



DATE: April 8, 2021
TO: Oversight Committee
THROUGH: Kathryn Walker, City Attorney
FROM: Anthony Purinton, Assistant City Attorney
SUBJECT: Regulation of Unsolicited Written Materials

BACKGROUND:

For the past 10 years, the City Attorney's office has regularly updated Council on potential solutions to the City's longstanding issues with the haphazard distribution of unsolicited written materials on the lawns of private residences. This memo provides an update on current case law and gives some suggested next steps in the event the City wishes to move forward with previously recommended courses of action.

DISCUSSION:

Since the last presentation made to Council in 2019, no notable case law has arisen that directly addresses this set of facts. However, should the City decide to enact regulations limiting placement of unsolicited written material, the City should anticipate First Amendment litigation. In doing so, the City should (1) compile a better factual understanding of the problem, (2) consider less restrictive alternatives that could be employed that do not burden free speech, and (3)

The City would have to overcome several hurdles if it were to enact an ordinance limiting the deposit of unsolicited advertising material to specific, enumerated locations on the private property of residences (e.g., porch, mailbox, door). First, the City would have to show that the haphazard distribution of these materials "is a concrete, non-speculative problem." *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1076 (10th Cir. 2020). Second, the City would

First, the City would be required to show that (1) the harms are real and (2) that the restrictions would actually serve the interests asserted. Narrow tailoring and leaves open ample alternatives.

RECOMMENDATION:

Ultimately, the recommendation of the City Attorney's Office remains largely unchanged. Yes, the City could pursue enacting an ordinance which regulates the

¹ In fact, the plaintiff was ultimately unsuccessful on the merits. A later Sixth Circuit opinion affirmed the lower court's grant of summary judgment in favor of the city, summarily concluding that "the district court properly addressed, analyzed, and disposed of the issues." *Lexington H-L Servs., Inc. v. Lexington-Fayette Urban Cty. Gov't*, 920 F.3d 1126 (6th Cir. 2019), *aff'd*, 329 F. Supp. 3d 333 (E.D. Ky. 2018).

distribution of unsolicited written door-to-door commercial advertising, although the City would still be open to First Amendment litigation. While *Lexington H-L Services* provides the City with a potential course of action to help withstand a potential First Amendment challenge, the case is still only useful for its persuasive value and is not binding precedent in Oklahoma, which sits in the Tenth Circuit.

However, if the City were to seek to implement regulations such as the one in Jefferson/Louisville or Lexington-Fayette, the City should first conduct fact-finding to determine the effect of the distribution activity which would be regulated. Doing so would place the City in a more favorable position in the event that the regulations were challenged in litigation. Information such as the approximate number of total unsolicited written materials distributed in the City in a given year, whether the material makes its way to public property, and whether the materials tend to remain uncollected on sidewalks and driveways would help the City later withstand a First Amendment challenge alleging that the City does not have a substantial interest in regulating the activity.



office memorandum

TO: Honorable Mayor and Councilmembers

DATE: June 17, 2010

THROUGH: Jeff H. Bryant, City Attorney

FROM: Leah Messner, Assistant City Attorney

SUBJECT: Regulation of Door-to-Door Commercial Advertising

BACKGROUND:

Several Councilmembers have expressed an interest in whether the City of Norman could either regulate or ban the distribution of door-to-door commercial advertising, i.e. the Buyer's Edge, under the City's current littering ordinance or by adoption of an amended ordinance. A review of the pertinent case law follows discussing First Amendment protections afforded to commercial speech.

DISCUSSION:

The First Amendment to the United States Constitution guarantees freedom of speech. That guarantee applies not only to religious or political speech but to commercial speech as well. Commercial speech is protected so long as it concerns lawful activity (i.e. truthful advertising or advertisements for legal goods). *Central Hudson*, 447 U.S. 557. Courts across the country, as well as the United States Supreme Court, have overturned ordinances seeking to ban distribution of handbills, advertisements, circulars, and other literature door-to-door. In *Martin v. City of Struthers, Ohio*, the United States Supreme Court concluded that the First Amendment embraces the right to distribute literature and protects the right to receive it. 319 U.S. 141 (1943). The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets. *Id.* However, under *Martin*, a community may regulate the time, place, and manner of distribution in order to protect the peace, good order, and comfort of its citizens. *Id.*

The City of Norman has an ordinance regulating littering. In City of Norman Code of Ordinances Chapter 15 § 15-111, litter is defined as "garbage, refuse, rubbish, dirt and all like material". In a similar case, the City of Laramie, Wyoming prosecuted Gerald Miller under the City of Laramie's littering ordinance for distributing a free newspaper door-to-door. *Gerald Miller v. City of Laramie*, 880 P.2d 594 (Wyoming Sup. Ct. 1994). Laramie's ordinance defined litter as any quantity of uncontainerized paper, metal, glass, plastic, animal feces, or miscellaneous solid waste which may be classed as trash, debris, rubbish, refuse, garbage, or junk. *Id.* at 596. The Wyoming Court found the ordinance to be unconstitutional because it failed to demonstrate that the restrictions imposed actually achieved the goal of reducing litter on Laramie's streets. *Id.* at 598. In addition, the Court questioned that the subject newspaper met the definition of litter contained within

the ordinance. *Id.* at 598. As with the ordinance from Laramie, it is questionable whether door-to-door commercial advertising could fall within the City of Norman's definition of litter as these items are unlikely to be considered refuse or rubbish by their distributors.

To amend the City of Norman's littering ordinance to include door-to-door commercial advertising, the amendment must be a valid time, place, and manner regulation. Regulating the time, place, and manner of this type of expression may prove difficult. To meet constitutional muster, such a regulation must be content-neutral, narrowly tailored to serve a significant government interest, and leave open alternative methods of communication. *Statesboro Publishing Company, Inc. v. City of Sylvania*, 516 S.E.2d 296 (Ga. Sup. Ct. 1999). In *Statesboro Publishing*, the Georgia Supreme Court overturned a municipal ordinance that banned the distribution of any handbill or printed or written material by placing it in the yard, walkway, driveway, or porch of any structure within the City of Sylvania. *Id.* at 297. While the Court found the ordinance to be content-neutral since it banned all handbills without differentiating between speakers, it was not narrowly tailored—meaning that it swept in too much protected speech without a compelling justification for doing so.

In addition, the United States Court of Appeals for the Third Circuit reviewed an ordinance regulating door-to-door commercial advertising and also found it lacking. *Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136 (3rd Cir. 1982). The Township of Doylestown adopted an ordinance that sought to ban the door-to-door distribution of commercial advertising materials because accumulation may tip off burglars that a given home is unoccupied. *Id.* at 1138. The ordinance exempted door-to-door distribution of religious, ideological, or political handbills or flyers. *Id.* at 1138. The Third Circuit did not accept Doylestown's rationale for the ordinance because, first, the exempted materials could lead to a similar accumulation at vacant properties, and, second, Doylestown could produce no evidence of an increase in burglaries. *Id.* at 1140-1141. For those reasons the ordinance was determined to be unconstitutional because it was not content-neutral nor did it serve a significant government interest. *Id.*

These last two cases discussed highlight the potential difficulty in drafting an ordinance amendment that would survive a First Amendment challenge. The Court in Georgia held that the ordinance swept in too many types of speech to be constitutional while the Third Circuit held that because the ordinance did not include all types of speech it was unconstitutional.

RECOMMENDATION:

Ordinances regulating door-to-door distribution of commercial advertising have been the subject of rough treatment by courts when upholding the free speech guarantees of the First Amendment. In light of this treatment, it is the opinion of the City Attorney's Office that pursuing an ordinance amendment restricting door-to-door distribution of commercial advertising would expose the City of Norman to First Amendment litigation.

However, Council may want to consider other approaches suggested in one of the above cases. Instead of an ordinance that seeks to ban distribution of these materials, citing the property

owner for failing to pick up their property is one option. Another option noted was developing regulations that would require the distributor to collect any unclaimed materials left in yards, on city streets, or on sidewalks. However, both these options present potential enforcement issues that would need to be thoroughly studied.



TO: Honorable Mayor and Councilmembers

DATE: August 5, 2010

THROUGH: Jeff H. Bryant, City Attorney

FROM: Leah Messner, Assistant City Attorney

SUBJECT: Regulation of Door-to-Door Commercial Advertising

BACKGROUND:

Councilmember Cubberley has asked for some additional information and research regarding the June 17, 2010 Memo addressing door-to-door distribution of commercial advertising.

DISCUSSION:

The cases presented in the first memo deal specifically with ordinances regulating distribution of advertising door-to-door. The following cases, decided by the Oklahoma Court of Criminal Appeals, deal with distribution of fliers, magazines, or handbills on sidewalks and street corners to passers-by. However, though dealing with a different form of speech, the cases use the same First Amendment analysis. In the first case, *Greiner v. City of Yale*, Mr. Greiner appealed his conviction for distributing fliers on the streets of Yale, Oklahoma. 139 P.2d 606 (Okla. Crim. App. 1943). The City of Yale had an ordinance against handing out handbills or advertising material along the sidewalks or streets of the city without first obtaining consent of the Yale City Council. *Id.* Using *Martin v. City of Struthers*, cited in the previous memo, as precedent, the Court of Criminal Appeals overturned Mr. Greiner's conviction by stating that the ordinance gives the City Council authority to pick and choose between speakers in violation of the protections of the First Amendment.

The second case, *Brown et al. v. City of Stillwater*, is an appeal of two convictions by Mr. and Mrs. Brown for violation of a City of Stillwater ordinance banning the display of any sign, emblem, or device which is insulting, profane, or abusive to citizens of Stillwater. 149 P.2d 509 (Okla. Crim. App. 1944). Mr. and Mrs. Brown, both Jehovah's Witnesses, offered magazines for sale on the streets of Stillwater that were official publication of Jehovah's Witnesses. *Id.* The defendants were prosecuted because citizens were disturbed by their presence and by the beliefs of the defendants (specifically a refusal to salute the United States flag). *Id.* The Court of Criminal Appeals overturned the convictions stating that the ordinance violated both the free speech and free exercise of religion clauses of the First Amendment. *Id.*

The First Amendment analysis used by the Court of Criminal Appeals in the above cases can be applied to the present issue. For example, an ordinance regulating distribution of some, but not

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all, types of door-to-door distribution of handbills or fliers could also be found to be violative of the First Amendment because the ordinance treated speakers differently.

RECOMMENDATION:

After reviewing the above cases, it is the opinion of the City Attorney's Office that pursuing an ordinance amendment restricting door-to-door distribution of commercial advertising would expose the City of Norman to First Amendment litigation.

However, Council may want to consider another approach upheld by the Federal Court for the Western District of Kentucky. While a unique approach, the opinion by the Western District is an unpublished opinion—meaning that it does not carry any precedential weight in Kentucky nor can it be cited to an Oklahoma court for persuasive argument. At issue in *Courier-Journal, Inc. v. Louisville/Jefferson County Metro Government*, is an ordinance requiring that all unsolicited written materials be placed on the porch, inside the screen door, on the doorknob, or delivered personally to the resident. 2009 WL 2982923 (W.D.Ky. 2009). The ordinance was adopted to avoid the litter issues related to what the Court called the “fly and fling” method of distributing sales advertisements in plastic baggies to the yards of Louisville residents. *Id.* The Court upheld the Ordinance because it only regulated how the protected speech was to occur rather than a complete ban on speech or differing treatment of types of speakers. *Id.* For this reason, an Ordinance amendment of this type might be the least problematic to defend from Constitutional challenge.

xc: Steve Lewis, City Manager



TO: Steve Lewis, City Manager

DATE: May 8, 2013

THROUGH: Jeff H. Bryant, City Attorney

FROM: Leah Messner, Assistant City Attorney

SUBJECT: Regulation of Door-to-Door Commercial Advertising

BACKGROUND:

You have asked this office to address questions and concerns expressed to the City Manager through Councilmembers Kovach and Jungman regarding the distribution of commercial advertising, primarily the *Buyer's Edge*, and the effect that the advertising has on neighborhoods in their wards. The following memo provides updated research regarding door-to-door commercial advertising in response to your questions.

DISCUSSION:

During the summer of 2010, the City Attorney's Office wrote two memos, dated June 17th and August 5th, regarding the regulation of door-to-door commercial advertising. Those memos are attached. Those memos discuss relevant research on this topic including the Kentucky case as mentioned by Councilmember Jungman. Additional legal research has been performed to make sure no other cases on the subject have been reported and to make sure the prior cases cited have not been overturned.

All of the cases cited in the previous memos, except for *Statesboro Publishing Company, Inc. v. City of Sylvania*, are still the law of the land in their respective jurisdictions. *Statesboro* has not been overturned regarding its First Amendment jurisprudence. However, although not relevant to the issues raised in this memo, the Georgia Supreme Court in two more recent opinions, has disagreed with the interpretation of the Georgia Constitution in *Statesboro*. *Grady v. Unified Government of Athens-Clarke County*, 289 Ga. 726 (2011); *Great American Dream, Inc. v. DeKalb et al.*, 290 Ga. 749 (2012).

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called the “fly and fling” method of distributing sales advertisements in plastic baggies to the yards of Louisville residents. *Id.*

The ordinance was challenged by the Courier-Journal who routinely distributed 340,000 green bags containing unsolicited written materials to non-subscribers. *Id.* According to the Courier-Journal, approximately thirty percent of the bags were delivered to or near front porches; fifteen percent were delivered to distribution boxes or tubes; sixteen percent were left outside of locked apartment buildings; and seventeen percent were left on driveways, yards, or in other locations. *Id.*

The seventeen percent of materials that were left in driveways and yards, according to the Jefferson/Louisville County Metro Government, contribute to visual blight and sewer and drainage backups. *Id.* In light of this legitimate governmental interest, the Court determined that the ordinance restricting where the materials could be delivered, was a permissible limitation because it regulated how this type of free speech could occur rather than preventing speech from occurring or treating different speakers differently. *Id.*

The City of Norman could pursue an ordinance patterned after the Louisville/Jefferson County case, but the case itself would have no precedential value in a case filed in our jurisdiction if the legality of the ordinance were litigated by the *Oklahoman*.

RECOMMENDATION:

After reviewing the previously cited cases, it is the opinion of the City Attorney’s Office that pursuing an ordinance amendment prohibiting door-to-door distribution of commercial advertising could be done, but it would likely expose the City of Norman to First Amendment litigation.

However, the City Council may want to consider an ordinance similar to Jefferson/Louisville County Metro Government’s ordinance. In doing so, enforcement issues should be considered. Violations would be tried in Municipal Court. A citation would be issued against the person distributing the materials rather than the company that produced them. Also, prosecution of such a violation would require a citizen, a police officer, or a code compliance officer to observe the violation (i.e. the impermissible mode of distribution, not simply returning home to find the materials in the driveway) in order to substantiate the citation.

Another option that could alleviate First Amendment concerns that City Council may want to consider is to develop an ordinance requiring the property owners to remove the materials from their property within a certain time after their distribution. However, this type of ordinance would also pose enforcement hurdles. A neighboring property owner, a police officer, or a code compliance officer would need to be able to testify to when the materials were distributed in order to prove the violation. Also, an ordinance of this type may need to identify a responsible party for the materials that are found in the streets and gutters.

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The City Attorney's Office is available to discuss this issue further or to begin to develop an ordinance, of one of the types mentioned above, if it is Council's desire to do so.