



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 . . .”¹

INTRODUCTION

Municipal regulation of peddlers, itinerant vendors, solicitors, and canvassers is a surprisingly complex area of municipal law. It is also an area of the law that becomes quite political when City Councils seek to balance the financial stability and emotions of their local owners with the legal framework required by the Courts. This paper attempts to provide meaningful background information about this topic and some practical pointers as well.

DEFINITIONS OF KEY TERMS

To give the following discussion a framework to maximize understanding, we think it best to provide definitions as best we can of the following key terms:

- ***Peddler*** -- 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.”²
- ***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.”³ 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.”⁴

The courts typically treat peddlers and itinerant vendors similarly when resolving legal questions involving these groups as their primary purposes are commercial in nature.

- ***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.”⁵

¹ *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 165-66 (2002).

² *Ex Parte Hogg*, 156 S.W. 931 (1913).

³ 34 TAC §3.252(1) (2012).

⁴ 34 TAC §3.286 (a)(3) (2012).

⁵ 34 TAC §3.252(2) (2012).

- ***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.⁶
- ***Canvasser*** -- Canvassers are generally individuals who attempt to gather support for a particular political, social, or religious idea without soliciting funds or donations.⁷

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.”⁸ In 1938, the United States Supreme Court in *Lovell v. City of Griffin* examined the constitutionality of a municipal ordinance requiring persons wishing to distribute literature to obtain a permit from the City.⁹ Following a conviction for distributing religious pamphlets without a permit, Ms. Lovell began the appellate process. 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.”¹⁰ Specifically, the Court noted that the municipal ordinance was not limited in its application, not restricted to the purpose of maintaining public order or preventing disorderly conduct, nor was it limited strictly to the promotion of important governmental interests.¹¹

In 1939, the Court examined a factually similar case in *Schneider v. State* related to challenges of municipal ordinances in a number of cities throughout the country. These ordinances required persons canvassing, soliciting, or distributing information from house to house to obtain permits from the Police Department.¹² The Supreme Court examined the government argument that such door to door travelers might fraudulently misrepresent themselves in an attempt to further criminal conduct, but ultimately held that municipalities could not require such persons wishing to disseminate ideas to first go to the Police Department and obtain approval in hopes of preventing such criminal activity. Specifically, municipalities could enact regulations in the interest of public safety, health and welfare, but such regulations cannot interfere with “the individual liberty secured by the Constitution to those who wish to speak, write, print or circulate information or opinion.”¹³

Moving forward to 1943, the Supreme Court again visited this issue in *Martin v. City of Struthers*.¹⁴ Similar to *Lovell*, *Martin* involved a lady convicted of violating an ordinance prohibiting persons distributing handbills, circulars, or other advertisements door to door.¹⁵ Ms.

⁶ *Watchtower Bible and Track Society of New York, Inc. vs. Village of Stratton*, 536 U.S. 150, 165 (2002).

⁷ See generally, *Id.*

⁸ The U.S. Const. Amend. I

⁹ *Lovell v. City of Griffin*, 303 U.S. 444, 452-53 (1938).

¹⁰ *Id.* at 451.

¹¹ *Id.*

¹² *Schneider v. State*, 308 U.S. 147, 148.

¹³ *Id.* at 160.

¹⁴ *Martin v. City of Struthers*, 319 U.S. 141 (1943).

¹⁵ *Id.* at 142.

Martin was delivering leaflets, advertisements, and invitations from the Jehovah's Witness Church.¹⁶ Using language that would become a foundation for future decisions, the Supreme Court found the ordinance unconstitutional, noting that "freedom to distribute information to every citizen wherever 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."¹⁷ This focus on a person's right to receive such information, as opposed to (or in addition to) a person's right to disseminate such information, reappears in numerous court opinions throughout the years. The Court noted that individual residents could simply refuse to speak with such persons, sufficiently enabling them to protect their privacy.¹⁸

With the right to First Amendment protection in non-commercial canvassing established, courts next turned their attention to the question of charitable solicitations. The threshold question evolved as to whether such persons or groups that were protected by the above cases would still be protected if mixing charitable solicitation with such dissemination of ideas and/or beliefs. *Village of Schaumburg v. Citizens for a Better Env't*, examined a municipal ordinance requiring 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.¹⁹ Following denial of a permit based on an inability to demonstrate that 75% of its contributions went directly towards charitable objectives, the charity attacked the ordinance alleging that such door to door canvassing was its "single most important source of funds".²⁰

The municipality argued to the Supreme Court that the ordinance was valid because it prohibited only financial solicitation, without affecting the charity's freedom to disseminate their ideas and information to residents.²¹ The Supreme Court held 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."²² The Court noted that these types of charities have much higher administrative costs than charities that essentially work as a pass through of funds to their constituencies. Accordingly, the 75% requirement was not sufficiently related to the governmental interests asserted, and therefore could not justify any restriction of the First Amendment.²³

In 1984, the Court again looked at a similar ordinance addressing limits on charitable expenses. In *Secretary of State v. Joseph H. Munson, Co.*, 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.²⁴ In examining the oft-used municipal argument that such restrictions on door to door canvassing and solicitation were necessary for public safety and/or residential privacy, the Court found that the statute was

¹⁶ *Id.* at 142.

¹⁷ *Id.* at 146-47.

¹⁸ *Id.* at 147.

¹⁹ *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620-24 (1980).

²⁰ *Id.* at 626.

²¹ *Id.* at 628.

²² *Id.* at 635.

²³ *Id.* at 639.

²⁴ *Secretary of State v. Joseph H. Munson, Co.*, 467 U.S. 947, 950-51 (1984).

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.²⁵

By 1988, the Supreme Court was examining a tiered schedule for addressing the reasonableness of charitable fundraising experiences in *Rowley v. Nat'l Federation of the Blind of North Carolina, Inc.* The ordinance also 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.²⁶ The governmental unit argued that the ordinance constituted a narrowly-tailored approach to accomplish the objectives of preventing fraud and freedom of speech.²⁷ 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.²⁸

Finally, in 2002, the Supreme Court carried this lineage of cases to a point in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002). In *Watchtower*, the Court struck down a municipal ordinance requiring religious groups to subject to licensing requirements. While the Jehovah's Witnesses argued that the ordinance violated their First Amendment rights to their free exercise of religion, free speech, and freedom of the press, the municipality asserted that the ordinance served the goals of protecting its residents from fraud and crime and helped to insure their privacy.²⁹ While the Court acknowledged these objectives amounted to valid governmental interest, the Court determined the licensing requirement impeded individual's rights to support causes of their choice as well as individual's rights to express such opinions and/or provide such support anonymously.³⁰ In answering the longstanding argument of municipalities that such restrictions were necessary to protect citizens from crime and fraud, the Court noted that a criminal intent on defrauding residents would unlikely be deterred from knocking on someone's door because they lacked a permit to do so.³¹ The Court struck down the ordinance, upholding the right of a charitable organization to canvas an area to solicit funds.

This lineage of cases displays that 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 Courts. That being said, numerous municipalities continue to have ordinances on the books (whether enforced or not) requiring such registration and permitting. Others continue to go so far as to require background checks, daily, weekly or monthly fees, and other restrictions undoubtedly designed to discourage such behavior. Such regulation(s) should be carefully examined for potential challenge by charitable groups.

²⁵ *Id.* at 962.

²⁶ *Rowley v. Nat'l Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 786 (1988).

²⁷ *Id.* at 792.

²⁸ *Id.* at 793.

²⁹ *Watchtower*, 536 U.S. at 154, 164-65.

³⁰ *Id.* at 154, 165-66.

³¹ *Id.* at 169.

CITIES' AUTHORITY TO REGULATE COMMERCIAL ACTIVITY

In general, cities have broad authority to regulate commercial activity to accomplish the following purposes: (1) the prevention of fraud, (2) the prevention of crime, and (3) the protection of resident's privacy.³² 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.³³ General law cities have express statutory authority to "license, tax, suppress, prevent, or otherwise regulate" peddlers as provided for in Texas Local Government Code §215.031.³⁴ A Texas general law city is authorized to adopt an ordinance, rule or regulation for the purpose of good government, peace or order of the municipality or in regards to the commerce of the municipality.³⁵ This section of the local government code is applicable to all cities.³⁶ A Type A general law city is also authorized to designate and regulate market places.³⁷ Finally, general law cities have been granted exclusive control over their streets and alleys.³⁸

While cities have been granted broad authority to regulate peddlers and solicitors, cities have not been granted the express authority to completely prohibit peddlers and solicitors.³⁹ 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.⁴⁰ However, the cities' authority to regulate peddlers and solicitors on private property is a different matter. There is no express statutory authority or case law that would authorize a city to completely prohibit or bar peddlers from conducting their business on private property.⁴¹ On the contrary, the court in *Faulkner* reasoned that because the Texas Legislature had not expressly prohibited peddlers from going on private property, it would not make such a broad ruling.⁴² Accordingly, a city may regulate, but not prohibit such activities on private property.

At this point, the question becomes how far a city can go in imposing conditions on commercial activity.

Constitutional Limitations on Cities' Regulation of Peddlers

A city attorney must draft a peddler ordinance within the limitations of the state and federal constitutions.⁴³ An ordinance regulating street vending must comport with the state and federal equal protection provisions of the constitutions. A city may reasonably classify persons

³² *Id.* at 165.

³³ TEX. LOC. GOV'T CODE §§51.035, 51.051; *Ex Parte Faulkner*, 158 S.W.2d 525, 526 (Tex. Crim. App. 1942)

³⁴ TEX. LOC. GOV'T CODE §215.031.

³⁵ TEX. LOC. GOV'T CODE §51.001(1).

³⁶ *Id.*

³⁷ TEX. LOC. GOV'T CODE §215.028

³⁸ See *Texas Transportation Code Annotated* §311.002 (Vernon 1999).

³⁹ *Faulkner*, 158 S.W.2d 527; Attorney General Opinion JC-0145.

⁴⁰ *Faulkner*, 158 S.W.2d at 526;

⁴¹ *Ex Parte Hogg*, 156 S.W.2d 931,932 (Tex. Crim. App. 1913); Attorney General Opinion JC-0145.

⁴² *Faulkner*, 158 S.W.2d at 527.

⁴³ The Texas Attorney General's office outlined a great summary of such constitutional limits in Opinion No. JC-0145 (1999). It is obvious to anyone who has read \such opinion that this section borrows heavily from it.

according to their business and apply different rules to different classes, so long as persons in the same class are treated the same and the goal remains to further legitimate purposes of the city.⁴⁴

In *City of New Orleans v. Dukes*, the United States Supreme Court upheld an ordinance prohibiting 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.”⁴⁵ 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.”⁴⁶ Allowing the continued operation of some vendors, the Court reasoned it 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.⁴⁷

However, an ordinance regulating street vending may not, as a general matter, impinge on fundamental personal rights or classify persons based on inherently suspect distinction such as race, religion, or alienage.⁴⁸ A different test is applied by the courts under the equal protection analysis when a regulatory ordinance’s classification affects fundamental rights such as the rights of free speech and free press. If speech or press rights are affected, the classification becomes suspect, and the city must show that the classification is necessary to promote a compelling interest.⁴⁹

In *Houston Chronicle Publishing Co.*, the Court struck down an ordinance that 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. The Court observed that the three classes of street vendors established by the ordinance -- those selling flowers, those selling frozen desserts, and those selling newspapers -- were similarly situated as sellers of merchandise on the city’s streets and sidewalks.⁵⁰ The reasons offered by the city, the court concluded, for the differential treatment of newspaper vendors were insufficient to justify the selective exclusion of newspaper vendors from the city streets. The Court noted that “[w]hile 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.”⁵¹

⁴⁴ *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Hixon v. State*, 523 S.W.2d 711 (Tex. Crim. App. 1975); *Rucker v. State*, 342 S.W.2d 325 (Tex. Crim. App. 1961); *Houston Chronicle Publ’g Co. v. City of Houston*, 620 S.W.2d 833, 838 (Tex. App.-Houston [14th Dist.] 1981, no writ)

⁴⁵ *Dukes*, 427 U.S. at 298

⁴⁶ *Id.* at 304

⁴⁷ *Id.* at 305; see also *Hixon*, 523 S.W.2d 711 (upholding city ordinance prohibiting sale of all merchandise on city streets except flowers and ice cream).

⁴⁸ See *Dukes*, 427 U.S. at 303.

⁴⁹ *Houston Chronicle Publ’g Co.*, 620 S.W.2d at 838 (citing *Dunn v. Blumstein*, 405 U.S. 330 (1972)).

⁵⁰ *Houston Chronicle Publ’g Co.*, 620 S.W.2d at 838.

⁵¹ *Id.*

Further, if a regulation impinges on First and Fourteenth Amendment rights, the city must show the validity of its asserted interest *and* the absence of less intrusive alternatives to achieving that interest.⁵² For instance, the court in *Houston Chronicle Publishing Co.* also invalidated the City of Houston ordinance prohibiting newspaper sales to motor vehicle occupants as violating those rights, stating: “The . . . ordinance is unreasonably restrictive. While the ends are permissible [preventing traffic hazard and congestion], [in] the means of achieving those ends the ordinance sweep[s] too broadly, unnecessarily invading appellant’s protected freedom.”⁵³

An ordinance regulating street vending may not interfere with interstate commerce. A regulatory ordinance violates the Commerce Clause of the Federal Constitution if it (1) affirmatively discriminates against out-of-state merchants, or (2) regulates evenhandedly but incidentally burdens interstate commerce and the burden is clearly excessive in relation to the local benefits.⁵⁴ In *Hispanic Taco Vendors v. City of Pasco*, the court upheld a city ordinance that required licensing fees on street vendors, made the licenses nontransferable, banned sales from vacant lots, and imposed setback requirements against the contention, among others, that it imposed unreasonable burdens on interstate commerce.⁵⁵ The court determined 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, *i.e.*, “reduction in urban blight, the potential development of vacant lots with permanent structures, and a heightened ability to police the vendors’ operations.”⁵⁶

Finally, a city may not place special requirements on peddlers based outside the city. While there is no similar Texas decision, the Montana Supreme Court found that an ordinance declaring 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 violated the Equal Protection clause of the U.S. Constitution.⁵⁷ The court ruled that equal protection of the laws required that all persons under like circumstance be treated alike.⁵⁸ 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.⁵⁹ Even though the ordinance was content-neutral and not in violation of the First Amendment, the court held that it did violate the equal protections of law offered by the Fourteenth Amendment.⁶⁰

⁵² *Id.* at 836-37

⁵³ *Id.* at 837

⁵⁴ *Hispanic Taco Vendors v. City of Pasco*, 994 F.2d 676, 678-79 (9th Cir. 1993)

⁵⁵ *Id.* at 677

⁵⁶ *Id.* at 679

⁵⁷ *Tipco Corp., Inc. v. City of Billings*, 642 P.2d 1074, 1078 (Mont. 1982), citing U.S. CONST. AMEND. 14.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 1078-79.

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.

License fees must be reasonable to the duration of the license, and can vary from a daily amount to a yearly amount. Texas statute requires that “[t]he governing body of the municipality may authorize the proper municipal officer to grant and issue licenses, direct the manner of issuing and registering licenses, and set the fees to be paid for licenses.”⁶¹ The city may charge a reasonable fee for the primary purpose of regulation.⁶² 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.”⁶³ The authority to charge a fee, however, does not allow a city to set fees at amounts so excessive that it would preclude vendors from their employment. For example, it has been determined that a licensing fee of \$1,200, valid for one year, was so excessive as to render the ordinance imposing it invalid.⁶⁴ Some cities have referred to such fees as an occupation tax in order to justify the regulations. However, a city cannot levy an occupation tax on street vendors because the State of Texas does not levy such a tax.⁶⁵

A municipal peddler license “may not be issued for a period of more than one year.”⁶⁶ 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.⁶⁷ Regarding license revocation, cities can deny an application for license based on a background check or other factors, but a license, once-issued, can be revoked by the municipal court due to violations of the pertinent ordinance.⁶⁸

Municipal ordinances will typically limit the time of peddling to reasonable hours.⁶⁹ Traditionally, some cities have restricted peddling from 9:00 a.m. to 5:00 p.m., citing the need for safety in restricting such activities to daylight hours. However, courts have noted that 5:00 p.m., during summer months, is well lit and hours from dark. The safer approach seems to be 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.

⁶¹ Tex. Loc. Gov’t Code § 215.033(a).

⁶² *Harris Co. Outdoor Adver.*, 879 S.W.2d at 326.

⁶³ *Id.* at 326, 327

⁶⁴ *Houston Credit Sales Co. v. City of Trinity*, 269 S.W.2d 579, 581 (Tex.App.—Waco 1954)

⁶⁵ Texas Constitution Art. VIII, Section 1(f)(prohibiting cities from the occupation tax where no such tax is levied by the State)

⁶⁶ TEX. LOC. GOV’T CODE § 215.033(b).

⁶⁷ *Watchtower*, 536 U.S. at 169.

⁶⁸ TEX. LOC. GOV’T CODE § 215.034(a)(2).

⁶⁹ *See Houston Chronicle Publishing Co. v. City of League City*, 488 F.3d 613, 622 (2007).

Further, a city may designate which public property and city streets may be used by peddlers for their business provided there are sufficient alternate locations for such activity.⁷⁰ Put another way, you cannot draft such regulations to prohibit peddlers altogether.

Door-to-Door Security Alarm Sales

Under Texas law, alarm installation companies qualify as “security services contractors.”⁷¹ Accordingly, they are licensed by the Texas Department of Public Safety.⁷² 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.⁷³ Historically, there have been some questions whether this exemption prohibited cities from licensing alarm installation companies under a city’s peddler ordinance.

On April 6, 2012, the Texas Department of Public Safety proposed a new administrative rule that would definitively answer this question.⁷⁴ 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.⁷⁵ Further, “[t]his rule is intended to provide assurance to the public and to local law enforcement that those who engage in residential solicitation of private security services are properly licensed with the department.”⁷⁶ Comments on this proposed rule were due by May 6, 2012. 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.

“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. A peddler or solicitor that failed to comply with such list could then have their license revoked. 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.

⁷⁰ *Faulkner*, 158 S.W.2d at 526.

⁷¹ TEX. OCC. CODE § 1702.102.

⁷² TEX. OCC. CODE § 1702.102.

⁷³ TEX. OCC. CODE § 1702.134(a).

⁷⁴ See *TML Legislative Updates: Door-To-Door Security Alarm Sales*, available at http://www.tml.org/leg_updates/legis_update042012e_security_alarm_sales.asp (last visited May 17, 2012).

⁷⁵ *Id.*

⁷⁶ Proposed Rules Title 37, 37 TAC §35.47, available at <http://www.sos.state.tx.us/texreg/archive/April62012/PROPOSED/37.PUBLIC%20SAFETY%20AND%20CORRECTIONS.html#138> (last visited May 17, 2012).

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.⁷⁷ The U.S. Supreme Court has addressed leafleting to persons in the street⁷⁸, door-to-door,⁷⁹ mail,⁸⁰ and through postings on public utility poles.⁸¹ The Court has not, however, directly addressed the Constitutional merits of ordinances affecting the placement of materials on automobiles.

In order to pass constitutional muster, ordinances affecting speech are analyzed as time, place, and manner restrictions.⁸² 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.⁸³ A court's determination that an ordinance fails to meet any of these standards will result in that ordinance being found unconstitutional.

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.⁸⁴ The Seventh, Eighth, and Ninth Circuits, however, have struck down such bans as unconstitutional.^{85, 86, 87}

In *Jobe v. City of Catlettsburg*, the Sixth Circuit considered an ordinance which stated, in pertinent part, "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"⁸⁸ The ordinance clearly did not consider the content or viewpoint of the speech, so the content neutral requirement was met.⁸⁹ The Court's determination of Constitutionality, then, depended only on the last three prongs of the time, place, and manner analysis.

⁷⁷ Bickel, Tony, Comment, *Windshield leafleting ordinances: a permissible use of local government authority?*, 79 U. Cin. L. Rev. 749-767 (2010).

⁷⁸ *Schneider v. New Jersey*, 308 U.S. 147, 155 (1939).

⁷⁹ *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

⁸⁰ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 60 (1983).

⁸¹ *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 792-94 (1984).

⁸² *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

⁸³ See *id.* at 791.

⁸⁴ See *Jobe v. City of Catlettsburg*, 409 F.3d 261 (6th Circuit 2005).

⁸⁵ See *Krantz v. City of Fort Smith*, 160 F.3d 1214 (8th Cir. 1998).

⁸⁶ See *Horina v. Granite City*, 538 F.3d 624 (7th Cir. 2008).

⁸⁷ See *Klein v. City of San Clemente*, 584 F.3d 1196 (9th Cir. 2009).

⁸⁸ *Jobe*, 409 F.3d at 263.

⁸⁹ *Id.* at 266.

Regarding the requirement of government interest, the city argued that the ordinance furthered its significant interests of litter prevention and the protection of private property.⁹⁰ Interestingly, the city relied on the existence of similar ordinances and experiences of other cities to demonstrate its significant interest and the resulting need for the ordinance.⁹¹ The Sixth Circuit reasoned that the city could rely on those outside experiences for its assertion of its own government interest, a contrast from the approach used by the Seventh, Eighth, and Ninth Circuits.⁹²

As to the element of being narrowly tailored, the Plaintiff in *Jobe* argued that the city could control littering through general anti-littering laws, meaning that the ordinance was an unnecessary burden on expression.⁹³ However, the Court differentiated the facts of this case because private property interests of recipients were not considered previously.⁹⁴ The Court also noted that previous case law addressed the tendering of written material to passersby who then had the option of rejecting it, a luxury not available to recipients of windshield leafleting.⁹⁵ Based on this reasoning, the Court held that the ordinance burdened no more speech than necessary while addressing the issue it was intended to correct, and was therefore narrowly tailored.

The final prong of the analysis, requiring alternative channels of communication, was addressed by considering other methods of distributing leaflets.⁹⁶ The Plaintiff claimed that other methods of leaflet distribution were both less efficient and more expensive. While sympathetic to the cost issue, the Court balanced the practical boundaries of each side of the argument and decided that the remaining options of door-to-door distribution, placing leaflets on porches, mailing, and person-to-person dissemination satisfied the requirement of alternative channels of communication.⁹⁷

As mentioned previously, the Seventh, Eighth, and Ninth Circuits have all found ordinances prohibiting windshield leafleting to be unconstitutional. In each instance, the municipal entity failed to provide evidence to satisfy each prong of the time, manner, and place analysis.⁹⁸

In *Horina v. Granite City*, the Seventh Circuit found that the ordinance in question failed to satisfy the second, third, and fourth prongs of the time, manner, and place analysis. Refusing to allow the city to draw on the experience of other municipalities, the Court held that some evidence of a substantial government interest *in that city* must be produced.⁹⁹ Since no such evidence was provided, the second prong of the time, manner, and place analysis was not satisfied. The Court also found that the ordinance failed to satisfy the third prong of being

⁹⁰ *Id.* at 268.

⁹¹ *Id.*

⁹² Compare *id.* with *Krantz*, 160 F.3d at 1221-22 and *Klein*, 584 F.3d 1196 at 1203.

⁹³ *Id.* at 270 (citing *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939)).

⁹⁴ *Id.*

⁹⁵ *Id.* at 271.

⁹⁶ *Id.* at 270.

⁹⁷ *Id.* at 270-71.

⁹⁸ See *Horina*, 538 F.3d 624; see also *Krantz*, 160 F.3d 1214; see also *Klein*, 584 F.3d 1196.

⁹⁹ 538 F.3d at 633.

narrowly tailored since its goals could be accomplished through litter laws.¹⁰⁰ Finally, the ordinance failed the fourth prong because other methods of communication were found to be insufficient.¹⁰¹

The Eighth Circuit in *Krantz v. City of Fort Smith* struck down an ordinance after determining that it was not narrowly tailored. The city cited litter prevention as a legitimate governmental interest, but didn't establish a cause-and-effect relationship between the stated government interest and the ordinance.¹⁰² The Court stated that the city had to demonstrate a "reasonable fit" between the asserted goal of the ordinance and the means that they have selected to accomplish that goal.¹⁰³ As a result, the court determined 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.¹⁰⁴

Similarly, the Ninth Circuit struck down an ordinance in *Klein v. City of San Clemente* because no nexus between leaflets and an increase in litter was shown.¹⁰⁵ As such, the ordinance could not be held to be narrowly tailored.¹⁰⁶ The Ninth Circuit also emphasized on the rights and burdens of the recipients of the information, noting that the right to distribute literature also involves the right to receive that literature.¹⁰⁷ The Court placed the burden of litter control on the recipient, stating that recipients had the burden to throw the leaflet in the trash.¹⁰⁸

There is no doubt that municipal governments have the authority to maintain a sanitary environment and to protect the property of its citizens. We cannot know how the Fifth Circuit, which encompasses Texas, would apply existing First Amendment law to windshield leafleting because it has not dealt with this issue. However, municipalities can glean some guidance from the analyses proffered by other Circuits. The authors refer those interested in additional information to an excellent and in-depth law review article by Tony Bickel titled, "Windshield Leafleting Ordinances: A permissible Use of Local Government Authority?"¹⁰⁹.

If drafting a windshield leafleting ordinance, a municipality should be prepared to establish independent evidence to support the assertion that their regulation is narrowly tailored to satisfy substantial government interests. Of course, every effort should be made to limit the effect of such ordinances to the control of windshield leafleting. Municipalities should also take care not to limit alternative channels for communication. Careful planning at the time a windshield leafleting ordinance is drafted may pay dividends in the event the Constitutionality of that ordinance is challenged.

¹⁰⁰ *Id.* at 634-35.

¹⁰¹ *Id.* at 636 (finding other methods of communication to be both inefficient and expensive when compared to windshield leafleting).

¹⁰² 160 F.3d at 1221-22.

¹⁰³ *Id.* at 1221 (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993)).

¹⁰⁴ *Id.* at 1221.

¹⁰⁵ 584 F.3d at 1202.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1204

¹⁰⁸ *Id.*

¹⁰⁹ *Bickel*, 79 U. Cin. L. Rev. 749.

CONCLUSION

As noted above, 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. The authors have described herein key terms, outlined cities' authority to regulate such matters, reviewed the constitutional limits inherent in this area of law, detailed common regulations, highlighted a recent development dealing with municipal regulation of alarm companies, and provided a summary of the law regarding leafleting on the windshields of automobiles.

SAMPLE TML PEDDLER ORDINANCE¹¹⁰

****This document is just an example. Legal counsel should be consulted in drafting documents that meet the needs of a particular city.****

AN ORDINANCE REGULATING PEDDLERS, ITINERANT VENDORS, HAWKERS, SOLICITORS, AND CANVASSERS, ESTABLISHING REGISTRATION REQUIREMENTS FOR THE PEDDLERS, HAWKERS, AND SOLICITORS, ESTABLISHING PROTECTIONS FOR HOMEOWNERS DESIRING TO AVOID PEDDLERS, SOLICITORS AND CANVASSERS, REGULATING HANDBILLS AND PROVIDING PENALTIES FOR VIOLATIONS

WHEREAS, many citizens of this community expect their local government to assist them in preserving their privacy and avoiding petty annoyances that disrupt their quiet enjoyment of their homes, and

WHEREAS, other persons often desire to interrupt the quiet enjoyment of one's home to solicit donations for causes believed to be worthy of support, or to canvas for support for particular religious, ideological, or political causes or for reasons of prompting commerce, and

WHEREAS, an important part of the freedom enjoyed by all citizens and residents of the United States is the right to speak freely, to express ideas that may be unpopular, and to engage others in debate without government interference, and

WHEREAS, the Supreme Court of the United States has consistently recognized the right and obligation of local governments to protect their citizens from fraud and harassment, particularly when solicitation of money is involved, and

WHEREAS, it is the responsibility of all units of government to balance these competing interests in a manner consistent with the Constitution of the United States and of Texas, while attempting to minimize fraud, prevent crime, and protect the privacy of our citizens.

NOW THEREFORE BE IT ORDAINED BY THE CITY COUNCIL (BOARD OF ALDERMEN) OF THE CITY OF _____ TEXAS, AS FOLLOWS:

Section One. Definitions. As used in this ordinance the following words have the meaning indicated:

A. "Peddler" 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 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."

¹¹⁰ See http://www.tml.org/legal_pdf/2007-Peddler.pdf.

B. "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.

C. "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.

D. "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.

Section Two. Exception. This ordinance shall not apply to a federal, state or local government employee or a public utility employee in the performance of his/her duty for his/her employer.

Section Three. License Required for Peddlers, Hawkers, and Solicitors, available for Canvassers. No person shall act as a peddler, hawker, or solicitor within the city without first obtaining a Peddler License in accordance with this ordinance. A canvasser is not required to have a Peddler License but any canvasser wanting a Peddler License for the purpose of reassuring city residents of the canvasser's good faith shall be issued one upon request.

Section Four. Fee. The fee for the issuance of each Peddler License shall be:

- A. For a peddler acting on behalf of a merchant a fee of \$_____ per day.
- B. For a solicitor (including a commercial solicitor advertising an event, activity, good or service for purchase at a location away from the residence).....no fee.
- C. For a canvasser requesting a Peddler License.....no fee.

Section Five. Application for Peddler License. Any person or organization (formal or informal) may apply for one or more peddler licenses by completing an application form at the office of the issuing officer, during regular office hours.

The peddler license shall be issued promptly after application but in all cases within twenty-four business hours of completion of an application, unless it is determined within that time that:

- A. the applicant has been convicted of a felony or a misdemeanor involving moral turpitude within the past seven years,
- B. with respect to a particular license, the individual for whom a card is requested has been convicted of any felony or a misdemeanor involving moral turpitude within the past seven years, or
- C. any statement upon the application is false, unless the applicant can demonstrate that the falsehood was the result of excusable neglect.

Section Six. Contents of Application. The applicant (person or organization) shall provide the following information:

- A. Name of applicant.
- B. Number of peddler licenses required.
- C. The name, physical description and photograph of each person for which a card is requested. In lieu of this information, a driver's license, state identification card, passport, or other government-issued identification card (issued by a government within the United States) containing this information may be provided, and a photocopy taken. If a photograph is not supplied, the city will take an instant photograph of each person for which a card is requested at the application site. The actual cost of the instant photograph will be paid by the applicant.
- D. The permanent and (if any) local address of the applicant.
- E. The permanent and (if any) local address of each person for whom a license is requested.
- F. A brief description of the proposed activity related to this peddler license. (Copies of literature to be distributed may be substituted for this description at the option of the applicant).
- G. Date and place of birth for each person for whom a card is requested.
- H. A list of all infraction, offense, misdemeanor and felony convictions of each person for whom a license is requested for the seven years immediately prior to the application.
- I. The motor vehicle make, model, year, color, and state license plate number of any vehicle which will be used by each person for whom a card is requested.
- J. If a license is requested for a peddler:
 - 1. The name and permanent address of the business offering the event, activity, good or service (i.e., the peddler's principal).
 - 2. A copy of the principal's sales tax license as issued by the state of Texas, *provided that no copy of a license shall be required of any business which appears on the city's annual report of Sales Tax payees as provided by the Texas Comptroller's office.*
 - 3. The location where books and records are kept of sales which occur within the city and which are available for city inspection to determine that all city sales taxes have been paid.
- K. If a license is requested for a solicitor:

1. The name and permanent address of the organization, person, or group for whom donations (or proceeds) are accepted.
 2. The web address for this organization, person, or group (or other address) where residents having subsequent questions can go for more information.
- L. Any other information the applicant wishes to provide, perhaps including copies of literature to be distributed, references to other municipalities where similar activities have occurred, etc.

Section Seven. Investigation. During the time following the application for one or more peddler licenses and its issuance, the city shall investigate as to the truth and accuracy of the information contained in the application. If the city has not completed this investigation within the 24 business hours provided in section seven, the identification card will nonetheless be issued, subject, however, to administrative revocation upon completion of the investigation. [If a canvasser requests a peddler license, the investigation will proceed as described above, but if the city refuses to issue the peddler license (or revokes it after issuance), the canvassers will be advised that the failure to procure a peddler license does not prevent him/her from canvassing the residents of the city.]

Section Eight. Revocation of license.

- A. Grounds. Any license issued hereunder may be revoked if the license holder is convicted of a violation of any provisions of this article or has knowingly made a false material statement in the application or otherwise becomes disqualified for the issuance of a license under the terms of this article.
- B. Notice. If the issuing officer denies (or upon completion of an investigation revokes) the peddler license to one or more persons he shall immediately convey the decision to the applicant orally and shall within 16 working hours after the denial prepare a written report of the reason for the denial which shall be immediately made available to the applicant.
- C. Appeal; hearing. The licensee shall have ten (10) days from the date of revocation or denial in which to file notice of his appeal to the city council from the order denying or revoking the license. The applicant shall have at his option an appeal of the denial of his application before the city council, at its next regular meeting. After holding the hearing on the revocation or denial, the city council shall by majority vote either sustain the action or issue an order reinstating the license.
- D. In the event of the filing of an appeal from a revocation issued under the provisions of this article, then, until such appeal has been determined by the city council such revocation order shall be stayed.

Section Nine. Hearing on Appeal. If the applicant requests a hearing under Section 9, the hearing shall be held in accordance with the Administrative Procedure Act of the State of Texas, and review from the decision (on the record

of the hearing) shall be had to the county court in which the city is located. The hearing shall also be subject to the Texas Open Meetings and Records law.

Section Ten. Display of Peddler License. Each peddler license shall be (when the individual for whom it was issued is acting as a peddler or solicitor) worn on the outer clothing of the individual or otherwise displayed, as so to be reasonably visible to any person who might be approached by said person.

Section Eleven. Validity of Peddler License. A peddler license shall be valid within the meaning of this ordinance for a period of one year from its date of issuance or the term requested, whichever is less.

Section Twelve. Revocation of Card by Municipal Court Judge. A municipal court judge, in addition to imposing a fine, may institute proceedings to suspend or revoke the license of a person if the person is required by law to obtain a peddler license from the city and the judge finds the person guilty of violating a city ordinance relating to peddlers.

Section Thirteen. "No Visit" List. The issuing officer shall maintain a list of persons within the city who restrict visits to their residential property (including their leasehold, in the case of a tenant) by peddlers, solicitors, and canvassers. The issuing officer may provide a form to assist residents, and this form may allow the resident to select certain types of visits that the resident finds acceptable while refusing permission to others. This "no visit" list shall be a public document, and may be reproduced on the city's web site and available for public inspection and copying. A copy of the "no visit" list shall be provided to each applicant for and each recipient of a peddler license. If a canvasser chooses not to apply for a peddler card, it will be the responsibility of that canvasser to obtain in some other way a copy of the current "no visit" list.

Section Fourteen. Distribution of Handbills and Commercial Flyers. In addition to the other regulations contained herein, a solicitor or canvasser leaving handbills or commercial flyers about the community shall observe the following regulations:

A. No handbill or flyer shall be left at, or attached to any sign, utility pole, transit shelter or other structure within the public right-of-way. The police are authorized to remove any handbill or flyer found within the right-of-way.

B. No handbill or flyer shall be left at, or attached to any privately owned property in a manner that causes damage to such privately owned property.

C. No handbill or flyer shall be left at, or attached to any of the property: (a) listed on the city "no visit" list, or (b) having a "no solicitor" sign.

D. Any person observed distributing handbills or flyers shall be required to identify himself/herself to the police (either by producing an peddler license or other form of identification). This is for the purpose of knowing the likely identity of the perpetrator if the city receives a complaint of damage caused to private property during the distribution of handbills or flyers.

Section Fifteen. General Prohibitions. No peddler, hawker, solicitor or canvasser shall:

A. Enter upon any private property where the property has clearly posted in the front yard a sign visible from the right of way (public or private) indicating a prohibition against peddling, soliciting and/or canvassing. Such sign need not exceed one square foot in size and may contain words such as "no soliciting" or "no solicitors" in letters of at least two inches in height. (The phrase "no soliciting" or "no solicitors" shall also prohibit peddlers, hawkers, and canvassers)

B. Remain upon any private property where a notice in the form of a sign or sticker is placed upon any door or entrance way leading into the residence or dwelling at which guests would normally enter, which sign contains the words "no soliciting" or "no solicitors" and which is clearly visible to the peddler, solicitor or canvasser.

C. Enter upon any private property where the current occupant has posted the property on the city's "no visit" list (except where the posting form indicates the occupant has given permission for this type of visit), regardless of whether a front yard sign is posted.

D. Use or attempt to use any entrance other than the front or main entrance to the dwelling, or step from the sidewalk or indicated walkway (where one exists) leading from the right-of-way to the front or main entrance, except by express invitation of the resident or occupant of the property.

1. Remove any yard sign, door or entrance sign that gives notice to such person that the resident or occupant does not invite visitors.

2. Enter upon the property of another except between the hours of 8:00 a.m. and 9:00 p.m. Except that the above prohibitions shall not apply when the peddler, hawker, solicitor, or canvassers has an express invitation from the resident or occupant of a dwelling allowing him/her to enter upon any posted property.

E. For a commercial solicitor, peddler, or hawker to solicit for a purpose other than that set out in the application upon which the license was issued.

Section Sixteen. Solicitation in public right-of-way. A. A person may solicit for a charitable or political purpose in or upon the public right-of-way, except those areas prohibited in this article.

B. A person may conduct commercial solicitation in or upon the public right-of-way, except those areas prohibited in this article, if the solicitor has obtained a license or who is a member of an organization that has obtained a license.

C. Solicitation for any purpose in the public right-of-way shall be conducted only during the hours of daylight, specifically one-half (1/2) hour after sunrise and one-half (1/2) hour before sunset.

D. It shall be unlawful for a person younger than eighteen (18) years of age to solicit in the public right-of-way.

E. It shall be unlawful for a solicitor at any time to enter or remain in the traveled portion of the roadway unless the solicitor has been granted authorization pursuant to § 552.0071 of Chapter 552 of the Texas Transportation Code. The

restriction on solicitation in the traveled portion of the roadway does not apply to public residential streets.

F. It shall be unlawful for a solicitor at any time to enter or remain in the traveled portion of the roadway of residential streets so that their presence impedes the flow of traffic.

G. It shall be unlawful for a person to solicit in the public right-of-way that is within one thousand (1,000) feet of any public or private elementary or secondary school between the hours of 7:30 a.m. and 4:30 p.m. on days when such school is in session. The measurement of the distance shall be made from the nearest property line of the public or private elementary or secondary school.

Section Seventeen. Solicitation in selected public rights-of-way prohibited.

A. It shall be unlawful for any person to solicit, peddle, or to distribute handbills at any time in the public rights-of-way, with or without a license, within one thousand (1,000) feet of the following intersections.

List Intersections

B. A solicitor who has received authorization pursuant to § 552.0071 of Chapter 552 of the Texas Transportation Code, is permitted to solicit in the following intersections notwithstanding the restrictions set forth in subsection 11-144(a):

List Intersections

Section Eighteen. Violation. Any person violating any part of this ordinance or failing to observe any provision of this article shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars. Every day the violation continues shall be deemed as a separate offense.

Section Nineteen. Severability. It is hereby declared to be the intention of the City Council ([Board of Aldermen](#)) that the sections, paragraphs, sentences, clauses, phrases and words of this ordinance are severable, and if any section, paragraph, sentence, clause, phrase or word(s) of this ordinance shall be declared unconstitutional or otherwise invalid, such unconstitutionality or invalidity shall not affect any of the remaining sections, paragraphs, sentences, clauses, phrases and words of this ordinance since the same would have been enacted by the City Council ([Board of Aldermen](#)) without the incorporation in this ordinance of any such unconstitutional or invalid portion of the ordinance.

Section Twenty. Effective Date. This ordinance shall be in full force and effect from and after _____.