



**CITY OF CAMBRIDGE**  
**INTEROFFICE CORRESPONDENCE**

**To** Russell B. Higley, City Solicitor

**Date** May 25, 1983

**From** Paul E. Healy, City Clerk

**Reference**

**Subject** City Council Agenda Item No. 14 and Order No. 7  
of May 23, 1983

Enclosed herewith you will find copies of two items which were referred to your attention at the City Council meeting of Monday, May 23, 1983.

The first being Agenda Item No. 14, regarding fees paid for newspaper vending machines, was referred to your attention on motion of Councillor Duehay.

The second being Order No. 7, as introduced by Mayor Vellucci, requesting that the City Manager instruct the Commissioner of Public Works to deny issuance of any further construction/excavation permits to the D. Cicconi Company until a public hearing is held before the City Council. Said proposed order was referred to you for action on motion of Councillor Walter Sullivan.

Your kind attention in this matter will be greatly appreciated by the City Council.

PEH/mh

Enclosures

Re: response to Awaiting Report Item No. 11  
regarding fees for newspaper vending  
machines.

*5/23/83*  
*Report Requested*

In City Council,

May 23, 1983

*5/23/83*  
*Response to the*  
*City Solicitor*  
*" " "*



# CITY OF CAMBRIDGE

CAMBRIDGE, MASSACHUSETTS 02139  
Tel. 498-9011

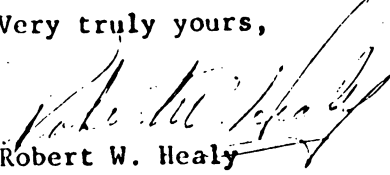
EXECUTIVE DEPARTMENT  
ROBERT W. HEALY  
City Manager

May 23, 1983

To the Honorable, the City Council:

With reference to Awaiting Report Item No. 11,  
I transmit herewith communication received from the  
Law Department, relative to fees for newspaper vending  
machines.

Very truly yours,

  
Robert W. Healy  
City Manager

RWH/b



CITY OF CAMBRIDGE  
INTEROFFICE CORRESPONDENCE

To Mr. Robert W. Healy  
Mr. Everett R. Kennedy

Date May 20, 1983

From Birge Albright, Esq. *BA*  
Law Department

Reference

Subject Fees - Newspaper Vending Machines

I enclose a copy of a recent opinion by the City Attorney of San Diego, which reaches the following conclusions:

1. A city may not charge a rental, regulatory or permit fee for the placement of newsracks on city streets or sidewalks.

2. A city may require newsracks to be of uniform dimensions and to be kept clean and in good repair. But "the regulation of the appearance of (newsracks), to the extent that it involves a subjective aesthetic judgment, would be impermissible."

I am also enclosing a copy of 10 McQuillin, Municipal Corporations, §30.101a (1981), which discusses the kind of "time, place and manner" regulations which might be acceptable.

I would be happy to get together with you, Everett, to work out some regulations.

BA/jl

Encs.

ROBERT S. TEAZE  
ASSISTANT CITY ATTORNEY  
CURTIS M. FITZPATRICK  
SENIOR CHIEF DEPUTY CITY ATTORNEY

OFFICE OF  
**THE CITY ATTORNEY**  
CITY OF SAN DIEGO  
JOHN W. WITT  
CITY ATTORNEY

CITY ADMINISTRATION BUILDING  
SAN DIEGO, CALIFORNIA 92101  
(714) 236-6220

OPINION NO. 83-2

DATE: February 16, 1983  
SUBJECT: Regulation of Newsracks  
REQUESTED BY: Councilman Bill Mitchell  
PREPARED BY: Anthony J. Shanley, Deputy City Attorney

QUESTIONS PRESENTED

By memorandum of January 18, 1983, you inquire on behalf of two La Jolla community groups about the regulation of newsracks in the public right-of-way. The La Jolla Town Council has asked whether the City may require all newspaper racks in the La Jolla Community Plan area to be of uniform appearance with the Town Council to be involved in the approval of the design.

In addition, you ask whether a rental, regulatory, or permit fee may be charged to compensate the public for this use of the City's streets and to offset the costs involved in regulation. Finally, you ask whether the answer to this second question would be different if the newspapers were distributed for free rather than being offered for sale.

CONCLUSIONS

The City may, as it presently does, require newsracks to be of uniform dimensions and to be kept clean and in good repair. However, the regulation of the appearance of these devices, to the extent that it involves a subjective aesthetic judgment, would be impermissible.

A rental or permit fee of the kind proposed would not be permissible--regardless of whether the newspapers are offered for sale or distributed free of charge.

DISCUSSION

At the outset it should be emphasized that the publication and distribution of newspapers in the United States is no ordinary business enterprise. A free press is one of the hallmarks of our democracy. The courts of this country have long recognized the dissemination of information on the public streets as a uniquely protected constitutional right fundamental to the principles upon which this nation was founded. It is almost axiomatic that when one set of values is accorded so high a priority others, however worthwhile, must yield.

In recent years both state and federal courts have specifically and consistently ruled that newsracks are a constitutionally protected means of distribution. Philadelphia Newspapers, Inc. v. Borough C., etc. Swarthmore, 381 F.Supp. 228 (1974); Kash Enterprises, Inc. v. City of Los Angeles, 19 Cal.3d 294 (1977); California Newspaper Publishers Association, Inc. v. City of Burbank, 51 Cal.App.3d 50 (1975); Larry Remer v. City of El Cajon, 52 Cal.App.3d 441 (1975); Gannett Co. v. City of Rochester, 330 N.Y.S.2d 648 (1972).

In Kash Enterprises, supra, at 299-300, the California Supreme Court begins its discussion of a Los Angeles City newsrack ordinance as follows:

In evaluating the constitutionality of . . . the municipal newsrack regulations at issue here, we must begin by recognizing that the right to distribute newspapers and other periodicals on the public streets lies at the heart of our constitutional guarantees of freedom of speech and freedom of the press. As both The United States Supreme Court and this court have emphasized on numerous occasions: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purpose of assembly, communicating thoughts between citizens, and discussing public questions." (Hague v. C.I.O. (1939) 307 U.S. 496, 515 [83 L.Ed. 1423, 1436, 59 S.Ct. 954].)

The Kash court specifically addresses the question of whether a municipality may include subjective aesthetic standards in its regulatory system. The Los Angeles ordinance at issue in Kash required that newsracks be maintained in an "attractive condition." The Supreme Court indicated that, to the extent such a requirement imposed aesthetic standards beyond the commonly accepted meaning of the terms clean and neat, it was constitutionally unacceptable.

Your question regarding the right of the City to charge the newspaper distributor for, in effect, setting up a business on City property rests on a somewhat faulty premise--that the streets are in fact the property of the City. In most cases the City does not own its streets outright, but owns only an easement for street purposes; fee title ordinarily remains vested in the owner of the adjacent property. Based on this rationale this office has advised the Mayor and Council that where the City owns only an easement for street purposes it may not lease unneeded right-of-way for non-street purposes since the City itself has no right to use the property for anything but street purposes. Opinions of the City Attorney, No. 82-1, March 22, 1982, and authorities cited therein.

This reasoning would preclude the City from renting or leasing street space for non-street purposes, such as the vending of general merchandise. However, as indicated in the case law cited above, the distribution of newspapers has not only been accepted as a traditional and proper street purpose, but it enjoys the status of a protected constitutional right.

The narrow question that remains is whether or not that right, to distribute newspapers in the public right-of-way, may be conditioned upon the payment of a regulatory fee.

There do not appear to be any reported California cases in which the question of a permit fee for newsracks has been specifically at issue. However, one of the landmark newsrack cases addresses the permit question as follows:

To make it unlawful to maintain or use any table, box, stand, newspaper vending machine or other structure for the sale, display or storage of newspapers or magazines upon any

sidewalk without obtaining a permit constitutes a giant step backward into a time when people were afraid to express themselves and government was for the privileged few.

Gannett Co. v. City of Rochester,  
330 N.Y.S. 2d 648, 655 (1972).

The Rochester newsrack ordinance at issue in the Gannett case involved the imposition of a fee in an amount not to exceed the cost of processing the permit application with a maximum fee of ten dollars per newsrack. The Gannett court characterized this requirement as an unconstitutional prior restraint on the exercise of First Amendment rights. Gannett has been cited with approval by both the federal courts and the California Supreme Court. See, Philadelphia Newspapers, Inc. v. Borough C. etc. Swarthmore, 381 F.Supp. 228 (1974); and Kash Enterprises, Inc. v. City of Los Angeles, 19 Cal.3d 294 (1977). It seems likely that if the same question were presented to either the state or federal courts in California, they would reach the same conclusion as in Gannett.

Finally, you ask whether it makes any difference if the newspapers are offered for sale, rather than being distributed free of charge. It does not. In a leading First Amendment case decided by the United States Supreme Court more than forty years ago, Mr. Justice Douglas reminds us that the works of Thomas Paine were not distributed free of charge. The opinion continues:

Freedom of speech, freedom of the press,  
freedom of religion are available to all,  
not merely to those who can pay their own way.

Murdock v. Pennsylvania, 319 U.S. 105,  
111 (1942).

More recently in Philadelphia Newspapers a federal district court addressed the specific question of newsracks operated for profit in the public right-of-way:

While we are sensitive to the commendable goals of the residents of the Borough to control what may be perceived as a pervasive commercialism in our cities that is rapidly encroaching upon pleasant and well-ordered

suburban communities such as the Borough of Swarthmore, we cannot agree with the contention that a newspaper loses the protection of the First and Fourteenth Amendments merely because it is operated for profit, or forms part of a profit-making enterprise.

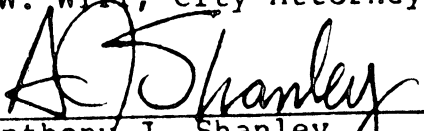
Philadelphia Newspapers, Inc. v. Borough C., etc. Swarthmore, 381 F.Supp. 228, 239 (1974).

At first, the parallel between the concerns of the residents of the Borough of Swarthmore and those expressed by the community groups in La Jolla may seem remarkable. However, the essential conflict between the preservation of the environmental quality of a neighborhood and the freedom of the press is a theme that is common to virtually all of the reported newsrack cases. In those cases the direction of the courts is clear. Where the right to buy and sell newspapers on the public streets cannot be reconciled with other public interests, those other interests in all but the rarest instances must give way.

Respectfully submitted,

JOHN W. WITT, City Attorney

By

  
Anthony J. Shanley  
Deputy City Attorney

AJS:js:940.1(x043)

APPROVED:

  
John W. Witt  
City Attorney

abutter's withdrawal of consent to operate stand, commissioner of licenses had no alternative but to suspend or revoke operator's license. *Mazzanobile v. McCaffrey* (Misc), 108 NYS2d 649.

<sup>12</sup> Abutting owner maintaining newsstand in front of his store without license was guilty of violating ordinance. *People v. Roseman*, 164 Misc 11, 295 NYS 882.

### § 30.101a. Newsracks and newspaper vending boxes.

The First Amendment protections afforded speech and other forms of communication are also applicable to the public distribution of newspapers and periodicals through the use of newsracks or vending boxes placed on public sidewalks and streets.<sup>1</sup> A municipality may not, therefore, constitutionally foreclose all use of newsracks or other newspaper vending devices on its streets and sidewalks.<sup>2</sup> Entitlement to constitutional protection does not mean, however, that newsracks or other newspaper vending machines are totally immune from municipal regulation. Rather, municipalities may impose reasonable "time, place and manner" regulations on the use of newsracks which are clearly and narrowly drawn so as to avoid arbitrary and unnecessary curtailment of freedom of speech and press.<sup>3</sup> Thus a municipality may prohibit the placement of a newsrack in a location that "unreasonably interferes with or impedes the flow of pedestrian or vehicular traffic."<sup>4</sup> So too, a municipality may prevent the installation or maintenance of newsracks "when such news rack interferes with the cleaning of any sidewalk by use of mechanical sidewalk cleaning machinery."<sup>5</sup> Further, the placement of newsracks "within three feet of any area improved with lawn, flowers, shrubs or trees," may be proscribed by ordinance.<sup>6</sup> Deemed constitutionally defective, however, has been an ordinance restricting the placement of newspaper vending boxes to a three-foot strip of public sidewalk adjacent to premises within the city's business district, and then only during business hours and when such boxes were so placed by the tenant, owner or occupant of a business establishment which ordinarily sold newspapers.<sup>7</sup>

<sup>1</sup> **New York.** *Gannet Co. v. City of Rochester*, 69 Misc2d 619, 330 NYS2d 648 (ordinance requiring permit for use of newspaper vending boxes on public sidewalks held void as creating unconstitutional prior restraint on First Amendment freedom of press).

<sup>2</sup> **United States.** *Philadelphia News, Inc. v. Borough Council, Mayor, Manager & Director of Public Works of Borough of Swarthmore*, 381 F Supp 228 (ED Pa 1974).

**California.** *Kash Enterprises, Inc. v. Los Angeles*, 19 Cal3d 294, 138 Cal Rptr 53, 562 P2d 1302; *Remer v. El Cajon*, 52 Cal App3d 441, 125 Cal Rptr 116.

<sup>3</sup> **California.** *Kash Enterprises, Inc. v. Los Angeles*, 19 Cal3d 294, 138 Cal Rptr 53, 562 P2d 1302.

If there are too many newsracks in city, the constitutional method of decreasing their number is a "time, place and manner" restriction, neutral as to content. *Carl v. Los Angeles*, 61 Cal

App3d 265, 132 Cal Rptr 365.

<sup>4</sup> *Kash Enterprises, Inc. v. Los Angeles*, 19 Cal3d 294, 138 Cal Rptr 53, 562 P2d 1302.

If the feared evil is traffic congestion or illegal parking or stopping by motorists in order to purchase newspapers, narrow regulations with respect to the location of newspaper boxes in relation to the character of the roadway could be formulated which would survive constitutional scrutiny. *Philadelphia News, Inc. v. Borough Council, Mayor, Manager & Director of Public Works of Borough of*

*Swarthmore*, 381 F Supp 228 (ED Pa 1974).

<sup>5</sup> *Kash Enterprises, Inc. v. Los Angeles*, 19 Cal3d 294, 138 Cal Rptr 53, 562 P2d 1302.

<sup>6</sup> *Kash Enterprises, Inc. v. Los Angeles*, 19 Cal3d 294, 138 Cal Rptr 53, 562 P2d 1302.

<sup>7</sup> *United States. Philadelphia News, Inc. v. Borough Council, Mayor, Manager & Director of Public Works of Borough of Swarthmore*, 381 F Supp 228 (ED Pa 1974).

### § 30.102. Grandstands.

A grandstand in a street, erected for the purpose of reviewing a parade and charging a fee for seats thereon, has been held a nuisance, especially where not erected by municipal permit, as against an objecting abutting owner.<sup>1</sup>

In New York City, under charter power to construct seats in the parks, it was held that the authority could be delegated to certain individuals to build stands in the park to accommodate those desiring to review the parade in the Hudson-Fulton celebration, where no corrupt motive was shown, and the licensees were organizations of a patriotic character, and not acting for profit.<sup>2</sup>

<sup>1</sup> *Pennsylvania. Taylor v. Sauer*, 40 Pa Super 229.

<sup>2</sup> *New York. Epstein v. Smith*, 121 NYS 854.

### § 30.103. Hack and taxicab stands.

"A certain use of the streets by carriages, either in front of hotels, clubs, theaters, churches and similar buildings, is a legitimate use of the streets as such," and when they are occupied temporarily and reasonably by licensed cabmen or chauffeurs or by private carriages or automobiles, the municipality has no right to interfere, "unless such occupation becomes so clearly and unmistakably annoying and continuous as to constitute an occupation which the law would regard as a nuisance."<sup>1</sup> The use of streets for hack stands and taxicab stands is generally recognized as a proper street use, but such stands must not interfere unreasonably with the rights of abutting property owners.<sup>2</sup> Accordingly, a municipality cannot permit the use of a part of a street for a hack stand or cabstand as against the objections of the owner of the property in front of which the stand is located, where it interferes with his access to his premises or other rights as an abutter,<sup>3</sup> at least if the abutter owns the fee in the street.<sup>4</sup>

Mayor Vellucci order re: City Manager to instruct the Commissioner of Public Works to deny issuing any further construction/excavation permits to the D. Cicconi Company until after a public hearing is held by the City Council.

In City Council,

May 23, 1983

5/23/83

On motion of CWT Sullivan  
I referred to the  
City Council  
For  
Action



# City of Cambridge

7.

IN CITY COUNCIL

May 23, 1983

MAYOR VELLUCCI

ORDERED: That the City Manager be and hereby is requested to instruct the Commissioner of Public Works to deny issuing any further construction/excavation permits to D. Cicconi Company until such time that a public hearing is held before this City Council with said contractor present to discuss the company's affirmative action plan for employees as it relates to construction jobs in Cambridge, as well as to discuss whether or not any Cambridge residents had been offered employment on these jobs; and be it further

ORDERED: That the City Clerk be and hereby is requested to forward copies of this order to the President of the Massachusetts Mayor's Association, the Massachusetts Municipal Association and to the Mayors, City Councillors and Boards of Selectman in Middlesex, Suffolk and Norfolk Counties.

REFERRED TO THE CITY SOLICITOR FOR ACTION ON MOTION OF COUNCILLOR WALTER SULLIVAN.



# City of Cambridge

7.

IN CITY COUNCIL

May 23, 1983

MAYOR VELLUCCI

ORDERED: That the City Manager be and hereby is requested to instruct the Commissioner of Public Works to deny issuing any further construction/excavation permits to D. Cicconi Company until such time that a public hearing is held before this City Council with said contractor present to discuss the company's affirmative action plan for employees as it relates to construction jobs in Cambridge, as well as to discuss whether or not any Cambridge residents had been offered employment on these jobs; and be it further

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REFERRED TO THE CITY SOLICITOR FOR ACTION ON MOTION OF COUNCILLOR WALTER SULLIVAN.

JUN 1 1983  
 MAY 23 1983  
 MAY 23 1983

Order # 7 *F-149*

Mayor Vellucci order re: City Manager to instruct the Commissioner of Public Works to deny issuing any further construction/excavation permits to the D. Cicconi Company until after a public hearing is held by the City Council.

*copy sent to City Solicitor with letter 5/23/83 mch*

In City Council,

May 23, 1983

*5/23/83*

*On motion of CWT Sullivan  
referred to the  
City Solicitor  
for  
Action*