



Municipal Excess Liability Joint Insurance Fund

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PRIVILEGED AND CONFIDENTIAL BULLETIN

TO: All Members

FROM: Fred Semrau, Fund Attorney

DATED: May 13, 2019

RE: Solicitation Permit Requirements

Over the past two years, municipalities throughout New Jersey have been approached by entities threatening to challenge the constitutionality of their door-to-door solicitation ordinances. For example, Aptive Environmental, LLC ("Aptive"), a pest control company, has vigorously opposed municipal curfews and fingerprint/background check requirements. A thorough analysis of case law regarding municipal solicitation ordinances reveals that such ordinances could be invalidated if challenged through the courts.

The United States Supreme Court's decision in Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 160-62 (2002), established that a high level of First Amendment protection is afforded to door-to-door canvassers based on the central role of canvassing in spreading protected speech. This ruling affords entities seeking to canvas or even solicit within the State a great deal of latitude.

New Jersey courts have held that businesses and non-profit groups have the right to conduct door-to-door solicitation until 9:00 p.m. See N.J. Citizen Action v. Edison Twp., 797 F.2d 1250, 1266 (1986); see also N.J. Env'tl. Fed. v. Wayne Twp., 310 F. Supp. 2d 681, 699-700 (2004). Moreover, our courts have questioned and invalidated ordinances that contain lengthy background check processes, opining that such processes interfere with the right to conduct business. In 2018, on the recommendation of the Municipal Excess Liability Joint Insurance Fund, many municipalities temporarily amended various aspects of their door-to-door solicitation ordinances to allow Aptive to solicit pesticide services. Last year a municipality paid more than \$50,000 in attorney fees and court costs after Aptive filed suit in Superior Court, alleging the town failed to make the necessary changes to their ordinance to address Aptive's claims.

Over the past several weeks, we have been in discussions with Aptive's legal counsel to develop a reasonable framework to address these issues for 2019. The suggested agreement with Aptive would contain a change in solicitation hours whereby Aptive would stop soliciting one-

half hour after sunset. This in itself is a favorable proposal given that in November, sunset often occurs around 5:30 p.m., yet our courts have ordered 9:00 p.m. as the cutoff time.

Aptive has also challenged the constitutionality of fingerprinting requirements contained in the majority of solicitation code provisions, based upon Shuttlesworth v. Birmingham, 394 U.S. 147 (1969). New Jersey courts have agreed that fingerprinting and/or background check requirements could be considered a violation of a solicitor's First Amendment right to free speech. See N.J. Envtl. Fed. v. Monroe Twp., No. 05-143, 2008 WL 2982598 at *5 (July 31, 2008).

In order to adequately address a municipality's concern with the safety of its residents and the interests of the company, the agreement requires that Aptive provide a certification letter indicating that background checks have been performed on each named individual who will be soliciting within the municipality. We have verified that the background check service being utilized by Aptive is legitimate, and in view of the fact that local government options are somewhat limited, it would be best to agree to such certifications as opposed to the risk of losing any ability to conduct a vetting process.

In order to prevent this issue from arising in the future with Aptive or other companies, we recommend that you consult with your municipal attorney and consider the following amendments to your municipal Code:

- 1) Create or bolster an existing "no-knock/no-solicitation" provision, including maintenance of a no-solicitation list that would supersede any business's right to conduct door-to-door solicitation.
- 2) Revise any fingerprinting requirements to include the provision that an applicant may, in lieu of being fingerprinted by the municipality, submit to the municipality and Chief of Police a certification from the company's general counsel regarding fingerprint and/or criminal background check results from a recognized service. Such amendment should also provide that the Chief of Police must approve the results received.
- 3) Provide for continued communications between the soliciting vendors and the local police as to the geographical area where the solicitation will be conducted.
- 4) Consider agreements with vendors seeking to solicit in the municipality that all solicitation activities will cease one-half hour after sunset.

We bring this matter to your attention in an effort to assist our members in avoiding unnecessary legal exposure. However, please contact your municipal attorney for specific advice regarding amendment of your municipal Code.