



CITY OF CAMBRIDGE

Office of the City Solicitor
City Hall

795 Massachusetts Avenue
Cambridge, Massachusetts 02139

Tel. (617) 349-4121
Fax. (617) 349-4307

Russell B. Higley
City Solicitor

Donald A. Drisdell
Deputy City Solicitor

Michael C. Costello
Assistant City Solicitor

Birge Albright
Legal Counsel

Gail S. Gabriel
Legal Counsel

Diane Wynshaw-Boris
Legal Counsel

Laura H. Yager
Legal Counsel

Linda A. Stamper
Legal Counsel

Arthur J. Goldberg
Legal Counsel

October 1, 1992

Robert W. Healy
City Manager
City Hall
Cambridge, MA 02139

Re: *Awaiting Report Item No. 1--Sandwich Board Signs*

Dear Mr. Healy:

I am enclosing several documents regarding the above-referenced matter. As you will see from the correspondence we have been working with the Public Works Department for some time now in a general review of their ordinances. As part of that review we have looked at the provisions creating authority on the part of the Superintendent of Streets relating to permits for the use of public sidewalks.

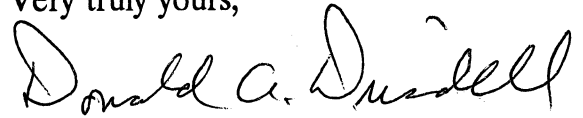
The memorandum prepared by Birge Albright points out how scattered the regulation of commercial use of streets and sidewalks has been in the General Laws and in the Municipal Code. Birge's recommendation to consolidate these uses into one ordinance, perhaps based upon the model ordinance enclosed herein, appears to offer an opportunity to streamline procedures and clarify requirements.

I intend to schedule meetings with the Commissioner of Public Works as soon as possible, and I anticipate that those meetings will involve the Chairman of the License Commission, the Police Commissioner, and the Arts Council--each of whom has some responsibility under statute or ordinance regarding the use of sidewalks.

Revision of the ordinances regarding commercial uses of sidewalks presents organizational as well as legal complexities. Given these complexities, response to the Council Order has been delayed longer than we would have liked. I thought that submission to the City Council of an interim response to the order would be helpful and for that reason

have forwarded these materials to you. Our goal is to prepare and submit a draft ordinance to the City Council within the next few weeks.

Very truly yours,

A handwritten signature in black ink, reading "Donald A. Drisdell". The signature is written in a cursive style with a large, stylized "D" and "A".

Donald A. Drisdell



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M E M O

April 22, 1991

TO: Russell B. Higley
Donald Drisdell

FROM: Birge Albright

Re: Commercial Use of Public Sidewalks

=====

This memorandum is in response to Council Order #24 of October 15, 1990 (Councillor Duehay), which ordered

That the City Manager... is requested to develop a policy and companion ordinance... specifying under what conditions public sidewalks may be used commercially for sandwich boards, products and merchandise, outdoor tables, and all such related uses...

In this memorandum, I will first set forth the current state of the law, and, second, my recommendations.

I. CURRENT LAW

A. Hawkers and Peddlers

Municipal corporations ordinarily have power to require peddlers, hawkers and transient merchants to obtain licenses, and to pay fees for them, for the privilege of pursuing their activities within the municipality. 9 McQuillin, Municipal

Corporations, § 26.144 (1986). Municipal power of licensing is particularly clear respecting these activities where they are conducted on city streets. See Commonwealth v. Ellis, 158 Mass 555 (1893) (Holmes, J.); 7 McQuillin, Municipal Corporations, § 23.374 (1989).

1. Statutes

General Laws, c. 101, § 13 defines "hawker" and "peddler" as

... any person, either principal or agent, who goes from town to town or from place to place in the same town selling or bartering, or carrying for sale or barter or exposing therefor, any goods, wares or merchandise, either on foot, on or from any animal or vehicle.

G.L. c. 101 § 22

The Director of Standards in the Executive Office of Consumer Affairs may grant a license to a hawker or peddler, who files a certificate signed by the City Police Chief that the applicant has a good reputation.

The hawker or peddler is subject to "such local rules and regulations as may be made in a City by the mayor and City Council..."

G.L. c. 101 § 33 provides for the granting of special temporary licenses to charitable organizations to sell "flags, badges, medals, buttons, flowers, souvenirs, and similar small articles", by "such board or officer as may be designated by ordinance."

St. 1990, c. 117 amends G.L. c. 85 § 17A, as follows:

Notwithstanding the provisions of the first sentence of this section, on any city or town way which is not under

the jurisdiction of the department (of public works), the Chief of Police of a city... may issue a permit to non-profit organizations to solicit on said ways in conformity with the rules and regulation established by the Police department of said City...

I believe that this amendment is intended to deal with the practice of soliciting money from the occupants of motor vehicles on public ways.

2. Cambridge Code

Chapter 5.36 (Peddlers)

§ 5.36.010 Permit required - Fee

No person shall sell any goods or keep a table on any sidewalk without a permit from the Superintendent of Streets.

§ 5.36.020 Selling of certain foods - Permit required - Fee

"The Board of License Commissioners may grant a license to... peddle meats, butter, cheese, fish and fresh fruit or vegetables..."

§ 5.36.060 (Harvard Square)

No person shall peddle goods in the Harvard Square area without a permit issued by the Chief of Police.

B. Signs and Other Structures
Projecting Onto and Over Ways

The control of highways, including sidewalks, has generally been regarded as primarily a state duty, which is ordinarily delegated to some extent to municipalities within the limits of constitutional requirements. See 10A McQuillin, Municipal Corporations, § 30.39 (1990). The streets and sidewalks of a city are held by it in trust for the public, to be used for the ordinary purpose of travel. It follows that these public ways must be kept

free from obstructions which impair their use as public thoroughfares. See Id., § 30.73. See Commonwealth v. McCafferty, 145 Mass 384 (1888) (Ordinance forbidding the placing or carrying, on any sidewalk, of any placard or sign, is reasonable and valid.

1. Statutes

G.L. c. 83, § 25

... No... sidewalk shall be obstructed without the consent of the board or officer having charge of the maintenance and repair of public ways in a city...

G.L. c. 85, § 8

The municipal board or officer having charge of the laying out of public ways may grant permits for the placing... of signs... on or over public ways... and may fix the fees therefor, and may make rules and regulations...

2. Cambridge Code

Chapter 12.08 (Advertising Signs and Displays)

§ 12.08.010

Encroachments onto Streets - Permit required - Fee - Exceptions

No sign... placed on or over the public highway... except... shall be placed... in any, public way until a permit therefor has been granted by the City Council. The permit shall be issued by the Superintendent of Streets and the fee shall be (\$1.00).

§ 12.08.020

Display of merchandise - Permit - Fee

A. No merchandise shall be displayed within the limits of any public highway in the City without a permit granted by the City Council and issued by the Superintendent of Streets...

* * *

C. No permit shall be granted for encroachment of such merchandise, counter, platform or other apparatus or structure to exceed more than twenty-five percent of the width of the sidewalk...

Chapter 12.16 (Street and Sidewalk Use Regulations)

§12.16.080

Carrying showboards, placards and signs

No person shall, without authority from the Superintendent of Streets, place or carry, or cause to be placed or carried, on a sidewalk, a showboard, placard or sign for the purpose of there displaying or attracting attention to the same.

C. Street Performers

Although I am not aware of any Massachusetts statute on this subject, it is clear that the activities of street performers are protected by the First Amendment.

They are regulated by § 12.16.160 of the Cambridge Municipal Code, which was passed to be ordained on June 25, 1990. Under this section, street performers must obtain permits from the Cambridge Arts Council.

D. Newspaper Boxes

I am not aware of any Massachusetts statute or Cambridge ordinance on this subject. Like street performers and people using tables on the sidewalk to distribute literature, newspaper boxes (sometimes referred to as "newsracks") have some First Amendment protection, but there is disagreement as to the extent of this protection.

This disagreement is illustrated by the recent Supreme Court decision in Lakewood v. Plain Dealer, 486 U.S. 750 (1988), which held, 4-3, that a city ordinance giving the mayor unfettered discretion to deny a permit for placing newsracks on public property violated the First Amendment. The ordinance gave the Mayor the authority to grant or deny applications for annual

newsrack permits. If the Mayor denied the application, he or she was required to "state the reasons for such denial." If he granted the application, the permit would issue subject to several terms and conditions, including "such other terms and conditions deemed necessary and reasonable by the Mayor."

Justice Brennan, writing for himself and Justices Marshall, Blackmun and Scalia, held that the ordinance was subject to a facial challenge. He argued that, because the circulation of newspapers is itself protected, a licensing system which permits boundless discretion to determine the placement of newsracks implicates the First Amendment. He further states that a law subject to facial challenge must "have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks." Id. at 759.

In dissent, Justice White, joined by Justices Stevens and O'Connor, argued that the ordinance at issue did not regulate First Amendment activity, because the right of newspaper publishers to distribute their product, although protected, did not imply a right to distribute newspapers in whatever manner they wished, particularly on public property. "The right to leaflet does not create a right to build a booth on city streets from which leafletting can be conducted." Id. at 780. Justice White concludes, "... our precedents suggest that an outright ban on newsracks on city sidewalks would be constitutional, particularly where (as is true here) ample alternative means of 24 - hour

distribution of newspapers exist." Id. at 773.

II. RECOMMENDATIONS

It can be seen from the foregoing summary that the City's sidewalks are used for a great variety of activities in addition to pedestrian travel. Some of these activities, e.g., hawkers and peddlers, have no First Amendment protection. Others, e.g. leafletting, have the highest First Amendment status. A third category, e.g. newsracks, fall somewhere in between.

It is important to remember, however, that streets (including sidewalks) are maintained primarily for travel by the public. 39 Am. Jr. 2d., Highways, Streets and Bridges, § 192 (1968). Since the space on sidewalks is limited, the City must regulate the other activities so as to ensure that there is enough space for travel.

The key here is that municipalities may place reasonable time, place or manner restrictions on speech that takes place in the public forum, provided that these regulations are implemented without regard to the content of the speech. Such regulations must be "content-neutral,... narrowly tailored to serve a significant government interest, and (must) leave open ample alternative channels of communication." United States v. Grace, 461 U.S. 171, 177 (1983).

With this introduction, I make the following recommendations:

1. Street Performers

I recommend that the Arts Council continue to regulate street performers under Code § 12.16.160. It is important, however, that the Council have adequate personnel and equipment to carry out its

responsibilities.

I understand that there have been some recent complaints from businesses in the Harvard - Brattle Square area regarding performers playing during normal business hours. It may be necessary to amend the Code to deal with this problem.

2. All Other Activities

I recommend that licenses for all other activities on sidewalks be issued by the Commissioner of Public Works.

I attach a copy of the NIMLO Model Ordinance Regulating Street and Sidewalk Vendors, which could serve as a model for our ordinance. I believe that this ordinance could also cover signs placed on the sidewalk and charitable organizations which use tables to distribute literature and solicit donations.

Newspaper Boxes

If the City Council should decide to regulate newsracks, I believe that they should be governed by a separate ordinance, which would provide for licensing by the Commissioner of Public Works. This would have to be carefully drafted to comply with the Lakewood decision.

Ord#3\sidewalk.use\dadrbh.mem

NIMLO MODEL ORDINANCE REGULATING STREET AND SIDEWALK VENDORS

EDITOR'S NOTE: Prepared by Jennifer C. Pinson
NIMLO Staff Attorney

Regulation of street and sidewalk vendors is an area of interest to many municipalities. This model ordinance is designed to aid municipal attorneys charged with the task of drafting regulatory language on this subject. NIMLO members are reminded that these recommended guidelines, as with all NIMLO model ordinances, must be tailored to suit the individual needs and requirements of each municipality.

In preparing these recommended guidelines, we have gathered information from a wide variety of sources, including relevant case law and treatises. In addition, we have also examined ordinances and comments sent to us from many municipalities, including Sweetwater, Florida; Amherst, Massachusetts; Lancaster, Pennsylvania; Minneapolis, Minnesota; South Orange, New Jersey; Naperville, Illinois; Sioux City, Iowa; Phoenix, Arizona; Elgin, Illinois, and the Florida League of Cities.

Although certain legal issues surrounding street and sidewalk vendors are still evolving, we believe these recommended guidelines set out reasonable and effective procedures that incorporate important First and Fourteenth Amendment requirements.

The contents of this Model Ordinance do not encompass activities involved in any type of door-to-door solicitation or sales from newsracks, although these areas share many common legal concerns with street and sidewalk vending. Municipal regulation of these subjects is covered by other NIMLO Model Ordinances.

NOTE: Rulings on many of the legal issues involved in regulation of street and sidewalk vendors vary greatly among the state and federal courts. The municipal attorney should carefully research the law in the municipality's state courts and federal district and appeals courts before drafting an ordinance on this subject. The cases and comments in the Editor's Note are intended to serve as a general guideline only.

A. INTRODUCTION

The ability of a municipality to regulate or prohibit the sale of merchandise, food, or other articles on its streets, sidewalks, or other public ways depends largely upon the power delegated by the state, through the city charter or by statute. Ordinarily, a municipality may regulate such practices in the interests of protecting the health, safety, and welfare of the population. Brennan v. Titusville, 153 U.S. 289 (1894). Because the regulated activities necessitate the use of public streets, sidewalks, and thoroughfares, the municipality's police power may appropriately be applied. National Foundation v. Fort Worth, 415 F.2d 41 (5th Cir. 1969).

cert. denied, 396 U.S. 1040 (1970). Municipalities have the authority to regulate use of sidewalks for sale or display of vendors' merchandise, goods, etc. Newark v. Germano, 89 A.2d 298 (N.J. 1952).

Courts have generally held that a municipality may enact ordinances which completely prohibit vending on public ways, but only when the purpose of such a ban is to protect public health, safety, and welfare. Municipalities should always consult state law if such a total prohibition is desired. An Illinois state statute held to encompass the power to prohibit all vending on all public ways. Good Humor Corp. v. Village of Mundelein, 211 N.E.2d 269 (Ill. 1965). Other total prohibitions have been upheld in New Jersey, Good Humor Inc. v. Bradley Beach, 11 A.2d 113 (N.J. 1940); Waco v. O'Neal, 33 S.W.2d 205 (Tex.Civ.App. 1930). Specific types of prohibitions are discussed in following sections.

The regulation of vendors must be reasonable, non-discriminatory, and non-oppressive. Frost Bar, Inc. v. Shaker Heights, 141 N.E.2d 245 (Ohio C.P. 1954). The municipality may regulate activities which take place on public streets, public parks, and private property. However, such regulation must be in conformity with state law. Where a state statute empowers the municipality only to regulate the questioned activity, ordinances entirely prohibiting it have been held invalid. Washington v. Thompson, 160 N.E.2d 568 (Ohio C.P. 1949).

The Idaho Supreme Court rejected the claim of a hot dog stand vendor that an ordinance barring unlawful obstruction of sidewalks was vague. The court held that streets and sidewalks are held in trust by a municipality, and it has exclusive control over them by virtue of the police power. Because the city has no right or authority to grant a private right to use the public streets, issuance of a vending license confers no vested property right to use the sidewalks. Kleiber v. City of Idaho Falls, 716 P.2d 1273 (Idaho 1986).

B. TIME RESTRICTIONS

Municipalities may regulate business hours of vendors under the police power, but such regulation must be reasonable and must be related to protecting the public health, safety, and welfare. Feldman v. Cincinnati, 20 F. Supp. 531 (S.D. Ohio 1937); Justesen's Food Stores, Inc. v. Tulare, 111 P.2d 424 (Cal. App. 1941); Jones v. Moultrie, 27 S.E.2d 39 (Ga. 1943).

Ordinances regulating operating hours of lunch wagons and other food vendors must not discriminate between such transient food servers and permanent restaurants. An ordinance requiring lunch wagons, but not restaurants, to be closed between the hours of 1 a.m. and 7 a.m. was found unreasonable. Hart v. Teaneck Tp., 50 A.2d 856 (N.J. 1947).

Ordinances prohibiting vending before, during, and after school hours have been upheld. Commonwealth v. Gulden, 341 N.E.2d 262 (Mass. 1970); Duchain v. Lindsay, 345 N.Y.S.2d 53, appeal dismissed, 419 U.S. 809 (1974). The Seventh Circuit upheld a Maywood, Illinois ordinance which denied mobile food dispenser vehicles the right to operate between 8 a.m. and 4 p.m. in residential areas when school is in session. The court held the ordinance was a reasonable means of seeing that children come and go from school in a timely fashion, which is a legitimate government interest. Vaden v. Village of Maywood, 809 F.2d 361 (7th Cir. 1987), cert. denied, 482 U.S. 908 (1987).

C. PLACE RESTRICTIONS

Ordinances prohibiting vending on specified streets in a municipality have been upheld where such regulation was necessary to prevent a traffic hazard, to protect life and property, etc. Ordinances restricting vending to designated streets of the central business district have been upheld. Perry v. Chicago, 480 F. Supp. 498 (N.D. Ill. 1979); Paine v. Conway, 395 A.2d 517 (N.H. 1978). However, such restrictions must be narrowly drawn and have a reasonable relation to public health and safety. Italiano v. Harrison, 488 N.Y.S.2d 13 (1985); Huggins v. New York, 484 48 (1984).

A town's stated goals of preventing traffic congestion and protecting citizens in their homes was found to justify a regulation prohibiting vending on certain streets in the town. Local flower vendors had challenged the ordinance as intending to protect retail florists from competition. The court ruled for the town, holding that the allegation's truth was not established beyond a reasonable doubt. Bobka v. Town of Huntington, 532 N.Y.S.2d 561 (1988).

Municipalities must make policy decisions on whether to grant licenses for a fixed and designed vending location or for a non-fixed location, in which the vendor is prohibited from remaining in any one location for longer than generally necessary to make a sale. Typically, vendors using stands are granted the former, while those using motor vehicles are granted the latter. Mister Softee v. Hoboken, 186 A.2d 513 (N.J. 1962), overruled in part by Brown v. City of Newark, 552 A.2d 125 (N.J. 1989), (see infra); Barr v. City of Syracuse, 411 N.Y.S.2d 814 (1978).

Numerous cases have arisen from the placement of fixed location stands near permanent, established businesses, particularly those selling similar goods. Several courts have ruled in favor of established merchants whose rights have been threatened by vendors on abutting public ways. Barr v. City of Syracuse, supra. However, most courts have ruled for the vendors. Operators of a Philadelphia business claimed the city's vendor licensing provisions were unconstitutional because they deprived owners of property abutting the proposed location, or to limit vending to particular location. The court upheld the ordinance. Newsstand, Inc. v. City of

Philadelphia, 577 F. Supp. 1576 (E.D. Pa. 1984), aff'd. 746 F.2d 1467 (3rd Cir. 1984).

An ordinance regulating vendors is valid insofar as it prohibits vending near bus stops, but a section of the ordinance requiring vendors to move unless making a sale is void for vagueness. Brown v. City of Newark, 552 A.2d 125 (N.J. 1989). The Supreme Court of New Jersey held that because a peddler by definition moves from place to place, if the ordinance is read literally, a vendor would not know how long he could stay in one place to attract sales. This, the court said, gives the police too much discretion in enforcing the ordinance. This holding overruled an earlier New Jersey Superior Court finding in Mister Softee v. Hoboken, 186 A.2d 513 (N.J. 1962), although the remainder of the earlier case was primarily left intact. A New York appellate court reached a conclusion similar to the Brown court's in Russell v. Pittsford, 464 N.Y.S.2d 906 (1983).

The Louisiana Supreme Court struck down ordinances requiring itinerant vendors to move to a new site every two days and further requiring that each new location be at least 1,000 feet from the prior location. The court held that the restrictions were not reasonably related to the legitimate government purposes of protecting health, property, and aesthetic values. City of Lake Charles v. Chaney, 468 So.2d 1191 (La. 1985).

An ordinance prohibiting the vending or peddling of any commodity upon the public streets and public property from any type of motor vehicle has been upheld. Blue Sky Bar, Inc. v. Town of Stratford, 493 A.2d 908 (Conn. App. 1985), aff'd. 523 A.2d 467 (Conn. 1987). The court found that the town possessed the statutory authority to prohibit vending from motorized vehicles and the ordinance was a reasonable exercise of the town's police power. Several cases have held that a municipality may not entirely prohibit vending from ice cream trucks absent a compelling showing of danger to public safety, particularly that of children. Otherwise, such total prohibition is arbitrary and unreasonable. Delight Wholesale Co. v. Prairie Village, 491 P.2d 910 (Kan. 1971); Trio Distributor v. Albany, 143 N.E.2d 329 (1957).

A California appellate court upheld an ordinance prohibiting the sale of food and beverages from non-motorized pushcarts, holding that safety concerns constituted a rational basis for the ordinance. The ordinance was found not to violate equal protection, despite the contention that it discriminated against those of Mexican ancestry. Mora Amezcua v. City of Pomona, 216 Cal. Rptr. 37 (1985).

Ordinances prohibiting vending near schools have been upheld. Mister Softee v. Hoboken, supra; Duchain v. Lindsay, 345 N.Y.S.2d 53, appeal dismissed, 419 U.S. 809 (1974). See also Vaden v. Village of Maywood in Time Restrictions, supra.

D. MANNER RESTRICTIONS AND LICENSING

LICENSING AND FEES

Municipalities have the power to require vendors to obtain licenses or permits and to pay fees or taxes for them, for the privilege of conducting their business within the municipality. Healy v. Ratta, 1 F.Supp. 669 (N.H. 1932), aff'd. 67 F.2d 554 (1st Cir. 1933), rev'd. on jurisdictional grounds 292 U.S. 263 (1934). Municipal licensing powers are especially enforceable when peddling is pursued on municipal streets. Therefore, a city may constitutionally prohibit all sales on its streets unless the vendor has obtained a license from the city. People v. Ala Carte Catering Co., 159 Cal. Rptr. 479 (1979);

Licensing boards or officials must take action on license applications without delay. People v. Domick, 326 N.Y.S.2d 466 (1971). Denial of a vending license must not be arbitrary or unreasonable. Procedural due process requires that disapproval of a license application be preceded by adequate notice and a hearing. Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963).

Municipalities may require strict regulation of vendors selling foodstuffs or beverages, primarily due to health concerns. New Orleans v. Dukes, 427 U.S. 297 (1976); People v. Ala Carte, supra; People v. Christian, 410 N.Y.S.2d 513 (1978). An ordinance placing a cap on the number of permits issued to vehicles for street food vending was upheld in light of the city's traffic congestion. Short Stop Industrial Catering Corp. v. New York, 485 N.Y.S.2d 921 (1985).

In some states, vendors are subject to both state and local licensing, although this varies from state to state. Requirements for payment of license fees or taxes also vary according to state laws. Stone v. Seale-Lily Ice Cream Co., 52 So.2d 486 (Miss. 1951); Frecker v. Dayton, 85 N.E.2d 419 (Ohio 1949); Washington v. Thompson, 160 N.E. 2d 568 (Ohio C.P. 1949); Murfreesboro Bread v. Town of McMinnville, 68 S.W.2d 935 (Tenn. 1934). Municipalities should always consult state laws on vendor licensing before drafting an ordinance.

Any ordinance requiring vendors to pay license fees must be reasonable, non-arbitrary, and non-discriminatory. Shapiro v. Newark, 130 A.2d 907 (N.J. 1957). Ordinances may distinguish between itinerant merchants and regularly established merchants, thereby imposing higher fees on itinerants than on non-itinerants. Louisville v. Koehler, 264 S.W.2d 80 (Ky. 1954); Aluminum Cooking Utensil Co. v. North Bend, 311 P.2d 464 (Or. 1957).

However, vendors who are non-residents of the municipality may not be subject to licensing and fees greater than those applicable to residents, unless a reasonable basis exists for such distinction. Louisville v. Koehler, supra; Grantham v. Chickasha, 9 P.2d 747 (Okla. 1932). The U.S. Supreme Court affirmed a lower court ruling

which found unconstitutional a solicitation ordinance exempting those who have resided in the town for at least six months. Town of Southhampton v. Troyer, 449 U.S. 988 (1980).

INSURANCE AND BONDING

Many municipalities require vendors, as a prerequisite to obtaining a vending license, to provide either a surety bond or an insurance policy to the city to protect against any property damage, injury, or death caused by the vendor or vending equipment. Such requirements must be for reasonable amounts. State v. Brown, 188 A. 713 (Me. 1936); Larson v. Shelton, 224 P.2d 1067 (Wash. 1950).

FINGERPRINTING AND CRIMINAL BACKGROUND

Ordinances often require fingerprinting and criminal background checks for their vendor licensing applications. However, municipalities should consult state laws and court rulings regarding the use of prior convictions as grounds for the denial of a vending license. While few cases exist on fingerprinting of vendors, several cases on fingerprinting of solicitors lend guidance.

In a pertinent case, the Supreme Court held a city may use identificatfion devices to control abuses made by criminals posing as solicitors. Martin v. City of Struthers, 319 U.S. 141 (1943). The Third Circuit has held, however, that fingerprinting of solicitors violates the First Amendment unless the municipality can show there is a substantial relation between fingerprinting and some legitimate and important state interest. Township of Piscataway v. New Jersey Citizen Action, 797 F.2d 1250 (3rd Cir. 1986), cert. denied, 479 U.S. 1103 (1987). Because of its commercial nature, the need for First Amendment protecting is less compelling with vending than with solicitation, particularly non-commercial solicitation.

In Miller v. District of Columbia Board of Appeals and Review, 294 A.2d 365 (D.C. 1972), the court reversed the city's denial of a license to sell jewelry. Although the applicant had prior felony convictions, no evidence supported the conclusion that the applicant was not rehabilitated at the time he applied for the license. However, while an applicant's prior crimes may be insufficient reason for denial of the application, conviction may be a basis for denial when the offense is relative to a vending business, or related to the competency of the applicant. Wes Ward Enterprises, Ltd. v. Andrews, 355 N.E.2d 131 (Ill. 1976); Brown v. Murphy, 224 N.Y.S.2d 423 (1962).

NUISANCE/NOISE

Because a municipality has police power to abate public nuisances, ordinances may be enacted prohibiting the outcry by vendors of their goods for sale, the ringing of bells, and the making

of other such noises. Mister Softee v. Hoboken, 186 A.2d 513 (N.J. 1962), overruled in part by Brown v. City of Newark, 552 A.2d 125 (N.J. 1989); New Jersey Good Humor, Inc. v. Bradley Beach, 11 A.2d 113 (N.J. 1940). However, such prohibitions have been held not to extend to the characteristic "tinkle" of ice cream trucks. Mister Softee v. Hoboken, supra.

The New Jersey Supreme Court upheld the portions of an ordinance that prohibits acts that create a nuisance, regulates cart size, and requires vendors to keep receipts. Brown v. City of Newark, 552 A.2d 125 (N.J. 1989). The court held that economic regulations of vendors need only be rationally related to a legitimate governmental purpose, and not be arbitrary, capricious, or unreasonable.

E. EXEMPTIONS

Statutes or ordinances may exempt certain persons from vending license requirements. Murfreesboro Bread and Ice Cream Co. v. Town of McMinnville, 58 S.W.2d 935 (Tenn. 1934); Larson v. Shelton, 224 P.2d 1067 (Wash. 1950). Ordinances which exempt certain classifications of goods from licensing requirements must be reasonably related to the purpose of the regulation.

Exemptions for newspaper sales have been upheld. Hixon v. Texas, 523 S.W.2d 711 (Tex.Crim.App. 1975); City of Chicago v. Rhine, 2 N.E.2d 905 (Ill. 1936). Ordinances exempting certain classifications of persons have also been upheld including vending by charitable organizations. Perry v. Chicago, 480 F.Supp. 498 (N.D. Ill. 1979). Ordinances allowing vending permits for special events, such as during the Christmas season only, have been upheld. Commonwealth v. Gulden, 341 N.E.2d 262 (Mass. 1970).

Certain types of merchandise have been held to be within the scope of First Amendment protection; therefore, regulations pertaining to their sale must be narrowly drawn. Milwaukee Mobilization for Survival v. Milwaukee County Park Comm'n., 474 F. Supp. 881 (E.D. Wis. 1979); Field Enterprises Education Corp. v. Village of Wheeling, 248 N.E.2d 666 (Ill. 1969); H & L Messengers, Inc. v. City of Brentwood, 577 S.W.2d 444 (Tenn. 1979).

An ordinance regulating commercial speech, including certain vending activities, must (1) concern lawful activity and not be misleading; (2) seek to implement a substantial government interest; (3) directly advance that interest; and (4) reach no further than necessary to accomplish the given objective. Central Hudson Gas and Electric v. Public Service Commission of New York, 447 U.S. 557 (1980).

However, certain commercial activities intertwined with the exercise of First Amendment rights have been held not subject to First Amendment protection. A city may require street artists to obtain vending licenses while exempting those who sell newspapers. A New York City ordinance was upheld which exempted sellers of

newspapers and pamphlets from vendor licensing but kept the requirements for the paintings of street artists. The court held the city did not violate the equal protection clause because the decision to exempt some street vendors was based on their medium of expression, not the content of their speech. People v. Milbry, 530 N.Y.S.2d 928 (1988).

Farmers and growers selling their own products on city streets and sidewalks may be exempted from licensing. Such exemptions have been found constitutional. Youngquist v. Chicago, 90 N.E.2d 205 (Ill. 1950); Stone v. Wichita, 65 P.2d 595 (Kan. 1937); Mims v. Fort Worth, 61 S.W.2d 539 (Tex.Ct.App. 1933).

For further reference, see 14 A.L.R.3d 896 (1967) Annotation on "Authorization, prohibition, or regulation by municipality of the sale of merchandise on streets or highways, or their use for such purpose."; Rhyne's The Law of Local Government Operations, Section 19.38; and McQuillin's Municipal Corporations, Sections 26.144 through 26.147.

BE IT ORDAINED BY THE CITY OF _____.

Section _____. Findings and Purpose.

It is found and declared that:

(a) The primary purpose of the public streets, sidewalks, and other public ways is for use by vehicular and pedestrian traffic;

(b) Vending on such public ways promotes the public interest by contributing to an active and attractive pedestrian environment;

(c) Reasonable regulation of vending on public ways is necessary to protect the public health, safety, and welfare; and

(d) The regulations contained in this ordinance are not intended to prohibit or hamper speech which is protected by the First Amendment, but merely to regulate specific activities which are commercial in nature.

Section _____. Definitions:

(a) "Motor vehicle" shall mean any vehicle used for the displaying, storing, or transporting of articles for sale by a vendor which is required to be licensed and registered by the state department of motor vehicles. The term is to include trailers, trucks, and automobiles.

(b) "Public way" shall mean all areas legally open to public use such as public streets, sidewalks, roadways, highways, parkways, alleys, parks, as well as the interior and areas surrounding public buildings.

(c) "Special event" shall mean any occasion including, but not limited to fairs, shows, exhibitions, city-wide celebrations, festivals, etc. within a specifically defined area of the city of _____ for a period of time not to exceed _____ days.

(d) "Stand" shall mean any newsstand, table, bench, booth, rack, handcart, pushcart, or any other fixture or device which is not required to be licensed and registered by the department of motor vehicles, and is used for the display, storage, or transportation of articles offered for sale by a vendor.

(e) "Vendor" shall mean any individual, including an employee or agent of a group of individuals, partnership, or corporation, who sells or offers to sell food, beverages, goods, or merchandise on any public way from a stand, motor vehicle, or from his or her person.

Section _____. License Required.

It shall be unlawful for any vendor to sell, display, or offer for sale any food, beverage, goods, or merchandise on a public way within the city of _____ without first obtaining a license from the city's _____.

(* NOTE: The appropriate licensing agency, board, etc. within the city should be specified here.)

Section _____. Application.

The application for a vendor's license shall contain all information relevant and necessary to determine whether a particular license may be issued, including but not limited to:

(a) Full name, home address, permanent business address (if any), telephone number, driver's license number, three copies of a current full-face photograph, and proof of identity;

(b) A brief description of the nature, character, and quality of the food, beverages, goods, or merchandise to be sold;

(c) The specific location, if any, in which the vendor intends to conduct business;

(d) If vendor is employed by or is an agent of another, the name and business address of the principal/hiring person, firm, association, organization, company or corporation.

(e) If a motor vehicle is to be used in the vending business, a description of the vehicle together with the motor vehicle registration number and the license number;

(f) A complete listing of any other licenses or permits issued to applicant by the city of _____ within the past five years.

Section _____. Health Permits.

The application of any vendor engaged in the sale of food or beverages shall also be referred to the local health department for approval of a health permit in addition to the regular vending license. Such vendor's equipment shall be subject to inspections by the health department at the time of application and at periodic intervals thereafter.

(*NOTE: The city may wish to be much more specific in granting a vending license for the sale of food or beverages, with additional regulations on cooking, waste disposal, inspections, etc. Such regulations may be included in the vendor ordinance, or reference may be made to sections of a food service ordinance, health ordinance, etc.)

Section _____. Issuance of License.

Not later than 30 days after the filing of a completed application for a vendor's license, the applicant shall be notified in writing by the license officer of the decision on the issuance or denial of the license. If the vendor applicant complies with all application requirements and is found to have no nonconformities rationally related to sales on public ways in the city of _____, the the applicant shall be issued a vendor's

license. If a food and beverage applicant meets the prior requirements, and receives health department approval, then such applicant shall be issued both a vending license and a health permit. Any applicant denied a vending license may seek an appeal pursuant to Section _____. A vending license is valid for a period of one year from the date of issuance.

(*NOTE: In granting licenses for vending from stands, a municipality will generally assign the vendor to a specific location specified in the license. Selection of this location may be accomplished by lottery, by a first-come, first-served basis, or by another method as predetermined by the municipality. At license renewal time, the municipality may choose to approve a location different from that granted in the original license.)

Section _____. Special Events.

Vendors wishing to conduct business at any special event shall apply to the city for a Temporary Vending License. Application for such a license must be made at least _____ days prior to the beginning of the event. The license is valid only for the duration of the special event. Fees for such licenses shall be as specified in Section _____. Vendors granted a temporary license are subject to the same operating regulations as other vendors, except where otherwise specified.

(*NOTE: In certain situations, the applicant for a temporary vendor license may appropriately be the sponsor of the special event. Also, the city should state in this section whether temporary license applicants must meet the same application requirements as other vendors, including health permit specifications.)

Section _____. Exemptions.

The following vendors are exempt from the licensing requirements of Sections _____ and _____, but shall otherwise be required to comply with the provisions of this ordinance:

(a) All religious, non-profit, and charitable organizations, including school groups;

(b) The sale of fresh produce by the grower of such produce;

(c) Vendors, merchants, exhibitors, and salesman who exhibit, demonstrate, or solicit orders for goods in conjunction with, and as

part of, the organized program of conventions, professional meetings, seminars, etc,

(d) Any individual selling newspapers or magazines, or distributing free samples from his or her person.

Section _____. Fees.

Each vendor granted a license under this ordinance shall pay an annual license fee of _____. Vendors granted Temporary Vending Licenses for special events shall pay a fee of _____ per day of vending permitted.

Section _____. Insurance or Bond.

No license shall be issued to an applicant unless the applicant furnishes proof to the city of a public liability bond or insurance policy in an amount not less than _____ for property damage and injuries, including injury resulting in death, caused by the operation of the vending business.

Section _____. Licenses and Identification Badges.

(a) The license issued to a vendor shall be carried with the vendor at all times when he or she is engaged in the business of vending. If the vendor sells food or beverages, the health permit must also be displayed.

(b) In addition to the license, the city shall issue an identification badge to every vendor. Vendors shall display their badges in such a way that the badges may be easily read, while doing business. If a badge becomes damaged or obscured, the vendor shall return it to the city and receive another badge.

(c) Licenses, permits, and identification badges shall be used only by the person to whom they were issued and may not be transferred to any other person.

Section _____. Restrictions Applicable to All Vendors.

(a) Stands. Vendor stands shall not:

(1) Exceed _____ feet in length, _____ feet in width, or _____ feet in height;

(2) Impede access to the entrance or driveway of any adjacent building;

(3) Occupy more than half of the available sidewalk width or _____ feet of such sidewalk, whichever is less.

(b) Hours of Operation. Vendors shall be allowed to engage in the business of vending only between _____ a.m. and _____ p.m. All vending stands must be removed from public property during non-vending hours. When Temporary Vending Permits are sought for special events, etc. (see Section _____), the applicant may request from the city an exception to the usual hours of operation. All stands used for vending must be removed from public property during non-operating hours.

(c) Handicapped areas. No vendor shall conduct business within _____ feet of any handicapped parking space or access ramp.

(d) Removal of trash. All trash or debris accumulating within _____ feet of any vending stand shall be collected by the vendor and deposited in a trash containers. All vendors selling food or beverages must provide trash receptacles adjacent to or as a part of their stands.

(e) Prohibited areas. A vending license issued pursuant to this ordinance is valid only on the public ways of the city of _____. The city shall prohibit vendors from selling on specified public ways if it determines such prohibitions are necessary for the protection of public health and safety. Vendor stands and motor vehicles are prohibited within _____ feet of a fire hydrant, fire escape, bus stop, loading zone, or driveway of a fire station, police station, or hospital.
(*NOTE: The city may also wish to prohibit vending near schools between the hours of 8 a.m. and 4 p.m. on school days.)

(f) Noise. No vendor may sound any device which produces a loud and raucous noise, or use or operate any loudspeaker, public address system, radio, sound amplifier, or similar device to attract public attention.

(g) Motor vehicles. No vendor vending from a motor vehicle shall:

(1) Stop, stand or park the vehicle within _____ feet of any intersection, within any other prohibited area, or during prohibited hours;

(2) Conduct business in such a way as would increase traffic congestion or delay, constitute a hazard to life or property, interfere with an abutting property owner, or obstruct access to emergency vehicles.

(h) Pushcarts. Vendors utilizing pushcarts or other mobile, non-motorized vending stands may only conduct business in each location for a period of _____ minutes* at a time. At the end of that period, such vendors must move to a new vending location at

least _____ feet* from the previous location. Pushcart vendors who do not adhere to these regulations will be considered fixed-location stand vendors, and will be assigned to a fixed location.
(*Note: Some cities limit this time to 30 minutes and require a move of at least 500 feet.)

Section _____. Suspension or Revocation of License.

(a) Any license issued under this ordinance may be suspended or revoked for any of the following reasons:

- (1) Fraud or misrepresentation in the application for the license;
- (2) Fraud or misrepresentation in the course of conducting the business of vending;
- (3) Conducting the business of vending contrary to the conditions of the license;
- (4) Conducting the business of vending in such a manner as to create a public nuisance or constitute a danger to the public health, safety or welfare;
- (5) Conviction of any crime involving moral turpitude while holding a vending license from the city of _____;
- (6) Cancellation of health department authorization for a food or beverage vending unit due to uncorrected health or sanitation violations.

(b) Upon suspension or revocation, the city shall deliver written notice to the license holder stating the action taken and the reasons supporting such action. The written notice shall be delivered to the license holder's place of business or mailed to the license holder's last known address.

Section _____. Appeals.

Persons who are denied licenses or whose licenses have been suspended or revoked may appeal by filing a written notice of appeal with the city council
(*NOTE: Instead of the city council, the city may use a permit board or other appropriate adjudicative agency.)

Section _____. Renewals.

Licenses may be renewed, provided an application for renewal and license fees are received by the city no later than the expiration date of the current license. Applications received after that date

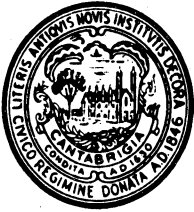
shall be processed as new applications. The city shall review each application for renewal to determine that the applicant is in full compliance with the provisions of this ordinance. If the city finds that the application meets the above requirements, the city shall issue a new license.

Section _____. Penalties.

Any person who violates any provision of this ordinance shall be punished by a fine not to exceed _____ or by imprisonment not to exceed _____, or by both fine and imprisonment.

Section _____. Severance Clause.

The provisions of this ordinance are declared to be severable and if any section, sentence, clause, or phrase of this ordinance shall for any reason be held to be invalid or unconstitutional, such decisions shall not affect the validity of the remaining sections, sentences, clauses, and phrases of this ordinance, but they shall remain in effect, it being the legislative intent that this ordinance shall stand notwithstanding the validity of any part.



EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

RICHARD C. ROSSI
Deputy City Manager

CITY OF CAMBRIDGE
CAMBRIDGE, MASSACHUSETTS 02139

TEL 349-4300
FAX 349-4307

October 5, 1992

To The Honorable, The City Council:

Please find attached a response to Awaiting Report Item No. 1, regarding policy for sandwich board signs, received from Donald A. Drisdell, Deputy City Solicitor, relative to this issue.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Robert W. Healy", written in a cursive style.

Robert W. Healy
City Manager

RWH/mev
attachments

CONSENT AGENDA ITEM #16

#1-195

Awaiting Report Item No. 1 regarding policy
for sandwich board signs.

In City Council,

October 5, 1992

Placed on file