

FILED

MAY 19 2011

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF HUMBOLDT



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7 SUPERIOR COURT OF CALIFORNIA  
8 COUNTY OF HUMBOLDT  
9

10 RICHARD SALZMAN,  
11 Plaintiff,  
12 vs.

13 CITY OF ARCATA, RANDY MENDOSA,  
14 City Manager, SUSAN ORNELAS,  
15 Mayor, Does 1 through 10,  
16 Defendants.  
17

) No. **DR110422**  
)  
) COMPLAINT FOR DECLARATORY AND  
) INJUNCTIVE RELIEF UNDER C.C.P.  
) 526a TO RESTRAIN ILLEGAL  
) EXPENDITURE OF PUBLIC MONEY

18  
19  
20 COMES NOW Plaintiff Richard Salzman to allege:

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22 **PARTIES**

23 1. Plaintiff Richard Salzman is, and at all times mentioned  
24 herein was, an individual residing in the County of  
25 Humboldt, State of California.

26  
27 2. Defendant City of Arcata is a public entity located in the  
28 County of Humboldt. Defendant Randy Mendosa is an  
individual and is the City Manager of the City of Arcata.

1 Defendant Susan Ornelas is an individual and is the Mayor  
2 of the City of Arcata. Said individual defendants are  
3 public officials charged with the duty to properly expend  
4 the public funds of the City of Arcata.

5  
6 3. Plaintiff is ignorant of the true names and capacities of  
7 Defendants sued herein as DOES 1 through 10, inclusive, and  
8 therefore sue these Defendants by such fictitious names.  
9 Plaintiff will amend this complaint to allege their true  
10 names and capacities when ascertained. Plaintiff is  
11 informed and believes and thereon alleges that each of  
12 these fictitiously named defendants are responsible in some  
13 manner for the occurrences herein alleged, and that  
14 Plaintiff's injuries as herein alleged were proximately  
15 caused by the aforementioned Defendants.

16  
17 4. Plaintiff is informed and believes, and thereon alleges,  
18 that at all relevant times herein defendants, and DOES 1  
19 through 10, were the agents, employees and/or servants,  
20 masters or employers of each other, and in doing the things  
21 herein alleged, were acting within the course and scope of  
22 such agency or employment, and with the approval and  
23 ratification of each of the other Defendants. Plaintiff is  
24 further informed and believes, and thereon alleges, that  
25 each and every one of the acts and omissions alleged herein  
26 were performed by, and/or attributable to, all Defendants,  
27 each acting as agents and/or employees, and/or under the  
28 direction and control of each of the other Defendants, and

1 that said acts and failures to act were within the course  
2 and scope of said agency, employment and/or direction and  
3 control. Plaintiff is further informed and believes, and  
4 thereon alleges, that each of the Defendants herein gave  
5 consent to, ratified, and authorized the acts alleged  
6 herein to each of the remaining Defendants. The wrongful  
7 acts and omissions alleged to have occurred herein were  
8 performed by management level employees of defendants,  
9 and/or were performed by employees of the defendant(s) in  
10 the course and scope of their employment.  
11

12 **JURISDICTION, VENUE AND ADMINISTRATIVE CLAIMS**

13 5. The unlawful practices complained of herein occurred in  
14 Humboldt County, California. Venue is proper in Humboldt  
15 County under Code of Civil Procedure sections 393(b) and  
16 395(a) as the causes of action arose in Humboldt County,  
17 and the injuries suffered by plaintiff occurred in Humboldt  
18 County.  
19

20  
21 6. This action involves a series of harmful acts and omissions  
22 by Defendants, and each of them, against Plaintiff. The  
23 factual allegations set forth hereinafter are for the sole  
24 purpose of stating causes of action against Defendants, and  
25 each of them, and are not intended to be an inclusive list  
26 of all of the harmful acts and omissions performed by  
27 Defendants, and each of them, against Plaintiff.  
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**FACTUAL ALLEGATIONS**

7. At all times relevant herein, Plaintiff was and is a real property owner, taxpayer and resident of the City of Arcata.

8. On or about March 17, 2010, the Arcata City Council passed, by a 3-2 vote, a panhandling ordinance that was to take effect April 16, 2010. [Ordinance No. 1399, hereafter "the Ordinance"]. The Ordinance was codified as Sections 4280, 4281 and 4282 of the Arcata Municipal Code, a copy of which is attached hereto as Exhibit A, and incorporated herein by this reference.

9. On February 14, 2011, Plaintiff, through his counsel, made a demand upon the City of Arcata, to amend the Ordinance because it is unconstitutional. A copy of said demand is attached hereto as Exhibit B, and incorporated herein by this reference.

10. On or about March 24, 2011, the Arcata City Council voted 4-1 not to amend the Ordinance.

11. Plaintiff alleges that Sections 4281F, 4282B, 4282C, 4282D, 4282E, 4282F and 4282G, of the Ordinance, taken as a whole, are unconstitutional.

12. Plaintiff does not challenge Section 4282A of the

1 Ordinance, which declares panhandling in an "aggressive  
2 manner" to be unlawful.  
3

4 13. The Ordinance prohibits panhandling in an unacceptably  
5 large proportion of the downtown public commons in the City  
6 of Arcata, an area that is supposed to receive the highest  
7 Free Speech protection under the California and U.S.  
8 Constitutions.  
9

10 14. The ordinance prohibits all solicitation for immediate  
11 donations of money, both verbal and written, in most of the  
12 downtown public commons, including solicitation of  
13 charitable gifts, and presumably, hand-to-hand sales  
14 transactions of goods or services.  
15

16 15. The Ordinance was passed for the unlawful purpose of  
17 driving out the homeless population from the City of  
18 Arcata, or to impose an unlawful burden on the homeless, or  
19 for the purpose of selectively enforcing the Ordinance  
20 against the homeless population of Arcata, and the City  
21 unlawfully singles out the homeless and downtrodden for  
22 discriminatory treatment under the Ordinance.  
23

24 16. Plaintiff alleges that the Ordinance is  
25 unconstitutional for the following reasons:  
26

27 (a) The Ordinance is facially unconstitutional  
28 under the Article 1, Section 2, of the

1 California Constitution, and under the First  
2 Amendment to the U.S. Constitution in that:  
3 (1) the Ordinance places an impermissible  
4 burden on the free speech rights of citizens  
5 in a public forum; (2) the Ordinance fails to  
6 give adequate notice of the conduct  
7 prohibited, lacks sufficient guidelines to  
8 prevent arbitrary and discriminatory  
9 enforcement, and is void for vagueness; (3)  
10 the Ordinance is a content-based regulation  
11 of speech that is presumptively  
12 unconstitutional in each and every  
13 application, in that it presents an  
14 unacceptable risk of chilling and/or  
15 suppressing protected speech; (4) the  
16 Ordinance is unconstitutionally overbroad;  
17 (5) the Ordinance is not narrowly tailored to  
18 achieve a compelling governmental interest;  
19 (6) the Ordinance fails to leave open ample  
20 alternative channels for communication, in  
21 that it prevents persons soliciting alms,  
22 selling goods or services, or soliciting  
23 charitable donations from reaching their  
24 intended audience; and (7) even if the  
25 Ordinance is neutral on its face, its  
26 restrictions on speech fall unevenly on  
27 different viewpoints and groups in society,  
28 and the Ordinance has the invidious effect of

1 discriminating against disfavored viewpoints  
2 or speakers;

3  
4 (b) The Ordinance is unconstitutional as applied  
5 to the homeless and downtrodden under Article  
6 1, Section 2, of the California Constitution,  
7 and under the First Amendment to the U.S.  
8 Constitution; and

9  
10 (c) The Ordinance denies equal protection of the  
11 law to the homeless and downtrodden under the  
12 U.S. and California Constitutions in that:  
13 (1) the Ordinance is unlawfully administered  
14 by City officials which results in unequal  
15 application of the Ordinance to persons who  
16 are entitled to be treated alike, and such  
17 unequal treatment is the product of  
18 intentional or purposeful discrimination; and  
19 (2) the Ordinance is enforced in a manner  
20 that is malicious, arbitrary or plainly  
21 irrational, in that the homeless and  
22 downtrodden are singled out for unequal  
23 treatment.

24  
25 16. The defendants, and each of them, have expended  
26 the public monies of the City of Arcata, and have  
27 threatened and will continue to spend said monies to  
28 enforce the Ordinance. Because the Ordinance is

1 unconstitutional, money spent to enforce it is an illegal  
2 expenditure and such further expenditures should be  
3 enjoined.  
4

5 17. Actual controversies exist as to (1) whether the  
6 Ordinance is unconstitutional; and (2) whether the City's  
7 expenditure of public funds to enforce the Ordinance is  
8 illegal.  
9

10 18. Unless the court issues a declaration of rights,  
11 there will continue to be controversy surrounding said  
12 issues, and further litigation the likely result.  
13

14 19. Unless compelled to refrain from infringing  
15 constitutional and statutory rights, defendants will continue  
16 to do so.  
17

18 20. Plaintiff has no plain, speedy or adequate remedy at  
19 law.  
20

21 21. Plaintiff has suffered injury resulting from  
22 defendants' violations of his rights as set forth herein.  
23

24 22. Plaintiff seeks attorney's fees under under Code of  
25 Civil Procedure section 1021.5 and under the substantial  
26 benefit doctrine.  
27  
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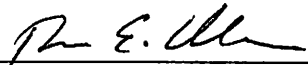
1 **PRAYER**

2  
3 WHEREFORE, Plaintiff prays the Court grant relief as follows:  
4

- 5 1. For a preliminary injunction and a permanent injunction  
6 preventing the defendants from enforcing the Ordinance or  
7 from expending public funds to enforce the Ordinance;  
8 2. For a declaration that the Ordinance is unconstiutional;  
9 3. For reasonable attorney's fees;  
10 4. For costs of suit;  
11 5. For such further relief as the court deems just and  
12 proper.  
13

14 Respectfully Submitted,  
15

16 Dated: May 19, 2011

  
\_\_\_\_\_  
Peter E. Martin  
Attorney for Plaintiff

## ARTICLE 10—UNLAWFUL PANHANDLING

### **Sec. 4280 Findings.**

The City Council finds as follows:

- A. Within the last few years there has been a substantial increase in aggressive solicitation or panhandling throughout the City of Arcata as well as an increase in targeted panhandling in certain areas of the City.
- B. Aggressive panhandling, which usually includes approaching or following pedestrians, the use of abusive language, unwanted physical contact, or the intentional blocking of pedestrian and vehicular traffic, is extremely disturbing and disruptive to residents and businesses and contributes not only to the loss of access and enjoyment of public places, but also to an enhanced sense of fear, intimidation and disorder.
- C. The increase of targeted panhandling at locations where residents are captive audiences, in which it is impossible or difficult for them to exercise their own right to decline to listen to or avoid solicitation from others, intimidates persons who are approached, interferes with privacy and security, impedes traffic flow, causes congestion, and negatively impacts businesses within the City. Such places include buses and bus shelters, parking lots, major intersections where cars and bicyclists must stop for traffic, and pedestrian foot bridges where pedestrians are unable to take an alternate route.
- D. Aggressive and targeted panhandling of commercial customers as they enter and exit retail establishments, including restaurants, bars and cafes, has become increasingly disturbing to residents and business, has generated an enhanced sense of fear, intimidation and disorder, and has caused many retail customers to avoid shopping or dining within the City. This situation threatens the economic vitality of the City.
- E. This law is timely and appropriate because current laws and City regulations are insufficient to address the above-mentioned problems. The restrictions contained herein are neither overbroad nor vague, and are narrowly tailored to serve a substantial governmental interest.
- F. The goal of this law is to protect citizens from fear and intimidation accompanying certain kinds of solicitation that have become an unwelcome and overwhelming presence in the City, and to restore an atmosphere of mutual respect within the community. (Ord. 1399, eff. 4/16/2010)

### **Sec. 4281 Definitions.**

For purposes of this article, the following words shall have the following meaning, unless the context clearly indicates otherwise:

- A. "Aggressive manner" shall mean:
  - 1. Approaching or speaking to a person, or following a person before, during or after panhandling, if that conduct is likely to cause a reasonable person to:
    - (i) Fear bodily harm to oneself or to another, damage to or loss of property; or
    - (ii) Otherwise be intimidated into giving money, goods or other things of value;
  - 2. Approaching an occupied vehicle by entering into the roadway when traffic is either stopped or moving, before, during or after panhandling;
  - 3. Knocking on the window of, or physically reaching toward or into, an occupied vehicle before, during or after panhandling;
  - 4. Continuing to solicit from a person after the person has given a negative response to such panhandling;
  - 5. Intentionally touching or causing physical contact with another person without that person's consent in the course of panhandling;
  - 6. Intentionally blocking or interfering with the safe or free passage of a pedestrian or vehicle by any means, including causing a pedestrian or vehicle operator to take evasive action to avoid physical contact before, during or after panhandling;
  - 7. Using violent or threatening gestures toward a person before, during or after panhandling;
  - 8. Using profane, offensive or abusive language which is inherently likely to provoke an immediate violent reaction, either before, during or after panhandling;
  - 9. Following a person while panhandling, with the intent of asking that person for money, goods or other things of value.
- B. "Automated teller machine" shall mean a device, linked to a financial institution's account records, which is able to carry out transactions, including, but not limited to, account transfers, deposits, cash withdrawals, balance inquiries, and mortgage and loan payments.
- C. "Automated teller machine facility" shall mean the area comprised of one or more automatic teller machines, and any adjacent space that is made available to banking customers after regular banking hours.

D. "Check cashing business" shall mean any person duly licensed by the Attorney General to engage in the business of cashing checks, drafts or money orders for consideration pursuant to Section 1789.31 of the California Civil Code.

E. "Intersection" shall mean the intersection of the lateral curb lines, or if none, the lateral boundary lines of the roadway, of two roads that join one another at approximately right angles.

F. "Panhandling" 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. Panhandling shall include using the spoken, written, or printed word, bodily gestures, signs, or other means with the purpose of obtaining an immediate donation of money or other thing of value.

G. "Public place" shall mean a place where a governmental entity has title or to which the public or a substantial group of persons has access, including, but not limited to, any street, highway, parking lot, transportation facility, shopping center, school, place of amusement, park, or playground. (Ord. 1399, eff. 4/16/2010)

### **Sec. 4282 Unlawful Panhandling.**

It is unlawful and a public nuisance for any person to:

- A. Panhandle in an aggressive manner in any public place;
- B. Panhandle within twenty (20) feet of any check cashing business, or within twenty (20) feet of any automated teller machine; provided, however, that when an automated teller machine is located within an automated teller machine facility, such distance shall be measured from the entrance or exit of the facility;
- C. Panhandle within twenty (20) feet of the entrance to a supermarket, retail store, restaurant or bar;
- D. Panhandle in any public transportation vehicle, or within twenty (20) feet of a bus stop or bus shelter;
- E. Panhandle in any parking lot or parking structure accessible to the general public, or within twenty (20) feet of the entrance or exit to such parking lot or parking structure;
- F. Panhandle while on any public pedestrian foot bridge, or within twenty (20) feet of the entrance or exit to a public pedestrian foot bridge; or
- G. Panhandle within twenty (20) feet of any intersection. (Ord. 1399, eff. 4/16/2010)

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February 14, 2011

Susan Ornelas, Mayor  
Michael Winkler, Vice-Mayor  
Shane Brinton, Council Member  
Alexandra Stillman, Council Member  
Mark Wheatley, Council Member  
Randy Mendosa, City Manager  
Nancy Diamond, Esq., City Attorney  
City of Arcata  
736 F Street  
Arcata, CA 95521

Re: Unconstitutional Panhandling Ordinance enacted April 16, 2010, as Arcata Municipal Code [AMC] Sections 4280-4282.

Dear City Council, City Manager and City Attorney:

Please take notice that Mr. Richard Salzman, a resident of, and taxpayer within, the City of Arcata, has retained the undersigned to bring an action against the City of Arcata to declare its panhandling ordinance unconstitutional and to enjoin the City from any further enforcement of said ordinance. The purpose of this letter is to invite the City to amend its panhandling ordinance as set forth herein, and thereby avoid the expense, uncertainty and unpleasantness of contested litigation.

Specifically, Mr. Salzman contends that AMC Sections 4282B, 4282C, 4282D, 4282E, 4282F and 4282G are unconstitutional. The overall impact of these sections is to criminalize begging in most of the City where it would be fruitful to beg. Begging is a charitable solicitation. The First Amendment clearly protects charitable solicitations. No distinction of constitutional dimension exists between soliciting funds for oneself and for charity. The fact that a beggar keeps the money she receives does not strip the speech of First Amendment protection. A speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because she is paid to speak.

To be lawful, the ordinance must serve a compelling interest that is narrowly drawn to achieve its end. The City's compelling interest, if one exists, is well-served by the ordinance's ban on aggressive panhandling, to which Mr. Salzman does not take

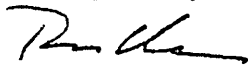
exception. Mr. Salzman objects to the near-total ban on begging in public fora, the justification for which can be little more than avoiding “annoyance” to the public, hardly a compelling interest in First Amendment jurisprudence. Moreover, the ordinance’s ban on begging is not “narrowly tailored;” indeed, it is embarrassingly broad. To achieve the City’s goal of criminalizing the speech of a few beggars, the City has criminalized all solicitations for money. A girl scout cannot sell cookies on the City’s streets. Nor may any charity solicit money in most of the City. A beggar cannot even hold a sign up to ask for money; a more clearly content-based restriction on speech is difficult to imagine.

The City’s attempt to justify these draconian restrictions on speech under the so-called “captive audience rule” is unavailing. The City’s expansion of that concept to include almost all public space within the City perverts the intent of the rule and strikes at the very heart of discourse in a democratic society- the right to communicate with one’s fellow citizens on the public commons.

Other constitutional concerns are implicated in the City’s ordinance. The criminalization of solicitation implicates equal protection concerns, to wit, the ordinance targets the First Amendment rights of the City’s poorest and most downtrodden residents, while it remains legal to accost members of the public to ask the time of day, or to sign a petition. The complexity of the ordinance, with its crazy patch-work of places where it is illegal to beg, implicates notice and due process concerns. A reasonable citizen of the City lacks adequate notice as to where she may beg and where she may not beg. Likewise, the ordinance’s definition of “panhandling” leaves questions unanswered: Is a check or credit card transaction on the City’s streets illegal, or just a cash transaction? This renders the ordinance subject to challenge for vagueness.

Mr. Salzman would prefer to resolve this matter without litigation, and to that end, invites the City and its attorneys to meet with the undersigned to work toward resolution of the issues raised herein.

Respectfully,



Peter E. Martin