



November 20, 2024

Philip M. Marshall, Esq.
Village Attorney
Village of Orchard Park
4295 S. Buffalo Street
Orchard Park, New York 14127

Sent via U.S. Mail and Electronic Mail (pmmarshalllaw@hotmail.com)

Dear Mr. Marshall:

The Foundation for Individual Rights and Expression (FIRE) is concerned by the Village of Orchard Park's refusal to confirm that the New York Public Interest Research Group Fund, Inc. (NYPIRG) is free to canvass in Orchard Park. As a nonpartisan nonprofit dedicated to defending freedom of speech, FIRE is committed to ensuring local governments do not unconstitutionally restrict the First Amendment right to go door to door to communicate ideas to fellow Americans. We therefore urge the Village to confirm NYPIRG will not face punishment for its canvassing activities.

Our concerns arise from your July 15 response to NYPIRG when it asserted Orchard Park's solicitation ordinance,¹ which bans "soliciting or peddling within the Village" without obtaining a permit from the Village Clerk and paying the applicable fees,² does not apply to the political canvassing NYPIRG planned to conduct. NYPIRG, a 501(c)(3) nonprofit charitable organization, "examines important issues, produces studies, and engages New Yorkers in public education campaigns designed to produce policies that strengthen democracy, enhance the rights of consumers and voters, and protect the environment and public health."³ Since 1977, NYPIRG has "conducted a public education, civic engagement and fundraising door-to-door canvass in communities across the state."⁴ NYPIRG planned to canvass in the Village of

¹ The narrative in this letter represents our understanding of the pertinent facts, but we appreciate that you may have additional information to offer and invite you to share it with us.

² VILL. OF ORCHARD PARK VILL. CODE §§ 166-3, 166-5 (amended Feb. 11, 2019), *available at* <https://ecode360.com/11455193#11455193>.

³ *About NYPIRG*, NYPIRG, <https://www.nypirg.org/about>.

⁴ Email from Russ Haven, Gen. Couns., NYPIRG, to Philip M. Marshall, Vill. Att'y, Vill. of Orchard Park, et al. (July 9, 2024, 1:49 PM) (on file with author).

Orchard Park this past summer and plans to do so in spring 2025. The group wishes to ensure it can canvass without facing civil or criminal penalties.

The Village ordinance at issue defines “peddling” as “selling or offering for sale of any goods, wares or merchandise for immediate delivery, which the person selling or offering for sale carries with him in traveling or has in his possession or control, upon any of the streets, roads or highways or from house to house.”⁵ “Soliciting” is defined as “seeking or taking of contracts or orders for any goods, wares or merchandise for future delivery upon any of the streets, roads or highways or from house to house.”⁶ The ordinance further provides:

Notwithstanding any of the provisions herein contained, any person, corporation, partnership or association engaged in charitable, benevolent, patriotic, religious or school purposes, native to the Village, or engaged in selling produce or products raised in the Village which are offered for sale, who are soliciting shall be permitted to obtain a permit in compliance with the regulations hereof, without payment of any fee therefor.⁷

On March 25, 2024, consistent with NYPIRG’s “commitment to cooperating fully with local municipalities while we are conducting our outreach efforts,” Statewide Outreach Manager Gabrielle Alper notified the Village Clerk’s Office of the group’s plans to canvass in Orchard Park between April 29 and August 31.⁸ Alper explained that NYPIRG’s activities would include “circulating support statements, collecting small contributions, distributing information and recruiting support (letters, calls, participation) on a variety of issues of concern to the community,” and requested written confirmation of the letter’s receipt.⁹ The Village Clerk responded via email that she referred the matter to you, copied you on the email, and directed NYPIRG to address further communication to you.¹⁰

Having not heard from you, NYPIRG General Counsel Russ Haven called your office and left a message, then emailed you on July 9 requesting that you inform the Village Clerk’s office that NYPIRG’s canvassing activities, scheduled to begin July 15, are not subject to the solicitation ordinance’s permit requirement.¹¹ Haven noted that in past correspondence dated July 5, 2019, NYPIRG pointed out that the ordinance does not apply to its charitable canvass since they are not “selling goods or services or taking orders therefor.”¹² That letter also explained that the

⁵ VILL. OF ORCHARD PARK VILL. CODE § 166-2.

⁶ *Id.*

⁷ *Id.* § 166-10(A).

⁸ Letter from Gabrielle Alper, Statewide Outreach Manager, NYPIRG, to Vill. Clerk’s Office, Vill. of Orchard Park, March 25, 2024 (on file with author).

⁹ *Id.*

¹⁰ Email from Mary Beth Jensen, Adm’r / Clerk-Treasurer, Vill. of Orchard Park, to Buffalo Off. Outreach, NYPIRG (June 11, 2024, 10:02 AM) (on file with author).

¹¹ Email from Haven to Marshall, *supra* note 4.

¹² *Id.* (citing Letter from Russ Haven, Gen. Couns., NYPIRG, to Philip M. Marshall, Vill. Attorney, Vill. of Orchard Park, July 5, 2019 (on file with author)).

First Amendment protects NYPIRG’s political canvassing activities. Haven further noted that last summer the Village Clerk informed NYPIRG that door-to-door contacts were banned due to the COVID-19 pandemic, but you subsequently informed the Clerk’s Office that NYPIRG was free to canvass. Haven said NYPIRG would, as in the past, provide a list of its authorized representatives and copies of their photo IDs to the Village Clerk and Police Department before commencing its canvass, and inform you when it concludes.

Receiving no response, Haven emailed you again on July 15, as follows:¹³

My understanding is that the Clerk is awaiting your response to our July 9th email regarding our charitable canvass.

We’re asking for you to respond promptly as we’re eager to commence our outreach in the Village. Undue delay is viewed [as] effectuating a prior restraint on First Amendment rights.

Later that day, you responded, “Please refrain from sending me emails, especially emails containing threats. I do not render legal opinions to outside parties.”¹⁴

As a threshold matter, the Village’s solicitation ordinance does not apply to NYPIRG’s planned canvassing activities, which, as explained in the organization’s prior correspondence, involve neither the sale of goods nor taking orders for goods.

More fundamentally, the First Amendment protects NYPIRG’s canvassing. In *Martin v. City of Struthers*, the Supreme Court struck down a ban on door-to-door distribution of handbills, emphasizing that such expressive activity is in the “best tradition of free discussion.”¹⁵ Permit requirements for canvassing are also constitutionally suspect. In *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, the Court invalidated an ordinance that required a permit to engage in door-to-door advocacy for any religious, political, or other cause.¹⁶ As the Court explained: “It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.”¹⁷

¹³ Email from Russ Haven, Gen. Couns., NYPIRG, to Philip M. Marshall, Vill. Attorney, Vill. of Orchard Park (July 15, 2024, 10:58 AM) (on file with author).

¹⁴ Email from Philip M. Marshall, Vill. Att’y, Vill. of Orchard Park, to Russ Haven, Gen. Couns., NYPIRG (July 15, 2024, 4:07 PM) (on file with author).

¹⁵ 319 U.S. 141, 145 (1943).

¹⁶ 536 U.S. 150 (2002).

¹⁷ *Id.* at 165–66. While the Court recognized a permit requirement for “solicitation of funds” could “arguably” be narrowly tailored to a municipality’s interest in preventing fraud, Orchard Park’s ordinance specifically applies to solicitation of “contracts or orders for any goods, wares or merchandise”—activities NYPIRG does not plan to pursue.

As the Village Clerk has referred NYPIRG's inquiry to you to speak on behalf of the Village, FIRE urges you to confirm that, consistent with past practice, NYPIRG is free to conduct its upcoming free speech canvassing activities within the Village without obtaining a permit.

Thank you for your attention to this matter. We respectfully request a substantive response no later than December 4, 2024.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Terr', written in a cursive style.

Aaron Terr, Esq.
Director of Public Advocacy

Cc: Jo Ann Litwin Clinton, Mayor
Matthew Hartung, Deputy Mayor
Mary Beth Jensen, Administrator / Clerk-Treasurer