

ORDINANCE NO. 2022-04

**AN ORDINANCE OF THE CITY OF ESPAÑOLA, NEW MEXICO,
REGARDING SOLICITATION ACTIVITIES ON PUBLIC
ROADWAYS AND PARKING LOTS AND ON PRIVATE ROADWAYS
AND PARKING LOTS WITH CONSENT OF THE PROPERTY OWNER,
DEFINING TYPES OF PUBLIC FORUMS, ESTABLISHING SOLICITATION
RESTRICTIONS IN CERTAIN PUBLIC FORUMS, AND PROVIDING
PENALTIES FOR VIOLATIONS**

WHEREAS, the City of Española has previously regulated solicitation activities by adoption of Ordinance No. 2010-09, adopted on October 26, 2010, and codified at sections 272-1 to 272-5 of the City of Española Code of Ordinances and entitled “Panhandling”; and

WHEREAS, the Governing Body, responding to constitutional concerns discussed in recent judicial decisions, repealed Ordinance No. 2010-09 on December 18, 2018, by the adoption of Ordinance No. 2018-06; and

WHEREAS, recent judicial decisions from the United States Court of Appeals for the Tenth Circuit have clarified the standards by which municipalities may prohibit or regulate panhandling activities; and

WHEREAS, the Governing Body has determined that unrestricted solicitation on roadways and within parking lots in the city have created dangerous conditions for persons engaging in solicitation activities, persons being solicited, and traffic generally; and

WHEREAS, the Governing Body has determined that the standards and restrictions specified herein are narrowly tailored to serve the city’s significant governmental interest in establishing safe locations and standards for solicitation that leave open ample alternative channels for communication of information;

NOW THEREFORE, BE IT ORDAINED by the Governing Body of the City of Española, that new material is hereby adopted and added to the Code of Ordinances as follows:

Section One—Findings. The Governing Body makes the following findings:

- A. The roadways within the city are intended and designed for the primary purpose of safely facilitating vehicular movement.
- B. Certain features within or adjacent to the roadways, such as medians and other traffic control features are designed and intended for the primary purpose of facilitating vehicular movement and may secondarily facilitate safe pedestrian movement.
- C. Sidewalks and other pedestrian walkways within the right of way and adjacent to the roadway serve the dual purposes of protecting pedestrians from traffic and of facilitating pedestrian movements and other constitutionally protected activities, including the expression of free speech.

- D. Some forms of solicitation and pedestrian activities have the effect of creating an unsafe or threatening environment to both vehicles and pedestrians.
- E. The city has a significant governmental interest in facilitating the safe flow of vehicular and pedestrian traffic.
- F. The state municipal code, NMSA (1978), § 3-49-1(L), authorizes a municipality to regulate traffic and sales upon streets, sidewalks and public places.
- G. The United States Court of Appeals for the Tenth Circuit, in the case of *Evans v. Sandy City*, 944 F.3d 847 (2019), held that a city may impose reasonable time, place and manner restrictions on speech without reference to content if narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of information.
- H. The Governing Body finds that the regulations and prohibitions on solicitation contained herein are narrowly tailored in that they are limited by reasonable spatial specifications related to vehicle-pedestrian safety and by time limitations, allowing ample alternative channels for communication immediately outside the restricted areas and during all daylight hours and within all traditional public forums.

Section Two—Purpose. The purpose of this ordinance is to identify areas where solicitation may impair the safe flow of vehicles and pedestrians and to place reasonable time, place and manner restrictions on solicitation activities in furtherance of the government’s significant public safety interests while leaving open ample alternative channels for the communication of information and other protected activities.

Section Three—Scope. The ordinance applies to all public roadway, rights of way and parking lots within the city, and pursuant to the provisions of NMSA (1978), § 3-49-1(O), also applies to any private property for which the owner has provided written consent. The ordinance does not apply to solicitation or other activities in places other than those specified herein, although other ordinances and regulations may apply to such activities and places.

Section Four—Definitions.

- A. “Aggressive solicitation” is solicitation in which the solicitor:
 - 1. Comes closer than three (3) feet to the person solicited unless and until the person solicited indicates that he or she wishes to make a donation or purchase or otherwise communicate;
 - 2. Touches the solicited person without the consent of that person;
 - 3. Solicits within five (5) feet of any person who is waiting within the right of way to be admitted into any public or commercial facility or public or private conveyance, such as a bus, taxi, etc.;
 - 4. Blocks or otherwise impedes the movement of any person;
 - 5. Blocks or otherwise impedes the entrance to any structure or vehicle;

6. Continues to solicit from or follows behind, ahead or alongside a person after that person has declined the solicitation by words or actions;
 7. Threatens a person by word or gesture or otherwise uses abusive language directed at the solicited person;
 8. Makes any statement, gesture or communication that would cause a reasonable person to be placed in fear for his or her safety;
- B. “Median” means any area within a traveled roadway, including a bordering curb, that is elevated or otherwise physically separated from traffic lanes or turning lanes and that is intended to create a physical separation between lanes of traffic, regardless of direction.
- C. “Median not suited for pedestrian use” means:
1. Any portion of a median that is less than six feet in width, and located within a roadway with a posted speed limit of 30 miles per hour or faster or located within 25 feet of an intersection with such a roadway; or
 2. Is the landscaped area of the median as defined by this Traffic Code; or
 3. Is otherwise identified by signage as not suitable for pedestrian use by the City Traffic Engineer based on identifiable safety standards, including but not limited to an unsuitable gradient or other objectively unsuitable features.
- D. “Pedestrian way” means any sidewalk, path, trail or other area intended for use by pedestrians. Medians are considered medians not suited for pedestrian use unless specifically designated as such.
- E. “Public roadway” means any publicly owned street, road, highway or other traveled route intended for vehicular traffic.
- F. “Right of way (R.O.W.)” is the entirety of the publicly owned roadway, including the traveled surface, sidewalks, trails, medians and other adjoining spaces separating the traveled roadway from adjoining properties. Right of way also refers to the entirety of any private parking lot or roadway for which the property owner has provided written consent for traffic regulation.
- G. “Solicit” and “Solicitation” means, without reference to content, the request by a pedestrian through words, signs or actions for donations of money or other items of value, appeals for support of persons, policies or projects, and offers of sale of products or services. Any person who engages in such activity is a solicitor regardless of the identity of the person or organization. Solicitation does not include activities for which a business license or registration is required and which is conducted in the manner and according to the regulations applicable to such a permit. Solicitation also does not apply to messages attached to or contained within vehicles, such as signs, bumper stickers, flags, etc.

- H. “Solicitor” is any person who engages in solicitation, and includes occupants of vehicles who respond to solicitation requests.

Section Five--Designation of Right of Way and Public Parking Lots as Public Forums. For purposes of this ordinance, the Governing Body designates the following areas as public forums. These designations shall not apply to any public spaces in the city not specifically listed herein.

A. **Traditional Public Forum.** Any pedestrian area within a right of way that is not otherwise designated as a limited public forum or a nonpublic forum is a traditional public forum.

B. **Limited Public Forum.**

1. **Within Right of Way.** Limited Public Forums include all paved medians greater than thirty-six (36) inches in width and all paved or unpaved pedestrian walkways immediately adjacent to traffic or turning lanes and greater than thirty-six inches (36”) in width, including any curbs.
2. **Within public or private parking lots.** Limited Public Forums include all pedestrian walkways not within vehicular aisles or parking spaces.

C. **Nonpublic Forum.**

1. **Within Right of Way.** Nonpublic forums include all traffic lanes, turn lanes and on-street parking spaces within a roadway, all medians that are not suited for pedestrian use within a roadway that are either unpaved or less than thirty-six inches (36”) in width, and all pedestrian walkways within a right of way immediately adjacent to traffic lanes, turning lanes or on-street parking spaces and less than thirty-six inches (36”) in width, including any curbs.
2. **Within public or private parking lots.** Nonpublic forums include all vehicular aisles and parking spaces.

Section 6—Solicitation Regulations.

A. **Traditional Public Forum.** Solicitation is allowed in all traditional public forums, provided, that aggressive solicitation is prohibited and provided further than any activity which requires a business license or registration or special permit shall comply with the regulations applicable thereto.

B. **Limited Public Forum.** Solicitation is allowed in all limited public forums, provided that the following activities are prohibited:

1. Aggressive solicitation; or
2. Solicitation occurring between the period from one-half hour after sunset to one-half hour before sunrise.

C. **Nonpublic Forum.** Solicitation is prohibited in nonpublic forums.

D. **Aggressive Solicitation.** Aggressive solicitation is prohibited in the city at all times and in all locations.

- E. **Occupants of vehicles.** Any occupant of a vehicle who offers money or other item of value to a solicitor who is in violation of the time, place or manner restrictions specified herein shall be guilty of an offense.

Section 7—Penalties. Violations of the provisions of this ordinance are punishable according to the general penalty provisions of this code, provided that an officer may issue a verbal or written warning in lieu of a citation. The specification of offenses herein shall not be construed as limiting the prosecution of other offenses specified in this code.

Section 8—Codification. The City Clerk is directed to consult with the publisher of the city’s Code of Ordinances and determine the location and numbering system appropriate for insertion of the provisions of this ordinance, including the recitals. This section 8 and section 9 below are parts of the ordinance but shall not be included in the codification.

Section 9—Effective Date. This ordinance shall be effective five (5) days after publication of Notice of Adoption.

PASSED, APPROVED AND ADOPTED by the Governing Body this ____ day of _____, 2022.

John Ramon Vigil, Mayor

Attest:

Debbie J. Garcia, City Clerk