "No Solicitation" signs and which is not challenged in this case, coupled with the resident's unquestioned right to refuse to engage in conversation with unwelcome visitors, provides ample protection for the unwilling listener. *Schaumburg,* 444 U.S., at 639, 100 S.Ct. 826 ("[T]he provision permitting homeowners to bar solicitors from their property by posting [no solicitation] signs ... suggest[s] the availability of less intrusive and more effective measures to protect privacy").

The annoyance caused by an ***169** uninvited knock on the front door is the same whether or not the visitor is armed with a permit.

With respect to the latter, it seems unlikely that the absence of a permit would preclude criminals from knocking on doors and engaging in conversations not covered by the ordinance. They might, for example, ask for directions or permission to use the telephone, or pose as surveyers or census takers. See n. 1, *supra.* Or they might register under a false name with impunity because the ordinance contains no provision for verifying an applicant's identity or organizational credentials. Moreover, the Village did not assert an interest in crime prevention below, and there is an absence of any evidence of a special crime problem related to door-to-door solicitation in the record before us.

The rhetoric used in the World War II-era opinions that repeatedly saved petitioners' coreligionists from petty prosecutions reflected the Court's evaluation of the First Amendment freedoms that are implicated in this case. The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack is unchanged. It motivates our decision today.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BREYER, with whom Justice SOUTER and Justice GINSBURG join, concurring.

While joining the Court's opinion, I write separately to note that the dissent's "crime prevention" justification for this ordinance is not a strong one. Cf. *post,* at 2095-2097 (opinion of REHNQUIST, C.J.). For one thing, there is no indication that the legislative body that passed the ordinance considered this justification. Stratton did not rely on the rationale in the courts below, see 61 F.Supp.2d 734, 736 (S.D.Ohio 1999) (opinion of the District Court describing the ***170** ordinance as "constructed to protect the Village residents from 'flim flam' con artists"); 240 F.3d 553, 565 (C.A.6 2001) (opinion of the Court of Appeals describing interests as "protecting [the Village's] residents from fraud and undue annoyance"), and its general references to "deter[ing] crime" in its brief to this Court cannot fairly be construed to include anything other than the fraud it discusses specifically. Brief for Respondents 14-18.

In the intermediate scrutiny context, the Court ordinarily does not supply reasons the legislative body has not given. Cf. *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 816, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("When the Government restricts speech, *the Government bears the burden* of proving the constitutionality of its actions" (emphasis added)). That does not mean, as THE CHIEF JUSTICE suggests, that only a government with a "battery of constitutional lawyers," *post,* at 2092, could satisfy this burden. It does mean that we expect a government to give its real reasons for passing an ordinance. Legislators, in even the smallest town, are perfectly able to do so-sometimes better on their own than with too many lawyers, *e.g.,* a "battery," trying to offer their advice. I can only ****2092** conclude that if the village of Stratton thought preventing burglaries and violent crimes was an important justification for this ordinance, it would have said so.

But it is not just that. It is also intuitively implausible to think that Stratton's ordinance serves any governmental interest in preventing such crimes. As the Court notes, several categories of potential criminals will remain entirely untouched by the ordinance. *Ante,* at 2091, 2083, n. 1. And as to those who might be affected by it, "[w]e have never accepted mere conjecture as adequate to carry a First Amendment burden," *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 392, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000). Even less readily should we accept such implausible conjecture offered not by the party itself but only by an *amicus,* see Brief for Ohio et al. as *Amici Curiae* 5-6.

***171** Because Stratton did not rely on the crime prevention justification, because Stratton has not now "present[ed] more than anecdote and supposition," *Playboy Entertainment Group, supra,* at 822, and because the relationship between the interest and the ordinance is doubtful, I am unwilling to assume that these conjectured benefits outweigh the cost of abridging the speech covered by the ordinance.

Justice SCALIA, with whom Justice THOMAS joins, concurring in the judgment.

I concur in the judgment, for many but not all of the reasons set forth in the opinion for the Court. I do not agree, for example, that one of the causes of the invalidity of Stratton's ordinance is that some people have a religious objection

to applying for a permit, and others (posited by the Court) "have such firm convictions about their constitutional right to engage in uninhibited debate in the context of door-to-door advocacy, that they would prefer silence to speech licensed by a petty official." *Ante,* at 2090.

If a licensing requirement is otherwise lawful, it is in my view not invalidated by the fact that some people will choose, for religious reasons, to forgo speech rather than observe it. That would convert an invalid free-exercise claim, see *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), into a valid free-speech claim-and a more destructive one at that. Whereas the free-exercise claim, if acknowledged, would merely exempt Jehovah's Witnesses from the licensing requirement, the free-speech claim exempts *everybody,* thanks to Jehovah's Witnesses.

As for the Court's fairytale category of "patriotic citizens," *ante,* at 2090, who would rather be silenced than licensed in a manner that the Constitution (but for their "patriotic" objection) would permit: If our free-speech jurisprudence is to be determined by the predicted behavior of such crackpots, we are in a sorry state indeed.

***172** Chief Justice REHNQUIST, dissenting.

Stratton is a village of 278 people located along the Ohio River where the borders of Ohio, West Virginia, and Pennsylvania converge. It is strung out along a multilane highway connecting it with the cities of East Liverpool to the north and Steubenville and Weirton, West Virginia, to the south. One may doubt how much legal help a village of this size has available in drafting an ordinance such as the present one, but even if it had availed itself of a battery of constitutional lawyers, they would have been of little use in the town's effort. For the Court today ignores the cases on which those lawyers would have relied, and comes up with newly fashioned doctrine. This doctrine contravenes well-established precedent, renders local governments largely impotent to address the very real safety threat that canvassers pose, and may actually result in less of the door-to-door communication that it seeks to protect.

****2093** More than half a century ago we recognized that canvassers, "whether selling pots or distributing leaflets, may lessen the peaceful enjoyment of a home," and that "burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later." *Martin v. City of Struthers,* 319 U.S. 141, 144, 63 S.Ct. 862, 87 L.Ed. 1313 (1943). These problems continue to be associated with door-to-door canvassing, as are even graver ones.

A recent double murder in Hanover, New Hampshire, a town of approximately 7,500 that would appear tranquil to most Americans but would probably seem like a bustling town of Dartmouth College students to Stratton residents, illustrates these dangers. Two teenagers murdered a married couple of Dartmouth College professors, Half and Susanne Zantop, in the Zantops' home. Investigators have concluded, based on the confession of one of the teenagers, that the teenagers went door-to-door intent on stealing ***173** access numbers to bank debit cards and then killing their owners. See Dartmouth Professors Called Random Targets, Washington Post, Feb. 20, 2002, p. A2. Their *modus operandi* was to tell residents that they were conducting an environmental survey for school. They canvassed a few homes where no one answered. At another, the resident did not allow them in to conduct the "survey." They were allowed into the Zantop home. After conducting the phony environmental survey, they stabbed the Zantops to death. See *ibid.*

In order to reduce these very grave risks associated with canvassing, the 278 " 'little people,' " *ante,* at 2088, of Stratton, who, unlike petitioners, do not have a team of attorneys at their ready disposal, see Jehovah's Witnesses May Make High Court History Again, Legal Times, Feb. 25, 2002, p. 1 (noting that petitioners have a team of 12 lawyers in their New York headquarters), enacted the ordinance at issue here. The residents did not prohibit door-to-door communication; they simply required that canvassers obtain a permit before going door-to-door. And the village does not have the discretion to reject an applicant who completes the application.

The town had little reason to suspect that the negligible burden of having to obtain a permit runs afoul of the First Amendment. For over 60 years, we have categorically stated that a permit requirement for door-to-door canvassers, which gives no discretion to the issuing authority, is constitutional. The District Court and Court of Appeals, relying on our cases, upheld the ordinance. The Court today, however, abruptly changes course and invalidates the ordinance.

The Court speaks of the "historical and analytical backdrop for consideration of petitioners' First Amendment claim," *ante,* at 2087. But this "backdrop" is one of longstanding and unwavering approval of a permit requirement like Stratton's. Our early decisions in this area expressly ***174** sanction a law that merely requires a canvasser to register. In *Cantwell v. Connecticut,* 310 U.S. 296, 306, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), we stated that "[w]ithout doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." In *Murdock v. Pennsylvania,* 319 U.S. 105, 116, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), we contrasted the license tax struck down in that case with "merely a registration ordinance calling for an identification of the solicitors so as to give the authorities some basis for investigating strangers coming into the community." And *Martin, supra,* at 148, 63 S.Ct. 862, states that a "city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices ****2094** control the abuse of the privilege by criminals posing as canvassers."

It is telling that Justices Douglas and Black, perhaps the two Justices in this Court's history most identified with an expansive view of the First Amendment, authored, respectively, *Murdock* and *Martin.* Their belief in the constitutionality of the permit requirement that the Court strikes down today demonstrates just how far the Court's present jurisprudence has strayed from the core concerns of the First Amendment.

We reaffirmed our view that a discretionless permit requirement is constitutional in *Hynes v. Mayor and Council of Oradell,* 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976). *Hynes,* though striking down a registration ordinance on vagueness grounds, noted that "the Court has consistently recognized a municipality's power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing. A narrowly drawn ordinance, that does not vest in municipal officials the undefined power to determine what messages residents will hear, may serve these important interests without running afoul of the First Amendment." *Id.,* at 616-617, 96 S.Ct. 1755.

***175** The Stratton ordinance suffers from none of the defects deemed fatal in these earlier decisions. The ordinance does not prohibit door-to-door canvassing; it merely requires that canvassers fill out a form and receive a permit. Cf. *Martin, supra.* The mayor does not exercise any discretion in deciding who receives a permit; approval of the permit is automatic upon proper completion of the form. Cf. *Cantwell, supra.* And petitioners do not contend in this Court that the ordinance is vague. Cf. *Hynes, supra.*

Just as troubling as the Court's ignoring over 60 years of precedent is the difficulty of discerning from the Court's opinion what exactly it is about the Stratton ordinance that renders it unconstitutional. It is not clear what test the Court is applying, or under which part of that indeterminate test the ordinance fails. See *ante,* at 2088 (finding it "unnecessary ... to resolve" what standard of review applies to the ordinance). We are instead told that the "breadth of speech affected" and "the nature of the regulation" render the permit requirement unconstitutional. *Ibid.* Under a straightforward application of the applicable First Amendment framework, however, the ordinance easily passes muster.

There is no support in our case law for applying anything more stringent than intermediate scrutiny to the ordinance. The ordinance is content neutral and does not bar anyone from going door-to-door in Stratton. It merely regulates the manner in which one must canvass: A canvasser must first obtain a permit. It is, or perhaps I should say was, settled that the "government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' " *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (quoting *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)). Earlier ***176** this Term, the Court reaffirmed that this test applies to content-neutral time, place, or manner restrictions on speech in public forums. See *Thomas v. Chicago Park Dist.,* 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002).

The Court suggests that Stratton's regulation of speech warrants greater scrutiny. *Ante,* at 2088. But it would be puzzling if regulations of speech taking place on *another*

citizen's private property warranted greater scrutiny than regulations of speech taking place in public forums. Common sense and our precedent say just the opposite. In *Hynes,* the Court explained: **2095 " 'Of all the methods of spreading unpopular ideas, [house-to-house canvassing] seems the least entitled to extensive protection. The possibilities of persuasion are slight compared with the certainties of annoyance. Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires.' " 425 U.S., at 619, 96 S.Ct. 1755 (quoting Z. Chafee, Free Speech in the United States 406 (1954)). In *Ward,* the Court held that intermediate scrutiny was appropriate "*even* in a public forum," 491 U.S., at 791, 109 S.Ct. 2746 (emphasis added), appropriately recognizing that speech enjoys greater protection in a public forum that has been opened to all citizens, see *ibid.* Indeed, we have held that the mere proximity of private residential property to a public forum permits more extensive regulation of speech taking place at the public forum than would otherwise be allowed. See *Frisby v. Schultz,* 487 U.S. 474, 483-484, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). Surely then, intermediate scrutiny applies to a content-neutral regulation of speech that occurs not just near, but at, another citizen's private residence.

The Stratton regulation is aimed at three significant governmental interests: the prevention of fraud, the prevention of crime, and the protection of privacy.[1] The Court concedes *177 that "in light of our precedent, ... these are important interests that [Stratton] may seek to safeguard through some form of regulation of solicitation activity." *Ante,* at 2089. Although initially recognizing the important interest in preventing crime, the Court later indicates that the "absence of any evidence of a special crime problem related to door-to-door solicitation in the record before us" lessens this interest. *Ante,* at 2091. But the village is entitled to rely on our assertion in *Martin* that door-to-door canvassing poses a risk of crime, see *Erie v. Pap's A.M.,* 529 U.S. 277, 297, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (citing *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)), and the experience of other jurisdictions with crime stemming from door-to-door canvassing, see 529 U.S., at 297, 120 S.Ct. 1382; *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 393, n. 6, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000).

The double murder in Hanover described above is but one tragic example of the crime threat posed by door-to-door canvassing. Other recent examples include a man soliciting gardening jobs door-to-door who tied up and robbed elderly residents, see Van Derbken, 98-Year-Old Latest Victim in Series of Home Invasions, San Francisco Chronicle, Sept. 13, 2000, p. A18, a door-to-door vacuum cleaner salesman who raped a woman, see Employers Liable for Rape by Salesman, Texas Lawyer, Jan. 11, 1999, p. 2, and a man going door-to-door purportedly on behalf of a church group who committed multiple sexual assaults, see Ingersoll, Sex Crime Suspect Traveled with Church Group, Wis. State Journal, Feb. 19, 2000, p. 1B. The Constitution does not require that Stratton first endure its own crime wave before it takes measures to prevent crime.

What is more, the Court soon forgets both the privacy and crime interests. It finds the ordinance too broad because it applies to a "significant number of non-commercial 'canvassers.' " *Ante,* at 2089. But noncommercial canvassers, for example, those purporting to conduct environmental surveys for school, see *supra,* at 2093, can violate no trespassing *178 signs and engage in burglaries and violent crimes just as easily as commercial canvassers can. See *Martin,* 319 U.S., at 144, 63 S.Ct. 862 (canvassers, "whether selling pots *or distributing leaflets,* may lessen **2096 the peaceful enjoyment of a home" and "sp[y] out" homes for burglaries (emphasis added)). Stratton's ordinance is thus narrowly tailored. It applies to everyone who poses the risks associated with door-to-door canvassing, *i.e.,* it applies to everyone who canvasses door-to-door. The Court takes what should be a virtue of the ordinance-that it is content neutral, cf. *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 501, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996) ("[O]ur commercial speech cases have recognized the dangers that attend governmental attempts to single out certain messages for suppression")-and turns it into a vice.

The next question is whether the ordinance serves the important interests of protecting privacy and preventing fraud and crime. With respect to the interest in protecting privacy, the Court concludes that "[t]he annoyance caused by an uninvited knock on the front door is the same whether or not the visitor is armed with a permit." *Ante,* at 2091. True, but that misses the key point: The permit requirement results in fewer uninvited knocks. Those who have complied with the permit requirement are less likely to visit residences with no

trespassing signs, as it is much easier for the authorities to track them down.

The Court also fails to grasp how the permit requirement serves Stratton's interest in preventing crime.[2] We have approved of permit requirements for those engaging in protected First Amendment activity because of a commonsense recognition that their existence both deters and helps detect wrongdoing. See, *e.g.,* ***179** *Thomas v. Chicago Park Dist.,* 534 U.S. 316, 122 S.Ct. 775, 151 L.Ed.2d 783 (2002) (upholding a permit requirement aimed, in part, at preventing unlawful uses of a park and assuring financial accountability for damage caused by the event). And while some people, intent on committing burglaries or violent crimes, are not likely to be deterred by the prospect of a misdemeanor for violating the permit ordinance, the ordinance's effectiveness does not depend on criminals registering.

The ordinance prevents and detects serious crime by making it a crime not to register. Take the Hanover double murder discussed earlier. The murderers did not achieve their objective until they visited their fifth home over a period of seven months. If Hanover had a permit requirement, the teens may have been stopped before they achieved their objective. One of the residents they visited may have informed the police that there were two canvassers who lacked a permit. Such neighborly vigilance, though perhaps foreign to those residing in modern day cities, is not uncommon in small towns. Or the police on their own may have discovered that two canvassers were violating the ordinance. Apprehension for violating the permit requirement may well have frustrated the teenagers' objectives; it certainly would have assisted in solving the murders had the teenagers gone ahead with their plan.[3]

Of course, the Stratton ordinance does not guarantee that no canvasser will ever commit a burglary or violent crime. The Court seems to think this dooms the ordinance, erecting an insurmountable hurdle that a law must provide a fool-proof method of preventing crime. In order to survive intermediate scrutiny, however, a law ****2097** need not solve the crime ***180** problem, it need only further the interest in preventing crime. Some deterrence of serious criminal activity is more than enough to survive intermediate scrutiny.

The final requirement of intermediate scrutiny is that a regulation leave open ample alternatives for expression. Undoubtedly, ample alternatives exist here. Most obviously, canvassers are free to go door-to-door after filling out the permit application. And those without permits may communicate on public sidewalks, on street corners, through the mail, or through the telephone.

Intermediate scrutiny analysis thus confirms what our cases have long said: A discretionless permit requirement for canvassers does not violate the First Amendment. Today, the Court elevates its concern with what is, at most, a negligible burden on door-to-door communication above this established proposition. Ironically, however, today's decision may result in less of the door-to-door communication that the Court extols. As the Court recognizes, any homeowner may place a "No Solicitation" sign on his or her property, and it is a crime to violate that sign. *Ante,* at 2091. In light of today's decision depriving Stratton residents of the degree of accountability and safety that the permit requirement provides, more and more residents may decide to place these signs in their yards and cut off door-to-door communication altogether.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Section 116.01 provides: "The practice of going in and upon private property and/or the private residence of Village residents in the Village by canvassers, solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise or services, not having been invited to do so by the owners or occupants of such private property or residences, and not having first obtained a permit pursuant to Section 116.03 of this Chapter, for the purpose of advertising, promoting, selling and/or explaining any product, service, organization or cause, or for the purpose of soliciting orders for the sale of goods, wares, merchandise or services, is hereby declared to be a nuisance and is prohibited."

App. to Brief for Respondents 2a. The Village has interpreted the term "canvassers" to include Jehovah's Witnesses and the term "cause" to include their ministry. The ordinance does not appear to require a permit for a surveyor since such an individual would not be entering private property "for the purpose of advertising, promoting, selling and/or explaining any product, service, organization or cause, or for the purpose of soliciting orders for the sale of goods, wares, merchandise or services." Thus, contrary to the assumption of the dissent in its heavy reliance on the example from Dartmouth, *post,* at 2093, 2095, 2096 (opinion of REHNQUIST, C.J.), the Village's ordinance would have done nothing to prevent that tragic crime.

2 Section 116.03 provides:

"(a) No canvasser, solicitor, peddler, hawker, itinerant merchant or transient vendor of merchandise or services who is described in Section 116.01 of this Chapter and who intends to go in or upon private property or a private residences in the Village for any of the purposes described in Section 116.01, shall go in or upon such private property or residence without first registering in the office of the Mayor and obtaining a Solicitation Permit.

"(b) The registration required by subsection (a) hereof shall be made by filing a Solicitor's Registration Form, at the office of the Mayor, on a form furnished for such purpose. The Form shall be completed by the Registrant and it shall then contain the following information:

"(1) The name and home address of the Registrant and Registrant's residence for five years next preceding the date of registration;

"(2) A brief description of the nature and purpose of the business, promotion, solicitation, organization, cause, and/or the goods or services offered;

"(3) The name and address of the employer or affiliated organization, with credentials from the employer or organization showing the exact relationship and authority of the Applicant;

"(4) The length of time for which the privilege to canvass or solicit is desired;

"(5) The specific address of each private residence at which the Registrant intends to engage in the conduct described in Section 116.01 of this Chapter, and,

"(6) Such other information concerning the Registrant and its business or purpose as may be reasonably necessary to accurately describe the nature of the privilege desired." Brief for Respondents 3a-4a.

3 Section 116.04 provides: "Each Registrant who complies with Section 116.03(b) shall be furnished a Solicitation Permit. The permit shall indicate that the applicant has registered as required by Section 116.03 of this Chapter. No permittee shall go in or upon any premises not listed on the Registrant's Solicitor's Registration Form.

"Each person shall at all times, while exercising the privilege in the Village incident to such permit, carry upon his person his permit and the same shall be exhibited by such person whenever he is requested to do so by any police officer or by any person who is solicited." *Id.,* at 4a.

4 Section 116.06 provides: "Permits described in Section 116.04 of this Chapter may be denied or revoked by the Mayor for any one or more of the following reasons:

"(a) Incomplete information provided by the Registrant in the Solicitor's Registration Form.

"(b) Fraud or misrepresentation contained in the Solicitor's Registration Form.

"(c) Fraud, misrepresentation or false statements made in the course of conducting the activity.

"(d) Violation of any of the provisions of this chapter or of other Codified Ordinances or of any State or Federal Law.

"(e) Conducting canvassing, soliciting or business in such a manner as to constitute a trespass upon private property.

"(f) The permittee ceases to possess the qualifications required in this chapter for the original registration." *Id.,* at 5a.

5 Section 116.07 provides, in part: "(a) Notwithstanding the provisions of any other Section of this Chapter 116, any person, firm or corporation who is the owner or lawful occupant of private property within the territorial limits of the Village of Stratton, Ohio, may prohibit the practice of going in or upon the private property and/or the private residence of such owner or occupant, by uninvited canvassers, solicitors, peddlers, hawkers, itinerant merchants or transient vendors, by registering its property in accordance with Subdivision (b) of this Section and by posting upon each such registered property a sign which reads 'No Solicitation' in a location which is reasonably visible to persons who intend to enter upon such property.

"(b) The registration authorized by Subsection (a) hereof shall be made by filing a 'No Solicitation Registration Form', at the office of the Mayor, on a form furnished for such purpose. The form shall be completed by the property owner or occupant and it shall then contain the following information: ...." *Id.,* at 6a.

6 The suggested exceptions listed on the form are:

1. Scouting Organizations
2. Camp Fire Girls

3. Children's Sports Organizations
4. Children's Solicitation for Supporting School Activities
5. Volunteer Fire Dept.
6. Jehovah's Witnesses
7. Political Candidates
8. Beauty Products Sales People
9. Watkins Sales
10. Christmas Carolers
11. Parcel Delivery
12. Little League
13. Trick or Treaters during Halloween Season
14. Police
15. Campaigners
16. Newspaper Carriers
17. Persons Affiliated with Stratton Church
18. Food Salesmen
19. Salespersons.App. 229a.

Apparently the ordinance would prohibit each of these 19 categories from canvassing unless expressly exempted.

7 Specifically, from the Book of "Matthew chapter 28, verses 19 and 20, which we take as our commission to preach. ... So Jesus, by example, instituted a house-to-house search for people so as to preach the good news to them. And that's the activity that Jehovah's Witnesses engage in, even as Christ's apostles did after his resurrection to heaven." *Id.,* at 313a-314a.

8 "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut,* 310 U.S., at 304-307, 60 S.Ct. 900 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick,* 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), to direct the education of their children, see *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school)." 494 U.S., at 881, 110 S.Ct. 1595 (footnote omitted).

9 In their briefs and at oral argument, the parties debated a factual issue embedded in the question presented, namely, whether the permit contains the speaker's name. We need not resolve this factual dispute in order to answer whether the ordinance's registration requirement abridges so much protected speech that it is invalid on its face.

10 *Hynes v. Mayor and Council of Oradell,* 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976); *Martin v. City of Struthers,* 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943); *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943); *Jamison v. Texas,* 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869 (1943); *Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); *Schneider v. State (Town of Irvington),* 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); *Lovell v. City of Griffin,* 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938).

11 The question presented is similar to one raised, but not decided, in *Hynes.* The ordinance that we held invalid in that case on vagueness grounds required advance notice to the police before "casually soliciting the votes of neighbors." 425 U.S., at 620, n. 4, 96 S.Ct. 1755.

12 *Hynes,* 425 U.S., at 620, n. 4, 96 S.Ct. 1755.

13 *Talley v. California,* 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960); *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995).

14 Although the Jehovah's Witnesses do not themselves object to a loss of anonymity, they bring this facial challenge in part on the basis of overbreadth. We may, therefore, consider the impact of this ordinance on the free speech rights of individuals who are deterred from speaking because the registration provision would require them to forgo their right to speak anonymously. See *Broadrick v. Oklahoma,* 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

1 Of course, fraud itself may be a crime. I assume, as does the majority, that the interest in preventing "crime" refers to a separate interest in preventing burglaries and violent crimes.

2 It is sufficient that the ordinance serves the important interest of protecting residents' privacy. A law need only serve *a* governmental interest. Because the Court's treatment of Stratton's interest in preventing crime gives short shrift to Stratton's attempt to deal with a very serious problem, I address that issue as well.

3 Indeed, an increased focus on apprehending criminals for "petty" offenses, such as not paying subway fares, is credited with the dramatic reduction in violent crimes in New York City during the last decade. See, *e.g.,* M. Gladwell, The Tipping Point: How Little Things Can Make a Big Difference (2000). If this works in New York City, surely it can work in a small village like Stratton.

100 S.Ct. 826
Supreme Court of the United States

VILLAGE OF SCHAUMBURG, Petitioner,
v.
CITIZENS FOR A BETTER ENVIRONMENT et al.

No. 78–1335.
|
Argued Oct. 30, 1979.
|
Decided Feb. 20, 1980.
|
Rehearing Denied April 14, 1980.
|
See 445 U.S. 972, 100 S.Ct. 1668.

Synopsis
Suit was brought against a village seeking declaratory and injunctive relief with respect to an ordinance prohibiting door-to-door or on-street solicitation of contributions by charitable organizations not using at least 75% of their receipts for "charitable purposes." The United States District Court for the Northern District of Illinois entered summary judgment for plaintiff, and the Court of Appeals, 590 F.2d 220, affirmed. The Supreme Court, Mr. Justice White, held that the ordinance was unconstitutionally overbroad in violation of the First and Fourteenth Amendments.

Affirmed.

Mr. Justice Rehnquist dissented and filed opinion.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (6)

[1] Charities
Statutory regulations
Constitutional Law
Government property, use of
Constitutional Law
Residences
Constitutional Law
Charities or religious organizations

Charitable appeals for funds, on-street or door-to-door, involve variety of speech interests, including communication of information, dissemination and propagation of views and ideas, and advocacy of causes, that are within protection of First Amendment. U.S.C.A.Const. Amend. 1.

165 Cases that cite this headnote

[2] Constitutional Law
Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising

Soliciting financial support is subject to reasonable regulation, but such regulation must be undertaken with due regard for reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues, and for reality that without solicitation the flow of such information and advocacy would likely cease. U.S.C.A.Const. Amend. 1.

99 Cases that cite this headnote

[3] Constitutional Law
What is "commercial speech"
Constitutional Law
Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising

Because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about characteristics and costs of goods and services, it is not treated as variety of purely commercial speech. U.S.C.A.Const. Amend. 1.

55 Cases that cite this headnote

[4] Municipal Corporations
Permits

In suit by charitable organization against village attacking constitutionality of ordinance prohibiting door-to-door or on-street solicitation of contributions by charitable organizations not using at least 75% of their receipts for "charitable purposes," plaintiff was entitled to judgment on

facial validity of ordinance insofar as it purported to prohibit canvassing by substantial category of charities to which 75-percent limitation could not be applied consistently with First and Fourteenth Amendments even if there was no demonstration that plaintiff itself was one of such organizations. U.S.C.A.Const. Amend. 1.

60 Cases that cite this headnote

[5] **Constitutional Law**
First Amendment in General

Given case or controversy, litigant whose own activities are unprotected may nevertheless challenge statute by showing that it substantially abridges First Amendment rights of other parties not before court. U.S.C.A.Const. Amend. 1.

75 Cases that cite this headnote

[6] **Charities**
Statutory regulations

Constitutional Law
Overbreadth

Constitutional Law
Government property, use of

Constitutional Law
Residences

Constitutional Law
Charities or religious organizations

Constitutional Law
Charitable solicitation

Village ordinance prohibiting door-to-door or on-street solicitation of contributions by charitable organizations not using at least 75% of their receipts for "charitable purposes" was unconstitutionally overbroad in violation of First and Fourteenth Amendments, and could not be justified on basis that such limitation was intimately related to substantial governmental interests in preventing fraud and protecting public safety and residential privacy. U.S.C.A.Const. Amends. 1, 14; S.H.A.Ill. ch. 23, § 5102(a, f).

149 Cases that cite this headnote

****827 *620** *Syllabus* *

Petitioner village has an ordinance prohibiting door-to-door or on-street solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for "charitable purposes," such purposes being defined to exclude solicitation expenses, salaries, overhead, and other administrative expenses. After petitioner denied respondent Citizens for a Better Environment (CBE) (a nonprofit environmental-protection organization) a solicitation permit because it could not meet the ordinance's 75-percent requirement, CBE sued petitioner in Federal District Court, alleging that such requirement violated the First and Fourteenth Amendments, and seeking declaratory and injunctive relief. The District Court granted summary judgment for CBE. The Court of Appeals affirmed, rejecting petitioner's argument that summary judgment was inappropriate because there was an unresolved factual dispute as to the true character of CBE's organization, and holding that since CBE challenged the facial validity of the ordinance on First Amendment grounds the facts as to CBE's internal affairs and operations were immaterial and therefore not an obstacle to the granting of summary judgment. The court concluded that even if the 75-percent requirement might be valid as applied to other types of charitable solicitation, the requirement was unreasonable on its face because it barred solicitation by advocacy-oriented organizations even where the contributions would be used for reasonable salaries of those who gathered and disseminated information relevant to the organization's purpose.

Held : The ordinance in question is unconstitutionally overbroad in violation of the First and Fourteenth Amendments. Pp. 831–837.

(a) Charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information ****828** dissemination and propagation of views and ideas, and advocacy of causes—that are within the First Amendment's protection. While soliciting financial support is subject to reasonable regulation, such regulation must give due regard to the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, ***621** political, or social issues, and to the reality that without solicitation the flow of such information and advocacy would likely cease. Moreover,

since charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it is not dealt with as a variety of purely commercial speech. Pp. 831–834.

(b) The Court of Appeals was free to inquire whether the ordinance was overbroad, a question of law that involved no dispute about CBE's characteristics, and thus properly proceeded to rule on the merits of the summary judgment. CBE was entitled to its judgment of facial invalidity if the ordinance purported to prohibit canvassing by a substantial category of charities to which the 75-percent limitation could not be applied consistently with the First and Fourteenth Amendments, even if there was no demonstration that CBE itself was one of these organizations. Pp. 834–835.

(c) The 75-percent limitation is a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest that petitioner is entitled to protect. Here, petitioner's proffered justifications that such limitation is intimately related to substantial governmental interests in preventing fraud and protecting public safety and residential privacy are inadequate, and such interests could be sufficiently served by measures less destructive of First Amendment interests. Pp. 835–837.

590 F.2d 220, affirmed.

Attorneys and Law Firms

Jack M. Siegel, Chicago, Ill., for petitioner.

Milton I. Shadur, Chicago, Ill., for respondent.

Adam Yarmolinsky, Washington, D.C., for the Coalition of National Voluntary Organizations et al., as amici curiae, by special leave of Court.

Opinion

***622** Mr. Justice WHITE delivered the opinion of the Court.

The issue in this case is the validity under the First and Fourteenth Amendments of a municipal ordinance prohibiting the solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for "charitable purposes," those purposes being defined to exclude solicitation expenses, salaries, overhead, and other administrative expenses. The Court of Appeals held the ordinance unconstitutional. We affirm that judgment.

I

The Village of Schaumburg (Village) is a suburban community located 25 miles northwest of Chicago, Ill. On March 12, 1974, the Village adopted "An Ordinance Regulating Soliciting by Charitable Organizations," codified as Art. III of Chapter 22 of the Schaumburg Village Code (Code), which regulates the activities of "peddlers and solicitors," Code § 22–1 *et seq.* (1975). [1] ****829** Article III [2] provides that ***623** "[e]very charitable organization, which solicits or intends to solicit contributions from persons in the village by door-to-door solicitation or the use of public streets and public ways, shall prior to such solicitation apply for a permit." § 22–20. [3] ***624** Solicitation of contributions for charitable organizations without a permit is prohibited and is punishable by a fine of up to $500 for each offense. Schaumburg Ordinance No. 1052, §§ 1, 8 (1974).

Section 22–20(g), which is the focus of the constitutional challenge involved in this case, requires that permit applications, among other things, contain "[s]atisfactory proof that at least seventy-five per cent of the proceeds of such solicitations will be used directly for the charitable purpose of the organization." [4] In determining whether an organization satisfies the 75-percent requirement, the ordinance provides that

> "the following items shall not be deemed to be used for the charitable purposes of the organization, to wit:
>
> "(1) Salaries or commissions paid to solicitors;
>
> "(2) Administrative expenses of the organization, including, but not limited to, salaries, attorneys' fees, rents, telephone, advertising expenses, contributions to other organizations and persons, except as a charitable contribution and related expenses incurred as administrative or overhead items." § 22–20(g).

Respondent Citizens for a Better Environment (CBE) is an Illinois not-for-profit corporation organized for the purpose of promoting "the protection of the environment." ****830** CBE is registered with the Illinois Attorney General's Charitable Trust Division pursuant to Illinois law, [5] and has been afforded ***625** tax-exempt status by the United States

Internal Revenue Service, and gifts to it are deductible for federal income tax purposes. CBE requested permission to solicit contributions in the Village, but the Village denied CBE a permit because CBE could not demonstrate that 75 percent of its receipts would be used for "charitable purposes" as required by § 22–20(g) of the Code. CBE then sued the Village in the United States District Court for the Northern District of Illinois, charging that the 75-percent requirement of § 22–20(g) violated the First and Fourteenth Amendments. Declaratory and injunctive relief was sought.

In its amended complaint, CBE alleged that "[i]t was organized for the purpose, among others, of protecting, maintaining, and enhancing the quality of the Illinois environment." The complaint also alleged:

> "That incident to its purpose, CBE employs 'canvassers' who are engaged in door-to-door activity in the Chicago metropolitan area, endeavoring to distribute literature on environmental topics and answer questions of an environmental nature when posed; solicit contributions to financially support the organization and its programs; receive grievances and complaints of an environmental nature regarding which CBE may afford assistance in the evaluation and redress of these grievances and complaints."

The Village's answer to the complaint averred that the foregoing allegations, even if true, would not be material to ***626** the issues of the case, acknowledged that CBE employed "canvassers" to solicit funds, but alleged that "CBE is primarily devoted to raising funds for the benefit and salary of its employees and that its charitable purposes are negligible as compared with the primary objective of raising funds." The Village also alleged "that more than 60% of the funds collected [by CBE] have been spent for benefits of employees and not for any charitable purposes." [6]

Real Cause in Clean-Air Fight?" Suburban Trib, Nov. 10. 1976, p. 1. Based on reports on file with the Illinois Attorney General's office, the article stated that more than two-thirds of the funds collected by CBE in fiscal year 1975 were spent on salaries and employee health benefits. The article noted that in 1971 the Illinois Attorney General had sued CBE for failing to register its solicitors and for making false claims that CBE was working to " 'increase the size of the attorney general's staff and consequently their effectiveness in the fight against pollution.' " The suit was settled by a consent decree with CBE agreeing to register its solicitors and to change some of the claims it was making. The article stated that the chief of the Charitable Trusts and Solicitation Division of the Illinois Attorney General's office was convinced of CBE's commitment to environmental issues, but that his division would continue to monitor carefully the group's solicitation activities.

CBE moved for summary judgment and filed affidavits describing its purposes and the activities of its "canvassers" as outlined in the complaint. One of the affidavits also alleged that "the door-to-door canvass is the single most important source of funds" for CBE. A second affidavit offered by CBE stated that in 1975 the organization spent 23.3% of its income on fundraising and 21.5% of its income on administration, and that in 1976 these figures were 23.3% and 16.5%, respectively. The Village opposed the motion but filed no counteraffidavits taking issue with the factual representations in CBE's affidavits.

****831** The District Court awarded summary judgment to CBE. The court recognized that although "the government may regulate solicitation in order to protect the community from ***627** fraud, . . . [a]ny action impinging upon the freedom of expression and discussion . . . must be minimal, and intimately related to an articulated, substantial government interest." The court concluded that the 75-percent requirement of § 22–20(g) of the Code on its face was "a form of censorship" prohibited by the First and Fourteenth Amendments. Section 22–20(g) was declared void on its face, its enforcement was enjoined, and the Village was ordered to issue a charitable solicitation permit to CBE.

The Court of Appeals for the Seventh Circuit affirmed. 590 F.2d 220 (1978). The court rejected the Village's argument that summary judgment was inappropriate because material issues of fact were disputed. Because CBE challenged the facial validity of the village ordinance on First Amendment grounds, the court held that "any issue of fact as to the nature of CBE's particular activities is not material . . . and is therefore not an obstacle to the granting of summary judgment." *Id.*, at 223. Like the District Court, the Court of Appeals recognized that the Village had a legitimate interest

in regulating solicitation to protect its residents from fraud and the disruption of privacy, but that such regulation "must be done 'with narrow specificity' " when First Amendment interests are affected. *Id*., at 223–224. The court concluded that even if the 75-percent requirement might be valid as applied to other types of charitable solicitation, the Village's requirement was unreasonable on its face because it barred solicitation by advocacy-oriented organizations even "where it is made clear that the contributions will be used for reasonable salaries of those who will gather and disseminate information relevant to the organization's purpose." *Id*., at 226. The court distinguished *National Foundation v. Fort Worth*, 415 F.2d 41 (CA5 1969), cert. denied, 396 U.S. 1040, 90 S.Ct. 688, 24 L.Ed.2d 684 (1970), which upheld an ordinance authorizing denial of charitable solicitation permits to organizations with excessive solicitation costs, on the ground that although the Fort Worth ordinance deemed unreasonable solicitation costs in excess of ***628** 20 percent of gross receipts, it nevertheless permitted organizations that demonstrated the reasonableness of such costs to obtain solicitation permits.

We granted certiorari, 441 U.S. 922, 99 S.Ct. 2029, 60 L.Ed.2d 395 (1979), to review the Court of Appeals' determination that the village ordinance violates the First and Fourteenth Amendments.

II

It is urged that the ordinance should be sustained because it deals only with solicitation and because any charity is free to propagate its views from door to door in the Village without a permit as long as it refrains from soliciting money. But this represents a far too limited view of our prior cases relevant to canvassing and soliciting by religious and charitable organizations.

In *Schneider v. State*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), a canvasser for a religious society, who passed out booklets from door to door and asked for contributions, was arrested and convicted under an ordinance which prohibited canvassing, soliciting, or distribution of circulars from house to house without a permit, the issuance of which rested much in the discretion of public officials. The state courts construed the ordinance as aimed mainly at house-to-house canvassing and solicitation. This distinguished the case from *Lovell v. Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938), which had invalidated on its face and on First Amendment grounds an ordinance criminalizing the distribution of any handbill at any time or place without a permit. Because the canvasser's conduct "amounted to the solicitation . . . of money contributions without a permit" *Schneider, supra*, at 159, 60 S.Ct., at 150, and because the ordinance was thought to be valid as a protection against fraudulent ****832** solicitations, the conviction was sustained. This Court disagreed, noting that the ordinance applied not only to religious canvassers but also to "one who wishes to present his views on political, social or economic questions," 308 U.S., at 163, 60 S.Ct., at 152, and holding that the city could not, in the name of preventing fraudulent appeals, subject ***629** door-to-door advocacy and the communication of views to the discretionary permit requirement. The Court pointed out that the ordinance was not limited to those "who canvass for private profit," *ibid*., and reserved the question whether "commercial soliciting and canvassing" could be validly subjected to such controls. *Id*., at 165, 60 S.Ct., at 152.

Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), involved a state statute forbidding the solicitation of contributions of anything of value by religious, charitable, or philanthropic causes without obtaining official approval. Three members of a religious group were convicted under the statute for selling books, distributing pamphlets, and soliciting contributions or donations. Their convictions were affirmed in the state courts on the ground that they were soliciting funds and that the statute was valid as an attempt to protect the public from fraud. This Court set aside the convictions, holding that although a "general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection," *id*., at 305, 60 S.Ct. at 904, to "condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause," *id*., at 307, 60 S.Ct., at 904–905, was considered to be an invalid prior restraint on the free exercise of religion. Although *Cantwell* turned on the free exercise clause, the Court has subsequently understood *Cantwell* to have implied that soliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425

U.S. 748, 761, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363, 97 S.Ct. 2691, 2698, 56 L.Ed.2d 810 (1977).

In *Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942), an arrest was made for distributing on the public streets a commercial advertisement in violation of an ordinance forbidding this distribution. Addressing the question left open in *Schneider*, ***630** the Court recognized that while municipalities may not unduly restrict the right of communicating information in the public streets, the "Constitution imposes no such restraint on government as respects purely commercial advertising." 316 U.S., at 54, 62 S.Ct., at 921. The Court reasoned that unlike speech "communicating information and disseminating opinion" commercial advertising implicated only the solicitor's interest in pursuing "a gainful occupation." *Ibid*.

The following Term in *Jamison v. Texas*, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869 (1943), the Court, without dissent, and with the agreement of the author of the *Chrestensen* opinion, held that although purely commercial leaflets could be banned from the streets, a State could not "prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes." 318 U.S., at 417, 63 S.Ct., at 672. The Court reaffirmed what it deemed to be an identical holding in *Schneider*, as well as the ruling in *Cantwell* that "a state might not prevent the collection of funds for a religious purpose by unreasonably obstructing or delaying their collection." 318 U.S., at 417, 63 S.Ct., at 672. See also, *Largent v. Texas*, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873 (1943).

In the course of striking down a tax on the sale of religious literature, the majority opinion in ****833** *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), reiterated the holding in *Jamison* that the distribution of handbills was not transformed into an unprotected commercial activity by the solicitation of funds. Recognizing that drawing the line between purely commercial ventures and protected distributions of written material was a difficult task, the Court went on to hold that the sale of religious literature by itinerant evangelists in the course of spreading their doctrine was not a commercial enterprise beyond the protection of the First Amendment.

On the same day, the Court invalidated a municipal ordinance that forbade the door-to-door distribution of handbills, ***631** circulars, or other advertisements. None of the justifications for the general prohibition was deemed sufficient; the right of the individual resident to warn off such solicitors was deemed sufficient protection for the privacy of the citizen. *Martin v. Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943). On its facts, the case did not involve the solicitation of funds or the sale of literature.

Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945), held that the First Amendment barred enforcement of a state statute requiring a permit before soliciting membership in any labor organization. Solicitation and speech were deemed to be so intertwined that a prior permit could not be required. The Court also recognized that "espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause." *Id.*, at 538, 65 S.Ct., at 326. The Court rejected the notion that First Amendment claims could be dismissed merely by urging "that an organization for which the rights of free speech and free assembly are claimed is one 'engaged in business activities' or that the individual who leads it in exercising these rights receives compensation for doing so." *Id.*, at 531, 65 S.Ct., at 323. Concededly, the "collection of funds" might be subject to reasonable regulation, but the Court ruled that such regulation "must be done, and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly." *Id.*, at 540–541, 65 S.Ct., at 327.

In 1951, *Breard v. Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233, was decided. That case involved an ordinance making it criminal to enter premises without an invitation to sell goods, wares, and merchandise. The ordinance was sustained as applied to door-to-door solicitation of magazine subscriptions. The Court held that the sale of literature introduced "a commercial feature," *id.*, at 642, 71 S.Ct., at 932, and that the householder's interest in privacy outweighed any rights of the publisher to distribute magazines by uninvited entry on private property. The Court's opinion, however, did not indicate that the solicitation of gifts or contributions by religious or charitable organizations should

be deemed commercial activities, nor did the facts of ***632** *Breard* involve the sale of religious literature or similar materials. *Martin v. Struthers, supra*, was distinguished but not overruled.

Hynes v. Mayor of Oradell, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976), dealt with a city ordinance requiring an identification permit for canvassing or soliciting from house to house for charitable or political purposes. Based on its review of prior cases, the Court held that soliciting and canvassing from door to door were subject to reasonable regulation so as to protect the citizen against crime and undue annoyance, but that the First Amendment required such controls to be drawn with " 'narrow specificity.' " *Id.*, at 620, 96 S.Ct., at 1760. The ordinance was invalidated as unacceptably vague.

[1] **[2]** **[3]** Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject ****834** to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money. Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech. [7]

***633** III

The issue before us, then, is not whether charitable solicitations in residential neighborhoods are within the protections of the First Amendment. It is clear that they are. "[O]ur cases long have protected speech even though it is in the form of . . . a solicitation to pay or contribute money, *New York Times Co. v. Sullivan*, [376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)]." *Bates v. State Bar of Arizona*, 433 U.S., at 363, 97 S.Ct., at 2699.

The issue is whether the Village has exercised its power to regulate solicitation in such a manner as not unduly to intrude upon the rights of free speech. *Hynes v. Mayor of Oradell, supra*, 425 U.S., at 616, 96 S.Ct., at 1758. In pursuing this question we must first deal with the claim of the Village that summary judgment was improper because there was an unresolved factual dispute concerning the true character of CBE's organization. Although CBE's affidavits in support of its motion for summary judgment and describing its interests, the activities of its canvassers, and the percentage of its receipts devoted to salaries and administrative expenses were not controverted, the District Court made no findings with respect to the nature of CBE's activities; and the Court of Appeals expressly stated that the facts with respect to the internal affairs and operations of the organization were immaterial to a proper resolution of the case. The Village claims, however, that it should have had a chance to prove that the 75-percent requirement is valid as applied to CBE because CBE spends so much of its resources for the benefit of its employees that it may appropriately be deemed an organization existing for private profit rather than for charitable purposes.

[4] **[5]** We agree with the Court of Appeals that CBE was entitledto ***634** its judgment of facial invalidity if the ordinance purported to prohibit canvassing by a substantial category of charities to which the 75-percent limitation could not be applied consistently with the First and Fourteenth Amendments, even if there was no demonstration that CBE itself was one of these organizations. [8] Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court. ****835** *Grayned v. City of Rockford*, 408 U.S. 104, 114–121, 92 S.Ct. 2294, 2302–2306, 33 L.Ed.2d 222 (1972); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); *Schneider v. State*, 308 U.S., at 162–165, 60 S.Ct., at 151–152; *Lovell v. Griffin*, 303 U.S., at 451, 58 S.Ct., at 668; *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 741, 84 L.Ed. 1093 (1940). See also the discussion in *Broadrick v. Oklahoma*, 413 U.S. 601, 612–616, 93 S.Ct.

2908, 2915–2918, 37 L.Ed.2d 830 (1973), and in *Bigelow v. Virginia*, 421 U.S. 809, 815–817, 95 S.Ct. 2222, 2229–2230, 44 L.Ed.2d 600 (1975). In these First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute.

We have declared the overbreadth doctrine to be inapplicable in certain commercial speech cases, *Bates v. State Bar of Arizona, supra*, 433 U.S., at 381, 97 S.Ct., at 2707, but as we have indicated, that limitation does not concern us here. The Court of Appeals was thus free to inquire whether § 22–20(g) was overbroad, a question of law that involved no dispute about the characteristics of CBE. On this basis, proceeding to rule on the merits of ***635** the summary judgment was proper. As we have indicated, we also agree with the Court of Appeals' ruling on the motion.

IV

[6] Although indicating that the 75-percent limitation might be enforceable against the more "traditional charitable organizations" or "where solicitors represent themselves as mere conduits for contributions," 590 F.2d, at 225, 226, the Court of Appeals identified a class of charitable organizations as to which the 75-percent rule could not constitutionally be applied. These were the organizations whose primary purpose is not to provide money or services for the poor, the needy or other worthy objects of charity, but to gather and disseminate information about and advocate positions on matters of public concern. These organizations characteristically use paid solicitors who "necessarily combine" the solicitation of financial support with the "functions of information dissemination, discussion, and advocacy of public issues." *Id.*, at 225. These organizations also pay other employees to obtain and process the necessary information and to arrive at and announce in suitable form the organizations' preferred positions on the issues of interest to them. Organizations of this kind, although they might pay only reasonable salaries, would necessarily spend more than 25 percent of their budgets on salaries and administrative expenses and would be completely barred from solicitation in the Village.[9] The Court of Appeals ***636** concluded that such a prohibition was an unjustified infringement of the First and Fourteenth Amendments.

****836** We agree with the Court of Appeals that the 75-percent limitation is a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest that the Village is entitled to protect. We also agree that the Village's proffered justifications are inadequate and that the ordinance cannot survive scrutiny under the First Amendment.

The Village urges that the 75-percent requirement is intimately related to substantial governmental interests "in protecting the public from fraud, crime and undue annoyance." These interests are indeed substantial, but they are only peripherally promoted by the 75-percent requirement and could be sufficiently served by measures less destructive of First Amendment interests.

Prevention of fraud is the Village's principal justification for prohibiting solicitation by charities that spend more than one-quarter of their receipts on salaries and administrative expenses. The submission is that any organization using more than 25 percent of its receipts on fundraising, salaries, and overhead is not a charitable, but a commercial, for profit enterprise and that to permit it to represent itself as a charity is fraudulent. But, as the Court of Appeals recognized, this cannot be true of those organizations that are primarily engaged in research, advocacy, or public education and that use their own paid staff to carry out these functions as well as ***637** to solicit financial support. The Village, consistently with the First Amendment, may not label such groups "fraudulent" and bar them from canvassing on the streets and house to house.[10] Nor may the Village lump such organizations with those that in fact are using the charitable label as a cloak for profitmaking and refuse to employ more precise measures to separate one kind from the other. The Village may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. *Hynes v. Mayor of Oradell,* 425 U.S., at 620, 96 S.Ct., at 1760; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407, 1421 (1978). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . .." *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405 (1963) (citations omitted).

The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly. *Schneider v. State,* 308 U.S., at 164, 605 S.Ct., at 152; *Cantwell v. Connecticut,* 310 U.S., at 306, 60 S.Ct., at 904; *Virginia Pharmacy Board v. Virginia Citizens Consumer Council,* 425 U.S., at 771, 96 S.Ct., at 1830. [11] Efforts ***638** to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions ****837** will be employed. [12] Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses.

We also fail to perceive any substantial relationship between the 75-percent requirement and the protection of public safety or of residential privacy. There is no indication that organizations devoting more than one-quarter of their funds to salaries and administrative expenses are any more likely to employ solicitors who would be a threat to public safety than are other charitable organizations. [13] Other provisions in the ordinance that are not challenged here, such as the provision making it unlawful for charitable organizations to use convicted felons as solicitors, Code § 22–23, may bear some relation to public safety; the 75-percent requirement does not.

The 75-percent requirement is related to the protection of privacy only in the most indirect of ways. As the Village concedes, householders are equally disturbed by solicitation on behalf of organizations satisfying the 75-percent requirement as they are by solicitation on behalf of other organizations. The 75-percent requirement protects privacy only by reducing the total number of solicitors, as would any prohibition on solicitation. The ordinance is not directed to the unique privacy interests of persons residing in their homes ***639** because it applies not only to door-to-door solicitation, but also to solicitation on "public streets and public ways." § 22–20. Other provisions of the ordinance, which are not challenged here, such as the provision permitting homeowners to bar solicitors from their property by posting signs reading "No Solicitors or Peddlers Invited," § 22–24, suggest the availability of less intrusive and more effective measures to protect privacy. See *Rowan v. Post Office Dept.*, 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970); *Martin v. Struthers,* 319 U.S., at 148, 63 S.Ct., at 865.

The 75-percent requirement in the village ordinance plainly is insufficiently related to the governmental interests asserted in its support to justify its interference with protected speech. "Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than . . . [deciding in advance] what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press." *Schneider v. State, supra,* 308 U.S., at 164, 60 S.Ct., at 152.

We find no reason to disagree with the Court of Appeals' conclusion that § 22–20(g) is unconstitutionally overbroad. Its judgment is therefore affirmed.

It is so ordered.

Mr. Justice REHNQUIST, dissenting.

The Court holds that Art. III of the Schaumburg Village Code is unconstitutional as applied to prohibit respondent Citizens for a Better Environment (CBE) from soliciting contributions door to door. If read in isolation, today's decision might be defensible. When combined with this Court's earlier pronouncements on the subject, however, today's decision relegates any local government interested in regulating door-to-door activities to the role of Sisyphus.

The Court's opinion first recites the litany of language from 40 years of decisions in which this Court has considered various ***640** restrictions on the right to distribute information or solicit door to door, concluding from these decisions that "charitable appeals for ****838** funds, on the street or door to door, involve a variety of speech interests . . . that are within the protection of the First Amendment." *Ante*, at 833–834. I would have thought this proposition self-evident now that this Court has swept even the most banal commercial speech within the ambit of the First Amendment. See *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). But, having arrived at this conclusion on the basis of earlier cases, the Court effectively departs from the reasoning of those cases in discussing the limits on Schaumburg's authority to place

limitations on so-called "charitable" solicitors who go from house to house in the village.

The Court's neglect of its prior precedents in this regard is entirely understandable, since the earlier decisions striking down various regulations covering door-to-door activities turned upon factors not present in the instant case. A plurality of these decisions turned primarily, if not exclusively, upon the amount of discretion vested in municipal authorities to grant or deny permits on the basis of vague or even non-existent criteria. See *Schneider v. State*, 308 U.S. 147, 163–164, 60 S.Ct. 146, 151–152, 84 L.Ed. 155 (1939); *Cantwell v. Connecticut*, 310 U.S. 296, 305–306, 60 S.Ct. 900, 904, 84 L.Ed. 1213 (1940); *Largent v. Texas*, 318 U.S. 418, 422, 63 S.Ct. 667, 669, 87 L.Ed. 873 (1943); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620–621, 96 S.Ct. 1755, 1760–1761, 48 L.Ed.2d 243 (1976). In *Schneider*, for example, the Court invalidated such an ordinance as applied to Jehovah's Witnesses because "[i]n the end, [the applicant's] liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion." 308 U.S., at 164, 60 S.Ct., at 152. These cases clearly do not control the validity of Schaumburg's ordinance, which leaves virtually no discretion in the hands of the licensing authority.

Another line of earlier cases involved the distribution of information, as opposed to requests for contributions. *Martin v. Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), for example, dealt with ***641** Jehovah's Witnesses who had gone door to door with invitations to a religious meeting despite a local ordinance prohibiting distribution of any "handbills, circulars or other advertisements" door to door. The Court noted that such an ordinance "limits the dissemination of knowledge," and that it could "serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." *Id.,* at 144, 147, 63 S.Ct., at 865.

Here, however, the challenged ordinance deals not with the dissemination of ideas, but rather with the solicitation of money. That the *Martin* Court would have found this distinction important is apparent not only from *Martin'* s emphasis on the dissemination of knowledge, but also from various other decisions of the same period. In *Breard v. Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233 (1951), for example, the Court upheld an ordinance prohibiting "solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise" from entering private property without permission. The petitioner in *Breard* had been going door to door soliciting subscriptions for magazines. Despite petitioner's invocation of both freedom of speech and freedom of the press, the Court distinguished the "commercial feature" of the transactions from their informational overtone. See *id*., at 642, 71 S.Ct., at 932. Because *Martin* "was narrowly limited to the precise fact of the free distribution of an invitation to religious services," the Court found that it was "not necessarily inconsistent with the conclusion reached in this case." 341 U.S., at 643, 71 S.Ct., at 933.

Shunning the guidance of these cases, the Court sets out to define a new category of solicitors who may not be subjected to regulation. According to the Court, Schaumburg cannot prohibit door-to-door solicitation for contributions by "organizations whose primary purpose is . . . to gather and disseminate information about and advocate positions on matters of public ****839** concern." *Ante*, at 835. In another portion of its opinion, the majority redefines this immunity as extending to all ***642** organizations "primarily engaged in research, advocacy, or public education and that use their own paid staff to carry out these functions as well as to solicit financial support." *Ante*, at 836. This result—or perhaps, more accurately, these results—seem unwarranted by the First and Fourteenth Amendments for three reasons.

First, from a legal standpoint, the Court invites municipalities to draw a line it has already erased. Today's opinion strongly, and I believe correctly, implies that the result here would be otherwise if CBE's primary objective were to provide "information about the characteristics and costs of goods and services," *ante*, at 834, rather than to "advocate positions on matters of public concern." *Ante*, at 835. Four years ago, however, the Court relied upon the supposed bankruptcy of this very distinction in overturning a prohibition on advertising by pharmacists. See *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, supra*. According to *Virginia Pharmacy*, while "not all commercial messages contain the same or even a very great public interest element[,] [t]here are few to which such an element . . . could not be added." 425 U.S., at 764, 96 S.Ct., at 1827. This and other considerations led the Court in that case to conclude that "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." *Id*., at 765, 96 S.Ct., at 1827. To the extent that the Court found such a line elusive in *Virginia Pharmacy*, I

venture to suggest that the Court, as well as local legislators, will find the line equally elusive in the context of door-to-door solicitation.

Second, from a practical standpoint, the Court gives absolutely no guidance as to how a municipality might identify those organizations "whose primary purpose is . . . to gather and disseminate information about and advocate positions on matters of public concern," and which are therefore exempt from Art. III. Earlier cases do provide one guideline: the municipality must rely on objective criteria, since reliance ***643** upon official discretion in any significant degree would clearly run afoul of *Schneider, Cantwell, Largent*, and *Hynes*.[1] In requiring municipal authorities to use "more precise measures to separate" constitutionally preferred organizations from their less preferred counterparts, *ante*, at 836, the Court would do well to remember that these local bodies are poorly equipped to investigate and audit the various persons and organizations that will apply to them for preferred status. Stripped of discretion, they must be able to resort to a line-drawing test capable of easy and reliable application without the necessity for an exhaustive case-by-case investigation of each applicant.[2]

***644** ****840** Finally, I believe that the Court overestimates the value, in a constitutional sense, of door-to-door solicitation for financial contributions and simultaneously underestimates the reasons why a village board might conclude that regulation of such activity was necessary. In *Hynes v. Mayor of Oradel*, this Court referred with approval to Professor Zechariah Chafee's observation that "[o]f all the methods of spreading unpopular ideas, [house-to-house canvassing] seems the least entitled to extensive protection." 425 U.S., at 619, 96 S.Ct., at 1760, quoting Z. Chafee, Free Speech in the United States 406 (1954). While such activity may be worthy of heightened protection when limited to the dissemination of information, see, *e. g., Martin v. Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed.2d 1313 (1943)87 L.Ed.2d 1313 (1943), or when designed to propagate religious beliefs, see, *e. g., Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed.2d 1213 (1943)84 L.Ed.2d 1213 (1943), I believe that a simple request for money lies far from the core protections of the First Amendment as heretofore interpreted. In the case of such solicitation, the community's interest in ensuring that the collecting organization meet some objective financial criteria is indisputably valid. Regardless of whether one labels noncharitable solicitation "fraudulent," nothing in the United States Constitution should prevent residents of a community from making the collective judgment that certain worthy charities may solicit door to door while at the same time insulating themselves against panhandlers, profiteers, and peddlers.

The central weakness of the Court's decision, I believe, is its failure to recognize, let alone confront, the two most important issues in this case: how does one define a "charitable" organization, and to which authority in our federal system is application of that definition confided? I would uphold Schaumburg's ordinance as applied to CBE because that ordinance, ***645** while perhaps too strict to suit some tastes, affects only door-to-door solicitation for financial contributions, leaves little or no discretion in the hands of municipal authorities to "censor" unpopular speech, and is rationally related to the community's collective desire to bestow its largess upon organizations that are truly "charitable." I therefore dissent.

All Citations

444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Article II of Chapter 22 regulates commercial solicitation by requiring "for profit peddlers and solicitors" to obtain a commercial license. For the purposes of Art. II, peddlers and solicitors are defined as any persons who, going from place to place without appointment, offer goods or services for sale or take orders for future delivery of goods or services. Code § 22–6. Section 22–7 requires any person "engage[d] in the business of a peddler or solicitor within the village" to obtain a license. Licenses can be obtained by application to the village collector and payment of an annual fee ranging from $10 to $25. License applications must contain a variety of information, including the kind of merchandise to be offered,

the address of the applicant, the name of the applicant's employer, and whether the applicant has ever been arrested for a misdemeanor or felony. § 22–8. A license must be denied to anyone "who is not found to be a person of good character and reputation." § 22–9.

Solicitation is permitted between the hours of 9 a. m. and 6 p. m., Monday through Saturday. § 22–13. Cheating, deception, or fraudulent misrepresentation by peddlers or solicitors is prohibited by § 22–12. Peddlers and solicitors are required to depart "immediately and peacefully" from the premises of any home displaying a sign, "No Solicitors or Peddlers Invited," near the main entrance. §§ 22–15 and 22–16.

Persons violating the provisions of Art. II may be fined up to $500 for each offense. § 22–18. The village manager may revoke the license of any peddler or solicitor who violates any village ordinance or any state or federal law or who ceases to possess good character. § 22–11.

2 Article III of Chapter 22 includes §§ 22–19 to 22–24 of the Code. Section 22–19 defines a "charitable organization" as "[a]ny benevolent, philanthropic, patriotic, not-for-profit, or eleemosynary group, association or corporation, or such organization purporting to be such, which solicits and collects funds for charitable purposes." A "charitable purpose" is defined as "[a]ny charitable, benevolent, philanthropic, patriotic, or eleemosynary purpose." A "contribution" is defined as "[t]he promise or grant of any money or property of any kind or value, including payments for literature in excess of the fair market value of said literature."

3 Applications for charitable solicitation permits must include the following information: the names and addresses of the persons and organizations involved, the dates and times solicitation is to be undertaken, the geographic area in which solicitation will occur, and proof that the organization has complied with state laws governing charitable solicitation and is tax exempt under the Internal Revenue Code. The information contained in permit applications must be verified under oath by a responsible officer of the organization desiring to solicit funds. Completed applications, which must be accompanied by payment of a $10 fee, are submitted by the village clerk to the village board. "If the village board shall find and determine that all requirements of [Article III] have been met, a permit shall be issued specifying the dates and times at which solicitation may take place." § 22–21.

Charitable solicitation permits may permit solicitation only between the hours of 9 a. m. and 6 p. m., Monday through Saturday. No person who has been convicted of a felony or is under indictment for a felony may be used as a solicitor. § 22–23. Section 22–24 provides that "[n]othing herein provided shall permit a solicitor to go upon any premises which has posted a sign indicating 'no solicitors or peddlers invited.' "

4 The "satisfactory proof" of compliance with the 75-percent requirement must include "a certified audit of the last full year of operations, indicating the distribution of funds collected by the organization, or such other comparable evidence as may demonstrate the fact that at least seventy-five per cent of the funds collected are utilized directly and solely for the charitable purpose of the organization." § 22–20.

5 Illinois law requires "[e]very charitable organization . . . which solicits or intends to solicit contributions from persons in th[e] State by any means whatsoever" to file a registration statement with the Illinois Attorney General. Ill.Rev.Stat., ch. 23, § 5102(a) (1977). The registration statement must include a variety of information about the organization and its fundraising activities.

Charitable organizations are required to "maintain accurate and detailed books and records" which "shall be open to inspection at all reasonable times by the Attorney General or his duly authorized representative." § 5102(f). Registration statements filed with the Attorney General are also open to public inspection.

6 The Village appended to its answer a copy of an article appearing in a local newspaper. "Is

7 To the extent that any of the Court's past decisions discussed in Part II hold or indicate that commercial speech is excluded from First Amendment protections, those decisions, to that extent, are no longer good law. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 758–759, 762, 96 S.Ct. 1817, 1823–1824, 1825, 48 L.Ed.2d 346 (1976). For the purposes of applying the overbreadth doctrine, however, see *infra*, at 834–835, it remains relevant to distinguish between commercial and noncommercial speech. *Bates v. State Bar of Arizona*, 433 U.S. 350, 381, 97 S.Ct. 2691, 2707, 56 L.Ed.2d 810 (1977).

8 CBE defends the rationale of the Court of Appeals, but it also asserts that the facts concerning its purposes and its operations were uncontroverted and are sufficiently complete to demonstrate that the 75-percent limitation is invalid as applied to it. As a respondent, CBE is entitled to urge its position although the Court of Appeals did not reach it; but we need not pursue it since we do not conclude that the Court of Appeals was in error.

9 The village ordinance requires all charitable organizations that seek "to solicit contributions from persons in the village by door-to-door solicitation or the use of public streets and public ways" to obtain a charitable solicitation permit. Code

§ 22–20. Solicitation without a permit is prohibited. Schaumburg Ordinance No. 1052, § 1 (1974). Unlike the ordinance upheld in *National Foundation v. Fort Worth*, 415 F.2d 41 (CA5 1969), cert. denied, 396 U.S. 1040, 90 S.Ct. 688, 24 L.Ed.2d 684 (1970), the village ordinance has no provision permitting an organization unable to comply with the 75-percent requirement to obtain a permit by demonstrating that its solicitation costs are nevertheless reasonable. Moreover, because compliance with the 75-percent requirement depends on organizations' receipts and expenses during the previous year, there appears to be no way an organization can alter its spending patterns to comply with the ordinance in the short run. Thus, the village ordinance effectively bars all in-person solicitation by organizations who spent more than one-quarter of their receipts in the previous year on salaries and administrative expenses.

Although there is some suggestion that organizations unable to comply with the 75-percent requirement may be able to obtain commercial solicitation permits, the ordinance governing issuance of such permits appears to apply only to solicitors offering goods or services for sale. Code § 22–6.

10 There is no dispute that organizations of the kind described in CBE's affidavits are considered to be nonprofit, charitable organizations under both federal and state law, despite the fact that they devote more than one-quarter of their receipts to salaries and administrative expenses. The costs incurred by charitable organizations conducting fundraising campaigns can vary dramatically depending upon a wide range of variables, many of which are beyond the control of the organization.

11 The Village Code, for example, already contains direct proscriptions of fraud by commercial solicitors. Section 22–12 makes it "unlawful for any peddler or solicitor to cheat, deceive or fraudulently misrepresent, whether through himself or through an employee, while acting as a peddler or solicitor in the village. . . ." Unlike the situation in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), where we upheld disciplinary action taken against an attorney who solicited accident victims for the purpose of obtaining remunerative employment, charitable solicitation is not so inherently conducive to fraud and overreaching as to justify its prohibition.

12 Illinois law, for example, requires charitable organizations to register with the State Attorney General's Office and to report certain information about their structure and fundraising activities. Ill.Rev.Stat., ch. 23, § 5102(a) (1977). See n. 5, *supra*.

13 Indeed, solicitation by organizations employing paid solicitors carefully screened in advance may be even less of a threat to public safety than solicitation by organizations using volunteers.

1 In this regard, I find somewhat surprising the Court's reference to the ordinance considered in *National Foundation v. Fort Worth*, 415 F.2d 41 (CA5 1969), cert. denied, 396 U.S. 1040, 90 S.Ct. 688, 24 L.Ed.2d 684 (1970), as if it were an improvement on Schaumburg's ordinance. See *ante*, at 835–836, n. 9. Fort Worth requires solicitors to demonstrate that the cost of soliciting will not exceed 20 percent of the amount expected to be raised. The Court finds appeal, however, in the ability of Fort Worth's officials to waive that requirement if the applicant can show that the costs of solicitation are "not unreasonable." See 415 F.2d, at 44, n. 2. Given the potential for abuse of this open-ended grant of discretion, I would think that Fort Worth's ordinance would be more, not less, suspect than Schaumburg's.

2 The Court implies that an organization's eligibility for tax-exempt status under state or federal law could determine its eligibility for preferred constitutional status in its fundraising efforts. See *ante*, at 836, n. 10. Such a rule, although superficially appealing, suffers from serious drawbacks. The availability of such exemptions and deductions is a matter of legislative grace, not constitutional privilege. See *Commissioner v. Sullivan*, 356 U.S. 27, 28, 78 S.Ct. 512, 513, 2 L.Ed.2d 559 (1958). See also *Lewyt Corp. v. Commissioner*, 349 U.S. 237, 240, 75 S.Ct. 736, 739, 99 L.Ed. 1029 (1955). Indeed, prior to the Tax Reform Act of 1976, a federal exemption was not available to any organization that devoted a "substantial part" of its activities to attempts "to influence legislation." See 26 U.S.C. § 501(c)(3), as amended by Pub.L. 94–455, 90 Stat. 1727. See also 1976 U.S.Code Cong. & Admin.News, pp. 2897, 4104–4109. Even today there are strict limitations on the amount a tax-exempt organization can spend on such activities. See 26 U.S.C. § 501(h). Nevertheless, I imagine that the lobbying activities previously excluded from, and now closely regulated by, § 501 would lie close to the core of those activities that the Court seeks to protect. For this reason, I cannot believe that the Court bases CBE's First Amendment protection on such sandy soil. Yet it gives no indication what other objectively verifiable characteristics might render an organization eligible for preferred status under the First Amendment.

63 S.Ct. 862
Supreme Court of the United States

MARTIN
v.
CITY OF STRUTHERS, OHIO.

No. 238.
|
Argued March 11, 1943.
|
Decided May 3, 1943.

Synopsis
On Appeal from the Supreme Court of the State of Ohio.

Thelma Martin was convicted of violating an ordinance of the City of Struthers, Ohio. The Supreme Court of Ohio, 139 Ohio St. 372, 40 N.E.2d 154, dismissed an appeal from the judgment of conviction, and the defendant appeals. The United States Supreme Court dismissed the appeal, 317 U.S. 589, 63 S.Ct. 49, 87 L.Ed. 483, but vacated the judgment of dismissal, 318 U.S. 739, 63 S.Ct. 528, 87 L.Ed. 1119.

Reversed with directions.

See, also, 319 U.S. 157, 63 S.Ct. 882, 87 L.Ed. 1324.

Mr. Justice REED, Mr. Justice JACKSON and Mr. Justice ROBERTS dissenting.

West Headnotes (5)

[1] **Constitutional Law**
Freedom of Speech, Expression, and Press
Constitutional Law
Receipt of Information or Ideas; Listeners' Rights

The right of "freedom of speech" and "freedom of press" has broad scope which embraces the right to distribute literature, and the right to receive it. U.S.C.A.Const. Amends. 1, 14.

62 Cases that cite this headnote

[2] **Constitutional Law**
Government Property, Use Of

The constitutional right to distribute literature may not be withdrawn, even if it creates minor nuisance for a community of cleaning litter from its streets but peace, good order, and comfort of the community may imperatively require regulation of the time, place and manner of distribution. U.S.C.A.Const. Amends. 1, 14.

206 Cases that cite this headnote

[3] **Municipal Corporations**
Ordinances and Regulations in General

In considering validity of city ordinance limiting the distribution of literature, court could examine effect of the ordinance and weigh the circumstance and appraise the substantiality of the reasons advanced in support of the ordinance.

23 Cases that cite this headnote

[4] **Constitutional Law**
Soliciting, Canvassing, Pamphletting, Leafletting, and Fundraising

Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. U.S.C.A.Const. Amends. 1, 14.

132 Cases that cite this headnote

[5] **Constitutional Law**
Residences
Municipal Corporations
Prohibitory Ordinances

City ordinance making it unlawful for any person distributing handbills, circulars or other advertising matter to ring door bell or otherwise summon inmate of residence to door for purpose of receiving such matter violates constitutional right of "freedom of speech" and "freedom of press". U.S.C.A.Const. Amends. 1, 14.

165 Cases that cite this headnote

Attorneys and Law Firms

****862** ***141** Mr. Hayden C. Covington, of Brooklyn, N.Y., for appellant.

Messrs. Theodore T. Macejko and David C. Haynes, both of Youngstown, Ohio, for appellee.

Opinion

Mr. Justice BLACK delivered the opinion of the Court.

For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants. The question to be decided is whether the City, consistently with the federal Constitution's ***142** guarantee of free speech and press, possesses this power. [1]

****863** The appellant, espousing a religious cause in which she was interested-that of the Jehovah's Witnesses-went to the homes of strangers, knocking on doors and ringing doorbells in order to distribute to the inmates of the homes leaflets advertising a religious meeting. In doing so, she proceeded in a conventional and orderly fashion. For delivering a leaflet to the inmate of a home she was convicted in the Mayor's Court and was fined $10.00 on a charge of violating the following City ordinance:

'It is unlawful for any person distributing handbills, circulars or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing.'

The appellant admitted knocking at the door for the purpose of delivering the invitation, but seasonably urged in the lower Ohio state court that the ordinance as construed and applied was beyond the power of the State because in violation of the right of freedom of press and religion as guaranteed by the First and Fourteenth Amendments. [2]

***143** **[1]** **[2]** The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. [3] This freedom embraces the right to distribute literature, Lovell v. Griffin, 303 U.S. 444, 452, 58 S.Ct. 666, 669, 82 L.Ed. 949, and necessarily protects the right to receive it. The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets. Schneider v. State, 308 U.S. 147, 162, 60 S.Ct. 146, 151, 84 L.Ed. 155. Yet the peace, good order, and comfort of the community may imperatively require regulation of the time, place and manner of distribution. Cantwell v. Connecticut, 310 U.S. 296, 304, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 128 A.L.R. 1352. No one supposes, for example, that a city need permit a man with a communicable disease to distribute leaflets on the street or to homes, or that the First Amendment prohibits a state from preventing the distribution of leaflets in a church against the will of the church authorities.

[3] We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens, whether particular citizens want that protection or not. The ordinance does not control anything but the distribution of literature, and in that respect ***144** it substitutes the judgment of the community for the judgment of the individual householder. It submits the distributer to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it. In considering legislation which thus limits the dissemination of knowledge, we must 'be astute to examine the effect of the challenged ****864** legislation' and must 'weigh the circumstances and * * * appraise the substantiality of the reasons advanced in support of the regulation.' Schneider v. State, surpa, 308 U.S. 161, 60 S.Ct. 151, 84 L.Ed. 155.

Ordinances of the sort now before us may be aimed at the protection of the householders from annoyance, including intrusion upon the hours of rest, and at the prevention of crime. Constant callers, whether selling pots or distributing leaflets, may lessen the peaceful enjoyment of a home as much as a neighborhood glue factory or railroad yard which zoning ordinances may prohibit. In the instant case, for example, it is clear from the record that the householder to whom the appellant gave the leaflet which led to her arrest was more irritated than pleased with her visitor. The City, which is an industrial community most of whose residents are engaged in the iron and steel industry,[4] has vigorously argued that its inhabitants frequently work on swing shifts, working nights and sleeping days so that casual bell pushers might seriously interfere with the hours of sleep although they call at high noon. In addition, burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later.[5] Crime prevention may thus be the purpose of regulatory ordinancies.

***145** While door to door distributers of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes atests its major importance. 'Pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people.' Schneider v. State, supra, 308 U.S. 164, 60 S.Ct. 152, 84 L.Ed. 155. Many of our most widely established religious organizations have used this method of disseminating their doctrines,[6] and laboring groups have used it in recruiting ***146** their members. ****865** [7] The federal government, in its current war bond selling campaign, encourages groups of citizens to distribute advertisements and circulars from house to house.[8] Of, course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes.[9] Door to door distribution of circulars is essential to the poorly financed causes of little people.

[4] Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the ***147** preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states,[10] while similar statutes of narrower scope are on the books of at least twelve states more.[11] We know of no state which, ***148** as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command ****866** from the owners to stay away.[12] The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities[13] which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributers of literature may lawfully call at a home where it belongs-with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers.[14] In any case the problem must be worked ***149** out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributers from the home.

[5] The Struthers ordinance does not safeguard these constitutional rights. For this reason, and wholly aside from any other possible defects, on which we do not pass but which are suggested in other opinions filed in this case, we conclude that the ordinance is invalid because in conflict with the freedom of speech and press.

The judgment below is reversed for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice MURPHY, concurring.

I join in the opinion of the Court, but the importance of this and the other cases involving Jehovah's Witnesses decided today, moves me to add this brief statement.

I believe that nothing enjoys a higher estate in our society than the right given by the First and Fourteenth Amendments freely to practice and proclaim one's religious convictions. Cf. Jones v. Opelika, 316 U.S. 584, at page 621, 62 S.Ct. 1231, 1250, 86 L.Ed. 1691, 141 A.L.R. 514. The right extends to the aggressive and disputatious as well as to the meek and acquiescent. The lesson of experience is that-with the passage of time and the interchange of ideas-organizations, once turbulent, perfervid and intolerant in their origin, mellow into tolerance and acceptance by the community, or else sink into oblivion. Religious differences are often sharp and pleaders at times resort 'to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.' Cantwell v. Connecticut, 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213, 128 A.L.R. 1352. If a religious brlief ***150** has substance, it can survive criticism, heated and abusive though it may be, with the aid of truth and reason alone. By the same method those who follow false prophets are exposed. Repression has no place in this country. It is our proud achievement to have demonstrated that unity and strength are best accomplished, not by enforced orthodoxy of views, but by diversity ****867** of opinion through the fullest possible measure of freedom of conscience and thought.

Also, few, if any, believe more strongly in the maxim, 'a man's home is his castle', than I. Cf. Goldman v. United States, 316 U.S. 129, at page 136, 62 S.Ct. 993, 996, 86 L.Ed. 1322. If this principle approaches a collision with religious freedom, there should be an accommodation, if at all possible, which gives appropriate recognition to both. That is, if regulation should be necessary to protect the safety and privacy of the home, an effort should be made at the same time to preserve the substance of religious freedom.

There can be no question but that appellant was engaged in a religious activity when she was going from house to house in the City of Struthers distributing circulars advertising a meeting of those of her belief. Distribution of such circulars on the streets cannot be prohibited. Jamison v. Texas, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869. Nor can their distribution on the streets or from house to house be conditioned upon obtaining a license which is subject to the uncontrolled discretion of municipal officials, Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Largent v. Texas, 318 U.S. 418, 63 S.Ct. 667, 87 L.Ed. 873, or upon payment of a license tax for the privilege of so doing. Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292; Jones v. Opelika, 319 U.S. 103, 63 S.Ct. 890, 87 L.Ed. 1290, decided today. Preaching from house to house is an ageold method of proselyting, and it must be remembered that 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' Schneider v. State, supra, 308 U.S. page 163, 60 S.Ct. page 151, 84 L.Ed. 155.

***151** No doubt there may be relevant considerations which justify considerable regulation of door to door canvassing even for religious purposes,-regulation as to time, number and identification of canvassers, etc., which will protect the privacy and safety of the home and yet preserve the substance of religious freedom. And, if a householder does not desire visits from religious canvassers, he can make his wishes known in a suitable fashion. The fact that some regulation may be permissible, however, does not mean that the First Amendment may be abrogated. We are not dealing here with a statute 'narrowly drawn to cover the precise situation' that calls for remedial action, Thornhill v. Alabama, 310 U.S. 88, 105, 60 S.Ct. 736, 746, 84 L.Ed. 1093; Cantwell v. Connecticut, supra, 310 U.S. at page 311, 60 S.Ct. at page 906, 84 L.Ed. 1213, 128 A.L.R. 1352. As construed by the state courts and applied to the case at bar, the Struthers ordinance prohibits door to door canvassing of any kind, no matter what its character and purpose may be, if attended by the distribution of written or printed matter in the form of a circular or pamphlet. I do not believe that this outright prohibition is warranted. As I understand it, the distribution of circulars and pamphlets is a relatively minor aspect of the problem. The primary concern is with the act of canvassing as a source of inconvenience and annoyance to householders. But if the city can prohibit canvassing for the purpose of

distributing religious pamphlets, it can also outlaw the door to door solicitations of religious charities, or the activities of the holy mendicant who begs alms from house to house to serve the material wants of his fellowmen and thus obtain spiritual comfort for his own soul.

Prohibition may be more convenient to the law maker, and easier to fashion than a regulatory measure which adequately protects the peace and privacy of the home without suppressing legitimate religious activities. But that does not justify a repressive enactment like the one now before us. Cf. Schneider v. State, supra, 308 U.S. page 164, 60 S.Ct. page 152, 84 L.Ed. 155. Freedom of religion has a higher dignity under the Constitution ***152** than municipal or personal convenience. In these days free men have no loftier responsibility than the preservation of that freedom. A nation dedicated to that ideal will not suffer but will prosper in its observance.

Mr. Justice DOUGLAS and Mr. Justice RUTLEDGE join in this opinion.

****868** Mr. Justice FRANKFURTER.

From generation to generation fresh vindication is given to the prophetic wisdom of the framers of the Constitution in casting it in terms so broad that it has adaptable vitality for the drastic changes in our society which they knew to be inevitable, even though they could not foresee them. Thus it has come to be that the transforming consequences resulting from the pervasive industrialization of life find the Commerce Clause appropriate, for instance, for national regulation of an aircraft flight wholly within a single state. Such exertion of power by the national government over what might seem a purely local transaction would, as a matter of abstract law, have been as unimaginable to Marshall as to Jefferson precisely because neither could have foreseen the present conquest of the air by man. But law, whether derived from acts of Congress or the Constitution, is not an abstraction. The Constitution cannot be applied in disregard of the external circumstances in whch men live and move and have their being. Therefore neither the First nor the Fourteenth Amendment is to be treated by judges as though it were a mathematical abstraction, an absolute having no relation to the lives of men.

The habits and security of life in sparsely settled rural communities, or even in those few cities which a hundred and fifty years ago had a population of a few thousand, cannot be made the basis of judgment for determining the area of allowable self-protection by present-day industrial communities. The lack of privacy and the hazards ***153** to peace of mind and body caused by people living not in individual houses but crowded together in large human beehives, as they so widely do, are facts of modern living which cannot be ignored.

Concededly, the Due Process Clause of the Fourteenth Amendment did not abrogate the power of the states to recognize that homes are sancturaries from intrusions upon privacy and of opportunities for leading lives in health and safety. Door-knocking and bell-ringing by professed peddlers of things or ideas may therefore be confined within specified hours and otherwise circumscribed so as not to sanctify the rights of these peddlers in disregard of the rights of those within doors. Acknowledgement is also made that the City of Struthers, the particular ordinance of which presents the immediate issue before us, is one of those industrial communities the residents of which have a working day consisting of twenty-four hours, so that for some portions of the city's inhabitants opportunities for sleep and refreshment require during day as well as night whatever peace and quiet is obtainable in a modern industrial town. It is further recognized that the modern multiple residences give opportunities for pseudo-canvassers to ply evil trades-dangers to the community pursued by the few but farreaching in their success and in the fears they arouse.

The Court's opinion apparently recognizes these factors as legitimate concerns for regulation by those whose business it is to legislate. But it finds, if I interpret correctly what is wanting in explicitness, that instead of aiming at the protection of householders from intrusion upon needed hours of rest or from those plying evil trades, whether pretending the sale of pots and pans or the distribution of leaflets, the ordinance before us merely penalizes the distribution of ‘literature.’ To be sure, the prohibition of this ordinance is within a small circle. But it is not our business to require legislatures to extend the area ***154** of prohibition or regulation beyond the demands of revealed abuses. And the greatest leeway must be given to the legislative judgment of what those demands are. The right to legislate implies the right to classify. We should not, however unwittingly, slip into the judgment seat of legislatures. I myself cannot say that those in whose keeping is the peace of the City of Struthers and the right of privacy of its home dwellers could not single out in circumstances of which they may have knowledge and I certainly have not, this class of canvassers as the particular source of mischief. The Court's opinion leaves one in doubt whether prohibition

of all bell-ringing and door-knocking would be deemed an infringement of the constitutional protection of speech. It would be fantastic to suggest that a city has power, in the circumstances of modern urban life, to forbid house-to-house canvassing generally, but that the Constitution prohibits ****869** the inclusion in such prohibition of door-to-door vending of phylacteries or rosaries or of any printed matter. If the scope of the Court's opinion, apart from some of its general observations, is that this ordinance is an invidious discrimination against distributors of what is politely called literature, and therefore is deemed an unjustifiable prohibition of freedom of utterance, the decision leaves untouched what are in my view controlling constitutional principles, if I am correct in my understanding of what is held, and I would not be disposed to disagree with such a construction of the ordinance.

Mr. Justice REED, dissenting.

While I appreciate the necessity of watchfulness to avoid abridgments of our freedom of expression, it is impossible for me to discover in this trivial town police regulation a violation of the First Amendment. No ideas are being suppressed. No censorship is involved. The freedom to teach or preach by word or book is unabridged, save only the right to call a householder to the door of ***155** his house to receive the summoner's message. I cannot expand this regulation to a violation of the First Amendment.

Freedom to distribute publications is obviously a part of the general freedom guaranteed the expression of ideas by the First Amendment. It is trite to say that this freedom of expression is not unlimited. Obscenity, disloyalty and provocatives do not come within its protection. Near v. Minnesota, 283 U.S. 697, 712, 716, 51 S.Ct. 625, 629, 631, 75 L.Ed. 1352; Schenck v. United States, 249 U.S. 47, 51, 39 S.Ct. 247, 248, 63 L.Ed. 470; Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 574, 62 S.Ct. 766, 769, 770, 86 L.Ed. 1031. All agree that there may be reasonable regulation of the freedom of expression. Cantwell v. Connecticut, 310 U.S. 296, 304, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 128 A.L.R. 1352. One cannot throw dodgers 'broadcast in the streets.' Schneider v. State, 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155.

The ordinance forbids 'any person distributing handbills, circulars or other advertisements to ring the doorbell, sound the door knocker, or otherwise summon the inmate or inmates * * * to the door' to receive the advertisement. The Court's opinion speaks of prohibitions against the distribution of 'literature.' The precise matter distributed appears in the footnote. [1] I do not ***156** read the ordinance as prohibiting the distribution of literature nor can I appraise the dodger distributed as falling into that classification. If the ordinance, in my view, did prohibit the distribution of literature, while permitting all other canvassing, I should believe such an ordinance discriminatory. This ordinance is different. The most, it seems to me, that can be or has been read into the ordinance is a prohibition of free distribution of printed matter by summoning inmates to their doors. There are excellent reasons to support a determination of the city council that such distributors may not disturb householders while permitting salesmen and others to call them to the door. Practical experience may well convince the council that irritations arise frequently from this method of advertising. The classification is certainly not discriminatory. [2]

****870** If the citizens of Struthers desire to be protected from the annoyance of being called to their doors to receive printed matter, there is to my mind no constitutional provision which forbids their municipal council from modifying the rule that anyone may sound a call for the householder to attend his door. It is the council which is entrusted by the citizens with the power to declare and abate the myriad nuisances which develop in a community. Its determination should not be set aside by this Court unless clearly and patently unconstitutional.

The antiquity and prevalence of colportage are relied on to support the Court's decision. But the practice has persisted because the householder was acquiescent. It can hardly be thought, however, that long indulgence of a practice which many or all citizens have welcomed or tolerated creates a constitutional right to its continuance. ***157** Changing conditions have begotten modification by law of many practices once deemed a part of the individual's liberty.

The First Amendment does not compel a pedestrian to pause on the street to listen to the argument supporting another's views of religion or politics. Once the door is opened, the visitor may not insert a foot and insist on a hearing. He certainly may not enter the home. To knock or ring, however, comes close to such invasions. To prohibit such a call leaves open distribution of the notice on the street or at the home without signal to announce its deposit. Such assurance of privacy falls far short of an abridgment of freedom of the press. The ordinance seems a fair adjustment of the privilege of distributors and the rights of householders.

Mr. Justice ROBERTS and Mr. Justice JACKSON join in this dissent.

For dissenting opinion of Mr. Justice JACKSON, see 63 S.Ct. 882.

All Citations

319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313

Footnotes

1 This ordinance was not directed solely at commercial advertising. Cf. Valentine v. Chrestensen, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262; Town of Green River v. Fuller Brush Co., 10 Cir., 65 F.2d 112, 88 A.L.R. 177. Compare for possible different results under state constitutions Prior v. White, 132 Fla. 1, 180 So. 347, 116 A.L.R. 1176; City of Orangeburg v. Farmer, 181 S.C. 143, 186 S.E. 783.

2 The appellant's judgment of conviction was appealed to the Supreme Court of Ohio which dismissed the appeal on the stated ground that: 'No debatable constitutional question is involved.' City of Struthers v. Martin, 139 Ohio St. 372, 40 N.E.2d 154. We at first dismissed the appeal, thinking that the Supreme Court of Ohio meant that no constitutional question had been properly raised in accordance with Ohio procedure. 317 U.S. 589, 63 S.Ct. 49, 87 L.Ed. 483. Upon reconsideration we concluded that since a constitutional question had been presented in the lower State court, the language of the Order of the Supreme Court of Ohio should be construed as a decision upon the constitutional question. 318 U.S. 739, 63 S.Ct. 528, 87 L.Ed. 1119.

3 'The only security of all is in a free press. The force of public opinion cannot be resisted, when permitted freely to be expressed. The agitation it produces must be submitted to. It is necessary to keep the waters pure.' Jefferson to Lafayette, Writings of Thomas Jefferson, Washington ed., v. 7, p. 325.

4 16th Census, 'Population-2d Series-Ohio', 133, 151.

5 For a discussion of such practices see Soderman and O'Connell, Modern Criminal Investigation, chap. 13 and chap. 20; Federal Bureau of Investigation Law Enforcement Bulletin, July, 1938; 20 Public Management 83 (an analysis of the criminal records of a group of canvassers in Winnetka, Illinois). Sacramento, California, has rested a canvassing ordinance on crime prevention, In re Hartmann, 25 Cal.App.2d 55, 76 P.2d 709, and courts have been aware of this aspect of the problem in dealing with such ordinances. Allen v. McGovern, 169 A. 345, 12 N.J.Misc. 12, 13; Dziatkiewicz v. Maplewood, 115 N.J.L. 37, 178 A. 205.

6 Representatives of the American Tract Society, an interdenominational organization engaged in colportage since 1841, have visited over twenty-five million families. Article on 'American Tract Society', 1 Encyclopedia Americana (1932 ed.) 566; Annual Reports of the American Tract Society (e.g. the 116th Report, 1941, 37-38; 117th Report, 1942, pp. 37-38); Baird, Religion in America (1856), 334-340.
See also the activities of the American Bible Society. Jones, Colportage Sketches (1883); Dwight, The Centennial History of he American Bible Society (1916) 177-81, 293-95, 460; Annual Reports of the American Bible Society (e.g., 126th Report, 1942, passim.).
For the world-wide colportage activities of the British and Foreigh Bible Society, see the Society's 137th Report, 1941, passim; For Wayfaring Men, (1939), 31-78; Ritson, The World Is our Parish (1939), 116-18.
This practice has been followed by many religious groups. See, e.g., Barnes, Barnes and Stephenson, Pioneers of Light (1924), 81-104; Stevens, The First Hundred Years of the American Baptist Publication Society (1925), 30-32. During the fiscal year 1939-1940, representatives of the American Baptist Publication Society visited 52,832 families. More than six million families have been visited over a one hundred year period. Annual of Northern Baptist Convention, 1940, 671, 673; Year Book of the Northern Baptist Convention, 1942, 332-335. See for the practice of other religions, Stewart, Sheldon Jackson (1908), 32; Goodykoontz, Home Missions on the American Frontier (1939), 120-122; Keller, The Second Great Awakening in Connecticut (1942), 117-121.

7 Lorwin and Flexner, The American Federation of Labor, 352; International Ladies Garment Workers Union, Handbook of Trade Union Methods, 10; Brooks, When Labor Organizes, chap. 1 ('Organizing a Union').

8 'Women's Handbook', pp. 22 and 63, a publication of the Women's Section of the War Savings Staff of the Department of the Treasury; The Home Front Journal, April 1943, p. 1, a publication of the same group; 'A Program of Action for

Clubs', p. 3, a publication of the Department of the Treasury. Presumably a citizen of Struthers distributing to homes the pamphlets recommended in 'A Program of Action' would violate the City's ordinance.

9 Merriam and Gosnell, The American Party System, 317 (The Canvass); Bruce, American Parties and Politics, 407; Ostogoskii, Democracy, 153-155, 453; Pierson, In the Brush, 142 (politics in the old Southwest); Barnes, The Antislavery Impulse, 137-143 (circulation of antislavery petitions). The American Politician, ed. by J. T. Salter, 19, 235, 310, 339, and The American Political Scene, ed. by Edward Logan, 64, 150, indicate by passing references to practices in many states the extent to which the door to door canvass is a staple of political life.
For encouragement of this practice see Handbook of Club Organization, National Federation of Women's Republican Clubs (1942) 21; and Precinct Organization in War Time, a recent publication of the Democratic National Committee.

10 Alabama Code (1940), Tit. 14, s 426; Connecticut Gen.Stat. (1930), s 6119; Florida Stat. (1941), s 821.01; Georgia Code Ann. (1938), s 26-3002; Illinois Ann.Stat. (Smith Hurd, 1935), Ch. 38, s 565; Indiana Stat. (Burns, 1933), s 10-4506; Maryland Ann.Code (Flack, 1939), Art. 27, ss 24, 286; Massachusetts Ann.Laws (1933), v. 9, Ch. 266, s 120; Mississippi Code Ann. (1930), s 1168; Nebraska Comp.Stat. (1929), ss 76-807, 76-808; Nevada Comp.Laws (1929), s 10447; North Carolina Code (1943), s 14-134; Ohio Code Ann. (Throckmorton, 1942), s 12522; Oklahoma Stat. (1937), Tit. 21, s 1835; Oregon Comp.Laws Ann. (1940), ss 23-593, 23-594; Pennsylvania Ann.Stat. (Purdon, 1942 pocket part), Title 18, s 4954; South Carolina Code (1942), s 1190; Virginia Code (1936), s 4480a; Washington Rev.Stat. (Remington, 1932), s 2665; Wyoming Rev.Stat. (1931), s 32-337.

11 Arkansas Stat. (Pope, 1937), s 3181; California Penal Code (Deering, 1941), ss 602, 627; Colorado Stat.Ann. (1935), vol. 3, Ch. 73, s 118; Kentucky Rev.Stat. (Baldwin, 1942), ss 433.720, 433.490; Louisiana Gen.Stat. (Dart, 1939), s 9463; Maine Rev.Stat. (1930), Ch. 139, s 22; Minnesota Stat. (1941), s 621.57; Montana Rev.Code Ann. (1935) s 11482; New Hampshire Public Laws (1926), Ch. 380, s 11; New Jersey Rev.Stat. (1937), Tit. 4, s 17-2, N.J.S.A. 4:17-2; New York Consol.Laws Ann. (McKinney, 1941), Conservation Law, ss 361-364; Texas Stat. (Vernon, 1936), P.C. Art. 1377.

12 Municipalities have occasionally made canvassers trespassers without requiring that the householder give an explicit notice, as the instant ordinance testifies. See e.g. People v. Bohnke, 287 N.Y. 154, 38 N.E. 478.

13 Municipalities and the Law in Action (1943), National Institute of Municipal Law Officers, 373. We do not, by this reference, mean to express any opinion on the widsom or validity of the particular proposals of the Institute.

14 'Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct. Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury. Without doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.' Cantwell v. Connecticut, 310 U.S. 296, 306, 60 S.Ct. 900, 904, 84 L.Ed. 1213, 128 A.L.R. 1352.

1 'Religion as a World Remedy, The Evidence in Support Thereof. Hear Judge Rutherford, Sunday, July 28, 4 P.M., E.S.T. Free. All Persons of Goodwill Welcome, Free. Columbus Coliseum, Ohio State Fair Grounds. (on one side)
'1940's Event of Paramount Importance To You! What is it? The Theocratic Convention of Jehovah's Witnesses. Five Days-July 24-28-Thirty Cities. All Lovers of Righteousness-Welcome! The strange fate threatening all 'Christendom' makes it imperative that you Come and Hear the public address on Religion As A World Remedy, The Evidence in Support Thereof, by Judge Rutherford at the Coliseum of the Ohio State Fair Grounds, Columbus, Ohio, Sunday, July 28, at 4 p.m., E.S.T. 'He that hath an ear to hear' will come to one of the auditoriums of the convention cities listed below, tied in with Columbus by direct wire. Some of the 30 cities are (21 are listed). For detailed information concerning these conventions write Watchtower Convention Committee, 117 Adams St., Brooklyn, N.Y.' (on the other side)

2 Keokee Coke Co. v. Taylor, 234 U.S. 224, 34 S.Ct. 856, 58 L.Ed. 1288; German Alliance Insurance Co. v. Kansas, 233 U.S. 389, 34 S.Ct. 612, 58 L.Ed. 1011, L.R.A.1915C, 1189; Hall v. Geiger-Jones Co., 242 U.S. 539, 37 S.Ct. 217, 61 L.Ed. 480, L.R.A.1917F, 514, Ann.Cas.1917C, 643; State of Minnesota v. Probate Court, 309 U.S. 270, 60 S.Ct. 523, 84 L.Ed. 744, 126 A.L.R. 530; National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46, 57 S.Ct. 615, 628, 81 L.Ed. 893, 108 A.L.R. 1352; Carmichael v. Southern Coal Co., 301 U.S. 495, 509, 512, 57 S.Ct. 868, 872, 873, 81 L.Ed. 1245, 109 A.L.R. 1327.

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COUNCIL AGENDA ITEM MEMORANDUM

DEPT. / DIVISION SUBMISSION REVIEW:

Jason Deckman, Planner

ITEM DESCRIPTION: FIRST READING – PUBLIC HEARING – FY-19-29-ZC: Consider adopting an ordinance authorizing a Conditional Use Permit with a Site Plan to allow for the sale of beer and wine for on-premise consumption of less than 10% of total revenue at 10148 West Adams Avenue.

PLANNING & ZONING COMMISSION RECOMMENDATION: During its October 7, 2019, meeting, the Planning & Zoning Commission voted 8 to 0 to recommend approval per staff's recommendation.

STAFF RECOMMENDATION: Staff recommends approval of the requested Conditional Use Permit. The request is:

1. Compatible with surrounding uses;
2. Compliant with the specific standards in Unified Development Code (UDC) Section 5.3.15 Alcoholic Beverage Sales for On-Premise Consumption;
3. Compliant with the CUP review criteria in UDC Section 3.5.4; and
4. Compliant with Chapter 4 of the City of Temple Code of Ordinances related to alcoholic beverages.

Staff recommends approval of the Conditional Use Permit subject to the following conditions:

1. Substantial compliance with the building footprint depicted by Site Plan, attached as Exhibit A;
2. Compliance with the City of Temple Code of Ordinances, Chapter 4, "Alcoholic Beverages" and applicable TABC regulations; and
3. That the Director of Planning may be authorized to approve minor changes to the Site Plan, which may include but are not limited to: building footprint configuration, exterior building materials, and landscaping.

ITEM SUMMARY: TrueCore Fitness is a locally-owned fitness center providing various types of exercise classes in a new building being constructed on West Adams Avenue. Amenities to be provided include a separate space for child care, a fenced outdoor patio, and a café area serving snacks and drinks. The requested Conditional Use Permit will allow only beer and wine to be served to members of the fitness center.

BACKGROUND: TrueCore Fitness will be open seven days a week. Monday through Friday hours are divided between morning and evening classes, from 5:30 to 11:30 a.m. and from 4:30 to 8:30 p.m. On Saturday the fitness center is open from 8:00 a.m. to 12:00 p.m. and Sunday from 2:00 to 6:00 p.m. All clients have appointments and sign up for classes in advance.

Alcohol will be available between 5:30 and 8:30 pm from Monday to Friday and will not be served on weekends. The applicant has a TABC "Wine & Beer Retailers Permit" that will allow on-premise consumption and purchase of bottles to take home. Consumption of alcohol will be restricted to after the workout session. As opposed to a bar or tavern, a bartender will not serve the drinks. Each client will purchase a card to use on a wine dispensing machine that provides measured amounts of wine. The dispenser provides 1-ounce, 3-ounce, and 6-ounce pours with consumption limited to 10 ounces. Additional pours will require assessment and approval by the manager to reset the client's card. The cards will only be available to TrueCore account holders, not guests. The manager and selected trainers will have a TABC server's license, even though they aren't physically pouring the drinks. The child care room has a separate entrance and children are not allowed in the studio. This will minimize the likelihood of minors being exposed to alcohol and/or alcohol consumption.

Additionally, the UDC states*:*

The City Council may deny or revoke a Conditional Use Permit in accordance with UDC Section 3.5 if is affirmatively determines that the issuance of the permit is:

a. Incompatible with the surrounding uses of property; or

b. Detrimental or offensive to the neighborhood or contrary to the health, safety and general welfare of the City and its inhabitants, and

c. Per UDC Section 3.5.5, the Planning & Zoning Commission may recommend, and the City Council may impose additional conditions of approval.

Sales of alcoholic beverages for on-premise consumption are permitted in the Neighborhood Services zoning district with a Conditional Use Permit, where less than 75% of revenue is derived from sales of beer and wine.

Further, Chapter 4 of the City Code requires that all establishments with alcoholic beverage sales with on-premise consumption are not within a straight-line distance of 300 feet of a place of worship, public school, or public hospital. None of the identified uses are within 300 feet of the fitness center.

The proposed Conditional Use Permit has demonstrated compliance to the seven Review Criteria as set forth in UDC Section 3.5.4 (A-G). Sales of alcoholic beverages will take place entirely within the fitness center, during a defined time frame. Alcohol sales will not take place on the weekends and the purchase of individual drinks will be monitored through an electronic card system that limits purchases to a total of 10 ounces per visit, unless otherwise authorized by the manager. Staff is confident that the use will not create an impediment to development and the measures in place will mitigate the likelihood of a nuisance to the neighboring properties. A brief summary of each item is provided in the attached table. If the Conditional Use Permit is approved by City Council, the attached Site Plan will be included as Exhibit A with the ordinance.

DEVELOPMENT REGULATIONS: Building permits have been issued and construction is underway. Parking, landscaping and setbacks were addressed during the permit approval process.

DEVELOPMENT REVIEW COMMITTEE (DRC): Members of the DRC reviewed the proposed conditional use permit and site plan. No issues were identified during the review.

PUBLIC NOTICE: Twenty notices of the public hearing were sent out to property owners within 200-feet of the subject property as required by State law and City Ordinance. As of Thursday, October 3, 2019 at 12:00 pm, four notices have been received in agreement. An update regarding late notices will be provided at Council, if necessary.

The newspaper printed notice of the public hearing on September 5, 2019, in accordance with state law and local ordinance.

FISCAL IMPACT: Not Applicable

ATTACHMENTS:
Site Plan (Exhibit A)
Maps
Conditional Use Permit Review Criteria Table (UDC Section 3.5.4 (A-G)
Site Photos
Returned Property Notices
Ordinance

Exhibit A

FLOOR PLAN NOTES

1. DIMENSIONS INDICATED ARE TO FACE OF PARTITION. PARTITIONS ARE 4-7/8" THICK UNLESS NOTED OTHERWISE.

2. PARTITIONS AND OTHER CONSTRUCTION THAT APPEAR TO ALIGN SHALL BE ASSUMED TO ALIGN FLUSH, UNLESS NOTED OTHERWISE.

3. ALL EXTERIOR SIGNAGE, WITH THE EXCEPTIONS OF BUILDING SIGNAGE AND MONUMENT SIGN, AS INDICATED ON CIVIL DOCUMENTS.

4. PROVIDE APPROVED STREET ADDRESS AND BUILDING NUMBER POSITIONED SUCH TO BE PLAINLY VISIBLE AND LEGIBLE FROM THE STREET, THIS LOCATION BEING ACCEPTABLE TO THOSE HAVING JURISDICTION. NUMBERS SHALL CONTRAST THEIR BACKGROUND WITH A MINIMUM 6" HIGH CHARACTER WITH 3/4" STROKE RECOMMENDED.

5. DOORS TO ELECTRIC ROOM SHALL BE SIGNED SUCH. CIRCUIT BREAKERS SHALL BE LEGIBLY AND DURABLY MARKED.

6. FLOOR FINISHES ARE SHOWN AS A GENERAL REFERENCE. REFER TO ROOM FINISH SCHEDULE FOR FLOOR FINISHES IN ROOMS. FLOOR MATERIAL TRANSITION OCCURS AT THE CENTERLINE OF DOOR WHEN DOOR IS IN CLOSED POSITION, UNLESS NOTED OTHERWISE.

7. REMOVE ALL FLOOR FINISHES AND ADHESIVES IN PREPARATION FOR APPLICATION OF NEW FLOORINGS.

8. REMOVE, STORE AND PROTECT EXISTING EQUIPMENT AND ITEMS TO BE RE- USED.

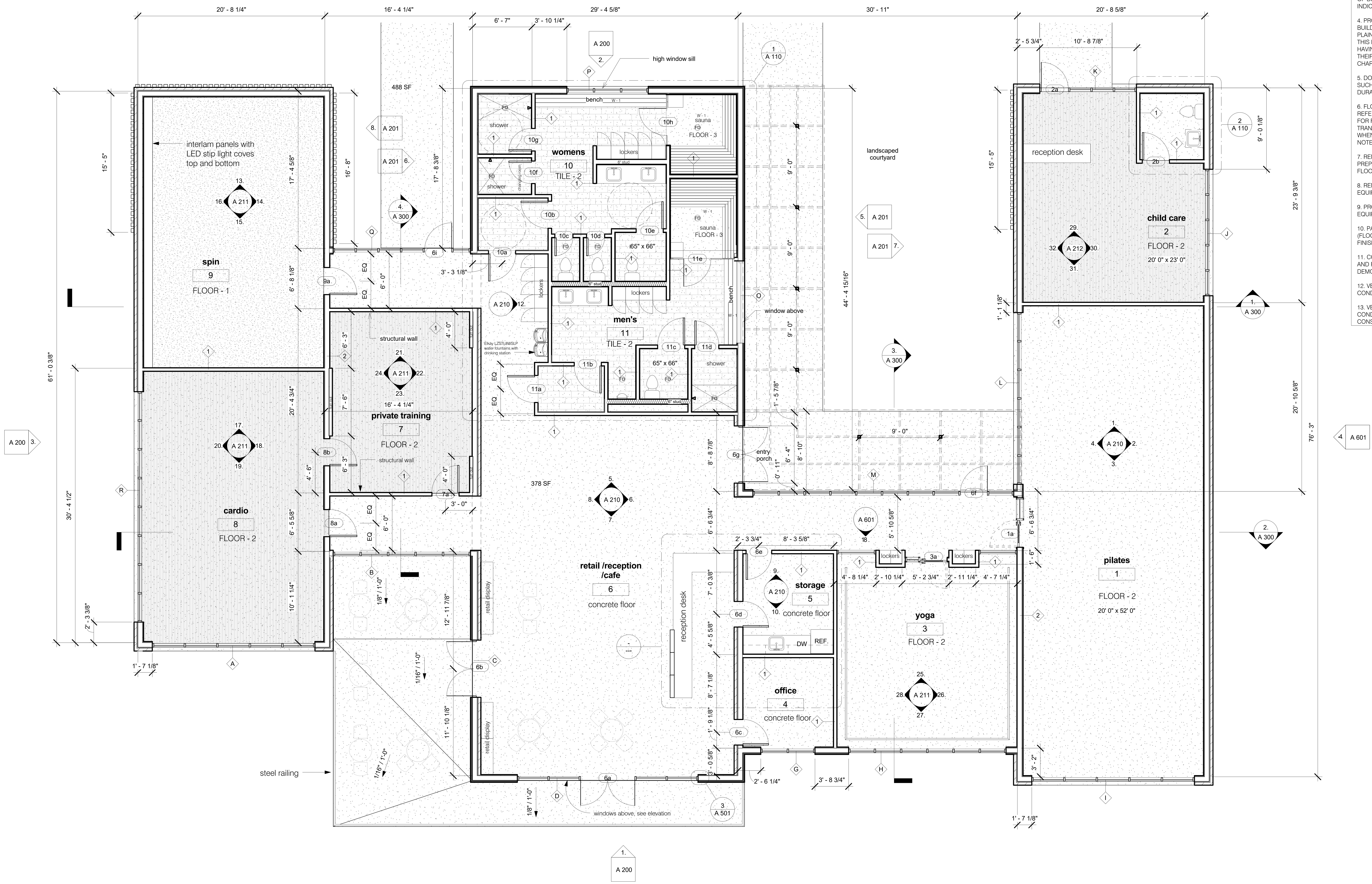
9. PROVIDE PROTECTION FOR ALL EXISTING EQUIPMENT AND ITEMS TO REMAIN.

10. PATCH, CLEAN AND REPAIR ALL SURFACES (FLOORS, WALLS, CEILINGS, ETC.) TO RECEIVE NEW FINISHES.

11. COORDINATE REMOVAL OF LOOSE EQUIPMENT AND FURNISHINGS PRIOR TO START OF DEMOLITION.

12. VERIFY EXISTING STRUCTURAL AND MEP CONDITIONS PRIOR TO START OF DEMOLITION.

13. VERIFY EXISTING STRUCTURAL AND MEP CONDITIONS PRIOR TO START OF NEW CONSTRUCTION.



1 floor plan level 1
3/16" = 1'-0"

6/29/2018 4:56:02 PM

reach architects

1107 South 8th Street
austin, texas 78704
512.970.5669

REGISTERED ARCHITECT
ALAN C. KNOX
21945
STATE OF TEXAS

06/29/2018

No.	Description	Date

truecore fitness

10148 W. Adams Ave.
Temple, Texas 76502

Date 06/29/2018

project number 1073

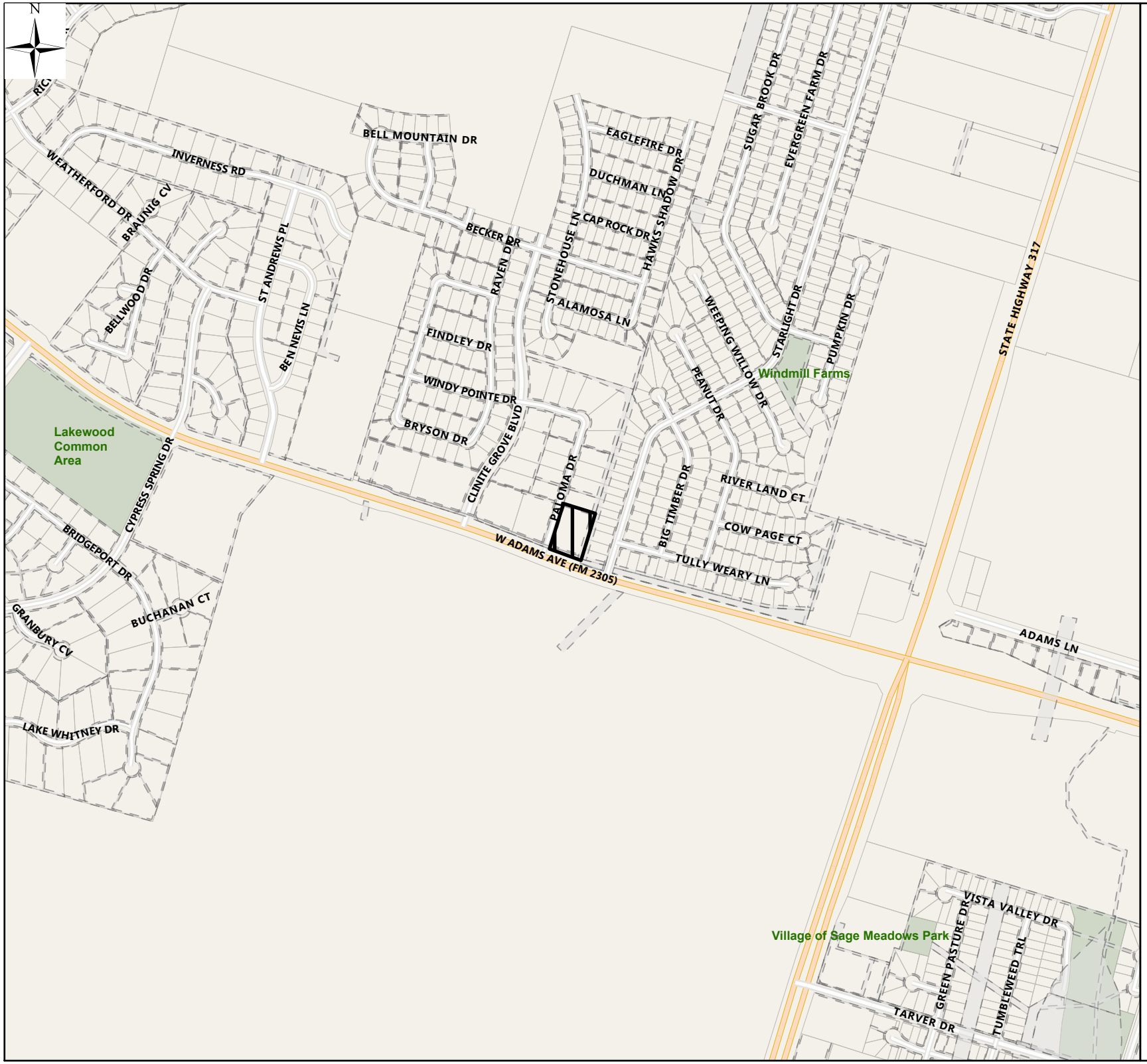
Drawn by TG
Checked by AK

contents

floor plan level 1

Scale: As indicated for full size set or 1/2 of indicated scale for 11x17 set.

A 101



CUP for Alcohol Sales

VICINITY MAP

Zoning Case :
FY-19-29-ZC

Address :
10148 W ADAMS AVE

Transportation

Streets

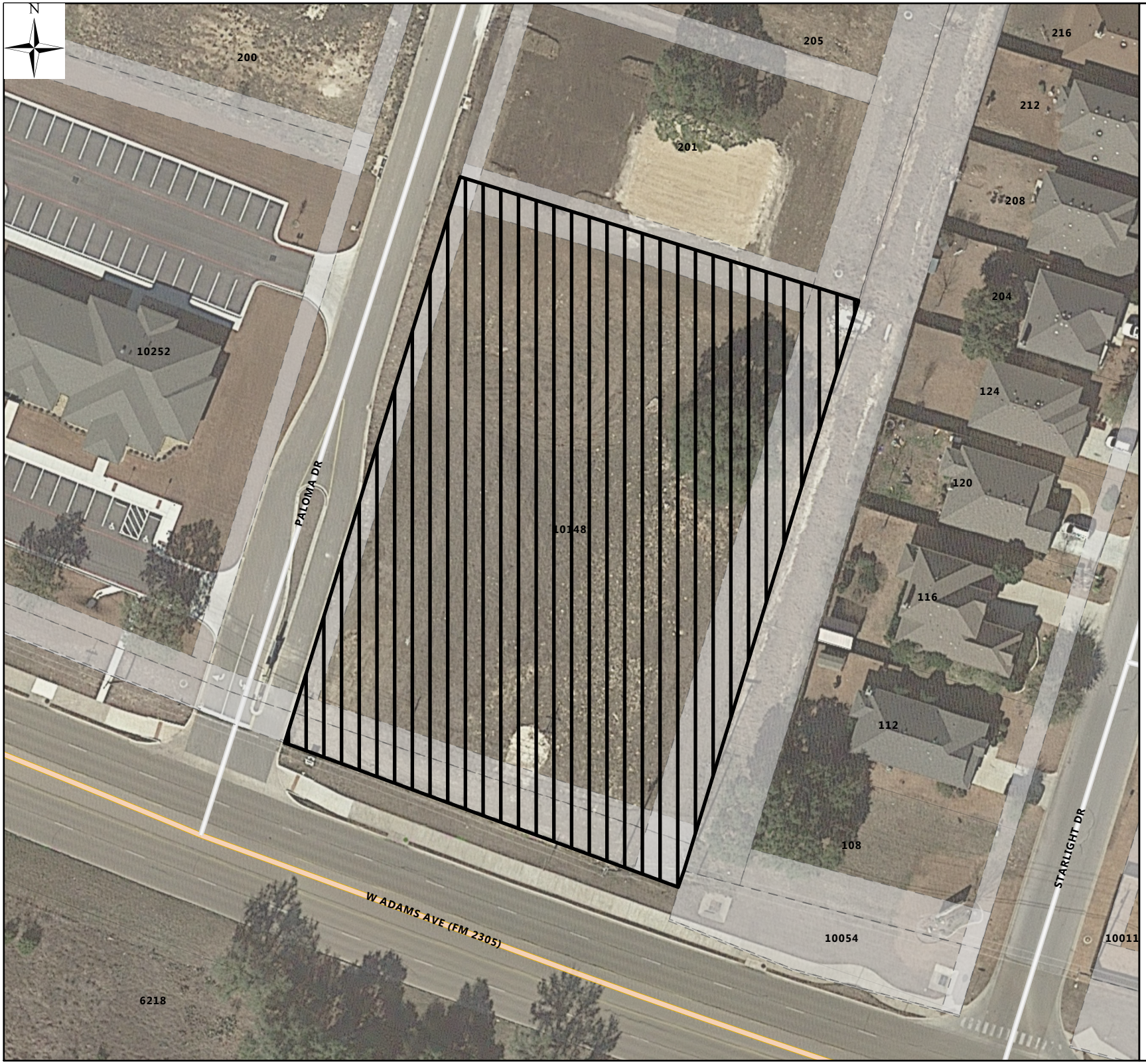
- MAJOR ARTERIAL
- COLLECTOR
- LOCAL STREET
- Temple Municipal Boundary

Parcel Features

- Parcels
- ETJ Parcels
- Production.SDE.Easement

jdeckman
Date: 9/16/2019

City of Temple



CUP for Alcohol Sales

AERIAL MAP

Zoning Case :
FY-19-29-ZC

Address :
10148 W ADAMS AVE

Transportation

Streets

- MAJOR ARTERIAL
- LOCAL STREET
- Temple Municipal Boundary

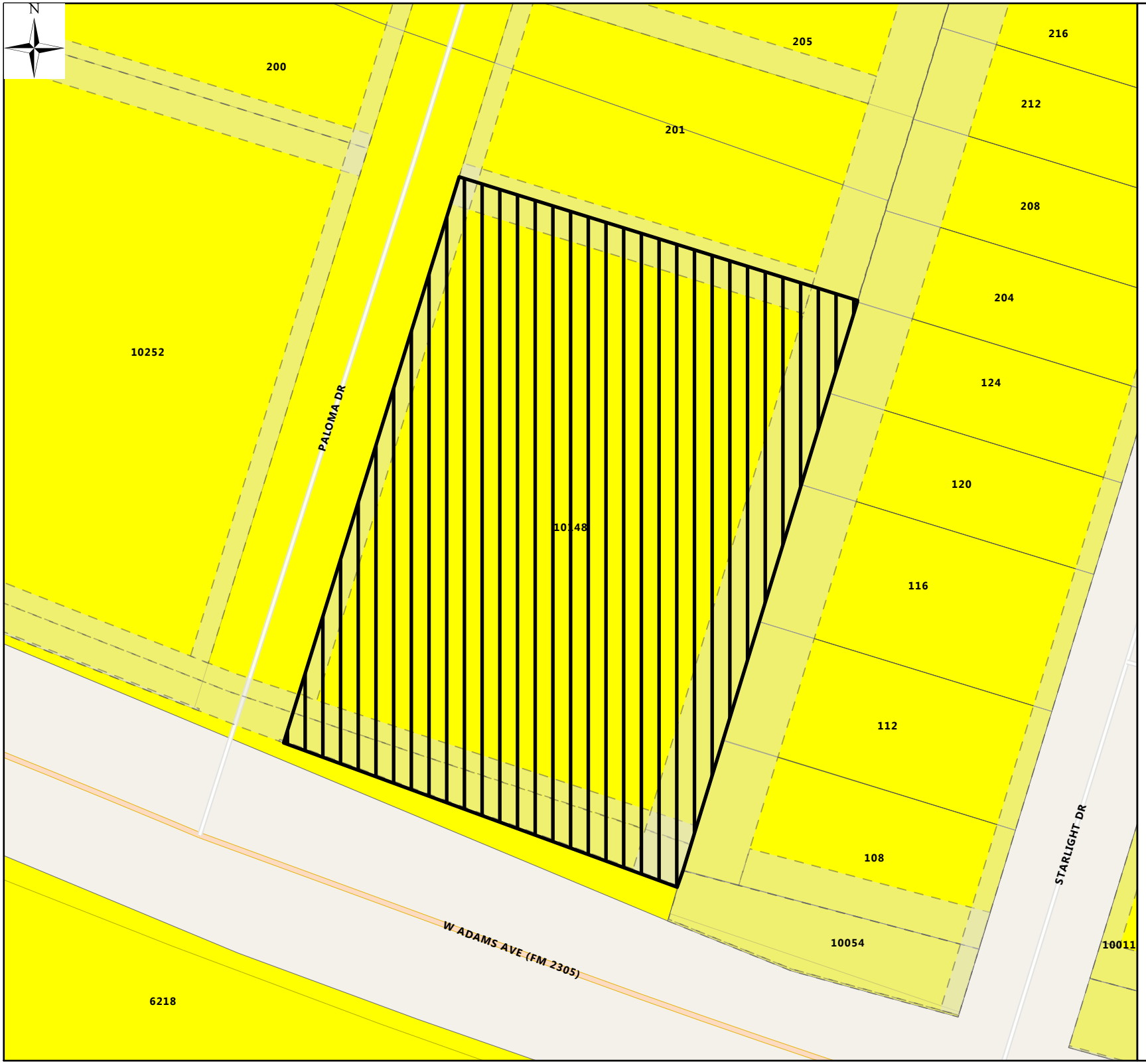
Parcel Features

- Parcels
- Production.SDE.Easement

GIS products are for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. They do not represent an on-the-ground survey and represent only the approximate relative location of property boundaries and other features.

jdeckman
Date: 9/16/2019

City of Temple



CUP for Alcohol Sales

FUTURE LAND USE MAP

Zoning Case :
FY-19-29-ZC

Address :
10148 W ADAMS AVE

Transportation

- EXPRESSWAY
- MAJOR ARTERIAL
- COLLECTOR
- LOCAL STREET
- MINOR ARTERIAL
- PRIVATE
- RAMP

Parcel Features

- Parcels

Future LUP

- Agricultural/Rural
- Auto-Urban Commercial
- Auto-Urban Mixed Use
- Auto-Urban Multi-Family
- Auto-Urban Residential
- Business Park
- Estate Residential
- Industrial
- Neighborhood Conservation
- Parks & Open Space
- Public Institutional
- Suburban Commercial
- Suburban Residential
- Temple Medical Education District
- Urban Center
- Easement

jdeckman
Date: 9/16/2019

City of Temple

CUP for Alcohol Sales

UTILITY MAP

Zoning Case :
FY-19-29-ZC

Address :
10148 W ADAMS AVE

Sewer

- Manhole
- Gravity Main

WaterDistribution

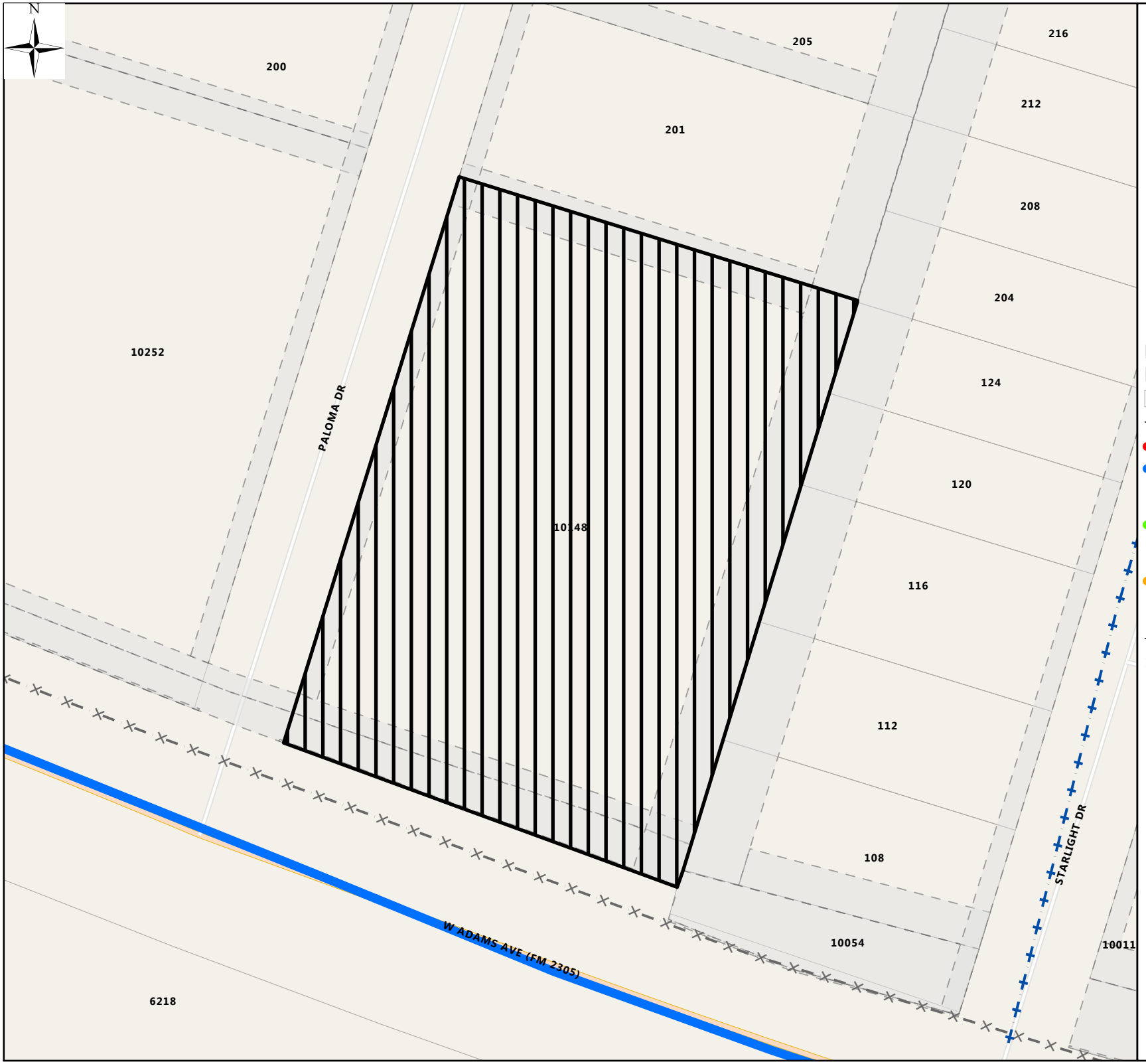
- Hydrant
- Main

Parcel Features

- Parcels
- Easement

jdeckman
Date: 9/16/2019

City of Temple



CUP for Alcohol Sales

THOROUGHFARE AND TRAILS MAP

Zoning Case :
FY-19-29-ZC

Address :
10148 W ADAMS AVE

Parcel Features

- Parcels

Thoroughfare Plan

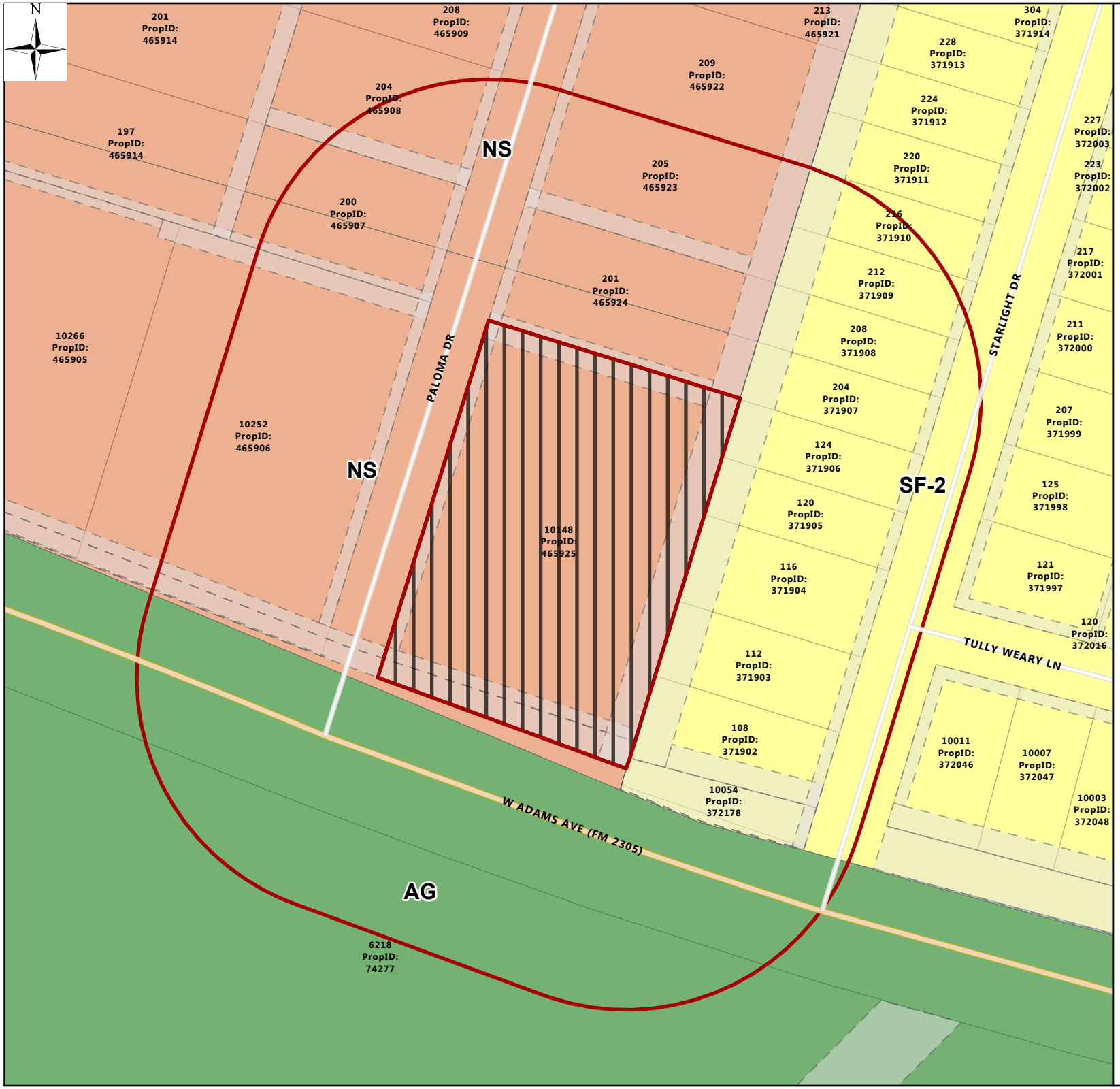
- Expressway
- Major Arterial
- Proposed Major Arterial
- Minor Arterial
- Proposed Minor Arterial
- Collector
- Proposed Collector

Trails Master Plan

- EXISTING, CITY WIDE SPINE
- EXISTING, COMMUNITY WIDE CONNECTOR
- EXISTING, LOCAL CONNECTOR
- PROPOSED, CITY WIDE SPINE
- PROPOSED, COMMUNITY WIDE CONNECTOR
- PROPOSED, LOCAL CONNECTOR
- Easement

jdeckman
Date: 9/16/2019

City of Temple



CUP for Alcohol Sales

200'
NOTIFICATION MAP

Zoning Case :
FY-19-29-ZC

Address :
10148 W ADAMS AVE

CurrentZoning

- HI - CUP
- UE
- UE - PD
- SF-1
- SF-1 - CUP
- SF-1 - PD
- SF-2
- SF-2 - PD
- SF-3
- SF-3 - PD
- SF-3 - CUP, PD
- SFA
- SFA-2
- SFA-2 - PD
- SFA-3
- SFA-3 - PD
- 2F
- 2F - CUP
- 2F - PD
- MF-1
- MF-1 - CUP
- MF-1 - PD
- MF-2
- MF-2 - CUP
- MF-2 - PD
- MF-3 - PD
- O-1
- O-1 - CUP
- O-1 - PD
- O-2
- O-2 - CUP
- O-2 - PD
- NS
- NS - CUP
- NS - PD
- GR
- GR - CUP
- GR - PD
- GR - CUP, PD
- CA
- CA - CUP
- CA - PD
- C
- C - CUP
- C - PD
- C - CUP, PD
- LI
- LI - CUP
- LI - PD
- LI - CUP, PD
- HI
- HI - PD
- AG
- AG - CUP
- MH
- MH - CUP
- MH - PD
- MU
- MU - CUP
- SD-C
- SD-C - CUP
- SD-H
- SD-H - CUP
- SD-T
- SD-V
- T4
- T4 - PD
- T4 - CUP
- T5-C
- T5-C - CUP
- T5-C - PD
- T5-E
- T5-E - CUP
- T5-E - PD
- NO BASE
- CUP
- PD
- Easement

jdeckman
Date: 9/16/2019

City of Temple

UDC Code Section 3.5.4	Criteria met?	Discussion
A. The conditional use is compatible with and not injurious to the use and enjoyment of the property and does not significantly diminish or impair property values within the immediate area.	Yes	The alcohol sales use will take place entirely within the fitness center. It is compatible with and will not diminish property values of the surrounding properties.
B. The establishment of the conditional use does not impede normal and orderly development and improvement of surrounding vacant property.	Yes	Allowing alcohol sales will not impede development or improvements on the surrounding properties.
C. Adequate utilities, access roads, drainage, and other necessary support facilities have been or will be provided.	Yes	The property fronts onto a local street, with easy access to West Adams, a major arterial. Public Works has determined that water and wastewater service to the property will be adequate and won't be negatively impacted.
D. The design, location and arrangement of all driveways and parking spaces provide for the safe and convenient movement of vehicular and pedestrian traffic without adversely affecting the general public or adjacent development.	Yes	The property will have parking located behind the fitness center with access from Paloma Drive, a local street. Sidewalks are available for pedestrians. Adequate parking is available and was previously addressed with the building permit.
E. Adequate nuisance prevention measures have been or will be taken to prevent or control offensive odors, fumes, dust, noise, and vibration.	Yes	Staff is confident that alcohol sales within the fitness center will not create offensive odors, fumes, dust, noise, or vibration. Specifically, alcohol will only be sold from 5:30 to 8:30 pm from Monday to Friday.
F. Directional lighting is provided so as not to disturb or adversely affect neighboring properties.	Yes	Compliance for exterior lighting was addressed during review of the building permit.
G. There is sufficient landscaping and screening to insure harmony and compatibility with adjacent property.	Yes	A small screened patio is available to patrons of the fitness center. Compliance with landscaping and screening was confirmed during permit review.

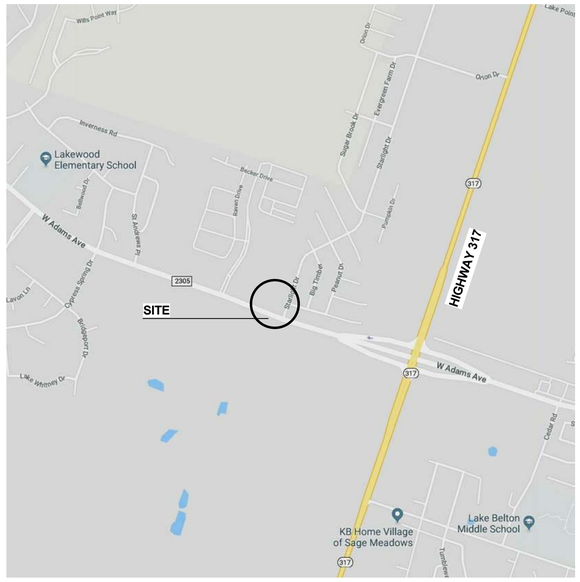
Reference: City of Temple Unified Development Code

TRUECORE FITNESS

PERMIT SET - 6/29/2018

10148 West Adams Avenue
Temple, Texas 76502

Rendering



locator map

site map

project team

client representative
Holly McDaniel
email: holly.roehl@gmail.com

architect
Reach Architects, LLC
contact: Alan Knox, AIA
phone: 512.970.5669
e-mail: alan.knox@reacharchitects.com

PROJECT CRITERIA & REQUIREMENTS

BUILDING CODE:	**I.B.C. (2009) WITH LOCAL AMENDMENTS**
STRUCTURAL CODE:	**I.B.C. (2009) WITH LOCAL AMENDMENTS**
PLUMBING CODE:	**U.P.C. (2009) WITH LOCAL AMENDMENTS**
MECHANICAL CODE:	**U.M.C. (2009) WITH LOCAL AMENDMENTS**
ELECTRICAL CODE:	**N.E.C. (2009) WITH LOCAL AMENDMENTS**
FIRE / LIFE SAFETY CODE:	**I.F.C. (2009) WITH LOCAL AMENDMENTS**
ENERGY CODE:	**I.E.C.C. (2009) WITH LOCAL AMENDMENTS**
GAS CODE:	**I.G.C. (2009) WITH LOCAL AMENDMENTS**
ACCESSIBILITY:	**TAS (2009)**
SIGN CODE:	**CITY OF TEMPLE**
JURISDICTION:	**TEMPLE, TEXAS**

TYPE OF CONSTRUCTION: III-B (IBC TABLE 602)

OCCUPANCY CLASSIFICATION: A-3: GYMNASIUM

MAX ALLOWABLE AREA PER FLOOR: 9,500 SF (per IBC 506.2)

PROJECT AREA PER FLOOR: 7,302 SF OF LEASED SPACE (GROSS); 6,324 SF UFA INTERIOR (NET)

MAX ALLOWABLE HEIGHT: 55' / 4 STORY per IBC section 504.2
PROJECT HEIGHT: 32' - 1 7/8" / 1 STORY

FIRE RESISTANCE RATING: 2 HR FOR EXTERIOR BAERIING WALLS, 0 HR FOR ROOF, STRUCTURAL FRAME, FLOOR, AND PARTITIONS PER IBC TABLE 601

PROJECT GENERAL NOTES

1. THE PURPOSE OF THE WORK IS THE CONSTRUCTION OF A NEW FINTNESS CENTER

2. SCOPE OF WORK: THE SCOPE WILL BE AS DEFINED IN THE CONSTRUCTION DOCUMENTS AND DRAWINGS AND AS DIRECTED BY THE OWNER AND/OR OWNER'S REPRESENTATIVE.

3. CODES: ALL WORK SHALL CONFORM TO THE CODE SET FORTH BY CITY OF HOUSTON AND AS LISTED HEREIN.

Sheet List

Sheet Number	Sheet Name
A 000	cover page
G 001	general notes, accessibility notes
G 002	ADA/TAS standards
G 003	ADA/TAS standards
A 001	life safety plan
A 001.1	envelope comcheck
A 002	3D Views
A 003	3D sections
A 004	specifications
A 005	specifications
A 006	specifications
A 007	specifications
A 100	architectural site plan
A 101	floor plan level 1
A 102	reflected ceiling plan
A 103	roof plan
A 104	foundation plan
A 110	enlarged floor plans
A 200	building elevations
A 201	building elevations
A 210	interior elevations
A 211	interior elevations
A 212	interior elevations
A 300	building sections
A 411	wall sections
A 412	wall sections
A 501	details
A 601	door schedule, storefronts
A 602	partition types/finish schedule

TRUECORE FITNESS | PERMIT SET - 6/29/2018

reach architects

Facing east from intersection of W Adams and Paloma Drive

Frontage along W Adams showing sidewalk

Neighboring businesses with entrance from Paloma Drive

Facing southwest along W Adams showing sidewalk

RESPONSE TO PROPOSED REZONING REQUEST CITY OF TEMPLE

465924
TEM-TEX HOLDINGS - SERIES 19
PO BOX 1344
TEMPLE, TX 76503

Zoning Application Number: FY-19-29-ZC **Case Manager: Jason Deckman**

Location: 10148 West Adams Avenue

The proposed rezoning is the area shown in hatched marking on the attached map. Because you own property within 200 feet of the requested change, your opinions are welcomed. Please use this form to indicate whether you are in favor of the possible rezoning of the property described on the attached notice, and provide any additional comments you may have.

I (✓) **agree** ( ) **disagree with this request**

Comments:

_____

_____

_____

_____

Scott Kells

Signature **Print Name**

_____ **(Optional)**

Provide email and/or phone number if you want Staff to contact you

If you would like to submit a response, please email a scanned version of this completed form to the Case Manager referenced above, jdeckman@templetx.gov, or mail or hand-deliver this comment form to the address below, no later than **October 7, 2019.**

City of Temple
Planning Department
2 North Main Street, Suite 102
Temple, Texas 76501

Number of Notices Mailed: 20 Date Mailed: September 25, 2019

***OPTIONAL**: Please feel free to email questions or comments directly to the Case Manager or call us at 254.298.5668.*

RESPONSE TO PROPOSED REZONING REQUEST CITY OF TEMPLE

465908
VB LEGACY LLC-SERIES 101
15 N MAIN ST
TEMPLE, TX 76501-7629

Zoning Application Number: FY-19-29-ZC **Case Manager: Jason Deckman**

Location: 10148 West Adams Avenue

The proposed rezoning is the area shown in hatched marking on the attached map. Because you own property within 200 feet of the requested change, your opinions are welcomed. Please use this form to indicate whether you are in favor of the possible rezoning of the property described on the attached notice, and provide any additional comments you may have.

I (X) **agree** ( ) **disagree with this request**

Comments:

VB Legacy, LLC President

Signature Thomas C Baird **Print Name** 10/1/19

(Optional)

Provide email and/or phone number if you want Staff to contact you

If you would like to submit a response, please email a scanned version of this completed form to the Case Manager referenced above, jdeckman@templetx.gov, or mail or hand-deliver this comment form to the address below, no later than **October 7, 2019.**

City of Temple
Planning Department
2 North Main Street, Suite 102
Temple, Texas 76501

Number of Notices Mailed: 20 Date Mailed: September 25, 2019

***OPTIONAL**: Please feel free to email questions or comments directly to the Case Manager or call us at 254.298.5668.*

RESPONSE TO PROPOSED REZONING REQUEST CITY OF TEMPLE

465923
BLACKLAND CAPITAL INC
15 N MAIN ST
TEMPLE, TX 76501

Zoning Application Number: FY-19-29-ZC **Case Manager: Jason Deckman**

Location: 10148 West Adams Avenue

The proposed rezoning is the area shown in hatched marking on the attached map. Because you own property within 200 feet of the requested change, your opinions are welcomed. Please use this form to indicate whether you are in favor of the possible rezoning of the property described on the attached notice, and provide any additional comments you may have.

I (X) **agree** ( ) **disagree with this request**

Comments:

Blackland Capital, Inc

Stephen T. Bresciani, President

Signature

Stephen T. Bresciani, President

Print Name

10/1/19

(Optional)

Provide email and/or phone number if you want Staff to contact you

If you would like to submit a response, please email a scanned version of this completed form to the Case Manager referenced above, jdeckman@templetx.gov, or mail or hand-deliver this comment form to the address below, no later than **October 7, 2019.**

City of Temple
Planning Department
2 North Main Street, Suite 102
Temple, Texas 76501

Number of Notices Mailed: 20 Date Mailed: September 25, 2019

***OPTIONAL**: Please feel free to email questions or comments directly to the Case Manager or call us at 254.298.5668.*

RESPONSE TO PROPOSED REZONING REQUEST CITY OF TEMPLE

465907
BLACKLAND CAPITAL INC
15 N MAIN ST
TEMPLE, TX 76501

Zoning Application Number: FY-19-29-ZC **Case Manager: Jason Deckman**

Location: 10148 West Adams Avenue

The proposed rezoning is the area shown in hatched marking on the attached map. Because you own property within 200 feet of the requested change, your opinions are welcomed. Please use this form to indicate whether you are in favor of the possible rezoning of the property described on the attached notice, and provide any additional comments you may have.

I (X) **agree** ( ) **disagree with this request**

Comments:

Blackland Capital, Inc

Stephen T. Brzechuc, President

Signature

Stephen T. Brzechuc, President

Print Name

10/1/19

(Optional)

Provide email and/or phone number if you want Staff to contact you

If you would like to submit a response, please email a scanned version of this completed form to the Case Manager referenced above, jdeckman@templetx.gov, or mail or hand-deliver this comment form to the address below, no later than **October 7, 2019.**

City of Temple
Planning Department
2 North Main Street, Suite 102
Temple, Texas 76501

Number of Notices Mailed: 20 Date Mailed: September 25, 2019

***OPTIONAL**: Please feel free to email questions or comments directly to the Case Manager or call us at 254.298.5668.*

ORDINANCE NO. 2019-5005
(FY-19-29-ZC)

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A CONDITIONAL USE PERMIT WITH A SITE PLAN TO ALLOW FOR THE SALE OF BEER AND WINE FOR ON-PREMISE CONSUMPTION OF LESS THAN 10% OF TOTAL REVENUE AT 10148 WEST ADAMS AVENUE; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, TrueCore Fitness is a locally-owned fitness center providing various types of exercise classes in a new building being constructed on West Adams Avenue - amenities to be provided include a separate space for child care, a fenced outdoor patio, and a café area serving snacks and drinks;

Whereas, the requested Conditional Use Permit will allow only beer and wine to be served to members of the fitness center;

Whereas, the applicant has a "Wine and Beer Retailers Permit" from the Texas Alcoholic Beverage Commission that will allow the on-premise consumption and purchase of alcohol to take home—alcohol will only be available for consumption after workouts;

Whereas, alcohol sales will be restricted to TrueCore account holder and each client will purchase a card to use on a dispensing machine that delivers a measured amount of wine, with each card limited to 10 ounces—additional pours will require assessment and approval by the manager to reset the client's card;

Whereas, sales of alcoholic beverages for on-premise consumption are permitted in the Neighborhood Services zoning district with a Conditional Use Permit, where less than 75% of revenue is derived from sales of beer and wine;

Whereas, Chapter 4 of the City's Code of Ordinances requires that all establishments with alcoholic beverage sales with on-remise consumption are not within a straight-line distance of 300 feet of a place of worship, public school, or public hospital—none of the identified uses are within 300 feet of the fitness center;

Whereas, the proposed Conditional Use Permit has demonstrated compliance with the review criteria set forth in Unified Development Code Section 3.5.4 (A) – (G);

Whereas, the Planning and Zoning Commission of the City of Temple, Texas, after due consideration to the planned development conditions, recommends approval of the requested Conditional Use Permit, subject to the following conditions:

- Substantial compliance with the building footprint depicted by Site Plan, attached as Exhibit A;
- Compliance with the City of Temple Code of Ordinances, Chapter 4, "Alcoholic Beverages" and applicable TABC regulations; and

- That the Director of Planning may be authorized to approve minor changes to the Site Plan, which may include but are not limited to: building footprint configuration, exterior building materials, and landscaping; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Ordinance as if copied in their entirety.

Part 2: The City Council approves of a Conditional Use Permit with a Site Plan to allow for the sale of beer and wine for on-premise consumption of less than 10% of total revenue at 10148 West Adams Avenue and subject to the following conditions:

- Substantial compliance with the building footprint depicted by Site Plan, attached as Exhibit A;
- Compliance with the City of Temple Code of Ordinances, Chapter 4, "Alcoholic Beverages" and applicable TABC regulations; and
- That the Director of Planning may be authorized to approve minor changes to the Site Plan, which may include but are not limited to: building footprint configuration, exterior building materials, and landscaping.

Part 3: The City Council approves the Site Development Plan which is made a part hereof for all purposes.

Part 4: The City Council directs the Director of Planning to make the necessary changes to the City Zoning Map.

Part 5: It is hereby declared to be the intention of the City Council that the sections, paragraphs, sentences, clauses, and phrases of this ordinance are severable and, if any phrase, clause, sentence, paragraph or section of this ordinance should be declared invalid by the final judgment or decree of any court of competent jurisdiction, such invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance, since the same would have been enacted by the City Council without the incorporation in this ordinance of any such phrase, clause, sentence, paragraph or section.

Part 6: This Ordinance shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Temple, Texas, and it is accordingly so ordained.

Part 7: It is hereby officially found and determined that the meeting at which this Ordinance was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED on First Reading and Public Hearing on the **7th** day of **November,** 2019.

PASSED AND APPROVED on Second Reading on the **21st** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

_____
TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT. / DIVISION SUBMISSION REVIEW:

Mark Baker, Principal Planner

ITEM DESCRIPTION: FIRST READING – PUBLIC HEARING – FY-19-30-ZC: Consider adopting an ordinance authorizing a rezoning from Two Family to Planned Development-Neighborhood Service with a development/ site plan for a specialty coffee shop, located at 1617 West Avenue R.

PLANNING & ZONING COMMISION RECOMENDATION: At its October 7, 2019, meeting, the Planning & Zoning Commission voted 7 to 1 to recommend approval of the Planned Development, per staff's recommendation.

During the meeting, the potential for parking lot lighting and increased traffic were discussed. While there are "speed cushions" in place along South 33rd Street, measures with more deterrence to reduce speed including restrictions to on-street parking along the property frontage were requested by the neighbors. In addition to the six conditions proposed by staff, as a result of public discussion, the Planning & Zoning Commission added the following three conditions:

1. That any outdoor lighting is consistent with UDC Section 7.1.8, which shall include full cutoff or shielded light fixtures to prevent light trespass;
2. City staff to investigate additional traffic calming measures along South 33rd Street and West Avenue R; and
3. City staff to comprehensively investigate adding "No Parking Signs" along South 33rd Street and West Avenue R.

At present, the applicant has been in contact with Public Works to investigate potential traffic calming measures.

STAFF RECOMMENDATION: staff recommends approval of the proposed Planned Development and development/ site plan with the following conditions:

1. Lots 1, 2 & 3, Block 8, Dubose Addition First Extension may be used for as a specialty coffee shop or other permitted use within the Neighborhood Service (NS) district as shown and further described by Exhibit A of the Planned Development;
2. A 6-foot sidewalk be provided along the street frontage of West Avenue R with connectivity to the adjacent parking lot across the alley;
3. A 6-foot high solid wood fence be provided along the southern property boundary;

4. Future demolition of the existing primary structure would require an amendment to the Planned Development ordinance;
5. The Director of Planning & Development may approve minor modifications to the City Council-approved development plan for the 5.204 +/- acre tract, including but not limited to, screening, buffering, landscaping and minor modifications to the overall site layout; and
6. Significant changes to the Development/ Site Plan require review by the Planning & Zoning Commission and City Council.

ITEM SUMMARY: The applicants, Greg & Sonya Burnett, on behalf of the owner Dr. Vijay Mehta, would like to open a specialty coffee shop to be known as 1914 Coffee House, request rezoning for a Planned Development with development/ site plan approval.

The proposed Planned Development is an adaptive reuse of an existing single-family residence as well as two adjacent vacant lots for a specialty coffee shop consisting of approximately 0.67 +/- acres. The property is legally described as Lots 1, 2 & 3 of Block 8 of the Dubose Addition First Extension subdivision. It is understood that the existing residence was constructed in or about 1914 and the proposed coffee shop would reuse the unoccupied residence for non-residential purposes as a specialty coffee shop. According to the applicant's attached business plan, the residence is approximately 2,000 square feet and would be used to offer for sale specialty coffee, tea, espresso drinks and the like. Pastries, sandwiches and salads would also be available for purchase.

Development of the property would incorporate two additional lots to be used for parking and landscaping and in total would equal approximately 29,000 square feet of area (0.67 +/- Ac.).

The subject property is bordered to the west by existing single-family homes (Dubose Addition First Extension) along West Avenue R and existing retail and service uses fronting along South 31st Street across from the Baylor, Scott & White Hospital campus. The location of this proposed use in the shell of the existing single-family residence is a good buffer between the change of uses.

PLANNED DEVELOPMENT (UDC SEC. 3.4): A Planned development is a flexible overlay zoning district designed to respond to unique development proposals, special design considerations and land use transitions by allowing evaluation of land use relationships to surrounding areas through development / site plan approval.

As a Planned Development (PD), per UDC Sec.3.4, a Development/Site Plan is binding and subject to review and approval by City Council as part of the rezoning. As opposed to a standard rezoning, conditions of approval can be included into the rezoning Ordinance.

This PD would have a base-zoning of Neighborhood Service (NS). The NS zoning district would provide retail and service uses that are compatible with specialty coffee house on the 0.67 +/- acres however, not every use can be accommodated on the three lots nor would the existing structure accommodate the use. Therefore, any proposed reuse of the property that requires demolition or expansion of the existing structure would require a public review of a new Planned Development.

The NS zoning still accommodates a number permitted and conditionally permitted uses, if future reuse be necessary. Uses include but not limited to those listed in the attached table.

In determining whether to approve, approve with conditions or deny a Planned Development application, the Planning & Zoning Commission and City Council must consider criteria as set forth in UDC Section 3.4.5 A-J. The Planned Development Criteria and Compliance Summary is attached. It is noteworthy that the applicant has worked closely with staff on the Development/Site Plan which is summarized as follows:

DEVELOPMENT/ SITE PLAN: The development/Site Plan reflects the adaptive reuse of an existing unoccupied single-family residence on Lots 1, 2 & 3, Block 8, Dubose Addition First Extension. The site plan shows dimensions for an approximately 2,000 square foot building footprint for the unoccupied residence proposed for the specialty coffee house. A parking area showing 21 parking spaces with internal maneuvering room to accommodate the proposed parking, landscaping and access driveways from both West Avenue R and into the alley as well as provisions for a sidewalk along West Avenue R.

Notable dimensions and setbacks are as follows:

- Parking area dimensions 74” 5” X 109’ 8”
- Existing Unoccupied building (roofline) footprint 47’ 9” X 57’ 10” (2761 SF)
- Existing building setback (from South 33rd Street) 17’ 10”
- Distance from proposed coffee shop to south property line 133’ 8”

FLOOR PLAN: A floor plan is attached, which reflects the use of floor space as the proposed coffee shop. According to the applicant, public seating would be in the living room, sun room and study. The coffee bar would be located in the living room area in front of the kitchen. The coffee bar would include the counter area where orders are taken and served and would not include the sale of alcoholic beverages.

PARKING: Per UDC Section 7.5, parking for restaurant uses is one space per three patrons. While the site plan shows striping for 21 parking stalls. The applicant anticipates accommodation for up to 60 patrons which requires 20 parking spaces.

The parking area includes provisions for Americans with Disabilities Act (ADA) as well as the requirements in UDC Section 7.5 for maneuvering and circulation within parking areas. Compliance to both would be determined with the review of the Building permit.

LANDSCAPING: Development/ site plan shows existing landscaping. Applicant has agreed to install additional landscaping. Compliance to UDC Section 7.4 would be made with the review of the building plans.

SCREENING & BUFFERING: Screening and buffering would be provided by the existing landscaping however, a 6-foot wood fence would further reduce impacts associated with vehicle lights in the parking area shining toward the property to the south. The applicant is in agreement with providing a 6-foot wood fence along the southern property boundary.

DRC REVIEW: The DRC reviewed the Development/Site Plan on September 23, 2019. No significant issues were identified. The change of use would trigger compliance with parking requirements which would be addressed with the building permit.

COMPREHENSIVE PLAN (CP) COMPLIANCE: Compliance to goals, objectives or maps of the Comprehensive Plan and Sidewalk and Trails Plan are summarized by the attached Comprehensive Plan Compliance table but further described below:

Future Land Use Map (CP Map 3.1)
The subject property is within the Neighborhood Conservation designation, which is intended for the preservation of the character of the existing neighborhood. Since the coffee shop would utilize the existing shell of the single-family residence as an adaptive reuse, this Planned Development is consistent with the intent of the FLUM designation.

Thoroughfare Plan (CP Map 5.2)
The property has frontage along South 33rd Street and West Avenue R, both local streets. No issues have been related to existing ROW. Access to the coffee shop would be limited to the east of the existing building along West Avenue R to minimize any negative impact on the neighborhood.

Availability of Public Facilities (CP Goal 4.1)
Sewer is available from an existing 8-inch sewer line in the alley across West Avenue R. Water is available from a 2-inch water line in the alley and along South 33rd Street.

Temple Trails Master Plan Map and Sidewalks Ordinance
A proposed local connector trail is shown on the Trails Master Plan along West Avenue R. Further, as a result of the Trails Master Plan, a 6-foot sidewalk would be necessary along the West Avenue R frontage. There is currently no sidewalk in place. Since there is a potential for increased pedestrian traffic, there is an opportunity for connection to the parking area beyond the alleyway.

DEVELOPMENT REGULATIONS: The attached table show the required dimensional standards of the NS zoning district.

PUBLIC NOTICE: Twenty-one notices to property owners within 200-feet of the subject property were sent notice of the public hearing as required by State law and City Ordinance. As of Thursday October 29, 2019, at 9:00 AM, three notices in disagreement and two notices in agreement have been received.

The newspaper printed notice of the public hearing on September 25, 2019, in accordance with state law and local ordinance.

FISCAL IMPACT: Not Applicable

ATTACHMENTS:
Applicant's Narrative Letter
PD Criteria & Compliance Table (UDC Section 3.4.5 A-J)
Site Plan (Exhibit A)
Floor Plan (Exhibit B)
Photos
Tables
Maps
Returned Property Notices
P&Z Excerpts (October 7, 2019)
Ordinance

July 28, 2019

Planning and Zoning Commission
City Municipal Building
2 N. Main St
Temple, Texas 76501

Dear Planning and Zoning Commission,

We have the vision to open 1914 Coffee House, a specialty coffee shop, in Temple, Texas.

The goal of 1914 Coffee House will be to offer its customers the perfect cup of coffee in a relaxing and inviting atmosphere. Our close proximity to Baylor Scott and White Hospital and facilities will offer a service to our community that is not currently available. Our product will be achieved by using high-quality ingredients and strictly following professional preparation guidelines. Espresso drinks, brewed coffee, teas, and refreshment beverages will be sold in the coffee house. 1914 Coffee House will also offer its clients a light menu of pastries, salads, and sandwiches. For the clientele that prefers to prepare its coffee at home, 1914 Coffee House will be selling private label coffee beans.

The proposed location for 1914 Coffee House is a 2000 square feet historic house located at 1617 W Ave. R, Temple, Texas. The company has negotiated a one-year lease of the vacant house and adjoining lots. The lease contract has an option to purchase the property after one year.

The house sits on three lots with a combined area of 29,000 square feet. The property is currently zoned as two-family dwelling. 1914 Coffee House is requesting that the property (3 lots) be rezoned or given a variance to allow for the business to operate as a coffee house.

The property is owned by Dr. Vijay Mehta, DaysFNBTNote, LLC. He is aware of the plan to convert the property to a coffee house and fully supports a zoning change.

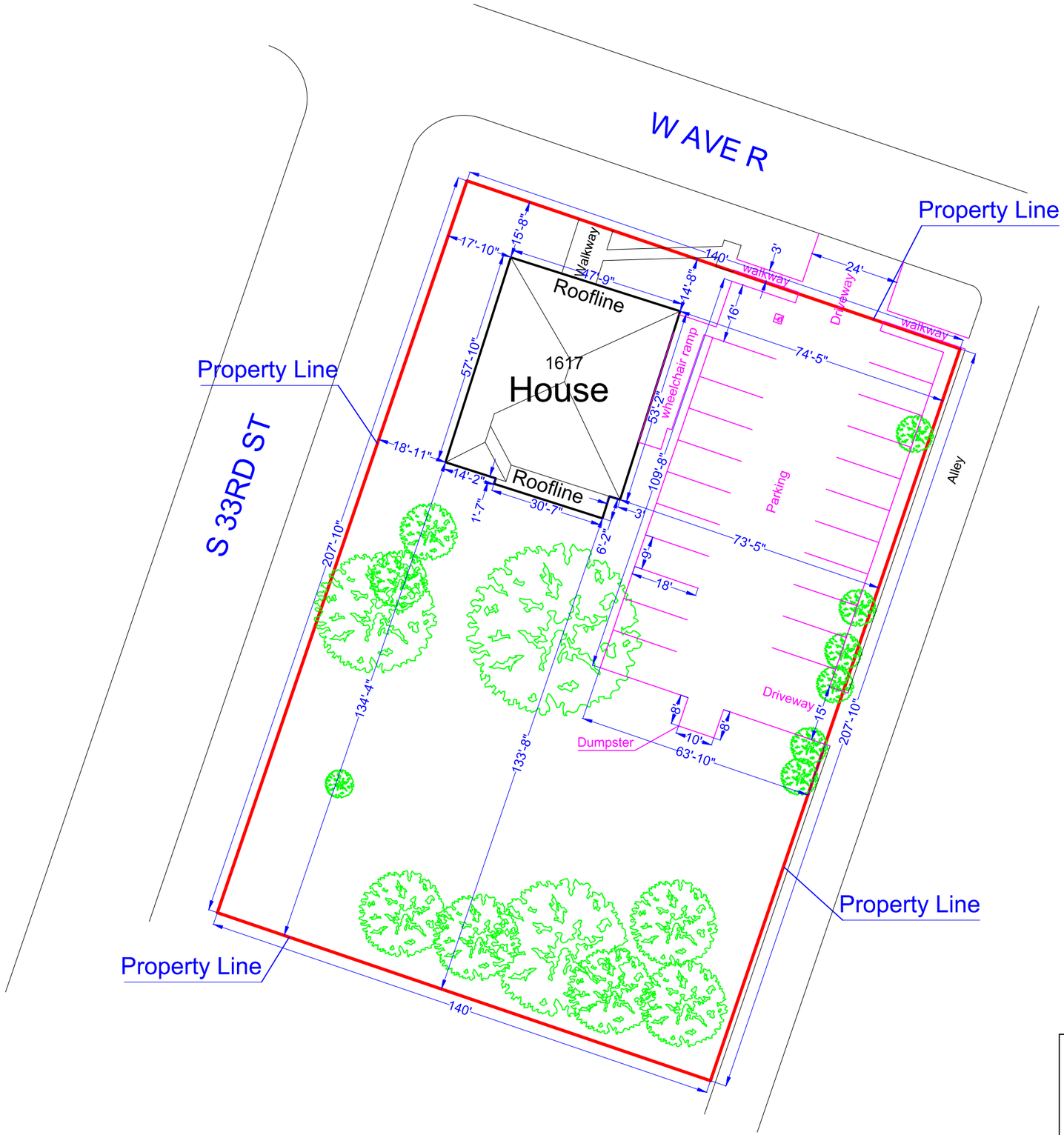
We are excited about the opportunity to create a space for Temple residents to meet together and enjoy great coffee. Your review of this proposal is very much appreciated.

Sincerely,

Greg and Sonya Burnett
3800 Valley View Dr
Temple, TX 76502
254-231-7634
gregburnett@sbcglobal.net

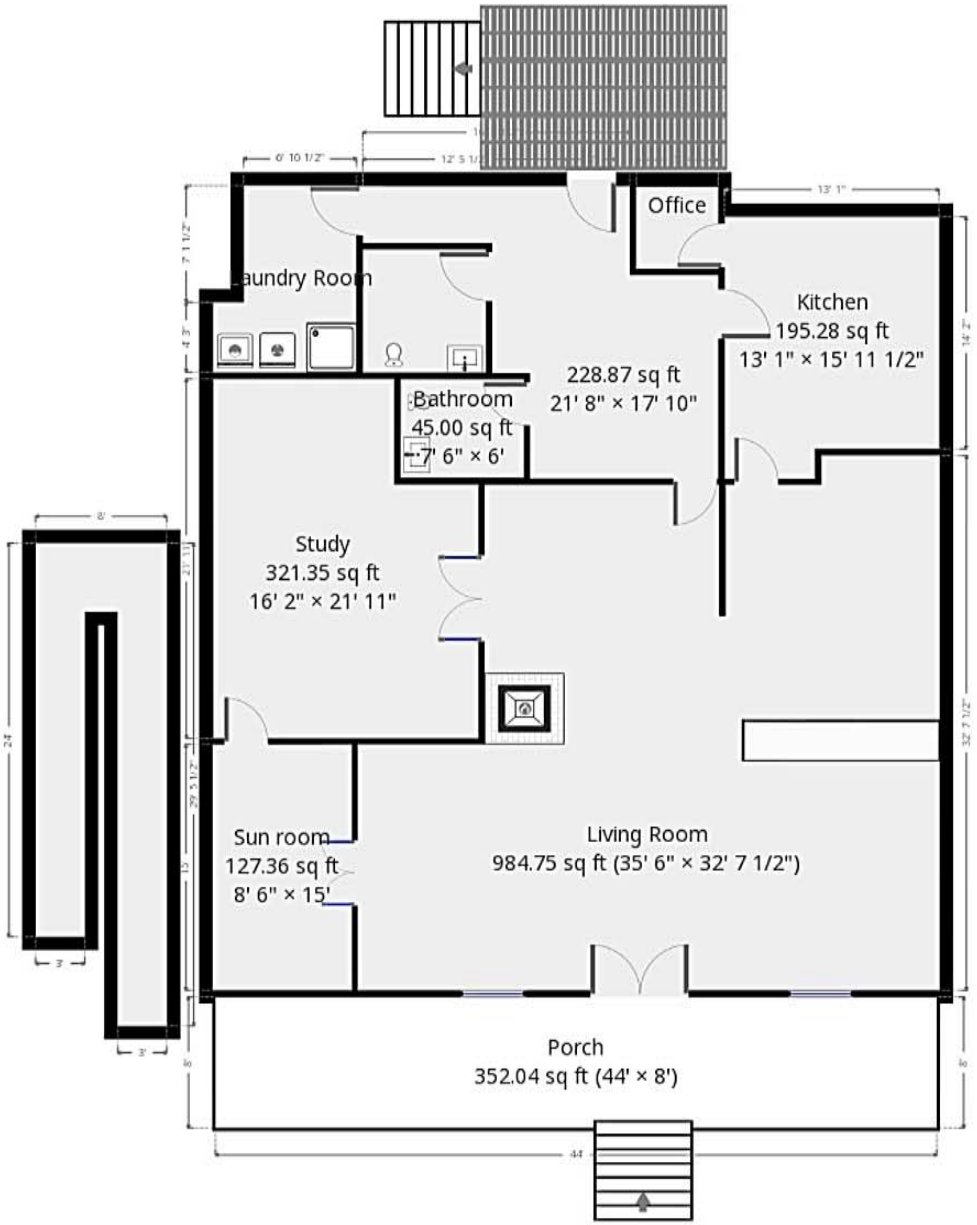
Planned Development Criteria and Compliance Summary

UDC Code Section 3.4.5 (A-J)	Yes/No	Discussion / Synopsis
A. The Plan Complies with all provisions of the Design and Development Standards Manual, this UDC and other Ordinances of the City.	**YES**	It is fully anticipated that the development / site plan attached with the rezoning ordinance will conform to all applicable provisions of the UDC as well as to dimensional, developmental and design standards adopted by the City for non-residential development.
B. The environmental impact of the development relating to the preservation of existing natural resources on the site and the impact on natural resources of the surrounding impacts and neighborhood is mitigated.	**YES**	Drainage and other related engineering will be addressed through building permit process. No impacts to existing natural resources on the property have been identified.
C. The development is in harmony with the character, use and design of the surrounding area.	**YES**	The project site is propsoed as an adaptive resuse to an existing unoccupied single family residence. While portion of the property, three existing lots, will be developed with a parking lot, the exterior of the existing structure will maintain the residential harmony and character. No additional structures or expansion to the existing structure are anticipated.
D. Safe and efficient vehicular and pedestrian circulation systems are provided.	**YES**	Vehicular access will be addressed with the change of use through a building permit. A 6-foot sidewalk will be constructed along the property's W. Ave R street frontage and provide connectivity to the parking area to the east. No other circulation issues have been identified.
E. Off-street parking and loading facilities are designed to ensure that all such spaces are usable and are safely and conveniently arranged.	**YES**	The parking area proposes parking to accomdoate 21 parking spaces based on UDC Section 7.5, 1 space is required per 3 patrons. The applicant anticipated 60 patrons maximum which requires 2o parking spaces. compliance to UDC Section 7.5 will be confirmed during the change of use by the building permit.
F. Streets are designed with sufficient width and suitable grade and location to accommodate prospective traffic and to provide access for firefighting and emergency equipment to buildings.	**YES**	No streets are proposed by this planned development. Access to the site will be provided by a proposed driveway onto W. Ave R and a one-way driveway into the alley.
G. Streets are coordinated so as to compose a convenient system consistent with the Thoroughfare Plan of the City.	**YES**	Compliance and consistancy with the Thoroughfare Plan has been reviewed with the Planned Development and wil be confirmed with the review of the final plat. No issues are anticipated.
H. Landscaping and screening are integrated into the overall site design: **1. To provide adequate buffers to shield lights, noise, movement or activities from adjacent properties when necessary.** **2. To complement the design and location of buildings.**	**YES**	Landscaping requirements will be finalized during the building permit stage. A Landscape Plan (Exhibit) will be attached to the Planned Development Ordinance. The Landscape Plan reflects the use of ten (10) trees of 2" diameter at breast height (dbh) along the SH 317 frontage as well as turf in other areas along the property perimeter and detention basin. Compliance will be made with the review of the building plans. A condition of approval provides flexibility to the Director of Planning & Development to make minor adjustment for landscaping, buffering and screening as warranted to address buffering and screening requirements.
I. Open space areas are designed to ensure that such areas are suitable for intended recreation and conservation uses.	**YES**	No Parkland dedication fees are required for this Planned Development. No parkland dedication fees are required with the subdivsion plat since the plat is non-residential.
J. Water, drainage, wastewater facilities, garbage disposal and other utilities necessary for essential services to residents and occupants are provided.	**YES**	Water will be provided by the City of Temple. Wastewater will be provided by the City of Temple. Drainage & detention facilities as well as other utilties will be addressed with the review of the building permit. To date, no issues have been identified.



MySitePlan.com
Site Plans When You Need Them

1617 W Ave R
Temple, TX 76504
1":30'


Office
Laundry Room
Kitchen
195.28 sq ft
13' 1" × 15' 11 1/2"
228.87 sq ft
21' 8" × 17' 10"
Bathroom
45.00 sq ft
7' 6" × 6'
Study
321.35 sq ft
16' 2" × 21' 11"
Sun room
127.36 sq ft
8' 6" × 15'
Living Room
984.75 sq ft (35' 6" × 32' 7 1/2")
Porch
352.04 sq ft (44' × 8')

Site & Surrounding Property Photos

Site: Existing (unoccupied) SF Residence from W. Ave R (2F)

Site: Existing (unoccupied) SF Residence from S. 33rd Street (2F)

South: Single-Family Residential Uses,
Dubose Addition, First Extension subdivision (2F)

West: Single-Family Residential Uses,
Dubose Addition, First Extension subdivision (2F)

North: Single-Family Residential Uses,
Dubose Addition, First Extension subdivision (2F)

East: Non-Residential Uses – Fronting along South 31st Street
(TMED – T5-E)

Tables

Permitted & Conditional Uses Table
Comparison between 2F & NS

Use Type	Two Family (2F)	Neighborhood Service (NS)
Agricultural Uses	Farm, Ranch or Orchard	Same as 2F
Residential Uses	Single Family Residence (Detached & Attached) Two-Family (Duplex) Industrialized Housing Family / Group Home Triplex (CUP)	Single Family Residence (detached & attached) Industrialized Housing Family or Group Home (CUP)
Retail & Service Uses	None	Most Retail & Service Uses Beer & Wine Sales, off-premise consumption (CUP)
Commercial Uses	None	None
Office Uses	None	Office Uses
Industrial Uses	Temporary Asphalt & Concrete Batching Plat (CUP)	Same as 2F Laboratory, medical, dental, scientific or research (CUP)
Recreational Uses	Park or Playground	Same as 2F
Educational & Institutional Uses	Cemetery (CUP) Place of Worship Social Svc. Shelter (CUP) Halfway House (CUP)	Same as 2F
Vehicle Service Uses	None	Fuel Sales (CUP)
Restaurant Uses	None	Restaurant - No Drive-In
Overnight Accommodations	None	None

Surrounding Property Uses

	Surrounding Property & Uses		
Direction	FLUP	Zoning	Current Land Use
Site	Neighborhood Conservation	2F	Unoccupied SF Residence
North	Neighborhood Conservation	2F	SF Uses (Dubose Addition, First Extension)
South	Neighborhood Conservation	2F	SF Uses (Dubose Addition, First Extension)
East	Temple Medical & Educational	T5-E	Retail & Service Uses
West	Neighborhood Conservation	2F	SF Uses (Dubose Addition, First Extension)

Comprehensive Plan Compliance

Document	Policy, Goal, Objective or Map	Compliance?
CP	Map 3.1 - Future Land Use Map	YES
CP	Map 5.2 - Thoroughfare Plan	YES
CP	Goal 4.1 - Growth and development patterns should be consistent with the City's infrastructure and public service capacities	YES
STP	Temple Trails Master Plan Map and Sidewalks Ordinance	YES
CP = Comprehensive Plan STP = Sidewalk and Trails Plan		

Dimensional Standards
(UDC Section 4.5)

	(2F) SF Residential	(NS) Non-Residential
Minimum Lot Size	6,000 SF	N/A
Minimum Lot Width	50 Feet	N/A
Minimum Lot Depth	100 Feet	N/A
Front Setback	25 Feet	15 Feet
Side Setback	5 Feet	10 Feet
Side Setback (corner)	15 Feet	10 Feet
Rear Setback	10 Feet	❖ 10 Feet
Max Building Height	2 ½ Stories	2 ½ Stories

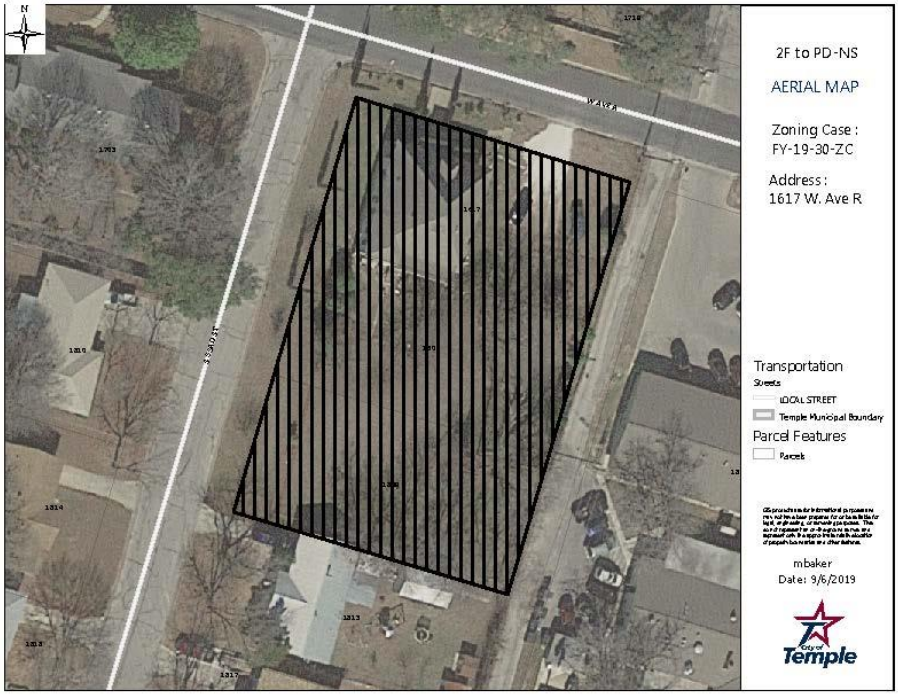
❖ **10' rear setback (Non-residential use abuts a residential zoning district or use - UDC Section 4.4.4.F3**

General provisions for buffering and screening for non-residential uses adjacent to residential uses are found in UDC Section 7.7, highlighted provisions include but not limited to:

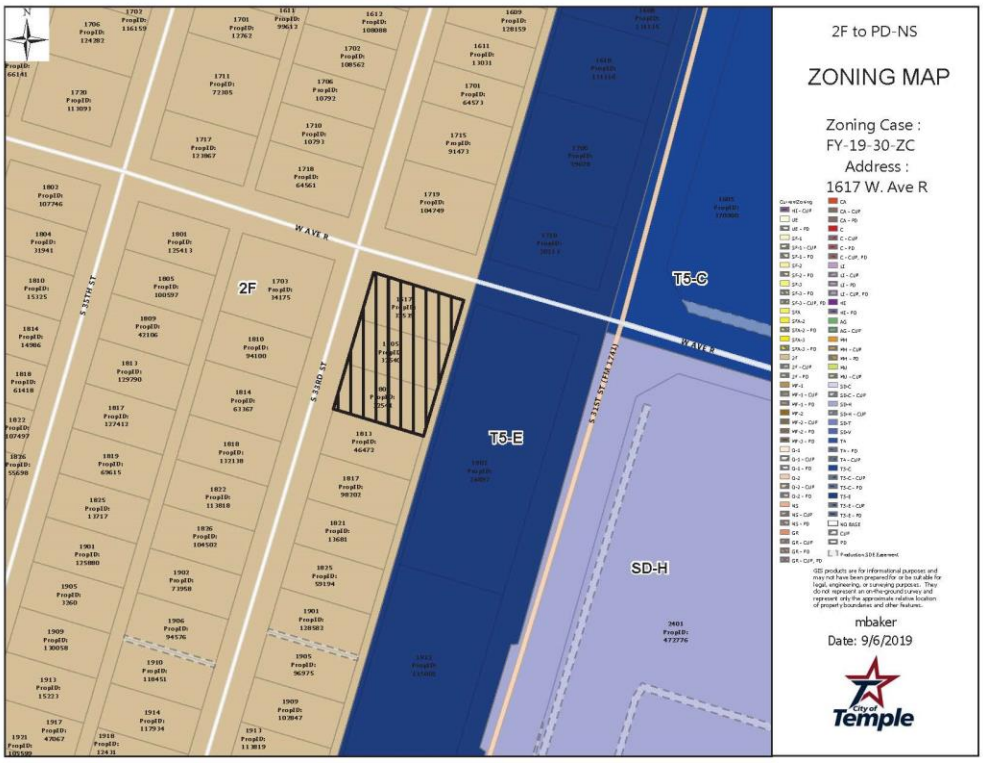
* **Landscaping or solid fencing from 6 to 8 feet in height (UDC Section 7.7.4),**
* **Refuse containers located in the side or rear of the property (UDC Section 7.7.6), and**
* **Screened outdoor storage (UDC Section 7.7.8.B1).**

Maps

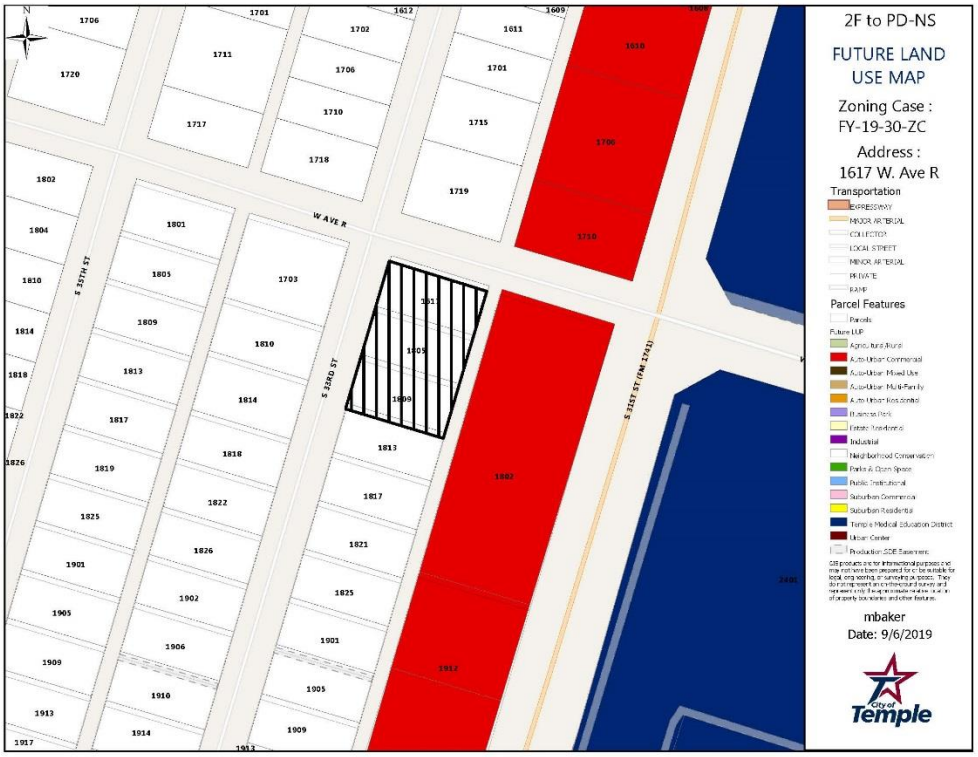
Location Map



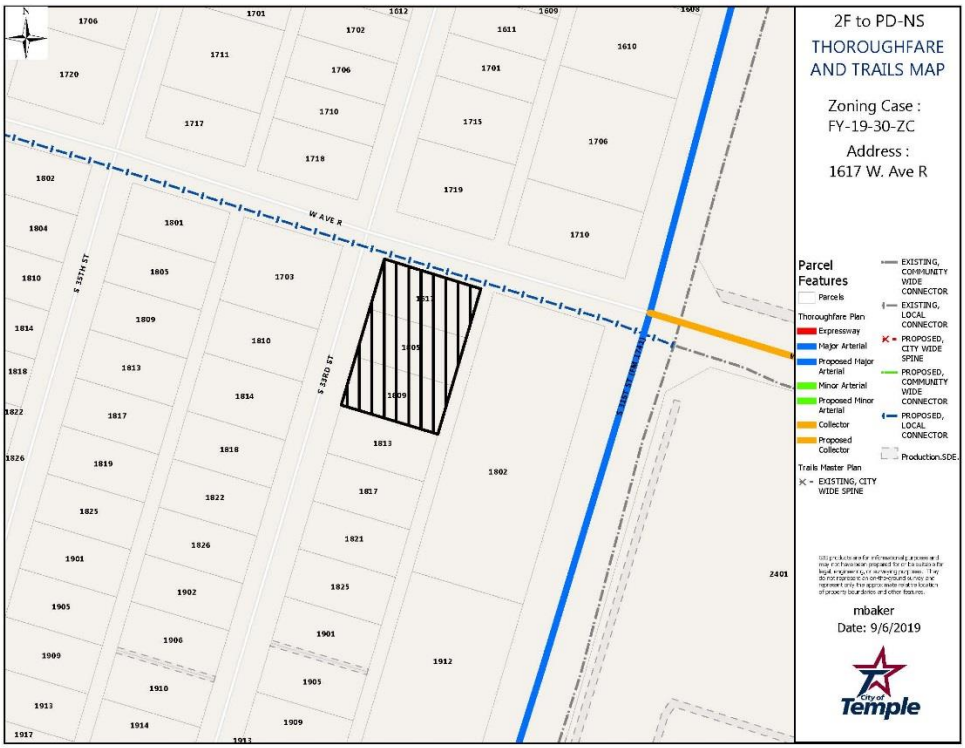
Aerial Map



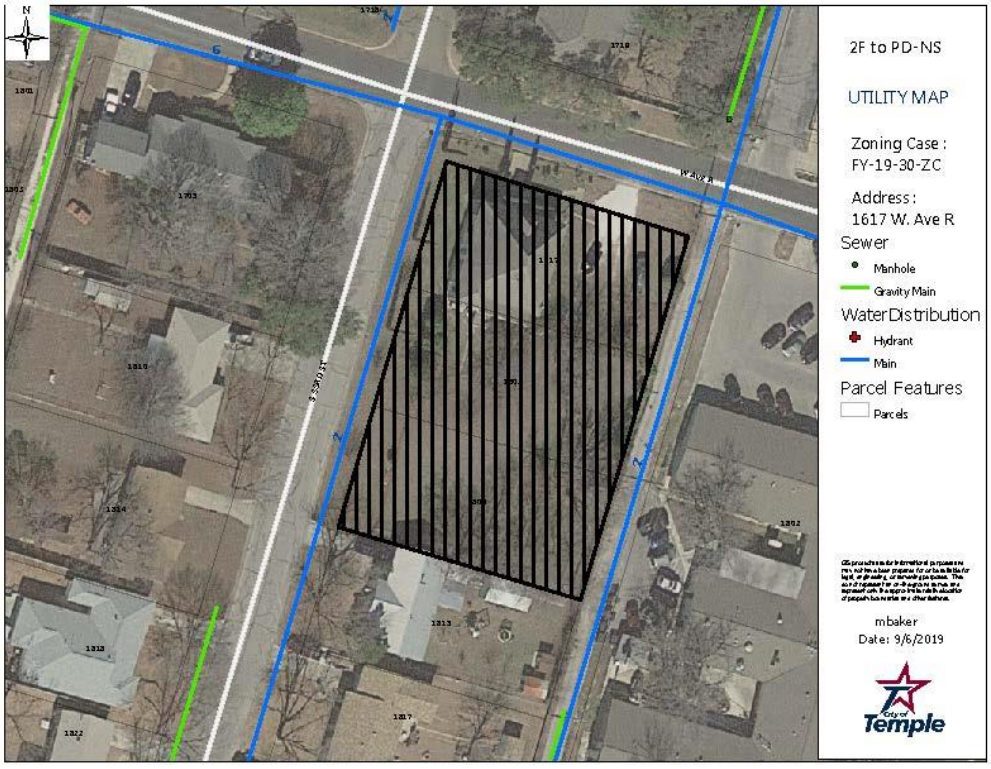
Zoning Map



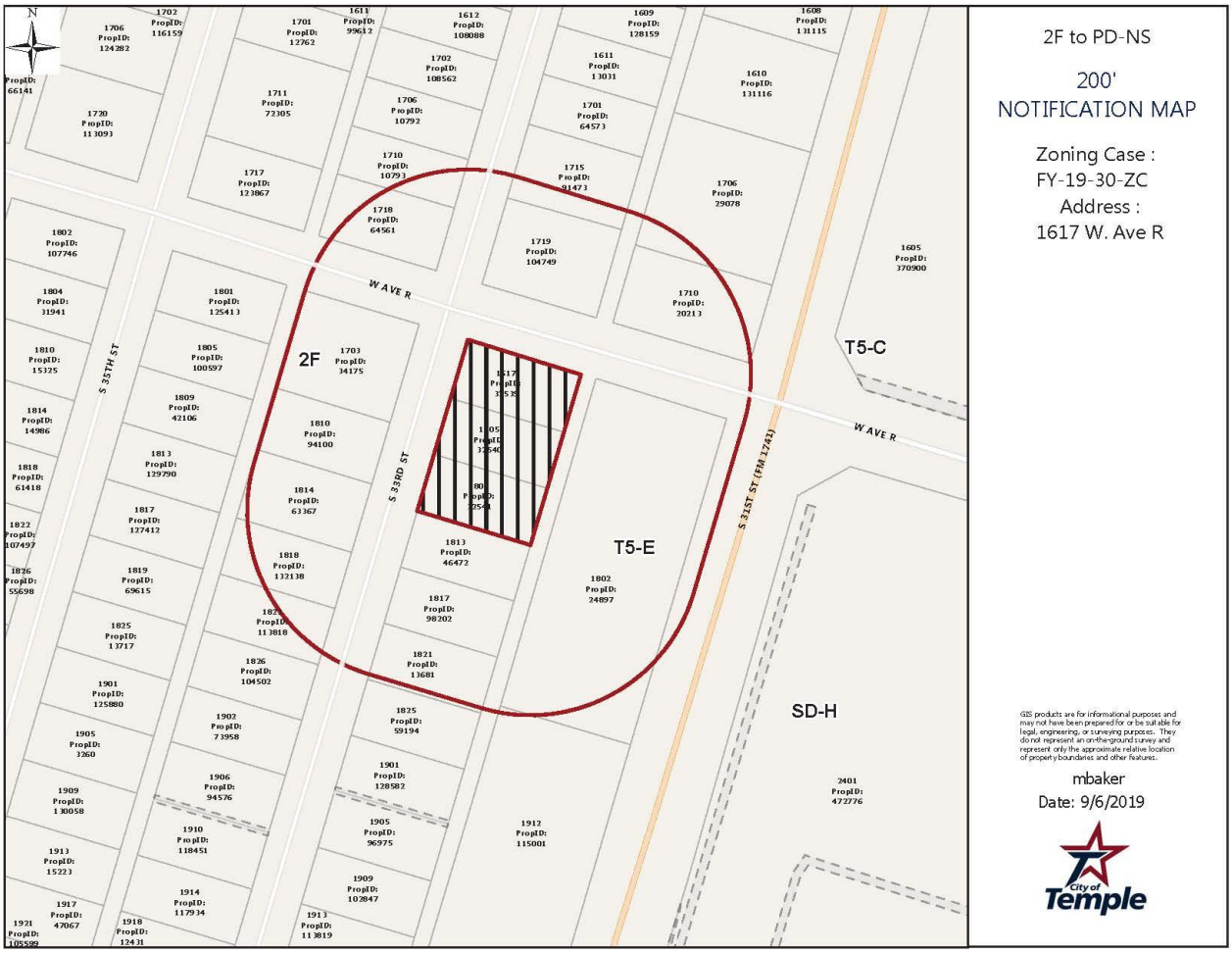
Future Land Use Map



Thoroughfare & Trails Map



Utility Map



Notification Map

RESPONSE TO PROPOSED REZONING REQUEST CITY OF TEMPLE

34175
EVANS, MARY LOUISE
1703 W AVENUE R
TEMPLE, TX 76504-6723

Zoning Application Number: FY-19-30-ZC **Case Manager: Mark Baker**

Location: 1617 W. Ave R

The proposed rezoning is the area shown in hatched marking on the attached map. Because you own property within 200 feet of the requested change, your opinions are welcomed. Please use this form to indicate whether you are in favor of the possible rezoning of the property described on the attached notice, and provide any additional comments you may have.

I ( ) **agree** (✓) **disagree with this request**

Comments:
THIS is A RESIDENTIAL district/PROPERTY ABOVE, AND I would LIKE FOR IT TO STAY THAT WAY. BECAUSE I OWN PROPERTY THAT IS RESIDENTIAL THAT IS within 200 feet of THIS REQUESTED CHANGE.

Mary Louise Evans-Brooks MARY LOUISE EVANS-BROOKS
Signature **Print Name**

_____ **(Optional)**
Provide email and/or phone number if you want Staff to contact you

If you would like to submit a response, please email a scanned version of this completed form to the Case Manager referenced above, mbaker@templetx.gov or mail or hand-deliver this comment form to the address below, no later than **October 7, 2019.**

RECEIVED
SEP 30 2019
CITY OF TEMPLE
PLANNING & DEVELOPMENT

City of Temple
Planning Department
2 North Main Street, Suite 102
Temple, Texas 76501

Number of Notices Mailed: 21 Date Mailed: September 25, 2019

***OPTIONAL**: Please feel free to email questions or comments directly to the Case Manager or call us at 254.298.5668.*

Brooks, Johnny

To: marylbrooks1030@gmail.com
Cc: Brooks, Johnny
Subject: FW: Proposed Rezoning Change

RESPONSE TO PROPOSED REZONING REQUEST CITY OF TEMPLE

Zoning Application Number: FY-19-30-ZC **Case Manager: Mark Baker** **September 30, 2019**

Location: 1617 West Ave R

Mary Louise Evans-Brooks
1703 West Ave R
Temple, Tx 76504-6723

The proposed rezoning is the area shown in hatched marking on the attached map. I must disagree with this proposed request of rezoning of the property described on the attached notice. The reasons that I do not want this neighborhood property rezoned is, not only that it's within 200 feet of the property that I own, but I have concerns regarding my neighborhood as well. Please see below. Thanks for your help with this matter.

1. **By rezoning this property, it will hurt the value of our neighborhood homes all around our area.**
2. **Will cause more traffic/noise and congestion.**
3. **Parking problems in the neighborhood, and around/in front of my home, because the rezoning location is across the street from my property.**
4. **This rezoning may/will add to future commercial development in our neighborhood.**
5. **The change in demographic that rezoning this property may target.**
6. **May have the potential to increase the crime in our neighborhood.**
7. **I'm not contemplating the sound of dumpsters being emptied at 4am, In the morning outside of my bedroom window.**
8. **I'm willing to listen, because I would like to know how will this rezoning be a positive change for my/our neighborhood.**

My recommendation would be not to rezone the property at 1617 West Ave R, but to relocate the business project one block east to 31st street were no rezoning will be needed. Why would someone want to put a business project right in the middle of someone's neighborhood were kids live and play?

Sincerely yours

Mary Louise Evans-Brooks
External: 254-718-7783 and or 254-534-0300

RESPONSE TO PROPOSED REZONING REQUEST CITY OF TEMPLE

RECEIVED
OCT 1 2019
CITY OF TEMPLE
PLANNING & DEVELOPMENT

46472
LONG, BRYAN E ETUX MADISSON A
1813 S 33RD ST
TEMPLE, TX 76504

Zoning Application Number: FY-19-30-ZC **Case Manager: Mark Baker**

Location: 1617 W. Ave R

The proposed rezoning is the area shown in hatched marking on the attached map. Because you own property within 200 feet of the requested change, your opinions are welcomed. Please use this form to indicate whether you are in favor of the possible rezoning of the property described on the attached notice, and provide any additional comments you may have.

I (✓) **agree** ( ) **disagree with this request**

Comments:
These are good people with high character, morals, and values. They will do what is in the best interest of those in this area. They care about this community and want to be a light to those they come in contact with.

Signature Bryan Long **Print Name**

blong324@gmail.com 214-663-2140 **(Optional)**
Provide email and/or phone number if you want Staff to contact you

If you would like to submit a response, please email a scanned version of this completed form to the Case Manager referenced above, mbaker@templetx.gov or mail or hand-deliver this comment form to the address below, no later than **October 7, 2019.**

City of Temple
Planning Department
2 North Main Street, Suite 102
Temple, Texas 76501

Number of Notices Mailed: 21 Date Mailed: September 25, 2019

***OPTIONAL**: Please feel free to email questions or comments directly to the Case Manager or call us at 254.298.5668.*

RESPONSE TO PROPOSED REZONING REQUEST CITY OF TEMPLE

63367
ST AMANT, HAROLD A JR
2316 PIN OAK DR
TEMPLE, TX 76502-2659

Zoning Application Number: FY-19-30-ZC **Case Manager: Mark Baker**

Location: 1617 W. Ave R

The proposed rezoning is the area shown in hatched marking on the attached map. Because you own property within 200 feet of the requested change, your opinions are welcomed. Please use this form to indicate whether you are in favor of the possible rezoning of the property described on the attached notice, and provide any additional comments you may have.

I (✓) **agree** ( ) **disagree with this request**

Comments:

Harold A. St Amant, Sr. 09.30.2019
Signature

Harold A. St. Amant, Sr. 09.30.2019
Print Name

(Optional)
Provide email and/or phone number if you want Staff to contact you

If you would like to submit a response, please email a scanned version of this completed form to the Case Manager referenced above, mbaker@templetx.gov or mail or hand-deliver this comment form to the address below, no later than **October 7, 2019.**

City of Temple
Planning Department
2 North Main Street, Suite 102
Temple, Texas 76501

Number of Notices Mailed: 21 Date Mailed: September 25, 2019

***OPTIONAL**: Please feel free to email questions or comments directly to the Case Manager or call us at 254.298.5668.*

RESPONSE TO PROPOSED REZONING REQUEST CITY OF TEMPLE

1 of 2

Done 9-30-19

RECEIVED
OCT 04 2019
CITY OF TEMPLE
PLANNING & DEVELOPMENT

132138
ZELISKO, JON C
1818 S 33RD ST
TEMPLE, TX 76504-6721

Zoning Application Number: FY-19-30-ZC **Case Manager: Mark Baker**

Location: 1617 W. Ave R

The proposed rezoning is the area shown in hatched marking on the attached map. Because you own property within 200 feet of the requested change, your opinions are welcomed. Please use this form to indicate whether you are in favor of the possible rezoning of the property described on the attached notice, and provide any additional comments you may have.

I ( ) **agree** (X) **disagree with this request**

Comments:

See page 2.

Jon C. Zelisko

Signature **Print Name**

9-30-2019

(Optional)

Provide email and/or phone number if you want Staff to contact you

254-778-6505

If you would like to submit a response, please email a scanned version of this completed form to the Case Manager referenced above, mbaker@templetx.gov or mail or hand-deliver this comment form to the address below, no later than **October 7, 2019.**

City of Temple
Planning Department
2 North Main Street, Suite 102
Temple, Texas 76501

Number of Notices Mailed: 21 Date Mailed: September 25, 2019

***OPTIONAL**: Please feel free to email questions or comments directly to the Case Manager or call us at 254.298.5668.*

Mr. Baker: 2 of 2

The zoning of this property has already been determined residential by surrounding Property owners several years ago because it is ideal for families with medical needs getting care at Baylor Scott and White. PD-NS can rent the vacant site of the "Old English Bakery" or the vacant site of "Freddy's" down the street if they need a site plan for a coffee shop. The hatched area on your map is not Commercial. It is Residential!! Don't mess with our area.

NO to the proposed rezoning.

9-30-2019

Jon & Shirley Zelisko

RESPONSE TO PROPOSED REZONING REQUEST CITY OF TEMPLE

RECEIVED
OCT 04 2019
CITY OF TEMPLE
PLANNING & DEVELOPMENT

113818
SYPERT, RAYMOND C ETUX PAT LEE
5014 SARAHS WAY
TEMPLE, TX 76502-3386

Zoning Application Number: FY-19-30-ZC **Case Manager: Mark Baker**

Location: 1617 W. Ave R

The proposed rezoning is the area shown in hatched marking on the attached map. Because you own property within 200 feet of the requested change, your opinions are welcomed. Please use this form to indicate whether you are in favor of the possible rezoning of the property described on the attached notice, and provide any additional comments you may have.

I ( ) **agree** (X) **disagree with this request**

Comments:
As need for this service. There is already To much Traffic on 33rd from West Ave T To West Ave R.

Raymond C Sypert
Signature

Raymond C Sypert
Print Name

_____ **(Optional)**
Provide email and/or phone number if you want Staff to contact you

If you would like to submit a response, please email a scanned version of this completed form to the Case Manager referenced above, mbaker@templetx.gov or mail or hand-deliver this comment form to the address below, no later than **October 7, 2019.**

City of Temple
Planning Department
2 North Main Street, Suite 102
Temple, Texas 76501

Number of Notices Mailed: 21 Date Mailed: September 25, 2019

***OPTIONAL**: Please feel free to email questions or comments directly to the Case Manager or call us at 254.298.5668.*

EXCERPTS FROM THE

PLANNING & ZONING COMMISSION MEETING

MONDAY, OCTOBER 7, 2019

ACTION ITEMS

Item 3: **FY-19-30-ZC –** Hold a public hearing to discuss and recommend action for a rezoning from Two Family (2F) to Planned Development Neighborhood Service (PD-NS) with a development/ site plan for a specialty coffee shop located at 1617 West Avenue R.

Mr. Baker, Principal Planner stated this item is scheduled to go forward to City Council for first reading on November 7, 2019 and second reading on November 21, 2019.

No subdivision plat will be required prior to development; however, a building permit for the change of use of property is required.

Site Plan shown.

Planned Development UDC Section 3.4 Criteria Table shown and found to be in compliance.

Zoning Map shown and found to be in compliance.

Future Land Use Map shown and found to be in compliance.

Existing water and sewer map shown and found to be in compliance.

Thoroughfare Plan and trails map shown and found to be in compliance.

On-Site photos shown.

Typical Neighborhood Service Uses and Planned Development Standards charts shown.

Site Plan map with details shown.

Twenty-one notices were mailed in accordance with all state and local regulations with two notices returned in agreement and three notices returned in disagreement.

Compliance Summary chart shown.

Staff recommends approval of the request for a rezoning from Two-Family “2F” district to Planned Development—Neighborhood Service “PD-NS” district subject to six conditions:

1. Coffee shop is allowed or other permitted use within the NS district
2. 6-foot sidewalk along W Ave R
3. 6-foot high solid wood fence along southern boundary
4. Future demolition of the existing building requires an amendment to the PD

5. Director of Planning approval authorization of minor changes to development plan

6. Significant changes require P&Z & City Council review

Commissioner Wright discussed the parking area, and Mr. Baker explained that parking would be composed of either the material concrete or asphalt.

Vice-Chair Ward reviewed the proposed sidewalk construction.

Commissioner Fettig asked for an estimate of the time that this building has been unoccupied.

Speaker, Mr. Greg Burnett, 3800 Valley View Drive, stated that he does not have an exact date, but it is his understanding that this structure was unoccupied since this past Spring.

Commissioner Fettig discussed outside seating, and Mr. Burnett stated there would be a deck at the back for seating.

Vice-Ward discussed fencing and buffering around the property.

Mr. Greg Burnett stated the proposed hours of operation are: Monday through Thursday-6:00 a.m. to 9:00 p.m.; Friday and Saturday-6:00 a.m. to 11:00 p.m.; and closed on Sunday. He also stated that no loud music is proposed, and guitar music is being considered. Live concerts are not proposed.

Chair Langley opened the public hearing.

Speaker, Mr. Bryan Long, 1813 South 33rd Street, stated he was in favor of this proposed coffee house at this location. As a neighbor in this location, he supported the need for a sidewalk and this structure needs attention. Mr. Long also addressed the traffic issues and feels this business would curtail the traffic.

Speaker, Mr. Clarence Ball, 1817 South 33rd Street, stated he has issues with this proposed project. He feels this business could increase his taxes and will create traffic and safety issues. He does feel it would bring curb appeal to an eyesore.

Speaker, Mr. John Brooks, 1703 West Avenue R, stated his concern is that he would not like a business across the street from his residence. He also discussed security, neighborhood changes, and noise distractions for this property.

Speaker, Ms. Sonya Burnett, 3800 Valley View Drive, stated the city has been very specific regarding measure to prevent interference in your neighborhood lifestyle. She also explained that the front door is not facing the nursing home.

Mr. Burnett explained that the main entrance and exit will be through Avenue R. The only outdoor light proposed will be in the parking lot.

Speaker, Ms. Mary Brooks, 1703 West Avenue R, discussed traffic issues and is also concerned about lighting illuminating into her property. She is concerned about possible changes to her neighborhood from this proposed project.

Speaker, Ms. Anitra Ball, 1817 South 33rd Street, discussed parking/traffic issues and stated she had considered opening a daycare business at this location. She is also concerned about the noise level and possibly an increase in criminal activity due to this proposed project.

Mr. Baker explained that any significant changes would trigger this case to return to public review, the P&Z, and the City Council. He also discussed the city ordinance that prohibits light trespass and would have to meet UDC requirements.

Mr. Brian Chandler, Director of Planning, explained that the UDC does have a performance standard related to lighting to prevent light trespass; however, it is helpful to add this as a condition to the motion to reinforce the code with a condition related to lighting.

Mr. Long stated this would be a quiet coffeehouse and the goal is not to have a high volume of customers at this proposed business. He described it as a "home" atmosphere.

There being no further speakers, the public hearing was closed.

Commissioner Marshall asked if additional language could be added regarding speed bumps and other conditions to this motion, and Mr. Chandler explained that any enforceable condition can be added. He also stated that there are criteria that must be met to provide traffic calming from Public Works.

Mr. Richard Wilson, Deputy City Engineer, explained that the traffic counts evaluation to install speed bumps would involve a few days.

Commissioner Fettig made a motion to approve Item 3, **FY-19-30-ZC**, per staff recommendation with a review of the proposed lighting to prevent light trespass, as well as for staff to explore adding no parking signs and traffic-calming along S. 33rd Street, and Commissioner Alaniz made a second.

Motion passed: (7:1)

Vice-Chair Ward opposed.

Commissioner Armstrong absent.

ORDINANCE NO. 2019-5006
(FY-19-30-ZC)

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A REZONING FROM TWO FAMILY ZONING DISTRICT TO PLANNED DEVELOPMENT NEIGHBORHOOD SERVICE ZONING DISTRICT WITH A DEVELOPMENT/SITE PLAN FOR A SPECIALTY COFFEE SHOP, LOCATED AT 1617 WEST AVENUE R; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, the applicants, Greg & Sonya Burnett, on behalf of the owner Dr. Vijay Mehta, who would like to open a specialty coffee shop to be known as 1914 Coffee House, request rezoning for a Planned Development with development/site plan approval;

Whereas, the proposed Planned Development is an adaptive reuse of an existing single-family residence as well as two adjacent vacant lots for a specialty coffee shop consisting of approximately 0.67 acres - the property is legally described as Lots 1, 2 & 3 of Block 8 of the Dubose Addition First Extension subdivision;

Whereas, it is understood that the existing residence, which is approximately 2,000 square feet, was constructed in or about 1914 and the proposed coffee shop would reuse the unoccupied residence for non-residential purposes as a specialty coffee shop offering specialty coffee, tea, espresso drinks and the like for sale - pastries, sandwiches and salads would also be available for purchase;

Whereas, development of the property would incorporate two additional lots to be used for parking and landscaping and in total would equal approximately 29,000 square feet of area;

Whereas, the property is bordered to the west by existing single-family homes (Dubose Addition First Extension) along West Avenue R and existing retail and service uses fronting along South 31st Street across from the Baylor, Scott & White Hospital campus - the location of this proposed use in the shell of the existing single-family residence is a good buffer between the change of uses;

Whereas, the Planning and Zoning Commission of the City of Temple, Texas, recommends approval of the rezoning from Two Family zoning district to Planned Development Neighborhood Service zoning district with a development/site plan for a specialty coffee shop, located at 1617 West Avenue R, as outlined in the map attached hereto as Exhibit 'A,' and made a part hereof for all purposes, and subject to the following conditions:

- Lots 1, 2 & 3, Block 8, Dubose Addition First Extension may be used as a specialty coffee shop or other permitted use within the Neighborhood Service district as shown and further described by 'Exhibit A' of the Planned Development;

- A 6-foot sidewalk must be constructed along the street frontage of West Avenue R with connectivity to the adjacent parking lot across the alley;
- A 6-foot high solid wood fence must be constructed along the southern property boundary;
- Future demolition of the existing primary structure would require an amendment to the Planned Development Ordinance;
- The Director of Planning & Development may approve minor modifications to the City Council-approved development plan, including but not limited to, screening, buffering, landscaping and minor modifications to the overall site layout; and
- Significant changes to the Development/Site Plan require review by the Planning & Zoning Commission and City Council; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Ordinance as if copied in their entirety.

Part 2: The City Council approves of the rezoning from Two Family zoning district to Planned Development Neighborhood Service zoning district with a development/site plan for a specialty coffee shop, located at 1617 West Avenue R, as outlined in the map attached hereto as Exhibit 'A,' and made a part hereof for all purposes, and subject to the following conditions:

- Lots 1, 2 & 3, Block 8, Dubose Addition First Extension may be used as a specialty coffee shop or other permitted use within the Neighborhood Service district as shown and further described by 'Exhibit A' of the Planned Development;
- A 6-foot sidewalk must be constructed along the street frontage of West Avenue R with connectivity to the adjacent parking lot across the alley;
- A 6-foot high solid wood fence must be constructed along the southern property boundary;
- Future demolition of the existing primary structure would require an amendment to the Planned Development Ordinance;
- The Director of Planning & Development may approve minor modifications to the City Council-approved development plan, including but not limited to, screening, buffering, landscaping and minor modifications to the overall site layout; and
- Significant changes to the Development/Site Plan require review by the Planning & Zoning Commission and City Council; and

Part 3: The City Council directs the Director of Planning to make the necessary changes to the City Zoning Map.

Part 4: It is hereby declared to be the intention of the City Council that the sections, paragraphs, sentences, clauses, and phrases of this Ordinance are severable and, if any phrase, clause, sentence, paragraph or section of this Ordinance should be declared invalid by the final judgment or decree of any court of competent jurisdiction, such invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs or sections of this Ordinance, since the same would have been enacted by the City Council without the incorporation in this Ordinance of any such phrase, clause, sentence, paragraph or section.

Part 5: This Ordinance shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Temple, Texas, and it is accordingly so ordained.

Part 6: It is hereby officially found and determined that the meeting at which this Ordinance was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED on First Reading and Public Hearing on the **7th** day of **November,** 2019.

PASSED AND APPROVED on Second Reading on the **21st** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

_____
TIMOTHY A. DAVIS, Mayor

ATTEST:

_____
Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

_____
Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Tammy Lyerly, Senior Planner

ITEM DESCRIPTION: FIRST READING – PUBLIC HEARING – FY-19-31-ZC: Consider an ordinance adopting a rezoning from Agricultural zoning district to Single Family-Two on 0.942 +/- acres addressed as 3707 West Nugent Avenue.

PLANNING AND ZONING COMMISSION RECOMMENDATION: At its October 7, 2019, meeting the Planning and Zoning Commission voted 8/0 to recommend approval of the requested rezoning from Agricultural (AG) zoning district to Single Family-Two (SF-2), per Staff's recommendation.

STAFF RECOMMENDATION: Staff recommends a rezoning from Agricultural (AG) District to Single Family-Two (SF-2) District for the following reasons:

1. Compliance with surrounding zoning and land uses;
2. Compliance with the Thoroughfare Plan; and
3. Compliance with availability of public facilities to serve the subject property

PROPOSED CITY COUNCIL MEETING SCHEDULE: This rezoning is scheduled for City Council 1st Reading on November 7, 2019 and 2nd Reading on November 21, 2019.

ITEM SUMMARY: The applicant requests this rezoning from Agricultural District (AG) to Single Family-Two District (SF-2) on 0.942 acres of land to allow expansion of a recent rezoning for a single-family development on 23.901 acres, located at the southwest corner of West Nugent Avenue and John Paul Jones Drive (FY-19-2-ZC). The applicant recently purchased this strip of land from the Temple Independent School District (TISD).

This rezoning case is associated with the Preliminary Plat of Monte Verde Residential Development (FY-19-56-PLT), a proposed 94-lot single-family development along West Nugent Avenue. The preliminary plat is on hold pending this rezoning request.

The applicant's requested Single Family-Two (SF-2) zoning district permits single-family detached residences and related accessory structures and provides smaller single-family lots. This district may also serve as a transition from Single Family-One (SF-1) zoning district to less restrictive or denser residential zoning districts.

COMPREHENSIVE PLAN COMPLIANCE: The proposed rezoning relates to the following goals, objectives or maps of the Comprehensive Plan and Sidewalk and Trails Plan:

Future Land Use and Character Plan (FLUP) (CP Map 3.1)
The subject property is within the **Public Institutional character district** of the *Choices '08* City of Temple Comprehensive Plan. The **Public Institutional** land use classification is comprised of public uses including schools, government buildings and semi-public uses such as churches, hospitals, cemeteries, community facilities, clubs/lodges and other places of assembly. **The applicant's requested Single Family-Two (SF-2) zoning district does not comply with the Public Institutional character district.**

Thoroughfare Plan (CP Map 5.2) and Temple Trails Master Plan Map and Sidewalk Ordinance
The subject property fronts **West Nugent Avenue**, a minor arterial. Since minor arterials are high traffic streets, they are only appropriate for subdivision entrances to local streets within residential developments. **Staff will ensure during the platting process that residential lots along West Nugent Avenue will not have vehicular access to West Nugent Avenue, per Unified Development Code (UDC) Section 8.2.6.E Design Standards-Lot Arrangement.**

Temple Trails Master Plan Map and Sidewalks Ordinance
The Temple Trails Master Plan shows a proposed local connector trail along the north side of West Nugent Avenue. The subject property has an existing sidewalk along West Nugent, as required by UDC Section 8.2.3.

The developer has been in contact with TISD about potentially partnering to create a hike and bike trail through the neighborhood that connects to Kennedy-Powell Elementary.

Availability of Public Facilities (CP Goal 4.1)
There is an existing 8-inch water line along the south right-of-way of West Nugent Avenue. An existing 8-inch sanitary sewer line is located along the property's south property line.

PUBLIC NOTICE: Nine notices of the Planning and Zoning Commission public hearing were sent out to property owners within 200-feet of the subject property as required by State law and City Ordinance. As of Friday, October 25, 2019, two notices have been returned in favor of the proposed rezoning and none have been received in opposition to the proposed rezoning.

The newspaper printed notice of the public hearing on September 26, 2019, in accordance with state law and local ordinance.

FISCAL IMPACT: Not Applicable

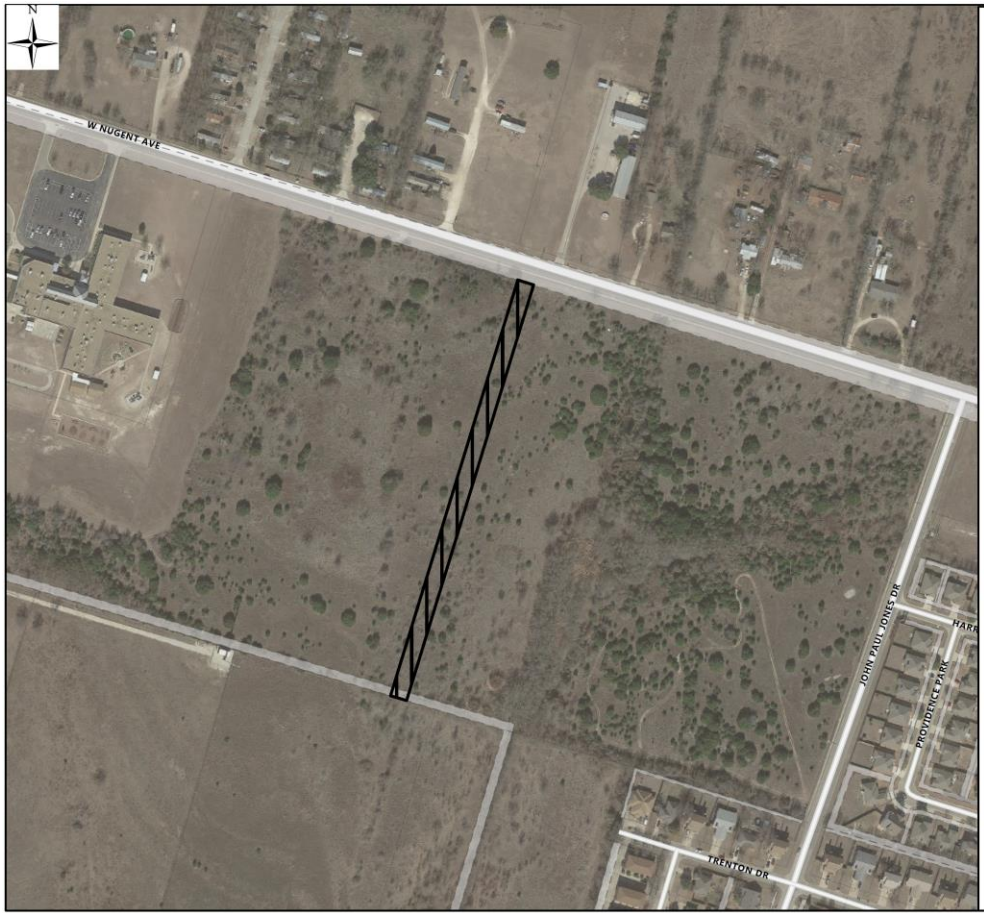
ATTACHMENTS:
Site and Surrounding Property Photos
Maps
Development Regulations
Property Owners Response Letters
P&Z Excerpts (October 7, 2019)
Ordinance

SURROUNDING PROPERTY AND USES:

The following table shows the subject property, existing zoning and current land uses:

Direction	Zoning	Current Land Use	Photo
Subject Property	AG	Undeveloped Land	 
East	SF-2	Undeveloped Single Family Residential	

Direction	Zoning	Current Land Use	Photo
West	AG	Undeveloped TISD Land	
South	AG	Undeveloped Land	
North	AG	HUD Code Land Lease Community Park, & Commercial	



AG To SF-2

AERIAL MAP

Zoning Case :
FY-19-31-ZC

Address :
3707 W Nugent Ave

Transportation

Streets

COLLECTOR

LOCAL STREET

MINOR ARTERIAL

Temple Municipal Boundary

Parcel Features

Parcels

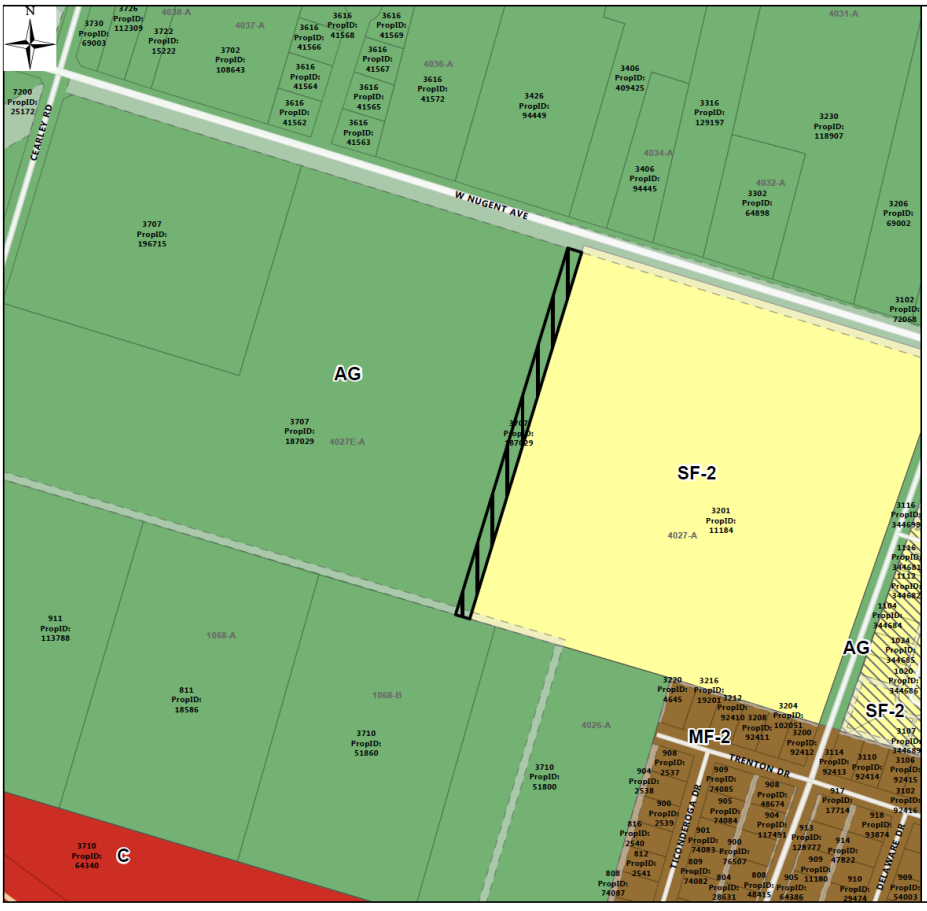
Production.SDE.Easement

GIS products are for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. They do not represent an on-the-ground survey and represent only the approximate relative location of property boundaries and other features.

tlyerly

Date: 9/19/2019

City of Temple



AG To SF-2

Zoning Case :
FY-19-31-ZC
Address :
3707 W Nugent Ave

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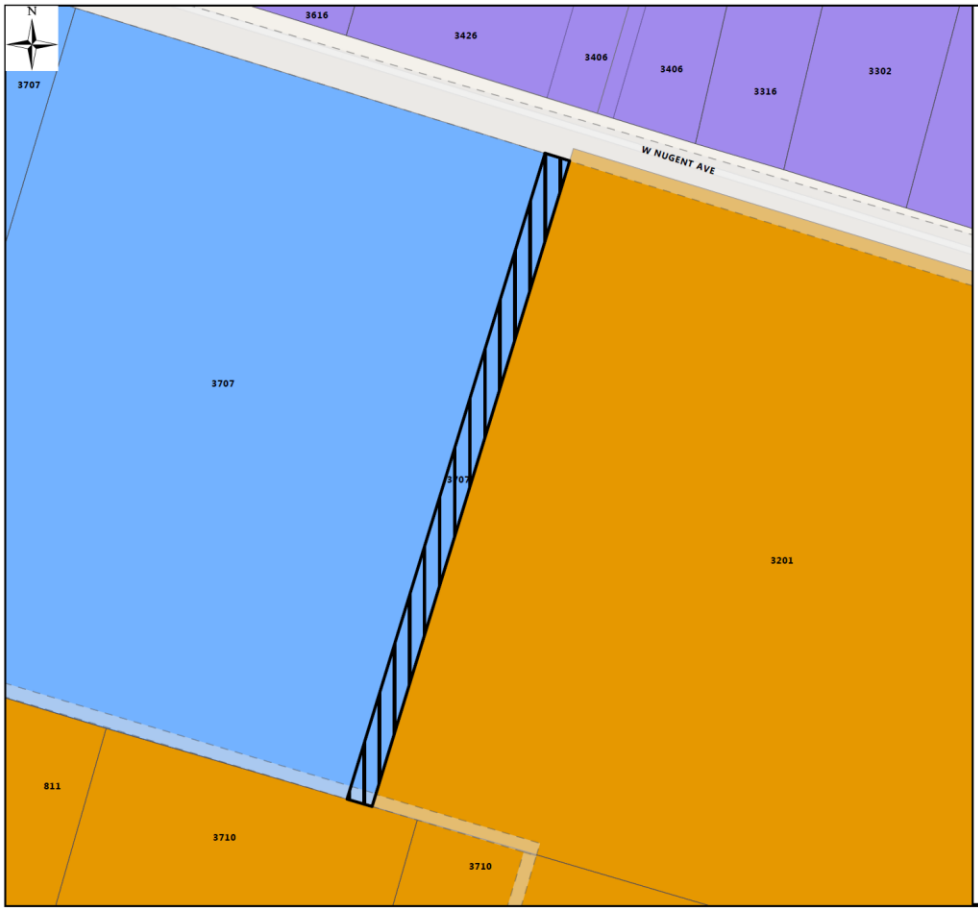
tlyerly

Date: 9/19/2019

City of Temple



AG To SF-2

FUTURE LAND USE MAP

FY-19-31-ZC
Address :
3707 W Nugent Ave

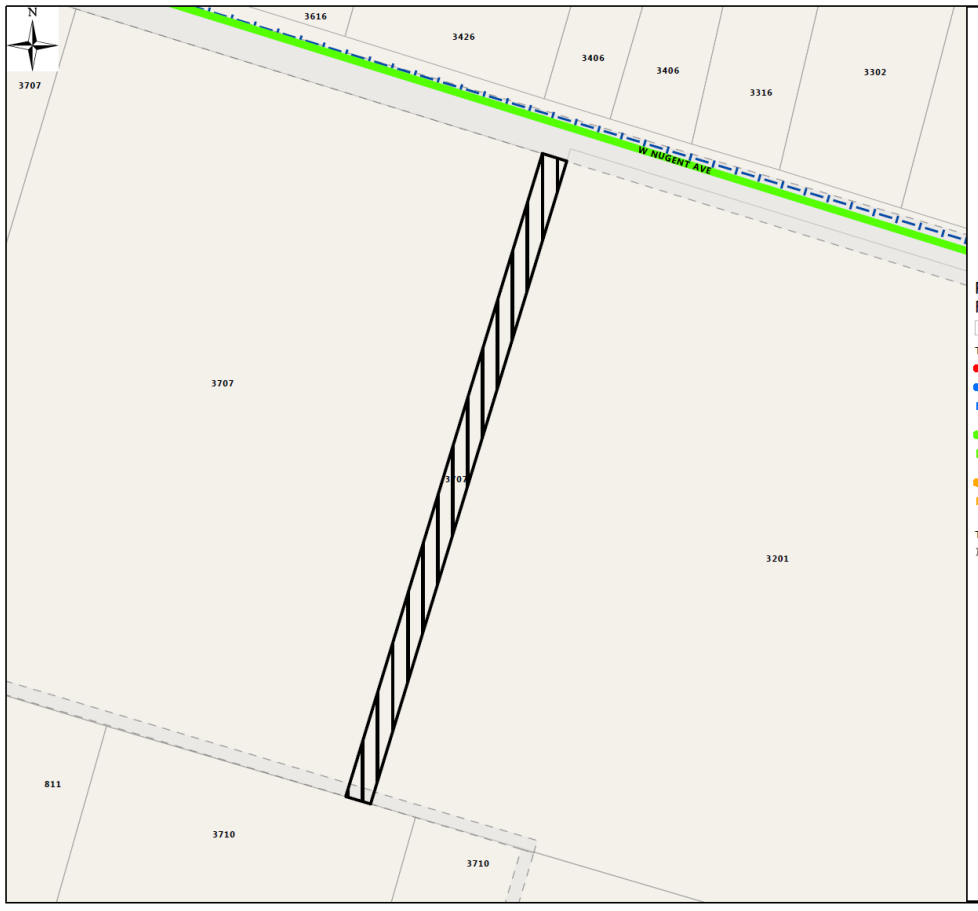
Transportation
- EXPRESSWAY
- MAJOR ARTERIAL
- COLLECTOR
- LOCAL STREET
- MINOR ARTERIAL
- PRIVATE
- RAMP

Parcel Features
- Parcels

Future LUP
- Agricultural/Rural
- Auto-Urban Commercial
- Auto-Urban Mixed Use
- Auto-Urban Multi-Family
- Auto-Urban Residential
- Business Park
- Estate Residential
- Industrial
- Neighborhood Conservation
- Parks & Open Space
- Public Institutional
- Suburban Commercial
- Suburban Residential
- Temple Medical Education District
- Urban Center
- Production.SDE.Easement

tlyerly
Date: 9/19/2019

City of Temple



AG To SF-2

THOROUGHFARE AND TRAILS MAP

FY-19-31-ZC

Address :
3707 W Nugent Ave

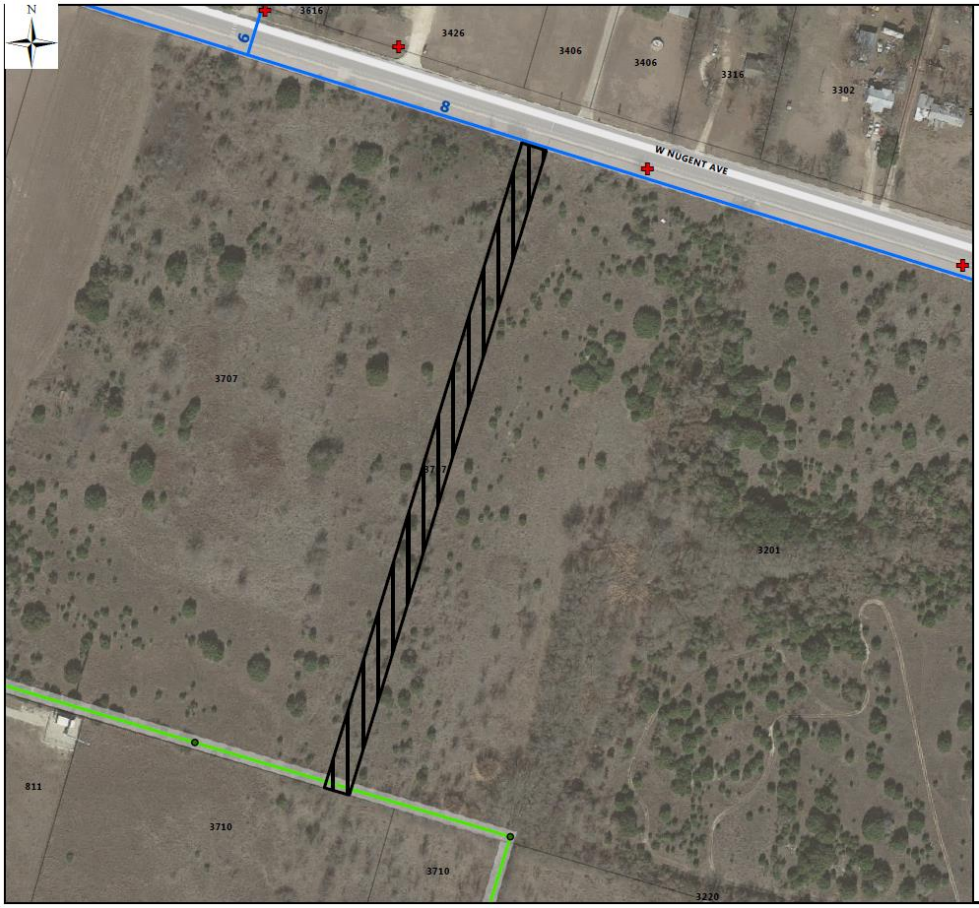
Parcel Features
- Parcels

Thoroughfare Plan
- Expressway
- Major Arterial
- Proposed Major Arterial
- Minor Arterial
- Proposed Minor Arterial
- Collector
- Proposed Collector

Trails Master Plan
- EXISTING, CITY WIDE SPINE
- EXISTING, COMMUNITY WIDE CONNECTOR
- EXISTING, LOCAL CONNECTOR
- PROPOSED, CITY WIDE SPINE
- PROPOSED, COMMUNITY WIDE CONNECTOR
- PROPOSED, LOCAL CONNECTOR
- Production.SDE

tlyerly
Date: 9/19/2019

City of Temple



AG To SF-2

UTILITY MAP

Zoning Case :
FY-19-31-ZC

Address :
3707 W Nugent Ave

Sewer
- Manhole
- Gravity Main

WaterDistribution
- Hydrant
- Main

Parcel Features
- Parcels
- Production.SDE.Easement

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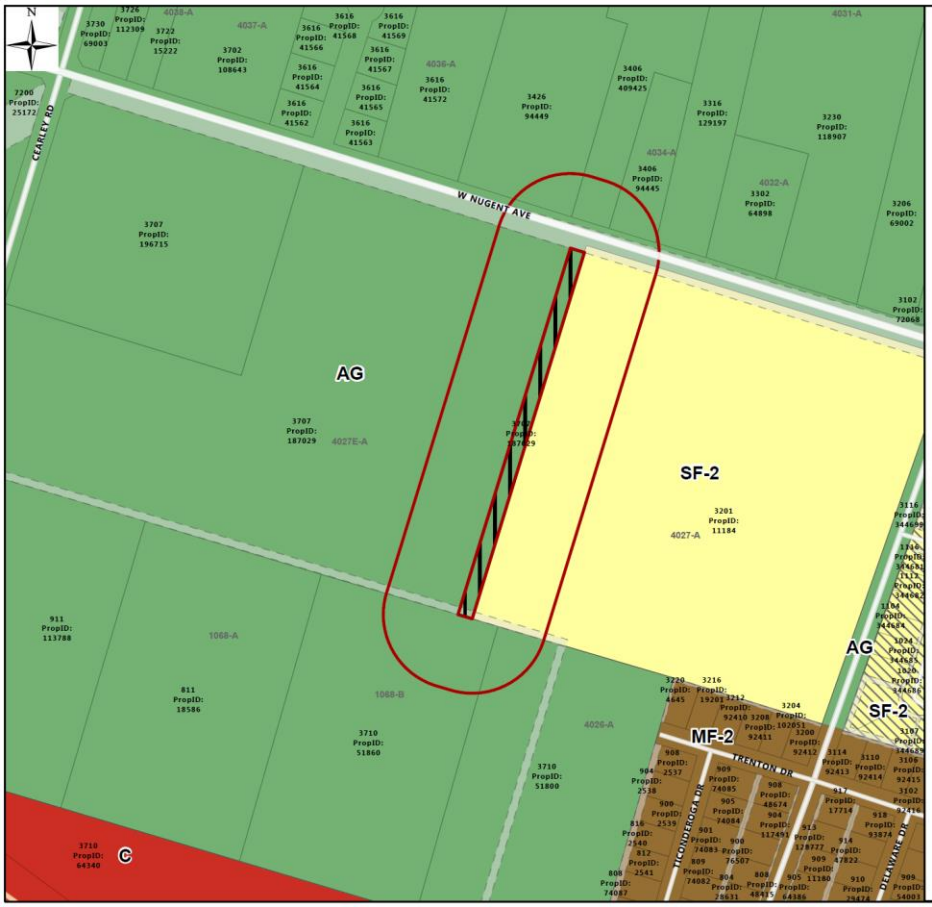
tlyerly
Date: 9/19/2019

City of Temple



AG To SF-2

200'
NOTIFICATION MAP
Zoning Case :
FY-19-31-ZC
Address :
3707 W Nugent Ave

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tlyerly
Date: 9/19/2019

City of Temple

DEVELOPMENT REGULATIONS: Standards for detached Single Family residential homes in the SF-2 district are:

	SF-2 (Proposed)
Minimum Lot Size	5,000 Square Feet
Minimum Lot Width	50 Feet
Minimum Lot Depth	100 Feet
Front Setback	25 Feet
Side Setback	5 Feet
Side Setback (corner)	15 Feet
Rear Setback	10 Feet
Max Building Height	2 ½ Stories

Although the property is anticipated for development of detached single family residential dwellings, there are a number of other uses allowed in the SF-2 district which, include but are not limited to:

Permitted & Conditional Use Table – Single Family Two (SF-2)	
Agricultural Uses	*** Farm, Ranch or Orchard**
Residential Uses	*** Single Family Residence (Detached Only)** *** Industrialized Housing** *** Family or Group Home**
Retail & Service Uses	*** None**
Commercial Uses	*** None**
Industrial Uses	*** Temporary Asphalt & Concrete Batching Plat (CUP)**
Recreational Uses	*** Park or Playground**
Educational & Institutional Uses	*** Cemetery, Crematorium or Mausoleum (CUP)** *** Place of Worship** *** Child Care: Group Day Care (CUP)** *** Social Service Center (CUP)**
Restaurant Uses	*** None**
Overnight Accommodations	*** None**
Transportation Uses	*** Railroad Track Right-of-Way**

Prohibited uses include HUD-Code manufactured homes and land lease communities, most commercial uses and industrial uses.

	Surrounding Property & Uses		
Direction	**Future Land Use Map**	**Zoning**	**Current Land Use**
Site	Public Institutional	AG	Undeveloped Land
North	Business Park	AG	Agricultural & Rural Residential
South	Auto-Urban Residential	AG	Undeveloped Land,
East	Auto-Urban Residential	SF-2	Undeveloped Single Family Residential
West	Public Institutional	AG	Undeveloped TISD Land

COMPREHENSIVE PLAN (CP) COMPLIANCE: The proposed rezoning relates to the following goals, objectives or maps of the Comprehensive Plan and Sidewalk and Trails Plan
:

Document	Policy, Goal, Objective or Map	Compliance?
CP	Map 3.1 - Future Land Use Map	No
CP	Map 5.2 - Thoroughfare Plan	Yes
CP	Goal 4.1 - Growth and development patterns should be consistent with the City's infrastructure and public service capacities	Yes
STP	Temple Trails Master Plan Map and Sidewalks Ordinance	Yes

CP = Comprehensive Plan STP = Sidewalk and Trails Plan

RESPONSE TO PROPOSED REZONING REQUEST CITY OF TEMPLE

187029
TEMPLE ISD
PO BOX 788
TEMPLE, TX 76503-0788

Zoning Application Number: FY-19-31-ZC **Case Manager: Tammy Lyerly**

Location: 3707 West Nugent Avenue

The proposed rezoning is the area shown in hatched marking on the attached map. Because you own property within 200 feet of the requested change, your opinions are welcomed. Please use this form to indicate whether you are in favor of the possible rezoning of the property described on the attached notice, and provide any additional comments you may have.

I (✓) **agree** ( ) **disagree with this request**

Comments:
TISD SOLD THIS STRIP OF PROPERTY TO MR HERNANDEZ FOR EXPANSION OF HIS DEVELOPMENT. THEREFORE, THE ADMINISTRATION SUPPORTS THIS REZONING REQUEST.

Signature KENT BOYD **Print Name**

(Optional)
Provide email and/or phone number if you want Staff to contact you

If you would like to submit a response, please email a scanned version of this completed form to the Case Manager referenced above, tlyerly@templetx.gov, or mail or hand-deliver this comment form to the address below, no later than **October 7, 2019.**

City of Temple
Planning Department
2 North Main Street, Suite 102
Temple, Texas 76501

Number of Notices Mailed: 9 Date Mailed: September 25, 2019

***OPTIONAL**: Please feel free to email questions or comments directly to the Case Manager or call us at 254.298.5668.*

RESPONSE TO PROPOSED REZONING REQUEST CITY OF TEMPLE

129197
TOMASEK, HENRY O & SARA JO
2616 W ADAMS AVE
TEMPLE, TX 76504-3927

Zoning Application Number: FY-19-31-ZC **Case Manager: Tammy Lyerly**

Location: 3707 West Nugent Avenue

The proposed rezoning is the area shown in hatched marking on the attached map. Because you own property within 200 feet of the requested change, your opinions are welcomed. Please use this form to indicate whether you are in favor of the possible rezoning of the property described on the attached notice, and provide any additional comments you may have.

I (✓) **agree** ( ) **disagree with this request**

Comments:

Henry O. Tomasek
Signature

Henny O. Tomasek
Print Name

_____ **(Optional)**
Provide email and/or phone number if you want Staff to contact you

If you would like to submit a response, please email a scanned version of this completed form to the Case Manager referenced above, tlyerly@templetx.gov, or mail or hand-deliver this comment form to the address below, no later than **October 7, 2019.**

City of Temple
Planning Department
2 North Main Street, Suite 102
Temple, Texas 76501

Number of Notices Mailed: 9 Date Mailed: September 25, 2019

***OPTIONAL**: Please feel free to email questions or comments directly to the Case Manager or call us at 254.298.5668.*

EXCERPTS FROM THE

PLANNING & ZONING COMMISSION MEETING

MONDAY, October 7, 2019

ACTION ITEMS

Item 4: **FY-19-31-ZC –** Hold a public hearing to discuss and recommend action on a rezoning request from Agricultural (AG) zoning district to Single Family Two (SF-2) zoning district for 0.942 +/- acres addressed as 3707 W. Nugent Avenue.

Ms. Tammy Lyerly, Senior Planner, stated this item is scheduled to go forward to City Council for first reading on November 7, 2019 and second reading on November 21, 2019.

Aerial Map shown.

Zoning Map shown and found to be in compliance.

Future Land Use Map shown and found to be in non-compliance.

Thoroughfare Map shown and found to be in compliance.

Existing water and sewer map shown and found to be in compliance.

On-Site photos shown.

Permitted and Conditional Use Table shown.

Development Standards for SF-2 zoning shown.

Compliance Summary shown.

Nine notices were mailed in accordance with all state and local regulations with two returned in agreement and zero returned in disagreement.

Staff recommends approval of the request for a rezoning from Agricultural District “AG” to Single Family Two District “SF-2”.

Chair Langley opened the public hearing.

There being no speakers, the public hearing was closed.

Vice-Chair Ward made a motion to approve Item 4, **FY-19-31-ZC**, per staff recommendation, and Commissioner Wright made a second.

Motion passed: (8:0)
Commissioner Armstrong absent.

ORDINANCE NO. 2019-5007
(FY-19-31-ZC)

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A REZONING FROM AGRICULTURAL ZONING DISTRICT TO SINGLE FAMILY TWO ZONING DISTRICT ON APPROXIMATELY 0.942 ACRES, ADDRESSED AS 3707 WEST NUGENT AVENUE; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, the applicant requests this rezoning from Agricultural zoning district to Single Family Two zoning district on approximately 0.942 acres of land to allow expansion of a recent rezoning for a single-family development on approximately 23.901 acres, located at the southwest corner of West Nugent Avenue and John Paul Jones Drive (FY-19-2-ZC) - the applicant recently purchased this strip of land from the Temple Independent School District ;

Whereas, this rezoning case is associated with the Preliminary Plat of Monte Verde Residential Development (FY-19-56-PLT), a proposed 94-lot single-family development along West Nugent Avenue - the preliminary plat is on hold pending this rezoning request;

Whereas, the applicant's requested Single Family Two zoning district permits single-family detached residences and related accessory structures and provides smaller single-family lots - this district may also serve as a transition from Single Family One zoning district to less restrictive or denser residential zoning districts;

Whereas, the Planning and Zoning Commission of the City of Temple, Texas, recommends approval of the rezoning from Agricultural zoning district to Single Family Two zoning district on approximately 0.942 acres, addressed as 3707 West Nugent Avenue, as outlined in the map attached hereto as Exhibit 'A,' and made a part hereof for all purposes; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Ordinance as if copied in their entirety.

Part 2: The City Council approves of the rezoning from Agricultural zoning district to Single Family Two zoning district on approximately 0.942 acres, addressed as 3707 West Nugent Avenue, as outlined in the map attached hereto as Exhibit 'A,' and made a part hereof for all purposes.

Part 3: The City Council directs the Director of Planning to make the necessary changes to the City Zoning Map.

Part 4: It is hereby declared to be the intention of the City Council that the sections, paragraphs, sentences, clauses, and phrases of this Ordinance are severable and, if any phrase, clause, sentence, paragraph or section of this Ordinance should be declared invalid by the final judgment or decree of any court of competent jurisdiction, such invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs or sections of this Ordinance, since the same would have been enacted by the City Council without the incorporation in this Ordinance of any such phrase, clause, sentence, paragraph or section.

Part 5: This Ordinance shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Temple, Texas, and it is accordingly so ordained.

Part 6: It is hereby officially found and determined that the meeting at which this Ordinance was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED on First Reading and Public Hearing on the **7th** day of **November,** 2019.

PASSED AND APPROVED on Second Reading on the **21st** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

_____
TIMOTHY A. DAVIS, Mayor

ATTEST:

_____
Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

_____
Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT. / DIVISION SUBMISSION REVIEW:

Mark Baker, Principal Planner

ITEM DESCRIPTION: FIRST READING – PUBLIC HEARING – FY-19-32-ZC: Consider adopting an ordinance authorizing a rezoning from Agricultural zoning district to Planned Development Temple Medical and Educational zoning district, T-South Transect, with a development/ site plan on 23.069 +/- acres, located east of South 5th Street and south of West Blackland Road.

PLANNING & ZONING COMMISSION RECOMMENDATION: At its October 7, 2019, meeting the Planning & Zoning Commission voted 8 to 0 to recommend approval per staff's recommendation.

STAFF RECOMMENDATION: Staff recommends approval based on assessment that the proposed development:

1. Has demonstrated compliance with the provisions of the Planned Development Criteria as required by UDC Section 3.4.5;
2. Is compatible with the anticipated development of the South Study Area of the TMED-South Master Plan; and
3. Would meet the landscaping, architectural and sidewalk requirements of TMED South.

Staff recommends approval of the requested Planned Development, subject to the following conditions:

4. That the 23.069 +/- acre site may be developed with a car wash, fueling station, convenience store and self-storage facility as shown and further described by Exhibits A and B of the rezoning Ordinance or any permitted use within the TMED T-South transect;
5. That a subdivision plat is recorded prior to issuance of a building permit;
6. That the Director of Planning & Development may approve minor modifications to the City Council-approved development plan for the 23.069 +/- acre tract, including but not limited to screening, buffering, landscaping and minor modifications to the overall site layout; and
7. Significant changes to the Development/ Site Plan require review by the Planning & Zoning Commission and City Council.

ITEM SUMMARY: The applicant, Clark and Fuller, on behalf of 363 Development LLC, requests a rezoning from AG to Planned Development-TMED-T-South with a T-South transect (PD-TMED-T-South) with Development/ Site Plan approval. A car wash, fueling station, convenience store and self-storage facility as part of the 23.069 +/- acres is also included as part of the PD.

Important benchmark events related to TMED-T-South are as follows:

- Framework plan funding for preparation of South Temple Medical Education District – Resolution 2015-7694-R (May 7, 2015)
- Design funding for extension of South First Street, south of Loop 363 incorporating TMED standards - Resolution 2017-8555-R (March 2, 2017)
- Adoption of the TMED-South Master Plan - Resolution 2017-8561-R (March 2, 2017)
- Rezoning of 27.876 +/- acres to accommodate the Everest Rehabilitation Hospital on the southside of Loop 363 and east of South 5th Street from SF-1 to PD-GR - Ordinance 2017-4850 (July 6, 2017)
- Amendment to Ordinance 2017-4850 and total rezoning of 354.96 +/- acres from PD-GR, SF-1 and AG to TMED-T-South - Ordinance 2018-4897 (February 15, 2018)

This proposed Planned Development provides for the development of 23.069 +/- acres with several building footprints for anticipated retail and service uses. In addition, the applicant is requesting that a fueling station and convenience store, car wash and a self-storage facility be allowed with the development. These uses are not permitted in the base T-South transect.

TMED-SOUTH MASTER PLAN: The district is encompassed by the Southern Study Area, consisting of approx. 360 acres. The study area is further divided into smaller specific or focused corridors. The subject property is within the Canyon Creek Roadway Corridor. TMED-South Master Plan recognizes the importance of the intersection of Canyon Creek Road and 1st Street as a civic icon within the district for visitors to orient themselves.

However, the subject property does not lend itself satisfactory to the standard TMED uses or those conceptualized by the district's land use plan due to a 100-foot Atmos gas easement and overhead electrical transmission line that crosses the property. Therefore, additional flexibility is desired in order to adequately develop the property. The inclusion of the car wash, fueling station, convenience store and self-storage facility uses, in addition to traditional TMED retail, are proposed by the developer at locations that are not conducive to traditional TMED uses.

TMED Development Standards: This property would be required to meet TMED Overlay zoning district standards as required by UDC Section 6.3. The standards require a higher level of compliance than the general development standards provided for by UDC Section 7.1. The TMED development standards would be confirmed with the review of the building plans and address the following:

- Dimensional Standards, including encroachments into setbacks
- Building configuration
- Circulation / Parking / Loading
- Landscaping
- Screening & Buffering
- Exterior Building Materials
- Signage

Planned Development: UDC Section 3.4.1 defines a Planned Development as:

> "A flexible overlay zoning district designed to respond to unique development proposals, special design considerations and land use transitions by allowing evaluation of land use relationships to surrounding areas through development plan approval."

As a Planned Development, per UDC Sec.3.4.3A, a Development Plan (Exhibit A) is subject to review and approval by City Council as part of the rezoning. As opposed to a standard rezoning, conditions of approval can be included into the rezoning Ordinance with a binding Development/ Site Plan. The submitted Development/ Site Plan provides the boundaries of the tract, the layout for the proposed building footprints, parking and traffic circulation areas within the 23.069 +/- acre tract.

In accordance with UDC Section 3.4.5, in determining whether to approve, approve with conditions or deny a Planned Development application, the Planning & Zoning Commission and City Council must consider specific criteria. While more detailed discussion can be found throughout this report, a synopsis entitled "Planned Development Criteria and Compliance Summary" is attached.

The proposed Planned Development with a TMED transect of T-South allows for a wide range of uses, both permitted by right and with an approved conditional use permit (CUP). Uses which include, but are not limited to, are provided in an attached table.

SURROUNDING PROPERTY AND USES: An attached table provides Zoning, Future Land Use Plan (FLUP) designations, and current land uses surrounding the subject property.

COMPREHENSIVE PLAN COMPLIANCE: The proposed rezoning relates to the following goals, objectives or maps of the Comprehensive Plan and Sidewalk and Trails Plan:

Future Land Use Map (FLUM) (CP Map 3.1)
While the 2008 - City of Temple Comprehensive Plan shows the subject property as within the Suburban Residential classification. The subject property was included within the Reinvestment Zone (RZ)-funded TMED South Master Plan.

Thoroughfare Plan (CP Map 5.2)
The property has frontage along West Blackland Road, a major arterial, South 5th Street, a major arterial and the future extension of South 1st Street, which is not shown on the Thoroughfare Plan. Any needed ROW, particularly for the extension of South 1st Street would be addressed with the final plat.

Availability of Public Facilities (CP Goal 4.1)
Availability of water is from either a 12-inch waterline in South 5th Street or from the extension of an 8-inch waterline on the north side of West Blackland Road. Waste water is available from a 12-inch sewer line on West Blackland Road. Utilities would be addressed during the review of the subdivision plat.

Temple Trails Master Plan Map and Sidewalks Ordinance
According to the Trails Master Plan Map, a local connector trail is proposed along West Blackland Road. The trail and sidewalk would be further addressed during the platting stage.

SUBDIVISION PLAT: A subdivision plat would be required prior to any development. The plat would evaluate the drainage and detention for the site.

DEVELOPMENT REVIEW COMMITTEE (DRC): As required by UDC Section 3.4.2B, the Development/ Site plan for the proposed self-storage was reviewed by the DRC on September 23, 2019. Drainage was not reviewed by Public Works but would be reviewed during the subdivision plat process. No other issues have been identified.

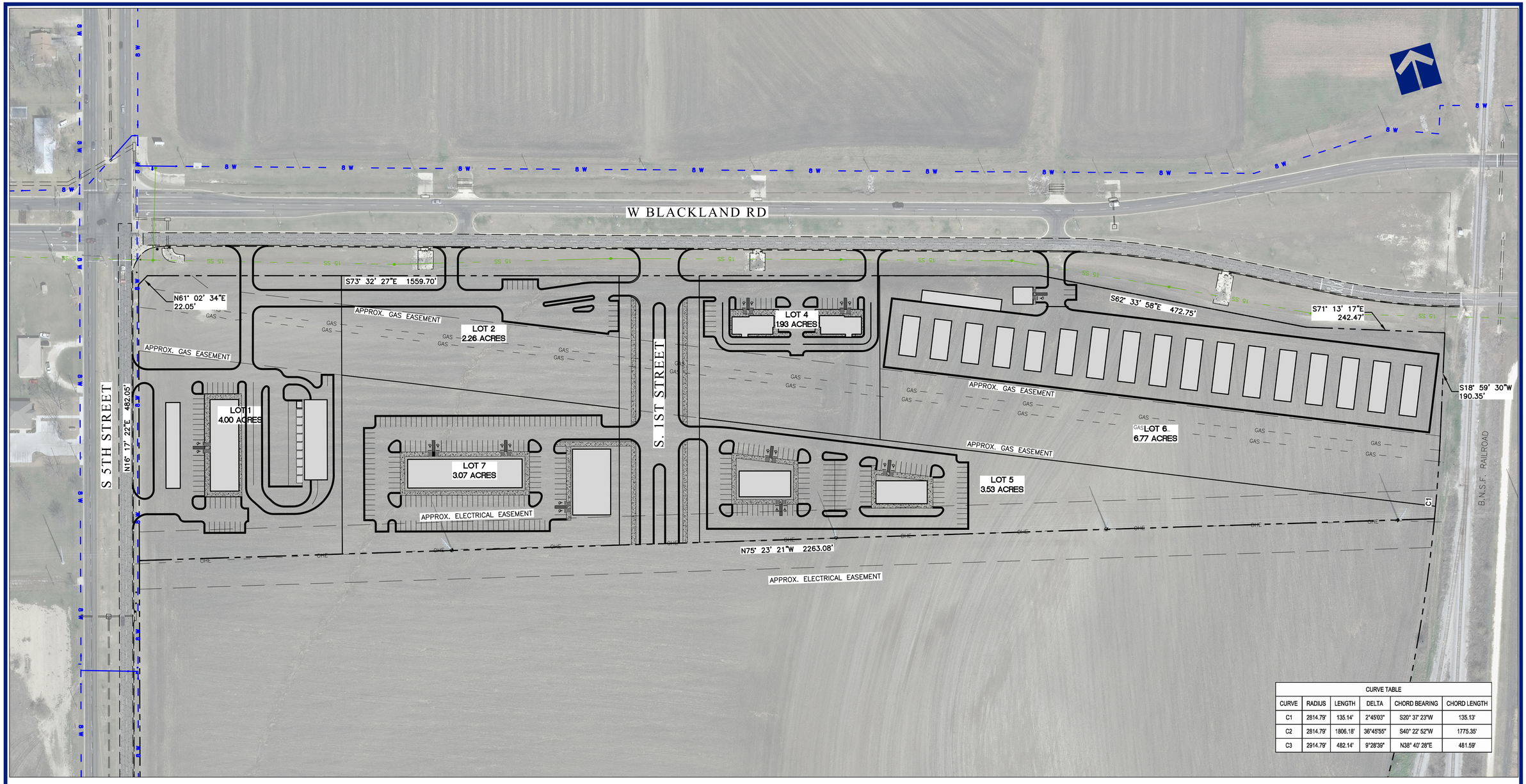
DEVELOPMENT REGULATIONS: In accordance with UDC Section 6.3.6, the attached table shows the residential and non-residential dimensional standards for the T-South transect.

PUBLIC NOTICE: Owners of nine properties within 200-feet of the subject property, were sent notice of the public hearing as required by State law and City Ordinance. As of Tuesday October 29, 2019, at 9:00 AM, one notice in agreement has been received.

The newspaper printed notice of the public hearing on September 25, 2019, in accordance with state law and local ordinance.

FISCAL IMPACT: Not Applicable

ATTACHMENTS:
Development/ Site Plan (Exhibit A)
Planned Development Criteria and Compliance Summary Table (UDC Section 3.4.5)
Photos
Tables
Maps
TMED South Framework Plan (Southern Study Area only) & Master Plan Resolution 2017-8561-R
P&Z Excerpts (October 7, 2019)
Ordinance



CURVE TABLE					
CURVE	RADIUS	LENGTH	DELTA	CHORD BEARING	CHORD LENGTH
C1	2814.79'	135.14'	2°45'03"	S20° 37' 23"W	135.13'
C2	2814.79'	1806.18'	36°45'55"	S40° 22' 52"W	1775.35'
C3	2914.79'	482.14'	9°28'39"	N38° 40' 28"E	481.59'

0 80 160
FEET

CLARK&FULLER
CIVIL ENGINEERING • DESIGN • PLANNING
215 North Main Street, Temple, TX 76501
254.899.0899 www.clark-fuller.com F-10384

BLACKLAND
CONCEPTUAL LAYOUT
TEMPLE, TEXAS

NOT FOR CONSTRUCTION

THIS DOCUMENT IS RELEASED FOR THE PURPOSE OF INTERIM REVIEW UNDER THE AUTHORITY OF JUSTIN B. FULLER, P.E. 100183 AS PER DATE ON DRAWING. IT IS NOT TO BE USED FOR BIDDING OR CONSTRUCTION.

3-4-19
STATE OF TEXAS
JUSTIN B. FULLER
100183
LICENSED
PROFESSIONAL ENGINEER

City of Temple

Planned Development Criteria and Compliance Summary

UDC Code Section 3.4.5 (A-J)	Yes/No	Discussion / Synopsis
A. The Plan Complies with all provisions of the Design and Development Standards Manual, this UDC and other Ordinances of the City.	**YES**	It is fully anticipated that the development / site plan attached with the rezoning ordinance will conform to all applicable provisions of the UDC as well as to dimensional, developmental and design standards provided for by UDC Section 6.3 specifically related to TMED.
B. The environmental impact of the development relating to the preservation of existing natural resources on the site and the impact on natural resources of the surrounding impacts and neighborhood is mitigated.	**YES**	Drainage and other related engineering will be addressed through the platting process. No impacts to existing natural resources on the property have been identified.
C. The development is in harmony with the character, use and design of the surrounding area.	**YES**	The project site is proposed to be platted into 6 lots with uses ranging from retail and service to a car wash, fueling station, convenience store and self storage facility on 23.069 +/- acres. Compliance to the TMED standards will esnure harmonious compatibility with the surrounding area. Compliance will be confirmed during the review of the building plans.
D. Safe and efficient vehicular and pedestrian circulation systems are provided.	**YES**	Vehicular access was addressed by the review of the subdivision plat. Vehicular access is proposed from South 5th Street, South 1st Street and W. Blackland Road. No circulation issues have been identified.
E. Off-street parking and loading facilities are designed to ensure that all such spaces are usable and are safely and conveniently arranged.	**YES**	Parking has been proposed to accommodate anticipated uses. Compliance with parking requirements will be confirmed during the review of building plans.
F. Streets are designed with sufficient width and suitable grade and location to accommodate prospective traffic and to provide access for firefighting and emergency equipment to buildings.	**YES**	The extension of South 1st Street is proposed by this Planned Development. ROW and configuration will be addressed during the platting stage. Overall access to the site is proposed by a number of driveways from South 5th Street, South 1st Street and W. Blackland Road.
G. Streets are coordinated so as to compose a convenient system consistent with the Thoroughfare Plan of the City.	**YES**	Compliance and consistancy with the Thoroughfare Plan has been reviewed with the Planned Development and wil be confirmed with the review of the final plat. No issues are anticipated.
H. Landscaping and screening are integrated into the overall site design: **1. To provide adequate buffers to shield lights, noise, movement or activities from adjacent properties when necessary.** **2. To complement the design and location of buildings.**	**YES**	Landscaping requirements will be finalized during the building permit stage. A detailed Landscape Plan will be required with the submittal of the Building Plans and will be required to meet the provisions of UDC Section 6.3 at it relates to landscaping. A condition of approval provides flexibility to the Director of Planning & Development to make minor adjustments for landscaping, buffering and screening as warranted to address buffering and screening requirements.
I. Open space areas are designed to ensure that such areas are suitable for intended recreation and conservation uses.	**YES**	No Parkland dedication fees are required for this Planned Development. No parkland dedication fees are required with the subdivsion plat since the plat is non-residential.
J. Water, drainage, wastewater facilities, garbage disposal and other utilities necessary for essential services to residents and occupants are provided.	**YES**	Water will be provided by the City of Temple. Wastewater will be provided by the City of Temple. Drainage facilities as well as other utilties will be addressed with the review of the plat and will be finalized by the review of Construction documents. To date, no issues have been identified.

Site & Surrounding Property Photos

Site: Undeveloped (GR)

South: Looking across Subject Property (AG)

North: Undeveloped (AG)

West: Scattered Residential & Non-Residential Uses (AG)

East: Undeveloped – Union Pacific RR line is the Eastern Boundary of Subject (AG)

Aerial Map to the East (Temple GIS Maps): Undeveloped (AG)

Tables

Permitted & Conditional Uses Table for TMED-South District (Not a Complete List)

Use Type	TMED-South (T-South Transect)
Residential Uses	Multiple Family Dwelling Live / Work Unit Single Family Residence (Detached & Attached) Townhouse (3 or more units) Accessory Dwelling Unit
Educational & Institutional Uses	Assisted Living Barber shop / Beauty shop Child care Commercial surface parking lot Library Medical clinic Medical office or lab Park / Playground or Open space Place of Worship Studio, artist, photographer, music, dance Trade or Vocational school Veterinary hospital (No kennels) Veterinary hospital with kennels (CUP)
Entertainment & Recreation, Office and Retail & Service Uses	Alcohol (On Premise Consumption) < 50% Alcohol (On Premise Consumption) < 75% (CUP) Alcohol (On Premise Consumption) > 75% (CUP) Drug store (drive-thru permitted) Grocery store Office Restaurant (Coffee shop) – w/o drive-thru Restaurant (Coffee shop) – with drive-thru Most Retail sales & service (No drive-thru)
Overnight Accommodations	Hotel Bed & Breakfast (Max 5 sleeping rooms) School Dormitory

Surrounding Property Uses

	Surrounding Property & Uses		
Direction	FLUM	Zoning	Current Land Use
Site	TMED-South	AG	Undeveloped
North	TMED-South	SF-1	Undeveloped
South	TMED-South	AG	Undeveloped
East	Agricultural/Rural	SF-1	Undeveloped
West	Commercial	GR	Mixed Residential & Non-Residential Service Uses

Comprehensive Plan Compliance

Document	Policy, Goal, Objective or Map	Compliance?
CP	**Map 3.1 - Future Land Use Map**	**YES**
CP	**Map 5.2 - Thoroughfare Plan**	**YES**
CP	**Goal 4.1 - Growth and development patterns should be consistent with the City's infrastructure and public service capacities**	**YES**
STP	**Temple Trails Master Plan Map and Sidewalks Ordinance**	**YES**
CP = Comprehensive Plan STP = Sidewalk and Trails Plan		

Dimensional Standards (UDC Section 6.3.6)

	(T-South) Residential & Non-Residential
Minimum Lot Size	N/A
Minimum Lot Width	18 Feet (50 feet for all detached SF without alley access)
Minimum Lot Depth	N/A
Min Front Yard Private Landscape Area	4 Feet
Min Front Setback	4 Feet
Max Front Setback	47 Feet (parking in alley is prohibited)
Side Setback	Per Bldg or Fire Code
Side Setback (corner)	Must Meet Visibility Triangle Requirements
Rear Setback	10 Feet
Max Building Height	5 Stories

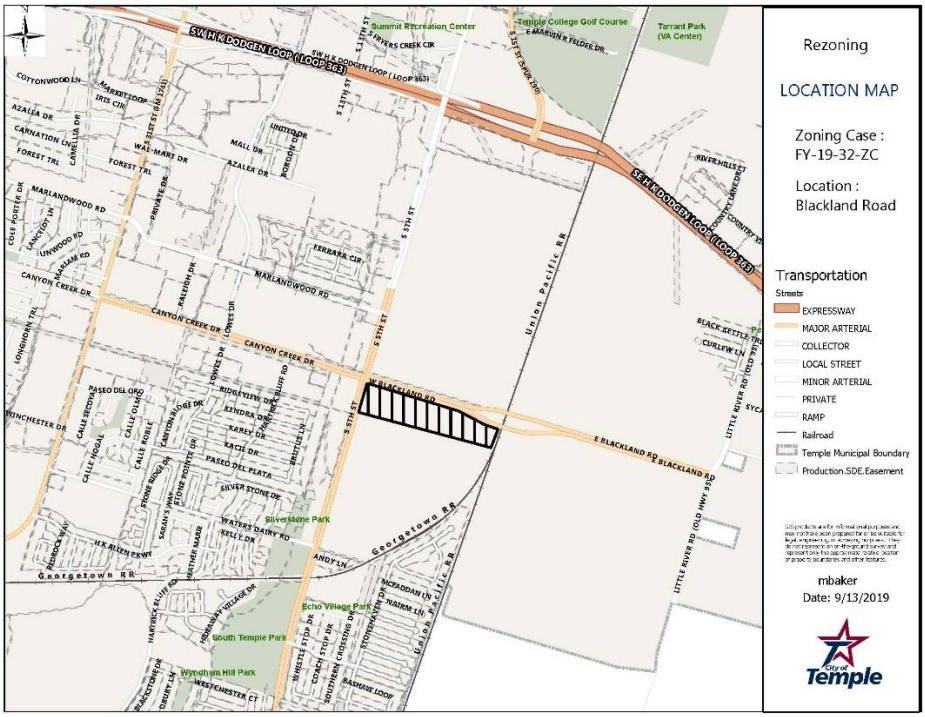
	(T-South) Residential & Non-Residential	(T-South) Non-Residential
Minimum Lot Size	N/A	N/A
Minimum Lot Width	18 Feet (50 feet for all detached SF without alley access	N/A
Minimum Lot Depth	N/A	N/A
Front Setback	4 Feet	15 Feet
Side Setback	Per Bldg or Fire Code	10 Feet
Side Setback (corner)	Meet Visibility Triangle Requirements	10 Feet
Rear Setback	10 Feet	❖ 10 Feet
Max Building Height	5 Stories	2 ½ Stories

- **10' rear setback (Non-residential use abuts a residential zoning district or use - UDC Section 4.4.4.F3**

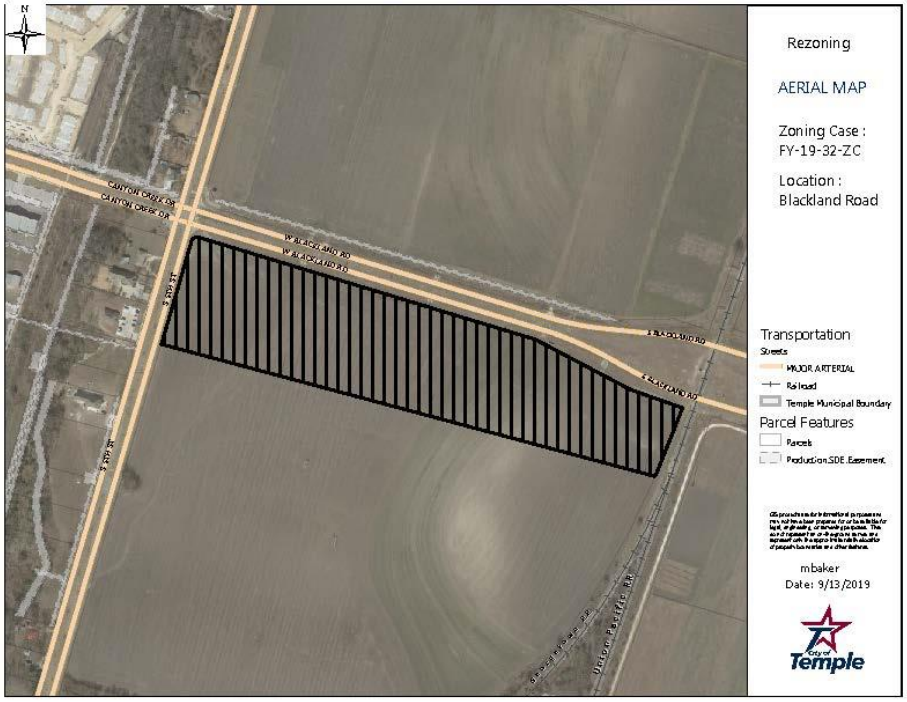
General provisions for buffering and screening for non-residential uses adjacent to residential uses are found in UDC Section 7.7, highlighted provisions include but not limited to:

* **Landscaping or solid fencing from 6 to 8 feet in height (UDC Section 7.7.4),**
* **Refuse containers located in the side or rear of the property (UDC Section 7.7.6), and**
* **Screened outdoor storage (UDC Section 7.7.8.B1).**

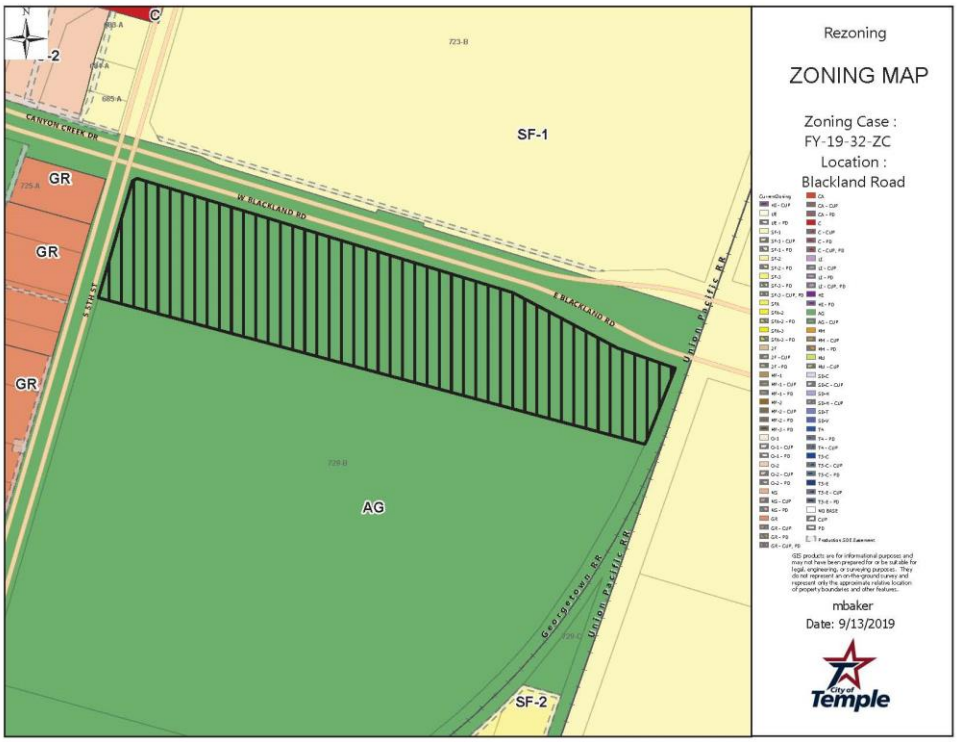
Maps



Location Map

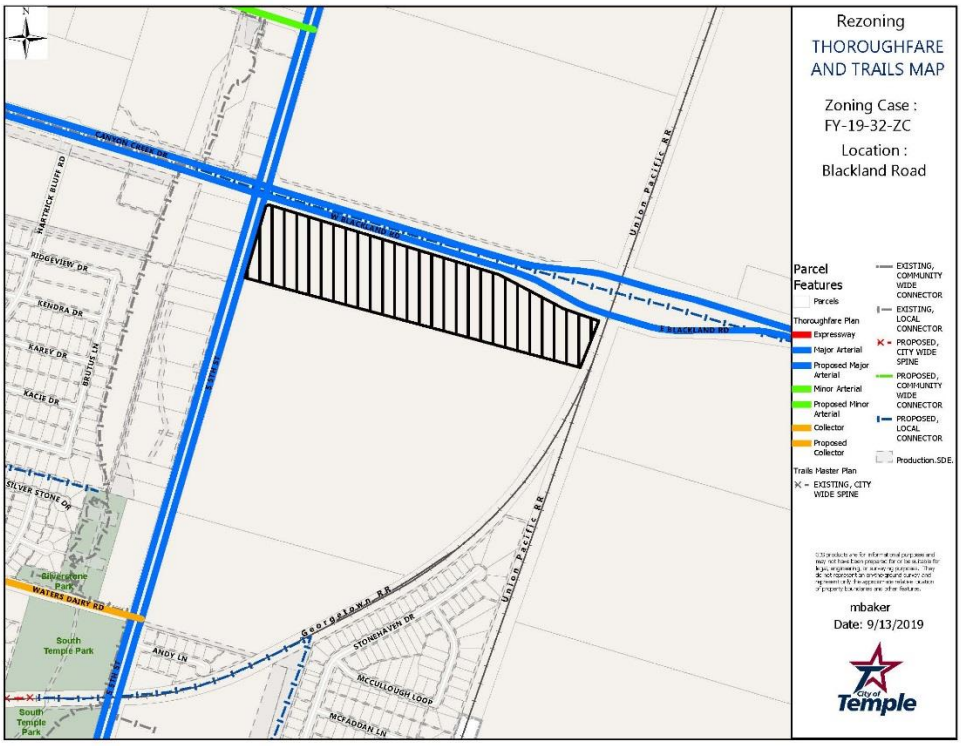


Aerial Map



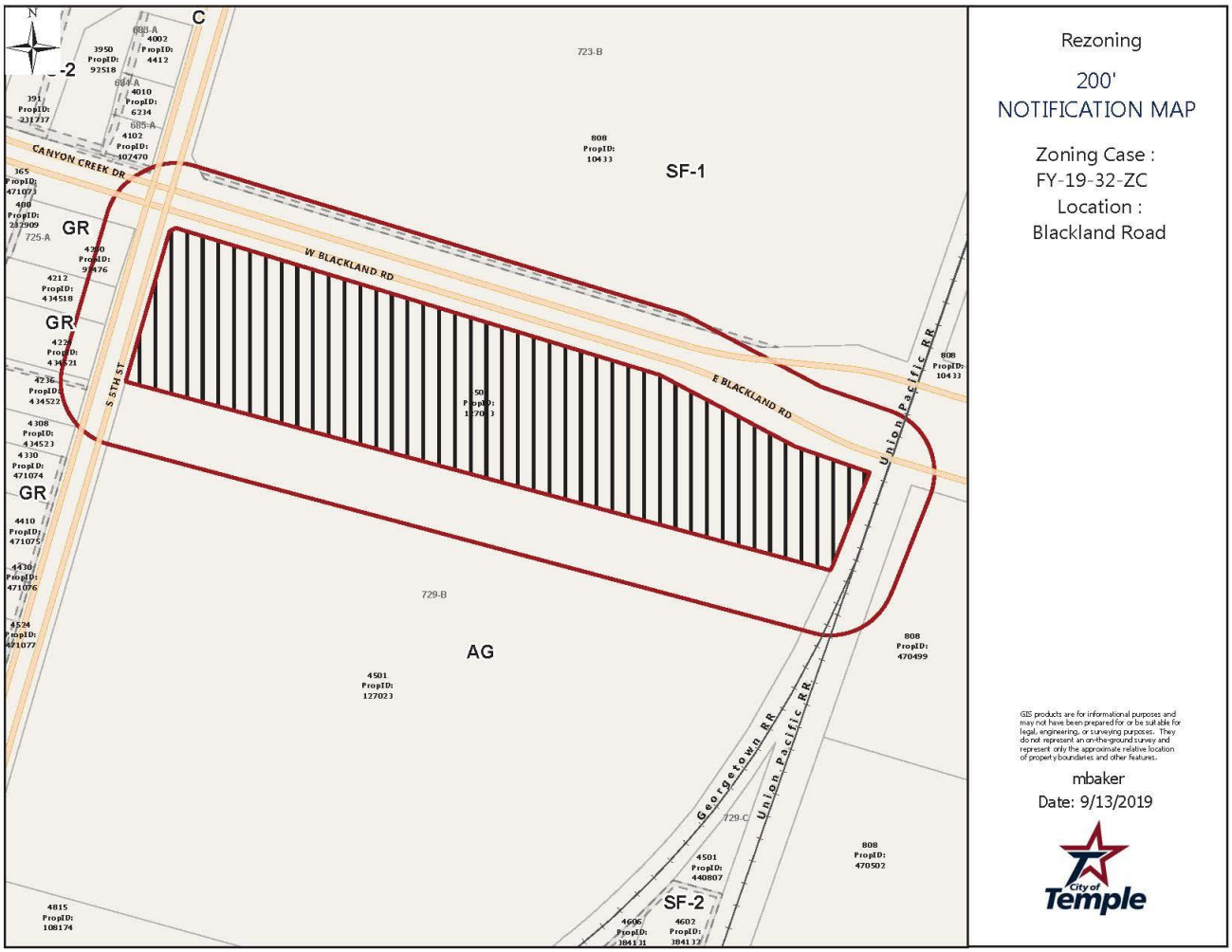
Zoning Map

Future Land Use Map



Thoroughfare & Trails Map

Utility Map



Notification Map

JUNE 2015

TMED SOUTH

YOUNG TEMPLE
CONNECTING
TO HISTORIC TEMPLE

Southern Study Area

Analysis

The southern study area consists of several unencumbered parcels totaling approximately 360 acres, bounded by Loop 363 to the north, the Union Pacific and Georgetown Railroad right-of-ways to the east and south, and 5th street to the west. An extension of 1st Street/ Veteran's Memorial Drive is planned to connect TMED with the southern study area, although the alignment is not finalized the extension will bend into and terminate at 5th Street. The properties within the area have historic agricultural ties and the land owned by Blackland Research and Extension Center (BREC) serve as agriculture, grassland, soil and water research laboratories.

Regional Ideas & Framework

The overall objective of the framework plan is to appropriate land uses and revitalize the area as a "live, work, play, learn" environment; to connect people and destinations through walkability and public realm space; make 1st street axis a civic icon; utilize resources such as the existing creek and greenways, BREC, and 1st Street; and build upon previous efforts and partnerships with TMED and area medical, education and research facilities. While the Street and Open Space framework sections elaborate on circulation and public realm access, the following paragraphs categorize the Southern Study Area into Key Areas to help establish a clear vision of their character and to best describe how each advances the Key Ideas for Regional TMED.

Regional TMED Key Ideas

Leverage TMED to create strong identity

1st street connection as primary linkage to downtown and south Temple

Create Friars Creek Trail Corridor along 1st from Temple College to Friars Creek Trail

Expand Arts/Culture/School and Programs as Heart of Community

Partner with the City of Temple, City Temple Economic Development Corporation and land owners to bring in development opportunities

Exhibit 16. Southern Study Area General Framework

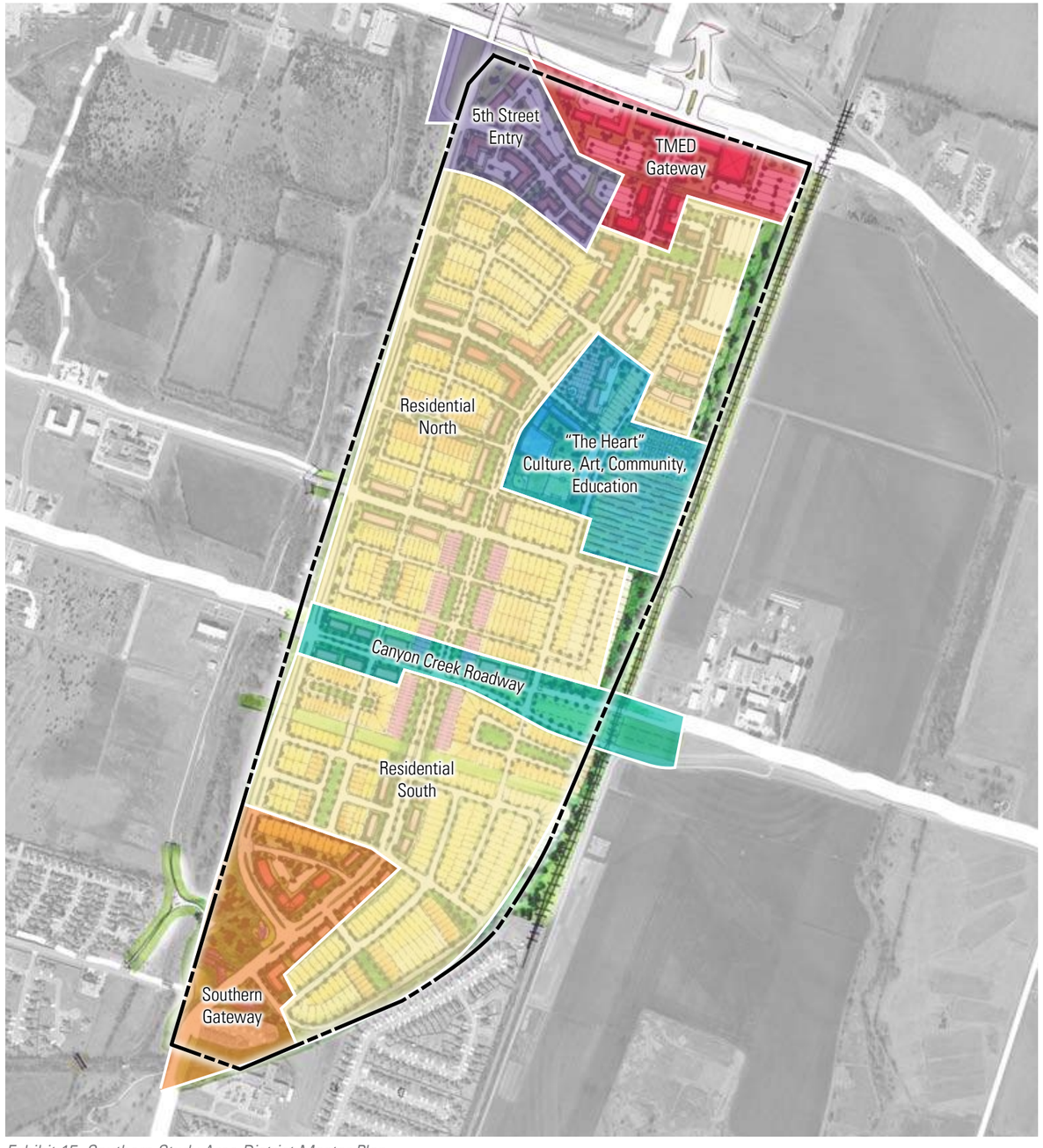


Exhibit 15. Southern Study Area District Master Plan

Exhibit 17. Birdseye of 1st Street Retail Entrance (Facing South)

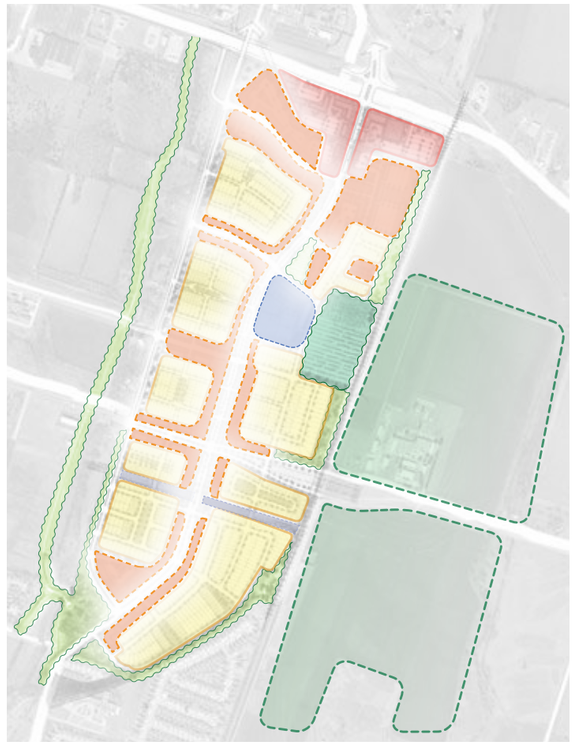


Exhibit 18. Land Use

Key Areas

TMED Gateway

The vision for the TMED Gateway is for a Conference Center based development to become an "entry" for TMED South by providing a strong street presence with architecture fronting Loop 363 and the 1st Street extension, as well as integrated entry signage / monumentation to help reinforce TMED's identity. Close proximity between buildings, building placement close to the street, and locating unsightly surface parking away from the street will enhance the character of the Gateway. By blending a combination of residential, commercial, cultural and institutional uses, the gateway has the opportunity to become a successful mixed-use development for the community and a hub for visitors. Medium to high density development allows a variety of community services as well. The Conference Center Complex will serve the three districts best by providing hotel, conference and meeting space, which is currently lacking in the urban core.

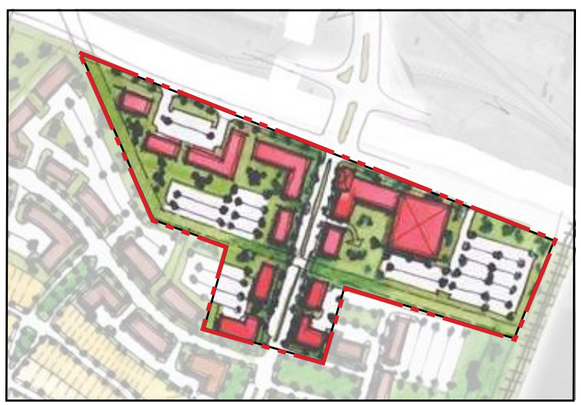


Exhibit 19. TMED Gateway

5th Street Entry

The 5th Street Entry is the essential medium to high density multifamily development needed to encourage livability on a slightly more urban setting. The density and adjacency to the TMED Gateway encourages greater community interaction. The realignment of 5th Street attracts and shifts development patterns towards a denser, people-oriented destination. The concept stems from the pent-up demand for student and young professional housing needed for TMED employees and students. The multi-family buildings in this area will tuck parking in the back and front a tree-lined neighborhood collector that connects residents to 5th Street, the Friars Creek Trail and neighborhood amenities on 1st Street and the TMED Gateway.

Exhibit 20. 5th Street Entry

Southern Study Area

Exhibit 21. Main Plaza and Comnmunity Event Green

Exhibit 22. Farm & Community Garden Hub

Community Heart

The Community's Heart is located within the Residential North Area, east of 1st Street, it serves as the hub of community activities and has the potential of becoming a "third place" for residents and users. The "third place" is one that is separate from the tacit social environments of home and work—the first two places—it contributes to civil society, democracy, civic engagement and creating a sense of place. The Heart consist of the following:

The Civic Plaza is intended to be a major draw for district residents, employees, students, visitors and commuters walking to nearby destinations along 1st Street. It should include an event green and flexible space for the neighborhood to come together to participate in community-inspired activities like concerts, food truck dining and programs uniquely suited for the district. The use of water features, shade, lighting, enhanced planting and a high-performing urban tree canopy are necessary for the comfort of users.

A school with adjoining athletic fields will help forge partnerships, provide context and an environment that will reinforce the values, culture, and learning of the community. A Performing & Fine Arts Magnet School will complement Travis STEM School located within TMED. Additionally, school facilities, fields and playgrounds could be open for recreational use benefiting the entire community.

The Farm and Community Gardens offer a unique setting within the urban landscape to tie to the areas agricultural past and connect the community to current research being conducted by BREC. This program will provide a great opportunity for the community to partner with BREC to come together in research and practice to support public health and stewardship of nature as well as sustainable food production. Facilities should include indoor/outdoor classrooms, space for food preparation and pavilions for outdoor dining.

Residential North

The Residential North area provides an opportunity to create a large tree lined residential community comprised of predominantly traditional single family homes that integrates pocket parks and a landscape buffer along 1st Street. It also provides diverse residential options including attached housing that fronts streets designated as neighborhood collectors. The northeast portion of the development adjacent to TMED Gateway offers higher density housing like flats and lofts as well as flexibility for live-work units along 1st Street and neighborhood collector streets. The southern portion fronting 1st Street linear park is comprised of 3-5 story residential/townhomes/ condos. Development of the plan requires a land exchange and partnership with BREC since approximately 70 acres of land within the area is owned by the research center.

Exhibit 23. Community Heart

Exhibit 24. Residential North

Canyon Creek Roadway

The intersection of Canyon Creek and 1st street will become a civic icon within the district for people to orient themselves. Buildings fronting the boulevard along the west portion of the roadway consist of a mix of townhomes, retail and single family residential. Future plans call for a flyover of the railway on the east portion of the road section. Residential development adjacent to this portion of the roadway will back due to grade level changes and to allow privacy for the residents.

Residential South

The Residential South Area consists of predominantly single family housing and attached residential units fronting a series of pocket parks. Three to five story residential/townhomes/condos front 1st street trail. The utility easement which cuts through this portion of the study area will serve as additional open space.

Southern Gateway

The Southern Gateway will serve as another community icon and entry that will strengthen the TMED identity through the use of district signage and mounumentation. The Gateway includes one neighborhood street segment of single family housing and multi-family mixed-use housing. The lofts and flats with ground floor retail are organized along 1st and 5th Streets which intersect at the site of the Friars Creek Trailhead and Park; parking is buffered and planned for low impact to the site. Restricted small parking lots will be nestled between and around buildings. The gateway also promotes a mix of uses which help establish neighborhood character and encourages walking and bicycling, reducing the distance between "home, work play and learn" as it locates essential services close to the community.

Exhibit 26. Canyon Creek Roadway

Exhibit 27. Residential South

Exhibit 28. Southern Gateway

Exhibit 25. Southern Study Area Illustrative Master Plan

Southern Study Area

Open Space Framework

TMED South's open space network has the ability of providing a great impact on the community by providing opportunities for physical activity, enjoyment of nature, social interaction, respite and escape that help create lasting improvements. Because access to nearby parks and natural settings is associated with improved quality of life, greater connection with people, reduced anxiety, improved physical and mental health among adults and children, this framework is crucial to the future of the TMED as a healthy, happy place.

Key Ideas

Help foster a strong sense of community by providing opportunities to engage in social contact and meaningful experiences

- Expand on arts, culture and education programs in Heart of Community/ Civic Park by setting the right mix of programs uniquely suited to the community.
- Use farm and gardens to create a link between residents, research centers and the TMED South magnet school to increase children's contact with broader education and heighten their interest in higher education.
- Increase access to public art throughout the 1st Street linear park.

Reshape the urban spatial form with pedestrian focused spaces and promote healthy lifestyles

- Provide a multi-use trail for walkers, runners, recreational and commuter bicycles to link to regional trail network.
- Design network to serve as an interface between the street and building realm through the use of water features, lighting, enhanced landscape planting, activity lawns and outdoor dining spaces.
- Buffer and blur unsightly boundaries such as parking and railroad ROW by providing views to nature from within buildings and architecture.
- Provide natural landscapes and urban canopy necessary to link between fragmented habitat necessary for protecting pollinators like birds, bees and butterflies.
- Provide natural buffer zones from pollution run-off and improve water quality through the use of LID features along 1st Street.

Allow trails to act as a connector of people and activity

- Create Trail Corridor along 1st Street from Temple College to Friars Creek Trail to provide pedestrians, and cyclists a safe access to green spaces throughout the region.
- Provide amenities such as trailhead, signage, bathrooms, water fountains, cycle racks, and benches for clear navigation and ease of use along trail system.
- Bisect trails through retail, housing, pocket parks, Gateways and Community Heart to strengthen district wide connectivity and a cohesive public realm.

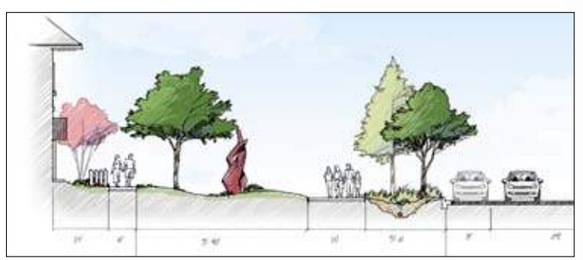
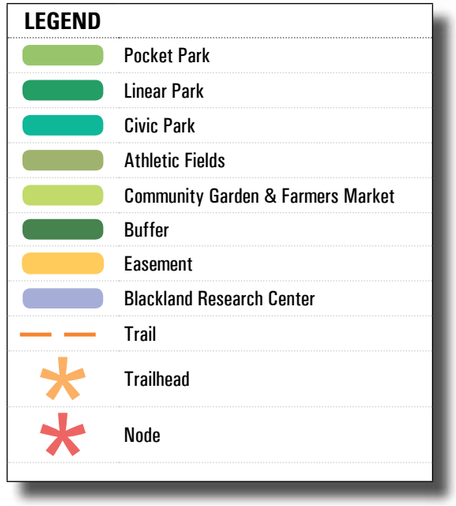


Exhibit 32. Green Buffers with art, water features, native landscaping



Southern Study Area

Alternative Options

The ability to create a cohesive neighborhood largely depends on whether the Blackland Prairie Research Center is able to find alternative land for their research. The organization is not currently looking to downsize so accommodations should be made in order to have a non-interrupted neighborhood. If this does not happen, there are several alternatives for moving forward.

Alternative 1: Bi-sect Blackland Prairie Property

Key Idea 1

If granted by Blackland Prairie Research Center, the first option for development would be to bi-sect the property with the 1st street extension. This provides a framwork that can be developed at a later time when Blackland Prairie no longer has need for the property.

It should be understood that their property is for research and thusly would be fenced off so these properties could not be used for open space. It should also be understood that bi-secting their property is an inconvenience for the research center because it would be fragmented.

Alternative 2: Preserve Blackland Prairie Property

Key Idea 1

If bi-secting the property is not an option, development will need to go around the property. This alternative is not preferred due to the street framework proposed however, as mentioned in the previous alternative, the Blackland Prairie property could still be developed at a a later date to provide the cohesive development framework.

This option should only be considered if Blackland Prairie Research Center is unable or not willing to find alternative land for their research.

Exhibit 34. Preferred Concept Framework

Exhibit 35. Alternative 1 Framework

Exhibit 36. Alternative 2 Framework

Exhibit 39. Northern public improvements

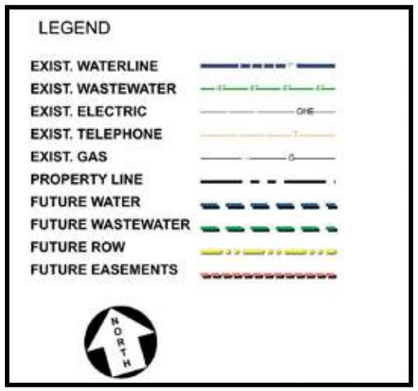


Exhibit 40. Southern Study Area Public Improvements

Proposed Projects

Friar's Creek Neighborhood Projects

1. Find developer to complete Friars Creek Neighborhood Vision
2. Partner with Housing Authority to relocate or redevelop Willow Brook Development
3. Adjust zoning to allow live/work along 5th Street
4. Extend Friars Creek Park to the southwest and Friars Creek Trail to the south
5. Strengthen and extend infrastructure connections
    - Extend S 9th Street and S 7th Street south
    - Connect W Avenue U to SW North Loop
    - Connect S 13th Street and W Avenue U / SW North Loop via roundabout
    - Connect Fryers Creek Drive across Friars Creek

Southern Proposed Projects

1. Construct 1st Street connection to TMED South
2. Find Development Partners for TMED South
    - Blackland Agrilife Research Center Partners
3. Phase road and infrastructure for 1st and 5th Street reconfiguration
4. Reconfigure 5th Street to connect to 1st Street
5. Design and construct TMED South Plaza
6. Design and construct Northern TMED (South) Gateway
7. Design and construct Southern gateway

RESOLUTION NO. 2017-8561-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, ACCEPTING THE TEMPLE MEDICAL EDUCATION DISTRICT SOUTH STRATEGIC MASTER PLAN; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, on May 7, 2015, Council authorized a professional services contract with Kasberg, Patrick and Associates, in partnership with TBG Partners, to develop a framework plan to help guide the City Council, Reinvestment Zone, property owners, and future developers in the creation of an overall unified plan for the South Temple Medical Education District ("TMED") area;

Whereas, a three-day stakeholder charrette and workshop process was held in June 2015 which led to the development of a draft TMED South Strategic Master Plan that was presented to Council on February 16, 2016 - the objective was to provide a framework plan to help guide city leaders, property owners, and future developers in the creation of an overall unified plan made up of a variety of urban districts;

Whereas, the TMED South Strategic Master Plan is designed to identify the best land use options and provide a cohesive urban design strategy to unify these areas as well as give guidance regarding future capital improvement projects and potential development & redevelopment areas;

Whereas, the TMED South Strategic Master Plan provides analysis of the study of two areas identified in the Plan as 1) the Friars Creek Neighborhood and 2) the Southern Study area - the Plan also includes analysis on the regional impact of TMED including adjacent key assets and impacts such as Blackland Prairie Research Center, Temple College, Veterans Administration Hospital, Baylor Scott and White, 1st and 3rd Street Corridors, and Downtown Temple;

Whereas, the Plan identifies the TMED South district as having the highest potential in the City to serve the needs of young professionals and cultivate the "live, work, play, learn" atmosphere they often seek as well as identifying key ideas for each study area including circulation, street framework, and open space plans. The Plan identifies seven key areas in the Southern study area: 1) TMED Gateway, 2) 5th Street Entry, 3) Community Heart, 4) Residential North, 5) Canyon Creek Roadway, 6) Residential South, and 7) Southern Gateway with ideas and proposed projects associated with each area;

Whereas, the Plan encourages the City of Temple, Tax Reinvestment Zone Number One, and the Temple Economic Development Corporation to continue strategic partnerships with land owners/developers and the Blackland Texas Agrilife Research and Extension Center to create development opportunities that benefit all parties; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: Findings. All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council accepts the Temple Medical Education District South Strategic Master Plan attached hereto as Exhibit A, and made a part hereof for all purposes as presented.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **2nd** day of **March,** 2017.

THE CITY OF TEMPLE, TEXAS

DANIEL A. DUNN, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
City Attorney

RESPONSE TO PROPOSED REZONING REQUEST CITY OF TEMPLE

434518
LIGHTHOUSE IT HOLDINGS LLC
4212 S 5TH
TEMPLE, TX 76501

Zoning Application Number: FY-19-32-ZC **Case Manager: Mark Baker**

Location: Situated in the Maximo Moreno Survey, Abstract No. 14, Bell County, Texas, located east of South 5th Street and south of West Blackland Road

The proposed rezoning is the area shown in hatched marking on the attached map. Because you own property within 200 feet of the requested change, your opinions are welcomed. Please use this form to indicate whether you are in favor of the possible rezoning of the property described on the attached notice, and provide any additional comments you may have.

I (X) **agree** ( ) **disagree with this request**

Comments: I have no concerns

Signature Jeremy Thompson **Print Name**

(Optional)

Provide email and/or phone number if you want Staff to contact you

If you would like to submit a response, please email a scanned version of this completed form to the Case Manager referenced above, mbaker@templetx.gov or mail or hand-deliver this comment form to the address below, no later than **October 7, 2019.**

RECEIVED
OCT 04 2019
CITY OF TEMPLE
PLANNING & DEVELOPMENT

City of Temple
Planning Department
2 North Main Street, Suite 102
Temple, Texas 76501

Number of Notices Mailed: 9 Date Mailed: September 25, 2019

***OPTIONAL**: Please feel free to email questions or comments directly to the Case Manager or call us at 254.298.5668.*

EXCERPTS FROM THE

PLANNING & ZONING COMMISSION MEETING

MONDAY, OCTOBER 7, 2019

ACTION ITEMS

Item 5: FY-19-32-ZC – Hold a public hearing to discuss and recommend action for a rezoning from Agricultural (AG) zoning district to Planned Development Temple Medical and Educational zoning district, T-South Transect (PD-TMEDT-South) with a development/ site plan, located east of South 5th Street and south of West Blackland Road.

Mr. Baker stated this item is scheduled to go forward to City Council for first reading on November 7, 2019 and second reading on November 21, 2019.

Summary of Notable Events for TMED-South

Development of this property is problematic due to 110-foot gas easement and does not lend itself to listed TMED uses without flexibility of uses.

Subdivision plat will be required prior to development of property (creating six-lots).

Site Plan shown.

Planned Development UDC Section 3.4 Criteria Table shown and found to be in compliance.

Zoning Map shown and found to be in compliance.

Future Land Use Map shown and found to be in compliance.

Existing water and sewer map shown and found to be in compliance.

Thoroughfare Plan and Trails map shown and found to be in compliance.

On-Site photos shown.

Typical TMED-South (T-South) Transect Uses and Planned Development Standards charts shown.

Site Plan shown with details.

Nine notices were mailed in accordance with all state and local regulations with one returned in agreement and zero returned in disagreement.

Compliance Summary shown.

Staff recommends approval of the request for a rezoning Agricultural “AG” district to Planned Development—Temple Medical and Educational-South district “PD-TMED-South” with the T-South transect subject to the following four conditions:

1. Site developed with a car wash, fueling station, convenience store & self-storage facility or any permitted use within the TMED-South, T-South Transect

2. Subdivision plat is recorded prior to issuance of a building permit

3. Director of Planning authorization for minor changes to development plan

4. Significant changes require P&Z & City Council review

Chair Langley opened the public hearing.

There being no speakers, the public hearing was closed.

Vice-Chair Ward made a motion to approve Item 5, **FY-19-32-ZC**, per staff recommendation, and Commissioner Fettig made a second.

Motion passed: (8:0)

Commissioner Armstrong absent

ORDINANCE NO. 2019-5008
(FY-19-32-ZC)

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A REZONING FROM AGRICULTURAL ZONING DISTRICT TO PLANNED DEVELOPMENT TEMPLE MEDICAL AND EDUCATIONAL ZONING DISTRICT, T-SOUTH TRANSECT, WITH A DEVELOPMENT/SITE PLAN ON APPROXIMATELY 23.069 ACRES, LOCATED EAST OF SOUTH 5TH STREET AND SOUTH OF WEST BLACKLAND ROAD; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, the applicant, Clark and Fuller, on behalf of 363 Development LLC, requests a rezoning from Agricultural to Planned Development-TMED-T-South with a T-South transect (PD-TMED-T-South) with development/site plan approval on approximately 23.069 acres;

Whereas, this proposed Planned Development provides for the development of approximately 23.069 acres with several building footprints for anticipated retail and service uses - the applicant is also requesting that a fueling station and convenience store, car wash and a self-storage facility be allowed with the development-- these uses are not permitted by right in the base T-South transect;

Whereas, this property would be required to meet TMED Overlay district standards as required by the Unified Development Code Section 6.3, which require a higher level of compliance than the general development standards;

Whereas, at its October 7, 2019 meeting, the Planning and Zoning Commission of the City of Temple, Texas, voted 8-0 to recommend Council's approval of the rezoning from Agricultural zoning district to Planned Development Temple Medical and Educational zoning district - T-South Transect with a development/site plan on approximately 23.069 acres, located east of South 5th Street and south of West Blackland Road, as outlined in the map attached hereto as
Exhibit 'A,' and made a part hereof for all purposes and subject to the following conditions:

- That the approximately 23.069-acre site may be developed with a car wash, fueling station, convenience store and self-storage facility as shown and further described by Exhibits A of the rezoning Ordinance or any permitted use within the TMED T-South transect;
- That a subdivision plat is recorded prior to issuance of a building permit;
- That the Director of Planning & Development may approve minor modifications to the City Council-approved development plan for the approximately 23.069-acre tract, including but not limited to screening, buffering, landscaping and minor modifications to the overall site layout; and
- Significant changes to the Development/ Site Plan require review by the Planning & Zoning Commission and City Council.

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Ordinance as if copied in their entirety.

Part 2: The City Council approves of the rezoning from Agricultural zoning district to Planned Development Temple Medical and Educational zoning district, T-South Transect, with a development/site plan on approximately 23.069 acres, located east of South 5th Street and south of West Blackland Road, as outlined in the map attached hereto as Exhibit 'A,' and made a part hereof for all purposes, and subject to the following conditions:

- That the approximately 23.069-acre site may be developed with a car wash, fueling station, convenience store and self-storage facility as shown and further described by Exhibits A of the rezoning Ordinance or any permitted use within the TMED T-South transect;
- That a subdivision plat is recorded prior to issuance of a building permit;
- That the Director of Planning & Development may approve minor modifications to the City Council-approved development plan for the approximately 23.069-acre tract, including but not limited to screening, buffering, landscaping and minor modifications to the overall site layout; and
- Significant changes to the Development/ Site Plan require review by the Planning & Zoning Commission and City Council.

Part 3: The City Council directs the Director of Planning to make the necessary changes to the City Zoning Map.

Part 4: It is hereby declared to be the intention of the City Council that the sections, paragraphs, sentences, clauses, and phrases of this Ordinance are severable and, if any phrase, clause, sentence, paragraph or section of this Ordinance should be declared invalid by the final judgment or decree of any court of competent jurisdiction, such invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs or sections of this Ordinance, since the same would have been enacted by the City Council without the incorporation in this Ordinance of any such phrase, clause, sentence, paragraph or section.

Part 5: This Ordinance shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Temple, Texas, and it is accordingly so ordained.

Part 6: It is hereby officially found and determined that the meeting at which this Ordinance was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED on First Reading and Public Hearing on the **7th** day of **November,** 2019.

PASSED AND APPROVED on Second Reading on the **21st** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

_____
TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT. / DIVISION SUBMISSION REVIEW:

Jason Deckman, Planner

ITEM DESCRIPTION: FIRST READING – PUBLIC HEARING – FY-19-33-ZC: Consider adopting an ordinance authorizing a rezoning from Agricultural zoning district to Urban Estates zoning district, on 3.16 +/- acres, addressed as 1709 West FM 93.

PLANNING & ZONING COMMISSION RECOMMENDATION: During its October 7, 2019 meeting, the Planning & Zoning Commission voted 8 to 0 to recommend rezoning to Urban Estate (UE).

STAFF RECOMMENDATION: Staff recommends approval for a rezoning from AG to Urban Estates (UE) district for the following reasons:

1. The proposed UE zoning is compatible with surrounding zoning, existing and anticipated uses as well as future growth trends in the area;
2. The proposal is in compliance with the Thoroughfare Plan; and
3. Public facilities are available to serve the subject property.

ITEM SUMMARY: The applicant has requested rezoning to UE. Urban Estate zoning is characterized by low-density residential development that is rural in character, on larger lots that allow for greater buffering and increased setbacks.

The property is proposed to be developed for residential uses. The property is not currently developed and has not been platted. Surrounding properties are residential with a mix of AG, SF-1, and UE zoning districts. A comparison between the existing and proposed zoning districts is shown in the attached table.

COMPREHENSIVE PLAN (CP) COMPLIANCE: Compliance to goals, objectives or maps of the Comprehensive Plan and Sidewalk and Trails Plan are summarized by the attached Comprehensive Plan Compliance table but further described below:

Future Land Use Map (CP Map 3.1)
The subject property is shown as Suburban Residential on the Future Land Use Map (FLUM). The Suburban Residential designation allows for greater separation between dwellings on mid-size single family lots with more emphasis on green spaces. This request is in compliance with the FLUM.

Thoroughfare Plan (CP Map 5.2)
The subject property fronts along West FM 93 which is shown as a major arterial and characterized by rural development patterns with residential lots fronting on the roadway. New residential drive approaches are prohibited on arterial streets per UDC 7.2.4. Future access to West FM 93 and is subject to approval by TxDOT and will be addressed at platting. The applicant is preparing a subdivision plat that will show a local street that connects new residential lots to the arterial roadway. This request is in compliance with the Thoroughfare Plan.

Availability of Public Facilities (CP Goal 4.1)
Water and sewer are available from city utilities located on the north side of West FM 93. The applicant has stated that future development will utilize on-site septic systems on larger lots.

Temple Trails Master Plan Map and Sidewalks Ordinance
There are no existing or proposed trails located on West FM 93. Compliance with the Trails Master Plan and required sidewalks will be addressed at platting.

SUBDIVISION PLAT: A subdivision plat will be required for this property prior to development. The plat will address connections to public facilities, right-of-way, and sidewalk development.

DEVELOPMENT REGULATIONS: The attached tables compare and contrast the current development standards for AG with the proposed UE standards as provided for in UDC Sections 4.2, 4.5 and 4.5.1

PUBLIC NOTICE: Fifteen notices, were sent to property owners within 200-feet of the subject property containing notice of the public hearing as required by State law and City Ordinance. An additional six notices were sent to property owners in the ETJ. As of Tuesday, October 29, 2019, one notice has been received in agreement and one in disagreement.

The newspaper printed notice of the public hearing on September 26, 2019, in accordance with state law and local ordinance.

FISCAL IMPACT: Not Applicable

ATTACHMENTS:
Survey (Exhibit A)
Use Tables
Maps
Site Photos
Returned Property Notices
Ordinance

QUINTERO ENGINEERING, LLC

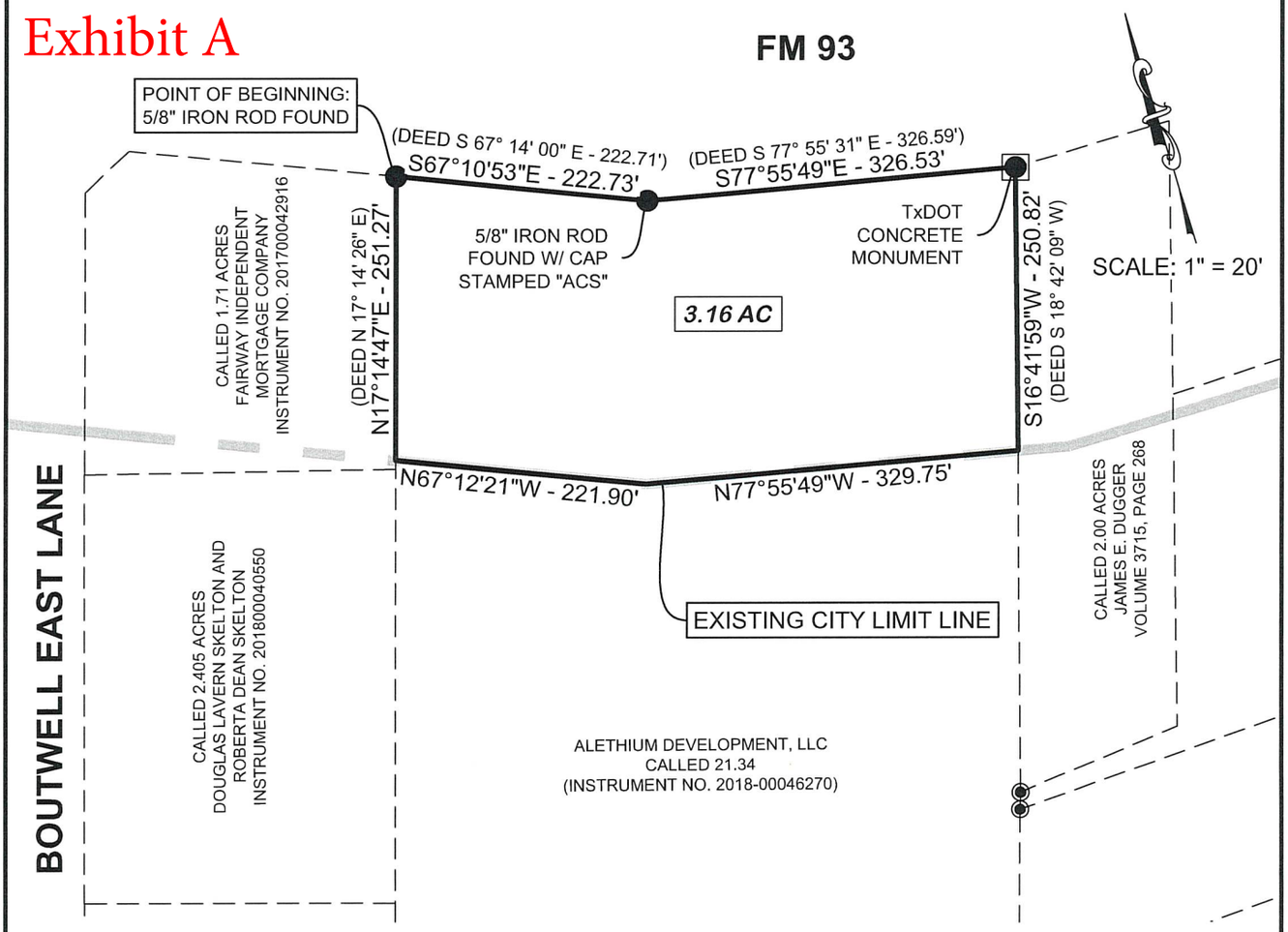
CIVIL ENGINEERING • LAND SURVEYING • PLANNING • CONSTRUCTION MANAGEMENT

415 E. AVENUE D, KILLEEN, TEXAS (254) 493-9962

T.B.P.E. FIRM REGISTRATION NO. 14709

T.B.P.L.S. REGISTRATION NO. 10194110

Exhibit A



BEING ALL THAT CERTAIN 3.16 ACRE TRACT OF LAND SITUATED IN THE REDDING ROBERTS SURVEY, ABSTRACT NO. 692, BELL COUNTY, TEXAS, AND BEING A PORTION OF THAT CALLED 21.344 ACRE TRACT OF LAND DESCRIBED IN A DEED TO ALETHIUM DEVELOPMENT,LLC, RECORDED IN INSTRUMENT NUMBER 201800046270, DEED RECORDS OF BELL COUNTY, TEXAS, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A 1/2" IRON ROD FOUND IN THE SOUTH LINE OF F.M. 93 AND AT THE NORTHEAST CORNER OF A CALLED 1.71 ACRE TRACT OF LAND DESCRIBED IN A DEED TO FAIRWAY INDEPENDENT MORTGAGE COMPANY, RECORDED IN INSTRUMENT NO. 201700042916, DEED RECORDS OF BELL COUNTY, TEXAS, FOR THE NORTHWEST CORNER OF THE HEREIN DESCRIBED TRACT;

THENCE, WITH THE SOUTH LINE OF F.M. 93, AND THE NORTH LINE OF THIS, THE FOLLOWING TWO COURSES AND DISTANCES;

1. S 67° 10' 53" E, 222.73 FEET (DEED S 67° 14' 00" E, 222.71 FEET), TO A 5/8" IRON ROD WITH CAP STAMPED "ACS" FOUND;
2. S 77° 55' 49" E, 326.53 FEET (DEED S 77° 55' 31" E, 326.59 FEET), TO A TXDOT CONCRETE MONUMENT FOUND IN THE SOUTH LINE OF THE SAID F.M. 93, BEING THE NORTHWEST CORNER OF A CALLED 2.00 ACRE TRACT OF LAND DESCRIBED IN A DEED TO JAMES E. DUGGAR, RECORDED IN VOLUME 3715, PAGE 268, DEED RECORDS OF BELL COUNTY, TEXAS, FOR THE NORTHEAST CORNER OF THE HEREIN DESCRIBED TRACT;

THENCE, S 16° 41' 59" W, 250.82 FEET (DEED S 18° 42' 09" W), TO A POINT IN THE SOUTH CITY LIMIT LINE, AND IN THE WEST LINE OF THE CALLED 2.00 ACRE TRACT FOR THE SOUTHEAST CORNER OF THE HEREIN DESCRIBED TRACT;

THENCE, ALONG THE SOUTH CITY LIMIT LINE, ACROSS AND UPON THE SAID 21.344 ACRE TRACT, THE FOLLOWING TWO COURSES AND DISTANCES:

1. N 77° 55' 49" W - 329.75' TO A POINT;
2. N 67° 12' 21" W - 221.90' TO A POINT IN THE EAST LINE OF THE SAID 1.71 ACRE TRACT, FOR THE SOUTHWEST CORNER OF THE HEREIN DESCRIBED TRACT;

THENCE, N 17° 14' 47" E, 251.27 FEET (DEED N 17° 14' 26" E), ALONG THE EAST LINE OF THE SAID 1.71 ACRE TRACT TO THE **POINT OF BEGINNING** AND CONTAINING 3.16 ACRES OF LAND, MORE OR LESS.

THE BEARINGS FOR THIS DESCRIPTION ARE BASED UPON THE TEXAS STATE PLANE COORDINATE SYSTEM, CENTRAL ZONE, NAD 83, PER LEICA TEXAS SMART NET GPS OBSERVATIONS, AS SURVEYED ON THE GROUND JANUARY 22, 2019 BY QUINTERO ENGINEERING, LLC.

STATE OF TEXAS REGISTERED BRADLEY W. SARGENT 5827 PROFESSIONAL LAND SURVEYOR

09/09/2019

Bradley W. Sargent, R.P.L.S.
Registered Professional Land Surveyor
R.P.L.S. No. 5827, Texas

Tables

Permitted & Conditional Uses Table
Comparison between SF-1 & GR

Use Type	Agricultural (AG)	Urban Estates (UE)
Residential Uses	• **Single Family Residence (Detached)** • **Industrialized housing** • **Recreational Vehicle Park (CUP)**	• **Single Family Residence (Detached)** • **Industrialized housing**
Agricultural Uses	• **Animal Shelter** • **Farm, Orchard, Garden** • **Greenhouse / Nursery**	• **Farm, Orchard, Garden**
Retail & Service Uses	• **Exercise Gym (CUP)**	**None**
Office Uses	**None**	**None**
Commercial Uses	**None**	**None**
Industrial Uses	• **Animal Feedlot (CUP)** • **Temporary Asphalt/Concrete Plant (CUP)** • **Laboratory – medical, scientific, or research (CUP)** • **Recycling Collection (CUP)**	• **Temporary Asphalt or Concrete Plant (CUP)**
Recreational Uses	• **Day Camp for children** • **Park or playround** • **Rodeo Grounds (CUP)** • **Amusement, Commercial, outdoor (CUP)**	• **Day Camp for children** • **Park or Playground**
Vehicle Service Uses	**None**	**None**
Restaurant Uses	**None**	**None**
Overnight Accommodations	• **Recreational Vehicle Park (CUP)**	**None**

AG to UE

VICINITY MAP

Zoning Case :
FY-19-33-ZC

Address :
1709 W FM 93

Transportation

Streets

- MAJOR ARTERIAL
- COLLECTOR
- LOCAL STREET
- PRIVATE
- Railroad
- Temple Municipal Boundary

Parcel Features

- Parcels
- ETJ Parcels
- Production.SDE.Easement

GIS products are for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. They do not represent an on-the-ground survey and represent only the approximate relative location of property boundaries and other features.

jdeckman
Date: 9/17/2019

City of Temple

AG to UE

AERIAL MAP

Zoning Case :
FY-19-33-ZC

Address :
1709 W FM 93

Transportation

Streets

- MAJOR ARTERIAL
- LOCAL STREET
- Temple Municipal Boundary

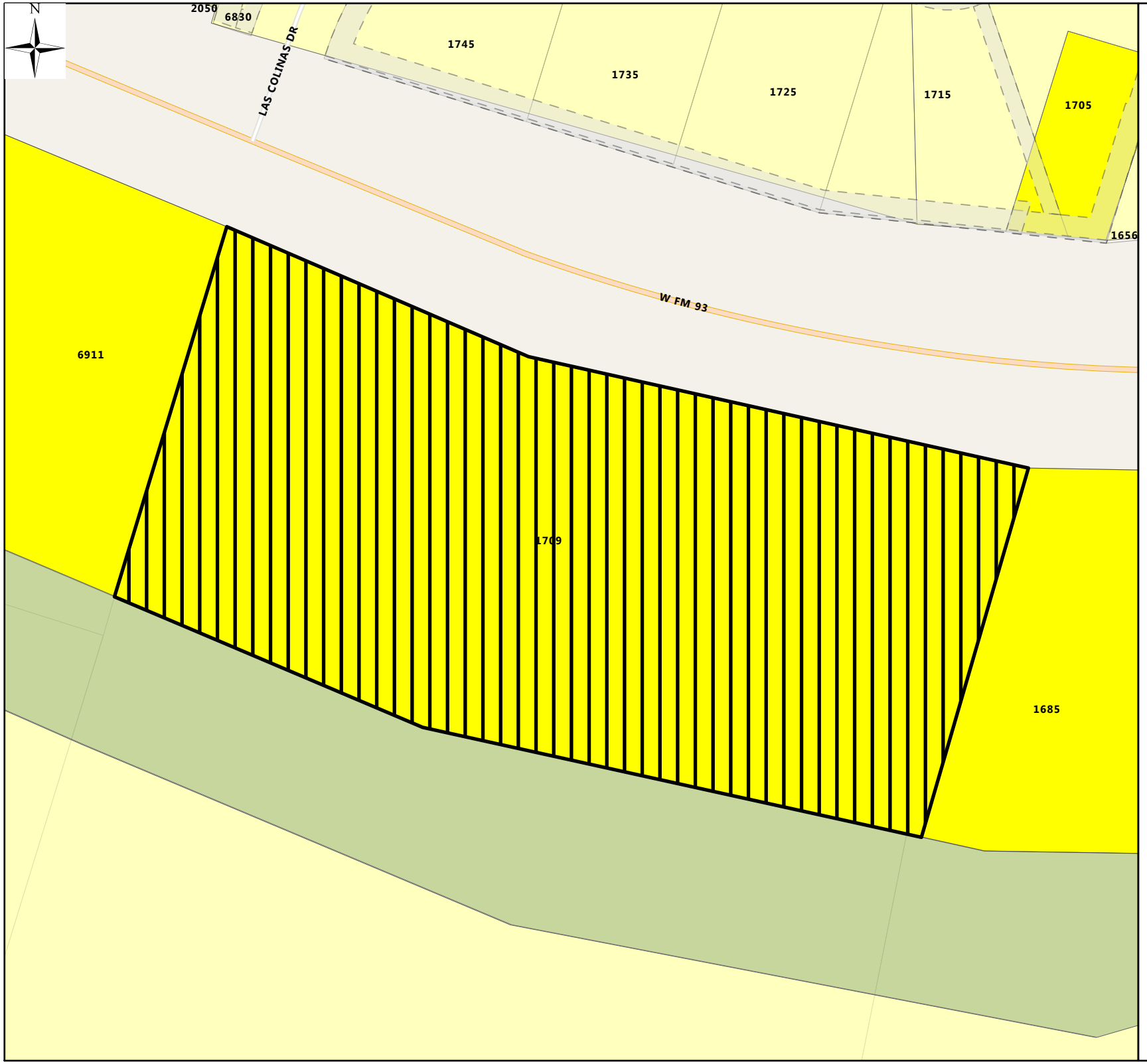
Parcel Features

- Parcels
- ETJ Parcels
- Production.SDE.Easement

GIS products are for informational purposes and may not have been prepared for or be suitable for legal, engineering, or surveying purposes. They do not represent an on-the-ground survey and represent only the approximate relative location of property boundaries and other features.

jdeckman
Date: 9/17/2019

City of Temple



AG to UE

FUTURE LAND USE MAP

Zoning Case : FY-19-33-ZC

Address : 1709 W FM 93

Transportation

- EXPRESSWAY
- MAJOR ARTERIAL
- COLLECTOR
- LOCAL STREET
- MINOR ARTERIAL
- PRIVATE
- RAMP

Parcel Features

- Parcels

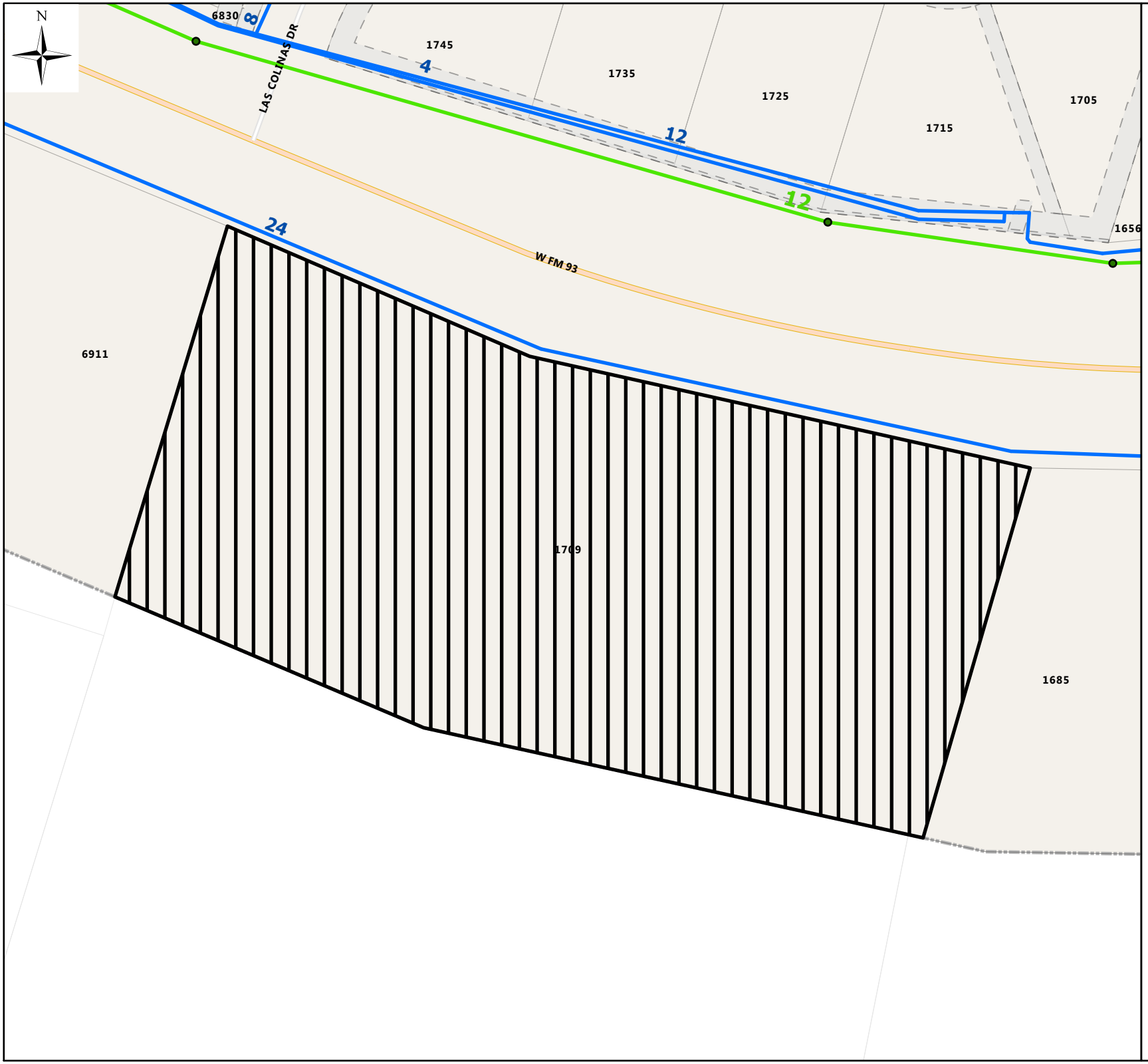
Future LUP

- Agricultural/Rural
- Auto-Urban Commercial
- Auto-Urban Mixed Use
- Auto-Urban Multi-Family
- Auto-Urban Residential
- Business Park
- Estate Residential
- Industrial
- Neighborhood Conservation
- Parks & Open Space
- Public Institutional
- Suburban Commercial
- Suburban Residential
- Temple Medical Education District
- Urban Center
- Easement

jdeckman

Date: 9/17/2019

City of Temple



AG to UE

UTILITY MAP

Zoning Case :
FY-19-33-ZC

Address :
1709 W FM 93

Sewer

- Manhole
- Gravity Main

WaterDistribution

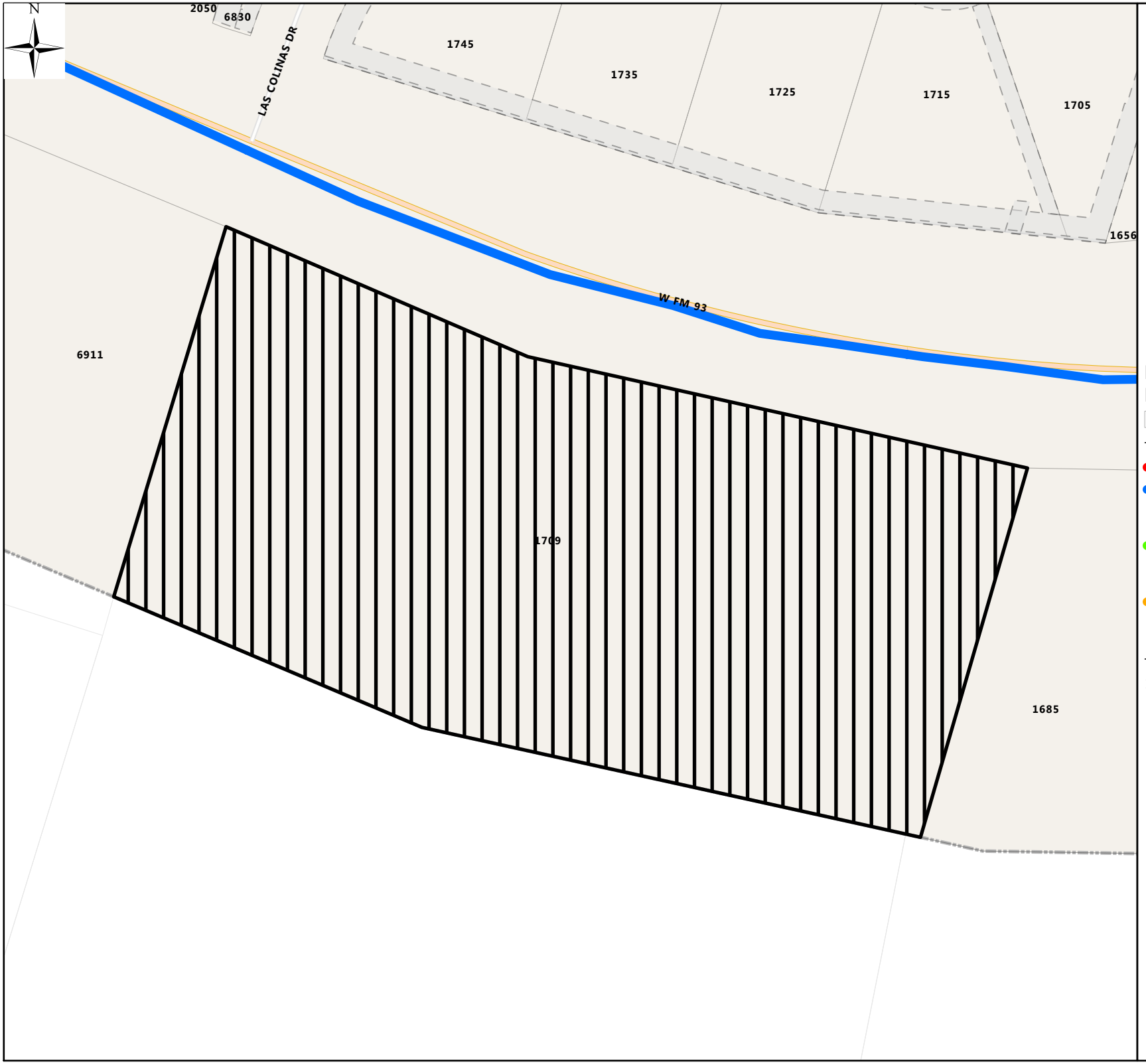
- Hydrant
- Main

Parcel Features

- Parcels
- Easement

jdeckman
Date: 9/17/2019

City of Temple



AG to UE

THOROUGHFARE AND TRAILS MAP

Zoning Case : FY-19-33-ZC

Address : 1709 W FM 93

Parcel Features

- Parcels

Thoroughfare Plan

- Expressway
- Major Arterial
- Proposed Major Arterial
- Minor Arterial
- Proposed Minor Arterial
- Collector
- Proposed Collector

Trails Master Plan

- EXISTING, CITY WIDE SPINE
- EXISTING, COMMUNITY WIDE CONNECTOR
- EXISTING, LOCAL CONNECTOR
- PROPOSED, CITY WIDE SPINE
- PROPOSED, COMMUNITY WIDE CONNECTOR
- PROPOSED, LOCAL CONNECTOR
- Easement

jdeckman

Date: 9/17/2019

City of Temple

AG to UE

200'

NOTIFICATION MAP

Zoning Case :
FY-19-33-ZC

Address :
1709 W FM 93

CurrentZoning

- HI - CUP
- UE
- UE - PD
- SF-1
- SF-1 - CUP
- SF-1 - PD
- SF-2
- SF-2 - PD
- SF-3
- SF-3 - PD
- SF-3 - CUP, PD
- SFA
- SFA-2
- SFA-2 - PD
- SFA-3
- SFA-3 - PD
- 2F
- 2F - CUP
- 2F - PD
- MF-1
- MF-1 - CUP
- MF-1 - PD
- MF-2
- MF-2 - CUP
- MF-2 - PD
- MF-3 - PD
- O-1
- O-1 - CUP
- O-1 - PD
- O-2
- O-2 - CUP
- O-2 - PD
- NS
- NS - CUP
- NS - PD
- GR
- GR - CUP
- GR - PD
- GR - CUP, PD
- CA
- CA - CUP
- CA - PD
- C
- C - CUP
- C - PD
- C - CUP, PD
- LI
- LI - CUP
- LI - PD
- LI - CUP, PD
- HI
- HI - PD
- AG
- AG - CUP
- MH
- MH - CUP
- MH - PD
- MU
- MU - CUP
- SD-C
- SD-C - CUP
- SD-H
- SD-H - CUP
- SD-T
- SD-V
- T4
- T4 - PD
- T4 - CUP
- T5-C
- T5-C - CUP
- T5-C - PD
- T5-E
- T5-E - CUP
- T5-E - PD
- NO BASE
- CUP
- PD
- Easement

jdeckman

Date: 9/17/2019

City of Temple

Facing west along FM 93, looking downhill

Facing east along FM 93, looking uphill

Facing north across FM 93

Facing south into subject property, from FM 93

RESPONSE TO PROPOSED REZONING REQUEST CITY OF TEMPLE

RECEIVED
OCT 04 2019
CITY OF TEMPLE
PLANNING & DEVELOPMENT

390068
STELLAR STRUCTURES INC
DBA STELLAR HOMES
413 DOWNING ST
BELTON, TX 76513-2049

Zoning Application Number: FY-19-33-ZC **Case Manager: Jason Deckman**

Location: 1709 West FM 93

The proposed rezoning is the area shown in hatched marking on the attached map. Because you own property within 200 feet of the requested change, your opinions are welcomed. Please use this form to indicate whether you are in favor of the possible rezoning of the property described on the attached notice, and provide any additional comments you may have.

I (✓) **agree** ( ) **disagree with this request**

Comments:

M. Rendon — Mark Rendon
Signature **Print Name**

Mark@Stellarhomes.us **(Optional)**
Provide email and/or phone number if you want Staff to contact you

If you would like to submit a response, please email a scanned version of this completed form to the Case Manager referenced above, jdeckman@templetx.gov or mail or hand-deliver this comment form to the address below, no later than **October 7, 2019.**

City of Temple
Planning Department
2 North Main Street, Suite 102
Temple, Texas 76501

Number of Notices Mailed: COT 15
ETJ 6
TOTAL 21

Date Mailed: September 25, 2019

***OPTIONAL**: Please feel free to email questions or comments directly to the Case Manager or call us at 254.298.5668.*

RESPONSE TO PROPOSED REZONING REQUEST CITY OF TEMPLE

33304
GARRETT, DAVID JR ETUX ALICIA
6911 BOUTWELL LN EAST
TEMPLE, TX 76502

Zoning Application Number: FY-19-33-ZC **Case Manager: Jason Deckman**

Location: 1709 West FM 93

The proposed rezoning is the area shown in hatched marking on the attached map. Because you own property within 200 feet of the requested change, your opinions are welcomed. Please use this form to indicate whether you are in favor of the possible rezoning of the property described on the attached notice, and provide any additional comments you may have.

I ( ) **agree** (✓) **disagree with this request**

Comments: Homes already abutting this area in hatched marking are on lots greater than 1 acre. This will allow for too dense of a population that has no access to sewer. Rainwater runoffs will be affecting my property and require more re-routing of runoff.

David Garrett
Signature

David Garrett, Jr.
Print Name

cell phone 210-863-2075 e-mail dagar@satx.rr.com **(Optional)**
Provide email and/or phone number if you want Staff to contact you

If you would like to submit a response, please email a scanned version of this completed form to the Case Manager referenced above, jdeckman@templetx.gov or mail or hand-deliver this comment form to the address below, no later than **October 7, 2019.**

City of Temple
Planning Department
2 North Main Street, Suite 102
Temple, Texas 76501

Number of Notices Mailed: COT 15
ETJ 6
TOTAL 21

Date Mailed: September 25, 2019

***OPTIONAL**: Please feel free to email questions or comments directly to the Case Manager or call us at 254.298.5668.*

ORDINANCE NO. 2019-5009
(FY-19-33-ZC)

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A REZONING FROM AGRICULTURAL ZONING DISTRICT TO URBAN ESTATES ZONING DISTRICT ON APPROXIMATELY 3.16 ACRES, ADDRESSED AS 1709 WEST FARM TO MARKET 93; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, the applicant has requested rezoning to Urban Estates which is characterized by low-density residential development that is rural in character, on larger lots that allow for greater buffering and increased setbacks;

Whereas, the property is proposed to be developed for residential uses and is not currently developed and has not been platted - surrounding properties are residential with a mix of Agricultural, Single Family One, and Urban Estates zoning districts;

Whereas, the Planning and Zoning Commission of the City of Temple, Texas, recommends approval of the rezoning from Agricultural zoning district to Urban Estates zoning district on approximately 3.16 acres, addressed as 1709 West Farm to Market 93, as outlined in the map attached hereto as Exhibit 'A,' and made a part hereof for all purposes; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Ordinance as if copied in their entirety.

Part 2: The City Council approves of the rezoning from Agricultural zoning district to Urban Estates zoning district on approximately 3.16 acres, addressed as 1709 West Farm to Market 93, as outlined in the map attached hereto as Exhibit 'A,' and made a part hereof for all purposes.

Part 3: The City Council directs the Director of Planning to make the necessary changes to the City Zoning Map.

Part 4: It is hereby declared to be the intention of the City Council that the sections, paragraphs, sentences, clauses, and phrases of this ordinance are severable and, if any phrase, clause, sentence, paragraph or section of this ordinance should be declared invalid by the final judgment or decree of any court of competent jurisdiction, such invalidity shall not affect any of the remaining phrases, clauses, sentences, paragraphs or sections of this

ordinance, since the same would have been enacted by the City Council without the incorporation in this ordinance of any such phrase, clause, sentence, paragraph or section.

Part 5: This ordinance shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Temple, Texas, and it is accordingly so ordained.

Part 6: It is hereby officially found and determined that the meeting at which this Ordinance was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED on First Reading and Public Hearing on the **7th** day of **November,** 2019.

PASSED AND APPROVED on Second Reading on the **21st** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

_____
TIMOTHY A. DAVIS, Mayor

ATTEST:

_____
Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

_____
Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Kevin Beavers, CPRP, Director of Parks and Recreation

ITEM DESCRIPTION: Consider adopting a resolution authorizing change order #11 with Emerson Construction Company, Inc. of Temple for construction of roadway and landscaping improvements on the north side of Avenue B from 3rd Street to 1st Street and 1st Street from Avenue A to Central Avenue in the amount of $1,340,729.53.

STAFF RECOMMENDATION: Recommend to the City Council for approval as presented in Item Description.

ITEM SUMMARY: In October 2017, Council authorized a professional services agreement with Kasberg, Patrick, & Associates, LP in the amount of $295,260 to design 1st Street from Avenue A to Central Avenue. Contract Amendment #2 was authorized by Council on May 2, 2019 in the amount of $103,700 to include bidding and construction phase services to oversee the project.

Council originally authorized the Santa Fe Plaza Phase 2 construction contract in the amount of $9,629,872.59 with Emerson Construction on June 7, 2018 that included the construction of 1st Street from Avenue B to Avenue A. Change orders #1-10 have been previously approved in the amount of $501,340.14. With the Council's authorization of change order #11 in the amount of $1,340,729.53, the revised contract amount will be $11,471,942.26, a net 19.1% increase to the original contract. By utilizing the existing unit prices for 1st Street from Avenue A to Central Avenue, a net savings of $185,131.47 is being accomplished based off the Opinion of Probable Construction Cost (OPC) of $1,380,000 identified in the TRZ Financing Plan. See the attached engineer's proposal and project map for further details.

Authorization of this change order to the construction contract with Emerson for the Santa Fe Phase 2 Roadway and Landscaping Improvements will provide the following additional work and associated cost:

- **Ave B Sidewalk and Parking** - This project will include removing existing sidewalk and parking spaces, installing a new ADA sidewalk and parking, landscaping, paving, brick pavers, street lights, and other miscellaneous construction items.

- **1st Street from Ave A to Central** - This project will include demolition of existing 1st street sidewalk and roadway from ROW line to ROW line, installing a new road with curb and gutter, parking, brick pavers, street lights, landscaping, irrigation, 12" water line, and other miscellaneous construction items.

Avenue B Sidewalk and Parking	$ 145,861.00
1st Street from Avenue A to Central	1,194,868.53
TOTAL	**$ 1,340,729.53**

An additional 90 days for construction of the proposed improvements have been included in this change order and the revised completion date is February 5, 2020.

The Reinvestment Zone No. 1 Board recommended approval of this change order at their October 23, 2019 Board meeting.

FISCAL IMPACT: Funding is available in the Reinvestment Zone No. 1 Financing and Project Plan, for change order #11 for the Avenue B Sidewalk and Parking addition and for 1st Street from Avenue A to Central Project as shown below.

	795-9500-531-6551 1st St, Ave A to Ave B 101847 Project Plan Line 409	795-9500-531-6561 795-9600-531-6561 1st St, Ave A to Central 101797 Project Plan Line 410	Total
Project Budget	$ 1,275,000	$ 1,734,000	$ 3,009,000
Encumbered/Committed to Date	(1,118,956)	(353,260)	(1,472,216)
Emerson Construction, Inc. - Change Order #11	(145,861)	(1,194,869)	(1,340,730)
Remaining Project Funds	$ 10,183	$ 185,871	$ 196,054

ATTACHMENTS:
Recommendation Letter
Project Map
Resolution

KASBERG, PATRICK & ASSOCIATES, LP
CONSULTING ENGINEERS
Texas Firm F-510

Temple
One South Main Street
Temple, Texas 76501
(254) 773-3731

RICK N. KASBERG, P.E.
R. DAVID PATRICK, P.E., CFM
THOMAS D. VALLE, P.E.
GINGER R. TOLBERT, P.E.
ALVIN R. "TRAE" SUTTON, III, P.E., CFM
JOHN A. SIMCIK, P.E., CFM

Georgetown
1008 South Main Street
Georgetown, Texas 78626
(512) 819-9478

October 10, 2019

Mr. Kevin Beavers, CPRP
City of Temple
2 North Main Street, Suite 201
Temple, Texas 76501

Re: City of Temple, Texas
Santa Fe Plaza Phase II – Roadway & Landscaping

Dear Mr. Beavers:

Attached is Change Order No. 11 in the amount of **$1,340,729.53** for the above referenced project. This change order reflects the following changes:

- **Avenue B Sidewalk & Parking Improvements ($145,861.00):**
  - Removal of the existing concrete sidewalk and parking spaces and installing new ADA compliant sidewalk, parking spaces, masonry stone planter box, landscaping, irrigation, utility adjustments, asphalt paving, french drain installation, brick pavers, handrail, street lights, and other miscellanous construction activities. Improvements are located from the northwest corner of Avenue B & 1st Street Intersection west to the alley way;
- **1st Street Improvements – Avenue A to Central Avenue ($1,194,868.53):**
  - Demolition of existing 1st Street sidewalk and roadway from ROW line to ROW line;
  - Installation of new roadway, curb & gutter, parking spaces, ADA compliant sidewalk, brick pavers, driveways, street lights, electric conduit, fiber optic conduit, 12" water line, landscpaing, irrigation, stirping, signage, and other misceallaneous construction activities.

Unit prices from the existing Santa Fe Plaza Phase II – Roadway & Landscaping contract are being utilitzed for the work associated with this change order. By utilizing the exisitng unit prices for the 1st Street: Avenue A to Central Scope, a net savings of $185,131.47 is being accomplished based off the Opinion of Probable Construction Cost of $1,380,000 identifed in the TRZ Fianincing Plan.

An additional 90 days for construction of the proposed improvements have been included in this change order. The revised completion date is February 5, 2020. We have reviewed Change Order No. 11, in the amount of **$1,340,729.53**, and recommend it be processed and executed with respect to the Emerson Construction Company, Inc. construction contract for the Santa Fe Plaza Phase II – Roadway & Landscaping project.

Sincerely,

Alvin R (Trae) Sutton III, P.E., CFM

ARS/

xc: Sarah Parker, City of Temple Purchasing (Original)
Bobby Ferguson, Emerson Construction Company, Inc.
2014-126-40

NORTH

0 30 60

HORIZONTAL SCALE IN FEET

1+00 2+00 3+00 4+00 5+00 6+00 7+00 8+00 8+74

1ST STREET

AVENUE A

AVENUE B

CENTRAL AVE

ADDITIONAL WORK - CHANGE ORDER 11

EXHIBIT A

SHEET NO.
01 OF
01 SHEETS

FILE: P:\Temple Reinvestment\2017\17-153 1st Street Downtown\cad\Exhibit\EXHIBIT A.dwg LAST SAVED: 10/16/2019 8:19:17 AM LAYOUT: EXHIBIT A

RESOLUTION NO. 2019-9890-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING CHANGE ORDER NO. 11 WITH EMERSON CONSTRUCTION, INC. OF TEMPLE, TEXAS IN THE AMOUNT OF $1,340,729.53, FOR SANTA FE PHASE 2 ROADWAY AND LANDSCAPING IMPROVEMENTS; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, in October 2017, Council authorized a professional services agreement with Kasberg, Patrick, & Associates, LP in the amount of $295,260 to design 1st Street from Avenue A to Central Avenue - Contract Amendment No. 2 was authorized by Council on May 2, 2019 in the amount of $103,700 to include bidding and construction phase services to oversee the project;

Whereas, Council originally authorized the Santa Fe Plaza Phase 2 construction contract in the amount of $9,629,872.59 with Emerson Construction on June 7, 2018 that included the construction of 1st Street from Avenue B to Avenue A - Change Order Nos. 1-10 have been previously approved in the total amount of $501,340.14;

Whereas, this change order to the construction contract with Emerson for the Santa Fe Phase 2 Roadway and Landscaping Improvements will provide the following additional work and associated cost:

- **Avenue B Sidewalk and Parking** - This project will include removing existing sidewalk and parking spaces, installing a new Americans with Disabilities Act sidewalk and parking, landscaping, paving, brick pavers, street lights, and other miscellaneous construction items; and

- **1st Street from Avenue A to Central Avenue** - This project will include demolition of existing 1st street sidewalk and roadway from right-of-way line to right-of-way line, installing a new road with curb and gutter, parking, brick pavers, street lights, landscaping, irrigation, 12-inch water line, and other miscellaneous construction items;

Whereas, the Reinvestment Zone No. 1 Board recommended approval of this change order at their October 23, 2019 Board meeting;

Whereas, Staff recommends Council authorize Change Order No. 11 to the construction contract with Emerson Construction, Inc. of Temple, Texas in the amount of $1,340,729.53, for the Santa Fe Phase 2 Roadway and Landscaping Improvements;

Whereas, funding for Change Order No. 11 is available in Reinvestment Zone Financing and Project Plans, Line 409, Account No. 795-9500-531-6551, Project No. 101847 and Line 410, Account No. 795-9500-531-6561, Account No. 795-9600-531-6561, Project No. 101797; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council authorizes the City Manager, or her designee, after approval as to form by the Interim City Attorney, to execute Change Order No. 11 to the construction contract with Emerson Construction, Inc. of Temple, Texas in the amount of $1,340,729.53, for the Santa Fe Phase 2 Roadway and Landscaping Improvements.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November,** 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:
Brynn Myers, City Manager
Kayla Landeros, Interim City Attorney

ITEM DESCRIPTION: Consider adopting a resolution authorizing a Tax Abatement Agreement with Turner Behringer Temple One, LLC which will cover increases in the taxable value of real property located at 102 East Central Avenue, Temple 76501.

STAFF RECOMMENDATION: Adopt resolution as provided in item description.

ITEM SUMMARY: The proposed agreement with Turner Behringer Temple One, LLC ("Turner Behringer") would give the company 10 years of tax abatement on the increased taxable value of real property improvements located at 102 East Central Avenue in Temple (the "Property"). The Property is commonly referred to as the Public Services Building or the Sears Building.

On this agenda, the City Council will consider, on second reading, designating the Property as Tax Abatement Reinvestment Zone No. 40. Turner Behringer plans to renovate the Property for residential, retail, and commercial uses. The agreement provides that the tax abatement period commences in the first full calendar year after a Certificate of Occupancy is issued for the improvements or the Property passes a final inspection, whichever is applicable. The proposed tax abatement would be for 10 years at a declining rate as set forth below:

Years 1-5:	100%
Year 6:	90%
Year 7:	80%
Year 8:	70%
Year 9:	60%
Year 10:	50%

Turner Behringer estimates that its investment will be approximately $4,500,000 in real property improvements. The actual value of the improvements, and the value of the City's tax abatement, is dependent on appraisal by the Bell County Appraisal District.

The City's Economic Development Policy sets out the criteria and guidelines for granting tax abatement. Turner Behringer's proposal meets the standards for granting tax abatement on the increase in real property improvements established by the City's Criteria and Guidelines for tax abatement. The improvements proposed meet the minimum criteria established for tax abatement consideration and meet the requirements for the proposed tax abatement. The proposed improvements fall within the definition of "eligible facilities" in the criteria.

The agreement will include all of the terms required by Chapter 312 of the Texas Tax Code for tax abatement agreements, including provisions: (1) listing the kind and number of improvements; (2) providing for inspections of the facility by the taxing entities; (3) requiring compliance with State and local laws; (4) recapturing abated taxes in the event of a default under the agreement; and (5) requiring Turner Behringer to annually certify to all the taxing entities that it is in compliance with all of the terms and conditions of the agreement.

The Board of Directors of Temple's Tax Increment Financing Reinvestment Zone #1 approved the proposed Tax Abatement Agreement at its September 25 meeting.

FISCAL IMPACT: The tax abatement agreement with Turner Behringer Temple One, LLC for property located at 102 East Central Avenue would have the potential of abating approximately $257,308 in City of Temple property taxes over the life of the agreement using the City's current tax rate of $0.6727 per $100 value. This amount is based on an estimated increase in the appraised value of real property improvements of $4,500,000.

ATTACHMENTS:
Resolution

RESOLUTION NO. 2019-9891-R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, AUTHORIZING A TAX ABATEMENT AGREEMENT WITH TURNER BEHRINGER TEMPLE ONE, LLC WHICH WILL COVER INCREASES IN THE TAXABLE VALUE OF REAL PROPERTY LOCATED AT 102 EAST CENTRAL AVENUE, TEMPLE, TEXAS 76501; AND PROVIDING AN OPEN MEETINGS CLAUSE.

Whereas, the proposed agreement with Turner Behringer Temple One, LLC ("Turner Behringer") would give the company 10 years of tax abatement on the increased taxable value of real property improvements located at 102 East Central Avenue in Temple (the "Property") - the Property is commonly referred to as the Public Services Building or the Sears Building;

Whereas, the agreement provides that the tax abatement period commences in the first full calendar year after a Certificate of Occupancy is issued for the improvements or the Property passes a final inspection, whichever is applicable;

Whereas, the tax abatement agreement with Turner Behringer Temple One, LLC would have the potential of abating approximately $257,308 in property taxes over the life of the agreement using the City's current tax rate of $0.6727 per $100 value - this amount is based on an estimate of the appraised value of real property improvements of $4,500,000 for 10 years at a declining rate of:

Years 1-5: 100%
Year 6: 90%
Year 7: 80%
Year 8: 70%
Year 9: 60%
Year 10: 50%

Whereas, Turner Behringer estimates that its investment will be approximately $4,500,000 in real property improvements - the actual value of the improvements, and the value of the City's tax abatement, is dependent on appraisal by the Bell County Appraisal District;

Whereas, the City's Economic Development Policy sets out the criteria and guidelines for granting tax abatement - Turner Behringer's proposal meets the standards for granting tax abatement on the increase in real property improvements established by the City's Criteria and Guidelines for tax abatement;

Whereas, the improvements proposed meet the minimum criteria established for tax abatement consideration and meet the requirements for the proposed tax abatement - the proposed improvements fall within the definition of "eligible facilities" in the criteria;

Whereas, the agreement will include all of the terms required by Chapter 312 of the Texas Tax Code for tax abatement agreements, including provisions: (1) listing the kind and number of improvements; (2) providing for inspections of the facility by the taxing entities; (3) requiring compliance with State and local laws; (4) recapturing abated taxes in the event of a

default under the agreement; and (5) requiring Turner Behringer to annually certify to all the taxing entities that it is in compliance with all of the terms and conditions of the agreement;

Whereas, the Board of Directors of Temple's Tax Increment Financing Reinvestment Zone No. 1 approved the proposed Tax Abatement Agreement at its September 25, 2019 meeting; and

Whereas, the City Council has considered the matter and deems it in the public interest to authorize this action.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPLE, TEXAS, THAT:

Part 1: **Findings.** All of the above premises are hereby found to be true and correct legislative and factual findings of the City Council of the City of Temple, Texas, and they are hereby approved and incorporated into the body of this Resolution as if copied in their entirety.

Part 2: The City Council approves the Tax Abatement Agreement with Turner Behringer Temple One, LLC.

Part 3: It is hereby officially found and determined that the meeting at which this Resolution was passed was open to the public as required and that public notice of the time, place, and purpose of said meeting was given as required by the Open Meetings Act.

PASSED AND APPROVED this the **7th** day of **November**, 2019.

THE CITY OF TEMPLE, TEXAS

TIMOTHY A. DAVIS, Mayor

ATTEST:

Lacy Borgeson
City Secretary

APPROVED AS TO FORM:

Kayla Landeros
Interim City Attorney

COUNCIL AGENDA ITEM MEMORANDUM

DEPT. / DIVISION SUBMISSION & REVIEW:

Mayor Timothy Davis

ITEM DESCRIPTION: Consider adopting a resolution appointing Kathryn Davis as City Attorney and setting compensation for the position.

STAFF RECOMMENDATION: Consider adopting resolution as presented.

ITEM SUMMARY: This proposed resolution would appoint Kathryn Davis to serve as City Attorney effective December 9, 2019 and sets her compensation at $190,008 annually.

FISCAL IMPACT: Total compensation including salary and benefits for this position is estimated at $234,964. This position is funding in Legal Department's FY 2020 Operating Budget.

ATTACHMENTS:
Resolution

COUNCIL AGENDA ITEM MEMORANDUM

DEPT./DIVISION SUBMISSION & REVIEW:

Lacy Borgeson, City Secretary

ITEM DESCRIPTION: Consider adopting a resolution appointing one member to serve as the City's representative on the Board of Directors of the Tax Appraisal District of Bell County for a two-year term.

STAFF RECOMMENDATION: Adopt resolution as presented in item description.

ITEM SUMMARY: The Appraisal District has requested the City make an appointment to this board for a two-year term beginning January 1, 2020 through December 31, 2022. Currently Scott Morrow has served as the City's representative on the Board since 2014 and is an active member.

FISCAL IMPACT: None

ATTACHMENTS: None