

1. Agenda

Documents: [AGENDA 06.11.13.PDF](#)

2. Amendments To Chapter 25

Documents: [AMENDMENTSTOCHAPTER25.PDF](#)

3. Memo To Committee, June 2013

Documents: [MEMOTOCOMMITTEEJUNE2013.PDF](#)

4. Worcester Ordinance

Documents: [WORCESTERORDINANCE.PDF](#)

5. Final Panhandling Publisher

Documents: [FINALPANHANDLINGPUBLISHER.PDF](#)

6. Memo Regarding Prohibition Against Standing In Medians

Documents: [MEMOREPROHIBITIONAGAINSTSTANDINGINMEDIANS.PDF](#)

CITY OF PORTLAND, MAINE
Public Safety, Health and Human Services

Public Safety, Health and Human Services

DATE: 6/11/2013

TIME: 6:00 PM

LOCATION: Council Chambers / 389 Congress Street

AGENDA

1. Meeting Called to Order and Minutes from Previous Meeting Reviewed including the April 9th Minutes which have been Amended.
2. Amendments to Chapter 25 of the Portland City Code; Prohibition Against Standing in Median.

MICHAEL F. BRENNAN (MAYOR)
KEVIN J. DONOGHUE (1)
DAVID A. MARSHALL (2)
EDWARD J. SUSLOVIC (3)
CHERYL A. LEEMAN (4)

CITY OF PORTLAND
IN THE CITY COUNCIL

JOHN R. COYNE (5)
JOHN M. ANTON (A/L)
JILL C. DUSON (A/L)
NICHOLAS M. MAVODONES (A/L)

AMENDMENT TO PORTLAND CITY CODE
CHAPTER 25 STREETS, SIDEWALKS AND OTHER PUBLIC PLACES
ARTICLE II. OBSTRUCTIONS, ENCUMBRANCES AND AUTHORIZED EVENTS AND
ARTICLE VII. EXCAVATIONS
SECTION 25-17 (Selling and other prohibited activity)
AND
SECTION 25-118 (Definitions)

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF PORTLAND,
MAINE IN CITY COUNCIL ASSEMBLED AS FOLLOWS:**

1. *That Article II, Obstructions and Encumbrances, Section 25-17 of the Portland City Code is hereby amended to read as follows:*

ARTICLE II. OBSTRUCTIONS, ENCUMBRANCES AND AUTHORIZED EVENTS

...

Sec. 25-17. Selling and other prohibited activity; exceptions.

(a) No person shall be or remain in or on any of the streets, ways, or public places of the city for the purpose of the sale of any article or for the exercise of any other business or calling, or event, except that which is approved by council order, for which a license has been duly issued in accordance with the provisions of article II of chapter 19, section 11-35.5, division 2 of this article, or, in relation to events, chapter 18, sections 18-40 to 18-50.

This section shall not apply to street artists who are working or selling on sidewalks or in public places other than city streets or to individuals who set up a table and chairs in compliance with Chapter 19, Section 24, paragraph (a)(1),(2),(5) to distribute political literature or gather signatures on petitions.

(b) No person shall stand, sit, stay, drive or park on a median as defined in Section 25-118, except that pedestrians may use median strips only in the course of crossing from one side of the street to the other.

....

Sec. 25-118. Definitions.

The following words and phrases, when used in this article, shall have the meanings respectively ascribed to them:

....

Median strip means a paved or planted are of public right-of-way, dividing a street or highway into lanes according to the direction of travel.

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MEMORANDUM

To: Public Safety, Health and Human Services Committee
From: Trish McAllister, Neighborhood Prosecutor
Re: Amendment to Chapter 25 of the Portland City Code: Prohibition against standing in medians
Date: June 7, 2013

Background

Last summer, the Public Safety Committee unanimously recommended passage of the following amendments to Chapter 25 of the Portland City Code:

“No person shall stand, sit, stay, drive or park on a median as defined in Section 25-118, 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 § 25-17(b).

“*Median strip* means a paved or planted area of public right-of-way, dividing a street or highway into lanes according to the direction of travel.” Portland City Code § 25-118.

After considerable public testimony and council debate, in July the City Council voted not to approve the amendments, by a vote of 6-3.

Councilor Suslovic requested that the ordinance be re-introduced to this committee for consideration based on the increase in complaints and associated concerns regarding safety in and around the medians.

Application of Current Laws and Regulations

Currently, an individual just standing in a median strip is not in violation of a state or local law. However, their presence poses a safety hazard when:

- people in cars stop short to read signs or give money when the light is green;
- drivers are distracted or frightened when approached by those in the medians;
- the person in the median is incapacitated and falls or stumbles into the roadway;
- the person leaves the median to walk through traffic/approach cars;
- individuals fight each other over the use of that particular median, etc.

Any of these *may* constitute a violation of state laws against obstruction of public ways or disorderly conduct, whether it is the person in the median or a driver in violation. However, an officer would have to witness such violation personally to issue a summons. Also, note that a warning from a police officer is required before an offense of obstruction of a public way can be prosecuted (17-A M.R.S. § 505).

Our current panhandling ordinance is one which prohibits abusive solicitation, not mere "panhandling." A panhandler needs to block, follow, threaten, or abuse the person before being in violation of this. Portland City Code § 17 – 2. This is not the behavior typically seen in the medians.

The current laws and ordinances simply do not provide an adequate tool for law enforcement officers to remove people from medians in order to provide for their own safety as well as the public's.

Legal Analysis

The attached legal memo, reviewed and approved by corporation counsel, discusses the legal implications of enacting such an ordinance. Because the proposed Portland ordinance does not explicitly pertain to panhandling – although the effect would be to prohibit the current practice of persons who panhandle in the City's median strips – it seems unlikely that an opponent could successfully argue that this restriction violates constitutionally-protected free speech. Notably, even ordinances imposing restrictions that do explicitly pertain to panhandling have been upheld elsewhere.

Attachments:

Amendment to Chapter 25, Streets, Sidewalks and Other Public Places:
Sections 25-17 and 25-118

Portland Police Department Complaint Statistics

Legal Memo to Corporation Counsel

AN ORDINANCE RELATIVE TO PEDESTRIAN SAFETY

Be it ordained by the City Council of the City of Worcester, as follows:

Section 1. Chapter Thirteen of the Revised Ordinances of 2008 is hereby amended by inserting a fourth sentence in § 77(a) thereof as follows:

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 to remove themselves from such roadway or traffic island and may arrest such person if they fail to comply with such request or order.

Section 2. Chapter Thirteen of the Revised Ordinances of 2008 is hereby amended by deleting the definition of "traffic island" in section one thereof and inserting the following as the definition of "traffic island:"

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.

Section 3. Chapter Eleven of the Revised Ordinances of 2008 is hereby amended by deleting section 13A concerning Tag Day Permits.

Section 4. Chapter 15, Section 2(b), of the Revised Ordinances of 2008 is hereby amended by inserting the following new subsection (31) as follows:

(31) Pedestrian Roadway/Traffic Island Safety Violation, R.O. c. 13, § 77

Enforcing Persons: Police Chief

Penalty: \$50.00

In City Council January 29, 2013

Passed to be ordained by a yea and nay vote of Nine Yeas and Two Nays

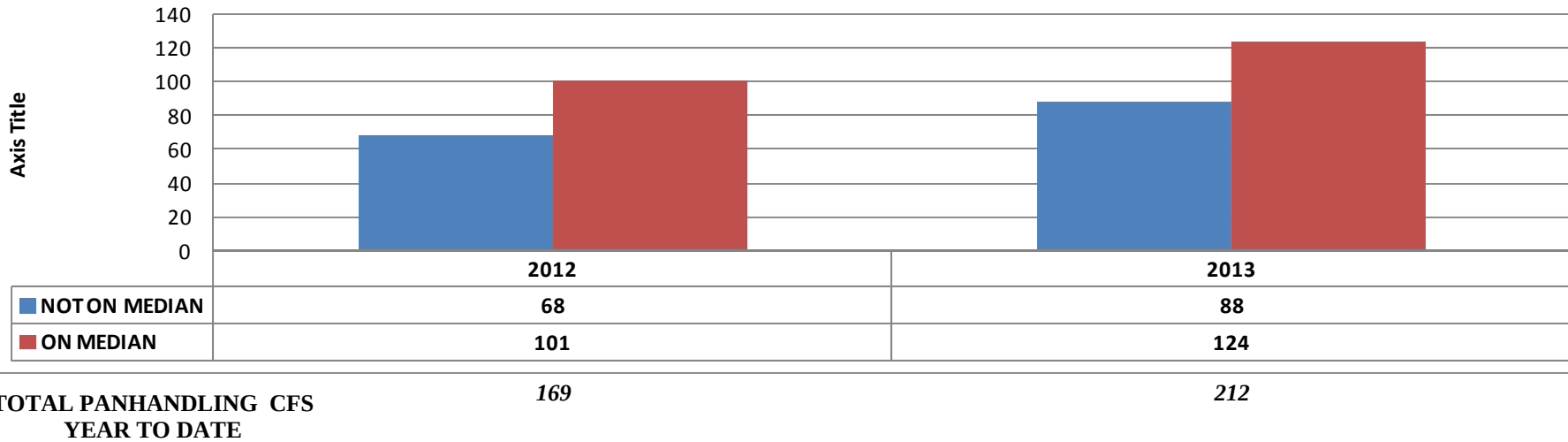
A Copy. Attest:

David J. Rushford, Clerk
David J. Rushford
City Clerk

Crime Analysis

Portland Police Department
Panhandling On Median Analysis
2012—May 31, 2013

TOTAL PANHANDLER CFS AS COMPARED TO MEDIAN CFS YEAR TO DATE: JAN-MAY

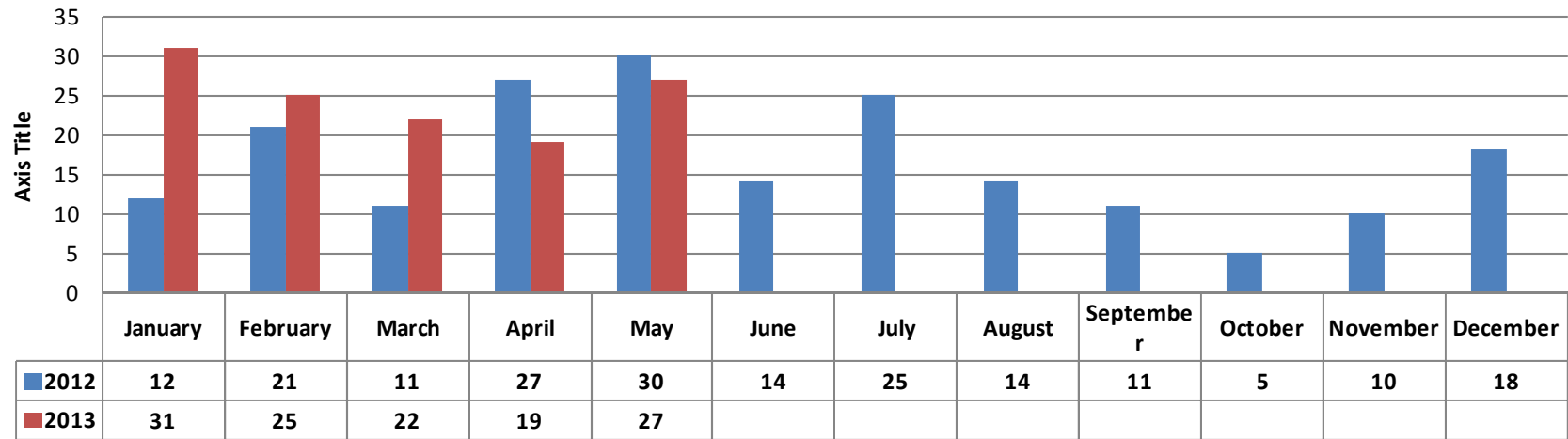


Year to date CFS referencing panhandling has increased by 25%. Specifically, CFS complaining about people panhandling in the median has increased by 23%

Crime Analysis

Portland Police Department
Panhandling On Median Analysis
2012—May 31, 2013

Total Median Related CFS Per Year and Month



MEMORANDUM

To: Danielle West-Chuhta, Corporation Counsel *DWC*
From: Trish McAllister, Neighborhood Prosecutor
Re: Constitutionality of Proposed Amendments to Chapter 25 of the Portland City Code:
Prohibition against standing in medians
Date: June 7, 2013

The Public Safety, Health and Human Services Committee will be considering the following amendments to Chapter 25 of the Portland City Code at their June 11th meeting:

"No person shall stand, sit, stay, drive or park on a median as defined in Section 25-118, 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 § 25-17(b).

"Median strip means a paved or planted area of public right-of-way, dividing a street or highway into lanes according to the direction of travel." Portland City Code § 25-118.

This is the same ordinance amendment rejected by the City Council last July. Councilor Suslovic has requested it come back before the committee based on increased constituent complaints and concerns regarding the safety of those standing in medians as well as motorists passing through those areas.

A question previously arose regarding whether or not the ordinance restricts constitutionally-protected free speech, particularly in the form of panhandling.

There is adequate case law to suggest that panhandling is protected by the First Amendment. *See, e.g., Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781(1988)(solicitation of charitable contributions is protected speech); *Clatterbuck v. City of Charlottesville*, 2013 U.S. App. LEXIS 3651, at *7 (4th Cir. Feb. 21, 2013) ("We agree [with other circuits] that begging is communicative activity within the protection of the First Amendment.").

Nevertheless, Portland would have a very strong argument that this ordinance amendment is still valid. First, the ordinance at issue here is not explicitly directed at restricting panhandling. Rather, it prevents any person from engaging in any conceivable activity in the median – standing, sitting, staying, driving or parking. Second, the ordinance would likely be considered a reasonable time, manner or place restriction on free speech. This is because the regulation "serves purposes unrelated to the content of expression," thus making it content neutral. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that "even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech"). Additionally, the ordinance is "narrowly tailored to serve a

significant governmental interest” and “leave[s] open ample alternative channels for communication of the information.” *Id.*

The governmental interest to be served here is one of pedestrian as well as traffic safety, which was deemed a valid and significant interest in *Gresham v. Peterson*, 225 F.3d 899, 901 (7th Cir. 2000) (where the Seventh Circuit upheld an Indianapolis ordinance which implemented a citywide ban on nighttime panhandling, all panhandling in specified areas, and all “aggressive panhandling”, stating “The city has a legitimate interest in promoting the safety and convenience of its citizens on public streets.”). Furthermore, the Portland restriction is very limited, applying only to median strips where activity is clearly dangerous, as medians are essentially islands surrounded on all sides by moving traffic.

The *Gresham* court noted that “the regulation need not be a perfect fit for the government’s needs, but cannot burden substantially more speech than necessary” and that “a time, place or manner restriction need not be the least restrictive means of achieving the government purpose, so long as it can be considered narrowly tailored to that purpose.” *Id.* at 906 (citing *Ward*, 491 U.S. at 797-800). The court found:

The city has a legitimate interest in promoting the safety and convenience of its citizens on public streets. See *Madsen v. Women's Health Center*, 512 U.S. 753, 768 (1994) (holding that the 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. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981) (recognizing state interest in safety and convenience of citizens using public fora); *Cox v. New Hampshire*, 312 U.S. 569, 574 (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.”) (emphasis added).

Id.

Furthermore, it seems that the proposed ordinance leaves ample alternative channels open for panhandlers in Portland. The regulation merely prevents persons from remaining in a median that divides a street or highway; it does not, for example, prevent persons from remaining on a public sidewalk along a street or highway. The regulation therefore leaves individuals with many alternative locations that are likely adequate for their speech. See *Ward*, 491 U.S. at 802 (“That the city’s limitations on volume may reduce to some degree the potential audience for respondent’s speech is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate.”).

Because the Portland ordinance does not explicitly pertain to panhandling – although the effect would be to prohibit the current practice of persons who panhandle in the City’s median strips – it seems unlikely that an opponent could successfully argue that this restriction

violates constitutionally-protected free speech. Notably, even ordinances imposing restrictions that do explicitly pertain to panhandling have been upheld elsewhere (as demonstrated in *Gresham*).

The recently enacted ordinance in Worcester, Massachusetts is analogous to the proposed Portland ordinance. See the attached document entitled "Worcester Ordinance." The ACLU filed a challenge to this ordinance in federal court on May 13, 2013; obviously we should monitor that case closely but based on the analysis above, I anticipate Worcester's ordinance will be upheld.

Attachments:

Amendment to Chapter 25, Streets, Sidewalks and Other Public Places:
Sections 25-17 and 25-118

Worcester Ordinance