

CITY OF NORMAN, OK
CITY COUNCIL OVERSIGHT COMMITTEE MEETING
Municipal Building, Executive Conference Room, 201 West Gray, Norman,
OK 73069
Thursday, October 14, 2021 at 4:00 PM

AGENDA

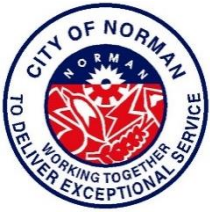
It is the policy of the City of Norman that no person or groups of persons shall on the grounds of race, color, religion, ancestry, national origin, age, place of birth, sex, sexual orientation, gender identity or expression, familial status, marital status, including marriage to a person of the same sex, disability, retaliation, or genetic information, be excluded from participation in, be denied the benefits of, or otherwise subjected to discrimination in employment activities or in all programs, services, or activities administered by the City, its recipients, sub-recipients, and contractors. In the event of any comments, complaints, modifications, accommodations, alternative formats, and auxiliary aids and services regarding accessibility or inclusion, please contact the ADA Technician at 405-366-5424, Relay Service: 711. To better serve you, five (5) business days' advance notice is preferred.

CALL TO ORDER

AGENDA ITEMS

1. DISCUSSION REGARDING UNSOLICITED JUNK MAIL.

ADJOURNMENT



CITY OF NORMAN, OK STAFF REPORT

MEETING DATE: 10/14/2021

REQUESTER: ???

PRESENTER: Kathryn Walker, City Attorney

ITEM TITLE: DISCUSSION REGARDING UNSOLICITED JUNK MAIL.



75°

BREAKING NEWS:

< 5 / 7 > ||

Sign up for our Coronavirus & Rossen Reports Newsletters

**TRACKING THE COVID-19 VACCINE**

Sign up for daily emails with local updates and other important news.

SUBMIT[Privacy Notice](#)

Advertisement

Metro resident says weekly batch of ads, coupons trashes neighborhood streets

Updated: 6:31 PM CDT Sep 15, 2015

Infinite Scroll Enabled

**Morgan Chesky** f

Anchor/Reporter

OKLAHOMA CITY — Take a drive through Derek Stevens neighborhood and for almost every house, you'll find the plastic-wrapped present Stevens never signed up for.

"They generally just look trashy in the neighborhood," said Stevens as he stood over a pile of decrepit newspapers. The supplement is called, "The Buyer's Edge," a weekly batch of ads and coupons Stevens says only sells him on its ability to trash his streets.

"I got these in about 20 minutes," he said as he pointed to a pile in his driveway. "All of these just sitting out in the street along these three blocks of neighborhood."

For those who don't want the paper, the Oklahoman tells KOCO you can call and opt out, but from the number of papers littering the streets, it's clear many aren't making the call.

"If it's happening here in my neighborhood then it's probably happening all over the city," Stevens said.

The company that delivers Buyer's Edge said nearly a 250,000 papers go out each and every week. The only way off the list is to ask and the city said the deliveries fall in line with city code.

If you'd like to opt out of Buyer's Edge delivery, call 405-478-7171.



Buyer's Edge publishes every week, it's a tabloid that wraps the inserts in the Wednesday paper, and the inserts we deliver to households that do not subscribe to the newspaper.

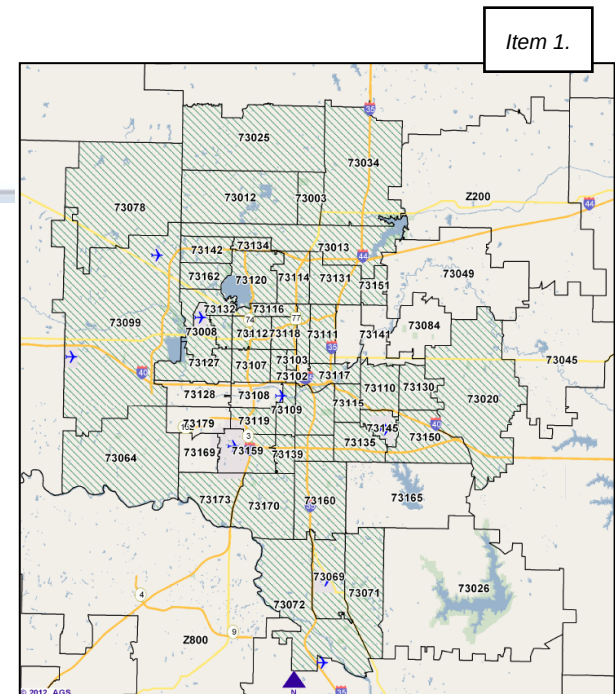
It wraps the weekly grocery inserts and other inserts like Walgreens, CVS, Home Depot, Wal-Mart, etc.

We print and deliver 445,000 copies of Buyer's Edge. It hits 97% of households in the metro. Of the 445,000, only about 21,000 go outside the metro.

The breakout of the 445,000 is: 140,000 in the Wednesday paper, wrapping the Wednesday inserts.

305,000 goes to non-subscribers, delivery starts on Tuesday and finishes on Wednesday.

Of the 305,000, 250,000 are delivered by carrier like a newspaper; the other 55,000 are mailed, mainly to apartments.



Total Market Coverage Rates

	1x	13x	26x	52x
Front & Back Pages	\$6,895	\$6,230	\$5,855	\$5,415
Inside Pages				
Full Pages	\$4,665	\$4,085	\$3,820	\$3,555
1/2 page vertical	\$2,810	\$2,465	\$2,305	\$2,150
1/4 page	\$1,700	\$1,540	\$1,430	\$1,330
Front Page Mastheads	\$1,200	\$1,025	\$925	\$800
Back Page Mastheads	\$1,220	\$1,055	\$940	\$835
Double Truck	\$10,030	\$8,850	\$8,270	\$7,695
4 Pg Tab Pullout	\$18,115	\$14,455	\$13,050	\$11,510

All rates include full color.
All rates are net.



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TMC PREPRINT DISTRIBUTION RATES

Item 1.

Total Annual Distribution Quantity

	>500,000	>1,000,000	>2,000,000	>4,000,000	>6,000,000	>8,000,000	>10,000,000	>12,000,000	>14,000,000	>17,000,000	>20,000,000
Discount Percentage :	5%	10%	13%	16%	18%	19%	20%	21%	22%	23%	24%

Weight (oz.)	Base Rate	>500,000	>1,000,000	>2,000,000	>4,000,000	>6,000,000	>8,000,000	>10,000,000	>12,000,000	>14,000,000	>17,000,000	>20,000,000
0.01 up to 0.11	\$24.00	\$22.80	\$21.60	\$20.88	\$20.16	\$19.68	\$19.44	\$19.20	\$18.96	\$18.72	\$18.48	\$18.24
0.12 up to 0.22	\$31.00	\$29.45	\$27.90	\$26.97	\$26.04	\$25.42	\$25.11	\$24.80	\$24.49	\$24.18	\$23.87	\$23.56
0.23 up to 0.33	\$34.00	\$32.30	\$30.60	\$29.58	\$28.56	\$27.88	\$27.54	\$27.20	\$26.86	\$26.52	\$26.18	\$25.84
0.34 up to 0.44	\$39.00	\$37.05	\$35.10	\$33.93	\$32.76	\$31.98	\$31.59	\$31.20	\$30.81	\$30.42	\$30.03	\$29.64
0.45 up to 0.55	\$44.00	\$41.80	\$39.60	\$38.28	\$36.96	\$36.08	\$35.64	\$35.20	\$34.76	\$34.32	\$33.88	\$33.44
0.56 up to 0.66	\$50.00	\$47.50	\$45.00	\$43.50	\$42.00	\$41.00	\$40.50	\$40.00	\$39.50	\$39.00	\$38.50	\$38.00
0.67 up to 0.77	\$56.00	\$53.20	\$50.40	\$48.72	\$47.04	\$45.92	\$45.36	\$44.80	\$44.24	\$43.68	\$43.12	\$42.56
0.78 up to 0.88	\$60.00	\$57.00	\$54.00	\$52.20	\$50.40	\$49.20	\$48.60	\$48.00	\$47.40	\$46.80	\$46.20	\$45.60
0.89 up to 0.99	\$64.00	\$60.80	\$57.60	\$55.68	\$53.76	\$52.48	\$51.84	\$51.20	\$50.56	\$49.92	\$49.28	\$48.64
1.00 up to 1.12	\$72.00	\$68.40	\$64.80	\$62.64	\$60.48	\$59.04	\$58.32	\$57.60	\$56.88	\$56.16	\$55.44	\$54.72
1.13 up to 1.25	\$78.00	\$74.10	\$70.20	\$67.86	\$65.52	\$63.96	\$63.18	\$62.40	\$61.62	\$60.84	\$60.06	\$59.28
1.26 up to 1.38	\$85.00	\$80.75	\$76.50	\$73.95	\$71.40	\$69.70	\$68.85	\$68.00	\$67.15	\$66.30	\$65.45	\$64.60
1.39 up to 1.51	\$94.00	\$89.30	\$84.60	\$81.78	\$78.96	\$77.08	\$76.14	\$75.20	\$74.26	\$73.32	\$72.38	\$71.44
1.52 up to 1.64	\$101.00	\$95.95	\$90.90	\$87.87	\$84.84	\$82.82	\$81.81	\$80.80	\$79.79	\$78.78	\$77.77	\$76.76
1.65 up to 1.77	\$108.00	\$102.60	\$97.20	\$93.96	\$90.72	\$88.56	\$87.48	\$86.40	\$85.32	\$84.24	\$83.16	\$82.08
1.78 up to 1.90	\$116.00	\$110.20	\$104.40	\$100.92	\$97.44	\$95.12	\$93.96	\$92.80	\$91.64	\$90.48	\$89.32	\$88.16
1.91 up to 2.00	\$126.00	\$119.70	\$113.40	\$109.62	\$105.84	\$103.32	\$102.06	\$100.80	\$99.54	\$98.28	\$97.02	\$95.76

over 2.00 Call for quote

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Office memorandum

DATE: April 5, 2021

TO: City of Norman Oversight Committee

FROM: Anthony Purinton, Assistant City Attorney

THROUGH: Kathryn Walker, City Attorney

SUBJECT: Regulation of Unsolicited Written Materials

BACKGROUND:

For the past 10 years, the City Attorney's office has regularly advised Council on potential solutions to the City's longstanding issues with the haphazard distribution of unsolicited written materials on private residences. This memo provides an update on current case law and gives some suggested next steps in the event the City wishes to take action. Attached below are all of the previous memos written by the City Attorney's office on this issue.

DISCUSSION:

As identified in prior memos submitted to this Committee, other municipalities have enacted ordinances aiming to curb similar "fly and fling" delivery methods. For example, a Lexington-Fayette Urban County Government ordinance requires unsolicited written material to be placed on one of six designated locations (e.g., a porch, securely attached to a front door, a mail slot). The Sixth Circuit has upheld that ordinance as a reasonable time, place, and manner restriction on free speech. *Lexington H-L Serv. Inc., v. Lexington-Fayette*, 879 F.3d 224 (6th Cir. 2018). However, the Sixth Circuit opinion is not binding in Oklahoma and only has persuasive value in the Tenth Circuit.

Since the last memo on this subject in 2019, there has been no binding or relevant case law published that addresses this particular set of facts. However, the Tenth Circuit's recent First Amendment opinions may be instructive of the City's next steps, if the City wishes to enact any regulations. The most helpful is *McCraw v. Oklahoma City*, which struck down Oklahoma City's prohibition on standing, sitting, or staying in public medians. The Court in *McCraw* found that the city's justifications for enacting the ordinance were insufficient and did not meet the standards required for a reasonable time, place, and manner restriction. *McCraw v. Oklahoma City*, 973 F.3d 1057, 1070 (10th Cir. 2020).

An ordinance similar to Lexington-Fayette's would be considered a time, place, and manner restriction on speech, subject to intermediate scrutiny. Intermediate scrutiny requires that the restrictions (1) do not depend on the content of the regulated speech, (2) are narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication of information.

Narrow tailoring requires justifying both the “ends” and the “means” of the restriction. *Id.* at 1074. The City must justify the “ends” by showing that the City’s interests or recited harms are real – not simply supported by speculation or conjecture. The “means” (i.e., the restrictions used by the City to curb the haphazard distribution) must actually solve the harm, but must not burden substantially more speech than is necessary. *Id.* at 1071.

There are three general principles that can be distilled from the *McCraw* holding which provide some of the steps that should be taken by the City, prior to enacting any time, place, and manner restriction. First, the City should develop a robust legislative record evidencing the concrete harms caused by the haphazard delivery of these materials. Second, the City should engage in good-faith discussion and consideration of alternative courses of action that reach the same “end” goal, but that are less burdensome on speech. Finally, the City should ensure that any proposed restriction leaves open ample alternative channels for communication.

RECOMMENDATION:

As there has been no particularly predictive case law that has developed in the Tenth Circuit since 2019, the City’s legal position and risk remain the same. However, if the City wishes to pass a regulatory measure, the City’s next steps are more defined after *McCraw*. It is important to note that even if the City completes all of the steps outlined above, the City still risks First Amendment litigation and still risks an unfavorable ruling. Additionally, regardless of the constitutionality of any proposed regulation, the problems with enforcement that other memos have identified still exist, which pose logistical problems.



office memorandum

DATE: November 8, 2019

TO: Kathryn Walker, City Attorney

FROM: Anthony Purinton, Licensed Legal Intern

SUBJECT: Regulation of Door-to-Door Commercial Advertising

BACKGROUND:

Given the high number of inquiries the City Attorney's office receives concerning potential ordinances regulating the distribution of commercial advertising, the City Attorney's Office has written several memos on the issue in response to these inquiries detailing the City's potential legal position, with periodic updates reflecting new developments in relevant legal precedent. The following memo provides additional research on recent decisions concerning municipal regulation of door-to-door commercial advertising.

DISCUSSION:

So far, three memos have been written by the City Attorney's office concerning this issue, the last of which was written in 2013. All three of these memos have been attached. In the 2013 memo, the recommendation of the City Attorney's Office included the suggestion that City Council consider an ordinance similar to the one adopted by the Jefferson/Louisville County Metro Government, which was found to be constitutional in *Courier-Journal, Inc. v. Louisville/Jefferson Cty. Metro Gov't*, 2009 WL 2982923 (W.D. Ky. Sept. 9, 2009). The previous recommendation noted, however, that the opinion was not precedential and couldn't be cited for its persuasive value in an Oklahoma court because it was an unpublished memorandum opinion in another jurisdiction. Since then, the Sixth Circuit Court of Appeals has recently upheld a similar ordinance in the same jurisdiction. *Lexington H-L Servs., Inc. v. Lexington-Fayette Urban Cty. Gov't*, 879 F.3d 224 (6th Cir. 2018). While this opinion still does not carry any precedential value in Oklahoma courts, the opinion's persuasive value would strengthen the City's position if it were to follow the 2013 recommendation and adopt a similar ordinance.

In *Lexington H-L Services*, the Sixth Circuit reversed a lower court's grant of a preliminary injunction against a city's ordinance that restricted delivery of unsolicited advertising materials to six specific locations:

- (1) on a porch, if one exists, nearest the front door; (2) securely attached to the front door; (3) through a mail slot, if one exists;
- (4) between an exterior front door, if one exists and is unlocked,

and an interior front door; (5) in a distribution box located on or adjacent to the premises, if permitted; or (6) personally with the owner, occupant, or lessee of the premises.

Id. at 227 (citing Lexington, Ky. Ordinance No. 25-2017 (March 2, 2017)). Applying an intermediate level of scrutiny to the city’s ordinance, the Sixth Circuit held that the plaintiff was unlikely to succeed on the merits of the case because the ordinance was an appropriate, content-neutral restriction on commercial speech that was narrowly tailored to substantial interests of the city while, at the same time, leaving open other methods of communication.¹ *Id.* at 229, 233.

The city advanced two substantial interests that the Court found persuasive. First, the Court recognized the city’s substantial interest in reducing visual blight caused by unsolicited commercial material which were “haphazardly” deposited on residents’ yards and driveways. *Id.* at 229–30. Importantly, the Court focused on the city’s account that millions of these materials were being distributed each year within city limits. *Id.* at 230. The city’s esthetic interests would be better achieved through the ordinance because the material would be placed in predictable, consistent locations and more likely to be picked up by residents. *Id.* Second, relying on data compiled by other cities adopting similar ordinances and council members’ reported observations noting that they have noticed these materials washing into sewers, the Court held that the city’s interest in reducing litter caused by the distribution of these materials would also be served by the means identified in the ordinance. *Id.*

Additionally, because there were still other alternative channels of communication open to the plaintiff to distribute written materials, the ordinance was able to survive intermediate scrutiny. *Id.* at 233. Not only did the Court find that the restrictions, which only targeted unsolicited materials, left open alternative channels to the plaintiff, the restrictions appeared to *increase* the chances that residents would actually receive the material because the material would have to be placed in predictable, secure locations. *Id.* Even though the plaintiff claimed that the ordinance’s requirements would place a harsh (and ultimately fatal) burden on their business and suggested cheaper alternative regulations, the Court did not strike down the ordinance. While the city was required to leave open inexpensive alternatives to distribute the communication, that requirement “must be balanced against the harms that can arise when cheap and efficient methods of circulating written materials are abused.” *Id.* at 235.

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’g*, 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.



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

office memorandum

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

Mayor and City Councilmembers
Door-to-Door Commercial Advertising
August 5, 2010
Page 2

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).

Courier-Journal, Inc. v. Louisville/Jefferson County Metro Government is a case from the Federal Court for the Western District of Kentucky. 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

City Manager Lewis
Door-to-Door Commercial Advertising
May 8, 2013
Page 2

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.

City Manager Lewis
Door-to-Door Commercial Advertising
May 8, 2013
Page 3

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.

CITY OF NORMAN

Regulation of Unsolicited Written Materials

**Anthony Purinton,
Asst. City Attorney**



Background

- Previous memos on issue
 - June 2010
 - Aug. 2010
 - May 2013
 - Nov. 2019
 - April 2021



Potential Solution:

Lexington-Feyette Ordinance

Item 1.

Unsolicited written materials delivered to premises shall be placed:

- (1) On a porch, near the door
- (2) Securely attached to the front door
- (3) Mail slot
- (4) Between the exterior front door and the interior front door
- (5) In a distribution box located on or adjacent to the premises
- (6) Personally with the owner, occupant, and/or lessee of the premises.

First Amendment Concerns

Item 1.

- Free speech at issue
- Time, place, manner restriction
 - Cannot distinguish based on content of speech
 - Must be narrowly tailored to serve significant government interest
 - Must leave open ample alternative channels for communication

McCraw v. OKC

- Struck down OKC prohibition on standing, sitting, or staying in public medians
- “Panhandling ordinance”
- Harm to public safety was not sufficiently proven
- Prohibition was too broad, not tailored enough
- The City failed to consider alternatives

McCraw cont.

- City should do the following prior to enactment:
 - Develop record (is the harm real?) ***
 - Consider alternatives
 - Leave open alternative routes for communication

Legislative Findings Update

Item 1.

Stormwater

- Summer 2022 – Cleanup of stormwater drainage area
 - Indication of scope and extent of environmental impact
 - Would yield highly demonstrative evidence of governmental interest in regulation
- Additional photographic evidence



Item 1.

Buyer's Edge publishes every week, it's a tabloid that wraps the inserts in the Wednesday paper, and the inserts we deliver to households that do not subscribe to the newspaper.

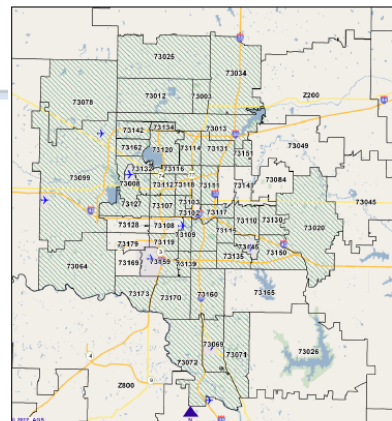
It wraps the weekly grocery inserts and other inserts like Walgreens, CVS, Home Depot, Wal-Mart, etc.

We print and deliver 445,000 copies of Buyer's Edge. It hits 97% of households in the metro. Of the 445,000, only about 21,000 go outside the metro.

The breakout of the 445,000 is:
140,000 in the Wednesday paper, wrapping the Wednesday inserts.

305,000 goes to non-subscribers, delivery starts on Tuesday and finishes on Wednesday.

Of the 305,000, 250,000 are delivered by carrier like a newspaper; the other 55,000 are mailed, mainly to apartments.

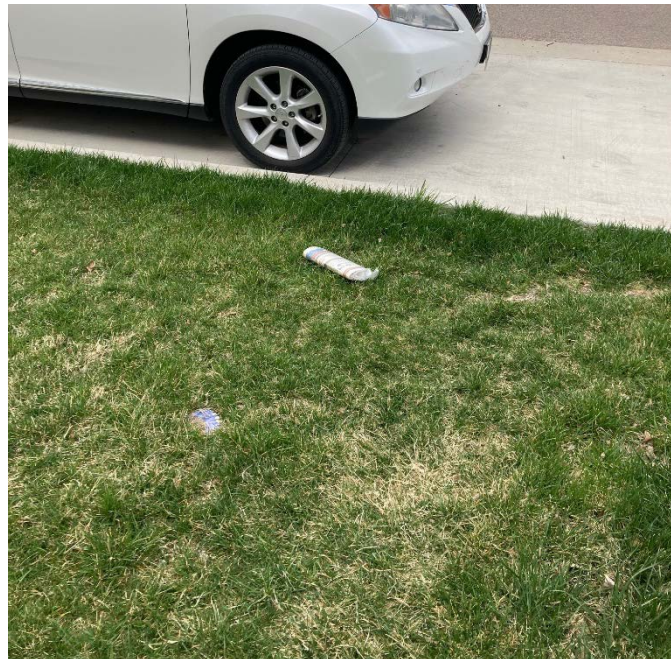


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Visual Blight

Item 1.



Visual Blight

Item 1.



Stormwater

Item 1.



Drainage Basin on Daws & University

Stormwater

Item 1.



Stormwater

Item 1.



Legislative Findings Cont.

Item 1.

- Citizen Complaints
 - Action center activity
- Winter 2021-Spring 2022
 - Develop citizen portal or reporting system to determine efficacy of opt out

QUESTIONS?

