

Article

18-1 NEWSRACKS

**ARTICLE 18-1: IMLA MODEL
NEWSRACK ORDINANCE**

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SECTION 18-101. Intent and Purpose.

The City Council of the City of _____ finds and declares that:

(a) Findings.

(1) The uncontrolled placement and maintenance of newsracks in public rights-of-way presents an inconvenience and danger to the safety and welfare of persons using such rights-of-way; including pedestrians, persons entering and leaving vehicles and buildings, and persons performing essential utility, traffic control and emergency services.

(2) Newsracks so located as to cause an inconvenience or danger to persons using public rights-of-way, and unsightly newsracks located therein, constitute public nuisances.

(3) It is a matter of public necessity that the City of _____ protect children and unconsenting adults in and on its public streets, sidewalks, transportation facilities and other public rights-of-way from viewing public displays of offensive sexual

material. Such displays are thrust indiscriminately upon unwilling audiences of adults and children and constitute assaults upon individual privacy.

(4) These factors constitute an unreasonable interference with and obstruction of the use of public rights-of-way, constitute an unwarranted invasion of individual privacy, are injurious to health, offensive to the senses, and constitute such an obstruction of the free use of property as to interfere in the comfortable enjoyment of life and property by the entire community.

(5) The Council recognizes, however, that the use of such rights-of-way is so historically associated with the sale and distribution of newspapers and publications that access to those areas for such purposes should not be absolutely denied. The Council further finds that these strong and competing interests require a reasonable accommodation which can only be satisfactorily achieved through the means of this Ordinance which is designed to accommodate such interests regulating the time, place and manner of using such newsracks.

(b) Purpose. The provisions and prohibitions hereinafter contained and enacted are in pursuance of and for the purpose of securing and promoting the public health, morals, and general welfare of persons in the City of _____ in their use of public rights-of-way through the regulation of placement, appearance, number, size, and servicing of newsracks on the public rights-of-way so as to:

- (1) Provide for pedestrian and driving safety and convenience;
- (2) Ensure no unreasonable interference with the flow of pedestrian or vehicular traffic, including ingress to, or egress from, any place of business or from the street to the sidewalk;
- (3) Provide reasonable access for the use and maintenance of sidewalks, poles, posts, traffic signs and signals, hydrants, mailboxes, and similar appurtenances, and access to locations used for public transportation purposes;
- (4) Reduce visual blight on the public rights-of-way, protect the aesthetics and value of surrounding properties, and protect the quiet of residential areas;
- (5) Reduce exposure of the city to personal injury or property damage claims and litigation; and
- (6) Protect the right to distribute information protected by the United States and _____ [State] Constitutions through use of newsracks.

(c) Preservation of Constitutional Rights. It is not the intent of this Ordinance to in any way discriminate against, regulate, or interfere with the publication, circulation, distribution, or dissemination of any printed material that is constitutionally protected.

SECTION 18-102. Definitions.

As used in this Ordinance, unless the context otherwise clearly indicates:

(a) *Block* means one (1) side of a street between two (2) consecutive intersecting streets.

(b) *Distributor* means the person responsible for placing and maintaining a newsrack in a public right-of-way.

(c) *Explicit sexual acts* means depictions of sexual intercourse, oral copulation, anal intercourse, oral-anal copulation, bestiality, sadism, masochism, or excretory functions in conjunction with sexual activity, masturbation, or lewd exhibition of genitals; whether any of the above conduct is depicted or described as being performed alone or between members of the same or opposite sex or between humans and animals, or other acts of sexual arousal involving any physical contact with a person's genitals, pubic hair, perineum, anus or anal region.

(d) *Newsrack* means any self-service or coin-operated box, container, storage unit or other dispenser installed, used, or maintained for the display and sale of newspapers or other news periodicals.

(e) *Obscene* means material which depicts or describes sexual conduct that is objectionable or offensive to accepted standards of decency which the average person, applying contemporary community standards would find, taken as a whole, appeals to prurient interests; or material which depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable State law, and taken as a whole, lacks serious literary, artistic, political, or scientific value.

(f) *Parkway* means the area between the sidewalk and the curb of any street, and where there is no sidewalk, the area between the edge of the roadway and the property line adjacent thereto. Parkway shall also include any area within a roadway that is not open to vehicular travel.

(g) *Person* means any person or persons, or entity including, but not limited to, a corporation, partnership, unincorporated association or joint venture.

(h) *Pictorial material* means any material suggesting or conveying a visual image, and includes, but is not limited to, a photograph, painting or drawing. Any pictorial material is "obscene" if all of the following apply:

(1) The average person, applying contemporary community standards, would find that it appeals to prurient interests when the publication or material is considered as a whole; and

(2) It depicts, describes or represents in a patently offensive manner, sexual behavior as defined in Section 18-102 (1); and

(3) It lacks serious literary, artistic, political or scientific value when the publication or material is considered as a whole.

(i) *Public Works Director* refers to the Public Works Director or the designee of the Public Works Director.

(j) *Roadway* means that portion of a street improved, designed, or ordinarily used for vehicular travel.

(k) *Sexual arousal, gratification or affront* when used in this Ordinance to state the purpose or effect of statements, words, pictures or illustrations means depictions of the following subjects or acts:

(1) Sexual intercourse, oral copulation, anal intercourse, oral-anal contact, bestiality, direct physical stimulation of genitals, flagellation or torture in the context of a sexual relationship, or any of the following depicted sexually oriented acts or conduct: anilingus, buggery, coprolagnia, coprophagy, coprophilia, cunnilingus, fellatio, necrophilia, pederasty, pedophilia, piquerism, sapphism, zooerasty; or

(2) Human genitals in a state of sexual stimulation, arousal, or tumescence; or

(3) Use of human or animal masturbation, sodomy, oral copulation, coitus, ejaculation; or

(4) Fondling or touching of human genitals, pubic region, buttock, or female breast; or

(5) Masochism, erotic or sexually-oriented torture, beating or the infliction of pain; or

(6) Erotic or lewd touching, fondling or other contact with an animal by a human being; or

(7) Human excretion, urination, menstruation, vaginal or anal irrigation.

(l) *Sexual behavior* means the patently offensive representation, depiction or description of any of the following:

(1) Ultimate sexual acts, actual or simulated, including vaginal intercourse between a male and a female, and anal intercourse, fellatio and cunnilingus between persons regardless of gender.

(2) Masturbation, excretory functions and lewd exhibition of the genitals.

(3) The actual or simulated infliction of pain by one individual upon another, or by an individual upon himself, for the purpose of the sexual gratification or release of either individual, as a result of flagellation, beating, striking or touching of an erogenous zone, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast.

(4) Ultimate sexual acts, actual or simulated, between a human being and an animal.

(m) *Sidewalk* means any surface provided for the exclusive use of pedestrians.

(n) *Street* means all the area dedicated to public use for public street purposes and shall include, but not be limited to, roadways, parkways, alleys and sidewalks.

SECTION 18-103. Newsracks Prohibited.

(a) No person shall install, use, or maintain any newsrack which projects onto, into, or which rests, wholly or in part, upon the roadway of any public street.

(b) No person shall install, use, or maintain any newsrack which in whole or in part rests upon, in, or over any public sidewalk or parkway:

(1) when such installation, use, or maintenance endangers the safety of persons or property;

(2) when such site or location is used for public utility purposes, public transportation purposes, or other governmental use;

(3) when such newsrack unreasonably interferes with or impedes the flow of pedestrian or vehicular traffic, including parked or stopped vehicles; the ingress in or egress from any residence or place of business; the use of poles, posts, traffic signs or signals, hydrants, mailboxes, or other objects permitted at or near said location;

(4) when such newsrack interferes with the cleaning of any sidewalk by the use of mechanical sidewalk cleaning machinery; or

(5) in any other manner inconsistent with or in violation of the provisions of this Ordinance.

SECTION 18-104. Permit Required.

It shall be unlawful for any person, firm or corporation to erect, place, maintain or operate, on any public street or sidewalk, or in any other public way or place, in the City of _____ any newsrack without first having obtained a permit from the Public Works Director specifying the exact location of such newsrack. One permit may be issued to include any number of newsracks, and shall be signed by the applicant.

SECTION 18-105. Application for Permit.

(a) Application for such permit shall be made, in writing, to the Public Works Director upon such form as shall be provided by him, and shall contain the name and address of the applicant, the proposed specific location of said newsrack, and shall be signed by the applicant.

(b) From the above application information the Public Works Director shall approve the locations. He shall be guided therein solely by the standards and criteria set forth in this Ordinance. In any case where the Public Works Director disapproves of a particular location, such disapproval shall be without prejudice to the registrant designating a different location or locations.

SECTION 18-106. Conditions for Permit.

(a) Permits shall be issued for the installation of a newsrack or newsracks without prior inspection of the location but such newsrack or newsracks and the installation, use or maintenance thereof shall be conditioned upon observance of the provisions of this Ordinance. Permits shall be issued within twenty-four (24) hours (excluding Saturday, Sunday and legal holidays) after the application has been filed. A permit fee of _____ dollars shall be required.

(b) Such permits shall be valid for three (3) years and shall be renewable pursuant to the procedure for original applications referred to in Section 18-105 and upon payment of the _____ dollar permit fee.

SECTION 18-107. Hold Harmless.

Every owner of a newsrack who places or maintains a newsrack on a public sidewalk or parkway in the City of _____ shall file a written statement with the Public Works Director in a form satisfactory to the City Attorney, whereby such owner agrees to indemnify and hold harmless the City, its officers, and employees, from any loss, liability, or damage, including expenses and costs, for bodily or personal injury, and for property damage sustained by any person as a result of the installation, use and/or maintenance of a newsrack within the City of _____.

SECTION 18-108. Newsrack Identification Required.

Every person who places or maintains a newsrack on the streets of the City of _____ shall have his permit number, name, address, and telephone number affixed to the newsrack in a place where such information may be easily seen. Prior to the designation of location by the Public Works Director under Section 18-109 herein, the registrant shall present evidence of compliance with this Section.

SECTION 18-109. Location, Placement, and Number of Newsracks.

(a) Any newsrack which rests in whole or in part upon, or on any portion of a public right-of-way or which projects onto, into, or over any part of a public right-of-way shall be located in accordance with the following provisions of this Section:

(1) No newsrack shall be used or maintained which projects onto, into, or over any part of the roadway of any public street, or which rests, wholly or in part upon, along, or over any portion of the roadway of any public street.

(2) No newsrack shall be chained, bolted, or otherwise attached to any fixture located in the public right-of-way, except to other newsracks.

(3) Newsracks may be placed next to each other, provided that no group of newsracks shall extend for a distance of more than eight (8) feet along a curb, and a space of not less than three (3) feet shall separate each group of newsracks.

(4) No newsrack shall be placed, installed, used or maintained:

(i) Within five (5) feet of any marked crosswalk.

(ii) Within fifteen (15) feet of the curb return of any unmarked crosswalk.

(iii) Within five (5) feet of any fire hydrant, fire call box, police call box or other emergency facility.

(iv) Within five (5) feet of any driveway.

(v) Within three (3) feet ahead or twenty-five (25) feet to the rear of any sign marking a designated bus stop.

(vi) Within five (5) feet of the outer end of any bus bench.

(vii) At any location whereby the clear space for the passageway of pedestrians is reduced to less than six (6) feet.

(viii) Within three (3) feet of or on any public area improved with lawn, flowers, shrubs, trees or other landscaping, or within three (3) feet of any display window of any building abutting the sidewalk or parkway or in such a manner as to impede or interfere with the reasonable use of such window for display purposes.

(ix) Within one hundred (100) feet of any other newsrack on the same side of the street in the same block containing the same issue or edition of the same publication.

(x) On any access ramp for disabled persons.

(5) No more than eight (8) newsracks shall be located on any public right-of-way within a space of two hundred (200) feet in any direction within the same block of the same street; provided, however, that no more than sixteen (16) newsracks shall be allowed on any one block. In determining which newsracks shall be permitted to be located or to remain if already in place, the Public Works Director shall be guided solely by the following criteria:

(i) First priority shall be daily publications (published five (5) or more days per week).

(ii) Second priority shall be publications published two (2) to four (4) days per week.

(iii) Third priority shall be publications published one (1) day per week.

SECTION 18-110. Standards for Maintenance and Installation.

Any newsrack which in whole or in part rests upon, in or over any public sidewalk or parkway, shall comply with the following standards:

(a) No newsrack shall exceed five (5) feet in height, thirty (30) inches in width, or two (2) feet in thickness.

(b) No newsrack shall be used for advertising signs or publicity purposes other than that dealing with the display, sale, or purchase of the newspaper or news periodical sold therein.

(c) Each newsrack shall be equipped with a coin-return mechanism to permit a person using the machine to secure an immediate refund in the event the person is unable to receive the paid for publication. The coin-return mechanism shall be maintained in good working order.

(d) Each newsrack shall have affixed to it in a readily visible place so as to be seen by

anyone using the newsrack, a notice setting forth the name and address of the distributor and the telephone number of a working telephone service to call to report a malfunction, or to secure a refund in the event of a malfunction of the coin-return mechanism, or to give the notices provided for in this Ordinance.

(e) Each newsrack shall be maintained in a neat and clean condition and in good repair at all times. Specifically, but without limiting the generality of the foregoing, each newsrack shall be serviced and maintained so that:

- (1) It is reasonably free of dirt and grease;
- (2) It is reasonably free of chipped, faded, peeling and cracked paint in the visible painted areas thereof;
- (3) It is reasonably free of rust and corrosion in the visible unpainted metal areas thereon;
- (4) The clear plastic or glass parts thereof, if any, through which the publications therein are viewed are unbroken and reasonably free of cracks, dents, blemishes and discoloration;
- (5) The paper or cardboard parts or inserts thereof are reasonably free of tears, peeling or fading; and
- (6) The structural parts thereof are not broken or unduly misshapen.

SECTION 18-111. Display of Certain Matter Prohibited.

Publications offered for sale from newsracks placed or maintained on or projecting over the street or sidewalk shall not be displayed or exhibited in a manner which exposes to public view from the street or sidewalk any of the following:

- (a) Any publication or material which exposes to public view any pictorial material that is obscene;
- (b) Any statements or words describing explicit sexual acts, sexual organs, or excrement where such statements or words have as their purpose or effect sexual arousal, gratification, or affront;
- (c) Any picture or illustration of a person's genitals, pubic hair, perineum, anus, or anal region where such picture or illustration has as its purpose or effect sexual arousal, gratification, or affront; or
- (d) Any picture or illustration depicting explicit sexual acts as defined in this

Ordinance where such picture or illustration has as its purpose or effect sexual arousal, gratification, or affront.

SECTION 18-112. Violations.

Upon determination by the Public Works Director that a newsrack has been installed, used or maintained in violation of the provisions of this Ordinance, an order to correct the offending condition shall be issued to the distributor of the newsrack. Such order shall be telephoned to the distributor and confirmed by mailing a copy of the order by certified mail return receipt requested. The order shall specifically describe the offending condition, suggest actions necessary to correct the condition, and inform the newsrack distributor of the right to appeal. Failure to properly correct the offending condition within five (5) days (excluding Saturdays, Sundays, and legal holidays) after the mailing date of the order or to appeal the order within three (3) days after its receipt shall result in the offending newsrack being summarily removed and processed as unclaimed property. If the offending newsrack is not properly identified as to owner under the provisions of Section 18-108 hereof, it shall be removed immediately and processed as unclaimed property. An impound fee, which shall be measured by the City's cost and expense of impounding, shall be assessed against each newsrack summarily removed. The Public Works Director shall cause inspection to be made of the corrected condition or of a newsrack reinstalled after removal under this Section. The distributor of said newsrack shall be charged a _____ dollar inspection fee for each newsrack so inspected. This charge shall be in addition to all other fees and charges required under this Ordinance.

SECTION 18-113. Appeals.

Any person or entity aggrieved by a finding, determination, notice, order or action taken under the provisions of this Ordinance may appeal and shall be apprised of his right to appeal to the City's Appeals Board. An appeal must be perfected within three (3) days after receipt of notice of any protested decision or action by filing with the Office of the _____ a letter of appeal briefly stating therein the basis for such appeal. A hearing shall be held on a date not more than ten (10) days after receipt of the letter of appeal. The appellant shall be given at least five (5) days notice of the time and place of the hearing. The Appeals Board shall give the appellant, and any other interested party, a reasonable opportunity to be heard, in order to show cause why the determination of the Public Works Director should not be upheld. At the conclusion of the hearing, the Appeals Board shall make a final and conclusive decision. This decision shall be immediately appealable to a court of competent jurisdiction.

SECTION 18-114. Abandonment.

In the event that a newsrack remains empty for a period of thirty (30) continuous days, the same shall be deemed abandoned, and may be treated in the manner as provided in Section

18-112 for newsracks in violation of the provisions of this Ordinance.

SECTION 18-115. Severability.

If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance.

NEWSRACK ORDINANCE: EDITOR'S COMMENTARY

I. Introduction and Acknowledgements

This Ordinance revises and supersedes the prior Model Ordinance on Newsracks that appears as Sections 10-1201 through 10-1214 in the 1981 version of **NIMLO Model Ordinance Service**. Portions of this Model Ordinance are based on the NIMLO Model Newsrack Ordinance prepared by Rachel Sobin Ullman, former NIMLO Staff Attorney, and code provisions adopted by Burbank, California and San Diego, California.

II. Municipal Power to Regulate Newsracks

The right to distribute newspapers in newsracks is protected by the First Amendment. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). Municipalities may, however, subject newsracks located on public streets and sidewalks to reasonable time, place and manner restrictions. *Plain Dealer Publishing Co. v. City of Lakewood*, 794 F. 2d 1139, 1143 (6th Cir. 1986), *aff'd*, 486 U.S. 750 (1988). These restrictions must be "content neutral, ... narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.* (citing *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

III. Permits

Municipalities may require newsrack applicants to obtain permits. *City of Lakewood*, 486 U.S. at 760. Ordinance provisions may not, however, give a municipal representative unbridled discretion to deny permits nor can they allow permits to be conditioned on terms that the representative deems "reasonable and necessary." *Id.* at 772. See *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969) (licensing authority must be guided by "narrow, objective, and definite standards").

Licensing fees are permissible if they cover only administrative costs. *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Jacobsen v. Crivaro*, 851 F.2d 1067, 1071 (8th Cir. 1988). To avoid potential challenges to a licensing fee, municipalities should prepare a report establishing the cost of processing. Meck & Pearlman, *Controlling Newsracks: Commentary on City of Lakewood v. Plain Dealer*, Land Use L., Feb. 1989, at 7; See *Chicago Newspaper Publishers v. City of Wheaton*, 697 F. Supp. 1464 (N.D. Ill. 1988). (The NIMLO Model does not allow for any unguided discretion. Permits must be issued within 24 hours of the receipt of an application. The standards for maintenance and installation are objective.)

IV. Indemnification

Municipalities should only require indemnification from newsrack distributors if other permittees, such as bus and telephone companies, are also required to provide indemnification. See *Jacobsen v. Harris*, 869 F.2d 1172, 1174 (8th Cir. 1989) (requirement that newsrack applicants obtain hold harmless insurance policy upheld where all those using municipal property required to insure municipality against claims); *Plain Dealer Publishing Co. v. City of Lakewood*, 794 F.2d at 1147 (requirement that newsrack applicants indemnify city unconstitutional where city did not require other permittees to provide insurance).

V. Newsrack Removal

Newsracks installed or maintained in violation of ordinance provisions may be removed by the municipality if the due process rights of the newsrack distributor are protected. See *Jacobsen v. Harris*, 869 F.2d at 1174. A newsrack distributor should be given written notice of the violation and be informed that the newsrack will be removed unless the violation is cured or successfully contested. *Id.* See also *Kash Enterprises, Inc. v. City of Los Angeles*, 19 Cal. 3d 294, 313 (Cal. 1977). (The NIMLO Model provides for written notice, an opportunity to cure the violation, and an opportunity for a hearing.)

VI. Prohibition From Residential Neighborhoods

A municipality must be able to show that an ordinance banning newsracks from residential areas is narrowly tailored to serve a significant government interest and that alternative channels of communication are available. *Plain Dealer Publishing Co.*, 794 F.2d at 1147. A municipality seeking to ban newsracks from residential neighborhoods can allege safety and aesthetic interests in support of its ban. *Id.* A municipality should, however, be prepared to present evidence showing that the ban is narrowly tailored to serve such interests. See *City of Wheaton*, 697 F. Supp. at 1469-70 (city failed to show that ban was least restrictive way to serve significant interests of safety and aesthetics).

As to the need for adequate alternative channels of communication, the courts are divided as to whether the availability of publications through other private outlets can satisfy this

requirement. *Gannett Satellite Information Network v. Pennsauken Township*, 709 F. Supp. 530, 536 n. 3 (D.N.J. 1989). In *Plain Dealer*, the United States Court of Appeals for the Sixth Circuit upheld a residential ban on newsracks relying, in part, on the availability of newspapers from "eleven 'all-night' businesses within the City and two 'all-night' businesses adjacent to the City which sell newspapers 24 hours a day, seven days a week." 794 F.2d at 1147. In *City of Wheaton*, however, a total ban on newsracks in residential neighborhoods was found to be unconstitutional despite the availability of newspapers through home delivery, non-residential newsracks, and commercial businesses. 697 F. Supp. at 1470. The court specifically found "the availability of private sellers to be irrelevant" as to the issue of alternative channels of communication. *Id.* (The NIMLO Model does not ban newsracks from residential areas.)

VII. Display of Obscene Material

Obscene material is not protected by the Constitution. *Miller v. California*, 413 U.S. 15 (1972). A municipality should review its state's laws to determine whether its power to regulate the display of obscene material has been preempted. See, e.g., *Chelsea Theater Corp. v. Burlington*, 258 N.W.2d 372 (Iowa 1977) (state statute preempted city obscenity ordinance); *Whitney v. Municipal Court*, 58 Cal. 2d 907 (Cal. 1962) (state preempted regulation of the dissemination of adult obscenity). (The NIMLO Model prohibits the display of obscene materials from newsracks. The ordinance uses the test for obscenity set forth in *Miller*.)

VIII. Commercial Material

A municipality's selective and categorical ban on the distribution, via newsracks, of "commercial handbills" violates the First Amendment. *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1517 (1993) (application of ordinance to ban newsracks containing commercial handbills while allowing newsracks containing newspapers not reasonable time, place, or manner restriction because the ordinance regulated based on content). (The NIMLO Model makes no distinction between the distribution of commercial and non-commercial publications by newsracks.)