

# DRAFTING A PEDDLER/ITINERANT MERCHANT ORDINANCE

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*“It is offensive...to the very notion of a free society - that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors...”<sup>1</sup>*

<sup>1</sup> Watchtower Bible and track Society of New York, Inc. v Village of Stratton, 536 U.S. 150, 165-66 (2002).

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## DEFINITIONS OF KEY TERMS

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<ul style="list-style-type: none"> <li>• <b>Peddler</b> -- A peddler or hawker has been defined as “a small retail dealer who carries his merchandise with him, traveling from place to place, or from house to house, exposing his or his principal’s goods for sale and selling them.”</li> </ul>	<ul style="list-style-type: none"> <li>• <b>“Peddler”</b> is defined as “a person who attempts to make personal contact with a resident at his/her residence without prior specific invitation or appointment from the resident, for the primary purpose of attempting to sell a good or service. A “peddler” does NOT include a person who distributes handbills or flyers for a commercial purpose, advertising an event, activity, good or service that is offered to the resident for purchase at a location away from the residence or at a time different from the time of visit. Such a person is a “solicitor.”</li> </ul>

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## DEFINITIONS OF KEY TERMS

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- Itinerant vendor** -- An itinerant vendor has been defined in the Texas Administrative Code as "a retailer who does not operate any "place of business" as defined in this section." A separate Texas Administrative Code provision provides a similar definition of itinerant vendor: "A seller who does not operate a place of business in Texas and who travels to various locations in this state to solicit sales."  
The courts typically treat peddlers and itinerant vendors similarly when resolving legal questions involving these groups as their primary purposes are commercial in nature.  
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**DEFINITIONS OF KEY TERMS:  
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- "Itinerant Vendor" or "Hawker"** is a person who sets up and operates a temporary business on privately owned property, whether improved or unimproved, in the city, soliciting, selling, or taking orders for, or offering to sell or take orders for any goods or services. A temporary business is one that continues for forty-five days or less; and, exists whether solicitation is from a stand, vehicle, or freestanding.

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## DEFINITIONS OF KEY TERMS

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- Place of business** -- Which is "[a]n established outlet, office, or location operated by a retailer, the retailer's agent, or the retailer's employee for the purpose of receiving orders for taxable items. The term includes any location at which three or more orders are received by a retailer in a calendar year. A location such as a warehouse, storage yard, or manufacturing plant is not a "place of business" unless at least three orders for taxable items are received by the retailer during a calendar year."  
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**DEFINITIONS OF KEY TERMS:  
AS PER TEXAS MUNICIPAL LEAGUE**

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## DEFINITIONS OF KEY TERMS

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- Solicitor** -- Solicitors are typically charities, political advocates, or other similar organizations who ask for money on both public and private property to support their noncommercial purposes.

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**DEFINITIONS OF KEY TERMS:  
AS PER TEXAS MUNICIPAL LEAGUE**

- "Solicitor"** is a person who attempts to make personal contact with a resident at his/her residence without prior specific invitation or appointment from the resident, for the primary purpose of: (1) attempting to obtain a donation to a particular patriotic, philanthropic, social service, welfare, benevolent, educational, civic, fraternal, charitable, political or religious purpose, even if incidental to such purpose there is the sale of some good or service, or (2) distributing a handbill or flyer advertising a commercial event or service.

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## DEFINITIONS OF KEY TERMS

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- **Canvasser** -- Canvassers are generally individuals who attempt to gather support for a particular political, social, or religious idea without soliciting funds or donations.

### DEFINITIONS OF KEY TERMS: AS PER TEXAS MUNICIPAL LEAGUE

- **"Canvasser"** is a person who attempts to make personal contact with a resident at his/her residence without prior specific invitation or appointment from the resident, for the primary purpose of: (1) attempting to enlist support for or against a particular religion, philosophy, ideology, political party, issue or candidate, even if incidental to such purpose the canvasser accepts the donation of money for or against such cause, or (2) distributing a handbill or flyer advertising a non-commercial event or service.

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## NON-COMMERCIAL SPEECH

- The First Amendment of the United States Constitution reads "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or bridging the freedom of speech."

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### NON-COMMERCIAL SPEECH

- *Lovell v. City of Griffin*, 303 U.S. 444 (1938)
  - **FACTUAL BACKGROUND:** Municipal ordinance requiring persons wishing to distribute literature to obtain a permit from the City.
  - **FINDING:** The Supreme Court struck down the municipal ordinance, finding that it struck “at the very foundation of the freedom of the press by subjecting it to license and censorship.”

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### NON-COMMERCIAL SPEECH

- *Schneider v. State*, 308 U.S. 147 (1939)
  - **FACTUAL BACKGROUND:** Ordinance required persons canvassing, soliciting, or distributing information from house to house to obtain permits from the Police Department.
  - **FINDING:** Supreme Court held that the municipality could not require such persons wishing to disseminate ideas to first go to the Police Department and obtain approval in hopes of preventing criminal activity.

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### NON-COMMERCIAL SPEECH

- *Martin v. City of Struthers*, 319 U.S. 141 (1943)
  - **FACTUAL BACKGROUND:** A lady was convicted of violating an ordinance prohibiting persons distributing handbills, circulars, or other advertisements door to door. Particularly Ms. Martin was delivering leaflets, advertisements and invitations from the Jehovah’s Witness Church.
  - **FINDING:** The Supreme Court found the ordinance unconstitutional, noting that “Freedom to distribute information to every citizen whenever he desires to receive it is so vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.”

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### NON-COMMERCIAL SPEECH

- *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980)

- **FACTUAL BACKGROUND:** This case deals with charitable solicitations. Specifically, the municipal ordinance required charitable solicitors to acquire a permit, be subject to a curfew, and designate at least 75% of contributions received go directly towards charitable objectives, and not administrative costs.

- **FINDING:** The Supreme Court ruled that the 75% rule could not be constitutionally applied against "organizations whose primary purpose is not to provide money or services for the poor, the needy, or other worthy objects of charity, but to gather and disseminate information about and advocate positions on matter of public concern."

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### NON-COMMERCIAL SPEECH

- *Secretary of State v. Joseph H. Munson, Co.*, 467 U.S. 947 (1984)

- **FACTUAL BACKGROUND:** A professional fundraising business challenged a State law prohibiting charitable groups using professional fundraising businesses from paying more than 25% of the amount raised to such fundraisers.

- **FINDING:** The Supreme Court found that the statute was overbroad because the governmental unit could show little or no connection between this threshold percentage requirement and the protection of public safety or residential privacy.

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### NON-COMMERCIAL SPEECH

- *Rowley v. Nat'l Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988)

- **FACTUAL BACKGROUND:** The ordinance required professional fundraisers to obtain a license which required disclosure of their name, employer's name, and an average percentage of solicited funds received by the organization.

- **FINDING:** The Supreme Court held that there was no "nexus" that could be determined based on the percentage of received funds that were paid out in expenses and the likelihood of fraud.

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### NON-COMMERCIAL SPEECH

- *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002)
  - **FACTUAL BACKGROUND:** The municipal ordinance required religious groups to be subject to licensing requirements.
  - **FINDING:** The Supreme Court held that the licensing requirement impeded individual's rights to support causes of their choice as well as individual's right to express such opinions and/or provide such support anonymously. The Court struck down the ordinance, upholding the right of a charitable organization to canvas an area to solicit funds.
  - **NOTE:** The Court acknowledged that the stated objectives of the ordinance, which were protecting residents from fraud and crime and helping to insure their privacy, were valid governmental interests.

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### NON-COMMERCIAL SPEECH

- **Conclusions:**
  - Essentially, any attempt by municipalities to infringe upon charitable organizations distributing information/ideas, even coupled with solicitation of charitable funds, will not be looked upon favorably by the Court.
  - Such regulations by municipalities should be carefully examined for potential challenge by charitable groups.

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CITIES' AUTHORITY TO REGULATE COMMERCIAL ACTIVITY

- For Texas home rule cities, the authority to regulate peddlers derives from their broad powers of self-government, as home rule cities are not expressly forbidden from regulating peddlers

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REGULATING COMMERCIAL ACTIVITY

- General law cities have express statutory authority to “license, tax, suppress, prevent, or otherwise regulate” peddlers as provided for in Texas Local Government Code §215.031

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REGULATING COMMERCIAL ACTIVITY

- Cities have been granted broad authority to regulate peddlers and solicitors, however, cities have not been granted the express authority to completely prohibit peddlers and solicitors.
- In the *Faulkner* case, the court held that cities have the authority to prohibit peddlers and solicitors from conducting their business in certain public places.

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**REGULATING COMMERCIAL ACTIVITY**

**CONSTITUTIONAL LIMITATIONS ON CITIES' REGULATION OF PEDDLERS**

- *City of New Orleans v. Duke*, 427 U.S. 297 (1976)
  - **FACTUAL BACKGROUND:** The ordinance prohibited vendors from selling food from pushcarts in the French Quarter, except those that had "continuously operated the same business . . . for eight or more years prior to January 1, 1972."
  - **FINDING:** The Court held that the classification of "established" versus "new vendors" rationally furthered a legitimate governmental purpose "to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists." The Court reasoned that such a provision in the ordinance was not an arbitrary or irrational method of achieving the city's purpose because the city could rationally choose to initially eliminate only recent vendors, reasoning that newer businesses were less likely to have built up substantial reliance on continued operation; and that the grandfathered vendors had themselves become part of the distinctive part of the charm of the French Quarter.

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**REGULATING COMMERCIAL ACTIVITY**

**CONSTITUTIONAL LIMITATIONS ON CITIES' REGULATION OF PEDDLERS**

- *Houston Chronicle Publ'g Co. v. City of Houston*, 620 S.W.2d 833 (Tex.App.—Houston [14th Dist] 1981, no writ).
  - **FACTUAL BACKGROUND:** An ordinance prohibited the sale of newspapers to any occupant of a motor vehicle on a city street or other public place, but allowed sales of other commercial products. There were three classes of street vendors established by the ordinance:
    - those selling flowers
    - those selling frozen desserts
    - those selling newspapers
  - **FINDING:** The Court struck down the ordinance and noted that "while traffic control and vendor safety are compelling interests, access to the street cannot be denied on those bases to those who would there exercise fundamental rights, yet allowed to those involved in purely commercial endeavors."

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**REGULATING COMMERCIAL ACTIVITY**

**CONSTITUTIONAL LIMITATIONS ON CITIES' REGULATION OF PEDDLERS**

- *Hispanic Taco Vendors v. City of Pasco*, 994 F.2d 676 (9th Cir. 1993)
  - **FACTUAL BACKGROUND:** A city ordinance required licensing fees on street vendors, made the licenses nontransferable, banned sales from vacant lots, and imposed setback requirements.
  - **FINDING:** The Court upheld the city ordinance and determined that the burden on interstate commerce – decreased sales of out-of-state products to the vendors' state assuming the vendors went out of business – to be slight and not clearly excessive in relation to the benefits to the city in adopting the ordinance.
    - **NOTE:** The general rule is that an ordinance regulating street vending may not interfere with interstate commerce.

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REGULATING COMMERCIAL ACTIVITY

CONSTITUTIONAL LIMITATIONS ON CITIES' REGULATION OF PEDDLERS

- *Tipco Corp., Inc. v. City of Billings*, 642 P.2d 1074 (Mont. 1982).
  - **FACTUAL BACKGROUND:** Ordinance declared uninvited door-to-door salespersons who did not have an office within the city to be a nuisance and prohibited them from doing business via solicitation in the city.
  - **FINDING:** The Court held that the ordinance violated the Equal Protection clause of the U.S. Constitution because that law requires all persons under like circumstance be treated alike. The Court held that uninvited door-to-door solicitors were no less of a nuisance if they were employees of local businesses than if they had come from out of town.

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REGULATING COMMERCIAL ACTIVITY

TYPES OF PERMISSIBLE REGULATIONS

- Municipal ordinances regulating peddlers, solicitors, and itinerant vendors commonly include the following types of permissible time, place, and manner regulations: license fees, license application forms, background checks, license revocations, requiring display of licenses, and time and place restrictions.

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REGULATING COMMERCIAL ACTIVITY

TYPES OF PERMISSIBLE REGULATIONS

- License fees must be reasonable to the duration of the license, and can vary from a daily amount to a yearly amount.
- A license fee “cannot be excessive nor more than reasonably necessary to cover the cost of granting a license and of exercising proper police regulation, or it must bear some reasonable relationship to the legitimate object of the licensing ordinance.”

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REGULATING COMMERCIAL ACTIVITY

TYPES OF PERMISSIBLE REGULATIONS

- A municipal peddler license “may not be issued for a period of more than one year.” TEX. LOC. GOV’T CODE § 215.033(b).
- An ordinance should require the applicant provide his/her name, address, business name, and photo identification.
- A license application may ask for information through which a city can verify the truth of the applicant’s statements and whether the peddler could provide a threat of fraud or crime. *Watchtower*, 536 U.S. at 169.

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REGULATING COMMERCIAL ACTIVITY

TYPES OF PERMISSIBLE REGULATIONS

- Municipal ordinances will typically limit the time of peddling to reasonable hours
  - The safest approach seems to be to set restrictive time limits to extend from daybreak to sunset. It is probably permissible to even shorten those hours to 30 minutes following daybreak to 30 minutes before sunset.

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REGULATING COMMERCIAL ACTIVITY

DOOR-TO-DOOR SECURITY ALARM SALES

- Under Texas law, alarm installation companies qualify as “security services contractors.” Accordingly, they are licensed by the Texas Department of Public Safety. As a result of such state licensure, alarm installation companies have traditionally not had to pay a “local permit or licensing fee” to a municipality.
  - On April 6, 2012, the Texas Department of Public Safety proposed a new administrative rule that would definitively require alarm installation companies to be licensed under a city’s peddler ordinance. Under the proposed rule, a city’s ordinance regulating peddlers would be applicable to alarm installation companies who go door-to-door attempting to sell their goods.

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REGULATING COMMERCIAL ACTIVITY

DOOR-TO-DOOR SECURITY ALARM SALES

- As this new proposed rule will change the landscape of local municipal regulation of alarm installation companies, it should be watched carefully for a final resolution.

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REGULATING COMMERCIAL ACTIVITY

"NO SOLICITATION" LISTS

- A recent development in this area of the law involves municipalities developing "no solicitation" resident lists.
- This idea arrives out of the national Do Not Call Registry.
- The theory behind such lists is that they are no different than requiring peddlers and solicitors to comply with "no solicitor" signs.
- One of the problems with such lists is the obvious requirement that a city designate the time and expense to develop and update such lists.

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LEAFLETING ON WINDSHIELDS OF AUTOMOBILES

- The distribution of written materials by placing those materials on an unattended automobile represents a conflict between the First Amendment and municipal interests of sanitation and protecting private property.
- The U.S. Supreme Court has addressed leafleting to persons in the street, door-to-door, mail, and through postings on public utility poles.
- The Court has not, however, directly addressed the Constitutional merits of ordinances affecting the placement of materials on automobiles.

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LEAFLETING ON WINDSHIELDS OF AUTOMOBILES

- In order to pass constitutional muster, ordinances affecting speech are analyzed as time, place, and manner restrictions.
- As such, leafleting ordinances must:
  - 1) be content neutral,
  - 2) serve a significant government interest,
  - 3) be narrowly tailored to affect no more speech than is necessary, and
  - 4) maintain ample alternative channels of communication.
- A court's determination that an ordinance fails to meet any of these standards will result in that ordinance being found unconstitutional.

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LEAFLETING ON WINDSHIELDS OF AUTOMOBILES

- Leafleting ordinances have been considered by the Sixth, Seventh, Eighth, and Ninth Circuits. The Circuit Courts are split in their applications of Supreme Court cases when considering the subject of windshield leafleting.
- The Sixth Circuit has upheld a ban on windshield leafleting.
- The Seventh, Eighth, and Ninth Circuits, however, have struck down such bans as unconstitutional.

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LEAFLETING ON WINDSHIELDS OF AUTOMOBILES

- *Jobe v. City of Catlettsburg*, 409 F.3d 261 (6<sup>th</sup> Circuit 2005).
  - **FACTUAL BACKGROUND:** Ordinance stated "It shall be unlawful for any person to ... affix ... to any automobile ... any handbill, sign, poster, advertisement, or notice of any kind ... unless he be the owner ... or without first having (written) consent of the owner ..."
  - **FINDING:** The Court held that the ordinance burdens no more speech than necessary while addressing the issue that was needed to correct, and was therefore narrowly tailored.

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LEAFLETING ON WINDSHIELDS OF AUTOMOBILES

- The Seventh, Eighth, and Ninth Circuits have all found ordinances prohibiting windshield leafletting to be unconstitutional. In each instance, the municipal entity failed to provide evidence to satisfy each prong of the time, manner, and place analysis.
- See *Horina*, 538 F.3d 624; see also *Krantz*, 160 F.3d 1214; see also *Klein*, 584 F.3d 1196.

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LEAFLETING ON WINDSHIELDS OF AUTOMOBILES

- *Horina v. Granite City*, 538 F.3d 624
  - The Court held that some evidence of a substantial government interest *in that city* must be produced. The Court found that the ordinance failed to satisfy the second, third and fourth prongs of the required time, manner and place requirements.

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LEAFLETING ON WINDSHIELDS OF AUTOMOBILES

- *Krantz v. City of Fort Smith* 160 F.3d at 1221-22.
  - The Court struck down an ordinance after determining that it was not narrowly tailored to the government's interest.
  - The Court stated that the city had to demonstrate a "reasonable fit" between the asserted goal of the ordinance, which was litter prevention, and the means that they have selected to accomplish that goal.
  - The Court held that the ordinance curtailed substantially more speech than necessary, and it therefore failed to meet the requirements of the third prong of the time, manner, and place analysis.

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## CONCLUSION

- Municipal regulation of peddlers, itinerant vendors, solicitors, and canvassers is a complex area of law. It involves important constitutional issues as well as practical matters important to citizens.

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