

CITY COUNCIL OVERSIGHT COMMITTEE MINUTES

June 12, 2013

The City Council Oversight Committee of the City of Norman, Cleveland County, State of Oklahoma, met at 5:30 p.m. in the City Council Conference Room on the 12th day of June, 2013, and notice and agenda of the meeting were posted in the Municipal Building at 201 West Gray 48 hours prior to the beginning of the meeting.

PRESENT:	Councilmembers Jungman, Lockett, and Chairman Kovach
ABSENT:	Councilmembers Castleberry and Spaulding
STAFF PRESENT:	Ms. Susan Connors, Director of Planning and Community Development Mr. Terry Floyd, Development Coordinator Ms. Janay Greenlee, Planner II Ms. Leah Messner, Assistant City Attorney Ms. Syndi Runyon, Administrative Assistant IV

Chairman Kovach asked that Item 2 be discussed first.

Item 2, being:

DISCUSSION REGARDING DOOR-TO-DOOR COMMERCIAL ADVERTISING.

Ms. Leah Messner, Assistant City Attorney, said the basic legal standard for distribution of advertisement door-to-door is the time, place, and manner standard. She said in the Supreme Court case of *Martin vs. City of Struthers, Ohio*, the United States Supreme Court concluded the First Amendment embraces the right to distribute literature and protects the right to receive it. The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets; however, cities may regulate the time, place, and manner of the distribution in order to protect the peace, good order, and comfort of its citizens.

Ms. Messner highlighted two additional court cases regarding commercial advertising. She said the Georgia Supreme Court overturned an ordinance that prohibited written materials from being placed in the yard, walkway, driveway, or porch of any structure within the City of Sylvania because it swept in too much protected speech without a compelling justification. The Third Circuit Court overturned an ordinance that banned door-to-door distribution of commercial advertising while exempting religious, ideological, or political handbills or flyers because it was not content neutral.

Ms. Messner said the court case most talked about is the 2009 case of the *Courier-Journal vs. Louisville/Jefferson County Metro Government*. She said this is an unpublished opinion, which means that it does not carry any precedential weight in Kentucky nor can it be cited to an Oklahoma court for persuasive argument. The Louisville, Kentucky, case was an ordinance requiring all unsolicited written materials be placed on the porch, inside the screen door, on the doorknob, or delivered personally to the resident. The ordinance was intended to prevent materials left in driveways and yards from contributing to visual blight and sewer and drainage backups if the materials ended up in the gutters. The Western District Court of Kentucky determined that the ordinance restricting where the materials could be delivered was a permissible limitation because it regulated how this type of free speech could occur rather than preventing speech from occurring or treating different speakers differently. Ms. Messner said City Council could consider the type of ordinance adopted by Louisville, but if it was adopted and challenged, the Legal Department could not use the Louisville case in support.

Item 2, continued:

Ms. Messner spoke to Ms. Susan Connors, Director of Planning and Community Development, Mr. Keith Humphrey, Police Chief, and Ms. Jeanne Snider, Assistant City Attorney, regarding enforcement concerns on this type of ordinance. For enforcement, citations would be issued against the person distributing the materials rather than the company that produced them, which could be helpful in causing a change of distribution policies. She said prosecution of the violation would require a citizen, a police officer, or a code compliance officer to observe and testify to the violation and identify the violator in order to substantiate the citation. Ms. Messner said a name would be needed to issue a citation. Chairman Kovach asked if identifying the violator would be sufficient and Ms. Messner said the person's name would be needed to issue a summons. She said Chief Humphrey strongly encourages citizens not to chase down the people to find out their name for their own safety. He suggested getting a tag number and contacting the Police Department or Action Center; however, a tag number may not be enough to identify the person that left the materials.

Ms. Messner said another type of ordinance Council could consider would require the property owner to remove the materials within a certain amount of time after it is distributed. She said this type of ordinance does not pose the same First Amendment concerns of the previous ordinance. She said the ordinance would have the same type of enforcement concerns as discussed earlier such as being able to testify as to when the materials were distributed and identifying the responsible party distributing the materials that are found in the gutters or street. She said the Code Enforcement Division frequently has issues with absentee property owners who live in another state. She said citizens may find this punitive since they have not requested to receive these materials. She said when citizens are planning to be out of town they normally stop their mail and newspaper deliveries, but these advertisements cannot be stopped.

Chairman Kovach said the Buyers Edge is the advertisement that is getting the most complaints and he thought it is being distributed by their parent company, The Oklahoman. Councilmember Jungman was sure it is being distributed by The Oklahoman. He said the second option is feasible and asked what case law could be cited in support of the ordinance and Ms. Messner said she has found nothing from Oklahoma. She said Oklahoma cases cited in the August memo from the Legal Department are older cases and there is nothing in Oklahoma specific to this type of door-to-door commercial advertising. Councilmember Jungman said the memos from the Legal Department also cite Georgia and the Third Circuit as counter examples and asked if Staff researched other States for more supportive examples. Ms. Messner said she used those cases as examples because they are more factually specific to what is being discussed tonight and the standard of time, place, and manner is a universal standard.

Councilmember Jungman said he found some relevant items online and one item said there was some type of four part analysis from the United States Supreme Court. He asked if that is something that would be in support of the ordinance and Ms. Messner said the time, place, and manner requirement is based on that neutral, narrowly tailored text and is a Constitutional standard. Ms. Brenda Hall, City Clerk, said time, place, and manner is used to regulate door-to-door solicitors obtaining a permit from the City, but the type business doing the soliciting is not regulated.

Councilmember Jungman asked if there is a different standard for commercial speech vs. other types of speech and Ms. Messner said yes. Councilmember Jungman asked if that standard is meaningful to this ordinance example and Ms. Messner said it is a little, but not fully because primarily you cannot treat speech differently so commercial speech vs. other speech is not a line to draw here. She said if the ultimate concern is blight, health, and safety then it can be argued that all types of handbills and advertising can lead to blight and sewer backups regardless of their content. She said commercial speech vs. other types of speech could not be argued in this instance.

Chairman Kovach said he hates the commercial advertising flyers, but does not want the City to be accused of violating free speech. He said this is one of those situations where if the Council adopts an ordinance they can push the envelope, but believes The Oklahoman would not hesitate to challenge the ordinance. He said they have deep pockets and good attorneys and that is not a battle the City can afford to get into.

Item 2, continued:

Councilmember Jungman asked if the Sign Code has a time, place, and manner restriction and Chairman Kovach said the City cannot regulate content, but can regulate location. Councilmember Jungman asked why that survives muster while this ordinance would not and Ms. Messner said she is not saying the City cannot adopt an ordinance similar to Louisville, she is just saying the Oklahoma Court has not ruled on it and Norman would be a trailblazer. She said Chairman Kovach is absolutely right in stating that if the Buyers Edge is funded by The Oklahoman, they would be quick to challenge the ordinance. She said the ordinance poses enforcement issues as well.

Chairman Kovach said as much as he hates having the advertisements distributed as they are, he certainly does not want someone walking up to his house hanging it on his door or placing it between the door and screen either. Councilmember Jungman said he finds it offensive that property owners do not pick the advertisements up when thrown on their property. He picks his up and has tried to opt out of the service without success. He said if the City can regulate the distribution and Council chooses not to do that then that is wrong. He said Council should do something even if it is not terribly well enforceable. Chairman Kovach felt it was not worth the people's purse to make a point the City will end up losing. Councilmember Lockett said she picks up trash as she walks her dog. Chairman Kovach said that is the basic principle so in a way it is the property owner or occupant's duty to pick up the materials. Councilmember Lockett said she did not like to pass anything the City does not have the capability of reasonably enforcing because it builds up disrespect for the rules and regulations.

Chairman Kovach said the majority of the Committee is recommending no action be taken.

Mr. Steve Lewis, City Manager, said The Oklahoman could look at the ordinance and say the City of Norman never contacted them regarding there being a problem. He suggested a letter be drafted to The Oklahoman and signed by the Mayor expressing the City's concerns and Chairman Kovach felt that would be appropriate. Chairman Kovach suggested The Oklahoman be informed that many citizens' requests to opt out of receiving the advertisements are not being honored and ask them to look into the matter. Chairman Kovach said he does not believe The Oklahoman wants to make people mad because that does not help them and asked Mr. Lewis to pursue a letter at Staff level.

Items submitted for the record

1. Memorandum dated May 8, 2013, from Leah Messner, Assistant City Attorney, through Jeff H. Bryant, City Attorney, to Steve Lewis, City Manager
2. Memorandum dated August 5, 2010, from Leah Messner, Assistant City Attorney, through Jeff H. Bryant, City Attorney, to Honorable Mayor and Councilmembers
3. Memorandum dated June 17, 2010, from Leah Messner, Assistant City Attorney, through Jeff H. Bryant, City Attorney, to Honorable Mayor and Councilmembers
4. PowerPoint presentation entitled, "Regulation of Door to Door Commercial Advertising," City Council Oversight Committee, June 12, 2013
5. Louisville-Jefferson County Metro Government Ordinance, Chapter 101: Unsolicited Written Materials

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Item 1, being:

CONTINUED DISCUSSION REGARDING POSSIBLE MODIFICATIONS OF THE CITY OF NORMAN E-MAIL POLICY.

Mr. Rick Knighton, Assistant City Attorney, said on April 10, 2013, the Oversight Committee discussed Resolution No. R-1112-9 to streamline the electronic mail retention policy and requested Staff make modifications to Section 6 to add flexibility for Staff to disregard junk electronic mail as technology develops to allow that to be done.

Item 1, continued:

Mr. Knighton said the purpose of Section 6 is to establish an electronic mail policy, which requires the City maintain reasonable records for reasonable formal requests. He said while there is not an efficient way to separate junk electronic mail from email concerning the transaction of public business, the expenditure of public funds, or the administering of public property, the proposed amendment permits Staff to dispose of junk email if an efficient manner of doing so is developed in the future.

Mr. Knighton said there is a litany of state and federal laws which require retention of certain records for longer than one (1) year so instead of citing each of the provisions, the proposed language refers generally to "state and federal law." Not only is this language inclusive of all state and federal provisions regarding record retention, it will not require an amendment if state or federal law changes.

Mr. Knighton said the proposed amendment does not include language regarding pending litigation because state and federal laws already include an obligation to preserve documents that are relevant to litigation or potential litigation or are reasonably calculated to lead to the discovery of admissible evidence.

Chairman Kovach asked Mr. Knighton to define "transaction of public business." Mr. Knighton gave an example of his recent email usage. He said there were recent email communications between him and another attorney regarding how they were resolving a case so those would be considered a transaction of public business. He said the alternative to that would be him receiving an email from his wife regarding what time he will be home for dinner, which is not a transaction of public business.

Chairman Kovach said if he emailed Councilmember Jungman and said, "I really like this proposed amendment. I hope you will join me in supporting that" would that be public record and Mr. Knighton said yes. Chairman Kovach said if emails are about City business then that is an open record and anything else is basically junk and Mr. Knighton said correct. Mr. Knighton said the current City's system keeps everything because there is no efficient way to cull out emails that are unsolicited and this proposed amendment would allow the City to cull emails when an efficient way to do that becomes available.

Chairman Kovach recommended moving the proposal forward to review by the full Council.

Items submitted for the record

1. Memorandum dated June 7, 2013, from Ricky J. Knighton, II, Assistant City Attorney, and Kari Madden, Network Manager, to City Council Oversight Committee

Item 3, being:

MISCELLANEOUS DISCUSSION.

None

ADJOURNMENT.

The meeting adjourned at 5:31 p.m.