

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CENTRO DE LA COMUNIDAD HISPANA DE :
LOCUST VALLEY; and THE WORKPLACE :
PROJECT, :

Civ. 10-2262

Plaintiffs, :

-versus- :

TOWN OF OYSTER BAY; JOHN :
VENDITTO, Town Supervisor of the Town :
of Oyster Bay, :

Defendants. :
-----X

ORDER GRANTING PRELIMINARY INJUNCTION

WHEREAS the Plaintiffs have filed a complaint alleging that Chapter 205.32 of the Code of the Town of Oyster Bay is unconstitutional under, *inter alia*, the First Amendment to the U.S. Constitution, and

WHEREAS on May 18, 2010, the Plaintiffs moved by Order to Show Cause for a preliminary injunction and temporary restraining order enjoining enforcement of Chapter 205.32, and

WHEREAS on May 20, 2010, the Court granted Plaintiffs' application for a temporary restraining order on the grounds that Plaintiffs demonstrated a substantial likelihood of success on the merits of their First Amendment claim and irreparable harm, and set a schedule for a hearing on the application for preliminary injunction, and

WHEREAS Defendants have requested that the Court forego a hearing on the application for preliminary injunction and further development of the factual record and

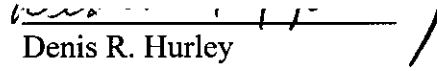
issue a preliminary injunction based on the Court's opinion and findings of May 20, 2010, so as to enable Defendants to appeal that ruling, and

WHEREAS, Plaintiffs do not oppose this request,

For the reasons set forth on the record by the Court on May, 20, 2010, a copy of the transcript of which is attached and incorporated herein, IT IS HEREBY ORDERED that Defendants Town of Oyster Bay and John Venditto, together with their subdivisions and representatives are hereby preliminarily enjoined from enforcing Chapter 205.32 of the Code of the Town of Oyster Bay, pending final resolution of the merits of Plaintiffs' First Amendment claims.

SO ORDERED.

Dated: Central Islip, New York
June 1, 2010



Denis R. Hurley
Senior District Judge

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
CENTRO DE LA COMUNIDAD HISPANA
DE LOCUST VALEY;
and THE WORKPLACE PROJECT

: CV 10-2262

Plaintiffs,

: United States Courthouse
Central Islip, New York

-against-

TOWN OF OYSTER BAY;
JOHN VENDITTO, Town Supervisor
of the Town of Oyster Bay,

: May 20, 2010
2:00 p.m.

Defendants.

-----X

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DENIS R. HURLEY
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiffs: NEW YORK CIVIL LIBERTIES UNION
125 Broad Street
New York, NY 10004
By: COREY STOUGHTON, ESQ.

For the Defendants: SINNREICH KOSAKOFF & MESSINA
267 Carleton Avenue, Suite 301
Central Islip, NY 11722
By: JONATHAN SINNREICH, ESQ.

TOWN OF OYSTER BAY
Office of The Supervisor
54 Audrey Avenue
Oyster Bay, NY 11771
By: COLIN F. O'DONNELL, ESQ.

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1 (Case called.)

2 THE COURT: As indicated yesterday, what is
3 before me today is an application by plaintiffs for a
4 temporary restraining order. That's the sole matter that
5 will be addressed today.

6 Yesterday, we set a schedule for the preliminary
7 injunction hearing, and that process will start on
8 May 28th, and it will continue to June 1st, to the extent
9 that is required. And if it's not concluded by June 1st,
10 we'll address the matter then as to when we'll continue
11 the preliminary injunction hearing.

12 At the conclusion of the proceedings yesterday,
13 after I had heard extensive oral argument on the temporary
14 restraining order application made by plaintiffs, the
15 parties asked to submit further briefing. In defendants'
16 case, it would be initial briefing on the issue of
17 standing. That was done.

18 By way of background, the complaint in this case
19 has two constitutional claims. Both seek the same relief,
20 that being the stay of the enforcement and ultimately a
21 declaration that the subject ordinance is
22 unconstitutional.

23 The first cause of action is predicated on a
24 First Amendment violation. The second cause of action
25 sounds in an equal protection claim under the Fourteenth

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1 Amendment. However, the temporary restraining order and
2 the preliminary injunction as well is sought on the basis
3 of the first cause of action alone.

4 As to that cause of action, defendant has
5 indicated that they agree there is standing for present
6 purposes, in other words, for this Court to entertain the
7 pending application for a TRO.

8 In sum, the question of standing which was
9 discussed yesterday is a nonissue.

10 That being said, I would note parenthetically,
11 commend counsel for the very professional way in which
12 this issue was addressed.

13 Mr. Sinnreich is a very forceful advocate. He's
14 also a good lawyer. And having reviewed the question,
15 even though he had some reservations yesterday as to
16 whether plaintiffs have standing, there is an indication,
17 the law indicates, that the plaintiff has standing.

18 Now we move on to the question of laches.

19 The defendants' position on the issue of laches,
20 or delay, is essentially as follows. He underscores for
21 the Court, or I should say counsel for the defendant
22 underscores for the Court, that following two highly
23 publicized public hearings, the subject ordinance was
24 passed on September 19, 2009.

25 The lawsuit in this case, which was commenced by

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1 the filing of the complaint, was not started until May 18,
2 2010, that being approximately eight months after the
3 statute was enacted.

4 The temporary restraining order was sought
5 contemporaneously with the filing of the complaint.

6 Given that factual scenario, defense counsel
7 argues that the delay here, that being the delay between
8 the enactment of the ordinance and the commencement of
9 litigation, and more particularly the seeking of a
10 temporary restraining order, belies or is inconsistent
11 with the claim that this matter is urgent and,
12 accordingly, was brought before the Court via an
13 accelerated mechanism of a temporary restraining order.

14 Plaintiffs counter through their counsel that
15 following the enactment of the statute, various groups and
16 individuals apparently negotiated with the Town in an
17 apparent effort to prevent the enforcement of the
18 ordinance and conceivably a rescission of the ordinance.

19 Accompanying that argument is the proposition
20 that efforts to resolve the dispute absent litigation
21 should be encouraged, and surely such efforts in this case
22 cannot be deemed to be somehow fatal to the temporary
23 restraining application which is presently before me.
24 Mr. Sinnreich, as I recall, labeled the efforts by various
25 individuals and groups negotiating with the Town on this

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1 as "lobbying."

2 In any event, though, no matter what label is
3 attached to the activities that occurred between the
4 enactment of the statute and the current litigation being
5 commenced by plaintiffs, the applicable law suggests that
6 the delay in filing suit here obviously doesn't preclude
7 plaintiffs from seeking a temporary restraining order, nor
8 is that delay given the attendant circumstances I so find
9 inconsistent with plaintiffs seeking an emergence of
10 relief via the present application for a temporary
11 restraining order.

12 My conclusion in that regard is based on a
13 number of authorities, including Tom Doherty,
14 D-O-H-E-R-T-Y, Associates against Sabin, S-A-B-I-N,
15 Entertainment, 60 F.3d 27, that being a Second Circuit
16 decision decided in 1995.

17 In that decision the Second Circuit, at page 39
18 of the decision, quotes an excerpt from a lower court case
19 decided in 1980, insofar as that lower court decision
20 stated: "Parties should not be discouraged" -- let me
21 rephrase that.

22 "Parties should not be encouraged to sue before
23 a practical lead to do so has been clearly demonstrated."

24 In reaching the above conclusion -- in other
25 words, the delay here is understandable given the

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1 attendant circumstances. And I agree with the general
2 proposition stated by plaintiffs' counsel: To the extent
3 parties can resolve disputes absent the involvement of the
4 Court, that is something that should be encouraged rather
5 than discouraged.

6 In reaching the above conclusion, I have
7 considered the case advanced by the defense. That's a
8 decision of Judge Pauley of the Southern District of New
9 York. The decision bears the caption National Council of
10 Arab Americans against the City of New York, 331 F.Supp.
11 2d, 258.

12 The facts of that case are somewhat sui generis,
13 and as a result, the holding of that case is not
14 particularly helpful for present purposes.

15 By way of a quick overview, in that case the
16 plaintiffs sought to use a park for demonstrations, which
17 demonstrations were apparently held during the National
18 Republican Convention which was to begin on August 30th.
19 August 30th is the day that the plaintiff intended to have
20 the demonstrations.

21 The City denied the permit on June 15th. In
22 denying the application, the City invited plaintiff to
23 contact them and to consider other alternatives.

24 Plaintiffs did not respond to that application.
25 Instead, they filed a lawsuit on August 13th. In that

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1 lawsuit they sought emergency relief, to wit, an
2 injunction granting them a permit. In doing so, however,
3 they proceeded by way of notice of motion, not by order to
4 show cause. Moreover, in making this belated application
5 for emergency relief, supporting authority was not
6 provided, at least in the first instance.

7 Judge Pauley, accordingly and understandably,
8 said basically that the emergency cited by plaintiffs was
9 essentially self-created. Moreover, given that the
10 application for an injunction to prevent or to require --
11 so it would be a mandatory injunction, to be an issuance
12 of the permit was literally served at the last moment. As
13 a result, the defendants had less than a week to defend
14 against the constitutional challenge.

15 Judge Pauley, considering all of those
16 circumstances, found, basically, the application was too
17 late, and, accordingly, it would not be entertained on the
18 merits.

19 That situation is sufficiently different than
20 what transpired here to warrant, in my judgment, a
21 different result.

22 So to partially reiterate: I certainly have
23 considered the delay, but I don't find that it in any way
24 belies the nature of the request advanced by the
25 plaintiffs, which is to say I don't find the delays

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1 inconsistent with them proceeding by way of temporary
2 restraining order seeking injunctive relief on an
3 emergency basis.

4 The next item I'd like to address is the
5 question of the applicable standard of proof for this
6 temporary restraining order.

7 As noted, plaintiffs seek to have the subject
8 ordinance, which is numbered 205-32, declared
9 unconstitutional. In so doing, plaintiffs seek to alter
10 the present status quo.

11 The applicable standards under those
12 circumstances is well-established and has been recently
13 restated in *VIP of Berlin against Town of Berlin*, 593 F.3d
14 179 at page 185-86. The Berlin case is a Second Circuit
15 decision decided in 2010.

16 The relevant excerpt from that case reads,
17 absent internal cites, as follows. "Where a party seeks a
18 preliminary injunction that challenges government action
19 taken in the public interest pursuant to a statutory or
20 regulatory scheme, and that would alter rather than
21 maintain the status quo, the moving party must demonstrate
22 irreparable harm and a clear or substantial likelihood of
23 success on the merits."

24 Before addressing some of the fundamental
25 questions which bear on the issue at hand, I think it is

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1 worthwhile to note that the question before me is not
2 whether a municipality may pass an ordinance to address
3 the problems associated with street solicitations by day
4 laborers seeking employment. Rather, the issue, of
5 course, is whether this particular ordinance passes
6 constitutional muster or, more accurately for present
7 purposes, whether plaintiffs have shown on the information
8 presently before the Court both, one, a substantial
9 likelihood of success on the merits and, two, irreparable
10 injury.

11 A fundamental question involves whether the
12 speech under discussion is appropriately labeled as
13 commercial speech or noncommercial speech.

14 Before I address that subject, I will note that
15 one relevant consideration in assessing the
16 constitutionality of the statute or ordinance subject to a
17 constitutional challenge under the First Amendment is
18 where the speech -- or the nature of forum in which the
19 speaker or the speakers -- let me reword that.

20 One of the factors the Court should consider in
21 determining the constitutional issue here is the forum
22 that is affected by the ordinance. In other words, where
23 are the speakers who are the subject of this ordinance
24 likely to be located?

25 In reference to the statute or the ordinance

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1 itself indicates appropriately the site involved. The
2 site involved in the caption are the sidewalks and the
3 streets of Oyster Bay.

4 Historically, the streets and sidewalks have
5 been considered, basically, the quintessential forum for
6 assembly, protests, etcetera, and other communications
7 that fall within the ambit of the First Amendment.

8 At this point, though, let's address what I
9 consider to be the pivotal question, and that again is the
10 question whether the speech, which is restricted by this
11 ordinance, is commercial or noncommercial.

12 Before doing this, I will address a question
13 raised yesterday. And the question was, as I understand,
14 as to whether this is speech, and even if it is speech, it
15 may be protected speech. I may have misunderstood what
16 was communicated yesterday.

17 So there be no uncertainties in this regard,
18 that there is absolutely no question in my mind that
19 individuals standing on a street corner, typically in
20 significant numbers, given, again, the attendant
21 circumstances which I will not go into, are communicated.

22 There are certain areas in the county where
23 individuals typically stand, typically in numbers of ten
24 or multiples thereof, and they are there seeking
25 employment. Basically everyone in the county knows that.

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1 Now sometimes, apparently from papers that have
2 been submitted, they will vocally ask for employment.
3 Sometimes they will rather signal individuals in cars.
4 But given the totality of the circumstances, I don't think
5 there can be any legitimate dispute -- and I recognize we
6 haven't had a full record on this -- they are
7 communicating, the day laborers.

8 What are they communicating? Their availability
9 for short-term, basically, blue-collar employment. I
10 don't hesitate on the question whether we have speech.

11 And on the question of whether the speech is
12 protected, we'll address that in a moment. But I did want
13 to address that initial question whether we can even talk
14 about speech in the first instance. As indicated, we are.

15 In my judgment, for the reasons I'll indicate, I
16 believe that what we're talking about here is commercial
17 speech.

18 In the case of *Bad Frog Brewery, Inc.*, against
19 New York State Liquor Authority, 134 F.3d 87 at page 97,
20 the Second Circuit, in its decision of 1998, succinctly
21 states, "The core notion of commercial speech includes
22 speech which does no more than propose a commercial
23 transaction."

24 Other cases indicate that the nature of the
25 commercial transactions involved has to do with basically

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1 only reason I don't want to go through that, I believe it
2 is unnecessary, and it will unduly prolong the analysis.

3 This ordinance and the speech that is embraced
4 within the ordinance does constitute an advertisement
5 consistent with the rationale embodied in the Bolger case.

6 The second element raises the question of
7 whether the speech refers to a particular product or
8 service.

9 I think what I've already said concerning the
10 first element indicates that the second element with
11 respect to a service is clearly satisfied.

12 The third element is whether the speech contains
13 an economic motivation. Clearly, such is the case here.
14 The day laborer is seeking employment with the purpose
15 being to receive compensation for his services. There's
16 clearly an economic motivation to the speech involved.

17 For the reasons indicated, I believe we're
18 talking about commercial speech.

19 Then the question becomes: Is that speech
20 protected speech within the purview of the First
21 Amendment?

22 That inquiry gives rise to a four-part test.
23 That test, the specifics of which will be provided in a
24 moment, is derived from the case of Central Hudson Gas and
25 Electric Corporation against Public Service Commission of

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1 New York, 447 U.S. 557 (1980), as later modified by
2 another supreme court decision, which is Board of Trustees
3 of the University of New York against Fox, 492 U.S. 469.
4 The Fox decision was issued in 1989.

5 From those two cases, the four-part test is as
6 follows:

7 The first element is whether what is being
8 sought to be regulated is nonmisleading and lawful
9 commercial speech.

10 The first aspect of that element, to wit, that
11 the speech be nonmisleading, is not at issue here. There
12 is no thought that communication seeking employment by the
13 day laborers is misleading.

14 The second aspect of that first prong of the
15 four-part test does not lend itself to a simple answer;
16 the second aspect, whether we're talking about lawful
17 activity.

18 During argument yesterday, there was a
19 discussion about whether the day laborers, who are at
20 least in part the target of this ordinance, are seeking
21 lawful employment. It may be that some of the day
22 laborers are illegally in the country; it may be that most
23 are illegally in the country. So does that somehow tinge
24 the transaction with an unlawfulness, which would indicate
25 that the speech involved here is not protected under the

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1 Constitution?

2 I don't believe this issue has been addressed at
3 any great length, head on, by an appellate court.

4 It was my impression -- and I so conclude having
5 read some Law Review articles on the subject and some of
6 the cases which, while not directly on point, are
7 partially instructive -- that lawful means or that
8 unlawful means that the speech and the transaction that is
9 occurring is either lawful or unlawful.

10 Therefore, by way of an example, if an
11 individual is endeavoring to sell controlled substances on
12 a corner and communicates that fact to a prospective
13 purchaser, that obviously is not protected speech.

14 The fact that some of the day laborers here may
15 be illegally in the country -- and, of course, presumably
16 some are not -- and the fact that to the extent the
17 transaction occurs on a street corner and, accordingly,
18 labor law requirements and regulations, as well as taxing
19 requirements, may not be satisfied, I don't think renders
20 the transaction unlawful for purposes of the Central
21 Hudson/Fox test. I don't believe that is what is meant.

22 That being said, I will note that on the
23 information before me -- and again, this is in a temporary
24 restraining order context -- that there's information to
25 suggest that what I've just mentioned about potential

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1 unlawfulness, albeit indirect unlawfulness, it is true of
2 all or a substantial -- I'll just say all of the persons
3 seeking employment via, basically, street solicitation.

4 That's a very interesting issue. I don't
5 pretend that it is a simple issue, as I indicated earlier.
6 I think what I said is correct. I think that the
7 lawfulness has to do with the character of the transaction
8 and the communication itself rather than what may underlie
9 the transaction or what may ultimately materialize or not
10 materialize after the transaction has occurred.

11 In using the word "transaction," I'm referring
12 to the offer and acceptance of the employment.

13 Now the second element is -- I'll just back up
14 for a minute.

15 Again, I think we're talking about protected
16 speech here for the reasons I've indicated. Therefore,
17 the next question is whether the regulation, in this case
18 the subject ordinance, is directed at establishing or
19 advancing a substantial governmental interest.

20 As to that element, I think the statute of the
21 ordinance, at least facially, satisfies that element. I
22 think the courts have recognized that municipalities have
23 an interest in promoting the safety of individuals driving
24 or riding in automobiles, as well as pedestrians who are
25 in close proximity to the various roadways.

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1 As to this element, that being the regulation
2 advancing a substantial government interest or at least
3 seeking to do so, a question comes to mind. Ordinance
4 section 205.32 subdivision (a), lists the legislative
5 intent. The legislative intent as set forth in the
6 ordinance is self-explanatory.

7 The question here is whether, at the preliminary
8 hearing, evidence of legislative intent beyond that which
9 is stated in subdivision 1(a) of ordinance 205.32 would be
10 appropriate.

11 The reason I mention that is that the primary
12 reason that is advanced in that particular subdivision of
13 the ordinance does not seem to embrace, at least directly,
14 the idea of the Town being concerned individuals hiring --
15 individuals hiring day laborers who might be in the
16 country illegally and related issues, such as preventing
17 compliance -- let me withdraw that.

18 Another ground that was advanced by the defense
19 yesterday concerning why this ordinance was enacted and
20 what it seeks to address includes the idea of people
21 avoiding their obligations under the relevant labor law
22 and taxing provisions.

23 Simply put, would evidence as to those concerns,
24 to the extent they were harbored by the town board at the
25 time this ordinance was enacted, be appropriately adduced

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1 at a hearing?

2 But in any event, to go back to these various
3 factors...

4 Then another factor mentioned in the Central
5 Hudson's/Fox test is whether the regulation in fact
6 advances the interest which was sought to be promoted.

7 In that regard, the evidence at this point, of
8 course, is sketchy, which is, of course, not unusual in a
9 case which is in a temporary restraining order context.

10 The question arises whether there should be some
11 evidence before the Court -- I'll withdraw that.

12 On the third element, I'm satisfied, at least
13 for present purposes, or I will assume that that has been
14 satisfied.

15 The last element is where the problem arises,
16 and this is the fourth element, again, of that Central
17 Hudson/Fox four-part test. Under that fourth element,
18 there must be evidence that the regulation or ordinance is
19 narrowly tailored to serve, basically, the goal of the
20 ordinance.

21 Under the case law, sometimes that has been
22 characterized as there must be a reasonable fit between
23 the goals sought to be advanced by the government in which
24 they have a substantial interest and the ordinance under
25 attack.

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1 We do know that the methodology employed by the
2 municipality need not be the least restrictive means
3 available to address that substantial government interest.

4 We also know, though, that to the extent there
5 are less restrictive alternatives which are reasonably
6 available to promote the government interest involved,
7 that the availability of those less restrictive
8 alternatives which were not utilized suggest that the
9 ordinance under attack was not narrowly tailored as
10 required by the four-part test.

11 Against that backdrop, to the extent the
12 ordinance is concerned, basically, with traffic safety
13 defined, in essence, as safety to the drivers and
14 occupants in automobiles and the safety to those in
15 relatively close proximity to the roadways, the plaintiff
16 points out that there are a number of existing regulations
17 and statutes on the books which are more than adequate to
18 address the traffic safety issue.

19 From that, it is argued not so much there is an
20 appropriate fix or fit but that the ordinance is
21 unnecessary, and to the extent it infringes on First
22 Amendment rights, it cannot survive a constitutional
23 attack.

24 I will not go through all of the ordinances and
25 statutes cited by the plaintiffs with respect to the issue

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1 under discussion; rather, I will incorporate by reference
2 what appears on page 9 of the memorandum submitted in
3 support of the relief sought in the order to show cause.
4 That being said, I will mention a few.

5 Plaintiffs indicate that the Town has authority
6 to enforce New York State traffic laws, which laws limit
7 pedestrian behavior when entering roadways. There's also
8 a provision in the New York State Vehicle and Traffic Law,
9 I'm told, that prohibits persons from standing in roadways
10 for the purposes of solicitation. There are also
11 provisions which prevent individuals from proceeding in
12 their automobile at such a slow rate of speed to impede
13 the normal and reasonable movement of traffic, etcetera.

14 Is also noted, and I believe correctly so, that
15 the Town has the authority to enforce, among other things,
16 the provision in the New York State Penal Law which
17 pertains to disorderly conduct. So that's one
18 observation. In other words, is this ordinance narrowly
19 tailored?

20 On the information before me, I don't believe it
21 is. One reason is, there is some question whether it is
22 even necessary. To the extent it is unnecessary because
23 there are alternate, less restrictive ways to accomplish
24 the intended goal, that calls its constitutionality into
25 serious question.

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1 But beyond that, a statute or an ordinance can't
2 be considered narrowly tailored to the extent its scope is
3 considerably broader than necessary to accomplish the
4 intended goal, and to the extent its scope in and of
5 itself raises very serious constitutional questions.

6 By way of an example, the ordinance as presently
7 configured provides in paragraph 1(c) that "it shall be
8 unlawful for any person standing within or adjacent to any
9 public right-of-way within the Town of Oyster Bay to stop
10 or attempt to stop any motor vehicle utilizing said public
11 right-of-way for the purpose of soliciting employment of
12 any kind from the occupants of said motor vehicle."

13 Subdivision (d) basically mirrors the provision
14 just quoted except that, unlike subdivision (c), it
15 indicates when the motorist or someone in the vehicle is
16 acting improperly as defined in the statute.

17 Under subdivision (c), by way of example, if an
18 individual was on his own property but that property is
19 adjacent to or abuts any public right-of-way, and while so
20 positioned he, for instance, raised a sign which said
21 "please pull over" or "please turn in the next driveway
22 because I am a disabled veteran and I need employment,"
23 that would run afoul, in my judgment, of the ordinance.
24 Yet the sign displayed by the hypothetical "disabled
25 veteran," positioned so that it could be seen by

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1 motorists, would have no more effect on traffic safety
2 than many of the solicitations and signs that line the
3 strip mall or the strip zoning areas which are prevalent
4 in Nassau and Suffolk County.

5 By way of example, it's no more disruptive than
6 a McDonald's sign, somebody standing on the corner -- I'll
7 leave it at that.

8 With respect to any sign which is near a
9 roadway, an argument can be made that the sign represents
10 a potential distraction to motorists. I think that is
11 probably true. But there are limits to what a
12 municipality can do. Just as a municipality would have
13 problems, I assume, telling McDonald's to take down their
14 sign because it is a distraction to motorists, it seems to
15 me they can encounter the same difficulty and legitimately
16 should encounter the same problem.

17 I think I've made my point, except I will add
18 that a person who is, by hypothetical, a disabled veteran,
19 on his property which happens to lie adjacent to a public
20 roadway, points a sign to a motorist, is not the type of
21 individual which will cause the traffic problems and raise
22 safety concerns which apparently is the core concern of
23 this ordinance. However, that individual would, under the
24 scenario that I've provided, I believe consistent with the
25 literal meaning of this ordinance, be subject to being

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1 issued a ticket for \$250.

2 What is my point? Well, my point is that this
3 statute and this ordinance and what it attempts to
4 preclude is not finely tailored to the situation; rather,
5 it is too broad. And to the extent its breadth affects
6 the constitutional rights of individuals without any
7 corresponding benefits to the municipality or any
8 legitimate corresponding benefit, it has -- it raises
9 constitutional concerns.

10 In any event, and for the reasons I've indicated
11 by way of partial conclusion, at least, on this point, on
12 the limited information that is before me, I find that the
13 plaintiffs have established a substantial likelihood of
14 success and that they've also satisfied the irreparable
15 injury standard that must also be satisfied for injunctive
16 relief to issue.

17 For the reasons I've indicated, it seems to me
18 that there is a clear violation of the First Amendment.
19 That in and of itself establishes irreparable harm for
20 present purposes.

21 One other thing I'd like to mention, just
22 because we have this preliminary injunction hearing coming
23 up, and that is the question of whether the named
24 plaintiffs have also been directly affected by this
25 ordinance as distinct from affected, basically, as the

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1 medium -- I will say as for the spokesperson for the
2 migrant laborers, which are members of the plaintiff
3 organizations.

4 Plaintiffs' counsel raised an interpretation of
5 the portion of the ordinance which is entitled "Solicit or
6 Solicitation." That portion of the statute involves the
7 definition of those terms.

8 Plaintiffs' counsel posits that a fair reading
9 of the statute would be broader than the manner in which
10 I've interpreted it. I've interpreted it, as I've
11 articulated it yesterday, as essentially a nonsolicitation
12 statute by day laborers who are seeking immediate
13 employment and by individuals in automobiles who are
14 offering immediate employment.

15 If the statute is read, recognizing its
16 disjunctive wording, as follows, I think it tends to
17 support the position of plaintiff on this point. The
18 reading would be: "Any action which seeks to secure
19 employment" would constitute solicitation within the
20 definition.

21 From that, plaintiff argues, as I understand it,
22 that if an individual from one of the plaintiff
23 organizations, for instance, held up a sign directed at
24 motorists which said "hire day laborers because it will
25 save you money and they are hard workers," the argument

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1 would be made, that falls within the ambit of the statute.
2 The thought would be that such action does seek to secure
3 employment. The employment may not be immediate, but yet
4 it falls within the ambit of seeking to secure employment.

5 I don't know if that is correct or not. I've
6 not had a chance to fully reflect on it. It probably
7 should not have been dismissed as summarily as I did
8 yesterday.

9 The resolution of the issue is not necessary for
10 purposes of a temporary restraining order. However, if
11 plaintiff elects to raise that issue again, as I suspect
12 plaintiffs will through counsel, the issue will be
13 addressed further on the next date, that being the
14 May 28th date or shortly thereafter.

15 Parenthetically, should the legislative --
16 excuse me. Should the term "solicit" or "solicitation" be
17 interpreted as including the alternative just mentioned,
18 the significance of that would be, I would imagine, that
19 that would be arguably noncommercial speech, and therefore
20 it would be entitled to greater protection by the courts
21 than would be true for commercial speech.

22 One of the things -- excuse me. The last issue
23 concerns the issue of a bond. Rule 65(b), I believe, or
24 it may be (c) of the Rules of Civil Procedure, provided
25 for a bond issue should the Court issue a preliminary

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1 injunction or a temporary restraining order.

2 I'm aware of a number of cases, although I have
3 none at hand, which indicate that even though that
4 directive seems to be mandatory, it is not. In certain
5 circumstances, no bond needs to be furnished.

6 Plaintiffs' counsel indicated yesterday there is
7 case law, when they were talking about the First Amendment
8 as we are here, there is no need for a bond to be
9 furnished.

10 If the defense feels to the contrary, I'll be
11 happy to hear them; otherwise, I will not require that a
12 bond be furnished.

13 MR. SINNREICH: We're not requiring one, your
14 Honor.

15 THE COURT: So that will conclude my decision
16 over the objection of defense.

17 Both sides have done a very good job in this
18 case, both the plaintiffs' counsel and defendants'
19 counsel. They have helped to frame the issues for the
20 Court. And since it was done in a temporary restraining
21 order context, it was done somewhat under the gun. That
22 is particularly true for the defendant, who has to
23 respond, whereas the plaintiff has time to reflect on
24 these matters.

25 In any event, that's where we are.

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1 What I'd ask counsel to do for the hearing is
2 discuss it to see what can be stipulated to. It may be
3 you will not be able to reach any stipulations, and if you
4 can't, that's fine.

5 What I'll do, in the exercise of my authority at
6 the hearing, I'll listen to proffers, at least in the
7 first instance. Once I receive a proffer by an attorney
8 indicating what they are prepared to prove and why, I
9 would look to opposing counsel and ask for their input.

10 The point is, to the extent -- if a party is not
11 in a position to rebut what opposing counsel presents by
12 way of a reasonable proffer, I really don't think it is
13 worthwhile to take testimony, because it would essentially
14 be a waste of time.

15 Having said that, if there is a dispute on any
16 of this, obviously, I'll address it.

17 So I'm prepared at this point to sign a
18 temporary restraining order. I know one has been
19 presented, but I have not read it.

20 So I want to go off the bench, and I'll review
21 it. I'll ask counsel to remain for a couple of minutes so
22 if I have any questions, I can review it with counsel.

23 To the extent I don't have any questions, I will
24 reappear and so indicate, and you'll be on your way. So
25 thank you, Counsel. (Proceedings adjourned.)

OWEN WICKER, RPR
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