

CHARLOTTE OFFICE

2907 PROVIDENCE RD., SUITE 200 (28211)  
POST OFFICE BOX 30787  
CHARLOTTE, NORTH CAROLINA 28230  
TELEPHONE (704) 332-8300  
FAX (704) 332-9994



M. JANELLE LYONS  
ATTORNEY AT LAW  
DIRECT DIAL #: (704) 940-3444  
DIRECT FAX #: (704) 831-5538  
EMAIL: JLYONS@CSHLAW.COM  
WWW.CSHLAW.COM

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**VIA EMAIL**

Ryan Spitzer  
Lisa Synder  
Town of Pineville  
505 Main Street  
Pineville, NC 28134

**Re: Peddlers and Hawkers Ordinance Constitutionality  
CSH File: 8251.0000001**

Council,

I have reviewed counsel for Moxie Pest Services' letter regarding the constitutionality of the Town's "Peddlers and Hawkers" Ordinance, Chapter 111 of the Pineville Ordinances. As an aside, none of Moxie's attorneys who signed this letter are barred in NC, according to their website, and they cite case law from other jurisdictions.

The Town's Chapter 111 states that its authority comes from N.C.G.S. § 160A-178 titled Regulation of solicitation campaigns, flea markets and itinerant merchants, which states:

A city may by ordinance regulate, restrict or prohibit the solicitation of contributions from the public for any charitable or eleemosynary purpose, and also the business activities of itinerant merchants, salesmen, promoters, drummers, peddlers, flea market operators and flea market vendors or hawkers. These ordinances may include, but shall not be limited to, requirements that an application be made and a permit issued, that an investigation be made, that activities be reasonably limited as to time and place, that proper credentials and proof of financial stability be submitted, that not more than a stated percentage of contributions to solicitation campaigns be retained for administrative expenses, and that an adequate bond be posted to protect the public from fraud. (1963, c. 789; 1971, c. 698, s. 1; 1987, c. 708, s. 8.)

Moxie desires to engage in door-to-door solicitation for its pest services, and alleges that the Town's ban is unconstitutionally facially and as applied, which impair Moxie's business viability and profits. Specifically, they allege that:

- i. the ban violates the 1<sup>st</sup> and 4<sup>th</sup> Amendment to the Constitution and Article I, Section 14 of the NC Constitution, and establishes unconstitutional viewpoint discrimination.
- ii. Section 111.01(b) selectively exempts from the ban "solicitation for charitable,

- civic, religious or patriotic purposes by persons who serve without compensation or remuneration.”
- iii. Section 111.16(c) discriminates similarly.
  - iv. Surety Bond Is Unconstitutional
  - v. Licensing Fee is Unconstitutional

### **The Ban-Is It Constitutional and/or Content Based Discrimination.**

Section § 111.01 makes it unlawful to enter upon any privately owned premises in the town used as a dwelling for the purpose of soliciting orders for the immediate or future delivery of goods, merchandise or services, specifically including the taking of subscriptions for magazines, unless with the prior permission or invitation of the owner or occupant.

Moxie claims the ban violates the 1<sup>st</sup> and 4<sup>th</sup> Amendment to the Constitution and Article I, Section 14 of the NC Constitution, and establishes unconstitutional viewpoint discrimination, because it allows “charitable, civic, religious or patriotic” solicitations for favorable treatment to the exclusion of scholastic, commercial, political, environmental, or other solicitations.

### **Surety Bond Is Unconstitutional**

Under Section 111.16(a), the Town requires a surety bond “in the penal sum of \$1,000.00.” The bond requirement violates the First and Fourteenth Amendments to the United States Constitution, and Article I, Section 14 of the North Carolina Constitution.

### **Licensing Fee is Unconstitutional**

Under Sections 111.15(h), 111.17, and 111.18, every individual solicitor must pay \$5 for a permit effective for twenty-four hours.

Moxie alleges, these fees violate the First and Fourteenth Amendments to the United States Constitution, and Article I, Section 14 of the North Carolina Constitution, because they are arbitrary. They allege the Town is profiting from imposing these fees, verses simply covering the administrative cost of the permits.

### **Other Counties and Towns in NC**

Charlotte

#### **Sec. 6-438. - Restricted hours in residential areas.**

It shall be unlawful to peddle any article of merchandise from any vehicle or on foot between the hours of 8:00 p.m. and 8:00 a.m. in areas zoned for residential purposes within the corporate limits. However, during such periods that daylight saving time is in effect, these hours shall be from 9:00 p.m. to 8:00 a.m.

ARTICLE VIII. - PEDDLERS | Code of Ordinances | Charlotte, NC | Municode Library

Matthews

Hours of door-to-door sales are restricted to the hours of 9:00 a.m. to one (1) hour prior to sunset.

ARTICLE VIII. - PEDDLERS | Code of Ordinances | Charlotte, NC | Municode Library

Huntersville

Chapter 95 Solicitation

Requires permit from chief of police

No solicitation after 8pm and before 7am

5k bond required.

[Town of Huntersville : Municipal Code](#)

ARTICLE I. - IN GENERAL | Code of Ordinances | Charlotte, NC | Municode Library

Wake County

The permit lasts six months, and there is no fee

[§ 94.02 PROVISIONS; EXCEPTIONS.](#)

## **The Law**

“The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws ‘abridging the freedom of speech.’ ” *Billups v. City of Charleston*, 194 F. Supp. 3d 452, 461 (D.S.C. 2016) citing *Reed v. Town of Gilbert, Ariz.*, — U.S. —, 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015) (quoting U.S. Const., Amdt. 1).

The court in analyzing the Town’s ordinance will have to determine what form of First Amendment scrutiny is required to analyze our ordinances.

### 1. Strict Scrutiny:

- **Purpose:** This is the highest level of scrutiny, used when the government's action impacts fundamental rights or discriminates against suspect classes.
- **Standard:** The government must demonstrate that the action is necessary to achieve a compelling government interest and is narrowly tailored to achieve that interest. This means the restriction must be the least restrictive way to advance the compelling interest.
- **Examples:** Restrictions on political speech, content-based regulations of speech.

### 2. Intermediate Scrutiny:

- **Purpose:** This level of scrutiny is used when the government action impacts non-fundamental rights, such as commercial speech or restrictions on expressive conduct.
- **Standard:** The government must demonstrate that the action is substantially related to an important government interest and is narrowly tailored to achieve that interest.
- **Examples:** Regulations of commercial speech, restrictions on expressive conduct.

### 3. Rational Basis Review:

- **Purpose:** This is the lowest level of scrutiny, used when the government's action impacts non-fundamental rights and does not discriminate against a suspect class.
- **Standard:** The government must demonstrate that the action is rationally related to a legitimate government interest.
- **Examples:** Regulations of general conduct, economic regulations.

Moxie argues that the Court will and should review our ordinances under strict scrutiny, because “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.” Billups v. City of Charleston, 194 F. Supp. 3d 452, 461 (D.S.C. 2016) citing Reed v. Town of Gilbert, Ariz., — U.S. —, 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015) (quoting U.S. Const., Amdt. 1). A law may be content-based in two ways: it may be content-based “on its face,” or it may rely on a content-based “purpose and justification.” Billups v. City of Charleston, 194 F. Supp. 3d 452, 463 (D.S.C. 2016) citing Reed, 135 S.Ct. at 2228.

“In contrast, [laws] that are unrelated to the content of speech are subject to an intermediate level of scrutiny, [ ] because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.” Billups v. City of Charleston, 194 F. Supp. 3d 452, 462–63 (D.S.C. 2016) quoting Turner Broad. Sys., 512 U.S. at 642, 114 S.Ct. 2445 (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)).

Thus, “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.’ ” Reed, 135 S.Ct. at 2226 (quoting Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972)).

## **Possible Courses of Action**

### **Edit Ordinance**

- Limit solicitation days or times
- Change permit length of time
- Change Bond Requirement

### **Leave As Is**

Leave Ordinance as Is, and potentially deal with a federal case seeking the 4<sup>th</sup> circuit to rule on whether the Town’s ordinance is constitutional as written

### **Repeal the Ordinance In Its Entirety**

## **Ordinance**

### **CHAPTER 111: PEDDLERS AND HAWKERS**

#### **Section**

#### **General Provisions**

111.01 Invitation to dwellings required

111.02 Sale of goods on streets; peddlers

#### **Permits**

111.15 Application; fee

111.16 Bond required

111.17 Issuance

111.18 Duration

111.19 Contents

111.20 Display

111.21 Revocation

#### **Statutory reference:**

Authority to regulate peddlers and solicitors, see G.S. § 160A-178

#### **GENERAL PROVISIONS**

##### **§ 111.01 INVITATION TO DWELLINGS REQUIRED.**

(A) It shall be unlawful, unless with the prior permission or invitation of the owner or occupant, for any person to enter upon any privately owned premises in the town used as a dwelling for the purpose of soliciting orders for the immediate or future delivery of goods, merchandise or services, specifically including the taking of subscriptions for magazines.

(B) This section shall not apply to solicitation for charitable, civic, religious or patriotic purposes by persons who serve without compensation or remuneration, provided those persons shall have first obtained a permit from the Town Administrator or his or her designee.(1995 Code, § 14-66)

Penalty, see § 10.99

##### **§ 111.02 SALE OF GOODS ON STREETS; PEDDLERS.**

It shall be unlawful for any person to sell or offer for sale or peddle goods, wares or merchandise upon the public streets or public parking lots of the town; provided, however, this section shall not apply to vendors selling fresh produce. (1995 Code, § 14-67) (Ord. 5, passed 3-19-1996; Ord. 7, passed 9-10-1996) Penalty, see § 10.99

#### **PERMITS**

##### **§ 111.15 APPLICATION; FEE.**

Any person desiring a permit to engage in business as a peddler within the town shall make written application to the town, which application shall show and contain the following:

(A) The name and address of the applicant;

(B) The name and address of the person, if any, that the applicant represents;

(C) The kind of goods or services offered for sale;

(D) Whether the applicant, upon any sale or order, shall demand, accept or receive payment or deposit of money in advance of final delivery;

(E) The period of time the applicant wishes to engage in that business within the town;

(F) Whether or not the applicant has ever been convicted of a felony, and if so, the complete circumstances thereof;

(G) The last five cities wherein the applicant has worked before coming to the town; and

(H) An application fee of \$5.(1995 Code, § 14-82)

#### § 111.16 BOND REQUIRED.

(A) Before any permit shall be issued under the provisions of this subchapter, the applicant therefor shall furnish a bond in the penal sum of \$1,000 to the town signed by the applicant and signed as surety by some surety company authorized to do business in the state, conditioned upon the final delivery of goods, wares, merchandise, services, photographs, magazines and newspapers in accordance with the terms of any order obtained prior to delivery and also conditioned to indemnify any and all purchasers or customers for any and all defects in material or workmanship that may exist in the article sold by the principal on the bond, at the time of delivery, and that may be discovered by the purchaser or customer within 30 days after delivery. The bond shall be for the use and benefit of all persons that may make any purchase or give any order to the principal on the bond, or to any agent or employee of the principal.

(B) Only one bond shall be required of each applicant, even though the applicant shall have one or more agents or employees; provided, the bond shall be made to cover the activities of all of the agents or employees.

(C) Applicants soliciting for charitable, civic, religious or patriotic purposes without compensation or remuneration shall be exempt from the bond requirement.(1995 Code, § 14-83)

#### § 111.17 ISSUANCE.

No permit shall be issued under the provisions of this subchapter until the applicant shall have complied with all the provisions and requirements of this chapter.(1995 Code, § 14-84)

#### § 111.18 DURATION.

Every permit issued under the provisions of this subchapter shall be valid for a period of 24 hours.(1995 Code, § 14-85)

#### § 111.19 CONTENTS.

Each permit issued under the provisions of this subchapter shall be signed by the Town Administrator or designee, shall be dated as of the date of its issuance and shall state the duration or term of the license on the face thereof. Any license not dated and signed as required in this section, or which was issued in violation of this section, shall be void. (1995 Code, § 14-86)

#### § 111.20 DISPLAY.

Every peddler licensed under the provisions of this subchapter and doing business within the town shall display his or her permit upon the request of any person. Failure to display the license shall be deemed a misdemeanor. (1995 Code, § 14-87) Penalty, see § 10.99

#### § 111.21 REVOCATION.

Any permit issued under the provisions of this subchapter may be revoked for the violation by the permittee of any applicable provision of this code, state law or town ordinance, rule or regulation. (1995 Code, § 14-88)

